

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

RECEIVED
MAR 23 1999
FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

In the Matter of)
)
The Development of a National Framework to)
Detect and Deter Backsliding to Ensure)
Continued Bell Operating Company Compliance)
with Section 271 of the Communications Act)
Once In-Region InterLATA Relief is Obtained)

RM 9474

REPLY COMMENTS OF PAC-WEST TELECOMM, INC.

Pac West Telecom Inc. ("Pac West"), by undersigned counsel, submits these reply comments in the above-captioned proceeding ¹ concerning establishment of a national framework to detect and deter backsliding by Bell Operating Companies ("BOCs") once interLATA authority is granted pursuant to Section 271 of the Communications Act of 1934, as amended.²

I. SECTION 271 BACKSLIDING SAFEGUARDS ARE NECESSARY

The Commission should reject the claims of Bell Operating Companies ("BOCs") that there is no need for the requested rulemaking.³ Pac-West submits that initial comments in this proceeding⁴ and the Commission's experience shows that competitive local exchange carriers ("LECs") are experiencing significant difficulties in obtaining reasonable and nondiscriminatory interconnection and access to unbundled network elements ("UNEs") even before BOCs have

¹ Petition for Expedited Rulemaking filed February 1, 1999 by Allegiance Telecom, Inc., RM 5474, *Public Notice*, Report No. 2315, 1999 WL 49798 (February 5, 1999).
² 47 U.S.C. Section 271.
³ Comments of Bell Atlantic at 7-8; Comments of BellSouth at 2-3; Comments of SBC at 3
⁴ *See, e.g.*, Comments of MGC at 3-5; Pac-West at 4; Comments of RCN at 3-4; Comments of WinStar at 8.

No. of Copies rec'd 074
List A B C D E

gained interLATA entry and have an incentive to comply with the market-opening requirements of Section 271 in order to gain interLATA entry. Once a BOC has gained interLATA entry, it will have no incentive to comply with those provisions. Instead, it will have a heightened incentive to limit its compliance with the market-opening requirements of the Act in order to hinder competition in both the interexchange and local service markets. As noted by Pac-West in its initial comments, BOCs are seeking to define in the most minimal way their obligations to provide access to UNEs *post-AT&T Corp. v. Iowa Utilities Board*.⁵ One BOC has even attempted to avoid any need to comply with Section 271 requirements by seeking to have it declared unconstitutional.⁶ Accordingly, Pac-West submits that the Commission should establish a regulatory program to assure full and continued compliance with Section 271 requirements once a BOC has gained initial interLATA approval.

II. THE REQUESTED RULEMAKING WOULD NOT DUPLICATE OTHER PROCEEDINGS

Pac-West disagrees with those commenters who contend that the requested Section 271 backsliding rulemaking is unnecessary because it would be duplicative of other rulemaking

⁵ 119 S. Ct. 721 (1999). *See e.g., Ex Parte* letter from Lynn Starr, Vice President Regulatory Affairs, Ameritech, to Secretary, Federal Communications Commission, February 18, 1999, CC Docket No. 96-98; *Ex Parte* letter from Kathleen Levitz, Vice President-Federal Regulatory to Secretary, Federal Communications Commission, February 16, 1999, CC Docket No. 96-98.

⁶ *SBC Communications, Inc. v. FCC*, 981 F.Supp (N.D. Texas 1997), *rev'd SBC Communications v. FCC*, 13 Communications Reg. (P& F) 458 (5th Cir. 1998).

proceedings such as the *OSS*⁷ and *Advanced Services Proceedings*.⁸ These proceedings concern adoption of standards and rules that could be suitable for performance standards against which to measure Section 271 backsliding. However, Pac-West submits that, even if those rulemakings result in the expeditious adoption of performance standards in some regulatory areas, at a minimum it would still be necessary to initiate a rulemaking to make any standards adopted in those proceedings specifically applicable as triggers for some of the enforcement mechanisms proposed as backsliding safeguards. Thus, it would be necessary, for example, to propose that standards concerning time intervals for provision of loops be adopted as the trigger for automatic reductions in UNE prices, if the Commission chooses to adopt automatic price reductions as a Section 271 backsliding safeguard.

Moreover, it would not be inefficient or duplicative of efforts in other proceedings to initiate the requested rulemaking. The Commission need not solicit comment on particular issues on which it already has an adequate record. The Commission could tailor any notice of proposed rulemaking so that it builds upon, and does not unnecessarily duplicate, other proceedings.

Pac-West is concerned in any event, that, in fact, the Commission is not making significant progress in working toward resolution of some proceedings, in particular the *OSS Proceeding*. Pac-West suggests that the Commission consider whether using a Section 271

⁷ Performance Measures and Reporting requirements for Operations Support Systems, Interconnection, and Operator Services and Directory Assistance, CC Docket No. 98-56, RM 9101, *Notice of Proposed Rulemaking*, 13 FCC Rcd 12817 (released April 17, 1998)

⁸ Deployment of Wireline Service Offering Advanced Telecommunications Capability, CC Docket No. 98-147, FCC 98-188, *Memorandum Opinion, Order and Notice of Proposed Rulemaking*, 1998 WL 458500 at ¶¶ 125, 143, 155, Separate Statement of Commissioner Michael K. Powell (released August 7, 1998).

backsliding proceeding may be the vehicle that can most expeditiously resolve OSS issues, rather than the other way around.

Further, other proceedings are not focusing on enforcement mechanisms. The *OSS Proceeding* expressly declined to consider enforcement issues.⁹ In the *Section 706 Proceeding*, the Commission noted the importance of enforcement in relation to any collocation and local loop rules, but did not seek comment on any specific enforcement mechanisms.¹⁰ Thus, at a minimum, the enforcement mechanisms proposed in the Allegiance petition are not duplicative of other proceedings. In fact, it is the enforcement mechanisms and penalties proposed in the Allegiance petition that may be its strongest contribution to assuring continued compliance with Section 271 standards once a BOC gains interLATA entry. Pac-West submits that the enforcement mechanisms proposed in the Allegiance petition are a sufficient justification to warrant institution of the requested rulemaking. As noted, if the Commission believes it would be more efficient, it could adopt performance standards in some areas in other proceedings and institute the requested rulemaking to consider enforcement mechanisms for violation of those standards, whether adopted in this proceeding or separately, as Section 271 backsliding safeguards.

⁹ Performance Measures and Reporting requirements for Operations Support Systems, Interconnection, and Operator Services and Directory Assistance, CC Docket No. 98-56, RM 9101, *Notice of Proposed Rulemaking*, 13 FCC Rcd 12817 (released April 17, 1998)("We do not think that proposing model enforcement mechanisms is appropriate since our focus, at this initial stage, is on issuing guidelines for performance measures and reporting procedures.").

¹⁰ Deployment of Wireline Service Offering Advanced Telecommunications Capability, CC Docket No. 98-147, FCC 98-188, *Memorandum Opinion, Order and Notice of Proposed Rulemaking*, 1998 WL 458500 at ¶¶ 125, 143, 155, Separate Statement of Commissioner Michael K. Powell (released August 7, 1998).

III. CONCLUSION

A majority of commenters urge the Commission to grant the Allegiance petition and institute a rulemaking to establish Section 271 backsliding safeguards.¹¹ Only a few commenters opposed or questioned the need for the requested rulemaking.¹² Pac-West respectfully requests that the Commission grant the Petition.



Andrew Lipman
Patrick Donovan
SWIDLER BERLIN SHEREFF FRIEDMAN, LLP
3000 K Street, N.W. Suite 300
Washington, D.C. 20007-5116
(202) 424-7500 (phone)
(202) 424-7645 (fax)

Dated: March 23, 1999

Counsel for Pac-West Telecomm, Inc.

274974.1

¹¹ Comments of Time Warner Telecom ("Time Warner") at 3; *see* Comments of AT&T Corp. ("AT&T") at 1, 9-10; *see* Comments of MCI WorldCom, Inc. ("MCI WorldCom") at i, 1; Comments of Intermedia Communications, Inc. ("Intermedia") at 2; Comments of CoreComm, Ltd. ("CoreComm") at 1, 3-4; *see* Comments of Hyperion Telecommunications, Inc. ("Hyperion") at 1; Comments of RCN Telecom Services, Inc. ("RCN") at 1, 4; Comments of Pac-West Telecomm, Inc. ("Pac-West") at 1-2; Comments of State Communications, Inc. ("SCI") at 1-2; Comments of WinStar Communications, Inc. ("WinStar") at 1; *see* Comments of CTSI, Inc. ("CTSI") at 1; *see* Comments of MGC Communications, Inc. ("MGC") at 1.

¹² Comments of Bell Atlantic at 1; Comments of BellSouth Corp. ("BellSouth") at 1; Comments of SBC Communications, Inc. ("SBC") at 1; *see* Comments of AT&T at 2; Comments of State of New York Department of Public Service ("NYDPS") at 1-2.

CERTIFICATE OF SERVICE

I hereby certify on this 23rd day of March 1999, that copies of the foregoing Reply Comments of Pac-West Telecomm, Inc., were served via Messenger** or U.S. Mail, postage prepaid, upon the following parties:



Candise M. Pharr

275038.1

VIA HAND DELIVERY

Magalie Roman Salas, Esq. (Original +4)
Secretary
Federal Communications Commission
The Portals - 445 12th Street, SW
Filing Counter TWS-A325
Washington, D.C.

Robert W. McCausland
Vice President, Regulatory & Interconnection
Allegiance Telecom, Inc.
1950 Stemmons Freeway, Suite 3026
Dallas, Texas 75207-3118

VIA HAND DELIVERY

International Transcription Service
1231 20th Street, N.W.
Washington, D.C.

VIA HAND DELIVERY

Jonathan E. Canis
Ross A. Buntrock
Kelley Drye & Warren LLP
1200 Nineteenth Street, NW - 5th Floor
Washington, D.C. 20036

VIA HAND DELIVERY

Brad E. Mutschelknaus
Michael B. Hazzard
Kelley Drye & Warren LLP
1200 Nineteenth Street, NW - 5th Floor
Washington, D.C. 20036

William B. Barfield
Jonathan Banks
1155 Peachtree Street, N.E. - Suite 1800
Atlanta, Georgia 30309-3910

VIA HAND DELIVERY

Richard H. Rubin
Mark C. Rosenblum
Stephen C. Garavito
295 North Maple Avenue - Room 325213
Basking Ridge, New Jersey 07920

Keith L. Seat
Karen T. Reidy
MCI Worldcom, Inc.
1801 Pennsylvania Avenue, N.W.
Washington, D.C. 20006

VIA HAND DELIVERY

Jerome L. Epstein
Jenner & Block
601 13th Street, N.W.
Washington, D.C. 20005

Lawrence G. Malone
General Counsel
New York State Department of Public Service
3 Empire State Plaza
Albany, New York 12223-1350

Hamilton E. Russell, III
General Counsel and Vice President
of Regulatory Affairs
State Communications, Inc.
200 North Main Street - Suite 303
Greenville, South Carolina 29601

Robert M. Lynch
Roger K. Toppins
Michael J. Zpevak
Lori A. Fink
William A. Brown
One Bell Plaza - 30th Floor
Dallas, Texas 75265-5521

Joseph A. Kahl
Director of Regulatory Affairs
RCN Telecom Services, Inc.
105 Carnegie Center
Princeton, New Jersey 08540

Robert Berger
Russell Merbeth
Winstar Communications, Inc.
1146 19th Street N.W.
Washington, D.C. 20036

Brian Conboy
Thomas Jones
Willkie Farr & Gallagher
Three Lafayette Centre
1155 21st Street, N.W.
Washington, D.C. 20036

Leslie A. Vial
1320 North Court House Road - 8th Floor
Arlington, Virginia 22201

Kent F. Heyman, General Counsel
Richard E. Heatter, Associate Counsel
Marilyn Ash, Associate Counsel
MGC Communications, Inc.
3301 N. Buffalo Drive
Las Vegas, Nevada 89129

Janet S. Livengood, Esq.
Director, Regulatory Affairs
Hyperion Telecommunications, Inc.
DDI Plaza Two
500 Thomas Street - Suite 400
Bridgeville, Pennsylvania 15017

Mark DeFalco
Director, Regulatory Affairs
CTSI, Inc.
100 CTE Drive
Dallas, PA 18612