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Federal Communications Commission
Washington, D.C.

January 10, 2000

Dow, Lohnes & Albertson, PLLC
c/o Loretta J. Garcia
1200 New Hampshire Avenue, N.W.
Suite 800
Washington, D.C. 20036-6802

Re: Acceptance of Comments As Timely Filed in (Docket No. 97-172 and 99-311)

The Office of the Secretary has received your request for acceptance of your pleading in the above-referenced proceedings as timely filed due to operational problems with the Electronic Comment Filing System (ECFS). Pursuant to 47 C.F.R. Section 0.231(I), the Secretary has reviewed your request and verified your assertions. After considering arguments, the Secretary has determined that this pleading will be accepted as timely filed. If we can be of further assistance, please contact our office.

FEDERAL COMMUNICATIONS COMMISSION

for *William F. Cator*
Magalie Roman Salas
Secretary

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November 30, 1999

VIA HAND DELIVERY

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Washington, DC 20554

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

Re: Comments of Teltrust, Inc. in CC Docket Nos. 97-172 and 99-311

Dear Ms. Salas:

Please find enclosed an original and four copies of Comments of Teltrust, Inc., in the above-captioned proceedings regarding Petitions for Forbearance filed by Bell Atlantic, BellSouth Corp. and SBC Communications, on behalf of its operating subsidiaries Ametiech, Pacific Bell, Nevada Bell and Southwestern Bell. We attempted to file these comments electronically from 6:30 p.m. until midnight yesterday, on the comment filing deadline, but the Electronic Comment Filing System ("ECFS") did not respond to our attempts. Our technical staff confirmed that the difficulty was not caused by the law firm's system.

I spoke with William Caton of the Commission staff this morning and he confirmed that the ECFS system was inoperative intermittently yesterday. The Commission's technical support staff also informed me today that ECFS was taken offline yesterday evening for repairs. Thus, and as suggested by Mr. Caton, we request an extension of time to file these comments today due to the technical difficulties we experienced in attempting to file electronically. We served copies on parties that previously filed comments in CC Docket No. 97-172 and, therefore, no party would be prejudiced by this extension of time.

We have enclosed a stamp-and-return copy to confirm acceptance of the filed comments. Please return this copy via the messenger. If you have any questions regarding this filing, please contact me at (202) 776-2973.

Respectfully submitted,


Loretta J. Garcia

Enclosure

cc: William F. Caton

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

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

In the Matter of)	
Petition of SBC Communications Inc.)	
For Forbearance of Structural Separation)	
Requirements and Request for Immediate)	
Interim Relief in Relation to the Provision of)	
Non-local Directory Assistance Service)	
Petition of US West Communications, Inc.)	
For a Declaratory Ruling Regarding the)	CC Docket No. 97-172
Provision of National Directory Assistance)	
Petition of Bell Atlantic for Forbearance from)	
Section 272 Requirements in Connection with)	CC Docket No. 97-172
National Directory Assistance Services)	
Petition of Bell Atlantic for Further)	
Forbearance from Section 272 Requirements)	CC Docket No. 97-172
In Connection With National Directory)	
Assistance Services)	
BellSouth Petition for Forbearance)	CC Docket No. 99-311
For Non-local Directory Assistance Service)	

**COMMENTS ON PETITIONS FOR FORBEARANCE
TELTRUST, INC.**

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SUMMARY

Teltrust, Inc. provides directory assistance services in competition with incumbent local exchange carriers (“ILECs”) and a growing number of alternative DA providers. The Commission cannot grant BellSouth’s, Bell Atlantic’s and SBC’s petitions for forbearance from section 272 separate affiliate requirement until the Commission has received evidence that petitioners have met all conditions of forbearance and, in particular, comply with the specific nondiscrimination requirement of section 272(c)(1).

As shown in these comments, the petitioning BOCs do not currently meet the criteria for forbearance from the section 272 separate affiliate requirement for their national directory assistance services. In the *US West Order*, the Commission required, as preconditions for forbearance, that (i) BOCs use their own information storage facilities to provide incidental interLATA services within the meaning of section 271(g)(4); and (ii) BOCs make available to unaffiliated entities the same directory listing information they use at the same rates, terms and conditions they impute to themselves. Thus, forbearance from section 272 structural separation requirement can be granted only with respect to incidental interLATA services within the meaning of section 271(g)(4). However, the petitioners’ provision of non-local directory assistance services fail to qualify as incidental interLATA services within the meaning of section 271(g)(4) because petitioners only are in the process of taking measures to meet the conditions established by the Commission in the *US West Order*. Therefore, their petitions for forbearance are premature and cannot be granted.

Moreover, the petitioners do not give unaffiliated entities nondiscriminatory access to their directory listing information at the same rates, terms and conditions they impute to themselves under section 272(c)(1). When they agree to provide the subscriber listing

information on which they have a virtual monopoly, the BOCs charge rates widely in excess of their incremental costs in violation of all the statutory provisions prohibiting discriminatory pricing and the preferential treatment of affiliates. Once again, the petitioners fail to satisfy an essential condition of forbearance from the separate affiliate requirement.

Section 272(c)(1) establishes a flat prohibition of discrimination by a Bell Operating Company against “any other entity.” The construction of this statutory provision compels the conclusion that independent DA providers, as any other unaffiliated entities, must receive access to LECs’ directory listing information at the same rates, terms and conditions ILECs impute to themselves. To make this nondiscrimination obligation meaningful, the Commission should require ILECs to file disclosure statements fully describing and quantifying their DA imputation arrangements.

Finally, Teltrust urges the Commission to declare that the federal law and federal requirements regarding the provision of national directory assistance preempt inconsistent state regulations. At a minimum, the Commission should preempt state regulations that require BOCs to obtain the permission of the subscriber’s carrier prior to releasing information on the subscribers of other carriers.

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BellSouth Petition for Forbearance)	CC Docket No. 99-311
For Non-local Directory Assistance Service)	

To: The Commission

COMMENTS ON PETITIONS FOR FORBEARANCE

Teltrust, Inc. ("Teltrust"), by its attorneys, hereby submits its comments on the petitions for forbearance from section 272 of the Act filed by SBC Communications, Inc. ("SBC"), Bell Atlantic and BellSouth Corporation ("BellSouth") in the above-referenced dockets regarding their provision of non-local directory assistance services. As a competitive provider of directory assistance ("DA") services, Teltrust has a significant interest in the outcome of this proceeding. Teltrust's success in the market place is directly linked to its ability to obtain nondiscriminatory

access to the local exchange carriers' current subscriber list information at rates, and under terms and conditions that the local exchange carriers ("LECs") impute to themselves. Teltrust believes that providing such access to independent DA providers under section 272(c)(1) of the Act would be consistent with both the specific provision itself and the general purposes of the Telecommunications Act of 1996 ("1996 Act"): "to secure lower prices and higher quality services for American telecommunications consumers and encourage the rapid development of new telecommunications technologies."

I. BACKGROUND

On September 27, 1999, the Federal Communications Commission (hereafter the "FCC" or "Commission") released an Order granting in part US West's petition for forbearance from the structural separation requirement of section 272 of the Act to provide non-local directory assistance ("NDA") services.¹ The Commission found that US West's centralized provision of NDA constitutes an "incidental interLATA" service within the meaning of section 271(g)(4) of the Act. The Commission further determined that a Bell Operating Company ("BOC") or its affiliate may provide local DA on an in-region basis, without prior authorization from the Commission, pursuant to section 271(b)(3) of the Act.² Although section 272 requires that BOCs provide such interLATA service through a separate affiliate, the Commission authorized US West to provide the regionwide component of its DA service on an integrated basis, subject

¹ Petition of US West Communications, Inc. for a Declaratory Ruling Regarding the Provision of National Directory Assistance Petition of US West Communications, Inc. for Forbearance; The Use of N11 Codes and Other Abbreviated Dialing Arrangements, *Memorandum Opinion and Order*, CC Docket No. 97-172 and 92-105 (released September 27, 1999) ("*US West Order*").

² MCI Telecommunications Corporation v. US West Communications, Inc., et al., *Memorandum Opinion and Order*, DA 99-2479, at ¶ 5 (released November 8, 1999) ("*MCI Order*").

to the condition that US West make available to unaffiliated entities all of the in-region telephone numbers it uses to provide nationwide DA service at the same rates, terms and conditions it imputes to itself.³

However, the Commission found that US West's provision of its nationwide DA service did not satisfy the requirement in section 271(g)(4) that it own the information storage facility it uses to provide nationwide directory assistance.⁴ The record demonstrated that numbers requested for locations outside of US West's region were retrieved from the Nortel-owned Quest411 database rather than from a database owned by US West.⁵ The Commission confirmed its analysis that this was a violation of section 272 in a subsequent order resolving an MCI complaint against the US West and Ameritech NDA offerings.⁶

As a result of the Commission's conclusions in the *US West Order*, several BOCs filed petitions for forbearance from the separate affiliate requirement of section 272 in connection with their national DA services, so as to be able to provide NDA service on an integrated basis with their local DA services.⁷ In support of their petitions, they claim that they meet, or are taking measures to meet, the preconditions the Commission set for forbearance, *i.e.* (1) that they are making, or will make, available to unaffiliated competing providers of DA services on a nondiscriminatory basis the same in-region listing information they use to provide their own

³ *US West Order* at ¶ 3.

⁴ *MCI Order* at ¶ 5.

⁵ *US West Order* at ¶ 9; *MCI Order* at ¶ 10.

⁶ *MCI Order* at ¶ 38.

⁷ See BellSouth's Petition for Forbearance for Non-local Directory Assistance Service filed October 8, 1999; Bell Atlantic's Petition for Forbearance and Petition for Further Forbearance, filed respectively October 22, 1999 and November 5, 1999; SBC's Petition for Forbearance, filed November 2, 1999.

NDA services, and (2) that they are taking the appropriate measures to own their own information storage facilities.

The Commission should not grant any of the petitions for forbearance because the petitioners have not demonstrated that they satisfy either of these preconditions. Regulatory forbearance should not be granted until petitioners demonstrate that they actually are in compliance with each of the conditions set forth by the Commission. In addition, the public interest would be advanced if the Commission would plainly state that independent DA providers are among the "unaffiliated entities" that are entitled to receive nondiscriminatory access to the BOCs' directory assistance information under section 272(e)(1). As described below, Teltrust also urges the Commission to reject SBC's narrow interpretation of "unaffiliated entity" which is inconsistent with the plain language of this section.

II. PETITIONERS DO NOT CURRENTLY SATISFY THE CRITERIA FOR GRANT OF REGULATORY FORBEARANCE

BellSouth, Bell Atlantic and SBC each petition the Commission under section 10 of the Act to forbear from applying the section 272(a)(2)(B)(i) separate affiliate requirement to their provision of DA services. Before the Commission examines whether it can grant forbearance from section 272 requirement, it must ascertain that the petitioners' provision of DA services constitutes incidental interLATA services within the meaning of section 271(g)(4) which is subject to the separate affiliate requirement of section 272. Then only, the Commission must assess, with respect to each petitioner, whether the forbearance criteria set forth in section 10 are met. The three criteria that must be satisfied to gain a grant of regulatory forbearance are: (i) enforcement of the regulation in question is not necessary to ensure that the carrier's charges and practices are just, reasonable and nondiscriminatory; (ii) enforcement of the regulation is not necessary for the protection of consumers; and (iii) forbearance is consistent with the public

interest.⁸ As the Commission noted in an earlier case, any decision to forbear must be based upon a record that contains more than broad, unsupported allegations that those criteria are met.⁹

In the *US West Order*, where the forbearance analysis only applied to the provision of regionwide DA service, the Commission found that the first criterion for forbearance would be met only if US West makes available to unaffiliated entities all of the in-region directory listing information it used to provide DA services at the same rates, terms and conditions it imputes to itself.¹⁰ The Commission found that, under the circumstances, enforcement of section 272 was not necessary to protect consumers and, therefore, the next forbearance criterion was met. Finally, the FCC concluded that forbearance for in-region DA service would be in the public interest.¹¹ This situation is in contrast to the BellSouth, Bell Atlantic and SBC petitions which obviously do not satisfy the requirements for forbearance set forth in the *US West Order*.¹²

⁸ 47 U.S.C. § 160.

⁹ See Bell Operating Companies' Petition for Forbearance From the Application of Section 272 of the Communications Act of 1934, as Amended, to Certain Activities, *Memorandum Opinion and Order*, 13 FCC Rcd 2627, 2637 (1998).

¹⁰ Forbearance cannot be extended to the nondiscrimination requirements of section 272(c)(1) because, as the Commission recognized, section 272 contains a more stringent nondiscrimination standard than section 10(a)(1) of the Act. *US West Order* at ¶¶ 38-41.

¹¹ See *US West Order* at ¶ 28. The Commission noted that it would have applied its forbearance analysis to the nationwide component of US West's NDA service if it was in compliance with section 271(g)(4).

¹² The Commission has not addressed whether it would impose additional requirements on the section 272 forbearance for the provision of the nationwide component of NDA, an issue not addressed in the *US West Order*.

A. Petitioners Do Not Provide Incidental InterLATA Services Within the Meaning of Section 271(g)(4) of the Act

None of the petitioners currently complies with section 271(g)(4) ownership requirement set forth in the *US West Order*. Although they each claim to be taking steps to conform with the Commission's ruling, none of them currently retrieves all requested non-local telephone numbers from its own information storage facilities. Bell Atlantic claims it is the sole owner of only one of the information storage facilities, to which out-of-region inquiries are directed. But it confesses that "work is in progress to direct Bell Atlantic queries exclusively to the Bell Atlantic facility" and assures that "this rearrangement should be completed in about six weeks."¹³ Moreover, while it also claims that it has purchased additional information storage facilities from VoltDelta, Bell Atlantic provides no evidence of its current compliance with section 271(g)(4) in the northern Bell Atlantic states.

SBC states that its subsidiaries, Southwestern Bell Telephone ("SWBT") and Pacific Bell are purchasing a national directory listing information storage facility from Nortel and that "the resulting contract, upon execution, will immediately vest SBC with ownership of the national directory listing information storage facility."¹⁴ SBC admits, however, that the contract still must be executed. In addition, SWBT and Pacific Bell reportedly plan to reconfigure their operator workstations to access the DA databases currently owned by Ameritech, a transition which could take a year to complete. BellSouth merely promises to comply with the ownership requirements set forth in the *US West Order* without disclosing its existing compliance status or

¹³ See Bell Atlantic's Petition for Further Forbearance at 2-3.

¹⁴ See SBC's Petition for Forbearance at 3.

the time frame it needs for the establishment of the necessary service architecture.¹⁵ These arrangements for future ownership do not satisfy the requirement of section 271(g)(4) that carriers retrieve information out of their own information storage facilities.

Finally, SBC submits a request for forbearance on behalf of Nevada Bell for a national directory assistance service Nevada Bell does not currently offer. In these circumstances, Nevada Bell is unable to satisfy any of the three prongs of the section 10 forbearance standard. Forbearance can be granted only if *present*, not future, market conditions ensure that a carrier's rates and practices are just and reasonable and protect consumers.¹⁶ A petitioner's allegations that its provisioning of services will meet both section 271(g)(4) requirements and section 10 forbearance standards in the future are insufficient to justify a grant of forbearance.

As the Commission recognized in the *US West Order*, Congress made it plain, through enactment of the separate affiliate and nondiscrimination requirements of section 272, that there are competitive dangers arising from the BOCs' monopoly position and control of bottleneck facilities that may linger even after a BOC has satisfied the market-opening requirements of section 271. The Commission has also recognized that compliance with section 271 alone does not ensure that the local telecommunications market will remain open to competition. Section 272 is meant as an additional safeguard to prevent BOCs' anticompetitive practices occurring after section 271 requirements are met.¹⁷ It is impossible to evaluate now whether, once Nevada

¹⁵ See BellSouth's Petition for Forbearance at 5-6.

¹⁶ See Personal Communications Ind. Ass'n Broadband Personal Communications Services Alliance, Petition for Forbearance For Broadband Personal Communications Services. *Memorandum Opinion and Order and Notice of Proposed Rulemaking*, 13 FCC Rcd 16857, 16869-870, 16877-878 (1998).

¹⁷ *US West Order* at ¶ 55.

Bell starts offering the service, enforcement of section 272 will be necessary to ensure that Nevada Bell's DA charges for these services are just and reasonable. Moreover, section 10(c) of the Act allows that petitions for forbearance be filed only with respect to services actually offered by the carrier. Therefore, Nevada Bell's petition for forbearance is entirely premature and cannot be granted.

Teltrust also urges the Commission not to consider the merits of the other petitioners' requests for forbearance until each petitioner demonstrates that it provides incidental interLATA services within the meaning of section 271(g)(4). Teltrust urges the Commission not to rely on the few cited anecdotal examples of measures taken by the petitioners to begin to meet the requirements of section 271(g)(4) as interpreted by the Commission. Petitioners should provide evidence of their purchase of information storage facilities and their reconfiguration of the service before any of their forbearance petitions can be considered.

B. Petitioners Do Not Make In-Region Directory Listing Information Available to All Unaffiliated Entities, as Required Under Section 272(c)(1).

In the *US West Order*, the FCC allowed US West to provide the region-wide component of its NDA service on an integrated basis but required US West to make available to unaffiliated entities all of the in-region directory listing information it uses to provide region-wide directory assistance at the same rates, terms and conditions it imputes to itself.¹⁸ In addition to the directory information of its own subscribers, US West was also required to make available to unaffiliated entities the directory information it obtains from independent and competitive LECs operating in its region for the provision of NDA service.¹⁹ Within sixty days of the release of the

¹⁸ *Id.* at ¶¶ 30-37.

¹⁹ *Id.* at ¶ 37.

order, US West also had to make changes to its cost allocation manuals to reflect changes in its accounting.

The vague commitment of the petitioners to, in the future, give unaffiliated entities nondiscriminatory access to their in-region listing information falls short of meeting the continuing nondiscrimination obligation set forth in section 272(c)(1).²⁰ Bell Atlantic only promises that it will, in the future, offer regionwide listing information to unaffiliated entities on nondiscriminatory terms and conditions.²¹ BellSouth also agrees to meet this requirement once the Commission grants forbearance of its NDA services.²² This means that petitioners' provision of in-region directory listings constitutes an unlawful practice within the meaning of section 272 as long as they are not supplying the same listings to unaffiliated entities under the same rates, terms and conditions in accordance with section 272(c)(1). It is, of course, impossible to judge whether the BOCs are treating third parties in a nondiscriminatory manner without knowing how the carriers impute costs to themselves.

SBC selectively interprets the applicable nondiscrimination requirement in a predictably restrictive manner, arguing that only local exchange and toll carriers are entitled to receive access to in-region listing information, to the exclusion of independent DA providers.²³ SBC obviously intends to restrict access to its directory listing information only to certain kinds of unaffiliated entities. However, section 272(c)(1) imposes a flat prohibition on discrimination

²⁰ See *MCI Order* at ¶ 28. "Defendants have had a continuing obligation, pursuant to section 272(c)(1), to provide in-region directory listing information to unaffiliated entities on a nondiscriminatory basis."

²¹ See Bell Atlantic's Petition for Forbearance at 4.

²² BellSouth's Petition for Forbearance at 8-9.

²³ SBC's Petition for Forbearance at 4.

against “any other entity,” as the *US West Order* acknowledges.²⁴ SBC’s proposed restriction thus is contrary to the express language of section 272(c)(1) which does not distinguish between different types of unaffiliated entities. As the *US West Order* recognized, section 272 contains a more stringent nondiscrimination standard than the one set forth in section 10.²⁵ Ruling that BOCs have no obligation to provide directory listing information to certain unaffiliated entities like the independent DA providers would totally ignore the relevant and more stringent nondiscrimination standard.²⁶

Like US West, SBC failed to provide any information that might support a conclusion that SBC’s NDA service would still face meaningful competition from alternative providers of DA services if it makes its directory listing information available to local exchange and toll carriers only. Because the goal of section 272 is to protect competition when the BOCs are allowed under section 271 to provide certain in-region services without the Commission’s prior approval, the instructions of this section most fully adhered to preserve and promote competitive

²⁴ *US West Order* at ¶ 40. In an earlier case, the Commission forbore from applying section 272 separate affiliate requirement to the BOCs’ E911 and BellSouth’s reverse directory services, subject to the condition that the BOCs make available to unaffiliated entities listing information it used to provide these services. The Commission did not restrict access to listing information to local exchange and toll carriers. Instead, the Commission directed BellSouth to provide its listing information to unaffiliated entities to ensure that BellSouth’s electronic reverse directory service face meaningful competition from alternative providers of the same service. See Bell Operating Companies’ Petitions for Forbearance From the Application of Section 272 of the Communications Act of 1934 to Certain Activities, *Memorandum Opinion and Order*, 13 FCC Rcd 2627, 2643, 2661 (1998).

²⁵ *US West Order* at ¶¶ 38-41.

²⁶ See Implementation of the Non-Accounting Safeguards of Sections 271 and 272 of the Communications Act of 1934, First Report and Order and Further Notice of Proposed Rulemaking, 11 FCC Rcd 21905, 21998 (1996) (“*Non-Accounting Safeguards Order*”); *reconsidered sua sponte*, 12 FCC Rcd 2297; *reconsideration denied*, 12 FCC Rcd 8653 (1997). Congress’ use of the term “any other entity,” demonstrates that section 272(c)(1) establishes an unqualified prohibition against discrimination by BOCs.

choices. Consequently, all unaffiliated DA providers must be afforded full nondiscriminatory access to the BOCs' DA subscriber information.

Finally, if the statutory provisions Teltrust has already discussed are judged by the Commission to be insufficient, section 271(h) still requires the Commission to ensure that the BOCs' provision of incidental interLATA services does not adversely affect telephone exchange service ratepayers or competition in any telecommunications market. Authorizing BOCs not to supply directory listing information to certain unaffiliated entities, like non-carrier DA providers, would adversely affect the market for directory assistance services by limiting the carriers' methods of providing DA services to their subscribers. Independent DA providers usually act as agents of the carriers for whom they provide DA service. As agents of these carriers, independent DA providers compete with previously established carrier providers of DA services. If the Commission excludes independent DA providers from accessing from accessing the BOCs' directory assistance data on a nondiscriminatory basis, it will block the most realistic prospect for competition in the market for wholesale DA. Therefore, Teltrust asks the Commission not to adopt such a needlessly restrictive interpretation of the statute. Instead, the Commission should clarify that independent DA providers, as any other unaffiliated entities, are entitled to access the BOCs' DA subscriber data at the same rates, terms and conditions as the BOCs impute to themselves.

III. THE COMMISSION SHOULD ENSURE THAT THE BOCs' PRICING OF DIRECTORY ASSISTANCE DATA IS NOT UNREASONABLE

In justifying its request for forbearance, SBC argues that it is not necessary to require it to provide national directory assistance services through a separate affiliate to ensure that its rates

and services are just and reasonable.²⁷ SBC asserts that “vigorous competition” in the provisioning of national directory assistance services and state tariff oversight will ensure reasonable rates.²⁸

In support of its position, SBC points out that AT&T, MCI and Sprint generally charge their long distance subscribers rates within a range of \$0.99 and \$1.40 for access to subscriber listings outside their home area code, while SBC charges \$0.95 for its comparable directory assistance service. SBC uses these sample prices to support its claim that its national directory assistance rates are not unreasonable, unjust or discriminatory.²⁹ However, the fact that a BOC can undercut the prices of DA services offered by non-BOC competitors does not prove that the BOC’s prices are reasonable. It may, in fact, show exactly the opposite when the BOC’s ability to undercut the prices of competitors is due to the BOC’s overwhelming information and cost advantage over non-BOC competitors and its failure to give full effect to the statutory requirement for imputation.

Anti-competitive forces are at work with respect to the BOCs’ offering of national directory assistance. The BOCs, by virtue of their historical monopoly, have direct access to the information of the majority of telephone subscribers. Not only do the BOCs continue to have the majority of subscribers, they also obtain subscriber information of other carriers’ subscribers, often at no charge. Thus, the BOCs may be able to offer their national DA services at rates

²⁷ SBC’s Petition for Forbearance at 5.

²⁸ *Id.* at 5-6.

²⁹ *Id.* at 6.

below those of their competitors because they do not suffer the expense of purchasing subscriber data and because they control the prices of the necessary inputs.³⁰

DA providers not affiliated with a BOC do not have comparable access to the critical subscriber data. They must obtain subscriber data from the BOCs, other LECs and other sources. Because competing DA providers must purchase the directory assistance data, their costs are subject to the rates charged for obtaining this data. In other words, they cannot price their NDA services below the cost of the required subscriber data.

Teltrust offers both retail and wholesale directory assistance services, but it offers wholesale DA to carriers only on a limited basis and in a limited geographic area. Teltrust has experienced significant hardship in establishing itself in the wholesale DA market due to the BOCs' virtual monopoly in reliable, updated directory information, BOC reluctance to make access available on a nondiscriminatory basis, and BOC tariffed pricing for subscriber information. For Teltrust to be a viable alternative to BOC wholesale DA, it needs critical access to the DA data of the BOCs at the same rates, terms and conditions they impute to themselves.

Because the BOCs control an essential input to the provision of directory assistance services (the majority of subscriber data), they also control the rate for that input. Since the BOCs' competitors must set their own prices above the rates at which they purchase the subscriber data input, the BOCs are in the enviable position of creating a price floor on what competitors can charge.

The BOCs charge wildly inflated prices for subscriber data. Indeed, there is evidence in this docket that incumbent LECs typically charge far more than a cost-based rate for this information. As an example of the costs of obtaining subscriber information, MCI submitted

³⁰ Nor have they demonstrated that they impute any of these costs to their DA services.

testimony provided by Southwestern Bell Telephone ("SWBT") in a Texas proceeding showing that SWBT's "total costs per directory assistance listing are \$0.0064 (initial load via tapes); \$0.0026 (daily update via tape); and \$0.0019 (daily update via electronic file transfer)."³¹ This contrasts with \$0.0585 per listing that SWBT charges for DA information. Thus, the Commission should ensure that any BOC that obtains forbearance from separate affiliate obligations provides subscriber information to competing carriers and their DA agents under the same rates, terms and conditions as the LECs impute to themselves. And, the BOC must publicly demonstrate its imputation methods and its results.

As Teltrust discussed in its comments in the *Local Competition UNE Remand* proceeding, Teltrust and other third party vendors are required by ILECs to purchase access at commercial tariffed rates.³² The price differential between recreating DA services that are of comparable quality, or of reselling BOC DA purchased at inflated, often "market-based," tariffed rates currently impedes Teltrust's ability to compete widely in the wholesale DA market. It should be persuasive to the Commission that some potential DA competitors, such as MCI Worldcom, have consciously chosen not to offer wholesale DA services because they concluded they could not compete with the incumbent LECs' wholesale pricing for DA.³³ The actual preclusion of at least one reasonably efficient competitor from the market should itself establish the need for stepped-up Commission vigilance on BOC imputation practices to assure that they demonstrate the nondiscriminatory availability and pricing of DA data.

³¹ Comments of MCI Worldcom at 9, CC Docket No. 97-271, filed October 13, 1999 (*citing* Direct Testimony of SWBT Area Manager Linda Robey, Texas PUC Docket No. 19075, July 1, 1998).

³² Teltrust UNE Comments at 4, 8-9.

³³ See UNE Comments of MCI Worldcom at 72.

Controlling the prices of their competitors allows the BOCs to charge rates for wholesale DA far in excess of their incremental costs and to reap a windfall that is not available to their non-BOC competitors. Any price the BOCs charge need not be anywhere near their actual costs. The lack of cost-based pricing has the undesirable result of encouraging inefficiencies in BOC operations, discouraging competition in the provision of directory assistance services and, ultimately, raising DA rates for consumers.

The BOCs' high rates for subscriber data violate the statutory prohibition against unreasonable discrimination under section 202(a) and constitute "unjust and unreasonable practices and charges" under section 201(b). Indeed, in the *US West Order*, the FCC found that "absent nondiscriminatory access to the in-region telephone numbers US West uses to provide regionwide directory assistance service, ... US West's charges, practices, classifications and regulations with respect to this service would be unjust and unreasonable, and unjustly or unreasonably discriminatory within the meaning of section 10(a)(1)."

These high rates also are contrary to Commission precedent. The BOCs' ability to set a *de facto* pricing floor deprives consumers of the benefits of competition by preventing the BOCs' competitors from competing effectively even when they are more efficient providers of DA services. As the Court of Appeals for the Seventh Circuit explained, when a price floor is set substantially above incremental cost, a "price umbrella" is created which allows less efficient rivals to remain in the market sheltered from full price competition.³⁴

Moreover, the FCC rejected an anticompetitive strategy that would allow a BOC to set high prices for interstate exchange access services, over which the BOC has monopoly power,

³⁴ *MCI Comm. v. American Tel. & Tel.*, 708 F.2d 1081, 1117 (7th Cir. 1983), *cert. denied*, 464 U.S. 891 (1983).

while its affiliate offers 'low' prices for long distance services in competition with the other long-distance carriers."³⁵ In the Non-Accounting Safeguards proceeding, the FCC acknowledged the risk that a BOC providing interLATA services in competition with other interLATA service providers could create a "price squeeze" by charging other firms prices for inputs that are higher than the prices it charges to its section 272 affiliate.³⁶ The FCC noted that the BOC affiliate could lower its retail price to reflect its unfair cost advantage and competing providers would be forced either to match the price reduction and absorb profit margin reductions or maintain their retail prices at the higher levels and accept market share reductions. The Commission also concluded in that same order that unlawfully preferential dissemination of information provided by BOCs to their section 272 affiliates could have the same effect as charging unlawfully discriminatory prices. It concluded that such artificial advantages may allow the BOC affiliate to win customers, even though a competing carrier may be a more efficient provider in serving the customer.

Consequently, the FCC must find that the BOC petitioners have not satisfied the relevant legal standards for forbearance or ensure that these BOCs provide access to subscriber data at the same rates, terms and conditions that they impute to themselves. The FCC also must require the BOCs to report their imputed costs to the Commission in documents available for public review. Such a requirement is warranted given their requests for forbearance of a significant statutory obligation meant to encourage competition. The FCC required such a showing of imputation, for example, in the Video Dialtone proceeding, where it required Bell Atlantic to show the rates it

³⁵ Access Charge Reform, Price Cap Performance Review for Local Exchange Carriers, *First Report and Order*, 12 FCC Rcd 15982, 16100 (1997).

³⁶ *Non-Accounting Safeguards Order*, 11 FCC Rcd at 21912-13.

imputed to itself for the use of poles and conduits, so it could ensure that those rates were not lower than its rates to competitors for pole attachments.³⁷ Similarly for video dialtone trials, the FCC not only required that BOCs modify their Cost Allocation Manuals but also required that they file quarterly expense reports. Additional reporting requirements for imputation, at least initially, are required.³⁸

Imposing such conditions is consistent with the Commission's declaration that sections 271 and 272 are intended to both protect subscribers to BOC monopoly services and to protect competition in competitive markets from the BOCs' ability to use their existing market power in local exchange services to obtain an anti-competitive advantage in those new markets the BOCs seek to enter.³⁹ On the other hand, allowing unfair pricing and an artificial price umbrella shields the BOCs against competition and deprives customers of the benefits of competition.⁴⁰

³⁷ Bell Atlantic Tel. Co., Rates, Terms and Regulations for Video Dialtone in Dover Township, New Jersey, *Order Designating Issues for Investigation*, 11 FCC Rcd 2024 (Common Carr. Bur. 1995); *vacated as moot*, 12 FCC Rcd 12274 (1997) (1996 Act repealed the telephone-cable cross-ownership restriction, repealed the FCC's video dialtone rules and policies, and established the open video system as a new means for entry into the multichannel video programming distribution market).

³⁸ Policing of the imputation obligation requires something more than directing the BOCs merely to make a change to their Cost Allocation Manuals to reflect some level of imputation. Rather, it should include a requirement that BOCs make an initial filing describing and quantifying their imputation arrangements that would need to be modified only when they are changed.

³⁹ *Non Accounting Safeguards Order*, 11 FCC Rcd at 21910.

⁴⁰ See, e.g. *Northeastern Tel. Co. v. American Tel. & Tel. Co.*, 651 F.2d 76, 87 (2d Cir. 1981); *cert. denied* 455 U.S. 943 (1981) (establishing a pricing floor above marginal cost would encourage underutilization of productive resources and would provide a price umbrella under which less efficient firms could hide from the stresses and storms of competition).

IV. THE COMMISSION SHOULD PREEMPT INCONSISTENT STATE REGULATIONS PROHIBITING BOCs FROM ALLOWING ACCESS TO SUBSCRIBER INFORMATION

In an apparent defense of its narrow interpretation of its legal obligations of nondiscriminatory access, SBC notes that the California Public Utility Commission has prohibited Pacific Bell from releasing subscriber information obtained from other carriers without the authorization of the subscriber's carrier.⁴¹ SBC states that it has no objection to releasing the information as required by the FCC in the *US West Order*, but SBC claims that it needs "additional direction" from the FCC on this point so it will not violate contrary state commission policies or orders.

In the event there are indeed inconsistent federal and state rules governing the scope of BOC provision of DA, then the FCC should declare that the federal law and federal requirements regarding the provision of national directory assistance preempt inconsistent state regulations. In other words, the Commission should clarify that any state regulations that would prevent the BOCs from complying with the requirements imposed as a condition of federal regulatory forbearance are preempted by federal law.

The FCC has the legal authority to preempt state regulations that impair the FCC's ability to carry out its responsibilities under the Act. The Supreme Court recently held that the FCC has "general jurisdiction" to implement the 1996 Act's local competition provisions (i.e., provisions added by the 1996 Act) since Congress expressly directed that the 1996 Act be inserted in the Communications Act of 1934 and since the 1934 Act already provides that the FCC may

⁴¹ SBC's Petition for Forbearance at 4.

prescribe rules and regulations that are necessary to carry out the provisions of the Act.⁴² The Court found that “the grant in section 201(b) means what it says: The FCC has rulemaking authority to carry out the provisions of this Act,” which includes sections 271 and 272. As such, the Court concluded that the FCC’s regulatory authority extends to implementation of the local competition provisions of the Act and that the section 152(b) jurisdictional limitation on intrastate communications service did not change this conclusion because the 1996 Act plainly applies to intrastate as well as interstate matters.

Also, in *California v. FCC*, the Ninth Circuit ruled that the FCC properly preempted a state’s regulations that made it infeasible economically for carriers to comply with both the federal and state regulations and therefore compelled the carriers to obey the state requirement in disregard of the federal requirements.⁴³ In that case, the court found that the state required carriers to provide enhanced services through a separate subsidiary although the FCC had removed its structural separation requirement. Carriers subject to the state requirement were faced with the prospect of providing interstate enhanced services on an integrated basis and intrastate enhanced services using separate facilities and personnel. The court agreed with the FCC that carriers as a practical matter would opt to comply with the more conservative state regulations for both interstate and intrastate enhanced services, thereby negating the federal goal of integrated provision of enhanced and basic services.

⁴² *AT&T Corp., et al. v. Iowa Utils. Bd., et al.*, 120 F.3d 753 (8th Cir. 1999); *aff’d in part, AT&T Corp. v. Iowa Utils. Bd.*, 119 S.Ct. 721 (1999); *judgment vacated*, 199 S.Ct. 1022 (1999).

⁴³ *California v. Federal Communications Commission*, 39 F.3d 919, 932 (9th Cir. 1994); *cert. denied*, 514 U.S. 1050 (1995); *FCC remand pending*, Computer III Further Remand Proceedings: Bell Operating Company Provision of Enhanced Services, *Further Notice of Proposed Rulemaking*, 13 FCC Rcd 6040 (1998).

A similar dilemma would present itself in the provision of national directory assistance. Carriers faced with a state requirement to obtain the approval of the subscriber's carrier before providing access to subscriber information would opt to comply with the state requirement, which would impede the FCC's goal of requiring the BOCs to provide access to the subscriber information they obtain due to their past role as monopoly providers of telecommunications services. Assuming that there are state regulations that require the BOCs to obtain the permission of the subscriber's carrier prior to releasing information on the subscribers of other carriers, such state policies, rules or regulations should be preempted.

Indeed, the FCC has already taken a step in the direction of federal preemption in interpreting sections 271 and 272. In the Non-Accounting Safeguards proceeding, the FCC concluded that its authority under sections 271 and 272 applies to intrastate as well as interstate interLATA services provide by the BOCs or their affiliates.⁴⁴ It based this conclusion on the plain language of sections 271 and 272 and on the scope of the Modified Final Judgment restrictions on the BOCs' provision of interLATA services. The FCC held that the rules it established to implement section 272 are binding on the states and the states may not impose regulations with respect to BOC provision of intrastate interLATA service that are inconsistent with section 272 or the Commission's rules thereunder.⁴⁵ A further declaration of federal preemption is necessary to ensure that the BOCs fulfill the federal conditions imposed on them in exchange for forbearance of the full range of their obligations under section 272.

⁴⁴ *Non-Accounting Safeguards Order*, 11 FCC Rcd at 21917-19.

⁴⁵ This reading of the Commission's jurisdiction is entirely consistent with the Supreme Court's view of FCC authority in *AT&T v. Iowa Utils. Bd.*, 119 S.Ct. at 730 ("section 201(b) *explicitly* gives the FCC jurisdiction to make rules governing matters to which the 1996 Act applies") (*emphasis in original*).

V. CONCLUSION

The BOC petitions demonstrate the petitioners' attempt to evade their obligations under sections 271(g)(4) and 272. It is incumbent on the Commission to clarify that forbearance from the structural separation obligations in section 272 depends upon the BOCs' compliance with the section 272 obligation to provide nondiscriminatory access to their directory listing information to *all* unaffiliated competing providers of NDA services, including non-carrier DA providers, under the same rates, terms and conditions as the BOCs impute to themselves. Forbearance should be granted only when BOCs can demonstrate that they satisfy section 271(g)(4) ownership requirement, rather than in anticipation of their providing NDA services in the future in accordance with the provisions of the Act and the Commission's rules. Finally, Teltrust urges the Commission to preempt inconsistent state regulations that may have the effect of prohibiting or delaying BOCs from allowing unaffiliated entities access to the full range of subscriber information they possess.

Respectfully submitted,

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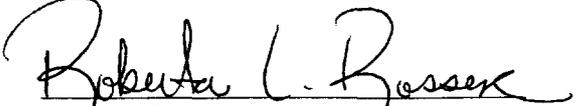
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