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

In the Matter of	)	
	)	
Implementation of the Non-Accounting Safeguards of Sections 271 and 272 of the Communications Act of 1934, as amended	)	CC Docket No. 96-149
	)	

COMMENTS OF THE COMMERCIAL INTERNET EXCHANGE ASSOCIATION

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November 29, 2000

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INTRODUCTION

The Commercial Internet eXchange Association (CIX) is a trade association that represents 125 Internet Service Provider (ISP) networks that handle approximately 75 percent of the United States', and much of the world's, backbone Internet traffic.[1] CIX is the world's oldest trade association of ISPs and Internet-related businesses, having been established in 1991 to provide the first commercial access point to the Internet backbone. CIX, by its attorneys, files

[1] The views expressed herein are those of CIX as a trade association, and are not necessarily the views of each individual member.

these comments in response to the Commission's *Public Notice*[2] requesting comments in connection with the United States Court of Appeals for the District of Columbia Circuit remand of the Commission's Non-Accounting Safeguards Orders.[3] In particular, the Commission requests comment on specific issues raised by a petition for judicial review filed by the Bell Atlantic telephone companies (n/k/a the Verizon telephone companies) and US West, Inc., (n/k/a Qwest Communications International, Inc.) (collectively the "Petitioners") in response to the Commission's *Accounting Safeguards Order* and, to an extent, the Commission's *Third Reconsideration Order*.[4]

In the *Public Notice*, the Commission requests comment on specific, enumerated issues, and invites comments on additional issues previously raised before the Commission or the court that may be relevant to this proceeding. CIX mainly addresses the Commission's latter request in these Comments, and intends to address the Commission's enumerated inquiries more fully in the reply comments to be filed on December 11, 2000.

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[2] *Comment Requested in Connection with Court Remand of Non-Accounting Safeguards Order*, Public Notice, CC Docket No. 96-149, DA 00-2530, rel. Nov. 8, 2000.

[3] *Implementation of the Non-Accounting Safeguards of Sections 271 and 272 of the Communications Act of 1934, as amended*, CC Docket No. 96-149, First Report and Order and Further Notice of Proposed Rulemaking, 11 FCC Rcd 21905 (1996) ("*Non-Accounting Safeguards Order*"); *Implementation of the Non-Accounting Safeguards of Sections 271 and 272 of the Communications Act of 1934, as amended*, CC Docket No. 96-149, Third Order on Reconsideration, 14 FCC Rcd 16299 (1999) ("*Third Reconsideration Order*").

[4] *See Bell Atlantic Telephone Companies and Qwest Communications International, Inc. v. Federal Communications Commission and the United States of America*, Brief for Petitioners, *Case No. 99-1479 (consolidated with Case No. 00-1004)*, United States Court of Appeals for the District of Columbia Circuit (Sep. 1, 2000).

When Congress enacted the Telecommunications Act of 1996 (the "1996 Act"), it struck a careful balance.[5] Congress provided an opportunity for the Bell Operating Companies ("BOCs") to enter the in-region inter-LATA services market – including the market for inter-LATA information services – once they have satisfied Section 271 requirements. Congress recognized that until the BOCs' open their local networks to competition, as required by Section 271, they will continue to have the ability and incentive to leverage their market power to obtain an unfair advantage in the market for in-region inter-LATA services, thereby harming both consumers and competing service providers. Congress therefore carefully crafted a mechanism for BOC entry into the market for interLATA services, set forth in both sections 271 and 272 of the Act.

In Section 271(a) of the Act, Congress barred the BOCs from providing in-region "inter-LATA services" until they comply with the requirements contained in Section 271(c) designed to open local telecommunications markets to competition.[6] Reading sections 271 and 272 together,

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[5] The Senate bill that became the basis for the Act would have made the inter-LATA separate subsidiary requirement permanent, while giving the Commission the authority to grant exceptions. *See* S. 652, 104th Cong., 1st Sess., § 102 (1995). The Senate Committee Report made clear, however, that "the Senate [did] not intend that the Commission would grant an exception to the basic separate subsidiary requirement of this section prior to authorizing the provision of inter-LATA service ... by the Bell Operating Company seeking the exception to the requirements of this section." S. Rpt. 104-23, 104th Cong., 1st Sess. at 24 (1995). The Conference Committee melded features of the Senate and House bills. While reflecting the House's deregulatory goals by including a provision "sunsetting" the inter-LATA safeguards, the 1996 Act also reflects the Senate's concern that the pro-competitive safeguards not be eliminated prematurely by giving the Commission authority to extend the sunset periods.

[6] *See* 47 U.S.C. § 271(a).

it is clear that Congress intended the term "interLATA services" as used in Section 271 to include both interLATA telecommunications services *and* interLATA information services. Section 272 describes the means under which a BOC can provide *both* interLATA information[7] and interLATA telecommunications services once it has met the requirements set forth in Section 271, clearly indicating that the "interLATA services" described in Section 271 include both information and telecommunications services[8].

Last November, CIX petitioned the Commission to extend the Section 272(f)(2) sunset period and extend the structurally separate affiliate requirement for the provision of interLATA information services. While the Commission ultimately denied CIX's request,[9] it was clear to all parties that the Section 271 prohibition on BOC provision of interLATA information services would continue to apply even after sunset of specific separate affiliate requirements pursuant to Section 272(f)(2).

In fact, one of the Petitioners conceded this point in that earlier proceeding, which was within this Docket. Specifically, Qwest argued in response to CIX's *Request for Extension of the*

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[7] Section 272(a)(2)(C) requires that once 271 approval has been obtained that interLATA information services be provided through a separate affiliate. 47 U.S.C. § 272(a)(2)(C).

[8] 271(d)(3) states that "The Commission shall not approve the authorization requested in an application submitted . . . unless it finds... (B) the request authorization will be carried out in accordance with the requirements of section 272." 47 U.S.C. § 272(d)(3).

[9] *See Request for Extension of the Sunset Date of the Structural, Non-Discrimination, and Other Behavioral Safeguards Governing Bell Operating Company Provision of In-Region, Inter-LATA Information Services*, Order, CC Docket No. 96-149, FCC 00-40, rel. Feb. 8, 2000.

Sunset Date that sections 271 and 272 constitute a bar to BOC provision of interLATA information service without prior Section 271 approval. Qwest stated that "concerns about BOCs acting in an anti-competitive manner in the interLATA information services [upon the effectiveness of the sunset conditions of Section 272(f)] are not apt because *the BOCs cannot provide those services at all* [pursuant to Section 271(d)(6)] (emphasis added)."[10] It is disingenuous for Qwest, as one of the Petitioners in this proceeding, to make exactly the opposite argument in order to wriggle free of the requirements of Section 271.

The Commission should not permit the Petitioners to successfully utilize such doubletalk in this blatant attempt to place BOC interests ahead of the public's interest, which is otherwise protected by the Section 271 prohibitions on premature BOC provision of interLATA information services. Congress, and the Commission, have already provided a singular mechanism through which BOCs can participate in the interLATA information service market – the Section 271 process. That process must apply to all interLATA services, as Congress has clearly intended.

As the Commission is well aware, the opening of local telecommunications markets to competition has taken far longer than expected. Nevertheless, the Petitioners present strained and legalistic arguments that misconstrue the words of the 1996 Act in an attempt to short-circuit the process set forth therein and artificially exempt BOC provisioning of interLATA services

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[10] Opposition of US West Communications, Inc., *Request for Extension of the Sunset Date of the Structural, Non-Discrimination, and Other Behavioral Safeguards Governing Bell Operating Company Provision of In-Region,*

(Footnote continued to next page)

from Section 271 and 272 restrictions – *despite the specific restrictions on BOC provisioning of interLATA and Internet access services appearing in those sections.*[11]

This maneuver is no more than another instance of the incessant attempts by BOCs, such as the Petitioners, to misconstrue the 1996 Act and to thwart competition in the communications market. In this latest iteration, the Petitioners once again demonstrate no regard for the public interest in, and Congress's intent behind, the pro-competition policies embodied in the 1996 Act. The Commission cannot let this effort endure. As CIX has often stated, the BOCs hold the keys to the provision of interLATA information services in their own hands; they need merely comply with Section 271 and open their local networks to competition.

The safeguards found in the 1996 Act and the Commission's regulations relating to the prohibition on BOC provision of interLATA information services without prior Section 271 approval are necessary to prevent the anti-competitive behavior that would otherwise thwart the ability of independent ISPs to compete. If the BOCs are allowed to escape the 1996 Act's requirements for the provision of interLATA information services through linguistic trickery rather than through compliance with Congressional intent and the Commission's policies and

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(Footnote continued from previous page)

Inter-LATA Information Services, CC Docket No. 96-149, Dec. 17, 1999, at 7.

[11] The 1996 Act provides a narrow carve-out permitting BOCs to provide "incidental interLATA services" that specifically include Internet services over dedicated facilities to or for elementary and secondary schools. If Congress had intended that BOCs could participate in interLATA provisioning of such interLATA information service without benefit of Section 271 authorization, this carve-out would be wholly unnecessary. *See* 47 U.S.C. §

(Footnote continued to next page)

regulations, they will have gained the ability and incentive to harm competition in the emerging market for broadband Internet access service. Clearly it is the Petitioner's desire for that very advantage that has inspired their arguments – were there any public interest benefits to be gained by adopting the Petitioner's preferred reading of the 1996 Act, certainly the Petitioners would have identified them.

(Footnote continued from previous page)

271(g)(2). In addition, Section 272 clearly specifies that a separate affiliate is required for BOC provisioning of interLATA information services. *See* 47 U.S.C. § 272(a)(2)(C).

CONCLUSION

CIX urges the Commission to continue to maintain its vigilance and support for competition in the telecommunications markets. By doing so, the Commission will help to ensure that local facilities are fully opened for competition. The term interLATA services in Section 271 of the Act encompasses both information and telecommunication services. The Commission's has correctly interpreted the Act as requiring BOCs compliance with Section 271 of the Act prior to being permitted to offer interLATA information services.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Mary W. Malone, certify that I have, on this 29st day of November, 2000, caused a true and correct copy of the foregoing "Comments of The Commercial Internet Exchange Association" to be hand delivered to:

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