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Federal Communications Commission
Washington, D.C 20544

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

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 AT&T CORP.

Pursuant to the Public Notice released on November 8, 2000, AT&T Corp. ("AT&T") respectfully submits these comments on the question whether interLATA information services are exempt from the interLATA services prohibition of Section 271 of the Communications Act.

Introduction And Summary

In its 1996 *Non-Accounting Safeguards Order*, the Commission held that "interLATA information services" are "interLATA services" within the meaning of Section 271 of the Act.¹ The Commission reasoned that because interLATA information services contain a bundled interLATA telecommunications component, these services include "telecommunications" between points located in different LATAs and thus satisfy the statutory definition of "interLATA services" contained in § 153(21) of the Act. This holding was plainly correct. It was mandated by a prior holding of the D.C. Circuit on this very question and by the terms, structure, and purposes of §§ 271 and 272 of the Act. Indeed, this matter was so clear in 1996 that BOCs themselves urged this same construction of the statutory language.

¹ See First Report and Order and Further Notice of Proposed Rulemaking, *Implementation of the Non-Accounting Safeguards of Sections 271 and 272 of the Communications act of 1934, as amended*, 11 FCC Rcd. 21905 (1996) ("*Non-Accounting Safeguards Order*"), at ¶¶ 55-56.

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However, in their belated recent appeal of the 1996 order, the BOCs repudiated their own prior positions and made a series of arguments that the Commission had not and could not have addressed. The Commission thus requested, and was granted, a voluntary remand to address these new arguments. But the BOCs' belated claims do not withstand even cursory analysis.

The BOCs' appellate brief claims that the 1996 order is inconsistent with the interpretation of the Act that the Commission adopted in its subsequent 1998 Universal Service Report to Congress.² This Report explained the Commission's reasons for correctly concluding that the Telecommunications Act of 1996 did not overrule the *Computer II* rules and did not require the Commission to treat information service providers as "telecommunications carriers" that are subject to common carrier regulation and required to contribute to the universal service fund. That holding turned on the Act's definitions of "telecommunications service" (§ 153(46)) as well as of "telecommunications carrier" (§ 153(44)), and any other holding would have produced the absurdity that providers of videoprogramming and other information services would be subject to the requirements of §§ 201-05 and § 254 of the Act.

But in their appellate brief, the BOCs treated this Report as establishing that if a firm provides an "information service," the Act's terms foreclose a finding that it can be deemed to be "providing" "telecommunications" for any purpose. In particular, the BOCs claim that the 1998 Report somehow established the "plain meaning" of the term "provide" in the very different context of Section 271.

² See Report to Congress, *Federal-State Joint Board on Universal Service*, 13 FCC Rcd. 11501 (1998) ("Report").

This claim is frivolous. The Commission and the D.C. Circuit have held that, irrespective of the meaning given “provide” under other sections of the Act, the term “provide” in Section 271 must be construed in the context of its unique terms, structure, history and purposes and that “the differences in the statutory contexts justifies different outcomes” under § 271 than under the Act’s other sections. *U S West v. FCC*, 177 F.3d 1057, 1059-61 (D.C. Cir. 1999). In this regard, the D.C. Circuit has held that, like the MFJ, § 271 serves the dual purposes of (1) preventing BOCs from using local exchange monopolies to discriminate in favor of their owned or leased interLATA facilities (*BellSouth v. FCC*, 162 F.3d 678, 689 (D.C. Cir. 1998)) and (2) providing BOCs with maximum “incentive[s] to cooperate in opening [their] local markets to competition.” *U S West v. FCC*, 177 F.3d at 1060. These purposes absolutely compel the holding that a BOC’s bundling of interLATA transmission with information service constitutes prohibited interLATA services.

Indeed, the D.C. Circuit’s MFJ precedents expressly so held, and rejected the very claims that the BOCs now advance. For the MFJ contained the same definitions of “information services” and of “telecommunications” as does the Act, and the D.C. Circuit’s MFJ decisions rejected the BOCs’ claim that an information service cannot also constitute the provision of interLATA telecommunications in this unique context. Specifically, the D.C. Circuit held that a BOC is providing “telecommunications” across LATA boundaries whenever it offers a service that bundles information and the use of interLATA transmission facilities that the BOC either owns or leases. *United States v. Western Electric Co.*, 907 F.2d 160, 163 (D.C. Cir. 1990). The Court held that to permit the BOCs to bundle interLATA transmission and information would create an “enormous loophole” that would allow BOCs to evade the purposes of the interLATA ban at will. *Id.*

Further, Congress could not have made it clearer that, with the exception of the incidental services authorized by Section 271(g), Section 271 is intended to codify the foregoing D.C. Circuit interpretation of the MFJ. In particular, rather than narrow the MFJ's definition of prohibited interLATA services, Congress broadened the definition by expressly providing that it applied to any and all provisions of telecommunications across LATA boundaries, whether or not these constituted the provision of a "telecommunications service." Further, because the "incidental interLATA services" authorized by Section 271(g) indisputably include a number of different interLATA information services, Congress plainly understood that the ban on providing interLATA services would otherwise have prohibited the provision of all interLATA information services. Similarly, by adopting different rules for "interLATA telecommunications services" and "interLATA information services," Section 272(a)(2) confirms that the ban on providing "interLATA services" encompasses both telecommunications services and information services that transmit information across LATA boundaries.

As the D.C. Circuit previously held, the BOCs' position would defeat the purposes of the "core [interLATA services] restriction" by creating an "enormous loophole" in this prohibition. *United States v. Western Elec. Co.*, 907 F.2d at 163. Indeed, the BOCs' submission in this matter is merely the most recent of their many attempts to cripple the interLATA services ban by exempting the data transmission services that represent the largest and fastest growing segment of interexchange usage and that are increasingly difficult to distinguish from voice transmissions. As the D.C. Circuit stated, the BOCs' position would allow the BOCs to provide "extensive" such interLATA services by "simply packaging" them with services that provide sufficient "storage" to allow the services to be characterized as "information services." *Id.* That would both allow the anticompetitive integration of

interexchange services and local BOC monopolies and dramatically reduce or even eliminate the BOCs' incentives to comply with the market opening requirements of the competitive checklist.

The rest of AT&T's comments are divided into three parts, which respond to the questions that the Public Notice raises. Part I responds to the first set of questions by discussing the relevant D.C. Circuit precedent that addresses these same issues. It explains that information services can, but need not, include bundled telecommunications components, but that the D.C. Circuit has already held that a service that includes these components is an interLATA service. In addition to squarely rejecting the BOCs' claim that "information services" cannot be deemed to include "telecommunications" in this unique context, this decision further provided the historical background against which Congress enacted Section 271.

Part II responds to the Notice's second, third, and fourth sets of questions. It demonstrates that the "text, structure, purpose, and history" of § 271 establish that it codifies the earlier D.C. Circuit holding that interLATA information services fall within the interLATA services ban. In particular, the 1996 Act adopted a broader definition of prohibited interLATA services, and the provisions of Sections 271(g) and 272(a)(2) vividly confirm that Congress intended that the interLATA services ban include both interLATA information services and interLATA telecommunications services. Finally, Part II demonstrates that the BOCs themselves acknowledged these points in their 1996 and subsequent comments in this docket.

Part III addresses the fifth set of questions set forth in the Notice. It demonstrates that the BOCs' appellate brief mischaracterizes the Commission's 1998 Report in some respects and that the Commission's conclusion that information services providers are not "telecommunications carriers" that are subject to common carrier regulation has no pertinence to

the correct interpretation of Section 271. By contrast, the BOCs' proposed "construction" of § 271 would patently defeat its terms, structure, history, and purposes.

I. As The D.C. Circuit Has Already Held, A Service That Bundles Information And InterLATA Transmission Is An InterLATA Service.

The principal claim that the BOCs raised in their appellate brief is that it violates the "plain meaning" of the Act for the Commission to conclude that a BOC can be providing an interLATA service when it offers an information service. The BOCs note that "interLATA service" is defined to mean "telecommunications between a point located in a [LATA] and a point located outside [it]" (§ 153(21)) and that "telecommunications" is defined to mean the "transmission" of information without change in its form or content. § 153(43). The BOCs further note that "information services" is defined as the offering of the capability to store, acquire, or manipulate information "via telecommunications." § 153(20). The BOCs claim that the two definitions are "mutually exclusive" as a matter of the "plain meaning" of the foregoing statutory language, and that the provider of an "information service" can never also be deemed to be providing "telecommunications." The BOCs' brief made these claims without even acknowledging that the D.C. Circuit has already rejected them as a matter of law.

The BOCs' claims are echoed in the first set of questions that the Public Notice asks commenters to address. The Notice asks whether "the provision of an 'information service' necessarily includes a bundled telecommunications component that falls within the Act's definition of 'interLATA services?'" The Notice then asks "to the extent that it is using telecommunications, can the provider of an information service also be deemed to be providing telecommunications?" Both questions have been answered by the MFJ precedents and by the unchallenged portions of the Commission's *Non-Accounting Safeguards Order*.

First, information services do not “necessarily” include a bundled telecommunications component. It is entirely a matter of the information service provider’s choice whether it will include telecommunications transmission as part of the service that it offers its subscribers.

That is so even though all information services require the use of telecommunications to connect customers to the computer or computers where information is stored or manipulated. But information services need only provide the “capability” to obtain information “via telecommunications,” and information service providers can choose to require their customers independently to obtain the interLATA telecommunications required to transmit information to and from the centrally located computers. Thus, as the Commission noted in the *Non-Accounting Safeguards Order* (¶¶ 115-119), information services providers can require their customers to access the service “on an interLATA basis by means independently chosen by the customer, such as a presubscribed interexchange carrier.” *Id.* ¶ 117. The Commission thus held that if a BOC provides an information service in this way, it is not bundling interLATA transmission as a component of its service and is providing neither an “interLATA information service” nor any other “interLATA service.” *Id.* ¶¶ 117-120.

Second, by contrast, it is an entirely different matter if a BOC were to choose to provide an information service by constructing, acquiring, or leasing the interLATA transmission facilities that will be used, in whole or in part, to connect the BOC’s customers to the centrally located computers that store or manipulate information. The facilities that transmit information to and from these computers are unquestionably “telecommunications” within the meaning of § 153(43), for the facilities do not themselves alter the form or content of the information. Rather, the facilities transmit the information as sent by the customer to the computer, and

transmit the information as sent by the computer to the customer. By acquiring the facilities that provide these connections itself – rather than requiring its customers independently to obtain them – the BOC is unquestionably obtaining and providing interLATA telecommunications facilities. Whether it owns or leases the facilities, the BOC is obtaining them and providing them to itself for use in its information service. The “bundled” service that the BOC offers its customers further has both an interLATA telecommunications component and an information component. Indeed, part of the value of the service to the customer is that it is spared the inconvenience and expense of independently obtaining the interLATA telecommunications services required to connect to the BOC’s centrally located computers, and depending on the nature of the service, the customer may value the interLATA transmission component far more highly than the storage or other features that can have nominal value but that make the service into an information service.

For these reasons, the D.C. Circuit has squarely rejected the precise claim that the BOCs are now making. It held that when a BOC provides an information service that has a bundled interLATA transmission component, the BOC is not merely providing “telecommunications” across LATA boundaries (which is the 1996 Act’s definition of “interLATA services”), but also is providing an “interexchange telecommunications *service*” (which was the activity prohibited by the MFJ). *United States v. Western Elec. Co.*, 907 F.2d at 163. In particular, to be a prohibited “interexchange telecommunications service” under the MFJ, the service had to satisfy both the definition of “interexchange telecommunications” (“telecommunications between a point or point located in one exchange [LATA] and a point or point located in one or more other exchange areas [LATAs]”) and the definition of

“telecommunications service” (“the offering for hire of telecommunications facilities or of telecommunications by means of such facilities”). *Id.*

The D.C. Circuit held that to satisfy these definitions, a service need only include an interLATA telecommunications component and that it was irrelevant whether the service also included the storage, manipulation or provision of information. The Court also held that it makes no difference whether the BOC “owns or leases” the bundled interLATA transmission component. *Id.* Thus, “the analysis of this issue” does not “change” if the BOC uses “its own telecommunications facilities rather than using facilities obtained from other carriers.” Public Notice, p. 3. The Commission recognized all the foregoing points in its *Non-Accounting Safeguards Order*. See 11 FCC Rcd. at 21, 961-62, ¶¶ 115-16 & nn.265 & 266 (quoting D.C. Circuit’s holding).

Indeed, the D.C. Circuit held that a BOC could otherwise evade the interLATA prohibition at will and create an “enormous loophole in the core restriction.” *United States v. Western Elec. Co.*, 907 F.2d at 163. For the BOC would then have been permitted to provide “extensive” interexchange services “by simply packaging that service” with something that is nominally an information service. *Id.* The D.C. Circuit thus held that “when information services are, as here, bundled with leased interexchange lines, the activity is covered by the decree.” *Id.*

In all these regards, the D.C. Circuit decision squarely forecloses the BOCs’ arguments that the Act’s definitions of “information services” and “telecommunications” are “mutually exclusive” and that an information service cannot constitute the provision of telecommunications in the unique context of the interLATA services prohibition. As the

Commission has previously stated, “in defining ‘telecommunications’ and ‘information services’ [in the Telecommunications Act of 1996], Congress built on the MFJ” definitions (Report, 13 FCC Rcd. at 11520, ¶ 39), and there is no material difference between the MFJ’s and the Act’s definitions of these terms. Both define “telecommunications” as the transmission of information “without change in the form or content of the information as sent and received”³ and both define “information services” as the offering of a capability for generating, acquiring, storing, transforming, processing, retrieving, or making available information via telecommunications.⁴

In short, the D.C. Circuit has construed the operative terms of the 1996 Act and has held that they not only permit but require a construction in which it constitutes the provision of interexchange services for a BOC to choose to provide an information service that bundles interLATA transmission. In the *Non-Accounting Safeguards Order* (¶¶ 111-17), the Commission thus correctly followed the D.C. Circuit’s “MFJ precedent” and held that the prohibition of Sections 271 applies to “interLATA information services,” which the Commission defined as information services that have a bundled interLATA transmission component. *Id.*

II. With The Exception Of The Incidental InterLATA Services Authorized In Section 271(g), Congress Codified The D.C. Circuit’s Holding In The Telecommunications Act

Further, the “text, structure, history, and purposes” of the Act make it explicit that Congress codified the D.C. Circuit’s holding that the interexchange prohibition applies to information services that include bundled interLATA transmission components. *See* Public Notice, p. 3. In the Telecommunications Act of 1996, Congress replaced the MFJ with Sections 271-275 of the Act. While these sections authorize a number of incidental and other activities

³ *See United States v. AT&T*, 552 F. Supp. 131, 229 (D.D.C. 1982); 47 U.S.C. § 153(43).

that had been prohibited by the MFJ, Congress could scarcely have made it clearer that it was codifying the D.C. Circuit's holding that BOCs are otherwise to be prohibited from providing interLATA information services until such time as they have opened their local markets to competition and received interLATA authorization from the Commission.

First, Congress did not narrow the MFJ's basic definition of the services that the BOCs are prohibited from providing. To the contrary, Congress broadened it. As noted above, because the MFJ's interexchange restriction applied only to "interexchange telecommunications services," the MFJ would not prohibit an activity unless it satisfied both the definition of "interexchange telecommunications" and the definition of "telecommunications services." By contrast, in the 1996 Act, Congress prohibited the BOCs from providing "interLATA services" and it defined "interLATA services" as referring only to "interLATA telecommunications": that is, telecommunications across LATA boundaries. § 153(21). *See Non-Accounting Safeguards Order*, ¶ 52 (new definition "refers to telecommunications provided across LATA boundaries, not to telecommunications *services* provided across LATA boundaries") (emphasis added). At the same time, as noted above, the Act continued the MFJ's definition of "telecommunications" as well as its definition of "information services." Thus, unless the activity is a permitted "incidental interLATA service," the Act's terms make it explicit that a BOC is prohibited from providing any and all telecommunications across LATA boundaries, and there is no requirement that the offering also constitute the provision of a "telecommunications service."

Second, the structure of Section 271 makes it explicit that Congress understood that the definition of "interLATA services" included both "interLATA information services" and "interLATA telecommunications services." In particular, while the Act's definition of

⁴ *See United States v. AT&T*, 552 F. Supp. at 229; 47 U.S.C. § 153(20).

“interLATA services” is broader than the MFJ’s, Section 271(g) of the Act authorizes the BOCs immediately to provide a number of “incidental interLATA services” that the BOCs could not lawfully have provided under the MFJ. Notably, six of the nine specific activities that are authorized by Section 271(g) constitute the “interLATA provision” of specific information services. *See* 47 U.S.C. §§ 271(g)(1)(A) (audio, video, or other programming to subscribers), 271(g)(1)(B) (interaction by subscribers with audio, video, or other programming), 271(g)(1)(C) (providing audio, video, or other programming to distributors of them), 271(g)(1)(D) (alarm monitoring), 271(g)(2) (interactive video or Internet services over dedicated facilities to schools), & 271(g)(4) (information storage and retrieval). By authorizing these specific “interLATA information services,” Congress made it very clear that it understood that Section 271(a) would bar BOCs from providing any interLATA information services that were not specifically authorized by Section 271(g). In this regard, as the Notice points out (p. 3, Question 2), the Commission has “interpreted [section 271(g)] as applying to both incidental telecommunications and information services.”

Third, these conclusions are confirmed by the provisions of Section 272(a)(2) of the Act, which defines the interLATA services that a BOC is required to provide through a separate affiliate and which refers both to “interLATA telecommunications services” (Section 272(a)(2)(B)) and to “interLATA information services” (Section 272(a)(2)(C)). The BOCs are plainly wrong in suggesting that the reference to “interLATA telecommunications services” was intended to “distinguish common carrier transmission services from non-common carrier transmission services.” *See* Public Notice, p. 3. Section 272(a)(2)(B) provides that the separate subsidiary requirement applies to all “interLATA telecommunications services other than the incidental services described in paragraphs (1), (2), (3), (5), and (6) of section 271(g).” Because

these incidental services include a number of interLATA information services, the text of section 272(a)(2)(B) establishes that Congress understood that interLATA information services could be found to be “interLATA telecommunications services,” which, of course, is what the D.C. Circuit had held that they are in *United States v. Western Elec. Co.*, 907 F.2d 160.

However, Section 272(a)(2)(C)’s separate reference to “interLATA information services” is significant. It confirms what Section 271 already shows: that Congress understood that these services comprises a subset of the possibly more general category of “interLATA services.”

At the same time, “for purposes of interpreting the term ‘interLATA services’ in section 271,” there is no “significance” to the “fact that section 272 treats interLATA telecommunications services differently from ‘interLATA information services’” in one respect. See Public Notice, p. 3, Question 4. This single difference in treatment is that Section 272 provides that its provisions will apply to interLATA information services for a minimum of four years following the enactment of the 1996 Act (47 U.S.C. § 271(f)(2)), whereas Section 272 provides that its provisions will apply to other interLATA services for a minimum of three years after a BOC first obtains interLATA authority (47 U.S.C. § 272(f)(1)). That difference reflects the reality that Section 271(g)(4) authorized the BOC to provide a particular interLATA information service immediately upon the enactment of the 1996 Act, and that under Sections 272(a)(2)(B)&(C), this interLATA information service is the only interLATA service that the BOC is both immediately authorized to provide and required to provide through a separate subsidiary. This difference thus has no significance for the interpretation of Section 271.

Finally, the BOCs recognized all the foregoing points in the prior proceedings in this docket. Because the terms, structure, history, and purposes of the Act so clearly established that Section 271 fully applies to interLATA information services, the BOCs candidly acknowledged the point in their comments. For example, in the 1996 proceedings, BellSouth explained in detail why the Act's history and structure required this conclusion. *See Non-Accounting Safeguards Order*, ¶¶ 52-57. That one BOC would so forcefully advocate a position contrary to its interests is vivid proof of that position's correctness and a stark refutation of the BOCs' belated appellate claim that the position violates the Act's "plain meaning."

Moreover, BellSouth was not the only BOC to embrace this position. BellSouth had made its admissions in support of its (unsuccessful) arguments that the Act did not require a separate subsidiary for out-of-region interLATA information services. U S West joined BellSouth in petitioning for reconsideration on this issue; Bell Atlantic enthusiastically supported both petitions, and all these BOCs forcefully argued a position that is diametrically opposite to the claims raised in their appellate brief. In particular, their appellate brief claims that information services cannot offer telecommunications and thus cannot provide "interLATA services." But these BOCs previously told the Commission that "interLATA information services clearly fall within the Act's definition of 'interLATA services' because by definition, interLATA information services must include telecommunications that cross LATA boundaries." *See Bell Atlantic/NYNEX Joint Comments, Implementation of the Non-Accounting Safeguards of Sections 271 and 272 of the Communications act of 1934, as amended*, CC Docket No. 96-149 at 9 (April 2, 1997); *accord*, U S West Reply Comments, *id.*, at 3-4 (April 16, 1997).

The Commission had pointed out the BOCs' prior admissions in its motion for a remand,⁵ and the BOCs attempted to dispute their significance in a response to the Commission's motion.⁶ The BOCs there contended that their prior statements related to an entirely different issue, and that neither Bell Atlantic nor U S West had "separately re-examined the legal issue that the Commission had already resolved" in the 1996 *Non-Accounting Safeguards Order*.⁷ These claims do not withstand even cursory scrutiny. The BOCs' claim on reconsideration was that *because* extraregional interLATA information services constituted "interLATA services originating outside a [BOC's] in-region states" within the meaning of § 271(b)(2), they should be held to be exempt from the separate subsidiary requirement under Section 272(a)(2)(B)(ii), notwithstanding the categorical command of Section 272(a)(2)(C) that all "interLATA information services" are subject to the separate affiliate requirements. It speaks volumes that the BOCs chose to raise only this latter far-fetched claim on reconsideration. Indeed, because the Notice of Proposed Rulemaking concededly "did not specifically seek comments" on the question of the classification of interLATA information services (*Non-Accounting Safeguards Order*, ¶ 52; *see* BOCs' Br. 6-7), the BOCs plainly should – and would – have asked the Commission to "re-examine" its holding that these are "interLATA services" if the BOCs had believed there was any basis to question it. The BOCs quite plainly then correctly understood that the Act's terms, structure, history, and purposes mandated the holding that interLATA information services are "interLATA services." By contrast, it did not even occur to the BOCs

⁵ *See* Motion of Federal Communications Commission for Remand to Consider Issues, *Bell Atlantic v. FCC*, No. 99-1479 (D.C. Cir. filed Sept. 22, 2000), pp. 5-7.

⁶ *See* Petitioners' Response to Motion of Federal Communications Commission for Remand to Consider Issues, *Bell Atlantic v. FCC*, No. 99-1479 (D.C. Cir. filed October 3, 2000), p. 2.

⁷ *Id.*

to challenge this holding until they decided that a “plain meaning” argument could be manufactured from the Commission’s 1998 Report to Congress. As explained below, this latter claim, too, is spurious.

III. The Commission’s 1998 Universal Services Report Has No Relevance To The Interpretation Of Section’s 271’s Ban On The Provision Of InterLATA Services.

In its Public Notice (p. 3), the Commission notes that the BOCs’ appellate brief has quoted several passages from the Commission’s 1998 Report to Congress, and asks if these passages support the conclusion that interLATA information services fall outside the statutory definition of “interLATA services.” The answer is that these passages are irrelevant.

First, the narrow question that the Commission was addressing in the 1998 Report was whether providers of information services are “telecommunications carriers” and are therefore required to be regulated as common carriers under §§ 201-05 of the Act and to contribute to the funds that support universal service under § 254 of the Act. The answer to this narrow question turned on statutory definitions that simply have no relevance to the scope of Section 271’s ban on the BOCs’ provision of interLATA services..

In particular, the Act defines “telecommunications carrier” as a “provider of telecommunications service,” and the definition provides that a telecommunications carrier may be treated as a common carrier “only to the extent that it is engaged in providing telecommunications services.” 47 U.S.C. § 153(44). The Act defines “telecommunications service” as the “offering of telecommunications directly to the public, or to . . . classes of the public” (47 U.S.C. § 153(46)), and the Commission has held that a firm cannot be deemed to be

providing “telecommunications services” unless it operates as a “common carrier.”⁸ As noted above, Congress expressly declined to make the application of Section 271’s prohibition turn in any way on whether a BOC is or is not providing a “telecommunications service.” Rather, the definition of “interLATA service” requires a showing that a BOC is providing “telecommunications across LATA boundaries” and not a showing that the BOC is providing “telecommunications services” on an interLATA basis. *Id.* § 153(21).

By contrast, the entire thrust of the 1998 Report was to determine not whether and when information services can be deemed to offer “telecommunications,” but to decide whether these services constitute “telecommunications services.” In this regard, the ultimate conclusion of the Report did not address the relationship of “telecommunications” and “information services.” Rather, it held that “the categories of ‘telecommunications services’ and ‘information services’ in the 1996 Act are mutually exclusive” and that providers of information services therefore are not required to be regulated as common carriers. Report, 13 FCC Rcd. at 11507, ¶ 13; *accord, id.* at 11520, ¶ 39. In so concluding, the Commission noted that, since the issuance of its *Computer II* regulations in 1980, the Commission’s consistent position has been that providers of what are now defined as “information services” cannot be regulated as common carriers, and the Commission concluded that there is nothing in the 1996 Act’s terms or purposes that calls this longstanding position into question.

In their appellate brief, the BOCs rely on snippets from the Commission’s Report that are taken out of context and that, by their terms, are not confined to the narrow question of whether information services offer “telecommunications services.” For example, the BOCs repeatedly quote a footnote of the Commission’s Report that states that “‘telecommunications’

⁸ See *Virgin Islands Tel Co. v. FCC*, 198 F.3d 921 (D. C. Cir. 1999).

and ‘information services’ are mutually exclusive categories.” *E.g.*, BOC Br. at 2 & 8, quoting Report, ¶ 69 n. 138. But that footnote goes on to conclude, as does the text of the Report, only that the Commission does not “treat an information service provider as providing a telecommunications *service*.” *Id.* (emphasis supplied). Read in context, the quoted passage from this footnote does not remotely suggest that “telecommunications” cannot be a component of an “information service” and the footnote is equally irrelevant to the scope of the interLATA services prohibition of Section 271.

Second, the BOCs also rely on the statements in the Report that information service providers do not “provide” telecommunications but “use” telecommunications to provide their information services to their subscribers. BOC Br. 8; *see* Report, 13 FCC Rcd. at 11521, ¶ 41. In making these statements, the Commission did not deny that information services make information available “via telecommunications” and that telecommunications can thus be a component of an information service. Rather, the Commission made these statements because the Act provides that a firm can be regulated as a telecommunications carrier “only to the extent” that it “provides” telecommunication. The Commission thus construed the term “provide” in *this* definition (§ 153(44)) to apply to services that provide only telecommunications and to exclude services that use telecommunications (as a component) to provide information. In these passages, therefore, the Commission was not construing the term “telecommunications” as it is used in either the Act’s definition of information services or in its definition of “interLATA services.” Rather, the Commission was construing the term “provide” as it is used in the Act’s definitions of “telecommunications carrier” (§ 153(44)) and of “telecommunications service” (§ 153(46)).

The BOCs’ basic claim, therefore, is that because the Commission gave the term “provide” the foregoing meaning in Sections 153(44) and 153(46) of the Act, the Commission

must give the term “provide” this meaning in Section 271. This claim is baseless, and has been rejected by the Commission and the D.C. Circuit in this precise context. In particular, the Commission and the Court have squarely rejected the claim that because the term “provide” has been given a particular narrow meaning in other provisions of Sections 271-275 of the Act, the Commission must give the term “provide” the same meaning in Section 271.⁹ As the Court has held, “textual analysis is a language game played on a field called context,”¹⁰ and the terms of Section 271 have to be construed in light of its unique terms, structure, history, and purposes which often require that the term “provide” be given a unique meaning in § 271. As explained in detail above, when Section 271 is evaluated on this basis, there is not the slightest doubt that it must be construed to apply to information services that have bundled interLATA transmission components.

In particular, the D.C. Circuit’s prior decisions are dispositive on these points. It has held that Section 271 must be construed to effectuate its dual purposes of preventing BOCs from leveraging local monopolies into competitive long distance markets and assuring that BOCs have maximum incentives to implement the market opening provisions of the competitive checklist.¹¹ Both objectives would be defeated if the Act were construed to allow BOCs to offer interLATA information services while their local bottleneck monopolies are intact. As the D.C. Circuit and the Commission have stated, to give a “narrow” meaning to the term “provide” in § 271 would allow the BOCs to obtain “competitive advantages” from “involvement in the long

⁹ See *U S WEST v. FCC*, 177 F.3d 1057, 1059-61 (D.C. Cir. 1999) (affirming *AT&T v. Ameritech*, 13 FCC Rcd. 21438 (1998)).

¹⁰ See *Bell Atlantic v. FCC*, 131 F.3d 1044, 1047 (D.C. Cir. 1997).

¹¹ See *U S WEST v. FCC*, 177 F.3d at 1060-61; *BellSouth v. FCC*, 162 F.3d 678, 689 (D.C. Cir. 1998).

distance market” while they possess local monopolies and would reduce or eliminate the BOCs’ “incentive to cooperate in opening [their] local market to competition.” *U S West v. FCC*, 177 F.3d at 160 (quoting *AT&T v. Ameritech*, 13 FCC Rcd. 21438 (1998)).

In this regard, the D.C. Circuit has already held that acceptance of the BOCs’ claim would “create an enormous loophole in th[is] core restriction,” for it would mean a BOC could provide “extensive” interLATA services by “simply packaging that service” with something that is nominally an information service. *United States v. Western Electric*, 907 F.2d at 163. Indeed, that could be tantamount to eliminating the interLATA services restriction for virtually all data transmission services and for many voice services. The reason is that it requires only modest amounts of storage for a service to satisfy the statutory definition of information services, and a characteristic of data transmission is that customers tolerate short delays in data transmission that would not be acceptable for most voice services. That is so whether the service is e-mail, facsimile, or the transmission of huge volumes of data.

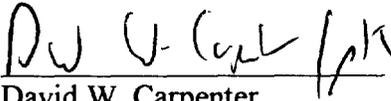
A BOC that were free to provide interLATA information services would thus have *carte blanche* to construct or lease interLATA facilities that would provide data transmission on a massive scale and that would offer the largest and fastest growing segments of interLATA services. Further, because the same technologies are increasingly used in the transmission of both data and voice and because there is increasing use of storage in voice transmission services, the practical effect could be to allow the BOC to enter the interLATA market on an even broader scale – without having implemented the market opening requirements of the checklist. That would patently defeat the objectives of Section 271.

CONCLUSION

For the reasons stated, the Commission should reaffirm its *Non-Accounting Safeguards Order* and again hold that “interLATA information services” are “interLATA services” that BOCs cannot provide in their regions until they obtain Section 271 authority.

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