

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

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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 BELL SOUTH CORPORATION**

BellSouth Corporation, on behalf of itself and its affiliates ("BellSouth"), hereby submits its Comments with respect to the *Public Notice*, released on November 8, 2000,<sup>1</sup> which seeks comments on the D.C. Circuit Court of Appeals remand relating to the Commission's *Non-Accounting Safeguards Order*.<sup>2</sup>

Congress expressly defined the term "interLATA service" to mean the provision of telecommunications that originate in one LATA and terminate in another. Congress also expressly defined the term "information service" to mean the offering of a capability to generate, acquire, store, transform, process, retrieve, use or make available information via telecommunications. In response to a request from Congress to describe how the Commission's interpretation of the terms "telecommunications" and information service" comport with Congress's definitions, the FCC advised that providers of information

<sup>1</sup> *Comments Requested in Connection with Court Remand of Non-Accounting Safeguards Order*, CC Docket No. 96-149, *Public Notice*, DA 00-2530, released Nov. 8, 2000 ("Public Notice").

<sup>2</sup> *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, *First Report and Order and Further Notice of Proposed Rulemaking*, 11 FCC Rcd 21905 (1996) ("*Non-Accounting Safeguards Order*").

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service use, but do not provide, telecommunications. In light of this, the issue on remand is two-fold: first, whether the provision of an information service that uses interLATA telecommunications also constitutes the provision of interLATA services, and second, whether a BOC's offering of an information service via interLATA telecommunications implicates Section 271's interLATA prohibitions.

The Commission's detailed statutory analysis, commissioned by Congress and completed by the Commission after its initial order in this proceeding, provides the answers. When asked by Congress to provide "a detailed description of the extent to which the Commission's interpretations" of the definitions of "information service" and "telecommunications" are "consistent with the plain language" of the Act, the Commission responded with a "thorough review of the Commission's interpretations of the relevant provisions of the 1996 Act," which included an analysis of the statutory text and the legislative history of the Act, including the language of both the House and Senate bills, within the context of the 1996 Act's "procompetitive goals." The Commission conclusively and correctly determined that the provision of information services cannot constitute the provision of telecommunications. Because interLATA services are defined by Congress to be a mere subset of telecommunications, it necessarily follows that the provision of information services cannot constitute the provision of interLATA service. Because Congress neither defined the term "interLATA service" to include "information services" nor expressly included "information services" in Section 271's prohibition, a BOC's offering of an information service using interLATA telecommunications does not implicate Section 271's prohibitions.

Indeed, the Commission advised Congress that the categories of

“telecommunications service” and “information service” in the 1996 Act are “mutually exclusive:”

It appears that the purpose of these words is to ensure that an entity is *not* deemed to be providing “telecommunications,” notwithstanding its transmission of user information, in cases in which the entity is altering the form or content of that information.

\* \* \*

The language and legislative history of both the House and Senate bills indicate that the drafters of each bill regarded telecommunications services and information services as mutually exclusive categories. The House bill explicitly stated in the statutory text: “The term ‘telecommunications service’ . . . does not include an information service.” The Senate Report stated in unambiguous terms that its definition of telecommunications “excludes those services that are defined as information services.” Information service providers, the Report explained, “do not ‘provide’ telecommunications services; they are users of telecommunications services.” . . . We believe that these statements make explicit the intention of the drafters of both the House and Senate bills that the two categories be separate and distinct, and that information service providers not be subject to telecommunications regulation.

\* \* \*

Moreover, given the explicit statements in the House and Senate bills and the Senate Report, we believe it is significant that the Joint Explanatory Statement (adopting the Senate version of “telecommunications” and “telecommunications service”) does not appear to contain anything inconsistent with the view that “telecommunications” and “information service” are mutually exclusive categories.<sup>3</sup>

Courts have relied upon, adopted and upheld the Commission’s determination that the terms “information service” and “telecommunications” are mutually exclusive.

Noting that the FCC has defined the Internet “as an information service,” the United

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<sup>3</sup> *In the Matter of Federal-State Joint Board on Universal Service*, CC Docket No. 96-45, *Report to Congress*, 13 FCC Rcd. 11501, 11503, 11520-523 (1998) (“*Report to Congress*”) (emphasis in original, footnotes omitted). See *esp.* fn. 79 “Our examination of the legislative history, however, convinces us that Congress intended the two categories to be mutually exclusive . . .” See also fn. 86 “Moreover, Judge Greene’s opinion accompanying the MFJ appears to treat telecommunications and information services as mutually exclusive.”)

States Court of Appeals for the Eleventh Circuit acknowledged that “the FCC has specifically said that the Internet is not a telecommunications service.”<sup>4</sup> Citing several Commission orders, the Eleventh Circuit has determined that “there is no statutory basis for the FCC to regulate the Internet as a telecommunications service under the 1996 Act.”<sup>5</sup> Accord Bell Atlantic Telephone Companies, v. FCC, 206 F.3d 1, 7 (D.C. Cir. 2000) (although ISPs use telecommunications to provide information service, they are not themselves telecommunications providers); Texas PUC v. FCC, 183 F.3d 393, 440 n.87 (5<sup>th</sup> Cir. 1999) (the FCC has recognized that internet access or internal connection services are “information services” that cannot be equated with “telecommunications services”; Illinois Bell Telephone Company v. Worldcom Technologies, 1998 WL 547278 (N.D. Ill. 1998) (the FCC has repeatedly made it clear that “telecommunications” and “information services” are “mutually exclusive” categories. The distinction drawn by the FCC mirrors the definitions of “telecommunications” and “information services” in the Act).

The law as established by Congress, as adduced by the Commission and as stated by the courts, is that the provision of information services does not constitute the provision of telecommunications. The Verizon and Qwest petitioners are therefore correct to point out that the Commission’s conclusion in the *Non-Accounting Safeguards Order* is contrary to established law and settled interpretation and must be reversed. That conclusion was reached early in the history of the 1996 Act, and prior to the Commission’s opportunity to undertake a more thorough and exhaustive review of these

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<sup>4</sup> Gulf Power Co. v. FCC, 208 F.3d 1263, 1277 (11<sup>th</sup> Cir. 2000).

<sup>5</sup> Id.

terms as used in the statute and its legislative history. As that subsequent review shows, the Commission had no legal or policy justification to graft “information services” onto Section 271’s prohibition against Bell Operating Companies (“BOCs”) provision of in-region interLATA services. The prohibition goes directly to the provision of interLATA telecommunications but not to the use of interLATA telecommunications to provide information services.

## I. ANSWERS TO QUESTIONS IN PUBLIC NOTICE

- 1. Does the provision of “information service” necessarily include a bundled telecommunications component that falls within the Act’s definition of an “interLATA service”? To the extent that it is using telecommunications, can the provider of an information service also be deemed to be providing telecommunications? Does the analysis of this issue change if the information service provider is transmitting services over its own telecommunications facilities rather than using facilities obtained from other carriers?**

The erroneous premise of the question, and of the *Non-Accounting Safeguards Order*, is that Section 271’s prohibition against a BOC’s provision of “interLATA service” also prevents a BOC from providing an “information service” if the BOC uses interLATA telecommunications to provide those information services. Section 271 on its face only prohibits the provision of “interLATA service,” a term expressly defined by Congress to mean “telecommunications.” A BOC, therefore, is only prohibited from “providing telecommunications” – specifically, interLATA telecommunications. Congress expressly defined “information service” as a category of service which is separate, distinct and mutually exclusive of “telecommunications.” Congress in no way prohibited a BOC’s provision of “information service” as it did a BOC’s provision of “interLATA service.”

However, the Commission's use of the term "bundled" in the question suggests that a telecommunications component is being "provided" by the information service provider ("ISP") to the customer; indeed this is the premise underlying the Commission's original, and faulty, conclusion in the *Non-Accounting Safeguards Order*. Congress, to the contrary, expressly defined an information service as something that is made available "via" telecommunications. When the Commission had more time to study the statute and its legislative history, it advised Congress that the statutory definitions of "telecommunications" and "information service" make clear that ISPs use, but do not provide, telecommunications when they provide information services:

The statutory text suggests to us that an entity should be deemed to provide telecommunications, defined as "the transmission, between or among points specified by the user, of information of the user's choosing, without change in the form and content of the information," only when the entity provides a transparent transmission path, and does not "change . . . the form and content" of the information. When an entity offers subscribers the "capability for generating, acquiring, storing, transforming, processing, retrieving, utilizing or making available information via telecommunications," it does not provide telecommunications; it is using telecommunications.<sup>6</sup>

Thus, as the Commission has advised Congress to the extent that the provider of an information service is using telecommunications, it cannot also be deemed to be providing telecommunications:

By contrast, when an entity offers transmission incorporating the "capability for generating, acquiring, storing, transforming, processing, retrieving, utilizing, or making available information," it does not offer telecommunications. Rather, it offers an "information service" even though it uses telecommunications to do so.<sup>7</sup>

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<sup>6</sup> *Report to Congress* at 11521, ¶ 41.

<sup>7</sup> *Id.* at 11520, ¶ 39.

Whether an information service provider uses its own telecommunications facilities or facilities purchased from a carrier to provide its services to end-user subscribers does not alter the fact that it is using, not *providing*, telecommunications to ultimately provide an information service to end-user customers. It necessarily follows that an ISP that uses interLATA telecommunications to provide its information service cannot be a provider of interLATA service, which, by definition, is the provision of interLATA telecommunications.

**2. Considering the Act's text, structure, purpose, and history, what effect, if any, should the Commission give to section 271(g)'s reference to "incidental interLATA services," which the Commission has interpreted as applying to both incidental telecommunications and information services?**

In order to sustain its original conclusion in the *Non-Accounting Safeguards Order*, the Commission must find a statutory basis to expand Section 271's prohibition against the provision of interLATA services to the provision of information services. Section 271 says nothing about information services. The Commission cannot bootstrap Section 271's general interLATA service prohibition to information services by "interpreting" "incidental interLATA services . . . as applying to both incidental telecommunications and information services." Nothing can be reliably inferred about the meaning of the term "interLATA services" from Section 271(g), and no such inference is appropriate or necessary. Congress has expressly defined interLATA service as a kind of "telecommunications," and the Commission has correctly concluded that the provision of an information service cannot also be the provision of telecommunications.

3. **Considering the Act's text, structure, purpose, and history, what effect, if any, should the Commission give to section 272(a)(2)(B)'s reference to "interLATA telecommunications services"? Does use of this term imply that interLATA telecommunications service is a subset of a more general category of "interLATA services" that could include interLATA information services, or did Congress mean simply to distinguish common-carrier transmission services from non-common carrier transmission services, as the petitioners contend?**

Section 272(a)(2)(B)'s reference to "interLATA telecommunications service" cannot be read in such a way as to expand Section 271's prohibition against interLATA services to information services. The distinctions made in Section 272 are limited to Section 272, and have no bearing on the interpretation of Section 271, except that it demonstrates that Congress knew how to distinguish between "telecommunications services" and "information services." Congress's failure to mention "information services" when it defined "interLATA services" is the clearest statutory proof that Congress did not intend to include information services within Section 271's prohibition against interLATA services.

The Commission's question has it backwards. "InterLATA telecommunications services" are not a subset of "interLATA services," rather, "interLATA services," as defined by Congress (and as referred to in Section 271) are a subset of "telecommunications." Indeed, "interLATA services" is shorthand for interLATA telecommunications services, as the statutory definition makes clear.<sup>8</sup> Contrary to the implication in the question as framed by the Commission, "interLATA service" cannot constitute "a more general category" of service "that could include interLATA

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<sup>8</sup> "The term 'interLATA service' means *telecommunications* between a point located in a local access and transport area and a point located outside such area." 47 U.S.C. § 153(21) (emphasis added).

information service.” In the first place, Congress has not defined “interLATA service” to include “information service,” but rather has defined it as a “telecommunications service.” Secondly, the Commission has determined that information services and telecommunications services are mutually exclusive. Therefore, there is no legal basis for expanding the statutory definition of “interLATA service” to include “information service.”

4. **Considering the Act’s text, structure, purpose, and history, what effect, if any, should the Commission give to section 272(a)(2)(C)’s reference to “interLATA information services”? For purposes of interpreting the term “interLATA services” in section 271, is there any significance to the fact that section 272 treats “interLATA telecommunications services” differently from “interLATA information services”?**

As demonstrated above, there is absolutely no reason for the Commission to import into Section 271 the categories established in Section 272 for the purpose of expanding the prohibition of Section 271 beyond what Congress intended. Each section stands alone and serves its own distinct purpose. As matter of statutory construction, Section 272’s language merely demonstrates that Congress understood the difference between telecommunications and information services. Congress could have, but did not define “interLATA services” to include “information services;” Congress could have, but did not, bring “information services” within the scope of Section 271.

5. **Do the passages from the Commission's 1998 Report to Congress quoted in the petitioner's appellate brief support the conclusion that information services fall outside the scope of the statutory definition of "interLATA service"?**

Yes. "InterLATA service" means the provision of telecommunications originating in one LATA and terminating in another. Providers of information services use, but do not provide, telecommunications. The provision of information services that use interLATA telecommunications therefore cannot constitute the provision of interLATA services.

### CONCLUSION

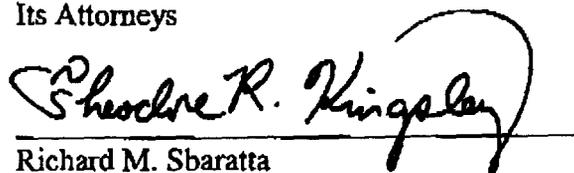
Congress, the Commission, and the Courts have made clear that the provision of information services that use interLATA telecommunications cannot also constitute the provision of interLATA services. The Commission should clarify the *Non-Accounting Safeguards Order* accordingly, and obviate the need for the current pending appeal.

Respectfully submitted,

**BELLSOUTH CORPORATION**

Its Attorneys

By:



Richard M. Sbaratta  
Theodore R. Kingsley  
BellSouth Corporation  
Suite 1700  
1155 Peachtree Street, N.E.  
Atlanta, GA 30309-3610  
(404) 249-2608

November 29, 2000

CERTIFICATE OF SERVICE

I do hereby certify that I have this 29<sup>th</sup> day of November, 2000 served the following parties to this action with a copy of the foregoing *COMMENTS OF BELLSOUTH CORPORATION*, CC Docket No. 96-149, by hand delivery, or by placing a copy of same in the United States Mail, addressed to the parties listed below.

Magalie Roman Salas\*  
Commission Secretary  
Federal Communications Commission  
Portals II  
445 Twelfth Street, S.W.  
Suite TW-B204  
Washington, D.C. 20554

Johanna Mikes\*  
Common Carrier Bureau  
Policy and Program Planning Division  
Federal Communications Commission  
445 Twelfth Street, S.W.  
Room 5-C163  
Washington, D.C. 20554

International Transcription Services, Inc.\*  
445 12<sup>th</sup> Street, SW.  
Room CY-B402  
Washington, D.C. 20554

  
Rachelle L. Thomas

***\*Via Hand Delivery***