

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

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

In the Matter of)
)
Notice of Inquiry Concerning a Review of the)
Equal Access and Nondiscrimination Obligations)
Applicable to Local Exchange Carriers)
)

CC Docket No. 02-39

REPLY COMMENTS OF CABLE & WIRELESS USA, INC.

Cable & Wireless USA, Inc. ("Cable & Wireless"), through its attorneys, submits these reply comments in the above-captioned proceeding. Initial comments filed in this proceeding overwhelmingly demonstrate that the equal access and nondiscrimination obligations set forth in the Modification of Final Judgment ("MFJ") remain appropriate in today's marketplace. As was the case when the restrictions were imposed, the Bell Operating Companies ("BOCs") maintain controlling market power over local loop facilities and have the ability and the incentive to discriminate against other carriers that need access to those facilities in order to compete. The Federal Communications Commission ("Commission") should retain the equal access and nondiscrimination obligations as codified in section 251(g) of the Communications Act of 1934, as amended (the "Act") until such time as the BOCs no longer have market power in the local exchange market.¹

¹ Cable & Wireless's reply comments focus solely on the equal access and nondiscrimination obligations set forth in sections II.A. and II.B., respectively, of the MFJ. See *United States v. AT&T*, 552 F.Supp. 131, 227 (D.D.C. 1982). Section II.A. requires BOCs to "provide to all interexchange carriers and information service providers exchange access, information access, and exchange services for such access on an unbundled basis, that is equal in type, quality, and price to that provided to AT&T and its affiliates."). Section II.B. prohibits BOCs from discriminating as follows:

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I. THE EQUAL ACCESS AND NONDISCRIMINATION OBLIGATIONS REMAIN NECESSARY IN THE CURRENT MARKETPLACE

The Commission must continue to apply the equal access and nondiscrimination obligations of the MFJ, because the BOCs continue to maintain bottleneck control of the local exchange market. Judge Greene imposed the equal access and nondiscrimination obligations in the MFJ to ensure that the BOCs themselves – not just AT&T – did not engage in the same anticompetitive conduct as that of the integrated Bell System.² The Court was clear when adopting the MFJ that the equal access and nondiscrimination obligations would be necessary as long as the Bells maintain bottleneck control of the local exchange market.³ The Court did not

between AT&T and its affiliates and their products and services and other persons and their products and services in the:

1. procurement of products and services;
2. establishment and dissemination of technical information and procurement and interconnection services;
3. interconnection and use of the BOC's telecommunications service and facilities or in the charges for each element of service; and
4. provision of new services and the planning for and implementation of the construction or modification of facilities, used to provide exchange access and information access.

² See *United States v. American Telephone and Telegraph Co.*, 552 F.Supp. 131, 142 (D.D.C. 1982) (stating that Section II of the MFJ is designed “to avoid a recurrence of the type of discrimination and cross-subsidization that were the basis of the *AT&T* lawsuit). See, e.g., Comments of General Communication, Inc. at 5-8.

³ After implementing the MFJ obligations, the Court continued to emphasize that the equal access and nondiscrimination obligations were “designed to make it impossible for a ‘bottleneck’ monopoly to prevent competitors from providing service . . . If such an entity; *i.e.*, an Operating Company, had the authority to determine when it would or would not provide access and to whom . . . it could frustrate such competition altogether.” *United States v. Western Electric*, 583 F.Supp. 1257 (D.D.C. 1984); see also Sprint Comments at 2 (stating that the “equal access and nondiscrimination obligations are rooted in the principle that competition cannot flourish when carriers have the ability to exercise market power through their control of bottleneck facilities.”).

implement these regulations, as Verizon suggests, merely to ensure that the BOCs did not discriminate in favor of AT&T.⁴

The type of bottleneck control about which the Court was concerned when enumerating the equal access and nondiscrimination requirements in the MFJ still exists in the current local marketplace. Comments in this proceeding illustrate that, six years after the implementation of the Telecommunications Act of 1996, the ILECs continue to maintain bottleneck control over local exchange facilities. In fact, as the Commission itself reported, ILECs hold over ninety percent (90%) of the local market share.⁵ Furthermore, section 271 authority solely means that the BOC has opened up the market to competition; it is not an assessment of BOC market power.⁶ To this end, Cable & Wireless supports WorldCom's position that BOCs that have obtained section 271 authority may have even greater incentives to discriminate against long distance providers.⁷ To date, carriers remain dependent upon BOC facilities to provide service to their own customers.

As a result, the original purpose of the equal access and nondiscrimination obligations remains relevant. Cable & Wireless agrees with AT&T that the BOCs have not lost the incentive to discriminate in favor of themselves.⁸ In addition, as the Public Utility Commission of Texas recognizes, removing the equal access and nondiscrimination obligations at this time – while competition is still in its infancy – “could halt competition before it has had

⁴ See Verizon Comments at 6.

⁵ See Federal Communications Commission, Industry Analysis Division, Common Carrier Bureau, *Trends in Telephone Service* (Aug. 2001) (“Telephone Loops of Incumbent Local Exchange Carriers by State”). See also Comments of the Association of Communications Enterprises at 3; AT&T Comments at 19.

⁶ See WorldCom Comments at 2 (citations omitted).

⁷ See WorldCom Comments at 4.

⁸ See AT&T Comments at 3.

sufficient opportunity to take root, and may have an impact on market entry, as well as the market share of competitive carriers in these markets.”⁹ Therefore, continued application of the equal access and nondiscrimination obligations as set forth in the MFJ – and through case precedent – is necessary to curtail the BOCs’ ability and incentive to discriminate among providers or in favor of themselves.¹⁰

II. THE COMMISSION SHOULD RETAIN THE EQUAL ACCESS AND NONDISCRIMINATION OBLIGATIONS

The *NOI* questions whether the MFJ equal access and nondiscrimination obligations remain important, given the nondiscrimination principles embodied in other provisions of the Act. None of these other provisions, however, justify removal of the MFJ’s complementary restrictions. Although the MFJ shares an adherence to the principle of nondiscrimination, the specific cases and rulings offer a robust explication of the principle that is unmatched in the Act. The MFJ equal access and nondiscrimination cases essentially fall into two categories: (1) applications of nondiscrimination principles that are more specific than obligations set forth in the Act, or for which there is no current corollary in the Act, and (2) instances where the MFJ applies to similar activities to those addressed in the Act. With regard to the first category, the Commission must maintain the equal access and nondiscrimination obligations so as not to lose the specific protections against the BOCs’ exercise of market power in the local exchange market. With regard to the second category, there is no reason to abandon

⁹ Comments of the Public Utility Commission of Texas at 3.

¹⁰ *See, e.g.,* WorldCom Comments at 2 (stating that the “equal access rules provide a comprehensive set of safeguards that have been demonstrated to attenuate the ILECs’ ability to use their market power to discriminate among long distance providers.”).

the MFJ, since it pursues the same policy as the Act. In this situation, the rulings provide valuable precedent for applying the Act’s restrictions.

A. Equal Access and Nondiscrimination Obligations Are Fully Developed

Due to the unique circumstances under which they were adopted, the equal access and nondiscrimination obligations sometimes address issues that are not explicitly addressed in the Act and the Commission’s rules implemented thereunder. Over the past twenty years, the MFJ court has had occasion to address numerous issues that were not similarly addressed by the Commission. As illustrated below, if the Commission eliminates the equal access and nondiscrimination obligations set forth in the MFJ – and the valuable case law developed thereunder – it does so at the risk of implicitly rejecting obligations that potentially are more fully developed than those obligations set forth in the Act and the Commission’s rules.¹¹

1. The MFJ Prohibits BOCs From Discriminating in Favor of Themselves, Their Affiliates, and Other Entities

By way of illustration, the MFJ consistently has been interpreted to prohibit all forms of discrimination, including discrimination in favor of the BOC itself. The Commission has suggested in other contexts that the Act might not address the same situations as the MFJ. Section 202 of the Act prohibits common carriers from making “any unjust or unreasonable discrimination in charges, practices, . . . in connection with like communication service. . . .”¹² In the *Local Competition Order*, the Commission noted that section 202(a) prohibits a BOC from discriminating among various carriers, but questioned – without resolving – whether section 202(a) also prohibits a BOC from discriminating against a carrier in favor of itself or its

¹¹ See Sprint Comments at 6 (stating that “any attempt to catalog [the MFJ’s] requirements runs the risk that some aspect of prior rulings will be overlooked or will be mutated in its codification without any considered evaluation of whether the obligation should be altered or eliminated.”).

¹² 47 U.S.C. § 201(b).

affiliates.¹³ Although sections 251(c)(3) and 272 of the Act prohibit an ILEC and a BOC, respectively, from discriminating in favor of their affiliates, the discriminatory conduct prohibited in those sections is narrowly tailored to specific circumstances or types of services.¹⁴

Several MFJ cases, on the other hand, illustrate that the equal access and nondiscrimination obligations set forth in the MFJ explicitly prohibit a BOC from discriminating in favor of itself or its affiliate(s). For example, in an MFJ proceeding addressing U S West's offer to provide service to the General Service Administration at lower rates than it charged AT&T for such service, the D.C. Circuit emphasized that the MFJ's restrictions prohibited discrimination not only in favor of AT&T, but also in favor of the BOC itself.¹⁵

¹³ See *Implementation of the Local Competition Provisions of the Telecommunications Act of 1996*, Report and Order, 11 FCC Rcd 15499, 15612 ¶ 218 (stating that the Commission rejected “for purpose of section 251, [its] historical interpretation of ‘nondiscriminatory,’ which [it] interpreted to mean a comparison between what the incumbent LEC provided *other parties* in a regulated monopoly environment.” Instead, the Commission concluded that the term ‘nondiscriminatory’ as *used throughout section 251* applies to “the terms and conditions an incumbent LEC imposes on third parties as well as on itself.”); see also *Non-Accounting Safeguards Order*, 11 FCC Rcd 21905, 21939-40, ¶ 70 (1996) (stating that sections 201 and 202 “prevent the BOCs from unjustly or unreasonably discriminating in providing facilities or services to interexchange carriers”).

¹⁴ 47 U.S.C. §§ 251(c)(3), 272(c). Section 251(c)(3) requires ILECs to provide nondiscriminatory access to unbundled network elements to requesting telecommunications carriers (for the provision of a telecommunications service) “on rates, terms, and conditions that are just, reasonable, and nondiscriminatory” In pertinent part, section 272(c) prohibits a BOC, in its dealings with its affiliate regarding manufacturing and certain interLATA information services, from discriminating “between that company or affiliate and any other entity in the provision or procurement of goods, services, facilities, and information, or in the establishment of standards. . . .” Section 272 sunsets, thus eliminating the prohibition on discrimination contained therein. See 47 U.S.C. § 272(f).

¹⁵ *United States v. Western Electric*, 846 F.2d 1422, 1427 (D.C. Cir. 1988) (“*U S West GSA Decision*”).

The Court agreed with Judge Greene's findings that:

[The MFJ] was not intended to prevent only discrimination in favor of AT&T or among interexchange carriers, while permitting discrimination against AT&T. This assertion was rejected several years ago, *see United States v. Western Electric Co.*, 583 F.Supp. 1257, 1259 n. 10 (D.D.C. 1984), and it is entirely inconsistent with the basic scheme of the decree that the competitive telecommunications markets were to operate on the basis of level playing fields.¹⁶

In that case, U S West had proposed to provide GSA with Dial 8 lines for free if GSA purchased the switch from U S West. In contrast, if GSA wanted to have AT&T provide the switch, AT&T would have had to obtain the Dial 8 lines at the charges specified in U S West's tariff, which AT&T ultimately would have passed through to GSA.¹⁷ The Court concluded that the term "other persons" as used in MFJ's prohibition on discriminating between AT&T and "other persons" included a broad range of persons and entities such as GSA and U S West.¹⁸ In addition, as the Court in the *U S West GSA Decision* referenced, in an earlier case involving Pacific Bell, the court explained that, absent the nondiscrimination requirements in section II.B., BOCs would have incentives to discriminate in favor of themselves.¹⁹ These MFJ cases, among others, illustrate that the MFJ prohibits BOCs from discriminating against other carriers in favor of themselves, their affiliates, or even third parties, such as a government agency.

¹⁶ *Id.* at 1427.

¹⁷ *Id.* at 1425.

¹⁸ *Id.* at 1427-28.

¹⁹ *United States v. Western Electric*, 583 F.Supp. 1257, 1259 (D.D.C. 1984) (stating that absent the requirement to grant nondiscriminatory exchange access to all interexchange carriers as required in section II.B. of the MFJ, BOCs "would become the arbiter of future inter-LATA services; it could shape the inter-LATA competition to suit *its needs or interests*") (emphasis added).

2. The MFJ Prohibits BOCs From Discriminating in their Provision of Products and Services

Another example of the MFJ's specificity comes in Section II.B.'s prohibition on BOC discrimination in products and services. The MFJ is broadly defined to prohibit discrimination in a BOC's provision of "products and services" including four specifically enumerated contexts.²⁰ These restrictions require fairness and nondiscrimination in all associated interactions with the BOC, including, activities that are not strictly defined as a "communications service." The obligations set forth in sections 201(b) and 202(a) of the Act by contrast, pertain to Title II "communications services." For example, section 201(b) of the Act requires that "all charges, practices, classifications, and regulations for and in connection with such *communication service*, shall be just and reasonable"²¹ Section 202(a) similarly applies to discrimination in "charges, practices, classifications, regulations, facilities or services, *for or in connection with like communication service*. . . ."²² It is possible, therefore, that the requirements in section 201(b) and nondiscrimination obligation in section 202(a) – and what constitutes "for or in connection with" a communication service – does not cover as broad a range of situations as in the MFJ. To the extent that a service is not deemed a communications service, application of the MFJ's equal access and nondiscrimination obligations may be the only viable way to ensure that the BOCs do not discriminate in connection with the service.

²⁰ MFJ at § II.B. Section II.B. prohibits discrimination "between AT&T and its affiliates and their products and services and other persons and their products and services in the: 1. procurement of products and services; 2. establishment and dissemination of technical information and procurement and interconnection services; 3. interconnection and use of the BOC's telecommunications service and facilities or in the charges for each element of service; and 4. provision of new services and the planning for and implementation of the construction or modification of facilities, used to provide exchange access and information access."

²¹ 47 U.S.C. § 201(b) (emphasis added).

²² 47 U.S.C. § 202(a) (emphasis added).

B. Equal Access and Nondiscrimination Obligations Provide Valuable Precedent

Even in those situations where the obligations overlap with other requirements in the Act the MFJ provides valuable experience and precedent. In these instances, there is no conflict between the MFJ and the Act. Both address the same activity and both prohibit the same conduct. The only difference is that the MFJ reflects a body of case law developed over a period of nearly twenty years, cases that involve factual situations not presented to the FCC. The myriad of situations that the MFJ court alone addressed already would serve as valuable precedent for the Commission, which did not have occasion to examine the same breadth of situations over this period. Throughout the duration of the MFJ's requirements (prior to their being incorporated into the Act), cases that otherwise would have been brought before the Commission were brought before the MFJ court instead. As various commenters have stated, the equal access and nondiscrimination obligations as initially set forth in the MFJ have evolved over the past twenty years and through the GTE Consent Decree, Commission rulemaking proceedings, and on a case-by-case adjudication in the courts.²³ The Commission should retain and benefit from the existing MFJ precedent.

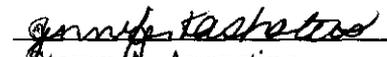
²³ See Sprint Comments at 4.

III. CONCLUSION

For the foregoing reasons, Cable & Wireless respectfully requests that the Commission maintain the status quo, and reject any suggestion that the equal access and nondiscrimination obligations are no longer necessary.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Alice R. Burruss, certify that on this 10th day of June, 2002, I served copies of the foregoing Reply Comments of Cable & Wireless USA, Inc. in CC Docket No. 02-39 by hand delivery on the following:

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