

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554**

In the Matter of)	
)	
Section 272(f)(1) Sunset of the BOC)	WC Docket No. 02-112
Separate Affiliate and Related Requirements)	

REPLY COMMENTS OF SPRINT CORPORATION

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I. INTRODUCTION AND SUMMARY.

Sprint Corporation, on behalf of its incumbent local exchange ("ILEC"), competitive local exchange ("CLEC")/long distance, and wireless divisions, respectfully submits its reply to comments filed in the above-captioned proceeding on August 5, 2002.

In its comments, Sprint argued that the RBOCs remain dominant in the telephone exchange and exchange access markets and retain the unique ability and the incentive to discriminate against non-affiliated long distance and local competitors. Accordingly, the Section 272 safeguards cannot be allowed to sunset at the end of the statutory three-year period. Rather, at a minimum, the following conditions must be met before the Commission can consider whether to eliminate these safeguards:

- Commission adoption of performance measurements and enforcement mechanisms for the RBOCs' provision of UNEs and special access;
- Passage of three years from the date on which an RBOC obtained Section 271 authority in the last of its states in which it is an ILEC; and
- Completion (and acceptance) of two biennial audits for each RBOC, in each state in which it has received Section 271 authority, demonstrating compliance with the Section 272 requirements.

As set forth below, most commenters agree with Sprint that the Section 272 safeguards must not sunset at the end of the three-year period. Many commenters also agree with Sprint that the Commission must adopt UNE and Special Access performance measurements and enforcement mechanisms before reviewing the sunset for any particular BOC. Likewise, many commenters agree that the sunset must be extended as to a particular BOC until that BOC has filed a second Biennial Audit that has been subjected to public scrutiny.

The RBOCs argue that the Section 272 safeguards are no longer necessary because of the development of competition and BOC good behavior upon the grant of Section 271 authority. However, the record in this proceeding overwhelmingly contradicts the RBOC claims.

SBC and BellSouth argue that the statute and legislative history direct that the separate affiliate requirement sunsets on a BOC-by-BOC basis, while Verizon argues for RBOC-by-RBOC. Sprint demonstrates that the statute is ambiguous in this area, but that the record in this proceeding makes it clear that the Commission can, and should, extend the sunset until three years after all BOCs that are part of a Regional Bell Operating Company have been granted Section 271 authority and the conditions set forth by Sprint and others have been met.

Finally, Verizon requests the Commission to eliminate the OI&M prohibition regardless of what the Commission does with the remaining Section 272 safeguards. The record in this proceeding demonstrates that the request must be denied.

II. MANY COMMENTERS AGREE THAT THE SUNSET OF THE SECTION 272 SAFEGUARDS MUST BE EXTENDED AND THAT CERTAIN CONDITIONS MUST BE MET PRIOR TO ANY SUNSET.

The overwhelming majority of commenters, indeed all but the RBOCs and USTA, agree with Sprint that the Section 272 requirements must be extended beyond the three-year period. The disagreement, to the extent it can be considered such, concerns the length of the extension. Several of the state commissions argue for an additional one-year period to be added to the existing three years.¹ Many other commenters take the position that the Section 272 requirements cannot expire until each BOC has lost its dominant position in the telephone exchange and/or exchange access markets:

Therefore, the Commission should extend the safeguards by rule. However, extending the § 272 safeguards for a defined period may not address the problem that the safeguards were intended to tackle - the BOC's local exchange bottleneck allows it to discriminate against long distance competitors. Thus, the separate affiliate safeguards placed on a BOC should be lifted only upon a showing that the BOC cannot engage in such discrimination. This would require analysis of the BOC's market power on a state-by-state basis. The safeguards should remain in place until the BOC can show that it is no longer the dominant local exchange carrier in its service territory in the state in question.²

Many commenters also share Sprint's belief that certain conditions must be met before the Commission can allow the Section 272 requirements to expire. For example, the state commissions of Pennsylvania, Missouri, and Texas all agree that the requirements cannot expire until the second biennial audit has been filed and thoroughly

¹ See, Comments of the Pennsylvania Public Utility Commission at p. 5 and Comments of the Public Service Commission of the State of Missouri at p. 4.

² Comments of the National Association of State Utility Consumer Advocates at p. 8. See also, WorldCom Comments at p. 2 and Comments of Time Warner Telecom at p. 22.

reviewed for proof of compliance with the BOC's statutory obligations.³ Indeed, these commissions explain that their request for a one-year extension of the requirements is to allow for the filing and review of the second biennial audit for each BOC.

Other commenters share Sprint's view that the Commission must adopt UNE and/or Special Access Performance Measurements and enforcement mechanisms in the pending Rulemakings⁴ before the Section 272 safeguards may be allowed to expire:

If, in spite of all these dangers, the Commission decides nonetheless to continue on its ill-advised course, Covad submits that the Commission should only allow 272 requirements to sunset after developing national performance metrics and imposing national performance standards for the ILEC provision of UNEs to competitors. Although the Commission ideally would utilize both the section 272 requirements and federally imposed national performance standards to restrain incumbents from discriminating against their competitors, the Commission must not eliminate one of the Act's protections against incumbent discrimination without at least developing a backstop.⁵

This need for a backstop is what caused Sprint to argue not for an extension for a particular period of time, but rather that certain conditions be met before the Commission considers eliminating the Section 272 safeguards. These conditions are necessary so that

³ Comments of the Pennsylvania Public Utility Commission at p. 5, Comments of the Public Service Commission of the State of Missouri at p. 4, and Comments of the Public Utility Commission of Texas at p. 8.

⁴ In the Matter of Performance Measurements and Standards for Unbundled Network Elements and Interconnection, Notice of Proposed Rulemaking, 16 FCC Rcd 20641 (2001) and In the Matter of Performance Measurements and Standards for Interstate Special Access, Notice of Proposed Rulemaking, 16 FCC Rcd 20896 (2001).

⁵ Reply Comments of Covad Communications Company at p. 3. *See also*, Comments of the Public Utility Commission of Texas at p. 7 (focusing on the need for special access performance measurements) and Comments of Focal Communications Corporation, Pac-West Telecomm, Inc. and US LEC Corp. at pp. 6-7 (arguing that the Commission must adopt both UNE and special access performance measurements.)

mechanisms will be in place to detect BOC discrimination and anti-competitive behavior after the detection mechanisms provided by the Section 272 safeguards are gone.

It is all well and good, as Qwest argues, that after the expiration of the Section 272 requirements, Section 272(e)(1) will still be in place and "will continue to impose an absolute prohibition against the BOCs fulfilling requests for telephone exchange service and exchange access for itself or its affiliates any more quickly than it fulfills such requests for competing providers."⁶ However, neither Section 272(e)(1), nor any of the other remaining statutory provisions that the RBOCs argue will restrain RBOC malfeasance⁷ or will provide the detection mechanisms currently provided by the Section 272 requirements for a separate affiliate and biennial audit. As the Texas Commission persuasively argues:⁸

In summary, the Texas PUC maintains that removal of the separate affiliate requirements at this time would fail to meet Congress' objectives in implementing section 272. **Additionally, if the section 272 requirements are sunset, Texas and the FCC will lose a valuable means to ensure SWBT's compliance with its obligation to provide access to the local exchange and exchange access markets that SWBT controls.** Accordingly, prudence demands that the sunset period be extended until the conditions which necessitated the creation of competitive safeguards no longer exist. At a minimum the sunset period for SWBT in Texas should be extended an additional year beyond the current sunset date (July 10, 2003) and, preferably until completion and release of the second biennial audit.

⁶ Qwest's Comments at p. 8.

⁷ See e.g., Comments of SBC, Inc. at p. 3 "Most importantly, sections 272(e)(1) and (3), which ensure parity of performance and access charge imputation, continue to apply even after sunset. And the nondiscrimination safeguards of sections 201 and 202, combined with the interconnection obligations under section 251(c), and the Commission's rules on network disclosure ensure further protection for competitors."

⁸ Comments of the Public Utility Commission of Texas at p. 13, **emphasis added.**

III. RBOC CLAIMS THAT THE SUNSET IS NO LONGER NECESSARY DUE TO INCREASED COMPETITION AND BOC GOOD BEHAVIOR ARE NOT SUPPORTED IN THE RECORD OF THIS PROCEEDING AND MUST BE REJECTED.

Not surprisingly, the RBOCs oppose any extension to the Section 272 safeguards. In part, they claim that the requirements are no longer necessary because of the development of competition.⁹ Alternatively, the RBOCs point to their "good" behavior upon being granted Section 271 authority.¹⁰

The record established in this proceeding, including the comments of Sprint¹¹ and findings from other regulatory proceedings, prove that such RBOC claims are false. Rather than burden the record by repeating all that has already been said in these regards, Sprint will simply point to two examples -- examples provided, importantly, not by RBOC competitors, but by the first two state commissions to grant Section 271 authority.

In reviewing the state of competition in Texas and SWBT's behavior since the grant of Section 271 authority in Texas, that Commission stated:¹²

The Texas PUC believes that although some progress has been made toward leveling the field, **SWBT's continued dominance over local exchange and exchange access services still hinders the development of a fully competitive market**, especially given the current status of the financial markets, competitive local exchange carriers (CLECs) access to capital, and the bankruptcy of many competitive carriers. Thus, SWBT

⁹ See e.g., Comments of Verizon at p. 7 ("Moreover, the record shows that the competition has continued to develop, and in fact is the strongest, in the states where the BOCs have been granted section 271 authority to enter the long distance market").

¹⁰ See e.g., Comments of SBC Communications Inc. at p. 14. ("BOC behavior in states with § 271 authority confirms that the Commission should not be concerned about potential discrimination or cost misallocation.")

¹¹ Comments of Sprint Corporation at pp. 13-14.

¹² Comments of the Public Utility Commission of Texas at p. 3, **emphasis added**.

retains both the incentive and ability to discriminate against competitors and to engage in anti-competitive behavior.

Not only did the Texas Commission find that SWBT maintained dominance and had the ability to hinder competition, but that SWBT is also failing to meet the standards established by that Commission to address discrimination and anti-competitive behavior:

The Texas PUC finds that, two years after receiving 271 approval, SWBT continues to fail to achieve full compliance with Texas' performance measures (PMs). During the collaborative process that lead to the Texas PUC's support of SWBT's section 271 application, the PMs were established to assess SWBT's performance in opening local markets to competition. The PMs were designed to identify problems and improve SWBT's procedures and behavior toward CLECs....

From November 1999 to present, SWBT has paid over \$23 million in Tier 1 and Tier 2 damages to other carriers and the State of Texas, respectively. **Additionally, in the six months from November 2001 through April 2002 (the date of the most recent data), SWBT had over 5254 separate violations, although not all of them resulted in fines.** Without addressing the merits of the violations and the relative fines, the fact is that there does not appear to be a significant trend downward in either category.¹³

New York's experience since the grant of Section 271 authority to Verizon has been similar. Last summer, approximately one and a half years after the grant of Section 271 authority, the New York Commission conducted a review of Verizon's performance in provisioning, among other things, special access.¹⁴ Of particular note, the New York Commission found that: "... a competitive facilities-based market for Special Services

¹³ *Id.*, at pp. 5-6, **emphasis added.**

¹⁴ Proceeding on Motion of the Commission to Investigate Methods to Improve and Maintain High Quality Special Services Performance by Verizon New York Inc., CASE 00-C-2051, and Proceeding on Motion of the Commission to Investigate Performance-Based Incentive Regulatory Plans for New York Telephone Company, CASE 92-C-0665, Opinion No. 01-1, Opinion and Order Concerning Methods to Improve and Maintain

Footnote continued on next page

[including special access] has yet to emerge and that Verizon continues to dominate the market overall."¹⁵ As to Verizon's behavior, the commission found:

The data also suggest that Verizon treats other carriers less favorably than its retail customers. On average, it meets only 74% of its appointments on carrier service requests, but meets 94% of its retail customer appointments. ... Verizon denies discrimination, but provides no data to explain the 20% difference in performance or to refute the prima facie indicia of discrimination. The November 24, 2000, Order required Verizon to substantiate nondiscriminatory treatment of its affiliates in comparison to other carriers. Substantiation was to be filed in a fashion similar to monthly service reports made for carrier-to-carrier performance in Case 97-C-0139. Verizon's compliance filings, however, did not refute the presumption of discrimination indicated by this difference in provisioning performance.¹⁶

The weight of the evidence in the record establishes that: (1) RBOC claims to the contrary notwithstanding, the RBOCs maintain their dominant market position in telephone exchange service and exchange access service and have used that position to disadvantage competitors; and (2) the grant of Section 271 authority has done nothing to improve a BOC's performance in the provision of services for its competitors vis-à-vis its performance for itself or its affiliates. The need for the Section 272 safeguards has not been lessened by the grant of Section 271. Rather, the need to continue the safeguards has been made manifestly apparent.

High Quality Special Services Performance by Verizon New York, Inc., issued and effective June 15, 2001.

¹⁵ *Id.*, at p. 9.

¹⁶ *Id.*, at pp. 5-6.

IV. THE COMMISSION SHOULD ADOPT SPRINT'S PROPOSAL AND EXTEND THE SUNSET ON AN RBOC-BY-RBOC BASIS.

SBC, BellSouth, and Verizon argue for various interpretations of the language in Section 272(f)(1). SBC and BellSouth argue that the plain language in Section 272(f)(1) and the statutory history require the sunset of the Section 272 safeguards must be applied on a BOC-by-BOC basis. Verizon takes this argument even further and claims that the phrase "or any Bell Operating company affiliate" in Section 272(f)(1) means the sunset should apply to an entire Regional Bell Operating Company three years after the first BOC is granted Section 271 interLATA authority.¹⁷ These arguments ignore the fact that Section 271 interLATA authority is granted on a state-by-state basis, even when the BOC operates in multiple states, and that the Section 272 safeguards follow from the grant of Section 271 authority. Therefore, the RBOCs' argument would have the Commission ignore the Section 271 process resulting in the possibility of the operations of a Bell operating company in a particular state being freed of the Section 272 safeguards prior to the grant of Section 271 interLATA authority.

Sprint suggest that, as with many other provisions of the Telecommunications Act of 1996, the language the RBOCs use to free BOC operations in states where the BOC has had a more difficult time achieving Section 271 authority from application of the

¹⁷ Interestingly, even SBC acknowledges that Verizon's argument is flawed, arguing that such a "... construction of the statute seems overly broad." Comments of SBC Communications, Inc. at footnote 49.

Section 272 safeguards is ambiguous.¹⁸ However, there are several points that are clear. First, it is clear from the legislative history that the Senate's version of the Act, the version ultimately adopted with some modification, demonstrates the Senate's strong support for the proposition that interLATA services must be provided through a separate affiliate upon the grant of interLATA authority:

The Commission may only grant an application, or any part of an application, if the Commission finds that the petitioning BOC has fully implemented the competitive checklist in new section 255(b)(2), **that the interLATA services will be provided through a separate subsidiary that meets the requirements of new section 252**, and that the provision of the requested interLATA services is consistent with the public interest, convenience, and necessity.¹⁹

Second, the record developed in this proceeding clearly demonstrates the need for the continued application of the safeguards. The BOCs have the unique ability and incentive to discriminate and have engaged in such activity both before and after the grant of Section 271 authority.

Third, the Commission has been empowered to extend, but not accelerate, the sunset of the Section 272 requirements. It is on the basis of that authority that Sprint urges the Commission to wait until all of the Bell operating companies that are part of a RBOC have been granted Section 271 authority before any relief from the Section 272 requirements can be granted.

¹⁸ As the Supreme Court has stated: "It would be gross understatement to say that the Telecommunications Act of 1996 is not a model of clarity. It is in many important respects a model of ambiguity or indeed even self-contradiction." AT&T Corporation, et al., v. Iowa Utilities Board et al., 525 U.S. 366, 397 (1999).

¹⁹ Conference Report (H.Rept. 104-458), 142 Cong. Rec. H1078, H1116 (1995) **emphasis added.**

Sprint argued in its comments that such an extension of the sunset is necessary because of the administrative burden of conducting a state-by-state analysis and because of the increasing regionalization of the BOCs and their Section 271 applications. BellSouth, while arguing for a far different result, agrees with Sprint's view that a state-by-state sunset analysis is too burdensome and does not necessarily reflect the current status of the RBOCs' organizations:²⁰

Moreover, from an administrative perspective, reviews on a state-by-state basis are wholly impractical. As the Commission is well aware, the trend has been for BOCs to submit consolidated Section 271 applications for multiple states.... The rationale behind these multi-state applications is that much of the information provided regarding compliance with the competitive checklist is not state-specific, but rather regional. Therefore, it is more efficient for the Commission to evaluate such information once rather than engaging in redundant reviews of the same information.

Sprint agrees that it makes no sense for the Commission to engage in redundant activity. However, given the Bell operating companies' unique ability and incentive to discriminate and engage in anti-competitive conduct, as well as their demonstrated propensity to engage in same, it also makes no sense to grant the operations of a Bell operating company in a particular state relief from the Section 272 requirements prior to the demonstration that it has met the competitive checklist. The only rational solution is to wait until each Bell operating company within a particular RBOC has gained Section 271 authority and until the conditions urged by Sprint have been met before granting relief from the Section 272 requirements.

²⁰ Comments of BellSouth Corporation at p. 14.

V. VERIZON'S REQUEST FOR THE IMMEDIATE ELIMINATION OF THE OI&M PROHIBITION MUST BE REJECTED.

Verizon argues that, regardless of whether other Section 272 requirements have sunset, the Commission should immediately eliminate the prohibition against a BOC and its Section 272 long-distance affiliate sharing OI&M (Operating, Installation & Maintenance) functions for all BOCs. Simultaneous with filing its comments in this proceeding, Verizon filed a separate petition for forbearance from the OI&M prohibition.²¹ While Sprint believes this issue is better addressed in the separate forbearance petition proceeding, in which Sprint intends to vigorously oppose Verizon's petition, Sprint will nevertheless briefly explain why Verizon's argument in this proceeding is flawed.

Verizon argues that the OI&M prohibition is not mentioned in Section 272, but is merely a creation of the FCC. To the contrary, the Commission adopted the prohibition in the *Non-Accounting Safeguards Order*²² to implement Section 272(b)(1)'s requirement that the separate Section 272 affiliate "operate independently from the Bell operating company." The FCC held that the "operate independently" requirement of Section 272(b)(1) imposes requirements beyond those listed in sections 272(b)(2)-(5), noting:

²¹ Petition for Forbearance, CC Docket No. 96-149, filed August 5, 2002. The Wireline Competition Bureau has set September 9, 2002 as the date for comments on the petition. See, Public Notice, DA 02-1989, released August 9, 2002.

²² 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, FCC 96-489, 11 FCC Rcd 21905 (1996).

"[t]his conclusion is based on the principle of statutory construction that a statute should be construed so as to give effect to each of its provisions."²³ The FCC concluded that:

The limited prohibition on shared services that we impose rests on the "operate independently" requirement of section 272(b)(1), rather than the requirement of section 272(b)(3) that a BOC and its section 272 affiliate have "separate officers, directors, and employees."²⁴

Accordingly, the OI&M prohibition is clearly grounded in the statute.

Verizon complains that when the Commission adopted the OI&M prohibition it did not have a sufficient record to conduct a cost-benefit analysis of using structural separation rather than cost accounting safeguards. However, the record in the *Non-Accounting Safeguards* proceeding was quite detailed, and over fifty parties, including all of the RBOCs, participated in same. Verizon has offered nothing new on the record except for unverified estimated cost data that falls far short of supporting reversal of the *Non-Accounting Safeguards Order*.

Verizon claims that the Commission primarily adopted the OI&M prohibition out of a concern over cost misallocation. While this was, and is, a valid concern, it was not the only concern the Commission had. The Commission found that there was a risk that sharing of OI&M would provide the Section 272 affiliate with access to the BOC's facilities "that is superior to that granted to the affiliate's competitors."²⁵ The record in this proceeding overwhelmingly demonstrates that concern over BOC discrimination in

²³ *Id.*, at para. 156.

²⁴ *Id.*, at para. 166.

²⁵ *Id.*, at para. 163.

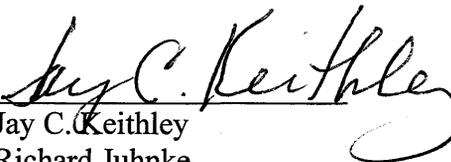
favor of itself and its affiliate is still well founded and that Verizon's request must not be granted.

VI. CONCLUSION.

It is undeniable that each BOC is still dominant in its territory in the provision of telephone exchange service and exchange access. Each BOC still has the ability and incentive to discriminate against its competitors. The record in this proceeding demonstrates that this incentive does not evaporate or even lessen upon the grant of Section 271 authority. Accordingly, Sprint again urges the Commission to extend the sunset of the Section 272 safeguards beyond the initial three-year period. The Commission should not consider allowing the safeguards to sunset until the conditions identified by Sprint have been met. Then the Commission can undertake a review as to whether the safeguards may safely be allowed to sunset as to a particular RBOC.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Reply Comments of Sprint Corporation in WC Docket No. 02-112 was sent by United States First Class Mail, postage prepaid, and/or electronic mail on this the 26th day of August, 2002 to the following parties.


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