

**BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C. 20554**

In the Matter of)	
)	
Section 272(f)(1) Sunset of the BOC Separate Affiliate and Related Requirements)	WC Docket No. 02-112
)	
2000 Biennial Regulatory Review Separate Affiliate Requirements of Section 64.1903 of the Commission's Rules)	CC Docket No. 00-175
)	

**REPLY COMMENTS OF
BT AMERICAS INC.**

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**REPLY COMMENTS OF
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I. INTRODUCTION AND SUMMARY.

BT Americas Inc. (“BTA”), by its undersigned counsel, hereby submits these reply comments in response to the Commission’s Further Notice of Proposed Rulemaking¹ in the above-captioned proceeding. BTA is a wholly owned subsidiary of British Telecommunications plc (“BT”). BTA has been authorized by the Commission to provide international telecommunications services in the United States since 1994. Through its parent, BT, and BT's subsidiaries, BTA provides large enterprise customers in the United States with a full range of seamless global telecommunications services, including end-to-end managed networks, IT applications, integration and out-sourcing services. These services are underpinned by global

¹ *In the Matter of Section 272(f)(1) Sunset of the BOC Separate Affiliate and Related Requirements, 2000 Biennial Regulatory Review Separate Affiliate Requirements of Section 64.1903 of the Commission’s Rules, WC Docket No. 02-112, CC Docket No. 00-175, Further Notice of Proposed Rulemaking (rel. May 19, 2003) (“FNPRM”).*

network breadth and depth. With network coverage in more than 120 countries, BTA and its affiliates have one of the world's leading MPLS networks, and one of the most extensive IP networks in Europe.

BTA agrees with the Commission's basic approach of defining the relevant service markets, determining if there is market power and then determining the appropriate regulation that should apply to a service provider that holds market power. BTA suggests that the principles underpinning the new European regulatory framework could be instructive in assisting the Commission with its analysis in this regard. Specifically, under the new EC framework, regulation is focused on the wholesale level and predominantly on access. The national regulatory authorities ("NRAs") are required to analyze the state of competition in wholesale access markets and apply appropriate regulation if the NRAs find economic dominance in the relevant markets. Appropriate regulation would consist, at a minimum, of elements of the following:

- Access service rates based on forward looking economic costs.
- Accounting separation between the wholesale and retail activities of the dominant provider in particular to ensure the effective application of the non-discrimination obligations.
- Imputation of access rates charged by the wholesale arm of the dominant provider to other carriers to the retail arm of the dominant provider.
- Effective nondiscrimination obligations on the dominant provider as regards the provision of those monopoly inputs to third parties, vis a vis its internal supply terms. Nondiscrimination obligations must cover both

price and non-price terms, such as delivery times, service levels and repair times.

- Transparency in provisioning by the dominant provider.

If there is effective regulation of the dominant provider's wholesale services, then there is, for the majority of inputs required for large enterprise customers, no need for intervention at the retail level. However, where there is not effective wholesale regulation, then retail regulation may become necessary.

A review of this record plainly indicates that the Bell Operating Companies (“BOCs”) control of access facilities necessary to deliver interstate interexchange and international telecommunications services confers upon them the ability to exercise market power in downstream markets, such as the market for interstate interexchange and international telecommunications services. BTA's experience, as well as the record of this proceeding, also indicates that the current regulation of the BOCs' wholesale access services is inadequate to prevent or police abuses of BOCs' market power in the provision of access services. Therefore BTA submits that the Commission should adopt and enforce a regime of wholesale regulation of access markets that contain the key elements of accounting separation, forward looking cost-based access rates, cost imputation, nondiscrimination and transparency that underpin the European Union's new telecommunications regulatory framework.

II. AN EXAMINATION OF THE MARKET INDICATES THAT THE BOCS EXERCISE SIGNIFICANT MARKET POWER BY VIRTUE OF THEIR CONTROL OF LAST MILE BOTTLENECK FACILITIES.

The Commission's rules and legal precedent have long recognized that an entity that controls bottleneck facilities has the ability to exercise market power in downstream markets in the absence of effective regulation at the wholesale level. Wholesale services are those

provided to competitive carriers. Their availability is key to driving competition in telecommunications. In particular, these services should be made available on terms which encourage infrastructure competition. As a general rule, long run incremental cost inputs should encourage efficient network roll out. It is clear that the BOCs' control of the bottleneck facilities confer upon them market power in their provision of wholesale access services. BTA's experience in the marketplace provides case-in-point.

BTA provides a full suite of interstate interexchange and international telecommunications services to large enterprise customers, who require high capacity, high quality, highly reliable telecommunications services. BTA submits that the BOCs' control the essential bottleneck facilities that BTA and other providers rely upon to provide interstate interexchange and international telecommunications services to large enterprise customers via their control of the last mile infrastructure into the majority of commercial buildings in the United States. Unlike other market segments, there is no intermodal competition for the delivery of services to large enterprise customers in the U.S. – wireless, cable and satellite technologies are not and cannot in the foreseeable future deliver the reliability, quality and/or rates required for the provision of telecommunications service to large enterprise customers, and are simply not viable alternatives to the BOC local access tails.

Geography plays a large role in the picture - the only access mechanism that is relevant currently and for the foreseeable future is wireline telephony. The BOCs local access tails are the only means of accessing the majority of the buildings where large enterprise customers' sites are located. A large enterprise customer may have a headquarters office located in New York City, for example, where perhaps CLEC and/or cable services may have been built out. However, most enterprise customers throughout the United States are typically located on

the outskirts of major cities, and in most cases neither a CLEC nor cable provider would have built competing facilities. Even in more recently built office park locations, CLEC and cable provisioning is severely limited. It is BTA's continuing experience the only option for access to the majority of a typical large enterprise customer's sites is via a BOC's facilities.

III. BTA'S EXPERIENCE AND THE RECORD REFLECT THAT REGULATION OF THE BOC'S WHOLESALE PROVISION OF ACCESS SERVICES NEEDED TO PROVIDE INTERSTATE AND INTERNATIONAL TELECOMMUNICATIONS SERVICES IS INADEQUATE.

BTA's access costs can amount to up to sixty percent of its incremental cost of delivering interstate interexchange and international telecommunications services to its large enterprise customers in the U.S. which is very high and out of proportion to the other components of BTA's incremental costs of providing such services such as long distance transport. The record of this proceeding makes clear that BOCs continue to have the ability and the incentive to unfairly discriminate against their competitors in the access market on basis of both price and availability of special access. The record indicates that the BOCs have raised special access rates to excessive levels and in some instances have used special access rates to create a price squeeze situation. Furthermore, the record indicates that the BOCs unreasonably discriminate against competitors in their provisioning of special access services. The Commission should act promptly to adopt comprehensive special access performance metrics in the docket the Commission opened for that purpose almost two years ago.² Adoption of such metrics is necessary to deter discrimination against competitors in the BOCs' provisioning and

² See News Release, "FCC Seeks to Establish National Performance Standards For Telecom Carriers Wholesale Operations" CC Docket 01-318 (Nov. 8, 2001).

maintenance of interstate special access services necessary to serve large volume enterprise customers.

IV. THE COMMISSION MUST APPLY EFFECTIVE REGULATION TO BOCS' PROVISION OF WHOLESALE SERVICES.

A. Dominant Carriers Must Be Required to Provide Wholesale Access on A Forward Looking Cost Basis to Provide for Effective Retail Competition

Dominant providers must be required to price their wholesale products on a forward looking cost basis. Prices for interexchange and international access should not include any additional surcharges which amount to a cross-subsidy of other loss-making services. The Commission should require cost reporting at a level of granularity sufficient to allow visibility of the various components that underlie the wholesale access service. Furthermore, any financial reporting should be underpinned by published methodology and an independent audit.

B. Dominant Carriers Must Be Required To Separate Accounting For Their Wholesale And Retail Activities

Accounting separation of the dominant carrier's wholesale and retail activities is the critical method by which non-discrimination is delivered; without it an obligation for non-discrimination is critically weakened. The Commission should implement a coherent accounting separation system that records the costs of the individual components of the dominant carrier's network and sets out how these are used by the various wholesale services provided by the dominant carrier. The accounting separation system should then show the relationship of the costs of these wholesale services to the prices of these services (including a reasonable return on capital). Finally, it should demonstrate that the retail arm of the dominant carrier pays for these

services on this basis. All this has to occur in accordance with a published methodology and an independent auditor has to endorse that this is in fact what has occurred. BTA doubts whether the current reporting regime adequately recognizes the vertically-integrated nature of the dominant operators, and therefore whether it provides a rigorous enough framework for ensuring that the wholesale prices charged by the BOC to both competitors and its retail operations are cost-based and that wholesale access is provided on a non-discriminatory basis. BTA submits that the Commission should consider adopting accounting separation requirements similar to those set forth in the European Union's *New Regulatory Framework* which allow National Regulatory Authorities (i.e. individual members of the EU) to require, among other things, that carriers make their wholesale prices and the internal transfer prices between BOC wholesale and retail operations transparent.

In addition, accounting separation provides a basis for detecting and preventing price squeeze. The Commission should develop price squeeze tests for the key markets in which the competitive market is dependent on access inputs supplied by dominant carriers; e.g. a price squeeze test for BOC provision of retail interstate interexchange and international telecommunications to large enterprise customers. The price squeeze test should be based on a cost stack in which various cost elements are classified into wholesale and retail costs. The principal components of the cost stack should be established. Furthermore, the dominant carrier should be able to provide on demand in sufficient granularity the information necessary to establish the existence of a price squeeze. Developing a methodology to detect price squeezes in advance will allow for more effective investigation and intervention in the event of anti-competitive pricing at the retail level.

C. Dominant Carriers Must be Required to Provide Wholesale Access Services on a Nondiscriminatory Basis and to Provide Transparency So That Competitors May Determine If They Are Receiving Wholesale Access Services on a Nondiscriminatory Basis

The BOCs, as “vertically integrated” enterprises consisting of both up-stream wholesale businesses and a retail down stream business, must provide their wholesale products to their affiliated entities on a non-discriminatory basis. Such a requirement already exists in Sec. 272(e)(3)'s “imputation” requirement, which requires that BOCs sell wholesale special access services to their affiliated inter-exchange carriers at the tariffed wholesale access price. This requirement must be extended and made applicable to all instances where the BOC becomes a fully-integrated local and inter-exchange business. The imputation principle is a cornerstone of effective wholesale regulation that would make it possible for competitors to determine if the BOCs are unlawfully leveraging their market power from the upstream wholesale access for large enterprise customer market into the downstream large enterprise market for long distance and international telecommunications services.

In addition, the Commission should apply the nondiscrimination requirement of Sec 272(e)(1) and (2) to all of the BOC's wholesale relationships and provide effective tools that will make transparent to competitors whether the BOC is providing access on a nondiscriminatory basis. The BOCs must be required to publish comparative data for access services provided to wholesale interexchange customers, as well as access provided to the BOC's own interexchange arm. The data must cover provisioning, performance, facility availability and repair. Further, the BOC should also be required to publish the parameters utilized to draw the comparative assessments so that competitors can both audit the information, and tailor their own internal information gathering to ensure that comparisons are useful to identify discrimination.

A statistically significant deviation in performance must be explained by the BOC. Furthermore, the performance reports need to be produced with a frequency and timeliness that ensures rapid action.

V. CONCLUSION.

The BOCs' control of access facilities necessary to deliver interstate interexchange and international telecommunications services confers upon them the ability to exercise market power in downstream markets such as the market for interstate interexchange and international telecommunications services. Accordingly, the Commission should apply to the BOCs a regime of effective wholesale access regulation, including requiring accounting separation between the BOCs' wholesale and retail activities, forward looking cost-based access rates, cost imputation, nondiscrimination and transparency, similar to the scheme set forth in European Union's new telecommunications regulatory framework. The Commission should continue to impose the regime proposed herein until such time as the BOCs are no longer capable of leveraging their control over local bottleneck facilities into downstream markets.

Respectfully submitted,

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