

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

In the Matter of )  
 )  
272(b)(1)(1) “Operate Independently” ) WC Docket No. 03-228  
NPRM )  
 )

**REPLY COMMENTS OF SBC COMMUNICATIONS**

The initial comments confirm that the Commission should eliminate the OI&M restrictions and should do so immediately. AT&T and others who oppose such action raise no new arguments and present no new facts – certainly nothing that should give the Commission pause. Instead, they recycle the same tired old slogans and empty rhetoric that they previously served in connection with the various forbearance petitions that were filed on this issue. SBC and others have addressed these arguments in detail and have shown them to be spurious. The Commission should so find.

The Commission also should reject AT&T’s objections to the joint ownership prohibition. Like its other claims, AT&T’s arguments against the lifting of that requirement are based on speculation and ignore the changing communications landscape. However, as SBC stated in its comments, resolution of the joint ownership rules should in no way delay OI&M relief.

**I. AT&T, MCI and Americatel Simply Recycle Their Old Arguments On The OI&M Restrictions While Continuing To Ignore The Real World Harm To Consumers.**

For the most part, AT&T and others simply regurgitate their stock arguments from the *OI&M Forbearance Petitions* and other proceedings without raising any new substantive issues. The BOCs have already addressed these arguments in great detail and SBC will not repeat those responses here.<sup>1</sup> Suffice it to say that those who oppose repeal of the OI&M requirements

---

<sup>1</sup> See e.g., SBC Reply Comments in Support of Petition for Forbearance and Modification, CC Docket Nos. 96-149 and 98-141, filed July 15, 2003 (*SBC Reply Comments*); See also, *Ex Parte Letter* to Marlene Dortch, FCC, from Dee May, Verizon, dated June 24, 2003.

trivialize the enormous burdens those requirements place on BOCs and their customers, while exaggerating in the extreme their benefits. Thus, for example, although they raise ostensible “concerns” about discrimination, they are completely unable to demonstrate how in the real world the sharing of employees and systems for functions like network monitoring, project planning, or engineering of facilities between a BOC and its section 272 affiliate could result in undetected discrimination.<sup>2</sup> Similarly, although they repeat their stock claims about cross-subsidization, they never explain how, in the real world, cross-subsidization is a significant concern, particularly for carriers, such as SBC, that are subject to pure price-caps in all jurisdictions.<sup>3</sup> And in response to documented evidence of the burdens and costs created by this rule, AT&T and MCI reiterate their ludicrous argument – already rejected by this Commission in both the *Non Accounting Safeguards Order* and the *Verizon OI&M Forbearance Order* – that Congress has already performed the cost benefit analysis and determined that BOCs and their section 272 affiliates must perform OI&M services on a separated basis.<sup>4</sup> These arguments need no further briefing and should be rejected outright.

In addition to these recycled claims, AT&T does advance one new argument, but this argument fares no better than the others. It argues that because (as the Commission determined in the *Verizon OI&M Forbearance Order*) the Commission lacks authority to forbear from the OI&M requirements, it would be unlawful for the Commission to eliminate those requirements

---

<sup>2</sup> Americatel and MCI argue also that the OI&M restrictions are somehow necessary to place SBC on a level playing field with its competitors. See Americatel Comments at 8, MCI Comments at 4-5. As SBC noted in its Reply Comments in the OI&M Petition, this argument is fallacious for two reasons. First, there is no reason to handicap one firm just because others do not have the same advantages. Second, it ignores that other carriers have the legal right to provide end-to-end services, while BOCs do not. See *SBC Reply Comments* at 21-22.

<sup>3</sup> See *SBC Reply Comments* at 12-14.

<sup>4</sup> *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, ¶157, 162 (1996) (*Non-Accounting Safeguards Order*); *Petition of Verizon for Forbearance from the Prohibition of Sharing Operating, Installation, and Maintenance Functions Under Section 53.203(a)(2) of the Commission’s Rules*, CC Docket No. 96-149, *Memorandum Opinion and Order* at 7 (rel. Nov. 4, 2003).

through a rulemaking proceeding. In support of this proposition, AT&T cites the D.C. Circuit Court's decision in *ASCENT*, where the Court held that this Commission erred in concluding that, if SBC's advanced services affiliates complied substantially with section 272 requirements, those affiliates would not be successor or assigns of the SBC BOCs for section 251 purposes. That holding is irrelevant to the circumstances here for the simple reason that *ASCENT* involved what the court considered an end-run around the *statutory* requirements of section 251. Congress had prohibited the FCC from forbearing from section 251 until that provision was fully implemented and the court felt that the Commission had ignored that restriction by relieving SBC's advanced services affiliates from those *statutory* requirements. But the OI&M rules are not statutory requirements. Congress left it to the FCC to determine the meaning of "operate independently." The OI&M rules are thus regulations enacted pursuant to that discretion, and they reflect – as even AT&T has acknowledged – one of many possible choices the Commission might have made, consistent with section 272.<sup>5</sup> *ASCENT* is clearly inapplicable to this situation and the Commission should dismiss AT&T's weak attempts to misread *ASCENT* as a restriction on the Commission's ability to change its own rules.<sup>6</sup>

## **II. AT&T's and Americatel's Arguments For Retention Of Joint Ownership Requirements Ignore The Changing Communications Landscape.**

As with their opposition to the elimination of OI&M restrictions, AT&T's and Americatel's opposition to the lifting of the joint ownership prohibition ignores reality. AT&T and Americatel refuse to acknowledge the rapidly changing communications landscape and the fact that this prohibition, imposed at a time when the industry generally deployed separate networks for local and long distance, no longer serves the public interest. As BellSouth has

---

<sup>5</sup> See, *Implementation of the Non-Accounting Safeguards of Sections 271 and 272 of the Communications Act of 1934, as Amended*, CC Docket No. 96-149, *Third Order On Reconsideration*, 14 FCC Rcd 16299, ¶14 (1999), (holding that the phrase "operate independently" has no plain or ordinary meaning and that AT&T, like the majority of the commenters, concedes that the Commission has discretion to interpret this term).

<sup>6</sup> Even if the Commission agrees with AT&T – which it should not – that *ASCENT* somehow limits its rulemaking authority, it should clarify that its current rules do not apply to SBC's Data Service Affiliates. See SBC Comments at 4.

explained in its comments, the networks today are moving towards packet-based technology that delivers data as well as voice services. With the integration of voice into packet-based networks, separate networks for local and long distance are fast becoming obsolete. Today, more than ever, vendors are offering integrated equipment at lower prices and while AT&T and others can take advantage of these new offerings - and of the efficiencies attendant thereto - BOCs and their consumers continue to be hampered by obsolete rules that no longer make sense.

AT&T and Americatele make four arguments against the lifting of the joint ownership prohibition, all of which are baseless. First, they argue that lifting of the joint ownership prohibition would be inconsistent with prior Commission policies and would disavow the premise of the *Computer II* and the *Competitive Carrier* orders. This argument, that the joint ownership prohibition should be retained just because it is consistent with prior Commission policy, is nonsensical.<sup>7</sup> Far from being consistent with Commission policy, a Commission decision to retain safeguards that no longer serve the public interest would be *inconsistent* with a long line of precedent in which the Commission, in a variety of contexts, has lifted structural separation requirements because the costs outweigh their benefits.

For example, in *Computer III* the Commission lifted structural separation requirements imposed in *Computer II* because it found that those requirements impose substantial costs resulting from a duplication of facilities and personnel, limitations on joint marketing, loss of economies of scope, and increased transaction and production costs. Significantly, the Commission found that *no* structural separation of BOCs' enhanced services operations was necessary, and it did so despite the fact that the BOCs then maintained franchised monopolies for local service and were regulated both at the state and federal levels on a strict rate-of-return

---

<sup>7</sup> Americatele also cites the Ninth Circuit's decision in *State of California* to support its argument that the Commission should not change its prior policy. Americatele's reference to that decision is pointless. The *State of California* simply stands for the proposition that administrative agencies must articulate their reasons and provide justification for policy changes; not that an agency cannot eliminate existing rules.

basis.<sup>8</sup> Similarly, in *COMSAT*, the Commission found that there was no reason to continue structural safeguards because the costs would exceed their benefits, and, more recently, it declined to extend the section 272 structural safeguard requirements for information services and for telecommunications services in New York and Texas.<sup>9</sup> If the Commission could find in these contexts that *no* structural safeguards are necessary, surely it could find that the joint ownership prohibition – that no longer makes sense in light of market developments – is no longer necessary.

Second, AT&T argues that elimination of the joint ownership prohibition would result in arrangements that offer little protection from the Commission’s nondiscrimination safeguards. It argues, further, that if the Commission permitted joint ownership it would have to ensure that non-affiliated entities have comparable ownership rights or equivalent contractual rights to the equipment.<sup>10</sup> Like AT&T’s discrimination arguments in other proceedings, these arguments completely ignore reality. As an initial matter, and as SBC has argued in the context of the OI&M restriction and in other proceedings, AT&T’s claims of discrimination are grossly exaggerated and have no basis in reality. AT&T has never been able to explain how a BOC could engage in discrimination that causes customers to leave AT&T or other carriers without being detected by carriers and regulators and being subject to large penalties. Second, and in any event, even if there was any validity to AT&T’s discrimination arguments in other contexts - which there is not – its arguments are completely invalid in the context of the joint ownership prohibition. As BOCs have explained, the joint ownership prohibition is particularly burdensome in the context of new purchases of next generation technologies. These new technologies are not the “bottleneck facilities” or the “monopoly services” that are the focus of

---

<sup>8</sup> *Computer III Further Remand Proceedings: Bell Operating Company Provision of Enhanced Services; 1998 Biennial Review of Computer III and ONA Safeguards and Requirements*, CC Docket Nos. 95-20 and 98-10, *Further Notice of Proposed Rulemaking*, 13 FCC Rcd 6040, ¶¶ 47, 56 (1998) (*Computer III FNPRM*).

<sup>9</sup> See *COMSAT Corporation; Petition Pursuant to § 10(c) of the Communications Act of 1934, as amended, for Forbearance from Dominant Carrier Regulation and for Reclassification as a Non-Dominant Carrier*, 13 FCC Rcd 14083 (1998).

<sup>10</sup> See *AT&T Comments* at 21.

the nondiscrimination requirements in the section 272 rules.<sup>11</sup> Indeed, the Commission has recognized that. In declining to impose unbundling requirements on next generation technologies, the Commission stated that entry barriers for new technology are the same for both BOCs and CLECs. It stated further that not only do BOCs have no advantage over CLECs in the deployment of new technologies, but CLECs are, in fact, *leading* the deployment of some of the new technologies like Fiber-To-The-Home.<sup>12</sup> Most of these CLECs -- like AT&T and MCI -- have both local and long distance operations and while they can, and do, integrate facilities to achieve higher efficiencies, the BOCs are prevented from doing the same. Thus, far from discriminating against AT&T, the joint ownership prohibition discriminates against the *BOCs*.

Third, AT&T and Americatel once again raise the old and worn out argument that because joint ownership entails common costs, elimination of this prohibition would provide BOCs with an opportunity to improperly allocate costs. As SBC and other BOCs have demonstrated in other proceedings, this argument defies the real world. For one thing, AT&T never explains convincingly how the BOCs, operating under pure price-caps, can engage in cross subsidization. The plain fact is that under pure price-caps there is no longer any BOC rate base onto which the section 272 affiliate's costs can be loaded in order to increase the BOC's total return, and thus there is no incentive to misallocate costs. Because BOCs no longer have any incentive to cross-subsidize through a misallocation of joint ownership costs, this is a non-issue. Further, while AT&T continues to speculate about future cost misallocations, history and reality have proven otherwise. The reality is that the BOCs have been providing on an un-separated basis customer premises equipment, enhanced services, and other non-regulated services for

---

<sup>11</sup> See e.g., *Non Accounting Safeguards Order* at ¶ 162 (limiting the joint ownership restriction to facilities that competitors are unable to obtain from other sources).

<sup>12</sup> Report and Order and Order on Remand and Further Notice of Proposed Rulemaking, *Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*, CC Docket Nos. 01-338 *et al.*, FCC 03-36 at ¶¶ 272-280 (rel. Aug. 21, 2003) ("*Triennial Review Order*"), *petitions for review pending, United States Telecom Ass'n v. FCC*, Nos. 03-1310 *et al.* (D.C. Cir.) Indeed, requiring nondiscriminatory access to the BOCs next generation technologies under section 272 would be inconsistent with the Commission's policy in the Triennial Review Order, which specifically permits BOCs to compete with the CLECs head-on in the deployment of the new network architecture.

years, and the Commission has never found any evidence of cross subsidization by any BOC. Finally, and in any event, AT&T and Americatele ignore that both the BOC and the section 272 affiliate are required to follow Generally Accepted Accounting Principles (GAAP), and any transactions entailing joint ownership would be subject to, and could be audited for their compliance with, GAAP. Under these circumstances, the Commission should reject AT&T's cross subsidization arguments as empty rhetoric.

Finally, AT&T argues that the "operate independently" language of section 272(b)(1) precludes the Commission from eliminating the joint ownership restrictions. It argues that if the joint ownership restrictions are eliminated, the section 272 affiliate will be a mere "shell" and will not be operating independently of the BOC.<sup>13</sup> But, as BOCs have already argued in the OI&M proceeding, and as the Commission itself found in the *Non-Accounting Safeguards Order*, the term "operate independently" can have a variety of meanings depending on the context. The use of this term by Congress does not compel the conclusion that the BOC and its section 272 affiliate own separate facilities – to the contrary, legislative history shows that Congress specifically *deleted* the requirement for separate facilities even though it required the two companies to operate independently.<sup>14</sup> Thus, Congress certainly did not believe that joint ownership would render one company a "shell" of the other. The purpose of joint ownership is for BOCs and their customers to gain efficiencies – efficiencies that AT&T and other CLECs are already taking advantage of – and the Commission should not let AT&T distract its attention from that issue. For the reasons stated above, the Commission should reject AT&T's arguments and eliminate the joint ownership restrictions.

### **III. CONCLUSION.**

The initial comments of parties raise no new issues on the OI&M restriction. Indeed, they could not do so because parties have already spent countless hours briefing this issue.

---

<sup>13</sup> See *AT&T Comments* at 10-13.

<sup>14</sup> *BellSouth Comments* at 3-4.

BOCs have responded in detail – in *ex partes* and in briefs – to all legal and business issues presented by CLECs and Commission staff, and have provided overwhelming evidence of the crippling effects of this restriction. The record is complete and it is clear, the costs of the OI&M rules -- which include not only the tens of millions of dollars spent on redundant personnel and systems but, more importantly, the costs to the public in terms of long outages, impaired service quality, and piece-meal service – far outweigh any hypothetical benefits that could be provided by this restriction. The Commission needs to eliminate the OI&M requirements and do so immediately.

The Commission should also eliminate its rules that prohibit joint ownership of switching and transmission equipment. AT&T's arguments to the contrary ignore completely the changing communications landscape and the fact that, when applied to next generation technologies, these rules discriminate against the BOCs, not against CLECs. However, resolution of this issue should in no way delay relief from the OI&M requirements.

Respectfully Submitted,

SBC Communications Inc.

By: /s/ Anu Seam

Anu Seam

Gary L. Phillips

Paul K. Mancini

SBC Communications Inc.

1401 Eye Street, NW

Suite 400

Washington, D.C. 20005

(202) 326-8891 – phone

(202) 408-8763– facsimile

Its Attorneys

December 22, 2003

**CERTIFICATE OF SERVICE**

I, Regina Ragucci, do hereby certify that on this 22nd day of December 2003, Reply Comments of SBC Communications Inc. in WC Docket No. 03-228, were served first class mail - pre-paid postage to the parties attached.

/s/ Regina Ragucci  
Regina Ragucci

JUDITH L. HARRIS  
ROBERT H. JACKSON  
REED SMITH, LLP  
COUNSEL FOR AMERICATEL CORP.  
1301 K STREET, NW  
SUITE 1100 – EAST TOWER  
WASHINGTON, DC 20005

CRAIG T. SMITH  
SPRINT CORPORATION  
6450 SPINT PARKWAY  
KSOPHN0214-2A671  
OVERLAND PARK, KS 66251

H. RICHARD JUHNKE  
JOHN E. BENEDICT  
SPRINT CORPORATION  
401 NINTH STREET  
SUITE 400  
WASHINGTON, DC 20004

INDRA SEHDEV CHALK  
MICHAEL T. McMENAMIN  
ROBIN E. TUTTLE  
USTA  
1401 H STREET, NW, SUITE 600  
WASHINGTON, DC 20005

STEPHEN L. EARNEST  
BELLSOUTH CORPORATION  
SUITE 4300  
675 WEST PEACHTREE STREET, NE  
ATLANTA, GA 30375-0001

ALAN BUZACOTT  
WORLD COM, INC. d/b/a MCI  
1133 19<sup>TH</sup> STREET, NW  
WASHINGTON, DC 20036

DAVID L. LAWSON  
MICHAEL J. HUNSEDER  
SIDLEY AUSTIN BROWN & WOOD, LLP  
COUNSEL FOR AT&T CORP.  
1501 K STREET, NW  
WASHINGTON, DC 20005

LEONDARD J. CALI  
LAWRENCE J. LAFARO  
ARYEH S. FRIEDMAN  
AT&T CORP.  
ONE AT&T WAY  
BEDMINSTER, NJ 07921

JAMES T. HANNAN  
ANDREW D. CRAIN  
QWEST SERVICES CORPORATION  
SUITE 950  
607 14<sup>TH</sup> STREET, NW  
WASHINGTON, DC 20005