

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

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 THE COMPETITIVE
TELECOMMUNICATIONS ASSOCIATION**

The Competitive Telecommunications Association (“CompTel”), by its attorneys, hereby submits comments in response to the request of the Federal Communication Commission (the “Commission”) for comments in connection with the remand of the Commission’s Non-Accounting Safeguards Order.¹ CompTel has followed and actively participated in the above-docketed proceeding since the Commission released its initial Notice of Proposed Rulemaking in this matter on July 18, 1996.² The exhaustive record in this proceeding illustrates that the Commission has thoroughly considered these matters,³ and CompTel strongly supports the

¹ “Comments Requested in Connection with Court Remand of Non-Accounting Safeguards Order – CC Docket No. 96-149,” Public Notice DA 00-2530, rel. Nov. 8, 2000 (“the Public Notice”). CompTel filed comments on Aug. 15, 1996 and April 3, 1997 in this proceeding.

² *In the Matter of Implementation of the Non-Accounting Safeguards of Sections 271 and 272 of the Communications Act of 1934, as amended; and Regulatory Treatment of LEC Provision of Interexchange Services Originating in the LEC’s Local Exchange Area*, Notice of Proposed Rulemaking, CC Docket No. 96-149, rel. July 18, 1996 (*Non-Accounting Safeguards NPRM*).

³ *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, First Report and Order and Further Notice of Proposed Rulemaking, 11 FCC Rcd. 21905 (1996) (*Non-Accounting Safeguards Order*); First Order on Reconsideration, 12 FCC Rcd. 2297 (1997); Second Order on Reconsideration, 12 FCC Rcd. 8653 (1997); Third Order on Reconsideration, 14 FCC Rcd. 16299 (1999) (*Third Reconsideration Order*).

Commission's conclusion that the statutory term "interLATA services" includes both telecommunications services and information services.

INTRODUCTION AND SUMMARY

In the Public Notice, the Commission seeks comments on the definitional interplay of "telecommunications," "telecommunications service," "information service," and "interLATA service" in the Telecommunications Act of 1996 ("the Act"). These questions arise from an appeal brought by the Bell Atlantic Telephone Companies and Qwest Communications International Inc. (hereinafter, "the BOC Petitioners") in the U.S. Court of Appeals for the District of Columbia Circuit, which challenges the Commission's four-year consideration and ultimate conclusions in this proceeding.⁴ In that appeal, the BOC Petitioners assert that "information services" are not "interLATA services" under the Act. The BOC Petitioners' assertion is a blatant attempt to circumvent the Act's restrictions on the provision of interLATA services by BOCs, as explicitly detailed in Sections 271 and 272 of the Act.⁵ If the Commission were to accept the BOC Petitioners' interpretation, they would be able to provide information services, such as two-way interactive video services or Internet service, without first complying with the competitive checklist requirements as Congress intended in Section 271(c)(2)(B).

When the Commission requested comments regarding the definition of "information services" and the "interLATA nature of information services" in the *Non-Accounting Safeguards NPRM*, many commenters supported the conclusion that interLATA information services are a subset of interLATA services, because the provision of information services requires an underlying "telecommunications" component. It is telling that several BOCs

⁴ *Bell Atlantic Telephone Companies v. Federal Communications Commission*, No. 99-1479 (D.C.Cir. Oct. 27, 2000) (order granting motion for remand).

⁵ 47 U.S.C. §§ 271 and 272.

came to this same conclusion.⁶ Later in the proceeding, however, the BOCs changed their minds and filed petitions for reconsideration, arguing that BOC affiliates should be able to provide “information services” according to Section 272(a)(2)(B).⁷

The Commission has the authority to interpret and implement the Act, including the definitions adopted by Congress.⁸ In determining the meaning of these key terms, the Commission already has sought and considered numerous comments. Contrary to the BOC Petitioners’ claims, the Commission has consistently held that the terms “information service” and “telecommunications service” are mutually exclusive, although each is a subset of the broader term “interLATA services” because each involves a “telecommunications” component. As the Commission has noted, “interLATA information services must logically incorporate the transmission of, or capability of transmitting information between LATAs, which is an interLATA service.”⁹

In their Brief, the BOC Petitioners claim that the Commission has not been consistent with its interpretation and application of the key terms in question. However, it is the BOCs that have failed to maintain a consistent position in this matter, making arguments for whichever interpretation best suits their business interests. Beginning with the Modification of Final Judgment’s (“MFJ”) governing the AT&T divestiture,¹⁰ the BOCs took the position that

⁶ See generally, Comments of BellSouth at 19, n.45 and Reply Comments of Ameritech at 33.

⁷ See generally, Petition for Reconsideration by BellSouth Corp.

⁸ Sections 4(i), 201(b), and 303(r) of the Act authorize the Commission to adopt any rules it deems necessary or appropriate in order to carry out its responsibilities under the Communications Act (as amended), so long as those rules are not otherwise inconsistent with the Communications Act (as amended). See *United States v. Storer Broadcasting Co.*, 351 U.S. 192, 202-03 (1956).

⁹ *Non-Accounting Safeguards Order* at ¶ 52, citing reply comments of MFS.

¹⁰ See *United States v. Western Elec. Co.*, 552 F. Supp. 131 (D.D.C. 1982).

information services were “interLATA services” and requested a waiver in order to provide them.¹¹ Similarly, in response to the *Non-Accounting Safeguards NPRM*, several BOCs took the position that the term “interLATA service” in Section 271 includes “information services” as defined in the statute. It is duplicitous for the BOCs to argue now that the Commission’s long-held position on this issue is undermined by an alleged lack of consistency in using these statutory terms in its decisions.

I. “INTERLATA TELECOMMUNICATIONS SERVICE” AND “INTERLATA INFORMATION SERVICE” MUST BE CONSIDERED SUBSETS OF THE TERM “INTERLATA SERVICE” BECAUSE BOTH INCLUDE A “TELECOMMUNICATIONS” COMPONENT.

When the Commission released the *Non-Accounting Safeguards NPRM*, it requested comments on the statutory definitions of “information service” and “interLATA service,” in addition to how these definitions affect certain requirements of Section 252.¹² Based in part on comments received, the Commission concluded that the term “interLATA service” encompasses both “interLATA information services” and “interLATA telecommunications services.”¹³ In support of this conclusion, the Commission noted that because an interLATA information service necessarily includes an interLATA transmission component, interLATA information services are provided *via* “telecommunications” and accordingly fall within the definition of an “interLATA service.”¹⁴

¹¹ See *Motion for a Waiver of the Interexchange Restriction to Permit them to Provide Information Services Across LATA Boundaries*, Civ. Action 82-0192 (June 25, 1995).

¹² See generally, *Non-Accounting Safeguards NPRM* at ¶ 42 (requesting comment on whether all “enhanced services” fall within the statutory definition of “information service”); and ¶ 44 (requesting comment on whether an information service should be considered an interLATA service when the service actually involves an interLATA telecommunications transmission component).

¹³ *Non-Accounting Safeguards Order* at ¶ 55.

¹⁴ *Id.* at ¶ 56.

Review of Section 272 of the Act clearly supports the Commission's conclusion. As the Commission pointed out in the *Non-Accounting Safeguards Order*, "Congress uses and distinguishes between 'interLATA telecommunications services' and 'interLATA information services,' demonstrating that it limited the term 'interLATA services' to transmission services when it wished to."¹⁵ Clearly, if Congress intended to limit the term "interLATA service" to the provision of an interLATA telecommunications service, it would have specifically defined it as such. Instead, Congress used the separate and distinct terms "interLATA telecommunications service" and "interLATA information service" in Section 272 to illustrate that these services are subsets of the more general term "interLATA service." Both interLATA telecommunications services and interLATA information services necessarily encompass a "telecommunications" component, which is the term used to define an "interLATA service." Thus, the Commission does not need to decide whether a facilities-based information services provider qualifies as a "telecommunications carrier" under the statute in order to determine that the phrase "interLATA service" includes "information services."

Additionally, Section 271 identifies several classes of interLATA services, including "incidental interLATA services," indicating that "incidental interLATA services" are a subset of "interLATA service." The term "incidental interLATA service" is defined in Section 271(g) to include several "information services,"¹⁶ thereby supporting the conclusion that

¹⁵ *Id.*

¹⁶ 47 U.S.C. § 271(g). Such services include audio, video, and other programming services, interactive programming services, two-way interactive video and Internet services to schools, and information storage and retrieval services.

Congress considered “information services” to be a subset of “interLATA service” when provided via telecommunications.¹⁷

A closer look at the terms in question and their statutory definitions is necessary to understand how these terms are related, yet distinct from one another. The Act includes the following definitions:

“The term ‘**telecommunications**’ means the transmission, between or among points specified by the user, of information of the user’s choosing, without change in the form or content of the information as sent and received.” 47 U.S.C. § 153(43).

“The term ‘**telecommunications service**’ means the offering of telecommunications for a fee directly to the public, or to such classes of users as to be effectively available directly to the public, regardless of the facilities used.” 47 U.S.C. § 153(46).

“The term ‘**information service**’ means the offering of a capability for generating, acquiring, storing, transforming, processing, retrieving, utilizing, or making available information via telecommunications, and includes electronic publishing, but does not include any use of any such capability for the management, control, or operation of a telecommunications system or the management of a telecommunications service.” 47 U.S.C. § 153(20).

“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).

¹⁷ This conclusion is supported by the BOCs. *See generally*, Comments of BellSouth at 21. Although BellSouth tries to argue that this interpretation leads to the conclusion that BOCs do not need to utilize a Section 272 affiliate to provide interactive or non-interactive cable and wireless service, as well as “other programming services” such as Internet access to their cable subscribers, Section 271(h) makes it clear that the provisions of Section 271(g) are intended to be narrowly construed.

In order to resolve the question of whether an interLATA information service is a subset of the more general interLATA service, it is necessary to consider all four of the definitions above. Although the natural inclination may be to compare the term “interLATA service” with the term “interLATA information service,” the key to interpreting these terms lies in the distinction between “telecommunications” and “telecommunications service.” The term “telecommunications” refers to the *transmission* of information. The term “telecommunications service” refers to the offering of telecommunications (the *transmission* of information) for a fee to the public. “Telecommunications service” relates to the provision of the broader “telecommunications.” Although closely related, Congress has created separate definitions for each of these terms in order to clarify an important distinction.

Unfortunately, the close association between these two terms creates confusion and often results in the inadvertent misuse of these terms. In particular, it happens on occasion that the term “telecommunications service” is used when “telecommunications” is more accurate, or vice versa. The BOCs themselves do not always use the terms correctly. For example, the BOC Petitioners argue that the Commission, in its 1998 Report to Congress regarding the Federal-State Joint Board on Universal Service,¹⁸ concluded that “telecommunications” and “information services” are mutually exclusive categories.¹⁹ A closer look at these statements shows that the Commission concluded that “information service” and “telecommunications service,” not “telecommunications,” are mutually exclusive categories.²⁰ In any event, the

¹⁸ *In the Matter of Federal-State Joint Board on Universal Service*, Report to Congress, 13 FCC Rcd. 11501 (1998) (“Report to Congress”).

¹⁹ BOC Petitioners’ Brief at 8.

²⁰ Report to Congress at ¶ 13. The Commission states, “[w]e conclude, as the Commission did in the *Universal Service Order*, that the categories of ‘telecommunications service’ and ‘information service’ in the 1996 Act are mutually exclusive” (emphasis added).

inadvertent misuse of these statutory terms cannot and does not undermine the conclusions reached by the Commission when it directly and thoroughly considered the meaning of those terms. Because the Commission has never wavered from the correct interpretation of these terms when it has addressed the issue, the Commission's conclusions are subject to deference by the Court in accordance with the standard set forth by *Chevron U.S.A., Inc. v. NRDC*.²¹ CompTel endorses the Commission's existing interpretation as the only reasonable conclusion that is consistent with the language of the Act as well as the underlying policies and purposes.

II. THE BOC PETITIONERS' BRIEF IS SELF-SERVING AND DOES NOT SUPPORT THE CONCLUSION THAT INFORMATION SERVICES FALL OUTSIDE THE SCOPE OF "INTERLATA SERVICE" AS DEFINED BY THE ACT.

Comments filed in this proceeding by BOCs and other parties support the conclusion reached by the Commission that an interLATA information service is an "interLATA service" because an information service necessarily includes a "telecommunications" (*i.e.* *transmission*) component.²² It is hypocritical for the BOCs to argue that an interLATA information service is an interLATA service for some purposes, but not for others. As noted above, the BOC Petitioners' Brief contains several assertions that are based on incomplete statements, many of which are erroneously quoted or taken out of context. This is an ongoing attempt by the BOCs to manipulate these definitions contrary to their language and Congress'

²¹ *Chevron U.S.A., Inc. v. NRDC*, 467 U.S. 837 (1984).

²² *See generally*, Comments of MFS Communications Co. (Congress clearly indicated an intent to include both information services and telecommunications services in "interLATA services" by distinguishing between them in Section 272); Comments of NYNEX Corp. ("since the Act defines 'interLATA service' as 'telecommunications between a point located in a LATA and a point located outside such LATA, it follows that a BOC may provide an 'interLATA information service' (*or any other kind of interLATA service*) only if the BOC provides telecommunications (defined to mean transmission) between a point located in one LATA and a point outside that LATA"); and Comments of BellSouth Corp. ("[t]hus, an 'interLATA information service' is an 'information service' that also constitutes an 'interLATA service' because it is provided via interLATA 'telecommunications'").

intentions. The history of inconsistent positions taken by the BOCs throughout this proceeding undermines their new attacks on the meaning of the term “interLATA service.”

Prior to this proceeding, in the Spring of 1995, several BOCs petitioned the MFJ Court for a waiver of the interLATA restriction in order to provide information services.²³ In support of their petition, the BOCs vigorously argued that interLATA transport is an essential element of information services. After passage of the Telecommunications Act of 1996 and throughout this proceeding, the BOCs have continued to argue both sides in order to gain a regulatory advantage based on these key definitions. For example, Ameritech argued that “interLATA information services” are a subset of “interLATA telecommunications services” and are “activities described in section 271(f)” to conclude that the “previously authorized activities” exemptions from the separate subsidiary requirement described in section 271(f) and section 272(a)(2)(B)(iii) should also apply to previously waived interLATA information services.²⁴ BellSouth argued that out-of-region interLATA services encompass out-of-region interLATA *information* services, such that the provision of such services is exempt from the separate affiliate requirement, pursuant to Sections 271(b)(2) and 272(a)(2)(B)(ii).²⁵

CompTel urges the Commission to reject the BOCs’ blatant attempt to distort the meaning of the statutory term “interLATA service.” The Commission also should reject the BOCs’ efforts to magnify the impact of a correct reading of the statute. Certainly, the question

²³ See generally, Comments of MFS Communications Co. at 7

²⁴ Reply Comments of Ameritech at 32-33. Ameritech argues that “[j]ust as Congress, when discussing waived activities in the Conference Report, used ‘interLATA service’ as shorthand for the subsets of that service, including ‘interLATA information services,’ it used the same shorthand in section 272(a)(2)(B)(iii).”

²⁵ Petition for Reconsideration by BellSouth Corp. at 11 (original emphasis) (Feb. 20, 1997). Joint comments filed by Bell Atlantic and NYNEX support BellSouth’s conclusion that “interLATA information services clearly fall within the Act’s definition (continued...) ”

of whether BOC-provided Internet services falls within the definition of interLATA information services does not mean that Congress intended that all Internet service providers should be subject to regulation, or even that Internet services are “telecommunications services.” Congress intended to include “information services” within the definition of “interLATA services” in order to prevent the BOCs from abusing their local market power and avoid the potential for anti-competitive behavior associated with the integrated provision of essential local telecommunications services and information services.

CONCLUSION

For the foregoing reasons, the Commission should confirm that “information services” are within the scope of the broader statutory term “interLATA service.”

Respectfully submitted,

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of ‘interLATA services’ because by definition, interLATA information services must include telecommunications that cross LATA boundaries.”