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ORAL ARGUMENT NOT SCHEDULED

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

NO. 05-1032

BELLSOUTH TELECOMMUNICATIONS, INC.,

Petitioner,

v.

FEDERAL COMMUNICATIONS COMMISSION
AND UNITED STATES OF AMERICA,

Respondents.

PETITION FOR REVIEW OF AN ORDER OF THE
FEDERAL COMMUNICATIONS COMMISSION

BRIEF FOR RESPONDENTS

THOMAS O. BARNETT
ASSISTANT ATTORNEY GENERAL

ROBERT B. NICHOLSON
JAMES J. FREDRICKS
ATTORNEYS

UNITED STATES
DEPARTMENT OF JUSTICE
WASHINGTON, D.C. 20530

SAMUEL L. FEDER
GENERAL COUNSEL

ERIC D. MILLER
ACTING DEPUTY GENERAL COUNSEL

RICHARD K. WELCH
ASSOCIATE GENERAL COUNSEL

FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C. 20554
(202) 418-1740

CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

A. Parties:

1. Parties and *Amici* Before the Court

BellSouth Telecommunications, Inc. ("BellSouth") is the petitioner in this case.

The Federal Communications Commission ("Commission") and the United States of America are respondents.

AT&T Inc. ("AT&T") originally intervened in support of respondents, but moved the Court on May 31, 2006, to withdraw as an intervenor.

The Verizon Telephone Companies and Qwest Corp. are *amici*.

2. Parties to the Proceeding Below

AT&T Corp. (a predecessor to AT&T Inc.) and BellSouth participated in the complaint proceeding before the Commission.

B. Ruling Under Review:

AT&T Corp. v. BellSouth Telecommunications, Inc., Memorandum Opinion and Order, FCC 04-278 (released Dec. 9, 2004) (*Order*) (JA 1). A public version of the *Order*, with confidential information redacted, is published at 19 FCC Rcd 23898. In this brief, we cite to the non-public, unredacted version of the *Order* reproduced in the Joint Appendix.

C. **Related Cases:**

The order on review has not previously been before this Court or any other court, and Commission counsel are not aware of any related cases currently pending before this Court or any other court. This case was consolidated with *AT&T Corp. v. FCC*, No. 05-1117 (filed April 8, 2005), but the Court recently granted AT&T's motion to withdraw its petition for review. *See* Order, No. 05-1032 (D.C. Cir. April 21, 2006).

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GLOSSARY

1996 Act	Telecommunications Act of 1996, Pub.L.No. 104-104, 110 Stat. 56
BOC	Bell Operating Company
Br.	Petitioner's brief
JA	Joint Appendix
Order	*AT&T Corp. v. BellSouth Telecommunications, Inc.*, Memorandum Opinion and Order, FCC 04-278 (released Dec. 9, 2004)
PSIP	Premium Service Incentive Plan
TSP	Transport Savings Plan

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PETITION FOR REVIEW OF AN ORDER OF THE
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BRIEF FOR RESPONDENTS

JURISDICTION

The Federal Communications Commission issued the *Order* under review on December 9, 2004. BellSouth filed a petition for review on February 4, 2005, which was timely under 28 U.S.C. § 2344. This Court has jurisdiction under 47 U.S.C. § 402(a) and 28 U.S.C. § 2342(1).

ISSUE PRESENTED

It is undisputed that BellSouth: (a) sold network access to its subsidiary BellSouth Long Distance at disproportionately large discounts [redacted] (b) failed to offer any cost justification for the disproportionate discounts; and (c) imposed "shortfall" penalties on access customers whose annual purchases

from BellSouth fell below 90 percent of prior expenditures. On these facts the issue is whether the Commission reasonably found that BellSouth discriminated in favor of its long distance subsidiary in violation of 47 U.S.C. § 272.

STATUTES

Pertinent statutes are set out in the appendix to this brief.

COUNTERSTATEMENT OF THE CASE

This case involves the lawfulness of BellSouth's Transport Savings Plan ("TSP"), under which BellSouth sold tariffed special access services on a wholesale basis at volume discounts to long distance providers such as AT&T Corp., MCI WorldCom, and BellSouth Long Distance. Those carriers needed access to BellSouth's network to complete long distance calls on behalf of their retail customers. Such network access is essential to the provision of retail long distance voice and data services, and the price of network access is a significant part of the retail rates a long distance provider charges to its end-user customers.

AT&T, a TSP customer, complained to the Commission that the TSP violated various provisions of the Communications Act. After the parties engaged in discovery and full briefing, the Commission in the *Order* on review granted AT&T's complaint in part and dismissed and denied it in part. *AT&T Corp. v. BellSouth Telecommunications, Inc.*, Memorandum Opinion and Order, FCC 04-278 (released Dec. 9, 2004) (JA 1).[1] The Commission held that BellSouth violated section 272 of the Communications Act, as amended, [redacted]

[1] A public version of the *Order*, with confidential information redacted, is published at 19 FCC Rcd 23898. In this brief, we refer to the non-public, unredacted version of the *Order* reproduced in the Joint Appendix.

[redacted] The Commission ordered BellSouth to terminate the TSP tariff and encouraged it to file a new tariff that did not suffer from the discriminatory effects of the TSP. BellSouth filed a new volume discount plan shortly thereafter. The parties also entered into a private settlement, thus obviating an agency inquiry into damages. BellSouth's petition for review challenges the *Order*'s determination that the TSP violated section 272's prohibition against discrimination.[2]

COUNTERSTATEMENT OF FACTS

I. Statutory and Regulatory Background

A. Section 272

The 1982 AT&T consent decree flatly barred the Bell Operating Companies ("BOCs") from offering long distance services (also called "interLATA" services) in their local markets.[3] In the Telecommunications Act of 1996 ("1996 Act"),[4] Congress provided the BOCs an opportunity to enter the long distance market, but that opportunity came with a condition: the BOCs were required to take certain actions to open their local markets to competition.[5] Like the consent decree, the new statutory scheme displayed considerable concern about the BOCs' ability, upon entry into the long distance market, to leverage their market power over local

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[2] AT&T filed its own petition for review of the *Order*, which the Court docketed as No. 05-1117. After AT&T merged into SBC Corp., the newly merged entity – now renamed AT&T, Inc. – withdrew that petition for review. *See* Order, No. 05-1032 (D.C. Cir. April 21, 2006). The post-merger AT&T also moved the Court on May 31, 2006 to withdraw as an intervenor in support of the Commission.

[3] *See BellSouth Corp. v. FCC*, 162 F.3d 678, 681 (D.C. Cir. 1998); *SBC Communications, Inc. v. FCC*, 138 F.3d 410, 412 (D.C. Cir. 1998).

[4] Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56.

[5] *See US WEST Communications, Inc. v. FCC*, 177 F.3d 1057, 1060 (D.C. Cir. 1999), *cert. denied*, 528 U.S. 1188 (2000); 47 U.S.C. § 271.

exchange service to gain an advantage in long distance. One response to that concern was the anti-discrimination provisions of section 272.[6]

Under section 272, a BOC may provide FCC-authorized "in-region" long distance services only through a separate affiliate. 47 U.S.C. § 272(a).[7] In order to complete long distance calls on behalf of its retail customers, a BOC's new section 272 affiliate – like all long distance providers[8] – must purchase access to the BOC's local network. This creates the possibility that the parent BOC could favor its affiliate in the provision of network access in ways that might disadvantage unaffiliated long distance competitors.

Section 272 addresses that possibility by establishing special anti-discrimination rules that a BOC must follow in dealing with its long distance affiliate. Under section 272(c)(1), a BOC such as BellSouth "may not discriminate between [its long distance affiliate, here

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[6] Section 272 is not the only part of the statute that seeks to limit the BOCs' ability to use their dominance of the local market to gain an advantage in long distance. For example, under section 271, a BOC wishing to provide long distance service within its local service area must apply to the Commission for authorization on a state-by-state basis. 47 U.S.C. § 271(d). And to obtain such authorization, the BOC must demonstrate that it has complied with a comprehensive fourteen point "competitive checklist." 47 U.S.C. § 271(c)(2)(B). That checklist, among other things, incorporates by reference certain "stringent market-opening duties" involving interconnection, provision of unbundled network elements, and resale of services that apply to all incumbent local telephone carriers. *Ass'n of Communications Enterprises v. FCC*, 235 F.3d 662, 664 (D.C. Cir. 2001); *see* 47 U.S.C. § 251(c)(2), (3), (4).

[7] That long distance affiliate must: (1) "operate independently" from the BOC; (2) maintain separate books, records, and accounts; (3) have separate officers, directors, and employees; (4) obtain credit independently of the BOC; and (5) conduct all transactions with its parent BOC "on an arm's length basis … reduced to writing and available for public inspection." 47 U.S.C. § 272(b)(1)-(5).

[8] Historically, BellSouth and other BOCs sold network access services to long distance providers such as AT&T, MCI, and Sprint through tariffs filed at the Commission that imposed fees known as "access charges." *See generally WorldCom, Inc. v. FCC*, 238 F.3d 449, 453 (D.C. Cir. 2001); 47 U.S.C. § 203. Under 47 U.S.C. §§ 201 and 202, such charges must be just and reasonable, and free of any "unreasonable" discrimination.

BellSouth Long Distance] and any other entity in the provision … of goods, services, facilities, and information." 47 U.S.C. § 272(c)(1). Likewise, when providing services such as network access, under section 272(e)(3), BellSouth must charge BellSouth Long Distance (or impute to itself) "no less than the amount charged to any unaffiliated [long distance] carriers for such service." 47 U.S.C. § 272(e)(3).[9]

B. The *Non-Accounting Safeguards Order*

In 1996, the Commission issued the *Non-Accounting Safeguards Order*, which established rules to implement section 272. 11 FCC Rcd 21905 (1996) (subsequent history omitted). The Commission concluded that section 272 establishes an "unqualified prohibition" against discrimination by a BOC in its dealings with its own affiliate and unaffiliated long distance competitors. *Id.* at ¶ 197; *see also id.* at ¶ 16 ("We interpret section 272(c)(1) as imposing a flat prohibition against discrimination."). Over the objections of the BOCs, the agency determined that this absolute ban – unique to BOCs entering the long distance market – was more stringent than the qualified discrimination provision that is found in section 202(a) of the Communications Act, which prohibits only "unjust and unreasonable" discrimination. *Id.* at ¶ 197 (Congress did not intend the section 272 prohibition to be "synonymous" with the section 202 prohibition, but rather "more stringent"); ¶ 16 (same). *See also* 47 U.S.C. § 202(a). The agency reached its interpretation on the basis of the statute's language and its purpose of "preventing anticompetitive abuses by BOCs that control essential local facilities and seek to

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[9] The section 272 safeguards described above – with the exception of the section 272(e)(3) prohibition against discrimination – cease to apply in a particular state three years after the BOC receives FCC approval to provide long distance service in that state, unless the Commission acts to extend the safeguards. 47 U.S.C. § 272(f)(1); *see generally AT&T Corp. v FCC*, 369 F.3d 554 (D.C. Cir. 2004).

enter competitive markets that require these facilities as an input." *Non-Accounting Safeguards Reconsideration Order*, 12 FCC Rcd 8653, 8658 ¶ 10 (1997) (citing *Non-Accounting Safeguards Order* at ¶¶ 13, 16). The unqualified ban on discrimination meant that the BOCs "must treat all other entities in the same manner in which they treat their section 272 affiliates," *Non-Accounting Safeguards Order* at ¶ 16, and "must provide to unaffiliated entities the same goods, services, facilities, and information [they provide] to [their] section 272 affiliate[s] at the same rates, terms, and conditions," *id.* at ¶ 202 (discussing section 272(c)(1)). No party sought judicial review of that holding.

The Commission held that a BOC may offer volume and term discounts to its long distance affiliate, but only if it makes them "available on a nondiscriminatory basis to all unaffiliated [long distance] carriers." *Id.* at ¶ 257 (discussing section 272(e)(3)). The Commission approved such discounts because "'price differences, such as volume and term discounts, when based upon legitimate variations in costs, are permissible under the 1996 Act when justified.'" *Id.* at ¶ 212 (quoting *Local Competition Order*, 11 FCC Rcd 15499, 15928 ¶ 860 (1996) (subsequent history omitted)). *See also id.* ("[W]here costs differ, rate differences that accurately reflect those differences are not unlawfully discriminatory.").

But the Commission emphasized that even a facially neutral BOC tariff containing volume discounts may be unlawfully discriminatory under section 272, and it observed that "a BOC may have an incentive to offer tariffs that, while available on a nondiscriminatory basis, are in fact tailored to its affiliate's specific size, expansion plans, or other needs." *Id.* at ¶ 257. The Commission pledged to address such "potential discrimination" in the context of complaints filed under 47 U.S.C. § 208. *Id.* Echoing its emphasis on cost variations, the Commission specifically noted that a BOC facing such a complaint may rebut a charge of discrimination by

demonstrating, among other things, "that rate differentials between the section 272 affiliate and unaffiliated entity reflect differences in cost." *Id.* at ¶ 212.

II. BellSouth's Entry into Long Distance and Its Implementation of the Transport Savings Plan

In September 1997, BellSouth's long distance subsidiary, BellSouth Long Distance, filed its first section 271 application to provide long distance service in South Carolina. The Commission denied the application, finding that BellSouth had failed to satisfy the statutory requirement that it fully open its local market to competition.[10] After several more unsuccessful applications,[11] BellSouth won approval for Georgia and Louisiana in May 2002 and for its remaining seven states later that year.[12] BellSouth was the first BOC to receive authority to provide long distance service throughout its local service territory. Three years later, the structural, transactional, and nondiscrimination safeguards of section 272 – but not the discrimination ban in section 272(e)(3) – ended by operation of law in all states in BellSouth's region. *See* 47 U.S.C. § 272(f).

Meanwhile, BellSouth had filed its Transport Savings Plan tariff with the Commission in March 1999. The TSP is an optional discount plan for special access services, which are used by long distance carriers to provide retail long distance service to end-user customers. More specifically, in a typical situation relevant to this case, a long distance carrier will lease a

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[10] *South Carolina Denial Order*, 13 FCC Rcd 539 (1997). On review, this Court affirmed the Commission's action and rejected BellSouth's various constitutional attacks on section 271. *BellSouth v. FCC*, 162 F.3d 678 (D.C. Cir. 1998).

[11] *Louisiana I Denial Order*, 13 FCC Rcd 6245 (1998); *Louisiana II Denial Order*, 13 FCC Rcd 20599 (1998).

[12] *Georgia/Louisiana Authorization*, 17 FCC Rcd 9018 (2002); *BellSouth Five State Authorization*, 17 FCC Rcd 17595 (2002) (Alabama, Kentucky, Mississippi, North Carolina, South Carolina); *Florida/Tennessee Authorization*, 17 FCC Rcd 25828 (2002).

dedicated line (or lines) from BellSouth linking the carrier's facilities to one of its business customers that generates large volumes of voice and data traffic. Because traffic on that dedicated line bypasses BellSouth's switches and travels directly from the end-user customer to the long distance carrier's network, the access service provided by BellSouth is denoted as "special."[13]

The TSP is an "overlay" plan in which BellSouth provides volume discounts to certain customers.[14] The discount levels vary according to two factors. The first factor is the customer's volume. Customers are grouped into six revenue bands, with increasing discounts for each band.[15] The second factor is the customer's year in the plan: The discounts increase annually within each band from year one to year five. For example, a customer in the $3 million - $10 million revenue band (the lowest volume band) earns a discount of one percent in the first year of its TSP term, increasing to a maximum of three percent in year five and any extension year. A customer in the $500 million - $600 million revenue band earns a discount of five percent in the first year of its TSP term, to a maximum of 12 percent in the fifth year and any extension year.

To be eligible for the TSP, a customer must commit to buy special access from BellSouth for five years in annual amounts equal to at least 90 percent of its annualized purchases from BellSouth in the six months immediately preceding its subscription to the plan. This is called the

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[13] *See generally WorldCom*, 238 F.3d at 453 (explaining the distinction between special access and more conventional "switched" access).

[14] BellSouth offers other special access discount plans that do not provide volume-based discounts; as an "overlay," the TSP may function in combination with those other plans and provides incremental discounts beyond those available under the non-volume-based plans.

[15] The volume bands are as follows: $3 million to $10 million; $10 million to $100 million; $100 million to $300 million; $300 million to $500 million; $500 million to $600 million; and over $600 million.

customer's "committed volume level."[16] A customer may choose to increase its committed volume level to reach a higher volume band – thus earning a greater discount – but it may not lower its annual volume commitment. If a customer does not meet its committed volume level in a particular year, it must pay shortfall charges. And if a customer leaves the TSP before the plan's scheduled end, it must pay termination charges. At the end of the five-year term, a customer may invoke the so-called "evergreen" provision and extend its TSP plan in one-year increments indefinitely, so long as the customer continues to buy special access service from BellSouth at its committed volume level or higher.

The TSP took effect without suspension or investigation on April 6, 1999, over the objections of MCI WorldCom and AT&T. Subsequently, those two carriers subscribed to the plan, as did several other carriers, including BellSouth Long Distance. In June 2004, BellSouth amended its tariff to close the plan to new subscribers. Existing customers, however, were grandfathered and were permitted to invoke the evergreen provision to extend the plan indefinitely by one-year increments.

III. The Complaint Proceeding Before the Commission

A. Positions of the Parties

In July 2004, AT&T filed an administrative complaint against BellSouth under 47 U.S.C. § 208. AT&T alleged that the TSP violated the Communications Act in three ways: it was unjust and unreasonable, in violation of section 201(b); it was unreasonably discriminatory, in violation

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[16] For example, a customer that bought $5 million of special access from BellSouth in the last six months of 1999 would have to commit to buy at least $9 million per year for five years in order to enjoy TSP discounts ([$5 million x 2] x .9 = $9 million). A $250 million customer in the last six months of 1999 would have to commit to buy at least $450 million per year for five years ([$250 million x 2] x .9 = $450 million).

of section 202(a); and it discriminated in favor of BellSouth Long Distance over rival long distance carriers, in violation of section 272. AT&T placed particular emphasis on the requirement that customers participating in the TSP commit to buy at least 90 percent of their purchases from the previous year.

As permitted by the Commission's rules, AT&T bifurcated its complaint and initially sought only a determination of liability and prospective relief, reserving the right to file a supplemental complaint for damages at a later time. After engaging in discovery, AT&T and BellSouth each filed extensive briefs and reply briefs. Many key facts in the case were undisputed, and the case largely turned on the legal conclusions to be drawn from those facts.

As the administrative record developed, BellSouth's own description of the operation and purposes of the TSP became central to the dispute. BellSouth argued that the TSP served two objectives: (1) to maintain traffic on existing facilities; and (2) to provide meaningful discounts to the entire eligible base of BellSouth's special access customers, not just those with higher volume levels. BellSouth Legal Analysis at 17 (JA 164). To achieve this second objective, BellSouth asserted, the discounts under the TSP varied "somewhat" with volume commitment level, "but they are not proportional to volume." *Id.* at 19 (JA 166); *see also* Mims Declaration at 8 (JA 81) (BellSouth did not intend for TSP discounts to be proportional to volume).

[redacted] Even though TSP discounts were based on volume, BellSouth "sought to avoid creating a vast difference in pricing based on volume." BellSouth Legal Analysis at 68

(JA 215). [redacted] *Id.* at 68-69 (JA 215-216).[17]

AT&T emphasized BellSouth's own statements to support its case against the TSP. In its reply to BellSouth's answer, for example, AT&T assailed BellSouth's objective of "increasing discounts to smaller customers more than their volumes would have justified on a cost basis (and to do so through cross-subsidizing discounts at the expense of otherwise appropriate volume discounts for larger customers)." AT&T Reply at 37 (JA 245); *see also id.* at 40 (JA 247) ("This is simply a brute preference to smaller customers at the expense of larger customers, and BellSouth touts this fact."); at 43 (JA 250) [redacted] *Id.* at 15 (JA 243) (quoting *Non-Accounting Safeguards Order* at ¶ 257).

In later submissions, AT&T expanded upon these points.[18] It complained that "smaller customers received discounts many times larger than those that would have been proportional to the discounts received by customers that dwarfed the small customers' demand." AT&T Initial Brief at 52 (JA 414). [redacted]

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[17] BellSouth reiterated these points throughout its pleadings. *See, e.g.*, Mims Declaration at 12, 13-14, 15-16 (JA 85, 86-87, 88-89); BellSouth Initial Brief at 33, 48, 59-61, 105 (JA 320, 335, 346-48, 392).

[18] *See, e.g.*, AT&T Initial Brief at 2, 4, 48-49, 52-54, 77-78, 140-42, 148 (JA 401, 403, 411-12, 414-16, 418-19, 421-23, 425); AT&T Reply Brief at 3, 7, 58-60, 72-76 (JA 432, 434, 438-40, 442-46).

[redacted] *Id.* at 53 (JA 415). [redacted] *Id.* at 52, 53-54 (JA 414, 415-16).

In response, BellSouth argued that section 272 does not "impos[e] a blanket, strict cost justification standard on volume discounts, prohibiting BOCs in every instance from softening the advantage they confer on larger customers, [redacted] BellSouth Initial Brief at 48-49 (JA 335-36).

B. The *Order* on Review

The Commission determined that two separate features of the TSP violated section 272. *Order* at ¶¶ 18-42 (JA 7-19).[19] [redacted] *Id.* at ¶¶ 22-33 (JA 9-15). [redacted] *Id.* at ¶¶ 34-42 (JA 15-19).

The Commission directed BellSouth to terminate the TSP after a transition period, and it

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[19] The Commission's conclusion that the TSP was unlawful arose under both section 272(c)(1) and section 272(e)(3). As the Commission noted, no party argued that the two subsections imposed different substantive prohibitions, at least as applied to volume discount plans, and relevant Commission precedent called into question discount plans that favor a BOC affiliate under both subsections. *Order* at n.59 (JA 8).

encouraged BellSouth to file another volume discount plan for special access services that did not suffer from the discriminatory effects of the TSP. *Id.* at ¶¶ 52-57 (JA 22-24).

Discount Structure. As an initial matter, the agency explained that volume discounts are based on the well-established principle that costs per unit of output tend to decline as volume increases; reduced costs per unit may be passed on to customers in the form of volume discounts. Relying on its experience with federal tariffs, the Commission further noted that, as a general matter, volume discounts are "linear" in that such discounts tend to rise in close proportion to the rise in volume, reflecting economies of scale. *Id.* at ¶ 22 (JA 9).

BellSouth, however, devised its plan so that discounts were disproportional to volume. [redacted] *Id.* at ¶ 24 (JA 10).

The Commission illustrated the disproportionality of the plan with the following table:

Comparison of Discount Levels[20]

Customer size (in eligible revenues)	under TSP (year 5)	under proportional volume discount plan
$3 - $10 million	3%	0.07%
$10 - $100 million	5%	0.24%
$100 - $300 million	9%	2.40%
$300 - $500 million	10%	7.20%
$500 - $600 million	12%	12.00%
over $600 million	12.5%	14.40%

[20] *See Order* at ¶ 24 (JA 10) (using data provided by Mims Declaration at 16 (JA 89)).

One effect of the TSP discount structure was to narrow the gap or "discount differential" between discount levels available to large and small customers from what would have been available under a proportional plan. [redacted] *Id.* at ¶¶ 24-25 (JA 10-11).

The Commission emphasized, moreover, that BellSouth had not even claimed – let alone documented with evidence – a cost justification for these discounts, *id.* at ¶ 28 (JA 12), even though the Commission's *Non-Accounting Safeguards Order* had specifically held that a BOC may rebut a charge of discriminatory volume discounts under section 272 by demonstrating that the challenged rate differentials reflected differences in cost. [redacted] The Commission disagreed. [redacted] *See id.* at ¶ 32 (JA 13-14).

90 Percent Commitment Requirement. [redacted] *Id.* at ¶¶ 36-42 (JA 15-19). [redacted]

Id. at ¶ 38 (JA 16).

Id. (JA 16-17).

Id. (JA 17). The Commission also noted that the effects of the 90 percent requirement were exacerbated by BellSouth's elimination of an option under which TSP customers whose volumes were declining could allow their terms to lapse, wait six months, and then re-subscribe at a lower volume level. *Id.* (JA 17). As a result of the change, any customer that experienced a decline in volume would be ineligible for future participation in the TSP.

The Commission buttressed that finding by drawing an "instructive" but admittedly imperfect analogy between the 90 percent commitment requirement and so-called "growth

discounts," under which customers that commit to increase volume annually are rewarded with greater discounts. *Id.* at ¶ 37 (JA 16). The Commission had rejected such growth discounts by BOCs as inconsistent with section 272 because they create an artificial advantage for BOC section 272 affiliates, who start with no subscribers but have significant prospects for rapid growth because of their substantial name recognition and existing relationships with end-user customers. Though the TSP did not require an increase in volume as does a classic growth discount, the Commission found that it presented the same concerns given the unique nature of BOC entry into the long distance market. *Id.* at ¶¶ 37-38, n.104, n.110 (JA 16).

[redacted] *Id.* at ¶¶ 34-35 (JA 15).[21]

[21] The Commission also considered and rejected BellSouth's contention that it could not have devised the TSP with BellSouth Long Distance in mind because its affiliate did not receive approval to enter the long distance business until 2002. *Id.* at ¶¶ 39-42 (JA 17-19). BellSouth had created its long distance affiliate and filed several section 271 applications before it filed the TSP tariff. *Id.* at ¶ 39 (JA 17-18). In any event, liability under section 272 hinges on the *effect* of the TSP, not on BellSouth's intent in devising it. The agency did not reach AT&T's related theories that the TSP violated sections 201(b) and 202(a), and it dismissed those claims without prejudice. *Id.* at ¶ 43 (JA 19). The Commission rejected BellSouth's contentions that the applicable statute of limitations and principles of equitable estoppel barred AT&T's complaint. *Id.* at ¶¶ 44-51 (JA 19-22). Finally, the Commission denied AT&T's challenges to a second BellSouth volume discount plan for special access, known as the "PSIP," finding that plan materially distinguishable from the TSP. *Id.* at ¶ 58 (JA 25). None of the latter three holdings is presented for judicial review.

C. Subsequent Events

Three months after release of the Commission's *Order*, BellSouth terminated the TSP. In a simultaneous filing,[22] BellSouth introduced a new optional volume and term discount plan for special access services, which it called the Transport Advantage Plan. That new plan omitted any required commitment to future spending levels based on previous spending levels (such as the TSP 90 percent commitment requirement), and it modified the discount structure. BellSouth's revised volume discount plan took effect without challenge and remains in effect today.

In addition, the parties entered into a private settlement in light of the *Order*, and AT&T subsequently advised the Commission that it would not file a supplemental complaint seeking damages. The agency thus had no occasion to consider whether BellSouth would owe damages to AT&T as a result of its violation of section 272.

SUMMARY OF THE ARGUMENT

The Telecommunications Act of 1996 allowed Bell Operating Companies to enter the market for long distance telephone service. But to ensure that the long distance market remained competitive, the Act also imposed strict limits on the conduct of the BOCs. One such limit is found in section 272, which provides that a BOC "may not discriminate" between its long distance affiliate "and any other entity in the provision … of goods, services, facilities, and information." 47 U.S.C. § 272(c)(1).

This case involves the application of a longstanding and unchallenged interpretation of section 272 set out in the FCC's *Non-Accounting Safeguards Order*. That 1996 rulemaking order made clear that section 272 imposes an absolute ban on discrimination by a BOC in favor

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[22] *See* BellSouth Transmittal No. 882 (filed Mar. 30, 2006).

of its long distance affiliate. But it allowed a BOC to offer volume discounts to large customers and to defend against a section 272 challenge to those discounts by showing that its rates reflect variations in costs of providing service.

[redacted]

When challenged, BellSouth made no effort to show that those rates reflected actual variations in costs of providing service. Nor does BellSouth deny that the TSP contained a 90 percent commitment requirement that established a volume "floor" for every TSP customer based on prior expenditures, resulting in a penalty for any customer who failed to meet that volume target in a given year.

[redacted] As the Commission's *Order* explains, two separate features of the TSP violate the statute.

1. [redacted] Because BellSouth failed to produce any evidence to show that its discounts reflected variations in costs, the Commission properly found that BellSouth's skewed discounts violated section 272. That holding is consistent with the *Non-Accounting Safeguards Order* and

faithful to the language and purpose of section 272 to prevent a BOC from favoring its long distance affiliate at the expense of other long distance providers.

Contrary to BellSouth's suggestion, the Commission did not require – or even suggest – that all discounts must be directly proportional to volume; nor does its holding call into question the lawfulness of non-discounted prices for telecommunications services. [redacted] The Commission did not deviate from past practice, as BellSouth claims, but rather followed applicable precedent – the *Non-Accounting Safeguards Order* – in requiring BellSouth to provide some form of cost justification for its challenged discounts. [redacted]

BellSouth argues that the Commission committed procedural error because, it alleges, no party challenged this aspect of the TSP. This claim is barred by 47 U.S.C. § 405(a), because BellSouth did not raise it first with the Commission in a petition for reconsideration. The challenge also is substantively unfounded because, contrary to BellSouth's position, the discount structure was discussed in detail in the record below by both parties. [redacted]

[redacted] It also provided the data that the Commission relied on to describe and quantify the discriminatory effects of the discounts.

2. [redacted]

BellSouth's policy arguments in favor of the 90 percent rule ignore the language and purpose of section 272. Its assertion that the *Order* will deter volume discount plans conflicts with its broader claim that the special access market is highly competitive, forcing providers to offer volume discounts and other features to attract and hold customers. And, of course, BellSouth promptly replaced the TSP with a new volume discount plan that remains in effect. Likewise, BellSouth's suggestion that it has no reason to favor its affiliate by engaging in a price

squeeze finds no basis in the language, history, or purpose of section 272, which bans all forms of BOC discrimination and is not limited to addressing price squeezes.

BellSouth's argument that the 90 percent requirement was facially neutral misses the point that the Commission must examine the actual effect of a tariff. Here, the Commission reasonably determined that the TSP's effects made it discriminatory. [redacted] Customers do not give up their right to challenge a discriminatory plan by subscribing to it rather than paying undiscounted rates.

ARGUMENT

I. STANDARD OF REVIEW

This Court's review of the Commission's interpretation of the Communications Act is governed by *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984). Under *Chevron*, if "Congress has directly spoken to the precise question at issue," the Court "must give effect to the unambiguously expressed intent of Congress." 467 U.S. at 842-43. But "if the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute." *Id.* at 843.

To the extent BellSouth challenges the reasonableness of the Commission's application of section 272, the Court must uphold the Commission's action unless it is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2)(A). That standard is highly deferential, and the Commission need only articulate a "rational connection between the facts found and the choice made." *Motor Veh. Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983). The Court presumes the validity of agency action and must

affirm unless the Commission failed to consider relevant factors or made a clear error in judgment. *Cellco P'ship v. FCC*, 357 F.3d 88, 93-94 (D.C. Cir. 2004). In discharging this "limited" task, the Court may not substitute its judgment for that of the agency. *Larouche's Cmte. for a New Bretton Woods v. FEC*, 439 F.3d 733, 737 (D.C. Cir. 2006). The Court's review is "particularly deferential" where, as here, the Commission's decision is based upon predictive judgments within its area of expertise. *See BellSouth Corp. v. FCC*, 162 F.3d 1215, 1222 (D.C. Cir. 1999).

II. THE COMMISSION REASONABLY DETERMINED THAT THE TSP VIOLATED SECTION 272

In the *Order*, the Commission did exactly what it had pledged to do in the *Non-Accounting Safeguards Order* in 1996 – it adjudicated a complaint alleging that a BOC's volume discounts violated section 272 by discriminating in favor of that BOC's affiliate. *See Non-Accounting Safeguards Order* at ¶ 257. Consistent with its discussion concerning section 272 and volume discounts in the *Non-Accounting Safeguards Order*, the agency investigated whether BellSouth's TSP was in fact "tailored to its affiliate's specific size, expansion plans, or other needs." *Id.* And, as it had promised to do, the Commission specifically looked to see whether BellSouth had shown that its volume discounts were "based upon legitimate variations in costs." *Id.*; *see also id.* at ¶ 212 (BOC may rebut charge of discrimination by demonstrating that rate differentials reflect differences in costs). The Commission's investigation and analysis are thus consistent with longstanding (and unchallenged) agency precedent. And its holding that the TSP violates section 272 is faithful to that precedent and consonant with the language and purpose of section 272 in deterring favoritism by a BOC toward its long distance affiliate.

A. The Commission Properly Followed Precedent Holding That the Section 272 Prohibition Against Discrimination is Absolute

The *Order* rests upon the Commission's longstanding interpretation of the nondiscrimination provisions of section 272, set forth a decade ago in the *Non-Accounting Safeguards Order*. In that 1996 rulemaking, the Commission held that section 272 establishes an absolute ban against discrimination by a BOC in its dealings with its long distance affiliate and unaffiliated rivals. *Id.* at ¶¶ 16, 197. This prohibition is significantly broader than that imposed by section 202(a) – which prohibits only "unreasonable" discrimination[23] – because the nondiscrimination language of section 272 is unqualified. *See* 47 U.S.C. § 272(c)(1) (a BOC "may not discriminate" between its long distance affiliate and any other unaffiliated entity in the provision of services); *see also* 47 U.S.C. § 272(e)(3) (BOC shall charge its affiliate no less than it charges unaffiliated long distance providers for services). The Commission's interpretation is consistent with the statutory purpose of "preventing anticompetitive abuses by BOCs that control essential local facilities and seek to enter competitive markets that require these facilities as inputs." *Non-Accounting Safeguards Reconsideration Order*, 12 FCC Rcd at 8658 ¶ 10 (citing

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[23] *See, e.g.*, *Orloff v. FCC*, 352 F.3d 415, 420 (D.C. Cir. 2003) (generality of qualifying term "unreasonable" provides room for free play of agency discretion in determining scope of discrimination ban), *cert. denied*, 542 U.S. 937 (2004).

Non-Accounting Safeguards Order at ¶¶ 13, 16).[24] The Commission has followed this interpretation consistently, including in rulings involving BellSouth.[25]

BellSouth did not challenge that interpretation in 1996, and it does not directly challenge it here. In fact, BellSouth never seriously confronts the language and purpose of section 272, nor the Commission's precedent construing the nondiscrimination safeguards of that provision. Instead, BellSouth relies on principles drawn from antitrust cases, repeatedly asserting that the TSP was economically efficient. *See, e.g.*, Br. at 20. Arguments about efficiencies might well be relevant to the applicability of the antitrust laws, but BellSouth fails to explain why they have any relevance in the context of section 272, which imposes an absolute ban on discrimination by a BOC in favor of its long distance affiliate. As the Supreme Court has recognized, the 1996 Act is "much more ambitious than the antitrust laws." *Verizon Communications, Inc. v. Law Offices of Curtis V. Trinko*, 540 U.S. 398, 415 (2004).

B. [redacted]

(1) Under Section 272, Volume Discounts Must Be Justified By Differences in Cost

In 1996, the Commission also set forth its interpretation of the section 272 nondiscrimination provisions as they relate to volume discounts by a BOC. A BOC may offer

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[24] *See also AT&T Corp.*, 369 F.3d at 556 (section 272 safeguards designed "to deter a BOC from leveraging its local market power into long distance markets"); *Ass'n of Communications Enterprises*, 235 F.3d at 662 (same); *Bell Atlantic Tel. Cos. v. FCC*, 131 F.3d 1044, 1048 (D.C. Cir. 1997) (crediting FCC's position that section 272 is designed to prevent the BOCs from gaining an unfair competitive position in the long distance market).

[25] *See, e.g.*, *Louisiana II Denial Order*, 13 FCC Rcd at 20796-800, ¶¶ 341-47 (section 272(c)(1)), at 20802-03 ¶¶ 353-54 (section 272(e)(3)); *BellSouth Five State Authorization*, 17 FCC Rcd at 17748 ¶ 272, at 18045-46 ¶¶ 68-69.

such discounts to its long distance affiliate so long as it makes those discounts available to all unaffiliated long distance carriers, because "price differences, such as volume and term discounts, *when based upon legitimate variations in cost*, are permissible." *Non-Accounting Safeguards Order* at ¶ 212 (emphasis added). The Commission specifically advised BOCs that they may defend against a charge of discrimination by demonstrating "that rate differentials between the section 272 affiliate and unaffiliated entity reflect differences in cost." *Id.* And the agency put BOCs on notice that it would scrutinize challenged practices that appeared facially neutral to see whether they may have an unlawfully discriminatory impact, recognizing that a BOC may have an incentive to offer a tariff that, while appearing facially neutral, is in fact "tailored to its affiliate's specific size, expansion plans, or other needs." *Id.* at ¶ 257.

BellSouth did not challenge those principles when the Commission first articulated them in 1996. Nor, though the Commission adhered to those principles in the *Order* (¶¶ 19-20) (JA 7-9), does BellSouth directly challenge them in this case. Instead, BellSouth asserts (Br. at 39-40) that, under Commission precedent, carriers generally are not required to provide a cost justification for their discounts. It is true that the Commission does not always require cost justification for special access tariffs. But section 272 requires special safeguards when, as here, a BOC sells essential inputs to its long distance affiliate and to retail competitors of that affiliate.[26] BellSouth's abstract economic argument ignores section 272 as well as the relevant and binding administrative precedent, the *Non-Accounting Safeguards Order*. In that rulemaking

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[26] The Commission decisions cited by BellSouth (Br. at 39) involving volume discounts generally are inapposite because they do not address the specific situation in which a BOC is dealing with its section 272 long distance affiliate. Indeed, the primary authority BellSouth relies on was issued in 1984, around the time of AT&T's divestiture of its local operations, more than a decade before the BOCs were able to enter the long distance market through separate affiliates. *See Volume Discount Order*, 97 F.C.C.2d 923 (1984).

decision, the Commission made clear that volume-based discounts were permissible under section 272 "when based upon legitimate variations in costs," and that a BOC could defend against a charge of discrimination by demonstrating "that rate differentials between the section 272 affiliate and unaffiliated entity reflect differences in cost." *Non-Accounting Safeguards Order* at ¶¶ 257, 212. In requiring BellSouth to provide some evidence of cost differences to support its skewed discounts, the Commission simply adhered to that precedent. *See, e.g.*, *Order* at ¶¶ 19-20 (JA 7-9).

(2) [redacted] *Order* at ¶¶ 22-33 (JA 9-15). [redacted] *Id.* at ¶¶ 23-24 (JA 10-11). [redacted] *Id.* at ¶¶ 23, 27 (JA 10, 12); BellSouth Legal Analysis at 17 (JA 164). Thus, although the discounts under the TSP increased as the volume commitment level increased, BellSouth purposefully did not make the discounts "proportional to volume." BellSouth Legal Analysis at 19 (JA 166); Mims Declaration at 8 (JA 81). [redacted]

[redacted] *Order* at ¶ 24 (JA 10-11); Mims Declaration at 16 (JA 89). [redacted] *Id.* at ¶ 24 (JA 10-11); Mims Declaration at 16 (JA 89). This established the discriminatory nature of the TSP.

BellSouth's challenges to the Commission's conclusion are misplaced. First, BellSouth questions (Br. at 38-39) the Commission's observation that volume discounts typically rise in proportion to increases in volume, referring in footnotes to economic literature suggesting that scale economies sometimes can be "lumpy" or "discontinuous," rather than linear. That may well be true as a general matter, but it is irrelevant here, because the *Order* did not adopt a blanket requirement that all volume discounts be linear. [redacted] In the event a BOC actually encounters "lumpy," "discontinuous," or "tapering" scale economies and wishes to craft discounts reflecting

its actual costs, it may do so consistent with section 272, so long as it provides evidence that the pattern of discounts it has chosen is based upon legitimate variations in costs. BellSouth made no effort to produce such evidence here. [redacted] The Commission, however, rightly emphasized that it is the discriminatory *effect* of the TSP, rather than BellSouth's subjective intent, that matters for purposes of section 272. *Order* at ¶ 39 (noting that "liability under section 272 hinges on effect, not intent (although evidence of intent might be probative of effect)") (JA 17). [redacted] *Order* at ¶ 30 (JA 13).

Moreover, since BellSouth had filed the TSP in the midst of its multi-year effort to win long distance authority throughout its region, it ignores reality to suggest that the TSP somehow was conceived independently of BellSouth's simultaneous efforts to enter the long distance market, or that BellSouth did not consider the implications of the TSP for its fledgling affiliate, which would soon become a customer of the plan. *Order* at ¶ 39 (JA 17-18). After all, the Commission in its *Non-Accounting Safeguards Order* (¶ 257) had foreseen that a BOC would

have an incentive to offer a tariff "tailored to its affiliate's specific size, expansion plans, or other needs." *See Order* at ¶ 41 (JA 18-19). [redacted] *Id.* at ¶ 23 n.71 (JA 10).

Next, BellSouth speculates (Br. at 41) that the *Order*'s theory of liability, "[c]arried to its logical conclusion," would invalidate any *non*-discounted price for any telecommunications service, because non-discounted prices do not reflect scale economies. That is not the case. A provider that offered no discounts to anyone could not plausibly be said to be engaging in discrimination in violation of section 272, because it would be selling to everyone at the same price. The possibility of discrimination arises only when a provider offers discounts to some of its customers. And in that context, the Commission reasonably chose to adopt a bright-line rule that is easy to apply and that offers clear guidance to providers. In effect, the *Order* recognizes a safe harbor for discounts that are proportional to volume; discounts that are not proportional to volume are also permitted, but only if the provider shows that they are based on legitimate variations in costs. [redacted] But section 272 is intended to prevent a BOC from giving its fledgling long distance affiliate a discriminatory boost as it enters the market and seeks to take

customers away from existing rivals. That the TSP's harmful discrimination might go away once it has achieved its unlawful purpose cannot save the plan.

(3) BellSouth Failed to Show That Its Skewed Volume Discounts Were Based Upon Legitimate Variations In Costs

As noted above, the Commission has long made clear that costs are an important factor in judging the lawfulness of volume discounts offered by a BOC to its long distance affiliate. *Non-Accounting Safeguards Order* at ¶¶ 212, 257. Accordingly, the Commission looked for evidence in the record regarding whether BellSouth's discounts were based on differences in costs. *Order* at ¶ 28 (JA 12).

BellSouth, however, provided no cost information to support its discounts. [redacted]

That failure of proof is fatal to BellSouth's argument. [redacted] *Order* at ¶ 29 (JA 12) (emphasis added). In the absence of any evidence that BellSouth's skewed discounts reflected legitimate variations in costs, the Commission reasonably held that those discounts violated section 272.

(4) BellSouth's Procedural Challenge Is Baseless

BellSouth asserts (Br. at 36-37) that the Commission violated the Administrative Procedure Act and the Due Process Clause by basing its decision on a ground allegedly not at issue in the proceeding – the lawfulness of the TSP's discount structure. That alleged error, BellSouth argues, prejudiced the company by denying it an opportunity to defend itself on this issue. BellSouth's claim is jurisdictionally barred, but even if it were properly before the Court, it should be rejected on the merits.

The claim is jurisdictionally barred because BellSouth did not raise it first with the Commission in a petition for reconsideration. Under 47 U.S.C. § 405(a), a party may petition for reconsideration within 30 days after the Commission issues an order, but it may not seek judicial review of a question of fact or law upon which the Commission has been afforded no opportunity to pass. That exhaustion requirement "applies to procedural as well as substantive arguments." *AT&T Corp. v. FCC*, 113 F.3d 225, 229 (D.C. Cir. 1997); *see also 21st Century Telesis Joint Venture v. FCC*, 318 F.3d 192, 199 (D.C. Cir. 2003) (section 405 applies to due process claims).[27] Here, BellSouth's claim is that the Commission decided the case on a ground that was not properly before it. When the Commission is alleged to have made this kind of "technical or procedural mistake, such as an obvious violation of a specific APA requirement," the Court has "insisted that a party raise the precise claim before the Commission – if necessary, in a motion for reconsideration." *Time Warner Entertainment Co., L.P. v. FCC*, 144 F.3d 75, 81 (D.C. Cir. 1998). BellSouth suggests that, if it had known that it needed to defend its discounts, it could

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[27] *Accord Cassell v. FCC*, 154 F.3d 478, 485 (D.C. Cir. 1998) (alleged failure to follow APA notice and comment procedures); *Petroleum Communications, Inc. v. FCC*, 22 F.3d 1164, 1169-71 (D.C. Cir. 1994) (same); *Z-Tel Communications, Inc. v. FCC*, 333 F.3d 262, 272-73 (D.C. Cir. 2003) (alleged failure to follow procedural rules); *Freeman Eng'g Assocs., Inc. v. FCC*, 103 F.3d 169, 182 (D.C. Cir. 1997) (alleged failure to consider record evidence).

have submitted cost justification and other evidence to the agency. To the extent that is true,[28] it squarely implicates the policy underlying section 405, which is that the Commission should be given an opportunity to pass on all questions of fact or law prior to judicial review. Because BellSouth failed to raise its claim in a petition for reconsideration, this Court lacks jurisdiction to consider it.

Even if BellSouth had properly preserved the claim, it should be rejected on the merits for the simple reason that the TSP's discount structure was discussed in detail by both parties before the Commission. [redacted]

AT&T Reply at 15 (JA 243) (quoting *U.S. v. Western Elec.*, 900 F.2d 1231, 1243 (D.C. Cir. 1992)). [redacted] AT&T Initial Brief at 52-54 (JA 414-16).

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[28] BellSouth's suggestion – that it has a detailed cost justification for the TSP structure, but that it simply did not occur to the company to present this justification to the Commission – is not plausible. The *Non-Accounting Safeguards Order* specifically stated that a BOC may defend challenges of discrimination against volume discounts by providing exactly such information. BellSouth's reliance on its business discretion to set discounts strongly suggests that it did not have a cost justification.

[29] *See, e.g.*, AT&T Reply at 15, 37, 40, 43 (JA 243, 245, 247, 250); AT&T Initial Brief at 2, 4, 48-49, 52-54, 77-78, 140-42, 148 (JA 401, 403, 411-12, 414-16, 418-19, 421-23, 425); AT&T Reply Brief at 3, 7, 58-60, 72-76 (JA 432, 434, 438-40, 442-46).

BellSouth also addressed this issue with its own description of the operation and purposes of the plan. It explained that its discounts were not proportional to volume, *see* BellSouth Legal Analysis at 19 (JA 166), Mims Declaration at 8 (JA 81); [redacted] BellSouth Legal Analysis at 17 (JA 164).[30] Indeed, the Commission relied on BellSouth's own data to describe and quantify the skewing effect of the discounts. *See* Mims Declaration at 15-16 (JA 88-89). BellSouth also asserted – in direct response to AT&T's claim that the TSP violated section 272 – that section 272 does not "impos[e] a blanket, strict cost justification standard on volume discounts, [redacted] BellSouth Initial Brief at 48-49 (JA 335-36). [redacted][31]

BellSouth asserts (Br. 20) that AT&T "endorsed" the TSP's skewed discounts, but that is incorrect. To be sure, the primary form of relief that AT&T sought was the elimination of the 90

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[30] *See also* BellSouth Legal Analysis at 67-69 (JA 214-16); Mims Declaration at 12, 13-14 (JA 85, 86-87); BellSouth Initial Brief at 33, 48, 59-61, 105 (JA 320, 335, 346-48, 392).

[31] BellSouth's one-sentence assertion (Br. at 37) that the *Order* conflicts with the Commission's decision in *CoreComm Communications, Inc. v. SBC Communications, Inc.*, 19 FCC Rcd 8447 (2004), is likewise jurisdictionally barred by 47 U.S.C. § 405(a). It is also substantively baseless, because the complainant in that case had entered into a contract that – according to the complainant's stipulation – did not require the service it demanded in its complaint before the FCC. AT&T has made no such stipulation here. On the contrary, as noted above, it assailed BellSouth's discount structure in its pleadings.

percent commitment requirement. [redacted]

BellSouth emphasizes (Br. at 17, 36) statements in AT&T's administrative reply brief that AT&T "does not challenge the structure of the bands themselves" and that, in the absence of the 90 percent commitment requirement, the charges are "just and reasonable." These quotations ignore the context in which AT&T took that position. BellSouth had argued that the Commission could not simply strike the 90 percent commitment requirement and leave the discounts undisturbed because, it claimed, such action would constitute a rate prescription requiring a hearing to determine the lawfulness of the "prescribed" rates.[32] BellSouth staked out an "all-or-nothing" position on the question of remedy, contending that if the Commission found the plan unlawful, the agency must either leave the plan undisturbed or eliminate the TSP in its entirety, discounts and all. *See* BellSouth Initial Brief at 9-11, 12-20 (JA 296-98, 299-307). It was in that context – responding to BellSouth's "all-or-nothing" position on remedy – that AT&T argued that the Commission had the option of striking the 90 percent commitment requirement but leaving the discounts in place because they would result in just and reasonable charges. *See, e.g.*, AT&T Reply Brief at 8-9, 85 (JA 435-36, 453). Moreover, AT&T's statement regarding the "structure of the bands themselves" referred to the "width" of the bands, not to the actual rates charged for each band. [redacted] It did not "endorse" the TSP's discount levels.

[32] The Commission has authority to "prescribe," or set, future rates after a full opportunity for hearing. The Commission did not "prescribe" rates here, but found the existing tariff to be unlawful and required its termination.

C. [redacted]

1. As we have explained, section 272 reflects Congress's judgment that BOCs' entry into the long distance market poses unique competitive concerns. Those concerns arise from BOCs' ability to leverage its market power over local facilities into the adjacent long distant market and its incentive and ability to discriminate in favor of its long distance affiliate at the expense of competitors in the provision of services, including access service. [redacted] *Order* at ¶ 38 (JA 16-17).[33] [redacted]

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[33] [redacted] *Id.* (JA 17).

[redacted] *Id.* (JA 16). [redacted] *Id.* (JA 17). Accordingly, the Commission found that the 90 percent commitment requirement unlawfully favored BellSouth Long Distance over its existing rivals under section 272. The requirement, in short, appeared to be "tailored to [the Bellsouth] affiliate's specific size, expansion plans, or other needs." *Non-Accounting Safeguards Order* at ¶ 257.

The Commission found further support for that judgment in its longstanding rejection of so-called "growth" tariffs filed by BOCs that typically required access customers to increase their volume annually to qualify for discounts. Those tariffs were unlawfully discriminatory under section 272, the Commission had held, because they created an artificial advantage for BOC long distance affiliates due to their unique capacity for expansion, which placed them in a unique position to qualify for and benefit from such tariffs. *See Order* at ¶ 37 (JA 16). The Commission acknowledged that the analogy between the TSP and growth tariffs was not exact, since the TSP does not require a customer to grow in order to obtain discounts, yet the agency found that the 90 percent commitment requirement nevertheless presented many of the same concerns that led it to reject growth tariffs under section 272. *Id.* at ¶ 38 (JA 16-17).

The Commission's determination is reasonable and easily satisfies the "particularly deferential" standard this Court applies when reviewing predictive judgments concerning future

market conditions (*BellSouth*, 162 F.3d at 1222)[34] – especially since the agency's finding is consistent with section 272's purpose to bar any favoritism by a BOC toward its long distance affiliate.

2. In its brief, BellSouth largely ignores the language and purpose of section 272. Its argument (Br. at 23-35) rests on assertions that the 90 percent commitment requirement, in BellSouth's view, is economically efficient and that the Commission's *Order* finding that requirement unlawful will deter BellSouth and other access providers from offering volume discounts in the future. By attempting to frame the analysis in this manner, BellSouth seeks to divert the Court's attention from the statute and instead engage a debate over economic theory largely detached from the explicit anti-discrimination requirements of section 272.

In arguing that the TSP is economically efficient and therefore consistent with "sound public policy" (Br. 24), BellSouth relies on court opinions applying the antitrust laws. *See* Br. at 24, 26, 29 n.17. But those opinions do not purport to construe the 1996 Act, which, as the Supreme Court has recognized, is "much more ambitious than the antitrust laws." *Trinko*, 540 U.S. at 415. They therefore shed no light on the proper application of section 272 in this case.

In all events, to the extent that policy considerations are relevant here, BellSouth's argument founders on the assertion that the *Order* will chill volume discount plans in the future. *See, e.g.*, BellSouth Br. at 23, 26, 32. That claim is directly at odds with BellSouth's broader position that the provision of special access service is highly competitive and characterized by

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[34] *Accord Sioux Valley Regional Television, Inc. v. FCC*, 349 F.3d 667, 679 (D.C. Cir. 2003); *Consumer Electronics Ass'n v. FCC*, 347 F.3d 291, 300, 303 (D.C. Cir. 2003); *Time Warner Entertainment Co., L.P. v. FCC*, 240 F.3d 1126, 1133 (D.C. Cir. 2001).

multiple providers aggressively vying for the business of long distance carriers.[35] If competition is intense, as BellSouth maintains, market forces should compel BellSouth and other providers to compete for special access business by offering volume discounts and other attractive features in order to hold existing customers and attract new ones, at least to the extent that such discounts are justified based on cost.[36] And, in fact, shortly after the release of the *Order*, BellSouth implemented a new volume discount plan for special access that eschews anything resembling a 90 percent volume commitment requirement. That new plan remains in effect today.[37]

Continuing to overlook the language and purpose of section 272, BellSouth goes so far as to argue (Br. at 32-34) that the Commission should not be concerned about discrimination at all, because BellSouth allegedly has no incentive to discriminate in favor of its long distance affiliate. In this regard, BellSouth maintains that the "only" discrimination concern relevant to section 272 is that a BOC may conspire with its affiliate to attempt a "price squeeze" in an effort

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[35] *See, e.g.*, BellSouth Legal Analysis at 9, 16, 19, 55-60, 74 (JA 156, 163, 166, 202-08, 221); Mims Declaration at 7-8, 14 (JA 80-81, 87); Joint Statement, Appendix B (Facts Alleged by BellSouth and Disputed by AT&T) at 2.

[36] Indeed, *amici* Qwest and Verizon (Br. at 7) put it this way: "In response to this extensive competition – in the provision of both high-capacity services and the underlying special access facilities – carriers have been forced to develop new and innovative discount tariffs to meet the demands of customers that could purchase services elsewhere."

[37] BellSouth insinuates that it implemented that revised volume discount plan in response to what it calls "regulatory jawboning" by the Commission (Br. at 19), in that the *Order* (¶ 57) (JA 24) encouraged BellSouth to fashion a new plan that does not suffer from the unlawful defects of the TSP and stated that BellSouth's failure to do so might be relevant evidence in other Commission proceedings. That statement was a reference to the Commission's *Special Access* rulemaking, in which the agency currently is examining its regulatory framework for special access services and revisiting various predictive judgments it made concerning the development of competition in that market that led it to grant pricing flexibility to carriers such as BellSouth. *See Special Access*, 12 FCC Rcd 1994 (2005). To the extent that BellSouth claims it implemented its revised volume discount plan because of the Commission's statements in the *Order* – rather than to respond to competitive pressures – that would call into question claims made by BOCs in the *Special Access* record that the special access market is highly competitive.

to drive competing rivals from the market. That claim is based on a misreading of section 272. BellSouth points to nothing in the language, history, or purpose of section 272 to support the notion that Congress's concern over discrimination was limited to price squeezes. On the contrary, the Commission quite reasonably concluded in the *Non-Accounting Safeguards Order* that section 272 contains an absolute bar to all forms of discrimination in which a BOC might favor its affiliate at the expense of competing providers.[38] [redacted] BellSouth fails to confront this longstanding Commission precedent.

3. BellSouth also attempts to argue that the 90 percent commitment requirement is not discriminatory. It first emphasizes (Br. at 30) that the TSP was facially neutral in that it applied equally to all purchasers and was therefore "the very opposite of 'discrimination.'" This misses the point rightly made by the Commission (*Order* at ¶ 41) (JA 18-19) that facial neutrality does not always equate to lawfulness, and that a tariff may violate section 272 by virtue of its discriminatory effect. For this reason, the agency must look to the actual effect of the tariff's terms to determine whether discrimination exists. [redacted] But nothing in law or common sense says that the only way an unaffiliated special access customer can challenge a discount plan as discriminatory is to refuse to accept the benefit

[38] BellSouth and other BOCs at the time unsuccessfully urged the Commission to adopt a more lenient interpretation of the section 272 non-discrimination safeguards, but did not seek judicial review of the Commission's interpretation. *Non-Accounting Safeguards Order* at ¶¶ 196-97.

of the discount that is offered and instead pay full rates. [redacted]

The collapsed telecommunications boom (Br. at 25, 31-32) exacerbated the effect of the disparate rates on both the BellSouth affiliate and the larger unaffiliated carriers. The Commission took that into account in its review of the complaint, as it was required to do to assess the effects of the tariff under current market conditions. [redacted] The Commission would have been derelict if it had not considered current market realities in assessing the effect of the TSP tariff. Rates (or rate structures) that may pass muster under some economic circumstances may become unlawful when those circumstances change. Although BellSouth is incorrect in suggesting (Br. at 3, 32) that "the recent turndown in the telecommunications industry" was a linchpin in the Commission's decision, it is a factor that the Commission considered, and rightly so. It was not error for the Commission to find that the downturn exacerbated the discriminatory effect of the tariff.

The Commission also applied its expertise to predict the impact of the 90 percent volume commitment on BellSouth's customers – including BellSouth Long Distance – going forward. Those judgments were reasonable and, as noted above, are entitled to this Court's deference.[39]

Id. (JA 13).

4.

Having already found the skewed discounts to be unlawful, it was reasonable for the Commission to conclude that the 90

[39] *See BellSouth*, 162 F.3d at 1222; *see also WorldCom*, 238 F.3d at 459 (in affirming FCC's pricing flexibility rules, Court accorded deference to agency's "predictive forecasts" concerning the development of competition in the special access market). The *Order*'s focus on the current and future effect of the TSP, moreover, was fully consistent with AT&T's bifurcation of the complaint, in which it initially sought only declaratory and injunctive relief while deferring the question of whether BellSouth might be liable for any retrospective damages.

percent commitment requirement – an integral component of that unlawful scheme – to be likewise unlawful. *Order* at ¶¶ 34-35 (JA 15).

CONCLUSION

The petition for review should be denied.

Respectfully submitted,

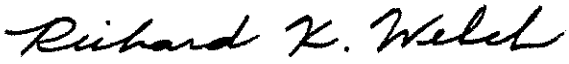
THOMAS O. BARNETT
ASSISTANT ATTORNEY GENERAL

SAMUEL L. FEDER
GENERAL COUNSEL

ROBERT B. NICHOLSON
JAMES J. FREDRICKS
ATTORNEYS

UNITED STATES DEPARTMENT OF JUSTICE
WASHINGTON, D.C. 20530

ERIC D. MILLER
ACTING DEPUTY GENERAL COUNSEL



RICHARD K. WELCH
ASSOCIATE GENERAL COUNSEL

FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C. 20554
(202) 418-1740 (TELEPHONE)
(202) 418-2819 (FAX)

June 1, 2006

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

BELLSOUTH TELECOMMUNICATIONS, INC.,	)	
PETITIONER,	)	
V.	)	
FEDERAL COMMUNICATIONS COMMISSION AND UNITED STATES OF AMERICA,	)	NO. 05-1032
RESPONDENTS.	)	

CERTIFICATE OF COMPLIANCE

Pursuant to the requirements of Fed. R. App. P. 32(a)(7), I hereby certify that the accompanying "Brief for Respondents" in the captioned case contains 12931 words.

RICHARD K. WELCH
ASSOCIATE GENERAL COUNSEL
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C. 20554
(202) 418-1740 (TELEPHONE)
(202) 418-2819 (FAX)

July 20, 2006

STATUTES

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United States Code Annotated Currentness
Title 5. Government Organization and Employees (Refs & Annos)
Part I. The Agencies Generally
Chapter 7. Judicial Review (Refs & Annos)

§ 706. Scope of review

To the extent necessary to decision and when presented, the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action. The reviewing court shall--

(1) compel agency action unlawfully withheld or unreasonably delayed; and
(2) hold unlawful and set aside agency action, findings, and conclusions found to be--
(A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;
(B) contrary to constitutional right, power, privilege, or immunity;
(C) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right;
(D) without observance of procedure required by law;
(E) unsupported by substantial evidence in a case subject to sections 556 and 557 of this title or otherwise reviewed on the record of an agency hearing provided by statute; or
(F) unwarranted by the facts to the extent that the facts are subject to trial de novo by the reviewing court.

In making the foregoing determinations, the court shall review the whole record or those parts of it cited by a party, and due account shall be taken of the rule of prejudicial error.

28 U.S.C.A. § 2342

United States Code Annotated Currentness
Title 28. Judiciary and Judicial Procedure (Refs & Annos)
Part VI. Particular Proceedings
Chapter 158. Orders of Federal Agencies; Review (Refs & Annos)

§ 2342. Jurisdiction of court of appeals

The court of appeals (other than the United States Court of Appeals for the Federal Circuit) has exclusive jurisdiction to enjoin, set aside, suspend (in whole or in part), or to determine the validity of--

(1) all final orders of the Federal Communications Commission made reviewable by section 402(a) of title 47;
(2) all final orders of the Secretary of Agriculture made under chapters 9 and 20A of title 7, except orders issued under sections 210(e), 217a, and 499g(a) of title 7;
(3) all rules, regulations, or final orders of--
(A) the Secretary of Transportation issued pursuant to section 2, 9, 37, or 41 of the Shipping Act, 1916 (46 U.S.C. App. 802, 803, 808, 835, 839, and 841a [FN1]) or pursuant to part B or C of subtitle IV, subchapter III of chapter 311, chapter 313, or chapter 315 of title 49; and
(B) the Federal Maritime Commission issued pursuant to--
(i) section 19 of the Merchant Marine Act, 1920 (46 U.S.C. App. 876);
(ii) section 14 or 17 of the Shipping Act of 1984 (46 U.S.C. App. 1713 or 1716); or
(iii) section 2(d) or 3(d) of the Act of November 6, 1966 (46 U.S.C. App. 817d(d) or 817e(d) [FN2];
[(iv) and (v) Redesignated (ii) and (iii)]
(4) all final orders of the Atomic Energy Commission made reviewable by section 2239 of title 42;
(5) all rules, regulations, or final orders of the Surface Transportation Board made reviewable by section 2321 of this title;
(6) all final orders under section 812 of the Fair Housing Act; and
(7) all final agency actions described in section 20114(c) of title 49.

Jurisdiction is invoked by filing a petition as provided by section 2344 of this title.

28 U.S.C.A. § 2344

United States Code Annotated Currentness
Title 28. Judiciary and Judicial Procedure (Refs & Annos)
Part VI. Particular Proceedings
Chapter 158. Orders of Federal Agencies; Review (Refs & Annos)

§ 2344. Review of orders; time; notice; contents of petition; service

On the entry of a final order reviewable under this chapter, the agency shall promptly give notice thereof by service or publication in accordance with its rules. Any party aggrieved by the final order may, within 60 days after its entry, file a petition to review the order in the court of appeals wherein venue lies. The action shall be against the United States. The petition shall contain a concise statement of--

(1) the nature of the proceedings as to which review is sought;
(2) the facts on which venue is based;
(3) the grounds on which relief is sought; and
(4) the relief prayed.

The petitioner shall attach to the petition, as exhibits, copies of the order, report, or decision of the agency. The clerk shall serve a true copy of the petition on the agency and on the Attorney General by registered mail, with request for a return receipt.

47 U.S.C.A. § 201

United States Code Annotated Currentness
Title 47. Telegraphs, Telephones, and Radiotelegraphs
Chapter 5. Wire or Radio Communication (Refs & Annos)
Subchapter II. Common Carriers (Refs & Annos)
Part I. Common Carrier Regulation
§ 201. Service and charges

(a) It shall be the duty of every common carrier engaged in interstate or foreign communication by wire or radio to furnish such communication service upon reasonable request therefor; and, in accordance with the orders of the Commission, in cases where the Commission, after opportunity for hearing, finds such action necessary or desirable in the public interest, to establish physical connections with other carriers, to establish through routes and charges applicable thereto and the divisions of such charges, and to establish and provide facilities and regulations for operating such through routes.

(b) All charges, practices, classifications, and regulations for and in connection with such communication service, shall be just and reasonable, and any such charge, practice, classification, or regulation that is unjust or unreasonable is declared to be unlawful: *Provided*, That communications by wire or radio subject to this chapter may be classified into day, night, repeated, unrepeated, letter, commercial, press, Government, and such other classes as the Commission may decide to be just and reasonable, and different charges may be made for the different classes of communications: *Provided further*, That nothing in this chapter or in any other provision of law shall be construed to prevent a common carrier subject to this chapter from entering into or operating under any contract with any common carrier not subject to this chapter, for the exchange of their services, if the Commission is of the opinion that such contract is not contrary to the public interest: *Provided further*, That nothing in this chapter or in any other provision of law shall prevent a common carrier subject to this chapter from furnishing reports of positions of ships at sea to newspapers of general circulation, either at a nominal charge or without charge, provided the name of such common carrier is displayed along with such ship position reports. The Commission may prescribe such rules and regulations as may be necessary in the public interest to carry out the provisions of this chapter.

47 U.S.C.A. § 202

United States Code Annotated Currentness
Title 47. Telegraphs, Telephones, and Radiotelegraphs
Chapter 5. Wire or Radio Communication (Refs & Annos)
Subchapter II. Common Carriers (Refs & Annos)
Part I. Common Carrier Regulation
§ 202. Discriminations and preferences

(a) Charges, services, etc.

It shall be unlawful for any common carrier to make any unjust or unreasonable discrimination in charges, practices, classifications, regulations, facilities, or services for or in connection with like communication service, directly or indirectly, by any means or device, or to make or give any undue or unreasonable preference or advantage to any particular person, class of persons, or locality, or to subject any particular person, class of persons, or locality to any undue or unreasonable prejudice or disadvantage.

(b) Charges or services included

Charges or services, whenever referred to in this chapter, include charges for, or services in connection with, the use of common carrier lines of communication, whether derived from wire or radio facilities, in chain broadcasting or incidental to radio communication of any kind.

(c) Penalty

Any carrier who knowingly violates the provisions of this section shall forfeit to the United States the sum of $6,000 for each such offense and $300 for each and every day of the continuance of such offense.

47 U.S.C.A. § 203

United States Code Annotated Currentness
Title 47. Telegraphs, Telephones, and Radiotelegraphs
Chapter 5. Wire or Radio Communication (Refs & Annos)
Subchapter II. Common Carriers (Refs & Annos)
Part I. Common Carrier Regulation
§ 203. Schedules of charges

(a) Filing; public display

Every common carrier, except connecting carriers, shall, within such reasonable time as the Commission shall designate, file with the Commission and print and keep open for public inspection schedules showing all charges for itself and its connecting carriers for interstate and foreign wire or radio communication between the different points on its own system, and between points on its own system and points on the system of its connecting carriers or points on the system of any other carrier subject to this chapter when a through route has been established, whether such charges are joint or separate, and showing the classifications, practices, and regulations affecting such charges. Such schedules shall contain such other information, and be printed in such form, and be posted and kept open for public inspection in such places, as the Commission may by regulation require, and each such schedule shall give notice of its effective date; and such common carrier shall furnish such schedules to each of its connecting carriers, and such connecting carriers shall keep such schedules open for inspection in such public places as the Commission may require.

(b) Changes in schedule; discretion of Commission to modify requirements

(1) No change shall be made in the charges, classifications, regulations, or practices which have been so filed and published except after one hundred and twenty days notice to the Commission and to the public, which shall be published in such form and contain such information as the Commission may by regulations prescribe.

(2) The Commission may, in its discretion and for good cause shown, modify any requirement made by or under the authority of this section either in particular instances or by general order applicable to special circumstances or conditions except that the Commission may not require the notice period specified in paragraph (1) to be more than one hundred and twenty days.

(c) Overcharges and rebates

No carrier, unless otherwise provided by or under authority of this chapter, shall engage or participate in such communication unless schedules have been filed and published in accordance with the provisions of this chapter and with the regulations made thereunder; and no carrier shall (1) charge, demand, collect, or receive a greater or less or different compensation for such communication, or for any service in connection therewith, between the points named in any such schedule than the charges specified in the schedule then in effect, or (2) refund or remit by any means or device any portion of the charges so specified, or (3) extend to any person any privileges or facilities in such communication, or employ or enforce any classifications, regulations, or practices affecting such charges, except as specified in such schedule.

(d) Rejection or refusal

The Commission may reject and refuse to file any schedule entered for filing which does not provide and give lawful notice of its effective date. Any schedule so rejected by the Commission shall be void

and its use shall be unlawful.

(e) Penalty for violations

In case of failure or refusal on the part of any carrier to comply with the provisions of this section or of any regulation or order made by the Commission thereunder, such carrier shall forfeit to the United States the sum of $6,000 for each such offense, and $300 for each and every day of the continuance of such offense.

47 U.S.C.A. § 208

United States Code Annotated Currentness
Title 47. Telegraphs, Telephones, and Radiotelegraphs
Chapter 5. Wire or Radio Communication (Refs & Annos)
Subchapter II. Common Carriers (Refs & Annos)
Part I. Common Carrier Regulation

§ 208. Complaints to Commission; investigations; duration of investigation; appeal of order concluding investigation

(a) Any person, any body politic, or municipal organization, or State commission, complaining of anything done or omitted to be done by any common carrier subject to this chapter, in contravention of the provisions thereof, may apply to said Commission by petition which shall briefly state the facts, whereupon a statement of the complaint thus made shall be forwarded by the Commission to such common carrier, who shall be called upon to satisfy the complaint or to answer the same in writing within a reasonable time to be specified by the Commission. If such common carrier within the time specified shall make reparation for the injury alleged to have been caused, the common carrier shall be relieved of liability to the complainant only for the particular violation of law thus complained of. If such carrier or carriers shall not satisfy the complaint within the time specified or there shall appear to be any reasonable ground for investigating said complaint, it shall be the duty of the Commission to investigate the matters complained of in such manner and by such means as it shall deem proper. No complaint shall at any time be dismissed because of the absence of direct damage to the complainant.

(b)(1) Except as provided in paragraph (2), the Commission shall, with respect to any investigation under this section of the lawfulness of a charge, classification, regulation, or practice, issue an order concluding such investigation within 5 months after the date on which the complaint was filed.

(2) The Commission shall, with respect to any such investigation initiated prior to November 3, 1988, issue an order concluding the investigation not later than 12 months after November 3, 1988.

(3) Any order concluding an investigation under paragraph (1) or (2) shall be a final order and may be appealed under section 402(a) of this title.

47 U.S.C.A. § 251

United States Code Annotated Currentness
Title 47. Telegraphs, Telephones, and Radiotelegraphs
Chapter 5. Wire or Radio Communication (Refs & Annos)
Subchapter II. Common Carriers (Refs & Annos)
Part II. Development of Competitive Markets (Refs & Annos)

§ 251. Interconnection

(a) General duty of telecommunications carriers

Each telecommunications carrier has the duty--

(1) to interconnect directly or indirectly with the facilities and equipment of other telecommunications carriers; and
(2) not to install network features, functions, or capabilities that do not comply with the guidelines and standards established pursuant to section 255 or 256 of this title.

(b) Obligations of all local exchange carriers

Each local exchange carrier has the following duties:

(1) Resale

The duty not to prohibit, and not to impose unreasonable or discriminatory conditions or limitations on, the resale of its telecommunications services.

(2) Number portability

The duty to provide, to the extent technically feasible, number portability in accordance with requirements prescribed by the Commission.

(3) Dialing parity

The duty to provide dialing parity to competing providers of telephone exchange service and telephone toll service, and the duty to permit all such providers to have nondiscriminatory access to telephone numbers, operator services, directory assistance, and directory listing, with no unreasonable dialing delays.

(4) Access to rights-of-way

The duty to afford access to the poles, ducts, conduits, and rights-of-way of such carrier to competing providers of telecommunications services on rates, terms, and conditions that are consistent with section 224 of this title.

(5) Reciprocal compensation

The duty to establish reciprocal compensation arrangements for the transport and termination of telecommunications.

(c) Additional obligations of incumbent local exchange carriers

In addition to the duties contained in subsection (b) of this section, each incumbent local exchange carrier has the following duties:

(1) Duty to negotiate

The duty to negotiate in good faith in accordance with section 252 of this title the particular terms and conditions of agreements to fulfill the duties described in paragraphs (1) through (5) of subsection (b) of this section and this subsection. The requesting telecommunications carrier also has the duty to negotiate in good faith the terms and conditions of such agreements.

(2) Interconnection

The duty to provide, for the facilities and equipment of any requesting telecommunications carrier, interconnection with the local exchange carrier's network--

(A) for the transmission and routing of telephone exchange service and exchange access;
(B) at any technically feasible point within the carrier's network;
(C) that is at least equal in quality to that provided by the local exchange carrier to itself or to any subsidiary, affiliate, or any other party to which the carrier provides interconnection; and
(D) on rates, terms, and conditions that are just, reasonable, and nondiscriminatory, in accordance with the terms and conditions of the agreement and the requirements of this section and section 252 of this title.

(3) Unbundled access

The duty to provide, to any requesting telecommunications carrier for the provision of a telecommunications service, nondiscriminatory access to network elements on an unbundled basis at any technically feasible point on rates, terms, and conditions that are just, reasonable, and nondiscriminatory in accordance with the terms and conditions of the agreement and the requirements of this section and section 252 of this title. An incumbent local exchange carrier shall provide such unbundled network elements in a manner that allows requesting carriers to combine such elements in order to provide such telecommunications service.

(4) Resale

The duty--

(A) to offer for resale at wholesale rates any telecommunications service that the carrier provides at retail to subscribers who are not telecommunications carriers; and
(B) not to prohibit, and not to impose unreasonable or discriminatory conditions or limitations on, the resale of such telecommunications service, except that a State commission may, consistent with regulations prescribed by the Commission under this section, prohibit a reseller that obtains at wholesale rates a telecommunications service that is available at retail only to a category of subscribers from offering such service to a different category of subscribers.

(5) Notice of changes

The duty to provide reasonable public notice of changes in the information necessary for the transmission and routing of services using that local exchange carrier's facilities or networks, as well as of any other changes that would affect the interoperability of those facilities and networks.

(6) Collocation

The duty to provide, on rates, terms, and conditions that are just, reasonable, and nondiscriminatory, for physical collocation of equipment necessary for interconnection or access to unbundled network elements at the premises of the local exchange carrier, except that the carrier may provide for virtual collocation if the local exchange carrier demonstrates to the State commission that physical collocation is not practical for technical reasons or because of space limitations.

(d) Implementation

(1) In general

Within 6 months after February 8, 1996, the Commission shall complete all actions necessary to establish regulations to implement the requirements of this section.

(2) Access standards

In determining what network elements should be made available for purposes of subsection (c)(3) of this section, the Commission shall consider, at a minimum, whether--

(A) access to such network elements as are proprietary in nature is necessary; and

(B) the failure to provide access to such network elements would impair the ability of the telecommunications carrier seeking access to provide the services that it seeks to offer.

(3) Preservation of State access regulations

In prescribing and enforcing regulations to implement the requirements of this section, the Commission shall not preclude the enforcement of any regulation, order, or policy of a State commission that--

(A) establishes access and interconnection obligations of local exchange carriers;

(B) is consistent with the requirements of this section; and

(C) does not substantially prevent implementation of the requirements of this section and the purposes of this part.

(e) Numbering administration

(1) Commission authority and jurisdiction

The Commission shall create or designate one or more impartial entities to administer telecommunications numbering and to make such numbers available on an equitable basis. The Commission shall have exclusive jurisdiction over those portions of the North American Numbering Plan that pertain to the United States. Nothing in this paragraph shall preclude the Commission from delegating to State commissions or other entities all or any portion of such jurisdiction.

(2) Costs

The cost of establishing telecommunications numbering administration arrangements and number portability shall be borne by all telecommunications carriers on a competitively neutral basis as determined by the Commission.

(3) Universal emergency telephone number

The Commission and any agency or entity to which the Commission has delegated authority under this subsection shall designate 9-1-1 as the universal emergency telephone number within the United States for reporting an emergency to appropriate authorities and requesting assistance. The designation shall apply to both wireline and wireless telephone service. In making the designation, the Commission (and any such agency or entity) shall provide appropriate transition periods for areas in which 9-1-1 is not in use as an emergency telephone number on October 26, 1999.

(f) Exemptions, suspensions, and modifications

(1) Exemption for certain rural telephone companies

(A) Exemption

Subsection (c) of this section shall not apply to a rural telephone company until (i) such company

has received a bona fide request for interconnection, services, or network elements, and (ii) the State commission determines (under subparagraph (B)) that such request is not unduly economically burdensome, is technically feasible, and is consistent with section 254 of this title (other than subsections (b)(7) and (c)(1)(D) thereof).

(B) State termination of exemption and implementation schedule

The party making a bona fide request of a rural telephone company for interconnection, services, or network elements shall submit a notice of its request to the State commission. The State commission shall conduct an inquiry for the purpose of determining whether to terminate the exemption under subparagraph (A). Within 120 days after the State commission receives notice of the request, the State commission shall terminate the exemption if the request is not unduly economically burdensome, is technically feasible, and is consistent with section 254 of this title (other than subsections (b)(7) and (c)(1)(D) thereof). Upon termination of the exemption, a State commission shall establish an implementation schedule for compliance with the request that is consistent in time and manner with Commission regulations.

(C) Limitation on exemption

The exemption provided by this paragraph shall not apply with respect to a request under subsection (c) of this section, from a cable operator providing video programming, and seeking to provide any telecommunications service, in the area in which the rural telephone company provides video programming. The limitation contained in this subparagraph shall not apply to a rural telephone company that is providing video programming on February 8, 1996.

(2) Suspensions and modifications for rural carriers

A local exchange carrier with fewer than 2 percent of the Nation's subscriber lines installed in the aggregate nationwide may petition a State commission for a suspension or modification of the application of a requirement or requirements of subsection (b) or (c) of this section to telephone exchange service facilities specified in such petition. The State commission shall grant such petition to the extent that, and for such duration as, the State commission determines that such suspension or modification--

(A) is necessary--
- **(i)** to avoid a significant adverse economic impact on users of telecommunications services generally;
- **(ii)** to avoid imposing a requirement that is unduly economically burdensome; or
- **(iii)** to avoid imposing a requirement that is technically infeasible; and

(B) is consistent with the public interest, convenience, and necessity.

The State commission shall act upon any petition filed under this paragraph within 180 days after receiving such petition. Pending such action, the State commission may suspend enforcement of the requirement or requirements to which the petition applies with respect to the petitioning carrier or carriers.

(g) Continued enforcement of exchange access and interconnection requirements

On and after February 8, 1996, each local exchange carrier, to the extent that it provides wireline services, shall provide exchange access, information access, and exchange services for such access to interexchange carriers and information service providers in accordance with the same equal access and nondiscriminatory interconnection restrictions and obligations (including receipt of compensation) that apply to such carrier on the date immediately preceding February 8, 1996 under any court order, consent decree, or regulation, order, or policy of the Commission, until such restrictions and obligations are explicitly superseded by regulations prescribed by the Commission after February 8, 1996. During the period beginning on February 8, 1996 and until such restrictions and obligations are so superseded, such restrictions and obligations shall be enforceable in the same manner as regulations of the Commission.

(h) Definition of incumbent local exchange carrier

(1) Definition

For purposes of this section, the term 'incumbent local exchange carrier' means, with respect to an area, the local exchange carrier that--

(A) on February 8, 1996, provided telephone exchange service in such area; and

(B)(i) on February 8, 1996, was deemed to be a member of the exchange carrier association pursuant to section 69.601(b) of the Commission's regulations (47 C.F.R. 69.601(b)); or

(ii) is a person or entity that, on or after February 8, 1996, became a successor or assign of a member described in clause (i).

(2) Treatment of comparable carriers as incumbents

The Commission may, by rule, provide for the treatment of a local exchange carrier (or class or category thereof) as an incumbent local exchange carrier for purposes of this section if--

(A) such carrier occupies a position in the market for telephone exchange service within an area that is comparable to the position occupied by a carrier described in paragraph (1);

(B) such carrier has substantially replaced an incumbent local exchange carrier described in paragraph (1); and

(C) such treatment is consistent with the public interest, convenience, and necessity and the purposes of this section.

(i) Savings provision

Nothing in this section shall be construed to limit or otherwise affect the Commission's authority under section 201 of this title.

47 U.S.C.A. § 271

United States Code Annotated Currentness
Title 47. Telegraphs, Telephones, and Radiotelegraphs
Chapter 5. Wire or Radio Communication (Refs & Annos)
Subchapter II. Common Carriers (Refs & Annos)
Part III. Special Provisions Concerning Bell Operating Companies
§ 271. Bell operating company entry into interLATA services

(a) General limitation

Neither a Bell operating company, nor any affiliate of a Bell operating company, may provide interLATA services except as provided in this section.

(b) InterLATA services to which this section applies

(1) In-region services

A Bell operating company, or any affiliate of that Bell operating company, may provide interLATA services originating in any of its in-region States (as defined in subsection (i) of this section) if the Commission approves the application of such company for such State under subsection (d)(3) of this section.

(2) Out-of-region services

A Bell operating company, or any affiliate of that Bell operating company, may provide interLATA services originating outside its in-region States after February 8, 1996, subject to subsection (j) of this section.

(3) Incidental interLATA services

A Bell operating company, or any affiliate of a Bell operating company, may provide incidental interLATA services (as defined in subsection (g) of this section) originating in any State after February 8, 1996.

(4) Termination

Nothing in this section prohibits a Bell operating company or any of its affiliates from providing termination for interLATA services, subject to subsection (j) of this section.

(c) Requirements for providing certain in-region interLATA services

(1) Agreement or statement

A Bell operating company meets the requirements of this paragraph if it meets the requirements of subparagraph (A) or subparagraph (B) of this paragraph for each State for which the authorization is sought.

(A) Presence of a facilities-based competitor

A Bell operating company meets the requirements of this subparagraph if it has entered into one or more binding agreements that have been approved under section 252 of this title specifying the terms and conditions under which the Bell operating company is providing access and interconnection to its network facilities for the network facilities of one or more unaffiliated

competing providers of telephone exchange service (as defined in section 153(47)(A) of this title, but excluding exchange access) to residential and business subscribers. For the purpose of this subparagraph, such telephone exchange service may be offered by such competing providers either exclusively over their own telephone exchange service facilities or predominantly over their own telephone exchange service facilities in combination with the resale of the telecommunications services of another carrier. For the purpose of this subparagraph, services provided pursuant to subpart K of part 22 of the Commission's regulations (47 C.F.R. 22.901 et seq.) shall not be considered to be telephone exchange services.

(B) Failure to request access

A Bell operating company meets the requirements of this subparagraph if, after 10 months after February 8, 1996, no such provider has requested the access and interconnection described in subparagraph (A) before the date which is 3 months before the date the company makes its application under subsection (d)(1) of this section, and a statement of the terms and conditions that the company generally offers to provide such access and interconnection has been approved or permitted to take effect by the State commission under section 252(f) of this title. For purposes of this subparagraph, a Bell operating company shall be considered not to have received any request for access and interconnection if the State commission of such State certifies that the only provider or providers making such a request have (i) failed to negotiate in good faith as required by section 252 of this title, or (ii) violated the terms of an agreement approved under section 252 of this title by the provider's failure to comply, within a reasonable period of time, with the implementation schedule contained in such agreement.

(2) Specific interconnection requirements

(A) Agreement required

A Bell operating company meets the requirements of this paragraph if, within the State for which the authorization is sought--

(i)(I) such company is providing access and interconnection pursuant to one or more agreements described in paragraph (1)(A), or

(II) such company is generally offering access and interconnection pursuant to a statement described in paragraph (1)(B), and

(ii) such access and interconnection meets the requirements of subparagraph (B) of this paragraph.

(B) Competitive checklist

Access or interconnection provided or generally offered by a Bell operating company to other telecommunications carriers meets the requirements of this subparagraph if such access and interconnection includes each of the following:

(i) Interconnection in accordance with the requirements of sections 251(c)(2) and 252(d)(1) of this title.

(ii) Nondiscriminatory access to network elements in accordance with the requirements of sections 251(c)(3) and 252(d)(1) of this title.

(iii) Nondiscriminatory access to the poles, ducts, conduits, and rights-of-way owned or controlled by the Bell operating company at just and reasonable rates in accordance with the requirements of section 224 of this title.

(iv) Local loop transmission from the central office to the customer's premises, unbundled from local switching or other services.

(v) Local transport from the trunk side of a wireline local exchange carrier switch unbundled from switching or other services.

(vi) Local switching unbundled from transport, local loop transmission, or other services.

(vii) Nondiscriminatory access to--

(I) 911 and E911 services;

(II) directory assistance services to allow the other carrier's customers to obtain telephone

numbers; and

(III) operator call completion services.

(viii) White pages directory listings for customers of the other carrier's telephone exchange service.

(ix) Until the date by which telecommunications numbering administration guidelines, plan, or rules are established, nondiscriminatory access to telephone numbers for assignment to the other carrier's telephone exchange service customers. After that date, compliance with such guidelines, plan, or rules.

(x) Nondiscriminatory access to databases and associated signaling necessary for call routing and completion.

(xi) Until the date by which the Commission issues regulations pursuant to section 251 of this title to require number portability, interim telecommunications number portability through remote call forwarding, direct inward dialing trunks, or other comparable arrangements, with as little impairment of functioning, quality, reliability, and convenience as possible. After that date, full compliance with such regulations.

(xii) Nondiscriminatory access to such services or information as are necessary to allow the requesting carrier to implement local dialing parity in accordance with the requirements of section 251(b)(3) of this title.

(xiii) Reciprocal compensation arrangements in accordance with the requirements of section 252(d)(2) of this title.

(xiv) Telecommunications services are available for resale in accordance with the requirements of sections 251(c)(4) and 252(d)(3) of this title.

(d) Administrative provisions

(1) Application to Commission

On and after February 8, 1996, a Bell operating company or its affiliate may apply to the Commission for authorization to provide interLATA services originating in any in-region State. The application shall identify each State for which the authorization is sought.

(2) Consultation

(A) Consultation with the Attorney General

The Commission shall notify the Attorney General promptly of any application under paragraph (1). Before making any determination under this subsection, the Commission shall consult with the Attorney General, and if the Attorney General submits any comments in writing, such comments shall be included in the record of the Commission's decision. In consulting with and submitting comments to the Commission under this paragraph, the Attorney General shall provide to the Commission an evaluation of the application using any standard the Attorney General considers appropriate. The Commission shall give substantial weight to the Attorney General's evaluation, but such evaluation shall not have any preclusive effect on any Commission decision under paragraph (3).

(B) Consultation with State commissions

Before making any determination under this subsection, the Commission shall consult with the State commission of any State that is the subject of the application in order to verify the compliance of the Bell operating company with the requirements of subsection (c) of this section.

(3) Determination

Not later than 90 days after receiving an application under paragraph (1), the Commission shall issue a written determination approving or denying the authorization requested in the application for each State. The Commission shall not approve the authorization requested in an application

submitted under paragraph (1) unless it finds that--

(A) the petitioning Bell operating company has met the requirements of subsection (c)(1) of this section and--

(i) with respect to access and interconnection provided pursuant to subsection (c)(1)(A) of this section, has fully implemented the competitive checklist in subsection (c)(2)(B) of this section; or

(ii) with respect to access and interconnection generally offered pursuant to a statement under subsection (c)(1)(B) of this section, such statement offers all of the items included in the competitive checklist in subsection (c)(2)(B) of this section;

(B) the requested authorization will be carried out in accordance with the requirements of section 272 of this title; and

(C) the requested authorization is consistent with the public interest, convenience, and necessity.

The Commission shall state the basis for its approval or denial of the application.

(4) Limitation on Commission

The Commission may not, by rule or otherwise, limit or extend the terms used in the competitive checklist set forth in subsection (c)(2)(B) of this section.

(5) Publication

Not later than 10 days after issuing a determination under paragraph (3), the Commission shall publish in the Federal Register a brief description of the determination.

(6) Enforcement of conditions

(A) Commission authority

If at any time after the approval of an application under paragraph (3), the Commission determines that a Bell operating company has ceased to meet any of the conditions required for such approval, the Commission may, after notice and opportunity for a hearing--

(i) issue an order to such company to correct the deficiency;

(ii) impose a penalty on such company pursuant to subchapter V of this chapter; or

(iii) suspend or revoke such approval.

(B) Receipt and review of complaints

The Commission shall establish procedures for the review of complaints concerning failures by Bell operating companies to meet conditions required for approval under paragraph (3). Unless the parties otherwise agree, the Commission shall act on such complaint within 90 days.

(e) Limitations

(1) Joint marketing of local and long distance services

Until a Bell operating company is authorized pursuant to subsection (d) of this section to provide interLATA services in an in-region State, or until 36 months have passed since February 8, 1996, whichever is earlier, a telecommunications carrier that serves greater than 5 percent of the Nation's presubscribed access lines may not jointly market in such State telephone exchange service obtained from such company pursuant to section 251(c)(4) of this title with interLATA services offered by that telecommunications carrier.

(2) IntraLATA toll dialing parity

(A) Provision required

A Bell operating company granted authority to provide interLATA services under subsection (d) of this section shall provide intraLATA toll dialing parity throughout that State coincident with its exercise of that authority.

(B) Limitation

Except for single-LATA States and States that have issued an order by December 19, 1995, requiring a Bell operating company to implement intraLATA toll dialing parity, a State may not require a Bell operating company to implement intraLATA toll dialing parity in that State before a Bell operating company has been granted authority under this section to provide interLATA services originating in that State or before 3 years after February 8, 1996, whichever is earlier. Nothing in this subparagraph precludes a State from issuing an order requiring intraLATA toll dialing parity in that State prior to either such date so long as such order does not take effect until after the earlier of either such dates.

(f) Exception for previously authorized activities

Neither subsection (a) of this section nor section 273 of this title shall prohibit a Bell operating company or affiliate from engaging, at any time after February 8, 1996, in any activity to the extent authorized by, and subject to the terms and conditions contained in, an order entered by the United States District Court for the District of Columbia pursuant to section VII or VIII(C) of the AT&T Consent Decree if such order was entered on or before February 8, 1996, to the extent such order is not reversed or vacated on appeal. Nothing in this subsection shall be construed to limit, or to impose terms or conditions on, an activity in which a Bell operating company is otherwise authorized to engage under any other provision of this section.

(g) "Incidental interLATA services" defined

For purposes of this section, the term "incidental interLATA services" means the interLATA provision by a Bell operating company or its affiliate--

(1)(A) of audio programming, video programming, or other programming services to subscribers to such services of such company or affiliate;
(B) of the capability for interaction by such subscribers to select or respond to such audio programming, video programming, or other programming services;
(C) to distributors of audio programming or video programming that such company or affiliate owns or controls, or is licensed by the copyright owner of such programming (or by an assignee of such owner) to distribute; or
(D) of alarm monitoring services;
(2) of two-way interactive video services or Internet services over dedicated facilities to or for elementary and secondary schools as defined in section 254(h)(5) of this title;
(3) of commercial mobile services in accordance with section 332(c) of this title and with the regulations prescribed by the Commission pursuant to paragraph (8) of such section;
(4) of a service that permits a customer that is located in one LATA to retrieve stored information from, or file information for storage in, information storage facilities of such company that are located in another LATA;
(5) of signaling information used in connection with the provision of telephone exchange services or exchange access by a local exchange carrier; or
(6) of network control signaling information to, and receipt of such signaling information from, common carriers offering interLATA services at any location within the area in which such Bell operating company provides telephone exchange services or exchange access.

(h) Limitations

The provisions of subsection (g) of this section are intended to be narrowly construed. The interLATA

services provided under subparagraph (A), (B), or (C) of subsection (g)(1) of this section are limited to those interLATA transmissions incidental to the provision by a Bell operating company or its affiliate of video, audio, and other programming services that the company or its affiliate is engaged in providing to the public. The Commission shall ensure that the provision of services authorized under subsection (g) of this section by a Bell operating company or its affiliate will not adversely affect telephone exchange service ratepayers or competition in any telecommunications market.

(i) Additional definitions

As used in this section--

(1) In-region State

The term "in-region State" means a State in which a Bell operating company or any of its affiliates was authorized to provide wireline telephone exchange service pursuant to the reorganization plan approved under the AT&T Consent Decree, as in effect on the day before February 8, 1996.

(2) Audio programming services

The term "audio programming services" means programming provided by, or generally considered to be comparable to programming provided by, a radio broadcast station.

(3) Video programming services; other programming services

The terms "video programming service" and "other programming services" have the same meanings as such terms have under section 522 of this title.

(j) Certain service applications treated as in-region service applications

For purposes of this section, a Bell operating company application to provide 800 service, private line service, or their equivalents that--

(1) terminate in an in-region State of that Bell operating company, and
(2) allow the called party to determine the interLATA carrier,

shall be considered an in-region service subject to the requirements of subsection (b)(1) of this section.

47 U.S.C.A. § 272

United States Code Annotated Currentness
Title 47. Telegraphs, Telephones, and Radiotelegraphs
Chapter 5. Wire or Radio Communication (Refs & Annos)
Subchapter II. Common Carriers (Refs & Annos)
Part III. Special Provisions Concerning Bell Operating Companies

➡§ 272. Separate affiliate; safeguards

(a) Separate affiliate required for competitive activities

(1) In general

A Bell operating company (including any affiliate) which is a local exchange carrier that is subject to the requirements of section 251(c) of this title may not provide any service described in paragraph (2) unless it provides that service through one or more affiliates that--

(A) are separate from any operating company entity that is subject to the requirements of section 251(c) of this title; and

(B) meet the requirements of subsection (b) of this section.

(2) Services for which a separate affiliate is required

The services for which a separate affiliate is required by paragraph (1) are:

(A) Manufacturing activities (as defined in section 273(h) of this title).

(B) Origination of interLATA telecommunications services, other than--

(i) incidental interLATA services described in paragraphs (1), (2), (3), (5), and (6) of section 271(g) of this title;

(ii) out-of-region services described in section 271(b)(2) of this title; or

(iii) previously authorized activities described in section 271(f) of this title.

(C) InterLATA information services, other than electronic publishing (as defined in section 274(h) of this title) and alarm monitoring services (as defined in section 275(e) of this title).

(b) Structural and transactional requirements

The separate affiliate required by this section--

(1) shall operate independently from the Bell operating company;

(2) shall maintain books, records, and accounts in the manner prescribed by the Commission which shall be separate from the books, records, and accounts maintained by the Bell operating company of which it is an affiliate;

(3) shall have separate officers, directors, and employees from the Bell operating company of which it is an affiliate;

(4) may not obtain credit under any arrangement that would permit a creditor, upon default, to have recourse to the assets of the Bell operating company; and

(5) shall conduct all transactions with the Bell operating company of which it is an affiliate on an arm's length basis with any such transactions reduced to writing and available for public inspection.

(c) Nondiscrimination safeguards

In its dealings with its affiliate described in subsection (a) of this section, a Bell operating company--

(1) may not discriminate 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; and

(2) shall account for all transactions with an affiliate described in subsection (a) of this section in accordance with accounting principles designated or approved by the Commission.

(d) Biennial audit

(1) General requirement

A company required to operate a separate affiliate under this section shall obtain and pay for a joint Federal/State audit every 2 years conducted by an independent auditor to determine whether such company has complied with this section and the regulations promulgated under this section, and particularly whether such company has complied with the separate accounting requirements under subsection (b) of this section.

(2) Results submitted to commission; State commissions

The auditor described in paragraph (1) shall submit the results of the audit to the Commission and to the State commission of each State in which the company audited provides service, which shall make such results available for public inspection. Any party may submit comments on the final audit report.

(3) Access to documents

For purposes of conducting audits and reviews under this subsection--
(A) the independent auditor, the Commission, and the State commission shall have access to the financial accounts and records of each company and of its affiliates necessary to verify transactions conducted with that company that are relevant to the specific activities permitted under this section and that are necessary for the regulation of rates;
(B) the Commission and the State commission shall have access to the working papers and supporting materials of any auditor who performs an audit under this section; and
(C) the State commission shall implement appropriate procedures to ensure the protection of any proprietary information submitted to it under this section.

(e) Fulfillment of certain requests

A Bell operating company and an affiliate that is subject to the requirements of section 251(c) of this title

(1) shall fulfill any requests from an unaffiliated entity for telephone exchange service and exchange access within a period no longer than the period in which it provides such telephone exchange service and exchange access to itself or to its affiliates;
(2) shall not provide any facilities, services, or information concerning its provision of exchange access to the affiliate described in subsection (a) of this section unless such facilities, services, or information are made available to other providers of interLATA services in that market on the same terms and conditions;
(3) shall charge the affiliate described in subsection (a) of this section, or impute to itself (if using the access for its provision of its own services), an amount for access to its telephone exchange service and exchange access that is no less than the amount charged to any unaffiliated interexchange carriers for such service; and
(4) may provide any interLATA or intraLATA facilities or services to its interLATA affiliate if such services or facilities are made available to all carriers at the same rates and on the same terms and conditions, and so long as the costs are appropriately allocated.

(f) Sunset

(1) Manufacturing and long distance

The provisions of this section (other than subsection (e) of this section) shall cease to apply with respect to the manufacturing activities or the interLATA telecommunications services of a Bell

operating company 3 years after the date such Bell operating company or any Bell operating company affiliate is authorized to provide interLATA telecommunications services under section 271 (d) of this title, unless the Commission extends such 3-year period by rule or order.

(2) InterLATA information services

The provisions of this section (other than subsection (e) of this section) shall cease to apply with respect to the interLATA information services of a Bell operating company 4 years after February 8, 1996, unless the Commission extends such 4-year period by rule or order.

(3) Preservation of existing authority

Nothing in this subsection shall be construed to limit the authority of the Commission under any other section of this chapter to prescribe safeguards consistent with the public interest, convenience, and necessity.

(g) Joint marketing

(1) Affiliate sales of telephone exchange services

A Bell operating company affiliate required by this section may not market or sell telephone exchange services provided by the Bell operating company unless that company permits other entities offering the same or similar service to market and sell its telephone exchange services.

(2) Bell operating company sales of affiliate services

A Bell operating company may not market or sell interLATA service provided by an affiliate required by this section within any of its in-region States until such company is authorized to provide interLATA services in such State under section 271(d) of this title.

(3) Rule of construction

The joint marketing and sale of services permitted under this subsection shall not be considered to violate the nondiscrimination provisions of subsection (c) of this section.

(h) Transition

With respect to any activity in which a Bell operating company is engaged on February 8, 1996, such company shall have one year from February 8, 1996, to comply with the requirements of this section.

47 U.S.C.A. § 402

United States Code Annotated Currentness
Title 47. Telegraphs, Telephones, and Radiotelegraphs
Chapter 5. Wire or Radio Communication (Refs & Annos)
Subchapter IV. Procedural and Administrative Provisions

§ 402. Judicial review of Commission's orders and decisions

(a) Procedure

Any proceeding to enjoin, set aside, annul, or suspend any order of the Commission under this chapter (except those appealable under subsection (b) of this section) shall be brought as provided by and in the manner prescribed in chapter 158 of Title 28.

(b) Right to appeal

Appeals may be taken from decisions and orders of the Commission to the United States Court of Appeals for the District of Columbia in any of the following cases:

(1) By any applicant for a construction permit or station license, whose application is denied by the Commission.
(2) By any applicant for the renewal or modification of any such instrument of authorization whose application is denied by the Commission.
(3) By any party to an application for authority to transfer, assign, or dispose of any such instrument of authorization, or any rights thereunder, whose application is denied by the Commission.
(4) By any applicant for the permit required by section 325 of this title whose application has been denied by the Commission, or by any permittee under said section whose permit has been revoked by the Commission.
(5) By the holder of any construction permit or station license which has been modified or revoked by the Commission.
(6) By any other person who is aggrieved or whose interests are adversely affected by any order of the Commission granting or denying any application described in paragraphs (1), (2), (3), (4), and (9) of this subsection.
(7) By any person upon whom an order to cease and desist has been served under section 312 of this title.
(8) By any radio operator whose license has been suspended by the Commission.
(9) By any applicant for authority to provide interLATA services under section 271 of this title whose application is denied by the Commission.

(c) Filing notice of appeal; contents; jurisdiction; temporary orders

Such appeal shall be taken by filing a notice of appeal with the court within thirty days from the date upon which public notice is given of the decision or order complained of. Such notice of appeal shall contain a concise statement of the nature of the proceedings as to which the appeal is taken; a concise statement of the reasons on which the appellant intends to rely, separately stated and numbered; and proof of service of a true copy of said notice and statement upon the Commission. Upon filing of such notice, the court shall have jurisdiction of the proceedings and of the questions determined therein and shall have power, by order, directed to the Commission or any other party to the appeal, to grant such temporary relief as it may deem just and proper. Orders granting temporary relief may be either affirmative or negative in their scope and application so as to permit either the maintenance of the status quo in the matter in which the appeal is taken or the restoration of a position or status terminated or adversely affected by the order appealed from and shall, unless otherwise ordered by the court, be effective pending hearing and determination of said appeal and compliance by the Commission with the final judgment of the court rendered in said appeal.

(d) Notice to interested parties; filing of record

Upon the filing of any such notice of appeal the appellant shall, not later than five days after the filing of such notice, notify each person shown by the records of the Commission to be interested in said appeal of the filing and pendency of the same. The Commission shall file with the court the record upon which the order complained of was entered, as provided in section 2112 of Title 28.

(e) Intervention

Within thirty days after the filing of any such appeal any interested person may intervene and participate in the proceedings had upon said appeal by filing with the court a notice of intention to intervene and a verified statement showing the nature of the interest of such party, together with proof of service of true copies of said notice and statement, both upon appellant and upon the Commission. Any person who would be aggrieved or whose interest would be adversely affected by a reversal or modification of the order of the Commission complained of shall be considered an interested party.

(f) Records and briefs

The record and briefs upon which any such appeal shall be heard and determined by the court shall contain such information and material, and shall be prepared within such time and in such manner as the court may by rule prescribe.

(g) Time of hearing; procedure

The court shall hear and determine the appeal upon the record before it in the manner prescribed by section 706 of Title 5.

(h) Remand

In the event that the court shall render a decision and enter an order reversing the order of the Commission, it shall remand the case to the Commission to carry out the judgment of the court and it shall be the duty of the Commission, in the absence of the proceedings to review such judgment, to forthwith give effect thereto, and unless otherwise ordered by the court, to do so upon the basis of the proceedings already had and the record upon which said appeal was heard and determined.

(i) Judgment for costs

The court may, in its discretion, enter judgment for costs in favor of or against an appellant, or other interested parties intervening in said appeal, but not against the Commission, depending upon the nature of the issues involved upon said appeal and the outcome thereof.

(j) Finality of decision; review by Supreme Court

The court's judgment shall be final, subject, however, to review by the Supreme Court of the United States upon writ of certiorari on petition therefor under section 1254 of Title 28, by the appellant, by the Commission, or by any interested party intervening in the appeal, or by certification by the court pursuant to the provisions of that section.

47 U.S.C.A. § 405

United States Code Annotated Currentness
Title 47. Telegraphs, Telephones, and Radiotelegraphs
Chapter 5. Wire or Radio Communication (Refs & Annos)
Subchapter IV. Procedural and Administrative Provisions

§ 405. Petition for reconsideration; procedure; disposition; time of filing; additional evidence; time for disposition of petition for reconsideration of order concluding hearing or investigation; appeal of order

(a) After an order, decision, report, or action has been made or taken in any proceeding by the Commission, or by any designated authority within the Commission pursuant to a delegation under section 155(c)(1) of this title, any party thereto, or any other person aggrieved or whose interests are adversely affected thereby, may petition for reconsideration only to the authority making or taking the order, decision, report, or action; and it shall be lawful for such authority, whether it be the Commission or other authority designated under section 155(c)(1) of this title, in its discretion, to grant such a reconsideration if sufficient reason therefor be made to appear. A petition for reconsideration must be filed within thirty days from the date upon which public notice is given of the order, decision, report, or action complained of. No such application shall excuse any person from complying with or obeying any order, decision, report, or action of the Commission, or operate in any manner to stay or postpone the enforcement thereof, without the special order of the Commission. The filing of a petition for reconsideration shall not be a condition precedent to judicial review of any such order, decision, report, or action, except where the party seeking such review (1) was not a party to the proceedings resulting in such order, decision, report, or action, or (2) relies on questions of fact or law upon which the Commission, or designated authority within the Commission, has been afforded no opportunity to pass. The Commission, or designated authority within the Commission, shall enter an order, with a concise statement of the reasons therefor, denying a petition for reconsideration or granting such petition, in whole or in part, and ordering such further proceedings as may be appropriate: *Provided,* That in any case where such petition relates to an instrument of authorization granted without a hearing, the Commission, or designated authority within the Commission, shall take such action within ninety days of the filing of such petition. Reconsiderations shall be governed by such general rules as the Commission may establish, except that no evidence other than newly discovered evidence, evidence which has become available only since the original taking of evidence, or evidence which the Commission or designated authority within the Commission believes should have been taken in the original proceeding shall be taken on any reconsideration. The time within which a petition for review must be filed in a proceeding to which section 402(a) of this title applies, or within which an appeal must be taken under section 402(b) of this title in any case, shall be computed from the date upon which the Commission gives public notice of the order, decision, report, or action complained of.

(b)(1) Within 90 days after receiving a petition for reconsideration of an order concluding a hearing under section 204(a) of this title or concluding an investigation under section 208(b) of this title, the Commission shall issue an order granting or denying such petition.

(2) Any order issued under paragraph (1) shall be a final order and may be appealed under section 402(a) of this title.

05-1032

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

BellSouth Telcommunications, Inc., Petitioner,

v.

Federal Communications Commission, Inc., Respondents.

Certificate Of Service

I, Tamika S. Parker, hereby certify that the forgoing "Public Brief - 'Brief For Respondents'" was served this 21st day of July, 2006, by mailing true copies thereof, postage prepaid, to the following persons at the addresses listed below:

Scott H. Angstreich
Kellogg, Huber, Hansen, Todd, Evans & Figel, PLLC
1615 M Street, N.W.
Suite 400
Washington DC 20036-3209

Counsel For: Verizon Telephone Companies

C. Frederick Beckner III
Sidley Austin Brown & Wood LLP
1501 K Street, N.W.
Washington DC 20005

Counsel For: AT&T Corp.

Craig J. Brown
Robert B. McKenna, Jr.
Qwest Communications International, Inc.
607 14th Street, N.W., Suite 950
Washington DC 20005

Counsel For: Qwest Corporation

E. Earl Edenfield Jr.
BellSouth Telecommunications, Inc.
675 West Peachtree Street
Suite 4300
Atlanta GA 30375-0001

Counsel For: BellSouth Telecommunications, Inc.

Michael E. Glover
Verizon
1515 North Courthouse Road
Suite 500
Arlington VA 22201-2909

Counsel For: Verizon Telephone Companies

Lawrence J. Lafaro
AT&T Corp.
900 Routes 202/206 North
P.O. Box 752, Room 3A251
Bedminster NJ 07921-0752

Counsel For: AT&T Corp.

Jonathan E. Nuechterlein
Wilmer Cutler Pickering Hale and Dorr LLP
1875 Pennsylvania Ave., N.W.
Washington DC 20006

Counsel For: BellSouth Telecommunications, Inc.

Catherine G. O'Sullivan
United States Department of Justice
Antitrust Div., Appellate Section
905 Pennsylvania Avenue, N.W., Room 3224
Washington DC 20530-0001

Counsel For: USA

Tamika S. Parker

Tamika S. Parker