Before the
Federal Communications Commission
Washington, DC 20554

In the Matter of	)	
	)	
AT&T CORP.,	)	
	)	
Complainant,	)	
	)	
v.	)	
	)	
NYNEX CORPORATION, NEW YORK TELEPHONE COMPANY, and NEW ENGLAND TELEPHONE AND TELEGRAPH COMPANY,	)	File No. E-97-05B
	)	
Defendant.	)	

MEMORANDUM OPINION AND ORDER

Adopted: August 15, 2001 **Released:** August 22, 2001

By the Commission:

I. INTRODUCTION

1. In this Memorandum Opinion and Order, we deny a formal complaint that AT&T Corp. ("AT&T") filed against NYNEX Corporation, New York Telephone Company, and New England Telephone and Telegraph Company (collectively "NYNEX")[1] concerning NYNEX's 1-800-54NYNEX calling platform service (the "Service"). We conclude that the specific facts presented do not support a finding that the Service violates section 271 of the Communications Act of 1934, as amended ("Act").[2] We also conclude that the record does not support a finding

[1] After AT&T filed this complaint, Bell Atlantic acquired NYNEX, which later merged with GTE to form Verizon Communications, Inc. Notwithstanding these corporate changes, for purposes of clarity this Order refers to the defendant companies collectively as "NYNEX." NYNEX replaced its 1-800-54NYNEX calling card with a new card after its merger with Bell Atlantic. AT&T has not challenged the lawfulness of that new card in this proceeding and, accordingly, our order is limited to the lawfulness of the 1-800-54NYNEX offering. *See* AT&T's Brief Concerning the Effect of the *Qwest Order*, File No. E-97-05B (Jan. 29, 1999) at 2, n.4.

[2] 47 U.S.C. § 271(a) ("Neither a Bell operating company [BOC], nor any affiliate of a Bell operating company, may provide interLATA services except as provided in this section."). InterLATA service "means telecommunications between a point located in a local access transport area [LATA] and a point located outside such area." 47 U.S.C. § 153(21). LATAs are contiguous geographic areas established by a BOC such that no exchange area includes points within more than one metropolitan statistical area or state. 47 U.S.C. § 153(25).

that the Service violates the equal access and nondiscrimination requirements set forth in sections 202(a) and 251(g) of the Act.[3]

II. BACKGROUND

2. In July 1996, NYNEX introduced its 1-800-54NYNEX Service. Customers could use the Service to make local, regional, and long distance calls by dialing the toll-free 1-800 number and then entering the desired telephone number, followed by the customer's calling card number and personal identification number.[4] At the time it began offering its Service, NYNEX had not received approval from the Commission under section 271 of the Act to provide long-distance service in any state in its region.[5] Thus, prior to implementing its Service, NYNEX sought to partner with a long distance provider to provide the in-region, long distance component of the Service.[6]

3. In February 1996, NYNEX solicited bids from long distance service providers to participate in the new Service. From the responses it received, NYNEX chose Sprint to provide the long distance component of the Service.[7] NYNEX entered into a three-year contract with Sprint that NYNEX could terminate only in the event of a breach by Sprint.[8] After NYNEX implemented its Service in July 1996, NYNEX promoted the Service and usually clearly described Sprint's role as the long distance service provider.[9] AT&T's Complaint alleges that NYNEX's partnership with Sprint and the resulting provision of the 1-800-54NYNEX Service are unlawful.

4. We have previously addressed the legality of a 1-800 calling platform service offered by another BOC, and we are guided by that decision. In the *1-800-AMERITECH Order*,

---

3 47 U.S.C. §§ 202(a) and 251(g).

4 NYNEX Brief, File No. E-97-05B (Apr. 21, 1997) ("NYNEX Brief") at 2.

5 AT&T's Opening Brief, File No. E-97-05B (Apr. 21, 1997) ("AT&T Brief") at 2. After NYNEX's merger into Bell Atlantic, the merged company in late 1999 received authorization to provide interLATA services in New York. *See Application by Bell Atlantic New York for Authorization Under Section 271 of the Communications Act to Provide In-Region, InterLATA Service in the State of New York,* Memorandum Opinion and Order, 15 FCC Rcd 3953 (1999), *aff'd sub nom., AT&T Corp. v. FCC*, 220 F.3d 607 (D.C. Cir. 2000). We also recently authorized Verizon to provide interLATA services in Massachusetts. *Application of Verizon New England Inc., Bell Atlantic Communications, Inc. (d/b/a Verizon Long Distance), NYNEX Long Distance Company (d/b/a Verizon Enterprise Solutions) and Verizon Global Networks Inc., for Authorization to Provide In-Region, InterLATA Services in Massachusetts*, Memorandum Opinion and Order, CC Docket No. 01-9, FCC 01-130 (Apr. 16, 2001).

6 As explained *infra* at paragraph 6, NYNEX is prohibited from providing long distance service until it receives authorization to do so by the Commission pursuant to section 271 of the Act.

7 NYNEX Brief at 2-3.

8 Defendants' Initial Brief, File No. E-97-05B (Dec. 8, 2000) ("Defendants' Initial Brief") at 6; Defendants' Response Brief, File No. E-97-05B (Dec. 20, 2000) ("Defendants' Response Brief") at 2.

9 *See supra* at ¶¶ 19-20.

we determined that the Ameritech Operating Companies' ("Ameritech") calling platform service violated section 271 of the Act.[10] We relied upon our earlier *Qwest Teaming Order* to reach this conclusion.[11] We also note that, subsequently, the Enforcement Bureau ("Bureau") considered the legality of a calling platform service offered by U S WEST Communications, Inc. ("U S WEST").[12] The Bureau found that the U S WEST service was markedly similar to the Ameritech offering and concluded that the U S WEST service violated section 271 for the same reasons that the Ameritech offering violated section 271.[13]

III. DISCUSSION

5. As set forth below, the record demonstrates that NYNEX's Service is materially different than the services at issue in the *1-800-AMERITECH Order* and the *1-800-4USWEST Order*. Therefore, we conclude that the record does not support a ruling that the Service violates section 271 of the Act. Further, we conclude that AT&T's allegations are insufficient to establish a violation of the equal access and nondiscrimination requirements embodied in sections 202(a) and 251(g) of the Act.

A. The 1-800-54NYNEX Service Does Not Violate Section 271.

6. AT&T's primary contention is that the 1-800-54NYNEX Service violates section 271 of the Act, because it amounts to the provision of in-region, interLATA service before NYNEX has received approval from the Commission to offer such service. Section 271(a) states that "[n]either a Bell operating company, nor any affiliate of a Bell operating company, may provide interLATA services except as provided in this section."[14] The statute permits a BOC to provide interLATA service originating within its local service area on a state-by-state basis only upon application to and approval from the Commission pursuant to section 271(d).[15] Section 271 thus "both gives the BOCs an opportunity to enter the long distance market and conditions that

---

10 *See MCI Telecommunications Corp. v. Illinois Bell Tel. Co., et al.*, Memorandum Opinion and Order, 15 FCC Rcd 23184 (2000) ("*1-800-AMERITECH Order*").

11 *See AT&T Corp. v. U S WEST Corp.*, 13 FCC Rcd 21438 (1998) ("*Qwest Teaming Order*"), *aff'd sub nom., U S WEST Communications, Inc. v. FCC*, 177 F.3d 1057 (D.C. Cir. 1999), *cert. denied*, 528 U.S. 1188 (2000). In the *Qwest Teaming Order*, we found that a self-described "teaming" arrangement between U S WEST and Qwest, and a similar arrangement between Ameritech and Qwest, violated section 271. Each BOC separately combined Qwest's long distance service with its own local services and offered the resulting package separately to its customers under the BOC's brand, with the BOC's customer support.

12 *AT&T Corp. v. U S WEST Communications, Inc.*, File No. E-97-28, and *MCI Telecommunications, Inc. v. U S WEST Communications, Inc.*, File No. E-97-40A, Memorandum Opinion and Order, DA 01-418 (Enf. Bur. Feb. 16, 2001) ("*1-800-4USWEST Order*").

13 *Id.* at ¶ 12.

14 47 U.S.C. § 271(a).

15 47 U.S.C. § 271(d).

opportunity on the BOCs' own actions in opening up their local markets."[16] Congress intended section 271 to create a strong incentive for the BOCs to comply with new obligations in sections 251 and 252 of the Telecommunications Act of 1996,[17] which, in turn, were designed to facilitate competition in local markets (including interconnection, unbundling, and resale). The statute creates this "powerful incentive" by conditioning BOC entry into the in-region, long-distance market on compliance with a checklist of local market-opening criteria and other requirements.[18]

7. The *Qwest Teaming Order* sets forth the issue that we consider in deciding whether an offering violates section 271: "whether a BOC's involvement in the long distance market enables it to obtain competitive advantages, thereby reducing its incentive to cooperate in opening its local market to competition."[19] Thus, the "provision" of interLATA services, within the meaning of section 271(a), "must encompass activities that, if otherwise permitted, would undermine Congress's method of promoting both local and long distance competition by prohibiting BOCs from full participation pursuant to section 271's competitive checklist."[20] In order to determine whether a BOC's long distance-related activities run afoul of this standard, we balance the following three non-exclusive factors: "whether the BOC obtains material benefits (other than access charges) uniquely associated with the ability to include a long-distance component in [the challenged offering], whether the BOC is effectively holding itself out as a provider of long distance service, and whether the BOC is performing activities and functions that are typically performed by those who are legally or contractually responsible for providing interLATA service to the public."[21] In evaluating the challenged BOC actions, we consider "the totality of [the BOC's] involvement, rather than focus[ing] on any one particular activity."[22]

8. Here, the totality of the circumstances does not support a finding that NYNEX violated section 271. We draw this conclusion principally by comparing the facts of this case to those present in the two other calling platform cases that we and the Bureau have recently decided. In the *1-800-AMERITECH Order* and the *1-800-4USWEST Order*, we and the Bureau, respectively, found that Ameritech and U S WEST had engaged in numerous activities that, when considered as a whole, amounted to the unauthorized provision of long distance service.

---

16 *U S WEST Communications*, 177 F.3d at 1060.

17 *See* 47 U.S.C. §§ 251, 252. The Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56, *codified at* 47 U.S.C. §§ 151 *et seq.*, amended the Communications Act of 1934.

18 *U S WEST Communications*, 177 F.3d at 1060; 47 U.S.C. § 271(c). *See also AT&T Corp.*, 220 F.3d at 612 (conditional long distance entry pursuant to section 271 is designed "[t]o encourage BOCs to open their markets to competition as quickly as possible"). Our decision in the *Qwest Teaming Order* contains a more extensive explanation of the market-opening incentives behind section 271. 13 FCC Rcd at 21441-47, ¶¶ 3-7.

19 *Qwest Teaming Order*, 13 FCC Rcd at 21465, ¶ 37.

20 *Id.* at 21462, ¶ 30.

21 *Id.* at 21465-66, ¶ 37.

22 *Id.*

9. Specifically, we and the Bureau found that Ameritech and U S WEST each: (1) designed and developed a combined service offering for its local service customers that included a long distance component; (2) relied on its brand name in marketing the combined offering; (3) used bill inserts and other mailings to promote the combined offering to its local calling subscriber base; (4) maintained control and ownership of the customer relationship in connection with the combined service offering; (5) exercised exclusive control over the marketing of the service; (6) selected the long distance provider that would carry in-region, interLATA calls and dictated certain of the terms and conditions of the service; and (7) reserved the right to substitute its own services in place of the long distance provider's service as it obtained authority under section 271 to provide long distance service in various states.[23]

10. In concluding that Ameritech's and U S WEST's calling card platform services violated section 271, we focused on the business relationships between the BOCs and their long distance service provider partners, and the BOCs' marketing and promotional programs. The business relationship considerations led us and the Bureau to conclude that two of the *Qwest Teaming Order* factors described above were present: 1) the BOC obtained material benefits uniquely associated with including a long distance component in a combined package, and 2) the BOC performed activities typically performed by a reseller.[24]

11. In particular, we found in the *1-800-AMERITECH Order* and the Bureau found in the *1-800-4USWEST Order* that the BOCs were improperly attempting to obtain a "jumpstart" in the long distance market by structuring their contracts with their long distance provider partners to allow the BOCs to terminate the contracts almost immediately after receiving approval under section 271 to offer their own long distance service.[25] This made it appear as if the long distance provider was not a true partner, but simply a tool the BOC utilized to build an entrenched base of customers that it could quickly assume once it received section 271 authorization. Indeed, the requests for proposal the BOCs distributed seeking partners for their calling platform services highlighted the tenuous role the long distance provider partners would play in those cases.[26]

12. Further, the contracts between the BOCs and the long distance provider partners in both cases restricted the long distance provider's ability to interact with customers, thus providing the BOCs with an unfettered opportunity to develop goodwill with a base of long distance customers in advance of receiving section 271 approval.[27] Ameritech prohibited its long

---

[23] *1-800-AMERITECH Order*, 15 FCC Rcd at 23185, ¶ 2; *1-800-4USWEST Order* at ¶ 3.

[24] *1-800-AMERITECH Order*, 15 FCC Rcd at 23190-92 and 23195-96, ¶¶ 12-16 and 23-25; *1-800-4USWEST Order* at ¶¶ 13-19 and 27-29.

[25] *See 1-800-AMERITECH Order*, 15 FCC Rcd at 23190-91, ¶ 13 (Ameritech could terminate on seventy-five days' notice for any reason); *1-800-4USWEST Order* at ¶ 16 (U S WEST could terminate on thirty days' notice "for its convenience").

[26] *See 1-800-AMERITECH Order*, 15 FCC Rcd at 23190-91, ¶ 13, n.41; *1-800-4USWEST Order* at ¶ 16, n.43.

[27] *1-800-AMERITECH Order*, 15 FCC Rcd at 23191, ¶ 14; *1-800-4USWEST Order* at ¶ 17.

distance partner from contacting any customers without prior authorization from Ameritech.[28] Similarly, U S WEST retained "ownership" of the customer relationship and control of messages provided to customers in its arrangement with its long distance provider partner.[29] The BOCs' attempts to prevent their long distance partners from developing customer relationships in connection with the Service helped ensure that the BOCs would have little difficulty transitioning the customers from the service provided by the long distance partners to their own long distance service once they received section 271 authorization.

13. Moreover, the customer relationship restrictions also demonstrated that the BOCs were assuming responsibilities typically performed by resellers of long distance service. Resellers generally retain the right and obligation to market and promote their services and to engage in customer service activities.[30] Yet Ameritech and U S WEST had no apparent difficulty dictating contract terms to their long distance provider partners that allowed the BOCs to assume control of these functions.[31]

14. The BOCs' marketing and promotional materials established the presence of the final *Qwest Teaming Order* factor that we and the Bureau analyzed in the *1-800-AMERITECH* and *1-800-4USWEST* cases – whether the BOC holds itself out as a long distance service provider. In those materials, the BOCs made affirmative attempts to disguise the role of the long distance partner in providing the service.[32] In both cases, the long distance provider's name was usually buried in fine print and its role in providing the long distance portion of the service was either not adequately described or was de-emphasized.[33] We and the Bureau found that the steps taken to brand the offering as the BOC's exclusive combined offering could lead consumers to believe that the BOC was providing in-region, long distance service.[34]

15. The facts of this case are materially different than those described in the *1-800-AMERITECH Order* and the *1-800-4USWEST Order*. We have carefully reviewed the business relationship between NYNEX and Sprint, as well as NYNEX's marketing and promotional materials. Our review leads us to conclude that, based on the totality of the circumstances and

---

28 *1-800-AMERITECH Order*, 15 FCC Rcd at 23191, ¶ 14.

29 *1-800-4USWEST Order* at ¶ 17.

30 *See, e.g., Qwest Teaming Order*, 13 FCC Rcd at 21473, ¶ 48.

31 In addition, Ameritech was able to dictate the prices the long distance provider partner would charge for its services, a clear usurpation of the reseller's role. *1-800-AMERITECH Order*, 15 FCC Rcd at 23196, ¶ 25; *see also Qwest Teaming Order*, 13 FCC Rcd at 21472, ¶ 47 (BOCs exercised strong prospective influence over prices of the long distance services provided by the long distance provider partners).

32 *See 1-800-AMERITECH Order*, 15 FCC Rcd at 23192-94, ¶¶ 18-22; *1-800-4USWEST Order* at ¶¶ 21-26.

33 *See 1-800-AMERITECH Order*, 15 FCC Rcd at 23194, ¶¶ 21-22; *1-800-4USWEST Order* at ¶ 25.

34 *1-800-AMERITECH Order*, 15 FCC Rcd at 23194, ¶ 22; *1-800-4USWEST Order* at ¶ 26.

application of the *Qwest Teaming Order* factors, the record does not support a finding that NYNEX violated section 271 with its Service.

16. The business relationship between NYNEX and Sprint differs fundamentally from the business relationships at issue in *1-800-AMERITECH* and the *1-800-4USWEST* cases. First, NYNEX did not structure its agreement with Sprint to allow for early termination. NYNEX's contract with Sprint was for a three year term, and NYNEX could not terminate the contract early or on short notice except in the case of a breach by Sprint.[35] Thus, NYNEX's contract with Sprint did not allow NYNEX to obtain an improper "jumpstart" in the long distance market.[36]

17. Second, NYNEX did not exercise the same degree of control over the marketing and customer relationship that we found particularly troubling in the *1-800-AMERITECH* and *1-800-4USWEST* cases. In particular, NYNEX did not impose the type of restrictions on Sprint that Ameritech and U S WEST imposed on their long distance partners. Sprint was free to engage in customer care activities and market its services in connection with the card offering, and Sprint had an affirmative role in designing the calling card and the advertising program.[37] Sprint remained free to enhance its relationship with customers using the Service and was not forced by NYNEX, as the long distance providers partners were in the *1-800-AMERITECH* and *1-800-4USWEST* cases, to accept a secondary and restricted role vis a vis the customer base of card-users.[38] Because NYNEX did not employ a combination of early termination provisions and control over customer care and marketing that would allow it to pre-position a customer base for its long distance service prior to receiving 271 authorization, we conclude that the "material benefit" factor that we found present in the *1-800-AMERITECH* and *1-800-4USWEST* cases is not present here.[39]

---

[35] Defendants' Initial Brief at 6; Defendants' Response Brief at 2.

[36] Although AT&T points out that NYNEX's customers may have appreciated the "one-stop shopping" advantages provided by the Service, that alone does not make the Service unlawful. NYNEX did not affirmatively structure its contract with Sprint or its promotional program to allow it to capitalize unfairly on the benefits its Service provides to consumers.

[37] Defendants' Initial Brief at 4-5; Defendants' Response Brief at 5-6.

[38] Sprint's ability to market and promote its services and to engage in customer care activities also distinguishes this case from the *Qwest Teaming Order*, in which the BOCs retained the exclusive right to market and sell the services at issue and restricted customer care activities the long distance provider partners could perform. 13 FCC Rcd at 21451, 21470 and 21473, ¶¶ 13, 45 and 48. AT&T argues that NYNEX similarly prevented or restricted Sprint from contacting customers in connection with the Service. AT&T Corp.'s Opening Brief Concerning the Effect of the *AMERITECH Card Order*, File No. E-97-05B (Dec. 8, 2000) at 8. As NYNEX points out, this argument is belied by the terms of its contract with Sprint, which contained no such restrictions. Defendants' Initial Brief at 4-5; Defendants' Response Brief at 5-6. Further, the contract expressly required Sprint to provide "operator services" in connection with the Service. *See* NYNEX Responses to Interrogatories, File No. E-97-05 (Dec. 23, 1996) at 1-2.

[39] In addition to the absence of evidence of an improper "jumpstart" benefit in this case, *cf. U S WEST Communications*, 177 F.3d at 1060, the record also does not appear to contain evidence of certain financial benefits that the Commission found to be troubling in connection with at least one of the programs at issue in the (continued….)

18. Similarly, NYNEX's consent to share marketing and customer care responsibilities with Sprint also demonstrates that NYNEX did not function as a reseller would, because it permitted Sprint to play a significant role in the marketing of the service as well as customer care. NYNEX apparently could not simply dictate restrictive terms to Sprint and thereby assume responsibilities that the long distance provider typically would perform. As described above, Sprint retained the ability to engage in customer care and marketing activities. Further, Sprint retained control over the pricing of its services in connection with the Service,[40] a fact that was not true at least with respect to the 1-800-AMERITECH service and the *Qwest Teaming Order* arrangements.[41] Thus, the concern that existed in the *Qwest Teaming Order* and the *1-800-AMERITECH Order* and *1-800-4USWEST Order* that the BOC assumed responsibilities typically performed by the long distance provider is not present here.

19. Finally, NYNEX's marketing and promotional materials establish that NYNEX did not hold itself out as a long distance provider by trying to disguise or de-emphasize Sprint's role as the provider of long distance service. Initially, AT&T points to only three NYNEX promotional materials that it claims are problematic.[42] Two of those materials mention in small type that "[l]ong distance calling card calls made using 1 800 54NYNEX will be carried by Sprint."[43] The third promotional document states, in type that is the same size as the rest of the advertisement narrative, "you'll also get Sprint's rates for long distance."[44] NYNEX effectively counters AT&T's argument that Sprint's role was de-emphasized by pointing to other marketing and promotional materials that highlight Sprint's role. For example, the letters that accompanied the new cards sent to customers plainly stated that "long distance calls made by dialing 1 800 54NYNEX will be provided by Sprint" and further noted, in bold print in the middle of the letter,

(Continued from previous page)
Qwest Teaming Order. There, the evidence showed that Ameritech intended to use the disputed program to increase its sales of certain local services, such as Call Waiting, Caller ID and Automatic Redial, that had higher profit margins than basic local service. *Qwest Teaming Order*, 13 FCC Rcd at 21468, ¶ 43. AT&T has not cited evidence of such a targeted financial benefit here. This is not to suggest that the facts described herein and in paragraphs 17 and 18 above are the only facts that could establish the existence of the "material benefit" factor discussed in the *Qwest Teaming Order*. We will continue to evaluate all the facts presented in any future "partnering" or "teaming" cases to determine, based on the totality of the circumstances presented, whether the BOC obtains an improper "material benefit" from including long distance service in a package of services.

40 Defendants' Initial Brief at ¶ 6.

41 *1-800-AMERITECH Order*, 15 FCC Rcd at 23196, ¶ 25; *Qwest Teaming Order*, 13 FCC Rcd at 21472, ¶ 47 (expressing concern that the BOCs exercised "strong prospective influence over the prices, terms and conditions of the long distance services" provided under the BOCs' programs). *See also 1-800-4USWEST Order* at ¶ 29 (discussing U S WEST's apparent ability to dictate certain terms to its long distance provider partner).

42 AT&T also contends that the NYNEX brand name was the only name operators referenced in processing calls made with the Service. AT&T Corp.'s Reply Brief Concerning the Effect of the *AMERITECH Card Order*, File No. E-97-05B (Dec. 20, 2000) at 7. However, the call flow description contained in the contract between NYNEX and Sprint does not support this contention. AT&T Brief at Ex. G.

43 AT&T Brief at Ex. H and I. Similar language appears on the back of the 1-800-54NYNEX calling card.

44 *Id.* at Ex. J.

that "Sprint will take a spectacular 50% off each minute you spend on your long distance calls."[45] Other promotional materials similarly either highlighted Sprint's role or plainly described Sprint's role in the same type-face used for the remaining narrative portions of the promotional material.[46]

20. Further, AT&T's contention that NYNEX's advertisements for the Service did not adequately reveal Sprint's role in providing the long distance component of the Service rings hollow in light of AT&T's original criticism that Sprint's role was improperly *emphasized* in NYNEX's advertisements for the Service. AT&T complained to NYNEX shortly after NYNEX began promoting the Service that NYNEX's advertisements "*explicitly include promotion of the Sprint long distance services* that are evidently associated with the calling card."[47] AT&T's original concern that Sprint's role was made too clear by NYNEX undercuts its current contention that NYNEX did not adequately explain Sprint's role in the Service to potential customers.[48] Accordingly, the record does not support a finding that NYNEX is "holding itself out" as a long distance provider in connection with the Service.[49]

21. In sum, we find that NYNEX's Service is materially different than the services at issue in the *1-800-AMERITECH* and *1-800-4USWEST* cases. These differences demonstrate that the concerns expressed in the *Qwest Teaming Order* are not present here. Accordingly, we conclude, based on the totality of the circumstances, that the record does not support a finding that NYNEX's Service violates section 271.

---

[45] NYNEX Opposition to Motion to Compel, File No. E-97-05B (Jan. 23, 1997) at attachments. In addition to differentiating this case from *1-800-AMERITECH* and *1-800-4USWEST*, NYNEX's willingness to make clear Sprint's role in the Service also distinguishes this case from the *Qwest Teaming Order*. 13 FCC Rcd at 21450-51, 21453 and 21470, ¶¶ 11, 13, 16 and 45 (indicating that Qwest's role in providing the long distance component of the BOCs' services was not clear).

[46] *Id.*; *see also* Defendants' Response Brief at 7 and attachments B and C. We also note that the bills NYNEX sent to customers listed Sprint as the carrier for long distance calls. *See* Defendants' Response Brief at 2. Although AT&T contends that we should not consider this evidence, because it is allegedly inconsistent with prior NYNEX discovery responses, we are not persuaded that any inconsistency exists. AT&T Motion to Strike, File No. E-97-05B (Feb. 8, 1999). More importantly, though, we fail to see how AT&T is prejudiced by our consideration of this indisputably relevant evidence. Accordingly, we deny AT&T's motion to strike.

[47] NYNEX Answer, File No. E-97-05 (Dec. 16, 1996) at Ex. 5 (letter from AT&T to NYNEX complaining about the recent introduction of the NYNEX Service) (emphasis added).

[48] AT&T's original concerns regarding NYNEX's advertising of the Service appeared to involve whether NYNEX had violated section 251(g) of the Act. This contention is addressed *supra* at ¶ 23.

[49] We acknowledge the fact that NYNEX used a vanity number with the NYNEX name in connection with its Service. Nevertheless, based on our review of the advertising and promotional materials as a whole, we find it unlikely that customers would be misled into believing that NYNEX provided the long distance component of the Service.

B. AT&T Has Not Established That NYNEX Violated Sections 202(a) and 251(g).

22. In Count I of its Complaint, AT&T alleges that NYNEX's partnership with Sprint and its 1-800-54NYNEX Service violate the equal access and nondiscrimination requirements of sections 251(g) and 202(a) of the Act.[50]

23. Section 251(g) imports equal access and nondiscrimination obligations on BOCs as they existed the day before enactment of the 1996 Act.[51] "Thus, in order to succeed on its claim, AT&T must cite either, (a) a pre-1996 Act court order, consent decree, or Commission order" squarely on point that prohibits NYNEX from partnering with a long distance service provider to provide the Service at issue, "or (b) a Commission order issued after passage of the 1996 Act imposing such an obligation."[52] AT&T cites no such precedent, and we are aware of none. Accordingly, we conclude that the record does not support a finding that NYNEX's Service violates section 251(g).

24. AT&T relies principally on *United States v. Western Electric Company, Inc.* to support its 251(g) claim, but this decision does not help AT&T.[53] The facts of that case are far different than those involved here. *Western Electric* concerned the discriminatory practice of the BOCs providing validation data for calls made using their calling cards only for calls carried by AT&T, their former parent prior to divestiture under the Modified Final Judgment ("MFJ"). This practice prevented other long distance service providers from accepting calls made with the BOC calling cards and thus substantially advantaged AT&T over its competitors.[54] That case also involved misleading marketing and advertising by the BOCs in failing to inform customers that

---

50 AT&T Complaint, File No. E-97-05 (Oct. 29, 1996) ("AT&T Complaint") at 11; AT&T Supplement to Complaint, File No. E-97-05B (Jan. 10, 1997) ("AT&T Supplemental Complaint") at 2.

51 *AT&T Corp. v. New York Telephone Company, d/b/a Bell Atlantic – New York*, 15 FCC Rcd 19997, 20001 at ¶ 13 (2000) (rejecting AT&T's challenge based on section 251(g) to a Bell Atlantic's in-bound marketing practices for second telephone lines in New York post-section 271 approval). Section 251(g) provides, in pertinent part, "On and after the date of enactment of the [1996 Act], 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 … in accordance with the same equal access and non-discriminatory interconnection restrictions and obligations … that apply to such carrier on the date immediately preceding the date of enactment of the [1996 Act] 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 such date of enactment." 47 U.S.C. § 251(g).

52 *AT&T Corp.*, 15 FCC Rcd at 20000, ¶ 9. *Cf., Qwest Teaming Order*, 13 FCC Rcd at 21476-77 (declining to reach a section 251(g) claim and discussing, in dicta, general principles underlying section 251(g)). Moreover, to the extent that claims might lie under section 251(g) for denial of an equal opportunity to participate in a service (an issue we need not decide here), on the facts presented, we reject any such claim for the reasons provided in our discussion of section 202(a) in paragraph 26 below.

53 *United States v. Western Electric Company, Inc.*, 698 F. Supp. 348 (D.D.C. 1988).

54 *Id.* at 354.

they automatically routed all the long distance traffic to AT&T, rather than themselves providing the long distance service component of the calling card programs.[55] Nothing remotely resembling these practices occurs with NYNEX's calling card program. Although NYNEX selected Sprint, rather than AT&T, to handle the long distance component of the Service, that decision alone does not constitute the type of behavior that the MFJ court sought to constrain. Rather, *Western Electric* makes clear that the BOCs could not use their monopoly market positions to thwart the ability of AT&T's competitors to participate fully in the long distance market by impeding completion of calling card calls. This case does not present that situation (*see* discussion *infra* at ¶ 26), and, therefore, we decline to expand the section 251(g) obligations in the manner suggested by AT&T.[56]

25. Section 202(a) of the Act prevents unreasonable discrimination in the provision of services.[57] AT&T offers no independent arguments for why we should find a violation of section 202(a) if we do not find a violation of section 251(g) on the facts presented. In fact, AT&T includes both claims in a single count in its Complaint, relies on the same set of facts to support both claims, and devotes only a single paragraph in its briefs to arguments related specifically to section 202(a).[58]

26. AT&T's limited arguments addressed to section 202(a) are insufficient to establish a violation of that section. AT&T argues principally that NYNEX provided Sprint with a better opportunity to participate in the Service than it provided to AT&T, and that NYNEX did not provide AT&T an adequate opportunity to provide a comparable product after NYNEX and Sprint entered into their arrangement.[59] NYNEX effectively counters AT&T's arguments by pointing out that AT&T had numerous opportunities to work with NYNEX to establish their own calling platform service but that AT&T elected not to pursue these opportunities.[60] Accordingly, on the basis of the specific record in this case, we cannot conclude that NYNEX has engaged in unreasonable discrimination in violation of section 202(a).

---

55 *Id.* at 356.

56 AT&T also relies on the *Shared Tenant Services* decision, but that reliance is similarly misplaced. *United States v. Western Electric Company, Inc.*, 627 F. Supp. 1090 (D.D.C. 1986) ("*Shared Tenant Services*"). The *Shared Tenant Services* decision involved attempts by BOCs to buy interexchange services from interexchange carriers and resell those services in combined packages to groups of customers, such as tenants in apartment buildings. Thus, the BOCs were actually providing interexchange services in that case, rather than merely marketing a program that included an interexchange services component provided by an identified interexchange carrier. *Id.* at 1100. Accordingly, the *Shared Tenant Services* decision is not on point and does not dictate that we find a violation of section 251(g) here.

57 47 U.S.C. § 202(a).

58 AT&T Complaint at 11; AT&T Supplemental Complaint at 2; AT&T Brief at 19-20 (in which AT&T asserts, with virtually no supporting analysis, that "[f]or these same reasons, NYNEX is violating section 202(a) . . .").

59 AT&T Brief at 3-9.

60 NYNEX Brief at 2-7.

IV. CONCLUSION

27. We conclude that the record in this proceeding does not support a finding that NYNEX, through its 1-800-54NYNEX Service, has violated either section 202(a), 251(g), or 271 of the Act. Accordingly, we deny AT&T's complaint.

V. ORDERING CLAUSES

28. Accordingly, IT IS ORDERED, pursuant to sections 1, 4(i), 4(j), 202(a), 208, 251(g), and 271 of Act, as amended, 47 U.S.C. §§ 151, 154(i), 154(j), 202(a), 208, 251(g), and 271, that the Formal Complaint filed by AT&T Corporation IS DENIED.

29. IT IS FURTHER ORDERED, pursuant to sections 4(i), 4(j), and 208 of the Act, as amended, 47 U.S.C. §§ 154(i), 154(j), and 208, and sections 1.720 through 1.736 of the Commission's rules, 47 C.F.R. §§ 1.720-1.736, that AT&T's Motion to Strike, dated February 8, 1999, IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION

Magalie Roman Salas
Secretary