

PUBLIC NOTICE



FEDERAL COMMUNICATIONS COMMISSION
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COMMENTS REQUESTED IN CONNECTION WITH COURT REMAND OF NON-ACCOUNTING SAFEGUARDS ORDER

CC DOCKET NO. 96-149

Released: November 8, 2000

Comment Date: Wednesday, November 29, 2000

Reply Comment Date: Monday, December 11, 2000

In the *Non-Accounting Safeguards Order*, the Commission concluded that the term “interLATA services” as used in section 271 of the Communications Act of 1934, as amended, encompasses not only interLATA telecommunications services, but also interLATA information services.¹ The Commission reasoned that interLATA information services are “interLATA services” because they include a bundled, interLATA telecommunications component.² Although several parties petitioned for reconsideration of various aspects of the *Non-Accounting Safeguards Order*, no party asked the Commission to reconsider its ruling that the term “interLATA services” includes information services.

Following the Commission’s adoption of the *Third Reconsideration Order*,³ the Bell Atlantic telephone companies (n/k/a the Verizon telephone companies) and US WEST, Inc. (n/k/a Qwest Communications International Inc.) petitioned for judicial review of the *Non-Accounting Safeguards*

¹ *Implementation of the Non-Accounting Safeguards of Sections 271 and 272 of the Communications Act of 1934, as amended*, CC Docket No. 96-149, First Report and Order and Further Notice of Proposed Rulemaking, 11 FCC Rcd 21905 (1996) (*Non-Accounting Safeguards Order*), at ¶¶ 55-56. The Act defines “interLATA service” as “telecommunications between a point located in a local access and transport area and a point located outside such area.” 47 U.S.C. § 153(21). “Telecommunications” is defined as “the transmission, between or among points specified by the user, of information of the user’s choosing, without change in the form or content of the information as sent and received.” 47 U.S.C. § 153(43). The Act defines “information service” as “the offering of a capability for generating, acquiring, storing, transforming, processing, retrieving, utilizing, or making available information via telecommunications, and includes electronic publishing, but does not include any use of any such capability for the management, control, or operation of a telecommunications system or the management of a telecommunications service.” 47 U.S.C. § 153(20).

² *Non-Accounting Safeguards Order*, 11 FCC Rcd at 21932-33, ¶ 56.

³ *See Implementation of the Non-Accounting Safeguards of Sections 271 and 272 of the Communications Act of 1934, as amended*, CC Docket No. 96-149, Third Order on Reconsideration, 14 FCC Rcd 16299 (1999) (*Third Reconsideration Order*). In the *Third Reconsideration Order*, the Commission reaffirmed that the statute does not exclude out-of-region interLATA information services from the section 272(a)(2) separate affiliate requirement. *Id.* 14 FCC Rcd at 16328, ¶ 41.

Order in the United States Court of Appeals for the District of Columbia Circuit, seeking reversal of the Commission's holding that the term "interLATA services" extends to both telecommunications and information services. In their joint appellate brief, the petitioners contend that the agency's statutory interpretation conflicts with the statute's plain meaning. In support of their argument, the petitioners rely on a 1998 Commission Report to Congress in which, they claim, the Commission declared "that 'telecommunications' and 'information services' are mutually exclusive categories and that a provider of 'information services' does not *provide* 'telecommunications' but rather *uses* 'telecommunications.'"⁴ Petitioners argue that if a provider of information services does not provide telecommunications, then it does not provide "interLATA service," which the statute defines as a form of "telecommunications." Thus, petitioners contend, the restrictions established by section 271 do not apply when a Bell operating company or its affiliate provides an information service.

In response to the petitioners' appellate brief, the Commission moved for a voluntary remand to consider further the issues raised by the petitioners. The Commission explained that a remand was necessary because the arguments advanced by the petitioners in their appellate brief had not been presented in the administrative proceeding. The petitioners' appellate brief relied heavily on a Report to Congress that the Commission issued more than a year after release of the *Non-Accounting Safeguards Order*. The Commission further noted that, in comments filed during reconsideration of other aspects of the *Non-Accounting Safeguards Order*, the petitioners appeared to advocate the very same statutory interpretation that they now challenge on appeal.⁵ In light of these factors, the Commission asked that the court grant it the opportunity to consider the threshold question of statutory interpretation – the proper scope of the term "interLATA services" – based on a more complete administrative record. On October 27, 2000, the court granted the Commission's motion and remanded the matter to the Commission.⁶

We have placed a copy of the petitioners' appellate brief in the above-captioned docket. To aid the Commission in meeting its commitment to the court to consider and address within 180 days the issues raised by the petitioners, the Common Carrier Bureau issues this Public Notice seeking comment on the arguments raised by the petitioners before the D.C. Circuit. We ask that the parties address the following issues, as well as any additional issues previously raised before the Commission or the court that are relevant to this inquiry.

1. Does the provision of an "information service" necessarily include a bundled telecommunications component that falls within the Act's definition of an "interLATA service"? To the extent that it is using telecommunications, can the provider of an information service also be deemed to be providing telecommunications? Does the analysis of this issue change if the information service provider is transmitting services over its own telecommunications facilities rather than using facilities obtained from other carriers?

⁴ Br. at 4 (emphasis in original). See also Br. at 12-13 (citing *Federal-State Joint Board on Universal Service*, CC Docket No. 96-45, Report to Congress, 13 FCC Rcd 11501 (1998) (*Stevens Report*)).

⁵ See, e.g., CC Docket No. 96-149, Bell Atlantic/NYNEX Joint Comments (filed April 2, 1997); US WEST Reply Comments (filed April 16, 1997); US WEST Petition for Reconsideration (filed Feb. 20, 1997).

⁶ See *Bell Atlantic Telephone Companies v. Federal Communications Commission*, No. 99-1479 (D.C. Cir. Oct. 27, 2000) (order granting motion for remand).

2. Considering the Act's text, structure, purpose, and history, what effect, if any, should the Commission give to section 271(g)'s reference to "incidental interLATA services," which the Commission has interpreted as applying to both incidental telecommunications and information services?⁷

3. Considering the Act's text, structure, purpose, and history, what effect, if any, should the Commission give to section 272(a)(2)(B)'s reference to "interLATA telecommunications services"? Does use of this term imply that interLATA telecommunications service is a subset of a more general category of "interLATA services" that could include interLATA information services, or did Congress mean simply to distinguish common-carrier transmission services from non-common carrier transmission services, as the petitioners contend?

4. Considering the Act's text, structure, purpose, and history, what effect, if any, should the Commission give to section 272(a)(2)(C)'s reference to "interLATA information services"? For purposes of interpreting the term "interLATA services" in section 271, is there any significance to the fact that section 272 treats "interLATA telecommunications services" differently from "interLATA information services"?

5. The petitioners' appellate brief quotes several passages from the Commission's 1998 Report to Congress. Do those passages support the conclusion that information services fall outside of the scope of the statutory definition of "interLATA service"? If so, why? If not, why not?

Pursuant to sections 1.415 and 1.419 of the Commission's rules, 47 C.F.R. §§ 1.415, 1.419, interested parties may file comments on or before Wednesday, November 29, 2000, and reply comments on or before Monday, December 11, 2000. All filings should refer to CC Docket No. 96-149. Comments may be filed using the Commission's Electronic Comment Filing System (ECFS) or by filing paper copies.⁸ Comments filed through the ECFS can be sent as an electronic file via the Internet to <<http://www.fcc.gov/e-file/ecfs.html>>. Parties may also submit an electronic comment by Internet e-mail. To get filing instructions for e-mail comments, commenters should send an e-mail to ecfs@fcc.gov, and should include the following words in the body of the message, "get form <your e-mail address.>" A sample form and directions will be sent in reply.

Parties choosing to file by paper copy must file an original and two copies of each pleading with the Commission's Secretary, Magalie Roman Salas, Office of the Secretary, Federal Communications Commission, 445 12th St. SW, Room TW-B204, Washington, D.C. 20554. An additional copy should also be sent to: (1) Johanna Mikes, Common Carrier Bureau, Policy and Program Planning Division, FCC, 445 12th St., SW, Room 5-C163, Washington, D.C. 20554, and (2) the Commission's contractor for public service records duplication, International Transcription Services, Inc. (ITS), 445 12th Street, SW, Room CY-B402, Washington, D.C. 20554. Comments and reply comments will be available for public inspection during regular business hours in the FCC Reference Center, Room CY-A257, 445 12th Street, SW, Washington, D.C. 20554. Copies may also be

⁷ See, e.g., *Non-Accounting Safeguards Order*, 11 FCC Rcd at 21948-53, ¶¶ 88-98.

⁸ See *Electronic Filing of Documents in Rulemaking Proceedings*, 63 Fed. Reg. 24,121 (1998).

obtained from ITS, 445 12th Street, SW, Room CY-B402, Washington, D.C. 20554, (202) 314-3070.

We will continue to treat this proceeding as “permit-but-disclose” for purposes of the Commission’s *ex parte* rules. See 47 C.F.R. §§ 1.1200, 1.1206. Persons making oral *ex parte* presentations are reminded that memoranda summarizing the presentations must contain summaries of the substance of the presentations and not merely a listing of the subjects discussed.

For further information, contact: Johanna Mikes, Policy and Program Planning Division, Common Carrier Bureau at (202) 418-1535.