11 F.C.C.R. 21905, 13 F.C.C.R. 11230, 11 FCC Rcd. 21905, 13 FCC Rcd. 11230, 5 Communications Reg. (P&F) 696, 1996 WL 734160 (F.C.C.)

NOTE: An Erratum is attached to the end of this document.

Federal Communications Commission (F.C.C.)

First Report and Order and Further Notice of Proposed Rulemaking

****1** IN THE MATTER OF IMPLEMENTATION OF THE NON-ACCOUNTING SAFEGUARDS OF SECTIONS 271 AND 272 OF THE COMMUNICATIONS ACT OF 1934, AS AMENDED.

CC Docket No. 96-149
FCC 96-489

Adopted: December 23, 1996

Released: December 24, 1996
Comment Date: February 19, 1997
Reply Comment Date: March 21, 1997

***21905** By the Commission:

*21907 I. INTRODUCTION

1. In February 1996, the Telecommunications Act of 1996 became law.[FN1] The intent of the 1996 Act is "to provide for a pro-competitive, de-regulatory national policy framework designed to accelerate rapidly private sector deployment of advanced telecommunications and information technologies and services to all Americans by opening all telecommunications markets to competition."[FN2]

***21908** 2. In this proceeding, we adopt non-accounting safeguards, pursuant to section 272 of the Communications Act, to govern entry by the Bell Operating Companies (BOCs) into certain new markets.[FN3] This proceeding is one of a series of interrelated rulemakings that collectively will implement the telephony provisions of the 1996 Act. Other proceedings under the 1996 Act have focused on opening markets to entry by new competitors,[FN4] establishing rules to preserve and advance universal service,[FN5] establishing rules for competition in those markets that are opened to competitive entry,[FN6] and on lifting legal and regulatory barriers to competition.[FN7]

3. Upon enactment, the 1996 Act permitted the BOCs immediately to provide interLATA[FN8] services[FN9] that originate outside of their in-region states.[FN10] The 1996 Act conditions ***21909** the BOCs' entry into in-region interLATA services on their compliance with certain provisions of section 271. Under section 271, we must determine, among other things, whether the BOC has complied with the safeguards imposed by section 272 and the rules adopted herein.[FN11] Section 272 addresses the BOCs' provision of interLATA telecommunications services originating in states in which they provide local exchange and exchange access services, interLATA information services,[FN12] and BOC manufacturing activities.[FN13]

***21910** 4. On July 18, 1996, we initiated this proceeding by releasing a Notice of Proposed Rulemaking (Notice)[FN14] that sought comment on the non-accounting separate affiliate and nondiscrimination safeguards of the 1996 Act. These provisions govern the BOCs' entry into certain new markets. We initiated a separate proceeding to address the accounting safeguards required to implement sections 260 and 272 through 276 of the Communications Act.[FN15] Comments on the non-accounting separate affiliate and nondiscrimination safeguards were filed on August 15, 1996, and reply comments were filed on August 30, 1996.[FN16]

5. The Notice also sought comment on whether we should relax the dominant carrier classification that under our current rules would apply to in-region, interstate, domestic, interLATA services provided by the BOCs' interLATA affiliates. Further, the Notice sought comment on whether we should modify our existing rules for regulating the provision of in-region, inter-

state, interexchange services by independent local exchange carriers (LECs) (namely, carriers not affiliated with a BOC). Finally, the Notice considered whether to apply the same regulatory treatment to the BOC affiliates' and independent LECs' provision of in-region, international services, as would apply to the provision of in-region, interstate, domestic, interLATA services and in-region, interstate, domestic interexchange services, respectively. This order addresses only the non-accounting separate affiliate and nondiscrimination safeguards in sections 271 and 272. The classification of BOC affiliates or independent LECs (and their affiliates) as dominant or non-dominant will be addressed in a separate Report and Order in this docket.

****2** 6. In this order, we promulgate rules and policies implementing, and, where necessary, clarifying the non-accounting separate affiliate and nondiscrimination safeguards prescribed by Congress in sections 271 and 272. These safeguards are intended both to protect subscribers to BOC monopoly services, such as local telephony, against the potential risk of having to pay costs incurred by the BOCs to enter competitive markets, such as interLATA services and equipment manufacturing, and to protect competition in those markets from the BOCs' ability to use their existing market power in local exchange services to obtain an anticompetitive advantage in those new markets the BOCs seek to enter. Our action today continues the process of enhancing competition in all telecommunications markets as envisioned by the 1996 Act.

***21911 A. Background**

7. The fundamental objective of the 1996 Act is to bring to consumers of telecommunications services in all markets the full benefits of vigorous competition. As we recognized in the First Interconnection Order, "[t]he opening of all telecommunications markets to all providers will blur traditional industry distinctions and bring new packages of services, lower prices, and increased innovation to American consumers." [FN17] With the removal of legal, economic, and regulatory impediments to entry, providers of various telecommunications services will be able to enter each other's markets and provide various services in competition with one another. Both the BOCs and other firms, most notably existing interexchange carriers, will be able to offer a widely recognized brand name that is associated with telecommunications services. As firms expand the scope of their existing operations to new product lines, they will increasingly offer consumers the ability to purchase local, intraLATA, and interLATA telecommunications services, as well as wireless, information, and other services, from a single provider (i.e., "one stop shopping"), and other advantages of vertical integration.[FN18]

8. The 1996 Act opens local markets to competing providers by imposing new interconnection and unbundling obligations on existing providers of local exchange service, including the BOCs. The 1996 Act also allows the BOCs to provide interLATA services in the states where they currently provide local exchange and exchange access services once they satisfy the requirements of section 271. Moreover, by requiring compliance with the competitive checklist set out in section 271(c)(2)(B) as a prerequisite to BOC provision of in-region interLATA service, the statute links the effective opening of competition in the local market with the timing of BOC entry into the long distance market, so as to ensure that neither the BOCs nor the existing interexchange carriers could enjoy an advantage from being the first to enter the other's market.

9. In enacting section 272, Congress recognized that the local exchange market will not be fully competitive immediately upon its opening. Congress, therefore, imposed in section 272 a series of separate affiliate requirements applicable to the BOCs' provision of certain new services and their engagement in certain new activities. These requirements are designed, in the absence of full competition in the local exchange marketplace, to prohibit anticompetitive discrimination and cost-shifting, while still giving consumers the benefit of competition.

****3** 10. As we observed in the Notice, BOC entry into in-region interLATA services raises issues for competition and consumers, even after a BOC has satisfied the requirements of section ***21912** 271(d)(3). BOCs currently are the dominant providers of local exchange and exchange access services in their in-region states, ac-

counting for approximately 99.1 percent of the local service revenues in those markets.[FN19] If a BOC is regulated under rate-of-return regulation, a price caps structure with sharing (either for interstate or intrastate services), a price caps scheme that adjusts the X-factor periodically based on changes in industry productivity, or if any revenues it is allowed to recover are based on costs recorded in regulated books of account, it may have an incentive to allocate improperly to its regulated core business costs that would be properly attributable to its competitive ventures.

11. In addition, a BOC may have an incentive to discriminate in providing exchange access services and facilities that its affiliate's rivals need to compete in the interLATA telecommunications services and information services markets. For example, a BOC may have an incentive to degrade services and facilities furnished to its affiliate's rivals, in order to deprive those rivals of efficiencies that its affiliate enjoys. Moreover, to the extent carriers offer both local and interLATA services as a bundled offering, a BOC that discriminates against the rivals of its affiliates could entrench its position in local markets by making these rivals' offerings less attractive. With respect to BOC manufacturing activities, a BOC may have an incentive to purchase only equipment manufactured by its section 272 affiliate, even if such equipment is more expensive or of lower quality than that available from other manufacturers.[FN20]

12. Moreover, if a BOC charges other firms prices for inputs that are higher than the prices charged, or effectively charged, to the BOC's section 272 affiliate, then the BOC could create a "price squeeze."[FN21] In that circumstance, the BOC affiliate could lower its retail price to reflect its unfair cost advantage, and competing providers would be forced either to match the price reduction and absorb profit margin reductions or maintain their retail prices at existing levels and accept market share reductions. This artificial advantage may allow the BOC affiliate to win customers even though a competing carrier may be a more efficient provider in serving the customer. Unlawful discriminatory preferences in the quality of the service or preferential ***21913** dissemination of information provided by BOCs to their section 272 affiliates, as a practical matter, can have the same effect as charging unlawfully discriminatory prices. If a BOC charged the same rate to its affiliate for a higher quality access service than the BOC charged to unaffiliated entities for a lower quality service, or disclosed information concerning future changes in network architecture to its manufacturing affiliate before disclosing it to others, the BOC could effectively create the same "price squeeze" discussed above.

****4** 13. The structural and nondiscrimination safeguards contained in section 272 ensure that competitors of the BOC's section 272 affiliate have access to essential inputs, namely, the provision of local exchange and exchange access services, on terms that do not discriminate against the competitors and in favor of the BOC's affiliate. Because the BOC has the incentive to provide its affiliate with the most efficient access, the statute requires the BOC to provide competitors the same access. Access to such inputs on nondiscriminatory terms will enable a new entrant to compete effectively, assuming it is at least as efficient as the BOC and/or its section 272 affiliate. At the same time, Congress also was sensitive to the value to the BOCs of potential efficiencies stemming from economies of scale. Our task is to implement section 272 in a manner that ensures that the fundamental goal of the 1996 Act is attained -- to open all telecommunications markets to robust competition -- but at the same time does not impose requirements on the BOCs that will unfairly handicap them in their ability to compete. The rules and policies adopted in this order seek to preserve the carefully crafted statutory balance to the extent possible until facilities-based alternatives to the local exchange and exchange access services of the BOCs make those safeguards no longer necessary.[FN22]

B. Overview and Summary

14. Section 272 allows a BOC to engage in the manufacturing of telecommunications equipment and CPE, the origination of certain interLATA telecommunications services,[FN23] and the provision of interLATA information services,[FN24] as long as the BOC provides these activities through a separate affiliate. Unless extended by the Commission, the statutory sep-

arate affiliate requirements for manufacturing and interLATA telecommunications services expire three years after a BOC or any BOC affiliate is authorized to provide in-region interLATA services.[FN25] The ***21914** statutory interLATA information services separate affiliate requirement expires on February 8, 2000, four years after enactment of the 1996 Act, unless extended by the Commission.[FN26]

15. This order implements the structural separation requirements mandated by section 272 in a manner that is designed to prevent improper cost allocation between the BOC and its section 272 affiliate and discrimination by the BOC in favor of its section 272 affiliate. In particular, we construe the section 272(b)(1) "operate independently" requirement to prohibit the BOC and its section 272 affiliate from jointly owning transmission and switching facilities or the land and buildings on which such facilities are located. Moreover, we prohibit a BOC and its affiliates, other than the section 272 affiliate itself, from providing operating, installation, and maintenance services associated with the facilities owned by the section 272 affiliate. Similarly, a section 272 affiliate may not provide such services associated with the BOC's facilities. These requirements should reduce the potential for the improper allocation of costs to the BOC that should be allocated to the section 272 affiliate. In addition, they should ensure that a section 272 affiliate must follow the same procedures as its competitors in order to gain access to a BOC's facilities. Consistent with these requirements and those established pursuant to sections 272(b)(5) and 272(c)(1), however, a section 272 affiliate may negotiate with an affiliated BOC on an arm's length basis to obtain transmission and switching facilities, to arrange for collocation of facilities, and to provide or obtain services other than those expressly prohibited herein.

****5** 16. The structural separation requirements of section 272, in conjunction with the affirmative nondiscrimination obligations imposed by that section, also are intended to address concerns that the BOCs could potentially use local exchange and exchange access facilities to discriminate against competitors in order to gain an anticompetitive advantage for their affiliates that engage in competitive activities. We interpret section 272(c)(1) as imposing a flat prohibition against discrimination more stringent than the bar on "unjust and unreasonable" discrimination contained in section 202 of the Act. In short, the BOCs must treat all other entities in the same manner in which they treat their section 272 affiliates. We conclude that a BOC may not discriminate in favor of its section 272 affiliate by: 1) providing exchange access services to competing interLATA service providers at a higher rate than the rate offered to its section 272 affiliate; 2) providing a lower quality service to competing interLATA service providers than the service it provides to its section 272 affiliate at a given price; 3) giving preference to its affiliate's equipment in the procurement process; or 4) failing to provide advance information about network changes to its competitors. We seek comment in a Further Notice of Proposed Rulemaking on specific disclosure requirements to implement section 272(e)(1).

17. In this order, we also seek to ensure that BOC section 272 affiliates have the same opportunity to compete for customers as other long distance service providers. The joint marketing rules we have established limit the ability of the largest interexchange carriers to market jointly their interLATA service with resold BOC local exchange service, until the BOC receives in-region, interLATA authority under section 271 or until 36 months after enactment of ***21915** the 1996 Act. Once the BOC receives interLATA authority, the restrictions on interexchange carrier joint marketing expire, and the interexchange carriers and the BOCs and their section 272 affiliates may engage in the same types of marketing activities.

18. In addition, we clarify that the Communications Act allows a section 272 affiliate to purchase unbundled elements pursuant to section 251(c)(3)[FN27] and telecommunications services at wholesale rates under section 251(c)(4).[FN28] Thus, the section 272 affiliate may provide integrated services in the same manner as other competitors. Such an approach is consistent with the objectives of the 1996 Act, which are to give service providers the freedom to develop a wide array of service packages and allow consumers to select what best suits

their needs. We note, however, that the BOC may not transfer local exchange and exchange access facilities and capabilities to the section 272 affiliate, or another affiliate, in order to evade regulatory requirements.

19. We recognize that no regulatory scheme can completely prevent or deter discrimination, particularly in its more subtle forms. In this order, we shift the burden of production to the BOCs in the context of section 271(d)(6) enforcement proceedings in order to alleviate the burden on the complainant and facilitate the detection of anticompetitive behavior. Because the BOC is likely to be in sole possession of most of the relevant information necessary to establish the complainant's case, shifting the burden is the most efficient way of resolving complaints alleging violations of the conditions of in-region interLATA entry under section 271(d)(3). The goal of this proceeding and others is to establish a regulatory framework that enables service providers to enter each other's markets and compete on an equal footing by not allowing one service provider to game regulatory requirements in such a way as to hinder competition.

II. SCOPE OF COMMISSION AUTHORITY

A. Rulemaking Authority

1. Background

****6** 20. In the Notice, we addressed the scope of the Commission's authority, pursuant to sections 271 and 272, over interLATA services, interLATA information services and ***21916** manufacturing activities.[FN29] Although we did not seek comment on whether the Commission has authority to adopt rules implementing section 272, several commenters addressed this issue.

2. Comments

21. Certain BOCs and USTA maintain that the Commission lacks authority to adopt rules implementing the non-accounting safeguards contained in section 272.[FN30] They further maintain that, even if the Commission has such authority, it should not adopt any rules because they are not necessary. These and other parties argue that section 272 contains detailed separate affiliate requirements and therefore is self-executing and needs little or no interpretation.[FN31] They further suggest that all of the Commission's proposed regulations are impermissible because they go beyond the basic terms of section 272.[FN32] Bell Atlantic and USTA assert that Congress clearly intended for section 272 to be a self-executing provision because a Senate bill provision specifying that the Commission implement regulations under section 272 was removed from the legislation in conference.[FN33]

22. In response, other parties argue that the Commission has the authority to, and should, promulgate rules implementing section 272. AT&T, TIA, and Time Warner maintain that the Commission has authority, pursuant to other provisions of the Act, including sections 4(i), 201(b), and 303(r), to adopt rules implementing section 272, even though section 272 does not ***21917** specifically direct the Commission to adopt rules.[FN34] AT&T and Time Warner state that the Commission has the authority to adopt implementing rules when Congress enacts broad principles that require interpretation,[FN35] and that section 272 contains ambiguities that require explanation in order to effectuate the 1996 Act's purposes.[FN36] Time Warner argues that the courts have consistently held that the Commission has expansive rather than limited powers to conduct general rulemakings, so long as those rulemakings are based on permissible public interest goals and are a reasonable means to achieve those goals.[FN37] Finally, in response to the claim that the removal of specific 272 rulemaking authority indicates that Congress intended for section 272 to be self-executing, AT&T argues that Congress could have precluded the Commission from adopting rules, but did not.[FN38]

3. Discussion

23. We reject as unfounded the assertion that the Commission lacks authority to adopt regulations implementing section 272. Sections 4(i), 201(b), and 303(r) of the Act authorize the Commission to adopt any rules it deems necessary or appropriate in order to carry out its responsibilities under the Act, so long as those rules are not otherwise inconsistent with the Act.[FN39] Nothing in section 272 bars the Commission from exercising the rulemaking authority granted by these sections of the

Act to clarify and implement the requirements of section 272. Moreover, courts repeatedly have held that the Commission's general rulemaking authority is "expansive" rather than limited.[FN40] In addition, as AT&T notes, it is well-established that an agency has the ***21918** authority to adopt rules to administer congressionally mandated requirements.[FN41] Contrary to those parties that argue that section 272 is self-executing, we find that Congress enacted in section 272 broad principles that require interpretation and implementation in order to ensure an efficient, orderly, and uniform regime governing BOC entry into in-region interLATA telecommunications and other markets covered by section 272. In the Notice, we identified areas of ambiguity in the requirements of section 272 with the specific goal of clarifying and implementing Congress's intent in that provision. That remains our goal in this Order. Due to the importance of the introduction of competition to the local exchange market, we believe this Order to be both important and necessary to protect BOC customers and new entrants. Further, we agree with PacTel that it serves the interests of justice for us to clarify in advance the section 272 requirements so that BOCs and other parties may be advised of what is required to meet the condition for 271 authorization that in-region interLATA services be provided in compliance with section 272.[FN42]

****7** 24. We are not persuaded by the argument that the removal of the Senate bill's provision regarding implementing regulations from the 1996 Act indicates Congress's intent that section 272 be self-executing. Parties advancing this argument rely on a rule of statutory construction providing that, when a provision in a prior draft is altered in the final legislation, Congress intended a change from the prior version. The courts have rejected this rule of statutory construction, however, when changes from one draft to another are not explained.[FN43] In this instance, the only statement from Congress regarding the meaning of the omission of the Senate provision appears in the Joint Explanatory Statement. According to that Statement, all differences between the Senate Bill, the House Amendment, and the substitute reached in conference are noted therein "except for clerical corrections, conforming changes made necessary by agreements reached by the conferees, and minor drafting and clerical changes."[FN44] Because the Joint Explanatory Statement did not address the removal of the Senate bill provision, the logical inference is that Congress regarded the change as an inconsequential modification, rather than a significant alteration. Moreover, it seems implausible that, in enacting the final version of section 272, Congress intended a radical alteration of the Commission's general rulemaking authority.***21919** We therefore conclude that elimination of the proposed provision was a nonsubstantive change.[FN45] Based on the foregoing, we find, pursuant to the general rulemaking authority vested in the Commission by sections 4(i), 201(b), and 303(r) of the Act, and consistent with fundamental principles of administrative law, that the Commission has the requisite authority to promulgate rules implementing section 272 of the Act.

B. Scope of Commission's Authority Regarding InterLATA Services

a. Background

25. In the Notice, we tentatively concluded that the Commission's authority under sections 271 and 272 applies to intrastate and interstate interLATA services provided by BOCs or their affiliates.[FN46] We based this tentative conclusion in part on our analysis that Congress intended sections 271 and 272 to replace the pre-Act restrictions on the BOCs contained in the MFJ, which barred their provision of both intrastate and interstate interLATA services.[FN47] We also observed that the interLATA/intraLATA distinction appears to some extent to have supplanted the traditional interstate/intrastate distinction for purposes of sections 271 and 272.[FN48] We further noted that reading sections 271 and 272 as applying to all interLATA services fits well with the structure of the statute as a whole,[FN49] and that reading the sections as limited to interstate services would lead to implausible results.[FN50] We also indicated that we do not believe that section 2(b) of the Act precludes the conclusion that our authority under sections 271 and 272 applies to intrastate as well as interstate interLATA services.[FN51] Finally, we asked parties that disagreed with the foregoing analysis to

comment on the extent to which the Commission may have authority to preempt state regulation with respect to some or all of the non-accounting matters addressed by sections 271 and 272.[FN52]

***21920 b. Comments**

****8** 26. Many parties, including BellSouth, PacTel, USTA and the New York Commission, agree that sections 271 and 272 cover both intrastate and interstate services.[FN53] DOJ, BellSouth, and AT&T maintain that the Act, by its terms, explicitly covers intrastate interLATA services and thus, grants the Commission authority over intrastate interLATA services for purposes of sections 271 and 272.[FN54] DOJ and AT&T argue that, because the grant is explicit, section 2(b) does not bar the Commission from adopting rules that apply to the provision of intrastate interLATA services.[FN55] These and other parties generally argue, as a separate basis for finding that sections 271 and 272 extend to both intrastate and interstate interLATA services, that Congress intended for the Act to replace the MFJ.[FN56] These parties contend that, since the MFJ restrictions applied to the BOCs' provision of both intrastate and interstate interLATA services, Congress intended for sections 271 and 272 to apply to the BOCs' provision of both types of services as well.[FN57] Indeed, several of these parties maintain that interpreting sections 271 and 272 as covering both intrastate and interstate interLATA services is the only reasonable interpretation.[FN58] Several parties further maintain that section 2(b) of the Act does not affect this analysis.[FN59]

***21921** 27. State representatives and some of the BOCs, however, challenge our tentative conclusion that sections 271 and 272 give the Commission authority over intrastate interLATA services.[FN60] These parties argue that sections 2(b) and 601(c) of the Act bar the Commission from exercising authority under sections 271 and 272 to establish rules applicable to intrastate services.[FN61] Although the New York Commission agrees with our tentative view that the term "interLATA" covers both intrastate and interstate services,[FN62] other parties objecting to our reading of the scope of sections 271 and 272 generally do not address the issue of whether the term " interLATA services" as used in the Act or the MFJ includes intrastate interLATA services. Instead, they appear to contend that, even if the term "interLATA services" includes both intrastate and interstate services, section 2(b) precludes the Commission from establishing rules applicable to intrastate interLATA services.[FN63] According to these parties, states have authority to establish rules to govern the BOCs' provision of intrastate interLATA services,[FN64] and it is premature for the Commission at this time to preempt states from exercising that authority.[FN65] NARUC and the Missouri Commission claim that the legislative history shows that Congress intended to limit the Commission's authority under sections 271 and 272 to interstate services. In support of this claim, these parties point to the fact that the House and Senate versions of the pre-conference bill exempted sections 271 and 272 from section 2(b), but those exemptions were removed in the final legislation.[FN66]

****9** 28. Parties opposing our tentative conclusions also argue that, although the MFJ restrictions on the BOCs applied to both interstate and intrastate interLATA services, the states retained authority to regulate a BOC's intrastate interLATA services when such services were authorized by the MFJ Court.[FN67] They assert, therefore, that, even if sections 271 and 272 apply to intrastate services, those provisions would not divest the states of authority over intrastate ***21922** services,[FN68] and that the Commission's authority, if it exists, under sections 271 and 272, is not plenary.[FN69]

29. None of the parties opposing our reading of the scope of sections 271 and 272 contends that the Commission's authority under section 271(d) to authorize BOC entry into in-region interLATA services does not extend to BOC provision of intrastate interLATA services. The Wisconsin Commission argues, however, that "a state might decide that, for intrastate interLATA purposes, BOC (or affiliate) entry into intrastate interLATA markets should be delayed subject to satisfaction of previously-made infrastructure investment commitments, needed quality of service improvements, universal service obligations, or some other factor for which delayed or conditioned entry into intrastate interLATA

markets is appropriate leverage exercised in the public interest."[FN70]

3. Discussion

30. For the reasons set forth below, we conclude that sections 271 and 272, and the Commission's authority thereunder, apply to intrastate as well as interstate interLATA services provided by the BOCs or their affiliates. We base this conclusion on the scope of the pre-1996 Act MFJ restrictions on the BOCs' provision of interLATA services, as well as on the plain language of sections 271 and 272, and the requirements of those sections. In addition, we find that section 2(b) does not bar the Commission from establishing regulations to clarify and implement the requirements of section 272 that apply to intrastate interLATA services and other intrastate matters that are within the scope of section 272. We hold, therefore, that the rules we establish to implement section 272 are binding on the states, and the states may not impose regulations with respect to BOC provision of intrastate interLATA service that are inconsistent with section 272 and the Commission's rules under section 272. We emphasize, however, that the scope of the Commission's authority under sections 271 and 272 extends only to matters covered by those sections. Those sections do not alter the jurisdictional division of authority with respect to matters falling outside their scope. For example, rates charged to end users for intrastate interLATA service have traditionally been subject to state authority, and will continue to be.

***21923** 31. We stated in the Notice, and several parties agree, that section 601(a) of the 1996 Act indicates that Congress intended the provisions of the Act to supplant the MFJ.[FN71] That section provides:

> ****10** Any conduct or activity that was, before the date of enactment of this Act, subject to any restriction or obligation imposed by the [MFJ] shall, on and after such date, be subject to the restrictions and obligations imposed by the Communications Act of 1934 as amended by this Act and shall not be subject to the restrictions and the obligations imposed by [the MFJ].[FN72]

No party challenges the fact that the MFJ generally prohibited the BOCs and their affiliates from providing any interLATA services -- interstate or intrastate.[FN73] Moreover, no party challenges the fact that the term "interLATA services" as used in the MFJ referred to both intrastate and interstate services.[FN74]

32. Similarly, with respect to the term "interLATA services" as used in sections 271 and 272, the DOJ, AT&T, and BellSouth maintain that, because the Act defines the term "interLATA" to include intrastate services, references in sections 271 and 272 to interLATA services apply to both intrastate and interstate services. We agree.

33. The Act defines "interLATA service" as "telecommunications between a point in a local access and transport area and a point located outside such area."[FN75] The Act further defines the term "LATA" as "a contiguous geographic area ...) established before the date of enactment of the [1996 Act] by a Bell operating company such that no exchange area includes points within more than 1 metropolitan statistical area, consolidated metropolitan statistical area, or State, except as expressly permitted under the [MFJ]" or subsequently modified with approval of the ***21924** Commission.[FN76] This definition expressly recognizes that a LATA may comprise an area, such as a metropolitan statistical area, that is smaller than a state.[FN77] Indeed, the DOJ notes that most LATAs established by the MFJ consist of only parts of individual states; only nine LATAs out of a total of 158 encompass an entire state.[FN78] Thus, by defining an interLATA service as telecommunications from a point inside a LATA to a point outside a LATA, the Act expressly recognizes that interLATA services may include telecommunications between two LATAs within a single state. Accordingly, we find that the term "interLATA services," as used in sections 271 and 272, expressly refers to both intrastate and interstate services.

34. Although the term "interLATA services" as used in the MFJ and in sections 271 and 272 refers to both interstate and intrastate interLATA services, the New York Commission and others assert that, when Congress transferred responsibility for enforcing the prohibition on the BOCs' provision of interLATA services from the U.S. District Court to the Commission, it in-

tended to limit our authority only to interstate inter-LATA services.[FN79] To the contrary, we find that reading sections 271 and 272 as granting the Commission authority over intrastate as well as interstate interLATA services is consistent with, and indeed necessary to effectuate, Congress's intent that sections 271 and 272 replace the restrictions of the MFJ with respect to BOC provision of interLATA services.

****11** 35. The jurisdictional limitation that the New York Commission and others seek to read into sections 271 and 272 would lead to implausible results. Specifically, under that statutory interpretation, the BOCs would have been permitted to provide in-region, intrastate, interLATA services upon enactment, without complying with the section 271 entry requirements or the section 272 safeguards, and subject only to any existing, generally applicable state rules on interexchange entry. Any such rules, presumably, would not have been specifically directed at BOC entry, because of the long-standing MFJ prohibition on entry. Because concerns about BOC control of bottleneck facilities needed for the provision of in-region interLATA services are applicable to both interstate and intrastate services, it seems clear that sections 271 and 272 apply equally to the BOCs' provision of both intrastate and interstate, in-region, interLATA services. We find no reasonable basis for concluding that Congress intended to lift the MFJ's ban on BOC provision of intrastate interLATA services, which constitute approximately 30 percent of interLATA traffic, and permit the BOCs to offer such services before satisfying the requirements ***21925** of sections 271 and 272.[FN80] As the DOJ notes, " Congress could not have intended, for example, to open up the intrastate interLATA market immediately for BOC entry, without the carefully-devised entry requirements of Section 271, while at the same time establishing those requirements with respect to interstate interLATA entry. Nor could Congress have meant to defeat the safeguards carefully imposed under Section 272 by permitting the BOCs to engage in the behavior which Section 272 prohibits, as long as they do it within the individual states."[FN81] Indeed, we find it significant that neither the states nor the BOCs have argued that such a result was intended. In light of this analysis, we find that the Commission's authority under sections 271 and 272 extends to both intrastate and interstate interLATA services.

36. Similarly, several parties support the conclusion that our authority to consider the applications of BOCs seeking to provide in-region interLATA service pursuant to section 271(d) applies to both interstate and intrastate services.[FN82] None of the state representatives and BOCs commenting on this issue claims that the Commission's authority under section 271(d) does not apply to a BOC's provision of intrastate interLATA services. Despite the lack of controversy on this point, several commenters claim that rules adopted under section 272 apply only to interstate services.[FN83] We believe that the requirements of sections 271 and 272 repudiate this argument. In granting an application under section 271(d), the Commission must determine, among other things, that the BOC meets the requirements of section 271(d)(3)(B). Under this provision, the Commission must find that the requested authorization "will be carried out in accordance with the requirements of section 272."[FN84] In light of the Commission's authority to approve entry into both intrastate and interstate in-region interLATA service, pursuant to section 271, it seems logical and necessary that the Commission's authority to impose safeguards established by section 272, should similarly extend to both intrastate and interstate interLATA service.

****12** 37. Several parties have argued that, although the MFJ restrictions on the BOCs applied to both interstate and intrastate interLATA services, the states retained authority to regulate a BOC's intrastate interLATA services when such services were authorized by the MFJ court. They assert, therefore, that, even if sections 271 and 272 apply to intrastate services, those ***21926** provisions would not divest the states of authority over intrastate services. As we stated at the outset of this discussion, the scope of the Commission's authority under sections 271 and 272 extends only to matters covered by those sections, i.e., authorization for BOC entry into in-region interLATA service and the safeguards imposed in section 272. We do not dispute that the states retain their authority to regulate intrastate services in other contexts.

38. We further find that the requirements of sections 271 and 272 buttress our conclusions regarding the scope of the Commission's jurisdiction. For example, we find it significant that section 271(h) directs the Commission to address intrastate matters relating to BOC provision of incidental interLATA services. That section states that "[t]he Commission shall ensure that the provision of [incidental interLATA services] by a Bell operating company or its affiliate will not adversely affect telephone exchange service ratepayers or competition in any telecommunications market."[FN85] Telephone exchange service is primarily an intrastate service. This reference to a plainly intrastate service indicates that the scope of section 271 encompasses intrastate matters, and thus the Commission's authority thereunder applies to both intrastate and interstate interLATA services.

39. State representatives and some BOCs argue that sections 2(b) and 601(c) of the Act preserve the states' authority to adopt rules regarding BOC provision of intrastate interLATA services. They argue that section 2(b) bars the Commission from exercising authority under sections 271 and 272 to establish rules applicable to intrastate interLATA services.[FN86] For the reasons set forth below, we find that section 2(b) does not preclude us from finding that sections 271 and 272, and our authority to promulgate rules thereunder, apply to BOC provision of intrastate interLATA services.

40. In Louisiana Public Service Commission v. Federal Communications Commission, the Supreme Court determined that, in order to overcome section 2(b)'s limits on the Commission's jurisdiction with respect to intrastate communications service, Congress must either modify section 2(b) or grant the Commission additional authority.[FN87] As explained above, we find that the term "interLATA services," by the Act's own definition, includes intrastate services, and that Congress, in sections 271 and 272, expressly granted the Commission authority over intrastate interLATA services for purposes of those sections. Accordingly, consistent with the ***21927** Court's statement in Louisiana, we find that section 2(b) does not limit our authority over intrastate interLATA services under sections 271 and 272.

****13** 41. In addition, we find that, in enacting sections 271 and 272 after section 2(b), and squarely addressing therein the issues before us, Congress intended for sections 271 and 272 to take precedence over any contrary implications based on section 2(b).[FN88] In construing these provisions, we are mindful that "it is a commonplace of statutory construction that the specific governs the general."[FN89] Moreover, where amended and original sections of a statute cannot be harmonized, the new provisions should be construed to prevail as the latest declaration of legislative will.[FN90] We find also that, in enacting the 1996 Act, there are other instances where Congress indisputably gave the Commission intrastate jurisdiction without amending section 2(b). For instance, section 251(e)(1) provides that "[t]he Commission shall have exclusive jurisdiction over those portions of the North American Numbering Plan that pertain to the United States."[FN91] Section 253 directs the Commission to preempt state regulations that prohibit the ability to provide intrastate services. Section 276(b) directs the Commission to "establish a per call compensation plan to ensure that payphone service providers are fairly compensated for each and every completed intrastate and interstate call." [FN92] Section 276(c) provides that, "[t]o the extent that any State [payphone] requirements are inconsistent with the Commission's regulations, the Commission's regulations on such matters shall preempt such State requirements." [FN93] None of these provisions is specifically excepted from section 2(b), yet *all* of them explicitly give the Commission jurisdiction over intrastate matters. Thus, we find that the lack of an explicit exception in section 2(b) does not require us to conclude that the Commission's jurisdiction under sections 271 and 272 is limited to interstate services. A contrary holding would spatify several explicit grants of authority to the Commission, noted above, and would render substantial parts of the statute meaningless. Thus, in this instance, we believe that the lack of an explicit exception in section 2(b) is not dispositive of the scope of the Commission's jurisdiction.

42. Moreover, as stated above, with the exception of the New York Commission, the parties challenging the Commission's authority to preempt state regulation un-

der sections 272 do not address the issue of whether "interLATA services" are defined by the Act to include intrastate services. The New York Commission agrees with us that it does. These parties (including the New York Commission) also do not challenge the proposition that Congress vested in the ***21928** Commission authority over BOC entry into all in-region interLATA services -- intrastate and interstate. We find it difficult to reconcile these parties' silence on these issues, as well as the New York Commission's agreement that "interLATA services" includes intrastate services, with their position that section 2(b) limits the application of the Commission's implementing rules under section 272 to interstate interLATA services. If, as it remains undisputed in the record, the Commission would necessarily determine, in assessing whether to allow BOC entry into in-region interLATA services, whether a BOC's provision of intrastate as well as interstate interLATA services complies with section 272, we can find no basis to maintain that the Commission's authority under sections 271 and 272 does not include authority to apply its interpretation of section 272 to all of the interLATA services -- intrastate and interstate -- at issue in the BOC's 271 in-region interLATA services application.

****14** 43. NARUC and the Missouri Commission stress that earlier drafts of the legislation would have amended section 2(b) to make an exception for certain sections of Title II, including sections 271 and 272, but the enacted version did not include that exception. They argue that this change demonstrates that Congress intended that section 2(b)'s limitations remain fully in force with regard to sections 271 and 272. We find this argument unpersuasive.

44. As noted above, parties that attach significance to the omission of the proposed amendment of section 2(b) rely on a rule of statutory construction providing that, when a provision in a prior draft is altered in the final legislation, Congress intended a change from the prior version. This rule of statutory construction has been rejected, however, when changes from one draft to another are not explained.[FN94] In this instance, the only statement from Congress regarding the meaning of the omission of the section 2(b) amendment appears in the Joint Explanatory Statement. According to the Joint Explanatory Statement, all differences between the Senate Bill, the House Amendment, and the substitute reached in conference are noted therein "except for clerical corrections, conforming changes made necessary by agreements reached by the conferees, and minor drafting and clerical changes."[FN95] Because the Joint Explanatory Statement did not address the removal of the section 2(b) amendment from the final bill, the logical inference is that Congress regarded the change as an inconsequential modification rather than a significant alteration. It seems implausible that, by enacting the final version, Congress intended a radical alteration of the Commission's authority under sections 271 and 272, given the total lack of legislative history to that effect. Based on the foregoing, we conclude that elimination of the proposed amendment of section 2(b) was a nonsubstantive change.

45. Moreover, even if it were appropriate to speculate as to the meaning of the omission of the section 2(b) exception, we disagree with the argument that the omission necessarily indicates that Congress intended not to provide the Commission authority over ***21929** intrastate services in sections 271 and 272. We find it is equally possible that Congress omitted the exception based on an understanding that the use of the term interLATA in sections 271 and 272 established a clear grant of authority over intrastate services and therefore that such an exception was unnecessary.

46. We similarly are not persuaded that section 601(c) of the 1996 Act evinces an intent by Congress to preserve states' authority over intrastate matters. Section 601(c) of the 1996 Act provides that the Act and its amendments "shall not be construed to modify, impair, or supersede Federal, State, or local law unless expressly so provided in such Act or amendments."[FN96] As explained above, we conclude that sections 271 and 272, which apply to interLATA services, were expressly intended to modify federal and state law and jurisdictional authority.

****15** 47. For all of the reasons discussed above, we conclude that sections 271 and 272, and the Commission's authority thereunder, apply to intrastate and interstate

interLATA services provided by the BOCs or their affiliates. We hold, therefore, that the rules we establish to implement section 272 are binding on the states, and the states may not impose, with respect to BOC provision of intrastate interLATA service, requirements inconsistent with sections 271 and 272 and the Commission's rules under those provisions. In this regard, based on what we find is clear congressional intent that the Commission is authorized to make determinations regarding BOC entry into interLATA services, we reject the suggestion by the Wisconsin Commission that, after the Commission has granted a BOC application for authority under section 271, a state nonetheless may condition or delay BOC entry into intrastate interLATA services. [FN97]

C. Scope of Commission's Authority Regarding Manufacturing Services

48. In the Notice, we tentatively concluded that the Commission's authority under section 272 extends to all BOC manufacturing of telecommunications equipment and CPE. Only two parties, Sprint and TIA, commented on this issue, and both agreed with our tentative conclusion.

49. We adopt our tentative conclusion that our authority under section 272 extends to all BOC manufacturing of telecommunications equipment and CPE. As we stated in the Notice, to the extent that sections 271 and 272 address BOC manufacturing activities, we believe that the same statutory analysis set forth above with respect to interLATA services would apply. We see no basis for distinguishing among the various subsections of sections 271 and 272. Even apart from that analysis, however, we believe that the provisions concerning manufacturing clearly apply to all manufacturing activities. Section 2(b) of the Communications Act limits the ***21930** Commission's authority over " charges, classifications, practices, services, facilities, or regulation for or in connection with intrastate communications service."[FN98] Even though, for the reasons stated above, we find section 2(b) not to be relevant to sections 271 and 272, we find that the manufacturing activities addressed by sections 271 and 272 are not, in any event, within the scope of section 2(b). Alternatively, even if section 2(b) were deemed to apply with respect to BOC manufacturing, we find that such manufacturing activities plainly cannot be segregated into interstate and intrastate portions. Thus, any state regulation inconsistent with sections 271 and 272 or our implementing regulations would necessarily thwart and impede federal policies, and should be preempted.[FN99]

III. ACTIVITIES SUBJECT TO SECTION 272 REQUIREMENTS

50. Section 272(a) provides that a BOC (including any affiliate) that is a LEC subject to the requirements of section 251(c) may provide certain services only through a separate affiliate.[FN100] Under section 272, BOCs (or BOC affiliates) may engage in the following activities only through one or more affiliates that are separate from the incumbent LEC entity: (A) manufacturing activities; (B) interLATA telecommunications services that originate in-region;[FN101] and (C) interLATA information services.[FN102] We discuss below both the activities subject to the section 272 separate affiliate requirements and the activities that are exempt from these requirements.

***21931** A. General Issues

1. Definition of "interLATA services"

a. Background

****16** 51. In the Notice, we indicated that the 1996 Act defines "interLATA service" as a telecommunications service.[FN103] We further stated that, where the 1996 Act draws distinctions between in-region and out-of-region "interLATA services," these distinctions do not apply to interLATA information services.[FN104]

b. Comments

52. Although we did not specifically seek comment on this analysis, several parties disagree with our interpretation of the scope of the term "interLATA services." BellSouth and MFS argue that the definition of "interLATA services" includes interLATA information services.[FN105] They further dispute our view that "interLATA service" only refers to "telecommunications services," arguing that the stat-

utory definition in section 3(21) refers to "telecommunications" provided across LATA boundaries, not to "telecommunications services" provided across LATA boundaries.[FN106] MFS states that "telecommunications" is defined in section 3(43) as the transmission of information without change in the form or content of the information, whereas "information services" are defined in section 3(20) as the "offering of a capability for generating, ... or making available information viatelecommunications." [FN107] Therefore, argues MFS, "interLATA information services" must logically incorporate the transmission of, or capability for transmitting, information between LATAs, which is an interLATA service.[FN108]

53. In addition, BellSouth states that section 271(b) describes how section 271 applies to several categories of "interLATA services," including "incidental interLATA services." Since certain of the "incidental interLATA services" set forth in section 271(g) are indisputably information services, BellSouth argues that "interLATA services" must encompass interLATA ***21932** information services.[FN109] MFS also argues that, because Congress distinguished between interLATA telecommunications services and interLATA information services in section 272(a)(2), its use of the term "interLATA services" in section 271 clearly indicates an intent to include both information and telecommunications services.[FN110] MFS specifically argues that the section 271 restrictions apply to "interLATA services" and are not limited to "interLATA telecommunications services."[FN111]

54. MCI notes that BellSouth's interpretation of "interLATA services" as encompassing both interLATA telecommunications and information services in section 271(b) would mean that a BOC could not provide in-region interLATA information services until it had obtained section 271 authorization.[FN112] In response, BellSouth acknowledges that, prior to providing interLATA information services that are neither previously authorized activities under section 271(f) nor incidental interLATA services under section 271(g), the BOCs are required to obtain section 271 authorization from the Commission.[FN113]

c. Discussion

****17** 55. Upon consideration of the arguments raised in the record, we modify our interpretation of the scope of the term "interLATA service." Consistent with the views of the commenters that addressed this point, we conclude that the term "interLATA services" encompasses both interLATA information services and interLATA telecommunications services.[FN114]

56. We are persuaded that the definition of "interLATA service," which is "telecommunications between a point located in a [LATA] and a point located outside such area,"[FN115] does not limit the scope of the term to telecommunications services because, as MFS and BellSouth point out, information services are also provided via telecommunications. Elsewhere in this Report and Order, we conclude that "interLATA information services" must include a ***21933** bundled, interLATA transmission component.[FN116] Thus, interLATA information services are provided via interLATA telecommunications transmissions and, accordingly, fall within the definition of "interLATA service." Moreover, we believe that it is a more natural, commonsense reading of "interLATA services" to interpret it to include both telecommunications services and information services. In addition, as MFS argues, in section 272(a)(2), Congress uses and distinguishes between "interLATA telecommunications services" and "interLATA information services," demonstrating that it limited the term "interLATA services" to transmission services when it wished to. Further, if Congress had intended the term "interLATA services" to include only interLATA telecommunications services, its use of the term "interLATA telecommunications services" in section 272(a)(2) would have been unnecessary and redundant.

57. As MCI points out, interpreting the term "interLATA services" to include both interLATA telecommunications and interLATA information services means that a BOC may not provide in-region interLATA information services until it obtains section 271 authorization.[FN117] As a practical matter, we believe that interpreting "interLATA services" to include interLATA information services will not alter the applica-

tion of section 271. As noted above, and discussed in greater detail below, we conclude that the term "interLATA information service" refers to an information service that incorporates as a necessary, bundled element an interLATA telecommunications transmission component provided to the customer for a single charge.[FN118] Thus, regardless of whether we interpret "interLATA service" to include interLATA information services, a BOC would be required to obtain section 271 authorization prior to providing, in-region, the interLATA telecommunications transmission component of an interLATA information service.

2. Application of Section 272 Safeguards to International InterLATA Services

58. In the Notice, we tentatively concluded that Congress intended the section 272 safeguards to apply to all domestic and international interLATA services.[FN119] All of the parties that commented on this point supported this tentative conclusion.[FN120] As noted above, the 1996 Act defines "interLATA services" as "telecommunications between a point located in a [LATA] and a point located outside such area."[FN121] The definition does not distinguish between domestic and international interLATA services. Further, international telecommunications services, which ***21934** originate in a LATA and terminate in a country other than the United States, or vice versa, fit within the statutory definition of interLATA services. Thus, we hereby adopt our tentative conclusion.

3. Provision of Services through a Single Affiliate

a. Background

****18** 59. In the Notice, we tentatively concluded that BOCs may conduct all, or some combination of, manufacturing activities, interLATA telecommunications services, and interLATA information services through a single separate affiliate, so long as the affiliate satisfies all statutory and regulatory requirements imposed on the provision of each type of service.[FN122] Elsewhere in the Notice, we sought comment on whether the 1996 Act permits us to, and if so, whether we should, interpret or apply any of the requirements of section 272(b) differently with respect to a BOC's provision of interLATA telecommunications services, which are regulated under Title II, as opposed to a BOC's engagement in manufacturing and provision of interLATA information services, which are unregulated activities.[FN123] In addition, we sought comment on how we could impose different regulatory requirements if a BOC provides both regulated and unregulated services through a single affiliate.[FN124]

b. Comments

60. The majority of parties agree that BOCs may engage in manufacturing activities, and also provide interLATA telecommunications services and interLATA information services, through the same affiliate.[FN125] Further, most of the parties that commented on these issues state that neither the text of the statute nor regulatory concerns mandate that we apply the section 272(b) requirements differently to regulated services and unregulated activities offered through such an affiliate.[FN126] The Ohio Commission asserts, however, that BOCs should not be permitted to offer regulated interLATA telecommunications services together with unregulated competitive services, unless they are willing to have their unregulated services subject to the same scrutiny ***21935** as their regulated services.[FN127] VoiceTel argues that BOCs should be required to separate the provision of manufacturing activities from other competitive services, to prevent the interLATA service operations provided by the BOC's affiliate from obtaining an unfair advantage through access to information about manufacturing developments.[FN128]

c. Discussion

61. Based on the comments submitted in the record and our analysis of the 1996 Act, we adopt our tentative conclusion that BOCs may conduct all, or some combination, of manufacturing activities, interLATA telecommunications services, and interLATA information services through a single separate affiliate. Section 272(a) requires a BOC to provide these services through "one or more affiliates" that are "separate from any operating company entity that is subject to the requirements of section 251(c)."[FN129] We conclude that this language is intended to allow the BOCs flexibility in structuring their provision of competitive services, so long as those services are separated from the BOCs'

provision of any local exchange services that are subject to the requirements of section 251(c).

****19** 62. We further conclude, as a policy matter, that it is not necessary to require the BOCs to separate their manufacturing activities from their provision of interLATA telecommunications services and interLATA information services, as suggested by VoiceTel.[FN130] First, a BOC's manufacturing activities do not entail control over bottleneck local exchange facilities. Second, during the period that the MFJ prohibited the BOCs from engaging in manufacturing activities, a competitive market for these activities developed.[FN131] The market for ***21936** information services is fully competitive;[FN132] the market for interLATA telecommunications services is also substantially competitive.[FN133] Thus, while a BOC may achieve certain efficiencies and economies of scope by conducting all three categories of activity through the same section 272 affiliate, it cannot thereby increase its ability to exercise market power in either the manufacturing, interLATA telecommunications services, or interLATA information services markets. Further, we note that section 273, which is the subject of a separate proceeding,[FN134] establishes additional safeguards applicable to BOC manufacturing activities, which are intended to promote competition and prevent discrimination.[FN135] For these reasons, we conclude that BOCs may conduct all, or some combination of, manufacturing activities, interLATA telecommunications services, and interLATA information services through the same section 272 affiliate.

63. Further, we decline to adopt different requirements pursuant to section 272(b) for regulated and unregulated activities. The safeguards of section 272(b) apply to any "separate affiliate required by" section 272(a).[FN136] Thus, the section 272(b) safeguards address the BOCs' potential to allocate costs improperly and to discriminate in favor of their section 272 affiliates, irrespective of the activities in which those affiliates engage.

4. Manufacturing Activities

64. In the Notice, we stated that BOCs may only engage in manufacturing activities through a separate affiliate that meets the requirements of section 272, and noted that section 273 ***21937** sets forth additional safeguards applicable to BOC entry into manufacturing activities.[FN137] Subsequent to the closing of the record in this proceeding, the Commission released a Notice of Proposed Rulemaking to clarify and implement the provisions of section 273.[FN138] Several parties have raised arguments relating to the section 273 provisions on the record in this proceeding.[FN139] Because this proceeding implements the non-accounting safeguards provisions of sections 271 and 272, arguments relating to the specific provisions of section 273 are more appropriately addressed in the section 273 proceeding. We note that BOCs must conduct their manufacturing activities through a section 272 separate affiliate, manufacture and provide telecommunications equipment and CPE in accordance with section 273, and comply with the regulations that the Commission promulgates to implement both sections 272 and 273.

B. Mergers/Joint Ventures of Two or More BOCs

1. Background

****20** 65. In the Notice, we tentatively concluded that, pursuant to sections 271(i)(1)[FN140] and 153(4)(B),[FN141] if two or more of the BOCs combine their operations through merger or acquisition, the in-region states of the resultant entity shall include all of the in-region states of each of the BOCs involved in the merger/acquisition.[FN142] We sought comment on whether the entry into a merger agreement or a joint venture arrangement by two or more BOCs affects the application of the section 271 and 272 non-accounting separate affiliate and nondiscrimination requirements ***21938** to those BOCs. We further sought comment on whether additional safeguards are required to ensure that these BOCs do not provide the affiliates of their merger partners with an unfair competitive advantage during the pendency of their merger agreement.

2. Comments

66. All parties that commented on this issue unanimously agree with our tentative conclusion that, upon completion of a merger between or among BOCs, the in-region states of a merged entity shall include all of the in-region states of the BOCs involved in the merger.[FN143]

67. Existing and potential competitors of the BOCs express concern about the incentive and ability of the BOCs to discriminate in favor of the affiliates of their merger or joint venture partners during the pendency of a merger or joint venture. For the purpose of applying the section 272 safeguards, they urge the Commission to treat the regions of BOCs entering a merger or joint venture as combined from the time that they enter into the merger or joint venture agreement.[FN144] Further, competitors argue that all nondiscrimination safeguards that apply to the BOC's dealings with its own section 272 affiliates should apply to the BOC's dealings with the section 272 affiliates of its merger or acquisition partner, as well as to dealings with a joint venture partner.[FN145]

68. In contrast, the DOJ and several BOCs contend that because BOCs would not become affiliates of one another until a merger is consummated, entry into a merger agreement would have no effect on the application of the section 272 safeguards, which pertain to a BOC's relationship with (and potential discrimination in favor of) its own affiliate.[FN146] USTA further contends that a rule attributing the in-region service area of merging BOCs to one another during the pendency of a merger would be very difficult to administer.[FN147] These parties argue that the Commission need not adopt any additional regulations to govern the conduct of proposed merger partners during the pendency of a proposed merger. They claim that sufficient protection against unfair discrimination by BOCs in conjunction with mergers, acquisitions, and joint ventures already exists.[FN148]

***21939 3. Discussion**

69. We note the unanimous support among parties that commented on the issue, and hereby affirm our tentative conclusion that, upon completion of a merger between or among BOCs, the in-region states of the merged entity shall include all of the in-region states of each of the BOCs involved in the merger.[FN149] We decline, however, to adopt a general rule that would treat the regions of merging BOCs as combined prior to completion of the merger, for the purposes of applying the section 272 separate affiliate and nondiscrimination safeguards. Section 272 requires a BOC to provide certain services (interLATA telecommunications and information services and manufacturing activities) through one or more separate affiliates, and establishes nondiscrimination requirements that apply to the BOC's conduct and its relationship with these affiliates. Section 3(1), in turn, defines an "affiliate" as "a person that (directly or indirectly) owns or controls, is owned or controlled by, or is under common ownership and control with, another person."[FN150] Prior to completion of a merger, the merging BOCs are neither affiliates, nor successors or assigns, of one another. Thus, entry into a merger agreement does not render the section 272 safeguards applicable to a BOC's relationship with its merger partner, nor to its relationship with its merger partner's affiliates. Moreover, treating the regions of merging BOCs as combined from the inception of a merger agreement might create considerable problems in applying the section 271 and 272 safeguards. For example, if BOC A were offering out-of-region interLATA services in BOC B's region at the time the two entered a merger agreement, BOC A might be required immediately to cease the provision of such services until it had received approval under section 271 to offer in-region interLATA services. That result would be both disruptive and confusing to customers.

****21** 70. We further decline to adopt any additional regulations applicable to pending mergers or joint ventures between or among BOCs. We are persuaded that adequate protections against discriminatory and anticompetitive conduct already apply to mergers, acquisitions, and joint ventures among BOCs. As the DOJ and other commenters point out, these protections include the nondiscrimination obligations of sections 201 and 202 of the Communications Act, which, among other things, prevent the BOCs from unjustly or unreasonably discriminating in providing facilities or services to interexchange carriers, and would thus govern a BOC's relationship with the long-distance affiliate of its merger partner. Continuing enforcement of the MFJ equal access requirements and pre-existing Commission-prescribed interconnection requirements, pursuant to section 251(g), also safeguards against BOC discrimination in favor of the affiliates of their merger partners. Fur-

ther, as USTA notes, BOCs will be subject to the pre-merger ***21940** review process under the Hart-Scott-Rodino amendment to the Clayton Act.[FN151] Moreover, as MCI suggests, we retain our authority to impose additional safeguards in the context of particular mergers, should circumstances demonstrate the need for such safeguards, on a case-by-case basis.[FN152]

C. Previously Authorized Activities

1. Background

71. In the Notice, we sought comment on the meaning of and interaction between sections 271(f), 272(a)(2)(B)(iii), and 272(h).[FN153] Specifically, we sought comment on whether, subject to the exception established by section 272(a)(2)(B)(iii), section 272(h) requires the BOCs to come into compliance with the section 272 safeguards with respect to all of the activities listed in section 272(a)(2)(A)-(C) that they were providing on the date of enactment of the 1996 Act.[FN154] We observed that section 272(a)(2)(B)(iii) establishes an exemption for "previously authorized activities described in section 271(f)" from the separate affiliate requirement for "origination of interLATA telecommunications services."[FN155] We sought comment on whether Congress intended, through section 272(h), to require BOCs engaged in previously authorized manufacturing activities and interLATA information services to come into compliance with the section 272 requirements.[FN156]

2. Comments

72. Section 271(f). In general, the BOCs interpret section 271(f) to mean that section 271(a), which prohibits BOCs from providing in-region interLATA services prior to obtaining section 271 authorization, does not affect their provision of interLATA services that have already been authorized by the MFJ court, as long as they continue to provide such services in accordance ***21941** with the terms and conditions imposed by the MFJ court.[FN157] Several potential competitors argue that section 271(f) does not address whether BOCs must provide previously authorized services through a section 272 separate affiliate, but rather authorizes the BOCs to continue to provide in-region interLATA services for which they had obtained MFJ waivers prior to enactment of the 1996 Act, without first obtaining section 271 authorization.[FN158] Interexchange carriers argue that, to the extent certain previously authorized activities are not required eventually to comply with section 272 separate affiliate requirements, they must continue to be provided subject to the terms and conditions contained in an order of the MFJ court.[FN159]

****22** 73. Section 272(a)(2)(B)(iii). Bell Atlantic and BellSouth argue that section 272(a)(2)(B)(iii) exempts all previously authorized activities described in section 271(f) from the section 272 separate affiliate requirements.[FN160] Ameritech and PacTel argue that section 272(a)(2)(B)(iii) exempts from the section 272 separate affiliate requirements all previously authorized interLATA telecommunications services and interLATA information services.[FN161] In general, potential competitors to the BOCs argue that section 272(a)(2)(B)(iii) only exempts previously authorized interLATA telecommunications services from the section 272 separate affiliate requirements.[FN162] One BOC agrees with this interpretation.[FN163] These parties argue that section 272(a)(2)(B)(iii) does not exempt previously authorized interLATA information services from the separate affiliate requirements, because section 272(a)(2)(B)(iii) only applies to interLATA telecommunications services.[FN164] Although the BOCs and their competitors disagree as to the scope of the section 272(a)(2)(B)(iii) exemption, they agree that the exemption is permanent.[FN165]

***21942** 74. Section 272(h). Although the BOCs generally agree that section 272(h) authorizes a transition period for compliance with the separate affiliate requirements,[FN166] their views diverge as to the effect of the section. At one extreme, PacTel argues that section 272(h) does not apply to previously authorized interLATA information or telecommunications services or manufacturing activities, but rather provides a one-year transition period for compliance with requirements imposed on the telephone exchange and exchange access activities BOCs were providing on the date of enactment of the 1996 Act, e.g., compliance with section 272(e).[FN167] Several BOCs argue that section 272(h) requires only previously authorized manufacturing

activities to come into compliance with the separate affiliate requirements, because section 272(a)(2)(B)(iii) exempts all previously authorized services involving interLATA telecommunications, including information services.[FN168] At the other extreme, U S West argues that section 272(h) applies to all previously authorized manufacturing and interLATA information services, giving BOCs one year from the date of enactment of the 1996 Act to move these services into section 272 separate affiliates.[FN169] MCI, Sprint, and ITAA endorse U S West's position.[FN170]

75. Differential Treatment. A majority of the BOCs propose interpretations of sections 271(f), 272(a)(2)(B)(iii), and 272(h) that would result in differential treatment for different types of previously authorized services. NYNEX and U S West argue that permanently exempting only previously authorized interLATA telecommunications services from the section 272 separate affiliate requirements makes sense, because most of the telecommunications services for which BOCs obtained MFJ waivers would be impossible, or too costly, to provide on a separated basis.[FN171] Ameritech, however, contends that the Commission should not differentiate between previously authorized interLATA telecommunications services and previously authorized ***21943** information services, arguing that certain previously authorized interLATA information services cannot efficiently be provided on a separated basis.[FN172]

3. Discussion

****23** 76. Based on the record before us and our analysis of the relevant statutory terms, we conclude that BOCs may continue to provide all previously authorized services without interruption, pursuant to the terms and conditions set forth in the MFJ court orders that authorize those services. Previously authorized interLATA information services and manufacturing activities must come into compliance with the section 272 separate affiliate requirements within one year. Previously authorized interLATA telecommunications services, which do not have to comply with the section 272 separate affiliate requirements, must continue to be provided pursuant to the terms and conditions of the MFJ court orders that authorize them.

77. Section 271(f). As a general matter, section 271 addresses the timing and requirements for BOC entry into the interLATA market. Section 271(f) specifies that neither section 271(a) nor section 273 "prohibits" a BOC or its affiliate from engaging, at any time after enactment, in any activity previously authorized by an order of the MFJ court, subject to the terms and conditions imposed by the court.[FN173] We conclude that the purpose of Section 271(f) is to preserve the BOCs' ability to engage in previously authorized activities, without first having to obtain section 271 authorization from the Commission. Section 271(f) by its terms does not address, and thus does not preclude, application of the section 272 separate affiliate requirements to previously authorized services. Except for specifying that BOCs may continue to provide previously authorized services pursuant to the terms and conditions contained within the MFJ court order authorizing the service, section 271(f) does not address the manner in which BOCs must structure their provision of previously authorized services, or whether they must provide these services through a separate affiliate. These issues are addressed in section 272.

78. Section 272(a)(2)(B)(iii). Section 272 sets forth separate affiliate and nondiscrimination requirements with which the BOC must comply in order to provide certain services. Separate subsections of section 272(a)(2) establish separate affiliate requirements for BOC provision of manufacturing activities (section 272(a)(2)(A)), origination of interLATA telecommunications services (section 272(a)(2)(B)), and interLATA information services (section ***21944** 272(a)(2)(C)). Section 272(a)(2)(B)(iii) exempts "previously authorized activities described in section 271(f)" from the separate affiliate requirement for "origination of interLATA telecommunications services." We conclude that, because this exemption appears in section 272(a)(2)(B), it applies by its terms only to previously authorized activities that involve the origination of interLATA telecommunications services.

79. Previously authorized activities described in section 271(f) may include both manufacturing activities and interLATA information services. Neither of these types

of previously authorized activities, however, is exempt from the section 272 separate affiliate requirements, because neither section 272(a)(2)(A) nor section 272(a)(2)(C) contains an exemption for previously authorized activities similar to the explicit exemption set forth in section 272(a)(2)(B)(iii). We reject Ameritech's argument that section 272(a)(2)(B)(iii) exempts previously authorized interLATA information services from the section 272 separate affiliate requirements, because section 272(a)(2)(B) applies only to origination of interLATA telecommunications services.[FN174] Section 272(a)(2)(C) establishes the separate affiliate requirement for BOC provision of interLATA information services; there are exceptions to this requirement for electronic publishing services and alarm monitoring services, but there is no exception specified for previously authorized activities.

****24** 80. Section 272(h). As the majority of commenters agree, section 272(h) establishes a one-year transition period for BOCs to comply with the separate affiliate requirements of section 272 for all services they were providing on the date of enactment of the 1996 Act that are not exempt from these requirements. Because we concluded in the preceding paragraphs that previously authorized interLATA information services and manufacturing activities are not exempt from the section 272 separate affiliate requirements, BOCs providing these services must comply with those requirements within one year of enactment. We reject PacTel's argument that section 272(h) gives the BOCs one year to comply with the various requirements imposed by section 272 on their provision of exchange and exchange access services, because we find these requirements are effective immediately upon a BOC's entry into the in-region interLATA market pursuant to section 271.

81. Differential Treatment. We conclude that, with respect to requiring compliance with the section 272 separate affiliate requirements, Congress intended to treat previously authorized interLATA telecommunications services differently from previously authorized interLATA information services and manufacturing activities. Certain of the BOCs argue that such a distinction is justified because it would be more difficult to provide previously authorized interLATA telecommunications services on a separated basis.[FN175] Ameritech, however, argues that certain previously authorized interLATA information services, such as TDDS, would be equally ***21945** difficult to provide on a separated basis.[FN176] Section 10 of the Communications Act requires us to forbear from applying any provision of the Act that is not necessary to ensure just and reasonable charges and practices in the telecommunications marketplace, or to protect consumers, if we find that such forbearance would promote competition and is consistent with the public interest.[FN177] Thus, to the extent a BOC demonstrates, with respect to a particular previously authorized interLATA information service, that forbearance from the section 272 separate affiliate requirement fully satisfies the section 10 test, we must forbear from requiring the BOC to provide that service through a section 272 affiliate.

D. Out-of-region interLATA information services

1. Background

82. In the Notice, we tentatively concluded that the BOCs must provide interLATA information services through a separate affiliate, regardless of whether these services are provided in-region or out-of-region. We observed that section 272(a)(2)(B)(ii) exempts out-of-region interLATA services from the separate affiliate requirement for "origination of interLATA telecommunications services," but there is no analogous exemption from the section 272(a)(2)(C) separate affiliate required for interLATA information services (other than electronic publishing and alarm monitoring services).[FN178]

2. Comments

****25** 83. BellSouth is the only BOC that addresses this issue, arguing that the statute does not require BOCs to provide out-of-region interLATA information services through a separate affiliate.[FN179] BellSouth asserts that the Commission's conclusion is based on the faulty premise that interLATA information services do not fall within the definition of "interLATA services" and therefore are not subject to the "in-region"/"out-of-region" dichotomy of section 271.[FN180] BellSouth further suggests that imposition of a

separate affiliate requirement constitutes a prior restraint upon BOC provision of out-of-region information services and may violate the First Amendment. [FN181]

***21946** 84. All of the other parties that responded to this inquiry support the Commission's tentative conclusion that BOCs must provide out-of-region interLATA information services through a section 272 separate affiliate.[FN182] Several parties reject BellSouth's argument that the Commission is prevented by the First Amendment from requiring BOCs to provide out-of-region interLATA information services through a separate affiliate.[FN183]

3. Discussion

85. Based on the record before us and our own statutory analysis, we hereby adopt our tentative conclusion that BOCs must provide out-of-region interLATA information services through a section 272 separate affiliate. Although we concluded above that "interLATA information services" are included within the term "interLATA services" as used in section 271(b), that determination does not alter the conclusion that BOCs must provide out-of-region interLATA information services through a section 272 separate affiliate.[FN184] Section 271(b)(2) permits a BOC or its affiliate to provide interLATA services, including interLATA information services, that originate outside its in-region states, immediately upon enactment of the 1996 Act. Section 271, however, does not address whether such services must be provided through a separate affiliate; that issue is addressed in section 272(a).

86. Section 272(a)(2)(B) requires a separate affiliate for the "origination of interLATA telecommunications services," but exempts from that requirement "out-of-region services described in section 271(b)(2)." [FN185] We conclude that the exception created by section 272(a)(2)(B)(ii) extends only to out-of-region interLATA services that are telecommunications services. Section 272(a)(2)(C) requires a separate affiliate for "interLATA information services," and exempts electronic publishing and alarm monitoring services from that requirement. There are no other exceptions to the requirements of section 272(a)(2)(C). As several commenters noted, section 272(a)(2)(B) explicitly excludes out-of-region services, but section 272(a)(2)(C) does not.[FN186] We agree with MCI that the explicit exclusion of out-of-region interLATA telecommunications services in one subsection of the statute, and the absence of such an express exclusion of out-of-region interLATA information services in another subsection of the same provision, suggests that Congress intended not to exclude the latter from the separate affiliate ***21947** requirement.[FN187] Therefore, we find that out-of-region interLATA information services are not excluded from the separate affiliate requirement for interLATA information services.

****26** 87. BellSouth has argued that requiring BOCs to provide out-of-region interLATA information services through a section 272 separate affiliate violates the First Amendment.[FN188] As noted above, we find that this result is required by the statute. Although the courts have ultimate authority to determine the constitutionality of this and other statutes, we find it appropriate to state that we find BellSouth's argument to be without merit.[FN189] BellSouth bases its argument on an assertion that as "content-related" services, information services are commercial speech entitled to First Amendment protections.[FN190] We conclude, first, that with respect to certain information services, a BOC neither provides, nor exercises editorial discretion over, the content of the information associated with those particular services, and therefore provision of those information services does not constitute speech subject to First Amendment protections.[FN191] Second, to the extent that BOC provision of other interLATA information services constitutes speech for First Amendment purposes, the section 272 separate affiliate requirement neither prohibits the BOCs from providing such services, nor places any restrictions on the content of the information the BOCs may provide.[FN192] Instead, the section 272 separate affiliate requirement is a content-neutral restriction on the manner in which BOCs may provide interLATA information services, intended by Congress to protect against improper cost allocation and discrimination concerns. Thus, we conclude that the separate affiliate requirement imposed by section 272 of the Communications Act on BOC provision of inter-

LATA information services does not violate the First Amendment.[FN193]

***21948 E. Incidental InterLATA Services**

1. Background

88. In the Notice, we sought comment on whether we should establish any non-accounting structural or non-structural safeguards for BOC provision of the "incidental interLATA services" set forth in section 271(g), in light of section 271(h).[FN194] Section 271(h) directs the Commission to ensure that the provision of incidental interLATA services "will not adversely affect telephone exchange service ratepayers or competition in any telecommunications market," and states that the provisions of section 271(g) "are intended to be narrowly construed." [FN195] We also sought comment regarding the interplay between section 271(h) and section 254(k), which prohibits telecommunications carriers from "us[ing] services that are not competitive to subsidize services that are subject to competition."[FN196]

2. Comments

89. The majority of parties that addressed the issue, BOCs and competitors alike, contend that section 272(a)(2)(B)(i) exempts all incidental interLATA services from the separate affiliate requirements of section 272, except section 271(g)(4) information storage and retrieval services.[FN197] In their comments, however, several parties note that the "incidental interLATA services" listed in section 271(g) include information services as well as telecommunications services.[FN198]

****27** 90. Although they generally acknowledge that incidental interLATA services are not subject to section 272 separate affiliate requirements, several competitors argue that the Commission has the authority to, and should, impose separate affiliate requirements on the ***21949** provision of these services.[FN199] In the alternative, competitors propose that incidental interLATA services should be subject to a variety of non-structural safeguards. AT&T recommends that we apply the nondiscrimination provisions of sections 272(c) and (e) to BOC provision of incidental interLATA services, and that we enforce these requirements through network disclosure, accounting, cost allocation, and reporting requirements.[FN200] MCI argues that, for each service listed in section 271(g), BOCs must unbundle and make available on a nondiscriminatory basis to all carriers the same network elements, facilities, and services used in providing that service, pursuant to the Commission's comparably efficient interconnection (CEI) parameters.[FN201] NCTA contends that the Commission should prescribe safeguards related to inbound and outbound telemarketing of video programming services by the BOCs.[FN202]

91. In response, USTA and the BOCs argue that the Commission should not adopt any additional non-accounting structural or non-structural safeguards to govern BOC provision of the incidental interLATA services enumerated in section 271(g).[FN203] They argue that the Commission already has in place regulations applicable to incidental interLATA services that will protect telephone exchange ratepayers, such as the Part 61 price cap rules and the Part 32 accounting rules and Part 64 cost allocation rules, as well as regulations that ensure telecommunications competition, such as the section 251 interconnection and unbundling rules.[FN204] They further argue that additional safeguards are not warranted by any specific potential competitive harms, and would undercut the efficiencies of integration that Congress intended to permit the BOCs to obtain.[FN205]

***21950 3. Discussion**

92. Section 271(b)(3) permits the BOCs to provide incidental interLATA services described in section 271(g) immediately after the date of enactment of the 1996 Act. Thus, unlike other in-region interLATA services, BOCs may provide incidental interLATA services originating in their own in-region states without receiving prior authorization from the Commission pursuant to section 271(d). Neither section 271(b) nor section 271(g) addresses whether BOCs must provide incidental interLATA services through a section 272 separate affiliate; this issue is addressed by section 272 itself.

93. Scope of the section 272(a)(2)(B)(i) exemption. Section 272(a)(2)(B)(i) sets forth an exception to the separate affiliate requirement imposed on "origination

of interLATA telecommunications services." Congress specifically limited this exception to the "incidental interLATA services described in paragraphs (1), (2), (3), (5), and (6) of section 271(g)."[FN206] Consistent with the analysis set forth in the two immediately preceding sections of this Order, we conclude that the section 272(a)(2)(B)(i) exception applies, by its terms, to the origination of incidental interLATA services that are telecommunications services.[FN207]

****28** 94. For the most part, the incidental interLATA services enumerated within the section 272(a)(2)(B)(i) exception are telecommunications services.[FN208] Although the incidental interLATA services set forth in sections 271(g)(1)(A), (B), and (C) include audio, video, and other programming services that do not appear to be solely telecommunications services, section 271(h) specifies that these incidental interLATA services "are limited to those interLATA transmissions incidental to the provision by a [BOC] or its affiliate of video, audio, and other programming services that the company or its affiliate is engaged in providing to the public."[FN209] We therefore conclude that, pursuant to section 272(a)(2)(B)(i), BOCs are not required to provide the interLATA telecommunications transmission incidental to provision of the programming services listed in sections 271(g)(1)(A), (B), and (C) through a section 272 separate affiliate.[FN210] Moreover, ***21951** alarm monitoring services, listed as incidental interLATA services under section 271(g)(1)(D), are explicitly excepted from the section 272 separate affiliate requirements under section 272(a)(2)(C).

95. In addition, section 271(g)(2), which designates as "incidental interLATA services" the interLATA provision 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)," may encompass services that are not solely telecommunications services.[FN211] The statute does not classify educational interactive interLATA services as either telecommunications services or information services. We conclude, however, that the explicit inclusion of section 271(g)(2) in the list of services subject to the section 272(a)(2)(B)(i) exception exempts educational interactive interLATA services from the section 272 separate affiliate requirements. This interpretation is consistent with Congress's clear intent, expressed in other provisions of the 1996 Act, to promote the provision of advanced telecommunications and information services, of which educational interactive interLATA services are examples, to eligible public and non-profit elementary and secondary schools.[FN212] The inclusion of educational interactive interLATA services among the list of "incidental interLATA services" that BOCs could provide immediately upon enactment of the 1996 Act without prior Commission authorization promotes the congressional goal of rapidly deploying advanced telecommunications by permitting the BOCs to offer such services. Thus, we further find it reasonable to conclude that Congress did not wish to impose a significant regulatory barrier, in the form of a separate affiliate requirement, on BOC provision of these services.[FN213]

96. Additional regulation of incidental interLATA services. We decline to impose the section 272 separate affiliate requirements on incidental interLATA services that, as discussed ***21952** above, are exempt from those requirements under section 272(a)(2)(B)(i).[FN214] Section 272 itself does not require the BOCs to provide these services through a separate affiliate. Further, we conclude as a legal matter that neither section 271(h) nor section 254(k) requires us to impose the section 272 separate affiliate requirements on exempt incidental interLATA services in order to protect telephone exchange ratepayers or competition in the telecommunications market. Moreover, we decline to do so as a matter of policy, because we see no present need to impose structural separation requirements beyond those mandated by Congress in order to protect against improper cost allocation and access discrimination. We likewise decline to impose any other structural separation requirements on BOC provision of these services, as suggested by certain commenters.[FN215] This decision comports with the Commission's prior determinations not to impose structural separation requirements in contexts in which it found that nonstructural safeguards provide sufficient protection against improper cost al-

location and access discrimination (e.g., BOC provision of enhanced services).[FN216]

****29** 97. Under our rules, the BOCs are subject to existing nonstructural safeguards in their provision of incidental interLATA services, and we conclude that these safeguards are sufficient to protect telephone exchange ratepayers and competition in telecommunications markets, in accordance with section 271(h). For accounting purposes, incidental interLATA services will be treated as non-regulated services under our Part 32 affiliate transaction rules and Part 64 cost allocation rules, and accordingly costs associated with provision of those services may not be allocated to regulated services accounts.[FN217] Further, at the federal level and in many states, the BOCs are subject to price cap regulation, which reduces their incentive to engage in strategic cost-shifting ***21953** behavior.[FN218] The BOCs are also subject to the section 251 interconnection and unbundling requirements, which compel them to make available to other telecommunications carriers the local network elements and local exchange facilities that such carriers may require to provide services comparable to the incidental interLATA services listed in section 271(g).[FN219] Further, the BOCs are subject to network disclosure requirements imposed by section 251(c)(5), which require them to give timely information about network changes to their affiliates' competitors.[FN220]

98. Given the complement of nonstructural safeguards to which the BOCs are subject in their provision of incidental interLATA services, we find that the record in this proceeding does not justify the imposition of additional nonstructural safeguards on these services. We decline to extend to the integrated provision of incidental interLATA services any of the section 272(c) and 272(e) nondiscrimination requirements that depend on the existence of a section 272 affiliate, as suggested by AT&T.[FN221] Further, we decline to adopt any additional unbundling requirements applicable to BOC provision of incidental interLATA services, as suggested by MCI.[FN222] We agree with BellSouth that it would be inconsistent with the 1996 Act for us to require the BOCs to unbundle and make available interLATA transmission services that they are not authorized to provide except as components of an incidental interLATA service (i.e., without obtaining prior authorization under section 271 or complying with the section 272 separation requirements).[FN223] For the foregoing reasons, we decline to adopt any additional structural or nonstructural safeguards applicable specifically to BOC provision of incidental interLATA services.

***21954 F. InterLATA Information Services**

1. Relationship Between Enhanced Services and Information Services

a. Background

99. In the Notice, we sought comment on the services that are included in the statutory definition of "information service,"[FN224] and whether that term encompasses all activities that the Commission classifies as "enhanced services."[FN225] We noted that the statutory definition of "information service" is based on the definition used in the MFJ, and that prior to passage of the 1996 Act, neither the Commission nor the MFJ court resolved the question of whether the definition of enhanced services under the Commission's rules was synonymous with the definition of information services under the MFJ.

b. Comments

****30** 100. Virtually all parties that commented on this issue agree that the statutory term "information services" encompasses all activities that fall within the Commission's definition of "enhanced services."[FN226] The majority of commenters, including BOCs, interexchange carriers, and certain organizations representing information service providers (ISPs), advocate that the ***21955** Commission interpret "information services" to be coextensive with "enhanced services."[FN227] Other commenters interpret "information services" to be broader than "enhanced services."[FN228]

101. Parties disagree about whether "protocol processing" services fall within the statutory definition of "information services."[FN229] Bell Atlantic and U S West argue that protocol processing services are not information services, because they do not transform or

process the content of the information transmitted by the subscriber.[FN230] In contrast, ITI, ITAA, and Sprint assert that protocol conversion falls within the statutory definition of an information service, because that definition does not specify that such services must transform or process the content of information transmitted.[FN231]

c. Discussion

102. We conclude that all of the services that the Commission has previously considered to be "enhanced services" are "information services." We are persuaded by the arguments advanced by ITAA, CIX, and others, that the differently-worded definitions of "information ***21956** services" and " enhanced services" can and should be interpreted to extend to the same functions.[FN232] We believe that interpreting "information services" to include all "enhanced services" provides a measure of regulatory stability for telecommunications carriers and ISPs alike, by preserving the definitional scheme under which the Commission exempted certain services from Title II regulation. We agree with ISPs that regulatory certainty and continuity benefits both large and small service providers.[FN233] In sum, we find no basis to conclude that by using the MFJ term "information services" Congress intended a significant departure from the Commission's usage of "enhanced services."

103. We also find, however, that the term "information services" includes services that are not classified as "enhanced services" under the Commission's current rules. Stated differently, we conclude that, while all enhanced services are information services, not all information services are enhanced services. As noted by U S West, "enhanced services" under Commission precedent are limited to services "offered over common carrier transmission facilities used in interstate communications," whereas "information services" may be provided, more broadly, "via telecommunications."[FN234] Further, we agree with BellSouth and AT&T that live operator telemessaging services that do not involve "computer processing applications" are information services, even though they do not fall within the definition of "enhanced services."[FN235]

****31** 104. We further conclude that, subject to the exceptions discussed below, protocol processing services constitute information services under the 1996 Act. We reject Bell Atlantic's argument that "information services" only refers to services that transform or process the content of information transmitted by an end-user, because we agree with Sprint that the statutory definition makes no reference to the term "content," but requires only that an information service transform or process "information."[FN236] We also agree with ITI and ITAA that an end-to-end protocol conversion service that enables an end-user to send information into a network in one protocol and have it exit the network in a different protocol clearly "transforms" user information.[FN237] We further find that other types of protocol processing services that interpret and react to protocol information associated with the transmission of end-user content clearly "process" such information. Therefore, we conclude that both protocol conversion and protocol processing services are information services under the 1996 Act.

***21957** 105. This interpretation is consistent with the Commission's existing practice of treating end-to-end protocol processing services as enhanced services.[FN238] We find no reason to depart from this practice, particularly in light of Congress's deregulatory intent in enacting the 1996 Act.[FN239] Treating protocol processing services as telecommunications services might make them subject to Title II regulation. Because the market for protocol processing services is highly competitive, such regulation is unnecessary to promote competition, and would likely result in a significant burden to small independent ISPs that provide protocol processing services. Thus, policy considerations support our conclusion that end-to-end protocol processing services are information services.[FN240]

106. We note that, under Computer II and Computer III, we have treated three categories of protocol processing services as basic services, rather than enhanced services, because they result in no net protocol conversion to the end-user. These categories include protocol processing: 1) involving communications between an end-user and the network itself (e.g., for initiation, routing,

and termination of calls) rather than between or among users; 2) in connection with the introduction of a new basic network technology (which requires protocol conversion to maintain compatibility with existing CPE); and 3) involving internetworking (conversions taking place solely within the carrier's network to facilitate provision of a basic network service, that ***21958** result in no net conversion to the end-user).[FN241] We agree with PacTel that analogous treatment should be extended to these categories of "no net" protocol processing services under the statutory regime.[FN242] Because "no net" protocol processing services are information service capabilities used "for the management, control, or operation of a telecommunications system or the management of a telecommunications service," they are excepted from the statutory definition of information service.[FN243] Thus, "no net" protocol conversion services constitute telecommunications services, rather than information services, under the 1996 Act.

****32** 107. We further find, as suggested by PacTel, that services that the Commission has classified as "adjunct-to-basic" should be classified as telecommunications services, rather than information services.[FN244] In the NATA Centrex order, the Commission held that the enhanced services definition did not encompass adjunct-to-basic services.[FN245] Although the latter services may fall within the literal reading of the enhanced service definition, they facilitate establishment of a basic transmission path over which a telephone call may be completed, without altering the fundamental character of the telephone service. Similarly, we conclude that "adjunct-to-basic" services are also covered by the "telecommunications management exception" to the statutory definition of information services, and therefore are treated as telecommunications services under the 1996 Act.

2. Distinguishing InterLATA Information Services subject to Section 272 from IntraLATA Information Services

a. Background

108. In the Notice, we sought comment on how to distinguish between interLATA information services, which are subject to the section 272 separate affiliate requirements, and ***21959** intraLATA information services, which are not.[FN246] In particular, we asked whether an information service should be considered an interLATA service only when the service actually involves an interLATA telecommunications transmission component, or, alternatively, when it potentially involves interLATA telecommunications transmissions (e.g., the service can be accessed across LATA boundaries).[FN247] We further sought comment regarding how the manner in which a BOC structures its provision of an information service may affect whether the service is classified as interLATA.[FN248]

109. We also invited comment on whether a particular service for which a BOC had applied for or received an MFJ waiver should presumptively be treated as an interLATA information service subject to the separate affiliate requirements of section 272.[FN249] In addition, we sought comment on whether we should presume that services provided by BOCs pursuant to CEI plans approved by the Commission prior to the enactment of the 1996 Act are intraLATA information services.[FN250]

b. Comments

110. InterLATA Transmission/Resale. The BOCs, AT&T, and MCI argue that, for an information service to be considered an interLATA information service, the BOC must provide as a necessary component thereof telecommunications between a point located in one LATA and a point outside that LATA.[FN251] Certain of the BOCs argue that only interLATA information services in which the BOC's own facilities or services carry the information service across LATA boundaries are subject to section 272 separate affiliate requirements; services in which the interLATA telecommunications transmission component is provided through resale are not subject to section 272.[FN252] USTA argues that BOC provision of interLATA transmission through resale ***21960** does not raise improper cost allocation and discrimination concerns.[FN253] In contrast, several potential telecommunications competitors argue that, in accordance with MFJ precedent, BOC provision of an information service with an interLATA transmission component is an interLATA information service, regardless of whether transmission is provided

over resold facilities or the BOC's own facilities. [FN254]

**33 111. InterLATA Access. AT&T and the BOCs argue that an information service may not be considered interLATA merely because it may be accessed on an interLATA basis by means independently chosen by the customer, such as the services of the customer's presubscribed interexchange provider.[FN255] In contrast, several potential telecommunications competitors and ISPs urge the Commission to define interLATA information services to include any information service that is capable of being accessed across LATA boundaries. [FN256]

112. Bundling. AT&T and several of the BOCs assert that an information service is only subject to the section 272 separate affiliate requirement if the interLATA telecommunications transmission component is a bundled component of the information service.[FN257] The BOCs further state that where an interLATA telecommunications service and information service are separately purchased, even if both services are provided by the BOC or its affiliate, they should not be treated together as an interLATA information service.[FN258] MCI conditionally agrees with that position.[FN259]

*21961 113. Remote Databases/Network Efficiency. Several of the BOCs argue that certain interLATA information services should not be subject to the section 272 separate affiliate requirements. For example, they argue that information services in which the BOC locates a non-transmission database or processor in another LATA are not interLATA information services subject to section 272, but are incidental interLATA services, pursuant to section 271(g) (4).[FN260] They also contend that, where an information service involves interLATA transmission that is provided outside the control of the user solely to incorporate network efficiencies, that information service is excluded from the definition of interLATA information services.[FN261]

114. Presumptions Regarding Previously Authorized Information Services. Certain BOCs argue that we should presume that BOC provision of an information service without an MFJ waiver (i.e., pursuant to a CEI plan) is an intraLATA service.[FN262] MCI and TRA argue that, when a BOC has sought or obtained an MFJ waiver to provide an information service prior to enactment of the 1996 Act, that information service should be presumed to be interLATA.[FN263]

c. Discussion

115. InterLATA Transmission/Resale. We conclude that, as used in section 272, the term "interLATA information service" refers to an information service that incorporates as a necessary, bundled element an interLATA telecommunications transmission component provided to the customer for a single charge.[FN264] We find, as noted in the comments of AT&T, MCI, and the BOCs, that this definition of interLATA information service conforms to the MFJ precedent in this area.[FN265] We further conclude that a BOC provides an interLATA information service when *21962 it provides the interLATA telecommunications transmission component of the service either over its own facilities, or by reselling the interLATA telecommunications services of an interexchange provider. This conclusion also comports with MFJ precedent.[FN266]

**34 116. USTA contends that BOC provision of interLATA transmission through resale should be permitted because it does not raise improper cost allocation and discrimination concerns.[FN267] This argument, however, does not address the key issue of what is required by the statute. As discussed above, we find that section 601(a) of the 1996 Act indicates that Congress intended the provisions of the 1996 Act to supplant the MFJ.[FN268] Therefore, we conclude that the restrictions imposed by the 1996 Act on BOC provision of interLATA services, like the interLATA restrictions imposed under the MFJ, apply to services provided through resale, as well as to services provided through the BOC's own transmission facilities. Moreover, we decline to adopt PacTel's suggestion that end-user receipt of an "interLATA benefit" should be the test for determining whether an information service is interLATA.[FN269] PacTel's proposed test is inconsistent with MFJ precedent and would be very difficult to administer. Finally, we reject the arguments raised by Sprint and MFS that we should classify all information

services as interLATA services because of the difficulties inherent in distinguishing between interLATA and intraLATA information services.[FN270] We conclude that it is possible to distinguish between interLATA and intraLATA information services by applying the rule established by this Order.

117. InterLATA Access. We agree with AT&T and the BOCs that an information service may not be considered interLATA merely because it may be accessed on an interLATA basis by means independently chosen by the customer, such as a presubscribed interexchange carrier. In interpreting the statutory restrictions on BOC provision of interLATA information services, we are concerned not with the manner in which an information service is used, but rather with the components of the service that are provided by the BOC. When a BOC is neither ***21963** providing nor reselling the interLATA transmission component of an information service that may be accessed across LATA boundaries, the statute does not require that service to be provided through a section 272 separate affiliate. We reject MFS's contention that, where an interLATA transmission service is necessary for a customer to obtain access to a particular BOC-provided information service, that information service should be considered interLATA, even if the necessary interLATA transmission component is separately provided by another carrier.[FN271] In such circumstances, the BOC is not providing any interLATA services, and therefore is not required by section 272 to provide the information service in question through a separate affiliate.

118. Moreover, as the BOCs point out, if we were to determine that the mere possibility of interLATA access was sufficient to classify an information service as an interLATA service, that rule would render any telecommunications service that carries traffic that originates in one LATA and terminates in another, including local exchange service and exchange access service, an interLATA service.[FN272] Congress clearly did not intend that result.

****35** 119. In addition, we agree with the BOCs that classifying information services as interLATA solely because end-users may obtain access to the service across LATA boundaries would represent a significant departure from Commission precedent, as well as from MFJ precedent.[FN273] BOCs are currently providing a number of information services on an integrated basis pursuant to the Commission's Computer III regulations, and users may obtain access to some, if not all, of these services on an interLATA basis.[FN274] If we were to determine that these services were interLATA services simply because end-users may obtain access across LATA boundaries, BOCs would have to change the manner in which they are providing many of these services, which would likely result in lost efficiency and disruption of services to customers.[FN275] We see no basis in the statute to adopt such an interpretation, as sections 271 and 272 are intended to govern the BOCs' provision of services that they were previously prohibited from providing under the MFJ, not services that they were previously authorized to provide under the MFJ.

120. Bundling. As we concluded above, an interLATA information service incorporates a bundled interLATA telecommunications transmission component. When a customer obtains interLATA transmission service from an interexchange provider that is not affiliated with a BOC, ***21964** the use of that transmission service in conjunction with an information service provided by a BOC or its affiliate does not make the information service a BOC interLATA service offering. A customer also may obtain an in-region interLATA telecommunications service from a BOC section 272 affiliate that the customer uses in conjunction with an intraLATA information service provided by that affiliate or by the BOC itself. When such telecommunications and information services are provided, purchased, and priced separately, we conclude that they do not collectively constitute an interLATA information service offering by the BOC.[FN276] In such a situation, the BOC would, of course, be required to provide the in-region interLATA transmission service pursuant to section 271 authorization and the section 272 separate affiliate and nondiscrimination requirements. The BOC could choose to provide the separate, intraLATA information service either on an integrated basis, in compliance with the Commission's CEI and ONA requirements, or through a

separate affiliate.

121. Remote Databases/Network Efficiency. BOCs may not provide interLATA services in their own regions, either over their own facilities or through resale, before receiving authorization from the Commission under section 271(d). Therefore, we conclude that BOCs may not provide interLATA information services, except for information services covered by section 271(g)(4), in any of their in-region states prior to obtaining section 271 authorization. Section 271(g)(4) designates as an incidental interLATA service the interLATA provision by a BOC or its affiliate 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."[FN277] Because BOCs were able to provide incidental interLATA services immediately upon enactment of the 1996 Act, they may provide interLATA information services that fall within the scope of section 271(g)(4) without receiving section 271(d) authorization from the Commission. Since section 271(g)(4) services are not among the incidental interLATA services exempted from section 272 separate affiliate requirements, however, they must be provided in compliance with those requirements. To the extent that parties have argued in the record that centralized data storage and retrieval services that fall within section 271(g)(4) either are not interLATA information services, or are not subject to the section 272 separate affiliate requirements, we specifically reject these arguments.[FN278]

****36** 122. We also reject the BOCs' argument that their use of interLATA transmission, outside the control of the end-user and solely to maximize network efficiencies, in connection with the provision of an information service, does not render that information service interLATA ***21965** in nature.[FN279] Whenever interLATA transmission is a component of an information service, that service is an interLATA information service, unless the end-user obtains that interLATA transmission service separately, e.g., from its presubscribed interexchange provider. To the extent that BOCs are allowed to perform certain interLATA call processing functions associated with their provision of telephone exchange service or exchange access service in connection with an intraLATA information service, however, they may continue to do so without transforming that information service into an interLATA information service.[FN280]

123. We also reject PacTel's claim that a BOC's use of interLATA transmission solely for its own business convenience in providing an information service falls within the "telecommunications management exception" to "information service."[FN281] We disagree with PacTel's assertion that this practice is covered by the "technical management exception," because the BOC would be providing interLATA transmission in connection with the management of an information service, not "the management of a telecommunications service," as specified by section 3(20). Further, as noted above, we believe that the "telecommunications management exception" is analogous to the Commission's classification of certain services as "adjunct-to-basic;" that is, it covers services that may fit within the literal reading of the information services definition, but that are used to facilitate the provision of a basic telecommunications transmission service, without altering the character of that service.[FN282] In other words, the "technical management exception" relates to the classification of services as either telecommunications services or information services; it has no bearing upon the classification of either of these types of services as intraLATA or interLATA. As such, the "telecommunications management exception" provides no safe harbor for interLATA transmission services employed by BOCs in connection with the provision of information services.

124. Presumptions Regarding Previously Authorized Information Services. With respect to information services that the BOCs were authorized to provide prior to passage of the 1996 Act, we conclude that as a matter of administrative convenience it is helpful to establish several ***21966** rebuttable presumptions regarding intraLATA or interLATA classification. Thus, we will presume that information services that BOCs were authorized to provide pursuant to CEI plans, without MFJ waivers, are intraLATA information services. Similarly,

we will presume that information services for which BOCs were required to obtain MFJ waivers are interLATA information services. We conclude that these presumptions are rebuttable, rather than conclusive, because the BOCs have noted that, for expediency purposes, they sometimes requested and obtained MFJ waivers in order to provide services that were not clearly interLATA in nature.[FN283] Thus, a BOC would be able to rebut the presumption that an information service provided pursuant to an MFJ waiver is an interLATA information service by showing that it had obtained a waiver to provide the service on an intraLATA basis prior to 1991. Similarly, the presumption that an information service provided pursuant to a CEI plan is an intraLATA information service may be rebutted by a showing that the information service incorporates a bundled, interLATA telecommunications transmission component, as specified in this Order.

3. BOC-provided Internet Access Services

a. Background

****37** 125. On June 6, 1996, the Common Carrier Bureau (Bureau) released an order approving a CEI plan filed by Bell Atlantic for the provision of Internet Access Service.[FN284] MFS had filed comments opposing Bell Atlantic's plan, arguing, inter alia, that Bell Atlantic's Internet access service offering is an interLATA service that Bell Atlantic may only provide through a section 272 affiliate after obtaining section 271 authorization from the Commission.[FN285] Following release of the Bell Atlantic CEI Plan Order, MFS filed a petition for reconsideration of that Order, raising similar arguments.[FN286] At about the same time, Southwestern Bell Telephone Company (SWBT) filed a CEI plan for Internet Support Services.[FN287] On July 25, 1996, one week after the Commission released the Notice in this proceeding, MFS filed with the Commission a petition seeking to consolidate proceedings related to the Bell Atlantic CEI Plan Order***21967** reconsideration and the SWBT Internet support CEI plan with the instant proceeding, on the grounds that the three proceedings raise similar novel, policy, factual, and legal arguments.[FN288] Although the Notice in the instant proceeding did not specifically seek comment on the proper classification or regulatory treatment of BOC-provided Internet services and Internet access services under the 1996 Act, several parties discussed these matters in their comments, in the course of addressing how we should define "interLATA information services."

b. Comments

126. MFS argues that all Internet services are interLATA services and, hence, Internet services provided by the BOCs are interLATA information services subject to the section 272 separate affiliate requirements.[FN289] In response, the BOCs argue that it is possible for them to provide on an intraLATA basis an Internet access service that allows a customer to connect to an Internet service provider's point of presence (POP) using the traditional local loop, and that such service should be classified as an intraLATA information service.[FN290]

c. Discussion

127. The preceding sections of this Order establish a definition of "interLATA information service" that should assist the BOCs and other interested parties in determining the types of information services that the BOCs are statutorily-required to provide through section 272 affiliates. If a BOC's provision of an Internet or Internet access service[FN291] (or for that matter, any information service) incorporates a bundled, in-region, interLATA transmission component provided by the BOC over its own facilities or through resale, that service may only be provided through a section 272 affiliate, after the BOC has received in-region interLATA authority under section 271. We believe that this is not the appropriate forum for considering whether the various specific Internet services provided by the BOCs are "interLATA information services" because such determinations must be made on a case-by-case basis. We believe that the lawfulness of the specific Internet services provided by Bell Atlantic and SWBT is more appropriately analyzed in the context of the separate CEI plan proceedings regarding each service that are currently pending before the Bureau, consistent with the rules and policies enunciated in ***21968** this rulemaking proceeding. Therefore, we deny MFS's request to consolidate proceedings related to the provision of Internet

and Internet access services by Bell Atlantic and SWBT with the instant proceeding.

4. Impact of the 1996 Act on the Computer II, Computer III, and ONA requirements

a. Background

****38** 128. In the Notice, we concluded that, because the 1996 Act does not establish regulatory requirements for BOC provision of intraLATA information services, Computer II,[FN292] Computer III,[FN293] and ONA[FN294] requirements continue to govern BOC provision of these services, to the extent that these requirements are consistent with the 1996 Act.[FN295] We sought comment on which of the Commission's existing requirements were inconsistent with, or had been rendered unnecessary by, the 1996 Act, as well as on the specific provisions of the 1996 Act that supersede the existing requirements.[FN296] We also sought comment on the impact of the statute on our pending Computer III Further Remand Proceedings.[FN297]

b. Comments

129. Consistency of Commission's Computer II, Computer III, and ONA Rules with the 1996 Act. Bell Atlantic and NYNEX argue that enactment of the 1996 Act has rendered the Computer II, Computer III, and ONA rules unnecessary and redundant.[FN298] The majority of the BOCs, however, contend that the Commission's existing Computer III and ONA interconnection ***21969** and unbundling requirements are consistent with the 1996 Act and should remain in place to allow them to provide intraLATA information services on an integrated basis.[FN299] Several of the BOCs' potential telecommunications competitors and certain organizations representing ISPs also agree that the Computer III and ONA safeguards should be retained if the Commission continues to permit BOCs to provide intraLATA information services on an unseparated basis.[FN300]

130. Requiring section 272 affiliates for intraLATA information services. MCI, ITAA, and CIX argue that, in the interest of regulatory consistency, the Commission should require the BOCs to provide all information services through a section 272 separate affiliate.[FN301] Several of the BOCs object to this proposal on the ground that such a requirement would be directly contrary to congressional intent.[FN302]

131. Application of Computer II, Computer III, and ONA requirements to section 272 affiliate activities. Several of the BOCs argue that the Commission should not apply the Computer III and ONA requirements to any BOC information services provided through a section 272 separate affiliate (either interLATA information services, as required by statute, or intraLATA information services, provided on a separate basis by choice).[FN303] In contrast, ITI and ITAA argue that the Computer III and ONA requirements should be applied to section 272 affiliates, prohibiting such affiliates from bundling equipment or information services with local exchange, exchange access, or interLATA services, until local exchange markets become fully competitive.[FN304]

c. Discussion

****39** 132. Consistency of Commission's Computer II, Computer III, and ONA Rules with the 1996 Act. We conclude that the Computer II, Computer III, and ONA requirements are consistent with the 1996 Act, and continue to govern BOC provision of intraLATA information services. By its terms, the 1996 Act imposes separate affiliate and nondiscrimination requirements on BOC provision of "interLATA information services," but does not address BOC ***21970** provision of intraLATA information services.[FN305] We concluded above that, for the purposes of applying sections 271 and 272, interLATA information services must include a bundled interLATA transmission component.[FN306] We further conclude, in light of our definition of interLATA information services, that BOCs are currently providing a number of information services on an intraLATA basis.[FN307] We find that the BOCs may continue to provide such intraLATA information services on an integrated basis, in compliance with the nonstructural safeguards established in Computer III and ONA.[FN308]

133. We reject Bell Atlantic's conclusory assertions that the 1996 Act's customer proprietary network information (CPNI), network disclosure, nondiscrimination, and accounting provisions supersede various of the Com-

mission's Computer III nonstructural safeguards.[FN309] We also reject NYNEX's claim that the section 251 interconnection and unbundling requirements render the Commission's Computer III and ONA requirements unnecessary.[FN310] Based on our review of the record in this proceeding, we conclude that the pending Computer III Further Remand Proceedings are the appropriate forum in which to examine the necessity of retaining any or all of these individual Computer III and ONA requirements.[FN311] We therefore plan to issue a Further Notice in that proceeding to determine how to regulate BOC provision of intraLATA information services in light of the 1996 Act.

134. In the interim, the Commission's Computer II, Computer III, and ONA rules are the only regulatory means by which certain independent ISPs are guaranteed nondiscriminatory ***21971** access to BOC local exchange services used in the provision of intraLATA information services.[FN312] As noted above, the section 272 nondiscrimination requirements do not apply to BOC provision of intraLATA information services, and ISPs that are not telecommunications carriers cannot obtain interconnection or access to unbundled elements under section 251.[FN313] Thus, we believe that continued enforcement of these safeguards is necessary pending the conclusion of the Computer III Further Remand Proceedings and establishes important protections for small ISPs that are not provided elsewhere in the Act.

****40** 135. Requiring section 272 affiliates for intraLATA information services. We decline to require the BOCs to provide intraLATA information services through section 272 affiliates. It is clear that section 272 does not require the BOCs to offer intraLATA information services through a separate affiliate. We further decline to exercise our general rulemaking authority to impose such a requirement. We conclude that the record in this proceeding does not justify a departure from our determination, in Computer III, to allow BOCs to provide intraLATA information services on an integrated basis, subject to appropriate nonstructural safeguards. Some parties in this proceeding argue that we should harmonize our regulatory treatment of intraLATA information services provided by the BOCs with the section 272 requirements imposed by Congress on interLATA information services.[FN314] We invite these parties to comment on these matters in response to the Further Notice we intend to issue in the Computer III Further Remand Proceedings.

136. Application of Computer II, Computer III, and ONA requirements to section 272 affiliate activities. We conclude that a BOC that provides interLATA telecommunications services and information services through the same section 272 affiliate may bundle such services without providing comparably efficient interconnection to the basic underlying interLATA telecommunications services.[FN315] Under our definition of "interLATA information service," as explained above, such service must include a bundled interLATA telecommunications element. Hence, to prohibit a BOC affiliate from bundling interLATA telecommunications and information services would effectively prevent the BOCs from offering any interLATA information services, a result clearly not contemplated by the statute. Further, we note that the market for information services is fully competitive,[FN316] and the market for interLATA telecommunications services is substantially competitive.[FN317] Thus, we see no basis for concern that a section 272 affiliate ***21972** providing an information service bundled with an interLATA telecommunications service would be able to exercise market power. If, however, a BOC's section 272 affiliate were classified as a facilities-based telecommunications carrier (i.e., it did not provide interLATA telecommunications services solely through resale), the affiliate would be subject to a Computer II obligation to unbundle and tariff the underlying telecommunications services used to furnish any bundled service offering.[FN318]

137. Under our current regulatory regime, a BOC must comply fully with the Computer II separate subsidiary requirements in providing an information service in order to be relieved of the obligation to file a CEI plan for that service. We decline to adopt NYNEX's proposal that we find that all BOC information services provided through a section 272 separate affiliate satisfy the Computer II separate subsidiary requirements, because we

conclude that the record in this proceeding is insufficient to support such a conclusion.[FN319] Instead, we intend to examine this issue further in the context of the Computer III Further Remand Proceedings. Further, we reject USTA's argument that ONA reporting requirements do not extend to intraLATA information services provided through a section 272 separate affiliate.[FN320] BOCs must comply with the ONA requirements regardless of whether they provide information services on a separated or integrated basis.[FN321]

G. Information Services Subject to Other Statutory Requirements

1. Electronic Publishing (section 274)

a. Background

****41** 138. In the Notice, we observed that, although electronic publishing is specifically identified as an information service, interLATA provision of electronic publishing is exempt from section 272, and is instead subject to section 274.[FN322] Noting that we had initiated a separate proceeding to clarify and implement, interalia, the requirements of section 274,[FN323] we sought comment on how to distinguish information services subject to the section 272 requirements from ***21973** electronic publishing services subject to the section 274 requirements.[FN324] We also invited parties to comment on whether, in situations involving services that do not clearly fall within either the definition of "electronic publishing" (section 274(h)(1)) or the enumerated exceptions thereto (section 274(h)(2)), we should identify as "electronic publishing" those services for which the carrier controls, or has a financial interest in, the content of information transmitted by the service.[FN325]

b. Comments

139. Several parties assert that the section 274(h)(1) definition of "electronic publishing" needs no further refinement because it is clear, when read in conjunction with the exceptions set forth in section 274(h)(2).[FN326] Several BOCs argue that the Commission should not develop another rule for classifying ambiguous services, but rather should handle them on a case-by-case basis.[FN327] Generally, the BOCs also resist the idea of applying a "financial interest or control" test to determine whether ambiguous information services are subject to section 272 or section 274;[FN328] in contrast, MCI supports adoption of such a test.[FN329] Several existing and potential competitors to the BOCs suggest that it may not be necessary to distinguish between information services subject to section 272 and electronic publishing services subject to section 274.[FN330]

c. Discussion

140. Upon review of the record and further consideration, we conclude that it is not necessary to adopt the "financial interest or control" test in determining whether a particular BOC service involves the provision of electronic publishing, in addition to the definitions set forth in sections 274(h)(1) and 274(h)(2). Generally speaking, if a particular service does not appear to fit clearly within either the definition of "electronic publishing," set forth in section 274(h)(1), or the exceptions thereto listed in section 274(h)(2), determining the appropriate classification of that service will involve a highly fact-specific analysis that is better performed on a case-by-case ***21974** basis. In the context of such a case-by-case determination, the Commission may consider a number of factors, including whether the BOC controls, or has a financial interest in, the content of information transmitted to end-users.[FN331] We also note that the definition of electronic publishing, as well as specific services encompassed by that definition, may be further refined in the Electronic Publishing proceeding.

****42** 141. We also decline to adopt ITAA's suggestion that, because of potential difficulties in distinguishing between information services and electronic publishing services, we should impose substantially the same separate affiliate requirements on both.[FN332] Such an approach would be directly contrary to the statute.[FN333] Congress set forth distinct separate affiliate and nondiscrimination requirements in sections 272 and 274, and specified that the former apply to interLATA information services, while the latter apply to all BOC-provided electronic publishing services. To impose the section 272 requirements on electronic publishing ser-

vices, or to impose the section 274 requirements on interLATA information services, would be inconsistent with the clear statutory scheme.

142. Moreover, we specifically reject AT&T's contention that electronic publishing services are subject to the section 272 separate affiliate requirements, pursuant to section 272(a)(2)(B), which imposes a separate affiliate requirement on interLATA telecommunications services.[FN334] Electronic publishing services, however, are specifically included within the statutory definition of information services.[FN335] Accordingly, electronic publishing services would be subject to section 272(a)(2)(C), which imposes a separate affiliate requirement on interLATA information services, except that section 272(a)(2)(C) specifically exempts "electronic publishing (as defined in section 274(h))."

***21975 2. Telemessaging (section 260)**

a. Background

143. In the Notice, we tentatively concluded that "telemessaging" is an information service.[FN336] We further tentatively concluded that BOC provision of telemessaging on an interLATA basis is subject to the section 272 separate affiliate requirements, in addition to the section 260 safeguards.[FN337]

b. Comments

144. In general, parties agree with our tentative conclusions that telemessaging is an information service, and that when a BOC provides telemessaging on an interLATA basis, it must do so in accordance with the section 272 separate affiliate requirements.[FN338] Several parties also assert that, with respect to interLATA telemessaging services, it is possible to apply both section 260 and section 272 simultaneously.[FN339] PacTel, however, disagrees with both of our tentative conclusions, arguing that because "telemessaging" includes live operator services that are not information services, it constitutes a distinct category of service that is subject only to the section 260 requirements.[FN340]

c. Discussion

145. Based on our review of the comments and analysis of the statute, we hereby adopt our tentative conclusion that telemessaging is an information service. We reject PacTel's contention that live operator services do not constitute information services. Under the statute, ***21976** live operator services "used to record, transcribe, or relay messages" are telemessaging services.[FN341] Because these functions plainly provide "the capability for ... storing ... or making available information" via telecommunications, we conclude that live operator telemessaging services fall within the statutory definition of information services.[FN342] We also adopt our tentative conclusion that BOCs that provide telemessaging services that meet the definition of interLATA information services must do so in accordance with the section 272 requirements, in addition to the section 260 requirements.[FN343]

IV. STRUCTURAL SEPARATION REQUIREMENTS OF SECTION 272

A. Application of the Section 272(b) Requirements

****43** 146. Section 272(b) of the Communications Act establishes five structural and transactional requirements for separate affiliate(s) established pursuant to section 272(a). We address each of the requirements below, with the exception of section 272(b)(2), which we discuss in the Accounting Safeguards Order.[FN344]

B. The "Operate Independently" Requirement

1. Background

147. Section 272(b)(1) states that a separate affiliate "shall operate independently from the BOC."[FN345] The Act does not elaborate on the meaning of the phrase "operate independently." We stated in the Notice that under principles of statutory construction, a statute should be interpreted so as to give effect to each of its provisions.[FN346] We therefore tentatively concluded that the section 272(b)(1) "operate independently" provision imposes requirements beyond those contained in subsections 272(b)(2)-(5).

***21977** 148. As we observed in the Notice, section 274(b) contains similar language to section 272(b)(1). It states that "[a] separated affiliate or electronic publishing joint venture shall be operated independently from the [BBC]." Subsections 274(b)(1)-(9) list several re-

quirements that govern the relationship of an electronic publishing entity and the BBC with which it is affiliated.[FN347] We sought comment on the relevance of the "operated independently" language of section 274(b) when construing the "operate independently" requirement of section 272(b)(1).[FN348]

149. In addition, we sought comment on what rules, if any, we should adopt to implement the requirements of section 272(b)(1).[FN349] Moreover, we asked whether we should impose one or more of the separation requirements established in the Computer II or Competitive Carrier[FN350] proceedings.[FN351]

150. In the Computer II proceeding, the Commission required AT&T to provide enhanced services through a separate affiliate, a requirement that the Commission extended to the BOCs following divestiture.[FN352] The Commission required the enhanced services subsidiary to "have its own operating, marketing, installation and maintenance personnel for the services and equipment it offer[ed],"[FN353] to comply with information disclosure requirements, and to maintain its own books of account.[FN354] The Commission prohibited the regulated entity and its enhanced services subsidiary from using in common any leased or owned physical space or property on which transmission equipment or facilities used in basic transmission services were located,[FN355] barred them from sharing computer capacity, and limited the regulated entity's ability to provide software to the affiliate.[FN356] Moreover, the Commission barred the enhanced services subsidiary ***21978** from constructing, owning, or operating its own transmission facilities, thereby requiring it to obtain such facilities from a local exchange carrier pursuant to tariff.[FN357]

****44** 151. In the Competitive Carrier proceeding, the Commission prescribed the separation requirements to which independent LECs must conform to be regulated as nondominant in the provision of domestic, interstate, interexchange services. Specifically, an independent LEC must provide interstate interexchange services through an affiliate that: 1) maintains separate books of account; 2) does not jointly own transmission or switching facilities with its affiliated exchange telephone company; and 3) acquires that exchange telephone company's services at tariffed rates and conditions.[FN358]

2. Comments

152. Relationship of Section 272(b)(1) to Section 274(b)(1). Several commenters rely on the rule of statutory construction that similar terms in related parts of an act should be read similarly.[FN359] Two such commenters propose that the requirements listed under both sections 272(b) and 274(b) define the term "operate independently," and, consequently, that the additional prohibitions of subsection 274(b) must be read into subsection 272(b).[FN360] In contrast, several BOCs cite the doctrine of inclusio unius est exclusio alterius, the "inference [applied in statutory construction] that all omissions should be understood as exclusions."[FN361] They argue that, because Congress required electronic publishing affiliates and joint ventures to be "operated independently" and then imposed additional restrictions on activities that are not explicitly restricted in section 272(b), those activities cannot be barred by the "operate independently" provision of section 272(b).[FN362] Other commenters focus on the structural differences between the two subsections as evidence that we should construe "operate independently" and "operated independently" differently.[FN363]

***21979** 153. Defining "operate independently."With the exception of NYNEX, the BOCs and USTA interpret the term "operate independently" to impose a straightforward, descriptive requirement that needs no further clarification through the rulemaking process.[FN364] They generally contend that the omission of additional structural separation requirements in section 272(b) represents a deliberate congressional choice not to impose such restrictions.[FN365] They particularly oppose adoption of the Computer II structural separation requirements to implement the "operate independently" requirement. Indeed, they assert that adopting such restrictions would be inconsistent with congressional intent, as well as changes in the industry and common carrier regulation since the Computer II proceeding.[FN366] These commenters suggest that imposing additional structural separation requirements would result in a loss of efficiency and economies of scope, decreased

innovation, and fewer new services.[FN367]

154. The majority of commenters, other than the BOCs, urge us to construe the "operate independently" requirement as imposing additional structural separation requirements.[FN368] For instance, the DOJ contends that additional structural separation requirements are the most effective means of reducing the risks of cross-subsidization.[FN369] Commenters supporting this view argue that the "operate independently" requirement must be read to impose, at a minimum, the structural separation rules established in the Computer II proceeding, including those elements outlined above.[FN370] Among those commenters, several emphasize that a BOC and its affiliate ***21980** should not be permitted to engage in joint marketing.[FN371] Several commenters also propose restrictions that appear to go beyond those adopted in the Computer II proceeding, including a prohibition on shared administrative services,[FN372] a complete prohibition on common use of any leased or owned physical space,[FN373] a prohibition on jointly owned property,[FN374] and a complete prohibition on joint research and development, including joint equipment design.[FN375]

****45** 155. Other commenters propose that "the standards for independent operation established in the Competitive Carrier decision are the most appropriate for this section of the Act."[FN376] Suggesting that two of the three requirements are implemented elsewhere in section 272, they generally propose that we read "operate independently" to forbid joint ownership of transmission and switching facilities.[FN377] Other parties advocate that we adopt individual requirements, rather than a particular set of structural separation requirements established in another context, or ***21981** recommend that we use other proceedings in which structural separation was imposed as a guide.[FN378]

3. Discussion

156. We adopt our tentative conclusion that the "operate independently" requirement of section 272(b)(1) imposes requirements beyond those listed in sections 272(b)(2)-(5). This conclusion is based on the principle of statutory construction that a statute should be construed so as to give effect to each of its provisions.[FN379]

157. Relationship of Section 272(b)(1) to Section 274(b). Section 274(b) mandates that a separated affiliate or electronic publishing joint venture be "operated independently" and then lists nine specific requirements governing the relationship between a BOC and a separated affiliate. In contrast, section 272(b) imposes five structural and transactional requirements governing the relationship between a BOC and a section 272 affiliate, one of which is that the affiliate "shall operate independently from the [BOC]." The structural differences in the organization of the two sections suggest that the term "operate independently" in section 272(b)(1) should not be interpreted to impose the same obligations on a BOC as section 274(b). In particular, while the enumerated requirements of section 274(b) may be interpreted to define the term "operated independently" in that context, they do not define the term "operate independently" as used in section 272(b).[FN380] We agree with SBC that, because the requirements listed in sections 274(b)(1)-(9) of the Act overlap with the requirements of sections 272(b), (c), and (e), it would be redundant to incorporate all of the section 274(b) requirements into the "operate independently" requirement of section 272(b)(1).[FN381]

158. Defining "Operate Independently." The requirements that we adopt to implement section 272(b)(1) are intended to prevent a BOC from integrating its local exchange and exchange access operations with its section 272 affiliate's activities to such an extent that the affiliate could not reasonably be found to be operating independently, as required by the statute. In order to protect against the potential for a BOC to discriminate in favor of a section 272 affiliate in a manner that results in the affiliate's competitors' operating less efficiently, we seek to ensure that a section 272 affiliate and its competitors enjoy the same level of access to the BOC's ***21982** transmission and switching facilities. Accordingly, we conclude that operational independence precludes the joint ownership of transmission and switching facilities by a BOC and its section 272 affiliate, as well as the joint ownership of the land and buildings where those facilities are located. Furthermore, opera-

tional independence precludes a section 272 affiliate from performing operating, installation, and maintenance functions associated with the BOC's facilities. Likewise, it bars a BOC or any BOC affiliate, other than the section 272 affiliate itself, from performing operating, installation, or maintenance functions associated with the facilities that the section 272 affiliate owns or leases from a provider other than the BOC with which it is affiliated. Consistent with these requirements and those established pursuant to sections 272(b)(5) and 272(c)(1), a section 272 affiliate may negotiate with an affiliated BOC on an arm's length and nondiscriminatory basis to obtain transmission and switching facilities, to arrange for collocation of facilities, and to provide or to obtain services other than those expressly prohibited herein.

****46** 159. We agree with several commenters that joint ownership of transmission and switching facilities and the property on which they are located would permit such substantial integration of the BOCs' local operations with their interLATA activities as to preclude independent operation, in violation of section 272(b)(1). [FN382] Imposing a prohibition on such joint ownership also avoids the need to allocate the costs of such transmission and switching facilities between BOC activities and the competitive activities in which a section 272 affiliate may be involved. We agree with the claims of some commenters that, because the costs of wired telephony networks and network premises are largely fixed and largely shared among local, access, and other services, sharing of switching and transmission facilities may provide a significant opportunity for improper allocation of costs between the BOC and its section 272 affiliate.[FN383]

160. By prohibiting joint ownership of transmission and switching facilities, we also reduce the potential for a BOC to discriminate in favor of its section 272 affiliate. Consistent with this purpose, we define transmission and switching facilities broadly to include the facilities used to provide local exchange and exchange access service. The prohibition ensures that a section 272 affiliate must obtain any such facilities pursuant to section 272(b)(5), which requires all transactions between a BOC and its section 272 affiliate to be on an arm's length basis and reduced to writing. Requiring section 272 affiliates to obtain transmission and switching facilities from a BOC on an arm's length basis will increase the transparency of such transactions, thereby facilitating monitoring and enforcement of the section 272 requirements. Moreover, a section 272 affiliate and its interLATA competitors will have to follow the same procedures when obtaining services and facilities from a BOC. As described below, sections 272(c)(1) and (e) require a section 272 affiliate to obtain services and facilities on the same rates, terms, and conditions ***21983** available to unaffiliated entities. Contrary to the suggestion of some commenters,[FN384] those nondiscrimination safeguards would offer little protection if a BOC and its section 272 affiliate were permitted to own transmission and switching facilities jointly. To the extent that a section 272 affiliate jointly owned transmission and switching facilities with a BOC, the affiliate would not have to contract with the BOC to obtain such facilities, thereby precluding a comparison of the terms of transactions between a BOC and a section 272 affiliate with the terms of transactions between a BOC and a competitor of the section 272 affiliate. Together, the prohibition on joint ownership of facilities and the nondiscrimination requirements should ensure that competitors can obtain access to transmission and switching facilities equivalent to that which section 272 affiliates receive.

****47** 161. The requirement that a BOC and its section 272 affiliate not commonly own the land and buildings where their transmission and switching facilities are located, like the prohibition on joint ownership of facilities, should ensure that a section 272 affiliate and its competitors both receive the best available access to transmission and switching facilities. It does not, however, preclude a section 272 affiliate from collocating its equipment in end offices or on other property owned or controlled by its affiliated BOC. Rather, as IDCMA recognizes, the requirement should ensure that collocation agreements between a BOC and its section 272 affiliate are reached pursuant to arm's length negotiations and that the same collocation opportunities are available to similarly situated non-affiliated entities.

[FN385] Moreover, the ban on joint ownership of facilities should protect local exchange competitors that request physical collocation by ensuring that a BOC's section 272 affiliate does not obtain preferential access to the limited available space in the BOC's central office. [FN386]

162. We decline to read the "operate independently" requirement to impose a blanket prohibition on joint ownership of property by a BOC and a section 272 affiliate. Rather, we limit the restriction to joint ownership of transmission and switching facilities and the land and buildings where those facilities are located. We conclude that the prohibition we have adopted should ensure that the section 272 affiliate's competitors gain nondiscriminatory access to those transmission and switching facilities that both section 272 affiliates and their competitors may be unable to obtain from other sources. We find that joint ownership of other property, such as office space and equipment used for marketing or the provision of administrative services, may provide economies of scale and scope without creating the same potential for discrimination by ***21984** the BOCs. Moreover, we believe that the Commission's accounting rules,[FN387] the separate books, records, and accounts requirement of section 272(b); and the audit requirement of section 272(d) provide adequate protection against the potential for improper cost allocation.

163. We further conclude that allowing the same personnel to perform the operating, installation, and maintenance services associated with a BOC's network and the facilities that a section 272 affiliate owns or leases from a provider other than the BOC would create the opportunity for such substantial integration of operating functions as to preclude independent operation, in violation of section 272(b)(1). Regardless of whether the BOC or the section 272 affiliate were to provide such services, we agree with AT&T that allowing the same individuals to perform such core functions on the facilities of both entities would create substantial opportunities for improper cost allocation, in terms of both the personnel time spent in performing such functions and the equipment utilized.[FN388] We conclude, as we did in the BOC Separations Order, that allowing the sharing of such services would require "excessive, costly and burdensome regulatory involvement in the operation, plans and day-to-day activities of the carrier ... to audit and monitor the accounting plans necessary for such sharing to take place." [FN389] Accordingly, we read section 272(b)(1) to bar a section 272 affiliate from contracting with a BOC or another entity affiliated with the BOC to obtain operating, installation, and maintenance functions associated with the section 272 affiliate's facilities. As stated above, we believe that a prohibition on joint ownership of transmission and switching facilities is necessary to ensure that a BOC complies with the nondiscrimination requirements of section 272. Consistent with that approach, we further interpret the term "operate independently" to bar a BOC from contracting with a section 272 affiliate to obtain operating, installation, or maintenance functions associated with the BOC's facilities. Allowing a BOC to contract with the section 272 affiliate for operating, installation, and maintenance services would inevitably afford the affiliate access to the BOC's facilities that is superior to that granted to the affiliate's competitors.

****48** 164. We clarify that section 272(b)(1) does not preclude a BOC or a section 272 affiliate from providing telecommunications services to one another, so long as each entity performs itself, or obtains from an unaffiliated third party, the operating, installation, and maintenance functions associated with the facilities that it owns or leases from an entity unaffiliated with the BOC. In particular, if a section 272 affiliate obtains unbundled elements from a BOC, that BOC can perform the operating, installation, and maintenance functions associated with those facilities. Moreover, we recognize the need for an exception to the prohibition on shared operating, installation, and maintenance services to allow the BOC to obtain ***21985** support services for sophisticated equipment purchased from the affiliate on a compensatory basis.[FN390] For instance, the BOC could contract with the section 272 affiliate for the installation, maintenance, or repair of equipment, or the affiliate could train the BOC's personnel to perform such functions. We further note that the limited prohibition on shared services that we adopt is consistent with section 272(e)(4), which states that a BOC or BOC af-

filiate that is subject to section 251(c) "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."[FN391] As we discuss below, section 272(e)(4) does not grant a BOC the authority to provide particular services to its affiliate, but rather prescribes the manner in which a BOC must provide those services that it is otherwise authorized to provide.[FN392] Thus, section 272(e)(4) does not grant a BOC the authority to provide operating, installation, and maintenance services associated with the facilities that a section 272 affiliate owns or leases from a provider other than the BOC.

165. In imposing these requirements, we reject the contention of some commenters that Congress considered and rejected a prohibition on the joint ownership of telecommunications transmission or switching equipment or other property.[FN393] Although the House bill contained such a prohibition, the Senate bill did not.[FN394] The Joint Explanatory Statement indicates merely that the conference committee adopted the Senate version of this provision with several modifications and does not offer any specific explanation for the exclusion of the joint ownership restriction.[FN395] In these circumstances, our obligation is to interpret the language of section 272(b)(1) in a manner consistent with its purpose, which is to ensure the operational independence of a section 272 affiliate from its affiliated BOC.[FN396]

166. The limited prohibition on shared services that we impose rests on the "operate independently" requirement of section 272(b)(1), rather than the requirement of section 272(b)(3) that a BOC and its section 272 affiliate have "separate officers, directors, and employees."[FN397] ***21986** Accordingly, we reject the statutory construction argument advanced by several BOCs, which is predicated on the text of the latter provision. Those BOCs argue that, if a rule against separate employees were sufficient to prevent the sharing of in-house services, Congress would not have prohibited a BOC from engaging in purchasing, installation, maintenance, hiring, training, and research and development for the separated affiliate, in addition to forbidding the BOC and its separated affiliate from having common officers, directors, and employees, in section 274(b).[FN398]

****49** 167. We believe it is consistent with both the letter and purposes of section 272 to strike an appropriate balance between allowing the BOCs to achieve efficiencies within their corporate structures and protecting ratepayers against improper cost allocation and competitors against discrimination. We decline to impose additional structural separation requirements given the nondiscrimination safeguards, the biennial audit requirement, and other public disclosure requirements imposed by section 272. In combination with the accounting protections established in the Accounting Safeguards Order, we believe the requirements set forth herein will protect against potential anticompetitive behavior.

168. In particular, we decline to read the "operate independently" requirement to impose a prohibition on all shared services.[FN399] We recognize the inherent tension between the "operate independently" requirement and allowing the integration of services. As we discuss further below, however, we believe the economic benefits to consumers from allowing a BOC and its section 272 affiliate to derive the economies of scale and scope inherent in the integration of some services outweigh any potential for competitive harm created thereby.[FN400] Therefore, we permit the sharing of administrative and other services.[FN401] For example, we read section 272(b)(1) not to preclude a BOC and a section 272 affiliate from contracting with one another to provide marketing services.[FN402]

169. In construing other provisions of section 272, we address the concerns of those commenters who urge us to interpret section 272(b)(1) to prohibit a BOC and a section 272 affiliate from engaging in various forms of joint research and development.[FN403] As a preliminary matter, we note that the MFJ Court considered equipment design and development to be an ***21987** integral part of "manufacturing," as the term was used in the MFJ.[FN404] We emphasize that to the extent that research and development is a part of manufacturing, it must be conducted through a section 272 affiliate, pur-

suant to section 272(a).[FN405] To the extent that a BOC seeks to develop services for or with its section 272 affiliate, the BOC must develop services on a nondiscriminatory basis for or with other entities, pursuant to section 272(c) (1).[FN406]

170. Finally, although a number of commenters support a Computer II-type prohibition on a section 272 affiliate's ability to construct, own, or operate its own local exchange facilities,[FN407] we conclude that such a prohibition is not required by the language of section 272(b)(1). As several BOCs suggest, limiting a section 272 affiliate to resale would not necessarily increase the affiliate's operational independence, particularly if the affiliate had to acquire facilities from its affiliated BOC as a result of the requirement.[FN408]

C. Section 272(b)(3) and Shared Services

1. Background

****50** 171. In the Notice, we tentatively concluded that the section 272(b)(3) requirement that a BOC and its section 272 affiliate have "separate officers, directors, and employees" [FN409] prohibits the sharing of in-house functions, including operating, installation, and maintenance, as well as administrative services.[FN410] We noted that, pursuant to the Computer II proceeding, the Commission allowed AT&T and its enhanced services subsidiaries to share certain administrative services -- accounting, auditing, legal services, personnel recruitment and management, finance, tax, insurance, and pension services[FN411] -- on a cost reimbursable basis, but required the subsidiary to have its own operating, marketing, installation, and maintenance personnel for the services and ***21988** equipment it offered.[FN412] We sought comment on whether section 272(b)(3) forbids the sharing of outside services or other types of personnel sharing.[FN413]

172. In the context of our discussion of section 272(g), we sought comment on the related question of whether a section 272 affiliate must purchase marketing services from an affiliated BOC on an arm's length basis, pursuant to section 272(b)(5). Moreover, we sought comment on whether it is necessary to require a BOC and its section 272 affiliate to contract jointly with an outside marketing entity for joint marketing of interLATA and local exchange services in order to comply with section 272(b)(3). Finally, we invited parties to comment on the corporate and financial arrangements that are necessary to comply with sections 272(g)(2), 272(b)(3), and 272(b)(5).[FN414]

2. Comments

173. Sharing of Services. The BOCs, USTA, and the Yellow Pages Publishers Association argue that section 272(b)(3) does not preclude the sharing of "in-house" services, those services provided by a BOC or its separate affiliate.[FN415] Similarly, they assert that section 272(b)(3) does not prohibit BOC employees from performing marketing services on behalf of a section 272 affiliate.[FN416]

174. In response, a majority of commenters contend that section 272(b)(3) supports a broad prohibition on the sharing of services.[FN417] For instance, AT&T argues that BOC personnel should not be involved in any way in the activities of the section 272 affiliate, and vice versa.[FN418] MFS urges us to construe section 272(b)(3) to mean that employees may provide services only ***21989** for the BOC or its section 272 affiliate, not both.[FN419] In particular, interexchange carriers construe section 272(b)(3) as imposing a variety of restrictions on joint marketing activities. AT&T contends that a BOC and its affiliate may each jointly market exchange and interexchange services, but may not integrate their marketing operations or their product design and development.[FN420] Whereas, MCI argues that joint marketing must be conducted either by the BOC or its section 272 affiliate, but not both.[FN421] Finally, Sprint maintains that BOC employees may not market the section 272 affiliate's services, because they are not employed by the BOC affiliate.[FN422]

****51** 175. Services Provided by an Outside Entity. The BOCs and USTA argue that neither the statute nor legislative history can be read to prohibit a BOC and its section 272 affiliate from obtaining services from the same outside provider.[FN423] Sprint does not object to such sharing "provided that each [party] pays fair market value in writing for those services."[FN424] Other commenters contend, however, that sharing a common

outside provider creates the same opportunity for improper cost allocation as the sharing of in-house services.[FN425] Several commenters suggest that we place specific limits on outside contracting.[FN426]

176. Sprint and Time Warner argue that we should require a BOC and its section 272 affiliate to contract with an outside firm for the provision of joint marketing and advertising ***21990** services.[FN427] The BOCs and the Citizens for a Sound Economy Foundation object to the proposed requirement on the grounds that it would be contrary to the statute.[FN428]

177. Other Activities. AT&T argues that we "should prohibit the BOCs from using any compensation system that directly or indirectly bases any part of the compensation of BOC officers, directors, or employees on the performance of the affiliate, or vice versa."[FN429] The BOCs generally reply that there is no statutory basis for such a requirement, which would "deny the RBOC the ability to utilize stock-based compensation plans (e.g., stock options), a common compensation mechanism" and "powerful recruiting tool" used in the industry.[FN430]

3. Discussion

178. Sharing of Services. Based on the record before us, we decline to prohibit the sharing of services other than operating, installation, and maintenance services, as described above.[FN431] We clarify that "sharing of services" means the provision of services by the BOC to its section 272 affiliate, or vice versa. In response to our tentative conclusion on this issue in the Notice, the BOCs have argued persuasively that such a prohibition is neither required as a matter of law, nor desirable as a matter of policy. We note that section 272(b)(3) on its face is silent on the issue of shared services. We are persuaded by the arguments of the BOCs that the section 272(b)(3) requirement that a BOC and a section 272 affiliate have separate officers, directors, and employees simply dictates that the same person may not simultaneously serve as an officer, director, or employee of both a BOC and its section 272 affiliate.[FN432] Thus, as MFS asserts, an ***21991** individual may not be on the payroll of both a BOC and a section 272 affiliate.[FN433] As discussed below, to the extent that a BOC provides services to its section 272 affiliate, it must provide them to other entities on the same rates, terms, and conditions, pursuant to section 272(c)(1).[FN434]

****52** 179. We also decline to impose a prohibition on the sharing of services other than operating, installation, and maintenance services, on policy grounds. We find that, if we were to prohibit the sharing of services, other than those restricted pursuant to section 272(b)(1), a BOC and a section 272 affiliate would be unable to achieve the economies of scale and scope inherent in offering an array of services.[FN435] We do not believe that the competitive benefits of allowing a BOC and a section 272 affiliate to achieve such efficiencies are outweighed by a BOC's potential to engage in discrimination or improper cost allocation. As we have noted, the Commission permitted the sharing of administrative services in the Computer II Final Order, on the grounds that "[w]ith an appropriate accounting system, whatever administrative efficiencies may exist are preserved."[FN436] We reject the arguments of some parties that, because of changes in the telecommunications marketplace and the language of the 1996 Act, a different outcome is warranted in this case.[FN437]

180. We recognize that allowing the sharing of in-house services will require a BOC to allocate the costs of such services between the operating company and its section 272 affiliate and provide opportunities for improper cost allocation, exchanges of information, and discriminatory treatment that may not be revealed in a subsequent audit.[FN438] Indeed, in the Computer II proceeding, the Commission indicated that a major reason for prohibiting the sharing of particular services, such as marketing services, was its desire to eliminate "the inherent ***21992** difficulties in allocating joint and common costs."[FN439] For these reasons, we conclude that a BOC and a section 272 affiliate may share in-house services with each other only to the extent that such sharing is consistent with sections 272(b)(1), 272(b)(5), and 272(c)(1) of the Act.[FN440]

181. Consistent with section 272(b)(1), a BOC and its section 272 affiliate may not share operating, installation, and maintenance services, as discussed above.[FN441] In addition, as we conclude in the Accounting

Safeguards Order, an agreement to provide in-house services by a BOC to its section 272 affiliate (or vice versa) constitutes a transaction between that BOC and its section 272 affiliate, so that the requirements of section 272(b)(5) govern.[FN442] Accordingly, such transactions must be conducted on an arm's length basis, reduced to writing, and made available for public inspection. Moreover, such transactions must be consistent with the affiliate transaction rules, as modified in the Accounting Safeguards Order.[FN443] In addition, the section 272 requirements that a BOC and its section 272 affiliate maintain separate books, records, and accounts, and be subject to an audit every two years should strengthen the ability of competitors and regulators to detect any inequities in cost allocation for shared services. We agree with commenters who contend that, in any event, federal price cap regulation reduces a BOC's incentives to allocate costs improperly.[FN444] Finally, section 272(c)(1) ensures that to the extent that a BOC provides services to its section 272 affiliate, it must make them available to the affiliate's competitors on the same rates, terms, and conditions.[FN445]

****53** 182. We further conclude that section 272(b)(3) does not preclude the parent company of the BOC and the section 272 affiliate from performing functions for both the BOC and the section 272 affiliate, subject to the requirements of section 272(b)(1). Similarly, an affiliate of the BOC, such as a services affiliate, could provide services to both a BOC and a section 272 affiliate. We are not persuaded by claims that the sharing of services provided to a BOC and its section 272 affiliate by a parent company or another BOC affiliate would allow the BOC and the ***21993** section 272 affiliate to achieve an unacceptable level of integration.[FN446] Instead, we agree with the view that the section 272(b)(3) separate employees requirement extends only to the relationship between a BOC and its section 272 affiliate.[FN447] To the extent that the BOC contracts with an unregulated affiliate, it is subject to the affiliate transaction rules.[FN448] Moreover, a parent company or a BOC affiliate that performs services for both a BOC and its section 272 affiliate must fully document and properly apportion the costs incurred in furnishing such services.[FN449]

183. Consistent with our conclusions, we decline to read section 272(b)(3) to preclude the sharing of marketing services.[FN450] Given that section 272(g) expressly contemplates that the each entity may market or sell the services of the other, we conclude that a BOC and its section 272 affiliate may provide marketing services for each other.[FN451] We agree with those commenters that assert that the entities must provide such services pursuant to arm's length transactions, consistent with the requirements of section 272(b)(5).[FN452] Moreover, the parent of a BOC and its section 272 affiliate or another BOC affiliate may perform marketing functions for both entities.

184. Services Provided By an Outside Entity. We further conclude that section 272(b)(3) does not prohibit a BOC and its section 272 affiliate from obtaining services from the same outside supplier. Indeed, we find no statutory support for limiting permissible outsourcing, as proposed by MCI or Time Warner.[FN453]

***21994** 185. Nor do we construe section 272(b)(3), when read in light of section 272(b)(1), to require a BOC and a section 272 affiliate to contract with outside entities to perform their joint marketing services. We agree with the Citizens for a Sound Economy Foundation that such a requirement would reduce the BOCs' ability to serve consumers without providing additional protection against anticompetitive behavior.[FN454] Each entity, however, must pay its full share of any outsourced services that it receives.

186. Other activities. We reject AT&T's request that we interpret section 272(b)(3) to prohibit compensation schemes that base the level of remuneration of BOC officers, directors, and employees on the performance of the section 272 affiliate, or vice versa. We conclude that tying the compensation of an employee of a section 272 affiliate to the performance of a Regional Holding Company and all of its enterprises as a whole, including the performance of the BOC, does not make that individual an employee of the BOC.[FN455] Similarly, tying the compensation of a BOC employee to the performance of a Regional Holding Company and all of its enterprises as a whole, including the performance of the section 272 affiliate, does not make that individual an employee

of the section 272 affiliate.

E. Section 272(b)(4)

1. Background

****54** 187. Section 272(b)(4) states that a section 272 affiliate "may not obtain credit under any arrangement that would permit a creditor, upon default, to have recourse to the assets of the [BOC]."[FN456] In the Notice, we tentatively concluded "that a BOC may not co-sign a contract or any other instrument with a separate affiliate that would allow the affiliate to obtain credit in a manner that violates" this section. We sought comment on what other types of activities section 272(b)(4) prohibits, whether the Commission should establish specific requirements regarding those activities, and the relative costs and benefits of such regulation.[FN457]

2. Comments

188. Commenters generally agree with our tentative conclusion that section 272(b)(4) prohibits a BOC from signing a contract or other instrument with an affiliate that allows a ***21995** creditor, upon default, to have recourse to the BOC's assets.[FN458] Time Warner and others contend that no regulations are necessary to implement this provision.[FN459] In contrast, TIA urges us to adopt regulations precluding all arrangements that would result in the BOC having direct or indirect responsibility for the financial obligations of the separate affiliate.[FN460] AT&T and Teleport further suggest that we should preclude a BOC affiliate from obtaining credit under any arrangement that would permit a creditor, upon default, to have recourse to the assets of any parent of the BOC.[FN461]

3. Discussion

189. As we stated in the Notice, the intent of this provision is to protect ratepayers from shouldering the cost of a default by a section 272 affiliate.[FN462] We adopt our tentative conclusion that section 272(b)(4) prohibits a BOC from co-signing a contract or any other instrument with a section 272 affiliate that would allow the affiliate to obtain credit in a manner that grants the creditor recourse to the BOC's assets in the event of default by the section 272 affiliate. Moreover, because the provision precludes the section 272 affiliate from obtaining credit under "any arrangement that would permit a creditor, upon default, to have recourse to the assets of the [BOC]," we find that section 272(b)(4) likewise prohibits the parent of a BOC or any non-272 affiliate from co-signing a contract or any other arrangement with the BOC's section 272 affiliate that would allow the creditor to obtain such recourse to the BOC's assets in the event of default by the section 272 affiliate. Indeed, we conclude that section 272(b)(4) prohibits a section 272 affiliate from entering into any arrangement to obtain credit that permits the lender recourse to the BOC in the event of default.

190. While preventing the affiliate from jeopardizing ratepayer assets, we conclude that section 272(b)(4) does not forbid a section 272 affiliate from using assets other than its own as collateral when seeking credit. To impose such a restriction where, as here, it is not needed to protect ratepayer assets, would force section 272 affiliates to operate inefficiently, to the detriment ***21996** of consumers and competition. In particular, we agree with MCI and Sprint that a BOC's parent could secure credit, whether through the issuance of bonds or otherwise, for the benefit of the section 272 affiliate, provided that BOC assets are not at risk.[FN463]

F. Section 272(b)(5)

1. Background

****55** 191. Section 272(b)(5) states that an affiliate "shall conduct all transactions with the [BOC] of which it is an affiliate on an arm's length basis with any such transactions reduced to writing and available for public inspection."[FN464] In the Notice, we sought comment on whether this provision necessitates the adoption of any non-accounting safeguards.[FN465]

2. Comments

192. Several parties contend that we need not adopt additional non-accounting safeguards, stating that other provisions of section 272(b) and accounting regulations should suffice to implement section 272(b)(5).[FN466] Other commenters propose that we adopt a broad definition of "transaction" to prevent improper cost allocation and to facilitate monitoring of the BOCs' compliance with the nondiscrimination requirements.[FN467]

CompTel urges us to use this provision to impose several of the requirements established in the Ameritech Customers First Plan, Ameritech's plan to offer in-region interLATA service through an interexchange affiliate, including annual reporting and audit requirements, information disclosure requirements, and a requirement that an interexchange subsidiary "purchase any inputs or data from the BOC local exchange operations on the same rates, terms, and conditions" that are available to unaffiliated carriers.[FN468]

3. Discussion

193. We conclude that we need not adopt additional non-accounting safeguards to implement section 272(b)(5). In the Accounting Safeguards Order, we address the definition of***21997** "transactions" and consider the provision's requirement that all transactions be "reduced to writing and available for public inspection."[FN469] Moreover, in our discussion of sections 272(b)(1) and (b)(3), we make clear that "transactions" include the provision of services and transmission and switching facilities by the BOC and its affiliate to one another. We reject CompTel's proposal to adopt additional requirements, which are addressed generally in other parts of this Order and the companion Accounting Safeguards Order.[FN470]

V. NONDISCRIMINATION SAFEGUARDS

194. As we observed in the Notice, after a BOC enters a competitive market, such as long distance, it may have an incentive to use its control of local exchange facilities to discriminate against its affiliate's rivals. Section 272(c) of the Act responds to these competitive concerns by establishing nondiscrimination safeguards that apply to the BOCs' provision of manufacturing, interLATA telecommunications, and interLATA information services. We address the requirements of this section below.[FN471]

A. Relationship of Section 272(c)(1) and Pre-existing Nondiscrimination Requirements

1. Background

195. Section 272(c)(1) states that "[i]n its dealings with its affiliate described in subsection (a), a [BOC] (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."[FN472] In the Notice, we sought comment on the relationship between the nondiscrimination obligations imposed by sections 272(c)(1) and the Commission's pre-existing nondiscrimination obligations in sections 201 and 202.[FN473] In particular, we sought comment on whether the flat prohibition against discrimination in section 272(c)(1) imposes a stricter standard for compliance than the "unjust and unreasonable" standard in section 202.[FN474]

***21998 2. Comments**

****56** 196. Many BOCs assert that Congress did not intend to impose a stricter nondiscrimination standard in section 272(c)(1) than that contained in section 202.[FN475] For example, BellSouth, U S West, and USTA claim that the term "discriminate" in section 272(c)(1) includes unjust and unreasonable discrimination and, therefore, is not materially different from the standard of section 202.[FN476] Potential competitors and various trade associations, in contrast, assert that the flat prohibition in section 272(c)(1) was clearly intended to be more stringent than the general ban on "unjust and unreasonable" discrimination in section 202.[FN477] These commenters argue, therefore, that the unqualified prohibition against discrimination in section 272(c)(1) should be construed as stringently as similarly unqualified language in section 251(c)(2) was in the First Interconnection Order.[FN478]

3. Discussion

197. We find that section 272(c)(1) establishes an unqualified prohibition against discrimination by a BOC in its dealings with its section 272 affiliate and unaffiliated entities. Section 202(a), by contrast, prohibits "any unjust or unreasonable discrimination ..., or ... any undue or unreasonable preference or advantage."[FN479] Because the text of the section 272(c)(1) nondiscrimination bar differs from the section 202(a) prohibition, we conclude that Congress did not intend section 272's prohibition against discrimination in the 1996 Act to be synonymous with the "unjust and unreasonable" discrimination language used in the 1934 Act, but rather,

intended a more stringent standard. We therefore reject the arguments of those who argue that the section 272(c)(1) standard is not materially different from the standard in section 202.[FN480]

***21999 B. Meaning of Discrimination in Section 272(c)(1)**

1. Background

198. We tentatively concluded in the Notice that the prohibition against discrimination in section 272(c)(1) means, at a minimum, that BOCs must treat all other entities in the same manner as they treat their section 272 affiliates, and must provide and procure goods, services, facilities, and information to and from these other entities under the same terms, conditions, and rates.[FN481] We noted, however, that a requesting entity may have equipment with different technical specifications than the equipment of the BOC section 272 affiliate. We sought comment, therefore, on whether the terms of section 272(c)(1) could be construed to require a BOC to provide a requesting entity with a quality of service or "functional outcome" identical to that provided to its affiliate even if this would require the BOC to provide goods, facilities, services, or information to a requesting entity that are different from those provided to the affiliate.[FN482]

2. Comments

199. Both BOCs and potential competitors agree with our tentative conclusion that section 272(c)(1) requires a BOC to treat all other entities in the same manner as it treats its section 272 affiliate.[FN483] LDDS asserts that, if the BOC affiliate is required to obtain local exchange service in the same fashion as competitors, it is much more likely that the BOC will provide local exchange service on a nondiscriminatory basis, at nondiscriminatory prices, and with adequate operational support.[FN484]

****57** 200. BOCs claim, however, that this section does not require a BOC to provide a requesting entity with a quality of service or a functional outcome identical to the section 272 affiliate in order to offset differences in technical design, architecture, software or performance specifications between the affiliate's network and that of the requesting carrier.[FN485] They assert ***22000** that unlawful discrimination occurs only when similarly situated entities are treated differently; it is not unlawfully discriminatory under section 272(c)(1) for a BOC to treat differently unaffiliated companies whose capabilities or requirements vary from those of the BOC's affiliate.[FN486]

201. Potential competitors, on the other hand, argue that a BOC should be required to provide different goods, services, and facilities to other entities than it provides to its own affiliate in order to provide "functional equality" or service of equal quality.[FN487] Sprint concedes that different treatment is permissible if required by variations in network architecture between the section 272 affiliate and the unaffiliated entity and if the prices charged to different entities receiving disparate treatment are based on costs.[FN488] AT&T points out that, if nondiscrimination in section 272(c)(1) means only that a BOC has to provide the goods, services, facilities, and information to an unaffiliated entity that it provides to its own affiliate, the options available to competitors would be confined entirely to those the BOC affiliate finds useful.[FN489] This, some commenters claim, may give BOCs an incentive to design interfaces that work optimally only with its affiliate's specifications and not the specifications of other entities[FN490] or to discriminate against unaffiliated entities by anticompetitively cooperating in the development of new services with its affiliate.[FN491]

3. Discussion

202. We affirm our tentative conclusion that BOCs must treat all other entities in the same manner as they treat their section 272 affiliates. We conclude therefore that, pursuant to section 272(c)(1), a BOC must provide to unaffiliated entities the same goods, services, facilities, and information that it provides to its section 272 affiliate at the same rates, terms, and conditions.[FN492] We decline, as some commenters suggest, to interpret section 272(c)(1) more ***22001** broadly to conclude that a BOC must provide unaffiliated entities different goods, services, facilities, and information than it provides to its section 272 affiliate in order to ensure that it is providing the same quality of service or functional out-

come to both its affiliate and unaffiliated entities. To do so would, in effect, be interpreting this section the same way we interpreted section 251(c)(2) in the First Interconnection Order. We believe that to interpret the nondiscrimination requirement of section 272(c)(1) in this manner would be inappropriate as a matter of statutory construction, inconsistent with its legislative purpose, and unenforceable.

**58 203. As a matter of statutory construction, we find that the nondiscrimination provision of section 272(c)(1), by its terms, is much narrower in scope than the requirement in section 251(c)(2). Section 251(c)(2) imposes on incumbent LECs "the duty to provide, for the facilities and equipment of any requesting telecommunications carrier, interconnection with the local exchange carrier's network ... that is at least equal in quality to that provided by the [LEC] to itself or to any subsidiary, affiliate, or any other party to which the carrier provides interconnection."[FN493] In the First Interconnection Order, we interpreted the term "equal in quality" as requiring an incumbent LEC to provide interconnection to its network at a level of quality that is at least indistinguishable from that which the incumbent LEC provides itself. Further, we found that, to the extent a carrier requests interconnection that is of a superior or lesser quality than the incumbent LEC currently provides, the incumbent LEC is obligated to provide the requested interconnection to the extent technically feasible.[FN494]

204. The language of section 272(c)(1), in contrast, contains no such "equal in quality" requirement; it simply requires that unaffiliated entities receive the same treatment as the BOC gives to its section 272 affiliate. Unlike section 251, therefore, section 272(c) is not a vehicle by which requesting entities can require a BOC to provide goods, facilities, services, or information that are different from those that the BOC provides to itself or to its affiliates.[FN495] Nor is it, as some commenters suggest, designed to prevent a BOC from discriminating between unaffiliated competitors.[FN496]

205. Our reading of the statutory language of sections 251 and 272 is consistent with the differing underlying purposes of those provisions. The section 251 requirements are designed to ensure that incumbent LECs do not discriminate in opening their bottleneck facilities to competitors. As we stated in the First Interconnection Order, "[u]nder section 251, incumbent ***22002** [LECs], including [BOCs], are mandated to take several steps to open their network to competition, including providing interconnection, offering access to unbundled elements to their networks, and making their retail services available at wholesale rates so that they can be resold."[FN497] In implementing section 251, therefore, we adopted rules to open one of the last monopoly bottleneck strongholds in telecommunications -- the local exchange and exchange access market.[FN498]

206. In adopting rules in this proceeding, however, our goal is to ensure that BOCs do not use their control over local exchange bottlenecks to undermine competition in the new markets they are entering -- interLATA services and manufacturing. The section 272 safeguards, among other things, are intended to protect competition in these markets from the BOCs' ability to use their existing market power in local exchange services to obtain an anticompetitive advantage. We find that when viewed in this context, the section 272(c)(1) nondiscrimination provision is designed to provide the BOC an incentive to provide efficient service to rivals of its section 272 affiliate, by requiring that potential competitors do not receive less favorable prices or terms, or less advantageous services from the BOC than its separate affiliate receives.

**59 207. We find that interpreting section 272 to require "functional equality" between a BOC section 272 affiliate and any unaffiliated entity would not only be impractical, but unenforceable. The "functional equality" standard would require a BOC to provide additional services or functions to other entities that it does not provide to its own affiliate.[FN499] Because section 272, unlike section 251, contains no requirement that a BOC must provide goods, services, facilities, and information to the extent "technically feasible," it would be extremely difficult, as a practical matter, to limit the types of goods, services, and facilities that a BOC would be obligated to provide to requesting entities. Further, the terms "functional outcome" or "functional

equality" are likely to mean different things to different entities. Because the meaning of these terms is likely to depend on the particular characteristics of each requesting entity, the Commission would be required to apply this standard to a myriad of factual circumstances on a case-by-case basis. As one commenter observes, ensuring this type of equality would be impossible to do, as well as impossible to enforce.[FN500]

208. We reject the argument that, because our interpretation of section 272(c)(1) effectively limits competitors to those options that the BOC affiliate finds "useful," a BOC will be able to design network interfaces that work optimally only with its section 272 affiliate's specifications and not with the specifications of other entities. Section 272(c)(1) prohibits a BOC from discriminating in the establishment of standards. As we conclude below, a BOC's adoption ***22003** of a network interface that favors its section 272 affiliate and disadvantages an unaffiliated entity will establish a prima facie case of discrimination under section 272(c)(1).[FN501] Further, section 272(c)(1) prohibits a BOC from discriminating in the provision of facilities or information, and section 251(c)(5) imposes upon BOCs certain network disclosure requirements.[FN502] As mentioned above, section 251(c)(5) requires incumbent LECs to provide reasonable public notice of network changes affecting competing service providers' performance or ability to provide telecommunications services, as well as changes that would affect the incumbent LEC's interoperability with other service providers. In the Second Interconnection Order, we interpreted this provision to require incumbent LECs to disclose changes subject to this requirement at the "make/buy" point.[FN503] In light of the requirements of sections 272(c)(1) and 251(c)(5), we decline at this time to impose additional obligations on the BOCs to ensure that they structure their own networks to achieve the same level of interoperability that the section 272 affiliate receives from the BOC.

209. We also decline to adopt MCI's suggested presumption that the specifications requested by an unaffiliated entity are the appropriate ones for a truly separate and independent affiliate and that any different specifications needed by the BOC's section 272 affiliate reflect a lack of proper physical and operational separation from the BOC.[FN504] We recognize that there may be circumstances, such as the adoption of a new and innovative technology by the BOC section 272 affiliate, where differences in technical specifications between a section 272 affiliate and an unaffiliated entity do not evidence a lack of structural separation between the BOC and its section 272 affiliate.

****60** 210. As discussed below, we conclude that the protection of section 272(c)(1) extends to any good, service, facility, or information that a BOC provides to its section 272 affiliate.[FN505] We therefore agree with AT&T that to the extent a BOC develops new services for or with its section 272 affiliate, it must develop new services for or with unaffiliated entities in the same manner. That is, we find that the development of new services, including the development of new transmission offerings, is the provision of service under section 272(c)(1) that, once provided by the BOC to its section 272 affiliate, must be provided to unaffiliated entities in a nondiscriminatory manner. In the Notice, we recognized the potential for competitive harm in ***22004** a situation in which a BOC failed to cooperate with an interLATA carrier that is introducing an innovative new service until the BOC's section 272 affiliate is ready to initiate the same service.[FN506] Similarly, AT&T asserts that the section 272(c)(1) nondiscrimination requirement should be interpreted to prevent BOCs from denying a competitor's request for a new or more cost effective access arrangement on the ground that all entities, including its section 272 affiliate, are receiving the same access service at the same price.[FN507] We find that the BOC, under section 272(c)(1), is obligated to work with competitors to develop new services if it cooperates in such a manner with its section 272 affiliate.

211. We agree with AT&T therefore that if, as we outlined in our Notice, a BOC purposely delayed the implementation of an innovative new service by denying a competitor's reasonable request for interstate exchange access until the BOC section 272 affiliate was ready to provide competing service, such conduct may constitute unlawful discrimination under the Act. Moreover, as we

observed in the Notice, although the 1996 Act imposes specific nondiscrimination obligations on the BOCs and their section 272 affiliates, the Communications Act imposed certain pre-existing nondiscrimination requirements on common carriers providing interstate communications service. Among them, section 201 provides that all common carriers have a duty "to establish physical connections with other carriers," and to furnish telecommunications services "upon reasonable request therefor." [FN508] We conclude, therefore, that if a BOC were to engage in strategic behavior to benefit its section 272 affiliate, in the manner suggested by AT&T, such action may not only violate section 272(c)(1), but would also violate sections 201(a) of the Act.[FN509]

212. Finally, we conclude that a complainant will be found to have established a prima facie case of unlawful discrimination under section 272(c)(1) if it can demonstrate that a BOC has not provided unaffiliated entities the same goods, services, facilities, and information that it provides to its section 272 affiliate at the same rates, terms, and conditions. To rebut the complainant's case, the BOC may demonstrate, among other things, that rate differentials between the section 272 affiliate and unaffiliated entity reflect differences in cost or that the unaffiliated entity expressly requested superior or less favorable treatment in exchange for paying ***22005** a higher or lower price to the BOC.[FN510] We recognize, as Sprint and Time Warner suggest, there will be some instances where the costs of providing certain goods, services, or facilities to its affiliate and to an unaffiliated entity differ.[FN511] As we stated in the First Interconnection Order, where costs differ, rate differences that accurately reflect those differences are not unlawfully discriminatory.[FN512] Strict application of the section 272(c)(1) prohibition on discrimination would itself be discriminatory if the costs of supplying customers are different.[FN513] Similarly, we also conclude, as we did in the First Interconnection Order, that "price differences, such as volume and term discounts, when based upon legitimate variations in costs, are permissible under the 1996 Act when justified."[FN514]

C. Definition of "Goods, Services, Facilities and Information" in Section 272(c)(1)

1. Background

****61** 213. In the Notice we sought comment on the interplay among the definitions of the terms "services," "facilities," and "information" in various subsections of 272, and between section 272 and section 251(c). We also sought comment on what regulations, if any, are necessary to clarify the types or categories of services, facilities, or information that must be made available under section 272(c)(1). We asked parties to comment on whether further defining the terms "goods," "services," "facilities," and "information" would enable competing providers to detect violations of this section by enabling them to compare more accurately a BOC's treatment of its affiliate with a BOC's treatment of unaffiliated competing providers.[FN515]

***22006 2. Comments**

214. PacTel, U S West, and NYNEX urge the Commission to exclude administrative and support services from the scope of the term "services" in section 272(c)(1).[FN516] Similarly, U S West maintains that a BOC should not be required to provide non-telecommunications goods, services, facilities, and information.[FN517] TIA urges the Commission to construe the terms "goods" and "services" to encompass, at a minimum, all types of telecommunications equipment, CPE, and related software and services.[FN518] Sprint asserts that the term "service" in section 272(c)(1) should encompass at least telecommunications and information services, and that the term "facilities" should include all unbundled elements required under section 251(c)(3).[FN519] CIX maintains that, because the terms in section 272(c)(1) are not conditioned or qualified in any manner, "facilities, services and information" should be interpreted to encompass the meaning of those terms as used in section 251(c).[FN520]

215. Sprint argues that, because the term "information" in section 272(e)(2) is limited to information "concerning [a BOC's] provision of exchange access," the Commission should place no limit on the meaning of "information" as used in section 272(c)(1).[FN521] Several commenters disagree on whether the term "information" under section 272(c)(1) includes CPNI. PacTel and U S West contend that, because the Act in-

cludes a separate provision covering CPNI,[FN522] the term information in section 272(c)(1) must exclude CPNI.[FN523] They argue, therefore, that section 272(c)(1) does not require a BOC to provide CPNI to other entities when the BOC provides it to its section 272 affiliate. AT&T and MCI, in contrast, argue that section 272(c)(1) should include CPNI to ensure that a BOC will not use, disclose, or permit access to CPNI of ***22007** BOC customers for the benefit of its separate affiliate unless the CPNI is made available to all competing carriers.[FN524]

3. Discussion

216. We conclude that any attempt to define exhaustively the terms "goods, services, facilities, and information" in section 272(c)(1) may unnecessarily limit the scope of this section's otherwise unqualified nondiscrimination requirement.[FN525] At the same time, however, we disagree with ITAA that the Commission should refrain from attempting to clarify the meaning of these terms.[FN526] We find instead that clarifying the types of activities these terms encompass will provide useful guidance to potential competitors that seek to avail themselves of the protections of section 272(c)(1). In enforcing the nondiscrimination requirement of section 272(c)(1), we intend to construe these terms broadly to prevent BOCs from discriminating unlawfully in favor of their section 272 affiliates.[FN527]

****62** 217. We find that neither the terms of section 272(c)(1), nor the legislative history of this provision, indicates that the terms "goods, services, facilities, and information" should be limited in the manner suggested by some commenters. We therefore decline to interpret the terms in section 272(c)(1) as including only telecommunications-related or, even more specifically, common carrier-related "goods, services, facilities, and information." [FN528] Similarly, we reject arguments set forth by NYNEX, PacTel, and U S West that the term "services" should exclude administrative and support services. Although NYNEX contends that, as a practical matter, unaffiliated entities are unlikely to avail themselves of such services,[FN529] we find that there are certain administrative services, such as billing and collection services, that unaffiliated entities ***22008** may find useful.[FN530] Further, as discussed above, we construe the term "services" to encompass any service the BOC provides to its section 272 affiliate, including the development of new service offerings.[FN531]

218. We conclude therefore that the protection of section 272(c)(1) extends to any good, service, facility, or information that a BOC provides to its section 272 affiliate. For example, we find that if a BOC were to decide to transfer ownership of a unique facility, such as its Official Services network, to its section 272 affiliate, it must ensure that the transfer takes place in an open and nondiscriminatory manner.[FN532] That is, pursuant to the nondiscrimination requirement of section 272(c)(1), the BOC must ensure that the section 272 affiliate and unaffiliated entities have an equal opportunity to obtain ownership of this facility.

219. We also conclude that the terms "services," "facilities," and "information" in section 272 should be interpreted to include, among other things, the meaning of these terms under section 251(c). The term "facilities," therefore, includes but is not limited to the seven unbundled network elements described in the First Interconnection Order.[FN533] We decline to limit the scope of these terms to their meaning in section 251 because section 272 encompasses a broader range of activities than does section 251. We also emphasize that in contrast to section 251, where an incumbent LEC is prohibited from discriminating against any requesting telecommunications carrier, section 272(c)(1) prohibits BOCs from discriminating against "any other entity." Because section 272 does not define the term "entity," we interpret this unqualified term broadly to ensure that all competitors may benefit from the protections of section 272(c)(1). Thus, we agree with Sprint that this term should include the definition of the term "entity" as set forth in the electronic publishing section of the Act;[FN534] however, we also find it appropriate to include within the meaning of "entity" the providers of the activities encompassed by section 272. We conclude, therefore, that the term "entity" includes telecommunications carriers, ISPs, and manufacturers.

****63** 220. We disagree with ATSI and CIX, however,

that by interpreting "any other entity" to include information service providers and by concluding that the term "facilities" in section 272(c)(1) encompasses the meaning of that term as it is used in section 251(c), ISPs acquire the ***22009** right to obtain unbundled access to the local loop and other network elements whenever BOCs provide their section 272 affiliates with such access.[FN535] Pursuant to section 251(c)(3), only telecommunications carriers providing a telecommunications service are entitled to obtain access to unbundled network elements. Because ISPs may only obtain access to unbundled elements pursuant to section 251 to the extent they are providing telecommunications services, [FN536] we conclude that they may not attempt to circumvent the limitations of section 251 by virtue of their rights under section 272(c)(1). This conclusion is consistent with our finding in the Second Interconnection Order that the inclusion of information services in the definition of "services" under section 251(c)(5) "does not vest information service providers with substantive rights under other provisions of section 251, except to the extent that they are also operating as telecommunications carriers."[FN537] To the extent, however, that a BOC chooses voluntarily to provide facilities, including network elements, to a section 272 affiliate that is solely providing information services (and thus does not qualify as a telecommunications carrier under section 251), we conclude that a BOC must, pursuant to section 272(c)(1), provide such facilities to other requesting ISPs.

221. We therefore agree with MFS that, if a BOC chooses to allow its information service affiliate to collocate routers, servers, or other equipment, section 272(c)(1) requires that the same accommodations be extended, on a nondiscriminatory basis, to competing ISPs.[FN538] Collocation is a means of achieving interconnection and access to unbundled network elements that incumbent LECs, including BOCs, must provide to requesting carriers under section 251.[FN539] Although section 251 does not require incumbent LECs to permit entities other than telecommunications carriers to collocate equipment on an incumbent LEC's premises, [FN540] sections 251 and 272 do not prohibit BOCs from voluntarily allowing ISPs to collocate equipment on their premises. Thus, we find that, if a BOC permits its section 272 affiliate to collocate facilities used to provide information services, the BOC must permit collocation, under section 272(c)(1), by similarly situated entities. If the BOC's section 272 affiliate qualifies as a "telecommunications carrier," the BOC need only permit other telecommunications carriers to collocate their equipment. If, however, the BOC's section 272 affiliate only provides information services, the BOC must permit similarly situated ISPs to collocate equipment at the BOCs premises, even if such entities do not qualify as telecommunications carriers.

****64 *22010** 222. As Sprint points out, the term "information" in section 272(c)(1) is not limited as it is in section 272(e)(2) to information " concerning [the BOC's] provision of exchange access."[FN541] In fact, as noted above, we find no limitation in the statutory language on the type of information that is subject to the section 272(c)(1) nondiscrimination requirement. For this reason, we reject U S West's assertion that section 272(c)(1) only governs that information which may give a separate affiliate an "unfair advantage."[FN542] We conclude, however, that the term " information" includes, but is not limited to, CPNI and network disclosure information.[FN543] We therefore reject arguments made by some BOCs that the nondiscrimination provision of section 272(c)(1) does not govern the BOCs use of CPNI. With respect to CPNI, we conclude that BOCs must comply with the requirements of both sections 222 and 272(c)(1). We decline to address parties' arguments raised in this proceeding regarding the interplay between section 272(c)(1) and section 222 to avoid prejudging CPNI issues that will be addressed in a separate proceeding.[FN544]

D. Establishment of Standards

1. Background

223. Section 272(c)(1) prohibits a BOC from discriminating between its section 272 affiliate and other entities in the "establishment of standards." In the Notice we sought comment on what "standards" are encompassed by this provision. We observed that a BOC may act anticompetitively by creating standards that require or favor equipment designs that are proprietary to its section

272 affiliate. We sought comment on what procedures, if any, we should implement to ensure that a BOC does not discriminate between its affiliate and other entities in setting standards. We asked parties to comment, for example, on whether BOCs should be required to participate in standard-setting bodies in the development of standards covered by section 272(c)(1).[FN545]

***22011 2. Comments**

224. Although we received only a few comments on the meaning of the term "standards" in section 272(c)(1),[FN546] many parties expressed views on the need for the adoption of procedures to ensure nondiscrimination in the establishment of standards, the need for mandatory BOC participation in standard-setting, and whether the failure of BOC participation in standard-setting should be considered discrimination. Bellcore, ITAA, and PacTel argue it is unnecessary to adopt procedures to ensure the nondiscriminatory establishment of standards.[FN547] For example, Bellcore and PacTel maintain that nondiscriminatory standards-setting need not be addressed in the context of section 272(c)(1) because it is already addressed by sections 273(d)(4)[FN548] and 273(d)(5).[FN549] These provisions, they state, establish "reasonable and nondiscriminatory" procedures for Bellcore and non-accredited standards development organizations to follow in creating industry-wide standards and generic requirements for telecommunications equipment and CPE.[FN550] Congress, Bellcore asserts, did not purposefully create a process under section 273(d)(4) only to prevent BOCs from using the fruits of that process in section 272.[FN551]

****65** 225. AT&T asserts that, in appropriate cases, the Commission should involve itself in the standard-setting process.[FN552] Similarly, MCI proposes that the Commission act as or appoint an arbitrator to resolve disputes that arise in the public standards-setting process.[FN553] USTA and U S West, on the other hand, argue that industry consensus rather than Commission involvement ***22012** is required in the development of standards.[FN554] MCI contends that, as a matter of policy, BOCs should be required to participate in all public fora that are developing interconnection or interoperability standards concerning their current or foreseeable services and that all technical standards involving the BOCs or their affiliates should be developed in open, nondiscriminatory public standard-setting bodies and fora.[FN555] PacTel and Sprint, in contrast, assert that participation in standard-setting bodies should not be required.[FN556]

226. Sprint argues, however, that a BOC's failure to participate or its refusal to abide by the standards selected may be evidence of its intent to discriminate in the "establishment of standards."[FN557] Similarly, AT&T maintains that the Commission should treat the adoption of a standard that favors a BOC affiliate and harms unaffiliated entities as establishment of a prima facie case of discrimination under section 272(c)(1).[FN558] In addition, MCI argues that the Commission should refuse to recognize standards not established in an open, nondiscriminatory forum for purposes of resolving discrimination claims.[FN559]

3. Discussion

227. We conclude that the term "standards" in section 272(c)(1) includes the meaning of this term as it is used in section 273. In the Manufacturing NPRM, we sought comment on how the term "standards" should be defined "for purposes of implementation of the 1996 Act to ensure that standards processes are open and accessible to the public."[FN560] We note, however, that unlike the use of the term "standards" in sections 273(d)(4) and 273(d)(5), the term "standards" in section 272(c)(1) is not limited by the term "industry-wide." We conclude, therefore, that ***22013** section 272(c)(1) prohibits discrimination in the establishment of any standard, not only those that are "industry-wide."[FN561]

228. As we observed in the Manufacturing NPRM, the process by which standards are established may present opportunities for anticompetitive behavior by the BOCs.[FN562] We decline, however, to implement additional procedures, beyond those outlined in section 273, to ensure that BOCs do not discriminate between their section 272 affiliates and other entities in establishing industry-wide standards. Rather, we agree with Bellcore and PacTel that the procedures for the establishment of industry-wide standards and generic requirements for

telecommunications equipment and CPE appear at this time to be adequately addressed by the requirements contained in section 273(d)(4). For example, in response to MCI, we note that section 273(d)(4) already provides for an open standards-setting process whereby all interested parties have the opportunity to fund and participate in the development of industry-wide standards or generic requirements on a "reasonable and nondiscriminatory" basis."[FN563] We find no basis in the record for concluding that the requirements established by section 273, and any regulations adopted thereunder, will not be sufficient to deter discrimination in the establishment of industry-wide standards.

**66 229. Although we decline at this time to establish additional procedures beyond those required in section 273(d)(4), we recognize that there is a distinct potential competitive danger that a BOC will use standards in its own and its section 272 affiliate's network that are not "industry-wide" (that is, not employed by "at least 30 percent of all access lines") or established by an accredited standards development organization,[FN564] but rather specifically tailored to meet its own needs or those of its section 272 affiliate. Because such standards may not be developed in an open and nondiscriminatory process, such as the one required for the establishment of industry-wide standards in section 273(d)(4), we find that those standards may place unaffiliated entities at a competitive disadvantage. For example, if a BOC adopts a particular non-accredited or non-industry-wide protocol or network interface, it may, by virtue of its substantial size and market share, effectively force competing entities to alter their specifications in order to maintain the same level of interoperability with the BOC or the BOC affiliate. We conclude, therefore, that the adoption of any standard that has the effect of favoring the BOC's section 272 affiliate and disadvantaging an unaffiliated entity will establish a prima facie violation of section 272(c)(1).

*22014 230. We also conclude, on the basis of the record before us, that it is not necessary as a matter of law, nor desirable as a matter of policy, to require BOC participation in the standards-setting process. The language of section 272(c)(1) cannot be read as requiring such participation; moreover, BOCs have an interest in participating voluntarily in standard-setting organizations because standards that are ultimately adopted may materially impact the BOCs' competitive position.[FN565] Further, we decline to become involved at this time in the standard-setting process, as suggested by AT&T, in order to accomplish the purposes of section 272(c)(1). Unlike section 256, which, among other things, permits the Commission to participate in the development of public telecommunications network interconnectivity standards that promote access, section 272(c)(1) does not contemplate Commission involvement.[FN566] Moreover, we reject MCI's proposal that we insert ourselves into the dispute resolution process to accomplish the purposes of section 272(c)(1). Section 273(d)(5) requires the Commission to prescribe a dispute resolution process to address the anticompetitive harms that may result from the establishment of industry-wide standards under section 273(d)(4) and expressly prohibits the Commission from becoming a party to this process.[FN567] As to disputes that may arise in the context of other public standard-setting processes, we find, on the basis of the record before us, that Commission involvement beyond its existing role in the section 208 complaint process is unnecessary.[FN568]

E. Procurement Procedures

1. Background

**67 231. Section 272(c)(1) also prohibits the BOCs from discriminating between their section 272 affiliates and other entities in their procurement of goods, services, facilities, and information. In the Notice, we observed that this provision prohibits a BOC from purchasing manufactured network equipment solely from its affiliate, purchasing the equipment from the affiliate at inflated prices, or giving any preference to the affiliate's equipment in the procurement process and thereby excluding rivals from the market in the BOC's service area. We sought comment on how the BOCs could establish nondiscriminatory procurement procedures designed to ensure that other entities are treated on the same terms and conditions as a BOC affiliate. We *22015 invited comment, specifically, on the nature and extent of rules necessary to ensure that such procedures

are implemented.[FN569]

2. Comments

232. PacTel and U S West maintain that, in light of the procurement standards set forth in sections 273(e)(1) and 273(e)(2), it is unnecessary to adopt additional procurement procedures to implement the nondiscrimination requirement of section 272(c)(1).[FN570] ITAA asserts that, because the section 272(c)(1) language is absolute, it is unnecessary to prescribe procurement procedures to ensure that BOCs do not discriminate.[FN571] TIA, in contrast, contends that section 272(c)(1) requires BOCs to establish specific procurement procedures.[FN572] According to TIA, each BOC should specify the standards that it uses to make procurement decisions and file these with the Commission.[FN573] TIA also suggests that the Commission adopt a classification scheme that identifies discrete categories of products and related services procured by BOCs.[FN574]

3. Discussion

233. As stated above, we find that section 272(c)(1) establishes an unqualified prohibition against discrimination by a BOC in its dealings with its section 272 affiliate and unaffiliated entities.[FN575] We conclude, therefore, that any discrimination with respect to a BOC's procurement of goods, services, facilities, or information between its section 272 affiliate and an unaffiliated entity establishes a prima facie case of discrimination under section 272(c)(1). For example, consistent with our observations in the Notice, we find that a prima facie case of discrimination under section 272(c)(1) may be established if a BOC purchases manufactured network equipment solely from its section 272 affiliate, purchases such equipment from its affiliate at inflated prices, or gives any preference to the affiliate's equipment in the procurement process, thereby excluding rivals from the market in the BOC's service area.

234. Insofar as section 272(c)(1) governs a BOC's procurement of manufacturing services, we find that BOC procurement of telecommunications equipment should be performed in a manner consistent with the manufacturing requirements of section 273. We conclude, ***22016** therefore, that section 272(c)(1) requires a BOC to adhere to the nondiscrimination and procurement standards governing the procurement of telecommunications equipment set forth in sections 273(e)(1) and 273(e)(2) of the Act.[FN576] We therefore defer consideration of detailed procurement procedures with respect to telecommunications equipment to the Manufacturing NPRM, which specifically addresses the requirements of these sections. We conclude, however, that the BOCs must, at a minimum, comply with any and all regulations adopted to implement the standards of sections 273(e)(1) and 273(e)(2); failure to do so may be evidence of discrimination under section 272(c)(1).

****68** 235. We recognize, however, that the nondiscrimination requirement of section 272(c)(1) encompasses a broader range of activities than those described in sections 273(e)(1) and 273(e)(2). Nevertheless, because the record is largely silent on the nature and extent of rules necessary to ensure that BOCs do not discriminate in their procurement of goods, services, facilities, and information under section 272(c)(1), we decline, at this time, to adopt rules to implement this requirement. In response to TIA's concerns, therefore, we conclude that the record in this proceeding does not support adoption of any concrete procurement procedures beyond those already mandated by sections 273(e)(1) and 273(e)(2). Although we decline to issue rules, we caution BOCs that allegations of discrimination in their procurement of goods, services, facilities, and information under section 272(c)(1) will be evaluated in light of that section's unqualified prohibition on discrimination. Further, we note that allegations of discrimination may more easily be rebutted by demonstrated compliance with pre-existing, publicly available procedures for procurement.

F. Enforcement of Section 272(c)(1)

236. In the Notice, we observed that the Commission previously adopted a regulatory scheme to ensure that the BOCs do not discriminate in the provision of basic services used to provide enhanced services or in disclosing changes in the network that are relevant for the competitive manufacture of CPE. We sought comment on whether any of the reporting and other requirements that the Commission applied to the BOCs in the Computer III and ONA proceedings, which were adopted in

lieu of the structural separation requirements of Computer II, are sufficient to implement section 272(c)(1) and provide protection against the type of BOC behavior that section 272(c)(1) seeks to curtail.[FN577] We address this issue, as well as the ***22017** requirements and mechanisms necessary to facilitate the detection and adjudications of section 272 violations, below.[FN578]

VI. FULFILLMENT OF CERTAIN REQUESTS PURSUANT TO SECTION 272(e)

A. Section 272(e)(1)

1. Background

237. Section 272(e)(1) states that a BOC and a BOC affiliate subject to section 251(c) "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."[FN579] In the Notice, we tentatively concluded that the term "unaffiliated entity" includes "any entity, regardless of line of business, that is not affiliated with a BOC" as defined under section 153(1) of the Act.[FN580] We sought comment on the scope of the term "requests" and on whether it included, inter alia, "initial installation requests, as well as any subsequent requests for improvement, upgrades or modifications of service, or repair and maintenance of ... services."[FN581] We tentatively concluded that section 272(e)(1) requires the BOCs to treat unaffiliated entities on a nondiscriminatory basis in completing orders for telephone exchange service and exchange access, but does not grant unaffiliated entities any additional rights beyond those otherwise granted by the Communications Act or Commission rules.[FN582] We also sought comment regarding how to implement section 272(e)(1) and specifically inquired whether reporting requirements for service intervals analogous to those imposed by Computer III and ONA would be sufficient.[FN583]

*22018 2. Comments

****69** 238. Commenters generally support the Notice's analysis regarding the scope and purpose of section 272(e)(1).[FN584] AT&T, Sprint, MCI, TRA, Teleport, and ITAA support the imposition of reporting requirements to implement section 272(e)(1),[FN585] while BOCs generally oppose the imposition of reporting requirements.[FN586] Several parties question the utility of reporting that follows the format of Computer III and ONA reporting.[FN587] In an ex parte letter filed after the official pleading cycle closed, AT&T suggests an alternative format for reporting based on measures it currently uses to monitor the quality of access services provided to it by various LECs.[FN588]

3. Discussion

239. Based on our analysis of the record, we adopt our tentative conclusion that the term "unaffiliated entity" includes "any entity, regardless of line of business, that is not affiliated with a BOC" as defined under section 153(1) of the Act.[FN589] Also based on the record, we conclude that section 272(e)(1) requires the BOCs to treat unaffiliated entities on a nondiscriminatory basis in completing orders for telephone exchange service and exchange access, but does not grant unaffiliated entities any additional rights to make requests beyond those granted by the Communications Act or Commission rules.[FN590] We conclude that the term "requests" should be interpreted broadly, and that it includes, but is not limited to, initial ***22019** installation requests, subsequent requests for improvement, upgrades or modifications of service, or repair and maintenance of these services.[FN591]

240. Section 272(e)(1) unambiguously states that a BOC must fulfill requests from unaffiliated entities at least as quickly as it fulfills its own or its affiliates' requests. To implement this statutory directive, we conclude that, for equivalent requests, the response time a BOC provides to unaffiliated entities should be no greater than the response time it provides to itself or its affiliates.[FN592] We are not persuaded by the BOCs' argument that variations among individual requests make any comparison between requests meaningless, and thus make such a standard unachievable.[FN593] The BOC must fulfill equivalent requests within equivalent intervals. Thus, for example, an unaffiliated entity's request of a certain size, level of complexity, or in a specific geographic location must be fulfilled within a

period of time that is no longer than the period of time in which a BOC responds to an equivalent request from itself or its affiliates. Because we anticipate that the facts relating to each request will vary, we believe it is appropriate to determine whether requests are equivalent on a case-by-case basis.

241. Section 272(e)(1) requires a BOC to fulfill the requests of unaffiliated entities within a period no longer than the period in which it fulfills its own or its affiliates requests. Because the statute does not mandate that a BOC follow a particular procedure in meeting this requirement, we decline to adopt the proposals of AT&T and Teleport to require the BOCs to use electronic order processing systems or to use the identical systems that the BOCs use to process their own service requests.[FN594] We emphasize, however, regardless of the procedures that a BOC employs to process service orders from unaffiliated entities, it must be able to demonstrate that those procedures meet the statutory standard. Under current industry practice, BOCs and interexchange carriers use electronic mechanisms to implement PIC changes;[FN595] exchange billing information; and, in some instances, provide ordering, repair, and trouble administration information.[FN596] We believe that these current mechanisms, and the requirement that incumbent LECs provide nondiscriminatory access to operation support systems functions pursuant to ***22020** sections 251(c)(3) and 251(c)(4) of the Act, will promote the use of electronic interfaces between unaffiliated entities and the BOCs.[FN597]

****70** 242. We also conclude that the BOCs must make available to unaffiliated entities information regarding the service intervals in which the BOCs provide service to themselves or their affiliates. The statute imposes a specific performance standard on the BOCs in section 272(e)(1), and we conclude that, absent Commission action, the information necessary to detect violations of this requirement will be unavailable to unaffiliated entities. Unlike the information necessary to ensure compliance with other subsections of section 272, there is no requirement that the information necessary to verify compliance with section 272(e)(1) must be disclosed under other provisions of the Act or Commission rules. Without the disclosure requirements imposed here, parties will be unable readily to ascertain how long it takes a BOC to fulfill its own or its affiliates' requests for service. Section 272(b)(5), which requires that all transactions between a BOC and its section 272 affiliate be reduced to writing and made available for public inspection, does not provide parties an adequate mechanism to obtain information necessary to evaluate compliance with section 272(e)(1) because section 272(b)(5) is necessarily prospective in nature. The information disclosed pursuant to section 272(b)(5) will allow unaffiliated entities to determine that a BOC and its section 272 affiliate have reached an agreement and the relevant terms and conditions of that agreement, but the document produced to satisfy section 272(b)(5) will not allow parties to determine the time it actually takes for a BOC to fulfill its own or it affiliates' requests. Section 272(e)(1) governs actual BOC performance, not contractual arrangements. Moreover, section 272(b)(5) by itself is insufficient to implement section 272(e)(1) because it will only make information available about transactions between a BOC and its section 272 affiliate; section 272(e)(1), in contrast, governs requests by the BOC itself and all of the BOC's affiliates. We also conclude that, in order to provide meaningful enforcement of section 272(e)(1), interval response times must be disclosed more frequently than the biennial audit required by section 272(d). Finally, a disclosure obligation will allow all entities to compare, in a timely fashion, their own service intervals with those provided to the BOC or its affiliates.[FN598] Contrary to the contentions of some BOCs, vendor management programs similar to the one utilized by AT&T would not provide this information.[FN599] These vendor management programs provide information to a BOC customer about the service intervals the BOC provides to that customer, but do not provide comparative data about the service intervals provided to other entities, such as BOC affiliates.

***22021** 243. We do not agree with PacTel that the absence of discrimination found in ONA reports indicates that disclosure requirements are of little value in enforcing section 272(e)(1).[FN600] Disclosure requirements are valuable because they promote compliance and give

aggrieved competitors a basis for seeking a remedy directly from a BOC. If competitors can easily obtain data about a BOC's compliance with section 272(e)(1), this increases the likelihood that potential discrimination can be detected and penalized; this, in turn, decreases the danger that discrimination will occur in the first place. Disclosure requirements also minimize the burden on the Commission's enforcement process because entities will have the information needed to resolve disputes informally prior to submitting a complaint to the Commission. We also are not persuaded by NYNEX and Ameritech that the automation and nondiscriminatory design of their provisioning and maintenance procedures obviate the need for disclosure requirements.[FN601] Although the BOCs' use of nondiscriminatory, automated order processing systems is important for meeting the requirements of section 272(e)(1), the existence of these systems does not guarantee that requests placed via these systems are actually completed within the requisite period of time. Finally, we are not persuaded by the arguments of U S West and PacTel that, because parties are able to incorporate information disclosure requirements into agreements negotiated under sections 251 and 252 of the Act, a separate information disclosure requirement is unnecessary.[FN602] Section 272(e)(1) and section 251 do not govern similar activities. Section 251 provides a framework that requires incumbent LECs to provide, inter alia, interconnection, unbundled network elements, and wholesale services to requesting telecommunications carriers. In contrast, section 272(e)(1) requires BOCs to fulfill requests for telephone exchange service and exchange access from unaffiliated entities on a nondiscriminatory basis. To link compliance with section 272(e)(1) to the outcome of individual negotiations would not adequately implement section 272(e)(1), particularly because the class of entities entitled to nondiscriminatory treatment under section 272(e)(1) is much broader than the class of entities who may make requests under section 251.

****71** 244. In response to the comments raised in the record, we conclude that we should seek further comment on the specific information disclosure requirements proposed by AT&T in an ex parte letter filed after the official pleading cycle closed.[FN603] In the Notice, we sought comment on whether reporting requirements analogous to the Computer III and ONA reporting requirements would be sufficient to implement section 272(e)(1). The parties are divided about the usefulness of service interval reporting similar to ONA reporting for implementing section 272(e)(1)[FN604] and on the merits of AT&T's proposal.[FN605] We agree with NYNEX that we should ***22022** provide an additional opportunity for parties to comment on the specific aspects of the disclosure requirements needed to implement section 272(e)(1); therefore, we include a Further Notice of Proposed Rulemaking infra in Part XI of this Order.[FN606]

245. We reject at this time, however, AT&T's more expansive proposal to require BOCs to submit to the Commission the underlying data for the information they must make publicly available.[FN607] The submission of data necessary to meet this requirement -- including, for example, every trouble report submitted to a BOC for a given period -- would impose a substantial administrative burden on the BOCs, and possibly on the Commission as well, and is unnecessary to enforce section 272(e)(1). We also decline to order the BOCs to publicize the response times for all entities, as suggested by AT&T and Teleport, because the standard established by section 272(e)(1) is the response time given to the BOC itself and its affiliates.[FN608]

B. Section 272(e)(2)

1. Background

246. Section 272(e)(2) states that a BOC and a BOC affiliate that is subject to section 251(c) "shall not provide any facilities, services, or information concerning its provision of exchange access to [a section 272(a) affiliate] unless such facilities, services, or information are made available to other providers of interLATA services in that market on the same terms and conditions."[FN609] In the Notice, we sought comment on the scope of the term "facilities, services, or information concerning its provision of exchange access" and the term "other providers of ***22023** interLATA services in that market."[FN610] We also sought comment on the relevance of the MFJ and prior Commission proceedings, including our equal access rules, in implementing

this provision.[FN611]

2. Comments

247. Several parties suggest that the nondiscrimination obligation imposed on a BOC by section 272(e)(2) extends to ISPs.[FN612] U S West indicates that the term "in that market" implies a geographic limitation coextensive with the geographic territory served by a BOC affiliate.[FN613] BOCs generally argue that implementing regulations under section 272(e)(2) are unnecessary.[FN614] AT&T, on the other hand, favors specific public disclosure requirements to implement section 272(e)(2).[FN615] Parties also disagree over the relevance of MFJ and Commission precedent when interpreting this provision.[FN616]

3. Discussion

****72** 248. Definitional issues. We conclude that section 272(e)(2) does not require a BOC to provide facilities, services, or information concerning its provision of exchange access to ISPs, as suggested by ITAA and MFS.[FN617] Although ISPs are included within the term "other providers of interLATA services,"[FN618] ISPs do not use exchange access as it is defined by the Act, and, therefore, section 272(e)(2)'s requirement that BOCs provide exchange access on a ***22024** nondiscriminatory basis is not applicable to ISPs. " Exchange access" is defined as "the offering of access to telephone exchange services or facilities for the purpose of the origination or termination of telephone toll services."[FN619] "Telephone toll service" is defined, in turn, as "telephone service between stations in different exchange areas for which there is made a separate charge not included in contracts with subscribers for exchange service."[FN620] This definition makes clear that " telephone toll service" is a "telecommunications service." Therefore, by definition, an entity that uses "exchange access" is a telecommunications carrier.[FN621] Because ISPs do not provide telephone toll services, and therefore are not telecommunications carriers, they are not eligible to obtain exchange access pursuant to section 272(e)(2).[FN622]

249. We are not persuaded by ITAA's argument that, because section 272(f)(2) states that the requirements of section 272 cease to apply with respect to interLATA information services at sunset, but exempts section 272(e) from the sunset requirement, section 272(e), including section 272(e)(2), must apply to ISPs. Section 272(f)(2) cannot be read to extend the application of section 272(e)(2) beyond its express terms. Similarly, we reject MFS's argument that we should use section 272(e)(2) to grant ISPs rights under section 251 because, as we articulated above, this would expand the scope of section 251 beyond its express limitations.[FN623]

250. We agree with U S West that the term "in that market" is intended to ensure that, to benefit from section 272(e)(2), an interLATA provider must be operating in the same geographic area as the relevant BOC affiliate. Therefore, we conclude that the term "providers of interLATA services in that market" means any interLATA services provider authorized to provide interLATA service in the same state where the relevant section 272 affiliate is providing service. We have designated a state as the relevant geographic area for purposes of section 272(e)(2) because the BOCs will obtain authorization to provide interLATA services on a state-by-state basis.

***22025** 251. Implementation of section 272(e)(2). In light of the protections imposed in other portions of the Act and our rules, we conclude that we do not need to adopt rules to implement section 272(e)(2) at this time. In our First Interconnection Order and Second Interconnection Order, we adopted rules implementing section 251 of the Act, which address, inter alia, the provision of exchange access and network disclosure requirements under the Act.[FN624] In addition, section 251(g) of the Act preserves the equal access requirements in place prior to the passage of the 1996 Act, including obligations imposed by the MFJ and any Commission rules.[FN625] If, in the future, it appears that additional rules are necessary to enforce the requirements of section 272(e)(2), we will take action at that time.

****73** 252. We conclude that a separate disclosure requirement under section 272(e)(2) is not warranted.[FN626] Section 272(b)(5) requires that all transactions between a BOC and its section 272 affiliate be reduced

to writing and made available for public inspection.[FN627] Parties will be able to determine the specific services and facilities that a BOC provides to its section 272 affiliate by inspecting the documentation that must be maintained pursuant to section 272(b)(5). In addition, information about a BOC's provision of exchange access to itself or to its affiliates will be available through the information disclosure requirement we are imposing pursuant to section 272(e)(1).[FN628] Accordingly, we reject AT&T's suggestion that the Commission require the BOCs ***22026** to disclose publicly all exchange access services and facilities used by their interLATA affiliates and to update these disclosures whenever upgrades are made.[FN629]

253. We conclude that our current network disclosure rules are sufficient to meet the requirement of section 272(e)(2) that BOCs disclose any "information concerning ... exchange access" on a nondiscriminatory basis.[FN630] Therefore, we conclude that AT&T's suggestion that the Commission mandate additional technical disclosure requirements is unnecessary.[FN631] Section 251(c)(5) imposes on incumbent LECs "[t]he 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."[FN632] We have adopted detailed rules specifying how this requirement is to be implemented.[FN633] Further, the Commission's prior network disclosure requirements are still in place, including the Computer II "all carrier rule",[FN634] and the Computer III network disclosure requirements.[FN635] We emphasize that if a BOC preferentially disclosed information to its section 272 affiliate or withheld information from competing providers of interLATA services, that BOC would be in violation of section 272(e)(2). Our rules implementing section 251(c)(5) explicitly prohibit this behavior: they require LECs to make network disclosures according to a specific timetable, and prohibit preferential disclosures in advance of that timetable.[FN636] We do not address IDCMA's concerns regarding information ***22027** disclosures for manufacturers because section 273 addresses the needs of manufacturers in detail, and we are addressing the implementation of section 273 in a separate proceeding.[FN637]

C. Section 272(e)(3)

1. Background

254. Section 272(e)(3) provides that a BOC and a BOC affiliate that is subject to the requirements of section 251(c) "shall charge [a section 272(a) affiliate], 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."[FN638] In the Notice, we tentatively concluded that a section 272 affiliate's purchase of telephone exchange service and exchange access at tariffed rates, or imputation of tariffed rates to the BOC, would be sufficient to implement section 272(e)(3). We additionally sought comment regarding the appropriate mechanism to enforce this provision in the absence of tariffed rates.[FN639]

2. Comments

****74** 255. Commenters overwhelmingly support our tentative conclusion.[FN640] Several commenters indicate that the purchase of interconnection or unbundled elements at prices that are available on a nondiscriminatory basis from an agreement negotiated pursuant to sections 252, 251(c)(2) and (c)(3) would also satisfy section 272(e)(3).[FN641] Several parties suggest additional safeguards in addition to the use of tariffed rates.[FN642] MCI argues that, because access charges do not reflect costs, the requirements of section 272(e)(3) are meaningless if BOC affiliates are ***22028** allowed to price interLATA services below the price of access.[FN643] BOCs oppose these additional safeguards and reject MCI's argument.[FN644]

3. Discussion

256. We adopt our tentative conclusion that a section 272 affiliate's purchase of telephone exchange service and exchange access at tariffed rates, or a BOC's imputation of tariffed rates, will ensure compliance with section 272(e)(3). If a section 272 affiliate purchases telephone exchange service or exchange access at the highest price that is available on a nondiscriminatory

basis under tariff, section 272(e)(3)'s requirement that a BOC must charge its section 272 affiliate an amount for access to its telephone exchange service and exchange access that is no less than the amount charged to any unaffiliated interexchange carrier will be fulfilled. In addition, we conclude that other mechanisms are available under the Act to ensure that BOCs charge nondiscriminatory prices in accordance with section 272(e)(3). If a section 272 affiliate were to acquire services or unbundled elements from a BOC at prices that are available on a nondiscriminatory basis under section 251, the terms of section 272(e)(3) would be met.[FN645] To the extent that a statement of generally available terms filed pursuant to section 271(c)(1)(B) would include prices that are available on a nondiscriminatory basis in a manner similar to tariffing, and a BOC's section 272 affiliate obtains access or interconnection at a price set forth in the statement, this would also demonstrate compliance with section 272(e)(3).[FN646] We address the appropriate allocation and valuation of these transactions for accounting purposes in our companion Accounting Safeguards Order.[FN647]

257. We further conclude that section 272(e)(3) requires that a BOC must make volume and term discounts available on a nondiscriminatory basis to all unaffiliated interexchange carriers. We do not agree, however, with those parties that suggest that additional requirements are necessary to implement section 272(e)(3). AT&T, for example, proposes that a BOC or section 272 affiliate pay "a price per unit of traffic that reflects the highest unit price that any ***22029** interexchange carrier pays for a like exchange or exchange access service."[FN648] We agree with the BOCs that AT&T's suggested rule would unfairly disadvantage BOC affiliates by preventing them from receiving volume discounts that other interexchange carriers with similar access traffic volumes would receive.[FN649] We agree with Ameritech that, because the provision of services that fall under section 272(e)(3) must either be tariffed or made publicly available under section 252(h), unaffiliated interexchange carriers will be able to detect discriminatory arrangements.[FN650] We recognize 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. Our enforcement authority under section 271(d)(6) and section 208 are available to address this and other forms of potential discrimination by a BOC.

****75** 258. We reject MCI's proposal that the Commission review the BOC section 272 affiliates' prices, or profits, or both, to ensure that the section 272 affiliates' prices cover their access charges and all other costs.[FN651] MCI's contention that access charges are excessive is more appropriately addressed in the Commission's forthcoming proceeding on access charge reform.[FN652] We also note that the ability of competing carriers to acquire access through the purchase of unbundled elements (if those unbundled elements are properly priced) will increase pressure on the BOCs to decrease access charges, and will give competing carriers the opportunity to charge retail prices that reflect the lower cost of unbundled elements.[FN653] We interpret section 272(e)(3) to require the BOCs to charge nondiscriminatory prices, as indicated above, and to allocate properly the costs of exchange access according to our affiliate transaction and joint cost rules, as modified by our companion Accounting Safeguards Order.[FN654] We conclude that further rules addressing predatory pricing by BOC section 272 affiliates are not necessary because adequate mechanisms are available to address this potential problem. A BOC section 272 affiliate that charges a rate for interstate services below its incremental cost of providing such services would be in violation of sections 201 and 202 of the Act.[FN655] Federal antitrust law also would apply to ***22030** the predatory pricing of interstate and intrastate services; and the pricing of intrastate services can also be addressed at the state level.[FN656] Further, as we indicated in the Notice, the danger of successful predation by BOCs in the interexchange market is small.[FN657] We also reject MCI's proposal because, as the BOCs argue and MCI concedes, Commission review of affiliates' retail prices would place an enormous administrative burden on the Commission.[FN658] Such a review would also discourage BOC section 272 affiliates from competing on the basis of service prices.[FN659] Because we find that adequate remedies exist to address anticompetitive pricing by BOC section 272 affiliates, we believe that

regulation of these new interLATA providers' retail prices pursuant to section 272(e)(3) would not conform with the deregulatory, pro-competitive goals of the 1996 Act.

D. Section 272(e)(4)

1. Background

259. Section 272(e)(4) states that a BOC and a BOC affiliate that is subject to section 251(c) "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." [FN660] In the Notice, we sought comment regarding the scope of the term "interLATA or intraLATA facilities or services" including, for example, whether it included "information services and all facilities used in the delivery of such services."[FN661]

2. Comments

****76** 260. Parties are divided on the significance of section 272(e)(4). Several BOCs argue that section 272(e)(4) should be construed as a grant of authority specifying the facilities and services that a BOC may provide to its section 272 affiliate.[FN662] NYNEX argues that there is no basis on which to limit the scope of "interLATA or intraLATA facilities or services" that a BOC ***22031** can make available to its affiliate.[FN663] AT&T, supported by Ameritech and MCI, argues that section 272(e)(4) applies only to services and facilities that the BOC is separately authorized to provide. [FN664] PacTel argues, in the alternative, that if section 272(e)(4) is not a grant of authority, the definition of "telecommunications services" indicates that a BOC may provide wholesale, "carrier to carrier" interLATA services directly, rather than through the section 272 affiliate.[FN665] Parties disagree over whether, and under what circumstances, a BOC could be allowed to utilize capacity on its local network or its Official Services network to offer interLATA service to the public through its affiliate.[FN666] Finally, parties dispute the extent to which section 272(e)(4) applies to ISPs. [FN667]

3. Discussion

261. We conclude that section 272(e)(4) does not alter the requirements of sections 271 and 272(a). Section 272(e)(4) is not a grant of authority for BOCs to provide "interLATA or intraLATA facilities or services" in contravention of the scheme governing BOC provision of in-region interLATA services in section 271 or the requirement that these services must be provided through a separate affiliate in section 272(a). [FN668] Section 272(e)(4) is intended to ensure the nondiscriminatory provision of services that the BOCs are authorized to offer directly, and not through an affiliate, such as those services exempted from section 271 prior to the sunset of the separate affiliate requirement. [FN669] Like the other subsections of section 272, section 272(e)(4) ***22032** prescribes the manner in which a BOC must offer services and facilities it is authorized to provide.[FN670]

262. We find no basis in the 1996 Act for the BOCs' argument that section 272(e)(4) is a grant of authority for the BOCs to provide interLATA services and facilities. [FN671] By its terms, section 272(e)(4) contains no reference to the provisions of section 271 governing BOC entry into in-region interLATA services. Therefore, interpreting section 272(e)(4) as an immediate and independent grant of authority that allows BOCs to provide " interLATA or intraLATA facilities or services," [FN672] even where such provision is prohibited by other sections of the statute, would contravene the requirement of section 271 that BOCs receive Commission approval prior to providing these services.[FN673]

263. We are also unpersuaded by PacTel's alternative argument that section 272(e)(4) is not a grant of authority, but that section 272 allows the BOCs to provide wholesale, "carrier to carrier" interLATA services directly, rather than through the section 272 affiliate. [FN674] PacTel states that section 271 requires BOCs to obtain authorization from the Commission before providing "interLATA services," but, in contrast, section 272(a)(2)(B) only requires BOCs to offer interLATA "telecommunications service" through a separate affiliate. PacTel also states that the definition of "interLATA service" is broad and makes no distinction

between retail and wholesale offerings,[FN675] but that "telecommunications service" is defined as "the offering of telecommunications for a fee directly to the public, or to such classes of users as to be effectively available directly to the public, regardless of the facilities used."[FN676] PacTel therefore argues that only interLATA telecommunications services offered "directly to the public" must be offered through a separate affiliate.[FN677] PacTel contends that retail services are services offered "directly to the public" that must be offered through a section 272 affiliate, but that wholesale services may ***22033** be offered from the BOC because they are not "telecommunications services."[FN678] We reject PacTel's argument because it is inconsistent with language of section 251(c)(4) and because the legislative history indicates that the definition of telecommunications services is intended to clarify that telecommunications services are common carrier services, which include wholesale services to other carriers.

****77** 264. A comparison between the definitions relied upon by PacTel and the language of section 251(c)(4) leads us to conclude that wholesale services are not excluded from the definition of "telecommunications service." Unlike the definition of telecommunications service, section 251(c)(4) explicitly uses the terms "retail" and "wholesale." Section 251(c)(4) states that incumbent LECs must offer, "at wholesale rates any telecommunications service that the carrier provides at retail to subscribers who are not telecommunications carriers ..."[FN679] This language implicitly recognizes that some telecommunications services are wholesale services. If this were not the case, the qualifying phrase "that the carrier provides at retail" would be superfluous.

265. The legislative history and the definition of common carriage further support this conclusion. The Joint Explanatory Statement states that the definition of telecommunications service "recognize[s] the distinction between common carrier offerings that are provided to the public ... and private services."[FN680] Therefore, the term "telecommunications service" was not intended to create a retail/wholesale distinction, but rather a distinction between common and private carriage. Common carrier services include services offered to other carriers. For example, exchange access service is offered on a common carrier basis, but is offered primarily to other carriers.[FN681] In addition, both the Commission's rules and the common law have held that offering a service to the public is an element of common carriage. The Commission's rules define a "communication common carrier" as "any person engaged in rendering communication for hire to the public,"[FN682] and the courts have held that the indiscriminate offering of a service to the public is an essential element of common carriage.[FN683] Neither the Commission nor the courts, however, has construed "the public" as limited to end-users of a service. In NARUC I, the Court of Appeals for the D.C. Circuit held that an entity may qualify as a common carrier even if "the nature of the service rendered is sufficiently specialized as to be of possible use to only a fraction ***22034** of the total population."[FN684] In light of the statutory language of section 251(c)(4), legislative history, Commission precedent, and the common law, we decline to limit the definition of telecommunications services to retail services.

266. If a BOC wishes to utilize the capacity on its Official Services network to provide interLATA services to other carriers or to end-users, it must do so in accordance with the requirements of the 1996 Act and our rules. Specifically, the BOC must provide in-region, interLATA services through a section 272 affiliate as required by section 272(a). If a BOC, therefore, seeks to transfer ownership of its Official Services network to its section 272 affiliate, it must ensure that the transfer takes place in a nondiscriminatory manner, as explained supra in part V.C, and must comport with our affiliate transaction rules.[FN685]

****78** 267. Finally, although the term "interLATA services" includes both interLATA information services and interLATA telecommunications services,[FN686] we conclude that ISPs are not entitled to nondiscriminatory treatment under section 272(e)(4). The definitional sections of the Act make clear that the term "carriers" is synonymous with the term "common carriers," which does not include ISPs.[FN687] Therefore, the require-

ment that the BOCs provide interLATA or intraLATA facilities or services to "all carriers" on a nondiscriminatory basis does not extend to ISPs under section 272(e)(4).[FN688]

E. Sunset of Subsections 272(e)(2) and (4)

1. Background

268. The Notice sought comment regarding how to reconcile an apparent conflict between sections 272(e) and 272(f). We noted that subsections 272(e)(2) and (e)(4) establish standards that refer to BOC affiliates.[FN689] On the one hand, those sections could be interpreted as ***22035** subject to sunset because they depend on the existence of a separate affiliate. On the other hand, section 272(f) specifically exempts section 272(e) from the sunset requirements.[FN690] We sought comment regarding whether Congress intended to eliminate the requirements of sections 272(e)(2) and (e)(4) once the BOCs were no longer required to maintain separate affiliates under section 272(a).[FN691]

2. Comments

269. Several BOCs contend that sections 272(e)(2) and (e)(4) cease to have meaning once the separate affiliate requirements of section 272 expire.[FN692] In contrast, Teleport and ITAA argue that the language of section 272(f) makes clear that Congress intended to exempt section 272(e) in its entirety from the sunset requirements.[FN693] MCI and TRA argue that subsections (e)(2) and (e)(4) could be applied as long as a BOC utilized an affiliate to offer interLATA services.[FN694]

3. Discussion

270. We find that the plain language of the statute compels us to conclude that sections 272(e)(2) and 272(e)(4) can be applied to a BOC after sunset only if that BOC retains a separate affiliate. The nondiscrimination obligations imposed by subsections (e)(2) and (e)(4) are framed in reference to a BOC's treatment of its affiliates. In contrast, the nondiscrimination obligations imposed by subsections (e)(1) and (e)(3) are framed in reference to the BOC "itself" as well as the BOC affiliate. If a BOC does not maintain a separate affiliate, subsections (e)(2) and (e)(4) cannot be applied because there will be no frame of reference for the BOC's conduct. Section 272(f), however, exempts section 272(e) from sunset without qualification. In order to give meaning to section 272(f), we conclude that subsections (e)(2) and (e)(4) will apply to a BOC's ***22036** conduct so long as that BOC maintains a separate affiliate.[FN695] Subsections (e)(1) and (e)(3) will continue to apply in all events.

271. A number of safeguards will be available to prevent discriminatory behavior by BOCs after the separate affiliate requirements of section 272 cease to apply. As we explain in detail above, section 251(c)(5), section 251(g), and the Commission's rules imposing network disclosure and equal access requirements oblige BOCs to provide exchange access on a nondiscriminatory basis.[FN696] In addition, intraLATA services and facilities must be provided on a nondiscriminatory basis under section 251(c)(3), and the provision of interLATA services and facilities will continue to be governed by the nondiscrimination provisions of sections 201 and 202 of the Act. In addition, once local competition develops, it will provide a check on the BOCs' discriminatory behavior because competitors of the BOC affiliates will be able to turn to other carriers for local exchange service and exchange access.

VII. JOINT MARKETING

A. Joint Marketing Under Section 271(e)

1. Background

****79** 272. Section 271(e)(1) limits the ability of certain interexchange carriers to market interLATA services jointly with BOC local services purchased for resale. Specifically, the statute states that:

> Until a Bell operating company is authorized pursuant to [section 271(d)] to provide interLATA services in an in-region State, or until 36 months have passed since the date of enactment of the Telecommunications Act of 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) with interLATA services offered by that telecommunications carrier.

In the Notice, we sought comment on whether we should interpret section 271(e) to prohibit, for example, promoting the availability of interLATA services and local exchange services in the same advertisement, making these services available from a single source, or providing bundling discounts for the purchase of both services.[FN697] We also observed that the clear language of the ***22037** statute only restricts covered interexchange carriers (i.e., those carriers that fall within the scope of section 271(e) of the Act) from joint marketing interLATA services and BOC local services purchased for resale.[FN698] Thus, section 271(e) does not preclude these interexchange carriers from jointly marketing local exchange services provided over their own facilities, or through the purchase of unbundled network elements pursuant to section 251(c)(3).[FN699] Nor does section 271(e) prohibit those interexchange carriers from "marketing" BOC resold local exchange services. Rather, the prohibition is limited to "jointly marketing" BOC resold local services with interLATA services.

2. Comments

273. Most commenters agree that bundling local and interLATA services constitutes the type of joint marketing that is prohibited by section 271(e).[FN700] MCI argues, however, that the scope of "joint marketing" includes only those activities that involve the combining of two categories of services in a package for a bundled price or a package that constitutes a single product.[FN701] Thus, according to MCI, the other restrictions proposed in the Notice -- i.e., promoting the availability of interLATA services and local exchange services in the same advertisement and making such services available from a single source -- are not prohibited.[FN702] The BOCs and USTA oppose MCI's interpretation of section 271(e).[FN703] They argue that allowing a covered interexchange carrier to produce joint advertisements and to sell both local and interLATA service from a single source would render section 271(e) meaningless.[FN704]

274. AT&T further contends that "marketing" should only encompass efforts by a firm to persuade a potential customer to purchase or subscribe to its services, and not "customer care" that occurs after the customer has signed up.[FN705] Such an interpretation would enable an interexchange carrier subject to section 271(e) to deal jointly with existing customers who have ***22038** purchased both services by providing a single bill, or establishing a single point-of-contact to respond to maintenance and other customer inquiries.[FN706] The BOCs and USTA, on the other hand, contend that AT&T's proposal deliberately ignores the reality of telecommunications marketing.[FN707] They argue that telecommunications providers must constantly engage in marketing activities, even to existing subscribers, in order to win business for new services and to maintain goodwill.[FN708]

****80** 275. Most commenters agree with our observation in the Notice that section 271(e) only restricts joint marketing of interLATA services and local exchange services that covered interexchange carriers purchase for resale pursuant to section 251(c)(4).[FN709] USTA argues, however, that interexchange carriers should also be prohibited from jointly marketing local exchange services provided through the purchase of unbundled network elements pursuant to section 251(c)(3), because the purchase of such elements from a BOC is the equivalent of purchasing a BOC's local exchange services for resale.[FN710] Ameritech agrees that the section 271(e) joint-marketing prohibition only applies to BOC services purchased for resale under section 251(c)(4), but argues that the Commission should clarify that interexchange carriers may jointly market local and interLATA services only to the extent that their joint marketing campaign does not reach any customers to whom they provide BOC resold local exchange services.[FN711]

3. Discussion

276. Scope of section 271(e). We agree with the consensus of the commenters that the language in section 271(e) is clear -- the joint marketing prohibition applies only to the marketing of interLATA services together with BOC local exchange services purchased for resale pursuant to section 251(c)(4).[FN712] We refer to the latter services in the balance of this discussion as "BOC resold local services." In the First Interconnection Order

, we stated that the terms of section 271(e) do not prevent affected interexchange carriers from marketing interLATA services jointly with local exchange services provided through the use of unbundled network elements obtained ***22039** pursuant to section 251(c)(3).[FN713] We affirm that conclusion and, accordingly, reject USTA's suggestion that we extend the section 271(e) restriction to apply to the joint marketing of such services.[FN714] We find that the express text of the statute limits the prohibition to BOC resold local services obtained pursuant to section 251(c)(4) and we decline to extend the restriction beyond the limits mandated by Congress. We further conclude, for the same reason, that the joint marketing restriction does not apply if the covered interexchange carrier provides local service over its own facilities, or by reselling local exchange services purchased from a local exchange carrier that is not a BOC.

277. Specific Joint Marketing Restrictions. We conclude that Congress adopted the joint marketing restriction in section 271(e) in order to limit the ability of covered interexchange carriers to provide "one-stop-shopping" of certain services until the BOC is authorized to provide interLATA service in the same territory.[FN715] We agree with the majority of commenters that bundling BOC resold local services and interLATA services (including interLATA telecommunications and interLATA information services[FN716]) into a package that can be sold in a single transaction constitutes the type of joint marketing that Congress intended to restrict by enacting section 271(e).[FN717] We define "bundling" to mean offering BOC resold local exchange services and interLATA services as a package under an integrated pricing schedule.[FN718] Thus, we find that section 271(e) restricts covered interexchange carriers from, among other things, providing a discount if a customer purchases both interLATA services and BOC resold local services, conditioning the purchase of one type of service on the purchase of the other, and offering both interLATA services and BOC resold local services as a single combined product.[FN719] This restriction applies until the BOC receives authorization under section 271 to offer interLATA service in an in-region state, or February 8, 1999, whichever comes first.

****81 *22040** 278. We also conclude that section 271(e) bars covered interexchange carriers from marketing interLATA services and BOC resold local services to consumers through a single transaction. We define a "single transaction" to include, at a minimum, the use of the same sales agent to market both products to the same customer during a single communication. Although requiring separate transactions for different types of services might preclude interexchange carriers from taking advantage of economies of scale,[FN720] we agree with those commenters who argue that such a restriction is an essential element of the joint marketing prohibition in section 271(e) during the period the limitation remains in effect.[FN721] We reject the suggestion of some BOCs that the section 271(e) restriction requires covered interexchange carriers to establish separate sales forces for marketing interLATA services and BOC resold local services.[FN722] We agree with the commenting parties that claim neither the statute nor the legislative history indicates that Congress intended to impose such a requirement.[FN723] Moreover, in our view, requiring a separate sales force is not necessary to accomplish the primary congressional objective of barring the affected interexchange carrier from offering "one-stop shopping" for interLATA and BOC resold local services. Thus, a single agent is permitted to market interLATA services in the context of one communication, and to market BOC resold local services to the same potential customer in the context of a separate communication.

279. The application of the section 271(e) joint marketing restriction to advertising implicates constitutional issues. We are aware of our obligation under Supreme Court precedent to construe the statute "where fairly possible so as to avoid substantial constitutional questions."[FN724] In the advertising context, the Supreme Court has held that the First Amendment protects "the dissemination of truthful and nonmisleading commercial messages about lawful products and services."[FN725] We must be careful, therefore, not to construe section 271(e) as imposing an advertising restriction that is overly broad. The fact that section 271(e) permits

a covered interexchange carrier to offer and market separately both interLATA services and BOC resold services and also permits such carriers to offer and market jointly interLATA services and local ***22041** services provided through means other than BOC resold local services (e.g., through the use of unbundled network elements, over its own facilities, or by reselling local exchange services purchased from a local exchange carrier that is not a BOC) makes the task of crafting an effective advertising restriction particularly difficult. For example, we see no lawful basis for restricting a covered interexchange carrier's right to advertise a combined offering of local and long distance services, if it provides local service through means other than reselling BOC local exchange service.[FN726] In addition, we cannot adopt a blanket rule that prohibits interexchange carriers from publicizing in one advertisement that they offer interLATA services and publicizing in a separate advertisement that they offer BOC resold local services. As MCI points out, the statute permits interexchange carriers to offer both types of services through the same corporate entity and under the same brand name.[FN727] Thus, such advertisements would be truthful statements about lawful activities.

****82** 280. A closer question is whether we may ban a covered interexchange carrier from claiming in a single advertisement that it offers both interLATA services and local services in instances where the carrier intends to furnish the latter through BOC resold local services, which it is authorized to market only on a stand-alone basis. On the one hand, such an advertisement would contain truthful statements about services that the interexchange carrier is authorized to provide. On the other hand, such an advertisement may be inconsistent with the section 271(e) prohibition against jointly marketing the two types of services. As some BOCs appear to recognize, however, the principal concern with the promotion of both services in a single advertisement is that it may suggest "to consumers that the services are available jointly as a package when in fact they are not."[FN728] We agree with these commenters that the First Amendment does not confer the right to deceive the public. Indeed, the Supreme Court has emphasized that the First Amendment does not prevent the government from regulating commercial speech to avoid such deceptions.[FN729] Further, the Court has held that the government "may require commercial messages to appear in such a form, or include such additional information, warnings and disclaimers, as are necessary to prevent its being deceptive."[FN730] Consistent with this precedent, we conclude that a covered interexchange carrier may advertise the availability of interLATA services and BOC resold local services in a single advertisement, but such carrier may not mislead the public by stating or implying that it may offer bundled packages of interLATA service and BOC resold service, or that it can provide "one-stop shopping" of both services through a single transaction. As discussed above, both activities are prohibited under section 271(e).

***22042** 281. We further conclude that the joint marketing restriction in section 271(e) applies only to activities that take place prior to the customer's decision to subscribe. We agree with AT&T that, after a potential customer subscribes to both interLATA and BOC resold local services from a covered interexchange carrier, that carrier should be permitted to provide joint "customer care" (i.e., a single bill for both BOC resold local services and interLATA services, and a single point-of-contact for maintenance and repairs).[FN731] Such activities are post-marketing activities. To impose additional prohibitions on post-marketing activities would add additional burdens not required by the statute. Furthermore, a rule that would require a customer to send separate payments to the same corporate entity would be confusing and burdensome, and therefore would not serve the public interest. Customers should also be permitted to make a single phone call for complaints and repairs about both local and long distance services once they have ordered both services. Because we interpret section 271(e) to apply only to activities that take place prior to a customer's decision to subscribe, we conclude that, once a customer subscribes to both local exchange and interLATA services from a carrier that is subject to the restrictions of 271(e), that carrier may market new services to an existing subscriber.

****83** 282. We recognize that the principles we have adopted to implement the requirements of section 271(e)

may not address all of the possible marketing strategies that a covered interexchange carrier might initiate to sell BOC resold local services and interLATA services to the public. We emphasize, however, that in enforcing this statutory section, we intend to examine the specific facts closely to ensure that covered interexchange carriers are not contravening the letter and spirit of the congressional prohibition on joint marketing by conveying the appearance of "one-stop shopping" BOC resold local services and interLATA services to potential customers.

B. Section 272(g)

1. Marketing Restrictions on BOC Section 272 Affiliates

a. Background

283. Section 272(g)(1) provides that a BOC affiliate may not market or sell telephone exchange services provided by the BOC "unless that company permits other entities offering the same or similar service to market and sell its telephone exchange services."In the Notice, we requested comment on what regulations, if any, are necessary to implement this provision.[FN732]

***22043 b. Comments**

284. The BOCs, USTA, and Citizens for a Sound Economy argue that 272(g)(1) is clear on its face, and thus no implementing regulations are necessary.[FN733] According to PacTel, it will be apparent when a section 272 affiliate is marketing and selling its affiliated BOC's services because those activities will be conducted publicly.[FN734] Also, PacTel argues that the public disclosure requirements of section 272(b)(5) will ensure that others will know what BOC services the section 272 affiliate is marketing and selling and the applicable terms and conditions.[FN735]

285. AT&T, on the other hand, proposes that the Commission adopt a requirement that the BOC announce the availability and terms of any joint marketing arrangement with a BOC affiliate at least three months prior to implementing it, so that any such joint marketing opportunity is made available to affiliated and unaffiliated providers on a truly nondiscriminatory basis.[FN736] Sprint asserts that the term "same or similar service" in section 272(g)(1) means not only the interLATA services of the affiliate, but information services as well.[FN737] Thus, the joint marketing by a BOC affiliate of information service and telephone exchange service would not be permitted unless other information service providers may jointly market those services as well.[FN738] MCI also requests that we clarify that the joint marketing provisions of section 272(g)(1) apply to the international sphere, "because BOCs already have a variety of relationships with foreign carriers that would make it possible for a BOC interLATA affiliate to market BOC special features available only from the BOC's local exchange platform to foreign end users through a switch in the foreign country."[FN739]

c. Discussion

****84** 286. We agree with the BOCs that no regulations are necessary to implement section 272(g)(1).[FN740] We do not adopt the three-month advance notice period proposed by AT&T, ***22044** because it is not required by the statute.[FN741] Nor do we believe that such a notice period is necessary in order for other carriers to receive nondiscriminatory treatment. As PacTel notes, any agreement between a BOC and its affiliate that enables the affiliate to market or sell BOC services must be conducted on an arm's length basis, reduced to writing, and made publicly available as required by section 272(b)(5).[FN742] Thus, under section 272(g)(1), other entities offering services that are the same or similar to services offered by the BOC affiliate would have the same opportunity to market or sell the BOC's telephone exchange service under the same conditions as the BOC affiliate.

287. We also agree with Sprint that the term "same or similar service" in section 272(g)(1) encompasses information services.[FN743] Thus, a section 272 affiliate may not market or sell information services and BOC telephone exchange services unless the BOC permits other information service providers to market and sell telephone exchange services. Finally, we decline to adopt MCI's requested clarification that 272(g)(1) applies to the international sphere.[FN744] MCI appears to be concerned about a BOC's discriminatory provision of

exchange access to foreign carriers. We conclude, however, that section 272(g)(1) applies only to the provision of "telephone exchange" service, not to the provision of "exchange access."[FN745] Section 202 bars a BOC from unreasonable discrimination in the provision of exchange access services used to originate and terminate domestic interstate and international toll traffic. [FN746]

2. Marketing Restrictions on BOCs

a. Background

288. Section 272(g)(2) states that "[a BOC] 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)." In the Notice, we sought comment on whether section 272(g)(2) imposes the same types of restrictions on the BOCs that section 271(e) imposes on the interexchange carriers.[FN747]

***22045 b. Comments**

289. With respect to section 272(g)(2), the BOCs argue that no implementing regulations are necessary.[FN748] They state that, once they have received interLATA authority under section 271, the BOC and its section 272 affiliate should be able to engage in all marketing and sales activities that other service providers are permitted to engage in, including advertising the availability of interLATA services combined with local exchange services, making these services available from a single source, and providing discounts for the bundled purchase of both services.[FN749] In addition, they request that the Commission clarify that section 272(g) applies only to the relationship between a BOC and its section 272 affiliate.[FN750] Thus, the BOCs assert that they are not prohibited from aligning -- also known as "teaming"-- with a non-affiliate that provides interLATA services and marketing their respective services to the same customers prior to receiving interLATA authority under section 271.[FN751]

****85** 290. Other commenters argue that some marketing restrictions should be placed on the BOCs after section 271 authorization because of their status as incumbent local exchange carriers.[FN752] For example, MCI contends that BOCs should not be permitted to condition the availability of one category of service on the other, and that a discount should not be so great that it compels the customer to purchase both services.[FN753] Various other commenters argue that, when a customer calls a BOC to place an order for local service or to request a primary interexchange carrier, the BOC should be prohibited from turning such "inbound" communications into marketing opportunities for its long-distance affiliate.[FN754]

***22046 c. Discussion**

291. We agree with the BOCs that no regulations are necessary to implement section 272(g)(2).[FN755] The statute clearly states that BOCs are prohibited from either selling or marketing in-region interLATA services provided by a section 272 affiliate until they have received approval from the Commission under section 271.[FN756] We note, however, that section 272 does not prohibit a BOC that provides out-of-region interLATA services, or intraLATA toll service, from marketing or selling those services in combination with local exchange services. If such advertisements reach in-region customers, however, the BOC must make it clear to those customers that the advertisements do not apply to in-region interLATA services.[FN757] This obligation is similar to the obligation discussed above, which requires covered interexchange carriers to disclose to consumers receiving BOC resold local service that bundled packages are not available to them.[FN758] After a BOC receives authorization under section 271, the restriction in section 272(g)(2) is no longer applicable, and the BOC will be permitted to engage in the same type of marketing activities as other service providers.

292. Inbound Marketing. We conclude that BOCs must continue to inform new local exchange customers of their right to select the interLATA carrier of their choice and take the customer's order for the interLATA carrier the customer selects. The obligation to continue to provide such nondiscriminatory treatment stems from section 251(g) of the Act, because we have not adopted any regulations to supersede these existing require-

ments.[FN759] Specifically, the BOCs must provide any customer who orders new local exchange service with the names and, if requested, the telephone numbers of all of the carriers offering interexchange services in its service area.[FN760] A customer orders "new service" when the customer either receives service from the BOC for the first time, or moves to another location within the BOC's in-region territory.[FN761] As part of this requirement, a BOC must ensure that the names of the interexchange carriers are provided in random order.[FN762] We decline to adopt NCTA's request that we extend this obligation ***22047** to require that BOCs inform inbound callers of other cable operators and providers of video services in the area,[FN763] however, because no such obligation currently exists, and no new requirement is imposed by the statute. We further conclude that the continuing obligation to advise new customers of other interLATA options is not incompatible with the BOCs' right to market and sell the services of their section 272 affiliates under section 272(g).[FN764] Thus, a BOC may market its affiliate's interLATA services to inbound callers, provided that the BOC also informs such customers of their right to select the interLATA carrier of their choice.[FN765]

****86** 293. Teaming. We conclude that section 272(g) is silent with respect to the question of whether a BOC may align itself with an unaffiliated entity to provide interLATA services prior to receiving section 271 approval. We agree with the BOCs that the language of section 272(g) only restricts the BOC's ability to market or sell interLATA services "provided by an affiliate required by [section 272]."[FN766] We note, however, that any equal access requirements pertaining to "teaming" activities that were imposed by the MFJ remain in effect until the BOC receives section 271 authorization. Thus, to the extent that BOCs align with non-affiliates, they must continue to do so on a nondiscriminatory basis.

3. Section 272(g)(3)

a. Background

294. Section 272(g)(3) states that "[t]he joint marketing and sale of services permitted under this subsection shall not be considered to violate the nondiscrimination provisions of subsection [272](c)."[FN767]

b. Comments

295. During the course of this proceeding, various commenters suggested types of marketing activities that fall within the scope of section 272(g)(3)[FN768] and, therefore, would not be subject to the nondiscrimination requirements in section 272(c). For example, NYNEX states that marketing activities encompassed by section 272(g) should include: sales activities (the use of sales channels to make customer referrals, to act as a sales agent, and to resell services); ***22048** advertising and promotion activities; and other marketing activities (such as product development, product management, market management, channel management, market research, and product pricing).[FN769] NYNEX also suggests that the following activities do not fall within the definition of marketing: strategic planning and resource allocation, as well as the corporate responsibility for coordination and oversight of all corporate functions and activities, including marketing.[FN770]

c. Discussion

296. Some of the activities identified by the parties appear to fall clearly within the scope of section 272(g)(3) and hence would be excluded from the section 272(c) nondiscrimination requirements. For example, activities such as customer inquiries, sales functions, and ordering, appear to involve only the marketing and sale of a section 272 affiliate's services, as permitted by section 272(g). Other activities identified by the parties, however, appear to be beyond the scope of section 272(g), because they may involve BOC participation in the planning, design, and development of a section 272 affiliate's offerings. In our view, such activities are not covered by the section 272(g) exception to the BOC's nondiscrimination obligations. We see no point to attempt at this time to compile an exhaustive list of the specific BOC activities that would be covered by section 272(g). We recognize that such determinations are fact specific and will need to be made on a case-by-case basis.

C. Interplay Between Sections 271(e), 272(g) and Other Provisions of the Statute

1. Background

****87** 297. In the Notice, we sought comment on wheth-

er the affiliate may purchase marketing services from the BOC on an arm's length basis pursuant to section 272(b)(5), or whether a BOC and its affiliate should be required to contract jointly with an outside marketing entity for joint marketing of interLATA and local exchange service in order to comply with section 272(b)(3).[FN771] We also sought comment on the interplay between the marketing restrictions in sections 271 and 272 and the CPNI provisions set forth in section 222 that are the subject of a separate proceeding.[FN772] In addition, we requested comment on whether the joint marketing provision in section 274(c) has any bearing on how we should apply the joint marketing provisions in sections 271 and 272.[FN773]

***22049 2. Comments**

298. The BOCs oppose any proposal that would require them to obtain joint marketing services from an unaffiliated entity.[FN774] They argue that such a requirement would directly contravene rights granted to them under section 272(g) and, therefore, would violate the Act.[FN775] They contend that section 272(b)(5) merely requires that all transactions between a BOC and its section 272 affiliate, including the provision of marketing services, be on an "arms-length basis," in writing, and made available for public inspection.[FN776] Sprint asserts that, while the statute does not require that an outside entity be used, such a requirement would make it easier for the Commission and the public to ensure that neither competition nor monopoly local ratepayers are harmed by such joint activities.[FN777]

299. With respect to CPNI, NYNEX argues that a BOC should be allowed to use a customer's local exchange CPNI to sell its affiliate's interLATA services to the same customer, or to transfer a customer's local exchange CPNI to its affiliate under a referral arrangement, provided the customer orally consents to such use of information during the call.[FN778] AT&T and Time Warner assert that CPNI may be made available to a BOC affiliate only on nondiscriminatory terms, in accordance with section 272(c)(1).[FN779] PacTel and Time Warner assert that the joint marketing provisions in section 272(g) do not modify the statutory provisions concerning CPNI.[FN780] Consequently, they argue that BOCs that engage in joint marketing activities are required to comply with rules that the Commission adopts in CC Docket No. 96-115 to implement section 222 of the 1996 Act.[FN781] With respect to the interplay between sections 272(g) and 274(c), PacTel and the Yellow Pages Publishers Association argue that section 272(g) has no bearing on section 274(c) because Congress intended to create separate requirements for electronic publishing.[FN782]

***22050 3. Discussion**

300. As discussed above in Part IV.C, we conclude that a BOC and its affiliate are not required to contract jointly with an outside entity in order to comply with section 272(b)(3). Thus, a BOC and its affiliate may provide marketing services for each other, provided that such services are conducted pursuant to an arm's-length transaction, consistent with the requirements of section 272(b)(5).[FN783] We decline to address parties' arguments raised in this proceeding regarding the interplay between section 272(g) and either section 222 or section 274(c) to avoid prejudging issues in our pending CPNI proceeding, CC Docket No. 96-115, or our electronic publishing proceeding, CC Docket No. 96-152. We emphasize that, if a BOC markets or sells the services of its section 272 affiliate pursuant to section 272(g), it must comply with the statutory requirements of section 222 and any rules promulgated thereunder.

VIII. PROVISION OF LOCAL EXCHANGE AND EXCHANGE ACCESS BY BOC AFFILIATES

A. Background

****88** 301. In the Notice, we expressed concern that a BOC might attempt to circumvent the section 272 safeguards by transferring local exchange and exchange access facilities and capabilities to one of its affiliates.[FN784] We requested comment on whether we should prohibit all transfers of network capabilities from a BOC to an affiliate.[FN785] Alternatively, we sought comment on whether a BOC transfer of network capabilities to an affiliate would make that affiliate a successor or assign of the BOC pursuant to section 3(4)(B) of the Act and, consequently, subject the affiliate to the nondiscrimination requirements of section 272(c)(1) and 272(e).[FN786]

302. We also requested comment on whether, if a BOC were permitted to transfer local exchange and exchange access capabilities to an affiliate, we should exercise our general rulemaking authority to adopt regulations to prevent such an affiliate from engaging in discriminatory practices, or whether existing statutory prohibitions on discrimination are sufficient.[FN787] For example, we noted that BOC affiliates that provide interstate interLATA telecommunications services already would be subject to the requirements of sections 201 and ***22051** 202, which are applicable to all common carriers.[FN788] Those obligations would not apply to information services affiliates and manufacturing affiliates, however, because they are not "common carriers" under the Act.[FN789] As an additional matter, we tentatively concluded that a BOC affiliate that is classified as an incumbent LEC would also be subject to the nondiscrimination requirements of section 272(c).[FN790]

B. Comments

303. Interexchange carriers and other potential local exchange competitors argue that either a BOC should be prohibited from transferring any of its local exchange and exchange access facilities or capabilities to an affiliate, or, if any transfer occurs, the affiliate should be considered a successor or assign that is subject to the requirements of section 272.[FN791] BOCs, on the other hand, argue that an absolute prohibition on the transfer of network capabilities is overly broad.[FN792] They further assert that a BOC affiliate should not be considered a successor or assign of the BOC merely because a transfer of network capabilities has occurred between a BOC and an affiliate. Rather, such affiliate should only become a successor or assign if it "substantially take[s] the place of the BOC in the operation of one of the BOC's core businesses."[FN793] Because, in their view, only substantial transfers should affect a BOC affiliate's status as a successor or assign, the BOCs contend that the real issue is what constitutes a "substantial transfer of network capabilities."[FN794]

304. In addition, the BOCs assert that, based on the plain language of the statute, the section 272(c) safeguards only apply to the BOC or an affiliate that is a "successor or assign" of the BOC.[FN795] They argue that, unlike sections 272(a) and (e), section 272(c) does not apply to BOC affiliates merely because they qualify as incumbent LECs that are subject to the ***22052** requirements of section 251(c).[FN796] Ameritech also requests that we clarify that a BOC affiliate will not be regulated as an incumbent LEC solely because it offers local exchange and exchange access services.[FN797] According to Ameritech, section 251(c) only applies to entities that meet the definition of incumbent LEC under section 251(h).[FN798] Thus, if an affiliate provides local exchange service through its own facilities or by reselling the BOC's local exchange service, it would not necessarily be classified as an incumbent LEC.[FN799]

****89** 305. Through comments and ex parte presentations, several potential local competitors argue that BOCs also might be able to circumvent the separation requirements of section 272 by creating an integrated affiliate that offers a combination of local, intraLATA, and interLATA services.[FN800] These parties assert that several BOCs have already submitted applications to state regulatory commissions seeking authority to provide both local exchange services and interLATA services through the same affiliate.[FN801] According to Teleport, if such integrated affiliates are permitted, the development of effective competition in the local exchange market will be jeopardized.[FN802] One of Teleport's concerns is that the BOC or its parent may choose to upgrade the section 272 affiliate's network rather than the incumbent LEC network in order to avoid the obligation imposed by section 251(c) of the Act to offer such facilities, and the new services they are capable of providing, to their competitors.[FN803] Thus, potential local competitors urge us either to clarify that the Act prohibits a BOC from creating such an integrated affiliate or, in the alternative, to use our discretionary authority to prevent such activities.[FN804]

306. The BOCs, on the other hand, argue that section 272(g) and section 251 specifically allow them to create a section 272 affiliate that offers both local exchange and interLATA services, and that section 272(a) of the 1996 Act does not prohibit a section 272 ***22053** affiliate from providing local exchange service -- either by reselling BOC local service or through the purchase of

unbundled elements.[FN805] They also assert that, as a policy matter, allowing the section 272 affiliate to provide service through unbundled elements on the same terms and conditions as other local providers will promote competition and encourage the section 272 affiliate to provide innovative new services.[FN806]

307. In response to the BOCs, CCTA argues that there is no statutory basis for allowing a section 272 affiliate to provide local exchange services. According to CCTA, section 272(g)(1) does not permit section 272 affiliates to provide both local and interLATA services; rather, it only grants them the authority to market such services jointly.[FN807] CCTA further argues that section 272 affiliates should be prohibited from offering local exchange service, because "the Senate stated unequivocally that the long distance operations of the BOCs must be structurally separate from 'any entities' providing local exchange services."[FN808] In addition, CCTA asserts that section 251 cannot be relied upon as a basis for allowing section 272 affiliates to provide local exchange services, because the Act does not treat RBOCs or their affiliates as new entrants or telecommunications carriers that are entitled to request nondiscriminatory access to unbundled elements pursuant to section 251.[FN809]

****90** 308. AT&T and MCI, on the other hand, argue that section 272(g)(1) allows section 272 affiliates to resell the BOC's local services, but does not permit section 272 affiliates to purchase unbundled network elements from the BOC.[FN810] According to AT&T, section 272 affiliates will be able to avoid paying access charges if they are permitted to provide local exchange services using unbundled elements, which will also enable such affiliates to avoid the imputation requirements of section 272(e)(3).[FN811] AT&T further argues that, to the extent that a section 272 affiliate is able to avoid the imputation requirements of section 272(e), the BOC would have perverse incentives to maintain access charges at rates above those for unbundled network elements.[FN812] MCI asserts that opportunities for discrimination and cross-subsidy are substantially ***22054** greater when a BOC provides network elements to its affiliate than when it offers retail services at a standard wholesale discount.[FN813]

C. Discussion

309. Transfer of local exchange and exchange access capabilities. We conclude that a BOC cannot circumvent the section 272 requirements by transferring local exchange and exchange access facilities and capabilities to an affiliate. As we discussed above, all goods, services, facilities, and information that the BOC provides to its section 272 affiliate are subject to the section 272(c)(1) nondiscrimination requirement.[FN814] Application of section 272(c)(1) to the BOC's provision of such items should address to a large extent concerns about the BOC "migrating" or "transferring" key local exchange and exchange access services and facilities to the 272 affiliate. We note, however, that there are still legitimate concerns that a BOC could potentially evade the section 272 or 251 requirements by, for example, first transferring facilities to another affiliate or the BOC's parent company, which would then transfer the facilities to the section 272 affiliate. To address this problem, we conclude that, if a BOC transfers to an affiliated entity ownership of any network elements that must be provided on an unbundled basis pursuant to section 251(c)(3), we will deem such entity to be an "assign" of the BOC under section 3(4) of the Act with respect to those network elements. Any successor or assign of the BOC is subject to the section 272 requirements in the same manner as the BOC.[FN815] We also note that, based on the plain language of the statute, section 272(c) only applies to the BOC or an affiliate that is a "successor or assign" of the BOC. We agree with Ameritech that, unlike sections 272(a) and (e), section 272(c) does not apply to BOC affiliates merely because they qualify as incumbent LECs.[FN816]

310. We decline to adopt an absolute prohibition on a BOC's ability to transfer local exchange and exchange access facilities and capabilities to an affiliate, because we conclude based on the record before us that such a restriction would be overly broad and exceed the requirements of the Act.[FN817] We note, however, that our determination does not preclude a state from prohibiting a BOC's transfer of local exchange facilities under its regulatory framework for incumbent LECs.

****91 *22055** 311. In view of our decision to treat a BOC affiliate as a " successor or assign" of the BOC if the BOC transfers network elements to the affiliate, we find it unnecessary at this time to adopt additional nondiscrimination regulations applicable to section 272 affiliates. A section 272 affiliate that is not deemed a "successor or assign" of a BOC would nevertheless be subject to the obligations imposed by section 202 -- which prohibits common carriers from, among other things, engaging in "unjust and unreasonable" practices with respect to the provision of interstate services. Moreover, BOC interLATA services affiliates that offer intrastate interLATA telecommunications services would be subject to corresponding nondiscrimination obligations that state statutes and regulations typically impose on common carriers. We conclude based on the current record that these existing requirements should be adequate to protect competition and consumers against anticompetitive conduct by a BOC section 272 affiliate.

312. Integrated affiliates. Numerous commenters also request that we address whether the separate affiliate safeguards imposed by section 272 prohibit a section 272 affiliate from offering local exchange service through the same corporate entity. Based on our analysis of the record and the applicable statutory provisions, we conclude that section 272 does not prohibit a section 272 affiliate from providing local exchange services in addition to interLATA services, nor can such a prohibition be read into this section.[FN818] Specifically, section 272(a)(1) states that--

> A Bell operating company (including any affiliate) which is a local exchange carrier that is subject to the requirements of section 251(c) may not provide any service described in [section 272(a)(2)] unless it provides that service through one or more affiliates that ... are separate from any operating company entity that is subject to the requirements of section 251(c) ...

We find that the statutory language is clear on its face -- a BOC section 272 affiliate is not precluded under section 272 from providing local exchange service, provided that the affiliate does not qualify as an incumbent LEC subject to the requirements of section 251(c). Because the text and the purpose of the statute are clear, there is no need, as CCTA suggests,[FN819] to resort to legislative history.[FN820] We also agree with Ameritech that a BOC affiliate should not be deemed an incumbent LEC subject to the requirements of section 251(c) solely because it offers local exchange services; rather, section 251(c) applies only to entities that meet the definition of an incumbent LEC under section 251(h).[FN821] Section 251(h)(1) defines an incumbent LEC as, interalia, a local exchange carrier that: (1) on the date of enactment of the Telecommunications Act of 1996, provided telephone exchange service, and (2) was a member of the National Exchange ***22056** Carrier Association (NECA) or becomes a successor or assign of such a member.[FN822] Because no BOC affiliate was a member of NECA when the 1996 Act was enacted, such affiliates may be classified as incumbent LECs under this statutory provision only if they are successors or assigns of their affiliated BOCs. Alternatively, under section 251(h)(2), if the Commission determines that a carrier occupies a position in the market for telephone exchange service within an area that is comparable to the position occupied by the incumbent LEC, and such carrier has substantially replaced an incumbent LEC, such carrier may be treated by rule as an incumbent LEC for purposes of section 251.[FN823] We find no basis in the record of this proceeding to find that a BOC affiliate must be classified as an incumbent LEC under section 251(h)(2) merely because it is engaged in local exchange activities. Absent such a finding, BOC affiliates that are neither one of the Bell operating companies listed under 153(4)(A), nor a successor or assign of any such company, are not subject to the separation requirements of section 272.

****92** 313. Furthermore, we conclude that section 251 does not preclude section 272 affiliates from obtaining resold local exchange service pursuant to section 251(c)(4) and unbundled elements pursuant to section 251(c)(3), because the statute does not place any restrictions on the types of telecommunications carriers that may qualify as "requesting carriers." We disagree with CCTA's assertion that section 272 affiliates cannot be treated as requesting carriers, because such affiliates are "part of the standard for determining nondiscriminatory

interconnection by the [incumbent LEC] for all other telecommunications carriers." [FN824] The fact that a determination of whether an incumbent LEC provides nondiscriminatory access may be based on a comparison of the access that the incumbent LEC provides itself or its affiliate does not preclude such affiliate from being a "requesting carrier" under section 251. There is nothing inconsistent with both requiring nondiscriminatory access and at the same time allowing an affiliate to be a requesting carrier. Moreover, we find nothing in the statute or in the First Interconnection Order that limits the definition of "requesting carrier" to non-affiliates. Thus, section 272 affiliates cannot be precluded under section 251 from qualifying as "requesting carriers" that are entitled to purchase unbundled elements or retail services at wholesale rates from the BOC.

314. We further conclude that section 272(g)(1) cannot be read as imposing a limitation on the ability of section 272 affiliates to exercise their rights under section 251(c)(3). We are not persuaded by AT&T's argument that, because section 272(g)(1) sets forth limited conditions under which section 272 affiliates may "market or sell" local exchange services, allowing those affiliates to purchase unbundled elements is inconsistent with the Act.[FN825] Rather, we agree with CCTA that section 272(g)(1) speaks only to marketing issues, and does not address the conditions ***22057** under which a section 272 affiliate may provide local exchange services. [FN826] Furthermore, we find AT& T's claim that allowing section 272 affiliates to provide local exchange service through unbundled elements will "artificially and decisively slant [the] playing field in the BOC's favor" unpersuasive,[FN827] because other telecommunications carriers will be able to provide local exchange service through unbundled elements on the same terms and conditions. AT&T's concern that the affiliate will be able to avoid access charges by obtaining the unbundled elements appears to be premised on the view that access charges are currently too high.[FN828] The issue of reforming access charges will, however, be addressed in a separate proceeding.[FN829] Moreover, we conclude that MCI's argument -- that opportunities for discrimination and cross-subsidy are greater when the BOC provides network elements to its affiliate than when it provides resold services -- is speculative. [FN830] To the extent that concerns over discrimination arise, there are safeguards in sections 251 and 252 to address such concerns.[FN831] We therefore decline to distinguish between a section 272 affiliate's ability to provide local service by reselling BOC local exchange service and its ability to offer such service by purchasing unbundled elements from the BOC.

****93** 315. We also conclude as a matter of policy that regulations prohibiting BOC section 272 affiliates from offering local exchange service do not serve the public interest. The goal of the 1996 Act is to encourage competition and innovation in the telecommunications market. We agree with the BOCs that the increased flexibility resulting from the ability to provide both interLATA and local services from the same entity serves the public interest, because such flexibility will encourage section 272 affiliates to provide innovative new services. [FN832] To the extent that there are concerns that the BOCs will unlawfully subsidize their affiliates or accord them preferential treatment,[FN833] we reiterate that improper cost allocation and discrimination are prohibited by existing Commission rules and sections 251, 252, and 272 of the 1996 Act, and that predatory pricing is prohibited by the antitrust laws. Our affiliate transaction rules, as modified by our companion Accounting Safeguards Order, address the BOCs' ability to engage in improper cost allocation. The rules in this Order and our rules in our First Interconnection Order and our Second Interconnection Order ensure that BOCs may not favor their affiliates. In sum, we find no basis in the record for concluding that competition in the local market would be harmed if a ***22058** section 272 affiliate offers local exchange service to the public that is similar to local exchange service offered by the BOC.

316. Although we conclude that the 1996 Act authorizes section 272 affiliates to purchase unbundled elements, we emphasize that BOC facilities and services provided to section 272 affiliates must be made available to others on the same terms, conditions, and prices provided to the BOC affiliate pursuant to the nondiscrimination requirements of sections 272 and 251(c)(3).[FN834] Thus, if a BOC affiliate is a requesting carrier under

section 251, the BOC is required to treat unaffiliated requesting carriers in the same manner that the BOC treats its affiliate, unless the unaffiliated entity has requested different treatment.[FN835] For example, if a BOC were to provide its section 272 affiliate with access to operational support systems (OSS) functions via a different method or system than it provides to requesting carriers under section 251, we would regard such discriminatory treatment as a violation of section 251(c)(3).[FN836] We believe such nondiscrimination requirements will prevent BOCs from providing special treatment to their affiliates.

317. State regulation. As mentioned above, several BOCs have already submitted applications to state regulatory commissions seeking authority to provide both local exchange services and interLATA services from the same affiliate.[FN837] Although we conclude that the 1996 Act permits section 272 affiliates to offer local exchange service in addition to interLATA service, we recognize that individual states may regulate such integrated affiliates differently than other carriers.[FN838]

*22059 IX. ENFORCEMENT

A. Reporting Requirements under Section 272

1. Background

**94 318. BOCs are required under Computer III to provide information to third parties regarding changes to the network and new network services and to report periodically on the quality and timeliness of installation and maintenance.[FN839] We sought comment in the Notice on what requirements or mechanisms were necessary to facilitate the detection of violations of the separate affiliate and nondiscrimination requirements of section 272.[FN840] We asked parties to comment on whether we should impose reporting and other requirements on BOCs analogous to those requirements imposed in the Computer III and subsequent ONA proceedings to ensure compliance with section 272 requirements.[FN841] We specifically requested comment on whether these requirements are sufficient to implement the section 272(c)(1) nondiscrimination requirement.[FN842]

2. Comments

319. BOCs and USTA generally argue against the imposition of additional reporting requirements in addition to those required in the 1996 Act to facilitate detection and adjudication of violations of section 272 requirements.[FN843] To the extent the Commission does impose additional requirements, several parties maintain, it should model them after Computer III/ONA requirements.[FN844] Many commenters, including BOC competitors, argue that additional reporting requirements are needed to ensure BOC compliance with the requirements of section 272.[FN845] TIA **22060 contends that if reporting requirements are inadequate, the section 272 safeguards will be rendered ineffective.[FN846]

320. On the specific issue of whether the reporting and other requirements of Computer III/ONA are sufficient to implement section 272(c)(1), commenters generally advance three alternative views. They argue that: (1) no rules or reporting requirements are necessary to implement section 272(c)(1);[FN847] (2) no rules are needed but that if the Commission were to adopt rules, it should extend the existing Computer III reporting and other requirements;[FN848] or (3) although the extension of Computer III requirements is necessary, these requirements are insufficient to implement section 272(c)(1) and additional reporting requirements should be imposed.[FN849]

3. Discussion

321. We conclude that none of the reporting or other requirements of Computer III/ONA is necessary to implement the requirements of section 272(c)(1) at this time. For the same reasons, we further conclude that (with the exception of section 272(e)(1)),[FN850] no reporting requirements are needed to facilitate the detection and adjudication of violations of the separate affiliate and nondiscrimination requirements of section 272.[FN851] As many commenters observe, reporting requirements serve two primary purposes. First, they act to deter potential anticompetitive behavior by requiring BOCs to provide objective proof of their compliance with **22061 the separate affiliate and nondiscrimination requirements. Second, they enable competitors, as well as

the Commission, to detect any potential violations of these requirements. We believe, however, that sufficient mechanisms already exist within the 1996 Act both to deter anticompetitive behavior and to facilitate the detection of potential violations of section 272 requirements.[FN852] Nevertheless, we intend to monitor compliance with section 272 requirements and, of course, reserve the ability to undertake appropriate measures in the event that future developments warrant.

****95** 322. The requirements of section 272(b), as discussed above, discourage anticompetitive behavior by the BOC by requiring the BOC and its section 272 affiliate to adhere to certain structural and transactional requirements, including the requirement to "operate independently." We therefore conclude that it is unnecessary to impose the Computer III/ONA reporting requirements in order to implement the separate affiliate and nondiscrimination requirements of section 272. Further, we note that even some commenters that support imposing Computer III/ONA reporting requirements on BOCs admit that they do not seem useful or practical.[FN853]

323. We find, instead, that several of the disclosure requirements established in the 1996 Act will facilitate the detection of anticompetitive behavior. Section 272(d), for example, requires that a BOC obtain and pay for a biennial joint federal/state audit to determine whether it has "complied with [section 272] and the regulations promulgated under this section ...."[FN854] We conclude that this broad audit requirement is intended to verify BOC compliance with the accounting and nonaccounting requirements of section 272, as implemented.[FN855] In addition, we note that, pursuant to section 271(d)(3)(B), a BOC may not receive authorization to provide in-region interLATA services until it shows, among other things, that the "requested authorization will be carried out in accordance the requirements of section 272."[FN856] In view of these requirements, we reject ITAA's suggestion that BOCs should submit to the Commission section 272 compliance plans, and periodic reports regarding their implementation of those plans, as unnecessarily burdensome.[FN857]

***22062** 324. In addition, the section 272(b)(5) requirement that all transactions between a BOC and its section 272 affiliate be reduced to writing and made publicly available should serve as a powerful mechanism both to detect violations of the section 272 requirements and to deter anticompetitive behavior. Similarly, we find that our interpretation of section 272(c)(1) as a flat prohibition against discrimination will work in conjunction with the section 272(b)(5) disclosure requirement to deter anticompetitive behavior. Under section 272(c)(1), any difference between the goods, services, and facilities given to a section 272 affiliate and those given to an unaffiliated entity may give rise to a claim of discrimination. Some commenters argue that the requirement of section 272(b)(5) should be extended to encompass not only transactions between a BOC and its section 272 affiliate, but also transactions between a BOC and unaffiliated entities.[FN858] We find, however, that section 272(b)(5), by its terms, applies only to the transactions between the BOC and its section 272 affiliate. Extending such a requirement to transactions between a BOC and unaffiliated entities would expand the scope of this section beyond the statutory requirements and is not necessary to detect the type of discrimination that section 272 is intended to prevent. As discussed below, parties may make a request for such reporting requirements in the context of their interconnection negotiations with BOCs. Presented with such a request, the BOC will have the obligation to negotiate this proposal in good faith pursuant to section 251(c)(1).[FN859]

****96** 325. In addition to the requirements of section 272, the Act also imposes other disclosure requirements on the BOCs that, in our view, largely address the concerns cited by parties arguing for additional reporting requirements. For example, section 251(c)(5) requires all incumbent LECs, including BOCs, to disclose publicly information about network changes that will affect a competing service provider's performance or ability to provide service or will affect the incumbent LEC's interoperabiltiy with other service providers.[FN860] In implementing this requirement in our Second Interconnection Order, we found that this disclosure about network changes "promotes open and vigorous competition" and provides "sufficient disclosure to insure against anticompetitive acts."[FN861] Similarly, section 273(c)(1) requires BOCs to maintain and file with the

Commission full and complete information of the protocols and technical requirements used for network connection, and section 273(c)(4) requires BOCs to provide "to interconnecting carriers providing telephone exchange service, timely information on the planned deployment of telecommunications equipment."[FN862]

***22063** 326. We also find that, beyond the reporting requirements mandated under the 1996 Act, there are other avenues by which a telecommunications carrier may obtain information relevant to detecting anticompetitive BOC conduct. For example, competitive telecommunications carriers, on their own initiative, could seek to incorporate certain performance and quality standards into their negotiated or arbitrated interconnection agreements to ensure that BOCs satisfy their obligation to provide service in a nondiscriminatory manner.[FN863] As noted above, BOCs, like any other incumbent LEC, are obligated to negotiate such requests in good faith pursuant to section 251(c) (1).[FN864] Through this process, competitive carriers will be able to tailor the interconnection agreement to include only those reporting requirements that they deem necessary or find to be most useful.[FN865] Further, pursuant to section 252(a), BOCs must file all interconnection agreements with the appropriate state commission and under section 252(h) these agreements must be made publicly available; the terms and conditions of these interconnection agreements, therefore, are on public record and available to competitors.[FN866] We also note that there are several state utility commissions that, pursuant to state administrative code, require LECs to conform to certain service standards and make service quality reports publicly available.[FN867] New York and Virginia, for example, require all LECs to file periodic service quality or standard of service reports.

327. We believe that the reporting requirements required by the 1996 Act, those required under state law, and those that may be incorporated into interconnection agreements negotiated in good faith between BOCs and competing carriers will collectively minimize the potential for anticompetitive conduct by the BOC in its interexchange operations. In addition to deterring potential anticompetitive behavior, these information disclosures will also facilitate detection of potential violations of the section 272 requirements. We, therefore, agree with those parties who argue that there is no need to impose additional reporting requirements at this time. Further, we note that even several parties who advocate the imposition of additional reporting ***22064** requirements recognize the inherent difficulty of identifying and preventing every type of discrimination through regulatory measures.[FN868]

****97** 328. Finally, we believe that the complaint process will bring violations of section 272 to the attention of the Commission. Congress has established a mechanism in section 271(d) to facilitate the enforcement of the requirements of section 272. Further, as discussed below, if the information necessary to prove a complainant's claim is not publicly available, the complainant has the opportunity to obtain the necessary documentation from the BOC in the context of an enforcement proceeding.[FN869] We expect that BOC competitors will be vigilant in detecting BOC deficiencies and will avail themselves of the expedited complaint process established by section 271(d)(6).[FN870]

B. Section 271(d)(6) Enforcement Provisions

329. As discussed in the Notice, section 271(d)(6) of the Communications Act gives the Commission specific authority to enforce the conditions that a BOC is required to meet in order to obtain Commission authorization to provide in-region interLATA services. Specifically, section 271(d)(6) states:

> (A) COMMISSION AUTHORITY. -If at any time after the approval of an application under [section 271(d)(3)], the Commission determines that a [BOC] 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 title V; or
>
> (iii) suspend or revoke such approval.
>
> (B) RECEIPT AND REVIEW OF COMPLAINTS.-The Commission shall establish procedures for the review of complaints concerning fail-

> ures by [BOCs] to meet conditions required for approval under [section 271(d)(3)]. Unless the parties otherwise agree, the Commission shall act on such complaint within 90 days.[FN871]

***22065 1. Commission's Enforcement Authority under Section 271(d)(6)**

a. Background

330. In the Notice, we sought to clarify the relationship between the Commission's authority under section 271(d)(6) and the Commission's existing enforcement authority under sections 206-209 of the Communications Act.[FN872] We tentatively concluded that, in the context of "complaints concerning failures by [BOCs] to meet the conditions required for approval under [section 271(d)(3)]," section 271(d)(6) generally augments the Commission's existing enforcement authority. We sought comment on whether, in a situation where a complaint alleges that a BOC has ceased to meet the conditions for approval to provide in-region interLATA telecommunications services and seeks damages as a result of the underlying alleged unlawful conduct, a Commission determination that the BOC has ceased to meet the conditions and the imposition of a section 271(d)(6)(A) sanction would fulfill the Commission's duty to "act on such complaint within 90 days."[FN873]

331. In order to approve a BOC's application to provide in-region interLATA services pursuant to section 271(d)(3), the Commission must determine that the BOC: meets the requirements of section 271(c)(1); satisfies the competitive checklist in section 271(c)(2)(B); complies with the requirements of section 272; and demonstrates that the approval of its application is consistent with the public interest, convenience, and necessity.[FN874] Section 271(d)(6)(A) sets forth various actions the Commission may take at any time after the approval of an application, and after notice and opportunity for a hearing, if it determines that a BOC has ceased to meet any of these conditions. In the Notice, we stated that the Commission may determine that a BOC has ceased to meet the conditions of its approval under section 271(d)(3) either via the resolution of an expedited complaint proceeding pursuant to section 271(d)(6)(B) or in a proceeding commenced on its own motion.

***22066 b. Comments**

****98** 332. Nearly all the commenters agree with our tentative conclusion that section 271(d)(6) generally augments the Commission's existing enforcement authority.[FN875] Commenters also agree that, where a complainant seeks damages or other relief that is not available under section 271(d)(6), the Commission need not decide the question of additional relief in order to "act on" the complaint within 90 days.[FN876] In addition, all parties agree that the Commission may determine whether a BOC has ceased to meet the conditions for entry either on its own motion or in the context of a complaint proceeding.[FN877]

c. Discussion

333. We affirm our tentative conclusion that section 271(d)(6) augments the Commission's existing enforcement authority. We reject both NYNEX's contention that the specific remedies of section 271(d)(6)(A) supersede the general sanctions contained in sections 206-209 of the Act as well as SBC's assertion that there is no statutory basis for applying the provisions of section 206-209 when a violation of section 271(d)(3) has been alleged. As AT&T observes, there is no support in the statute or its legislative history for the assertion that Congress intended to eliminate the damages remedy that applies to all other violations of Title II for violations of sections 271 and 272, especially in light of the competitive concerns that underlie the 1996 Act.[FN878] We also conclude that, where a complainant seeks damages as a result of the underlying alleged violative conduct, a Commission determination on whether the BOC has ceased to meet the conditions and the imposition of a section 271(d)(6)(A) sanction, where appropriate, would fulfill the Commission's statutory duty to "act on such complaint within 90 days."Completion of this statutory obligation, however, would not preclude the complainant from filing a supplemental complaint to determine the actual amount of damages.[FN879]

334. With respect to imposition of a Title V penalty (e.g., forfeiture and fines) pursuant to section 271(d)(6)(A)(ii), we note that Title V provides for a separate process that is initiated ***22067** by the issuance of a notice of apparent liability.[FN880] We find, there-

fore, that the Commission's obligation under section 271(d)(6) is satisfied with respect to Title V penalties if, within 90 days (or longer if parties agree) of receiving a complaint, the Commission, upon finding a BOC liable for unlawful conduct, issues a notice of apparent liability pursuant to section 503.[FN881] Finally, we affirm our tentative conclusion that the Commission may make a determination that a BOC has ceased to meet the conditions for entry either in a proceeding commenced on its own motion or via the resolution of a complaint proceeding. We further find, as most commenters suggest, that the Commission is not bound by the 90-day time constraint when it initiates a proceeding on its own motion.

2. Legal and Evidentiary Standards

a. Background and Comments

****99** 335. We sought comment in the Notice on the legal and evidentiary standards necessary to establish that a BOC has ceased to meet the conditions required for its approval to provide in-region interLATA service.[FN882] The majority of commenters assert that prescribing the elements of every claim that could conceivably be brought before the Commission would, at this point, be a fruitless exercise.[FN883] USTA maintains that, in order to invoke section 271(d)(6), the complainant's allegations and supporting proof must be of such character that, had it been presented prior to entry, the Commission would not have approved the BOC's application.[FN884] Similarly, MCI contends that a complainant seeking section 271(d)(6) relief should state that the defendant BOC is no longer meeting the conditions for entry, cite the specific requirements the BOC is violating, and describe how it is violating them.[FN885]

b. Discussion

336. MCI and USTA correctly point out that section 271(d)(6) cannot be invoked unless the complainant alleges that the BOC has failed to meet the conditions of entry under section 271(d)(3). We conclude, however, that the procedural aspects of this showing are best addressed ***22068** in our pending proceeding to adopt expedited complaint procedures.[FN886] We agree with the majority of commenters and conclude that, beyond the duties and obligations discussed elsewhere in this Order, we need not establish at this time substantive rules that would define the specific legal elements of a claim that a BOC has failed or ceased to meet the conditions for entry under section 271(d)(3). Although we recognize that the establishment of substantive standards or "bright line" tests could assist in expediting the ultimate disposition of complaints invoking the 90-day statutory resolution deadline under section 271(d)(6), the conditions for entry include not only compliance with the section 272 requirements, but also satisfaction of the requirements of the competitive checklist in section 271(c)(2)(B), as well as a demonstration that the BOC application is consistent with the public interest, convenience, and necessity. Given the widely varying circumstances that may arise in the context of complaints alleging failure to meet the conditions of entry, we conclude that it is best to determine a BOC's compliance or noncompliance with these requirements on the basis of concrete facts presented in particular cases, rather than by substantive rule in this notice-and-comment proceeding.[FN887]

337. For these same reasons, we agree with a majority of the commenters that it would be impractical to prescribe specific evidentiary standards for establishing violations of all of the substantive requirements contained in the competitive checklist. Just as the circumstances that arise in the context of 271(d)(6) complaints are likely to vary from case to case, so too will the information necessary to prove or disprove allegations that the BOC has ceased to meet the conditions of entry. We note as a general matter that, consistent with the requirements of the APA, the Commission's practice in formal complaint proceedings pursuant to section 208 has been to determine compliance or noncompliance with the Act or the Commission's rules and orders according to a "preponderance of the evidence" standard of proof.[FN888] Neither section 271 nor its legislative history prescribe a different standard of proof for establishing a BOC's failure to meet the conditions required for entry; we conclude, therefore, that this evidentiary standard applies equally to section 271(d)(6) complaints. In the paragraphs that follow, we address related ***22069** issues regarding what constitutes a prima

facie showing that a BOC has ceased to meet one or more of the conditions for interLATA entry and whether the burden of proof should shift to the defendant BOC once the complainant makes such a showing. Notwithstanding the existence of a prima facie showing or any shift in the burden of production, as discussed below, to the extent that a complainant and defendant BOC differ over the material facts underlying a section 271(d)(6) complaint, the preponderance of evidence standard will guide our ultimate disposition of the complaint.

3.Prima FacieStandard

a. Background

****100** 338. We sought comment in the Notice on what constitutes a prima facie showing that a BOC has ceased to meet one or more of the conditions for interLATA entry. We asked parties to comment on whether it is enough for complainants invoking the expedited complaint procedures under section 271(d)(6)(B) to plead, along with proper supporting evidence, "facts which, if true, are sufficient to constitute a violation of the Act or Commission order or regulation" in order to establish a prima facie showing that the BOC has ceased to meet the conditions for approval in section 271(d)(3).[FN889]

b. Comments

339. Bell Atlantic, CompTel, LDDS, Sprint, Time Warner, and TRA all agree that a prima facie case can be made by pleading facts that are sufficient to constitute a violation of the Act, Commission order, or regulation.[FN890] Bell Atlantic and Sprint observe, however, that, because a prima facie case will vary with each factual context, it is not possible to go further and define all the requirements for a prima facie case under various factual circumstances. NYNEX argues that simply permitting a complainant to allege facts without requiring the submission of "proper supporting evidence" constitutes a "serious denial of due process."[FN891] AT&T and MCI propose specific examples of BOC behavior that should be deemed sufficient to constitute prima facie showings that a BOC has ceased to meet the section 272 requirements.[FN892]

***22070 c. Discussion**

340. We conclude that complainants invoking the expedited complaint procedures of section 271(d)(6)(B) must plead, along with proper supporting evidence, facts which, if true, are sufficient to constitute a violation of the Act or Commission order or regulation in order to establish a prima facie showing that a BOC has ceased to meet the conditions for entry. Contrary to the suggestion of NYNEX and others, we did not propose in our Notice that it would be sufficient for a complainant to establish a prima facie case without the submission of "proper supporting evidence."[FN893] Such a showing is not permissible under either our present pleading requirements or under the rules we propose in the Enforcement NPRM on expedited complaint procedures. Under our present rules, a formal complaint is required to include certain categories of information, including specific facts and legal authorities upon which the complaint is based.[FN894] In addition, a formal complaint must identify or describe specifically and in detail the carrier conduct that forms the basis for the complaint as well as the nature of injury sustained.[FN895] Further, in our Enforcement NPRM, we recently proposed to augment these requirements by requiring that a formal complaint include facts supported by relevant documentation or affidavits.[FN896] Under our proposed rules, a complainant that fails to meet these pleading requirements may face either a dismissal of the complaint or a summary denial of the relief sought.[FN897] Thus, in light of the pleading requirements that presently exist, as well as those proposed in the Enforcement NPRM, we reject allegations by some commenters that the prima facie standard we are adopting in this Order will violate the defendant's procedural rights, allow a complainant to file only a "bare notice-type complaint," or invite a flood of frivolous suits designed to harass the BOCs.[FN898]

****101** 341. We reject the recommendations of AT&T and MCI that we adopt specific criteria the complainant must demonstrate in order to establish a prima facie showing. As we stated above, beyond the legal and evidentiary standards established in this proceeding, it would be imprudent for us, at this time, to attempt to propose a comprehensive list of the showings that com-

plainants will be required to make in order to demonstrate violations of the conditions of entry. Rather, we find it more appropriate to establish a generally applicable prima facie standard that is suitable for all complaints invoking section 271(d)(6), not just those alleging specific violations of the section 272 requirements.

***22071 4. Burden-Shifting and Presumption of Reasonableness**

a. Background

342. In the Notice, we sought comment on whether the pro-competitive goals of the Act are advanced by shifting the ultimate burden of proof from the complainant to a defendant BOC, not just in complaints alleging discrimination under section 202(a), but in all complaints alleging that a BOC has ceased to meet any of the conditions for its approval to provide interLATA services under section 271(d)(3). We sought comment specifically on whether the burden should shift to the defendant BOC once the complainant makes a prima facie showing that a BOC has ceased to meet the conditions of section 271(d)(3).[FN899]

343. We also observed in the Notice that in complaints challenging the rates, terms, and conditions of non-dominant carrier service offerings under sections 201(b) and 202(a), the Commission has effectively established a rebuttable presumption that such rates and practices are lawful.[FN900] We tentatively concluded that, in the context of complaints alleging that a BOC has ceased to meet the conditions required for the provision of in-region interLATA services, we will not employ a presumption of reasonableness in favor of the BOC or BOC affiliate, regardless of whether the BOC or BOC affiliate is regulated as a dominant or non-dominant carrier.[FN901]

b. Comments

344. All BOCs and USTA oppose shifting the ultimate burden of proof to the defendant BOC after the complainant has established a prima facie case that the BOC has ceased to meet the conditions of entry.[FN902] BOCs assert, among other things, that shifting the burden of proof would violate due process and the APA, result in the filing of frivolous, anticompetitive complaints, and require them to prove a negative by continually demonstrating that they are not violating the conditions of entry. Some BOCs, however, support the idea of shifting the burden of producing evidence.[FN903] All other commenters, including potential competitors, trade associations and DOJ, support shifting the burden of proof.[FN904] In addition, most commenters, ***22072** including DOJ, agree with our tentative conclusion that the Commission should not employ a presumption of reasonableness in favor of the BOC or BOC affiliate in complaints alleging that a BOC has ceased to meet the conditions of entry.[FN905]

c. Discussion

****102** 345. For the reasons and in the manner discussed below, we conclude that the burden of production with respect to an issue should shift to the BOC after the complainant has demonstrated a prima facie case that a defendant BOC has ceased to meet the conditions of entry. As an initial matter, we note that the term "burden of proof" has historically been used to describe two separate but related concepts. First, it has been used to describe the burden of persuasion with respect to a particular issue which, under the traditional view, never shifts from one party to the other at any stage in the proceeding. Second, it has been used to describe the burden of going forward with evidence necessary to avoid an adverse decision on that issue. This burden may shift back and forth between the parties.[FN906] Under the approach we adopt today, the burden of production or coming forward with evidence will shift to the defendant BOC once the complainant has established a prima facie case that the conditions of interLATA entry have been violated. In other words, the defendant BOC will have an affirmative obligation to produce evidence and arguments necessary to rebut the complainant's prima facie case or risk an adverse ruling. The complainant, however, will have the ultimate burden of persuasion throughout the proceeding; that is, to show that the "preponderance of the evidence" produced in the proceeding weighs in its favor. As explained more fully below, shifting the burden of production to the defendant BOC once a prima facie case has been made will require the party most likely to have relevant information

in its possession to produce the information at an early stage in the proceeding.

346. Currently, in a typical complaint proceeding, the complainant has the burden of establishing that a common carrier has violated the Communications Act or a Commission rule or order.[FN907] This burden of persuasion does not shift to the defendant carrier at any time in the proceeding.[FN908] As Sprint observes, however, in view of the statutory mandate to resolve section ***22073** 271(d)(3) complaints in 90 days, the Commission must balance the need for expeditious resolution of the complaint against the need to develop a full record.[FN909] We recognize, as do many commenters, that, even though some information may be publicly available, in many cases the BOC will be the sole possessor of certain information relevant to the disposition of the complainant's case. Our primary goal, as we expressed in the Notice, is to give full force and effect to the pro-competitive policies underlying section 271(d)(6) by ensuring the full and fair resolution of complaints challenging a BOC's compliance with the conditions for interLATA entry within the statutory 90-day period. We find that shifting the burden of production to the defendant BOC after a prima facie showing has been made by the complainant will facilitate our ability to reach this goal.

****103** 347. Further, as we observed in the Notice, effective enforcement of the conditions of interLATA entry, including the separate affiliate and nondiscrimination requirements of section 272, is critical to ensuring the full development of competition in the local and interexchange telecommunications markets. Many commenters argue that prompt enforcement of these conditions is essential not only to ensure the advent of true competition, but also to ensure that the BOCs take the conditions of entry seriously, particularly after they enter the in-region interLATA market. We conclude that shifting the burden of production to the BOC will facilitate the detection of anticompetitive behavior by the BOC and will enable us to adjudicate expeditiously complaints alleging violations of section 271(d)(3). Further, as mentioned above, in the context of a complaint proceeding, BOCs will have an affirmative obligation to produce all relevant evidence in their possession to rebut the complainant's claim or face an adverse ruling. Shifting the burden of production, therefore, may ultimately reduce the number of complaints filed against the BOCs by encouraging them to divulge exculpatory evidence before enforcement proceedings begin.

348. Many commenters that support shifting the burden of proof do not specify whether they advocate shifting the burden of persuasion or the burden of production. It is evident from the context of some comments, however, that a few commenters support a shift in the burden of persuasion, rather than a shift in the burden of production.[FN910] In response to these commenters, we find that most of the competitive concerns they raise in support of shifting the burden of persuasion are more than adequately addressed by shifting the burden of production.[FN911] For example, some parties that advocate shifting the burden of persuasion argue that complainants frequently will require specific information that is within the exclusive possession of the BOC in order to substantiate their claim. These parties contend that requiring the complainant to ***22074** maintain the burden of proof would result in needless, extensive discovery, and shifting the burden will give BOCs the incentive to produce information necessary to resolve the complaint. We conclude that these concerns, as well as our goal of facilitating the full and fair resolution of claims alleging violations of the conditions of entry within the statutory 90-day period, are satisfied without requiring BOCs to prove a negative in order to avoid liability, i.e., to prove, by a preponderance of the evidence, that they did not violate the conditions of entry. Further, we find it unnecessary to address most of the BOCs' arguments against burden-shifting because they are directed against shifting the ultimate burden of persuasion rather than the burden of production.

349. We do find it necessary, however, to respond to Ameritech's argument that informational asymmetry between the complainant and defendant is best addressed in the context of the discovery process.[FN912] Ameritech maintains that, if the Commission's discovery processes are too cumbersome, they ought to be reformed rather than replaced with burden-shifting.

[FN913] Similarly, other commenters propose various procedural requirements that we might impose to enable us to resolve complaints within the 90-day statutory window.[FN914] Moreover, a few commenters suggest that Alternative Dispute Resolution may be another mechanism by which to facilitate resolution of complaints alleging a violation of section 271(d)(3).[FN915]

****104** 350. In response to these arguments, we note that purpose of the Enforcement NPRM is to streamline our current procedures and pleading requirements so that we may expedite the processing of all formal complaints and resolve complaints within the deadlines imposed by the 1996 Act. We therefore find that it would be inadvisable to attempt to establish any new procedural rules in this proceeding. Moreover, as PacTel points out, we do not have an adequate record on which to base any such rules.[FN916] In response to Ameritech, we note that in the Enforcement NPRM we specifically proposed to reform our discovery process. Specifically, we sought comment on a range of options to eliminate or modify the discovery process, including prohibiting discovery as a matter of right, limiting the amount or scope of discovery, and allowing the state to set timetables for completion of discovery on an individual case basis.[FN917] By shifting the burden of production to the BOC after a prima facie showing has been made by the complainant, we are ensuring that information relevant to the complainant's claim is disclosed ***22075** early in the process, and thereby providing the Commission a sufficient record on which to make a decision, even in the potential absence of traditional discovery.

351. Finally, we affirm our tentative conclusion that, in the context of complaints alleging that a BOC has ceased to meet the conditions required for the provision of in-region interLATA services, we will not employ a presumption of reasonableness in favor of the BOC or BOC affiliate, regardless of whether the BOC or BOC affiliate is regulated as a dominant or non-dominant carrier. The presumption of lawfulness given to nondominant carrier rates and practices is employed in the context of complaints alleging violations of sections 201(b) and 202(b), where the complaint must demonstrate that the defendant's rates and practices are "unjust and unreasonable." We agree with MCI that a presumption of reasonableness is an irrelevant concept in the context of complaints alleging violations of the conditions of interLATA approval in section 271(d)(3), particularly given our interpretation of section 272(c)(1) as an unqualified prohibition on discrimination.[FN918]

5. Enforcement Measures under Section 271(d)(6)(A)

a. Background

352. Section 271(d)(6)(A) provides that if, at any time after approval of a BOC application, the Commission determines that the BOC has ceased to meet any of the conditions of its approval to provide interLATA services, the Commission may, after notice and opportunity for a hearing: (1) issue an order to the BOC to "correct the deficiency;" (2) impose a penalty pursuant to Title V;[FN919] or (3) suspend and revoke the BOC's approval to provide in-region interLATA services.[FN920]

353. In the Notice, we tentatively concluded that we will follow the procedures set forth in Title V to impose Title V penalties, including forfeitures, under section 271(d)(6)(A). As to the non-forfeiture enforcement measures, we sought comment on whether the Commission should exercise its enforcement discretion and impose these sanctions on an individual case basis, or whether we should establish specific legal and evidentiary standards for each type of sanction. Further, we sought comment on the appropriate "notice and opportunity for a hearing" for the ***22076** imposition of these non-forfeiture sanctions, both in the context of a complaint proceeding and on the Commission's own motion. We interpreted "opportunity for hearing" not to require a trial-type hearing before an Administrative Law Judge (ALJ).[FN921] We also tentatively concluded that Congress, by imposing a 90-day deadline for complaints, did not intend to afford the BOC trial-type hearings in enforcement proceedings pursuant to section 271(d).[FN922]

b. Comments

****105** 354. All commenters agree with our tentative conclusion to follow the Title V procedures to impose Title V penalties in enforcement actions alleging viola-

tions of the conditions of entry under section 271(d)(3). Commenters also agree that we should exercise our enforcement discretion and impose non-forfeiture sanctions on an individual case basis and should not attempt to establish specific legal and evidentiary standards for each type of sanction.[FN923] AT&T proposes, however, that any sanction must ensure that the penalty for the misconduct exceeds any competitive benefit the BOC may have received as a result of the violation and that the BOC not be permitted to continue to provide long distance until it has corrected its violation.[FN924] Commenters were generally split on the issue of whether "opportunity for hearing" requires a trial-type hearing before an ALJ prior to the imposition of a non-forfeiture sanction.[FN925]

c. Discussion

355. We affirm our tentative conclusion that we will follow the procedures set forth in Title V to impose Title V penalties in enforcement actions alleging violations of the conditions of entry under section 271(d)(3). As to non-forfeiture enforcement measures, we conclude that it is impractical, at this point in time, to prescribe the specific elements and factors that would warrant issuance of an order to "correct the deficiency" or an order suspending or revoking a BOC's approval to provide in-region interLATA service. We agree with AT&T that to do so would limit our remedial flexibility.[FN926] Nor do we find it appropriate to establish specific evidentiary standards; rather, our determination of which non-forfeiture measure to impose will ***22077** depend on the specific facts and circumstances presented in a particular case. We find, nevertheless, that a BOC will have a full and fair opportunity to submit evidence and arguments challenging the imposition of a prescribed sanction within the statutory 90-day period.

356. We conclude that the phrase "opportunity for hearing" in section 271(d)(6)(A) does not require a trial-type hearing before an ALJ prior to the imposition of non-forfeiture enforcement measures. Although we recognize, as PacTel and USTA suggest, that hearings may be necessary to resolve material questions of fact, such as when oral testimony or cross-examination is required, we do not agree that trial-type hearings before an ALJ are required before the Commission imposes any non-forfeiture sanction.[FN927] We find instead that, regardless of whether the Commission is imposing a non-forfeiture sanction in a proceeding commenced on its own motion or in the context of a complaint proceeding, the Commission can satisfy the hearing requirement of section 271(d)(6)(A) through written submissions rather than oral testimony.[FN928] Finally, we affirm our tentative conclusion that Congress, by imposing a 90-day deadline for complaints, did not intend to afford BOCs trial-type hearings in all enforcement proceedings pursuant to section 271(d)(6)(B).

X. FINAL REGULATORY FLEXIBILITY CERTIFICATION

****106** 357. The Commission certified in the Notice that the proposed rules would not have a significant economic impact on a substantial number of small entities because the proposed rules did not pertain to small entities.[FN929] Written public comment was requested on this proposed certification, and only one comment was received.[FN930] For the reasons stated below, we certify that the rules adopted herein will not have a significant economic impact on a substantial number of small entities. This certification conforms to the Regulatory Flexibility Act (RFA), as amended by the Small Business Regulatory Enforcement Fairness Act of 1996 (SBREFA).[FN931]

358. The RFA incorporates the definition of small business concerns set forth in 15 U.S.C. § 632 (small business concerns are independently owned and operated, not dominant in their field of operations, and meet any additional criteria established by the Small Business Administration (SBA)). The rules we adopt in this Order implement the non-accounting separate affiliate and nondiscrimination provisions of sections 271 and 272 of the Act, and will apply to ***22078** the BOCs when they enter previously restricted markets. The Notice stated that, because BOCs are dominant in their field of operations, they are by definition not small entities and therefore no regulatory flexibility analysis is required.[FN932] We now note as well that none of the BOCs is a small entity because each BOC is an affiliate of a Regional Holding Company (RHC), and all of the BOCs or

their RHCs have more than 1,500 employees.[FN933] The order also clarifies the joint marketing restrictions that will apply to the nation's largest interexchange carriers for an interim period pursuant to section 271.[FN934] The most recent data shows that only AT&T, MCI, and Sprint meet the statutory threshold.[FN935] Moreover, these carriers are not small entities under the SBA definition because each has more than 1,500 employees.[FN936]

359. NTCA contends that small incumbent LECs should be considered small entities under the SBA's definition, and therefore, the basis of the proposed certification was incorrect.[FN937] The certification contained in the Notice applied both to our proposed rules implementing sections 271 and 272 and to our proposed rules addressing LEC interexchange services. This Order implements only sections 271 and 272, and, as we have indicated, affects only the BOCs, AT&T, MCI and Sprint. NTCA's arguments concerning small incumbent LECs are not relevant to this Order, therefore, and will be addressed in a separate Order in this docket.

360. We therefore certify, pursuant to section 605(b) of the RFA, that the rules adopted in this order do not have a significant economic impact on a substantial number of small entities. The Commission shall provide a copy of this certification to the Chief Counsel for Advocacy of the SBA, and include it in the report to Congress pursuant to the SBREFA.[FN938] The certification will also be published in the Federal Register.[FN939]

****107 *22079** 361. Report to Congress. The Commission shall send a copy of this FRFA, along with this Order, in a report to Congress pursuant to the SBREFA, 5 U.S.C. § 801(a)(1)(A). A copy of this FRFA will also be published in the Federal Register.

XI. FURTHER NOTICE OF PROPOSED RULEMAKING

A. Information Disclosure Requirements under Section 272(e)(1)

1. Background

362. Section 272(e)(1) states that BOCs "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."[FN940] In the Notice, we sought comment on how to implement section 272(e)(1) and specifically inquired whether reporting requirements for service intervals analogous to those imposed by Computer III and ONA would be sufficient.[FN941] We concluded above, in Part VI.A, that specific public disclosure requirements are necessary to implement section 272(e)(1) effectively. We also noted that the record does not provide sufficient detail for us to determine whether the current ONA disclosure requirements are suitable for assessing compliance with section 272(e)(1), or whether another proposal, such as AT&T's proposed reporting requirements, would be a better approach.

2. Comments

363. AT&T, Teleport, and MCI support the imposition of reporting requirements to implement section 272(e)(1) and argue that the existing ONA installation and maintenance reporting requirements are insufficient.[FN942] AT&T suggests, for example, that the service interval reporting requirements established in the ONA proceeding measure average response times, and would not provide an adequate mechanism for determining whether a BOC is complying with section 272(e)(1).[FN943]

***22080** 364. AT&T proposes a reporting scheme that is based on measures it currently uses to monitor the quality of access services provided to it by LECs.[FN944] AT&T proposes that the BOCs report data in eleven categories, most of which are broken down into subcategories according to the type of access service provided. AT&T's proposal includes relatively specific units of measure for these categories, such as, for example, the percentage of circuits installed within each successive twenty-four hour period, until a ninety-five percent installation level is reached.[FN945] According to AT&T, LECs currently track information in these categories to monitor the service they provide to AT&T.[FN946] Teleport proposes a reporting format that includes eight

service categories for both installation and service performance.[FN947] MCI proposes categories based on those used in Automated Reporting Management Information Systems (ARMIS), including additional categories for billing disputes and payment intervals.[FN948] MCI proposes quarterly reporting broken down among the BOC, its affiliate, and all other unaffiliated entities.[FN949]

****108** 365. The BOCs oppose AT&T's proposal. Bell Atlantic, for instance, states that some of the categories in AT&T's proposal ask for information beyond the information AT&T currently requests from the BOCs.[FN950] Bell Atlantic further argues that AT&T improperly proposes that the BOCs report on intermediate checkpoints that do not provide information on the ultimate timeliness of the BOCs' provision of service.[FN951] Several BOCs argue that the information AT&T seeks is already available in existing ARMIS reports.[FN952] Ameritech opposes the monthly updates proposed by AT&T, favoring quarterly updates instead.[FN953] Ameritech opposes reporting that would provide detail below a BOC's total service region.[FN954] Ameritech favors consolidating AT&T's DS0 subcategories into a single DS0 category.[FN955] PacTel argues that the disclosure of ***22081** the absolute number of requests placed by its affiliate would reveal competitively sensitive information, and that disclosure of relative data, such as the percentage of missed appointments and average time intervals, would provide sufficient information to monitor BOC behavior.[FN956]

366. BOCs also oppose Teleport's proposal. PacTel disagrees with Teleport's suggestion that BOCs provide data for each exchange area in their territory.[FN957] PacTel also indicates that reporting on DS0 as a separate category would unfairly disadvantage the one interexchange carrier that dominates the DS0 market.[FN958]

367. While the BOCs generally oppose reporting requirements, they state that, if the Commission imposes a reporting requirement, the ONA format should be utilized because it is currently in place and is well-understood.[FN959] PacTel provides an example of a modified ONA report that reflects the services provided to interLATA telecommunications providers.[FN960] Ameritech indicates that it would not oppose a reporting requirement that compares data for BOC affiliates with aggregated data for all unaffiliated carriers.[FN961]

3. Discussion

368. In order to implement section 272(e)(1) effectively, we concluded that the BOCs must make publicly available the intervals within which they provide service to their affiliates. We concluded that, without this requirement, competitors will not have the information they require to evaluate whether the BOCs are fulfilling their requests for telephone exchange service and exchange access in compliance with section 272(e)(1).[FN962]

369. Method of information disclosure. In requiring the BOCs to disclose information regarding the service intervals within which they provide telephone exchange service and exchange access, we seek to avoid imposing any unnecessary administrative burdens on the BOCs, unaffiliated entities, and the Commission. Consequently, we tentatively conclude that the BOCs need not submit directly to the Commission the data that must be disclosed under section 272(e)(1). Instead, we tentatively conclude that, upon receiving permission to provide interLATA services pursuant to section 271, each BOC must submit a signed affidavit stating: 1) the BOC ***22082** will maintain the required information in a standardized format; 2) the information will be updated in compliance with our rules; 3) the information will be maintained accurately; and 4) how the public will be able to access the information. We tentatively conclude that, if a BOC makes any material change in the manner in which the information covered by the affidavit is made available to the public, it must submit an updated affidavit within 30 days of the change. Further, we tentatively conclude that each BOC must submit an annual affidavit each year thereafter, affirming that the BOC has complied with the four requirements set out above during the preceding year. We note that, in order to address potential complaints alleging discrimination pursuant to section 272(e)(1), the BOCs are likely to maintain information regarding the service they provide to

their affiliates and to unaffiliated entities, regardless of whether they must disseminate such information publicly or file it with the Commission. Therefore, we tentatively conclude that maintaining this information for public dissemination will not impose a significant additional burden on the BOCs. We seek comment on the foregoing tentative conclusions.

****109** 370. We tentatively conclude that the BOCs must make such information available to the public in at least one of their business offices during regular business hours, and must include this information in their annual affidavits. We seek comment on this tentative conclusion. We seek comment on whether this information should also be available electronically. For example, we seek comment on whether the BOCs should make this information available on the Internet, or whether the information should be available through another electronic mechanism. We also seek comment on other methods to facilitate the access and use of this information by unaffiliated entities, including small entities.

371. Service categories and units of measure. We seek comment on whether the BOCs should maintain the information described below in a standardized format, and seek comment on whether the format in Appendix C would be appropriate. Parties favoring an alternative format should submit examples of their proposals.

372. We seek comment on whether we should require the BOCs to maintain information in the following service categories: 1) successful completion according to desired due date, measured in a percentage; 2) time from the BOC-promised due date to circuit being placed in service, measured in terms of the percentage installed within each successive twenty-four hour period until ninety-five percent complete; 3) time to firm order confirmation, measured in terms of the percentage received within each successive twenty-four hour period until ninety-five percent complete; 4) time from PIC change requests to implementation, measured in terms of percentage implemented within each successive six hour period until ninety-five percent complete; 5) time to restore and trouble duration, measured in terms of the percentage restored within each successive one hour interval until ninety-five percent of incidents are resolved; 6) time to restore PIC after trouble incident, measured by percentage restored within each successive one hour interval until ninety-five percent restored; and 7) mean time to clear network and the average ***22083** duration of trouble, measured in hours. We seek comment on whether any additional categories proposed by commenters should be included.[FN963]

373. We have sought comment on whether the BOCs should disclose the interval between the due date promised by the BOC and the time a circuit is actually placed in service, measured in terms of the percentage of circuits installed within each successive twenty-four hour period.[FN964] We have sought comment on a category that differs from AT&T's proposed category, which would measure a BOC's response time in relation to a customer's desired due date, because we recognize that the BOCs have no control over a customer's requested due date.[FN965] We have proposed this category because the BOCs have control over the due date they promise at the time an order is placed. Further, the amount of delay in installing a circuit, and not just whether a due date was missed, may be a significant source of difficulty to a customer.[FN966] Because our service category differs from the service category proposed by AT&T, we seek comment on whether any corresponding changes to the unit of measure are warranted.

****110** 374. We seek comment on whether we should require the BOCs to disclose the BOC-promised due date itself, i.e., the length of the interval promised by the BOCs to their affiliates at the time an order is placed. Parties favoring such a disclosure should provide a detailed description of the appropriate unit of measure and level of aggregation for these disclosures.

375. We seek comment on whether our proposed service categories and units of measure for these categories are more appropriate to implement section 272(e)(1) than the categories currently included in the ONA installation and maintenance reports or than PacTel's proposed modification of ONA installation and maintenance reports.[FN967] Our proposal addresses the provision of exchange access to interLATA service providers, unlike ONA reports, which address the provision

of ONA unbundled elements to enhanced service providers.[FN968] The units of measure ***22084** in our proposal are more precise than the ONA intervals. We therefore seek comment on whether these measures will provide a better guide for unaffiliated entities and the Commission to determine whether the BOCs are complying with section 272(e)(1).

376. We recognize that our proposal is patterned after arrangements regarding the provision of access between interexchange carriers and LECs. We seek comment on whether these categories will also provide sufficient information to ISPs, and whether our proposal is sufficient to implement the nondiscriminatory provision of telephone exchange service in accordance with section 272(e)(1).

377. We do not believe that the requirements proposed here will impose a significant additional administrative burden on the BOCs, particularly because under our existing price cap rules, the BOCs must track service intervals for end-users as part of their service quality reporting requirements.[FN969] Nevertheless, we seek comment on whether, and to what extent, the industry or state regulators currently collect data using the service categories and units of measure included in our proposal, and the need for the BOCs to modify their current tracking systems to comply with our proposal.[FN970]

378. Several BOCs argue that extensive reporting of their affiliates' requests could cause competitive harm to their affiliates.[FN971] Specifically, PacTel argues that relative data such as the percentage of missed appointments and average time intervals provide sufficient information to monitor BOC behavior, and that the disclosure of absolute figures for the number of orders placed by an affiliate would reveal competitively sensitive proprietary information[FN972] We seek comment on whether our proposal, which uses percentages and averages and does not require disclosure of the absolute number of BOC affiliate requests, adequately protects the competitive interests of BOC affiliates. Any party favoring other levels of aggregation should provide a specific alternative proposal and explain why that alternative proposal is sufficient to implement section 272(e)(1). The party should also explain how its alternative proposal addresses commenters' concerns regarding the inadequacy of ONA installation and maintenance reporting requirements.[FN973]

****111 *22085** 379. Frequency of Updates and Length of Retention. We seek comment on how often the BOCs should be required to update the data that they must maintain.[FN974] For example, we seek comment on whether the BOCs should update the data quarterly or monthly. Parties should substantiate their positions by comparing the amount of underlying data used to produce ONA reports or other reports that are prepared on a quarterly basis, with the amount of data that will be used to produce the information in our proposal. We also seek comment on how long the BOCs must retain the data that they must maintain.

380. Levels of Aggregation. Because section 272(e)(1) states that the BOCs must fulfill requests for unaffiliated entities in the period of time that the BOCs provide service to "itself or to its affiliates," we seek comment on whether the BOCs should aggregate their own requests and the requests of all of their affiliates for each service category, or whether they should maintain data for each affiliate and themselves separately.[FN975] We seek comment on whether the BOCs should maintain separate data for each state in their service regions. Parties favoring other levels of aggregation, such as by BOC region, or by exchange area, should provide detailed support for their proposals.[FN976]

381. We seek comment on whether the BOCs should provide the information required in service categories four and six, described above in paragraph 372, by carrier identification code (CIC). We seek comment on whether the BOCs should provide the information required by service category seven in two subcategories: DS1 Non-Channelized and DS0. We seek comment on whether information in all other service categories should be broken down into three subcategories: DS3, DS1, and DS0. We also seek comment on whether, in the alternative, we should further divide the DS0 subcategory into DS0 Voice Grade and DS0 Digital, as suggested by AT&T.[FN977]

382. Consistency with other reporting requirements. We seek comment on the extent of overlap, if any, between the disclosure requirements we propose in this Further Notice and reporting currently required by state commissions.[FN978] We also seek comment on whether the information provided under ARMIS form 43-05 provides sufficient information to implement section 272(e)(1), as several BOCs suggest,[FN979] or whether further disaggregation of the ARMIS ***22086** service categories is necessary, as MCI suggests.[FN980] Parties that favor relying on ARMIS data alone, rather than imposing an information disclosure requirement under section 272(e)(1), should explain why ARMIS reports are sufficient, given that ARMIS reports must be filed on an annual basis and that they focus on services provided to the end-user, rather than services provided between carriers.[FN981] Any parties contending that sufficient information to enforce section 272(e)(1) is available from other sources should explain, in detail, the categories and units of measure included in these alternative sources as compared with our proposal. Finally, we note that much of Teleport's proposal appears directed toward the implementation of local competition by incumbent LECs, and therefore does not address service intervals provided by the BOCs. Teleport has raised many of these same proposals in its petition for reconsideration of the First Interconnection Order.[FN982] We tentatively conclude, therefore, that we should limit the scope of the proposals considered in this docket to requirements necessary to implement the service interval requirements of section 272(e)(1).[FN983] We seek comment on this tentative conclusion.

B. Procedural Matters

1. Ex Parte Presentations

****112** 383. This is a non-restricted notice-and-comment rulemaking proceeding.Exparte presentations are permitted, in accordance with the Commission's rules, provided that they are disclosed as required.[FN984]

2. Regulatory Flexibility Analysis

384. Section 603 of the Regulatory Flexibility Act, (RFA) as amended,[FN985] requires an initial regulatory flexibility analysis in notice-and-comment rulemaking proceedings, unless we ***22087** certify that "the rule will not, if promulgated, have a significant economic impact on a significant number of small entities."[FN986] A "small entity" is an entity that is " independently owned and operated, ... not dominant in its field of operation," and meets any additional criteria established by the Small Business Administration (SBA).[FN987] SBA regulations define small telecommunications entities in SIC code 4813 (Telephone Companies Except Radio Telephone) as entities with fewer than 1,500 employees.[FN988] This proceeding pertains to the BOCs which, because they are dominant in their field of operation and have more than 1,500 employees, do not qualify as small entities under the RFA.[FN989] We now note as well that none of the BOCs is a small entity because each BOC is an affiliate of a Regional Holding Company (RHC), and all of the BOCs or their RHCs have more than 1,500 employees.[FN990] We therefore certify, pursuant to section 605(b) of the RFA, that the rules, if promulgated, will not have a significant economic impact on a substantial number of small entities. The Secretary shall send a copy of this Further Notice, including this certification and statement, to the Chief Counsel for Advocacy of the Small Business Administration.[FN991] A copy of this certification will also be published in the Federal Register.

3. Initial Paperwork Reduction Act of 1995 Analysis

385. This Further Notice contains either a proposed or modified information collection. As part of its continuing effort to reduce paperwork burdens, we invite the general public and the Office of Management and Budget (OMB) to take this opportunity to comment on the information collections contained in this Further Notice, as required by the Paperwork Reduction Act of 1995, Pub. L. No. 104-13. Public and agency comments are due at the same time as other comments on this Further Notice; OMB comments are due 60 days from date of publication of this Notice in the Federal Register. Comments should address: (a) whether the proposed collection of information is necessary for the proper performance of the functions of the Commission, including whether the information shall have practical utility; (b) the accuracy of the Commission's burden estimates; (c) ways to enhance the quality, utility, and clarity of the information collected; and (d) ways to

minimize the burden of the collection of information on the respondents, including the use of automated collection techniques or other forms of information technology.

***22088 4. Comment Filing Procedures**

****113** 386. Pursuant to applicable procedures set forth in 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 February 19, 1997, and reply comments on or before March 21, 1997. To file formally in this proceeding, you must file an original and six copies of all comments, reply comments, and supporting comments. If you want each Commissioner to receive a personal copy of your comments, you must file an original and eleven copies. Comments and reply comments should be sent to Office of the Secretary, Federal Communications Commission, 1919 M Street, N.W., Room 222, Washington, D.C., 20554, with a copy to Janice Myles of the Common Carrier Bureau, 1919 M Street, N.W., Room 544, Washington, D.C., 20554. Parties should also file one copy of any documents filed in this docket with the Commission's copy contractor, International Transcription Services, Inc., 2100 M Street, N.W., Suite 140, Washington, D.C., 20037. Comments and reply comments will be available for public inspection during regular business hours in the FCC Reference Center, 1919 M Street, N.W., Room 239, Washington, D.C., 20554.

387. Comments and reply comments must include a short and concise summary of the substantive arguments raised in the pleading. Comments and reply comments must also comply with Section 1.49 and all other applicable sections of the Commission's Rules.[FN992] We also direct all interested parties to include the name of the filing party and the date of the filing on each page of their comments and reply comments. All parties are encouraged to utilize a table of contents, regardless of the length of their submission. Parties may not file more than a total of ten (10) pages of exparte submissions, excluding cover letters. This 10 page limit does not include: (1) written exparte filings made solely to disclose an oral exparte contact; (2) written material submitted at the time of an oral presentation to Commission staff that provides a brief outline of the presentation; or (3) written materials filed in response to direct requests from Commission staff.Exparte filings in excess of this limit will not be considered as part of the record in this proceeding.

388. Parties are also asked to submit comments and reply comments on diskette. Such diskette submissions would be in addition to and not a substitute for the formal filing requirements addressed above. Parties submitting diskettes should submit them to Janice Myles of the Common Carrier Bureau, 1919 M Street, N.W., Room 544, Washington, D.C., 20554. Such a submission should be on a 3.5 inch diskette formatted in an IBM compatible form using MS DOS 5.0 and WordPerfect 5.1 software. The diskette should be submitted in “read only” mode. The diskette should be clearly labelled with the party's name, proceeding, type of pleading (comment or reply comments) and date of submission. The diskette should be accompanied by a cover letter.

****114 *22089** 389. Written comments by the public on the proposed and/or modified information collections are due February 19, 1997, and reply comments must be submitted not later than March 21, 1997. Written comments must be submitted by the OMB on the proposed and/or modified information collections on or before 60 days after date of publication in the Federal Register. In addition to filing comments with the Secretary, a copy of any comments on the information collections contained herein should be submitted to Dorothy Conway, Federal Communications Commission, Room 234, 1919 M Street, N.W., Washington, D.C., 20554, or via the Internet to dconway@fcc.gov and to Timothy Fain, OMB Desk Officer, 10236 NEOB, 725 - 17th Street, N.W., Washington, D.C., 20503 or via the Internet to fain_t@al.eop.gov.

XII. ORDERING CLAUSES

390. Accordingly, IT IS ORDERED that pursuant to sections 1, 2, 4, 201-205, 215, 218, 220, 271, 272, and 303(r) of the Communications Act of 1934, as amended, 47 U.S.C. §§ 151, 152, 154, 201-205, 215, 218, 220, 271, 272, and 303(r) the REPORT AND ORDER IS

ADOPTED, effective 30 days after publication of a summary in the Federal Register. The collections of information contained within are contingent upon approval by the Office of Management and Budget.

391. IT IS FURTHER ORDERED that pursuant to sections 1, 2, 4, 201-205, 215, 218, 220, 271, 272, and 303(r) of the Communications Act of 1934, as amended, 47 U.S.C. §§ 151, 152, 154, 201-205, 215, 218, 220, 271, 272, and 303(r) the FURTHER NOTICE OF PROPOSED RULEMAKING IS ADOPTED.

392. IT IS FURTHER ORDERED that the Secretary shall send a copy of this FURTHER NOTICE OF PROPOSED RULEMAKING, including the regulatory flexibility certification, to the Chief Counsel for Advocacy of the Small Business Administration, in accordance with paragraph 603(a) of the Regulatory Flexibility Act, 5 U.S.C. §§ 601et seq.

**115 393. IT IS FURTHER ORDERED that the MFS Petition to Consolidate Proceedings in CC Docket Nos. 96-149, 85-229, 90-623, 95-20, and CCBPol 96-09 filed on July 25, 1996 is DENIED.

394. IT IS FURTHER ORDERED that Part 53 of the Commission's Rules, 47 C.F.R. § 53 is ADDED as set forth in Appendix B attached hereto.

FEDERAL COMMUNICATIONS COMMISSION

William F. Caton
Acting Secretary

FN1. Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56 (1996 Act), to be codified at47 U.S.C. §§ 151etseq. Hereinafter, all citations to the 1996 Act will be to the 1996 Act as it will be codified in the United States Code. The 1996 Act amended the Communications Act of 1934. We will refer to the Communications Act of 1934, as amended, as "the Communications Act" or "the Act."

FN2. See Joint Statement of Managers, S. Conf. Rep. No. 104-230, 104th Cong., 2d Sess. 1 (1996) (Joint Explanatory Statement).

FN3. We define the term "BOC" as that term is defined in 47 U.S.C. § 153(4).

FN4. SeeImplementation of the Local Competition Provisions in the Telecommunications Act of 1996, CC Docket No. 96-98, First Report and Order, FCC 96-325 (rel. Aug. 8, 1996) (First Interconnection Order), Motion for stay of the FCC's Rules Pending Judicial Review denied, FCC 96-378 (rel. Sep. 17, 1996), partial stay granted, Iowa Util. Bd. v. Federal Communications Commission, No. 96-3321, WL 589204 (8th Cir. Oct. 15, 1996) (Iowa Utilities Board v. FCC),Order Lifting Stay in Part, (8th Cir. Nov. 1, 1996); Implementation of the Local Competition Provisions in the Telecommunications Act of 1996, CC Docket No. 96-98, Second Report and Order, and Memorandum Opinion and Order, FCC 96-333 (rel. Aug. 8, 1996) (Second Interconnection Order); appeal docketedBell Atlantic Telephone Companies v. FCC, No. 90-567 (D.C. Cir. Sept. 16, 1996), People of the State of California v FCC, No. 96-3519 (8th Cir. Sept.23, 1996), SBC Communications Inc, v. FCC, No. 96-1414 (D.C. Cir. Nov. 1, 1996).

FN5. SeeFederal-State Joint Board on Universal Service , CC Docket No. 96-45, Recommended Decision, FCC 96J-3 (rel. Nov. 8, 1996) (Universal Joint Board Recommended Decision); Order Establishing Joint Board on Universal Service, CC Docket No. 96-45, Notice of Proposed Rulemaking, FCC 96-93 (rel. Mar. 8, 1996).

FN6. SeeAmendment of the Commission's Rules to Establish Competitive Service Safeguards for Local Exchange Carrier Provision of Commercial Mobile Radio Services, WT Docket No. 96-162, Notice of Proposed Rulemaking, Order on Remand, and Waiver Order, FCC 96-319 (rel. Aug. 13, 1996).

FN7. SeeCommon Carrier Bureau Seeks Suggestions on Forbearance, DA 96-798, Public Notice (rel. May 17, 1996); Policy and Rules Concerning the Interstate, Interexchange Marketplace; Implementation of Section 254(g) of the Communications Act of 1934, CC Docket No. 96-61, Second Report and Order, FCC 96-424 (rel. Oct. 31, 1996) (Second Interexchange Order).

FN8. Under the 1996 Act, a "local access and transport

area" (LATA) is "a contiguous geographic area (A) established before the date of enactment of the [1996 Act] by a [BOC] such that no exchange area includes points within more than 1 metropolitan statistical area, consolidated metropolitan statistical area, or State, except as expressly permitted under the AT&T Consent Decree; or (B) established or modified by a [BOC] after such date of enactment and approved by the Commission."47 U.S.C. § 153(25). LATAs were created as part of the Modification of Final Judgment's (MFJ) "plan of reorganization" under which the BOCs were divested from AT&T. United States v. Western Elec. Co., 552 F. Supp. 131 (D.D.C. 1982), aff'd sub nom.Maryland v. United States, 460 U.S. 1001 (1983); United States v. Western Elec. Co., 569 F. Supp. 1057 (D.D.C. 1983) (Plan of Reorganization), aff'd sub nom.California v. United States, 464 U.S. 1013 (1983); seealsoUnited States v. Western Elec. Co., No. 82-0192 (D.D.C. Apr. 11, 1996) (vacating the MFJ). Pursuant to the MFJ, "all BOC territory in the continental United States [was] divided into LATAs, generally centering upon a city or other identifiable community of interest."United States v. Western Elec. Co., 569 F. Supp. 990, 993 (D.D.C. 1983).

FN9. The 1996 Act defines "interLATA services" 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).

FN10. For purposes of this proceeding, we have defined the term "in-region state" as that term is defined in 47 U.S.C. § 271(i)(1). We note that section 271(j) provides that a BOC's in-region services include 800 service, private line service, or their equivalents that terminate in an in-region state of that BOC and that allow the called party to determine the interLATA carrier, even if such services originate out-of-region.Id. § 271(j); see alsoBell Operating Company Provision of Out-of-Region Interstate, Interexchange Services, CC Docket No. 96-21, Report and Order, FCC 96-288 (rel. July 1, 1996) (Interim BOC Out-of-Region Order) (addressing BOC provision of out-of-region, domestic, interstate, interexchange services).

FN11. 47 U.S.C. § 271(d)(3)(B). The Commission also must find, within 90 days, that the interconnection agreements or statements approved by the appropriate state commission under section 252 satisfy the competitive checklist contained in section 271(c)(2)(B), and that the BOC's entry into the in-region interLATA market is "consistent with the public interest, convenience and necessity."Id. §§ 271(d)(3)(A), (d)(3)(C). In acting on a BOC's application for authority to provide in-region interLATA services, the Commission must consult with the Attorney General and give substantial weight to the Attorney General's evaluation of the BOC's application. In addition, the Commission must consult with the applicable state commission to verify that the BOC complies with the requirements of section 271(c).Id. § 271(d)(2)(B).

FN12. The 1996 Act excludes electronic publishing (as defined in section 274(h)) and alarm monitoring (as defined in section 275(e)) from the separate affiliate requirement for interLATA information services.47 U.S.C. § 272(a)(2)(C).

FN13. The MFJ prohibited the BOCs from providing information services, providing interLATA services, manufacturing and selling telecommunications equipment, and manufacturing customer premises equipment (CPE). The information services restriction was modified in 1987 to allow BOCs to provide voice messaging services and to transmit information services generated by others.United States v. Western Elec. Co., 673 F. Supp. 525 (D.D.C. 1987); United States v. Western Elec. Co., 714 F. Supp. 1 (D.D.C. 1988). In 1991, the restriction on BOC ownership of content-based information services was lifted.United States v. Western Elec. Co., 767 F. Supp. 308 (D.D.C. 1991), stay vacated, United States v. Western Elec. Co., 1991-1 Trade Cases (CCH) ¶ 69,610 (D.C. Cir. 1991). The 1996 Act defines the term "AT&T Consent Decree" to refer to the MFJ and all subsequent judgments or orders related to the MFJ.47 U.S.C. § 153(3). In the text of this order, we use the term "MFJ" and "MFJ Court" only to refer to the AT&T Consent Decree as defined in the 1996 Act and by the decisions of the D.C. District Court. We will cite with particularity to the terms of the original Modification of Final Judgment cited at United States v.

Western Elec. Co. 552 F. Supp. at 226-232.

FN14. Implementation of the Non-Accounting Safeguards of Sections 271 and 272 of the Communications Act of 1934, as amended; and Regulatory Treatment of LEC Provisions of Interexchange Services Originating in the LEC's Local Exchange Area, CC Docket No. 96-149, Notice of Proposed Rulemaking, FCC 96-308 (rel. July 18, 1996).

FN15. SeeAccounting Safeguards for Common Carriers Under the Telecommunications Act of 1996, CC Docket No. 96-150, Notice of Proposed Rulemaking, 11 FCC Rcd 9054 (1996) (Accounting Safeguards NPRM).

FN16. Appendix A lists the parties that filed comments and replies.

FN17. First Interconnection Order at ¶ 4.

FN18. There are economies of scope where it is less costly for a single firm to produce a bundle of goods or services together, than it is for two or more firms, each specializing in distinct product lines, to produce them separately.See, e.g., John C. Panzar and Robert D. Willig, Economies of Scope, 71 Am. Econ. Rev. of Papers and Proc. 268 (1981); William J. Baumol, John C. Panzar, and Robert D. Willig, Contestable Markets and the Theory of Industry Structure 71-79 (1982); Daniel F. Spulber, Regulation and Markets 114-15 (1989).

FN19. Industry Analysis Division, Telecommunications Industry Revenue: TRS Worksheet Data (Com. Car. Bur. Feb. 1996). Tables 18 and 15 show that BOC local and access revenues in 1994 were $61.4 billion, while Competitive Access Provider (CAP) local and access revenues both in and out of BOC regions were only $281 million. We acknowledge that the CAP rate of growth is high, but their share of the overall end market is small and is the key factor.

FN20. Whenever a competing manufacturer sells its product at a price that exceeds the marginal cost of producing it, the possibility exists that a BOC would have an incentive to favor its affiliate's product over the competitor's, even when it is inefficient to do so. In general, the greater the difference between the competitor's price and cost, the greater the incentive for the BOC to favor its affiliate.

FN21. See, e.g., P.L. Joskow, Mixing Regulatory and Antitrust Policies in the Electric Power Industry: The Price Squeeze and Retail Market Competition, in Antitrust and Regulation: Essays in Memory of John J. McGowan 173-239 (F.M. Fisher ed., 1985); S.C. Salop and D.T. Scheffman, Raising Rivals' Costs, 73 Am. Econ. Rev. Papers & Proc. 267 (1983); T.G. Krattenmaker and S.C. Salop, Anticompetitive Exclusion: Raising Rivals' Costs to Achieve Power over Price, 96 Yale L.J. 209 (1986).

FN22. Access Charge Reform, CC Docket No. 96-262, Notice of Proposed Rulemaking, FCC 96-488 (rel. Dec. 24, 1996) (Access Charge Reform NPRM).

FN23. Specifically, the separate affiliate requirement applies to the origination of interLATA telecommunications services, other than specified incidental interLATA services, out-of-region services, and previously authorized activities.47 U.S.C. § 272(a)(2)(B).

FN24. Id. § 272(a)(2)(C).

FN25. Id. § 272(f)(1).

FN26. Id. § 272(f)(2).

FN27. 47 U.S.C. § 251(c)(3).

FN28. 47 U.S.C. § 251(c)(4).

FN29. Notice at ¶¶ 19-30. In the Notice, in addressing the scope of sections 271 and 272, we referred to "interLATA services" and "interLATA information services" separately (but in the same analysis). In part III.A.1 of this Order, we determine that "interLATA services" includes "interLATA information services." Accordingly, in the discussion in this section regarding the scope of sections 271 and 272, we refer only to interLATA services, but intend that the use of that term include interLATA information services.

FN30. Bell Atlantic at 2-3 (with regard to intrastate services); BellSouth at 3-6; SBC at 2-5 (Commission has

authority to implement and enforce section 272, but may not expand those requirements); USTA at 2-3, 7-8; USTA Reply at 3.

FN31. USTA at 3-4, 7-8; Bell Atlantic at 2-3; BellSouth at 3-6. BellSouth also argues that Congress did not grant the Commission authority to adopt "legislative" rules other than accounting rules, and therefore any rules the Commission adopts would constitute "interpretive" rules not entitled to judicial deference. BellSouth at 3 (citing Chevron, U.S.A., Inc. v. Natural Resources Defense Council, 467 U.S. 837, 842-43 (1984)); see also SBC at 2-5; U S West Reply at 4 (stating that, "although the Commission certainly retains its general rulemaking authority, it should tread lightly here"); PacTel at 3-4 (stating that there are ambiguities in section 272 for which the "Commission's guidance would be helpful," but stating that "[b]eyond those difficulties, the only specific areas where Congress envisioned further rulemaking by the FCC were accounting and record keeping").

FN32. Bell Atlantic at 2-3; BellSouth at 4-6; USTA at 8; SBC at 2-5 (stating that the Commission has authority to implement and enforce section 272, but may not expand those requirements).

FN33. Bell Atlantic at 3; USTA at 3.

FN34. AT&T Reply at 6-7 & n.14; TIA Reply at 6-7; Time Warner Reply at 4-6; see also LDDS Reply at 2-4; MCI Reply at 2 n.6.

FN35. AT&T Reply at 6 (citingMorton v. Ruiz, 415 U.S. 199, 231 (1974), and Chevron, U.S.A., Inc. v. Natural Resources Defense Council, 467 U.S. 837 (1984)); Time Warner Reply at 6.

FN36. AT&T Reply at 8-14; LDDS Reply at 3-4; MCI Reply at 2; see also PacTel at 3 (stating that "it would serve the interests of justice for the Commission to indicate in advance -- whether by rule or otherwise -- how it interprets any ambiguous requirements in § 272 so that the BOCs may be advised of what is necessary to comply"); Sprint Reply at 2-3.

FN37. Time Warner Reply at 5-6 (citing Nat'l Broadcasting Co. v. United States, 319 U.S. 190, 219 (1943) and Fed. Communications Comm'n v. Nat'l Citizens Comm.for Broadcasting, 436 U.S. 775, 776, 793 (1978)); see also Sprint Reply at 2-3 (stating that "[t]he ability of the Commission to use general rulemaking procedures to provide further guidance to the states and interested parties and to thereby explicate the policies and interpretations it intends to adopt in its administration of the statute entrusted to its jurisdiction so as to carry out the intent of Congress is at the heart of the regulatory process").

FN38. AT&T Reply at 6.

FN39. SeeUnited States v. Storer Broadcasting Co., 351 U.S. 192, 202-03 (1956).

FN40. Nat'l Broadcasting Co. v. United States, 319 U.S. 190, 219 (1943); see alsoFed. Communications Comm'n v. Nat'l Citizens Comm. for Broadcasting, 436 U.S. 775, 793 (1978).

FN41. SeeChevron, U.S.A., Inc. v. Natural Resources Defense Council, 467 U.S. 837 (1984); Morton v. Ruiz, 415 U.S. 199, 231 (1974) (holding that "[t]he power of an administrative agency to administer a congressionally created... program necessarily requires the formulation of policy and the making of rules to fill any gap left, implicitly or explicitly, by Congress").

FN42. See PacTel at 3.

FN43. Mead Corp v. Tilley, 490 U.S. 714, 723 (1989); Rastelli v. Warden, 782 F.2d 17, 23 (2d Cir. 1986); Drummond Coal v. Watt, 735 F.2d 469, 474 (11th Cir. 1984).

FN44. Joint Explanatory Statement at 113.

FN45. In addition, even if the removal were considered as more than inconsequential, we believe that the most plausible explanation is that Congress found such a specification unnecessary in light of sections 4(i), 201(b), 303(r), and long-standing principles of administrative law.

FN46. Notice at ¶ 25.

FN47. Id. at ¶ 21.

FN48. Id. at ¶ 22.

FN49. Id. at ¶ 23.

FN50. Id. at ¶ 25.

FN51. Id. at ¶ 26.

FN52. Id. at ¶ 28.

FN53. DOJ Reply at 4-7; New York Commission at 2-3 (but arguing that the Commission lacks authority to establish rules applicable to intrastate interLATA services); BellSouth at 15; PacTel at 3 (maintaining, however, that "Congress did not give the FCC plenary authority over those services to implement any and all regulations and safeguards whatsoever."); USTA at 7 (but arguing that section 272 is self-executing); AT&T at 8; AT&T Reply at 3-4; Sprint at 9-10; Sprint Reply at 4; MCI at 3; MCI Reply at 3-4; Excel at 11; CompTel at 3-6; TRA at 5-6; ITAA at 5-7.

FN54. DOJ Reply at 4-5 (arguing that the Act's definitions of the terms "LATA," and "interLATA" include intrastate services); AT&T at 8 (arguing that the Act's definition of the term "interLATA" applies to both intrastate and interstate services so long as they cross a LATA boundary); BellSouth at 15-16 (stating that "[t]he explicit grants of FCC jurisdiction in Sections 271 and 272 override the generic restrictions on FCC jurisdiction in Section 2(b)," but arguing that "these exemptions must be narrowly construed in order to preserve the meaning of 2(b)"); see also CompTel at 4, 5 (stating that "[p]ursuant to the MFJ, LATAs were defined based 'upon a city or other identifiable community or interest,' without limitation by state boundaries. Because a single state may contain more than one LATA, interLATA communications may be intrastate as well as interstate in nature."(footnote omitted)).

FN55. DOJ Reply at 6-7; AT&T at 8-9.

FN56. New York Commission at 2-4 (maintaining, however, that the Commission lacks authority to establish rules applicable to intrastate interLATA services); BellSouth at 15; USTA at 7; DOJ Reply at 5-6; AT&T at 8 n.7; MCI at 3; Excel at 11; CompTel at 5-6; TRA at 5-6; ITAA at 5-7.

FN57. New York Commission at 2-4 (maintaining, however, that the Commission lacks authority to establish rules applicable to intrastate interLATA services); BellSouth at 15; USTA at 7; AT&T at 8 n.7; DOJ Reply at 5-6; MCI at 3; Excel at 11; CompTel at 5-6; TRA at 5-6; ITAA at 5-7.

FN58. DOJ Reply at 7; MCI at 5; MCI Reply at 3-4; Excel at 11; ITAA at 5-6; CompTel at 5-6.

FN59. AT&T at 8-9; Sprint Reply at 5; MCI at 5; TRA at 6-7; see also DOJ Reply at 6-7.

FN60. Bell Atlantic at 3; BellSouth at 15-17; California Commission at 2-9; Missouri Commission at 3; New York Commission at 2-6; Ohio Commission at 2-5; Wisconsin Commission Reply at 3-11; NARUC at 4-7.

FN61. Bell Atlantic at 3; BellSouth at 15-16; California Commission at 2-3; Missouri Commission at 3; New York Commission at 3-5; Ohio Commission at 2; Wisconsin Commission Reply at 3; NARUC at 7.

FN62. New York Commission at 2-3.

FN63. Bell Atlantic at 3; BellSouth at 15-16; California Commission at 2-3; Missouri Commission at 2-3; New York Commission at 2-5; Ohio Commission at 2; NARUC at 7; see Wisconsin Commission Reply at 2, 6-8.

FN64. BellSouth at 15-17; California Commission at 5-6, 9; Missouri Commission at 2-3; New York Commission at 2-5; Ohio Commission at 2-5; Wisconsin Commission Reply at 3-5, 6-11; NARUC at 5-7.

FN65. New York Commission at 5-6; Wisconsin Commission Reply at 5-6; NARUC at 4-5.

FN66. NARUC at 7; Missouri Commission at 3; see also Bell Atlantic at 3.

FN67. California Commission at 3-4; Missouri Commission at 2; New York Commission at 3-4; NARUC at

6.

FN68. California Commission at 3; Missouri Commission at 2; New York Commission at 3; Ohio Commission at 2; Wisconsin Commission Reply at 4; NARUC at 5-7.

FN69. BellSouth at 15; PacTel at 3. BellSouth and PacTel argue that Congress did not intend to give the Commission plenary jurisdiction over intrastate interLATA services. BellSouth at 15; PacTel at 3.

FN70. Wisconsin Commission Reply at 7.

FN71. Notice at ¶ 21; DOJ Reply at 5-6; New York Commission at 2-4 (maintaining, however, that the Commission lacks authority to establish rules applicable to intrastate interLATA services); Missouri Commission at 2 (but arguing that states still retain jurisdiction, as they did under the MFJ); BellSouth at 15-16 (stating that "the FCC unquestionably has authority to entertain and act upon Section 271 applications for BOC interLATA entry, whether interstate or intrastate;" but asserting that "Congress did not intend to give the Commission plenary jurisdiction over intrastate interLATA services"); AT&T at 8 n.7; Excel at 11; CompTel at 5-6; TRA at 5-6; ITAA Comments at 5.

FN72. 1996 Act, § 601(a), 110 Stat. 56, 143 (to be codified as a note following 47 U.S.C. § 152).

FN73. SeeUnited States v. Western Electric Co., 552 F. Supp. 131, 227 (D.D.C. 1982) (subsequent history omitted).

FN74. Seeid., 552 F. Supp. at 229 (defining "exchange area" and "interexchange telecommunications"); United States v. Western Electric Co., 569 F. Supp. 990, 993 (D.D.C. 1983) (explaining that the term "local access and transport area" was being used as a replacement for "exchange area") (subsequent history omitted).

FN75. 47 U.S.C. § 153(21).

FN76. 47 U.S.C. § 153(25). As the court stated, "simply put, [a Standard Metropolitan Statistical Area] is a U.S. Department of Commerce designation that includes a city and its suburbs.United States v. Western Electric Co., 569 F.Supp. at 993, n.8.

FN77. States served by a BOC with only one LATA are: Delaware, Maine, New Hampshire, New Mexico, Rhode Island, South Dakota, Utah, Vermont, and Wyoming. The District of Columbia is covered entirely by one LATA that also covers portions of southern Maryland and northern Virginia. DOJ Reply at 6 n.4.

FN78. DOJ Reply at 6.

FN79. See Bell Atlantic at 3; BellSouth at 15-16; California Commission at 2-3; Missouri Commission at 2-3; New York Commission at 2-5; Ohio Commission at 2; Wisconsin Commission Reply at 3-4; NARUC at 5-7.

FN80. SeeIndustry Analysis Division, Telecommunications Industry Revenue: TRS Fund Worksheet Data, Table 6 (Com. Car. Bur. Feb. 1996).

FN81. DOJ Reply at 7.

FN82. DOJ Reply at 4-7; New York Commission at 2 (maintaining, however, that the Commission lacks authority to establish rules regarding intrastate services); AT&T at 8; AT&T Reply at 3-5; MCI at 3; MCI Reply at 3-4; Sprint at 9-10; Sprint Reply at 4; USTA at 7 (but arguing that section 272 is self-implementing); Excel at 11; CompTel at 3-4; TRA at 5-6; ITAA at 5-7; BellSouth at 15 (maintaining, however, that Congress did not intend to give the Commission plenary jurisdiction over intrastate interLATA services); PacTel at 3.

FN83. Bell Atlantic at 3; BellSouth at 15-16; California Commission at 2-3; Missouri Commission at 2-3; New York Commission at 2-5; Ohio Commission at 2; NARUC at 7; see Wisconsin Commission Reply at 2, 6-8.

FN84. 47 U.S.C. §271(d)(3).

FN85. Id. § 271(h) (emphasis added).

FN86. As noted above, with the exception of the New York Commission, the parties challenging the Commission's authority to preempt state regulation do not ad-

dress the issue of whether the term "interLATA services" should be interpreted -- by definition or otherwise -- to include both intrastate as well as interstate services.

FN87. Louisiana Public Service Comm'n v. Fed. Communications Comm'n, 476 U.S. 355, 377 (1986).Section 2(b) provides that, except as provided in certain enumerated sections [not including sections 271 and 272], "nothing in [the Communications Act] shall be construed to apply or to give the Commission jurisdiction with respect to ... charges, classifications, practices, services, facilities, or regulations for or in connection with intrastate communications service by wire or radio of any carrier."47 U.S.C. § 152(b).

FN88. See, e.g., Morales v. Trans World Airlines, Inc., 504 U.S. 374, 384 (1992).

FN89. Morales v. Trans World Airlines, Inc., 504 U.S. at 384.

FN90. 2 J. Sutherland, Statutory Construction § 22.34 (6th ed.); see alsoAmerican Airlines, Inc. v. Remis Industries, Inc., 494 F.2d 196, 200 (2nd Cir. 1974).

FN91. 47 U.S.C. § 251(e)(1).

FN92. Id. § 276(b).

FN93. Id. § 276(c).

FN94. Mead Corp v. Tilley, 490 U.S. at 723;Rastelli v. Warden, 782 F.2d at 23;Drummond Coal v. Watt, 735 F.2d at 474.

FN95. Joint Explanatory Statement at 113.

FN96. 1996 Act, § 601(c)(1), 110 Stat. 56, 143 (to be codified as a note following 47 U.S.C. § 152).

FN97. We note that a state would retain authority to enforce obligations relating to a BOC's provision of intrastate interLATA service, such as those identified by the Wisconsin Commission, through mechanisms other than denial or delayed of entry into the intrastate interLATA market.

FN98. 47 U.S.C. § 152(b).

FN99. SeeLouisiana Public Service Comm'n, at 377.

FN100. 47 U.S.C. § 272(a)(1).

FN101. Section 272(a)(2)(B) exempts from the separate affiliate requirement for origination of interLATA telecommunications services certain incidental interLATA services (as described in sections 271(g)(1), (2), (3), (5), and (6)), out-of-region services (as described in section 271(b)(2)), and previously authorized activities (as described in section 271(f)).

FN102. Although they are information services (see47 U.S.C. §§ 153(20), 272(a)(2)(C)), electronic publishing (as defined in section 274(h)) and alarm monitoring services (as defined in section 275(e)) are exempted from the section 272 separate affiliate requirements, and are subject to their own specific statutory separate affiliate and/or nondiscrimination requirements.

FN103. Notice at ¶ 41 n.80.

FN104. Id.

FN105. BellSouth at 19 n.45; accord ITAA at 7; MFS at 10; Ameritech Reply at 33; MFS Reply at 6-7; seealso MCI Reply at 8.

FN106. BellSouth at 22-23 & n.55; MFS Reply at 6.

FN107. MFS Reply at 6.

FN108. Id.;accord BellSouth at 23.

FN109. BellSouth at 21-22; see also Letter from Robert T. Blau, Vice President - Executive and Federal Regulatory Affairs, BellSouth, to Carol Mattey, Deputy Division Chief, Policy and Program Planning Division, Common Carrier Bureau, at 1-2 (filed Oct. 29, 1996) (BellSouth Oct. 29 Ex Parte).

FN110. MFS at 10.

FN111. Id.

FN112. MCI Reply at 8.

FN113. See BellSouth Oct. 29 Ex Parte at 1-2.

FN114. E.g., BellSouth at 19 n.45; accord ITAA at 7; MFS at 10; Ameritech Reply at 33; MFS Reply at 6-7; see also MCI Reply at 8.

FN115. 47 U.S.C. § 153(21).

FN116. See infra part III.F.2.

FN117. MCI Reply at 8.

FN118. See infra part III.F.2.

FN119. Notice at ¶ 32.

FN120. AT&T at 9-10; Comptel at 8; Excel at 12; ITAA at 5; USTA at 9; TRA at 8; MCI at 6; Sprint at 11; DOJ Reply at 8.

FN121. 47 U.S.C. § 153(21).

FN122. Notice at ¶ 33.

FN123. The Commission retains ancillary jurisdiction over unregulated services pursuant to Title I of the Communications Act of 1934.See47 U.S.C. § 154(i).

FN124. Id. at ¶ 56.

FN125. Ameritech at 63; Bell Atlantic, Exhibit 1, at 1; NYNEX at 38 n.52; PacTel at 4; US West at 19; USTA at 10; Sprint at 12-13; TIA at 15.

FN126. E.g., MCI at 22 (expressing no opinion as to manufacturing); PacTel at 18-19; TIA at 19-20; USTA at 18-19. Contra Ohio Commission at 8.

FN127. Ohio Commission at 8.

FN128. VoiceTel at 10-11.

FN129. 47 U.S.C. § 272(a)(1).

FN130. See VoiceTel at 10-11. In contrast, the Telecommunications Industry Association, a national trade association representing manufacturers and suppliers of telecommunications equipment and customer premises equipment (CPE), agrees that the BOCs may provide manufacturing activities through the same section 272 affiliate that provides interLATA telecommunications services and interLATA information services. TIA at 15-16.

FN131. Under the MFJ, the BOCs were not prohibited from providing CPE. In 1987, the Commission lifted the structural separation requirement it had imposed on BOC provision of CPE, based in part on a determination that the CPE industry was substantially competitive.See Furnishing of Customer Premises Equipment by the Bell Operating Companies and the Independent Telephone Companies, CC Docket No. 86-79, Report & Order, 2 FCC Rcd 143, 147, ¶ 25 (1987) (BOC CPE Relief Order); see alsoProcedures for Implementing the Detariffing of Customer Premises Equipment and Enhanced Services (Second Computer Inquiry), CC Docket No. 81-893, Memorandum Opinion & Order, 8 FCC Rcd 3891, 3891, ¶ 5 (1993).

FN132. See, e.g., Amendment of Section 64.702 of the Commission's Rules and Regulations (Second Computer Inquiry), CC Docket No. 20828, Final Order, 77 FCC 2d 384, 433, ¶ 128 (1980) (Computer II Final Order); Amendment of Section 64.702 of the Commission's Rules and Regulations (Third Computer Inquiry), CC Docket No.85-229, Report & Order, 104 FCC 2d 958, 1010, ¶ 95 (1986)(Computer III Phase I Order).

FN133. See, e.g., Policy and Rules Concerning the Interstate, Interexchange Marketplace, CC Docket No. 96-61, Second Report & Order, FCC 96-424, at ¶ ¶ 21-22 (rel. October 31, 1996) (Tariff Forbearance Order); Motion of AT&T to be Reclassified as a Non-Dominant Carrier, Order, 11 FCC Rcd 3271, 3278-3279, 3288, ¶¶ 9, 26 (1995) (AT&T Nondominance Order); Competition in the Interstate Interexchange Marketplace, CC Docket No. 90-132, Report & Order, 6 FCC Rcd 5880, 5887, ¶ 36 (1991) (First Interexchange Competition Order).

FN134. SeeImplementation of Section 273 of the Communications Act of 1934, as amended by the Telecommunications Act of 1996, CC Docket No. 96-254, Notice of Proposed Rulemaking, FCC 96-472 (rel. Dec. 11, 1996) (Manufacturing NPRM).

FN135. See, e.g., 47 U.S.C. § 273(c) (requiring the BOCs to file with the Commission and disclose to competitors and interconnecting carriers information regarding protocols and technical requirements for connection with and use of its telephone exchange service facilities); 47 U.S.C. § 273(e) (imposing nondiscrimination requirements, procurement standards, joint network planning and design requirements, and proprietary information protection requirements on BOCs and their manufacturing affiliates).

FN136. 47 U.S.C. § 272(b).

FN137. Notice at ¶ 35.

FN138. SeeManufacturing NPRM.

FN139. See, e.g., TIA at 10-15 (addressing the scope of the term "manufacturing"); US West Reply at 20-24 (arguing that section 273(b)(1) authorizes a BOC to participate with a manufacturer in the design of equipment on an unseparated basis and without awaiting section 271(d) authorization); see also ITI/ITAA Reply at 2-3, 9-10.

FN140. Section 271(i)(1) provides that "[t]he 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 the date of enactment of the Telecommunications Act of 1996."47 U.S.C. § 271(i)(1).

FN141. Section 3(4) provides that "[t]he term 'Bell operating company' ... (B) includes any successor or assign of any such company that provides wireline telephone exchange service; but (C) does not include an affiliate of such company, other than an affiliate described in subparagraph (A) or (B)."47 U.S.C. § 153(4).

FN142. Notice at ¶ 40. Specifically, we noted that Bell Atlantic had announced plans to acquire NYNEX, and that SBC and PacTel had announced their intent to merge.Id. at n.74. These mergers have not yet been completed, although on November 5, 1996, the Department of Justice announced that it was closing its investigation into the SBC-PacTel merger, having concluded that the merger does not violate the antitrust laws.See U. S. Department of Justice, Antitrust Division, Antitrust Division Statement Regarding Pacific Telesis/SBC Communications Merger, News Release, DOJ 96-542 (November 5, 1996). In this Order, as in the Notice, we intend that our analysis of mergers between or among BOCs be extended to the acquisition of one BOC by another.

FN143. Ameritech at 66; AT&T at 15; Comptel at 11-12; Excel at 3; USTA at 13; MCI at 14; Sprint at 15; ITAA at 9 n.22; New York Commission at 6; TRA at 10; DOJ Reply at 8.

FN144. AT&T at 15; Comptel at 12-13; Excel at 2-4; TRA at 10-11; Sprint at 15; Sprint Reply at 8-9; accord New York Commission at 6-7.

FN145. TRA at 10-11; Sprint at 15; accord MCI Reply at 7.

FN146. DOJ Reply at 9; USTA at 13-14; NYNEX Reply at 28-29; PacTel at 8.

FN147. USTA at 13-14; see also PacTel Reply at 5.

FN148. DOJ Reply at 9; USTA at 13; Ameritech at 66; Nynex Reply at 28-29; PacTel at 8.

FN149. Similarly, where such a transaction takes the form of an acquisition, rather than a merger, pursuant to 47 U.S.C. § 153(4)(B), the surviving BOC shall become the successor or assign of the acquired BOC, and thus the in-region area of the surviving BOC shall include the in-region states of the acquired BOC.

FN150. Section 3(1) further provides, "[f]or the purposes of this paragraph, the term 'own' means to own an equity interest (or the equivalent thereof) of more than 10 percent."47 U.S.C. 153(1).

FN151. USTA at 13-14; see Hart-Scott-Rodino Antitrust Improvement Act of 1976, P.L. 94-435, Title II, § 201, 90 Stat. 1390, codified at15 U.S.C. § 18a. The Hart-Scott-Rodino review process provides an opportunity for the DOJ or the FTC to block a proposed mer-

ger that would be anticompetitive and would violate federal antitrust laws. By subjecting merging BOCs to the scrutiny of these agencies during the period prior to consummation of their merger, Hart-Scott-Rodino review may curb their incentive to engage in discriminatory conduct during this period.

FN152. See MCI at 14-15 (citing Interim BOC Out-of-Region Order at ¶ 33).

FN153. Notice at ¶¶ 34, 38-39.

FN154. Id. at ¶ 34, 38.

FN155. Id. at ¶ 38.

FN156. Id. at ¶ 39.

FN157. BellSouth at 18-19, 24; NYNEX at 39; U S West at 15; cf. Ameritech at 63-64.

FN158. See, e.g., MCI Reply at 5-6; see also TRA at 9; ITAA at 8; Comptel at 10-11.

FN159. AT&T at 12 n.12; Comptel at 10-11; MCI at 9 n.21; Sprint at 13 n.10; MCI Reply at 4-5.

FN160. Bell Atlantic, Exhibit 1, at 2; BellSouth at 19.

FN161. Ameritech at 64-65 (arguing that interLATA information services are covered by the section 272(a)(2)(B)(iii) exemption because they are a subset of interLATA telecommunications services); PacTel at 5-6; Ameritech Reply at 32-33; PacTel Reply at 3 (arguing that the scope of section 272(a)(2)(B) is not limited to "telecommunications services" because the excepted categories of "incidental interLATA services" and "previously authorized services" both include information services); see also USTA at 12-13; NYNEX Reply at 28 n.87.

FN162. MCI at 8-9; Sprint at 13-14; ITAA at 8; Sprint Reply at 6.

FN163. U S West at 16-17.

FN164. MCI at 8-9; ITAA at 8; U S West at 16; MCI Reply at 6; Sprint Reply at 6.

FN165. Ameritech at 65; BellSouth at 19; NYNEX at 42; MCI at 8-9; Sprint at 13.

FN166. See NYNEX at 41-42; Bell Atlantic, Exhibit 1, at 2; PacTel at 6; SBC at 11; see also MFS Reply at 16.

FN167. PacTel at 5-6.

FN168. USTA at 12-13; Ameritech Reply at 33; cf. NYNEX at 39; Ameritech at 65-66 (section 272(h) allows one year for the BOCs to come into compliance with the section 272 requirements for all interLATA information services and interLATA telecommunications services they are providing pursuant to MFJ waivers that incorporate a separate affiliate requirement.)

FN169. U S West at 17-18.

FN170. MCI at 8-9; Sprint at 13-14; see also ITAA at 8 (specifically referring to interLATA information services).

FN171. NYNEX at 39-40; U S West at 17. NYNEX and U S West state that most waivers granted by the MFJ court for provision of interLATA telecommunications services contemplated integrated provision of these services, including numerous waivers to provide Extended Area Service (EAS) by expanding the local calling area of a small number of usually rural customers to include nearby "communities of interest" located in another LATA.

FN172. Ameritech at 63-64 (citing United States v. Western Electric, No. 82-0192 (D.D.C. Feb. 6, 1989) (granting a waiver for a reverse directory service provided through the telephone operating company) and United States v. Western Electric, No. 82-0192 (D.D.C. Sept. 11, 1989) (granting a waiver for "telecommunications devices for the deaf" (TDDS) and specifically finding that service to be an information service)).

FN173. Section 273(a), like section 271, incorporates a timing element, permitting a BOC to manufacture and provide equipment "if" the FCC authorizes that BOC (or its affiliate) to provide interLATA services under 271(d).47 U.S.C § 273(a). The Joint Explanatory State-

ment indicates that this section permits a BOC to engage in manufacturing after the Commission authorizes the company to provide interLATA services under section 271(d) in any in-region state. Joint Explanatory Statement at 154.

FN174. See Ameritech at 64-65.

FN175. See, e.g., NYNEX at 39-40; U S West at 17.

FN176. Ameritech at 63-64.

FN177. 47 U.S.C. § 160.

FN178. Notice at ¶ 41.

FN179. BellSouth at 20-25.

FN180. BellSouth at 20, 21-23.

FN181. Id. at 20-21.

FN182. AT&T at 12-13; LDDS at 12 n.10; MCI at 15; Sprint at 16; ITAA at 8-9; VoiceTel at 12; MCI Reply at 7-8; Sprint Reply at 11; CIX Reply at 4.

FN183. Sprint Reply at 11; CIX Reply at 5 n.4.

FN184. See supra part III.A.1.

FN185. 47 U.S.C. § 272(a)(2)(B).

FN186. MCI at 15; see also Sprint at 16; ITAA at 9; CIX Reply at 4.

FN187. MCI at 15 n.36 (citing League to Save Lake Tahoe, Inc. v. Trounday, 598 F.2d 1164, 1171 (9th Cir. 1979)).

FN188. BellSouth at 20-21.

FN189. The Commission has previously offered its opinion on the constitutionality of other statutory provisions.SeeInquiry Into Section 73.1910 of the Commission's Rules and Regulations Concerning the General Fairness Doctrine Obligations of Broadcast Licensees, 102 F.C.C. 2d 143, 155-156, ¶ 18 (1985).

FN190. BellSouth at 20.

FN191. Cf.Turner Broadcasting System, Inc. v. FCC, 114 S. Ct. 2445, 2456 (1994)(Turner). Protocol processing services are examples of information services that do not constitute commercial speech.See infra part III.F.1.

FN192. Like the must-carry rules at issue in Turner, the section 272 separate affiliate requirement "on [its] face impose[s] burdens and confer[s] benefits without reference to the content of speech." Turner, 114 S. Ct. at 2460.

FN193. Content-neutral time, place, and manner restrictions that serve a substantial government interest are constitutionally permissible.See, e.g., City of Renton v. Playtime Theatres, Inc., 475 U.S. 41,reh'g denied, 475 U.S. 1132 (1986).

FN194. Notice at ¶ 37.

FN195. 47 U.S.C. § 271(h).

FN196. Notice at ¶ 37.

FN197. USTA at 10-11; AT&T at 10; MCI at 9-10; Ameritech Reply at 37-38; BellSouth Reply at 25-26; see also BellSouth at 23-24; PacTel at 7; Time Warner at 14-15.But see ITAA at 8-9; CIX Reply at 4-5; cf. MCI Reply at 8.

FN198. BellSouth at 23; see also PacTel Reply at 3. BellSouth asserts that audio, video, and other programming services, interactive programming services (47 U.S.C. § 271(g)(1)), alarm monitoring (47 U.S.C. § 271(g)(1)), two-way interactive video and Internet services to schools (47 U.S.C. § 271(g)(2)), and information storage and retrieval systems (47 U.S.C. § 271(g)(4)) are all information services. BellSouth at 21 n.50; see also BellSouth Oct. 29 Ex Parte at 1-2.

FN199. Time Warner at 33-34 (specifically addressing video services); VoiceTel at 11 (section 254(k) provides authority); AT&T at 11 n.11 (sections 254(k) and 271(h) provide authority to impose separation requirements on a case-by-case basis); TRA at 9-10 (section 271(h) provides authority); NCTA at 3-4; MCI at 10-11 (incidental interLATA services should be subject to

Competitive Carrier separation requirements).

FN200. AT&T at 11-12.But see BellSouth Reply at 25-26 (sections 272(c), 272(e)(2), and 272(e)(4) apply by their terms to BOCs' dealings with affiliates).

FN201. MCI at 11-12.But see BellSouth Reply at 26 (arguing that, under the statute, the Commission cannot require BOCs to unbundle and provide nondiscriminatory access to interLATA transmission services that are components of incidental interLATA services, because although BOCs may provide incidental interLATA services on an unseparated basis without prior section 271 authorization, they may not provide unbundled interLATA transmission services on a similar basis).

FN202. NCTA at 4.

FN203. Ameritech at 66; Bell Atlantic, Exhibit 1, at 1; PacTel at 6-7; U S West at 18; USTA at 11; Ameritech Reply at 37.

FN204. Bell Atlantic, Exhibit 1, at 1-2; U S West at 18-19; see also PacTel at 7; PacTel Reply at 4-5.

FN205. USTA at 11; see also PacTel at 7; Ameritech Reply at 38.

FN206. 47 U.S.C. § 272(a)(2)(B)(i).

FN207. See supra parts III.C and III.D.

FN208. Congress deliberately excluded remote data storage and retrieval services that fall within section 271(g)(4) from the section 272(a)(2)(B)(i) exception. These services are interLATA information services.See infra paragraph 121.

FN209. 47 U.S.C. § 271(h) (emphasis added).

FN210. Although this determination reflects a refinement in our analysis of the meaning of sections 271(g)(1)(A), (B), and (C), and section 272(a)(2)(B)(i), since our issuance of the OVS Second Report and Order , it is consistent with our determination in that proceeding that BOCs are not required to provide open video services through a section 272 affiliate.SeeImplementation of Section 302 of the Telecommunications Act of 1996, CS Docket No. 96-46, Second Report & Order, FCC 96-249, ¶ 249 (rel. June 3, 1996) (OVS Second Report & Order); see also Time Warner at 33-34. In that proceeding, we concluded that section 653 was silent as to the need for a separate affiliate requirement on provision of open video services, and that Congress had expressly directed that Title II requirements not be applied to the establishment and operation of an open video system under section 653.OVS Second Report & Order at ¶ 249. To the extent we interpreted the section 272(a)(2)(B)(i) exemption more broadly in that proceeding than we do in this proceeding, we determine that our current interpretation is correct.

FN211. For simplicity, we refer below to the incidental interLATA services described by section 271(g)(2) as "educational interactive interLATA services."

FN212. For example, section 254(h)(2) of the Communications Act requires the Commission to establish rules to enhance the availability of advanced telecommunications and information services to public institutional users. See47 U.S.C. § 254(h)(2); Joint Explanatory Statement at 133. In addition, section 706(a) of the 1996 Act requires the Commission to "encourage the deployment on a reasonable and timely basis of advanced telecommunications capability to all Americans (including, in particular, elementary and secondary schools and classrooms)."See 1996 Act, § 706(a), 110 Stat. 56, 153 (codified as a note following 47 U.S.C. § 157).

FN213. We note that even if any of the section 271(g)(2) educational interactive interLATA services were subject to the section 272 separate affiliate requirements under section 272(a)(2)(C), section 10 mandates that we forbear from enforcing any statutory or regulatory requirement that is not necessary to ensure just and reasonable charges and practices in the telecommunications marketplace, or to protect consumers, if we determine that such forbearance would promote competition and is consistent with the public interest. See47 U.S.C. § 160.

FN214. As noted above, remote data storage and retrieval services that fall within section 271(g)(4) are subject to the section 272 separate affiliate require-

ments.

FN215. See, e.g., MCI at 10-11 (incidental interLATA services should be subject to Competitive Carrier requirements).

FN216. SeeAmendment of Section 64.702 of the Commission's Rules and Regulations(Computer III), CC Docket No. 85-229, Phase I, 104 FCC 2d 958 (1986)(Phase I Order),recon., 2 FCC Rcd 3035 (1987) (Phase I Reconsideration Order), further recon., 3 FCC Rcd 1135 (1988) (Phase I Further Reconsideration Order), second further recon., 4 FCC Rcd 5927 (1989) (Phase I Second Further Reconsideration Order); Phase I Order and Phase I Reconsideration Ordervacated, California v. FCC, 905 F.2d 1217 (9th Cir. 1990)(California I);Phase II, 2 FCC Rcd 3072 (1987)(Computer III Phase II Order),recon., 3 FCC Rcd 1150 (1988) (Phase II Reconsideration Order), further recon., 4 FCC Rcd 5927 (1989) (Phase II Further Reconsideration Order); Phase II Order vacated, California I, 905 F.2d 1217 (9th Cir. 1990); Computer III Remand Proceeding, 5 FCC Rcd 7719 (1990)(ONA Remand Order), recon., 7 FCC Rcd 909 (1992), pets. for review denied, California v. FCC, 4 F.3d 1505 (9th Cir. 1993) (California II); BOC Safeguards Order, 6 FCC Rcd 7571 (1991), vacated in part and remanded, California v. FCC, 39 F.3d 919 (9th Cir. 1994)(California III),cert. denied, 115 S. Ct. 1427 (1995).

FN217. See47 C.F.R. §§ 32.23; 32.27; 64.901 et seq. See alsoImplementation of the Telecommunications Act of 1996: Accounting Safeguards Under the Telecommunications Act of 1996, CC Docket No. 96-150, Report & Order, FCC 96-490, parts III.B.2.b, IV.B.4 (rel. Dec. 24, 1996) (Accounting Safeguards Order).

FN218. See, e.g., Bell Atlantic, Exhibit 1, at 1-2.

FN219. See47 U.S.C. §§ 251(c)(2) and (3). In addition, the Commission's Open Network Architecture (ONA) rules provide a mechanism for competitors that are not telecommunications carriers to obtain access to network elements and facilities used in the provision of information services.SeeComputer III Further Remand Proceedings: Bell Operating Company Provision of Enhanced Services, CC Docket No. 95-20, Notice of Proposed Rulemaking, 10 FCC Rcd 8360, 8374-75, ¶¶ 19-22 (1995)(Computer III Further Remand Proceedings). These ONA requirements apply to the BOCs regardless of whether they provide information services on an integrated or separated basis.SeeComputer III Remand Proceedings, CC Docket No. 90-368, Report & Order, 5 FCC Rcd 7719 (1990) (ONA Remand Order). As discussed infra at part III.F.4, the ONA requirements remain in place pending our completion of the Computer III Further Remand Proceedings.

FN220. SeeSecond Interconnection Order at ¶¶ 165-260. Pending conclusion of the Computer III Further Remand Proceedings, BOCs are also subject to the Computer III network disclosure requirements.SeeComputer III Phase II Order, 2 FCC Rcd at 3086, 3091-3093, ¶¶ 102, 134-140.

FN221. See AT&T at 11-12; see also infra parts V and VI.

FN222. See MCI at 11-12.

FN223. See BellSouth Reply at 26.

FN224. 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).

FN225. Notice at ¶ 42. Under the Commission's rules, the term “enhanced services” refers to “services, offered over common carrier transmission facilities used in interstate communications, which employ computer processing applications that act on the format, content, code, protocol or similar aspects of the subscriber's transmitted information; provide the subscriber additional, different, or restructured information; or involve subscriber interaction with stored information.” See47 C.F.R. § 64.702(a); see alsoNorth American Telecom-

munications Association Petition for Declaratory Ruling under Section 64.702 of the Commission's Rules Regarding the Integration of Centrex, Enhanced Services, and Customer Premises Equipment, ENF No. 84-2, Memorandum Opinion & Order, 101 FCC 2d 349 (1985) (NATA Centrex Order), recon., 3 FCC Rcd 4385 (1988) (NATA Centrex Reconsideration Order).

FN226. But see Ameritech at 69 (asserting that an enhanced service is not the same as an information service); Bell Atlantic, Exhibit 1, at 2-3 (asserting that "information services" do not include protocol processing services, which, with three limited exceptions, are considered "enhanced services").

FN227. See, e.g., PacTel at 9; USTA at 16; MCI at 16; Sprint at 16-17; ITAA at 12-14; IIA Reply at 1-3; CIX Reply at 3-4; ITI/ITAA Reply at 15.

FN228. See, e.g., BellSouth at 27 n.67 ("information services" include live operator telemessaging services, but "enhanced services" do not, because such services are not "computer processing applications"); AT&T at 12 n.13 (same); U S West at 11-12 ("enhanced services" are limited to those services offered over common carrier transmission facilities used in interstate communications); CIX Reply at 3.

FN229. The Common Carrier Bureau previously explained the term "protocol processing" as follows:

> "Protocol" refers to the ensemble of operating disciplines and technical parameters that must be observed and agreed upon by subscribers and carriers in order to permit the exchange of information among terminals connected to a particular telecommunications network. A subscriber's digital transmission necessarily consists of two components: information-bearing symbols and protocol-related symbols.... "Protocol processing" is a generic term, which subsumes "protocol conversion" and refers to the use of computers to interpret and react to the protocol symbols as the information contained in a subscriber's message is routed to its destination. "Protocol conversion" is the specific form of protocol processing that is necessary to permit communications between disparate terminals or networks.

IDCMA Petition for a Declaratory Ruling That AT&T's Interspan Frame Relay Service is a Basic Service, Memorandum Opinion & Order, 10 FCC Rcd 13,717, 13,717-18 n.5 (Com. Carrier Bur. 1995) (Frame Relay Order).

FN230. Bell Atlantic, Exhibit 1, at 2-3; accord US West at 13. Compare PacTel at 9 (Commission should exclude from the definition of information services the three types of protocol conversion that it does not consider to be enhanced services).

FN231. ITI/ITAA Reply at 15-16; Sprint Reply at 10.

FN232. See ITAA at 13-14; CIX Reply at 3-4.

FN233. Cf. ITAA at 14; IIA Reply at 1-3; ITI/ITAA Reply at 18.

FN234. U S West at 11-12.

FN235. See infra part III.G.2.

FN236. See Bell Atlantic, Exhibit 1, at 2; Sprint Reply at 10.

FN237. See ITI/ITAA Reply at 17.

FN238. SeeBell Operating Companies Joint Petition for Waiver of Computer II Rules, Order, 10 FCC Rcd 13,758, 13,766, ¶ 51 and 13,770-13,774, app. A (1995) (BOC CEI Plan Approval Order) (approving PacTel CEI plan for provision of enhanced protocol processing services, as well as CEI plan amendments by Bell Atlantic, BellSouth, SWBT, and U S West); see e.g., The Ameritech Operating Companies Plan to Provide Comparably Efficient Interconnection to Providers of Enhanced Protocol Processing Services, Memorandum Opinion & Order, 5 FCC Rcd 3231 (Com. Car. Bur. 1990); New England Telephone and Telegraph Company and New York Telephone Company Plan to Provide Comparably Efficient Interconnection to Providers of Enhanced Protocol Processing Services, Memorandum Opinion & Order, 5 FCC Rcd 56 (Com. Car. Bur. 1990); South Central Bell Telephone Company and Southern Bell Telephone and Telegraph Company Plan for Comparably Efficient Interconnection of

Enhanced Services Providers for Synchronous Protocol Processing Services, Memorandum Opinion & Order, 4 FCC Rcd 6825 (Com. Car. Bur. 1989).

FN239. We observe that the arguments raised by Bell Atlantic and U S West in favor of treating protocol processing services as telecommunications services are quite similar to arguments that the Commission considered and rejected nearly ten years ago in the Computer III Phase II Order, which affirmed the status of protocol processing as an enhanced service.SeeComputer III Phase II Order, 2 FCC Rcd at 3078, ¶ 43. In that decision, the Commission found, among other things, that protocol processing services were being effectively provided on a competitive, unregulated basis, and that reclassifying such services as basic services could cloud the regulatory boundary between basic and enhanced services.

FN240. To the extent that BOCs suggest that the section 272 separate affiliate requirements will impair their provision of protocol processing services, we note that under our Computer III rules, they may continue to provide intraLATA protocol processing services on an integrated basis, pursuant to a CEI plan that has been approved by the Commission. We agree with ITI and ITAA that requiring the BOCs to provide interLATA protocol processing service through a section 272 separate affiliate merely requires them to negotiate the same organizational boundaries and service integration issues that their ISP competitors routinely face.See ITI/ITAA Reply at 18-19.

FN241. Frame Relay Order, 10 FCC Rcd at 13,719, ¶¶ 14-16;Computer III Phase II Order, 2 FCC Rcd at 3081-82, ¶¶ 64-71. An example of the third type of protocol conversion occurs when a carrier converts from X.25 to X.75 formatted data at the originating end within the network, transports the data in X.75 format, and then converts the data back to X.25 format at the terminating end.

FN242. PacTel at 9.

FN243. See47 U.S.C. § 153(20).

FN244. PacTel at 9. PacTel argues that such treatment of "adjunct-to-basic" services would correspond to the statutory definition of information services, which "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); see also U S West at 13.

FN245. NATA Centrex Order, 101 FCC 2d at 359-361, ¶¶ 24-28. Adjunct-to-basic services include, interalia, speed dialing, call forwarding, computer-provided directory assistance, call monitoring, caller i.d., call tracing, call blocking, call return, repeat dialing, and call tracking, as well as certain Centrex features.

FN246. Notice at ¶ 44.

FN247. Id. at ¶ 44.

FN248. Id. at ¶ 45. For example, we asked whether an interLATA information service required non-transmission computer facilities used in the provision of the service located in a different LATA from the end-user, or non-transmission facilities located in different LATAs.

FN249. Id. at ¶ 46.

FN250. Id. at ¶ 47.

FN251. Ameritech at 67-69; AT&T at 13-14; Bell Atlantic, Exhibit 1, at 3-5; BellSouth at 25; MCI at 17; NYNEX at 42-45; PacTel at 10; U S WEST at 9; Bell Atlantic Reply at 15-17; NYNEX Reply at 27-28.

FN252. Bell Atlantic, Exhibit 1, at 3-5; see also U S West at 9; USTA at 14; Ameritech Reply at 34; U S West Reply at 29.But see Bell Atlantic Reply at 16 (arguing that interLATA information services are those services that a BOC or its affiliate carries across LATA boundaries, either through its own facilities, or via facilities it leases and resells as its own).

FN253. USTA at 14; USTA Reply at 17.

FN254. AT&T Reply at 4 n.6 (citing United States v.

Western Electric, 907 F.2d 160, 163 (D.C. Cir. 1990)); see also MCI at 17; MFS Reply at 9.

FN255. E.g., AT&T at 14; Bell Atlantic, Exhibit 1, at 4; BellSouth at 25; NYNEX at 43-44; PacTel at 12; U S West at 9-10; Ameritech Reply at 33-34; Bell Atlantic Reply at 15-16; BellSouth Reply at 23; PacTel Reply at 5; U S West Reply at 27-28.

FN256. E.g., ITAA at 9-10 (arguing that information services capable of providing access to or being accessed by interLATA facilities should be classified as interLATA information services); Sprint at 17-18; TRA at 11-12; ITI/ITAA Reply at 7-8; see also VoiceTel at 11-12; MFS Reply at 12-13.

FN257. NYNEX at 43, 45; Ameritech at 67 (specifying that the interLATA transmission service and the information service must be provided together for a single charge); see also AT&T at 13-14.

FN258. NYNEX at 43; U S West at 9-10; accord BellSouth at 25.

FN259. MCI Reply at 10-11 (the BOC must provide the interLATA telecommunications service through a section 272 affiliate, after having obtained Commission authorization under section 271); see also MFS Reply at 9 (customer must establish an independent relationship with interLATA telecommunications carrier).But see Time Warner Reply at 7-8 (arguing that allowing BOCs separately to provide intraLATA information service and interLATA transmission would permit them to circumvent Congress's clear separate affiliate requirement).

FN260. Bell Atlantic, Exhibit 1, at 5; see also Ameritech at 67-68; BellSouth Reply at 23-24.But see MCI Reply at 9-10; Sprint Reply at 10.

FN261. BellSouth at 25; see also U S West at 10; PacTel at 10-11; PacTel Reply at 6. PacTel notes that, under the MFJ, a BOC could route exchange and exchange access traffic outside the LATA in which it originated for call processing (switching and screening) so long as the traffic returned to the original LATA for termination or delivery to an interexchange provider's point of presence. PacTel at 10-11.

FN262. NYNEX at 45 n.61; Bell Atlantic, Exhibit 1, at 4; U S West at 21.But see MFS Reply at 15 (satisfaction of the CEI requirements is irrelevant to classification of services as interLATA or intraLATA).

FN263. MCI at 17; TRA at 11-12.

FN264. An interLATA transmission component is "necessary" to an interLATA information service if it must be used in order for the end-user to make use of the information service capability. For example, a BOC may provide data storage and retrieval services to customers throughout its service region, using one centralized computer data storage facility and dedicated interLATA transmission links that connect the end-user with the data storage facility. In this case, the dedicated interLATA transmission links are "necessary" to the BOC's provision of centralized, interLATA data storage and retrieval services.

FN265. SeeUnited States v. Western Electric, 907 F.2d 160, 163 (D.C. Cir. 1990) ("[W]hen information services are... bundled with leased interexchange lines, the activity is covered by the [AT&T Consent] decree.")

FN266. SeeUnited States v. Western Electric, 907 F.2d at 163 ("We do not agree... that a distinction should be drawn between leasing lines, on the one hand, and acquiring or constructing them, on the other. A taxi company, for instance, offers taxi service for hire whether or not it owns or leases its cabs. The critical distinction under the decree, is not whether the BOC owns the interexchange capacity, but whether it 'provide[s]' interexchange service to its customers.")

FN267. USTA Reply at 17.

FN268. See supra paragraph 31.

FN269. PacTel at 11-12. PacTel's example of a service that should be classified as an intraLATA information service, because it provides no direct interLATA benefit to the end-user, is a gateway service located in a distant LATA used by a San Francisco end-user to obtain information from San Francisco area libraries. PacTel's

example of an information service that provides a direct interLATA benefit to the end-user is an e-mail service that allows exchange of messages between users in different LATAs.

FN270. Sprint at 17-18; MFS Reply at 12-13 (because major ISPs do not provide intraLATA-only information services, the Commission should declare that all BOC information services are interLATA); see also VoiceTel at 11; ITI/ITAA Reply at 7-8.

FN271. See MFS Reply at 9.

FN272. NYNEX at 43; U S West at 10; Ameritech Reply at 33-34; Bell Atlantic Reply at 15-16.

FN273. E.g., Bell Atlantic, Exhibit 1, at 4-5; PacTel at 10-11 (under the MFJ, if a necessary interLATA transmission component of an information service is provided by an interexchange carrier that is not selected by the BOC, the service would not be considered a BOC-provided interLATA information service); see also Ameritech Reply at 33.

FN274. SeeBOC CEI Plan Approval Order, 10 FCC Rcd at 13,770-74, app. A.

FN275. See, e.g., Bell Atlantic, Exhibit 1, at 4-5.

FN276. We note that even when an information service and interLATA transmission service are ostensibly separately priced, if the BOC offers special discounts or incentives to customers that take both services, this would constitute sufficient evidence of bundling to render the information service an interLATA information service.

FN277. 47 U.S.C. § 271(g)(4).

FN278. E.g., Bell Atlantic, Exhibit 1, at 5; see also Ameritech at 67; BellSouth Reply at 23-24.

FN279. PacTel at 10-11; PacTel Reply at 6; see also BellSouth at 25; U S West at 10.

FN280. For example, under the MFJ, BOCs were permitted to use interLATA "Official Services Networks" to perform on a centralized basis certain network functions associated with their provision of exchange and exchange access services, including trunk and switch monitoring and control, call routing, directory assistance, repair calls, and internal business communications.SeeUnited States v. Western Electric, 569 F. Supp. 1057, 1097-1101 (D.D.C. 1983). Although BOCs were entitled to provide out-of-band signalling associated with their own exchange services on a centralized basis, the MFJ court denied their request to furnish such signalling to interexchange carriers on a centralized basis, instead requiring them to establish interconnection with their signal transfer points (STPs) in each LATA.See United States v. Western Electric, 131 F.R.D. 647 (D.D.C. 1990), aff'd, 969 F.2d 1231 (D.C. Cir. 1992). Under the 1996 Act, the BOCs are now entitled to provide signaling information associated with both intraLATA services and interLATA services on a centralized basis. See47 U.S.C. §§ 271(g)(5) and (g)(6).

FN281. PacTel at 10-11 (citing 47 U.S.C. § 153(20)).

FN282. See supra paragraph 107.

FN283. NYNEX at 45 n.61; Ameritech at 69 (noting that prior to 1991, BOCs required MFJ waivers to provide information services at all, even on an intraLATA basis); PacTel Reply at 6-7.

FN284. Bell Atlantic Telephone Companies Offer of Comparably Efficient Interconnection to Providers of Internet Access Services, Order, 11 FCC Rcd 6919 (Com. Car. Bur. 1996) (Bell Atlantic Internet Access CEI Plan Order).

FN285. SeeBell Atlantic Internet Access CEI Plan Order at ¶ 48 (citing Comments of MFS Communications Company, Inc., at 8 (filed April 12, 1996)).

FN286. Petition for Reconsideration of MFS Communications Company, Inc., CCBPol 96-09, at 12-20 (filed July 3, 1996). This petition was subsequently put on public notice by the Bureau.SeePleading Cycle Established on MFS Communications Company Inc.'s Petition for Reconsideration, CCBPol 96-09, Public Notice, DA 96-1102 (rel. Jul. 10, 1996).

FN287. SeePleading Cycle Established for Comments on SWBT's Comparably Efficient Interconnection Plan

for Internet Support Services, CC Docket Nos. 85-229, 90-623 & 95-20, Public Notice, DA 96-1031 (rel. June 26, 1996).

FN288. Petition to Consolidate Proceedings by MFS Communications Company, Inc. (filed July 25, 1996).

FN289. MFS at 7-9, 11-12; MFS Reply at 10-12; see also ITAA at 12 n.31.

FN290. U S West at 11; Ameritech Reply at 34; PacTel Reply at 7-8; USTA Reply at 17; SBC Reply at 35-36; U S West Reply at 25-26.

FN291. The Internet is an interconnected global network of thousands of interoperable packet-switched networks that use a standard protocol, Transmission Control Protocol/Internet Protocol (TCP/IP), to enable information exchange.SeeUniversal Service Joint Board Recommended Decision at ¶ 457. An end-user may obtain access to the Internet from an Internet service provider, by using dial-up or dedicated access to connect to the Internet service provider's processor. The Internet service provider, in turn, connects the end-user to an Internet backbone provider that carries traffic to and from other Internet host sites.

FN292. Amendment of Section 64.702 of the Commission's Rules and Regulations, 77 FCC 2d 384 (1980) (Computer II Final Order), recon., 84 FCC 2d 50 (1980)(Computer II Reconsideration Order),further recon., 88 FCC 2d 512 (1981) (Computer II Further Reconsideration Order), affirmed sub nom.Computer and Communications Industry Ass'n v. FCC, 693 F.2d 198 (D.C. Cir. 1982), cert. denied, 461 U.S. 938 (1983).

FN293. See supra note 217 for full citation for Computer III proceeding.

FN294. SeeFiling and Review of Open Network Architecture Plans, 4 FCC Rcd 1 (1988)(BOC ONA Order), recon., 5 FCC Rcd 3084 (1990)(BOC ONA Reconsideration Order);5 FCC Rcd 3103 (1990) (BOC ONA Amendment Order), erratum, 5 FCC Rcd 4045,pets. for review denied, California v. FCC, 4 F.3d 1505 (9th Cir. 1993), recon., 8 FCC Rcd 97 (1993) (BOC ONA Amendment Reconsideration Order); 6 FCC Rcd 7646 (1991) (BOC ONA Further Amendment Order); 8 FCC Rcd 2606 (1993) (BOC ONA Second Further Amendment Order), pet. for review denied, California v. FCC, 4 F.3d 1505 (9th Cir. 1993) (collectively referred to as the ONA Proceeding).

FN295. Notice at ¶ 48-49.

FN296. Id. at ¶¶ 49-50.

FN297. Computer III Further Remand Proceedings, 10 FCC Rcd at 8360.

FN298. Bell Atlantic, Exhibit 1, at 5-6; NYNEX at 47-48; see also LDDS Worldcom at 12 n.10.

FN299. BellSouth at 27-28; PacTel at 13; SBC at 13-17; U S West at 20; USTA at 15-16; Bell Atlantic Reply at 17; PacTel Reply at 14-15.

FN300. TRA at 12; MCI at 17, 19-20; Sprint at 18-19; MCI Reply at 13; cf. ATSI at 8-13 (arguing that a minimum set of interconnection points and unbundled elements should be made available to information service providers).

FN301. Compare MCI at 19; ITAA at 11-12; MCI Reply at 14; CIX Reply at 6-7; with U S West at 20-21 (arguing that the Commission should harmonize the Computer III and ONA requirements with the provisions of the 1996 Act, to develop a single regulatory structure for the provision of information services).

FN302. BellSouth at 26-28; PacTel at 13.

FN303. U S West at 20; USTA at 15; SBC Reply at 12-14; YPPA Reply at 5.

FN304. ITI/ITAA Reply at 11-12.

FN305. See47 U.S.C. § 272(a)(2)(C).

FN306. See supra part III.F.2.

FN307. SeeBOC CEI Plan Approval Order, 10 FCC Rcd at 13,770-74, app. A.

FN308. BOCs currently provide intraLATA information

services on an integrated basis pursuant to service-specific CEI plans.SeeBell Operating Companies' Joint Petition for Waiver of Computer II Rules, 10 FCC Rcd 1724 (1995) (Interim Waiver Order). Contrary to the assertions of MCI and ITAA (see MCI at 18; ITAA at 11 & n.30), we concluded that California III returned the regulation of information services not to a Computer II structural separation regime, but rather to a Computer III service-specific CEI plan regime.BOC CEI Plan Approval Order, 10 FCC Rcd at 13,762, ¶ 22 (1995).

FN309. See Bell Atlantic, Exhibit 1, at 6.

FN310. See NYNEX at 47-48.

FN311. We have already initiated a proceeding in which we are examining which, if any, of the Commission's CPNI requirements should be retained in light of the CPNI restrictions set forth in section 222.See Implementation of the Telecommunications Act of 1996: Telecommunications Carriers' Use of Customer Proprietary Network Information and Other Customer Information, CC Docket No. 96-115, Notice of Proposed Rulemaking, 11 FCC Rcd 12,513 (1996) (CPNI NPRM).

FN312. CIX Reply at 8.

FN313. First Interconnection Order at ¶ 995.

FN314. See, e.g., U S West at 20-21.

FN315. See NYNEX at 49.

FN316. See, e.g., Computer II Final Order, 77 FCC 2d at 433, ¶ 128;Computer III Phase I Order, 104 FCC 2d at 1010, ¶ 95.

FN317. See, e.g., Tariff Forbearance Order at ¶¶ 21-22; AT&T Nondominance Order, 11 FCC Rcd at 3278-3279, 3288, ¶¶ 9, 26;First Interexchange Competition Order, 6 FCC Rcd at 5887, ¶ 36.

FN318. Frame Relay Order, 10 FCC Rcd at 13,719, ¶ 13.

FN319. NYNEX at 48; see also U S West at 20.

FN320. USTA at 15.

FN321. SeeONA Remand Order, 5 FCC Rcd at 7719.

FN322. Notice at ¶ 51.

FN323. SeeImplementation of the Telecommunications Act of 1996: Telemessaging, Electronic Publishing, and Alarm Monitoring Services, CC Docket No. 96-152, Notice of Proposed Rulemaking, FCC 96-310 (rel. July 18, 1996) (Electronic Publishing NPRM).

FN324. Notice at ¶ 53.

FN325. Id. This "financial interest or control" test is derived from the MFJ definition of "electronic publishing." SeeUnited States v. Western Electric, 552 F. Supp. at 178, 181.

FN326. See, e.g., Ameritech at 70; USTA at 17-18; Ameritech Reply at 36; cf. MFS at 17.

FN327. See e.g., Bell Atlantic, Exhibit 1, at 6; PacTel at 15-16; see also NYNEX at 46 (classification of services as electronic publishing should be done in Electronic Publishing proceeding).

FN328. PacTel at 14-15; Ameritech at 70-71.But see U S West at 15 (test should be the BOC's ability to control the content of information provided to end-users).

FN329. MCI at 21.

FN330. ITAA at 15-16; AT&T Reply at 4 n.7.

FN331. The Commission may also consider whether the BOC has "generated or altered" the content of information provided to end-users, as Ameritech suggests.See Ameritech Reply at 37.

FN332. ITAA at 15-16.

FN333. Accord Bell Atlantic Reply at 18-19.

FN334. AT&T Reply at 4 n.7.

FN335. 47 U.S.C. § 153(20).

FN336. Notice at ¶ 54. The 1996 Act defines "telemessaging" as "voice mail and voice storage and retrieval services, any live operator services used to re-

cord, transcribe, or relay messages (other than telecommunications relay services), and any ancillary services offered in combination with these services."47 U.S.C. § 260(c). LECs must provide telemessaging services in compliance with section 260, which is the subject of a separate proceeding. SeeElectronic Publishing NPRM.

FN337. Notice at ¶ 54.

FN338. Bell Atlantic, Exhibit 1, at 5; BellSouth at 25 n.61; AT&T at 12 n.13, 14-15; Sprint at 16-17 n.12; see also ITAA at 15.

FN339. ITAA at 15; see also MCI Reply at 12.

FN340. PacTel at 16; PacTel Reply at 9; see also MCI at 21-22 (questioning whether live operator services can be considered "information services").But see MCI Reply at 12 (conceding that live operator services constitute information services).

FN341. 47 U.S.C. § 260(c). In general, these services involve live operators that answer calls intended for unavailable end-users, transcribe messages, and relay them to the end-user. Live operator services are often used in health care contexts, where "person-to-person" communication is important.See ATSI at 2.

FN342. As discussed above at ¶ 103, live operator services do not appear to fall within the Commission's definition of "enhanced" services, because they do not employ "computer processing applications." Thus, they are an example of one area in which the "information service" definition is broader than that of "enhanced services."

FN343. One example of an telemessaging service that is an interLATA information service might be a voicemail service that is bundled with a personal 800 number, offered to the customer for a single price.See NYNEX at 44.

FN344. Accounting Safeguards Order part IV.B.1.c.

FN345. 47 U.S.C. § 272(b)(1).

FN346. Notice at ¶ 57.

FN347. 47 U.S.C. § 274(b).

FN348. Notice at ¶ 60.

FN349. Id. at ¶ 57.

FN350. Policy and Rules Concerning Rates for Competitive Common Carrier Services and Facilities Authorizations Thereof, CC Docket No. 79-252, Fifth Report and Order, 98 FCC 2d 1191, 1198 (1984) (Competitive Carrier Fifth Report and Order).

FN351. Notice at ¶ 59.

FN352. BOC Separations Order, 95 FCC 2d 1117 (1983).

FN353. Computer II Final Order, 77 FCC 2d at 477, ¶¶ 238-39.

FN354. Id. at 476, 480-81, ¶¶ 236, 245-49.

FN355. Id. at 477-78, ¶ 240.

FN356. Id. at 478-80, ¶¶ 241-44;Computer II Reconsideration Order, 84 F.C.C.2d at 81, ¶ 91 (requiring affiliate or its outside contractors to perform all software development, other than generic software embodied in equipment sold to any interested purchaser).

FN357. Computer II Final Order, 77 FCC 2d at 474, ¶ 229.

FN358. Competitive Carrier Fifth Report and Order, 98 FCC 2d at 1198.

FN359. ITAA at 17-18 & n.49; MCI at 26-27; PacTel at 21; U S West at 29 n.43.

FN360. ITAA at 17-18 & n.49; MCI at 26-27.Contra U S West at 29 n.43 (citing same rule of statutory construction to argue that provision is used as summary language in both sections).

FN361. See 2A Norman J. Singer, Statutes and Statutory Construction § 47.23 (5th ed. 1992).

FN362. E.g., Ameritech Reply at 11; BellSouth at ii, 30; BellSouth Reply at 19; PacTel at 21; see also YPPA

Reply at 3-4.

FN363. See AT&T Reply at 17 & n.40; SBC Reply at 20 n.33; Letter From David F. Brown, Attorney, SBC, to Regina Keeney, Chief, Common Carrier Bureau, at 4-5 (filed Nov. 14, 1996) (SBC Nov. 14 Ex Parte).Contra U S West at 29 n.43.

FN364. See Ameritech at 38-39 (contending provision raises question of fact best evaluated on a case-by-case basis in the context of section 271 applications to provide in-region interLATA services); Ameritech Reply at 7; Bell Atlantic at 4; BellSouth at 28-30; PacTel at 20 (characterizing provision as "a 'gloss' on the other requirements"); PacTel Reply at 9-10; SBC at 7; U S West at 29; see also SBC Nov. 14 Ex Parte at 2-3 (reading the provision to impose a "qualitative 'piercing the corporate veil' standard"); USTA at 19-20; USTA Reply at 3, 6-7; YPPA at 5-6; YPPA Reply at 3.

FN365. E.g., Ameritech at 38; Ameritech Reply at 10; Bell Atlantic at 5; BellSouth at 29-30; BellSouth Reply at 18; NYNEX Reply at 17-19; USTA at 18; U S West at 24; YPPA Reply at 2, 5-6.

FN366. E.g. Ameritech Reply at 8-9 (citing interconnection, unbundling, and collocation obligations); NYNEX at 25; SBC at 12; USTA at 4, 18; USTA Reply at 4-5 (citing price cap regulation); U S West Reply at 6 (citing regime for pricing of interconnection).

FN367. See, e.g., SBC at 13-17; USTA Reply at 4.

FN368. E.g., AT&T at 20; CompTel at 13-14 (advocating "complete segregation of affiliate interexchange subsidiary"); Excel at 4-5; IDCMA at 3-4; LDDS WorldCom at 13 n.12; LDDS WorldCom Reply at 7; MCI at 23; MFS at 15-16; Ohio Commission at 8; Sprint at 19-20; Time Warner at 16-17; TRA at 13.

FN369. DOJ Reply at 10 (providing example that sharing of all personnel should be prohibited).

FN370. E.g., AT&T at 20-23 (contending that while some of those requirements are expressly mandated by the language of section 272, all of them -- as outlined above -- are necessary elements of operational independence); Excel at 5-7 (advocating all requirements except for requirement that affiliate maintain separate books); IDCMA at 4; ITAA at 18-19; ITI & ITAA Reply at 10-11; Ohio Commission at 9; Ohio Commission Reply at 4-5; Time Warner at 17-18 & n.30; Time Warner Reply at 14; see also TRA at 13 (urging us to use Computer II proceeding as a guide).But see CompTel at 15-16 (proposing safeguards devised by DOJ in response to Ameritech's Customers First Plan, Ameritech's plan to offer in-region interLATA service through an interexchange affiliate).

FN371. E.g., AT&T at 57; MFS at 15-16 (also reading provision to forbid BOC and affiliate to refer customers to one another or to jointly advertise but to require the entities to have "separate logos, distinct names, no shared customer databases or information systems, and separate billing, collections, and ordering processes"); TIA at 22; see also CompTel at 16 (advocating that affiliate be forbidden to use BOC's brand name).

FN372. E.g., CompTel at 19-20; ITAA at 18-19; MCI Reply at 2 (advocating administrative separation); TIA at 22-23, 25 n.55; TRA at 13-14.

FN373. E.g., ITAA at 17 (advocating no sharing of property); MCI at 23; Sprint at 21-23 (advocating prohibition on common use of switches, facilities, buildings, and space); see also CompTel at 16 (advocating prohibition on sharing or co-location of facilities, assets, and personnel, except leasing telecommunications equipment space in same building and sharing power equipment on same terms, rates, and conditions available to nonaffiliated interexchange carriers); IDCMA at 5 (advocating physically separate facilities).

FN374. E.g., ITAA at 17; ITI & ITAA Reply at 10-11; MCI at 23-24 (advocating prohibition on joint use or ownership of property); Sprint at 21-22.

FN375. E.g., AT&T at 23 (urging us to preclude joint planning and joint services development); IDCMA at 5-6; MCI at 27; TIA at 22-23; TRA at 13.

FN376. NYNEX Reply at 17-18; Teleport at 19; see also CompTel at 15 n.44 (proposing these standards as a

minimum to be supplemented); Frontier at 4-5 (advocating standards as a minimum); PacTel Reply at 10 (stating that if additional restrictions are necessary, Competitive Carrier requirements are the most appropriate). In contrast, several commenters state that the structural safeguards established in the Competitive Carrier proceeding would be insufficient to protect ratepayers or establish operational independence. E.g., AT&T at 23; IDCMA at 3; ITAA at 18-19 & n.53.

FN377. E.g., NYNEX Reply at 17-18; Teleport at 19; see also Excel at 8; Frontier at 4-5 (contending that requirement would force BOC affiliates, like competitors, to invest capital and resources in interexchange business).

FN378. E.g., Excel at 6 (advocating adoption of Computer II and Competitive Carrier requirements as appropriate); Sprint at 20-21 (advocating that we seek guidance in interpreting the provision from the orders pursuant to which GTE Corporation was permitted to acquire Sprint's long distance predecessors in interest and urging us to read the provision to limit a BOC's ability to engage in common activities with a section 272 affiliate through its parent company); TIA at 23-25 (noting that neither the Computer II nor Competitive Carrier proceedings addressed cross-subsidy and discrimination issues associated with BOC entry into manufacturing); TRA at 13.

FN379. 2A Singer, supra note 362, at § 46.06; seeNotice at ¶ 57.

FN380. See SBC Reply at 20 n.33. We will construe the "operated independently" language of section 274(b) in a separate proceeding and do not purport to do so at this time.SeeElectronic Publishing NPRM at ¶ 35.

FN381. See SBC Reply at 20 n.33.

FN382. See, e.g., Frontier at 4-5; ITAA at 17; MCI at 24; Sprint at 21-23; Sprint Reply at 24-25; TRA at 13.

FN383. See Letter From Leonard J. Cali, General Attorney, AT&T, to William F. Caton, Acting Secretary, FCC, filed Oct. 4, 1996 (AT&T Oct. 4 Ex Parte); Excel at 5-6; Sprint at 22-23.

FN384. See SBC Nov. 14 Ex Parte at 7-8 (arguing that "as long as the BOC affiliate's joint use or sharing of switching, transmission, or computer facilities is nondiscriminatory and otherwise complies with the terms of Section 272, it should be allowed"); USTA Reply at 7.

FN385. IDCMA at 5 n.11.

FN386. Section 251(c)(6) of the Act requires a BOC to provide for physical collocation of a requesting carrier's equipment necessary for interconnection unless it can demonstrate "that physical collocation is not practical for technical reasons or because of space limitations."47 U.S.C. § 251(c)(6); seeFirst Interconnection Order at ¶ 267.

FN387. See47 C.F.R. §§ 32.27, 64.901-64.904.

FN388. AT&T Oct. 4 ExParte.

FN389. SeeBOC Separations Order, 95 FCC 2d at 1144, ¶ 70 (rejecting BOCs' argument that their enhanced services and CPE separate subsidiaries should be able to contract with regulated operations for provision of engineering, installation and maintenance, and similar services).

FN390. SeeComputer II Final Order, 77 FCC 2d at 477, ¶ 239 (adopting a similar exception to a prohibition on shared services).

FN391. 47 U.S.C. § 272(e)(4).

FN392. See infra part VI.D.

FN393. U S West Reply at 9 n.25; see also USTA Reply at 7-8.

FN394. See H.R. 1555, 104th Cong., 1st Sess., § 246 (1995); S. 652, 104th Cong., 1st Sess. § 252 (1995).

FN395. Joint Explanatory Statement at 152.

FN396. See, e.g., Mead Corp. v. Tilley, 490 U.S. at 723 (refusing to draw inference from change in committee draft of bill); Rastelli v. Warden, 782 F.2d at 24 n.3 (declining to draw conclusions from ambiguous indica-

tions of statutory purpose); Drummond Coal v. Watt, 735 F.2d at 474 (concluding that "[u]nexplained changes made in committee are not reliable indications of congressional intent").

FN397. 47 U.S.C. § 272(b)(3).

FN398. E.g., Ameritech at 42; BellSouth at 31 n.79; U S West at 24.

FN399. We further discuss our reasons for declining to do so in connection with our analysis of section 272(b)(3), below.

FN400. See infra paragraph 179.

FN401. See infra part IV.C.

FN402. We further discuss the marketing provisions below in our analysis of section 272(g).

FN403. E.g., AT&T at 23 ; IDCMA at 5-6; MCI at 27; TIA at 22-23; TRA at 13.

FN404. See, e.g., United States v. Western Elec. Co., 675 F. Supp. 655, 662-63, 667-68 (D.D.C. 1987), aff'd 894 F.2d 1387 (D.C. Cir. 1990).

FN405. We will address the scope of the BOC's authority to engage in manufacturing activities further in our proceeding to implement section 273 of the Act.See Manufacturing NPRM.

FN406. See infra part V.B.

FN407. E.g., AT&T at 20-22; Time Warner at 17-18.

FN408. See Ameritech Reply at 10; BellSouth Reply at 19.

FN409. 47 U.S.C. § 272(b)(3).

FN410. Notice at ¶ 62.

FN411. Computer II Reconsideration Order, 84 FCC 2d at 84-85,¶ 102.

FN412. Computer II Final Order, 77 FCC 2d at 477, ¶ 239.

FN413. Notice at ¶ 62.

FN414. Id. at ¶ 92.

FN415. E.g. Ameritech at 41; Bell Atlantic Reply at 3-4; Bell Atlantic at 6-7; BellSouth at 31; PacTel at 21-22; U S West at 22-24; USTA at 21; YPPA at 7-8.

FN416. E.g., Ameritech at 51; Ameritech Reply at 26-27; BellSouth at 10 & n.17; U S West at 27-28.

FN417. E.g., DOJ Reply at 10; Florida Commission Reply at 3-5 (urging us to read section 272(b)(3), in concert with section 272(b)(1), to preclude sharing of administrative services, as well as sharing of operating, installation and maintenance personnel, research and development activities, and marketing); ITAA at 19; MCI at 27-28 (arguing that allowing a BOC to provide services for a section 272 affiliate that would otherwise have been performed by the affiliate's own employees would undermine the separate employees requirement); MCI Reply at 2; Teleport at 20; TIA at 27; Time Warner at 18-19; TRA at 13-14.

FN418. AT&T at 24.

FN419. MFS Reply at 19-20.

FN420. AT&T Reply at 31.

FN421. MCI at 48.

FN422. Sprint Reply at 27-28.

FN423. E.g., Ameritech at 40; Bell Atlantic at 7; BellSouth at 31; PacTel at 23; SBC Reply at 8-9; USTA at 20-21.

FN424. Sprint at 26 n.19.

FN425. E.g., AT&T at 25; see also CompTel at 18-20; TIA at 23, 27 (arguing that together with the "operate independently" requirement, section 272(b)(3) forbids such sharing); TIA Reply at 9; TRA at 14.

FN426. MCI at 28 (urging us to allow outsourcing only for "those services and functions that the BOC outsourced prior to the date of passage of the 1996 Act"

and to require any sharing of outside services to be performed in accordance with requirements of section 272(b)(5)); Time Warner at 19-20 (suggesting we should allow such sharing only "where that third party actively provides services to other firms at large" and, in any event, prohibit it in the context of accounting and auditing).

FN427. Time Warner at 25; Sprint at 49 (asserting that although the statute does not require such a restriction, it would facilitate monitoring of such joint activities); Sprint Reply at 28; see also Florida Commission Reply at 4-5 (seeking a requirement that "an independent third party" provide such services, to the extent they are provided by a single entity).Butsee AT&T at 57 (concluding it may be possible for a BOC and its section 272 affiliate to contract with the same outside marketing entity for any joint marketing of interLATA and local exchange service, provided that the contract does not extend beyond marketing to joint services and development and planning).

FN428. E.g., Ameritech at 51-52; BellSouth at 10; Citizens for a Sound Economy Foundation Reply at 4; NYNEX Reply at 16; PacTel at 41; PacTel Reply at 25.

FN429. AT&T at 26; see also CompTel at 15-16 (advocating a similar requirement pursuant to section 272(b)(1)).

FN430. See, e.g., Ameritech Reply at 12-13; see also U S West Reply at 12 n.36.

FN431. See part IV.B.

FN432. See, e.g., Ameritech at 41; BellSouth at 31; YPPA at 7-8; see also SBC Nov. 14 Ex Parte at 3 (reading the "operate independently" requirement to mandate that a section 272 affiliate have a separate board of directors, chief executive officer, chief financial officer, and operating personnel, each of whom is not also an officer, director, or employee of the affiliated BOC). Although AT&T cites the legislative history of section 272 for the proposition that Congress intended to achieve "fully separate operations" between a BOC and its section 272 affiliate, the carrier cites to language from the House Report regarding the House bill.See AT&T at 24; see also H.R. 1555, 104th Cong., 1st Sess., § 246 (1995). As discussed above, the section 272 requirements were taken from the Senate bill with several modifications. Joint Explanatory Statement at 152.

FN433. MFS Reply at 20.

FN434. See infra part V.B.

FN435. See, e.g., Ameritech at 43-45; Bell Atlantic at 7; Bell Atlantic Comments, Exhibit 2 at 3-4 (predicting prohibition on shared administrative services would increase costs by as much as 15 percent); USTA at 22; USTA Reply, Haussman Affidavit at 9 (stating that "[a]dministrative services are a classic example of a situation where common costs are an important component of overall costs"); see also Sprint Reply Comments at 24 (stating that the "operate independently" requirement should not be interpreted to prevent the parent holding company of a BOC and its section 272 affiliate to provide various services and perform various functions for both entities).

FN436. Computer II Final Order, 77 FCC 2d at 484;see, e.g., Bell Atlantic Reply at 3-4; PacTel at 21-22; USTA at 21-22; USTA Reply at 9-10.

FN437. See, e.g., CompTel at 19-20; MCI Reply at 19.

FN438. E.g., AT&T at 24-25; AT&T Reply at 19; DOJ Reply at 10; Florida Commission Reply at 4; Teleport at 20; Time Warner at 18-19; Time Warner Reply at 15-16, 20; see CompTel at 18-20.

FN439. Computer II Final Order, 77 FCC 2d at 477, ¶ 238.

FN440. 47 U.S.C. §§ 272(b)(1) and (b)(5).

FN441. See infra part IV.B.

FN442. See, e.g., Letter from Celia Nogales, Ameritech, to William F. Caton, Acting Secretary, FCC, Attachment at 3 (filed Sept. 19, 1996) (stating that sharing of services would be subject to section 272(b)(5) and the

Part 64 rules); PacTel Reply at 11 (stating that a BOC would charge affiliates for any services it provides pursuant to the affiliate transaction rules); Letter from Gina Harrison, Director of Federal Regulatory Relations, to William F. Caton, Acting Secretary, FCC, Attachment at 14 (filed Sept. 26, 1996) (PacTel Sept. 27 Ex Parte); see also AT&T at 57; MCI at 48; TRA at 19-20.

FN443. Accounting Safeguards Order part IV.B.1.

FN444. See, e.g., Ameritech Reply at 13-14; Bell Atlantic Reply at 3-4; USTA Reply at 9.

FN445. See infra part V.B.

FN446. E.g., AT&T at 25; AT&T Reply at 18; Teleport Reply at 5; Time Warner at 19.Butsee Florida Commission Reply at 5-6 (suggesting that"[a]dministrative and other activities... [should] only be performed by a holding company on a consolidated, limited basis and should be subject to review and approval by federal and state commissions").

FN447. E.g., Ameritech at 40; Ameritech Reply at 13; Bell Atlantic at 5-6; BellSouth at 30-31; NYNEX at 23; PacTel at 17-18; SBC at 7; Sprint at 24; USTA Reply at 9; YPPA at 10-11.

FN448. Separation of Costs of Regulated Telephone Service From Costs of Nonregulated Activities, CC Docket No. 86-111, Report and Order, 2 FCC Rcd 1298, 1334-37, ¶¶ 284-301;recon., 2 FCC Rcd 6283 (1987); further recon., 3 FCC Rcd 6701 (1988).

FN449. See47 C.F.R. §§ 64.901-64.904; see also Sprint at 26.

FN450. Moreover, as discussed above, section 272(b)(1) does not preclude joint marketing.

FN451. See, e.g., NYNEX at 15; PacTel at 41; SBC at 11; U S West at 26.

FN452. See, e.g., Ameritech at 50-51; PacTel at 15, 41; PacTel Reply at 11, 25; USTA at 30; USTA Reply at 14; U S West at 27; see also Ameritech Sept. 19 Ex Parte, Attachment at 3; PacTel Sept. 27 Ex Parte, Attachment at 14. Several BOC competitors argue that, to the extent joint marketing is consistent with other provisions of section 272, a separate affiliate must, at a minimum, purchase joint marketing services from the BOC on an arm's length basis.E.g. AT&T at 57; MCI at 48; TRA at 19.

FN453. See MCI at 28; Time Warner at 20.

FN454. Citizens for a Sound Economy Foundation Reply at 4.

FN455. See Ameritech Reply at 12-13.

FN456. 47 U.S.C. § 272(b)(4).

FN457. Notice at ¶ 63.

FN458. E.g. AT&T at 26-27 (urging us to require "that any contract or other document in which an affiliate obtains credit contain a provision expressly stating that the creditor, upon default by the affiliate, has no recourse to the assets of the BOC"); Bell Atlantic, Exhibit 1 at 6-7; MCI at 29; Ohio Commission at 9; Sprint at 27; TIA at 28; TRA at 14.

FN459. Bell Atlantic, Exhibit 1 at 6-7; NYNEX Reply at 20; Time Warner at 18; USTA at 22.

FN460. TIA at 28-29 (urging us to forbid "any reference to the [affiliated] BOC in debentures, reference to the BOC in any equity instruments, use of the same underwriting facilities, or other arrangements" that shift responsibility for cost, debt, equity, or business risk to the BOC away from the affiliate); see also CompTel at 18 (urging us to prohibit all credit arrangements between BOCs and their affiliates).

FN461. AT&T at 27 n.27; Teleport at 20-21.But see NYNEX Reply at 20-21 (countering that section 272(b)(4) cannot be read to extend to the assets of a BOC's parent); Bell Atlantic Reply at 5.

FN462. Notice at ¶ 63.

FN463. See, e.g., MCI at 29; Sprint at 28.

FN464. 47 U.S.C. § 272(b)(5).

FN465. Notice at ¶ 64.

FN466. E.g., PacTel at 23-24; Teleport at 21; USTA at 22-23. Other commenters do not advocate particular safeguards but view the provision as supplementing or reinforcing other provisions of section 272.E.g., MCI at 29-30; Sprint at 28-29 (advocating interpretation similar to "operate independently" requirement); TIA at 30.

FN467. E.g., AT&T at 27-29; ITAA at 19-20.

FN468. CompTel at 17.

FN469. Accounting Safeguards Order part IV.B.1.e.

FN470. In particular, see our rejection of additional reporting requirements in part IX and our discussion of sections 272(c) and (e). We agree with Ameritech that in proposing an annual audit requirement, CompTel ignores the biannual audit requirement of section 272(d) of the Act.See Ameritech Reply Comments at 5 n.9; CompTel at 17.

FN471. We note that the nondiscrimination requirement of section 272(c)(2) is an accounting safeguard that is addressed in the Accounting Safeguards Order.

FN472. 47 U.S.C. § 272(c)(1).

FN473. Notice at ¶ 69.

FN474. Id. at ¶ 72.

FN475. Bell Atlantic, Exhibit 1 at 7; BellSouth at 3-4; PacTel at 29; PacTel Reply at 12-13; U S West at 32; USTA at 25; YPAA at 12.

FN476. BellSouth at 32; U S West at 32; USTA at 25.

FN477. AT&T Reply at 24; CIX Reply at 5-6; CompTel at 22; IDCMA at 6; ISA at 2; ITI and ITAA Reply at 14; LDDS at 13, n.13; LDDS Reply at 7-8; MCI at 34; Sprint at 39-40; TIA at 37; TIA Reply at 4-5; Time Warner at 21-22; TRA at 15; Voice-Tel at 13-14.

FN478. AT&T Reply at 23-24; CompTel at 22; ISA at 2; LDDS Reply at 7-8; MCI at 34; MCI Reply at 23; TIA Reply at 10-12; Time Warner at 21-22; Time Warner Reply at 20-22.

FN479. 47 U.S.C. § 202(a).

FN480. We note that this conclusion is consistent with the Commission's recent interpretation of similar language in section 251(c)(2).SeeFirst Interconnection Order at ¶ 217.

FN481. Notice at ¶ 73.

FN482. Notice at ¶ 67. We suggested, for example, that such disparate treatment may be justified by differences in the unaffiliated entity's network architecture.Id. at ¶ 73.

FN483. See, e.g., Ameritech at 54, U S West at 34-35; see also Frontier at 5-6; IDCMA at 6; ISA at 2-3; LDDS at 14-15; LDDS Reply at 6 (BOCs cannot take any action in regards to its affiliate without offering the very same deal to any other competing entity); MCI at 36; MFS Reply at 20-21; Sprint at 39; Teleport at 14; TIA at 38-39; Time Warner at 22; Voice-Tel at 14 (all services and facilities provided by a BOC to its affiliate should be pursuant to tariff). Some BOCs maintain, however, that section 272(c)(1) does not require identical treatment between a BOC affiliate and an unaffiliated entity in the provision of administrative and "corporate governance" services, and non-telecommunications facilities or goods. We will discuss this issue below.See infra part V.C.

FN484. LDDS at 15.

FN485. See, e.g., BellSouth at 32; NYNEX Reply at 22.

FN486. See Ameritech at 55-56; BellSouth at 32; NYNEX Reply at 22; U S West at 33.

FN487. See, e.g., AT&T at 31; MCI at 31; Sprint Reply at 15; TRA at 16.

FN488. Sprint at 39; Sprint Reply at 15; see also Time Warner at 22-23; Time Warner Reply at 22 (allowing prices to reflect underlying costs of providing a good, service, or facility does not demonstrate that discrimination is just and reasonable, rather it allows BOCs to

demonstrate that no discrimination is present because the price accurately reflects the cost of provision).

FN489. AT&T Reply at 21; see also AT&T at 32 (if an unaffiliated entity requests new access arrangements that will allow new or more cost effective long distance services, the Commission should not permit a BOC to deny the request on the ground that everyone is receiving the same access at the same price).

FN490. AT&T at 31; MCI Reply at 22; Sprint Reply at 15.

FN491. AT&T Reply at 21-22; see also AT&T at 32.

FN492. The BOCs' obligations with respect to procurement under section 272(c)(1) are discussed below.See infra part V.E.

FN493. 47 U.S.C. § 251(c)(2).

FN494. First Interconnection Order at ¶¶ 224-25, 314.

FN495. Ameritech at 56; see also Ameritech Reply at 28 (to obligate a BOC to provide a different service to an unaffiliated entity at the same price that it is charging an affiliate for another service, even though the costs are different, is at odds with the section 252(d) cost-based pricing requirements for interconnection, unbundled elements, and reciprocal compensation arrangements.)

FN496. See, e.g., MCI at 51-52.

FN497. First Interconnection Order at ¶ 4.

FN498. Seeid.

FN499. See USTA at 23-24; USTA Reply at 12.

FN500. PacTel Reply at 12.

FN501. See infra paragraph 229.

FN502. We conclude below that the information required to be disclosed under section 251(c)(5) is included within the definition of "information" under section 272(c)(1).See infra at paragraph 222.

FN503. SeeSecond Interconnection Order at ¶¶ 216-217 for a discussion of the "make/buy" point; see alsoid. at ¶ 224 (incumbent LECs should not make preferential disclosure to selected entities prior to disclosure at the make/buy point).

FN504. See MCI at 31-32 (if the BOC section 272 affiliate is truly separate it should not require services or facilities that are technically different than those required by its competitors)

FN505. See infra part V.C.

FN506. Notice at ¶ 139 n.266.

FN507. AT&T at 32.

FN508. 47 U.S.C. § 201(a).

FN509. We also note such anticompetitive behavior regarding the provision of intrastate services would be unlawful under various state provisions.See, e.g., Mich. Comp. Laws Ann. § 484.2305(1)(g) (West 1996) (a provider of basic local exchange service shall not refuse or delay access service or be unreasonable in connecting anther provider to the local exchange whose product or service requires novel or specialized access service requirements); N.Y. Pub. Serv. § 91 (McKinney 1996); N.D. Cent. Code § 49-21-07 (1995).

FN510. See AT&T at 33 (Commission should make explicit that any difference in treatment between BOC affiliates and their competitors is unlawful unless it results from a competitor's deliberate choice to receive different or less favorable treatment in exchange for lower prices); PacTel Reply at 12-13 (if an unaffiliated entity wants something different than the BOC affiliate, the other entity should request something different, instead of requiring BOC to figure out what entity needs to get the same end result as affiliate).

FN511. Sprint at 39-40; Time Warner at 22.

FN512. First Interconnection Order at ¶ 860.

FN513. See BellSouth at 32 (a blanket prohibition on discrimination when justified by differences in cost

would be anticompetitive); see alsoid. ("Strict application of the term 'nondiscriminatory' ... would itself be discriminatory according to the economic definition of price discrimination. If the 1996 Act is read to allow no price distinctions between companies that impose very different ... costs on LECs, competition for all competitors, including small companies, could be impaired.").

FN514. First Interconnection Order at ¶ 860.

FN515. Notice at ¶ 67.

FN516. NYNEX at 34-35; PacTel at 30; U S West at 36-37 (BOCs have no monopoly over the provision of administrative and support services so if these are withheld from competitors, this will not force those competitors from the market).But see Frontier at 6 (Commission should interpret the phrase "facilities, services, or information" to include not only tariffed access elements, but also the provision of non-tariffed services and information such as business office services, computing services, customer information, and the like).

FN517. U S West at 37; see also PacTel Reply at 17 (section 272(c)(1) is limited to regulating goods and services that are part of a common carrier service).

FN518. TIA at 33.

FN519. Sprint at 32-34; see alsoid. at 34 n.23 ("facilities" under section 272 may include not only section 251(c)(2) "facilities" but also the "network equipment" referred to in section 251(c)(2)).

FN520. CIX Reply at 6.

FN521. Sprint at 34-35.

FN522. 47 U.S.C. § 222; seeCPNI NPRM.

FN523. PacTel Reply at 16; U S West at 38; U S West Reply at 15.

FN524. AT&T at 34; AT&T Reply at 24-25; MCI at 38 (section 272(c)(1) should apply to CPNI to ensure that BOCs do not impose more demanding requirements on unaffiliated entities than they impose on their affiliates).

FN525. See ITAA at 21. As U S West observes, in interpreting section 272(c)(1), we are determining the scope of the goods, services, facilities, and information that are subject to the nondiscrimination requirement. U S West at 32; see also ISA at 3 (maintaining that section 272(c)(1) should be interpreted to ensure that a BOC does not provide or procure any good, service, facility, or information in a manner that could adversely affect competition on the information services industry).

FN526. See ITAA at 21.

FN527. See id.

FN528. See, e.g., U S West at 37 (contending that section 272 cannot logically be read as requiring a BOC to provide non-telecommunications-related items, over which it has no monopoly, to an unaffiliated entity simply because it has provided that item to a separate affiliate); PacTel Reply at 17 (arguing that the terms of section 272(c)(1) should be limited to goods and services that are part of a common carrier service regulated under Title II of the Act).

FN529. NYNEX at 34.

FN530. See ISA at 3 (stating that the discriminatory provision of billing and collection services could adversely affect competition in the information services market).

FN531. See supra at paragraph 210.

FN532. See discussion of Official Services network infra part VI.D.

FN533. These include the local loop, the network interface device, switching capability, interoffice transmission facilities, signalling networks and call-related databases, operations support system functions, and operator services and directory assistance. SeeFirst Interconnection Order, Appendix B, at 20-24.

FN534. Sprint at 37.Section 274 provides that "the term 'entity' means any organization, and includes corporations, partnerships, sole proprietorships, associations, and joint ventures."47 U.S.C. § 274(i)(6).

FN535. ATSI at 8-9; CIX Reply at 6.

FN536. SeeFirst Interconnection Order at ¶ 992.

FN537. Second Interconnection Order at ¶ 176.

FN538. MFS Reply at 20-21.

FN539. SeeFirst Interconnection Order at ¶¶ 542-617 (discussing collocation).

FN540. First Interconnection Order at ¶ 581.

FN541. See47 U.S.C. § 272(e)(2). Similarly, we note that the term "facilities" in section 272(c)(1) is not limited as it is in section 272(e)(4) to "interLATA or intraLATA facilities." See47 U.S.C. § 272(e)(4).

FN542. U S West at 37-38 (arguing that, if the information cannot give an unfair advantage to a separate affiliate, there is no reason under the 1996 Act to interfere with its flow between the BOC and its affiliate).

FN543. See, e.g., 47 U.S.C. §§ 222, 251(c)(5).

FN544. SeeCPNI NPRM. Several BOCs assert that there are certain instances under section 222 where it would be unlawful for them to distribute CPNI to other entities.See Ameritech Reply at 29, NYNEX Reply at 13-14; PacTel Reply at 16-17; U S West Reply at 14-15.

FN545. Notice at ¶ 78.

FN546. MCI at 39 (the term "standards" should encompass any that affect interconnection and interoperability between two or more public network operators); Sprint at 42 (there is nothing to suggest that the term "standards" means something other than its commonly understood dictionary definition); TIA at 44 (the term "standards" should encompass all activities undertaken in connection with a BOC's efforts to establish technical specifications for BOC network operation and interconnection of equipment and services to a BOC network).

FN547. Bellcore Reply at 2-3; ITAA at 21 (arguing that the nondiscrimination language of section 272(c)(1) is absolute); PacTel Reply at 18.

FN548. Section 273(d)(4) prescribes procedures that are intended to open to all interested parties the process for setting and establishing industry-wide standards and generic requirements for telecommunication equipment and CPE. SeeManufacturing NPRM.

FN549. Section 273(d)(5) requires that the Commission prescribe a dispute resolution process to be used if all parties cannot agree on a dispute resolution process when establishing and publishing any industry-wide standard or generic requirement.SeeImplementation of the Section 273(d)(5) of the Telecommunications Act of 1996, Dispute Resolution Regarding Equipment Standards, GC Docket No. 96-42, Report and Order, FCC No. 96-205 (rel. May 7, 1996) (Dispute Resolution Order).

FN550. See Bellcore Reply at 2-3; PacTel Reply at 18.

FN551. Bellcore Reply at 3.

FN552. AT&T at 35.

FN553. MCI at 40.

FN554. USTA Reply at 12-13 (in an era of open competition where BOCs compete against each other, BOCs have no incentive to collaborate with other BOCs in setting standards); U S West Reply at 14 (asserting that the Commission's complaint procedures should address any abuse of this process).

FN555. MCI at 39; see also ITI and ITAA Reply at 14 (Commission should require BOCs to establish fair and nondiscriminatory network performance, interconnection, and equipment interoperability standards); TIA at 43 (BOCs should be strongly encouraged, if not required, to participate in standard-setting activities of accredited standard-setting groups.)

FN556. PacTel at 35; PacTel Reply at 18; Sprint at 43 n.31.

FN557. Sprint at 43 n.31.

FN558. AT&T at 35.

FN559. MCI at 39.

FN560. Manufacturing NPRM at ¶ 34.

FN561. The term "industry-wide" as defined in section 273 means "activities funded by or performed on behalf of local exchange carriers for use in providing wireline telephone exchange service whose combined total of deployed access lines in the United States constitutes at least 30 percent of all access lines deployed by telecommunications carriers in the United States" as of February 8, 1996.See47 U.S.C. § 273(d)(8)(C).

FN562. Manufacturing NPRM at ¶ 31.

FN563. See47 U.S.C. § 273(d)(4)(A)(ii).

FN564. An "accredited standards development organization" is an entity composed of industry members that has been accredited by an institution vested with the responsibility for standards accreditation by the industry. See47 U.S.C. § 273(d)(8)(E).

FN565. Cf. PacTel at 35.

FN566. See47 U.S.C. § 256. We note that the Commission has asked its federal advisory committee, the Network Reliability and Interoperability Council, for recommendations on how the Commission should implement section 265. These recommendations will provide the basis for a notice of proposed rulemaking that will consider, among other things, Commission rules and policies dealing with telecommunications standards-setting activities, including Commission involvement.

FN567. See47 U.S.C. § 273(d)(5); Dispute Resolution Order.

FN568. See U S West Reply at 14 (if process is abused, Commission's complaint procedures are available to address the problem).

FN569. Notice at ¶ 77.

FN570. PacTel at 35; PacTel Reply at 17; U S West at 36 n.58.

FN571. ITAA at 21.

FN572. TIA at 46.

FN573. Id. at 41-42.

FN574. Id. at 34 n.74 (noting that its own "Buyer's Guide" may be useful in this process).

FN575. See supra at paragraph 197.

FN576. Section 273(e)(1), entitled "Nondiscrimination Standards for Manufacturing" requires, inter alia, that "[i]in the procurement or awarding of supply contracts for telecommunications equipment, a [BOC], or any entity acting on its behalf ... may not discriminate in favor of equipment produced or supplied by an affiliate or related person.Section 273(e)(2), entitled "Procurement Standards," provides that each BOC or entity acting on its behalf shall "make procurement decisions and award all supply contracts for equipment, services, and software on the basis of an objective assessment of price, quality, delivery, and other commercial factors." 47 U.S.C. §§ 273(e)(1)(B), (e)(2).

FN577. Notice at ¶ 75.

FN578. See infra part IX.

FN579. 47 U.S.C. § 272(e)(1).Section 272(e) applies to a BOC or a BOC affiliate subject to section 251(c).47 U.S.C. § 272(e). An affiliate subject to section 251(c) is an incumbent LECs as defined in section 251(h).Id. §§ 251(c), 251(h).

FN580. Notice at ¶ 82.

FN581. Id. at ¶ 83.

FN582. Id. at ¶ 84.

FN583. Id. at ¶ 85.

FN584. E.g., AT&T at 37; MCI at 41-42; Sprint at 43-44; TRA at 17; ITAA at 23; TIA at 45; PacTel at 36.

FN585. AT&T at 37; MCI at 42; Sprint at 44 & n.32; TRA at 17-18; Teleport at 13-15; ITAA at 23.

FN586. E.g., Ameritech Reply at 30; Bell Atlantic Reply at 11-12; NYNEX Reply at 23 & n.72; SBC at 13-17; U S West Reply at 16; PacTel Reply at 18-19.

NYNEX and Ameritech specifically argue that reporting is not needed because their internal procedures are automated and designed to be nondiscriminatory, and that therefore, discrimination would require expensive coordination by the BOCs. Letter from Suzanne Guyer, Executive Director, Federal Regulatory Policy Issues, NYNEX to William F. Caton, Acting Secretary, FCC at 5 (filed Oct. 23, 1996) (NYNEX Oct. 23 Ex Parte); Letter from Gary L. Phillips, Director of Legal Affairs, Washington Office, Ameritech to William F. Caton, Acting Secretary, FCC, Attachment (filed Oct. 23, 1996) (Ameritech Oct. 23 Ex Parte).

FN587. AT&T at 36-37; PacTel at 37; Time Warner at 23.

FN588. Letter from Charles E. Griffin, Government Affairs Regulatory Director, AT&T to William F. Caton, Acting Secretary, FCC at 3-5 (filed Oct. 3, 1996) (AT&T Oct. 3 Ex Parte). This proposal is discussed more fully infra in part XI.

FN589. E.g., Sprint at 36-37; TRA at 17; TIA at 45.

FN590. E.g., PacTel at 36; Sprint at 43-44.

FN591. AT&T at 37; MCI at 41-42; Sprint at 43-44; TRA at 17; ITAA at 23.

FN592. AT&T at 36-38.Contra Bell Atlantic Reply at 11; Ameritech Reply at 30.

FN593. Ameritech Reply at 30; Bell Atlantic Reply at 11-12; NYNEX Reply at 23; U S West Reply at 16.

FN594. AT&T at 38; Teleport at 13.

FN595. A PIC change is a change in a customer's selection of her presubscribed interexchange carrier. At one time the term “PIC” referred to “primary” or “preferred interexchange carrier.” Although we have retained the acronym “PIC,” we now define it as any toll carrier for purposes of our presubscription rules under the Second Interconnection Order.Second Interconnection Order at ¶ 5, n.15.

FN596. SeeFirst Interconnection Order at ¶¶ 507, 511-512, 520 (describing the use of automated PIC changes, electronic ordering and repair and trouble administration information, the Customer Account Record Exchange (CARE) system, and the Billing Name and Address (BNA) database).

FN597. First Interconnection Order at ¶¶ 312, 516-528.

FN598. As we indicate below, we are seeking additional comment before adopting the specific requirements of the disclosure obligation we impose in this Order.

FN599. See, e.g., Letter from Cyndie Eby, Executive Director, Federal Regulatory, U S West to Cheryl Leanza, Policy and Program Planning Division, Common Carrier Bureau, FCC at 2 (filed Nov. 19, 1996) (U S West Nov. 19 Ex Parte); Bell Atlantic Oct. 16 Ex Parte at 1-2.

FN600. PacTel at 37.

FN601. NYNEX Oct. 23 Ex Parte at 5; Ameritech Oct. 23 Ex Parte, Attachment.

FN602. U S West Nov. 19 Ex Parte at 2-3; PacTel Oct. 18 Ex Parte at 4.

FN603. AT&T October 3 Ex Parte at 3-6.

FN604. See supra note 588.

FN605. A number of other parties have also submitted Ex Parte letters in response to AT&T's proposal. Letter from Teresa Marrero, Regulatory Affairs, Teleport Communications Group to Regina Keeney, Chief, Common Carrier Bureau, FCC (filed Oct. 8, 1996) (Teleport Oct. 8 Ex Parte); Letter from Edward Shakin, Regulatory Council, Bell Atlantic to Cheryl A. Leanza, Policy and Program Planning Division, Common Carrier Bureau, FCC (filed October 16, 1996) (Bell Atlantic Oct. 16 Ex Parte); Letter from Gina Harrison, Director, Federal Regulatory Relations, Pacific Telesis Group Washington to William F. Caton, Acting Secretary, FCC (filed Oct. 18, 1996) (PacTel Oct. 18 Ex Parte); Ameritech Oct. 23 Ex Parte; NYNEX Oct. 23 Ex Parte; Letter from Gina Harrison, Director, Federal Regulatory Relations, Pacific Telesis Group Washington to William F.

Caton, Acting Secretary, FCC (filed Oct. 23, 1996) (PacTel Oct. 23 Ex Parte); Letter from Teresa Marrero, Regulatory Affairs, Teleport Communications Group to Regina Keeney, Chief, Common Carrier Bureau, FCC (filed Oct. 24, 1996) (Teleport Oct. 24 Ex Parte); Letter from Charles E. Griffin, Government Affairs Regulatory Director, AT&T to William F. Caton, Acting Secretary, FCC (filed Oct. 24, 1996) (AT&T Oct. 24 Ex Parte).

FN606. NYNEX Oct. 23 Ex Parte at 6.

FN607. AT&T at 37; AT&T Oct. 3 Ex Parte at 6.

FN608. See AT&T Oct. 3 Ex Parte at 6; Teleport Oct. 8 Ex Parte at 8. Ameritech supports disclosures regarding the service intervals provided to BOC affiliates rather than to individual competing carriers. Ameritech Oct. 23 Ex Parte, Attachment.

FN609. 47 U.S.C. § 272(e)(2); see supra note 580.

FN610. Notice at ¶ 86.

FN611. Notice at ¶¶ 86-87 & n.160.

FN612. ITAA at 24-25; MFS at 27-28.Contra U S West at 40-41.

FN613. U S West at 41.

FN614. USTA at 31-33.; Ameritech Reply at 30-31; PacTel at 31.

FN615. AT&T at 39.Contra Sprint at 41 (network disclosure rules under section 251(c)(5) are sufficient).See also IDCMA at 6-7 (requesting rules for manufacturers).

FN616. Compare MCI at 42-43 (supporting the use of MFJ precedent) with U S West at 41-42 (arguing the Commission should consider its own precedent in this area, but should not consider the relevance of the MFJ).

FN617. ITAA at 24-25 (arguing that the Commission must apply section 272(e) to information services providers because section 272(f)(2) applies to information services and specifically exempts section 272(e), thus implying that section 272(e) protects information services providers); MFS at 27-28 (section 272(e)(2) extends the requirements of section 251, including physical collocation, to ISPs because section 272(e)(2) requires nondiscriminatory treatment of "other providers of interLATA services").Contra U S West at 40 (because section 272(e)(2) applies only to exchange access it seems logical that section 272(e)(2) requires nondiscriminatory treatment of the "providers of interLATA services" who are most affected by the terms and conditions of exchange access).

FN618. See supra part III.A.1.

FN619. 47 U.S.C. § 153(16).

FN620. Id. § 153(48).

FN621. See47 U.S.C. § 153(44) (defining "telecommunications carrier" as, inter alia, a provider of telecommunications services). Our conclusion that ISPs do not use exchange access is consistent with the MFJ, which recognized a difference between "exchange access" and "information access." MFJ §§ IV(F), IV(I) in United States v. Western Elec. Co., 552 F. Supp. at 228-29 (exchange access is used in connection with interexchange telecommunications while information access is used in connection with information services). Because the requirement that the BOCs provide ISPs with "information access" under the MFJ is preserved under section 251(g), ISPs will continue to be able to obtain the services they require on a nondiscriminatory basis.47 U.S.C. § 251(g). For more detail regarding section 251(g), see infra paragraph 251 and note 626.

FN622. As we explain above, interLATA information service providers use telecommunications to provide interLATA information services, but they do not use telecommunications services. See supra part III.A.1.

FN623. See supra paragraph 220.

FN624. First Interconnection Order at ¶¶ 186-191, 342-365 (concluding that a requesting carrier may obtain interconnection to originate and terminate interexchange traffic under section 251(c)(2) only if it is offering exchange access to others, not for the purpose of

originating and terminating its own traffic, but that a requesting carrier may request unbundled elements under section 251(c)(3) in order to provide itself with exchange access); Second Interconnection Order at ¶¶ 165-240 (imposing network disclosure requirements).

FN625. 47 U.S.C. § 251(g). Under the MFJ the BOCs were required to "provide to all interexchange carriers and information service providers exchange access, information access and exchange services for such access on an unbundled, tariffed basis, that is equal in type, quality, and price to that provided to AT&T and its affiliates."MFJ § II(A), inUnited States v. Western Elec. Co., 552 F. Supp. at 227. Equal access included the nondiscriminatory provision of exchange access services, dialing parity, and presubscription of interexchange carriers. MFJ § IV(F), app. B inUnited States v. Western Elec. Co., 552 F. Supp. at 228, 233. Exchange access services included, but were not limited to, "provision of network control signalling, answer supervision, automatic calling number identification, carrier access codes, directory services, testing and maintenance of facilities, and the provision of information necessary to bill customers." Id. GTE became subject to similar restrictions in 1984, United States v. GTE Corp., 603 F. Supp. 730 (D.D.C. 1984), and, in 1985 the Commission imposed restrictions on independent LECs similar to those imposed on GTE.MTS and WATS Market Structure Phase III, CC Docket No. 78-72, Report and Order, 100 FCC 2d 860, 874-878, ¶¶ 47-60 (1983) (subsequent history omitted); see also Michael K. Kellogg et al., Federal Telecommunications Law 275-77, § 5.5.1 (1992); First Interconnection Order at ¶ 362.

FN626. Ameritech Reply at 30-31.

FN627. 47 U.S.C. § 272(b)(5).

FN628. See supra paragraph 242.

FN629. AT&T at 38-39.

FN630. Sprint at 41. These rules are cited infra at notes 633-637.

FN631. AT&T at 39 (arguing that the Commission should prohibit the BOCs from making any technical information available to their affiliates unless it is provided in written materials or technical references that are simultaneously provided to competitors).

FN632. 47 U.S.C. § 251(c)(5).

FN633. Second Interconnection Order at ¶¶ 165-240.

FN634. 47 C.F.R. § 64.702.

FN635. Computer III Phase II Reconsideration Order, 3 FCC Rcd at 1164, ¶ 116 (1988). Although the Ninth Circuit vacated this order, the Commission reimposed the network disclosure requirements on remand.BOC Safeguards Order, 6 FCC Rcd at 7602-7604 ¶¶ 68-70.

FN636. In general, public notice is required under section 251(c)(5) at the "make/buy" point, but at a minimum of 12 months prior to implementation; if the planned changes can be implemented within 12 months of the make/buy point, public notice must be given at least six months prior to implementation. Second Interconnection Order at ¶¶ 214, 224.

FN637. See IDCMA at 6-7 (arguing that current network disclosure rules are insufficient for manufacturers); Manufacturing NPRM.

FN638. 47 U.S.C. § 272(e)(3); see supra note 580.

FN639. Notice at ¶ 88. We also sought comment regarding the accounting safeguards necessary to implement this provision in our companion Accounting Safeguards NPRM, 11 FCC Rcd at 9091, ¶ 79, and address those requirements in the Accounting Safeguards Order at parts III.B.2.c and IV.B.1.b.

FN640. E.g., Ameritech Reply at 31; Bell Atlantic, Exhibit 1 at 8-9; PacTel Reply at 20; USTA at 26-27; Sprint at 45; TRA at 18. Some parties support the Commission's tentative conclusion, but also argue additional regulations are necessary.E.g., AT&T 39-40; MCI at 43; ITAA at 26.

FN641. ITAA at 26; Voice-Tel at 15-16; Ameritech Reply at 31-32.

FN642. AT&T at 40; ALTS at 5-6; MCI at 43-44.

FN643. MCI at 43-44.

FN644. See e.g., Ameritech Reply at 31; Bell Atlantic Reply at 12-15; PacTel Reply at 20; U S West Reply at 16-17.

FN645. ITAA at 26; Voice-Tel at 16; Ameritech Reply at 31-32. The Commission's pricing rules and interpretation of section 252(i) are currently under stay by the 8th Circuit Court of Appeals.Iowa Utilities Board v. FCC, No. 96-3321 (8th Cir. Oct. 15, 1996) (order granting stay pending judicial review).

FN646. SeeFirst Interconnection Order at ¶¶ 130-132 (concluding that the Commission's rules under section 251 should be equally applicable to statements of generally available terms under section 271(c)(2)(B)). The Commission's pricing rules are currently under stay by the 8th Circuit Court of Appeals. Iowa Utilities Board v. FCC.

FN647. SeeAccounting Safeguards Order parts III.B.2.c and IV.B.1.b.

FN648. AT&T at 40 (in the alternative favoring a rule that any tariff that has the effect of giving a BOC or BOC affiliate a lower charge per unit of traffic than other interexchange carriers is presumptively invalid); cf. ALTS at 5 (arguing the Commission should require the BOCs to show that non-affiliates purchase at least 10% of a given tariff).

FN649. Ameritech Reply at 31; Bell Atlantic Reply at 12; PacTel Reply at 20; U S West Reply at 16-17.

FN650. Ameritech Reply at 31-32.

FN651. MCI at 43-44.

FN652. Access Charge Reform NPRM; seeFirst Interconnection Order at ¶¶ 716-732.

FN653. See47 U.S.C. § 252(d)(1)(A)(i). The Commission's pricing rules interpreting section 252(d)(1)(A)(i) are currently under stay by the 8th Circuit Court of Appeals.Iowa Utilities Board v. FCC.

FN654. SeeAccounting Safeguards Order parts III.B.2.c and IV.B.1.b.

FN655. See USTA Reply, Haussman Statement at 10.

FN656. We emphasize that these pricing limitations should not be interpreted to preclude the section 272 affiliates from offering innovative service packages and pricing plans.

FN657. Notice at ¶ 137.

FN658. MCI at 44; NYNEX Reply at 25.

FN659. See Bell Atlantic Reply at 12.

FN660. 47 U.S.C. § 272(e)(4).

FN661. Notice at ¶ 89.

FN662. Bell Atlantic Reply at 14; NYNEX Reply at 25-26; PacTel Reply at 21-22; U S West Reply at 17-18.

FN663. NYNEX at 36.

FN664. AT&T at 44; Ameritech Reply at 32; MCI Reply at n.67; MCI Nov. 1 Ex Parte at 1-2.

FN665. Letter from Michael Yourshaw, Wiley, Rein & Fielding to William F. Caton, Acting Secretary, FCC, Attachment at 1-2 (filed Nov. 27, 1996) (PacTel Nov. 27 Ex Parte).

FN666. See, e.g., AT&T at 44; ALTS at 1-5; Bell Atlantic Reply at 14; NYNEX Reply at 25-26; PacTel Reply at 20-22; U S West Reply at 17-18. Under the MFJ, the BOCs were authorized to maintain interLATA networks that are used to manage the operation of local exchange services; these services are commonly known as “Official Services.” See generallyUnited States v. Western Elec. Co., 569 F. Supp. at 1097-1101 (D.D.C. 1983) (determining that the RBOCs, and not AT&T, should own the Official Services networks) (subsequent history omitted). These networks perform various support functions, such as connecting directory assistance operators in different LATAs with customers and monitoring and controlling trunks and switches.Id. at n.179.

FN667. Two BOCs argue that the definition of inter-

LATA service precludes including information services within the scope of "interLATA or intraLATA facilities or services."PacTel at 38; U S West at 42. ITAA and Sprint believe that section 272(e)(4) applies to ISPs. ITAA at 24-25; Sprint at 45.

FN668. AT&T at 42-44. We note that the record supports the Commission's tentative conclusion that section 272(e)(1) is not a grant of authority.See supra paragraph 239.

FN669. For example, section 272(e)(4) requires BOCs to provide on a nondiscriminatory basis "network control signalling," which is an incidental service exempted from the section 271 approval process under section 271(b)(3).47 U.S.C. §§ 271(b)(3), (g)(6).

FN670. We note that, by its terms, section 272(e)(4) applies only to services and facilities that a BOC provides to its section 272 affiliate.

FN671. Bell Atlantic Reply at 14; NYNEX Reply at 25-26; PacTel Reply at 21-22; U S West Reply at 17-18; Bell Atlantic Sept. 27 Ex Parte at 2; PacTel October 18 Ex Parte.

FN672. 47 U.S.C. § 272(e)(4) (emphasis added).

FN673. 47 U.S.C. § 271(d).

FN674. PacTel Nov. 27 Ex Parte at 1-2.

FN675. "InterLATA services" are defined as "telecommunications" between a point located in LATA and a point outside that LATA. 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."Id. at 153(43).

FN676. Id. at § 153(46).

FN677. PacTel Nov. 27 Ex Parte at 2.

FN678. Id.

FN679. 47 U.S.C. § 251(c)(4).

FN680. Joint Explanatory Statement at 115.

FN681. See47 C.F.R. § 69; see generally MTS and WATS Market Structure, Phase I, CC Docket 78-72, Third Report and Order, 93 FCC 2d 241, ¶¶ 13, 23 (1982) (access charges are regulated services and include "carrier's carrier" services).

FN682. 47 C.F.R. § 21.2.

FN683. NARUC v. FCC, 525 F.2d 630, 641 (D.C. Cir. 1976)(NARUC I) (citingSemon v. Royal Indemnity Co., 279 F.2d 737, 739 (5th Cir. 1960)).

FN684. NARUC I, 525 F.2d at 641.See alsoSouthwestern Bell Telephone Company v. FCC, 19 F.3d 1475, 1480-81 (D.C. Cir. 1994) (describing the test for common carriage).

FN685. 47 C.F.R. § 32.27(b).See also infra part VIII.B for a discussion of the limitations on a BOC's transfer of local bottleneck facilities.

FN686. See supra note 668. We discuss the definition of interLATA services supra at part III.A.1.

FN687. See47 U.S.C. § 153(10).

FN688. But cf. ITAA at 24-25 (arguing that, as in section 272(e)(2), section 272(f) demonstrates that all subsections of 272(e) apply to ISPs).

FN689. Section 272(e)(2) states that the BOC and its affiliate subject to section 251(c) "shall not provide any facilities, services, or information concerning its provision of exchange access to the affiliate described in subsection (a)... unless such facilities, services, or information are made available to other providers of interLATA services in that market on the same terms and conditions."47 U.S.C. § 272(e)(2) (emphasis added).Section 272(e)(4) states the BOC or its affiliate subject to section 251(c)"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."Id. § 272(e)(4) (emphasis added).

FN690. Section 272(f)(1) states: "The provisions of this section (other than subsection (e)) shall cease to apply with respect to manufacturing activities or the interLATA telecommunications services of a [BOC] 3 years after the date such [BOC] or any [BOC] affiliate is authorized to provide interLATA telecommunications services under section 271(d), unless the Commission extends such 3-year period by rule or order."47 U.S.C. § 272(f)(1) (emphasis added).Section 272(f)(2) contains similar language regarding section 272(e) in relation to the four-year sunset period for information services.Id. § 272(f)(2).

FN691. Notice at ¶ 80.

FN692. Bell Atlantic, Exhibit 1 at 8; PacTel at 35-36; SBC at 10; USTA at 25-26.

FN693. Teleport at 17-18; ITAA at 25.

FN694. MCI at 41; TRA at 17.

FN695. Accord MCI at 41; TRA at 17.

FN696. See supra part VI.B.

FN697. Notice at ¶ 91.

FN698. Id. Only three interexchange carriers are covered by section 271(e) -- AT&T, MCI, and Sprint. See Federal Communications Commission, CCB, Industry Analysis Division, Long Distance Market Shares: Fourth Quarter 1995, Tbl. 4 (March 1996).

FN699. Id.

FN700. See, e.g., MCI at 46-47; Ameritech at 48-49; PacTel at 40; TRA at 18-19; Bell Atlantic Reply at 10-11.

FN701. MCI Reply at 27.

FN702. Id. at 26-27.

FN703. See, e.g., SBC Reply at 19 n.31; NYNEX at 13-14; USTA Reply at 15-16; PacTel Reply at 24 n.26; Ameritech Reply at 27; Bell Atlantic Reply at 10.

FN704. Id.

FN705. AT&T at 53-54.

FN706. Id.

FN707. SBC Reply at 18-19; see also USTA Reply at 15-16; PacTel Reply at 24 n.26; Ameritech Reply at 27; Bell Atlantic Reply at 10-11.

FN708. SBC Reply at 18-19.

FN709. See, e.g., AT&T at 53; Sprint at 47-48; MCI Reply at 29-30.

FN710. USTA at 29.

FN711. Ameritech at 49-50.

FN712. See e.g., AT&T at 53; Sprint at 47-48; MCI at 45-46; Ameritech at 49-50.

FN713. First Interconnection Order at ¶ 335.

FN714. USTA at 29.

FN715. See, e.g., S. Rep. No. 104-23104th Cong., 1st Sess. 43 (1995) (stating that the Committee intends [section 271(e)] to provide parity between the Bell operating companies and other telecommunications carriers in their ability to offer 'one stop shopping' for telecommunications services).

FN716. See supra part III.A.1 (defining "interLATA services" to include interLATA telecommunications and interLATA information services).

FN717. As the Senate Commerce Committee observed, "the ability to bundle [a variety of telecommunications services] into a single package to create "one-stop-shopping" will be a significant competitive marketing tool."S. Rep. No. 104-23 at 22-23.See MCI at 46-47; Ameritech at 48-49; PacTel at 40; TRA at 18-19; Bell Atlantic Reply at 10-11.

FN718. See generallyComputer II Final Order, 77 FCC 2d at 442;47 C.F.R. § 64.702(e).

FN719. See, e.g., MCI at 46-47.

FN720. Id.

FN721. See generally SBC Reply at 19 n.31; NYNEX at 13-14; USTA Reply at 15-16; Ameritech Reply at 27; Bell Atlantic Reply at 10.

FN722. See, e.g., Letter from Michael Kellogg, Counsel for Bell Atlantic, to Christopher Wright, Deputy General Counsel, FCC at 4 (filed Dec. 9, 1996) (Bell Atlantic Dec. 9 Ex Parte); Letter from Robert Pettit, Counsel for Pacific Telesis Group, to Christopher Wright, Deputy General Counsel, FCC at 6 (filed Dec. 9, 1996) (PacTel Dec. 9 Ex Parte).

FN723. See, e.g., Letter from Frank W. Krogh, MCI, to Christopher Wright, Deputy General Counsel, FCC at 1-2 (filed Dec. 13, 1996) (MCI Dec. 13 Ex Parte); Letter from E. E. Estey, Government Affairs Vice President, AT&T, to William F. Caton, Acting Secretary, FCC at 4 (filed Dec. 13, 1996) (AT&T Dec. 13 Ex Parte).

FN724. United States v. X-Citement Video, 115 S.Ct. 464, 467, 469 (1994).

FN725. See44 Liquormart, Inc. v. Rhode Island, 116 S.Ct. 1495, 1504 (1996).

FN726. See paragraph 276, supra.

FN727. MCI at 46.

FN728. Bell Atlantic Dec. 9 Ex Parte at 4.

FN729. 44 Liquormart, 116 S.Ct. at 1505 n.7, 1506.

FN730. Id. at 1506 (internal quotation marks omitted).

FN731. AT&T at 53-54.

FN732. Notice at ¶ 90.

FN733. See, e.g., Ameritech at 46; PacTel at 39; BellSouth Reply at i; U S West Reply at 4; USTA Reply at i; Citizens for a Sound Economy Reply at 3-4.

FN734. PacTel at 39.

FN735. Id.

FN736. AT&T at 55; see also Teleport Reply at 6.

FN737. Sprint at 47.

FN738. Id.

FN739. MCI at 45.

FN740. See, e.g., Ameritech at 46; PacTel at 39; BellSouth Reply at i; U S West Reply at 4; USTA Reply at i; Citizens for a Sound Economy Reply at 3-4.

FN741. AT&T at 55; see also Teleport Reply at 4.

FN742. PacTel at 41.

FN743. Sprint at 47.

FN744. MCI at 45.

FN745. 47 U.S.C. §§ 272(g)(1).

FN746. Id. at § 202.

FN747. Notice at ¶ 91.

FN748. See, e.g., BellSouth at 7; Bell Atlantic Reply at 5-6.

FN749. See, e.g., PacTel at 40; BellSouth at 7.

FN750. See, e.g., NYNEX Reply at 15-16; U S West Reply at 18.

FN751. See, e.g., NYNEX Reply at 15-16.

FN752. See, e.g., CompTel at 24-25; Time Warner Reply at 18-19; AT&T Reply at 30-31; MCI Reply at 3-4; NCTA Reply at 3.

FN753. MCI Reply at 30; see also LDDS at 16-17; USTA Reply, Haussman Statement at 10 (opposing MCI's suggestion).

FN754. AT&T at 58; CompTel at 24; MCI Reply at 49; Sprint Reply at 28; see also NCTA at 4-6 (stating that the Commission should prohibit the BOC from conducting inbound telemarketing or referrals of its video services unless it provides the same marketing services to

all cable operators and other providers of video programming in the same area).

FN755. See, e.g., BellSouth at 8-9; Ameritech Reply at 22-25; U S West Reply at 4.

FN756. 47 U.S.C. § 272(g)(2).

FN757. See e.g., LDDS at 15-16 (stating that section 272(g) ensures that the operating company would not be able to create a self-fulfilling prophecy through premature advertising and marketing activities).

FN758. See supra part VII.A.

FN759. See, e.g., PacTel Reply at 24-25; NYNEX Oct. 23 Ex Parte at 2-3.

FN760. SeeInvestigation of Access and Divestiture Related Tariffs, CC Docket No. 83-1145, 101 FCC 2d 935, 950 (1985); see also47 U.S.C. § 251(g).

FN761. United States v. Western Elec. Co., 578 F.Supp 668, 676-77 (D.D.C. 1983).

FN762. SeeInvestigation of Access and Divestiture Related Tariffs, 101 FCC 2d at 950.

FN763. NCTA at 4-6.

FN764. NYNEX Oct. 23 Ex Parte at 3.

FN765. Id.

FN766. 47 U.S.C. § 272(g)(2).

FN767. 47 U.S.C. § 272(g)(3).

FN768. See, e.g., NYNEX at 13-14; Letter from Robert Blau, Vice President, Executive and Federal Regulatory Affairs, BellSouth, to William Caton, Acting Secretary, FCC at attachment 3 (BellSouth Nov. 14 Ex Parte).

FN769. NYNEX at 13-14.

FN770. Id. at n.13.

FN771. Notice at ¶ 92.

FN772. Id. at ¶ 93.

FN773. Id.

FN774. See, e.g., Ameritech at 50; Bell Atlantic at 9; NYNEX at 14-17; PacTel at 41.

FN775. Id.

FN776. See, e.g., Bell Atlantic at 9.

FN777. Sprint at 49.

FN778. NYNEX at 19.

FN779. AT&T at 59-60; Time Warner at 26.

FN780. PacTel at 41; Time Warner at 26.

FN781. Id.

FN782. PacTel at 41; YPPA at 10.

FN783. For further discussion of section 272(b)(5), see supra part IV.F.

FN784. Notice at ¶ 70. We note that such a transfer could occur between a BOC and any of its affiliates, not just a section 272 affiliate.

FN785. Id.

FN786. Id.

FN787. Id. at ¶ 71.

FN788. Id.

FN789. Id.

FN790. Id. at ¶ 79.

FN791. See, e.g., Letter from Jeffrey Sinsheimer and Lesla Lehtonen, California Cable Television Association, to William F. Caton, Acting Secretary, FCC, at 2 (filed Oct. 15, 1996) (CCTA Oct. 15 Ex Parte) (stating that, at a bare minimum, the FCC must act to ensure that the BOCs are not permitted to transfer hard assets -- such as switches or subscribers -- or intangible assets -- such as intellectual property -- to unregulated affili-

ates).

FN792. See, e.g., Ameritech at 59-60.

FN793. Ameritech at 60; see also BellSouth at 33-34; PacTel at 24-25.

FN794. See, e.g., PacTel at 25-26.

FN795. See, e.g., Ameritech at 60-61.

FN796. Id.

FN797. Notice at ¶ 79; Ameritech at 58 n.68.

FN798. Id.

FN799. Id.

FN800. See, e.g., Teleport Oct. 8 Ex Parte at 2; CCTA Oct. 15 Ex Parte at 1-2.

FN801. Id. The Ohio and Michigan commissions confirm in their comments that they have already received requests from BOC 272 affiliates for authorization to offer local exchange services in conjunction with interLATA services. Michigan Commission at 4-6; Ohio Commission at 6-8.

FN802. Teleport Oct. 8 Ex Parte at 5.

FN803. Teleport at 5; see also AT&T at 21-22.

FN804. E.g., Teleport at 7-13; NCTA at 10; Time Warner Reply at 19; CCTA Oct. 15 Ex Parte at 1-2 (stating that, although the 1996 Act does not address the provision of local service -- either on a resale or facilities basis -- by a BOC section 272 affiliate, the Commission should adopt a prohibition against such activities as a policy matter).

FN805. E.g., Ameritech Reply at 17-19; NYNEX Reply at 9 n.23; PacTel Reply at 22; U S West at 57.

FN806. See, e.g., Ameritech Sept. 19 Ex Parte at 3.

FN807. Letter from Alan J. Gardner, Vice President Regulatory & Legal Affairs, CCTA to John Nakahata, Senior Legal Advisor to Chairman Reed Hundt, FCC at 3 (filed Dec. 2, 1996) (CCTA Dec. 2 Ex Parte).

FN808. Id. at 4.

FN809. Memorandum from Alan Gardner, Glenn Semow, and Peter Casciato, CCTA to Linda Kinney, Policy and Program Planning Division, Common Carrier Bureau, FCC at 1-2 (filed Dec. 12, 1996) (CCTA Dec. 12 Ex Parte).

FN810. See MCI Nov. 1 Ex Parte at 2-3; AT&T Oct. 15 Ex Parte at 2; see also Time Warner Reply at 19.

FN811. AT&T Oct. 15 Ex Parte at 2.

FN812. Id.

FN813. MCI Nov. 1 Ex Parte at 3.

FN814. See supra part V.C.

FN815. See47 U.S.C. § 153(4)(B) (defining a "BOC" to include any successor or assign of any BOC that provides wireline telephone exchange service). Thus, the interLATA and manufacturing operations contemplated by section 272 would need to occur in an affiliate other than the one to which the local exchange and exchange access facilities have been transferred.

FN816. See Ameritech at 60-61.

FN817. See, e.g., Ameritech at 57; see also USTA at 24.

FN818. See, e.g., PacTel Oct. 23 Ex Parte at 1.

FN819. CCTA Dec. 2 Ex Parte at 4.

FN820. See, e.g., Darby v. Cisneros, 113 S.Ct. 2539, 2545 (1993); Connecticut Nat'l Bank v. Germain, 112 S.Ct. 1146, 1149 (1992).

FN821. Ameritech at 58 n.68.

FN822. See47 U.S.C. § 251(h)(1).

FN823. 47 U.S.C. § 251(h)(2); see alsoFirst Interconnection Order at ¶ 1248.

FN824. CCTA Dec. 12 Ex Parte at 2.

FN825. AT&T at 22. AT&T also argues this prohibition is part of the operate independently requirement of section 272(b)(1).Id. We address the meaning of that term supra in part IV.B.

FN826. CCTA Dec. 2 Ex Parte at 3.

FN827. See AT&T Oct 15 Ex Parte at 2.

FN828. Id.

FN829. SeeAccess Charge Reform NPRM.

FN830. MCI Nov. 1 Ex Parte at 2.

FN831. See, e.g., Ameritech Sept. 19 Ex Parte at 3.

FN832. See, e.g., PacTel Oct. 23 Ex Parte at 1-2; Ameritech Sept. 19 Ex Parte at 2-3.

FN833. NCTA at 10; CCTA at 7, 10; Teleport at 3-5, 8-9; Ohio Commission at 7.

FN834. Section 251(c)(3) requires incumbent LECs to provide access to network elements on rates, terms and conditions that are just, reasonable, and nondiscriminatory.47 U.S.C. § 251(c)(3).See alsoFirst Interconnection Order at ¶¶ 298-316.

FN835. See AT&T at 32-33.

FN836. First Interconnection Order at ¶¶ 504-528. Therefore, if BOCs are providing access to pre-ordering, ordering, provisioning, maintenance and repair, and billing functions to competing providers of local service through a separate system or “gateway” than they provide for themselves internally, then the BOC affiliate must use the same separate system or “gateway” in order to obtain access to these OSS functions.

FN837. Teleport at 5. The Ohio and Michigan commissions confirm in their comments that they have already received requests from BOC 272 affiliates for authorization to offer local exchange services in conjunction with interLATA services. Michigan Commission at 4-6; Ohio Commission at 6-8.See also CCTA Dec. 2 Ex Parte at 2 (asserting that PB COM has filed for authority in California to provide local exchange services, interLATA and intraLATA services, and discretionary services on both a facilities and resale basis).

FN838. See, e.g., Ohio Commission at 6 n.6.

FN839. See, e.g., Computer III Phase II Order, 2 FCC Rcd at 3091;BOC ONA Reconsideration Order, 5 FCC Rcd at 3093.

FN840. Notice at ¶ 94.

FN841. Id. at ¶ 95.

FN842. Id. at ¶ 75.

FN843. Bell Atlantic at 9; NYNEX at 63; PacTel at 46-47; SBC at 8-9; U S West at 60; USTA at 32-33.

FN844. PacTel at 46-47; U S West Reply at 30; USTA Reply at 20.

FN845. AT&T at 48; DOJ Reply at 12 (recommending two specific reporting requirements, one to detect cost misallocations and another to detect discrimination in the quantity, quality, and time of service between BOCs and their 272 affiliates); ITAA at 27-28; MCI at 50; Teleport at 15-17 (suggesting quarterly reporting on objective performance standards); TIA at 47-49; TRA at 16-17; Voice-Tel at 5.

FN846. TIA at 47.

FN847. Some parties maintain that no rules are necessary because other statutory provisions developed by Congress (e.g., sections 251(c)(5), 272(b)(5), and 272(d)(2)) are sufficient to protect against discriminatory behavior. Bell Atlantic at 8-9; ITAA at 21; ITI and ITAA Reply at 6 (section 272(c)(1)'s absolute prohibition on discrimination makes detailed regulation unnecessary); USTA at 25; USTA Reply at 13-14. Others argue that no rules are necessary because claims of discrimination are best resolved on a case-by-case basis. Ameritech at 53; NYNEX at 36; NYNEX Reply at 21-22; Sprint at 38.

FN848. PacTel at 32; PacTel Reply at 14; see also SBC at 13-14; cf. Ohio Commission at 9 (supports application of Computer II provisions to prevent discrimination

because these require structural separation).

FN849. AT&T at 33 (Computer III rules not fashioned to require equal treatment between a BOC affiliate and its competitor); MCI at 37-38; MCI Reply at 21-22; MFS Reply at 20-21 (section 272(c)(1) goes further than Computer III requirements); Teleport at 14; Time Warner at 23; TIA at 39-40 (existing Computer III rules do not guarantee equal treatment in the use of information between a BOC affiliate and unaffiliated entities); TRA at 17.

FN850. See supra part VI.A; see also infra part XI.

FN851. We note that our conclusion is consistent with the Commission's policy to eliminate or reduce reporting requirements wherever possible.SeeRevision of Filing Requirements, Report and Order, CC Docket No. 96-23,DA 96-1873 (Com. Car. Bur. rel. Nov. 13, 1996) (eliminating thirteen reporting requirements imposed on communications carriers by the Commission's rules and policies and reducing frequency of filing obligations for four other reporting requirements imposed pursuant to Commission orders).

FN852. Our discussion will be primarily focused on the non-accounting mechanisms that already exist in the Act. Accounting requirements imposed by the Act are discussed in the Accounting Safeguards Order.

FN853. See AT&T at 33-34, 37; PacTel at 37; PacTel Reply at 15 (citing Commission finding that Computer III/ONA nondiscrimination reports have not disclosed any discrimination in the BOC provision of CPE or resulted in the filing of any formal complaints); Sprint at 41 n.29; Time Warner at 23.

FN854. See47 U.S.C. § 272(d). This requirement is addressed in the Accounting Safeguards Order.

FN855. See Florida Commission at 5 (a joint audit, if performed according to the guidelines suggested by NARUC, will facilitate detection of separate affiliate and nondiscrimination requirements of section 272).

FN856. 47 U.S.C. § 271(d)(3)(B).

FN857. ITAA at 27-28.

FN858. DOJ Reply at 12 (Commission should require reporting of costs arising from transactions between third parties and the BOC or its section 272 affiliate); MCI at 50-51; TIA at 48, n.104.

FN859. 47 U.S.C.§ 251(c)(1).

FN860. Id. § 251(c)(5). For further discussion of this requirement, seeSecond Interconnection Order at ¶¶ 165-260.

FN861. Second Interconnection Order at ¶¶ 171, 173.

FN862. See47 U.S.C.§§ 273(c)(1), (c)(4). These requirements are addressed in the Manufacturing NPRM.

FN863. See47 U.S.C. § 252. We also note that competing carriers, in order to ensure they have a recourse for anticompetitive behavior by BOCs, may seek to include liquidated damage clauses, dispute resolution mechanisms, and other common commercial arrangements into their negotiated or arbitrated agreements.

FN864. 47 U.S.C. § 251(c)(1).

FN865. See, e.g., Letter from Todd F. Silbergeld, Director, Federal Regulatory, SBC to William F. Caton, Acting Secretary, FCC at 2 (filed Nov. 6, 1996) (SBC Nov.6 Ex Parte) (stating that requesting carriers have been sufficiently concerned about service quality and performance levels to have negotiated specific performance standards into interconnection agreements with SWBT).

FN866. 47 U.S.C. §§ 252 (a), (h), (i).

FN867. See, e.g., 83 Ill. Admin. Codetit. 83, § 730 (1996); NJ Admin Code tit. 14, § 10-1-1.10 (1996), NY Comp. Codes R. & Regs, tit. 16, § 603 (1996), Or. Admin R. 860-23-055 (1995); Mo. Code Regs. Ann. tit. 4 § 240-32.070 (1996); Va. Admin. Code tit. 20, § 5-400-100 (1996).

FN868. See, e.g., DOJ Reply at 13; MCI at 50; Letter from Charles E. Griffin, Government Affairs Director, AT&T to William F. Caton, Acting Secretary, FCC at 1

(filed Oct. 3, 1996) (AT&T Oct. 3 Ex Parte).

FN869. See infra part IX.B.4 (discussing burden-shifting).

FN870. See U S West at 61; USTA at 31-33.

FN871. We recently initiated a separate proceeding addressing the expedited complaint procedures mandated by this subsection as well as those mandated by other provisions of the 1996 Act.SeeAmendment of Rules Governing Procedures to be Followed When Formal Complaints are Filed Against Common Carriers, CC Docket No. 96-238, Notice of Proposed Rulemaking, FCC 96-460, (rel. Nov. 27, 1996) (Enforcement NPRM).

FN872. Section 206 provides that "any common carrier" found to be in violation of the Communications Act shall "be liable to the person or persons injured thereby for the full amount of damages sustained in consequence of any such violation."Section 207 of the Communications Act permits any person "damaged" by the actions of any common carrier to bring suit for the recovery of these damages. Section 208(a) authorizes complaints by any person "complaining of anything done or omitted to be done by any common carrier" subject to the Communications Act or its provisions. Section 209 specifies that the Commission will "make an order directing the carrier to pay to the complainant" any damages amount a complainant successfully establishes.47 U.S.C. §§ 206-209.

FN873. Notice at ¶ 97.

FN874. See47 U.S.C. § 271(d)(3).

FN875. AT&T at 49; CompTel at 26; Excel at 14; LDDS at 29-30; MCI at 52; PacTel at 47; Sprint at 55, n.35; Teleport at 22; TIA at 49; TRA at 20; U S West at 59; USTA at 33.But see NYNEX at 64-65; SBC Reply at 32-33.

FN876. See, e.g., Sprint at 55 n.35; USTA at 34 n.14.

FN877. AT&T at 50; BellSouth at 35; CompTel at 28; Excel at 14 n.41; LDDS at 31; MCI at 53; Sprint at 58; TRA at 21.

FN878. AT&T Reply at 28 n.62 (stating that the suggestion that Congress would have chosen to reduce incentives for BOC compliance and leave injured parties uncompensated is absurd).

FN879. See47 C.F.R. § 1.722.

FN880. See also infra at paragraph 355.

FN881. 47 U.S.C. § 503(b); 47 C.F.R. § 1.80et seq; see also NYNEX at 74-75.

FN882. Notice at ¶ 99.

FN883. Ameritech at 73; CompTel at 30; cf. Sprint at 57 n.38 (stating that it is not possible at this point to determine legal and evidentiary standards for the imposition of sanctions).

FN884. USTA at 34.

FN885. MCI at 53.

FN886. SeeEnforcement NPRM.

FN887. We expect to give content to the substantive requirements of the competitive checklist, for example, in the context of adjudicatory proceedings pursuant to section 271.

FN888. See, e.g., General Plumbing Corp. v. New York Telephone Co. and MCI, Memorandum Opinion and Order, DA 96-966 (Com. Car. Bur. rel. June 20, 1996). Proof by a preponderance of the evidence is applicable in most administrative and civil proceedings unless otherwise prescribed by statute or where other countervailing factors warrant a higher standard.SeeSea Island Broadcasting Corp. v. FCC, 627 F.2d 240, 242 (D.C. Cir. 1980) ("The use of the 'preponderance of evidence' standard is the traditional standard in civil and administrative proceedings. It is the one contemplated by the APA, 5 U.S.C. § 556(d)."), cert. denied, 449 U.S. 834 (1980); see alsoGrogan v. Garner, 498 U.S. 279, 285 (1991) (because the "preponderance of the evidence" standard results in roughly equal allocation of risks of error between litigants, the Supreme Court presumes

that such a standard is applicable in civil actions between private litigants unless particularly important individual interests or rights are at stake). Generally, preponderance of the evidence means the "greater weight of evidence, evidence which is more convincing than the evidence which is offered in opposition to it." Hale v. Department of Transportation, 772 F.2d 882, 885 (Fed. Cir. 1985).

FN889. Notice at ¶ 100.

FN890. Bell Atlantic at 10 n.26; CompTel at 29; LDDS at 30; Sprint at 55-56; Sprint Reply at 36; Time Warner at 36-37; TRA at 21.

FN891. NYNEX at 65-66; see also PacTel at 45; SBC Reply at 34.

FN892. AT&T at 31, 35; MCI at 53-55.

FN893. SeeNotice at ¶ 100.

FN894. See47 C.F.R. § 1.721.

FN895. 47 C.F.R. § 1.721(a)(6).

FN896. Enforcement NPRM at ¶¶ 37.

FN897. Id. at ¶ 85.

FN898. See NYNEX at 66; PacTel at 45; SBC Reply at 34.

FN899. Notice at ¶ 102.

FN900. See, e.g., Policy and Rules Concerning Rates for Competitive Common Carrier Services and Facilities Authorizations Therefor, CC Docket No. 79-252, First Report and Order, 85 FCC 2d 1, 31-33 (1980).

FN901. Notice at ¶ 104.

FN902. Ameritech at 74-75; Bell Atlantic at 10-11; BellSouth at 36-37; NYNEX at 70-72; PacTel at 42; SBC Reply at 34; U S West at 62; USTA at 36.

FN903. NYNEX at 66; PacTel Reply at 37-38; SBC Reply at 34.

FN904. See, e.g., AT&T at 50-51, CompTel at 29; DOJ Reply at 13-14; Excel at 14; ITAA at 28; LDDS at 30; MCI at 55; Sprint at 55-56; Teleport at 22; Time Warner at 37; TRA at 21.

FN905. CompTel at 30; DOJ Reply at 15; LDDS at 30-31; MCI at 56; NYNEX Reply at 37 n.113; Teleport at 22; TRA at 22.But see PacTel at 46; SBC Reply at 34.

FN906. See Black's Law Dictionary 136 (Abridged 6th ed. 1991).

FN907. See generally, Amendment of Rules Governing Procedures to be Followed When Formal Complaints Are Filed Against Common Carriers, CC Docket No. 92-26, Report and Order, 8 FCC Rcd 2614 (1993) (1993 Enforcement Order); 47 C.F.R. §§ 1.721 - 1.735.

FN908. In any complaint proceeding initiated under Section 208 of the Communications Act, the Commission, and the staff pursuant to delegated authority, may exercise discretion to require a defendant carrier to come forward with information or evidence determined to be in the sole possession or control of the carrier.See, e.g., General Services Admin. v. AT&T, 2 FCC Rcd 3574, 3576 n.31 (1987). In such cases, however, the burden of establishing a violation remains with the complainant.

FN909. Sprint Reply at 31.

FN910. See CompTel at 29; DOJ Reply at 13; LDDS at 30; MCI Reply at 32-33; Time Warner at 37; TRA at 21; see also Sprint at 55-57 (there is no way, absent discovery, to require a BOC to produce relevant evidence that is harmful to its case).

FN911. But see Sprint Reply at 34 (stating that it is unclear whether Commission means shift in burden of going forward or shift in burden of ultimate persuasion).

FN912. Ameritech at 74-75.

FN913. Id. at 74.

FN914. See, e.g., AT&T at 51-52; New Jersey Division

of Ratepayer Advocate at 4-5; NYNEX at 76; USTA Reply at 21-22.

FN915. ATSI at 15-16; NYNEX at 76; PacTel Reply at 38.But see AT&T at 52-53 n.44 (Commission may not adopt any procedures that would delay its decision beyond 90 days).

FN916. PacTel Reply at 38.

FN917. Enforcement NPRM at ¶¶ 48-56.

FN918. See MCI at 56.

FN919. Pursuant to section 503(b)(1)(B), a person who "willfully or repeatedly" fails to comply with any of the provisions of the Communications Act or any rule, regulation, or order issued by the Commission under the Communications Act, is liable to the United States for a forfeiture penalty.Section 503(b)(2)(B) authorizes the Commission to assess forfeitures against common carriers of up to one hundred thousand dollars for each violation, or each day of a continuing violation, up to a statutory maximum of one million dollars for a single act or failure to act. In exercising such authority, the Commission is required to take into account "the nature, circumstances, extent, and gravity of the violation and, with the respect to the violator, the degree of culpability, any history of prior offenses, ability to pay, and such other matters as justice may require." 47 U.S.C. §§ 503(b)(1)(B), (b)(2)(B).

FN920. 47 U.S.C. § 271(d)(6)(A).

FN921. See5 U.S.C. §§ 554, 556, 557.

FN922. Notice at ¶ 106.

FN923. AT&T at 51; NYNEX Reply at 38 n.118; Sprint at 57 n.38.

FN924. AT&T at 51.

FN925. PacTel and USTA argue that a trial-type hearing for section 271(d)(3) violations will afford parties full due process rights and help resolve highly technical, complex matters. PacTel at 45; USTA at 37. AT&T, Excel, MCI, and Sprint agree that no trial-type hearings before an ALJ are required prior to imposition of nonforeiture sanctions. AT&T at 50; Excel at 13 n.37; MCI at 57; Sprint at 56 n.37.

FN926. AT&T at 51.

FN927. See1993 Enforcement Order, 8 FCC Rcd at 2625-2626, ¶ 65;see also, e.g., Elehue Kawika Freemon and Lucille K. Freemon v. AT&T, Hearing Designation Order, 9 FCC Rcd 4032 (1994).

FN928. See AT&T at 50.

FN929. Notice at ¶ 165 (citing5 U.S.C. § 605(b)).

FN930. National Telephone Cooperative Association Comments at 5-6.

FN931. 5 U.S.C. § 601et seq. SBREFA was enacted as Subtitle II of the Contract With America Advancement Act of 1996, Pub. L. No. 104-121, 110 Stat. 847 (1996).

FN932. Notice at ¶ 165.

FN933. Federal Communications Commission, CCB, Industry Analysis Division, Preliminary Domestic Information From Statistics of Communications Common Carriers, Tbl. 1.1 (July 1996).

FN934. Specifically, the Order implements the joint marketing restrictions of section 271(e), which apply to interexchange carriers that serve "greater than 5 percent of the nation's presubscribed access lines."See47 U.S.C. § 271(e).

FN935. Federal Communications Commission, CCB, Industry Analysis Division, Long Distance Market Shares: Second Quarter, 1996, Tbl. 4 (Sept. 1996).

FN936. SBA regulations, 13 C.F.R. § 121.201, define small telecommunications entities in SIC Code 4813 (Telephone Communications Except Radiotelephone) as entities with fewer than 1,500 employees.

FN937. NTCA Comments at 5-6.

FN938. 5 U.S.C. § 801(a)(1)(A).

FN939. 5 U.S.C. § 605(b).

FN940. 47 U.S.C. § 272(e)(1).

FN941. Notice at ¶ 85.

FN942. AT&T at 36-37; Teleport Oct. 8 Ex Parte at 1; Letter from Frank W. Krogh, Appellate Counsel, Regulatory Law, MCI to William F. Caton, Acting Secretary, FCC at 1 (MCI Nov. 1 Reporting Ex Parte). Other parties also express dissatisfaction with ONA reporting. See e.g., Time Warner at 23.

FN943. AT&T at 36-37. According to AT&T, reliance on average response times allows a BOC to respond quickly to urgent requests of its affiliate and slowly to the less important requests of its affiliate, while doing the reverse for unaffiliated entities, thereby maintaining identical average response times for both entities, but discriminating against unaffiliated entities.Id.

FN944. AT&T Oct. 3 Ex Parte at 5.

FN945. Id.

FN946. Id. at 2.

FN947. Teleport Oct. 24 Ex Parte, Attachments 1 and 2.

FN948. MCI Nov. 1 Reporting Ex Parte at 2-3.

FN949. Id.

FN950. Bell Atlantic Oct. 16 Ex Parte at 2 n.1.

FN951. Id. at 2.

FN952. BellSouth Oct. 29 Ex Parte at 2; PacTel Oct. 18 Ex Parte at 4.

FN953. Ameritech Oct. 23 Ex Parte, Attachment.

FN954. Id.

FN955. Id.

FN956. PacTel Oct. 18 Ex Parte at 4.

FN957. PacTel Oct. 23 Ex Parte at 4.

FN958. Id. at 3.

FN959. E.g., PacTel at 37; USTA at 26; Bell Atlantic Oct. 15 Ex Parte at 2; NYNEX Oct. 23 Ex Parte at 4.

FN960. PacTel Oct. 18 Ex Parte at 4, Attachment 6.

FN961. Ameritech Oct. 23 Ex Parte, Attachment.

FN962. See supra paragraph 242.

FN963. See AT&T Oct. 3 Ex Parte at 5; Teleport Oct. 24 Ex Parte, Attachment 1; MCI Nov. 1 Reporting Ex Parte, Attachment.

FN964. The date promised by a BOC is sometimes referred to as the “FOC date.” See Teleport Oct. 24 Ex Parte, Attachment 2 at 1.

FN965. See Bell Atlantic Oct. 16 Ex Parte at 2; NYNEX Oct. 23 Ex Parte at 6, n.10; Ameritech Oct. 23 Ex Parte, Attachment.

FN966. For example, if a BOC misses a due date by several hours, this will probably cause less harm to a competitor than if the BOC misses a due date by several days.See Teleport Oct. 8 Ex Parte at 7 (indicating that reporting a BOC's total repair time provides more complete information regarding the service interval provided by the BOC than reporting only whether a due date has been met).

FN967. PacTel Oct. 18 Ex Parte, Attachment 6.

FN968. In the BOC ONA Reconsideration Order, the Commission determined that the ONA installation and maintenance reporting requirements should include 49 service categories presented in a standardized format. Filing and Review of Open Network Architecture Plans, CC Docket No. 88-2, Memorandum Opinion and Order on Reconsideration, 5 FCC Rcd 3084, 3093, ¶¶ 76-79 and app. B (1990) (subsequent history omitted).

FN969. See generally, Policy and Rules Concerning Rates for Dominant Carriers, AAD 92-47, Memorandum Opinion and Order, 8 FCC Rcd 7474 (1993) (modifying the service quality and other reporting requirements imposed after the imposition of price cap

regulation).

FN970. Compare AT&T Oct. 3 Ex Parte at 2 with Bell Atlantic Oct. 16 Ex Parte at 2 n.1.

FN971. NYNEX Reply at 23 & n.72; PacTel Reply at 18-19; Bell Atlantic Sept. 27 Ex Parte at 1-2; BellSouth Oct. 29 Ex Parte at 3.

FN972. PacTel Oct. 18 Ex Parte at 4.

FN973. See e.g., AT&T at 36-38.

FN974. Ameritech Oct. 23 Ex Parte, Attachment; MCI Nov. 1 Reporting Ex Parte at 1-2.

FN975. 47 U.S.C. § 272(e)(1).

FN976. See e.g., Teleport Oct. 24 Ex Parte; Ameritech Oct. 23 Ex Parte at 1.

FN977. AT&T Oct. 3 Ex Parte at 5.Contra Ameritech Oct. 23 Ex Parte, Attachment.

FN978. See e.g., SBC Oct. 8 Ex Parte, Attachments; PacTel Oct. 18 Ex Parte, Attachments 1 and 1; SBC Nov. 6 Ex Parte at 2-3; U S West Nov. 19 Ex Parte at 2.

FN979. PacTel Oct. 18 Ex Parte at 4; BellSouth Oct. 29 Ex Parte at 2-3; U S West Nov. 19 Ex Parte at 2.

FN980. MCI Nov. 1 Reporting Ex Parte.

FN981. The 1996 Act requires ARMIS reports to be filed annually. 1996 Act, 110 Stat. 56, 129, sec. 402(B)(2)(b) (to be codified at a note following 47 U.S.C. § 214); see generally, Policy and Rules Concerning Rates for Dominant Carriers, AAD 92-47, Memorandum Opinion and Order, 8 FCC Rcd 7474 (1993) (modifying service quality and other reporting requirements).

FN982. SeeTeleport Communications Group, Inc., Petition for Reconsideration of the First Interconnection Order, CC Docket No. 96-98 at 5-6 (Sept. 30, 1996); Letter from J. Manning Lee, Vice President Regulatory Affairs, Teleport Communications Group, Inc., to William F. Caton, Secretary, FCC, Oct. 14, 1996, CC Docket No. 96-98, Attachments 1 and 2.

FN983. See also SBC Nov. 6 Ex Parte at 1, 3 (arguing that AT&T's proposal contains reporting requirements relating to the provision of unbundled network elements).

FN984. See generally47 C.F.R. §§ 1.1200, 1.1202, 1.1204, 1.1206.

FN985. 5 U.S.C. § 603.

FN986. Id.§ 605(b).

FN987. The RFA incorporates the definition of small business concerns set forth in 15 U.S.C. § 632. 5 U.S.C. § 601(3).

FN988. 13 C.F.R. § 121.20.

FN989. Federal Communications Commission, CCB, Industry Analysis Division, Preliminary Domestic Information From Statistics of Communications Common Carriers table 1.1 (July 1996).

FN990. Id.

FN991. 5 U.S.C. § 605(b).

FN992. See47 C.F.R. § 1.49. However, we require here that a summary be included with all comments and reply comments, regardless of length. This summary may be paginated separately from the rest of the pleading (e.g., as “i, ii”).

***22090 Appendix A**

List of Commenters in CC Docket No. 96-149

****116** Ameritech

Association for Local Telecommunications Services (ALTS)

Association of Directory Publishers (ADP)

Association of Telemessaging International (ATSI)

AT&T Corp. (AT&T)

Bell Atlantic Telephone Companies (Bell Atlantic)

Bell Communications Research, Inc. (Bellcore)

BellSouth Corporation (BellSouth)

California Cable Television Association (CCTA)

California Public Utilities Commission (California Commission)

Centra Health

Citizens for a Sound Economy Foundation (CSEF)

Citizens Utilities Companies

Commercial Internet Exchange Association (CIX)

Commonwealth of the Northern Mariana Islands

Competitive Telecommunications Association (CompTel)

Economic Strategy Institute

Excel Telecommunications, Inc. (Excel)

Exco Noonan Inc.

Florida Public Service Commission (Florida Commission)

Frontier Corporation (Frontier)

GST Telecom, Inc.

GTE Service Corporation (GTE)

Hudson United Bank, Inc.

Independent Data Communications Manufacturers Association (IDCMA)

Independent Coalition

Independent Telephone & Telecommunications Alliance (ITTA)

Information Industry Association (IIA)

Information Technology Association of America (ITAA)

Information Technology Industry Council (ITIC)

Interactive Services Association (ISA)

LDDS WorldCom Inc. (LDDS)

MCI Telecommunications Corporation (MCI)

MFS Communications Company, Inc. (MFS)

Michigan Public Service Commission (Michigan Commission)

Missouri Public Service Commission (Missouri Commission)

Nabisco

National Association of Regulatory Utility Commissioners (NARUC)

National Cable Television Association, Inc. (NCTA)

National Telephone Cooperative Association (NTCA)

New Jersey Division of the Rate Payer Advocate (New Jersey Rate Payer Advocate)

***22091** New York State Department of Public Service (New York Commission)

NYNEX Telephone Companies (NYNEX)

Owens & Minor

Pacific Telesis Group (PacTel)

PNC Bank, N.A.

Prebon Yamane

Public Utilities Commission of Ohio (Ohio Commission)

SBC Communications, Inc. (SBC)

SmithKline Beecham

Southern New England Telephone Company (SNET)

Sprint Corporation (Sprint)

Telecommunications Industry Association (TIA)

Telecommunications Resellers Association (TRA)

Telefonica Larga Distancia de Puerto Rico, Inc. (TLD)

Teleport Communications Group, Inc. (Teleport)

Temple University

Time Warner Cable (Time Warner)

UGI Utilities, Inc.

United States Telephone Association (USTA)

U. S. Department of Justice (DOJ)

U S West

Voice-Tel

West Virginia Dept. of Administration

Wisconsin Public Service Commission (Wisconsin Commission)

Yellow Pages Publishers Association (YPPA)

***22092 Appendix B**

Final Rules

AMENDMENTS TO THE CODE OF FEDERAL REGULATIONS

1. Part 53 of Title 47 of the Code of Federal Regulations (C.F.R.) is added to read as follows:

PART 53 -- SPECIAL PROVISIONS CONCERNING BELL OPERATING COMPANIES

Subpart A - General Information
Sec.
****117 53.1 Basis and purpose.**

53.3 Terms and definitions.

Subpart B - Bell Operating Company Entry into InterLATA Services.
53.101 Joint marketing of local and long distance services by interLATA carriers.

Subpart C - Separate Affiliate; Safeguards.
53.201 Services for which a separate affiliate is required.

53.203 Structural and transactional requirements.

53.205 Fulfillment of certain requests.

53.207 Successor or assign.

Subpart D - Manufacturing by Bell Operating Companies.
53.301 [Reserved]

Subpart E - Electronic Publishing by Bell Operating Companies.
53.401 [Reserved]

Subpart F - Alarm Monitoring Services.
53.501 [Reserved]

AUTHORITY: Sections 1-5, 7, 201-05, 218, 251, 253, 271-75, 48 Stat. 1070, as amended, 1077; 47 U.S.C. 151 -55, 157, 201-05, 218, 251, 253, 271-75, unless otherwise noted.

***22093 Subpart A - General Information.**
§ 53.1 Basis and purpose.
(a) *Basis.* These rules are issued pursuant to the Communications Act of 1934, as amended.

(b) *Purpose.* The purpose of these rules is to implement sections 271 and 272 of the Communications Act of 1934, as amended, 47 U.S.C. 271 and 272.

§ 53.3 Terms and definitions.
Terms used in this part have the following meanings:

Act. The "Act" means the Communications Act of 1934, as amended.

Affiliate. An "affiliate" is a person that (directly or indirectly) owns or controls, is owned or controlled by, or

is under common ownership or control with, another person. For purposes of this part, the term 'own' means to own an equity interest (or the equivalent thereof) of more than 10 percent.

*AT&T Consent Decree.*The "AT&T Consent Decree" is the order entered August 24, 1982, in the antitrust action styled United States v. Western Electric, Civil Action No. 82-0192, in the United States District Court for the District of Columbia, and any judgment or order with respect to such action entered on or after August 24, 1982.

****118** *Bell Operating Company (BOC).* The term "Bell operating company" (A) means any of the following companies: Bell Telephone Company of Nevada, Illinois Bell Telephone Company, Indiana Bell Telephone Company, Incorporated, Michigan Bell Telephone Company, New England Telephone and Telegraph Company, New Jersey Bell Telephone Company, New York Telephone Company, U S West Communications Company, South Central Bell Telephone Company, Southern Bell Telephone and Telegraph Company, Southwestern Bell Telephone Company, The Bell Telephone Company of Pennsylvania, The Chesapeake and Potomac Telephone Company, The Chesapeake and Potomac Telephone Company of Maryland, The Chesapeake and Potomac Telephone Company of Virginia, The Chesapeake and Potomac Telephone Company of West Virginia, The Diamond State Telephone Company, The Ohio Bell Telephone Company, The Pacific Telephone and Telegraph Company, or Wisconsin Telephone Company; and (B) includes any successor or assign of any such company that provides wireline telephone exchange service; but (C) does not include an affiliate of any such company, other than an affiliate described in clause (A) or (B) of this paragraph.

In-Region InterLATA service. "In-region interLATA service" is interLATA service that originates in any of a BOC's in-region states, which are the states in which the BOC or ***22094** 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 February 7, 1996. For the purposes of this part, 800 service, private line service, or equivalent services that terminate in a BOC's in-region state and allow the called party to determine the interLATA carrier are considered to be in-region interLATA service.

InterLATA Service. An "interLATA service" is a service that involves telecommunications between a point located in a LATA and a point located outside such area. The term "interLATA service" includes both interLATA telecommunications services and interLATA information services.

InterLATA Information Service. An "interLATA information service" is an information service that incorporates as a necessary, bundled element an interLATA telecommunications transmission component, provided to the customer for a single charge.

Local Access and Transport Area (LATA). A "LATA" is a contiguous geographic area: (A) established before February 8, 1996 by a BOC such that no exchange area includes points within more than one metropolitan statistical area, consolidated metropolitan statistical area, or state, except as expressly permitted under the AT&T Consent Decree; or (B) established or modified by a BOC after February 8, 1996 and approved by the Commission.

Local Exchange Carrier (LEC). A "LEC" is any person that is engaged in the provision of telephone exchange service or exchange access. Such term does not include a person insofar as such person is engaged in the provision of commercial mobile service under section 332(c) of the Act, except to the extent that the Commission finds that such service should be included in the definition of such term.

****119** *Out-of-Region InterLATA service.* "Out-of-region interLATA service" is interLATA service that originates outside a BOC's in-region states.

Section 272 affiliate. A "section 272 affiliate" is a BOC affiliate that complies with the separate affiliate requirements of section 272(b) of the Act and the regulations contained in this part.

Subpart B - Bell Operating Company Entry Into In-

terLATA Services.

§53.100 Joint marketing of local and long distance services by interLATA carriers.

(a) Until a BOC is authorized pursuant to section 271(d) of the Act to provide interLATA services in an in-region State, or until February 8, 1999, 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 the Act with interLATA services offered by that telecommunications carrier.

***22095** (b) For purposes of applying section 271(e) of the Act, telecommunications carriers described in paragraph (a) of this section may not:

(1) market interLATA services and BOC resold local exchange services through a "single transaction." For purposes of this section, we define a "single transaction" to include the use of the same sales agent to market both products to the same customer during a single communication;

(2) offer interLATA services and BOC resold local exchange services as a bundled package under an integrated pricing schedule.

(c) If a telecommunications carrier described in paragraph (a) of this section advertises the availability of interLATA services and local exchange services purchased from a BOC for resale in a single advertisement, such telecommunications carrier shall not mislead the public by stating or implying that such carrier may offer bundled packages of interLATA service and BOC local exchange service purchased for resale, or that it can provide both services through a single transaction.

Subpart C - Separate Affiliate; Safeguards.

§ 53.201 Services for which a section 272 affiliate is required.

For the purposes of applying section 272(a)(2) of the Act:

(a) *Previously authorized activities.* When providing previously authorized activities described in section 271(f) of the Act, a BOC shall comply with the following:

(1) A BOC shall provide previously authorized interLATA information services and manufacturing activities through a section 272 affiliate no later than February 8, 1997.

****120** (2) A BOC shall provide previously authorized interLATA telecommunications services in accordance with the terms and conditions of the orders 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 that authorized such services.

(b) *InterLATA information services.* A BOC shall provide an interLATA information service through a section 272 affiliate when it provides the interLATA telecommunications transmission component of the service either over its own facilities, or by reselling the interLATA telecommunications services of an interexchange provider.

(c) *Out-of-region interLATA information services.* A BOC shall provide out-of-region interLATA information services through a section 272 affiliate.

***22096 § 53.203 Structural and transactional requirements.**

(a) *Operational independence.*

(1) A section 272 affiliate and the BOC of which it is an affiliate shall not jointly own transmission and switching facilities or the land and buildings where those facilities are located.

(2) A section 272 affiliate shall not perform any operating, installation, or maintenance functions associated with facilities owned by the BOC of which it is an affiliate.

(3) A BOC or BOC affiliate, other than the section 272 affiliate itself, shall not perform any operating, installation, or maintenance functions associated with facilities that the BOC's section 272 affiliate owns or leases from a provider other than the BOC.

(b) *Separate books, records, and accounts.* A section 272 affiliate shall maintain books, records, and accounts, which shall be separate from the books, records, and accounts maintained by the BOC of which it is an affiliate.

(c) *Separate officers, directors, and employees.* A section 272 affiliate shall have separate officers, directors, and employees from the BOC of which it is an affiliate.

(d) *Credit arrangements.* A section 272 affiliate shall not obtain credit under any arrangement that would permit a creditor, upon default, to have recourse to the assets of the BOC of which it is an affiliate.

(e) *Arm's-length transactions.* A section 272 affiliate shall conduct all transactions with the BOC of which it is an affiliate on an arm's length basis, pursuant to the accounting rules described in § 32.27 of this chapter, with any such transactions reduced to writing and available for public inspection.

§ 53.205 Successor or assign.

****121** If a BOC transfers to an unaffiliated entity ownership of any network elements that must be provided on an unbundled basis pursuant to section 251(c)(3) of the Act, such entity will be deemed to be an "assign" of the BOC under section 3(4) of the Act with respect to such transferred network elements. A BOC affiliate shall not be deemed a "successor or assign" of a BOC solely because it obtains network elements from the BOC pursuant to section 251(c)(3) of the Act.

***22097 APPENDIX C**

Format for Information Disclosures Pursuant to Section 272(e)(1)

Service Category	Types of Access	Outcome for BOC and BOC Affiliates
1) Successful Completion According to	DS3 and above	
Desired Due Date (measured in a		
percentage)	DS1	
	DS0	
2) Time from BOC Promised Due Date	DS3 and above	
to Circuit being placed in service		
(measured in terms of percentage installed	DS1	
within each successive 24 hour period,		
until 95% installation completed)	DS0	
3) Time to Firm Order Confirmation	DS3 and above	
(measured in terms of percentage received		
within each successive 24 hour period,	DS1	
until 95% completed)	DS0	
4) Time from PIC Change request to	By CIC (10XXX)	
implementation		
(measured in terms of percentage		
implemented within each successive 6		
hour period, until 95% completed)		
5) Time to Restore and trouble duration	DS3 and above	

(percentage restored within each	
successive 1 hour interval, until resolution	DS1
of 95% incidents)	DS0
6) Time to restore PIC after trouble	By CIC (10XXX)
incident (measured by percentage restored	
within each successive 1 hour interval,	
until resolution of 95% restored)	
7) Mean time to clear network / average	DS1 Non-Channelized
duration of trouble	
(measured in hours)	DS0

ERRATUM

DA 98-1107

****122** Erratum Released: June 10, 1998

By the Chief, Common Carrier Bureau

This Erratum corrects a final rule in the First Report and Order and Further Notice of Proposed Rulemaking, FCC 96-489, that the Commission adopted on December 23, 1996 by changing the word "unaffiliated" in the first line to "affiliated."[FN1] That Order was released on December 24, 1996. The corrected rule reads as follows:

> Amend rule § 53.205 to read:
> "§ 53.205 **Successor or assign**
> If a BOC transfers to an affiliated entity ownership of any network elements that must be provided on an unbundled basis pursuant to section 251(c)(3) of the Act, such entity will be deemed to be an 'assign' of the BOC under section 3(4) of the Act with respect to such transferred network elements. A BOC affiliate shall not be deemed a "successor or assign" of a BOC solely because it obtains network elements from the BOC pursuant to section 251(c)(3) of the Act."

FEDERAL COMMUNICATIONS COMMISSION

Richard K. Welch

Acting Deputy Chief
Common Carrier Bureau

FN1. *See Implementation of the Non-Accounting Safeguards of Sections 271 and 272of 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), 62 Fed. Reg. 2927 (1997), *petition for review pending sub nom. SBC Communications v. FCC,* No. 97-1118 (filed D.C. Cir. Mar. 6, 1997) (held in abeyance May 7, 1997), First Order on Reconsideration, 12 FCC Rcd 2297 (1997), Second Order on Reconsideration, 12 FCC Rcd 8653 (1997), *aff'd sub nom.Bell Atlantic Telephone Companies v. FCC,* 131 F.3d 1044 (D.C. Cir. 1997).

11 F.C.C.R. 21905, 13 F.C.C.R. 11230, 11 FCC Rcd. 21905, 13 FCC Rcd. 11230, 5 Communications Reg. (P&F) 696, 1996 WL 734160 (F.C.C.)

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