

requirements of the Communications Act. For example, if the non-transmission computer facilities that a BOC uses to provide an information service are located in a different LATA from the end-user, should that service be classified as an interLATA information service?⁸⁷ Alternatively, must an interLATA information service incorporate non-transmission components or functionalities that are located in different LATAs?

46. We seek comment on the relevance of what BOCs have done in the past in determining now what activities may only be offered through a separate affiliate. We note that, prior to the 1996 Act, some BOCs received MFJ waivers in order to employ transmission services that crossed LATA boundaries for the provision of certain enhanced services. We seek comment regarding whether the fact that a BOC in the past applied for or received an MFJ waiver for the provision of a particular enhanced service presumptively renders that service an interLATA information service subject to the separate affiliate requirements of section 272.

47. All of the BOCs currently are providing enhanced services in some or all of their in-region states, pursuant to comparably efficient interconnection (CEI) plans approved by the Commission's Common Carrier Bureau.⁸⁸ Because the MFJ barred BOC provision of interLATA services, we seek comment regarding whether, when a BOC has not applied for or received an MFJ waiver to provide a particular enhanced service, but instead is providing that enhanced service pursuant to a CEI plan approved prior to the enactment of the 1996 Act, we should presume that enhanced service to be an intraLATA information service that is

⁸⁷ See, e.g., United States v. Western Elec., Civil Action No. 82-0192, 1989-1 Trade Cases ¶ 68,400, 1989 WL 21992 (D.D.C. 1989) (gateway service involving single central processor serving multiple LATAs violates AT&T Consent Decree prohibition on BOC provision of interLATA service).

⁸⁸ See BOC CEI Plan Approval Order, 10 FCC Rcd at 13,770-74, app. A. Under Computer II, AT&T was required to provide enhanced services through a separate affiliate. See 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). Upon divestiture, this requirement was extended to the BOCs. BOC Separations Order, 95 FCC 2d 1117 (1983). In its Computer III decisions, the Commission removed the separate affiliate requirements applicable to AT&T and the BOCs, provided that they complied with certain nonstructural safeguards intended to guarantee that they offered their regulated network services to competing enhanced service providers (ESPs) on an equal and nondiscriminatory basis. In the first stage of implementing Computer III, carriers provided individual enhanced services on an integrated basis pursuant to service-specific CEI plans. During the second stage of Computer III, the BOCs developed and implemented open network architecture (ONA) plans and were subsequently permitted to provide integrated enhanced services without CEI plans. The U.S. Court of Appeals for the Ninth Circuit vacated portions of the Commission's Computer III decisions in three separate decisions. See California I; California II; California III. Following California III, the Commission initiated further remand proceedings. Computer III Further Remand Proceedings, 10 FCC Rcd 8360 (1995). The Common Carrier Bureau issued an Interim Waiver Order granting the BOCs any waivers necessary to continue to provide certain enhanced services on an integrated basis pursuant to service-specific CEI plans. Bell Operating Companies' Joint Petition for Waiver of Computer II Rules, Memorandum Opinion and Order, 10 FCC Rcd 1724 (1995) (Interim Waiver Order).

not subject to the separate affiliate requirements of section 272. To the extent that existing services offered pursuant to approved CEI plans are not subject to section 272, we seek comment regarding whether passage of the 1996 Act directly or indirectly affects how we should treat such services.

3. Impact of the 1996 Act on Existing Commission Requirements for Information Services

48. Because the 1996 Act does not establish regulatory requirements for BOC provision of intraLATA information services, we conclude that, with respect to these services, our existing Computer II, Computer III, and ONA⁸⁹ requirements remain in place to the extent that they are consistent with the 1996 Act.⁹⁰ The Commission developed those requirements to address the same concerns that Congress sought to address through the establishment of separate affiliate and nondiscrimination requirements in sections 271 and 272.⁹¹ We note that the combination of our Computer II, Computer III, and ONA proceedings established various unbundling and interconnection requirements for BOC provision of enhanced services. Under Computer II, the BOCs and other facilities-based carriers must unbundle their basic services from their enhanced services. Under Computer III and ONA, the BOCs must further unbundle the manner in which they provide basic services and make these unbundled basic services available to competing ESPs. Under our rules, these interconnection and unbundling requirements associated with the provision of enhanced services continue to apply to the BOCs regardless of whether they provide enhanced services on an integrated or a separated basis.⁹²

⁸⁹ See Filing 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).

⁹⁰ In the BOC Safeguards Order, the Commission preempted certain state regulation of enhanced services, including state structural separation requirements for facilities and personnel used to provide the intrastate portion of jurisdictionally mixed enhanced services, state CPNI rules requiring prior authorization not required by Commission rules, and state network disclosure that required initial disclosure at a time different than the Commission rules. 6 FCC Rcd at 7631, ¶ 121. The U.S. Court of Appeals for the Ninth Circuit upheld the Commission's narrowly tailored preemption of state regulation of enhanced services. California III, 39 F.3d at 933.

⁹¹ In the floor debate preceding passage of the 1996 Act, Representative John Conyers, Jr. (D-Mich) noted that "Section 271 applies separate affiliate requirements for at least 3 years in order to check potential market power abuses." See 142 Cong. Rec. H1171 (Feb. 1, 1996).

⁹² See ONA Remand Order, 5 FCC Rcd 7719. We do not address here whether information service providers or ESPs may obtain access to unbundled facilities under section 251 of the Communications Act.

49. We conclude that we should continue to enforce those existing Computer II, Computer III, and ONA requirements that are consistent with the 1996 Act, and we ask commenters to specify whether, and to what extent, the existing requirements are inconsistent with the 1996 Act. If parties contend that the statute supersedes our Computer II, Computer III, and ONA unbundling and interconnection requirements for BOC provision of intraLATA information services, they should identify the specific provisions of section 271 and 272 that they believe supersede our requirements, as well as the specific unbundling and interconnection requirements they believe these provisions impose upon the BOCs.

50. We recognize that some of the anticompetitive concerns we sought to address through the establishment of the Computer II, Computer III, and ONA requirements may now be addressed by new statutory provisions or by the anticipated competition that implementation of the statute should foster. We consequently seek comment on which, if any, of our Computer II, Computer III, and ONA rules may have been rendered unnecessary by the 1996 Act. Parties should also address the possible impact of the statutory requirements on our pending Computer III Further Remand Proceedings.⁹³

D. Overlap Between InterLATA Information Services and Services Subject to Other Statutory Requirements

51. Under the 1996 Act, electronic publishing is specifically included within the category of information services.⁹⁴ InterLATA provision of electronic publishing, however, is specifically exempted from the separate affiliate requirements of section 272.⁹⁵ Instead, section 274 establishes specific separate affiliate and nondiscrimination requirements which apply to the provision of electronic publishing services by the BOCs.⁹⁶

52. The 1996 Act defines "electronic publishing" to mean:

the dissemination, provision, publication, or sale to an unaffiliated entity or person, of any one or more of the following: news (including sports); entertainment (other than interactive games); business, financial, legal, consumer, or credit materials; editorials, columns, or features; advertising; photos or images; archival or research material; legal notices or public records; scientific, educational, instructional, technical, professional, trade, or other literary materials; or other like or similar information.⁹⁷

⁹³ 10 FCC Rcd 8360 (1995).

⁹⁴ 47 U.S.C. § 153(20).

⁹⁵ Id. § 272(a)(2)(C).

⁹⁶ Id. § 274(a). See Electronic Publishing NPRM.

⁹⁷ 47 U.S.C. § 274(h)(1).

The 1996 Act lists specific services that do not fall within the definition of electronic publishing.⁹⁸

53. We will examine the meaning of the phrase "electronic publishing" in greater depth in a separate proceeding on the section 274 separate affiliate and nondiscrimination requirements.⁹⁹ For the purposes of this proceeding, we seek comment in order to distinguish information services that are subject to the section 272 requirements from electronic publishing services that are subject to the section 274 requirements. We anticipate that this issue will arise with respect to services that are neither clearly encompassed by the statutory definition of "electronic publishing" nor specifically listed in the delineated exceptions to that definition. We seek comment on whether, where such classification questions arise, we should classify as "electronic publishing" services those services for which the carrier controls, or has a financial interest in, the content of information transmitted by the service. We note that under the MFJ, "electronic publishing" was defined as "the provision of any information which a provider or publisher has, or has caused to be originated, authored, compiled, collected, or edited, or in which he has a direct or indirect financial or proprietary interest, and which is disseminated to an unaffiliated person through some electronic means."¹⁰⁰

54. The 1996 Act defines "telemessaging" as "voice mail and voice storage and retrieval services, any live operator services used to record, transcribe, or relay messages (other than telecommunications relay services), and any ancillary services offered in combination with these services."¹⁰¹ We tentatively conclude that telemessaging is an information service.¹⁰² Unlike electronic publishing and alarm monitoring services, which are information services that are specifically exempted from the section 272(a) separate affiliate requirements,¹⁰³ BOC provision of telemessaging services is not specifically

⁹⁸ These excepted services include, among other things: common carrier provision of telecommunications service, information access service, information gateway service, voice storage and retrieval, electronic mail, certain data and transaction processing services, electronic billing or advertising of a BOC's regulated telecommunications services, language translation or data format conversion, "white pages" directory assistance, caller identification services, repair and provisioning databases, credit card and billing validation for telephone company operations, 911-E and other emergency assistance databases, video programming and full motion video entertainment on demand. *Id.* § 274(h)(2).

⁹⁹ See Electronic Publishing NPRM at ¶¶ 29-31.

¹⁰⁰ United States v. Western Elec. Co., 552 F. Supp. 131, 178, 181 (D.D.C. 1982) (subsequent history omitted).

¹⁰¹ 47 U.S.C. § 260(c).

¹⁰² The Commission has treated voicemail and voice messaging services as enhanced services. See BOC CEI Plan Approval Order, 10 FCC Rcd at 13,770-74, app. A.

¹⁰³ See 47 U.S.C. § 272(a)(2)(C).

exempted from these requirements. Therefore, we tentatively conclude that BOC provision of telemessaging on an interLATA basis is subject to the section 272(a) separate affiliate requirements, in addition to the section 260 safeguards, which apply to all incumbent LECs, including the BOCs. We seek comment on this tentative conclusion.

IV. STRUCTURAL SEPARATION REQUIREMENTS OF SECTION 272

55. Section 272(b) of the Communications Act establishes five structural and transactional requirements for the separate affiliate (or affiliates) established pursuant to section 272(a). Specifically, the 1996 Act requires that the separate affiliate:

- (1) shall operate independently from the [BOC];
- (2) shall maintain books, records, and accounts in the manner prescribed by the Commission which shall be separate from the books, records, and accounts maintained by the [BOC] of which it is an affiliate;
- (3) shall have separate officers, directors, and employees from the [BOC] of which it is an affiliate;
- (4) may not obtain credit under any arrangement that would permit a creditor, upon default, to have recourse to the assets of the [BOC]; and
- (5) 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.¹⁰⁴

We discuss each of these requirements below.

56. We note that section 272(a)(1) requires a BOC to provide services subject to the section 272 separate affiliate requirements through "one or more affiliates." As we tentatively concluded above, a BOC may, if it chooses, conduct all, or some combination, of its manufacturing activities, interLATA telecommunications services, and interLATA information services in a single separate affiliate.¹⁰⁵ A BOC's potential incentive and ability to favor its affiliate and to improperly allocate costs may vary, however, depending on the activity involved. For this reason, the structural and transactional requirements of section 272(b) may need to be implemented differently with respect to the three activities enumerated in the statute. We seek comment on whether the 1996 Act permits us to, and if so, whether we should, interpret or apply any of the section 272(b) requirements differently with respect to BOC provision of services regulated under Title II (namely, provision of interLATA telecommunications services) as opposed to nonregulated activities (namely, manufacturing and interLATA information services). In addition, we seek comment on how such different

¹⁰⁴ Id. § 272(b).

¹⁰⁵ See supra ¶ 33.

regulatory requirements could be imposed on the three activities if all three are provided through one affiliate.

A. Section 272(b)(1)

57. Section 272(b)(1) states that the separate affiliate "shall operate independently from the [BOC]." The 1996 Act does not elaborate on the meaning of the phrase "operate independently."¹⁰⁶ Under principles of statutory construction, a statute should be interpreted so as to give effect to each of its provisions.¹⁰⁷ Accordingly, we tentatively conclude that we should interpret the "operate independently" requirement in section 272(b)(1) as imposing requirements beyond those listed in subsections 272(b)(2)-(5). We seek comment on this tentative conclusion. We also seek comment on what requirements the Commission should adopt to implement the statutory requirement that affiliates operate independently.

58. In the Computer II proceeding,¹⁰⁸ the Commission required AT&T to provide CPE and enhanced services through separate subsidiaries. The Commission extended the Computer II requirements to the BOCs after divestiture.¹⁰⁹ Computer II mandated "maximum separation,"¹¹⁰ based on a determination that structural separation was an effective means of ensuring that the BOCs treated unaffiliated ESPs and CPE vendors identically to their own affiliated enhanced service and CPE operations. Under Computer II, the BOC's enhanced services subsidiary could not construct, own, or operate its own transmission facilities, and was required to obtain basic transmission capacity from the regulated carrier pursuant to tariff.¹¹¹ In addition, the Commission prohibited the regulated entity and unregulated subsidiaries from using in common any leased or owned physical space or property on which was located transmission equipment or facilities used to provide basic

¹⁰⁶ With respect to section 272, the Joint Explanatory Statement states that the conference agreement adopted the Senate provisions with several modifications. See Joint Explanatory Statement at 152. The Senate bill did not contain the "operate independently" requirement. See S. 652, 104th Cong., 1st Sess., § 252 (1995). The "operate independently" requirement, however, did appear in the House bill, along with several requirements that were not included in the Communications Act as ultimately passed: 1) a prohibition on joint venture activities or partnership; 2) a prohibition on joint ownership of telecommunications transmission or switching facilities; and 3) a prohibition on joint ownership or shared use of any other property. See H.R. 1555, 104th Cong., 1st Sess., § 246 (1995).

¹⁰⁷ See Sutherland Stat. Const. § 46.05 (4th ed. 1984).

¹⁰⁸ See supra n.88.

¹⁰⁹ BOC Separations Order, 95 FCC 2d 1117.

¹¹⁰ Computer II Final Order, 77 FCC 2d at 475-87, ¶¶ 233-64.

¹¹¹ Id. at 474, ¶ 229.

transmission services.¹¹² In Computer II, the Commission also required the BOC to provide unregulated services through computer facilities that were separate from those used to provide regulated services.¹¹³ In addition, the Commission prohibited the regulated entity and the unregulated subsidiaries from developing software for each other.¹¹⁴ In Computer II, the Commission also prohibited a subsidiary that provided both CPE and enhanced services from marketing any other equipment to affiliated entities -- e.g., transmission or other network equipment.¹¹⁵ We noted, however, that BOC manufacturing affiliates could continue to sell directly to affiliated carriers.¹¹⁶

59. In the Competitive Carrier proceeding,¹¹⁷ the Commission also established certain separation requirements that independent LECs need to meet in order to be regulated as non-dominant in the provision of interstate interexchange services. These requirements are less stringent than the Computer II separate subsidiary requirements. In Competitive Carrier, the Commission required, in order for independent LECs to be non-dominant, that they provide interstate interexchange services through an affiliate and that the affiliate: 1) maintain separate books of account; 2) not jointly own transmission or switching facilities with the exchange telephone company; and 3) obtain any exchange telephone company services at tariffed rates and conditions.¹¹⁸ We seek comment on whether the "operate independently" requirement in section 272(b)(1) should be interpreted as imposing one or more of the separation requirements established in Computer II or Competitive Carrier.

60. We note that section 274(b) states that "[a] separated affiliate or electronic publishing joint venture shall be operated independently from the [BOC]," and then prescribes specific activities that the electronic publishing affiliate can and cannot perform. We seek comment on the relevance of the "operated independently" requirement in section 274(b) when construing what Congress intended in section 272(b)(1).¹¹⁹

¹¹² Id. at 477, ¶ 240.

¹¹³ Id. at 478-79, ¶¶ 241-42.

¹¹⁴ Id. at 479, ¶ 243.

¹¹⁵ Id. at 483, ¶ 253; Computer II Reconsideration Order, 84 FCC 2d 50, 84 ¶ 101.

¹¹⁶ Computer II Final Order 77 FCC 2d at 483, ¶ 253.

¹¹⁷ See discussion infra Section VIII.A.

¹¹⁸ Competitive Carrier Fifth Report and Order, 98 FCC 2d at 1198, ¶ 9.

¹¹⁹ For example, among other restrictions, section 274(b) prohibits a BOC from "perform[ing] hiring or training of personnel on behalf of a separated affiliate," as well as "perform[ing] research and development on behalf of a separated affiliate." 47 U.S.C. §§ 274(b)(7)(A), 274(b)(7)(C).

B. Section 272(b)(2)

61. Section 272(b)(2) states that the affiliate shall maintain separate books, records, and accounts in the manner prescribed by the Commission. As noted above, we will address the implementation issues associated with this section in a separate rulemaking.¹²⁰

C. Section 272(b)(3)

62. Section 272(b)(3) states that the affiliate "shall have separate officers, directors, and employees from the [BOC] of which it is an affiliate." In Computer II, the Commission required the separate subsidiary to have its own operating, marketing, installation, and maintenance personnel for the services and equipment it offered.¹²¹ Under Computer II, however, the Commission permitted certain administrative services to be shared on a cost reimbursable basis. Specifically, the Commission permitted the sharing of the following administrative services: accounting, auditing, legal services, personnel recruitment and management, finance, tax, insurance, and pension services.¹²² We tentatively conclude that section 272(b)(3) prohibits the sharing of in-house functions such as operating, installation, and maintenance personnel, including the sharing of administrative services that are permitted under Computer II if those services are performed in-house. We seek comment on whether section 272(b)(3) prohibits the BOC and an affiliate from sharing the same outside services, such as insurance or pension services. We also seek comment on what other types of personnel sharing may be prohibited by section 272(b)(3).¹²³

D. Section 272(b)(4)

63. Section 272(b)(4) states that the affiliate "may not obtain credit under any arrangement that would permit a creditor, upon default, to have recourse to the assets of the [BOC]." This restriction appears to be designed to protect subscribers to a BOC's exchange and exchange access services from bearing the cost of default by BOC affiliates. We tentatively conclude 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 section 272(b)(4). We seek comment on this tentative conclusion and on what other types of activities are prohibited by this provision. Parties are invited to comment on whether we should establish specific requirements regarding the types of activities that are contemplated

¹²⁰ See Accounting Safeguards NPRM.

¹²¹ See Computer II Final Order, 77 FCC 2d 384, 477, ¶ 239.

¹²² See Computer II Reconsideration Order, 84 FCC 2d 50, 84, ¶ 102.

¹²³ See discussion infra ¶ 92.

by arrangements that are consistent with the requirements of section 272(b)(4). To the extent that there are a range of options, we seek comment on the relative costs and benefits of each.

E. Section 272(b)(5)

64. Section 272(b)(5) states that the 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." As previously noted, we will address the implementation issues associated with this accounting requirement in a separate rulemaking.¹²⁴ We seek comment, however, in this NPRM about whether implementation of the "arm's length" requirement specified in section 272(b)(5) necessitates any non-accounting safeguards.

V. NONDISCRIMINATION SAFEGUARDS

A. Nondiscrimination Provisions of Section 272

65. After a BOC affiliate enters competitive markets, that BOC will become subject to the economic incentives of the marketplace and therefore may have an incentive to favor its competitive affiliate or to take actions that could weaken the affiliate's rivals. As previously noted, a BOC's control of essential local exchange facilities provides a BOC with the opportunity to take these actions.¹²⁵ In brief, a BOC could provide inferior service to, charge higher prices to, withhold cooperation from, or fail to share information with its rivals in competitive markets. If a BOC were to provide inferior service to a rival, the quality of the rival's interLATA telecommunications service or information service would be degraded, making the rival less attractive to customers and lowering the prices the rival could charge. If a BOC were to charge higher prices to the rival, the rival would have to charge higher prices to customers and consequently lose market share or accept lower profits. In another example, a BOC could possibly withhold cooperation from an interexchange carrier that needs the BOC's assistance to introduce an innovative new service, until the BOC's affiliate is ready to initiate the same innovative service. A BOC could also share information with its manufacturing affiliate or set standards that enable its manufacturing affiliate to produce equipment at a lower cost or with superior compatibility with the BOC's network as compared to that of competing manufacturers. A BOC's behavior in one area could affect a rival in its provision of multiple services. For example, a BOC's provision of degraded local service could affect the rival's provision of telecommunications and information services.

¹²⁴ See Accounting Safeguards NPRM.

¹²⁵ See supra Section I.B.

66. Sections 272(c)(1) and (e) set forth nondiscrimination safeguards that apply to BOC provision of manufacturing, interLATA telecommunications services, and interLATA information services. Section 272(c)(1) sets forth broad nondiscrimination safeguards that govern a BOC's dealings with its section 271(a) affiliate and is subject to the sunset provisions set forth in section 272(f). Section 272(e), on the other hand, establishes more specific duties that must be fulfilled by the BOC and its affiliates that are subject to section 251(c), and is specifically excepted from the sunset provisions that apply to the other requirements in section 272.¹²⁶ We seek comment on whether, before sunset, the non-accounting requirements of section 272(e) are subsumed completely within the requirements of section 272(c)(1). In addition, we invite parties to comment on any additional interplay between sections 272(c)(1) and 272(e) that are not specifically addressed below.

67. A number of terms and requirements in section 272(c)(1) overlap with the terms and requirements of section 272(e)(1)-(4). In addition, some of these terms appear in other sections of the 1996 Act, in particular, section 251. We seek comment on the interplay between the definitions of the terms "services," "facilities," and "information" in various subsections of 272, and between section 272 and section 251(c).¹²⁷ We seek 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) and (e) in light of section 251(c). In particular, we seek comment on whether Congress meant something different by the terms "services" and "facilities" as used in section 271(c)(1) and (e). Additionally, variations on some of these terms appear in the four subsections of section 272(e), and we seek comment on the significance of these differences. We seek comment on whether further defining these terms, and the term "goods," would enable competing providers to detect violations of this section by enabling them to compare more accurately a BOC's treatment of its affiliates with a BOC's treatment of unaffiliated competing providers. We note that, for example, a requesting entity may have equipment with different technical specifications from a BOC affiliate's equipment. Therefore, we further seek comment on whether the terms of sections 272(c)(1) and (e) 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 the requesting entity that are different from those provided to the BOC affiliate.

68. The 1996 Act allows certain entities to interconnect with the local exchange carrier's network and to "acquire access to network elements on an unbundled basis" under

¹²⁶ 47 U.S.C. § 272(f)(2).

¹²⁷ We note that the Interconnection NPRM seeks comment on the difference between a functionality, a facility, and the service which results from the provision of those functionalities and facilities in light of the 1996 Act's definition of a "network element." See Interconnection NPRM at ¶ 84. See also 47 U.S.C. § 153(29) (defining "network element").

just, reasonable, and nondiscriminatory terms and conditions."¹²⁸ In Computer III, the Commission imposed unbundling and interconnection requirements which allowed ESPs to acquire unbundled basic services from the BOCs, AT&T, and GTE in order to provide enhanced services.¹²⁹ Sections 272(c)(1) and 272(e) require that varying categories of entities receive nondiscriminatory treatment from the BOCs.¹³⁰ The unbundling required by our Computer III and ONA rules, and the provisions of sections 251, 272(c)(1), and 272(e) are all available to different categories of entities. We seek comment on the impact of the variations between these categories of entities when implementing sections 272(c)(1) and (e), and the applicability of these sections to ESPs that are currently able to obtain unbundled network services under Computer III and ONA.

B. Applicability of Pre-Existing Nondiscrimination Requirements

69. Although the 1996 Act imposes specific nondiscrimination requirements on BOCs and their section 272(a) affiliates, we note that certain statutory provisions that predate the 1996 Act also impose nondiscrimination requirements on all common carriers. Under section 201, all common carriers have a duty "to establish physical connections with other carriers," and to furnish telecommunications services "upon reasonable request therefor."¹³¹ Section 201 also requires that "[a]ll charges, practices, classifications, and regulations . . . shall be just and reasonable."¹³² In addition, section 202 makes it unlawful for any common carrier "to make any unjust or unreasonable discrimination in charges, practices, classifications, regulations, facilities, or services," or "to make or give any unreasonable preference or advantage to any particular person, class of persons, or locality."¹³³ Pursuant to these statutory provisions, the Commission established requirements for interconnection between local exchange carriers and interexchange telecommunications service providers,¹³⁴

¹²⁸ 47 U.S.C. § 251(c)(2).

¹²⁹ See supra n.82 for full citation for the Commission's Computer III proceeding.

¹³⁰ Section 272(c)(1) uses the term "any other entity." The four parts of section 272(e) use four different terms: (1) "an unaffiliated entity," (2) "other providers of interLATA services;" (3) "any unaffiliated interexchange carriers;" and (4) "all carriers."

¹³¹ 47 U.S.C. § 201(a).

¹³² Id. § 201(b).

¹³³ Id. § 202(a).

¹³⁴ See MTS and WATS Market Structure, CC Docket No. 78-72, Phase I, Third Report and Order, 93 FCC 2d 241 (1983) (Access Charge Order), mod'd on recon., 97 FCC 2d 682 (1983), mod'd on further recon., 97 FCC 2d 834 (1984) (Second Reconsideration Order), aff'd in principal part and remanded in part, National Association of Regulatory Utility Commissioners v. FCC, 737 F.2d 1095 (D.C.Cir. 1984), cert. denied, 469 U.S. 1227 (1985), mod'd on further recon., 99 FCC 2d 708 (1984), 101 FCC 2d 1222 (1985), aff'd on further recon., 102 FCC 2d 849 (1985) (referred to collectively as the MTS and WATS Market Structure proceeding).

and for interconnection between BOCs and ESPs.¹³⁵ We seek comment on the relationship between the nondiscrimination obligations imposed by sections 272(c)(1) and 272(e) and the Commission's pre-existing nondiscrimination provisions. In particular, we seek to determine what non-accounting nondiscrimination rules, if any, are necessary to implement the section 272(c)(1) and 272(e) nondiscrimination requirements.

70. The nondiscrimination provisions of sections 272(c)(1) do not apply to the conduct of BOC affiliates, and the nondiscrimination provisions of section 272(e) do not apply to BOC affiliates that are not subject to section 251(c).¹³⁶ For this reason, a BOC might have the incentive and ability to transfer network capabilities of its local exchange company to the operations of its competitive affiliates to avoid the nondiscriminatory provision of these capabilities as required by sections 272(c)(1) and (e).¹³⁷ Section 272(a), however, requires any BOC affiliate that is a local exchange carrier subject to section 251(c) to be separate from the section 272(a) affiliates required for the provision of competitive activities. We tentatively conclude, therefore, that any transfer by a BOC of existing network capabilities of its local exchange entity to its affiliates is prohibited by section 272(a), and we seek comment on this tentative conclusion. In addition, section 153(4)(B) states that the definition of a BOC includes "any successor or assign of any such company that provides wireline telephone exchange service." Thus, we seek comment regarding whether, in the alternative, a transfer by a BOC of network capabilities to a competitive affiliate would qualify that affiliate as a successor or assign of the BOC under section 153(4)(B), thus subjecting the competitive affiliate to the nondiscrimination requirements of sections 272(c)(1) and 272(e).

71. If parties do not believe that section 272(a) and section 153(4)(B) prevent such transfers of local exchange network capabilities, we seek comment on whether additional regulations are necessary to prevent discriminatory practices in the provision of these capabilities by BOC affiliates. Because a BOC affiliate's provision of interLATA telecommunications services is subject to sections 201 and 202 of the Communications Act, we seek comment as to whether those nondiscrimination obligations would provide sufficient protection against discriminatory practices by a BOC interLATA telecommunications affiliate, or whether we should impose additional non-accounting safeguards to prevent a

¹³⁵ See supra n.82 for full citation for the Commission's Computer III proceeding.

¹³⁶ By its terms, section 272(c) applies to the conduct of a BOC alone. Section 272(e) applies to the conduct of a BOC or a BOC affiliate that is subject to section 251(c) (i.e. an affiliate that is an incumbent LEC).

¹³⁷ For example, BOCs may have the incentive and ability to transfer the provision of network capabilities to interLATA telecommunications affiliates, or BOCs may have the incentive to transfer network capabilities to its information services affiliate. BOCs may also have the ability to transfer network type functions to equipment produced by its manufacturing affiliates. We discuss infra ¶ 79 the possibility that a BOC might transfer its LEC functions, including network capabilities, to an affiliate that supplies only local exchange services.

BOC from discriminatorily providing these network capabilities through its interLATA telecommunications affiliate. In contrast, information services affiliates and manufacturing affiliates, because they are not "common carriers" under the Communications Act, are not subject to sections 201 and 202. Therefore, we seek comment as to whether other provisions of the Communications Act permit us to, and if so whether we should, place any additional nondiscrimination requirements on affiliates that engage in these activities. We also seek comment on whether nondiscrimination provisions that are established in other sections of the Communications Act, for example the restrictions on manufacturing affiliates in section 273¹³⁸ or those on electronic publishing affiliates in section 274,¹³⁹ affect our treatment of other services under sections 272(c)(1) and 272(e), particularly when one affiliate engages in multiple activities.

C. Section 272(c)(1)

72. Section 272(c)(1) provides that, in its dealings with its affiliate, a BOC "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."¹⁴⁰ As noted above, section 202 of the Communications Act makes it unlawful for any common carrier "to make any unjust or unreasonable discrimination in charges, practices, classifications, regulations, facilities, or services."¹⁴¹ We seek comment, therefore, on whether Congress intended to impose a stricter standard for compliance with section 272(c)(1) by enacting this flat prohibition on discrimination.

73. We tentatively conclude that the prohibition against discrimination in section 272(c)(1) means, at minimum, that BOCs must treat all other entities in the same manner as they treat their affiliates, and must provide and procure goods, services, facilities and information to and from these other entities under the same terms, conditions, and rates. We seek comment on this tentative conclusion, as well as on what regulations, if any, are necessary to implement this provision. Comments should be specific in terms of needed regulations, the problem they would address, and how they would address the identified problem. We also seek comment on whether a BOC can treat unaffiliated entities differently with respect to the activities at issue in section 272(c)(1), as long as such disparate treatment is justified upon an appropriate showing of differences between the unaffiliated entities (e.g., such as differences in the unaffiliated entities' network architecture). We also seek comment

¹³⁸ 47 U.S.C. § 273(b)-(e).

¹³⁹ Id. § 274(d).

¹⁴⁰ Section 272(c)(2) also states that in its dealings with its affiliate, a BOC "shall account for all transactions with an affiliate described in subsection (a) in accordance with accounting principles designated or approved by the Commission." As noted, we will address the implementation issues associated with this provision in a separate proceeding. See Accounting Safeguards NPRM.

¹⁴¹ 47 U.S.C. § 202(a) (emphasis added).

on whether the nondiscrimination safeguards should vary based on whether the affiliate is providing interLATA telecommunications services, interLATA information services, or manufacturing. In particular, we seek comment on whether, in addition to any tariffing or structural separation requirements proposed in this NPRM,¹⁴² any specific non-accounting safeguards are needed to enforce the nondiscriminatory pricing requirement of section 272(c)(1).

74. Section 272(c)(1) states, inter alia, that a BOC may not discriminate in the provision of goods, services, facilities, and information. As BOCs enter competitive markets, they may have additional incentives and opportunities to discriminate in favor of their affiliates in violation of section 272. As indicated above,¹⁴³ a BOC could provide unaffiliated telecommunications carriers or information service providers with inferior connections, or could disclose information to its affiliates before disclosing this information to unaffiliated carriers, providers, or manufacturers.

75. The Commission has previously adopted a regulatory scheme to ensure that the BOCs do not discriminate in the provision of basic services used to provide enhanced services¹⁴⁴ or in disclosing changes in the network that are relevant for the competitive manufacture of CPE.¹⁴⁵ We believe that the existing Computer III regulatory scheme contains non-accounting safeguards that provide protection against the type of BOC behavior that section 272(c)(1) seeks to curtail. The Computer III requirements provide for nondiscriminatory access to unbundled network services as well as nondiscriminatory access to the same quality of service, installation, and maintenance.¹⁴⁶ In addition, BOCs are required to provide information to third parties regarding information on changes to the network and new network services.¹⁴⁷ BOCs are also required to report on the quality and

¹⁴² We address the need for tariffing requirements under section 272(e)(3) infra ¶ 88.

¹⁴³ See supra ¶ 65.

¹⁴⁴ In Computer III, the Commission permitted BOCs to provide enhanced services on an integrated basis pursuant to a CEI plan for each enhanced service provided, and required the BOCs to file the CEI plan with the Commission. The Commission also subsequently approved ONA plans from each BOC that provided for further unbundling of their networks independent of the CEI requirements. Under ONA, BOCs were permitted to provide enhanced services pursuant to nonstructural safeguards instead of the Computer II regime of structural separation. See supra n.89 for full citation to ONA Proceeding.

¹⁴⁵ See, e.g., Furnishing of Customer Premises Equipment by the Bell Operating Telephone Companies and the Independent Telephone Companies, CC Docket No. 86-79, Report and Order, 2 FCC Rcd 143, 149-51, ¶¶ 44-54 (1987).

¹⁴⁶ See Computer III Phase I Order, 104 FCC 2d at 1041, ¶ 161.

¹⁴⁷ See Computer III Phase II Order, 2 FCC Rcd at 3091, ¶¶ 134-140.

timeliness of installation and maintenance.¹⁴⁸ We seek comment on whether any of the nondiscrimination safeguards 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).

76. We further seek comment on the scope of the term "goods, services, facilities and information" for which the 1996 Act prohibits discrimination. We note that our Computer III requirements do not specifically address "goods," and therefore seek comment on what regulations, if any, would be necessary to define that term. We also seek comment on whether the separate customer proprietary network information (CPNI) provisions of the 1996 Act affect the requirement to provide information on a nondiscriminatory basis in this section.¹⁴⁹

77. Section 272(c)(1) requires, inter alia, that the BOCs not discriminate with regard to their procurement of goods, services, facilities, and information. We note that this provision prohibits, for example, 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 and undermining competition. We seek 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 in the procurement of goods, services, facilities, and information. We also seek comment on the nature and extent of rules necessary to ensure that such procedures are implemented.

78. Section 272(c)(1) also prohibits a BOC from discriminating in the establishment of standards. We seek comment on what "standards" are encompassed by this provision. We also seek comment on what procedures, if any, we should implement to ensure that the BOC does not discriminate between its affiliate and other entities in setting standards. For instance, should BOCs be required to participate in standard-setting bodies in the development of standards covered by this section? We note that, for example, a BOC could act anticompetitively by creating standards that require or favor equipment designs which are proprietary to its affiliate. A BOC's knowledge of both its affiliate's and its competitors' networks might also allow a BOC to adopt or modify equipment standards that its affiliates would be able to comply with more easily, or at less cost, than could unaffiliated

¹⁴⁸ BOC ONA Reconsideration Order, 5 FCC Rcd at 3093, ¶¶ 73-80, 3096, app. B.

¹⁴⁹ 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, FCC 96-221 (rel. May 17, 1996) (CPNI NPRM).

carriers.¹⁵⁰ We seek comment on what regulations, if any, are necessary to implement this nondiscrimination safeguard.

79. We note that the difference in language between section 272(c) and sections 272(a) and (e) might appear to allow a BOC affiliate that provides local exchange services to avoid compliance with section 272(c). Although sections 272(a) and 272(e) apply to a BOC and an affiliate subject to 251(c),¹⁵¹ section 272(c) refers only to the "dealings" by a "Bell operating company" with its section 272(a) affiliates.¹⁵² Section 153(4), however, states that a "Bell operating company" includes "any successor or assign [of a BOC] . . . that provides wireline telephone exchange service."¹⁵³ Reading these sections together, we tentatively conclude that Congress did not intend for a BOC to be able to move its incumbent local exchange operations to an affiliate in order to avoid complying with section 272(c). Thus, we tentatively conclude that, if a BOC affiliate is engaged in local exchange activities and is therefore subject to section 251(c), then the local exchange affiliate would be subject to 272(c) requirements when dealing with BOC affiliates engaged in competitive activities.

D. Section 272(e)

80. Section 272(e) of the Communications Act places several additional obligations on BOCs and BOC affiliates that are subject to the requirements of section 251(c).¹⁵⁴ Sections 272(f)(1) and 272(f)(2) provide that the requirements of section 272(e) do not sunset. Some of the provisions in section 272(e), however, could be interpreted as subject to sunset because their requirements are contingent on the existence of a separate affiliate. Section 272(e)(2) states that the BOC "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

¹⁵⁰ See, e.g., Janusz A. Ordover and Robert D. Willig, An Economic Definition of Predation: Pricing and Product Innovation, 91 Yale L.J. 8 (1981); Joseph Farrell and Garth Saloner, Installed Base and Compatibility: Innovation, Product Preannouncements, and Predation, 76 Amer. Econ. Rev. 940 (1986).

¹⁵¹ Section 272(a)(1) applies to "a Bell operating company (including any affiliate) which is a local exchange carrier that is subject to the requirements of section 251(c)." 47 U.S.C. § 272(a)(1) (emphasis added). Section 272(e) applies to a BOC "and an affiliate that is subject to the requirements of section 251(c)." *Id.* § 272(e) (emphasis added).

¹⁵² *Id.* § 272(c) (emphasis added).

¹⁵³ *Id.* § 153(4)(B).

¹⁵⁴ The legislative history indicates that these additional requirements were included in the Senate bill "to reduce litigation by establishing in advance the standard to which a BOC entity that provides telephone exchange service or exchange access must comply in providing interconnection to an unaffiliated entity." Joint Explanatory Statement at 150.

providers of interLATA services in that market on the same terms and conditions."¹⁵⁵ Similarly, section 272(e)(4) states that the BOC "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."¹⁵⁶ If the BOCs did not maintain section 272(a) separate affiliates after that requirement expired, it is unclear whether the nondiscrimination requirements of sections 272(e)(2) and (4) would be maintained. We seek comment on whether Congress intended to sunset the requirements in sections 272(e)(2) and (4) if the BOCs eliminated their section 272(a) separate affiliates. Commenters claiming that the requirements of those sections survive the elimination of the section 272(a) separate affiliates should explain in detail how these requirements should be applied in those circumstances.

1. Section 272(e)(1)

81. Pursuant to section 272(e)(1), "[a BOC] and an affiliate that is subject to the requirements of 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."

82. In the 1996 Act, "affiliate" is defined as:

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 paragraph, the term 'own' means to own an equity interest (or the equivalent thereof) of more than 10 percent.¹⁵⁷

We tentatively conclude we should interpret "an unaffiliated entity" to include any entity, regardless of line of business, that is not affiliated with a BOC under the foregoing statutory definition. We seek comment on this tentative conclusion.

83. We seek comment on the scope of the term "requests" under this subsection. We seek comment on whether these requests should include, inter alia, initial installation requests, as well as any subsequent requests for improvement, upgrades or modifications of service, or repair and maintenance of these services.

84. We tentatively conclude that section 272(e)(1) requires BOCs to treat unaffiliated entities nondiscriminatorily in the provision of exchange services or exchange

¹⁵⁵ 47 U.S.C. § 272(e)(2) (emphasis added).

¹⁵⁶ Id. § 272(e)(4) (emphasis added).

¹⁵⁷ Id. § 153(1).

access in terms of timing, but does not create any additional rights beyond those granted to unaffiliated entities through the 1996 Act, pre-existing provisions of the Communications Act, or other Commission rules. We seek comment on this tentative conclusion.

85. We additionally seek comment on how to implement the phrase "a period no longer than the period in which it provides such . . . service to itself or to its affiliates" and whether rules are needed to enforce this requirement. We note that, in offering new and advanced services, slow provision of telephone exchange service or access service may delay the offering of services by unaffiliated entities and thus reduce their ability to compete. We seek comment on what mechanisms, if any, we should establish in order to ensure that a BOC fulfills service requests in compliance with this section. We further seek comment on whether reporting requirements for service intervals analogous to those imposed by Computer III and ONA would be sufficient to implement this provision.¹⁵⁸

2. Section 272(e)(2)

86. Section 272(e)(2) states that a BOC and an affiliate that is subject to the requirements of 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."¹⁵⁹ We seek comment on what regulations, if any, we should adopt to implement this statutory requirement.

87. We seek comment on the scope of the term "facilities, services or information concerning [the] provision of exchange access." We also seek comment on how to interpret the phrase "other providers of interLATA services in that market." We further seek comment on the relevance of previous Commission proceedings or provisions of the MFJ governing BOC provision of facilities, services or information when implementing this section.¹⁶⁰

3. Section 272(e)(3)

88. Section 272(e)(3) provides that a BOC and an 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

¹⁵⁸ See, e.g., BOC ONA Reconsideration Order, 5 FCC Rcd at 3093, ¶¶ 73-80, 3096, app. B.

¹⁵⁹ 47 U.S.C. § 272(e)(2).

¹⁶⁰ The MFJ ordered the BOCs to provide access services to AT&T and competing interexchange and information service providers which were "equal in type, quality, and price." United States v. Western Elec. Co., 552 F. Supp. 131, 196 (D.D.C. 1982) (subsequent history omitted). The Commission has imposed equal access requirements pursuant to its authority under sections 201 and 202 of the Communications Act. See supra n.134 for full citation to the MTS and WATS Market Structure proceedings.

exchange service and exchange access that is no less than the amount charged to any unaffiliated interexchange carrier for such services."¹⁶¹ We tentatively conclude that the BOCs' provision of telephone exchange and exchange access services under tariffed rates, including their affiliates' purchase at these rates pursuant to tariff or imputation of these rates to the BOCs, is sufficient to implement this provision. We also seek comment on the appropriate mechanism to enforce this provision in the absence of tariffed rates for the specified services. We seek comment on what additional regulations, if any, are necessary to implement this statutory provision.¹⁶²

4. Section 272(e)(4)

89. Section 272(e)(4) states that a BOC and an affiliate that is subject to the requirements of 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."¹⁶³ We seek comment regarding the scope of the term "interLATA or intraLATA facilities or services." For example, does it include information services and all facilities used in the delivery of such services? We seek comment on what additional regulations, if any, are necessary to implement this statutory provision.

VI. MARKETING PROVISIONS OF SECTIONS 271 AND 272

90. Section 272(g)(1) provides that "[a] Bell operating company affiliate required by this section may not market or sell telephone exchange services provided by the Bell operating company unless that company permits other entities offering the same or similar service to market and sell its telephone exchange services." We seek comment on what regulations, if any, are necessary to implement this provision.

91. Section 271(e) restricts joint marketing by certain large telecommunications carriers:

Until a Bell operating company is authorized pursuant to subsection (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,

¹⁶¹ 47 U.S.C. § 272(e)(3). We note that issues concerning the valuation of these services will be addressed in a separate proceeding. See Accounting Safeguards NPRM.

¹⁶² We have sought comment in our proceeding to implement section 251 on the relevance of section 272(e)(3) to the question of whether an incumbent LEC may assess Part 69 access charges, in addition to charges assessed for network elements under sections 251 and 252, on interexchange carriers that purchase access to unbundled network elements in order to provide toll services. See Interconnection NPRM at ¶ 165.

¹⁶³ 47 U.S.C. § 272(e)(4).

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.

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)."¹⁶⁴ Sections 271(e) and 272(g)(2) appear to be parallel provisions that are intended to prevent BOCs and the largest interexchange carriers from marketing local and long distance services jointly prior to the BOCs' entry into in-region interLATA service, if the interexchange carrier is purchasing incumbent LEC services pursuant to section 251(c)(4) for resale.¹⁶⁵ We note that, on its face, this provision does not preclude a covered interexchange carrier from jointly marketing local exchange services provided through interconnection of the interexchange carrier's facilities with an incumbent LEC pursuant to section 251(c)(2), or through purchase of unbundled network elements pursuant to section 251(c)(3). We tentatively conclude that the term "market or sell" in section 272(g)(2) should be construed similarly to the term "jointly market" in section 271(e).¹⁶⁶ We seek comment on this tentative conclusion. We also seek comment on whether these sections encompass such prohibitions as, for example, advertising the availability of interLATA services combined with local exchange services, making these services available from a single source, or providing bundling discounts for the purchase of both services.

92. Section 272(g)(2) allows the BOC to market and sell the interLATA services of its affiliate after the BOC enters the interLATA market pursuant to section 271(d). Section 272(g)(3) provides that "[t]he joint marketing and sale of services permitted under this subsection shall not be considered to violate the nondiscrimination provisions of subsection (c)." Section 272(b)(3) requires the BOC and its affiliate to maintain separate officers, directors, and employees, and section 272(b)(5) requires a section 272(a) affiliate to conduct "all transactions with the [BOC] . . . on an arm's length basis with any such transactions reduced to writing and available for public inspection." We invite parties to comment on the corporate and financial arrangements that are necessary to comply with

¹⁶⁴ *Id.* § 272(g)(2).

¹⁶⁵ As noted, Congress adopted the section 272 provisions from the Senate bill with several modifications. *See supra* n.64. The Senate bill also contained joint marketing prohibitions. *See* S. 652, 104th Cong., 1st Sess. §§ 252 and 255 (1995). The Senate Report stated that "to provide for parity among competing industry sectors, the Committee has included restrictions on joint marketing certain services. . . ." *See* S. Rep. No. 104-23, 104th Cong., 1st Sess. 23 (1995).

¹⁶⁶ We note that in discussing section 272(g)(2), the Joint Explanatory Statement uses the term "jointly market" rather than the term "market or sell." Joint Explanatory Statement at 152. This suggests that Congress considered the phrase "market or sell" and the term "jointly market" to be similar, if not interchangeable.

sections 272(g)(2), 272(b)(3), and 272(b)(5). We seek comment on whether the affiliate must purchase marketing services from the BOC on an arm's length basis pursuant to section 272(b)(5). We further seek comment on whether, instead of allowing BOC personnel to market its affiliate's services at arm's length, it is necessary to require a BOC and its affiliate to jointly contract to an outside marketing entity for joint marketing of interLATA and local exchange service in order to comply with the provisions of section 272(b)(3).¹⁶⁷

93. We seek comment on additional issues raised by the marketing provisions of the 1996 Act. We seek comment on the interplay between the joint marketing provisions in sections 271 and 272 and the CPNI provisions set forth in section 222 that are the subject of a separate proceeding.¹⁶⁸ We also seek comment on whether the joint marketing provision in section 274(c) has any indirect bearing on how we should apply the joint marketing provisions in sections 271 and 272.¹⁶⁹

VII. ENFORCEMENT OF SECTIONS 271 AND 272

A. Mechanisms to Facilitate Enforcement of the Separate Affiliate and Nondiscrimination Safeguards of Sections 271 and 272

94. Enforcement of the statutory separate affiliate and nondiscrimination safeguards established by sections 271 and 272 and the rules that we may adopt to implement those provisions will be critical to ensuring the full development of competition in the local and interexchange telecommunications markets. We seek comment generally on the mechanisms necessary to facilitate the detection and adjudication of violations of these safeguards and, specifically, on how the Commission should exercise its enforcement powers under section 271(d)(6).

95. We seek comment on what requirements or mechanisms are necessary to facilitate detection and adjudication of violations of the separate affiliate and nondiscrimination requirements discussed above. For instance, should we impose reporting requirements on BOCs analogous to those requirements imposed by our CEI plans and ONA plans under Computer III?¹⁷⁰ We recognize, however, that this will impose burdens on the BOCs as well as the Commission. Alternatively, would a third party compliance monitoring or reporting system be a more effective method of detecting violations of these provisions?

¹⁶⁷ We note that the accounting safeguards pertaining to joint marketing will be addressed in a separate proceeding. See Accounting Safeguards NPRM.

¹⁶⁸ See CPNI NPRM.

¹⁶⁹ We will address the implementation issues associated with the joint marketing provisions regarding CMRS in a separate proceeding.

¹⁷⁰ See BOC ONA Reconsideration Order, 5 FCC Rcd at 3093, ¶¶ 73-80, 3096, app. B.

96. We seek comment on what mechanisms, other than reporting requirements imposed on BOCs or their affiliates, would facilitate detection and adjudication of violations of sections 271 and 272, by both the Commission and third parties. In particular, we seek comment on mechanisms that would allow third parties to identify the goods, services, facilities, or information that have been provided to BOC affiliates or other parties. For example, are the disclosure requirements under section 272(b)(5) a sufficient means of detecting violations? We seek comment on whether we should determine that a BOC or its affiliate would be in violation of sections 272(c)(1) and (e) if a BOC provides varying levels of service between its affiliate and third parties as well as between third parties themselves. We also seek comment on whether there are reasonable grounds by which a BOC or its affiliate could justify deviation from a rate, term or condition established under sections 272(c)(1) and (e). In proposing regulations for this section, commenting parties should state specifically what regulations or procedures should be required and how a specific provision of sections 272(c)(1) or (e) make them necessary.

B. Section 271 Enforcement Provisions

97. 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 for the Commission to grant the BOC 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 failures 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.¹⁷¹

¹⁷¹ We expect to initiate a separate proceeding addressing the expedited complaint procedures mandated by this subsection as well as those mandated by other provisions of the 1996 Act.

We seek to clarify the relationship between this section and the Commission's existing enforcement authority under sections 206-209 of the Communications Act.¹⁷² We tentatively conclude 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. For example, we believe that, in a situation where a complainant successfully establishes conduct (such as a failure to provide nondiscriminatory access to operator call completion services) that would constitute both a failure by the BOC to meet the conditions of its approval, as well as the basis for financial harm, the Commission could impose any of the sanctions specified in section 271(d)(6)(A), and could also award damages pursuant to its preexisting authority under section 209. We seek comment on this tentative conclusion. We also seek 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 violative 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."

98. 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 (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.¹⁷³ 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. We believe that there are two ways in which the Commission may determine that a BOC has ceased to meet the conditions of its approval. First, the Commission could make such a determination via the resolution of an expedited complaint proceeding pursuant to section 271(d)(6)(B). Second, the Commission could make such a determination on its own motion. We seek comment on this interpretation.

99. In addition, we seek comment on what legal and evidentiary standards are necessary to establish that a BOC has ceased to meet the conditions required for its approval

¹⁷² 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.

¹⁷³ See 47 U.S.C. § 271(d)(3).

to provide in-region interLATA service. As noted above,¹⁷⁴ in order to establish a violation of section 201, a complainant must show that the defendant's terms of service and charges are "unjust and unreasonable." Similarly, in order to establish a violation of section 202(a), a complainant must demonstrate "unjust and unreasonable discrimination."¹⁷⁵ Sections 271(c)(1), (c)(2)(B), and 272, in contrast, set forth no such standards that we must apply to complaints arising under these sections. We seek comment, therefore, on the types of showings that should be required of a complainant and a defendant BOC in order to ensure a full and fair resolution, within the 90-day statutory window, of a complaint alleging that a BOC has ceased to meet the conditions required for approval to provide in-region interLATA services.¹⁷⁶

100. In the context of a complaint proceeding, we seek comment on what constitutes a prima facie showing that a BOC has ceased to meet any or all of the conditions for interLATA entry. Is it 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)?¹⁷⁷ Is such a broad, generally applicable, standard more likely to engender frivolous complaints,¹⁷⁸ or is it more likely to facilitate a complainant's ability to bring anti-competitive behavior by a BOC to the attention of the Commission? In the alternative, should the prima facie showing required be specific to the particular condition at issue, i.e., the requirements of section 271(c)(1), the conditions set forth in the competitive checklist of section 271(c)(2)(B), and the requirements of section 272? If so, commenters should describe what specific acts or omissions are sufficient to establish a prima facie showing that each of these conditions is no longer met.

101. Currently, in a typical complaint proceeding, the complainant generally has the burden of establishing that a common carrier has violated the Communications Act or a

¹⁷⁴ See supra ¶ 69.

¹⁷⁵ We note that under applicable judicial precedent, to prove a discrimination claim under section 202(a), the complainant has the burden of establishing that the services at issue are "like" and that discrimination exists between them. See, e.g., MCI Telecommunications Corp v. FCC, 917 F.2d 30, 39 (D.C. Cir. 1990) (MCI v. FCC).

¹⁷⁶ We earlier sought comment on whether Congress intended, by enacting the flat prohibition on discrimination in section 272(c)(1) to impose a stricter standard for compliance with section 272(c)(1) than with section 202. See supra ¶ 72.

¹⁷⁷ See 47 C.F.R. § 1.720(b)

¹⁷⁸ The Commission has indicated its intent to fully utilize its authority to discourage and deter the filing of frivolous pleadings by imposing appropriate sanctions when such pleadings are filed. See Commission Taking Tough Measures Against Frivolous Pleadings, Public Notice, FCC 96-42 (rel. Feb. 9, 1996).

Commission rule or order.¹⁷⁹ Ordinarily, this burden of proof does not, at any time in the proceeding, shift to the defendant carrier.¹⁸⁰ In the case of section 202(a) complaints, however, once a complainant alleging a violation establishes that the services are like and that discrimination exists between them, the burden shifts to the defendant carrier to show that the discrimination is justified and, therefore, not unreasonable within the meaning of section 202(a).¹⁸¹ In some instances, parties who have initiated formal complaint proceedings with the Commission have expressed concern that defendant carriers, in particular the BOCs, have an inherent advantage in the proceedings because of their control over the information regarding their service offerings and related practices necessary for a full and fair resolution of the disputed issues. These parties have further complained that the discovery mechanism contained in the Commission's formal complaint rules of practice and procedure is cumbersome and seldom produces on a timely basis information of decisional significance. We, therefore, seek to assist parties in their pursuit of complaints before the Commission that BOCs have ceased to meet the conditions for interLATA entry, by ensuring the prompt and fair resolutions these complaints within the statutory 90-day period.

102. With this objective in mind, we believe it appropriate to inquire into whether the pro-competitive goals of the 1996 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). Because the defendant BOC is likely to be in sole possession of information relevant to the complainant's case, and because the complaint must be acted upon in 90 days, we believe that shifting the burden may be an efficient way of resolving complaints invoking the expedited procedures of section 271(d)(6). We also find that by alleviating the burden on the complainant, burden-shifting may be a means of facilitating the detection of alleged anti-competitive behavior by the BOCs. We, therefore, seek comment 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), as it does when a complainant makes a prima facie showing of discrimination under section 202(a). If the burden should not shift upon a prima facie showing, we seek comment on what particular facts or circumstances established by the complainant, if any, would warrant shifting the burden of proof to a defendant BOC.

¹⁷⁹ 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 (1983); 47 C.F.R. §§ 1.721 - 1.735.

¹⁸⁰ 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 Administration 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.

¹⁸¹ See, e.g., MCI v. FCC.