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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF SECRETARY

In The Matter of)

IMPLEMENTATION OF THE NON-)
ACCOUNTING SAFEGUARDS OF)
SECTIONS 271 AND 272 OF THE)
COMMUNICATIONS ACT OF 1934,)
AS AMENDED)

And)

REGULATORY TREATMENT OF LEC)
PROVISION OF INTEREXCHANGE)
SERVICES ORIGINATING IN THE)
LEC'S LOCAL EXCHANGE AREA)

CC Docket No. 96-149

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COMMENTS OF THE
TELECOMMUNICATIONS RESELLERS ASSOCIATION

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RESELLERS ASSOCIATION

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SUMMARY

The Telecommunications Resellers Association ("TRA"), an organization consisting of more than 450 resale carriers and their underlying product and service suppliers, generally supports the manner in which the Commission has proposed to implement the non-accounting separate affiliate and nondiscrimination safeguards prescribed in Section 272 of the Telecommunications Act of 1996. TRA endorses the Commission's expansive approach both to the scope of its authority under Section 272 and to the applicability of the Section 272 safeguards. TRA, however, urges the Commission to more aggressively define the structural and transaction requirements embodied in Section 272(b) and the safeguards against discriminatory conduct set forth in Sections 272(c)(1) and (e). And TRA recommends that the Commission designate as a high priority the creation of mechanisms by which to detect and adjudicate violations of these critical safeguards. Finally, TRA strongly urges the Commission to refrain from relaxing dominant carrier regulation of the provision by Bell Operating Company affiliates of in-region, interstate, domestic, interLATA, as well as in-region international, telecommunications services, until such time as the BOC local exchange/exchange access "bottlenecks" have been dismantled.

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**COMMENTS OF THE
TELECOMMUNICATIONS RESELLERS ASSOCIATION**

The Telecommunications Resellers Association ("TRA"), through undersigned counsel and pursuant to Section 1.415 of the Commission's Rules, 47 C.F.R. § 1.415, hereby submits its Comments in response to the Notice of Proposed Rulemaking, FCC 96-308, released by the Commission in the captioned docket on July 18, 1996 (the "Notice"). In this proceeding, the Commission will promulgate regulations implementing the non-accounting safeguards applicable to "in-region" provision by the Bell Operating Companies ("BOCs") of interLATA telecommunications services, as well as BOC provision of interLATA information services and manufacture of telecommunications equipment and customer premises equipment ("CPE"),

embodied in Sections 271 and 272 of the Communications Act of 1934 ("1934 Act"),¹ as amended by the Telecommunications Act of 1996 ("1996 Act").² The Commission will also determine the regulatory classification -- *i.e.*, dominant or non-dominant -- of in-region, interstate, domestic, interLATA and international telecommunications services provided by structurally separate BOC affiliates, as well as by the independent local exchange carriers ("LECs").

I

INTRODUCTION

TRA was created, and carries a continuing mandate, to foster and promote telecommunications resale, to support the telecommunications resale industry and to protect the interests of entities engaged in the resale of telecommunications services. TRA's more than 450 members are all actively engaged in the resale of interexchange, international, local exchange, wireless and/or other telecommunications services and/or in the provision of products and services associated with such resale. Employing the transmission, and often the switching and other, capabilities of underlying facilities-based carriers, TRA's resale carrier members create "virtual networks" to serve generally small and mid-sized commercial, as well as residential, customers, providing such entities and individuals with access to rates otherwise available only to much larger users. TRA's resale carrier members also offer small and mid-sized commercial customers enhanced, value-added products and services, including a variety of sophisticated

¹ 47 U.S.C. §§ 271, 272.

² Pub. L. No. 104-104, 110 Stat. 56, § 151 (1996).

billing options, as well as personalized customer support functions, that are generally reserved for large-volume corporate users.

While TRA's resale carrier members range from emerging, high-growth companies to well-established, publicly-traded corporations, the bulk of these entities are not yet a decade old. Nonetheless, TRA's resale carrier members collectively serve millions of residential and commercial customers and generate annual revenues in the billions of dollars. The emergence and dramatic growth of TRA's resale carrier members over the past five to ten years have produced thousands of new jobs and new commercial opportunities. In addition, TRA's resale carrier members have facilitated the growth and development of second- and third-tier facilities-based interexchange carriers by providing an extended, indirect marketing arm for their services, thereby further promoting economic growth and development. And perhaps most critically, by providing cost-effective, high quality telecommunications services to the small business community, TRA's resale carrier members have helped other small and mid-sized companies expand their businesses and generate new employment opportunities.

TRA's interest in this proceeding is in protecting, preserving and promoting competition within the interexchange telecommunications services market, as well as in speeding the emergence and growth of facilities-based and resale competition in the local exchange/exchange access services market. In TRA's view, market forces are, all things being equal, generally superior to regulation in promoting the efficient provision of diverse and affordable telecommunications products and services. TRA is well aware, however, that the emergence, growth and development of not only a competitive interexchange telecommunications market, but a vibrant telecommunications resale industry, are direct products of a series of pro-

competitive initiatives undertaken, and pro-competitive policies adopted, by the Commission over the past decade. TRA thus understands that the market is an effective regulator only if market forces are adequate to discipline the behavior of all market participants. If one or more such participants are possessed of market power sufficient to exert control over the market, thereby impeding the competitive provision of service, regulatory intervention is essential to protect the public interest.

The Congress recognized as much when it adopted a series of structural, accounting and nondiscrimination safeguards upon which it conditioned BOC provision of in-region telecommunications and information services.³ As the Notice recognizes, "[t]he structural separation requirements of section 272, in conjunction with the affirmative nondiscrimination obligations imposed by that section, are intended to address concerns that the BOCs could potentially use local exchange access facilities to discriminate unlawfully against competitors in order to gain a competitive advantage for their affiliates that engage in competitive activities," as well as "to prevent improper cost allocations by BOCs."⁴ TRA urges the Commission to interpret, implement and enforce these critical safeguards in a manner that will effectively constrain abuse of market power by the BOCs and hence protect, promote and enhance competition in the provision of all forms of telecommunications and information services. TRA further urges the Commission to refrain from relaxing dominant carrier regulation of provision by BOC affiliates of in-region, interstate, domestic, interLATA, as well as in-region international,

³ Id.

⁴ Notice, FCC 96-308 at ¶¶ 12 -13.

telecommunications services until such time as the BOC local exchange/exchange access "bottlenecks" have been dismantled.

II

ARGUMENT

A. The Scope of the Commission's Authority to Adopt Rules Implementing the Non-accounting Safeguards Embodied in Sections 271 and 272 (¶¶ 19 - 29)

By their terms, Sections 271 and 272 apply to BOC provision of interLATA telecommunications and information services, but do not expressly state whether they encompass intrastate, as well as interstate, interLATA services. The Notice tentatively concludes that the Commission's authority to adopt rules implementing the non-accounting safeguards embodied in Sections 271 and 272 reaches BOC provision of both interstate and intrastate interLATA telecommunications and information services.⁵ TRA agrees with the Notice's jurisdictional analysis and conclusion.

As the Notice correctly observes,⁶ Sections 271 and 272 were designed to replace the line-of-business restrictions previously imposed on the BOCs by the Modification of Final Judgment ("MFJ").⁷ Just as the MFJ applied to the intrastate, as well as the interstate, activities of the BOCs, so too do Sections 271 and 272; the critical distinctions being, as it was in the

⁵ Id. at ¶¶ 21 - 27.

⁶ Id. at ¶ 21.

⁷ United States v. American Tel. & Tel. Co., 552 F. Supp. 131, 231 (D.D.C. 1982), aff'd mem. sub nom. Maryland v. United States, 460 U.S. 1001 (1983).

MFJ, interLATA versus intraLATA and now in-region versus out-of-region, rather than interstate versus intrastate.

Sections 271 and 272 clearly evidence the intent of Congress that they should govern the provision by the BOCs of all interLATA telecommunications and information services, contemplating a state-by-state, rather than a regional or national, review and entry review and entry and providing for a role for both federal and state regulatory authorities in the review process. As the Commission has recently held, "[t]he 1996 Act . . . expands the applicability of both national rules to historically intrastate issues, and state rules to historically interstate issues . . . creating parallel jurisdiction for the FCC and the states."⁸ On this basis, the Commission concluded that its authority under Sections 251 and 252 of the 1996 Act extended to both interstate and intrastate matters.⁹ In so doing, the Commission remarked that:

Although we recognize that these sections do not contain an explicit grant of intrastate authority to the Commission or of interstate authority to the states, we nonetheless find that this interpretation is the only reasonable way to reconcile the various provisions of sections 251 and 252, and the statute as a whole.¹⁰

In its Local Competition Order, the Commission also disposed of claims that Section 2(b) of the Communications Act restricts the authority granted to it under the 1996 Act.¹¹ While Section 2(b) generally reserves to the states authority over intrastate communications, that general

⁸ Implementation of the Local Competition Provisions in the Telecommunications Act of 1996, CC Docket No. 96-98, FCC 96-325, ¶ 83 (released August 8, 1996) ("Local Competition Order").

⁹ Id. at ¶¶ 84 - 85.

¹⁰ Id. at ¶ 85.

¹¹ 47 U.S.C. § 152.

reservation of authority can be overcome by specific Congressional action. As the Commission has recognized, there are numerous instances in the 1996 Act "where Congress indisputably gave the Commission intrastate jurisdiction without amending section 2(b)."¹² By way of illustration, the Commission has pointed to Sections 253 and 276¹³ and expressly held that the scope of its jurisdiction under Sections 251 and 252 was not limited by Section 2(b).¹⁴ Similarly, with respect to Sections 271 and 272, the Notice is correct that "Congress intended for sections 271 and 272 to take precedence over any contrary implications based on section 2(b)."¹⁵

B. BOC Activities to Which the Section 272 Non-accounting Safeguards are Applicable (¶¶ 31 - 54)

Under Section 272, BOCs must utilize structurally separate affiliates to provide, among other things, most in-region interLATA telecommunications services, as well as interLATA information services. The Notice raises a number of questions regarding the activities encompassed within these broad service categories and the application thereto of Section 272's separate affiliate and nondiscrimination safeguards. TRA generally concurs with the Notice's tentative conclusions with respect to these issues.

Several of the issues raised in the Notice regarding the activities to which the Section 272 separate affiliate and nondiscrimination safeguards apply relate to both interLATA

¹² Implementation of the Local Competition Provisions in the Telecommunications Act of 1996, CC Docket No. 96-98, FCC 96-325 at ¶ 93.

¹³ 47 U.S.C. §§ 253, 276.

¹⁴ Implementation of the Local Competition Provisions in the Telecommunications Act of 1996, CC Docket No. 96-98, FCC 96-325 at ¶ 93.

¹⁵ Id.

telecommunications and information services. TRA agrees with the Notice's tentative conclusion that these safeguards apply to both international, as well as domestic, interLATA in-region telecommunications and interLATA information services.¹⁶ As the Notice correctly points out, Section 272 makes broad reference to interLATA service, which is defined by the 1996 Act as "telecommunications between a point located in a local access and transport area and a point located outside such area."¹⁷ Unless otherwise qualified, "a point located outside [a LATA]" could be within or without the boundaries of the United States.

TRA, however, disagrees with the Notice's interpretation of Section 272(a)(1). Section 272(a)(1) prohibits a BOC from providing either interLATA in-region telecommunications or interLATA information services "unless it provides that service through one or more affiliates."¹⁸ The Notice reads this requirement to allow a BOC to provide interLATA in-region telecommunications and interLATA information services, as well as telecommunications equipment and CPE manufacturing, through a single structurally-separate affiliate.¹⁹ TRA believes that the provision should be read to permit a BOC to use multiple affiliates to provide a single category of services -- *e.g.*, interLATA information services -- but not to provide multiple categories of services through a single affiliate. Section 272(a)(1) after all clearly states that a BOC may not provide any "service" (singular) unless it provides that "service" (singular) through "one or more affiliates" (plural). TRA does, however, fully agree

¹⁶ Notice, FCC 96-308 at ¶ 32.

¹⁷ 47 U.S.C. § 153(21).

¹⁸ 47 U.S.C. § 272(a)(1).

¹⁹ Notice, FCC 96-308 at ¶ 33.

with the Notice's assessment that a BOC local exchange affiliate must always be separate from "BOC affiliate or affiliates engaged in covered competitive activities."²⁰

TRA also agrees with the Notice's tentative conclusion that Section 271(f)²¹ does not bar the Commission from applying Section 272(h)²² to BOC provision of either interLATA in-region telecommunications services or interLATA information services. Section 271(f) bars the Commission only from prohibiting a BOC from "engaging" in any interLATA in-region telecommunications services or interLATA information services it was authorized to provide prior to the enactment of the 1996 Act; it does not limit the Commission's authority under Section 272 to mandate the manner in which a BOC engages in those activities. Thus, while a BOC has twelve months under Section 272(h) to bring such previously authorized services into compliance with the Section 272 separate affiliate and nondiscrimination safeguards, it must be in compliance with those requirements by the end of that period.

1. InterLATA Telecommunications Services (¶¶ 36 - 40)

The Notice seeks comment on "what, if any, non-accounting structural or nonstructural safeguards the Commission should establish to implement the requirements of section 271(h)."²³ In TRA's view, Section 271(h) provides the Commission with broad discretion, authorizing (indeed, requiring) it to take such actions as are necessary to ensure that BOC

²⁰ Id.

²¹ 47 U.S.C. § 271(f).

²² 47 U.S.C. § 272(h).

²³ Notice, FCC 96-308 at ¶ 38.

provision of "incidental interLATA services" will not "adversely affect telephone exchange service ratepayers or competition in any telecommunications market."²⁴ Accordingly, the Commission could impose the full panoply of structural and nonstructural safeguards on an incidental interLATA service if such safeguards were necessary to protect consumers and competition. After all, Section 272(a) only lists the BOC activities that must be provided through a structurally-separate affiliate; it does not limit the BOC activities to which such a structural separation requirement may be applied. TRA urges the Commission to apply the full range of separate affiliate and nondiscrimination safeguards embodied in Section 272 to all in-region interLATA incidental services until such time as meaningful competitive alternatives are available in the local telecommunications market. TRA urges the Commission, at a minimum, to apply such safeguards to BOC provision of in-region interLATA commercial mobile services.

TRA strongly endorses the Notice's tentative conclusion that in instances in which two or more BOCs have combined through merger or acquisition, the category of "in-region states" must be interpreted broadly to include all of the states in which any of the combining BOCs were authorized to provide local exchange service prior to the passage of the 1996 Act.²⁵ Moreover, this reading should be applied upon execution of a merger or acquisition agreement and should not await closing of the transaction. And all nondiscrimination safeguards applicable to a BOC's dealings with its affiliates should be applied to the BOC's dealings with the affiliates of its merger or acquisition partner, commencing with the execution of the transactional

²⁴ 47 U.S.C. § 271(h).

²⁵ Notice, FCC 96-308 at ¶ 40.

documents. As the Commission has previously recognized, even "in the period prior to a merger's consummation, one partner to the merger may act in ways to favor . . . its merger partner . . . because . . . [it] may eventually share in . . . [the] profits."²⁶ Similarly, to the extent that affiliates of two or more BOCs enter into cooperative arrangements for the provision of interLATA services, including, but not limited to, formal joint ventures, these same nondiscrimination safeguards should be applicable to all of the affiliated BOCs. Competitive advantages obtained indirectly are no less detrimental to competition -- and ultimately to consumers -- than those obtained directly.

2. InterLATA Information Services (¶¶ 41 - 54)

TRA endorses the Notice's tentative conclusion 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."²⁷ As the Notice correctly observes, in applying separate affiliate requirements, Section 272(a)(2) simply does not, as it does with BOC provision of interLATA telecommunications services, distinguish between the in-region and out-of-region provision of service when addressing BOC provision of interLATA information services. The 1996 Act does, however, distinguish between interLATA and intraLATA information services. TRA, accordingly, urges the Commission to broadly define interLATA information services, including under this umbrella any information service that can be accessed across LATA

²⁶ Bell Operating Company Provision of Out-of-Region Interstate, Interexchange Services, CC Docket No. 96-21. FCC 96-288, ¶ 33 (released July 1, 1996).

²⁷ Id. at ¶ 41.

boundaries and information services provided through databases located outside LATAs.²⁸ Certainly, information services for which a BOC applied for or received a waiver of the MFJ's interexchange line-of-business restriction should be presumptively deemed to be interLATA information services.

In instances in which information services are deemed to be intraLATA in nature, TRA agrees with the Notice that the Commission's existing Computer II,²⁹ Computer III,³⁰ and Open Network Architecture ("ONA")³¹ requirements should be retained.³² These requirements were developed, as the Notice notes, to address the same concerns Congress sought to remedy in adopting the Section 272 separate affiliate and nondiscrimination requirements and hence are appropriately married to those safeguards.³³

²⁸ Id. at ¶¶ 44, 45.

²⁹ Amendment of Sections 64.702 of the Commission's Rules and Regulations (Second Computer Inquiry), 77 F.C.C.2d 384 (1980), *recon.* 84 F.C.C.2d 50 (1980), *further recon.* 88 F.C.C.2d 512 (1981), *aff'd sub nom. Computer and Communications Industry Association v. FCC*, 693 F.2d 198 (D.C.Cir. 1984), *cert denied sub nom. Louisiana Public Service Commission v. FCC*, 461 U.S. 938 (1983), *further recon.* FCC 84-190 (released May 4, 1984) (collectively, "Computer II").

³⁰ Amendment of Sections 64.702 of the Commission's Rules and Regulations (Third Computer Inquiry), Phase I, Report and Order, 104 F.C.C. 2d 958 (1986), *modified on recon.*, 2 FCC Rcd. 3035, (1987), *further recon.*, 3 FCC Rcd 1135 (1988), second further recon., 4 FCC Rcd 5927 (1989); Phase II, Report and Order, 2 FCC Rcd. 3072 (1987), *recon.* 3 FCC Rcd. 1150 (1988), *further recon.* 4 FCC Rcd. 5927 (1989), *rev'd on other grounds sub nom. California v. FCC*, 905 F.2d 1217 (9th Cir. 1990), *on remand* 6 FCC Rcd. 7571 (1991), *vacated in part and remanded California v. FCC*, 39 F.3d 919 (9th Cir. 1994) (collectively, "Computer III").

³¹ Filing and Review of Open Network Architecture Plans, 4 FCC Rcd. 1 (1988), *recon.* 5 FCC Rcd. 3084 (1990), 5 FCC Rcd. 3103 (1990), *erratum* 5 FCC Rcd. 4045, *aff'd sub nom. California v. FCC*, 4 F.3d 1505 (9th Cir. 1993), *recon.* 8 FCC Rcd. 97 (1993), 6 FCC Rcd. 7646 (1991), 8 FCC Rcd. 2606 (1993), *aff'd California v. FCC*, 4 F.3d 1505 (9th Cir. 1993) (collectively, "ONA").

³² Notice, FCC 96-308 at ¶ 48.

³³ Id.

**C. Structural and Transactional Requirements for BOC
Separate Affiliates (¶¶ 55 - 64)**

Section 272(b) imposes on BOC provision of in-region interLATA telecommunications services and interLATA information services five structural and transactional requirements including the requirements that the BOC affiliates (i) operate independently; (ii) maintain separate books, records and accounts; (iii) retain separate officers, directors and employees; (iv) secure separate credit arrangements with no recourse to BOC assets; and (v) transact business with BOCs at arm's length.³⁴ TRA urges the Commission in implementing these requirements, and particularly in interpreting "independent operation" to apply "maximum separation" standards. Using its Computer II decisions as a guide, the Commission should, as suggested by the Notice, look beyond the specific requirements listed in Section 272(b) to ensure meaningful independence of operation.³⁵ To this end, the Commission, until such time as meaningful competition has emerged in the local telecommunications market, should prohibit joint marketing, common ownership of equipment and facilities, sharing of personnel, joint research and development and sharing of information. Moreover, the Commission should require all Title II services provided by a BOC to its interLATA affiliate to be taken at generally available tariffed rates, terms and conditions.

TRA agrees with the Notice 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

³⁴ 47 U.S.C. § 271(h).

³⁵ Id. at ¶¶ 57 - 60.

in-house"³⁶ -- *i.e.*, accounting, auditing, legal, personnel recruitment and management, finance, tax, insurance and pension services.³⁷ TRA urges the Commission to apply the same standard to these Computer II services regardless of whether they are provided in-house or obtained from outside sources. The Commission should strictly enforce Section 272(b)(3)'s mandate that the BOC interLATA affiliate maintain "separate" officers, directors and employees and bar all sharing of personnel.

Finally, TRA endorses the Notice's tentative conclusion that a BOC should not be permitted to co-sign any contract or instrument with an interLATA affiliate which would allow the interLATA affiliate to obtain credit in reliance upon the financial strength of the BOC.³⁸ Permitting an interLATA affiliate to obtain financing predicated on the assets of a BOC allows the affiliate to share in the value derived from the BOC's long-standing local monopoly franchise in a manner no less consequential than a direct asset transfer for less than adequate compensation.

D. Implementation of Safeguards Against Discriminatory Conduct by BOCs (¶¶ 65 - 89)

As succinctly stated by the Notice, "[a]fter 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."³⁹ Moreover, the Notice correctly recognizes that "a BOC's control

³⁶ Notice, FCC 96-308 at ¶ 62.

³⁷ 84 F.C.C.2d 50, 84 ¶ 102.

³⁸ Notice, FCC 96-308 at ¶ 63.

³⁹ Id. at ¶ 65.

of essential local exchange facilities provided a BOC with the opportunity to take these actions."⁴⁰ Sections 272(c)(1) and (e) were adopted to safeguard against such anticompetitive abuses.⁴¹

TRA urges the Commission to strictly interpret Section 272(c)(1) in accordance with its precise terms. Section 272(c)(1) bars any discrimination by a BOC in favor of an interLATA affiliate or against any other entity, including competitors of that interLATA affiliate. It recognizes no exceptions whatsoever. "Goods, services, facilities and information" when combined with "standards," constitutes an all inclusive list of items that could flow from one entity to another and such items are all either "provided or procured." Hence, all dealings between a BOC and its interLATA affiliates are subsumed within Section 272(c)(1)'s mandate. Moreover, Section 272(c)(1), unlike Section 202 of the 1934 Act,⁴² does not recognize a "reasonableness" exception. Discrimination is thus prohibited by Section 272(c)(1) regardless of whatever justification might be put forth in its defense. Simply put, Section 272(c)(1) means exactly what it says, a BOC "may not discriminate."

Given the clear mandate of Section 272(c)(1), TRA urges the Commission to guard against loopholes which could undermine the pro-competitive, nondiscriminatory intent of the 1996 Act. Far too often, exceptions become the rule, particularly if good faith compliance is not the primary objective. And as the Commission has recognized, not only will incentives for abuse by the BOCs be strong, but the adverse impact of such abuse on competition and consumers will be substantial. Thus, a BOC should not be permitted to raise as a defense against

⁴⁰ Id.

⁴¹ 47 U.S.C. § 272(c)(1) & (e).

⁴² 47 U.S.C. § 202.

allegations of discrimination that the discriminatory treatment was justified because the technical specifications of the complaining entity's equipment were different from those of the equipment used by the BOC's interLATA affiliate. Section 272(c)(1) must in such instance be construed, as the Notice suggests, "to require a BOC to provide a requesting entity with a quality of service or functional outcome identical to that provided 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."⁴³

The Notice is absolutely correct in its view that a BOC will 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 section 272(c)(1) and (e)."⁴⁴ But as the Notice points out, Section 272(a) requires structural separation of any BOC affiliate that is a local exchange carrier subject to Section 251(c).⁴⁵ TRA, accordingly, agrees with the Notice's tentative conclusion that "any transfer by a BOC of existing network capabilities of its local exchange entity to its affiliates is prohibited by section 272(a)."⁴⁶ Any other interpretation would provide a ready vehicle to defeat Congressional intent that competition be fair and equitable.

To ensure compliance with Section 272(c)(1)'s nondiscrimination safeguards, TRA urges the Commission to require public disclosure of all transactions and standards involving a

⁴³ Notice, FCC 96-308 at ¶ 67.

⁴⁴ Id. at ¶ 70.

⁴⁵ Id.; 47 U.S.C. § 272(a).

⁴⁶ Notice, FCC 96-308 at ¶ 70.

BOC and its interLATA affiliates. Where appropriate, services provided to the interLATA affiliate by the BOC should be tariffed. In other instances, contracts should be filed with the Commission or otherwise made available for public inspection. Of course, all transactions and standards must be reduced to writing. Existing Computer III and ONA requirements are helpful in this regard, but cannot replace a general requirement that all transactions and standards be publicly disclosed.

The requirements of Section 272(e) are more specific and limited than, and are subsumed within, those mandated by Section 272(c)(1), explaining their exemption from the "sunset" provisions of Section 272(f).⁴⁷ While the Notice is correct that certain of the provisions of Section 272(e) contemplate a structurally-separate interLATA affiliate which the BOCs will not be required to utilize at some point in the future pursuant to Section 272(f), all Section 272(e) requirements will nonetheless survive and continue to apply in the event interLATA affiliates continue to be used.

TRA agrees with the Notice's assessment that "unaffiliated entities" under Section 272(e)(1) should not be restricted to any particular lines of business.⁴⁸ "Requests . . . for telephone exchange service and exchange access" should, in TRA's view, encompass not only initial installation, but any subsequent order for service modification or for maintenance and repair. Finally, in order to police the timely provisioning requirements of Section 272(e)(1), the Commission should require BOCs to submit reports setting forth averages and ranges of

⁴⁷ 47 U.S.C. § 272(f).

⁴⁸ Notice, FCC 96-308 at ¶ 82.

dissaggregated service intervals experienced by BOC interLATA affiliates on a quarterly basis. Disaggregation should be undertaken by both service and function.

Section 272(e)(2) should generally be governed by the same interpretation and requirements applied to Section 272(c)(1), in light of its all inclusive language and absence of limitations. "Other providers of interLATA services in that market" under Section 272(e)(2) should be read broadly to include any entity offering an interLATA telecommunications or information service to any customer anywhere in the market. TRA agrees with the Notice that Section 272(e)(3) requires BOC interLATA affiliates to take exchange and exchange access service under tariff and to pay generally available tariffed rates for the services.

E. Joint Marketing and Sales of Local and InterLATA Services (¶¶ 90 - 93)

Section 272(g) prohibits a BOC interLATA affiliate from marketing and selling the BOC's exchange services unless competitors are afforded the same opportunity and bars a BOC from marketing and selling interLATA services provided by an affiliate until it has been authorized to offer in-region interLATA services. TRA agrees with the Notice that the latter requirement parallels the joint marketing prohibition imposed on the largest interexchange carriers by Section 271(e),⁴⁹ both provisions being designed to prevent joint marketing of local and interLATA services by the largest potential competitors until each has entered the other's market.⁵⁰ TRA reads both provisions to bar unified advertising, single source supply and service

⁴⁹ 47 U.S.C. § 271(e).

⁵⁰ Notice, FCC 96-308 at ¶ 91.

bundling. Moreover, TRA submits that Section 272(g) does not necessarily override Section 272(b)'s mandate that the BOC and its interLATA affiliates must operate separately, maintain separate personnel and conduct business at arm's length. Joint marketing, if permitted at all under Section 272(a), cannot be accomplished through shared personnel or without a contract requiring compensation for services performed.

F. Enforcement of Separate Affiliate and Non-discrimination Safeguards (¶¶ 94 - 107)

The Notice correctly concludes that "[e]nforcement of the statutory separate affiliate and nondiscrimination safeguards established by sections 271 and 272 and the rules we may adopt to implement those provisions will be critical to ensuring the full development of competition in the local and interexchange telecommunications markets."⁵¹ The Notice, accordingly, seeks comment 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)."⁵²

TRA recommends use of five enforcement mechanisms to both ensure compliance with the separate affiliate and nondiscrimination safeguards and facilitate detection of violations. First, as discussed above, all transactions between BOCs and their interLATA affiliates should not only be reduced to writing, but filed with the Commission or otherwise made available for public inspection. Such disclosure will allow competitors to demand products and services at the

⁵¹ Id. at ¶ 94.

⁵² Id.

same rates and on the same terms and conditions and will permit regulators to determine whether the arrangements are bona fide. Second, where possible, transactions between BOCs and their interLATA affiliates should be undertaken pursuant to tariffs or other public listings of services and the rates and terms and conditions at which those services are offered. Tariffing ensures the general availability of products and services. Third, regular, periodic reporting of all matters involving interactions between a BOC and its interLATA affiliate should be required and such reports should be made promptly available for public inspection. Detailed reports, certified to be accurate by officers of the BOCs, will establish the standards pursuant to which competitors can determine whether they are being treated in an equitable manner. Fourth, third party audits or other forms of compliance monitoring should be undertaken on a regular basis to verify the accuracy of reports, to determine whether all transactions between a BOC and its interLATA affiliates have been documented and made available for public inspection, and to ascertain whether the BOC is complying generally with the Section 272 nondiscrimination and separate affiliate safeguards. And, finally, of course, prompt prosecution by the Commission of violations is an absolute must if safeguards are to be taken seriously by the BOCs.

With respect to Commission enforcement of the Section 272 separate affiliate and nondiscrimination safeguards, TRA concurs with the Notice's view⁵³ that the enforcement authority granted the Commission by Section 271(d)(6) augments the Commission's existing enforcement authority under Sections 206 through 209.⁵⁴ Accordingly, a complaint alleging that

⁵³ Id. at ¶ 97.

⁵⁴ 47 U.S.C. §§ 206, 207, 208, 209.

a BOC ceases to meet one or more conditions for in-region operating authority could provide the basis for monetary damages under Section 209, as well as for sanctions under Section 271(d)(6). TRA also agrees with the Notice that complaints would provide but one vehicle for a Commission determination that a BOC had ceased to meet a condition for in-region operating authority; certainly, the Commission could act on its own motion as well.⁵⁵

TRA firmly believes that a complainant should be deemed to have made a prima facie showing that a BOC has ceased to meet one or more conditions for in-region authority if, as the Notice suggests, it "plead[s], along with proper supporting evidence, 'facts which, if true, are sufficient to constitute a violation of the Act or Commission order or regulation.'"⁵⁶ Upon such a prima facie showing, the burden of proof should shift to the BOC. After all, the BOC will likely be the only party in possession of all the pertinent facts and unless the burden is shifted to the BOC, it will have a strong incentive to withhold pertinent details. Discovery, while useful, cannot replicate the incentive to ensure a full and complete record that a shift of the burden of proof to the party in possession of the facts will produce. Such an approach will also streamline the complaint process, facilitating the rapid resolution of complaints contemplated by Section 271(d)(6)(B).

Finally, the Commission should hold BOCs to a standard approaching strict liability. Monopolists do not readily relinquish market power; indeed, they will use every means at their disposal to hinder competitive entry. It goes without saying that BOCs will push the

⁵⁵ Notice, FCC 96-308 at ¶ 98

⁵⁶ Id. at ¶ 100.

outer edges of the envelope when confronting competitors, exploring every potential exception to or loophole in the rules. Absent prompt and hard enforcement of the Section 272 separate affiliate and nondiscrimination safeguards, the advent of a truly competitive local telecommunications market will be slowed. A strong message must be delivered that anticompetitive conduct will not be tolerated and will be dealt with severely. Presumptions of reasonableness in favor of the BOCs in complaint proceedings will send the opposite message.

G. Regulatory Classification of BOC In-region InterLATA Affiliates (¶¶ 108 - 152)

The Notice seeks comment on whether BOC affiliates should be regulated as non-dominant carriers in the provision of in-region, interstate, domestic, interLATA services and whether the same regulatory classification should be applied to their provision of in-region, international services.⁵⁷ TRA submits that until such time as the local exchange "bottleneck" has been effectively dismantled, BOC interLATA affiliates should be classified as dominant for regulatory purposes. This issue may be periodically revisited as competitive entry into the local telecommunications market expands and competitive local service offerings become readily available, but at this juncture, the "bottleneck" is still the critical factor.

1. Relevant Product and Geographic Market Definitions (¶¶ 115 - 129)

The Notice seeks comment on the manner in which the relevant product and market definitions the Commission has proposed in its Interexchange NPRM should, if adopted,

⁵⁷ Id. at ¶ 108.