Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

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In the Matter of	)	
	)	
Implementation of the Non-Accounting safeguards of Sections 271 and 272 of the Communications Act of 1934, as amended;	)	CC Docket No. 96-149
	)	
and	)	
	)	
Regulatory Treatment of LEC Provision of Interexchange Services Originating in the LEC's Local Exchange Area	)	

COMMENTS OF U S WEST, INC.

Robert B. McKenna
Richard A. Karre
Gregory L. Cannon
Sondra J. Tomlinson
Suite 700
1020 19th Street, N.W.
Washington, DC 20036
(303) 672-2861

Attorneys for
U S WEST, Inc.

Of Counsel,
Dan L. Poole

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SUMMARY

In these comments, U S WEST responds to the Commission's Notice of Proposed Rulemaking on the rules governing structural separation for BOC provision of interLATA services during the first three years following a BOC's authorization to enter the interLATA marketplace.

Structural separation is appropriate for BOC interLATA services (other than incidental interLATA services for which a separate subsidiary is not required), interLATA information services, and manufacturing. The Commission should interpret these provisions of the 1996 Act in a manner which is not disruptive to efficient service provisioning. For example, interLATA information services should be limited to those information services actually integrated with a BOC interLATA transport service, between the BOC and the end user. Incidental interLATA services offered by the incumbent LEC should not be subject to special or burdensome regulation. Only a single subsidiary should be required for all services which must be offered via a subsidiary vehicle.

The Commission should attempt to interpret its existing regulations consistent with the 1996 Act's provisions where possible. In this light, the Commission should define enhanced services and information services identically. The Commission should treat electronic publishing as a subset of information services and define it narrowly to be only those services in which a LEC has control of the content delivered to subscribers. The Commission should attempt to harmonize its existing Computer II, Computer III, and Open Network Architecture

rules with the Section 272 subsidiary requirements of the 1996 Act. In cases where a LEC has created a Section 272 subsidiary, the Commission need not also apply its Computer II/III or ONA rules.

The separation requirements imposed by section 272 of the 1996 Act reflect a careful attempt by Congress to balance the legitimate needs of the BOCs against the pro-competitive purposes of the 1996 Act. Though the 1996 Act does not require it, the Commission proposes to add to the specific requirements of section 272 by imposing additional restrictions. Specifically, the Notice tentatively concludes that the 1996 Act prohibits the BOCs from providing a long list of support and administrative services, including joint marketing, to its separate affiliate. Nowhere does the Notice attempt to justify the need for additional restrictions. In the Comments, we show that this proposal is the result of a misinterpretation of the 1996 Act; we argue that the extra restrictions are not needed and would upset the delicate balance sought by Congress, leaving the BOCs' separate affiliates unable to compete effectively against the large, well-financed companies it must meet in the interLATA market.

Sections 272(c)(1) and 272(e) of the 1996 Act provide protections to competitors against possible discriminatory activities by the BOCs. The Notice suggests that the Commission will interpret these provisions in a formalistic, mechanical fashion. In these Comments, we urge the Commission to look to the purposes of these sections in interpreting and applying them, and we propose an interpretive construct flowing from that view.

In addition, care must be taken to avoid unnecessarily or arbitrarily burdening the subsidiary with regulations which impede its ability to compete fairly and rationally. In this regard, it is especially important that the subsidiary: 1) be classified as a nondominant carrier under the Commission's rules (thereby not being disrupted in its ability to compete against AT&T by unequal regulations having no public purpose); and 2) not be classified as an incumbent LEC or a BOC when it provides local exchange service unless it does so as a successor or assignee of the BOC. Excessive regulation of the subsidiary would serve only to harm competition and would be inconsistent with the purposes of the 1996 Act.

Finally, the Commission suggests new rules to deal with complaints about the conduct of a BOC which has entered the interLATA market. We submit that these rules are unnecessary. One such rule in particular -- the proposal that complaining parties be relieved of their burdens of proof when a complaint is filed -- carries particular danger and would not be lawful.

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COMMENTS OF U S WEST, INC.

U S WEST, Inc. ("U S WEST") hereby submits its initial comments in the above-captioned docket.[1] In the Notice, the Federal Communications Commission ("Commission") seeks comment on the rules which should govern Bell Operating Company ("BOC") provision of originating interLATA transport services (and some interLATA "information services") during the short period during which structural separation is required for BOC provision of these services by the Telecommunications Act of 1996.[2]

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[1] 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, Notice of Proposed Rulemaking, FCC 96-308, rel. July 18, 1996 ("Notice").

[2] Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56 (1996) ("1996 Act").

I. INTRODUCTION

There are several troubling aspects of the Notice. The 1996 Act clearly contemplates rapid BOC entry into the interLATA marketplace (concomitant with rapid entry of competitors into local exchange markets). During a brief transition period, BOCs are required to offer some interLATA telecommunications services and information services via a separate subsidiary.[3] Other (and different) transitional restrictions are imposed on large interexchange carriers ("IXC") offering local exchange services.[4] The separate subsidiary requirements are meant by Congress to prevent BOCs from using their market strength in local exchange markets to disadvantage interexchange competitors in two main areas: discriminatory interconnection and cross subsidization.[5] They are also designed to disappear in a matter of few years.[6]

U S WEST has documented on the record in other proceedings that separate subsidiary requirements imposed by governmental entities accomplish very little more than impose inefficiencies on companies subject to their strictures and deprive the consuming public of the benefits which an integrated operation could bring.[7]

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[3] Id. at 92 § 272(a)(1).

[4] Id. at 90 § 271(e)(1).

[5] See, e.g., Senate Report on S.652, 104th Cong., 1st Sess., at 68; House Report on H.R. 155, 104th Cong., 1st Sess., at 73.

[6] 1996 Act, 110 Stat. at 94 § 272(f).

[7] See, e.g., Comments of U S WEST (appended to Erratum), CC Docket No. 95-20, Computer III Further Remand Proceedings: BOC Provision of Enhanced Services, filed Apr. 10, 1995 at 1-13.

The Computer II structural separation requirements (which are considerably more lenient than those which seem implicit in the Notice) were demonstrated to impose on U S WEST a total of $90.7 million in duplicative and unnecessary costs for expense and capital during the initial year in the provision of a limited amount of enhanced services.[8] The Commission has agreed that mandatory structural separation is generally uneconomical and harmful to the public interest -- a regulatory device to be deployed only when less drastic measures will not be likely to succeed in preventing discriminatory access and cross subsidization.[9]

We fully recognize that the Commission is not free to disregard the mandate of Congress in enacting the separate subsidiary requirements of the 1996 Act -- any more than it is free to disregard its statutory authority in any other area.[10] Nevertheless, it is troubling that the Notice often seems to focus on how to make the Congressionally-mandated separate subsidiary structure as onerous as possible without even considering the public interest. An example of this type of logic is the Commission's reasoning to the effect that the "operate independently" language of Section 272(b)(1) of the 1996 Act ought to be read cumulatively -- that is, that this language ought to be read as requiring imposition of additional burdens (to be determined by the Commission) on BOCs beyond the ones enumerated in the 1996

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[8] See 47 CFR § 64.702.

[9] See, e.g., Amendment of Sections 64.702 of the Commission's Rules and Regulations (Third Computer Inquiry), Report and Order, 104 FCC 2d 958, 1002-04 ¶¶ 79-81, 1007-10 ¶¶ 89-94 (1986).

[10] See, e.g., Heckler v. Chaney, 470 U.S. 821, 833 (1985).

Act) on the BOCs.[11] Whether it would be reasonable, rational or in the public interest to do so is not even set forth as a criterion for comment. This general approach permeates the Notice.

This leads to several key caveats.

First, the 1996 Act singles out U S WEST and the other BOCs for unique burdens not imposed on similarly situated competitors. Most obviously, GTE Telephone Company ("GTE"), a local exchange carrier ("LEC") larger than U S WEST with pre-existing manufacturing and interLATA capability, is not subject to the 1996 Act's separate subsidiary requirements, and the Commission does not suggest in the Notice that it might apply any of the subsidiary rules which the Notice proposes for the BOCs to GTE. Earlier efforts by the Commission to distinguish between the BOCs and GTE for purposes of applying Computer II structural separation were found tenuous, at best, by the Seventh Circuit Court of Appeals.[12] Discrimination between U S WEST and GTE (and a myriad of other competitors) can be justified only if there is some rational nexus between the discrimination and a valid public policy purpose.[13] An approach in this docket

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[11] Notice ¶ 57.

[12] See Illinois Bell Telephone Co. v. FCC, 740 F.2d 465, 476 (7th Cir. 1984).

[13] See, e.g., past discussions of the Commission regarding the appropriateness of different regulatory treatment for various classes of carriers and companies and the justifying public policy rationales within the context of the provision of customer premises equipment, enhanced serviced, etc. Amendment of Section 64.702 of the Commission's Rules and Regulations (Second Computer Inquiry), Final Decision, 77 FCC 2d 384, 466-75 ¶¶ 215-32 (1980), Memorandum Opinion and Order, 84 FCC 2d 50, 72-75 ¶¶ 64-71 (1980); Policy and Rules Concerning Rates for Competitive Common Carrier Services and Facilities Authorizations Therefor, First Report and

which focuses on legal formalism and ignores the absolute necessity of tying the proposed restrictions on the BOCs to a rational public policy would risk creating an unconstitutional regulatory structure by depriving U S WEST of its constitutional right to equal protection under the law.[14]

As we discuss throughout, U S WEST does not believe that the 1996 Act mandates that any structural separation rules be applied to U S WEST which cannot pass at least some minimal public interest muster. Should the Commission adopt rules which a) do not apply equally to the entire industry (or at least the entire LEC industry, and b) are not justified on the basis of reasonable public interest distinctions between U S WEST and those similarly situated LECs to whom the rules do not apply, we submit that the entire structure would suffer a fundamental constitutional defect in that U S WEST would be denied its right to equal protection under the law.[15] In other words, rational public interest analysis must guide the Commission in this docket -- with the challenge being to avoid ducking tough public policy analysis in the name of simple textual analysis of the language of the 1996 Act. We note here that U S WEST does not suggest that arbitrary rules be imposed on GTE -- rather, that any rules imposed on U S WEST be guided by rational public interest analysis consistent with the proper recognition

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Order, 85 FCC 2d 1, 20-30 ¶¶ 54-84 (1980), Fourth Report and Order, 95 FCC 2d 554, 575-82 ¶¶ 31-40 (1983).

[14] See Public Citizen v. U.S. Dept. of Justice, 491 U.S. 440, 466 (1989); Communications Workers of America v. Beck, 487 U.S. 735, 762 (1988).

[15] See id.

of the constitutional danger which the statute's discrimination between U S WEST and GTE creates.

Second, the 1996 Act clearly envisions that BOCs will be able to compete on a fair and rational basis in both the interexchange and local exchange markets. Indeed, one of the key components of integrated operations -- joint marketing -- is expressly allowed to the BOCs and their Section 272 subsidiaries under the 1996 Act.[16] Yet in proposing many of the restrictions which appear in the Notice -- including what would be tantamount to a flat prohibition on the very joint marketing expressly permitted under the 1996 Act[17] -- the Notice seems heedless of this basic statutory premise. The structural separation provisions of the 1996 Act -- while we remain of the opinion that they are unnecessary in themselves -- were not designed to give AT&T Corp. ("AT&T") or MCI Telecommunications Corporation ("MCI") an artificial competitive advantage rooted in uneconomic (or unnecessary) regulations. The Commission should decline to construct structural separation rules which are not closely related to the statutory purpose of the 1996 Act -- rules which unduly and unnecessarily obstruct BOC competitiveness are simply inconsistent with the purpose and intent of the 1996 Act.

Finally, it is likewise incontrovertible that the structural separation requirements of the 1996 Act are meant to be extremely temporal. The requirements for a Section 272 subsidiary for originating interLATA transport

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[16] 1996 Act, 110 Stat. at 94 § 272(g)(1).

[17] Id.

expire three years after the grant of interLATA authority,[18] while the requirements for a subsidiary for interLATA information services expire in four years from the date of enactment of the Act.[19] Particularly in the area of shared administrative services (which the Notice proposes to prohibit), incurrence of the expense of establishing separate systems and the like to totally separate the administrative and support functions of the BOC and the Section 272 subsidiary, only to tear the separate systems down again in three years, would be the height of folly, and folly is not required as part of the 1996 Act. Many separate systems could not even be implemented in such a short period of time.[20] A set of structural separation rules which was predicated on the assumption that the edifices created thereby were permanent ones (which seems to be the assumption underlying much of the Notice) would not be consistent with the purpose of the 1996 Act.

With these brief thoughts in mind, we turn to some of the specific questions posed in the Notice.

II. ACTIVITIES SUBJECT TO SECTION 272 SUBSIDIARY RULES

A key issue posed in the Notice is what BOC activities must be conducted in a Section 272 subsidiary. Section 272 of the 1996 Act requires BOCs to provide certain competitive services through a separate affiliate. These services include:

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[18] Id. at 94 § 272(f)(1).

[19] Id. § 272(f)(2).

[20] For example, Interexchange Access Billing Systems ("IABS") took three years to design and deploy.

- Manufacturing activities as defined in Section 273(h)
- Originating interLATA telecommunications services, other than:

  (i) incidental interLATA services defined in Section 271(g)(1-3, 5-6),

  (ii) out-of-region services described in Section 271(b)(2), and

  (iii) previously authorized activities described in Section 271(f));and
- InterLATA information services, other than electronic publishing and alarm monitoring services.

While the Section 272 provisions were designed to provide safeguards perceived as necessary by Congress, the Commission should interpret these provisions with a minimalist regulatory approach. Congress itself determined that these provisions were only necessary for a short period of time by including automatic expiration or "sunset" clauses.[21] Additionally, as the Commission noted in the Notice, "the intent of this legislation is 'to provide for a pro-competitive, de-regulatory national policy framework designed to accelerate rapidly private sector deployment of advanced telecommunications and information technologies and services to all Americans by opening all telecommunications markets to competition.'"[22] These principles likewise guide determination of which BOC activities can be conducted only in a separate subsidiary.

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[21] See note 6, supra.

[22] Notice ¶ 1 (emphasis added).

A. An Information Service Should Only Be Considered InterLATA When The Service Includes An Integrated InterLATA Transmission Component Between The End User And The BOC

The Notice requests comment on how it should distinguish between an interLATA information service and an intraLATA information service for purposes Section 272(a)(2)(C) of the 1996 Act. The Commission should classify information services based upon how they are offered to customers in the marketplace. Can such services be accessed locally? Or is an interLATA transmission component bundled as a part of the service?

The Notice correctly points out that information services generally consist of two components: 1) an enhanced or information service functionality; and 2) an underlying transmission component between the service provider and the end user. This distinction is highly relevant to a determination of the interLATA nature of an information service. For the purposes of the 1996 Act, an information service should only be considered to be interLATA where the service integrates the interLATA transmission component between the service provider and the end user and that transmission component is specifically provided by the BOC offering the service, e.g., 900 number information services. Should an information service be offered on a standalone basis, without an interLATA transmission component integrated, then that service should be considered intraLATA or local in nature, even if the likelihood exists that the service will be accessed from another LATA -- and even if a customer calling the information service selected the BOC's own toll service for interLATA transmission.

This construction is the only logical choice available to the Commission. Were the distinction based upon the potential for the information service to be accessed via interLATA transmission, then practically all enhanced and information services would be considered interLATA. For example, voice messaging services are activated whenever a caller reaches an end user's voice mail service -- whether the call is interstate or local. At this time, a long distance call can traverse U S WEST's interLATA facilities only if it originated beyond the U S WEST region and a calling customer selected the U S WEST long distance service. Once U S WEST has originating interLATA authority, the calling customer could still need to choose the U S WEST service. In any of these cases, access to the local voice messaging service via a U S WEST toll service would not make the service an interLATA information service. Such a result would be akin to the classification of all local telephone service as interLATA simply by virtue of access to a toll network. No such result was intended, nor is such a result required under the definitions provided by the 1996 Act.

Additionally, the manner in which an information service is internally provided should not make a difference in the classification of the service. Internal access to a centrally located database for information retrieval is, in most cases, the most efficient method available for information service provisioning. A single information server is much easier to operate, service, and maintain. Practically, all major information services databases are centrally located for that simple reason. The Commission should not make such a classification which would discourage the

most efficient and cost-effective use of resources in providing competitive information services.

Similarly, the provision of locally accessed Internet service must also be classified as an intraLATA service. Again, the relevant issue is the nature of the transmission component between the end user and the information service provider. In the case of locally provided Internet access, no interLATA component is integrated into the service -- indeed, no interLATA carrier service exists at all. While end users may have access to "home pages" and other Internet sites worldwide once connected to the "Net," that access is a function of the Internet itself (which, by virtue of its enhanced service status, is classified as an end user) and not the local access service provider. Thus, an interLATA classification for a locally provided Internet access service would not be appropriate.[23]

B. The Definition Of Information Services And Enhanced Services Should Be Identical For Purposes Of The 1996 Act

Although somewhat differently phrased, the definitions of information service and enhanced service appear to be identical in most respects. The basis for both definitions appears to be the provision of information to subscribers via the public telecommunications network which has been enhanced by the use of electronic data

[23] U S WEST submits that the continued viability of the "ESP exemption" is very much in question. These comments reflect, but do not endorse, today's regulatory structure.

processing. No significant dissimilarities are apparent from the definitions used by Congress in the 1996 Act and the Commission in its rules.

Congress defined "information service" in the 1996 Act to be "the offering of a capability for generating, acquiring, storing, transforming, processing, retrieving, utilizing, or making available information via telecommunications, and includes electronic publishing, but does not include any use of any such capability for the management, control, or operation of a telecommunications system or the management of a telecommunications service."[24] Under the Commission's rules, the term "enhanced services" refers to "services, offered over common carrier transmission facilities used in interstate communications, which employ computer processing applications that act on the format, content, code, protocol or similar aspects of the subscriber's transmitted information; provide the subscriber additional, different, or restructured information; or involve subscriber interaction with stored information."[25]

In reading the two definitions, the only difference appears to be the fact that the Commission specifically limited enhanced services to those services being offered over common carrier transmission facilities used in interstate communications; no such limitation was included by Congress. Otherwise, the definitions appear to be synonymous.

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[24] 1996 Act, 110 Stat at 59 § 3(a)(2)(41).

[25] 47 CFR § 64.702(a).

This distinction has one significant impact. Enhanced services which are used primarily for the management of a telecommunications service or a telecommunications system would not fit within the definition of information service. This means that functions (such as protocol conversion) which operate primarily to permit communications to take place would not be classified as information services. Instead, the functions would follow the transmission carrier with which they are associated. To rule otherwise would create an anomalous situation in the event an interLATA data transmission service were relieved of the separate subsidiary requirements at a different time than core interLATA information services. Excluding their particular class of enhanced services from the definition of information service will prevent an asymmetrical treatment of protocol conversion associated with interLATA transport.

C. Electronic Publishing Is Content-Oriented And A Subset Of Information/Enhanced Services

As noted previously, electronic publishing services were specifically included in the definition of "information service" under the 1996 Act. In the Notice, the Commission notes that it must distinguish electronic publishing from other information services as electronic publishing is excluded from Section 272 and treated separately under Section 274 of the Act.[26] The 1996 Act defines electronic publishing as:

[26] Notice ¶ 53.

> 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.[27]

Congress specifically excluded fifteen other items from the definition including: information access service, common carrier provision of telecommunications service, information gateway service, voice storage and retrieval services, electronic mail services, data and transaction processing services (to the extent that they do not generate or alter the content of information), electronic billing or advertising of a BOC's regulated telecommunications services, language translation or data format conversion, network operations and control information, directory assistance services, caller identification services, repair and provisioning databases, credit card and billing validation for telephone company operations, 911-E and other emergency assistance databases, and video programming or full motion video entertainment on demand.

The nature of publishing has always included the ability to edit, restrict, and control the information provided to end users. Publishing is primarily a content-based service. Electronic publishing is simply publishing via an electronic transmission medium such as telecommunications. As the Commission noted in its Notice, the MFJ Court defined electronic publishing as "the provision of any

[27] 1996 Act, 110 Stat. at 103 § 272(h)(1).

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."[28] For purposes of the 1996 Act, the Commission should define electronic publishing similarly. Electronic publishing services subject to section 274 should only apply to those services, not separately excluded by the 1996 Act, in which a BOC has the ability to control the content of the information provided to end user customers. All other information services should be considered under the provisions of Section 271 and 272.

D. A BOC May Continue To Engage In All Activities Previously Authorized By The MFJ Court; A Separate Subsidiary Is Not Required For The Origination Of Previously Authorized InterLATA Telecommunications Services Other Than InterLATA Information Services; A BOC Has One Year To Establish Separate Subsidiaries For Previously Authorized Manufacturing And InterLATA Information Services

Although requiring a fair amount of parsing, a contradiction does not appear to exist between Sections 271(f), 272(a)(B)(2)(iii), and 272(h) in the Act. Section 271(f) states "neither [section 271(a)] nor section 273 shall prohibit a [BOC] from engaging, at any time after the date of enactment of the [1996 Act], in any activity to the extent authorized by, and subject to the terms and conditions contained in" an order of the MFJ Court." This provision obviously allows the BOCs to continue to engage in activities previously approved under the MFJ Court's jurisdiction.

[28] Notice ¶ 53 (citation omitted).

However, a question from 271(f) remains, "is a BOC required to provide such previously authorized activities under a separate subsidiary as required by Section 272?"

Section 272(a)(2)(A-C) describes the services for which separate subsidiaries are required under the 1996 Act. Section 272(a)(2)(A) requires a BOC to establish a separate subsidiary for manufacturing activities defined in Section 273(h). Section 272(a)(2)(B) requires a BOC to establish a separate subsidiary for the origination of interLATA telecommunications services, *other than*: (i) incidental interLATA services described in Section 271(g)(1-3, 5, 6); (ii) out-of-region services described in Section 271(b)(2); and (iii) previously authorized activities described in Section 271(f). Section 272(a)(2)(C) requires a BOC to establish a separate subsidiary for interLATA information services, other than electronic publishing and alarm monitoring services.

Section 272(a)(2)(B)(iii) which limits the necessity for a BOC to create a separate subsidiary to provide previously authorized activities is only a subset under the general requirements of Section 272(a)(2)(B) regarding the origination of interLATA telecommunications services. Sections 272(a)(2)(A) (manufacturing) and (C) (interLATA information services) have no similar limiting subsections. Thus, it appears from the language of the 1996 Act that a BOC is required to have a separate subsidiary for both previously authorized manufacturing and interLATA information services. A previously authorized interLATA service that does not fall

under the definition of an interLATA information service would not require a separate subsidiary under the 1996 Act.

A contrary decision would produce absurd results. For example, U S WEST has previously received MFJ waivers to provide the following interLATA telecommunications services:

> 1) InterLATA Extended Area Service ("EAS"). In these waivers, U S WEST was permitted to provided EAS across LATA boundaries in communities where the LATA distinction was an artificial barrier to providing community-wide telephone service. U S WEST received many of these waivers in its in-region telephone service area. See e.g., United States v. Western Electric Co., Inc., CA No. 82-0192, slip op. (D.D.C. November 17, 1994)
>
> 2. Directory Assistance to Independent Telephone Companies ("ITC"). The MFJ Court previously provided U S WEST a waiver to furnish directory assistance ("DA") service to the customers of ITCs. This service is potentially interLATA since U S WEST utilizes a centrally located DA database to provide service across a state or states. DA has been previously classified as a "basic" telecommunications service. See United States v. Western Electric Co., Inc., CA No. 82-0192, slip op. (D.D.C. October 30, 1984).

To require U S WEST to provide these services in a subsidiary would require significant expense and duplication of facilities. In fact, it is more than likely that U S WEST would have to simply discontinue these services rather than move them due to the sheer cost involved. This was surely not the intent of Congress, nor should it be the intent of the Commission that these previously authorized interLATA telecommunications services be moved out of the BOC at any time.

Section 272(h) requires a BOC to comply with the separate subsidiary provisions of Section 272 within a year. Under the conclusions above, that section would apply to both previously authorized manufacturing and interLATA

information services. A BOC would have one year from enactment to move applicable services into one or more subsidiaries as defined by the 1996 Act.

E. No Safeguards Are Necessary For Incidental InterLATA Services Provided By A BOC; Existing Common Carrier And Interconnection Obligations More Than Meet Any Legitimate Concerns

Section 271(b)(3) allows the BOCs to provide certain "incidental" interLATA services either directly or through a separate affiliate upon enactment of the 1996 Act. These incidental services are defined in Section 271(g). Section 271(h) indicates that the provisions are to be narrowly construed and that the Commission is to "[E]ensure that the provision of services authorized under subsection (g) by a Bell operating company or its affiliate will not adversely affect telephone exchange service ratepayers or competition in any telecommunications market." The Commission seeks comment on what, if any, "safeguards" are required under Section 271(h).

No additional safeguards for the offering of incidental interLATA services are necessary at this time. The Commission has previously imposed on the BOCs both the Part 32 and Part 64 accounting rules which require that costs be appropriately divided between both regulated and unregulated subsidiaries and regulated and unregulated products and services. Additionally, previously established Open Network Architecture rules require the BOCs to offer comparably efficient interconnection to other enhanced services providers. Finally, the 1996 Act's interconnection requirements provide ample availability of all network elements

necessary for a competitor to provide any or all of the listed incidental services. Given these existing obligations, it is inconceivable that a BOC could provision these incidental services in such a manner as to adversely affect telephone ratepayers or competition. As such, the Commission need not issue any gratuitous safeguards in this area until such time as the potential for such harm can be factually demonstrated.

F. A BOC Is Free To Conduct Any Or All Manufacturing Activities, InterLATA Telecommunications Services, And InterLATA Information Services In A Single Affiliate If It So Chooses

The Commission has tentatively concluded that 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."[29] U S WEST supports the Commission's conclusion. Section 272(a)(1) specifically states that "A Bell operating company (including any affiliate) which is a local exchange carrier that is subject to the requirements of Section 251(c) may not provide any service described in paragraph (2) unless it provides that service through *one* or more affiliates."[30] The statutory language is clear. A BOC need only create one separate affiliate to engage in any or all of the activities provided in Section 272. Of course, a BOC is also free to create as many separate subsidiaries as it chooses for business or other purposes.

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[29] Notice ¶ 33.

[30] 1996 Act, 110 Stat. at 93 § 272(a)(1).