

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

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COMMENTS OF THE
UNITED STATES TELEPHONE ASSOCIATION

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Executive Summary

The Commission's NPRM proposes a number of unnecessary and inappropriate restrictions on entry by BOC affiliates into in-region long distance and other competitive markets. The United States Telephone Association urges the Commission to retreat from some of its more extreme proposals.

Section 272 represents a carefully crafted legislative balance between the prevention of anticompetitive conduct on the one hand and the promotion of efficient competition on the other. The structural separation and other requirements imposed by Section 272 were an explicit quid pro quo for BOC entry into in-region long distance markets. It is not appropriate for the Commission to alter the balance struck by Congress by adding additional restrictions or by embellishing upon the safeguards contained in the Act. Indeed, the legislative history of Section 272 and the comprehensive, detailed nature of Section 272 alike indicate that Section 272 was intended to be self-executing, with the Commission playing primarily an enforcement role.

Moreover, the safeguards spelled out by Congress in Section 272, along with the Commission's existing regulations, are ample to prevent any semblance of anticompetitive conduct by the BOCs. The Commission has recognized, in the context of enhanced services, that non-structural safeguards are sufficient to prevent discrimination and cross-subsidy. There is no reason to believe that such safeguards would not be equally effective as applied to long distance services. In any event, Congress has chosen to go beyond non-structural safeguards, for a transitional period, and

impose a specific form of structural separation. This Congressionally mandated belt-and-suspenders regulation will surely suffice to prevent any possible anticompetitive abuse.

Many of the additional measures proposed by the Commission are not only unnecessary but affirmatively anticompetitive. These restrictions would cripple the BOC affiliates as effective competitors to the incumbent long distance carriers without any corresponding benefit. This is particularly inappropriate since the BOC affiliates will be entering with zero market share into a market with well-heeled, well-entrenched incumbents.

In particular, Congress intended the separate affiliate requirement of Section 272 to be more of an accounting separate affiliate, rather than a separate facilities affiliate. Section 272(b)'s affiliate requirements are a compromise -- a transitional entity somewhere between the Computer II separate subsidiary and Computer III non-structural safeguards regime. Requiring a separate facilities affiliate thus will contravene congressional intent -- and unnecessarily hamstring BOC affiliates in their attempt to compete.

The nondiscrimination requirements of Section 272(c) and (e) are plain on their face and do not require additional interpretation or regulation by the Commission to determine whether the BOCs are complying with these requirements. Congress' extensive biennial audit requirements and the Commission's

complaint processes obviate the need to retain many of the existing Computer III reporting and other safeguards.

Congress recognized that competing industry sectors must have joint marketing parity because the ability to bundle telecommunications services into a single package to allow for "one stop shopping" is a significant competitive marketing tool. Thus, the Commission should not establish additional requirements that prevent the BOCs from engaging in fair and equivalent competition with the interexchange carriers once the BOCs are permitted to enter the interLATA market.

Nor is it necessary for the Commission to establish elaborate procedures for enforcement. Existing procedures are more than adequate to handle any complaints of anticompetitive conduct, while the Commission's regulations and the disclosure rules of Section 272 ensure the Commission ready access to enforcement information. Moreover, the Commission can rely on the BOCs' customers and competitors, which include sophisticated carriers like AT&T, MCI and Sprint, to report any suspected misconduct to the Commission. Indeed, in appropriate cases, a carrier can initiate the 90-day complaint process of Section 271(d)(6). Under that section, the Commission may impose a number of remedies -- or even reconsider its approval of a BOC's provision of in-region, interLATA services

-- if it can be shown that a BOC has ceased to meet the conditions for entry into the interLATA market inside its region.¹

Finally, it would be a serious mistake to categorize BOC affiliates providing interstate, interLATA services as dominant. BOC affiliates will not possess market power based on any of the well-established market features usually employed to make that determination. The BOC affiliates will start with zero market share; there are numerous long distance carriers (and consumers have shown themselves to be highly price sensitive in switching among them); and the BOC affiliates will not in any sense tower over the likes of AT&T and MCI.

Professed concerns about discrimination or cross-subsidy do not change this analysis. For one thing, the Commission has just completed a rulemaking to ensure that vigorous competition is introduced into exchange and exchange access markets. In the meanwhile, the BOCs are subject to a comprehensive array of safeguards, which bar any conceivable means by which their new interLATA affiliates could impede competition. Cross-subsidization is rendered singularly unlikely by the redundant protections of price caps and accounting safeguards, and could not, in any event, take place on a sufficient scale to have any effect on the huge interexchange market. Discrimination is precluded by a host of

¹Section 271(d)(6), however, cannot be viewed as a catch-all for carrier complaints. Instead, by its plain language, it is reserved for allegations of misconduct of such a nature that, had the Commission learned of it before in-region interLATA service was authorized, the Commission would have required a remedy (such as cessation) as a condition of entry.

equal access rules and the constant watchful eye of the BOCs' competitors. In such an environment, labelling the BOC affiliates as "dominant" providers would achieve nothing but make it more difficult for them to gain a foothold against the well-entrenched incumbents that currently control this market. Indeed, dominant carrier regulation would not even address any residual concerns the Commission might have about discrimination or cross-subsidy, a point the Commission itself concedes.

The overarching goal of the 1996 Act was to establish a deregulatory framework that would allow market forces, not regulatory fiat, to discipline the local exchange market. The Commission should be careful not to misread its mandate. The managed competition and handicapping of the BOCs proposed in the NPRM is inconsistent with congressional intent and harmful to competition and consumers alike. Consequently, the Commission should faithfully apply the specific safeguards established by Congress in Section 272 itself.

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LEC's Local Exchange Area)

**COMMENTS OF THE
UNITED STATES TELEPHONE ASSOCIATION**

In its Notice of Proposed Rulemaking, the Commission has proposed a number of extremely harsh restrictions on entry by BOC affiliates into in-region long distance and other competitive markets. These restrictions have no basis in the statute and would disrupt the careful balance struck by Congress in Section 272. The United States Telephone Association submits these comments to urge the Commission to retreat from some of its more draconian proposals.

The safeguards spelled out by Congress, along with the Commission's existing regulations, are ample to prevent any semblance of anticompetitive conduct by the BOCs. Indeed, it is not clear why this rulemaking is necessary at all or what authority the Commission has to add to or otherwise alter the precise scheme dictated by Congress. Many of the additional measures proposed by

the Commission -- such as the ban on any sharing of administrative services, the effective preclusion of joint marketing, and the possible classification of the BOCs as dominant providers -- would cripple the BOC affiliates as effective competitors to the incumbent long distance carriers without any corresponding benefit in terms of risks averted. Such restrictions would cause substantial and unnecessary harm to consumers and would, thus, constitute a denial of the congressional hope that entry by BOC affiliates will bring a needed measure of competition to this highly concentrated industry.

I. INTRODUCTION

Section 272 imposes a separate affiliate requirement and other safeguards upon BOC participation in various competitive markets, including in-region long distance, interLATA information services, and manufacturing. The restrictions contained in Section 272 are both comprehensive in scope and detailed in execution. These mandates are straightforward and require little or no interpretation.

It is unclear, therefore, why the Commission considers this rulemaking to be necessary at all. It is even less clear why the Commission is proposing to provide additional, extremely onerous restrictions on the BOCs and their affiliates that have no basis in the statute. Yet throughout its NPRM the Commission proposes to disrupt the careful balance struck by Congress between the prevention of anticompetitive conduct, on the one hand, and the

promotion of efficient competition, on the other. Indeed, despite paying brief lip service to the need to avoid imposing unnecessary costs on the BOCs, the Commission in many places proposes to adopt measures so punitive as to effectively eliminate the BOC affiliates as serious competitors to the incumbent interexchange carriers. This approach is improper under the statute, contrary to congressional intent, and profoundly unwise as a matter of policy.

Section 272 constitutes a carefully crafted legislative compromise. The structural separation and other requirements imposed by Section 272 were an explicit quid pro quo for BOC entry into in-region long distance markets. The Commission should not alter that balance by adding additional safeguards or by embellishing upon the safeguards contained in the Act. There is no justification for additional regulation in this area.

Indeed, it is clear from the Act's legislative history that Congress intended for Section 272 to be largely self-executing, and that the Commission has little or no role to play other than enforcement. S. 652 (the Senate Bill), on which Section 272 was based, had contained a provision authorizing the Commission to promulgate rules to enforce Section 272's separate affiliate requirements within nine months of the bill's enactment. See S. Conf. Rep. No. 230, 104th Cong., 2d Sess. 151 (1996). The Committee on Conference, however, rejected this proposal and eliminated this requirement from the Act. Thus, Congress plainly intended for Section 272 to be self-executing, without additional detailed regulatory rules to be promulgated by the Commission.

Even if the Commission has the technical authority drawn from other sections of the Act to add such regulations, it would be extremely troubling for the Commission, in essence, to invite the parties to reargue all the points and arguments raised during the legislative process. Congress resolved those debates and decided what safeguards should be imposed. It is not appropriate for the Commission now to second-guess that judgment.

Not only are additional restrictions contrary to the congressional intent, they are bad policy because they are both unnecessary and harmful to competition. The Commission has recognized, in the context of enhanced services, that non-structural safeguards are sufficient to prevent discrimination and cross-subsidy.¹ There is no reason to believe that such safeguards would not be equally effective as applied to long distance services. In any event, Congress has chosen to go beyond non-structural safeguards, for a transitional period, and impose a specific form of structural separation. This congressionally mandated belt-and-suspenders regulation will surely suffice to prevent any possible anticompetitive abuse.

¹See, e.g., Report and Order, Computer III Remand Proceedings: Bell Operating Company Safeguards and Tier 1 Local Exchange Company Safeguards, 6 FCC Rcd 7571, 7591 (1991) ("We conclude that our comprehensive system of cost accounting safeguards has worked well and, as strengthened above, effectively protects rate-payers against cross-subsidization by the BOCs."); id. at 7597 ("[W]e conclude that a set of nonstructural safeguards will effectively protect against potential discrimination by the BOCs in provision of basic services to competing ESPs."); id. at 7598 ("These safeguards, along with nonstructural safeguards against cross-subsidization, should effectively protect against anticompetitive conduct by the BOCs toward competing ESPs.")

The Commission itself has, in the past, acknowledged the extreme cost imposed by various kinds of structural safeguards. Such separation "imposes direct costs on the BOCs from the duplication of facilities and personnel, the limitations on joint marketing, and the inability to take advantage of scope economies.

. . . These are indications of more fundamental costs of structural separation -- namely, that the BOCs are unable to organize their operations in the manner best suited to the markets and customers they serve." Report and Order, Amendment of Sections 64.702 of the Commission's Rules and Regulations (Third Computer Inquiry), 104 F.C.C.2d 958, 1008 (1986) ("Computer III").

Yet the Commission now proposes to impose restrictions far beyond anything contemplated by Congress or previously found necessary to accompany BOC entry into any other competitive market. This is particularly ironic since the BOC affiliates will be entering with zero market share into a market with well-heeled, well-entrenched incumbents. They are already subject to a more than sufficient array of safeguards against discrimination and cross-subsidization and will be operating in a fishbowl environment in which any false step will be immediately detected and denounced to the Commission and to state regulators alike. The imposition of additional restrictions on the BOCs will simply tilt the competitive balance sharply in favor of the interexchange carriers, who will be free to enter local markets without any such crippling restrictions.

The overarching goal of the 1996 Act was to establish a deregulatory framework that would allow market forces, not regulatory fiat, to discipline the local exchange market. The Commission, in its NPRM, has misread that mandate. It is viewing the Act from a re-regulatory, not a deregulatory perspective. But such managed competition and handicapping of the BOCs is inconsistent with congressional intent.

The Commission should faithfully apply the specific safeguards established by Congress. The additional proposals contained in this NPRM are unwarranted, and both competition and consumers will suffer if they are adopted.

II. SCOPE OF THE COMMISSION'S AUTHORITY [¶¶ 19-30]

The Commission asks "whether sections 271 and 272, and our authority pursuant to those sections, apply" to both interstate and intrastate interLATA services. NPRM ¶ 20. The Commission appears to assume that if the sections themselves, by their terms, apply to both interstate and intrastate interLATA services then the Commission's authority pursuant to those sections must apply to both as well. See id. ¶ 21. But that by no means follows.

Section 2(b) states that, with specified exceptions, "nothing in this [Act] shall be construed to apply or to give the Commission jurisdiction with respect to" intrastate services and facilities. 47 U.S.C. § 152(b) (emphasis added). Thus, Congress recognized the distinction between the application of a statutory provision and the grant of authority to the Commission. It is possible for a statutory provision, by its clear terms, to apply to both

interstate and intrastate services without giving the Commission jurisdiction with respect to intrastate services.²

Here, there is no question but that Sections 271 and 272 apply to both intrastate and interstate aspects of the provision of interLATA services by BOC affiliates. The term "interLATA," drawn from the MFJ, clearly covers both. NPRM ¶ 23. Thus, we agree with the Commission that in Sections 271 and 272 Congress "put in place rules to govern both interstate and intrastate services." NPRM ¶ 24. It is also true, at least for Section 271, that Congress "provided a role for both the Commission and the states in implementing those rules." Id. Section 271, for example, explicitly sets forth the role of the FCC, in consultation with state commissions, in passing upon entry by BOC affiliates into in-region long distance markets.

But no similar role is carved out, either for the Commission or the states, in Section 272. As discussed above, Section 272 is intended to be self-executing. Congress itself set forth the single set of safeguards and requirements applicable to both the interstate and intrastate aspects of the provision of interLATA services by BOC affiliates. The Commission certainly has authority

²For example, Sections 251 and 252 plainly apply to both the intrastate and interstate aspects of unbundled elements and other interconnection and resale requirements imposed upon incumbent LECs. But they by no means indicate any intention to grant the Commission authority to determine the charges for those intrastate services. To the contrary, authority over both the intrastate and interstate aspects of these services is clearly reserved to private negotiation subject to arbitration by the states. See 47 U.S.C. § 252(c)(2).

to enforce those requirements. See 47 U.S.C. §§ 206-209. But it has not been granted any authority either to add to or otherwise alter them.³

In other words, the fact that Congress passed rules that apply to both intrastate and interstate services does not mean that Congress intended the Commission to pass additional regulations governing even the interstate, much less the intrastate, aspects of those services. Section 272, standing alone, makes clear what safeguards are to be applied. There is no basis for the Commission to add additional requirements.

Congress has already preempted the states by laying out the precise scheme that is applicable to both the interstate and intrastate aspects of BOC interLATA safeguards. Clearly, the states cannot impose more onerous or otherwise inconsistent safeguards. See NPRM ¶ 27. Where structural safeguards and nondiscrimination requirements are concerned, it is simply not "possible to separate the interstate and intrastate components" of interLATA services. Louisiana Public Service Comm'n v. FCC, 476 U.S. 355, 375 n.4 (1986). See also California v. FCC, 39 F.3d 919, 932-33 (9th Cir. 1994), cert. denied, 115 S.Ct. 1427 (1995). The problem with such inconsistent state regulations is not, however, that they "would thwart or impede the Commission's exercise of its

³As noted above, the only authority expressly granted to the Commission, is the authority to extend the statutory safeguards beyond their three- and four-year sunset periods. 47 U.S.C. § 272(f)(1), (2).

authority" under Section 272 (NPRM ¶ 29), but that they could thwart or impede Section 272 itself.⁴

III. ACTIVITIES SUBJECT TO SECTION 272 REQUIREMENTS [¶¶ 31-54]

A. Preliminary Issues

In determining what activities are subject to Section 272, the Commission has raised a number of general and specific questions. NPRM ¶ 32. As a general matter, the Commission has properly concluded that the requirements of Section 272 apply to a BOC's provision of both domestic and international interLATA telecommunications services that originate in a BOC's in-region states. This conclusion is consistent with the scope of "interLATA services" that are defined as "telecommunications between a point located in a local access and transport area and a point located outside such area." 47 U.S.C. § 153(21). Moreover, subject to the discussion concerning the definition of interLATA information services set forth below in Section C, this same conclusion is appropriate for interLATA information services that originate in a LATA and terminate outside such area, regardless of whether the termination point is inside or outside the United States. There appears to be no legal or policy reason not to apply Section 272 to such interLATA services.

⁴USTA agrees with the Commission that "the manufacturing activities addressed by sections 271 and 272 . . . are not within the scope of section 2(b)" and that, in any event, "such manufacturing activities plainly cannot be segregated into interstate and intrastate portions." NPRM ¶ 30. But, again, it does not follow that the Commission itself has authority to go beyond the specific requirements set forth in Sections 271 and 272.

Additionally, the Commission has correctly concluded that the plain language of Section 272(a)(1) permits a BOC to perform or offer any of the three activities or services set forth in Section 272(a)(2) from one or more separate affiliates. NPRM ¶ 33. Congress clearly left to the discretion of each company the types of services to be offered and the manner in which these services would be offered.⁵

B. The Commission Should Not Establish Burdens Beyond the Safeguards Enumerated in Section 272 for InterLATA Telecommunications Services.

Section 272(a)(2)(B) addresses the BOCs' origination of interLATA telecommunications services. Specifically, BOCs must use a separate affiliate to offer interLATA telecommunications services other than: (1) incidental interLATA services; (2) services that originate out-of-region; and (3) previously authorized activities.

1. Incidental Services. It is clear from the plain language of Section 272(a)(2)(B)(i) that a separate affiliate is unnecessary for a BOC to offer the specified incidental services in Section 271(g).⁶ Although these incidental services are technically interLATA services, BOC provision of these services have never and do not raise competitive issues or any specific competitive harms that require the Commission to develop additional safeguards. NPRM

⁵USTA will comment on the extent to which additional safeguards are necessary for a BOC's manufacturing separate affiliate in the Commission's separate proceeding implementing Section 273. NPRM ¶ 35.

⁶USTA recognizes that the Act does request a separate affiliate for the incidental services described in Section 271(g)(4). NPRM ¶ 37.

¶ 37. Allowing a BOC to offer these incidental services ensures that, for example, a BOC can engage in interLATA services related: (1) to receiving cable programming from satellite distributors; (2) to providing signaling information integral to the internal operation of the telephone network, or (3) to providing network control signaling information to, and receipt of such signaling information from, common carriers offering interLATA services at any location within an area in which such BOC provides telephone exchange services or exchange access. 47 U.S.C. § 271(g)(1)(C), (5) and (6). The types of incidental services permitted do not raise the competitive concerns that Congress addressed by enacting Section 272. Indeed, the MFJ Court recognized this when it granted the BOCs numerous waivers of the prohibition on providing interLATA services that included the incidental services listed in Section 271(g).⁷ As a result, the Commission should not and, indeed cannot, impose any additional safeguards to govern BOC provision of incidental services.

2. Previously Authorized Services. Section 272(a)(2)(B)(iii) specifically exempts from the separate affiliate requirements of Section 272(a) a BOC that is engaged in providing any interLATA telecommunications service to the extent authorized by Section 271(f). Section 271(f) authorizes a BOC to engage in, to the extent authorized by, and subject to the terms and conditions

⁷See, e.g., United States v. Western Elec. Co., 78 Rad. Reg. (P&F) 967 (D.D.C. Apr. 28 1995); see also United States v. Western Elec. Co., 1990-2 Trade Cas. (CCH) ¶ 69,177 (D.D.C. Sept. 12 1990).

contained in, an order entered by the United States District Court for the District of Columbia pursuant to the Section VII or VIII(C) of the AT&T Consent Decree. The Commission notes that a tension may exist, however, with the interplay between this section (Section 271(f)) and Section 272(h) that requires for any activity in which a BOC was engaged on February 8, 1996, that such company will have until February 8, 1997 to comply with the separate affiliate and nondiscrimination requirements of Section 272. NPRM ¶ 38.

This perceived conflict, however, is not real. The language of Section 272(a)(2)(B)(iii) is clear, a BOC is not subject to the separate affiliate requirements of Section 272 for previously authorized interLATA telecommunications services -- not now, not one year from now and not ever. If Congress had meant the one year transition period of Section 272(h) to modify Section 272(a)(2), it could easily have done so; yet it did not. These previously authorized services were granted pursuant to a series of safeguards imposed by the MFJ Court. The BOCs have relied on these safeguards and have entered into business relationships and provided services in reliance on these prior decisions. Section 272(a)(2)(B)(iii) protects this reliance.

Thus, the one year transition requirements of Section 272(h) can only apply to BOC activities that do not involve previously authorized interLATA telecommunications services. Such activities might include previously authorized manufacturing activities. As a result, there is no tension that the Commission must resolve

between these sections. The BOCs may continue to provide interLATA telecommunications services, under the terms allowed by the MFJ Court.

3. BOC Mergers and Joint Ventures. USTA believes that the Commission is correct to conclude that the definition of "in-region" includes both territories of merged BOCs; it only makes sense to join the merged companies' territories to determine the merged companies' in-state region. NPRM ¶ 40.

It would be premature and incorrect, however, to require special separate affiliate requirements during the pendency of a merger or from when a BOC joint venture arrangement is announced. During such time, the directors of each company continue to have a fiduciary duty to their shareholders, independent of the proposed merger, that helps negate any incentive to engage in anticompetitive behavior. In addition, public and governmental scrutiny of the merging companies will be at their greatest during the pendency of a merger, particularly because the companies involved will need to pass through the Hart-Scott-Rodino antitrust gauntlet in order to proceed with the merger. Thus, there is no need for special safeguards during this time period.

In addition to the above, the idea of special "premerger" restrictions would present huge practical problems. First, there is no guarantee that the merger or joint venture will occur or exactly what form it will take. Moreover, it would be virtually impossible for the Commission to determine at what point conditions should attach. Accordingly, USTA opposes the Commission adopting

any rules with respect to separate affiliates or nondiscrimination safeguards that are applicable to companies that have announced the formation of a merged company or a joint venture, but have not yet finalized the transaction.

C. BOC InterLATA Information Services Must Contain an Interexchange Transmission Component Provided by the BOC.

USTA supports the Commission's conclusion that an information service is an interLATA information service only when the service actually involves an interLATA telecommunications transmission component that is provided by a BOC. NPRM ¶ 45. There is no basis in Section 272 for the Commission to adopt the alternative proposal that interLATA information services include any information service that (1) "potentially" involves an interLATA telecommunications transmission component; (2) involves the use of non-transmission components or functionalities that are located in different LATAs; or (3) involves an interLATA transmission component that is provided by another carrier other than a BOC affiliate. The statute and common sense do not allow that interpretation and as a policy matter, it is only when a BOC provides the interLATA component itself that Congress' concerns about cross-subsidy or discrimination become relevant. These concerns just are not present if the BOC does not actually use its own interLATA telecommunications transmission facilities in offering these services.

USTA agrees with the Commission's conclusion that Section 272 does not apply to BOC provision of intraLATA information services.

NPRM ¶ 44. The statute just does not apply. Instead, as a matter of business judgment, BOCs should determine whether and how to offer intraLATA information services and whether they would combine both intraLATA and interLATA information services in a single Section 272 separate affiliate.

USTA agrees that the Commission's development of rules in Computer II, Computer III, and ONA addressed many of the same concerns that Congress sought to address through the establishment of separate affiliate and nondiscrimination requirements in Sections 271 and 272. NPRM ¶¶ 48-49. USTA agrees that the Commission should continue to enforce the basic unbundling and interconnection requirements of Computer III and ONA with respect to a BOC's provision of information services. These basic unbundling and interconnection nonstructural safeguards are analogous and akin to the nondiscrimination requirements in Sections 272(c) and (e) and, therefore, the Commission should continue to enforce them. The Commission, as USTA describes below in Section VII regarding the enforcement of Section 272 safeguards, however, should not extend the various reporting requirements of Computer III and ONA to the BOCs' provision of these services. Section 272(d)'s biennial audit provision and the complaint process replace any need for extending these requirements.

Other elements of the Computer II, Computer III, and ONA regime also have been superseded by Congress. For example, the Commission's rules concerning customer proprietary network information are no longer necessary. Congress overrode these rules

when it enacted Section 222 of the 1996 Act. The Commission has already recognized this fact in its recent Notice implementing Section 222. See Notice of Proposed Rulemaking, Implementation of the Telecommunications Act of 1996: Telecommunications Carriers' Use of Customer Proprietary Network Information and Other Customer Information, CC Docket No. 96-115, FCC 96-221 (rel. May 17, 1996).

More fundamentally, in Section 272 Congress has now resolved the issue of the Computer III/Computer II separate subsidiary regime. Congress and Section 272 have resolved the issue of when a separate affiliate is necessary and the degree of "separateness" required. Information services, which are for all intents and purposes, virtually coterminous with enhanced services, are covered by Section 272(a)(2)(C). Thus, there is no need for the Commission to conduct further proceedings as a result of the Ninth Circuit's second remand of Computer III. Notice of Proposed Rulemaking, Computer III Further Remand Proceedings: Bell Operating Company Provision of Enhanced Services, 10 FCC Rcd 8360 (1995). Congress has made the determination.

D. The Commission Should Harmonize the Rules Relating to Electronic Publishing and Telemessaging with Section 272.

Any information services that are clearly not encompassed by the statutory definition of electronic publishing services, nor specifically listed in the delineated exceptions to that definition (and thus, are not electronic publishing services), are information services and subject to the requirements of Section 272 only. NPRM ¶ 53. Any service that does not fall within the definition of

electronic publishing service, regardless of whether it fits precisely within one of the exceptions to the definition listed, cannot, by definition, be an electronic publishing service. Issues relating to the definition of control, attribution standards for ownership and similar issues should be deferred at this time.

The Commission also has tentatively concluded that telemessaging is an information service subject to the separate affiliate requirements of Section 272. NPRM ¶ 54. USTA is specifically concerned about its impact on USTA members already providing telemessaging services. In particular, as discussed above, if a BOC is not providing the underlying interLATA component of any telemessaging services because it is supplied by a non-BOC carrier, then the service is not an interLATA information service. The BOC therefore would not be subject to Section 272's separate affiliate requirement. Until and unless the BOC provides the underlying interLATA transmission component, telemessaging is an intraLATA information service and not regulated under Section 272.

IV. STRUCTURAL SEPARATION REQUIREMENTS OF SECTION 272(b) [¶¶ 55-64]

Section 272(b) requires that if a BOC engages in manufacturing activities, originates certain interLATA telecommunications services, or provides interLATA information services, it must do so through a separate affiliate that: (1) operates independently from the BOC; (2) maintains separate books, records and accounts; (3) has separate officers, directors and employees from the BOC; (4) does not obtain credit that relies on the assets of the BOC for