recourse; and (5) conducts all transactions with the BOC at arm's length. NPRM at ¶¶ 55-64. These five requirements are substantially similar to those the Commission adopted in the Computer II proceeding governing BOC provision of enhanced services. See 47 C.F.R. § 64.702(c)(1)-(5) (1995). Accordingly, where the language of Section 272(b) is identical to the language contained in Section 64.702(c), the Commission should interpret the same language similarly (i.e., it should interpret Section 272(b)'s requirements in the same manner in which it enforces Section 64.702(c)).

It also is crucial, however, to recognize where Section 272(b) differs from Section 64.702. As the Commission recognizes, Section 272(b) does not contain the facilities bar set forth in Section 64.702(c)(1). This is a deliberate choice by Congress. The separate affiliate intended by Congress is more of an accounting separate affiliate than a separate facilities affiliate. Thus, Section 272's affiliate is a compromise -- a transitional entity somewhere between the Computer II subsidiary and the Computer III non-structural safeguards regime. It is crucial that the Commission recognize this Congressional mandate. It is also clear, as set forth in more detail below, that certain proposals in the Notice do not recognize this Congressional requirement.

Moreover, there is no support in the statute for the Commission's suggestion that it may "interpret" Section 272's separate affiliate standards differently depending upon which activity the separate affiliate is engaged. NPRM ¶ 56. There is nothing in the statute which implies that such a distinction could or should be made. Thus, USTA believes it is unnecessary for the Commission to interpret or apply any of the Section 272(b)'s requirements differently with respect to BOC provision of services regulated under Title II (provision of interLATA telecommunications services) as opposed to nonregulated activities (manufacturing and interLATA information services).

A. Section 272(b)(1): Independent Operations

The first of the five separation prongs requires any separate affiliate to operate independently from the BOC. NPRM ¶ 57. USTA strongly opposes the Commission's tentative conclusion that the term "operate independently" requires the Commission to impose additional separation requirements beyond those listed in subsections 272(b)(2)-(5). The separate affiliate requirements contained in subsections 272(b)(2)-(5), coupled with the nondiscrimination requirements in Sections 272(c) and (e), more than adequately address the potential anticompetitive harms that Congress addressed by requiring separate affiliates. In fact, Section 64.702(c)(2) of the Commission's own rules, upon which Section 272 is clearly based, contains the very same "operate independently" language. The Commission has not used this section to impose broad additional requirements on the BOCs. It would be completely contrary to logic and precedent for the Commission to do so now.

Accordingly, USTA urges the Commission to interpret "operate independently" as requiring no additional regulation -- the other specific provisions of Section 272(b), the nondiscrimination requirements of Sections 272(c) and 272 (e) and the Commission's existing nonstructural safeguards, are more than ample to address any concerns. Thus, USTA believes that no additional requirements are mandated by Section 272(c)(1) and that it would be contrary to Congress' intent and to the law to attempt to graft the purposely discarded Computer II regulatory regime onto Section 272.

B. Section 272(b)(2): Separate Books, Records and Accounts

USTA will address the extent to which it must maintain separate books, records and accounts in the separate proceeding addressing these issues. NPRM ¶ 61.

C. Section 272(b)(3): Separate Officer, Directors and Employees

Section 272(b)(3) requires that any separate affiliate subject to the requirements of this section "have separate officers, directors and employees from the [Bell operating company] of which it is an affiliate." NPRM ¶ 62. This is a place where USTA believes the Commission has clearly "gone wrong" in its interpretation of Section 272(b)(3).

USTA strongly opposes the Commission's tentative conclusion that this provision "prohibits the sharing of in-house functions such as operating, installation, and maintenance personnel, including the sharing of administrative services that are permitted under Computer II if those services are performed in-house." Id. Even more misguided is the Commission's proposal to prohibit BOCs and their affiliates from sharing the same outside services, such as insurance or pension services. These draconian proposals have no basis in the statute's plain language or legislative history, nor do they make any policy sense in light of the Commission's learning since Computer II and the fact that there have not been any abuses of the Computer III rules.

Although the language of this provision prohibits the BOCs and their affiliates from sharing employees, there is absolutely nothing in the language of the provision that suggests that the BOCs and their affiliates are prohibited from entering into arm's length transactions that allow the affiliate to purchase from the BOC, a BOC holding company, or other BOC affiliate, overhead and administrative functions. Indeed, the legislative history of this provision is silent as to how the Commission should interpret this particular provision of Section 272. As a result, it is perfectly reasonable for the BOCs to enter into such agreements with their affiliates for these types of services.

As the Commission recognized in the NPRM, when it implemented the strictest of all the structural separation policies -- the Computer II regime -- even there the Commission permitted the BOCs to contract for in-house type services on a cost reimbursement basis. The Commission reasoned that in any structural separation regime, there are various cost/benefit factors associated with different levels of separation. See Final Decision, Section 64.702 of the Commission's Rules and Regulations (Second Computer Inquiry), 77 F.C.C.2d 383, 484 (1980). Indeed, the Commission has often struggled to find some acceptable middle ground between potential economies of integration derived from more efficient production and lowered transaction costs and potential diseconomies stemming from abuses of underlying market power made possible by integration. BOC competitors, in particular the IXCs, will provide one stop shopping and joint marketing in competition with the BOCs. These competitors will be under no ban on shared services; the BOCs will be under a significant competitive disadvantage if the Commission imposes such a burden on them alone. This is not what the 1996 Act is all about. For more than fifteen years the Commission has developed, and the BOCs have operated under, a regime that allows for economies generated through sharing. It makes utterly no sense to retreat from that position now.

D. Section 272(b)(4): No Cross-Credit Reliance

The fourth separation requirement requires that any affiliate "not obtain credit under any arrangement that would permit a creditor, upon default, to have recourse to the assets of the" BOC. NPRM ¶ 63. USTA supports the Commission's tentative interpretation of this requirement and the Commission should not at this time establish specific requirements regarding the types of activities restricted by this provision.

E. Section 272(b)(5): Arm's Length Transactions

The fifth and final requirement requires that the affiliate conduct all transactions with its affiliated BOC on an arm's length basis with such transactions reduced to writing and available for public inspection. NPRM ¶ 64. Again, USTA believes that the plain language of the statute is sufficiently clear and that there is no need for the Commission to interpret this provision further in its rules.

V. NONDISCRIMINATION SAFEGUARDS [¶¶ 65-89]

A. Nondiscrimination Provisions of Section 272

Section 272(c) outlines two broad nondiscrimination safeguards that apply to a BOC's dealings with its separate affiliate engaged in manufacturing and providing interLATA telecommunications and information services. NPRM ¶ 66. Section 272(e), however, identifies more specific duties that a BOC and its affiliate must fulfill. The specific duties do not sunset under Section 272(f). USTA supports the Commission's tentative conclusion that the requirements of Section 272(c)(1) completely subsume the specific non-accounting requirements of Section 272(e) during the period before sunset because the language of Section 272(c)(1) is broader than the specific requirements of Section 272(e). See NPRM ¶ 67.

The nondiscrimination requirements of Sections 272(c) and (e), however, should not be interpreted to require a BOC to provide to competitors products or services that it is not providing to its affiliate. Id. That obligation is not "nondiscrimination," but would be an obligation completely beyond the scope of the statute. These two sections cannot be interpreted to require a BOC to provide a requesting entity with a more than what is required by Section 272(c)(1); that is, a BOC may not discriminate between its "affiliate and any other entity in the provision or procurement of goods, services, facilities, and information, or in the establishment of standards." The plain language of the statute neither compels nor contemplates the Commission taking such action. To do so would be to require BOCs to provide goods, facilities, services and information that it would not normally maintain. Such a result is not "nondiscrimination."

B. Applicability of Pre-Existing Non-Discrimination Requirements

USTA opposes the Commission's tentative conclusion that any transfer by a BOC of existing network capabilities of its local exchange entity to its affiliate is prohibited by Section 272(a). NPRM ¶ 70. Nothing in Section 272(a), which requires a BOC to operate through a separate affiliate if it chooses to engage in manufacturing activities and to provide interLATA telecommunications and information services, suggests such a result. If a BOC transfers a portion of its network capabilities to an affiliate, and the affiliate provides exchange services using those facilities, Section 272(c)'s nondiscrimination and other safeguards would apply, but only to the extent that the affiliate qualifies as a successor or assign (as defined in Section 153(4)(B)). Accordingly, USTA supports the Commission's alternative proposal by which an assignee of a BOC's network capabilities becomes a successor of the BOC and, thus, is subject to the nondiscrimination requirements of Sections 272(c) and (e) -- but only to the extent that the successor is providing exchange or exchange access service. Otherwise the affiliate has no "bottleneck" and the Section 272 requirements do not and cannot apply.

C. Interpretation of Section 272(c)(1)

Section 272(c) requires that BOCs not discriminate with regard to procurement of goods, services, facilities and information. NPRM ¶ 72. Congress' concern in enacting this provision was to prevent BOCs from discriminating against their competitors by providing them inferior services or untimely network information in favor of their own facilities. USTA does not believe that the standard is materially different from the unjust or unreasonable standard of Section 202. The law and common sense would presume an element of "reasonableness" in whatever rule the Commission adopts.

Section 272(c)'s nondiscrimination provisions, as discussed earlier, are self-executing and, thus, do not require the Commission to establish additional requirements, beyond those already in Section 272, to determine whether the BOCs are complying with these requirements. Indeed, 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. As discussed below in Section VII, the Commission should not extend the various reporting requirements of Computer III and ONA to the BOCs' provision of these services in light of Congress' two new safeguards, namely the biennial audit and modified Commission complaint processes.

D. Interpretation of Section 272(e)(1) through (e)(4)

USTA believes that the nondiscrimination requirements in Section 272(e) are plain on their face and do not require the Commission to adopt additional or supplemental regulations or interpretations. NPRM ¶ 80. USTA agrees with the Commission that the plain language of the Sections 272(e)(2) and (4) will have no effect after the separate affiliate requirements of Section 272(a) have gone beyond the sunset period. Prior to the sunset period, USTA has the following recommendations. Section 271(e)(1) requires that a BOC fulfill any requests from an unaffiliated entity for telephone exchange service and exchange access within a period no longer than the period in which it provides such services to itself or its affiliates. Any requirements to implement this provision, however, should be viewed in light of USTA's recommendations in other proceedings to streamline unnecessary safeguards to take into account the competitive environment in which all telecommunications service providers are competing. See Comments of USTA, Improving Commission Processes, PP Docket No. 96-17 (filed Mar. 15 1996).

Section 272(e)(2) states that a BOC "shall not provide any facilities, services or information concerning its provision of exchange access to [one of its affiliates] unless such facilities, services or information are made available to other providers of interLATA services in that market on the same terms and conditions." NPRM ¶ 86. This requirement is self-executing and does not require additional interpretation by the Commission. USTA believes that this requirement will sunset after three years because the language of the provision has no significance once separate affiliates are no longer required.

Section 272(e)(3) requires a BOC to charge its affiliate or impute to itself, an amount for access to its telephone exchange service and exchange access that is no less than the amount charged to any unaffiliated interchange carriers for such service. USTA supports the Commission's tentative conclusion that the BOCs should charge their affiliates the same tariffed rates for access as any unaffiliated interexchange carrier. NPRM ¶ 88.

Section 272(e)(4) requires that "a BOC and its affiliate provide any interLATA or intraLATA facilities or service to its interLATA affiliate only if such services or facilities are made available to all carriers at the same rates and on the same terms and conditions, and so long as the costs are appropriately allocated." USTA supports the Commission's tentative conclusion that this requirement will not apply after the three year sunset period expires. NPRM ¶ 80.

VI. MARKETING PROVISIONS OF SECTIONS 271 AND 272 [¶¶ 90-93]

Congress, in enacting the joint marketing provisions of Sections 271 and 272, believed that the ability to bundle telecommunication services into a single package to allow for "one stop shopping" is a significant competitive marketing tool. See S. Rep. No. 652, 104th Cong., 1st Sess. 23 (1995). USTA strongly agrees. Realizing this, the 1996 Act takes two complementary steps to ensure that there is parity among competing industry sectors in terms of joint marketing. First, Congress established a timetable whereby BOCs and interexchange companies would be permitted to engage in joint marketing activities once BOCs are allowed to enter the interLATA market. Second, Congress ensured that the 1996 Act did not hamstring competing industry sectors from engaging in fair and equivalent competition once they were permitted to do so.

In terms of the timetable, Section 272(g)(1) prohibits a BOC's long distance affiliate from marketing or selling BOC exchange service unless the BOC permits other entities offering the same or similar services to market and sell the BOCs' local exchange telephone services. In addition, Section 272(g)(2) prohibits a BOC from marketing or selling interLATA service provided by an affiliate within any of its in-region state until such company is authorized to provide interLATA services in that state. Balanced against these BOC restrictions is Section 271(e), which prohibits large interexchange companies from jointly marketing in a state resold local exchange service obtained under Section 251(c)(4) for three years or until the BOC in that state is authorized to provide interLATA service, whichever is earlier. In light of the Congress' joint marketing parity policy, the Commission has correctly determined that the terms "market or sell" used in Section 272(g)(2) must be construed similarly to the term "jointly market" in Section 271(e).

The Commission's tentative conclusion in the NPRM and the language in the Section 251 Proceeding that Section 271(e) does not preclude a covered interexchange carrier from jointly marketing local exchange services provided through the purchase of unbundled network elements pursuant to Section 251(c)(3), however, contradicts Congress' joint marketing parity policy. First Report and Order, In the Matter of Implementation of the Local Competition

Provisions in the Telecommunications Act of 1996, CC Docket No. 96-98, FCC No. 96-325, at ¶¶ 335 (rel. Aug. 8, 1996) ("Section 251 Proceeding").[8] The purchase of unbundled network elements from a BOC is the equivalent to reselling a BOC's local exchange services.[9] In both cases, the interexchange carrier is purchasing elements or services from the BOC and reselling them to a third party, that is, the competitor is engaging in resale. The interexchange carriers should not be permitted to do something indirectly that they cannot do directly. To do so would undermine congressional policy and provide the interexchange carriers with a competitive advantage over the BOCs that certainly was not contemplated by Congress. As a result, the Commission should not adopt regulations that disregard Congressional policy.

Parity must also exist in how BOCs and interexchange carriers engage in joint marketing. NPRM ¶ 92. Consistent with Sections 272(b)(3) and (5), Section 272 permits a BOC to engage in the provision of joint marketing once interLATA authorization is obtained, even if this occurs at a time when the BOC is still required to offer interexchange services through a separate affiliate. In other words, during the three year Section 272(f)(1)

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[8]To the extent the Commission's language at ¶ 335 represents a finding or holding that purchased, recombined network elements may be used to evade the joint marketing restriction in Section 271(e)(1), USTA reserves its right to seek reconsideration or take other appropriate legal action with respect to that finding.

[9]The Commission in essence has already recognized this functional equivalency when it determined to impose a transitional access charge regime on interexchange carriers using unbundled network elements. Section 251 Proceeding ¶¶ 712-732.

transition period, the BOC and its affiliate may joint market, but the Section 272(b) separate affiliate requirements will be in force. Any other result would be inconsistent with Congress' parity policy and should not be adopted.

Equally as important is the terms and conditions under which the BOC and its affiliate will be able to provide "one stop shopping." If Section 272(b)(3)'s requirement, as discussed above,[10] is interpreted to prohibit shared administrative services or shared marketing services, Congress' intent and the BOCs' ability to compete head-to-head with their long distance and cable competitors will be severely compromised. In trying to harmonize these two provisions so that each one is given meaning, the time periods in Section 272(g) would be meaningless if Section 272(b)(3) prohibited shared marketing services. If that were the meaning of Section 272(b)(3), Congress would not have adopted the joint marketing provisions in Section 272(g). As a result, BOCs and their affiliates should be permitted to jointly market, provided that this joint marketing occurs on an arm's length basis and in compliance with subsections 272(b)(3) and (5) during the transitional three and four year time periods in which separate affiliates are required.

[10]See Section IV.C. above.

VII. ENFORCEMENT OF SECTIONS 271 AND 272 [¶¶ 94-107]

A. Mechanisms to Facilitate Enforcement of the Separate Affiliate and Nondiscrimination Safeguards of Sections 271 and 272 [¶¶ 94-96]

The Commission seeks comment on "the mechanisms necessary to facilitate the detection and adjudication of violations" of the separate affiliate and nondiscrimination safeguards in Sections 271 and 272. NPRM ¶ 94. In USTA's view, there is no need for the Commission to establish separate procedures to detect and adjudicate such violations. As an initial matter, the Commission already is guaranteed ready access to all of the enforcement information it needs. For example, the Telecommunication Act requires the biennial provision of audits to the FCC and state commissions alike, and requires the BOCs to provide such back-up data and documentation as the Commission deems necessary. See 47 U.S.C. §§ 272(b)(2), 272(d)(2), (d)(3).

In addition, the Commission can rely on the BOCs' customers and competitors -- which include sophisticated and experienced telecommunications carriers like AT&T, MCI, and Sprint -- to bring any suspected misconduct to the Commission's attention. As the FCC itself has explained, AT&T now plays the role of a "huge whistle blower." Hearing Transcript at 47-48, United States v. Western Elec. Co. (D.D.C. Apr. 19, 1991) (statement of John Ingle, FCC). Under the Act, industry participants have express complaint procedures through which they can make their concerns known.[11] Moreover, these industry players have a wealth of information at their disposal. They can rely not only on their own experiences, but also can benchmark the BOCs against each other,[12] and scrutinize the public disclosures required under the Act. See 47 U.S.C. § 272(b)(5), (d)(2).[13]

Given these available enforcement tools, the incentive for the BOCs' customers (the would-be victims of any potential misconduct) to keep a watchful vigil, and the sophistication of industry

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[11]The Commission has long held its doors open to complaints regarding LEC participation in the interexchange industry, and there no indication that its procedures have proven inadequate. See Fifth Report and Order, Policy and Rules Concerning Rates for Competitive Common Carrier Services and Facilities Authorizations Therefor, 98 F.C.C.2d 1191, 1196 (1984) ("Our complaint process is available for any allegations of such discrimination."). If the Commission considers it necessary, it can streamline its complaint procedures to ensure prompt action.

[12]United States v. Western Elec. Co., 993 F.2d 1572, 1580 (D.C. Cir. 1993) ("[F]ederal and state regulators have in fact used such benchmarks in evaluating compliance with equal access requirements . . . ."); see Hearings on S. 1981 Before the Senate Subcomm. on Communications of the Comm. on Commerce, Science, and Transp., 101st Cong., 2d Sess. at 186, 190-92 (May 9, 1990) (statement of FCC Chairman Alfred C. Sikes).

[13]To the extent there is concern about imperceptible forms of discrimination, those concerns are unfounded. As the Department has explained, "discrimination is unlikely to be effective unless it is apparent to customers. But, if it is apparent to customers, it is also likely to be apparent to regulators or to competitors that could bring it to the regulators' attention." Report and Recommendations of the United States Concerning the Line-of-Business Restrictions Imposed on the Bell Operating Companies by the Modification of Final Judgment at 96, United States v. Western Elec. Co., No. 82-0192 (D.D.C. Feb. 2, 1987). This is especially true where, as here, the supposed victims of the discrimination are not telecommunications novices but experienced and well-seasoned telecommunications giants.

players, there is no reason to impose additional reporting requirements or oversight. Indeed, the imposition of such needless regulation would defeat one of the central purposes of the Telecommunications Act -- *deregulation* of the telecommunications industry. And in so doing, it would burden not just the BOCs but the Commission too, as the Commission itself points out (NPRM ¶ 95).

B. The Section 271(d)(6) Complaint Process [¶¶ 97-107]

As the Commission points out, Section 271(d)(6)(A) of the Act authorizes the Commission to consider whether a BOC affiliate has ceased to meet any of the conditions precedent to providing in-region interLATA services. After notice and opportunity for a hearing, the Commission may -- if it determines that the BOC affiliate has ceased to comply with the relevant conditions -- order the BOC to correct the deficiency, impose a monetary sanction pursuant to title V (47 U.S.C. §§ 501-510), or suspend or revoke the BOC's interexchange authority. Finally, Section 271(d)(6)(B) authorizes industry participants to file complaints alleging failure to comply with the requirements of Sections 271 and 272.

USTA agrees with the Commission that Section 271(d)(6) supplements the Commission's existing enforcement authority. NPRM ¶ 97. Violations of the Commission's rules, unreasonable discrimination, and other misconduct can still be addressed under the Commission's existing enforcement authority under 47 U.S.C. §§ 206-209. And the same conduct that causes a BOC affiliate to cease to comply with the requirements for the provision of in-region interLATA service could form the predicate for a damages action as well. Ibid.[14]

But Section 271(d)(6) must not and cannot be read as a catch-all provision for common carrier complaints. By its plain terms, Section 271(d)(6) addresses one specific condition -- the alleged failure of a BOC affiliate to meet the conditions for entry into in-region interLATA service. See NPRM ¶ 98. As a result, Section 271(d)(6) cannot be invoked simply by alleging that a BOC has violated some Commission rule or order. Nor is it sufficient to allege that a BOC has committed some incidental misconduct that may be inconsistent with the numerous requirements for entry. Instead, the allegations and supporting proof must be of such a character that, had it been before the Commission before in-region interLATA service was authorized, the Commission would have required a remedy (such as cessation of the activity) before approving entry in the first instance. Only if the Commission would not have approved entry in light of the allegations can it be said that the BOC "has ceased to meet . . . the conditions required for . . . approval." 47 U.S.C. § 271(d)(6).

Consequently, where the allegations do not cast doubt on the propriety of the Commission's decision -- such as where the alleged misconduct is inconsequential, isolated, or predicated on disputed

[14]USTA agrees with the Commission that the damages portion of the complaint would not have to be acted upon within 90 days. NPRM ¶ 97. By its plain language, Section 271(d)(6) does not provide for damages actions. Consequently, the 90 day time-limit provided by Section 271 would not apply to claims for damages relief.

or disputable readings of the Commission's rules -- the Commission should not (and cannot) treat the complaint under Section 271. Instead, such a complaint must be treated under the Commission's regular complaint procedures, subject to the normal processes, and the normal time deadlines.

To put any other gloss on Section 271(d)(6) not only would be inconsistent with the Act's plain language but also would invite a raft of anticompetitive and harassing complaints. Every interconnection dispute, every negotiation over unbundling, every affiliate transaction could become the basis for an attempt to get the BOC removed from the in-region interLATA market. And the Commission would have no option but to act on such disputes within the 90-day deadline provided by statute. While such disputes are serious matters, they are not the types of issues to which Section 271(d)(6) is addressed. Instead, Section 271(d)(6) directs itself to serious and intentional misconduct of a variety suggesting that a BOC has chosen to abandon or ignore the obligations it assumed as a condition of entry.

In the event a complaint alleging such misconduct is filed, there is no reason for the Commission to employ the various elaborate burden-shifting schemes outlined in the NPRM. Indeed, there is no basis for such burden shifting or presumptions in the statute. Under Section 271, the Commission can impose one of the three listed sanctions if it "determines" that the BOC has ceased to comply with the conditions for approval of in-region interLATA service. Nowhere does the statute provide that the Commission can impose the sanction based on artificial presumptions or burden shifting rather than an actual factual determination based on a preponderance of the evidence.

Nor does such burden-shifting comport with common sense or adjudicative efficiency. Once the Commission has determined that the BOCs have complied with the conditions for approval, the burden of showing a change should lie with the complainant. Otherwise, the BOCs would be forced continuously to prove compliance. And requiring the BOCs to bear the burden of justifying their business decisions will involve the Commission in the constant monitoring and second guessing of BOC operational judgments -- an intrusive role not envisioned anywhere in the Telecommunications Act. Consequently, the Commission should eschew fancy allocations of burdens and resolve the dispute in favor of the party with the stronger case.

Finally, the Commission has asked for comment on the procedures to be employed in adjudicating a Section 271(d)(6)(B) complaint. While the statute does not require a hearing "on the record," see NPRM ¶ 106, the Court of Appeals for the District of Columbia Circuit has made it clear that "the absence of 'on the record' language" does not entitle an agency "always [to] utilize informal rule-making [type] procedures." Independent Bankers Ass'n v. Board of Governors, 516 F.2d 1206, 1218 (D.C. Cir. 1975). To the contrary, where the purpose is primarily adjudicative rather than legislative, and one industry participant is singled out for special treatment, the resolution of disputed issues of material fact can only be resolved "through the use of trial type procedures." Ibid. See also Northwestern Indiana Tel. Co. v. FCC, 824 F.2d 1205, 1211 (D.C. Cir. 1987), cert. denied, 493 U.S. 1035 (1990).

The Commission should be able resolve most Section 271(d)(6) complaints on paper submissions. Either the allegations will not be sufficiently serious even to warrant Section 271(d)(6) treatment or they will be readily answerable. Only in serious circumstances will the Commission find it necessary to designate the matter for a hearing before an ALJ. Certainly, however, the Commission could not impose the ultimate Section 271(d)(6) sanction -- revocation of in-region long distance authority -- without such a hearing on any genuine issue of material fact. Because of the adjudicative nature of the Section 271(d)(6) proceeding, due process requires that any such disputed issue of material fact be resolved in the appropriate adjudicative setting. Independent Bankers, 516 F.2d at 1218. To do otherwise would subject the continued viability of an entire enterprise to the test of trial by affidavit -- precisely the sort of arbitrary and inherently unreliable process that due process will not tolerate. Mathews v. Eldridge, 424 U.S. 319 (1976) (trial-type procedures more appropriate where effect of deprivation is severe).

VIII. BOC AFFILIATES OFFERING IN-REGION, INTERSTATE, INTERLATA SERVICES SHOULD BE CLASSIFIED AS NON-DOMINANT [¶¶ 108-162]

The Commission defines a dominant carrier as one that possesses market power (i.e., the ability to raise price and restrict output in the relevant market). The Commission recognizes that BOC affiliates will not possess market power based on any of the "well established market features" usually employed to make that determination, such as "market share," "supply and demand substitutability," and "the cost structure, size, or resources of the firm." NPRM ¶ 133. 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. Under these traditional indicia of market power, therefore, it is clear that the BOC affiliates are non-dominant, as the Commission readily admits. Id.

The Commission expresses concern, however, with "the BOCs' current control of bottleneck access facilities," and asks whether, by dint of that control, the BOCs could, through discrimination or cross-subsidy, impede competition in interexchange services within their respective regions. NPRM ¶ 134. The answer, emphatically, is no. As an initial matter, of course, 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 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. NPRM ¶ 132.

Price cap regulation, tariff filing requirements, and Section 214 approvals may make sense as applied to a long distance carrier with the traditional indicia of market power. But they do not even purport to address concerns with a local exchange affiliate's control of an essential input. Those concerns are addressed by Section 272 and the Commission's existing price cap rules, accounting safeguards and equal access requirements. Imposing price caps on an incumbent LEC may help prevent cross-subsidy. Imposing price caps and tariff filing requirements on the affiliated interexchange carrier will do nothing but make that carrier less able to respond to competitive conditions in the marketplace.

A. The Commission Should Retain Its Traditional Product and Geographic Market Definitions [¶¶ 115-129]

The NPRM correctly identifies geographic and product market definition as the first step towards determining whether the BOCs will have any market power in providing interexchange services. The Commission has repeatedly analyzed this issue, and has invariably identified the appropriate market as "all interstate, domestic, interexchange telecommunications services." Notwithstanding this, the NPRM proposes to abandon this long-settled market definition in favor of numerous, fragmented sub-markets. NPRM ¶¶ 116-29. This would be a serious mistake. Consistency aside, the Commission's new proposal is both unsound and unadministrable.

1. Product Market. Time and time again the Commission has concluded that "all interstate, domestic, interexchange telecommunications services" is the relevant market for analyzing whether interexchange carriers can exercise market power.[15] Just last September, the Commission reaffirmed the use of an "all services" market, concluding in the AT&T Non-Dominance Order that the appropriate market for dominance/non-dominance decisions consists of "all interstate, domestic, interexchange services." Order, Motion of AT&T to be Reclassified as a Non-Dominant Carrier, 11 FCC Rcd 3271, 3286 (1995) (emphasis added) ("AT&T Non-Dominance Order"). Thus, the Commission's tentative conclusion that "all interstate, domestic, interLATA telecommunications services [is]

[15] See, e.g., Fourth Report and Order, Policy and Rules Concerning Rates for Competitive Common Carrier Services and Facilities Authorizations Therefor, 95 F.C.C.2d 554, 575 (1983) ("Fourth Competitive Common Carrier Report and Order"); see also Order and Authorization, Application of Alascom, Inc., AT&T Corp. and Pacific Telecom, Inc. for Transfer of Control of Alascom, Inc. from Pacific Telecom, Inc. to AT&T Corp., 11 FCC Rcd 732, 754 (1995).

the relevant product market for purposes of determining whether the BOC affiliates have market power in the provision of interstate, domestic, interLATA services" is entirely consistent with precedent -- and undeniably correct. NPRM ¶ 119.

How the Commission arrives at that conclusion, however, is somewhat troubling. Throughout its prior decisions, the Commission consistently has held the market to be one for "all services," primarily because there is supply substitutability between the facilities used to provide different interexchange services. The Commission employed precisely this sort of reasoning in approving the merger of AT&T and McCaw just two years ago,[16] and reaffirmed that reasoning in holding AT&T to be non-dominant last September. See AT&T Non-Dominance Order, 11 FCC Rcd at 3287.

Yet, the Commission now proposes to rely almost exclusively on demand substitution factors. NPRM ¶¶ 116-20. But nowhere does the Commission justify departing from its reasoned and settled methodology. It may be, as the Commission itself suggests, that its new methodology also indicates that the relevant market is "all interstate, domestic, interexchange services." NPRM ¶ 119. But, absent a reasoned basis for the change, it is difficult to understand the Commission's sudden switch from a supply-side to a

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[16]Memorandum Opinion and Order, Craig O. McCaw and AT&T, 9 FCC Rcd 5836, 5845-48 (1994) ("there is no significant difference between the interexchange facilities made available to a customer making an interexchange call from a 'wireline' telephone and the facilities made available to a customer making an interexchange call from a cellular phone"), aff'd sub nom. SBC Communications v. FCC, 56 F.3d 1484, 1493 (D.C. Cir. 1995) ("Supply substitutability is a well-accepted consideration in market definition").

demand-side methodology. Moreover, the Commission relies on this switch in re-defining the relevant geographic market, as discussed below.

The arbitrariness of switching to substitutability of demand is further underscored by the NPRM's proposal to examine international services in light of supply substitutability as well as demand. NPRM ¶ 121. Nowhere does the Commission explain why it places its traditional emphasis on supply in the international context but relies exclusively on demand when measuring the market for domestic.

2. Geographic Market. The Commission has tentatively proposed a city-pair or regional market for interexchange services. NPRM ¶¶ 122-28. This represents a complete departure from the national market definition adopted in the Fourth Competitive Common Carrier Report and Order, 95 F.C.C.2d at 576, and reaffirmed in the AT&T Non-Dominance Order, 11 FCC Rcd at 3286-87. Moreover, a city-pair market for interexchange services is unjustifiable, as the Common Carrier Bureau recently concluded. According to the Bureau, supply substitutability and low entry barriers indicate that the relevant market for interstate, interexchange services is national in scope. Memorandum Opinion and Order, Application of MCI Communications Corp., 10 FCC Rcd 1072, 1075 (1994). And most importantly, "it would be inaccurate to segment the market into distinct city pairs or even domestic regions . . . because many networks have alternative routing capabilities with nationwide or near nationwide service areas." Id. Telecommunications networks