

equal in type, quality and price.<sup>99</sup> It seems logical to import this similar AT&T Consent Decree requirement and the case law applying it in construing Section 272(e)(2).

The Commission tentatively concludes that Section 272(e)(3), which requires that a BOC charge its affiliate an amount for access that is no less than the amount charged to any IXC, is sufficiently implemented by the BOCs' provision of exchange and exchange access services to their affiliates and all others at tariffed rates.<sup>100</sup> As MCI has explained in other proceedings, an intracorporate purchase of access at tariffed rates -- the "imputation" requirement -- is a meaningless safeguard as long as access is priced significantly over cost, as it is now.<sup>101</sup> The BOC and its affiliate will price their respective services to maximize total profit, whether or not that leads the affiliate to sell at a loss. The affiliate could simply absorb a loss while the BOC made up for it by overcharging for monopoly access service.

Accordingly, Section 272(e)(3) should be read to require not only an intracorporate purchase of access at rates no lower than

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<sup>99</sup> Id. at ¶ 87 n. 160 (quoting United States v. Western Electric Co., 552 F. Supp. 131, 196 (D.D.C. 1982)).

<sup>100</sup> See NPRM at ¶ 88.

<sup>101</sup> See, e.g., Comments of MCI Telecommunications Corporation at 25-27, Petition Requesting that Any Interstate Non-Access Service Provided by Southern New England Telecommunications Corporation Be Subject to Non-Dominant Carrier Regulation, CCB Pol 96-03 (Feb. 26, 1996).

the rates paid by other IXCs -- which can be implemented by requiring the affiliate to pay tariffed rates -- but also the enforcement of that requirement, either by reviewing the affiliate's prices or its profits on both information and telecommunications services. Unless the affiliate's rates or earnings cover its access and all other costs, requiring it to pay the BOC tariffed rates for access will not prevent anticompetitive pricing and cross-subsidization. Obviously, such a process of reviewing the affiliate's rates or earnings would be extremely difficult, uncertain and time-consuming, but without it, requiring the sale of services to the affiliate at tariffed rates is an empty requirement.<sup>102</sup>

#### VI. THE JOINT MARKETING PROVISIONS OF SECTIONS 271 AND 272

This portion of the NPRM addresses the restrictions in Sections 271 and 272 on the joint marketing of local exchange and interLATA services by BOCs, their affiliates and IXCs. The NPRM first requests comment on the regulations necessary to implement Section 272(g)(1), which prohibits the marketing or selling of BOC exchange services by BOC affiliates "unless that company permits other entities offering the same or similar service to

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<sup>102</sup> See F. M. Fisher, An Analysis of Switched Access Pricing and the Telecommunications Act of 1996 at 9-10, Attachment 1 to Reply Comments of MCI Telecommunications Corporation, Implementation of the Local Competition Provisions in the Telecommunications Act of 1996, CC Docket No. 96-98 (May 30, 1996).

market and sell its telephone exchange services."<sup>103</sup> The Commission simply needs to make it clear that this provision prohibits BOC interLATA affiliates from marketing or selling BOC exchange service unless the BOC permits other entities to market and sell its exchange services on the same terms and conditions. Any and all BOC local exchange features marketed or sold separately by the affiliate must be unbundled and made available separately for sale by other entities.

The Commission should also make it clear that this prohibition applies to the international sphere, since BOCs already have a variety of relationships with foreign carriers that would make it possible for a BOC interLATA affiliate to market BOC special features, available only from the BOC's local exchange platform, to foreign end users through a switch in the foreign country. Other international carriers, which may have no relationship with local exchange services, must have the same opportunity as the BOC affiliate to offer the BOC's local exchange features abroad.

Sections 271(e) and 272(g)(2) address joint marketing of local exchange and interLATA services by large IXC's and BOC's, respectively, prior to the BOC's entry into in-region interLATA service. As noted in the NPRM, IXC's only face this restriction in the case of local exchange services they purchase pursuant to Section 251(c)(4) for resale. Based on the language of Section

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<sup>103</sup> See NPRM at ¶ 90.

271(e), IXCs thus are not precluded from jointly marketing their interLATA services with local exchange service they provide through interconnection with an ILEC under Section 251(c)(2) or through purchase of unbundled network elements under Section 251(c)(3).<sup>104</sup>

The NPRM also seeks comment on whether these restrictions on joint marketing encompass prohibitions on advertising the availability of interLATA services combined with local exchange services, making these services available from a single source and providing bundling discounts for the purchase of both services.<sup>105</sup> Bundled discounts, or offering one product conditioned on the purchase of the other, or both products as a single combined product, is clearly the essence of joint marketing.

Advertising the availability of both interLATA and local exchange services by an IXC, however, does not constitute the type of joint marketing prohibited by Section 271(e), since IXCs, unlike BOCs, are permitted to provide both types of services through one entity. Since the same IXC employees and operations may market and sell both types of services, it makes no difference (apart from discounted bundling or product combination concerns) whether both appear in one advertisement or separate advertisements. There is no indication that Congress intended to

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<sup>104</sup> See id. at ¶ 91.

<sup>105</sup> See id.

impose unnecessary costs on the IXCs, such as duplicative advertising or marketing materials; rather, the intent was to maintain a level playing field until BOC entry into in-region services. Similarly, making both types of services available from a single source must not be considered joint marketing prohibited to the IXCs by Section 271(e), since IXCs are permitted to provide both types of service through the same entity. If making both available from a single source were to be considered prohibited joint marketing, the IXCs would have to set up separate affiliates, which is not required under the 1996 Act and would be contrary to the goals of that statute.

MCI also submits that the activities prohibited to the BOCs under Section 272(g)(2) should include "teaming" or other similar arrangements where a BOC is involved in a marketing program that also includes another entity's interLATA services. Where a BOC's involvement in, or endorsement of, a joint marketing program ostensibly conducted by another entity leaves the impression that the BOC and such other entity are jointly engaged in one-stop shopping for local and interLATA services, such a program constitutes the marketing and selling of interLATA services, which is prohibited to the BOCs by Section 272(g)(2).

The NPRM next addresses the manner in which joint marketing may be conducted once a BOC does obtain in-region authority.<sup>106</sup> Section 272(g)(3) provides that the joint marketing and sale of

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<sup>106</sup> See NPRM at ¶ 92.

local exchange and interLATA services permitted under subsection (g) "shall not be considered to violate the nondiscrimination provisions of subsection (c)." As discussed above, however, Section 272(b)(1) requires a BOC and its interLATA affiliate to operate independently, Section 272(b)(3) requires them to maintain separate officers, directors and employees, and Section 272(b)(5) requires such affiliate to conduct all transactions with the BOC on an arm's length basis, with any such transactions reduced to writing and available for public inspection.

Since nothing in Section 272(g)(3) or any other provision suggests that the joint marketing that is permitted once a BOC obtains in-region authority overrides or affects the strict separation requirements in Section 272(b), it must be concluded that such joint marketing must be conducted either by the BOC or its affiliate, under a written contract available for public inspection, but not both together. Moreover, any such services performed by the BOC for its affiliate must be negotiated at arm's length. In order to ensure that this BOC marketing service contract is not used to undermine the separation between the BOC and its affiliate, the contract must specify all of the charges with sufficient back-up to demonstrate that the BOC is not subsidizing its affiliate.

It should be noted that the restrictions on joint marketing in Sections 271 and 272 should apply as well to "inbound" telemarketing or referral calls. Section 274(c) explicitly

prohibits joint marketing by a BOC and its electronic publishing affiliate except in the case of "inbound telemarketing or referral services," strongly suggesting that the omission of such an exception for inbound telemarketing or referral services in Sections 271 and 272 reflects an intent to prohibit joint marketing in such inbound calling situations.<sup>107</sup>

Finally, since the joint marketing provisions do not affect or qualify the strict separation requirements in Section 272(b), or, for that matter, the nondiscrimination requirements in Section 272(e), once a BOC and its affiliate are permitted to engage in joint marketing, the Commission must make it clear that such joint marketing cannot condition the availability of local exchange service on the customer's purchase of interLATA service, or vice-versa, and may not offer both services with a bundled discount that is so great that it compels a customer to buy both services. Moreover, the BOC cannot make both types of service available from a single source, since that would constitute the provision of both types of services from the same affiliate.

#### VII. ENFORCEMENT OF SECTIONS 271 AND 272

This portion of the NPRM addresses the mechanisms necessary to facilitate the detection and adjudication of violations of the

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<sup>107</sup> See League to Save Lake Tahoe, Inc. v. Trounday, 598 F. 2d 1164, 1171 (9th Cir. 1979) (where exception in one part of a statute is omitted in a related part, it should be assumed that Congress intended to omit the exception in the latter).

safeguards in Sections 271 and 272.

A. Reporting Requirements

Because of the wide variety of BOC services and facilities that must be provided to all competitors on a nondiscriminatory basis, reporting requirements analogous to those imposed in the Computer III and ONA proceedings would be a useful first step in monitoring for some of the more obvious violations.<sup>108</sup> MCI has discussed those nondiscrimination reporting requirements in Part V(D), supra, in connection with Section 272(e)(1), and those comments are relevant here as well. In order to make such reporting truly useful as a monitoring device, however, it must be broader than the scope of Section 272(e)(1), which covers only the provision of "telephone exchange service and exchange access." Such reporting should also cover the provision of facilities, to ensure that affiliates are not favored with ICB and other one-time offerings that are not equally available to all competitors.

Reporting requirements can never be a sufficient safeguard, however, no matter how broad, since there is no way of anticipating every type of discriminatory and other anticompetitive conduct. The written transactions between BOCs and their affiliates required by Section 272(b)(5) provide some additional oversight, but that requirement, of course, would be

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<sup>108</sup> See NPRM at ¶ 95.

of no assistance for those transactions not reported or transactions between a BOC and other entities. Strong sanctions for violations thus will be necessary to ensure compliance.

**B. Violations of Nondiscrimination Requirements**

The NPRM seeks comment on whether violations of the nondiscrimination provisions of Section 272 may be shown by the provision by a BOC of different levels of service to its affiliate and other entities or between other entities and whether a BOC could ever justify deviation from a rate, term or condition established under the nondiscrimination provisions of Section 272.<sup>109</sup> Varying levels of service should certainly be sufficient to establish a prima facie case of discrimination, but, as explained above, there has to be some room for variations in services and facilities to meet the individual needs of unaffiliated competitors. Where the unaffiliated entity needs the same service provided in the same way as the BOC affiliate, however, any variation therefrom would almost never be justified.

It should be possible to show a violation of the nondiscrimination provisions by a BOC's provision of different levels of service among unaffiliated entities just as much as by a BOC's provision of different levels of service to its affiliate and other entities. Since competition can be harmed as much by BOC discrimination between unaffiliated entities as it is by

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<sup>109</sup> See id. at ¶ 96.

discrimination between the BOC affiliate and other entities, both forms of discrimination should be equally actionable.<sup>110</sup>

C. Expedited Complaint Procedures and Standards

This part of the NPRM next addresses the expedited complaint procedure in Section 271(d)(6), which covers situations in which a BOC "has ceased to meet any of the conditions required for [in-region] approval," one of which is that "the requested authorization will be carried out in accordance with the requirements of section 272."<sup>111</sup> MCI supports the Commission's tentative conclusion that this provision augments the previously existing complaint remedy in Sections 206-09 of the Act.<sup>112</sup> Otherwise, one or the other would be rendered superfluous. Thus, where a BOC violates the nondiscrimination provisions of Section 272 and thus has ceased to meet a condition of its approval under Section 271, and does so in a manner that causes economic injury, the Commission may impose any of the sanctions specified in Section 271(d)(6)(A) and must award damages under Section 209.<sup>113</sup>

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<sup>110</sup> As a practical matter, it may be much more difficult to demonstrate discrimination between unaffiliated entities, since any nondiscrimination reports will only show differences between the levels of service, by various criteria, received by the BOC affiliate, on one hand, and all other entities, on the other.

<sup>111</sup> See Section 271(d)(3)(B).

<sup>112</sup> See NPRM at ¶ 97.

<sup>113</sup> The Commission has no authority under Sections 206-09 to forgive proven violations of the Communications Act. MCI Telecommunications Corp. v. FCC, 712 F.2d 517, 536 (D.C. Cir.

MCI also supports the Commission's interpretation that it may determine that a BOC has ceased to meet the conditions of its in-region approval by means of the expedited complaint procedure in Section 271(d)(6) or on its own motion, as long as it uses the same legal and evidentiary standards.<sup>114</sup>

The NPRM next seeks comment on what those standards should be.<sup>115</sup> Given that a general complaint remedy already exists under Sections 206-09, a complainant seeking expedited relief under Section 271(d)(6) should specify which conditions for in-region approval are no longer being met by a BOC in order to state a prima facie case. Thus, a complainant seeking Section 271(d)(6) relief should facilitate the Commission's task by stating, for example, that the defendant no longer meets the conditions for approval because it is violating or has violated the nondiscrimination provisions of Section 272, stating which ones and how it is violating them, or is no longer implementing the competitive checklist in Section 271(c)(2)(B) and stating which items are no longer satisfied.

Focusing briefly on the showing necessary under the expedited complaint procedure for a prima facie case of a violation of the nondiscrimination provisions of Section 272, a complainant should be required to demonstrate: (1) a quantifiable

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1983).

<sup>114</sup> See NPRM at ¶ 98.

<sup>115</sup> See id. at ¶¶ 99-107.

or qualitative difference between the complainant and the BOC affiliate or another competitor in some aspect of the BOC's provision or procurement of service, facilities or information; or, (2) a quantifiable decline in quality or qualitative deterioration in some aspect of the BOC's provision of service, facilities or information to the complainant. The latter alternative is necessary because the information as to the BOC's dealings with others, which may ultimately be needed to demonstrate discrimination, might not be available to the complainant if that information is not the subject of a regular reporting requirement.

It should also be possible to establish a prima facie case of a violation of the Section 272 nondiscrimination rules by showing the failure to provide the complainant the equivalent functionality provided to the BOC's affiliate or another competitor, whether or not the BOC is providing the complainant the exact same service, facilities or information as it provides to its affiliate or other entity. It would be difficult to establish precise criteria for a prima facie case of that nature, but the Commission should expressly allow for this type of discrimination case in its regulations implementing Section 271(d)(6). The expedited complaint procedure should also be available to resolve disputes over the setting of technical standards and practices, and BOC insistence on a standard favored by its own affiliate and opposed by other entities should be

sufficient for a prima facie case of discrimination in the establishment of standards under Section 272(c)(1). Such a presumption is necessary to overcome the effects of BOC dominance of the industry technical fora.

Once a prima facie case of a violation of the nondiscrimination provisions of Section 272 has been shown under the expedited procedure, the burden of proof should shift, given the 90-day deadline and the BOCs' control of the relevant information.<sup>116</sup> The shifting of the burden in such cases would be somewhat analogous to the shifting of the burden in a complaint case for unreasonable discrimination under Section 202(a) once the complainant has shown the existence of discrimination between "like" services.<sup>117</sup> The defendant should then have to demonstrate that, in fact, there is no difference as claimed between the complainant and the BOC affiliate or other parties in the service, facilities or information being provided. In situations where the complainant has established a prima facie case by simply showing a deterioration in some aspect of service, the defendant would have to demonstrate that, in fact, there has been no such deterioration or that its affiliate has experienced a

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<sup>116</sup> For the same reasons, the burden should also shift in any case brought under the expedited complaint procedure alleging that a BOC is no longer meeting the conditions for its in-region approval. In this portion of its comments, however, MCI will be focusing largely on cases alleging violations of the nondiscrimination provisions of Section 272.

<sup>117</sup> See NPRM at ¶ 102.

similar deterioration.

The defendant should not be able to meet its burden by showing cost differences or other justifications typically relevant in a discrimination case under Section 202(a). A defendant also should not be allowed to avoid liability by showing a lack of intent to discriminate, since it is the impact of its actions that harms competition. The same factors that necessitate a shifting of the burden -- the short deadline and the BOCs' control of most of the relevant information -- also require that there be no presumption of reasonableness or lawfulness, whether or not the defendant is a dominant carrier. "Reasonableness" is a largely irrelevant concept in this context anyway, since the nondiscrimination provisions of Section 272 contain no such qualification. A somewhat more difficult question in this regard is presented where a prima facie case has been made out on the basis of functional inequality. In such cases, the qualitative nature of the complainant's showing would allow for more variation in the type of rebuttal that would be sufficient to defeat the claim of discrimination, although differences in cost would still be irrelevant.

It should also be noted that complaints under Section 271(d)(6) may also arise from violations of provisions other than the nondiscrimination safeguards. For example, the expedited procedure is available to resolve violations of the joint marketing rules in Section 272(g), including such matters as the

BOC affiliate failing to pay full compensation for marketing services provided by the BOC.

Finally, the Commission is correct in its tentative conclusion that a trial-type hearing before an Administrative Law Judge is not required for expedited complaints brought under Section 271(d)(6).<sup>118</sup> As with complaint proceedings brought under Sections 206-09 and tariff investigations under Section 204, there is no provision for a "hearing on the record" in such cases, but only "notice and opportunity for a hearing."<sup>119</sup> Thus, an informal "paper proceeding" is sufficient to allow the imposition of the non-forfeiture sanctions of Section 271(d)(6) - - an order to correct the deficiency and suspension or revocation of in-region approval.<sup>120</sup>

#### VIII. THE REGULATORY STATUS OF BOC INTERLATA AFFILIATES

The final portion of the NPRM addresses the regulatory treatment -- dominant or non-dominant regulation -- to be accorded BOC interLATA affiliates in their provision of interLATA telecommunications services.<sup>121</sup> The NPRM also seeks comment as to

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<sup>118</sup> See NPRM at ¶ 106.

<sup>119</sup> See Section 271(d)(6)(A).

<sup>120</sup> See Section 271(d)(6)(A)(i) and (iii).

<sup>121</sup> The NPRM also raised the issue of whether LEC interLATA services should continue to be governed by the Competitive Carrier rules, but the comment cycle on those issues was deferred in a subsequent order. See DA 96-1281 (released August 9, 1996).

whether BOC in-region international services should be subject to the same regulatory treatment as domestic in-region interLATA services.

#### A. Relevant Markets

The initial inquiry for any analysis of market power -- the predicate for a finding of dominance -- is the proper product and geographic market definitions. The Commission tentatively concludes that, following the approach it proposed in the Interexchange NPRM,<sup>122</sup> all interstate, domestic, interLATA telecommunications services should be treated as the relevant product market in analyzing the BOC affiliates' market power in the provision of interstate, domestic, interLATA services and that, following its approach in the International Competitive Carrier Order, international message telephone service (IMTS) and non-IMTS should be treated as the relevant product markets in analyzing the BOC affiliates' market power in international services.<sup>123</sup>

The NPRM also tentatively concludes that because of the BOCs' continuing bottleneck power, point-to-point markets in which calls originate in their service regions should be

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<sup>122</sup> Notice of Proposed Rulemaking, Policy and Rules Concerning the Interstate, Interexchange Marketplace: Implementation of Section 254(g) of the Communications Act of 1934, CC Docket No. 96-61, FCC 96-123 (released Mar. 25, 1996).

<sup>123</sup> International Competitive Carrier Policies, 102 FCC 2d 813 (1985), recon. denied, 60 R.R. 2d 1435 (1986).

evaluated separately from point-to-point markets in which calls originate out-of-region in determining whether a BOC affiliate possesses market power in the provision of in-region, interstate, domestic, interLATA services. Finally, the NPRM tentatively concludes that BOC affiliates can be analyzed on a worldwide basis in determining whether they possess market power in the provision of international services, at least for those routes where a BOC is not affiliated with a foreign carrier.<sup>124</sup>

MCI generally agrees with these tentative conclusions. Although some interLATA services have characteristics indicative of discrete product markets, it does not appear that there is now a lack of competitive performance with respect to a particular service or group of services that would require the Commission to address the issue of delineating the boundaries of specific interLATA product markets. The Commission is correct in observing that the critical market power issue before it is whether the BOC affiliates possess market power with respect to the provision of interLATA services originating in areas where BOC local exchange operations provide access service, and the opportunities for cross-subsidies and anticompetitive conduct are so great for interLATA service originating in a BOC's service region that in-region services should be analyzed separately from

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<sup>124</sup> See NPRM at ¶¶ 115-29.

out-of-region services.<sup>125</sup> The Commission is also generally correct in its approach to international service market definitions, although, as explained below, the issue of foreign affiliation should be refined somewhat.

#### B. Classification of BOC Affiliates

In addressing the issue of whether the BOC affiliates are dominant in these markets, the NPRM discusses the possible ways in which they could exercise market power and seeks comment as to whether its current regulations and the regulations proposed in the NPRM to implement the Section 271 and 272 safeguards can prevent such exercise of market power and whether dominant carrier regulation could do so. The NPRM recognizes three ways in which BOCs could exercise market power: (1) by restricting their own output of interLATA services and thereby raising market prices; (2) by raising their rivals' costs or restricting their output through the control of an essential input, such as access service; and (3) by raising their own interLATA and rivals' access costs equally. Under the third method, which does not

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<sup>125</sup> This is not to say that BOCs and LECs cannot exercise considerable leverage over out-of-region interLATA service markets as well, as MCI has explained previously. See letter from Anthony C. Epstein, Jenner & Block, to Richard L. Rosen, Department of Justice, dated August 1, 1994, attached as Exhibit B to Comments of MCI Telecommunications Corporation, Request of Southwestern Bell Communications Services, Inc. To be Classified as a Non-Dominant Carrier, CCB Pol 95-24 (filed Dec. 28, 1995). Their leverage is so much greater over in-region service, however, that a separate market power analysis is necessary.

necessarily involve discrimination or cost misallocation, the additional access profits would make up for the carrier's interLATA losses.<sup>126</sup>

Any of these three techniques should be considered a basis for classifying a BOC affiliate as dominant in the interLATA market. Even assuming that the Commission is correct that BOC affiliates are not likely to achieve sufficient interLATA market share anytime soon to be able to raise interLATA prices by restricting their own output,<sup>127</sup> they could certainly harm interLATA competition and local exchange and access ratepayers if they were able -- and MCI will demonstrate below that they are able -- to impose excessive costs on the IXCs or to restrict inputs needed by the IXCs.

There can be no doubt that such anticompetitive conduct constitutes the exercise of market power and should be considered more than an adequate basis for a finding of dominance, irrespective of whether it immediately results in an increase in consumer interLATA prices. Although the NPRM appears to require a direct effect on interLATA prices as a predicate for any finding that particular conduct constitutes the exercise of market power, it also recognizes that increasing rivals' costs can injure them, and competition as well, even if consumer prices are not raised immediately. If the rivals do not raise their

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<sup>126</sup> See NPRM at ¶¶ 131-32, 141.

<sup>127</sup> See *id.* at ¶ 133.

interLATA rates and instead choose to absorb their increased costs, consumer rates would not have been affected immediately, but competition has surely been harmed in the long run. Antitrust cases have recognized that firms in a position to raise their rivals' costs will do so and that such behavior injures competition, irrespective of the ability or lack of ability to drive those rivals from the market.<sup>128</sup> If it is not necessary to show that such conduct will drive rivals from the market, it should not be necessary to demonstrate that such conduct would force rivals to raise prices to stay in business. Moreover, it is likely that rivals that remain in the market will be weakened by the cost increases they absorb, thereby reducing their output and the vigor of competition, making consumer price increases inevitable. It is even more likely that the interLATA rivals will raise their rates in response to an access cost increase, thereby raising consumer prices immediately.

The NPRM then raises the issue of whether, assuming that raising rivals' costs should be recognized as an exercise of market power, dominant carrier regulation of the interLATA affiliate could prevent such an exercise of power.<sup>129</sup> The Commission assumes that raising rivals' costs will not necessarily result in an increase in the BOC affiliate's

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<sup>128</sup> See Ball Memorial Hospital, Inc. v. Mutual Hospital Insurance, Inc., 784 F.2d 1325, 1339 (7th Cir. 1986).

<sup>129</sup> NPRM at ¶ 132.

interLATA rates and that dominant carrier regulation of the BOC affiliate under the Competitive Carrier rules therefore might not have a direct impact on such BOC conduct. As discussed above, however, raising rivals' costs is in fact likely to result in an increase in the BOC's rates, which could be prevented by dominant carrier regulation. Dominant regulation thus reduces the incentive for such anticompetitive behavior.

More importantly, where the BOC has chosen the third market power abuse tactic discussed in this part of the NPRM -- imposing excessive access costs across the board for its own affiliate as well as other IXCs -- dominant carrier regulation, especially in conjunction with enforcement of the imputation requirement, would be helpful in restraining both BOC affiliate rate increases and predation. Of all of the ways in which the BOCs are likely to exercise market power to the detriment of interLATA service competition, imposing across-the-board excessive access costs is the most likely. Excessive access costs do not violate the letter of any of the separation or nondiscrimination safeguards of Section 272, making them an extremely tempting tactic for raising IXC costs. At the same time, the BOC affiliate can absorb the higher access costs. Although that results in a subsidization of the BOC affiliate by the BOC's access services, the Commission's cost allocation rules and other accounting regulations might not control such cross-subsidies in this situation.

Moreover, this tactic will not be restrained by price cap regulation of access rates, since access rates are already grossly excessive.<sup>130</sup> Thus, the BOCs and LECs start off with this tactic firmly in place. Nothing more has to be done to raise rivals' access costs to an unreasonable level. Moreover, as pointed out in the NPRM, this tactic can be implemented just as effectively by the BOC's failing to pass along reductions in the cost of providing access, which would not be prevented by price cap regulation if the "x" factor were too low.<sup>131</sup> The BOCs are thus already in a position to inflict significant harm on interLATA competition by forcing excessive costs on the IXCs while absorbing paper losses on their own interLATA services.

Other than greatly reduced access costs, only dominant regulation, with strengthened imputation enforcement, can help restrain this tactic. As explained above, the purposes of requiring BOCs to charge themselves (or their affiliates) full access costs are to prevent cross-subsidies and anticompetitive pricing of the non-access service, in this case, interLATA telecommunications services.

In order to carry out these goals, it must be possible to

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<sup>130</sup> See Hatfield Associates, The Cost of Basic Network Elements: Theory, Modeling and Policy Implications (March 1996), attached to ex parte letter from Frank W. Krogh, MCI, to William F. Caton, Secretary, FCC, Policy and Rules Concerning the Interstate, Interexchange Marketplace, CC Docket No. 96-61 (filed May 31, 1996).

<sup>131</sup> See NPRM at ¶ 141 n. 272.

compare all BOC affiliate interLATA rates with all of the costs of those services, on a service-by-service basis, to ensure that their interLATA rates cover all access and other costs. That, in turn, would require that a BOC affiliate file cost support with any interLATA tariff filing to permit the necessary analysis. Accordingly, every BOC interLATA tariff filing should include a description of the access services required to provide each interLATA service and the methods and assumptions used in the calculation of the imputation test for each such service, as well as a showing that the calculation was performed in a proper manner. Where the affiliate is offering a bundled interLATA and interLATA information service, its cost support would have to include all of the relevant costs underlying both categories of services to ensure that the interLATA telecommunications service is covering all of its costs. Thus, this requirement not only requires full cost support, but also, in no event could a BOC affiliate file interLATA tariffs on short notice, since that would not allow sufficient time for the Commission to ensure full compliance.

In short, dominant carrier regulation, including strict enforcement of the imputation rule, is the only way to restrain BOC access price squeezes of their IXC competitors. The Section 272 safeguards are irrelevant to such tactics. Thus, the Commission is wrong in its belief that dominant carrier regulation does nothing to prevent BOC attempts to exercise

market power by raising rivals' costs.<sup>132</sup> It is the only way to limit such tactics if the same costs are "imposed" on its own interLATA services.

Finally, it should be noted that past experience with LEC interexchange services under the Competitive Carrier rules and BOC enhanced services under the Computer III and ONA rules does not provide quite as much comfort as the Commission seems to draw.<sup>133</sup> As the Commission concedes, BOC service regions are much larger than independent LEC regions, giving the BOCs a much greater ability to abuse their bottleneck market power.<sup>134</sup> The BOCs are large enough, for example, for a significant proportion of their in-region traffic to terminate in the same BOC's region, giving it control over both ends of the call. To the extent that experience under Competitive Carrier has been positive, those rules should be retained for the LECs, but that provides little guidance as to the appropriate treatment for BOC interLATA affiliates. Moreover, the imputation problem discussed above requires that some dominant carrier regulation be applied to all BOC interLATA services, even those provided by a separate affiliate. The harm that has already been caused by high BOC and LEC access rates and low LEC interLATA rates is considered "the

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<sup>132</sup> See NPRM at ¶ 132.

<sup>133</sup> See id. at ¶¶ 144-46.

<sup>134</sup> The BOCs' greater ability to abuse their bottleneck power will be magnified, of course, for those BOCs that merge, creating a vast service region. See NPRM at ¶ 148.

norm" and thus does not register on the Commission's radar screen, but that does not equate to a positive experience with LEC interLATA services.

The Commission's reliance on the BOC enhanced services history is even more peculiar. Although the NPRM cheerfully announces that the Ninth Circuit found in the California case that the Commission had justified its elimination of structural separation,<sup>135</sup> nothing could be further from the truth. As explained above, the California decision to which the Commission was referring vacated the Commission's elimination of the structural separation requirements for BOC enhanced services because "the FCC never explains why it now authorizes lifting structural separation."<sup>136</sup> Moreover, such incidents as the MemoryCall case demonstrate the BOCs' repeated access discrimination and other abuses against other voice mail providers. CEI/ONA has not provided enhanced service providers (ESPs) with the unbundled network elements they need to compete effectively. This grim history militates strongly in favor of the most stringent regulation possible for BOC in-region interLATA services. Considering all of these factors, MCI accordingly submits that BOC affiliates should be regulated as dominant carriers in their provision of in-region interLATA telecommunications services.

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<sup>135</sup> NPRM at ¶ 145 n. 283.

<sup>136</sup> California, 39 F.3d at 930.