that could be misallocated. Those provisions also require that the BOC affiliate maintain separate books of account. In addition, they require that any transactions between the BOC and its affiliate be conducted on an arms length basis, and that they be reduced to writing that is available for public inspection. On top of this, section 272(d) requires each BOC to submit to a biannual federal/state audit to confirm compliance with section 272, including the separate accounting requirements set forth therein. These measures, coupled with the Commission's accounting rules and price cap regulation, represent a "belt and suspenders" approach that will provide more than enough protection against any level of cross-subsidization.

Even if these measures were not completely effective in curbing cross-subsidization, cross-subsidization could not possibly occur on such a widespread and sustained basis that a BOC could drive the incumbent carriers out of the market and confer market power on its affiliate. There are four interexchange carriers with nationwide networks, one of which, of course, is AT&T.[33] These carriers have massive investments in network infrastructure, minute incremental operating costs, and substantial financial resources at their disposal, includng healthy operating margins. The notion that an BOC could drive even the smallest of these carriers from the market, much less AT&T, strains the imagination. The notion that it could do so "quickly" is patently absurd. Moreover, as the Commission recognizes, in the most unlikely event it could, the facilities of that carrier would remain intact, ready for another firm to buy at distress sale prices, thereby denying the predator any ability to maintain

33 The Notice states that there are at least three such networks. There are, in fact, four facilities-based networks.

noncompetitive prices.[34] These points are aptly summarized by AT&T's expert economist, Professor Sullivan, in comments submitted by AT&T to the Department of Justice on Ameritech's Customers First Plan:

> Nor is there anything to suggest that any market participant has (or is in a position to) price in a predatory manner -- that is to set prices below incremental cost with the expectation of recouping consequent losses through monopoly prices once competitors have been disciplined or dispatched. . . . [T]he fixed and variable cost relationships culminating from the massive fiber optic investments of all major participants, and the fact that a fiber optic network cannot be withdrawn and turned to other uses, would make it blatantly irrational for any firm to cut prices below incremental costs in the hope of forcing surrender and then recouping losses. Such cuts would have to be massive and remarkably prolonged to drive any otherwise viable competitor out of the market. Moreover, even if such conduct succeeded in sending a competitor to the bankruptcy court it would leave the departing firm's fiber optic network intact. That network -- written down in bankruptcy proceedings and thereafter available at a lower capital cost -- would be brought on line again as soon as, or even before, the predator sought to recoup losses.[35]

In short, no credible claim can be made that BOCs are capable of quickly conferring market power on their affiliate through cross-subsidization. To the extent incumbent carriers suggest otherwise, they are simply trying to game the regulatory process to thwart competition.

(ii) Discrimination

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34 Notice at para. 137.

35 AT&T's Opposition to Ameritech's Motions for Permanent and Temporary Waivers from the Interexchange Restrictions of the Decree, Civil Action 82-0192, Affidavit of Lawrence A. Sullivan, App. C at 14-15, February 15, 1994.

The other potential abuse cited by the Commission is discrimination. The Commission asks whether a BOC could attempt to discriminate against unaffiliated interLATA carriers by providing its affiliate's competitors with poorer quality interconnection to the BOC's local network than it provides to its affiliate, or by delaying competitors' interconnection requests. Asserting that section 272 of the 1996 Act will not eliminate the BOCs' incentive to discriminate against competing interexchange carriers, the Commission asks whether that provision and other regulatory safeguards will prevent BOC affiliates from acquiring market power through discrimination. As discussed below, the answer to this question is clearly yes.

As an initial matter, Ameritech believes that claims as to BOC incentives to discriminate are grossly exaggerated. As discussed above, any use of "bottleneck facilities" to impede entry has been eliminated by the Act and Commission regulations. AT&T, MCI, MFS, and others are poised to compete for Ameritech's local exchange customers, using their own facilities, Ameritech network elements, and Ameritech's resold services, or any combination thereof. AT&T has already begun advertising its entry into the local exchange business, and, when Ameritech recently made a billing error affecting a relatively small number of customers, it took out full page ads in the Chicago Tribune and the Chicago Sun Times for several days to make sure all customers were aware of it.[36] Under the circumstances, it would be suicidal for Ameritech to attempt to discriminate by providing inferior service to customers using a competing interexchange carrier. That would be far more likely to alienate Ameritech's local

36 See, e.g., Chicago Sun Times July 4, 1996 at 7.

exchange customers -- at a time when Ameritech can ill-afford to do so -- than it would be to win new interexchange customers.

The actions of the cable television industry in recent years are instructive. Few would contend that, two years ago, there was widespread actual competition for cable television services. There was, however, significant potential competition. Several courts had struck down the cable-telco cross-ownership rules, the Commission had issued its video dialtone reconsideration order, and it had begun processing section 214 applications for video dialtone service. At that time, despite the service requirements of the 1992 Cable Act, cable television companies were notorious for poor customer service. Nevertheless, faced with the threat of imminent -- not actual -- competition, the cable industry took steps to improve customer service. Among these steps were "on-time guarantees," in which they promised to show up for cable installation appointments on time or do the installation for free.[37] They even began offering $20 refunds when they were late for a service appointment.[38] The industry took these steps because it recognized that it would quickly lose market share when competition did arrive unless it immediately began improving customer goodwill.

The actions of the cable industry stand in sharp contrast to the Commission's perceptions of BOC incentives. Like the cable industry, the BOCs have incentives to build upon customer goodwill, not destroy it. Providing

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37 See, e.g., Broadcasting and Cable, December 5, 1994, at 7.

38 Id.

customers with inferior local exchange or access service as part of a discrimination scheme would only destroy it.

Even assuming that BOCs have the incentive to discriminate, they lack the ability to do so. First, the 1996 Act is literally sprinkled with nondiscrimination requirements, so much so, that the Commission in this Notice is seeking comment on how all of these requirements interplay. There is no doubt that if a BOC attempted to discriminate in its provision of local exchange or access service in order to favor its long-distance affiliate, that would be a clear violation of the Act. It cannot be assumed that BOCs would embark on such a foolish and illegal course and it is inappropriate to issue regulations under Section 272 on the assumption that regulations issued under 251 will not be followed or effective.

Second, from an engineering perspective, there would be significant obstacles. In contrast to pre-divestiture practice, the assigning and provisioning of local exchange facilities today is almost totally automated, leaving little room for individual discretion to discriminate against a competitor. Each of the mechanized systems used by Ameritech -- Facility Assignment and Control System (FACS), Computer System for Mainframe Operations (COSMOS), and TIRKS -- assigns circuit components based on one factor only: whether the components meet the technical requirements of the service. Each of them is blind to the identity of the customer. Moreover, these systems do not contain information on the relative quality of facilities in inventory, only standard facility descriptions and codings that indicate whether facilities meet particular tariffed parameters.

Moreover, creating a deficient class of loops would be virtually impossible because competitors usually use loops that are part of the large, installed base of equal-quality loops, and because new loops are planned and engineered without knowledge of whether they will be used by competitors or their customers. Differentiation among customers occurs at the point of billing, but not at the network planning and engineering state. Also, a program of discrimination using loops would have to be capable of instantaneous adjustment -- a virtual impossibility -- because the same loop that is leased to AT&T on one day may return to Ameritech the next day and then go to MCI the day after that. Finally, because loops are provided by cable that binds together large numbers of loops, it would be difficult to single out for degradation loops leased to a competitor without harming other loops in the cable.

With respect to local switching, in order to give a competitor a poorer grade of service, certain line or trunk ports would have to be specifically programmed to support this poorer grade of service. This would require substantial switch reprogramming by the switch manufacturer. Since all of Ameritech's switches are manufactured by unaffiliated entities (44% of them, serving 49% of the lines, by AT&T), Ameritech could not discriminate without third party participation, a most unlikely conspiracy.

Third, even if a BOC did discriminate, the BOC could not be sure that it would derive any benefit from the discrimination. For one thing, a customer might well assume that the discrimination was the fault of the BOC. Even assuming the customer still lacks the option to switch local carriers, it might well decide to avoid the services of the BOC's long-distance affiliate, as a result of the discrimination. If the customer does not blame the BOC for the service problems,

there is no reason to assume that the customer would switch its long-distance service to the BOC affiliate. There are over 500 interexchange carriers offering service today, large numbers of which compete in any given state. A customer dissatisfied with MCI, for example, would be just as likely to switch to AT&T, Sprint, or one of the other carrriers serving that marketplace as it would a BOC affiliate. Only if the general public was aware that the BOC discriminated against all other carriers vis-a-vis the BOC's own affiliate would customers be incented to switch to the BOC affiliate. If customers were aware of such systematic, widespread discrimination, surely it would be apparent to the incumbent carriers and to regulators.

This point cannot be overemphasized. Because discrimination could only succeed in conferring market power on a BOC affiliate if large numbers of customers adjusted their purchases as a result of it, any attempt at discrimination is bound to fail. The reason is simple: if large numbers of customers are aware that a carrier's service is deficient in one or more respects, so too will be the carrier. If that deficiency is a result of discrimination, the carrier will promptly bring it to the attention of regulators. The Department of Justice has recognized this when it stated: "[D]iscrimination 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."[39] Likewise, the United States Court of Appeals for the District of

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39 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, filed Feb. 3, 1987 at 96. Ameritech does not disagree with the Commission's conclusion in the Interconnection Order that there may be forms of discrimination that are imperceptible to end users. Interconnection Order at para. 224. However, such types of discrimination would not lead to the acquisition of market power. Only discrimination that affects the purchasing decisions of large numbers of customers could confer market power.

Columbia Circuit recognized this when, in the context of BOC provision of information services, it stated: "[I]nformation service giants operating throughout the country, such as IBM, AT&T and GE, will notice any discrepancies in treatment by the various BOCs and will have the capacity and incentive to bring anticompetitive conduct to the attention of regulatory agencies."[40]

Indeed, discrimination would likely be obvious to long-distance carriers long before it would be remotely apparent to customers. All of the facilities-based long-distance companies have aggressive "vendor management" programs which regularly, and with great precision, record virtually every aspect of the access services provided to them, including, for example, circuit failure rates, installation intervals and repair intervals. Any service degradation would immediately be detected by automatic test equipment and performance monitoring devices employed by these carriers.

These monitoring programs can be, and are, enhanced by FCC parity reports as well as through benchmarking. Unlike pre-divestiture AT&T, which controlled virtually all local exchange facilities throughout the country, the BOCs can be the subject of extensive benchmarking with respect to service quality, installation, maintenance, and other criteria. Not only can BOC competitors compare the performance of one BOC with the others, it can also compare a single BOC's performance before and after long-distance entry. This benchmarking would enable a BOC competitor to identify any degradation in service quality quickly and before it had any effect on the carrier's position in the

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40 United States v. Western Electric Co., 993 F.2d 1572, 1579 (D. D.C. 1993), cert. denied, 114 S. Ct. 487 (1993) (Information Services Decision).

market. The United States Court of Appeals recently acknowledged the value of benchmarking, when it stated:

> There is a lot of evidence that the break-up and other recent developments have enhanced regulatory capability. The seven independent BOCs are not the old AT&T. As this court noted in the Triennial Review Opinion, the existence of seven BOCs increases the number of benchmarks that can be used by regulators to detect discriminatory pricing. Indeed federal and state regulators have in fact used such benchmarks in evaluating compliance with equal access requirements (i.e., the requirements disparaged by the district court) and in comparing installation and maintenance practices for customer premises equipment. . . . The BOCs themselves will be each other's customers in the transmission of information services, with a unique capacity to spot misbehavior and notify regulators.[41]

In short, discrimination may be theoretically possible, but in the real world, it is not a significant risk. Given the incentives of the BOCs to solidify their relationships with local exchange customers, the difficulties of discriminating from an engineering standpoint, and the enormous likelihood that any discrimination that is discernible to customers would be obvious to competitors, there should be little doubt that BOCs could not confer market power on their long-distance affiliates through discrimination.

B. BOCs Do Not Have The Ability To Cause Increases In The Price of InterLATA Services By Raising The Costs Of Their Rivals; But Even If They Did, That Would Be No Basis For Dominant Treatment Of The BOCs' Affiliates

The second manifestation of market power on which the Commission seeks comment has to do with raising rivals' costs. Specifically, the Commission

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41 Id.

asks whether the BOCs could, through discrimination or cross-subsidization, raise the cost of their affiliates' competitors, and thereby enable their interLATA affiliates to raise prices themselves. Alternatively, the Commission asks whether a BOC could effect a price squeeze by raising the costs of access for all interexchange carriers, including its affiliate. The Commission also asks whether these issues are relevant to the regulatory status of a BOC long-distance affiliate. The answer to each of these questions is no.

In the preceding section, Ameritech explained in detail why BOCs in general, and Ameritech in particular, do not have the ability to discriminate in their provision of local exchange or access services to favor their long-distance affiliates. Ameritech will not repeat those arguments here. Suffice it to say that, because the BOCs cannot discriminate, they cannot use this tool to raise their rivals' costs.

Nor do the BOCs have the ability to raise rivals' costs through cross-subsidization. As explained above, price caps, separate subsidiary requirements, accounting safeguards, and biannual federal/state audits provide more than abundant protection against any risk of undetected cross-subsidization. Moreover, because BOCs must charge their affiliates the same access rates they charge unaffiliated carriers, a BOC could not raise the costs of its rivals without also raising the costs of its long-distance affiliate.[42] Thus, even if it could inflate its access rates by misallocating costs, its long-distance affiliate would derive no cost or pricing advantage from such misallocation.

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42 See section 272(e)(3) of the Act.

Anticipating this argument, the Commission asks whether the RBOC would nonetheless benefit by raising access charges to everyone, including its affiliate. The Commission suggests that the BOC affiliate could then capture additional market share by not raising its prices to reflect the increase in access charges. It states that, although the affiliate would report little or no profit, the BOC firm as a whole would receive higher access revenues. According to the Commission, if the BOC were to raise its access rates high enough, it would be impossible for other interexchange competitors to compete effectively.

This theory ignores that, if the BOCs had the ability to raise access prices so substantially, they would have every incentive to do so now. Indeed, if the BOCs could increase access prices so high as to effect a price squeeze on the likes of AT&T, they would arguably be better off not entering the long-distance business at all. By staying out of the business, they could continue to collect excessive access charges exclusively from unaffiliated carriers, rather than from their own affiliate.

Obviously, BOCs do not have the ability to effect a price squeeze by raising access prices because their access prices are regulated. Indeed, the Commission recently adjusted the price cap mechanism, substantially raising the productivity index. That index is now significantly higher than the productivity index that applied to AT&T during the brief period in which AT&T was subject to price cap regulation.[43] Moreover, the FCC has announced its intention to

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43 Moreover, as noted above, the Commission has made it much easier for interexchange carriers to avoid access charges after the BOCs receive long-distance authority. Specifically, the Commission has interpreted section 251(c)(3) to permit interexchange carriers to purchase what is effectively section 251(c)(4) resale under the auspices of section 251(c)(3). No facilities are required; no investment is required. If the interexchange carrier wins the local exchange customer, it can avoid access charges.

reform its access charges rules to remove non-cost components from access charges no later than May 8, 1997.[44]

Moreover, the BOC long-distance affiliate could not just blithely ignore access charges in setting its own long-distance prices. Section 272(e)(3) requires the BOCs to charge their interLATA affiliates an amount for access that is no less than the amount charged to any unaffiliated interexchange carrier. A BOC affiliate's retail rates will have to recover these access charges, as well as the transport costs paid to the BOC's transmission supplier. Dominant or nondominant, the affiliate's retail rates would be readily discernible and below-cost pricing would provide a red flag to regulators.

Further diminishing the ability of a BOC to effect a price squeeze is the fact that their ostensible market power is confined to a relatively small region of the country. Ameritech serves less than 15% of the nation's access lines, and a substantial portion of the long-distance calls originating in Ameritech territory terminate outside that territory. Thus, even assuming Ameritech had the ability to raise its rivals' costs, the effect of any such endeavor would be blunted by the relatively small impact Ameritech could have on the overall cost structure of the major interexchange carriers. In fact, to the extent a BOC's long-distance affiliate focuses most heavily on in-region service, any increase in access charges by that BOC would have a greater impact on its affiliate than on unaffiliated carriers, such as AT&T, MCI, and Sprint, which market heavily in all regions of the country.

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44 Interconnection Order at para. 8.

In any event, these issues are completely irrelevant to whether an affiliate of a BOC is dominant or nondominant. Even assuming that a BOC could raise its rivals' costs of providing interexchange, interLATA services -- either through discrimination, cross-subsidization, or general access price increases designed to effect a price squeeze -- regulating the BOC affiliate would in no way address the problem. If, for example, the affiliate is denied the ability to raise its rates to take advantage of its competitors' higher costs, the affiliate would presumably gain market share. On the other hand, if the affiliate is permitted to raise its rates to prevent it from gaining market share, under the Commission's theory, the RBOC earns supracompetitive profits. In neither case, is the underlying problem addressed.

The Commission, in fact, appears to recognize this when it says:

> "[w]e believe that our regulations associated with the classification of a carrier as dominant generally are designed to prevent a BOC affiliate from raising price by restricting its output rather than to prevent a BOC from raising price by raising its rivals' costs. . . . Although price cap regulation could limit a BOC affiliate's ability to raise its interLATA rates if the BOC caused the affiliate's rivals to raise their prices by increasing their costs, price regulation would not prevent the affiliate from profiting from the BOC's raising of rivals' costs through increased market share."[45]

This is why, as the Commission notes, the Competitive Carrier Fourth Report and Order defines market power solely in terms of the ability of an entity to raise price by restricting its own output. Broadening that definition now -- and regulating a BOC affiliate as nondominant because of theoretical concerns about the conduct of the separated BOC -- would not only be a departure from

45 Notice at para. 132.

Competitive Carrier, it would be flatly inconsistent with the Commission's stated desire "to minimize the burden on the BOCs of the rules we adopt in this proceeding."[46]

In sum, subjecting BOC long-distance affiliates to dominant carrier regulation would not only be the wrong prescription for the hypothetical concerns raised in the Notice, it would be a prescription that would be administered to the wrong patient. To the extent the Commission is concerned with the potential abuse of alleged bottleneck control over local exchange facilities, those concerns relate to the conduct of the BOC, not the BOC affiliate. None of the regulatory requirements associated with dominant carrier status would in any way aid the Commission in detecting or preventing such conduct. They would advance no cause except that of the incumbent competitors who would like nothing more than to hobble BOC long distance entry in this critical respect. In the interest of true competition, the Commission should not countenance such a result.

C. Treating BOC InterLATA Affiliates As Dominant Would Be Antithetical To A Procompetitive Deregulatory National Policy Framework

In the Notice, and indeed, in virtually every item the Commission has issued since the enactment of the Telecommunications Act of 1996, the Commission has stated its intent to adopt rules and policies that further Congress' goal of providing for "a procompetitive, deregulatory national policy framework."[47] Treating BOC long-distance affiliates as dominant would do

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46 Notice at para. 9.

47 Interconnection Order at para. 21; Policy and Rules Concerning the Interstate, Interexchange Marketplace, CC Docket No. 96-61, FCC 96-331, released August 7, 1996 at para. 1, citing Joint Explanatory Statement at 1.

grave injustice to that goal. Not only would it be overly -- and unnecessarily -- regulatory, it would be anticompetitive. If there is to be a real injection of new competition in the long-distance marketplace, new entrants must be given the tools needed to compete. Subjecting them to dominant carrier regulation, when every other carrier in the market, including AT&T, is nondominant, would deny them these tools. Indeed, it would be devastating to their ability to compete effectively.

Most obviously, it would make them a step slower in the marketplace than every other competitor. Dominant carriers must file tariffs on up to 45 days' notice. Nondominant carriers, in contrast, may change rates and introduce new services on one day's notice. Not only does this prevent dominant carriers from responding quickly to the demands of the marketplace, it gives their competitors advance notice of all of their pricing and service initiatives. That, in turn, enables the competitors to preempt such initiatives, denying dominant carriers the first-mover advantages that they would otherwise obtain and that fuel pro-consumer initiatives. It also enables them to price just below the tariff rate of dominant carriers, thereby retarding aggressive price competition that BOC affiliates could bring to the market.

This regulatory disparity would be, of course, only the tip of the iceberg. In addition to the asymmetric regulatory rules, BOC affiliates would be subjected to the worst forms of regulatory gamesmanship. The incumbent long-distance carriers can be expected to use every weapon at their disposal to fight new competition. This is as it should be if they are waging their competitive battles in the marketplace. However, treating BOC long-distance affiliates as dominant,

would shift the battlefield from the marketplace to the regulatory arena. Instead of focusing exclusively on how better to serve customers, the incumbent carriers would throw regulatory roadblocks at the efforts of new competitors to serve customers. They would routinely challenge the tariffs of BOC affiliates on the most flimsy of grounds, injecting uncertainty and delay into the process, and thereby alienating customers whose business the BOC affiliates must attract from incumbent carriers.

These are not exaggerated concerns. The Commission recognized their legitimacy in declaring AT&T nondominant:

> The cost of dominant carrier regulation of AT&T in this context includes inhibiting AT&T from quickly introducing new services and from quickly responding to new offerings by its rivals. This occurs because of the longer tariff notice requirements imposed on AT&T, which allow AT&T's competitors to respond to AT&T tariff filings covering new services and promotions even before AT&T's tariffs become effective. The longer notice requirements imposed on AT&T thus also reduce the incentive for AT&T to initiate price reductions. In addition, to the extent AT&T were to initiate such strategies, AT&T's competitors could use the regulatory process to delay, and consequently, ultimately thwart AT&T's strategies. Furthermore, such regulation imposes compliance costs on AT&T and administrative costs on the Commission.[48]

The Commission should not cripple the BOC affiliates with unnecessary regulatory shackles as they seek to bring much-needed new competition to long-distance services. The need for additional competition in long-distance services is widely recognized. As Assistant Attorney General Bingaman has observed, "in

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48 Motion of AT&T Corp. to be Reclassified as a Non-Dominant Carrier, 11 FCC Rcd 3271, 3288 (1995).

long distance telephone markets," there is "room for more competition."[49] In this regard, despite claims of interexchange carriers that average prices have been moving downward, the facts are that basic rates have been ratcheting upwards for years, and the majority of all customers have been paying these steadily increasing rates because they do not qualify for or enroll in any of the interexchange carriers' discount programs. This is an industry that clearly needs a dose of additional competition to bring benefits to all customers. Indeed, just two weeks ago, it was reported that the top two long distance carriers had raised their rates again. According to the story in NetworkWorld, "[u]sers are rumbling that the long distance carriers are taking advantage of the customers while they can, before competition from the Bells begins."[50] If the BOCs are to be able to answer the call and compete effectively as new entrants in the long-distance marketplace, they must be accorded the same nondominant status that every other carrier enjoys.

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49 The Antitrust Reform Act: Hearings on H.R. 3626 Before the Subcommittee on Economic and Commercial Law of the House Committee on the Judiciary, 103d Cong., 2d Sess., at 5, 6 (Jan. 26, 1994).

50 "AT&T, MCI ratchet up rates," NetworkWorld, July 29, 1995 at 1. The Commission itself recently noted that BOC entry into the long-distance marketplace "provides the best solution to any problem of tacit price coordination" in the long-distance marketplace.Policy and Rules Concerning the Interstate, Interexchange Marketplace, Notice of Proposed Rulemaking, CC Docket No. 96-61, FCC 96-123, released March 25, 1996, at para. 81.

III. STRUCTURAL SAFEGUARDS UNDER CONSIDERATION GO BEYOND THE INTENT OF CONGRESS AND WOULD UNDULY LIMIT THE ABILITY OF BOCS TO COMPETE WITHOUT ANY REDEEMING ECONOMIC BENEFIT

Section IV of the Notice addresses each of the five provisions contained in the Act relating to the structural separation and transactional requirements imposed on section 272 affiliates. Unfortunately, the Commission's proposals for implementing section 272(b)(1) and section 272(b)(3) are overly broad and not supported by a fair reading of the Act. If adopted, they would expand the separation restrictions well beyond what Congress prescribed and would impose excessive costs on the BOCs and their affiliates. In addition, they are wholly unnecessary to prevent anticompetitive behavior. The Commission should reject these proposals in favor of an approach that is more consistent with the Act and sound public policy.

A. The Requirement that BOC Affiliates "Operate Independently"from the BOC is Qualitative in Nature

In Paragraph 57 of the Notice, the Commission notes that Section 272(b)(1) requires that the in-region interLATA affiliate "shall operate independently from the Bell operating company", and observes that the Act does not further explain that requirement. Citing the maxim that each provision of a statute must be presumed to have meaning, the Commission tentatively concludes that this subsection imposes requirements beyond the specific separation requirements listed in the subsections that follow. It asks whether it should impose further requirements to "implement" section 272(b)(1), suggesting, for example, various Computer II rules and/or Competitive Carrier separation requirements.

Ameritech agrees that each provision of a statute should be presumed to have some meaning. Ameritech does not agree, however, that the term "operate independently" therefore must mean something very specific and quantifiable.[51] When Congress intended to establish specific separation requirements, it did so, namely in sections 272(b)(2) through (5). Therefore, it can be presumed that if Congress had intended that the Computer II or the Competitive Carrier or any other specific requirements be incorporated into section 272, it would have made this clear. It did not. Section 272(b)(1), in contrast to sections 272(b)(2)-(5), is qualitative in nature. [52] The Commission should interpret this provision accordingly.

Specifically, Ameritech urges the Commission to refrain in this proceeding from grafting specific, additional separation requirements into section 272(b)(1). Instead, the Commission should recognize that this provision establishes a general, qualitative standard to guide the Commission in its application of the more specific requirements in sections 272(b)(2) - (5). In this respect, the issue of whether an affiliate is "operating independently" from a BOC is inevitably a question of fact. It depends, among other things, on the nature of the activity in question, as well as the relationship between the section 272 affiliate and the BOC. For example, given that section 272(g) of the Act expressly authorizes

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51 In construing "operate independently", the Commission should also recall that in Computer II the Commission required that "[e]ach such separate corporation shall operate independently in the furnishing of enhanced services and customer-premiseequipment,"but none of the more specific Computer II requirements were ever said to be derived from that requirement, nor was it ever given specific meaning.

52 Presumably, Congress drafted it that way to allow the Commission the flexibility to address differing factors, in which case, attempts by the Commission to anticipate all cases in advance would be inconsistent with Congressional intent.

BOCs and their interLATA affiliates to market or sell each other's services, the term "operate independently" is likely to mean something different in the marketing context than in another context. Likewise, "operate independently" may mean something different with respect to an interLATA affiliate that is wholly owned by a BOC (as opposed to an RBOC) than an affiliate that is owned by an RBOC. In the former case, it may be appropriate to impose certain restrictions that might be unnecessary in the latter case. The Commission should not attempt to address in this proceeding the inumerable permutations of how an interLATA affiliate may interact with a BOC. Attempting to craft one-size-fits-all rules in a factual vacuum would be a fruitless exercise doomed to failure.

Instead, the Commission should give content to the term "operate independently" in the context of individual BOC section 271 applications. In that context, the Commission will have a factual record on which to base its decisions. Specifically, it will be able to determine, based on the actual business and operating plans submitted by the applicant, whether the BOC and its interLATA affiliate will be sufficiently separate. The applications, supporting documents, and operational models presented by each BOC are likely to be widely divergent, and thus, these individual proceedings will be the ideal forum in which to conduct this inquiry.

B. Section 272 Only Applies to the Relationship Between Bell Operating Companies and their Manufacturing and InterLATA Affiliates.

Before taking up the individual separation requirements under consideration in the Notice, Ameritech wishes to clarify the scope of those provisions. Section 272(a) by its terms governs the relationship between (i) affiliates performing the activities specified in section 272(a) and (ii) the BOCs

(that is, the operating companies) and any affiliate of a BOC that is subject to section 251(c). Section 153(4)of the Act defines the term "Bell Operating Company." It specifically provides that the term includes only the actual operating companies, as opposed, for example, to the RBOCs. In fact, the provision states that the term "does not include an affiliate of any such company" other than a successor or assign of the BOC. Therefore, the separation requirements of section 272 do not apply to any other non-BOC Ameritech affiliate, such as Ameritech Corporation itself or Ameritech Mobile, Inc (Ameritech's cellular subsidiary). Ameritech's comments assume there is no dispute to be raised on these points, given the clear meaning of the statutory language.

C. Section 272 Does Not Prevent the Sharing of Administrative Services

In paragraph 62 of the NPRM, the Commission tentatively concludes that the Act prohibits the sharing of administrative services between a Bell operating company and its long-distance or manufacturing affiliate. This prohibition includes shared administrative services which were permitted under Computer II : accounting, auditing, legal, personnel recruitment and management, finance, tax, insurance, and pension services. The Commission even goes so far as to suggest the possibility that the BOC and its affiliate could not receive the same services provided from a common outside vendor.

Ameritech disagrees with the Commission's tentative conclusion. It also strongly opposes any suggestion that the Act, in any way, prohibits a BOC and its affiliate from using the same outside vendors of administrative services. These proposals are not only unsupported by the language of the Act, they are,

as discussed in subsection D below, not necessary to prevent discrimination or other anticompetitive conduct that threatens meaningful competition.

The only basis cited in paragraph 62 for forbidding administrative sharing is the language of section 272(b)(3) requiring the interLATA affiliate to "have separate officers, directors, and employees from the Bell operating company of which it is an affiliate". This provision, however, does not prohibit administrative sharing. Requiring an affiliate to operate with separate officers, directors, and employees means only that the same person may not simultaneously be an officer, director, or employee of both entities. It does not in any way imply that either entity, using its own employees, cannot provide any services to the other.

This point is irrefutably made by a series of provisions of the Act which clearly and expressly recognize that transactions and services between the BOC and the interLATA affiliate would occur with some regularity. For example, section 272(b)(5) requires that transactions between the interLATA affiliate and the BOC be "on an arm's length basis," while section 272(c)(1) prohibits BOCs from discriminating in their dealings with affiliates in the "procurement of goods, services, facilities and information, or in the establishment of standards[.]" These sections of the Act and others would be rendered meaningless by the Commission's tentative conclusion.[53]

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[53] Moreover, since nothing in the Act would preclude a BOC (as opposed to an RBOC) from owning a section 272 affiliate, it would be untenable for the Commission to hold that the Act prohibits BOCs and section 272 affiliates from sharing common administrative functions, since some many of those functions are inherent in ownership. For example, the parent must be able to file a consolidated federal income tax return which includes the operations of its affiliate. See 15 U.S.C. § 1502 and regulations thereunder (once a taxpayer has elected to file a consolidated federal return, it must thereafter include all subsidiaries of which it owns more than eighty percent).

The plain meaning of the words used by Congress is confirmed when they are compared to what Congress provided in the case of the electronic-publishing affiliate required under section 274. Under Section 274(b)(5)(A), the BOC and its electronic-publishing affiliate may "have no officers, directors, and employees in common", which is virtually indistinguishable from the rule of Section 272(b)(3). However, Section 274(b)(7) goes on to prohibit the BOC from doing "hiring or training of personnel on behalf of" the electronic-publishing affiliate. Obviously, if the rule against common employees were enough, standing alone, to forbid the sharing of such administrative services as personnel recruitment, a specific rule against shared personnel recruitment would be wholly unnecessary. Thus, applying -- once again -- the rule of construction that each statutory provision is presumed to have a meaning, it is plain that Congress did not regard its rule against common employees as an automatic blanket prohibition of shared administrative services.

It is also plain that Congress knew just what words to use when it needed to forbid a shared administrative service. It used those words with a deliberate purpose to forbid personnel training in section 274, and it left them out of section 272 just as deliberately. Accordingly, the tentative conclusion that section 272 forbids the sharing of administrative services lacks support in the statutory language and should be rejected.

In sum, if the separate affiliate is to remain, as it must, in the same corporate family as the BOC, subject ultimately to common governance, it is impossible to avoid -- and therefore Congress could not have intended to forbid

-- the sharing of certain administrative functions that are inherently required by the fact of common ownership. Accordingly, the Commission should revise its tentative conclusion that such sharing is forbidden by the law.

D. Restrictions on the Sharing of Administrative Services are Not in the Public Interestis Needed

As demonstrated above, the Act neither requires nor contemplates a prohibition on the sharing of administrative services between a BOC and its long-distance affiliate. In addition, any such restriction would be bad public policy. It is in no way necessary to prevent discrimination or cross-subsidization, the twin evils that section 272 is designed to address. At the same time, it would impose significant costs by denying BOCs the economies obtainable from utilizing existing organizations to perform administrative tasks. These additional costs reduce the ability of BOCs to offer lower prices to consumers.

As discussed earlier in these comments, there is no plausible basis upon which to conclude that BOCs have the ability to impede competition through cross-subsidization. Price cap regulation, the Commission's accounting rules, the Act's audit requirements, and the fact that cross-subsidization is of no utility unless it confers market power -- a practical impossibility here -- all negate the possibility that sharing of administrative functions could lead to anticompetitive cost-shifting.

Concerns about discrimination stemming from the sharing of administrative services are equally implausible, since administrative personnel are functionally and organizationally separate from personnel in network operations. For example, it is difficult to understand how a BOC might

discriminate long-distance or manufacturing competitors by affording affiliate employees the benefit of a common health plan or pension plan, or through shared legal legal counsel or any of the other administrative functions the Commission suggests might be subject to separation.

Although forcing RBOCs to replicate administrative support functions within their long-distance and manufacturing facilities appears to offer no redeeming public benefit, it is certainly not without cost. The BOCs' administrative functions, like those of most other large organizations, tend to be carried out by organizations that have developed specialized processes, procedures, and expertise. Because of the specialization required to make each of these functions effective, the RBOCs -- like other large organizations, carry these functions out on a firm-wide basis from centralized administrative services departments. To deny BOCs the ability to share with their affiliates these administrative services would force the BOCs to create new organizations that are not only redundant, but lacking the experience and institutional knowledge of BOC administrative departments. These added costs, which other carriers, including AT&T, will not have to incur, ultimately find their way into consumer prices. They are, therefore, harmful, not only to the BOCs, but to end users as well.

In contrast to the Commission's proposals here, in the Computer II decision, the Commission specifically exempted administrative functions from separation requirements. In considering whether to impose separate requirements, the Commission states::

> Various parties to this proceeding have urged stringent separation where a separate subsidiary is imposed. It is even