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Before the
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C. 20554

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF SECRETARY

In the Matter of	)	
	)	
Implementation of the Telecommunications Act of 1996:	)	CC Docket No. 96-150
	)	
Accounting Safeguards Under the Telecommunications Act of 1996	)	

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COMMENTS OF THE TELECOMMUNICATIONS RESELLERS ASSOCIATION

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August 26, 1996

No. of Copies rec'd 0+13
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SUMMARY

The Telecommunications Resellers Association ("TRA"), an organization consisting of nearly 500 interexchange, international, local and wireless resale carriers and their underlying product and service suppliers, offers the following comments on the Commission's adoption of accounting safeguards in connection with implementation of the 1996 Act:

- The Commission's Part 32 affiliate transactions rules should apply to all transactions between a BOC and its affiliate "to ensure that these services are not subsidized by subscribers to regulated telecommunications services.

- The Commission should require that the accounting of all transactions between a BOC and its affiliate, as well as all transactions between ILECs and their affiliates, comply with Generally Accept Accounting Principles ("GAAP").

- Internet access alone should not satisfy Section 272(b)(5)'s "public availability" requirement. Written accounts of all affiliate transactions should be submitted to the Commission and made available for public inspection.

- "Transactions", as that term is used in Section 272(b)(5), encompasses "requests by an affiliate to its BOC for telephone exchange service or exchange access."

- Modification of the rules to prescribe uniform treatment of valuation for both asset and services transfers, and to eliminate valuation based upon "prevailing price", would be consistent with Section 272(b)(5)'s mandate in favor of arm's length transactions.

- In support of their fair market value determinations, BOCs and ILECs should be required to subject all transactions capable of independent valuation to the mechanisms which will produce a reasonably accurate assessment of fair market value.

- The Commission should make clear that the preferred valuation method continues to be the tariff-based valuation process, and that resort to terms contained in either negotiated or arbitrated interconnection agreements or statements of generally available terms and conditions may only be had when no tariff-based evaluation may be undertaken.

- The Commission's Part 32 rules, as modified in this proceeding, should also apply to affiliate transactions between a BOC and its interLATA telecommunications services affiliate established pursuant to Section 272(a).

- The Commission should require that the audit provide, an accurate representation of whether the carrier has fulfilled its obligations under the 1996 Act, including the carrier's obligations pursuant to Section 272(e)(3) and (4).

- Regulated services outside the scope of local exchange and exchange access services provided on an integrated basis by a BOC must, at a minimum, remain subject to the Commission's cost allocation rules.

- The effectiveness of the Part 64 Rules would be enhanced by the Commission's treating as nonregulated all currently regulated BOC activities outside the scope of local exchange and exchange access services when those services are provided on an integrated basist.

- In order to effectuate the mandate of Section 272(e)(4), the rate which must be imputed to the BOC for provision of like services for its own internal operation must be the highest tariffed rate for those facilities or services.

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The Telecommunications Resellers Association ("TRA"), through undersigned counsel and pursuant to Section 1.415 of the Commission's Rules, 47 C.F.R. §1.415, hereby submits its Comments in response to the Notice of Proposed Rulemaking, FCC 96-309, released by the Commission in the captioned docket on July 18, 1996 (the "Notice"). In this proceeding, the Commission will adopt rules implementing the accounting safeguards set forth in Sections 260 and 271 through 276 of the Telecommunications Act of 1996 (the "1996 Act").[1] In connection therewith, the Commission seeks comment on the advisability of utilizing the Commission's current cost allocation and affiliate transactions rules, or some modification thereof, as a foundation for those accounting safeguard rules.

[1] Pub.L. No. 104-104, 110 Stat. 56.

I.

INTRODUCTION

Sections 260 and 271 through 276 of the 1996 Act set forth various accounting obligations which must be adhered to by Bell Operating Companies ("BOCs") and/or incumbent local exchange carriers ("ILECs") in connection with the provision of interLATA telecommunications and information services. In this proceeding, the Commission will formulate specific rules which will implement those statutory accounting safeguards in a manner designed to minimize the likelihood of misallocation of costs or discrimination by BOCs or ILECs against competitors. In so doing, the Commission also seeks to maximize the protection of subscribers to the BOCs' local exchange service and to prevent carriers from exploiting their existing local exchange services market power to place new market entrants at a competitive disadvantage.

TRA, an association of nearly 500 resale carriers and their underlying product and service vendors, was created, and carries a continuing mandate, to foster and promote telecommunications resale, to support the telecommunications resale industry and to protect and further the interests of entities engaged in the resale of telecommunications services. Although initially engaged almost exclusively in the provision of interexchange telecommunications services, TRA's resale carrier members have aggressively entered new markets and are now actively reselling international, wireless, enhanced and internet services and are poised to enter the local exchange market.

TRA's resale carrier members serve generally small to mid-sized commercial, as well as residential, customers, providing such entities and individuals with access to rates otherwise available only to much larger users. TRA's resale carrier members also offer small to mid-sized commercial customers enhanced, value-added products and services, including a variety of sophisticated billing options, as well as personalized customer support functions, that are generally reserved for large-volume corporate users.

As the Commission has noted, BOCs and other incumbent local exchange carriers "currently possess market share for local exchange and exchange access in areas where they provide such services of approximately 99.5 percent as measured by revenues."[2] The Commission has further noted that "[c]ontrol over the bottleneck facility may enable a BOC or other incumbent local exchange carrier to engage in predatory behavior."[3] Because its membership represents the rank and file of those entities who will be competing with the BOCs and ILECs following entry into the interexchange market, TRA's interest in this proceeding lies primarily in assuring, to the greatest extent possible, that BOCs and other incumbent local exchange carriers are precluded from manipulating accounting transactions related to the provisions of regulated and nonregulated activities in such a fashion as to circumvent the 1996 Act's prohibitions against cost misallocation and discrimination against competitors.

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[2] Notice at ¶ 6, citing Telecommunications Industry Revenue: TRS Worksheet Data, (Com. Car. Bur. Feb. 1996).

[3] Notice at ¶ 15.

Toward that end, TRA urges the Commission to satisfy the statutory mandates contained in Sections 260 and 271 through 276 of the 1996 Act by erecting and maintaining rigorous accounting safeguards. Such a policy will further the dual goals of curbing the ability of BOCs and ILECs to competitively disadvantage competing service providers and also protecting subscribers to local exchange services from disproportionately bearing the economic cost of transfers between regulated and nonregulated activities which effectively subsidize the provision of the competitive service in direct proportion to the increased economic burden on the regulated activity's ratepayers.

II.

ARGUMENT

TRA agrees with the Commission that the Congress "recognized that BOC entry into in-region interLATA services, manufacturing and other areas" would continue to "raise[] serious concerns for consumers and competition, even after a BOC has satisfied the requirements for entry."[4] Conceding the difficulty -- if not the impossibility -- of policing rules capable of "completely prevent[ing] improper cost allocations" -- rules which would of necessity be predicated upon nothing short of "complete separation between regulated telecommunications operations and new activities,"[5] the Commission proposes to fashion appropriate and effective accounting safeguard rules built upon the foundation provided by its current cost allocation and affiliate transactions rules.

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[4] Notice at ¶ 6.

[5] Notice at ¶ 7.

TRA supports the Commission's tentative conclusion that "existing Part 64 cost allocation rules generally satisfy the 1996 Act's accounting safeguards requirements" in situations where services are provided on an integrated basis and that "current affiliate transaction rules generally satisfy the statute's requirement of accounting safeguards when an incumbent local exchange carrier conducts transactions with its affiliate."[6] In light of the considerations discussed below, however, TRA strongly suggests to the Commission that BOCs and ILECs will avail themselves of every opportunity allowed them under the rules to maintain and strengthen their respective market positions. Accordingly, accounting safeguards less detailed than those proposed by the Commission's Notice will likely not accomplish the goals of the Congress in enacting Sections 260 and 271 through 276 of the 1996 Act. Indeed, in certain instances, even more stringent accounting safeguards may be called for.

A. SAFEGUARDS FOR SEPARATED OPERATIONS

Pursuant to Section 272(a)(2) of the 1996 Act, BOCS must provide a number of services, including the origination of interLATA telecommunications services, other than incidental, out-of-region, and previously authorized services, through a separate subsidiary. TRA agrees with the Commission that the current Part 32 affiliate transactions rules should apply to all transactions between a BOC and its affiliate "to ensure that these services are not subsidized by subscribers to regulated telecommunications services.[7] TRA offers the following modifications to the Commission's current affiliate transaction rules in order that

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[6] Notice at ¶ 26.

[7] Notice at ¶ 64.

the Commission's goal of eliminating, to the fullest extent possible, potential cost misallocation and discrimination against competitors may be fully implemented.

1. Section 272(b)(2) and (c)(2) Accounting Requirements (¶¶ 68 - 69)

TRA strongly supports the imposition of a Commission-mandated obligation that the accounting of all transactions between a BOC and its affiliate must comply with Generally Accept Accounting Principles ("GAAP"). As the Commission observed in its Affiliate Transactions Notice,[8] such a requirement will "ensure that the costing process is based on reliable data."[9] Subjecting all affiliate transactions to similar GAAP treatment also has the added advantage of creating a more uniform audit trail, thereby simplyfing the determination of whether such transactions have indeed been carried out on an arm's-length basis as mandated by Section 272(b)(5) of the 1996 Act.

Because "all accounting related to affiliate transactions must comply with GAAP" in the absence of clear Commission order to the contrary,[10] the obligation to maintain books, records and accounts in accordance with GAAP will not necessitate a drastic restructuring of carriers' internal systems. Accordingly, the Commission need not be concerned that adoption of GAAP accounting obligations would "impose substantial costs on the carriers".[11] Whatever minimal costs result from a requirement that GAAP must be

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[8] Affiliate Transactions Notice at ¶ 51.

[9] Id.

[10] Affiliate Transactions Notice at ¶ 51.

[11] Notice at ¶ 63.

adhered to with respect to all affiliate transactions are clearly outweighed by the benefits which will accompany a decrease in opportunities to engage in cost misallocation. These benefits will accrue to the consuming public and regulated ratepayers alike. The risk of cost misallocation is no less severe when the transaction occurs not between a BOC and its affiliate but rather between an ILEC and its affiliate. TRA, therefore, strongly urges the ommission to apply the obligation to adhere to GAAP to all transactions between ILECs and their affiliates as well.

2. Section 272(b)(5) Arm's Length Requirement (¶¶ 70 - 75)

Section 272(b)(5) of the 1996 Act requires that transactions between BOCs and their affiliates within the scope of activities delineated by Section 272(a)(2) must be undertaken on an arm's length basis. The Commission seeks comment on whether Section 272(a)(2) activities, in order to constitute "arm's length" transactions, must "be recorded in auditable form."[12] TRA submits that clear Commission policy requires nothing less. The Commission has long held that "[i]n order that the financial consequences of such arrangements may be recognized in the computation of costs," i.e., in order to successfully demonstrate a true arm's length transaction, "each company must be in the position to show, upon request, by probative evidence that the terms and conditions are comparable to that which could have been secured from others."[13] In the absence of auditable documentation,

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[12] Notice at ¶ 70.

[13] Communications Satellite Corporation, 45 F.C.C. 2d 444, 451 (1974).

such an inquiry into the bona fides of a transaction between affiliated entities would be meaningless.

In addition to financial information set forth in standardized auditable form, TRA urges that Commission to promote the effectiveness of the auditing process by requiring the accumulation and retention of "accurate information regarding the ongoing operation of carriers and their nonregulated affiliates."[14] In particular, TRA supports the adoption of a requirement that all BOCs and their affiliates must initiate internal rules designed to estimate the anticipated costs of affiliate transactions, including budgetary documentation detailing "costs each carrier and nonregulated affiliate anticipates it will incur, the kinds of transactions in which it intends to engage, and the expected volume of those transactions."[15] Carriers should be under a continuing obligation to update their good faith estimates of the above information on a quarterly basis and, to the extent the updated information does not accurately reflect costs associated with affiliate transactions at the carrier's year-end, "carriers should be required to true-up their books to eliminate any discrepancies" prior to the year-end closing of the carrier's books.[16] All such affiliate transactions documentation should be retained by the carrier for a minimum of one year to ensure that such information is readily available for auditing purposes.

The Commission also asks "whether a requirement that prices be compensatory would be consistent with the Congressional intent behind Section 272(b)(5) and, in particular,

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[14] Affiliate Transactions Notice at ¶ 77.

[15] Id. at ¶ 78.

[16] Id. at ¶¶ 78 - 79.

any intent that ratepayers of regulated services benefit from the economies of scope from BOC manufacturing, origination of interLATA telecommunications services, and interLATA information services activities."[17] TRA notes that a major policy goal driving the development of the Commission's cost allocation and affiliate transactions rules has been "to ensure that ratepayers in the interstate jurisdiction pay telephone rates that are just and reasonable, " a goal which requires for its success "guarding against cross-subsidy of nonregulated ventures by regulated services."[18]

To that end, the Commission has fashioned rules governing asset and services transfers between affiliates "designed to insure that the ratepayer receive the benefits associated with the appreciation of value of assets which are transferred to unregulated activities" and that "assets not be transferred to the regulated entity after they have served their purpose in unregulated activities unless the ratepayers benefit from the depreciation which has been charged."[19] In TRA's opinion, affiliate transfers which are undertaken in strict compliance with the Commission's Part 32 and Part 64 rules will of necessity be "compensatory" in nature and will allow ratepayers to benefit from the carrier's economies of scope.

With respect to Section 272(b)(5)'s requirement that all transactions "be reduced to writing and available for public inspection, TRA strongly urges the Commission that, while Internet access to information about affiliated transactions should be encouraged,

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[17] Notice at ¶ 70.

[18] Joint and Common Costs Order at ¶ 33.

[19] Id. at ¶ 296.

given the continued unavailability of Internet access to a not insignificant percentage of the consuming public,[20] Internet access alone should not satisfy Section 272(b)(5)'s "public availability" requirement. TRA urges the Commission to require that written accounts of all affiliate transactions be made available for public inspection.

TRA further suggests that, in order that availability of affiliate transactions information may be useful to the public, carriers must be directed to submit such documentation within a relatively short time frame after the affiliate transaction is completed. A period of 30 days should allow sufficient preparation time for the carrier without unduly prejudicing the rights of the public to access and comment upon any perceived irregularities in the accounting treatment reported by the carrier.

Finally, TRA is in full agreement with the Commission's interpretation that "transactions", as that term is used in Section 272(b)(5), encompasses "requests by an affiliate to its BOC for telephone exchange service or exchange access."[21] TRA stresses that only by requiring submission of documentation relating to requests by affiliates for telephone exchange service and exchange access service -- including information demonstrating provisioning time frames -- will the public or the Commission be in a position to evaluate the carrier's compliance with its Section 272(e)(1) obligation to "fulfill any requests from an

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[20] *See, e.g.*, PC Week, July 15, 1996 ("70 percent of U.S. households don't own a PC and won't buy one"); Telecommunications Alert, July 29, 1996 ("less than 10 percent of U.S. households can access the Internet"); Sales & Marketing Management, August, 1996 ("only 45 percent of people in homes with computers had heard of the Internet in July 1995; recent survey by Odyssey Ventures in San Francisco in indicates 1 percent of U.S. households are now online, and 8 percent of U.S. households have access to the World Wide Web.")

[21] Notice at ¶ 75.

unaffiliated entity for telephone exchange service and exchange access service within a period no longer than the period in which it provides such telephone exchange service and exchange access service to itself or to its affiliates.

a. Assets and Services Valuation Methods (¶¶ 76 - 79)

The Commission proposes to revise its affiliate transactions valuations rules to establish "uniform valuation methods for all affiliate transactions."[22] The valuation rules currently provide for the recordation of asset transfers to affiliates at "the higher of net book cost and estimated fair market value" and asset transfers from affiliates at "the lower of net book cost and estimated fair market value" while all transfers of services, in the absence of a tariffed or prevailing price, must be recorded at fully distributed costs regardless of which entity provides the service. TRA agrees with the Commission that modification of the rules to prescribe uniform treatment of valuation for both asset and services transfers would be consistent with Section 272(b)(5)'s mandate in favor of arm's length transactions. By eliminating the advantage, perceived by certain carriers, associated with the reflection of transactions as the transfer of a service when it ought more appropriately to have been recorded as the transfer of an asset, the likelihood of accurate affiliate transactions accounting will be significantly increased.

b. "Prevailing Company Prices" (¶¶ 80 - 82)

The Commission seeks comment on how differences in marketing and transactional costs should effect "the use of the prevailing price method for recording affiliate

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[22] Notice at ¶ 77.

transactions between BOCs and their affiliates . . . engaged in . . . services as described in Section 272(a)(2).[23] It is axiomatic that a company transacting business with an affiliate will benefit from lower or non-existent marketing costs since the company is already known to the affiliate and need not expend funds to capture the affiliate's attention, acquaint the affiliate with the company's operations or otherwise "win over" the affiliate. Frequently, transactional costs as well may be minimized in affiliate transactions. Accordingly, to the extent of a BOC is permitted to utilize the full "prevailing price" to account for a transaction with its affiliate, the carrier will be able to transfer to its nonregulated affiliate not only the asset or service specifically involved in the transaction but also all avoided marketing and transactional costs.

The Commission's task in this proceeding is to limit the allocation of costs between regulated and nonregulated activities, and between BOCs and/or ILECs and their affiliates, to ensure that only amounts appropriately accounted for are transferred. In TRA's view, only carriers capable of discounting the value of affiliate transactions to the extent necessary to compensate for the marketing, transactional and other costs avoided by the BOC or ILEC should be permitted to utilize the "prevailing price" method of accounting for affiliate transactions. Because marketing and transactional costs will vary from transaction to transaction, accurately accounting for these "costs avoided" will be difficult, if not impossible.

Valuation of transfers based on "prevailing price" is no less complex when the transfer flows from the affiliate to the BOC or ILEC. Indeed, the Commission proposes "to eliminate the valuation of affiliate transactions based on prevailing prices" with respect to affiliate transfers to the carrier precisely because in many instances it is exceedingly difficult

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[23] Notice at ¶ 80.

to "define[e] what constitutes a prevailing price."[24] TRA agrees that where the percentage of third-party business is small, there is little assurance that market activity would result in a true "arm's length" transaction between the carrier and the affiliate. As the Commission has also noted, the highly specialized nature of the affiliate's products and services may preclude any reasonably calculation of "prevailing price."

In light of the valuation difficulties associated with affiliate transactions flowing from BOC to affiliate, as well as from affiliate to BOC, TRA supports the Commission's proposal to revise the affiliate transaction rules to "eliminate the valuation of affiliate transactions based on prevailing price".[25] The preferable means of accounting for affiliate transactions remains, TRA believes, recording such transactions at tariffed rates. To the extent tariffed rates are unavailable, TRA supports the Commission's proposal that transactions flowing from the BOC to its nonregulated affiliate will be recorded at the higher of fair market value or fully distributed cost, while transactions flowing from the nonregulated affiliate to the BOC will be recorded at the lower of fully distributed cost or fair market value. TRA is concerned, however, that valuation of asset or services transfers between affiliates based on fair market value, if not strictly scrutinized by the Commission, will provide a hotbed of opportunities for BOC and ILECs to engage in precisely the type of cost misallocation and discrimination against competitors which the Commission here seeks to prevent.

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[24] Notice at ¶ 81.

[25] Id. at ¶ 82.

c. Estimates of Fair Market Value (¶¶ 83 - 85)

The Commission proposes to impose a "good faith" obligation upon carriers in connection with the determination of fair market value of assets and services to be transferred between the carrier and its nonregulated affiliate. TRA agrees that in almost all instances "reasonable efforts will enable the carrier to discover that value."[26] TRA has serious reservations, however, that carriers which retain, as the Commission has noted, "market share for local exchange and exchange access in areas where they provide such services of approximately 99.5 percent as measured by revenues,"[27] will consistently engage in such "reasonable efforts" absent clear Commission guidance outlining the minimum documentation required to support the sufficiency of a determination of fair market value.

Fair market value has been defined in various ways, including the "price which property would bring at a fair sale between parties dealing *on equal terms*,"[28] and "an estimate and a determination of what is the fair, economic, just, and equitable value *under normal conditions*."[29] Carriers and affiliates are not representative of the average "willing buyer" and "willing seller"; furthermore, relations between them can hardly be said to take place on equal

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[26] Notice at ¶ 83.

[27] Notice at ¶ 6, citing Telecommunications Industry Revenue: TRS Worksheet Data, (Com. Car. Bur. Feb. 1996).

[28] Union Nat. Bank of Pittsburgh v. Crump, 349 Pa. 339, 37 A.2d 773, 735.

[29] In re Board of Water Supply of City of New York, 227 N.Y. 452, 14 N.E.2d 789, 792.

terms or under normal conditions.[30] The potential for allocating a less than good faith estimate of fair market value to assets or services transferred between BOCs or ILECs and their affiliates is therefore exceedingly high. As the U.S. Court of Appeals for the District of Columbia Circuit observed,

> The risk of cost misallocation is magnified when regulated telephone companies engage in transactions with their nonregulated affiliates. As with any parent-subsidiary relationship, the parties may not conduct the purchase or sale of assets in an arm's-length fashion. The telephone company may attempt to purchase assets at inflated prices and then recoup the excessive cost through the resulting increase in the cost-based rate of return; meanwhile, the nonregulated affiliate would profit from the windfall price paid. Similarly, when selling an asset to a nonregulated affiliate, the telephone company has an incentive to sell at an artificially low price and then let any loss fall ultimately on its ratepayers.[31]

The Court also observed that the "narrow circumstance" in which "the carrier sells or purchases from its affiliate an asset for which no discernable market price exists", i.e., where no market price can be discerned because neither sufficient unaffiliated third-party transactions nor a prevailing price is available, "is precisely when the risk of abusive cost misallocation is greatest."[32]

Notwithstanding the provisions of Section 220(c) of the Communications Act which assign to a carrier a general "burden of proof to justify every accounting entry

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[30] *See, e.g.,* Order on Reconsideration, CC Docket No. 86-111, 3 FCC Rcd. 6701 ("Joint Cost Reconsideration Order") at ¶ 131. ("The suggestion that the marketplace will regulate abusive practices, so long as carriers are free to contract with unaffiliated service providers, is unpersuasive . . . it is not clear that we should ever assume that carriers are free to deal at arm's length with their parent corporations, commonly-controlled affiliates or subsidiaries.")

[31] Southwestern Bell Corp. v. FCC, 896 F.2d 1378, 1380 (D.C. Cir. 1990).

[32] Id.

questioned by the Commission",[33] in the absence of specific valuation evidence setting forth the measures undertaken by the carrier to reach its "good faith" determination of fair market value, neither the Commission nor the public will possess the analytical materials necessary to ascertain which accounting entries should be questioned. Through these Comments TRA has supported efforts designed to strengthen the audit trail which carriers should be creating to document their compliance with the Commission's cost allocation and affiliate transactions rules. In keeping with that rationale, TRA strongly urges the Commission to set criteria for determining "what constitutes a good faith estimate of fair market value."[34]

In support of their fair market value determinations, BOCs and ILECs should be required to subject all transactions capable of independent valuation to the mechanisms which will produce a reasonably accurate assessment of fair market value. TRA suggests, therefore, that the Commission impose upon carriers an affirmative obligation to determine fair market value through the use of (i) solicitation of competitive bids, (ii) surveys sufficiently broad in scope to constitute a statistical random sampling of potential independent suppliers, or (iii) independent appraisals. TRA submits that in the case of transactions involving real estate transfers, the determination of fair market value through the use of independent appraisals should be compulsory. Although independent valuation devices beyond the above may exist, BOCs or ILECs desirous of utilizing additional valuation methods should bear the clear burden of demonstrating the potential accuracy of such

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[33] 47 U.S.C. § 220(c).

[34] Notice at ¶ 84.

measures and such carriers should be required to proceed with such valuation methods only after obtaining a waiver from the Commission.[35]

Finally, TRA urges the Commission to clarify that carriers valuing assets or services to be transferred as part of an affiliate transaction at fair market value, rather than at tariffed rates, must include such valuation documentation in their affiliate transactions reports filed with the Commission.

d. Tariffed-Based Valuation and Rate of Return Issues (¶¶ 86 - 87)

The Commission also seeks comment on the status of tariffed-based valuation should ILECs not be required to provide interconnection and collocation services and network elements pursuant to tariffs. As TRA has previously stressed, the statutory scheme embodied in the Communications Act clearly contemplates publicly-filed rates as the essential predicate for private, as well as Commission, enforcement of the requirement that service be provided without unreasonable discrimination.[36] The Commission has long held that "tariffs are essential to the entire administrative scheme of the Act," serving as "a kind of 'tripwire'

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[35] TRA notes that requiring carriers to obtain a waiver in order to utilize alternate valuation methods is consistent with §32.18 of the Commission rules, which specifies "[a] waiver from any provision of this system of accounts shall be made by the Federal Communications Commission upon its own initiative or upon the submission of written request therefor from any telecommunications company, or group of telecommunications companies, provided that such waiver is in the public interest and each request for waiver expressly demonstrates that: existing peculiarities or unusual circumstances warrant a departure from a prescribed procedure or technique; a specifically defined alternative procedure or technique will result in a substantially equivalent or more accurate portrayal of operating results or financial condition, consistent with the principles embodied in the provision of this system of accounts; and the application of such alternative procedure will maintain or improve uniformity in substantive results as among telecommunications companies."

[36] 47 U.S.C. §§ 201, 202.

enabling the Commission to monitor the activities of carriers subject to its jurisdiction and to thereby insure that the charges, practices, classifications, and regulations of those carriers are just, reasonable, and nondiscriminatory within the meaning of Sections 201 and 202 of the Act."[37] Given the "enormous importance" of tariff filing to the statutory scheme,[38] TRA continues to believe that tariffed-based valuation continues to represent the most appropriate means of accounting for transactions between affiliates, and the method most protective against misallocation of costs. TRA believes the Commission's affiliate transactions rules should make clear that, to the extent ILEC tariffs exist for the carriers' rates and terms and conditions for interconnection and collocation services and network elements, tariffed-based valuation must be utilized in accounting for affiliate transactions.

As the Commission has noted, however, Section 252(e)(1) of the 1996 Act allows a BOC to submit negotiated or arbitrated agreements to a State Commission for approval; Section 252(f) permits BOCs to file statements of generally available terms and conditions for State Commission approval. In cases where a tariff is not available for valuation purposes, information similar to that which would be contained in a tariff will be available in the form of either a negotiated or arbitrated approved agreement or an approved statement of generally available terms and conditions. So long as tariff-like information is publicly available, TRA would not be opposed to modification of the affiliate transactions rules to allow for use of information from either of the above sources for valuation purposes

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[37] The Western Union Telegraph Company, 75 F.C.C.2d 461, ¶ 47 (1979).

[38] MCI Telecommunications Corp. v. American Telephone and Telegraph Co., 114 S.Ct. 2223 at 2232.

when an actual tariff is not available. TRA urges the Commission to formulate the modified affiliate transactions rules to make clear that the preferred valuation method continues to be the tariffed-based valuation process, and that resort to terms contained in either negotiated or arbitrated interconnection agreements or statements of generally available terms and conditions may only be had when no tariffed-based evaluation may be undertaken.

TRA agrees with the Commission that "from a regulatory standpoint, the Commission would have a difficult, if not impossible, burden if it had to engage in numerous prescription proceedings and then monitor compliance with each."[39] TRA also agrees that allowing carriers to select their own rate of return would run contra to the Commission's efforts to structure accounting safeguards to promote the conduct of affiliated transactions on purely an arm's length basis. These considerations, taken together, lead TRA to support the Commission's imposition of a uniform rate of return to value affiliate transactions. TRA is not opposed to the Commission's adoption of a uniform rate of return equivalent to the current interstate services rate of return of 11.25 percent and urges the Commission that, in order that the administrative and evidentiary burdens discussed above may be averted, the established rate of return should apply to BOC valuation of affiliate transactions as well.

3. Application of Affiliate Transactions Rules to InterLATA Telecommunications Affiliates (¶¶ 89 - 90)

TRA agrees with the Commission that "BOC in-region interLATA telecommunications services also present a potential for improper subsidization."[40] BOCs

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[39] Notice at ¶ 87.

[40] Notice at ¶ 89.

engaged in the provision of out-of-region interstate, interexchange services through affiliates are currently subject to the Commission's affiliate transaction rules. TRA supports the Commission's conclusion that the Part 32 rules, as modified in this proceeding, should also apply to affiliate transactions between a BOC and its interLATA telecommunications services affiliate established pursuant to Section 272(a).

In TRA's view, no further modification of the affiliate transactions rules is required in recognition that both participants to the transaction will be engaged in regulated activities. As modified, the Commission's affiliate transactions rules will serve their intended purpose of protecting subscribers to local exchange services against cost misallocation; unqualified adherence to those rules, and the valuation methodologies contained therein, will support this goal while presenting no noticeable hardships for either the BOC or its interLATA affiliate.

TRA notes, however, that pursuant to Section 254(d) of the 1996 Act, a "provider of interstate telecommunications activities may be required to contribute to the preservation and advancement of universal service if the public interest so requires." Although Section 254(d) specifically exempts from the requirement a carrier whose contribution would be "de minimis", the plain language of the statute supports the conclusion that, to the extent to Commission deems it in the public interest, a BOC's interLATA affiliate may be assessed a universal service contribution. Indeed, any reluctance on the part of the Commission to impose a universal access contribution when such contributions are assessed on all other interstate carriers would effectively competitively advantage the interLATA affiliate, and indirectly, the BOC.

In its Comments in the Commission's Universal Access proceeding,[41] TRA urged the Commission to adopt an equitable approach to the assessment of universal access fund contributions by allowing a deduction from the revenue base on which the interstate support contributions of resale carriers are computed of all amounts paid to other carriers for network services, an approach consistent with the mechanism utilized by the Commission to compute regulatory fees for interexchange carriers in a manner which would avoid a double, triple or greater recovery of such amounts from resale carriers.[42] To the extent a BOC's interLATA affiliate believes it will be disadvantaged through application of the Commission's uniformly-applied universal service assessments, this equitable approach should be available to the affiliate as well.

4. Application to Joint Marketing (¶ 91)

The Commission seeks comment on appropriate additional accounting safeguards which may be required in order to constrain misallocation of costs should the sharing of marketing personnel between a BOC and its affiliate be permitted after "such company is authorized to provide interLATA services in [a] State under section 271(d)."[43] In its Comments in the Commission's Nonaccounting Safeguards Proceeding, TRA strongly urged the Commission to prohibit joint marketing, as well as common ownership of

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[41] Comments of the Telecommunications Resellers Association, CC Docket No. 96-45, filed April 12, 1996.

[42] Assessment and Collection of Regulatory Fees for Fiscal Year 1995, 10 FCC Rcd. 13512, ¶¶ 118 - 137 (1995) ("Regulatory Assessment Order").

[43] 47 U.S.C. § 272(g)(2).