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

RECEIVED
AUG 30 1996
FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF SECRETARY

In the Matter of	)	
	)	
Implementation of the Non-Accounting Safeguards of Sections 271 and 272 of the Communications Act of 1934, as amended;	)	CC Docket No. 96-149
	)	
and	)	
	)	
Regulatory Treatment of LEC Provision of Interexchange Services Originating in the LEC's Local Exchange Area	)	

DOCKET FILE COPY ORIGINAL

DOCKET FILE COPY ORIGINAL

REPLY COMMENTS OF AMERITECH

Gary L. Phillips
John Gockley
Steve Schulson
Richard Hetke
Michael S. Pabian

Counsel for Ameritech
1401 H Street, N.W.
Suite 1020
Washington, DC 20005
202-326-3817

Dated: August 30, 1996

No. of Copies rec'd 0211
List ABCDE

TABLE OF CONTENTS

PAGE

SUMMARY iii

I. BOC AFFILIATES ARE NONDOMINANT IN THE PROVISION OF IN-REGION, INTERSTATE, INTERLATA SERVICES (Section VIII(B)(C)) 1

II. THE COMMISSION SHOULD NOT ADOPT STRUCTURAL SEPARATION RULES THAT GO BEYOND THE SEPARATION REQUIREMENTS IMPOSED BY CONGRESS (Section IV) 5

A. The Commission Should Determine Compliance With the Section 272(b)(1) Requirement to "Operate Independently" on a Case-By-Case Basis in the Context of Each Section 271 Application for In-Region Authority 6

B. The Generality of the Term "Operate Independently" Is Not a License to Impose Additional Requirements on BOC InterLATA Affiliates 7

C. Sharing of Administrative Services is Not Prohibited by Section 272(b)(3) 11

III. ANY JOINT MARKETING RULES MUST BE FAITHFUL TO CONGRESS' INTENT TO CREATE PARITY IN JOINT MARKETING OPPORTUNITIES (Section VI) 15

A. Congress Intended to Create Parity, Not Disparity, in Joint Marketing Opportunities in Order to Maximize Consumer Benefit 15

1. BOC affiliates may provide their own local exchange service or market the BOC's service. 17

2. Other proposed restrictions on joint marketing are unnecessary and at odds with the Act 22

3. The joint marketing restriction in section 271(e)(1) encompasses advertising, making services available from a single source, and providing bundled discounts 27

IV. NONDISCRIMINATION SAFEGUARDS SHOULD BE APPLIED ONLY AS REQUIRED BY THE ACT (Section VI) 28

A. Rules Implementing Section 272(c)(1). 28

B. Rules Implementing Section 272(e) 29

V. ACTIVITIES SUBJECT TO SECTION 272 REQUIREMENTS ARE LIMITED BY THE LANGUAGE OF THE ACT (Section III) 32

SUMMARY

As expected, incumbent interexchange carriers ("IXCs") as well as competing local exchange providers -- all well-financed with substantial shares in their incumbent markets -- seek regulatory protection from authorized competition by the RBOCs. Their proposed restrictions are in reality a "wish list" that ignore the words of the Act and would prevent BOC section 272 affiliates from providing meaningful competition to the existing long-distance oligopoly -- all to the detriment of the consumer. The Commission should treat these proposals accordingly.

Congress articulated, in section 272, the necessary safeguards to promote full and fair competition applicable to certain activities of the BOCs and their affiliates. In adopting rules implementing this section, the Commission should not impose regulations that are not necessary to ensure the effective functioning of the marketplace. Otherwise, the Commission will upset the careful balancing sought by Congress -- which would permit BOC affiliates a reasonable opportunity to participate fully and effectively in the competitive marketplace and, thus, bring benefits to consumers.

Specifically, despite the cries of others to the contrary, the fact is that the BOCs' interLATA affiliates will neither have market power nor be in the position to acquire market power quickly. Thus, the claims that those affiliates should be regulated as dominant carriers are meritless.

Similarly, the Commission should dismiss attempts to impose structural separation rules that go well beyond the requirements imposed by Congress. The statutory requirement that the section 272(a) affiliate "operate independently" is not an independent basis to create additional separation requirements that Congress did not mandate. Moreover, there is no statutory ban on the sharing of administrative services. A contrary ruling by the Commission would not only

preclude the recognition of economies of scale and scope that will certainly be relied upon by other large and financially secure competitors, but would be inconsistent with the Act and long-standing Commission policy.

Likewise, joint marketing rules must be congruent with the language of the statute and Congressional intent. Clearly, the Act does not prohibit the BOCs' interLATA affiliates from providing their own local exchange service or marketing the services of the BOCs. Also, the BOCs may jointly market their telephone exchange services in conjunction with the interLATA services offered by their section 272(a) affiliates. Restrictions proposed by some commenters -- e.g., a prohibition against joint marketing on in-bound calls -- have no basis in the language of the Act and contradict the statute's general imprimatur for joint marketing, which specifically states that it is not a violation of the non-discrimination provisions of subsection 272(c).

The Commission should also resist demands to expand the non-discrimination provisions of section 272 beyond all logic -- especially the requests of those such as AT&T who interpret the statute as requiring BOCs to provide their affiliates with worse service than they provide to anyone else and charge their affiliates more than they charge anyone else.

Finally, the Commission should dismiss the call of those that would require that interLATA information services previously "waivered" under the MFJ be provided through a separate section 272(a) affiliate, or that a single section 272(a) affiliate may not undertake more than one activity listed in section 272(a)(2).

Ameritech
August 30, 1996

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

In the Matter of	)	
	)	
Implementation of the Non-Accounting Safeguards of Sections 271 and 272 of the Communications Act of 1934, as amended;	)	CC Docket No. 96-149
	)	
and	)	
	)	
Regulatory Treatment of LEC Provision of Interexchange Services Originating in the LEC's Local Exchange Area	)	

REPLY COMMENTS OF AMERITECH

Ameritech submits these reply comments on the Commission's notice of proposed rulemaking in this docket.[1]

I. BOC AFFILIATES ARE NONDOMINANT IN THE PROVISION OF IN-REGION, INTERSTATE, INTERLATA SERVICES.

In the NPRM, the Commission set forth a comprehensive analytical framework for assessing whether BOC long-distance affiliates should be classified as dominant in their provision of in-region domestic, interstate, interLATA services.[2] The Commission noted that, under its longstanding rules, dominant carriers are those with market power -- that is, that ability to raise prices by restricting output. The Commission observed that there were two ways in which, theoretically, a carrier profitably could raise and sustain prices above competitive level: (1) by restricting its own output; or (2) by restricting its rivals' output through control of an essential input. The Commission sought comment on whether a BOC affiliate could exercise market power through either form of behavior.

[1] In the Matter of Sections 271 and 272 of the Communications Act of 1934, as Amended; and Regulatory Treatment of LEC Provision of Interexchange Services Originating in the LEC's Local Exchange Area, CC Docket No. 96-149, Notice of Proposed Rulemaking, FCC 96-308 (released July 18, 1996) ("NPRM").
[2] NPRM at section VII.

In its comments, Ameritech offered a comprehensive analysis demonstrating that BOC long-distance affiliates do not now have market power and could not possibly acquire market power quickly.[3] The BOCs' competitors, on the other hand, offer virtually no analysis. They robotically regurgitate their usual claims of discrimination or cross-subsidization, throwing in one new variation on the theme: They argue that because access charges are above economic cost, an RBOC will be able to cross-subsidize its long-distance operations without incurring a loss. Specifically, they allege that, since the BOC's long distance affiliate will pay access charges to the BOC rather than to an unaffiliated carrier, the affiliate need not recover its access costs in its rates. They urge the Commission to declare BOC affiliates dominant so that the Commission can ensure, through the tariff review process, that all of the affiliates' services fully recover their costs.[4]

This claim might have warranted at least some attention if its proponents alleged that BOC affiliates could gain market power through cross-subsidization. But that is not a credible claim, and no one makes it. Instead, they argue that a BOC affiliate might be able to gain market share it might not otherwise have had by setting rates that do not recover the costs of access.

Ameritech is aware of no legal or economic theory under which such a claim could be considered. Even assuming that the allegations are correct -- and Ameritech will show that they are not -- consumers would suffer no harm unless the BOC affiliate could somehow acquire market power from its actions.

---

[3] Ameritech at section II.

[4] AT&T (at 3) and Time-Warner at (at 3) attempt to use this proceeding as a departure point for arguing their version of the section 271 entry test. These comments are gratuitous because these issues are not raised in this proceeding. Ameritech would simply note, however, that, insofar as AT&T maintains that section 271(c)(1)(A) requires "effective" competitive alternatives, AT&T misrepresents the Act. Congress specifically considered and rejected including adjectives, such as "effective" or "actual and demonstrable" in the section 271(c) test. The law, as passed, requires only the presence of a competing provider of telephone exchange service to residential and business subscribers that uses predominantly its own facilities. See 47 U.S.C. § 271(c)(1)(A). When the Commission considers a BOC's section 271 application, it must reject AT&T's invitation to rewrite this provision.

Stripped to the core, these allegations are nothing more than a plea that the Commission protect competitors, not competition. This is an idea that the Commission, the courts, and economists have universally and repeatedly rejected, as well they should.[5] It is not a valid basis for regulation; in fact, it is contrary to consumer welfare. As the United States Supreme Court explains:

> Recoupment is the ultimate object of an unlawful predatory pricing scheme; it is the means by which a predator profits from predation. Without it, predatory pricing produces lower aggregate prices in the market, and consumer welfare is enhanced. Although unsuccessful predatory pricing may encourage some inefficient substitution toward the product being sold at less than its cost, unsuccessful predation is in general a boon to consumers.[6]

In any event, the suggestion that the BOC affiliates have some unique ability to price below cost in order to gain market share (but not market power) is patently foolish. BOC affiliates will be competing against huge international conglomerates with billions of dollars in annual revenues, strong financial backing and far deeper pockets than Ameritech's, all of which could provide an ample source of funds to finance painless price reductions and even below cost pricing. AT&T, for example, is an $80 billion company -- six times the size of Ameritech; and, when intraLATA toll dialing parity was introduced in Illinois, it gave away intraLATA toll service for free for three months. This was not anticompetitive: it may have been bad for Ameritech, but it was good for consumers.

Moreover, any notion that access charges need not be recovered by the BOC affiliate from consumers is fallacious. The fact that access charges are priced above

---

[5] See Motion of AT&T Corp. to be Reclassified as a Non-Dominant Carrier, 11 FCC Rcd 3271, 3288 (1995)("[T]he issue is not whether [a company] has advantages, but whether any such advantage are so great as to preclude the effective functioning of a competitive market." See also 3 Areeda & Turner, Antitrust Law ¶ 716; Hovenkamp, Federal Antitrust Policy 308 (1994)(some courts take the position that "[i]f structural analysis indicates that predatory pricing simply cannot be a profitable strategy in a particular market, then further inquiry need not be made into price/cost relationships").

[6] Brooke Group Ltd. v. Brown & Williamson Tobacco Corp., 113 S. Ct. 2578, 2588 (1993).

economic cost only tells part of the story. The principal reason access charges are now priced above cost is that they recover subsidies which have been built into the rates to promote universal service goals. These subsidies may not reflect the costs of access, but they are real costs that BOCs must recover one way or another to remain "whole." In fact, a principal purpose of the universal service provisions of the Act, and the Commission's proceeding to implement those provisions, is to find alternative recovery mechanisms that will enable them to do so. The Commission will complete this proceeding, along with access reform, in May, 1997.

These claims are grossly overstated in other respects, as well. First, they ignore that BOC affiliates will pay access charges not only to their own affiliate, but also to unaffiliated carriers -- every time they originate or terminate a call out-of-region. Second, they do not reflect that the facilities-based incumbent carriers actually have significant cost advantages over new entrants. These advantages derive from their substantial scale economies, as well as the fact that new entrants, lacking their own national networks, will have to rely on the transmission facilities of the four incumbent facilities-based carriers.[7] Third, these claims distort what is really at issue here. For the majority of Americans, who do not use special rate plans, long-distance prices have been going up and are well above economic cost. Therefore, it is not the viability of the long-distance incumbents that is at issue; it is their excess profit margin. Stated differently, they want the Commission to prevent new entrants from reducing long-distance prices. Ultimately, that is what these claims are really about.

Finally, even if there were a valid issue here -- which there is not -- and the Commission deemed it necessary to ensure that BOC affiliates were recovering the cost of access in their rates, there is no reason why the Commission needs to scrutinize every tariff in advance of its effective date. The issue here is <u>low</u> prices, not high prices. No

[7] Unlike new entrants in the local exchange business, BOC long-distance affiliates must negotiate for long-distance facilities, without help from the Commission. They have no guarantee of TELRIC-based rates.

one claims that any particular BOC tariff will adversely affect consumers. The claim is that, over time, BOCs will gain market share. But significant market changes do not occur overnight, particularly when the competition is as formidable, as it is here. It took twelve years for AT&T to lose just 30% of its market share (from about 85% in 1984 to about 55% in 1996), despite a court and FCC-imposed affirmative action policy with respect to access charges. Thus, to the extent the Commission harbors any concerns about whether the prices of BOC affiliates are predatorily low, it can address those concerns through audits. Reviewing the cost support for every single tariff would be regulatory overkill of the nth degree. It would certainly be a dramatic departure from the Commission's stated goal of minimizing the burden of the rules it adopts in this proceeding.[8]

II. THE COMMISSION SHOULD NOT ADOPT STRUCTURAL SEPARATION RULES THAT GO BEYOND THE SEPARATION REQUIREMENTS IMPOSED BY CONGRESS.

In section IV of the NPRM, the Commission sought comment on each of the five structural separation and transactional requirements of section 272 governing the relationship between a BOC and its interLATA affiliate. The comments on three of these requirements -- the section 272(b)(2) requirement for separate books, records and accounts; the section 272(b)(4) requirement that no credit arrangement provide for recourse to BOC assets; and the section 272(b)(5) requirement that transactions be at "arms length" -- were largely uncontroversial and consistent with the Act.[9] In contrast, the two remaining separation requirements: the 272(b)(1) requirement that the

[8] NPRM at ¶ 9.

[9] TCG stated, however, that it agreed with the Commission's tentative conclusion that the affiliate "not be allowed to borrow on the strength of the parent's signature," even though the Commission reached no such conclusion. (TCG at 21) The Commission's tentative conclusions, which Ameritech supports, is that a BOC may not co-sign a contract or other instrument which provides recourse to BOC assets in the event of a default. (NPRM at ¶ 63) CompTel also recommended the BOC fund an annual audit conveniently ignoring the biannual audit requirement of section 272(d). (CompTel at 17)

interLATA affiliate "operate independently" from its BOC affiliate and the 272(b)(3) requirement that the interLATA affiliate have "separate officers, directors, and employees" from its BOC affiliate were used by incumbent interexchange carriers as a way to erect regulatory road blocks to RBOC entry into long distance. The Commission should not permit these so-called "safeguards" to be used in such an anti-competitive manner.

Indeed, were the Commission to adopt all of the recommended "safeguards" suggested by the various commenters, the BOC interLATA affiliate would be saddled with, not only the safeguards prescribed by Congress in the Act, but, additional layers of unnecessary regulation not provide for by Congress, including the Competitive Carrier Rules, the Computer II ("CI-II") rules, a substantially stricter version of the Computer III ("CI-III") rules, the section 274 rules for electronic publishing affiliates, plus additional restrictions such as those contained in Ameritech's Customer First Plan.[10] Considering that prior to divestiture, AT&T was subject only to the CI-II rules, shackling a BOC interLATA affiliate that now seeks to compete with AT&T with this draconian array of restrictions would be contrary to the Act and the shared goal of Congress and the Commission to promote vigorous and fair competition.

A. The Commission Should Determine Compliance With the Section 272 (b)(1) Requirement to "Operate Independently" on a Case-By-Case Basis in the Context of Each Section 271 Application for In-Region Authority.

In its comments, Ameritech argued that the term "operate independently" is a qualitative term that must, of necessity, be construed on a fact-specific basis. Ameritech suggested that one vehicle for giving content to that term would be the section 271 process, wherein the Commission would have the opportunity to review each RBOC's compliance plan for section 272(b), in total. Not surprisingly, the BOC's competitors

[10] In addition, the Ohio Public Utilities Commission has suggested in its late filed comments that it believes it has the authority to impose its own set of separation requirements in addition to those present in the Act. (PUCO at 8)

take a different view. Seeking to use this proceeding as a vehicle for rewriting the Act, they contend that the term "operate independently" is nothing less than carte blanche for the Commission to load into section 272 a whole raft of additional separation requirements that Congress could have adopted, but did not.

Despite their common purpose, however, the specifics of their proposals vary widely. Ameritech submits that this variance confirms the point that it made in its comments: that the term "operate independently" does not have a specific meaning and is incapable of being reduced to a set of hard and fast rules that are adopted in a factual vacuum. The Commission can no more identify in this proceeding an exhaustive iron-clad punch list of "operate independently" criteria than it can identify all the criteria of what constitutes a "just and reasonable rate." It depends on the facts, and there are insufficient facts developed in this docket to reach an a priori conclusion.

B. The Generality of the Term "Operate Independently" Is Not a License to Impose Additional Requirements on BOC InterLATA Affiliates.

The generality of the term "operate independently" is not a Congressionally sanctioned loophole to foist burdensome and unreasonable restrictions on BOC interLATA affiliates. Had Congress intended for the potpourri of "safeguards" suggested in this proceeding to constitute "operate independently" criteria, it certainly could have specifically said so.[11] Had it wished for the Commission to fill this alleged "void," it could have required the Commission to promulgate rules as it has done under numerous other provisions of the Act.[12] Congress did neither choosing instead to identity those separation requirements that it believed struck the proper balance between the need for safeguards and the need to ensure full and fair competition between all telecommunication providers. These commenters seek to upset this carefully crafted

[11] By contrast, in the case of electronic publishing affiliates, Congress was very specific in identifying a long list of "operate independently" criteria. See section 274(b).

[12] For example, see section 272(b)(2) which authorized the Commission to promulgate accounting rules or section 254(g) which commands the Commission adopt "de-averaging" rules.

balance and tilt the scale in their competitive favor by loading on restrictions not provided for by Congress.

Perhaps the most glaring deficiency in these proposed "safeguards" is the total failure on the part of their proponents to reconcile these safeguards with the Act. Not only can these proposals not be squared with section 272(b) -- the provision of the Act containing the express structural safeguards -- but many of them are in direct conflict with other provisions of the Act. Distilled to their essence, their arguments are not interpretations of legislative intent, but rather for example, a "wish list" of regulatory restrictions, reflecting little more than their desire to handicap new competitors with excessive regulatory burdens in the hope that they may convince the Commission to "rewrite" the Act.

Many commenters suggest that the Commission's CI-II rules should be imposed on BOC interLATA affiliates to ensure that they "operate independently."[13] Plainly, this is not what Congress intended. At the heart of the C-II rules, was the prohibition against joint marketing. Congress did not intend, obviously, to include this prohibition because section 272(g) of the Act expressly permits joint marketing. Also the Act specifically incorporates <u>some</u> CI-II type requirements, such as the 272(b)(2) and (b)(3) requirements to maintain separate books and have separate officers, but not others. Since Congress expressly excluded some CI-II requirements while expressly including others, there can be no credible argument advanced that Congress implicitly intended the remaining CI-II requirements fall under the catch-all banner of the term "operate independently."[14] Arguments concerning imposing CI-III and the Competitive Carrier rules suffer from this same fatal infirmity.

---

[13] For example, AT&T at 20; Time Warner at 17; MCI at 23.

[14] AT&T basically concedes the point when it states (at 23) that "[W]hile some of these rules [CI-II] are independently mandated by other provisions of section 272, the Commission should make clear that all of them are necessary elements of the operational independence requirement of Section 271(b)(1)."

Beyond the fact that imposition of such restrictions defies Congressional intent, it is bad public policy. The CI-II, CI-III and Competitive Carrier rules were crafted in a by-gone era and some of the concerns are no longer valid. For example, at one time, it may have made sense to preclude any sharing of physical space, computer facilities, transmission equipment and the like by the BOCs and their affiliates as the BOCs were under no obligation to share these facilities with anyone else. Between interconnection, unbundled network elements, and collocation obligations, the Telecommunications Act has turned this paradigm on its head. The BOCs are now required by law to share these facilities with other telecommunication carriers. Thus, the imposition of rules which would deny the same "sharing" ability to the BOC interLATA affiliate are simply unnecessary and would work a serious discrimination against the interLATA affiliate. This is hardly the competitive balance that Congress envisioned when it passed the Act.

In advancing its argument that CI-II should apply, AT&T argues that, to "operate independently," the BOC interLATA affiliate must be prohibited from "constructing its own exchange facilities, from purchasing unbundled network elements from the BOC.... or from offering exchange service other than through service resale...."[15] AT&T contends that this is necessary to preclude the "integration of exchange and interexchange facilities" between the BOC and its interLATA affiliate which they contend is at the heart of the restriction.[16] This proposed "safeguard" clearly conflicts with the statute since it plainly ignores section 272(e) which expressly recognizes that the BOC may provide both interLATA and intraLATA facilities and telephone exchange service and exchange access to its interLATA affiliate. Thus the "integration" that AT&T contends is prohibited by the Act is actually permitted and the very premise upon which AT&T bases its crusade for "operate independently" safeguards is flawed. AT&T also ignores the

[15] AT&T at 20, 21.

[16] AT&T at 21.

approximately 700 pages that the Commission spent in CC Docket No. 96-98 describing the procedures for how all networks might be "integrated."

Furthermore, on its face AT&T's argument makes no sense. If the BOC interLATA affiliate owns its own exchange facilities which are separate from the BOC's, by definition, they are "independent" and not the other way around. Limiting the BOC interLATA affiliate to resale of the BOC's services as suggested by AT&T would arguably make them more dependent not less.[17]

Other commenters attempt to impose restrictions over and above the regulatory restrictions discussed above as they too attempt to rewrite the Act and hobble BOC interLATA entry. MCI argues that "operate independently" for purposes of the BOC interLATA affiliate also includes the laundry list of "operate independently" requirements contained in section 274(b) which, on its face, applies only to the electronic publishing affiliate.[18] MCI's theory seems to be that since both sections use the term "operate independently," it must mean the same thing in both places. This argument is absurd on its face, but if true, would seem to cut against MCI's kitchen sink argument that "operate independently" under section 272(b)(1) includes CI-II, and CI-III and the Competitive Carrier rules as well.

The term "operate independently" could only mean the same thing in both statutory sections if Congress intended for them to mean the same thing. The fact that Congress felt compelled to spell out specific requirements under "operate independently" in section 274(b) that it did not specify in section 272(b) conclusively establishes that it did not intend for the same meaning or result. Obviously, Congress had concerns about the BOC relationship with its electronic publishing affiliate that did not have with respect to the BOC interLATA affiliate. If Congress had intended to do what MCI is now

[17] In order to become a full service provider, Ameritech's interLATA affiliate is currently seeking local exchange authority in Ameritech states and intends to provide local exchange service on a resold basis.

[18] MCI at 26.

peddling as Congress' intent, there are a myriad of more direct was to have accomplished it. MCI's attempt to bootstrap these additional structural requirements onto the BOC interLATA affiliate must be rejected.

Similarly, the Commission must reject CompTel's attempt to graft Ameritech's Customer First Plan (the "Plan") restrictions onto the BOC interLATA affiliate.[19] CompTel doesn't even attempt to argue that Congress intended this result. Congress was well aware of Ameritech's Customer First Plan and it could have incorporated all of its restrictions into the Act if it wished.[20] Obviously, Congress did many things differently in the Act than were done in the Plan and it makes no sense to selectively pick some aspects of the Plan for consideration in this proceeding while ignoring other aspects of the Plan.[21]Since Congress chose not to include these specific restrictions in the Act, it is wholly inappropriate for them to be considered in this proceeding.

In short, the Commission should consider the "operate independently" requirement in the context of actual applications for in-region authority under section 271 of the Act. It may be that some of the concerns of commenters would be addressed in that process.[22]

C. Sharing of Administrative Services Is Not Prohibited By Section 272(b)(3).

Not surprisingly, commenters looking to hobble BOC interLATA entry have distorted beyond recognition the clear, simple language of section 272(b)(3) that the BOC interLATA affiliate have "separate officers, directors and employees." According to

[19] CompTel at 15-17.

[20] In point of fact, some of the Customer First Plan provisions are embodied in the Act such as the requirement to keep separate books and accounts (section 272(b)(2)).

[21] For example, the Plan only required network unbundling of loops and ports and not the persuasive unbundling required under section 251 of the Act.

[22] For example, Ameritech has no intention of using the Ameritech Operating Companies' "official services network" for the carriage of Ameritech's interLATA services or of jointly owning transmission facilities with the Ameritech interLATA affiliate as that term is used in the Commission's Competitive Carrier rules, and its applications for in-region authority when filed will so state.

them, in order to eliminate even the slightest chance of discrimination, it is apparently necessary to eliminate all contact between the BOC and its interLATA affiliate. They would deny the BOC interLATA affiliate access to even such innocuous administrative services as were permitted under CI-II as accounting, auditing, legal, personnel recruitment and management, finance, tax, insurance and pension services. Some would have the Commission extend the prohibition to wherever in the corporate family (e.g., holding company or service subsidiary) administrative services are provided while others would go so far as to even prohibit third parties from providing administrative services to both the BOC and its interLATA affiliate. In sum, rather than create a "separation," these commenters would force an implicit "divestiture" thereby denying the RBOC the normal scope of ownership rights inherent in a parent/affiliate relationship. Such a result is not mandated by section 272(b)(3) and, indeed, is in clear violation of the Act.

AT&T wrongly contends that section 272(b)(3) prohibits joint operations, planning and marketing of any kind, the sharing of both in-house and out-sourced administrative services, use of another affiliate to provide administrative services, and BOC compensation plans that have compensation based in anyway on the performance of the BOC interLATA affiliate or vice-versa.[23] The fact is that the Act expressly contemplates numerous interactions between the BOC and its interLATA affiliate, including joint marketing and the procurement and provision of services and facilities.[24] There is no "iron curtain" as AT&T suggests that would prohibit administrative services being provided between the BOCs and its interLATA affiliate. AT&T's argument that BOC compensation plans cannot be based, in any part, on the performance of the BOC interLATA affiliate or vice versa is designed to deny the RBOC the ability to utilize stock-based compensation plans (e.g., stock options), a common compensation

[23] AT&T at 24-26.

[24] See, e.g., Section 272(g)(2) (permits BOC to "market and sell" interLATA affiliates services) and Section 272(c) (requiring BOC to act in a non-discriminating manner with its interLATA affiliate in the "provision or procurement of goods, services, facilities . . .").

mechanism used in the industry. If successful, AT&T will have denied the RBOC a powerful recruiting tool and will greatly hamper the ability of the RBOC's to acquire talented personnel. More to the point though is the fact that such compensation plans have not a whit to do with whether the BOC and its interLATA affiliate have separate employees. The fact that both sets of employees may be compensated on the performance of Ameritech and all of its enterprises as a whole does not make them employees of both companies and therefore does not violate the prohibition against shared employees.

Like AT&T, Time Warner suggests that the Commission make it "unambiguous" that the prohibition on in-house sharing of administrative services extend to the holding company or any affiliate where such services are performed.[25] This proposition, however, flatly contradicts the Act. The section 272 separation requirements apply only to the relationship between the BOC and its interLATA affiliate. Indeed, all of the BOCs which are the subject of this prohibition are specifically named in the Act. Thus, there is no room for interpretation and there is no ambiguity: services provided by Ameritech's holding company or any of its other non-BOC affiliates to either the BOC or its interLATA affiliate, fall beyond the purview of section 272(b)(3) and are permitted.[26] To hold otherwise, would create the untenable and bizarre situation where Ameritech Corporation, the owner of the interLATA entity affiliated with the BOC, could exercise virtually none of the rights normally associated with ownership and corporate governance. Such a "blind trust" approach to ownership is bad policy and cannot be supported by any reasonable reading of the statute.

The common denominator among the comments which seek to deny access to the interLATA entity of shared administrative services is the argument that joint and

[25] AT&T at 25, 26; Time Warner at 19, 20.

[26] Currently, all of the Ameritech "administrative services" at issue are provided out of non-BOC legal entities.

common costs must be minimized in order to avoid cross subsidies and that any opportunity for discrimination must be eliminated. Time Warner asserts that the history of shared services "has not been a happy one" citing the NYNEX Material case.[27] One case in sixteen years is hardly a history, and the fact that the violation was detected in the first place bears testament to the effectiveness of the FCC's audit procedures and capabilities. In addition, the introduction of price caps (which post-dated the NYNEX case), for all of the reasons stated by Ameritech in its comments, virtually eliminates the incentive and ability to cross subsidize. Finally, the argument of Time Warner that, unless prohibited, shared services will provide a vehicle for rampant discrimination is an overstatement to say the least. The types of administrative services at issue do not lend themselves to the kind of abuses that Time Warner claims. Administrative personnel providing finance, tax, personnel and other administrative services are not likely to be in any position to meaningfully discriminate in favor of the interLATA affiliate in respect or otherwise subject such competitors to a competitive disadvantage. By contrast, denial of access to routine administrative services will preclude recognition of economies of scale and scope that will certainly be relied on by other, large and financially secure competitors.

Handicapping the BOC interLATA affiliate in this was can only make it a less effective competitor in the stagnant and oligopolistic long distance market and less likely to bring the consumer benefits that Congress had hoped for. It is certainly not a result that can be justified by a fair reading of the statute. BOC employees providing administrative services, to the interLATA affiliate no more become an employee of the affiliate than H&R Block becomes an employee of the person whose tax return they happen to be preparing. Shared services provided and properly accounted for are

[27] Time Warner at 20.

perfectly consonant with the Act and pose no risk to burgeoning competition and must be allowed.

III. ANY JOINT MARKETING RULES MUST BE FAITHFUL TO CONGRESS' INTENT TO CREATE PARITY IN JOINT MARKETING OPPORTUNITIES.

Mirroring their self-interested, anticompetitive position on structural separations issues, certain BOC competitors propose an array of joint marketing restrictions that would effectively gut section 272(g) of the Act. While paying lip service to the fact that the Act explicitly permits BOCs and their affiliates to engage in joint marketing, they assert that Congress meant to confer only limited joint marketing authority, or that the joint marketing provisions are sharply circumscribed by preexisting equal access obligations or various other provisions of the Act -- most notably, requirements that BOC affiliates "operate independently" and "have separate officers, directors, and employees" from the BOC. These arguments have no merit. They ignore not only the plain statutory language but Congress' stated intent to create parity in joint marketing opportunities.[28] They therefore should be rejected.

A. Congress Intended to Create Parity, Not Disparity, in Joint Marketing Opportunities in Order to Maximize Consumer Benefit.

The Commission has long recognized the significant public benefits of joint marketing. For example, in its CI-III proceeding, the Commission stated:

> Marketing plays an important role, and represents a significant cost, in bringing new services to the public. We see no reason to handicap AT&T and the BOCs competitively in this regard, particularly when significant competitors in the markets for enhanced and integrated systems are not so limited.[29]

[28] Report of the Committee on Commerce, Science, and Transportation on S. 652, S. Report 104-23, 104th Rep. 2d Sess. ("Senate Report") at 23.

[29] Amendment of Sections 64.702 of the Commission's Rules and Regulations (Third Computer Inquiry), 104 FCC 2d 958, 1012 (1986).

Indeed, the Commission has suggested that the joint marketing restrictions of its CI-II rules may have represented the single most significant cost of those rules:

> [T]he public is disserved [by the CI-II joint marketing restrictions] because firms are unable to provide them with the services, products, and service combinations they desire. Customers desiring systems solutions and designs offered by the provider of network services are unable to obtain such solutions and are forced to obtain their service in a manner that is less than optimal for them. We believe that these are probably the most significant costs of structural separation exceeding the more visible costs that are created from duplicated facilities and personnel.[30]

With passage of the 1996 Act, joint marketing takes on even more importance. Carriers will now have the opportunity, not only to offer basic services and equipment and enhanced services, but to be a single-source of local and long-distance services, wireless and wireline services, cable television services, internet access and other on-line services, as well. This opportunity is likely to fundamentally alter the manner in which communications services are delivered to Americans. It is therefore imperative that the Commission give all carriers equal opportunities to participate in this revolution. Denying RBOCs the ability to participate in the joint marketing of stand-alone and integrated service packages would not only severely disadvantage the RBOCs, but more importantly it would deny consumers the full competitive benefits that RBOCs can bring to the marketplace.

Congress recognized this when it adopted section 272(g) of the Act. While the legislative history of that provision is scant, two clear messages emerge: (1) joint marketing will be a critical marketing tool, and (2) there consequently must be "parity among competing industry sectors" in the rules that apply.[31] Consistent with this intent,

---

[30] Provision of Customer Premises Equipment by the Bell Operating Telephone Companies and the Independent Telephone Companies, Notice of Proposed Rulemaking, CC Docket No. 86-79, FCC 86-113, released March 28, 1986, at ¶ 35.

[31] Senate Report at 23. It is to this end that Congress adopted section 271(e) restricting joint marketing by large interexchange carriers before BOCs had similar opportunities.

section 272(g) confers broad joint marketing authority on BOCs and their affiliates. Indeed, the only express limitation on such authority is that the affiliate may not market or sell BOC exchange services unless the BOC also permits similar entities to sell its exchange services. In implementing these provisions, the Commission must adhere to the words of the statute and Congress' stated intent.

Some of Ameritech's competitors would have it otherwise. Seeking to obtain competitive advantages in the marketing of services, they effectively ask the Commission to rewrite the statute, proposing a panoply of joint marketing restrictions that do not apply to any one else in the industry. While Ameritech addresses these arguments individually, there is a common denominator in all of them: they are not consistent with the Act.

1. BOC affiliates may provide their own local exchange service or market the BOC's service.

Teleport Communications Group (TCG) asks the Commission to "clarify" that an RBOC affiliate that provides in-region, interLATA service may not also provide local exchange service, prior to the sunset of the separate affiliate requirements.[32] It bases this argument on a misreading of section 272(a). According to TCG, section 272(a) applies to a BOC and any affiliate and prohibits "any affiliate" that provides local exchange service from also providing interLATA services.[33] In fact, section 272(a) applies to "[a] Bell operating company (including any affiliate) which is a local exchange carrier that is subject to the requirements of section 251(c)." (emphasis added). Since, for the reasons discussed in Ameritech's comments, a section 272 affiliate would not be subject to section 251(c) unless that affiliate has "substantially replaced" the BOC and met the other

[32] TCG at 6. Asserting that the NPRM implies that BOC affiliates may be prohibited from providing local exchange service, the Michigan Public Service Commission Staff asks the Commission to clarify its intent in this regard. Likewise, the Public Utilities Commission of Ohio notes that it is currently considering whether to certify Ameritech's long-distance affiliate to resell local exchange services. Consistent with its discussion below, Ameritech urges the Commission to clarify that the Act clearly confers authority on BOC affiliates to market and sell the BOC's local exchange offering and to provide their own local exchange service, through resale, purchase of unbundled elements, or construction or acquisition of their own facilities.

[33] See also NCTA at 9 (making the same argument).

conditions of section 251(h), the section 272 affiliate can provide local exchange and long distance service.[34]

TCG's claim is also flatly inconsistent with sections 272(e) and 272(g). Section 272(e)(4), for example, provides that a BOC "may provide any interLATA or intraLATA facilities or services to its interLATA affiliate if such services or facilities are made available to all carriers at the same rates and on the same terms and conditions . . ."[35] Section 272(g)(1) permits a BOC affiliate to "market or sell telephone exchange services provided by the Bell operating company" if the BOC permits other entities offering the same or similar services to do so.[36]

These provisions make it clear that a BOC affiliate may: (1) resell the BOC's local exchange services, provided the affiliate purchases such services at the same wholesale rates on which such services are available to others;[37] (2) purchase network elements from the BOC at total element, long run incremental cost (TELRIC)-based rates in order to provide its own local exchange services;[38] and (3) market or sell the BOC's local

---

[34] See Ameritech at 56-60. It is not clear whether TCG means to argue that the phrase, "which is a local exchange carrier that is subject to the requirements of section 251(c)" applies only to the BOC and not the affiliate. If that is TCG's intent, its argument is nonsensical. It would mean that "any affiliate" may not provide interLATA services unless it provided such services through a separate affiliate.

[35] See also 47 U.S.C. § 272(e)(1).

[36] NCTA asserts that BOC affiliates should be considered incumbent LECs for purposes of the Act. However, the Act clearly defines the term incumbent LEC in a way that excludes BOC affiliates.
47 U.S.C. § 251(h). Likewise, the Act explicitly excludes BOC affiliates from the definition of a "BOC."
47 U.S.C. § 153(4)(C). NCTA's suggestion that there is no difference between a BOC and its affiliate, other than the fact that the affiliate "was created after the date of enactment," is facile. See NCTA at 11. There is a very significant distinction between a BOC and its affiliate: the BOC owns what are alleged to be "bottleneck" local exchange facilities; the affiliate does not.

[37] In its comments, Ameritech may have inadvertently left the impression that it was advocating that the affiliate would have to price resold local exchange services at wholesale rates. Ameritech at 46. This is not Ameritech's position. Rather, under sections 272(e) and (g), the affiliate may resell local exchange services by purchasing such services at wholesale rates.

[38] Relying on the CI-II provision that restricted a BOC affiliate from constructing, owning, or operating its own transmission facilities, AT&T argues that BOC affiliates should likewise be restricted from constructing their own exchange facilities or purchasing network elements. It is AT&T's position, therefore, that, if a BOC affiliate purchases network elements, the facilities purchased would be the affiliate's "own" facilities. For present purposes, however, the CI-II rule is irrelevant, because it is not the law. Indeed, even assuming that some of the CI-II requirements could be grafted into section 272(b)(1) -- which is not the case -- it is difficult to understand how prohibiting a BOC affiliate from constructing its own facilities or purchasing network elements is any way related to

exchange services on a stand-alone basis or in conjunction with its own interLATA services. A BOC affiliate may also build or acquire its own local exchange facilities, subject, of course, to any lawful limitations on the transfer of facilities from the BOC to its affiliate.[39]

In contrast to TCG, LDDS WorldCom (LDDS) recognizes that RBOCs, like all other carriers, must have the opportunity to offer one-stop shopping and integrated service packages to consumers. It argues that RBOCs should be permitted to provide full service retail offerings, including blended, discounted, or bundled offerings of local and interLATA services: "(1) only through the interLATA affiliate, and (2) with the interLATA affiliate obtaining the local exchange components on the same basis as its competitors (through purchase of unbundled elements, construction of new facilities, or service resale)."[40]

LDDS is less clear with respect to the role of the BOC LEC under its proposal. On the one hand, it seems to indicate that the operating company should be permitted to sell local exchange and long-distance service on an unbundled -- that is, "side-by-side" basis.[41] On the other, its confusing (and perhaps deliberate) references to "side-by-side" sales by "RBOCs," as opposed to "BOCs," coupled with its substitution of the term "RBOC" for "BOC" in describing the legislative history of section 272(g)(2), could signify its opposition to any selling or marketing of interLATA services by the BOC, even on an unbundled basis.[42]

---

the section 272(b)(1) requirement that it "operate independently." On the contrary, it would seem to ensure the affiliate's continued dependence on the BOC for facilities and services. See Implementation of the Local Competition Provisions in the Telecommunications Act: Interconnection between Local Exchange Carriers and Commercial Mobile Radio Service Providers, CC Docket No. 96-98, FCC 96-325, released August 8, 1996 at ¶ 333: "[A] carrier offering services solely be recombining unbundled elements can offer services that differ from those offered by an incumbent."

[39] See Ameritech at 56-60.

[40] LDDS at 11-12.

[41] Id. at 17.

[42] Id. at 18.

LDDS' view that BOCs should not be permitted to offer bundled discount packages of local and interLATA services is not shared by MCI. According to MCI, "[b]undled 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."[43] The only restriction MCI would place on the BOCs in this regard is that the bundled discount not be so great "that it compels a customer to buy both services."[44]

Ameritech, however, agrees with LDDS that there is no reason to preclude a BOC affiliate from offering any retail package it desires, including bundled discount packages, using its own local exchange service that it provides by reselling the BOC's service, purchasing unbundled elements from the BOC, or through facilities it has constructed or acquired.[45] So long as the affiliate's purchases of services for resale or of network elements are at generally available rates, there is no reason in law or policy to prevent it from doing so. In these respects, LDDS' proposal represents a reasonable and thoughtful approach.

On the other hand, to the extent LDDS means to argue that BOCs should be prohibited from marketing and selling interLATA services at all -- even on an unbundled basis -- LDDS is misreading the Act. Section 272(g)(2) clearly and unequivocally confers this right on the BOC. It states: "A Bell operating company may not market or sell interLATA service provided by an affiliate required by this section within any of its in-region States until such company is authorized to provide interLATA services in such

---

[43] MCI at 46.

[44] Id. at 49. Notwithstanding MCI's position, it would not be not unreasonable for the Commission to prohibit BOCs from offering discounts on their local exchange service conditioned on the customer's selection of their 272(a) affiliate's interLATA service. However, this should not be construed as denying a BOC the ability "to jointly market its telephone exchange services in conjunction with the interLATA services offered by the separate affiliate." Joint Explanatory Statement at 152.

[45] LDDS at 11-12.