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BEFORE THE
Federal Communications Commission
WASHINGTON, D.C.

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	)	DOCKET FILE COPY ORIGINAL
	)	
Regulatory Treatment of LEC Provision of Interexchange Services Originating in the LEC's Local Exchange Area	)	

REPLY COMMENTS OF TIME WARNER CABLE

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30 August 1996

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Time Warner Cable, a division of Time Warner Entertainment Company, L.P. ("Time Warner"), hereby submits its Reply Comments in the above-captioned proceeding.[1]

I. INTRODUCTION AND SUMMARY.

In the Telecommunications Act of 1996,[2] Congress put in place the required statutory foundation for the transition to a telecommunications industry structure largely shaped by the rigors of competition. According to the managers of the 1996 Act conference committee, the 1996 Act is intended "to provide for a

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1 Implementation of the Non-Accounting Safeguards 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) ("Notice").

2 Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56 ("1996 Act").

pro-competitive, de-regulatory national policy framework designed to accelerate rapidly private sector deployment of advanced telecommunications and information technologies and services to all Americans by opening all telecommunications markets to competition."[3] In this proceeding the Commission proposes to adopt rules implementing the non-accounting safeguards mandated by Congress in sections 271 and 272 of the Telecommunications Act of 1996. These safeguards will govern BOC provision of interLATA telecommunications, interLATA information services, and manufacturing during the period when BOCs have entered the interLATA market, but still possess substantial market power in local telephony.

This time period will be critical for new local telephone entrants and existing competitors in the BOCs' new markets. The non-accounting safeguards of sections 271 and 272 must be implemented by the Commission in a manner consistent with the goal of ensuring that BOCs are unable to leverage their local telephone market power to gain an anticompetitive advantage in adjacent markets during the transition to competition. Failure to do so could result in a reduction of competition in presently competitive markets and the preservation of the BOC local telephone monopoly. Such a result clearly is contrary to the 1996 Act.

The comments of the BOCs in this proceeding seem designed to obstruct competition, not promote it. The Commission should

[3] Joint Statement of Managers, S. Conf. Rep. No. 104-230, 104th Cong., 2d Sess. Preamble (1996) ("Explanatory Statement").

reject these efforts. Time Warner addresses below certain BOC arguments which would prove particularly damaging to competition. Specifically, the Commission should reject the following BOC arguments:

- that the Commission should adopt few, if any rules implementing, interpreting, clarifying or explaining the requirements of sections 271 and 272;
- that the Commission should not give any meaning to the obligation to "operate independently" which is not already specified elsewhere in section 272;
- that the Commission should avoid restricting BOC joint marketing or sharing of administrative services with its section 272 separate affiliate, and that the Commission should allow BOC affiliates to offer bundled interLATA and local exchange service;
- that the Commission should limit the separation requirements of section 272 to the relationship between the BOC and the separate affiliate;
- that the Commission should interpret the section 272 nondiscrimination obligation as allowing "just and reasonable" discrimination; and
- that, due to the requirements of sections 251 and 252 and other provisions of the 1996 Act, the Commission need not be concerned with continuing BOC control of the bottleneck monopoly.

II. IMPOSITION OF DETAILED REGULATIONS IMPLEMENTING THE REQUIREMENTS OF SECTIONS 271 AND 272 IS CONSISTENT WITH THE TERMS OF THE 1996 ACT, CONGRESSIONAL INTENT AND ADMINISTRATIVE LAW.

BOC commenters generally urge the Commission to adopt the provisions of section 272 as specified by Congress, without interpretation or elucidation. For example, BellSouth argues that "there is no need for adoption of rules to implement the non-accounting safeguards set forth in Sections 271 and 272,"[4] and that any "interpretive" rules the Commission might adopt "cannot in any binding way establish what the statute does or does not require."[5] Pac Tel states that "the Commission's principal task is to enforce § 272, pursuant to the authority of § 271(d)(6),"[6] while USTA argues that the "restrictions contained in Section 272 are both comprehensive in scope and detailed in execution," and "require little or no interpretation."[7] USTA goes so far as to accuse the Commission of proposing "to disrupt the careful balance struck by Congress between the prevention of anticompetitive conduct. . . and the promotion of efficient competition."[8]

These and other similar arguments that the Commission should refrain from implementing section 272 are contrary to administrative law and the 1996 Act. First, any suggestion that

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4 BellSouth Comments at 4.

5 Id.

6 Pac Tel Comments at 3.

7 USTA Comments at 2; see also NYNEX Comments at 8.

8 Id. at 2-3.

the Commission lacks general rulemaking authority to implement and interpret the safeguards imposed by section 272 is contrary to the express language of the 1996 Act. Specifically, section 601(c)(1) of the 1996 Act provides that "[t]his Act and the amendments made by this Act shall not be construed to modify, impair, or supersede Federal, State, or local law unless expressly so provided in such Act or amendments."[9] This provision preserves, inter alia, section 4(i) of the Act, which provides that "[t]he Commission may perform any and all acts, make such rules and regulations, and issue such orders, not inconsistent with this Act, as may be necessary in the execution of its functions."[10]

Thus, the Commission may adopt rules implementing and interpreting section 272 despite the lack, in most cases, of specific section 272 authority to do so.[11] BellSouth's argument to the contrary notwithstanding,[12] the adoption of implementing, interpretive, or even "substantive" rules is entirely consistent with applicable administrative law. Courts have held that the Commission, pursuant to its general rulemaking authority, has

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9 Telecommunications Act of 1996, section 601(c)(1).

10 47 U.S.C. § 154(i).

11 Section 272(b)(2) requires that BOCs maintain books, records and accounts "in the manner prescribed by the Commission." 47 U.S.C. § 272(b)(2). Section 272(c)(2) requires BOCs to account for all affiliate transactions in accordance with accounting principles designated or approved by the Commission. 47 U.S.C. § 272(c)(2).

12 See BellSouth Comments at 4-5.

expansive rather than limited powers.[13] Under these cases and their progeny, regulations properly fall under the Commission's general rulemaking authority when they are based on permissible public interest goals and are not an unreasonable means for seeking to achieve those goals.[14]

Moreover, in any event, applicable precedent provides that administrative agencies are entitled to judicial deference when interpreting the provisions of a statute that are ambiguous.[15] To argue that section 272 is unambiguous is a nullity. For example, section 272(b)(1) requires that separated affiliates "operate independently" from the BOC; the term "operate independently" is not defined in the statute. Clearly, Commission interpretation is required. Under the Chevron standard, the Commission's interpretation should be upheld unless it is manifestly contrary to the Act.[16]

By their terms, sections 271 and 272 seek to limit the BOCs' ability to impede competition in the provision of local telecommunications service, interLATA telecommunications service, interLATA information services and equipment manufacturing during the time that BOCs possess market power in the local telephone

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13 See National Broadcasting Company Co. v. U.S., 319 U.S. 190, 219 (1943); see also FCC v. National Citizens Committee for Broadcasting, 436 U.S. 775, 793 (1978).

14 See FCC v. National Citizens Committee for Broadcasting, 436 U.S. at 796.

15 See Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837, 842-43, 81 L. Ed. 2d 694, 104 S. Ct. 2778 (1984).

16 See id. at 843-45.

market. Indeed, the Commission has express authority to extend the applicability of section 272 beyond its scheduled sunset,[17] so that the deletion of regulatory obligations will closely coincide with the advent of functioning, sustained competition in the local loop. For these reasons, failure to adopt regulations appropriately implementing sections 271 and 272 in this proceeding would abdicate that responsibility to the BOCs, which is quite clearly contrary to Congressional intent.

III. THE COMMISSION MUST PREVENT BOC CIRCUMVENTION OF THE SEPARATE SUBSIDIARY REQUIREMENT.

The BOCs claim that Congress left to their discretion the types of services to be offered by the separate subsidiary and the manner in which the services would be offered.[18] On the contrary, by adopting section 272, Congress intended to restrain BOCs from leveraging their monopoly power into competitive markets. A broad grant of discretionary power to the BOCs is entirely contrary to this purpose. Such discretion will result in BOC attempts to acquire anticompetitive advantages. An example is exhibited in NYNEX's proposal.

NYNEX proposes that "[i]n cases where interLATA and information services are separately purchased, the purchases

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17 See 47 U.S.C. § 272(f).

18 See Ameritech Comments at 67 ("it is the bundling of the charge for interLATA transport into the charge for the information service that makes the service an interLATA information service"); see also U S WEST Comments at 35 ("[a] BOC should be allowed to pay its separate affiliate no more for interLATA service than other customers would pay for comparable service. There should otherwise be no limit on the BOC's ability to use its separate affiliate's interLATA service").

should be treated as independent transactions" and separate affiliate requirements do not apply.[19] If the NYNEX proposal accurately reflected congressional intent, the 1996 Act would be a mere toothless repeal of the MFJ. The NYNEX proposal would permit the BOCs to circumvent Congress' clear separation requirements by enabling them to jointly provide local exchange, interLATA telecommunications and interLATA information services.

The NYNEX proposal underscores Time Warner's grave concerns: the BOCs will seize every opportunity to circumvent the separate affiliate requirements to leverage their local telephone monopoly into competitive markets. The Commission must be vigorous in its protection of competition and thorough in its implementation of separate affiliate safeguards. In crafting the non-accounting safeguards required by section 272, the Commission must consider all BOC opportunities for circumvention of separate affiliate requirements. Specifically, the Commission should account for the potential for the joint provision of video and interLATA information services or electronic publishing.

As Time Warner explained in its Comments, the device of a third affiliate, namely a video entity unseparated from the LEC entity and unchecked by section 272 and 274 safeguards, could

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19 See NYNEX Comments at 43.

permit a BOC to circumvent the Act's separations requirements.[20] Information services and electronic publishing services are likely to be offered in conjunction with video. Because a BOC is not otherwise required to separate its video operations from its LEC operations, the video entity provides an instrument for leveraging BOC monopoly power into the provision of information services and electronic publishing without detection. If permitted to occur, such an arrangement unquestionably would undermine Congress' intent in creating separate affiliate requirements.

To maintain the operational independence of information services and electronic publishing envisioned by Congress, the Commission must prevent commingling of video and LEC operations, on the one hand, and the simultaneous commingling of video and information services (or electronic publishing services) on the other. If a BOC wishes to commingle its video operations, it must choose to do so either with its local telephone services or with its information services, but not both. Specifically, if the BOC commingles its video services and information services, it must do so through the section 272 affiliate; if it commingles its video services and its local telephone services, then both its local telephone and its video services must remain separated

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[20] See Time Warner Comments at 31. The BOCs seem to have envisioned the possibility of circumvention through a third entity and encourage the Commission to permit such behavior. See e.g., Pac Tel Comments at 23 ("the section 272(b) structural separation and transactional requirements apply between the BOC and separate affiliates, not between either of them and other affiliates, and even that separation is not absolute").

from the section 272 affiliate. This separation requirement will promote the pro-competitive goals of the 1996 Act by discouraging BOC circumvention of the section 272 structural safeguards.

IV. EFFECTIVE IMPLEMENTATION OF THE STATUTORY MANDATE FOR INDEPENDENT OPERATION REQUIRES SUBSTANTIVE REGULATION BEYOND THAT FOUND IN SECTIONS 272(b)(2)-(5).

Basic tenets of statutory interpretation and sound public policy support the Commission's tentative conclusion that the section 272(b)(1) requirement that separated affiliates "operate independently" imposes obligations beyond those contained in subsections 272(b)(2)-(5).[21] The inclusion of this provision in the list of separate affiliate requirements cannot be deemed meaningless.[22] Therefore, it is difficult to find merit in the BOCs' assertions that the independent operation requirement is merely a qualifier of, or a "gloss" on, the remaining separate affiliate requirements.[23]

To the contrary, section 272(b)(1)'s independent operation requirement imposes restrictions on the business relationship between the BOCs and their section 272 separated affiliates beyond those found in subsections 272(b)(2)-(5). The Commission is correct in tentatively concluding that it should utilize the

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21 See Astoria Fed'l Savings & Loan v. Solimino, 501 U.S. 104, 112 (1991)("we construe statutes, where possible, so as to avoid rendering superfluous any parts thereof"); see also Mail Order Ass'n of America v. U.S. Postal Service, 986 F.2d 509, 515 (D.C. Cir. 1993)("we are to construe statutes, where possible, so that no provision is rendered 'inoperative or superfluous, void or insignificant'")(citations omitted); see also Notice at ¶ 57.

22 See id.

23 See, e.g., Ameritech Comments at 38; Pac Tel Comments at 20; USTA Comments at 20; U S WEST Comments at 29-30.

strict separation requirements contained in Computer II to give effect to the independent operation requirement.[24] As the Commission recognized in the Notice, a separate affiliate must not be allowed to construct, own, or operate its own transmission facilities. Otherwise the affiliate would constitute a mere instrument for BOC circumvention of the separation requirements.[25]

Further, in order to meet the independent operation requirement, the separate affiliate must not: (1) lease or share physical space collocated with the regulated transmission facilities used to provide basic service; (2) share computer facilities with the BOC; (3) develop software jointly with the regulated entity; and (4) market any other equipment or services to any affiliate. The application of Computer II safeguards and additional requirements will complement the safeguards contained in subsections 272(b)(2)-(5) and assist in the protection of competition.

The 1996 Act explicitly preserves the Commission's authority to continue its enforcement of existing Computer II regulations. Section 601(c)(1) of the 1996 Act provides that "[t]his Act and the amendments made by this Act, shall not be construed to . . . supersede Federal . . . law unless expressly so provided in such Act or amendments."[26] The 1996 Act's provisions expressly

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[24] See Notice at ¶ 49.

[25] See Notice at ¶ 79 ("Congress did not intend for a BOC to be able to move its incumbent local exchange operations to an affiliate in order to avoid complying with section 272(c)").

[26] 1996 Act at § 601(c)(1).

supersede the AT&T Consent Decree,[27] the GTE Consent Decree,[28] and the McCaw Consent Decree.[29] The Act's provisions do not expressly or implicitly supersede Computer II, nor do they expressly or implicitly supersede the Commission's section 4(i) general rulemaking authority. Therefore, BOC assertions that Computer II was superseded by the Act are legally flawed and plainly wrong.[30] Further, as the Commission recently noted in the Interconnection Order:

> Where Congress has expressly delegated to the Commission rulemaking responsibility with respect to a particular matter, such delegation constitutes "something more than the normal grant of authority permitting an agency to make ordinary rules and regulations" . . . . Thus, the explicit rulemaking requirements . . . [are] best read as giving the Commission more jurisdiction than usual, not less.[31]

The Commission retains the authority to apply the Computer II separation requirements to give effect to the independent operation requirement of section 272(b)(1) and should do so in order to fulfill the congressional mandate to protect local ratepayers and competition alike.

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27 Id. at § 601(a)(1).

28 Id. at § 601(a)(2).

29 Id. at § 601(a)(3).

30 See, e.g., USTA Comments at 16.

31 Implementation of the Local Competition Provisions in the Telecommunications Act of 1996, Interconnection Between Local Exchange Carriers and Commercial Mobile Radio Service Providers, CC Docket No. 96-68, CC Docket No. 95-185, First Report and Order, FCC 96-325 (released August 8, 1996) ("Interconnection Order")(citing Fulani v. FCC, 49 F.3d 904, 909 (2d Cir. 1995) and Kay v. FCC, 443 F.2d 638, 640 (D.C. Cir. 1970)).

Finally, the Commission has authority to implement regulations beyond those found in Computer II to provide adequate protection against anticompetitive BOC behavior. The BOCs assert that the Commission's authority is limited to implementing those requirements expressly listed in section 272 and that Congress did not intend to provide the Commission with the authority to implement additional regulations,[32] relying on the negative pregnant rule of statutory construction which presumes that an express statutory requirement in one place and its absence in another indicates that the requirement was deliberately omitted.[33] In other sections, Congress provided for Commission implementation of additional regulations to fulfill the goals of the Act,[34] while no identical provision exists in section 272. However, recent Supreme Court doctrine supports the conclusion that the negative pregnant rule of construction does not apply here.

The Supreme Court recently limited the negative pregnant rule of construction where its application would lead to an unreasonable result.[35] Use of the negative pregnant rule of construction in this instance would lead to an unreasonable

32 See Pac Tel Comments at 18-19 ("if Congress had wanted the Commission to create additional or different rules, it would have directed the Commission to do so, as it did in sections 273(g) and 276(b)").

33 See Rusello v. United States, 464 U.S. 16, 23 (1983).

34 See, e.g., 47 U.S.C. § 273(g).

35 See Field v. Mans, 116 S.Ct. 437, 442 (1995)(the negative pregnant rule of construction is limited particularly in instances where its application would not divulge the correct standard or would lead to an unreasonable result).

result. The clear pro-competitive intent of Congress as indicated throughout the 1996 Act, particularly in the separate affiliate requirements of section 272, plainly indicates that Congress did not intend to limit the authority of the Commission to establish additional regulations to prevent anticompetitive behavior. In the absence of meaningful implementation and interpretation of the obligation to operate independently, BOCs and their "separate" affiliates will face little restraint when leveraging the BOCS' local telephone monopoly into adjacent markets. Congress designed the 1996 Act to provide a pro-competitive telecommunications environment.[36] It would be ludicrous and unreasonable to assert that Congress intended to prevent the Commission from ensuring the realization of Congress' goals in enacting the 1996 Act, and the Supreme Court's recent decision indicates that such an unreasonable result can and should be avoided.

In sum, the Commission can, and should, impose requirements beyond those used in Computer II to protect against BOC circumvention of Congress' intent to maintain a strong separation between the BOC's monopoly local exchange services and the competitive services offered by its affiliate.

V. SHARING OF ADMINISTRATIVE SERVICES MUST BE PROHIBITED.

Section 272(b) unequivocally states that a section 272 affiliate "shall have separate officers, directors, and employees from the Bell operating company of which it is an affiliate."

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[36] See Joint Statement of Managers, S. Conf. Rep. No. 104-230, 104th Cong., 2d Sess. Preamble (1996).

The comments of many of the BOCs ignore this explicit congressional mandate and, instead, advocate the sharing of administrative services, employees, officers and directors between the BOC and its affiliate.[37] Time Warner reiterates that the Commission must enforce the separate affiliate requirements in order to protect the development of competition in interLATA information services. To permit BOCs and their section 272 affiliates to share administrative services, employees and officers would render meaningless the Act's separate affiliate requirements.

Sharing would permit the monopolist to exert day-to-day control over the operations of the affiliate in the provision of information services. Because the monopolist parent company's officers and employees would direct the affiliate, the goals of the information services affiliate would be subsumed by the goals of the monopolist parent.

Further, contrary to BOC assertions, sharing would create greater opportunities for the BOC to absorb many of the costs of its affiliate. The BOCs assert that "price cap regulation, the Commission's accounting rules, the Act's audit requirements and the fact that cross-subsidization is of no utility unless it confers market power . . . all negate the possibility that sharing of administrative functions could lead to anticompetitive cost-shifting."[38] SBC contends that the "Commission's non-

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[37] See NYNEX Comments at 29-31; U S WEST Comments at 25.

[38] Ameritech Comments at 43.

structural safeguards have worked well for LECs for over eight years and can continue to work well in the structures required by the 1996 Act."[39]

Ironically, SBC goes on to cite BOC abuses uncovered in a Commission audit. SBC's comments illustrate the inability of existing Commission safeguards to protect against abuses before they happen. Notwithstanding their intent, the BOCs' comments demonstrate the need for implementing the protections Congress deemed necessary. All the measures listed by Ameritech and SBC as offering sufficient protection against anticompetitive cost-shifting were available to the Commission at the time the 1996 Act was enacted. Congress evidently presumed that although useful, these existing regulatory measures would fail to provide sufficient protection against the dangers of cross-subsidization. Instead, Congress ordered structural separation and explicitly listed the prohibition on sharing of employees, officers and directors as a requisite component of separation. The Commission must implement and enforce this requirement.[40] This prohibition must be interpreted to include sharing of administrative services to prevent evisceration of the statutory requirement.

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[39] SBC Comments at 13.

[40] Similarly, the Commission must prohibit the BOC from providing administrative services for its affiliate on a reimbursable basis. As MCI correctly noted in its comments, that situation could result in circumvention of cross-subsidization safeguards through an affiliate with no employees "leasing" services at subsidized rates from the parent company. See MCI Comments at 27-28.

If the BOCs' position were accepted, it would be difficult to understand the reasoning behind Congress' separate affiliate requirements. The BOCs' position would require the creation of a separate affiliate that received subsidies from its parent, services from its parent, and administrative direction from its parent. Congress intended its separation requirements to constitute more than simply different corporate names or addresses; it intended the separation to prevent captive local ratepayers from funding BOC competitive ventures as well as to protect competition in the provision of information services, interLATA telecommunications services, manufacturing, and local telephone services.

VI. JOINT MARKETING MUST BE PROHIBITED.

As with the sharing prohibition, BOCs assert that the 1996 Act's prohibition on joint marketing and sales is meaningless. However, with clarity, the 1996 Act states that "[a] Bell operating company affiliate. . . may not market or sell telephone exchange services provided by the Bell operating company"[41] and "[a] Bell operating company may not market or sell interLATA service provided by an affiliate."[42] Yet, USTA asserts that "during the three year. . . transition period, the BOC and its affiliate may joint market."[43] Similarly, Ameritech claims that "[s]ection 271(g)(1) and/or section 272(e) clearly permit an affiliate of a BOC to market [or] sell . . . the BOC's telephone

41 47 U.S.C. § 272(g)(1).

42 47 U.S.C. § 272(g)(2).

43 USTA Comments at 29-30.

exchange service."[44] If implemented without sufficient safeguards, these positions would permit a BOC affiliate to circumvent Congress' intent to protect ratepayers and competitive markets from anticompetitive behavior by monopoly BOCs.

As Time Warner indicated in its Comments, joint marketing of competitive services with local exchange service provides opportunities for the BOC to leverage its local exchange service monopoly power to impair competition in the provision of information services.[45] Congress directed the Commission to protect local ratepayers and nascent competition from BOC monopoly leveraging.[46] Indeed, the section 272 separate affiliate requirements are designed to assist in preventing anticompetitive behavior by the BOCs. However, the Commission should recognize that BOC market power in local telephony will continue for some time, despite the introduction of competition.

The success of competitive development in the local telephone market and continued development in the information services, interLATA telecommunications, and manufacturing markets depends in large part on limiting BOCs' ability to alter those markets through monopoly leveraging. Because joint marketing is a powerful tool for monopoly leveraging, the Commission should not only deny the BOCs the present ability to engage in joint marketing with their separated affiliate, but should also

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[44] Ameritech Comments at 46.

[45] Time Warner Comments at 23.

[46] See e.g., 47 U.S.C. 254(k)("A telecommunications carrier may not use services that are not competitive to subsidize services that are subject to competition").

continue to enforce joint marketing restrictions so long as the BOCs enjoy marketing advantages derived from their market power.

The 1996 Act prohibits not only joint marketing, but also the joint sale of the services of the BOC and its affiliate. Before it receives in-region interLATA authority, a BOC cannot sell the interLATA services of its affiliate.[47] While a BOC affiliate is permitted to sell the BOC's local exchange services (so long as the BOC permits other entities offering the same or similar service to market or sell its telephone exchange services), the Notice correctly recognizes the need for regulations to implement this provision.[48]

Without sufficient protections, the BOC affiliate offering local exchange services with its own interLATA services will become the central entity in the BOC's corporate structure because immediately it will be able to provide one-stop shopping without compliance with the 1996 Act's additional obligations for incumbent local exchange carriers. As the Notice recognizes, "Congress did not intend for a BOC to be able to move its incumbent local exchange operations to an affiliate in order to avoid complying with section 272(c)."[49] The Commission should affirm its tentative conclusion that a BOC affiliate selling the BOC's local exchange services is subject to the requirements of 251(c) and 272(c).[50]

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47 47 U.S.C. § 272(g)(2).

48 See Notice at ¶ 89.

49 Id. at ¶ 79.

50 Id.

Moreover, the purchase of local exchange service by the BOC affiliate from the BOC must occur on an arm's length basis. USTA asserts that "[t]he separate affiliate intended by Congress is more of an accounting separate affiliate than a separate facilities affiliate."[51] The USTA assertion is premised on the erroneous notion that transactions between the BOC and its separate affiliate will be subject to cost allocation requirements, not arm's length transaction requirements. The Commission should emphasize the need for a BOC affiliate, like any other independent third party, to purchase the BOC's local exchange services pursuant to tariff on a nondiscriminatory arm's length basis rather than simply making adjustments in an accounting ledger. Otherwise, the potential for cross-subsidization and discrimination will become increasingly difficult to detect resulting in devastating impacts on developing competitive markets.

VII. THE SECTION 272 NONDISCRIMINATION STANDARD IS MORE STRINGENT THAN THE SECTION 202 STANDARD.

BOCs argue that the nondiscrimination obligation imposed by section 272(c) and (e) does not differ from the nondiscrimination obligation imposed by section 202; BOCs urge the Commission to conclude that both standards require only that BOCs avoid "unjust and unreasonable" discrimination.[52] The BOCs' arguments should

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[51] USTA Comments at 18.

[52] USTA Comments at 25; Pac Tel Comments at 29; U S WEST Comments at 32; BellSouth Comments at 32.

be rejected as contrary to the express language of the statute and inconsistent with the statute's underlying policy.

The nondiscrimination obligations of subsections 272(c) and (e) are unqualified[53] and clearly are intended to ensure that BOCs are restrained from favoring their interLATA telecommunications and information services affiliate(s) when providing or procuring goods, services, facilities or information. In many cases these items will constitute essential inputs to the goods, services and facilities provided to end-user customers by BOC competitors. Thus, BOCs will retain the incentive and ability to inhibit competition by withdrawing their full cooperation when providing these essential inputs.

Given the discrimination obligation's competitive importance, the Commission must strictly enforce the statutory absolute or "flat" prohibition of discrimination. In the Interconnection Order, the Commission found that "Congress did not intend that the term 'nondiscriminatory' in [section 251 of] the 1996 Act be synonymous with 'unjust and unreasonable discrimination' used in the 1934 Act, but rather, intended a more stringent standard."[54] The Commission further found that "where an incumbent LEC proposes to treat one carrier differently than another, the incumbent must prove to the state commission that

[53] Section 272(c)(1) provides that, in its dealings with a section 272 affiliate, a BOC "may not discriminate between that company or affiliate and any other entity in the provision or procurement of goods, services, facilities, and information, or in the establishment of standards." 47 U.S.C. § 272(c)(1).

[54] Interconnection Order at ¶ 217.

the differential treatment is justified based on the cost of providing that element to the carrier."[55] The Commission determined that requiring uniform pricing for services with different underlying costs is discriminatory.[56] In other words, a carrier choosing low-cost interconnection is harmed if it pays the same amount as a carrier choosing high-cost interconnection. The Commission should interpret section 272's prohibition of discrimination similarly.

Time Warner believes it is important to emphasize that allowing prices to reflect the underlying cost of providing a good, service or facility does not allow BOCs to demonstrate that discrimination is just and reasonable; rather, it allows BOCs to demonstrate that no discrimination is present, because the price charged accurately reflects the underlying cost of providing the good, service or facility.

VIII. DESPITE PASSAGE OF THE 1996 ACT, BOCS HAVE THE INCENTIVE AND ABILITY TO ABUSE THE BOTTLENECK LOCAL TELEPHONE MONOPOLY.

Several BOCs argue that the "bottleneck abuse theory" -- the incentive and ability BOCs possess to leverage their local telephone monopoly into adjacent markets -- is mooted by the passage of the 1996 Act, with specific reference to sections 251 and 252 of the 1996 Act and the Commission's newly adopted

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55 Id. at ¶ 1317. See also id. at ¶ 860.

56 Id. at 860 (price discrimination "occurs not only when prices are different in the presence of similar costs but also *when the prices are the same and the costs of supplying customers are different*") (emphasis in original).

interconnection rules.[57] BellSouth argues that concerns that it would favor its own long distance service when providing access services are a "vestige of the predivestiture era, when AT&T, with over 95% of the interexchange market, used its control of the local exchange market to disadvantage its interexchange competitors."[58] These arguments confuse the legal possibility of competition or the potential for competition in the local loop with the presence of competition and should be rejected.

BellSouth's argument, that local telephone access discrimination concerns are a vestige of pre-divestiture AT&T, is particularly disingenuous.[59] BellSouth, like the other six BOCs, inherited AT&T's pre-divestiture local telephone monopoly. Clearly, AT&T presently lacks the ability to discriminate in the provision of local loop services -- BellSouth and its brethren now possess that ability. As described in the Notice, BOCs presently possess approximately 99.5 percent of their local telephone markets in terms of revenue.[60] Most significantly, the

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57 Pac Tel Comments at 55; Ameritech Comments at 6; U S WEST Comments at 48.

58 BellSouth Comments at 54.

59 Specious BOC claims that they are subject to vigorous competition in the local loop date back nearly a decade, shortly following divestiture. See e.g., United States v. Western Electric Co., Civ. Action No. 82-0192, Comments of NYNEX Corporation on the Department of Justice's Report Concerning the Line of Business Restrictions Contained in the Modified Final Judgment at 26 (D.D.C., March 13, 1987)("In areas such as directory, CPE and intraLATA networks, those companies, formerly Bell System Companies, including AT&T, compete aggressively with one another . . . . Any attempted cross-subsidization will be policed and detected").

60 BellSouth Comments at ¶ 7.