

BEFORE THE  
Federal Communications Commission  
WASHINGTON, D.C.

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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; )  
)  
and )  
)  
Regulatory Treatment of LEC Provision )  
of Interexchange Services Originating in the )  
LEC's Local Exchange Area )

CC Docket No. 96-149

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REPLY COMMENTS OF THE TELECOMMUNICATIONS INDUSTRY ASSOCIATION

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**REPLY COMMENTS OF THE TELECOMMUNICATIONS INDUSTRY ASSOCIATION**

The Telecommunications Industry Association ("TIA"), by its attorneys, hereby submits its reply to initial comments submitted in response to the Commission's Notice of Proposed Rulemaking ("NPRM") in the above-captioned proceeding.<sup>1</sup>

**I. INTRODUCTION AND SUMMARY [NPRM Section I.B.; Paragraphs 1-14]**

In their initial comments, the regional Bell Operating Companies ("RBOCs") predictably urge the Commission to adopt a minimalist approach toward implementation of the safeguards

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<sup>1</sup> Notice of Proposed Rulemaking, In the Matter of Implementation of the Non-Accounting Safeguards of Sections 271 and 272 of the Communications Act of 1934, as amended, FCC 96-308 (released July 18, 1996).

established in Sections 271 and 272. Indeed, several of the RBOCs go so far as to assert that notwithstanding their continued control of 99.5 percent of the market for local exchange and exchange access service within their respective regions,<sup>2</sup> there is little or no risk of anticompetitive abuse following removal of the current restrictions on their entry into manufacturing and other competitive markets.<sup>3</sup> At least one RBOC (BellSouth) goes on to argue that there is no need for the Commission to adopt **any** rules implementing the structural separation and non-discrimination provisions addressed in this proceeding, other than perhaps rules which simply restate the language of the statute.<sup>4</sup> BellSouth further argues that the Commission lacks the authority to adopt binding rules which go beyond the literal terms of the statute.<sup>5</sup>

The Commission should reject the RBOCs' attempt to trivialize this proceeding and thereby undermine the pro-competitive purposes of the Telecommunications Act of 1996 in general and the Section 272 safeguards in particular. As the Commission's Notice and the comments submitted by TIA and other

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<sup>2</sup> NPRM, ¶ 7.

<sup>3</sup> See e.g., Ameritech Comments at 6; Comments of Pacific Telesis Group ("PacTel Comments") at 55; Comments of U S West, Inc. ("U S West Comments") at 48.

<sup>4</sup> See Comments of BellSouth Corporation ("BellSouth Comments") at 4.

<sup>5</sup> Id.

interested parties observe,<sup>6</sup> significant risks to competition and consumers will exist even after a BOC satisfies the market-opening "checklist" requirements established in Section 271, as a precondition for BOC entry into now-prohibited interLATA and manufacturing markets. In the manufacturing area in particular, the potential risks of cross-subsidy and discrimination in procurement, standard-setting, and access to network-related information will remain quite substantial until such time as meaningful, sustained competition emerges in the BOCs' local service markets.

As TIA has indicated, it is therefore essential that the Commission make every effort to craft meaningful rules implementing the Section 272 safeguards in a manner which addresses the full range of risks to competition in manufacturing in an effective manner. The Commission plainly has the authority and, indeed, the obligation to go beyond the literal terms of Section 272, in order to ensure that the requirements of this section and other manufacturing-related provisions are implemented in a pro-competitive manner, consistent with the underlying purposes of the Communications Act, as amended.<sup>7</sup>

In this regard, TIA strongly supports the Commission's tentative conclusion that the "independent operation" requirement

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<sup>6</sup> See NPRM, ¶¶ 3, 7, 13, 75, 78; TIA Comments at 5-8; AT&T Comments at 16-18, 62-65; MCI Comments at 60-62; Teleport Comments at 8-10; MFS Comments at 3-4; IDCMA Comments at 4; Comments of LDDS Worldcom at 27-29; Sprint Comments at 1-3.

<sup>7</sup> See discussion at Section II, infra.

contained in Section 272(b)(1) has a meaning that encompasses a broader set of structural separation criteria for BOC separate affiliates than is reflected in the specific requirements of Sections 272(b)(2)-(5). The alternative statutory construction advanced by various RBOCs<sup>8</sup> would effectively render this provision meaningless and should be squarely rejected by the Commission.<sup>9</sup>

Ironically, after urging the Commission to adopt an unduly cramped reading of the Section 272 separation provisions, the RBOCs attempt to modify the literal terms of the Section 272 non-discrimination provisions, by adding qualifying language designed to make this provision less stringent and therefore less effective in ensuring that the BOCs deal with all competitors in an evenhanded, impartial manner.<sup>10</sup> The Commission has already properly rejected a similar argument advanced by the RBOCs and other incumbent LECs in the Local Competition proceeding,<sup>11</sup> and there is no valid basis for reaching a different conclusion in

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<sup>8</sup> See e.g., U S West Comments at 29-30; Ameritech Comments at 38; PacTel Comments at 20.

<sup>9</sup> See discussion at Section III, infra.

<sup>10</sup> See BellSouth Comments at 32; PacTel Comments at 29; U S West Comments at 32.

<sup>11</sup> First Report and Order, In the Matter of 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 Nos. 96-98, 95-185, FCC 96-325, (released August 8, 1996) ("Local Competition Order") at ¶¶ 217, 859.

this instance.<sup>12</sup> Accordingly, TIA again urges the Commission to confirm its tentative conclusion that Section 272(c)(1) establishes a stricter standard than that adopted in Section 202 of the Communications Act, one which requires the BOCs to "treat all other entities in the same manner as they treat their affiliates, and . . . provide and procure goods, services, facilities and information to and from these other entities under the same terms, conditions, and rates."<sup>13</sup>

**II. THE COMMISSION HAS BOTH THE AUTHORITY AND THE OBLIGATION TO ADOPT COMPREHENSIVE RULES THAT GIVE FULL EFFECT TO THE REQUIREMENTS OF SECTIONS 271 AND 272. [NPRM Section IV; Paragraphs 55-64]**

In its initial comments, BellSouth makes the remarkable assertion that "[t]here is no need for adoption of rules to implement the non-accounting safeguards set forth in Sections 271 and 272."<sup>14</sup> In support of this contention, BellSouth argues that Congress did not grant the FCC authority to adopt "legislative rules" to implement or "interpretive rules" to clarify the meaning of the non-accounting safeguard provisions of Section 272, asserting that the statute is clear and "essentially complete in itself."<sup>15</sup> At least one of the other commenting

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<sup>12</sup> See discussion at Section IV, infra.

<sup>13</sup> NPRM, Paragraph 73.

<sup>14</sup> BellSouth Comments at 4.

<sup>15</sup> Id. at i, 3-4; also see NYNEX Comments at 8; USTA Comments at 2.

RBOCs, however, apparently does not concur in this view.<sup>16</sup> In its comments, PacTel states that "it would serve the interests of justice for the Commission to indicate in advance -- whether by rule or otherwise -- how it interprets any ambiguous requirements in Section 272 so that the BOCs may be advised of what is necessary to comply," and indicates that there are "several subsections of Section 272 where the Commission's guidance would be helpful."<sup>17</sup>

While TIA does not share PacTel's views with regard to the proper construction of certain provisions, TIA believes that it is clear that several of the non-accounting safeguards included in Section 272, most notably the "independent operation" requirement of Section 272(b)(1), require further clarification, which should be reflected in the rules adopted in this proceeding.<sup>18</sup> With regard to this provision and in other areas where the statutory scheme is unclear and/or incomplete, it is entirely appropriate, and indeed essential, for the Commission to use its authority under Section 4(i) of the Communications Act,<sup>19</sup>

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<sup>16</sup> PacTel Comments at 3.

<sup>17</sup> Id.

<sup>18</sup> See discussion at Section III, infra.

<sup>19</sup> 47 U.S.C. § 154(i). Section 4(i) authorizes the Commission to "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." This authority remains effective, pursuant to Section 601(c)(1) of the Telecommunications Act of 1996 ("1996 Act") which provides that "this Act and the amendments made by this Act, shall not be construed to

to adopt rules implementing, interpreting, and if necessary, supplementing, the statutory safeguard provisions in a manner consistent with their pro-competitive purposes. As BellSouth itself concedes, in the area of manufacturing, the Commission also has available the supplemental authority granted in Section 273(g) of the Act,<sup>20</sup> which explicitly authorizes the Commission to "prescribe such additional rules and regulations as the Commission determines are necessary to carry out the provisions of this section, and otherwise to prevent discrimination and cross-subsidization in a Bell operating company's dealings with its affiliate and with third parties."<sup>21</sup>

It is critical that the Commission make full use of its general authority under Section 4(i), as well as its specific authority under Section 273(g), in order to ensure that its rules address the full range of risks to competition in manufacturing in an effective, comprehensive manner.

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modify, impair, or supersede Federal, state, and local law unless expressly so provided in such Act or amendments."

<sup>20</sup> In its comments, BellSouth acknowledges that Section 273(g) "specifically confers authority on the Commission to supplement the statutory structural separation scheme with additional structural regulations." BellSouth Comments at 28-29, n.71.

<sup>21</sup> 47 U.S.C. § 273(g).

**III. THE COMMISSION MUST ESTABLISH SPECIFIC RULES CONSTRUING AND IMPLEMENTING THE "INDEPENDENT OPERATION" REQUIREMENT OF SECTION 272(b)(1). [NPRM Section IV.A.; Paragraphs 57-60 and Section III; Paragraphs 34, 39]**

In its initial comments, TIA expressed its support for the Commission's tentative conclusion that Section 272(b)(1) of the Act,<sup>22</sup> which provides that a BOC separate affiliate must "operate independently" from its affiliated BOC, should be construed as "imposing requirements beyond those listed in subsections 272(b)(2)-(5)."<sup>23</sup> Several of the RBOCs take exception to this view, arguing that this provision has no independent significance, but is merely "summary language"<sup>24</sup> which provides a "gloss" for the requirements contained in subsections (b)(2)-(b)(5).<sup>25</sup> While at least one RBOC appears to concede that Section 272(b)(1) may in some instances provide authority for the Commission to "adopt rules needed to ensure the separate affiliate's independence,"<sup>26</sup> the RBOCs urge the Commission to defer providing any guidance as to what it means to "operate independently," and to address this issue on an ad hoc basis at a later date, e.g., in the context of addressing individual RBOC applications under Section 271.<sup>27</sup>

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<sup>22</sup> 47 U.S.C. § 272(b)(1).

<sup>23</sup> NPRM, Paragraph 57.

<sup>24</sup> PacTel Comments at 29.

<sup>25</sup> U S West Comments at 29-30; Ameritech Comments at 38.

<sup>26</sup> U S West Comments at 29.

<sup>27</sup> See Ameritech Comments at 39.

TIA continues to believe that the Commission's tentative conclusion that Section 272(b)(1) has independent significance is correct and that to conclude otherwise would violate the most basic rule of statutory construction, that "a statute should be interpreted to give meaning to each of its provisions."<sup>28</sup> As its initial comments indicate, TIA further believes that in order to ensure operational independence and protect competition and ratepayer interests, BOC affiliates that engage in manufacturing should be required to utilize separate facilities, and conduct marketing, administrative, research and development, and other operational functions on an independent basis, separate and apart from their affiliated BOCs.<sup>29</sup>

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<sup>28</sup> NPRM, Paragraph 57, n.107, citing Sutherland Stat. Const. § 46.05 (4th ed. 1984).

<sup>29</sup> TIA Comments at 22-23. In addition, while the separation requirements and non-discrimination provisions of Section 272 focus on the relationship between the separate affiliate and its affiliated BOC, the Commission must take care to ensure that other BOC affiliates do not become vehicles for evasion of the Section 272 safeguards.

In its initial comments, TIA also demonstrated that the requirements of Section 272 are fully applicable to previously-authorized manufacturing activities, at the end of the one-year transition period provided in Section 272(h). TIA Comments at 16-18. At least three of the RBOCs that have addressed this issue appear to concede that, notwithstanding the provisions of Section 271(f), such activities ultimately must be brought into compliance with the requirements of Section 272. See U S West Comments at 15-16; NYNEX Comments at 40; Comments SBC Communications, Inc. ("SBC Comments") at 11. BellSouth's contrary argument (BellSouth Comments at 19) is without merit and should be rejected, for the reasons stated in TIA's initial comments.

For the Commission to decline to provide any guidance as to what it means to "operate independently" until after a BOC has established plans for or is actively engaged in activities which fall within the requirements of Section 272 would be highly ill-advised, in TIA's view. Under this approach, individual BOCs would be allowed to determine, at least in the first instance, the extent of separation required under the statute. Given the BOC's clear incentives to minimize the degree of separation between their affiliate's competitive activities and their own local exchange activities, the likely effect of such an approach would be to substantially reduce the effectiveness of the Section 272 safeguards in controlling cross-subsidization and other anticompetitive behavior, a result wholly at odds with the pro-competitive purposes of these provisions.

**IV. THE SECTION 272 NON-DISCRIMINATION STANDARD, BY ITS TERMS, IS MORE STRINGENT THAN THE SECTION 202 STANDARD. [NPRM Section V; Paragraphs 65-81 and Section VII.A., Paragraphs 94-96]**

After arguing that the Commission **should not** add to or otherwise deviate from the literal terms of the structural separation provisions contained in Section 272(b), the RBOCs stand their own arguments on their head, by asserting that the Commission **should** modify the express terms of the non-discrimination provisions contained in Section 272(c), by

construing this provision as barring only "unjust and unreasonable" discrimination.<sup>30</sup>

Moreover, in its comments, BellSouth erroneously asserts that the Commission's Notice "tentatively concludes that the use of the term 'discriminate' in [Section] 272(c)(1) includes only unjust or unreasonable discrimination."<sup>31</sup> In fact, the paragraph cited by BellSouth merely notes that **Section 202** of the Communications Act includes this qualifying language, and requests comment on "whether Congress intended to impose a **stricter** standard for compliance with **Section 272(c)(1)** by enacting this **flat prohibition** on discrimination."<sup>32</sup> The Commission's tentative conclusion in the following paragraph that "the prohibition against discrimination in Section 272(c)(1) means, at a minimum, that BOCs must treat all other entities in the **same** manner as they treat their affiliates, and must provide and procure goods, services, facilities and information to and from these other entities under the **same** terms, conditions, and rates"<sup>33</sup> clearly reflects a recognition that the Section 272(c)(1) standard is in fact stricter than the Section 202 standard.

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<sup>30</sup> See BellSouth Comments at 32; PacTel Comments at 29; U S West Comments at 31-32.

<sup>31</sup> BellSouth Comments at 32.

<sup>32</sup> NPRM, ¶ 72 [emphasis added].

<sup>33</sup> Id., ¶ 73.

That the Commission should have reached such a conclusion is unsurprising, since it has already confronted and resolved a virtually identical issue, raised in the Commission's Local Competition proceeding, relating to the use of the term "non-discriminatory" in the interconnection and unbundling provisions of Sections 251 and 252. In that proceeding, the Commission ultimately concluded that "Congress did not intend that the term 'nondiscriminatory' in the 1996 Act be synonymous with 'unjust and unreasonable discrimination' used in the 1934 Act, but rather intended a more stringent standard."<sup>34</sup> While BellSouth argues that the Commission's ruling was "limited to Section 251,"<sup>35</sup> the logic of its analysis is equally applicable to the issue raised with respect to the non-discrimination requirements of Section 272(c)(1), and the RBOCs have offered no valid basis for the Commission to reach a different conclusion in this instance.

Accordingly, TIA reiterates its support for the Commission's tentative conclusion that the BOCs must treat all other entities in the same manner as they treat their affiliates. This principle should be applied to all of the activities encompassed within Section 272(c)(1), including "the provision or procurement of goods, services, facilities, and information," as

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<sup>34</sup> Local Competition Order, supra n.10, ¶ 217.

<sup>35</sup> In fact, the Commission's order refers to the use of the term 'nondiscriminatory' in Sections 251 and 252. See Local Competition Order, ¶¶ 851, 859.

well as "the establishment of standards."<sup>36</sup> TIA also renews its request for the adoption of rules requiring the BOCs to establish specific procedures to ensure non-discrimination in their procurement of "goods" and "services," defined in a manner consistent with the recommendations made in TIA's initial comments.<sup>37</sup>

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<sup>36</sup> 47 U.S.C. § 272(c)(1).

<sup>37</sup> See TIA Comments at 32-35, 41-42. As its initial comments indicate, TIA further believes that appropriate enforcement mechanisms, including reporting and record retention requirements, are essential to achieving the statutory goal of preventing anticompetitive discrimination and cross-subsidization. Id. at 45-49.

V. CONCLUSION.

For the foregoing reasons, the Commission should reject the RBOCs' efforts to construe the non-accounting safeguard provisions of Sections 271 and 272 in a manner which would prevent them from achieving their intended purpose of preventing anticompetitive cross-subsidy and discrimination. TIA again urges the Commission to make every effort to ensure that consumers continue to realize the benefits of the current, vigorously competitive domestic equipment marketplace, by adopting appropriate rules implementing the structural separation and non-discrimination requirements of Section 272, in a manner consistent with TIA's comments in this proceeding.

Respectfully submitted,

  
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