

requirements and language of the Act; and no RBOC has shown that the costs it would impose would be at all significant.⁴⁵

B. Non-Discrimination

Sections 272(c) and 272(e) establish broad prohibitions on all forms of discrimination through which a BOC would seek to favor its affiliate over unaffiliated entities.⁴⁶ Several proposals contained in the RBOCs' comments, however, would limit sharply the scope of those prohibitions, or create massive loopholes that would enable the BOCs to evade them. The Commission should reject those proposals.

1. **The Commission should reject the suggestion that putatively "equal treatment of an affiliate and an unaffiliated entity cannot be unlawfully discriminatory."**

Several of the RBOCs contend that a BOC will be in compliance with the general non-discrimination provision of Section 272(c)(1) so long as it offers to unaffiliated carriers the precise services or facilities, under the same terms and conditions, as it provides to its affiliate. These RBOCs thus reject the NPRM's suggestion (¶ 67) that a BOC should instead be required to offer to unaffiliated entities functional outcomes or service quality equal to that provided to its affiliate -- a requirement that would be highly material in the event that alleged technical differences between the affiliated and unaffiliated entities meant that the mere provision of

⁴⁵ Bell Atlantic's witness, Professor Taylor, for example, acknowledges that his estimate of a 15 percent increase in costs is "[i]n the extreme," because (1) it assumes that there will be complete duplication of administrative functions between the BOC and the affiliate, and that administrative expenses are essentially volume-insensitive; (2) even absent a prohibition on sharing, the BOC and the affiliate would duplicate some functions; and (3) complete sharing of functions would increase administrative expenses "to some degree" beyond the level of the BOC alone. See Bell Atlantic, Affidavit of William E. Taylor, ¶ 8 & n.5.

⁴⁶ See AT&T, pp. 29-47 (describing regulations that should be adopted to implement non-discrimination provisions of Section 272).

identical facilities or services would produce different results.⁴⁷ Relatedly, some of the RBOCs likewise contend that the non-discrimination requirement should not be construed to require a BOC to provide any service or facility to an unaffiliated entity if the BOC does not already provide that service or facility to its affiliate -- which would mean that the options available to competitors could be confined entirely to those services and facilities that the BOC affiliate would find useful.⁴⁸

This standard would drive service to the lowest common denominator and be a recipe for discrimination. The BOC would cooperate intensively with its affiliate to ensure that its affiliate's service works optimally, and then, when an unaffiliated carrier requests the same functionality but has different specifications, would exert minimal or no effort to provide a properly tailored offering and then defend the result on the ground that the unaffiliated carrier was receiving the same facility or service that the affiliated carrier had obtained.⁴⁹ It would also enable the BOC to "fail to cooperate with an interLATA carrier that is introducing an innovative new service until the BOC's interLATA affiliate is ready to initiate the same service" -- one of the classic discrimination scenarios identified by the NPRM (§ 139 n.266) -- on the

⁴⁷ See, e.g., Ameritech, pp. 54-56; PacTel, pp. 26-27; U S West, pp. 33-34.

⁴⁸ See, e.g., NYNEX, p. 37; USTA, p. 23.

⁴⁹ For example, AT&T's TrueVoice[®] improves the sound quality of interLATA calls, but requires that LEC access facilities meet certain specifications. Indeed, where access facilities fail to meet those specifications, the interaction with AT&T's new technology could, in some instances, render the sound quality inferior to what callers had previously experienced. Under the standard proposed by the RBOCs, however, a BOC could simply refuse to make such modifications unless and until its affiliate determines it needs them as well. As a result, under the rule advanced by the the RBOCs, a BOC could improperly convert a competitor's quality-enhancing innovation into a competitive disadvantage, and still purport to comply with its nondiscrimination obligations.

spurious ground that it is not discriminatory for the BOC to refuse to provide its competitor with a service or facility that had not been made available to its affiliate.⁵⁰

AT&T agrees with the RBOCs (see, e.g., Ameritech, pp. 55-56) that identical outcomes should be required only in those instances in which a BOC's affiliate and its interexchange competitors have each sought "like services." However, the RBOCs ignore that whether two services are "like" depends on the customer's perception that they are functionally equivalent.⁵¹ Accordingly, a BOC is required to achieve identical outcomes except in those cases in which the customer (here, the competing interexchange carrier) has expressly requested a functionally inferior service in exchange for the payment of a lower price (or a functionally superior service in exchange for a higher price).

To be sure, there will always be practical difficulties in enforcing a non-discrimination standard which requires that a BOC address its competitors' needs and its affiliate's needs with equal vigor, as opposed to one that requires the BOC merely to provide competitors and affiliates with equal inputs. But that does not make such "withhold[ing of] cooperation" (see NPRM, ¶ 65) any less discriminatory or improper. Indeed, these difficulties are among the reasons that Congress did not permit the BOCs to provide in-region interLATA

⁵⁰ This is the precise stratagem in which the Georgia Public Service Commission found BellSouth had engaged in order to give its affiliate a competitive advantage in voice messaging. See Order, pp. 31-34, Investigation into Southern Bell Tel. and Tel. Co.'s Provision of MemoryCall[™] Serv., Docket No. 4000-U (Georgia PSC decided May 21, 1991) (finding that BellSouth had manipulated development of its local network and the timing of its unbundling of network features so as to maximize its competitive advantage in offering voicemail service, and had "improperly impeded development of the VMS [voice messaging] market for almost a decade").

⁵¹ See, e.g., See Competitive Telecommunications Ass'n v. FCC, 998 F.2d 1058, 1061 (D.C. Cir. 1993); Ad Hoc Telecommunications Users Committee v. FCC, 680 F.2d 790, 795 (D.C. Cir. 1982).

services merely on the condition that they be subject to non-discrimination (or other regulatory) requirements, but also required as prerequisites the presence of facilities-based competition and the making of a public interest finding. At a minimum, however, the Commission can at least partially address these problems by (1) providing that the failure by a BOC to achieve identical outcomes among unaffiliated and affiliated entities shall be prima facie evidence of discrimination, and (2) establishing that a BOC may not deny a competitor's request for access services, or defend against a claim of discrimination, merely on the ground that all carriers are receiving the same service.⁵²

2. **Section 272(c)(1)'s requirement that a BOC "may not discriminate" imposes a stricter standard than Section 202(a)'s prohibition on "unreasonable discrimination."**

Several RBOCs contend that Section 271(c)(1)'s flat prohibition on BOC "discriminat[ion]" should be limited to acts of "unreasonable discrimination" as that term is used in Section 202(a).⁵³ As numerous commenters point out, however, that reading cannot be squared with the language of Section 272(c)(1), which, unlike Section 202(a), prohibits all discrimination rather than merely "unreasonable" discrimination.⁵⁴

Moreover, the Commission has expressly rejected the same argument in construing the parallel language of Section 251. In the First Interconnection Order, the Commission noted that section 251(c)(2)'s requirement that the rates, terms, and conditions for interconnection be "nondiscriminatory" "is not qualified by the 'unjust or unreasonable' standard

⁵² See AT&T, pp. 29-32.

⁵³ See, e.g., Bell Atlantic, p. A7; BellSouth, p. 32; PacTel, p. 29; USTA, p. 25; U S West, p. 31.

⁵⁴ See, e.g., AT&T, pp. 32-33; ITAA, p. 22; MCI, p. 34; Sprint, p. 40; TIA, p. 37; Time Warner, pp. 21-22.

of section 202(a)," and "therefore conclude[d] 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."⁵⁵ The Commission explained that Section 202(a)'s prohibition on unreasonable discrimination was designed for "comparison[s] between what the incumbent LEC provided other parties in a regulated monopoly environment."⁵⁶ Under the conditions created by the 1996 Act, in contrast, the LEC will also be providing service to itself, and will have a particular "incentive to discriminate" -- requiring a different standard.⁵⁷ The same circumstances apply under Section 272, and none of the RBOCs even attempts to suggest a basis for construing Section 272(c)(1) any differently from Section 251(c)(2).

3. The non-discrimination requirements of Section 272 apply to CPNI.

U S West contends (pp. 38-39) that Section 272(c)(1) does not apply to CPNI because Section 222 specifically addresses CPNI. That claim is untenable, and no other commenter advances it. Section 272(c) expressly prohibits all discrimination in the "provision" of "information," and nowhere does the Act otherwise exempt information from the structural separation requirements of section 272. The CPNI a BOC possesses by virtue of its local exchange monopoly is among the most competitively valuable information, and there could be no reason for permitting a BOC to provide its affiliate with preferential access to it.

⁵⁵ See First Interconnection Order, ¶ 217; see also id., ¶ 218 (rejecting for purposes of Section 251 "our historical interpretation of 'nondiscriminatory'").

⁵⁶ Id., ¶ 218.

⁵⁷ Id.

Nor does U S West suggest one. It simply notes that Section 222(c)(1) requires a carrier to disclose a customer's CPNI to a specific other carrier upon that customer's request, and that it would be inappropriate to apply the non-discrimination requirement of Section 272(c)(2) to require a BOC then to disclose such information to other carriers not designated by the customer -- an observation that is true, but irrelevant. While no broader distribution of that customer's CPNI would be appropriate in that narrow circumstance, that proposition obviously provides no justification for broadly eliminating Section 272(c)(1)'s prohibition against discriminatory use of CPNI in any other instance. For example, a BOC could not lawfully use its databases of, or communications with, its customers in order to seek and obtain customer authorization to provide such information to, or use such information for the benefit of, its affiliate, unless it seeks and obtains such authorizations on behalf of unaffiliated entities on the same terms.⁵⁸

4. Section 272(e)(1)'s requirement that a BOC fulfill "any" requests from unaffiliated carriers at intervals "no longer" than for affiliated entities cannot be satisfied merely by comparability in average response times.

PacTel urges (pp. 36-37) that the Commission establish that a BOC can satisfy Section 272(e)(1) as long as its average response times for requests from unaffiliated entities are comparable to its average response times for its affiliates. That statutory provision, however, provides otherwise -- and properly so. Section 272(e)(1) requires that "any requests" from unaffiliated carriers for exchange or exchange access be fulfilled within a period "no longer than" the period in which the BOC provides the service to its affiliates. It thus establishes the BOC's minimum response time to itself as its maximum permissible response time to others. Any other standard would permit the BOC to discriminate by providing faster service to itself

⁵⁸ See AT&T, pp. 34, 59-60.

when its customers needs are urgent and time-sensitive and slower service to itself in other instances, and doing the reverse for its competitors -- all while keeping average response times the same.⁵⁹

5. A BOC may not evade the non-discrimination requirements of Section 272 by transferring its network capabilities to an affiliate.

The NPRM described two types of intracorporate transfers of local network capabilities which a BOC might claim would enable it to evade the non-discrimination requirements of Section 272. First, a BOC might transfer network capabilities to an affiliate established under Section 272(a) and claim that the affiliate is not then subject to Sections 272(c) (which applies only to BOCs) and 272(e) (which applies only to BOCs and affiliates subject to Section 251(c)). Second, a BOC might transfer network capabilities to a different affiliate, and claim that that affiliate is not then subject to Section 272(c). The NPRM tentatively concluded (§ 70) that the first type of transfer would be prohibited by Section 272(a), or, alternatively, would render the affiliate a "successor or assign" of the BOC (see Section 153(4)(B)) subject to Section 272(c)(1) and 272(e). It further concluded (§ 79) that the second type of transfer would likewise render the BOC a "successor or assign" subject to the same non-discrimination requirements.

These conclusions were correct. Some of the BOCs, however, urge the Commission to limit the scope of its rules so as to permit such evasions. PacTel, for example, urges (p. 25) that only "substantial" transfers of assets should qualify for such treatment. Ameritech goes even further, specifically suggesting (pp. 61-62) that a BOC should be able to transfer "a single local exchange" to an affiliate without that affiliate then being subject to

⁵⁹ See AT&T, pp. 36-38.

Section 272(c), on the ground that the affiliate would still not be a "successor or assign" of the BOC.

The Commission should expressly prohibit such a patently improper effort to circumvent the statute's terms and purposes -- under which Ameritech could, for example, completely remove Section 272(c)'s non-discrimination requirements from the service it provides to the city of Chicago (which is "a single local exchange").⁶⁰ Congress could not have intended its comprehensive prohibitions on discrimination to be evaded by the mere shifting of assets among affiliated companies. The Commission should therefore adopt a construction of "successor or assign" broad enough to encompass any transfer of a BOC's local network capabilities. Alternatively, the Commission could achieve the same result by holding that it will not deem approval of any Section 271 application to be in the public interest unless the BOC agrees that any such transfer would render the transferee affiliate fully subject to the requirements of Sections 251, 272(c) and 272(e).⁶¹

C. Enforcement

With one exception, all commenters that address the issue agree that the Commission's new enforcement authority under 47 U.S.C. § 271(d)(6) augments its existing

⁶⁰ Ameritech contends (pp. 61-62) that this wholesale exemption from Section 272(c)(1)'s non-discrimination requirement should be no cause for concern, because the affiliate would still be subject to the non-discrimination requirement of Section 202(a). As the Commission has already indicated, however, the non-discrimination requirements of the 1996 Act impose a substantially "more stringent" standard. See *supra* pp. 23-24 (citing First Interconnection Order, ¶¶ 217-18) It is that standard that Ameritech apparently seeks to evade.

⁶¹ Ameritech implies (p. 59) that such transfers could have been effectuated under the MFJ without rendering the transferee a successor to the BOC. There is no basis for that suggestion. No MFJ precedent so holds, because the issue was never adjudicated -- and AT&T disagrees with Ameritech's (now academic) interpretation of the pertinent MFJ provisions.

enforcement authority under 47 U.S.C. §§ 206-209.⁶² However, the RBOCs make several proposals that would rewrite the statutory standard or seriously impede its enforcement.

First, Ameritech and USTA propose to render the standard meaningless. USTA contends (pp. 34-35) that Section 271(d)(6) should not apply where the alleged violation rests on "disputable readings of the Commission's rules." Ameritech contends (p. 73) that Section 271 principally establishes "one-time conditions" that must exist at the time a BOC's application is approved, but for the most part can cease to exist the next day without affecting the BOC's right to provide interLATA service -- so that, for example, even the termination of the interconnection agreement on which a BOC's application was based would not establish a basis for revoking that BOC's interLATA authority. However, the statute provides otherwise. It establishes that if, "at any time after the approval of an application," the Commission determines that the BOC "has ceased to meet any of the conditions required for such approval," the Commission is authorized to "suspend or revoke such approval."⁶³ And it nowhere provides that the willingness of a BOC to file a pleading disputing that claim renders that standard inapplicable.

⁶² See, e.g., CompTel, p. 26; Excel, p. 14; MCI, p. 52; PacTel, p. 47; Sprint, p. 55 n.35; USTA, pp. 33-34 & n.14. The lone dissenter is NYNEX, who contends (pp. 64-65) that Section 271(d)(6) "supersedes" Sections 206-208. However, there is absolutely no support for the assertion that Congress intended to eliminate for violations of Sections 271 and 272 the damages remedy that applies to all other provisions of Title II. Indeed, in light of the risks posed by violations of Sections 271 and 272 to the competitive concerns that underlie the Act, the suggestion that Congress would have chosen to reduce the incentives for BOCs to comply and to leave injured parties uncompensated is absurd.

⁶³ See 47 U.S.C. § 271(d)(6)(A)(iii) (emphasis added); see also 47 U.S.C. § 271(d)(6)(B) (directing expedited review of complaints alleging that a BOC has failed "to meet conditions required for approval under" Section 271(d)(3)).

Second, that language also supports the Commission's proposal (§ 101-03) that the burden of proof should shift to the BOC once a complainant has established a prima facie case (a proposal that the RBOCs oppose).⁶⁴ Because the BOC bears the burden of proof in its application,⁶⁵ a BOC "ceases to meet" the conditions required for approval whenever it cannot meet that burden. And the shifting of the burden is further justified, as the Commission found (§ 102), by the fact that the relevant information will in all likelihood be in the BOC's possession in any event.⁶⁶

Finally, the BOCs uniformly oppose the reporting requirements proposed by AT&T and others to facilitate detection and deterrence of their violations of Section 272, asserting that such requirements would be burdensome and that the Commission can instead rely

⁶⁴ See, e.g., Ameritech, p. 74; Bell Atlantic, p. 10; NYNEX, pp. 70-74; PacTel, pp. 42; USTA, pp. 35-36; U S West, p. 62.

⁶⁵ See 47 U.S.C. § 271(d)(3) (Commission "shall not approve" the authorization "unless it finds" that prerequisites have been met).

⁶⁶ Contrary to BellSouth's misstatement (pp. 36-37 & n.88), 5 U.S.C. § 556(d) does not prohibit the shifting of the burden of proof. That provision applies only to adjudications under 5 U.S.C. § 554 (see 5 U.S.C. § 556(a)), i.e., adjudications required to be determined "on the record" with a live hearing. See 5 U.S.C. § 554 (a). See American Trucking Assocs., Inc. v. United States, 344 U.S. 298, 319-320 (1953) ("we think it plain that the requirement" that the proponent of a rule shall have the burden of proof "applies only when hearings were required by the statute under which they were conducted to be made on the record and with opportunity for oral hearing"); United States v. Florida East Coast Ry., 410 U.S. 224, 234-35 (1973) (statutory mandate that commission act "after hearing" insufficient to trigger requirements of section 556); Railroad Comm'n of Texas v. United States, 765 F.2d 221, 227 (D.C. Cir. 1985) (statutory requirement that "Commission may take action . . . only after a full hearing" insufficient to make sections 556 and 557 applicable). Because section 271(d)(6) neither requires an "on the record" hearing nor mandates that live testimony be taken, section 556(d) is simply inapplicable. With respect to its separate assertion (p. 38) that BOCs must be accorded a "rebuttable presumption of lawfulness" once their application is approved, BellSouth cites no authority or other basis to support it, and none exists.

upon the BOCs' competitors to report any illegalities.⁶⁷ But any BOC that intends to comply with the non-discrimination requirements will have to keep such records itself anyway -- tracking, for example, the time intervals for service to its affiliate and to unaffiliated entities -- so no additional burden would be imposed by requiring that data to be placed on the public record.⁶⁸ Moreover, reliance on BOC competitors to bring violations to the Commission's attention would be chimerical in the absence of reporting requirements. While unaffiliated entities will know the level of service they are receiving, there would generally be no way for them to know how the BOC is treating its affiliate and therefore no way to know whether they are the victims of discrimination.

III. THE COMMISSION SHOULD ADOPT RULES IMPLEMENTING THE JOINT MARKETING PROVISIONS OF SECTION 272(G).

If and when a BOC affiliate is authorized to provide in-region interLATA services, the BOC and its affiliate will each be permitted to market or sell the services of the other, subject to the conditions imposed by Section 272(g)(1), 272(b), and the other applicable provisions of the Act. Although several of the RBOCs variously accuse the Commission of proposing to "eliminat[e]," "abrogate," or "neuter" their ability to engage in joint marketing,⁶⁹ nothing the Commission (or AT&T) has proposed remotely supports this rhetoric. Under Section 272(g)(1), a BOC affiliate will be permitted to purchase and resell the BOC's local exchange service in conjunction with its own interLATA service (provided unaffiliated carriers

⁶⁷ Compare AT&T, pp. 36-38; ITAA, p. 23; MCI, p. 50; Sprint, p. 44; TCG, pp. 13-18, with NYNEX, pp. 62-63; PacTel, p. 47; USTA, p. 31; U S West, p. 60.

⁶⁸ To the extent a BOC contends that reporting requirements will be burdensome because it otherwise would not bother to keep track of such information, that merely underscores the need for such requirements to be imposed.

⁶⁹ See, e.g., BellSouth, pp. 8, 12; Bell Atlantic, p. 9; U S West, p. 6.

have the same opportunity), and under Section 272(g)(2), the BOC will likewise be permitted to market and sell the interLATA services of its affiliate pursuant to an arm's length agreement through which its affiliate purchases those marketing services.

However, while Section 272(g)(3) provides that the non-discrimination provisions of Section 272 do not prohibit such joint marketing, the separation requirements of Sections 272(a) and 272(b) continue fully to apply to the relationship between a BOC and its affiliate. Thus, while the BOC and its affiliate can each "jointly market" in the sense that each company can offer exchange and interexchange services to its customers, they cannot together integrate their marketing operations or their product design and development without violating Section 272(b)(1)'s requirement that they "operate independently" or Section 272(b)(3)'s requirement that they maintain separate employees. This is the distinction that USTA ignores (p. 30) in asserting that joint marketing by either company somehow requires "shared marketing services" and that Section 272(b)'s prohibition on such sharing cannot be enforced, and that NYNEX likewise ignores in suggesting (p. 11) that the BOC and its affiliate can lawfully engage in "product development" together.⁷⁰

Moreover, some of the RBOCs likewise ignore that the equal access rules, which remain in effect (see Section 251(g)), prohibit a BOC from touting its affiliate's interLATA service over the services of other carriers when customers contact the BOC to order local service. Any such joint marketing must therefore be limited to instances in which either the

⁷⁰ SBC likewise has it exactly backwards when it suggests (p. 12) that application of the Act's structural separation requirements to prohibit collective marketing efforts between a BOC and its affiliate would be inconsistent with the Act's joint marketing provisions. The only permissible joint marketing by a BOC or its affiliate is that which can be done consistent with the requirements of Section 272(b).

BOC initiates the call or the customer calls specifically to inquire about interLATA service.⁷¹ NYNEX even suggests (p. 19), however, that the BOC should be permitted to use customer-initiated calls seeking local service to obtain the customer's consent to provide the customer's CPNI to the BOC affiliate (even though the BOC would not then seek such consent for, or provide that CPNI to, unaffiliated carriers). The Commission should confirm that such discriminatory conduct by the BOC to favor its affiliate will be prohibited.

Finally, a few RBOCs devote portions of their comments to contending that the Commission should impose restrictions on joint marketing by larger interexchange carriers beyond those imposed by Section 271(e) -- such as extending that prohibition to the joint marketing of interexchange services with exchange services obtained through the purchase of unbundled network elements under Section 251(c)(3),⁷² or prohibiting the provision of interexchange and resold exchange service through a single source.⁷³ These contentions appear to be beyond the scope of this proceeding, which is about the safeguards to be imposed on the BOCs.⁷⁴

In any event, they are meritless. The attempt to impose "parity" on the restrictions applicable to interexchange carriers so that they match the restrictions applicable to the BOCs ignores that only the BOCs have market power over either of the services to be marketed -- which is why Section 271(e) imposes far more narrow restrictions on interexchange

⁷¹ See AT&T, pp. 57-59.

⁷² See USTA, p. 28.

⁷³ See Ameritech, pp. 48-49.

⁷⁴ The NPRM invited comment on Section 271(e) only insofar as it bore on the proper interpretation of the language of Section 272(g). See NPRM, ¶ 91.

carriers than Section 272 imposes on the BOCs. The Commission has thus held, as the plain language of Section 271(e) provides, that interexchange carriers are not prohibited from jointly marketing interexchange services with exchange services obtained under Section 251(c)(3) (or through any means other than under the resale provisions of Section 251(c)(4)) -- a far less categorical restriction than that applicable to the BOCs, who cannot engage in the joint marketing of any exchange and interexchange services until they satisfy the requirements of Section 272(g).⁷⁵ Similarly, because there are no structural separation requirements applicable to interexchange carriers (as opposed to the BOCs), there is no prohibition on exchange and interexchange services being made available from the same source -- as even Ameritech ultimately concedes.⁷⁶

IV. REGARDLESS OF WHETHER THE COMMISSION CLASSIFIES THE BOC AFFILIATES AS DOMINANT CARRIERS IN THE PROVISION OF INTEREXCHANGE SERVICES, ITS REGULATION SHOULD ADDRESS THEIR STRONG POTENTIAL FOR ABUSE OF MARKET POWER.

With respect to the regulatory classification of BOC affiliates, AT&T's Comments demonstrated three propositions: (1) an analysis of the BOC affiliate's market power in the interexchange market must focus on the BOC's market power in its local exchange markets (pp. 61-62); (2) to the extent a BOC retains market power in its local markets, that market power can be leveraged so as to enable the BOC affiliate to exercise market power in the interexchange market (pp. 62-65); and (3) the Commission should adopt regulations that address this potential leveraging of market power (pp. 65-66). Nothing in the RBOCs' comments refutes any of those conclusions.

⁷⁵ See First Interconnection Order, ¶¶ 335-36; see also NPRM, ¶ 91.

⁷⁶ See Ameritech, p. 48 ("theoretically a company could provide a single source of contact for local and long-distance services without violating the joint marketing prohibition").

First, while the RBOCs are correct that the Commission's existing interexchange market definitions should not be modified,⁷⁷ they completely miss the point in suggesting that a BOC affiliate would therefore lack market power because it would start with no interexchange market share and would be entering a market with pervasive supply substitutability.⁷⁸ Where abuse of market power would occur through leveraging, the critical market shares are in the input market in which the monopolist controls bottleneck facilities -- i.e., markets for access and local services -- not the downstream market for interexchange service.⁷⁹

Indeed, that is precisely the approach the Commission has adopted in classifying U.S. international carriers as dominant or non-dominant. Pursuant to the Commission's rules, a U.S. carrier that is affiliated with a monopoly foreign carrier is presumptively classified as dominant for calls along the route between that country and the United States.⁸⁰ A U.S. carrier that seeks to be classified as non-dominant but is affiliated with a non-monopoly foreign carrier still bears the burden of showing that its affiliate "lacks the ability to discriminate . . . through control of bottleneck services or facilities."⁸¹ In such instances, the inquiry is properly focused

⁷⁷ See, e.g., Bell Atlantic, pp. 11-14; BellSouth, pp. 40-45; NYNEX, pp. 51-54; PacTel, pp. 50-51; USTA, pp. 39-44.

⁷⁸ See Ameritech, pp. 8-12, 31; Bell Atlantic, pp. 14-15; BellSouth, pp. 45-46, 51; NYNEX, p. 54; PacTel, pp. 52-53; USTA, p. 44.

⁷⁹ See Olympia Equip. Leasing Co. v. Western Union Tel. Co., 797 F.2d 370, 373-75 (7th Cir. 1986) (carrier's monopoly power over Commission-regulated telex services could give it "power to curtail competition in the complementary equipment market" even though it held "only a tiny fraction" of equipment market); see also Otter Tail Power Co. v. United States, 410 U.S. 366, 375 (1973) (leveraging by denial of access); Town of Concord v. Boston Edison Co., 915 F.2d 17, 25-29 (1st Cir. 1990) (leveraging by price squeeze); Berkey Photo, Inc. v. Eastman Kodak Co., 603 F.2d 263, 275-76 (2d Cir. 1979) (discussing leveraging of monopoly power in one market to obtain improper competitive advantage in another market).

⁸⁰ See 47 C.F.R. § 63.10(a)(2).

⁸¹ See 47 C.F.R. § 63.10(a)(3).

on "the scope or degree of the foreign affiliate's bottleneck control" in the market in which that control exists.⁸² These regulations recognize, as does the Commission in the NPRM (§ 126), that affiliation with a carrier that controls bottleneck facilities is a significant source of market power, and that determining the proper regulatory classification of an entity with such an affiliation requires careful scrutiny of the market in which the affiliated carrier has its bottleneck.⁸³

Second, this leveraging of market power would enable the BOC to provide its affiliate with anticompetitive advantages through discrimination, cost misallocations, price squeezes, and other improper conduct.⁸⁴ In that regard, the suggestion by the RBOCs (and the Commission, see NPRM, §§ 135, 137) that cost misallocations would not harm competition unless (1) they succeeded in forcing other interexchange carriers out of business, and (2) the RBOC could then raise prices sufficiently to recoup the losses it would have incurred from below-cost pricing, is quite wrong.⁸⁵ Exploiting cost misallocation to divert business to BOC affiliates from other, more efficient suppliers would be anticompetitive even if the latter suppliers remained in the market. Moreover, such a strategy would be costless to the BOC, for

⁸² See id.

⁸³ For these same reasons, the contention of the RBOCs and their witness, Professor Hausman, that the Commission should not adopt a geographic market definition based on city pairs addresses a strawman. No one has proposed that here. See USTA, Affidavit of Jerry A. Hausman, pp. 6-7.

⁸⁴ As discussed supra (pp. 10 - 11), the Act reflects Congress' rejection of the RBOCs' repeated claims that regulatory mechanisms alone would or could prevent such abuses of market power.

⁸⁵ See Ameritech, pp. 7, 18-21; Bell Atlantic, p. 16; BellSouth, p. 53; U S WEST, p. 50; USTA, pp. 45-57.

it would recover its "losses" in the competitive market through contemporaneous higher rates in the non-competitive market -- and no subsequent recoupment would be necessary.⁸⁶

However, as AT&T explained in its Comments (pp. 65-66), dominant carrier regulation is neither a necessary nor a sufficient response to the threat of such abuses. While some aspects of dominant carrier regulation, such as advance tariff filing requirements, cost support requirement, and price floors, are addressed to the risks of cost misallocation and predation and should here be imposed, other aspects (such as more stringent Section 214 requirements and price ceilings) are irrelevant to these competitive risks. At the same time, those aspects of dominant carrier regulation that should be imposed would not substitute for, but rather should complement, the structural separation, non-discrimination, and reporting

⁸⁶ See AT&T, p. 64. Both Professor Sullivan and Judge Bork, whom the BOCs quote out of context, have emphasized this distinction. Professor Sullivan, while noting that classic predation in the interexchange industry is implausible (see Ameritech, p. 21) has explained that BOCs have "both the capacity and incentive to leverage" their monopoly power "from local exchange markets into the interexchange market" by "cross-subsidiz[ing] interexchange service from supra-competitive local exchange returns." See AT&T's Opposition to Ameritech's Motions for "Permanent" and "Temporary" Waivers from the Interexchange Restrictions of the Decree, Affidavit of Lawrence A. Sullivan, pp. 14-15, United States v. Western Elec. Co., Civil Action No. 82-0192 (D.D.C. filed Feb. 15, 1994). Likewise, Judge Bork, whom PacTel selectively quotes (p. 63) for the proposition that price squeezes are not usually profit-maximizing, has testified that this proposition does not hold when one of two adjacent markets is competitive and the other is a regulated monopoly. See AT&T's Opposition to the Four RBOCs' Motion to Vacate the Decree, Affidavit of Robert H. Bork, pp. 4-5, United States v. Western Elec. Co., Civil Action No. 82-0192 (D.D.C. filed Dec. 7, 1994).

requirements that should also be adopted in this proceeding.

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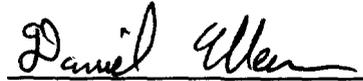
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August 30, 1996

CERTIFICATE OF SERVICE

I, Daniel Meron, hereby certify that, on this 30th day of August, 1996, I served one copy of the foregoing Reply Comments of AT&T Corp., via first class mail, postage prepaid, on the persons on the attached service list.

A handwritten signature in cursive script that reads "Daniel Meron". The signature is written in black ink and is positioned above a horizontal line.

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