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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF SECRETARY

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of	)	
	)	
Implementation of the	)	CC Docket No. 96-152
Telecommunications Act of 1996:	)	
	)	
Telemessaging,	)	
Electronic Publishing, and	)	
Alarm Monitoring Services	)	

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REPLY COMMENTS OF AT&T CORP.

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SUMMARY

The comments generally support the Commission's proposed regulations for the implementation of Sections 260, 274 and 275, which supplement the separation requirements of Section 272 for any in-region telemessaging, electronic publishing or alarm monitoring services of the BOCs that have interLATA transmission or access as a component.

Section 260. The comments support the conclusion that Section 260 confers jurisdiction on the Commission to prevent discrimination or cross-subsidization in the provision of all telemessaging services by any incumbent LEC without regard to state or LATA boundaries. Furthermore, the comments support the conclusion that the nondiscrimination requirements of Section 260 go beyond the general prohibition against "unreasonable" discriminations or preferences in Section 202 by categorically prohibiting any preference or discrimination by an incumbent LEC in favor of its own telemessaging service operations in its provision of telecommunications services. The comments also support the continued application of the nondiscrimination requirements established by the Commission in its Computer III and ONA proceedings to the provision of telemessaging services by the BOCs and other incumbent LECs that control substantial bottleneck facilities.

Section 274. The comments generally agree that Section 274 confers jurisdiction on the Commission to enforce the structural separation and nondiscrimination requirements in Section 274 for electronic publishing services by the BOCs

without regard to state or LATA boundaries. Except for the BOCs, the comments strongly support the conclusion that the "operated independently" requirement of Section 274(b) is the governing principle and paramount requirement established by Congress for the structural separation of the BOCs' electronic publishing services. Accordingly, the specific prohibitions in the nine subsections of Section 274(b) must be interpreted and applied to achieve the overriding requirement of operational independence between a BOC and any separated affiliate or joint venture engaged in electronic publishing, and the Commission should reject the self-serving interpretations of those subsections urged by the BOCs to nullify the statutory requirements and preclude the Commission from dealing effectively with future BOC conduct.

Like the absolute prohibition in Section 260 against discriminations or preferences by the LECs in favor of their own telemessaging services, Section 274(d) absolutely prohibits price discrimination by the BOCs in the provision of basic telephone services to electronic publishers. For that purpose, the Commission should continue to apply its Computer III and ONA nondiscrimination requirements to the BOCs' electronic publishing operations.

Section 275. The comments also support the conclusion that Section 275(b) prohibits any discrimination or cross-subsidization in the provision of alarm monitoring services by incumbent LECs without regard to state or LATA boundaries. The comments further support the continued application of the

Commission's Computer III and ONA nondiscrimination requirements to the alarm monitoring services of the BOCs and other incumbent LECs that control substantial bottleneck facilities.

Enforcement. Except for the BOCs, the comments strongly support the Commission's proposal that the burden of proof in cases brought under the nondiscrimination provisions of Sections 260, 274 and 275 should shift to the respondent BOC or LEC once the complainant has established specific facts which, if true, would constitute a violation of Sections 260, 274 or 275. Such a shifting of the burden of proof is appropriate in light of the short periods of time for Commission action established in these sections and the fact that the relevant information will ordinarily be in the possession of the respondent BOC or LEC rather than the complainant. Shifting the burden of proof in these cases is also consistent with the procedures employed by the Commission in discrimination cases arising under Section 202(a).

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REPLY COMMENTS OF AT&T CORP.

Pursuant to Section 1.415 of the Commission's Rules and its Notice of Proposed Rulemaking in this proceeding released July 18, 1996 ("NPRM"), AT&T submits these reply comments on the nonaccounting safeguards applicable to the provision of telemessaging, electronic publishing and alarm monitoring services by the Bell Operating Companies ("BOCs") and other incumbent Local Exchange Carriers ("LECs") under Sections 260, 274 and 275 of the Communications Act, as amended by the Telecommunications Act of 1996 ("1996 Act").[1]

INTRODUCTION

In their comments in this proceeding, the BOCs try to have it both ways. First, they argue that the statutory requirements established in Sections 260, 274 and 275 are complete and "self-executing" and require no further action or interpretation by the Commission to protect competitors from the

[1] A list of the parties filing comments in this proceeding, and the abbreviations used herein to refer to those parties, is attached as Appendix A.

monopoly power of the BOCs and other incumbent LECs.[2] Then the BOCs contend that the Commission should construe the statutory requirements of these sections in ways that would nullify virtually all of the protections against anticompetitive conduct by the BOCs that were established by Congress. This transparent attempt by the BOCs to undermine the requirements of the statute and evade all checks on their use of their monopoly power to gain an unfair advantage over their competitors in the provision of telemessaging, electronic publishing and alarm monitoring services should be firmly rejected by the Commission.

These reply comments are organized into four parts. Part I responds to the comments relating to the Commission's authority over telemessaging services and the nondiscrimination safeguards established in Section 260. Part II responds to the comments regarding the Commission's authority over electronic publishing services provided by the BOCs and the separated affiliate and nondiscrimination requirements of Section 274. Part III responds to the comments concerning the Commission's authority over alarm monitoring services and the nondiscrimination safeguards of Section 275. Part IV responds to the comments regarding to the enforcement issues pertaining to Sections 260, 274 and 275 raised in the NPRM.

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[2] See, e.g., Bell Atlantic, pp. 4-5, 14-15; BellSouth, pp. 2, 10; Ameritech, pp. 1-2; NYNEX, pp. 3-4, 8; PacTel, p. 2; SBC, p. 3; US West, p. 2; USTA, p. 2.

I. THE REQUIREMENTS OF SECTION 260 FOR THE PROVISION OF TELEMESSAGING SERVICES BY INCUMBENT LECS.

A. The Scope Of The Commission's Authority Over Telemessaging Services Under Section 260.

The comments filed in this proceeding strongly support the conclusion that Section 260 categorically prohibits any discrimination or cross-subsidization in the provision of any telemessaging service by any incumbent LEC without regard to state or LATA boundaries. With the exception of two state commissions and some BOCs which continue to argue that nothing in the 1996 Act gives the Commission jurisdiction over any intrastate service[3] -- a position already rejected by the Commission[4] -- the comments agree that Section 260 confers jurisdiction on the Commission to take steps to prevent discrimination or cross-subsidization with respect to all telemessaging services, including both intrastate and intraLATA telemessaging services, offered by incumbent LECs.[5]

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[3] See California, pp. 3-6; NY DPS, p. 2; BellSouth, pp. 4-7; Bell Atlantic, pp. 2-4 (but see p. 14). Although Ameritech appears to present a similar argument, its argument is simply that the Commission's jurisdiction over intrastate telemessaging services under Section 260 is limited to the prevention of cross-subsidization and discrimination. See Ameritech, p. 5.

[4] See First Report and Order, Implementation of the Local Competition Provisions of the Telecommunications Act of 1996, CC Docket No. 96-98, ¶¶ 83-103 (August 8, 1996).

[5] See ATSI, pp. 4-5; MCI, p. 3 (Section 260 "clearly" gives the Commission jurisdiction over intrastate telemessaging services); Bell Atlantic, p. 14 (Section 260 applies "both" to "interLATA and intraLATA provision of telemessaging services"); NYNEX, p. 26 ("both intraLATA and interLATA telemessaging services should be subject to section 260 requirements"); Ameritech, p. 5 (Commission's jurisdiction under Section 260 extends to "both intra and interLATA" telemessaging service); Voice-Tel, pp. 3,

(continued...)

Furthermore, all of the comments that address the relevant facts recognize that telemessaging services use the same equipment for all calls, whether the call is intrastate or interstate, and that it would not be possible as a practical matter for the interstate and intrastate portions of such services to be separated and regulated by different entities.[6] Accordingly, under well-established preemption principles,[7] the Commission also has the authority to preempt any state regulation of intrastate telemessaging services that would negate or interfere with the Commission's regulation of telemessaging services under Section 260.[8]

The comments also strongly support the Commission's tentative conclusions (NPRM ¶¶ 19, 75) that telemessaging is an information service that, in the case of the BOCs, is subject to the structural separation requirements of Section 272 as well as

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[5] (...continued)
7-8 ("Section 260 applies to telemessaging on both an intraLATA and interLATA basis"); AT&T, pp. 5-6.

[6] See Voice-Tel, pp. 3, 7-8; ATSI, p. 5; AT&T, pp. 5-6. See also Petition for Emergency Relief and Declaratory Ruling Filed by BellSouth, 7 FCC Rcd. 1619, 1620-22 (1992) (finding that "BellSouth's voice mail service is provided and marketed, and uses the same equipment and underlying basic services, without regard to the jurisdictional nature of the customer's use of the service" and that "it is not possible to separate the interstate and intrastate provision of the service").

[7] See, e.g., Louisiana Public Service Comm'n v. FCC, 476 U.S. 355, 375 n.4 (1986); California v. FCC, 39 F.3d 919, 931 (9th Cir. 1994); Maryland Public Service Comm'n v. FCC, 909 F.2d 1510, 1515 (D.C. Cir. 1990); Texas Public Utility Comm'n v. FCC, 886 F.2d 1325, 1332-33 (D.C. Cir. 1989); National Ass'n of Regulatory Utility Comm'rs v. FCC, 880 F.2d 422, 429-31 (D.C. Cir. 1989).

[8] See MCI, p. 3 & n.3; Voice-Tel, pp. 3, 8; AT&T, p. 6 n.4.

the nondiscrimination requirements of Section 260 when interLATA access or transmission is a component of the service.[9] When telemessaging services are provided by a BOC on an interLATA basis, therefore, Section 272(a)(2)(C) specifically requires a separate affiliate that complies with the structural separation and nondiscrimination requirements of Section 272.[10]

In addition, with exceptions not here relevant, Section 272(a)(2)(B) requires a BOC to use a separate affiliate to offer "origination of interLATA telecommunications services" in its region, and Section 272(a)(2)(B)(i) specifically provides that this duty applies to those "incidental interLATA services" authorized by Section 271(g)(4) which "permit a customer that is located in one LATA to retrieve stored information from, or file information for storage in, information storage facilities of

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[9] See MCI, p. 3; NYNEX, p. 26 (NYNEX agrees . . . that telemessaging is an information service, and if provided on an interLATA basis, is subject to the requirements of section 272 in addition to the requirements of section 260"); US West, p. 31; Voice-Tel, p. 11; AT&T, pp. 6-7. See also United States v. Western Electric Co., 907 F.2d 160, 163 (D.C. Cir. 1990) (holding that when information services are bundled with interLATA access or transmission, an interLATA service results regardless of whether the interLATA portion of service is provided over resold facilities or the BOC's own facilities).

[10] Although acknowledging that "telemessaging meets the statutory definition of an information service" subject to the separate affiliate requirements of Section 272, BellSouth argues (pp. 25-26) that because Section 260 does not impose a separate affiliate requirement, telemessaging services are not subject to the separate affiliate requirements of Section 272. BellSouth's argument is obviously inconsistent with Congress' express exclusion of interLATA electronic publishing and alarm monitoring services, but not telemessaging, from Section 272(a)(2)(C), and the fact that Section 272(a)(2)(B) requires that in-region telemessaging, electronic publishing and alarm monitoring services must be offered through separate affiliates. See AT&T, pp. 2-3.

such company that are located in another LATA." Because the BOCs have previously indicated that telemessaging and other information services originating in their regions will include this "interLATA access" as a component,[11] all telemessaging services that originate in the BOC's region will also be subject to Section 272's separate affiliate requirement under Section 272(a)(2)(B).[12]

B. The Nondiscrimination Requirements Applicable To Telemessaging Services Under Section 260.

The comments strongly support the conclusion that the nondiscrimination requirements of Section 260 go beyond the general prohibition against "unreasonable" discriminations or preferences in Section 202 of the Act by categorically prohibiting any preference or discrimination in favor of its own telemessaging service operations by an incumbent LEC in its provision of telecommunications services. As Voice-Tel correctly states, "Section 260 prohibits discrimination . . . without regard to reasonableness."[13] Likewise, ATSI states that "Section 260 establishes an absolute prohibition against the anticompetitive practices of subsidization of telemessaging

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[11] See Motion of the Bell Operating Companies for a Waiver of the Interexchange Services Restriction to Permit Them to Provide Information Services Across LATA Boundaries, pp. 7-8 & Aff. of Jerry A. Hausman, ¶ 19 (App. A, Tab 1), United States v. Western Electric Co., No. 82-0194 (D.D.C. filed April 24, 1995) ("Regardless of the network used, major information service providers almost invariably arrange interLATA access as an essential element of the information service network").

[12] See AT&T, pp. 2-3.

[13] Voice-Tel, p. 6. See also id. at 4, 5 ("the nondiscrimination provisions of Section 260 are absolute"), 8, 10.

services and unfair preferential treatment on the part of the incumbent network owner towards itself or its affiliate in the provision of any and all telemessaging services."[14]

The comments also support the continued application of the requirements established by the Commission in its Computer III and Open Network Architecture ("ONA") proceedings to the provision of telemessaging services by the BOCs. All parties agree that the continued application of the Computer III and ONA requirements to the BOCs' telemessaging services is fully consistent with the requirements of Section 260.[15] Moreover, nearly all parties agree that the continued application of the Commission's Computer III and ONA requirements to the BOCs' telemessaging services is necessary (though not sufficient) to reduce the potential for the BOCs to abuse their bottleneck control over local exchange services to gain for themselves an unfair advantage over competing providers of telemessaging services.[16]

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[14] ATSI, p. 5. See also id. at 6; AT&T, pp. 7-8. Although PacTel and SBC contend that Section 260(a)(2) does not impose any new obligations on LECs providing telemessaging services that were not already imposed by Sections 201 and 202 (PacTel, p. 23; SBC, p. 22), neither PacTel nor SBC provides any analysis or support for their position, which is plainly contrary to the words of the statute.

[15] See, e.g., US West, pp. 33-34 ("The non-discrimination provisions of Computer III and ONA are consistent with Section 260(a)); PacTel, p. 23 ("existing Computer III and ONA requirements . . . are entirely consistent with § 260").

[16] See MCI, pp. 7-8 ("Computer III and ONA requirements . . . , although inadequate to prevent discrimination, are . . . the very least that should be done to protect against access discrimination"); ATSI, pp. 6-7; Voice-Tel, p. 6; AT&T, pp. 8-9.
(continued...)

Further, all parties agree that Section 260 makes no distinction between the BOCs and other incumbent LECs.[17] A number of parties propose, therefore, that the Commission's Computer III and ONA requirements should be made applicable to all incumbent LECs.[18] USTA and Cincinnati Bell propose, on the other hand, that "small and mid-sized" LECs should be exempted from the Computer III and ONA requirements.[19] The controlling statutory standard is the protection of competition in telemessaging services from the incumbent LECs' use of their local exchange monopolies to disadvantage their competitors through cross-subsidization or discrimination in the provision of other telecommunications services. Where an incumbent LEC possesses substantial market power as a result of its bottleneck control over local exchange facilities in a significant service

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[16] (...continued)
Some of the BOCs also support the continued application of the Computer III and ONA requirements to their telemessaging services (see PacTel, p. 23; BellSouth, p. 26), while others contend -- without any basis in fact -- that there is no longer any need for them. See Bell Atlantic, pp. 14-15; US West, p. 34.

[17] See, e.g., ATSI, pp. 4, 7 ("Section 260 applies to all incumbent network owners and distinctions between BOCs and other [incumbent] LECs are not necessary"); Voice-Tel, pp. 5, 12; USTA, p. 6 (Section 260 "applies to all [incumbent] local exchange carriers"); SBC, p. 22.

[18] See, e.g., PacTel, p. 23 ("Computer III and ONA requirements . . . should be applied to all ILECs"); SBC, p. 22 ("any regulations to implement the statutory safeguards of Section 260(a)(2) . . . must be applied to all LECs"); US West, p. 34 ("Computer III and ONA requirements . . . should apply to all incumbent local exchange carriers and not just to BOCs"); SBC, p. 22.

[19] See, e.g., USTA, p. 6 ("Small and mid-sized carriers should not be subject to the current Computer III and ONA requirements"); Cin. Bell, pp. 5-7.

area, like the BOCs, SNET, GTE, and other Tier I LECs, it possesses both the ability to discriminate against competing providers of telemessaging services and the incentive to gain an unfair competitive advantage over its competitors. The concerns of USTA and Cincinnati Bell can be accommodated, therefore, by applying the nondiscrimination requirements of Computer III and ONA to all incumbent LECs that control substantial bottleneck facilities.[20]

II. THE REQUIREMENTS OF SECTION 274 FOR THE BOCS' PROVISION OF ELECTRONIC PUBLISHING SERVICES.

A. The Scope Of The Commission's Authority Over Electronic Publishing Services Under Section 274.

The comments generally agree that Section 274 confers jurisdiction on the Commission to enforce the structural separation and nondiscrimination requirements in Section 274 for electronic publishing services by the BOCs without regard to state or LATA boundaries.[21] Moreover, because the interstate and intrastate aspects of electronic publishing cannot be separated, the Commission's unquestioned jurisdiction over interstate service extends to the intrastate service as well. As Bell Atlantic explains, "If the electronic publishing service is received in one or more states other than the state from which

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[20] See AT&T, p. 9.

[21] See, e.g., NAA, p. 3 ("The FCC's authority [under Section 260] applies to a BOC's electronic publishing over its basic telephone service, regardless of state or LATA boundaries"); NYNEX, pp. 4-5 ("Congress clearly intended that the BOC provision of both intraLATA and interLATA electronic publishing services be governed by requirements in section 274"); YPPA, p. 2 ("section 274 covers both interLATA and intraLATA electronic publishing"); AT&T, pp. 9-11; Time Warner, p. 5.

[it is] sent, and if the interstate and intrastate aspects of the service cannot be separated, as will almost always be the case, the Commission has jurisdiction [over both]."[22]

In an effort to restrict the reach of Section 274, Ameritech presents a novel contention that the requirements of Section 274 apply only to electronic publishing that is disseminated exclusively by means of a BOC's local exchange service within a single LATA, and not to electronic publishing that uses the BOC's exchange access service and is provided across LATA boundaries.[23] This contention is contrary to the clear words of the statute. Ameritech erroneously equates the term "basic telephone service" in Section 274(a) with "telephone exchange service," but "basic telephone service" is specifically defined in Section 274(i)(2) to include both the "telephone exchange service" offered within an exchange area (see 47 U.S.C. § 153(47)) and the "telephone exchange service facilities" that provide exchange access. Section 274, therefore, extends to any electronic publishing disseminated by means of either the BOC's local exchange service or its local exchange facilities -- a definition that obviously includes the BOC's exchange access

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[22] Bell Atlantic, p. 4. Moreover, even where particular BOC services are exempted from the requirements of Section 274, the separate affiliate requirements of Section 272 may still apply. For example, while certain BOC "gateway" services are excepted from the definition of electronic publishing under Section 274, a gateway service originating in the BOC's region and having interLATA transmission or access as a component will be subject to the separate affiliate requirements of Section 272 pursuant to Section 272(a)(2)(B). See AT&T, pp. 2-3.

[23] See Ameritech, pp. 6-8.

service.[24] Furthermore, Ameritech's unduly narrow view of Section 274 is plainly contrary to the intent of Congress to apply the Section 274 safeguards against the BOCs' abuse of their monopoly power to the detriment of competing electronic publishers in all situations in which the BOCs' bottleneck facilities are used to provide electronic publishing services.

B. The Structural Separation And Nondiscrimination Requirements For BOC Electronic Publishing Services.

Notwithstanding the authority over the BOCs' electronic publishing services clearly conferred on the Commission by Section 274, the BOCs and their trade association, USTA, argue that the structural separation and nondiscrimination requirements of Section 274 are "self-executing" and that there is no need for any further regulations.[25] The BOCs then contend, however, that the statutory requirements of Section 274 should be construed by the Commission in ways that would eviscerate the requirements established by Congress to protect competition in electronic publishing services from the BOCs' monopoly power.

There is no question but that the Commission has the express statutory authority both to enforce the requirements of

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[24] See also 47 U.S.C. § 153(16) (defining "exchange access" to mean access to "telephone exchange services or facilities"). Electronic publishing services of the BOCs that originate in the BOC's region and include interLATA access as a component are also subject to the separate affiliate and nondiscrimination safeguards of Section 272. See Sections 272(a)(2)(B), 271(g)(4); AT&T, pp. 2-4.

[25] See USTA, p. 2; Bell Atlantic, pp. 4-5; BellSouth, pp. 2, 10; Ameritech, p. 2; NYNEX, p. 8; PacTel, p. 2; SBC, p. 3; US West, p. 2.

Section 274[26] and to adopt rules and regulations for its implementation and enforcement.[27] Moreover, the regulations proposed in the Commission's NPRM would not add new requirements to those established by Congress in Section 274, but would simply interpret and apply the statutory language by declaring in advance the policies the Commission will follow in enforcing the statutory requirements -- an approach that is plainly within the Commission's authority.[28]

1. The Operational Independence Requirement Of Section 274(b).

The BOCs' attempt to undermine the explicit statutory requirements of Section 274 is graphically demonstrated by their claim that the "operated independently" requirement in Section 274(b) is mere "summary language" or "gloss" and "not a separate substantive restriction" on the BOCs' provision of electronic publishing services.[29] Ironically, some of the BOCs argue in support of this claim that Section 274(b) is unlike Section 272(b) in that the "operated independently" requirement in Section 274(b) is not contained in a separately numbered,

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[26] See 47 U.S.C. §§ 206-208, 274(e) & (f).

[27] See 47 U.S.C. § 153(i); Morton v. Ruiz, 415 U.S. 199, 231 (1934) ("The power of an administrative agency to administer a congressionally created . . . program necessarily requires the formulation of policy and the making of rules to fill any gap left, implicitly or explicitly, by Congress").

[28] See, e.g., SEC v. Chenery Corp., 332 U.S. 194, 203 (1947) ("the choice made between proceeding by general rule or by individual, ad hoc litigation is one that lies primarily in the informed discretion of the administrative agency").

[29] See US West, pp. 4-5 n.11; Pactel, p. 9; Bell Atlantic, p. 5; NYNEX. p. 8; BellSouth, pp. 12-13; SBC, pp. 5-6.

substantive subsection as it is in Section 272(b).[30] However, while that argument is an admission that "operate independently" is a separate and independent requirement under Section 272(b), contrary to the claims that the BOCs made in their comments in CC Docket No. 96-149, it does not support the BOCs' argument here.

The "operated independently" requirement of Section 274(b) is not only a separate and independent requirement; it is the governing principle and paramount requirement established by Congress for the structural separation of the BOCs' electronic publishing services.[31] The paramount importance of the "operated independently" requirement is clear both from its position at the very front of Section 274(b) and from the unambiguous words of the statute, which command that every "separated affiliate or electronic publishing joint venture shall be operated independently from the Bell operating company."[32]

While the nine subsections which follow this requirement establish specific separation requirements mandated by Congress, there is nothing in Section 274(b) which supports, directly or indirectly, the claim of the BOCs that Congress intended the "operated independently" requirement to be restricted to those nine specific requirements. If Congress had intended to impose only the requirements in the nine subsections of Section 274(b), it would have omitted the first sentence

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[30] See PacTel, p. 9; SBC, p. 5.

[31] See Time Warner, pp. 11-12; AT&T, pp. 12-15.

[32] 47 U.S.C. § 274(b).

entirely -- the very result that the BOCs are now trying to achieve through their comments. In view of the explicit inclusion of the "operated independently" requirement and its placement at the head of Section 274(b), however, the only reasonable construction of Section 274(b) as enacted by Congress is that the nine subsections of Section 274(b) are the minimum set of structural separation requirements mandated by Congress and that Section 274(b) plainly does not preclude the Commission from adopting additional requirements which it deems necessary or appropriate to effectuate the fundamental objective of Congress of operational independence between a BOC and any separated affiliate or joint venture involved in electronic publishing.

Furthermore, contrary to the contention advanced by some BOCs,[33] there is nothing in the Commission's Computer II or cellular service rules[34] that supports the BOCs' claim that the "operated independently" requirement in Section 274(b) must be restricted to the specific requirements in the nine subsections. To the contrary, the view advocated by the BOCs would completely nullify the effectiveness of the Commission's existing rules, for if "operate independently" meant nothing beyond the four requirements of (1) separate books, (2) separate officers, (3) separate personnel, and (4) separate facilities specifically mandated in the Commission's rules, there would be nothing to prevent the separate officers and personnel from openly working

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[33] See BellSouth, p. 10; Bell Atlantic, p. 6; NYNEX, p. 13; YPPA, pp. 3-4.

[34] See 47 C.F.R. §§ 64.702(c)(2), 22.903(b).

together to use the BOC's monopoly position to disadvantage competitors in direct derogation of the "operate independently" requirement. If the Commission's rules are to provide any meaningful protection against the BOCs' abuse of their monopoly power, therefore, the "operate independently" requirement must be a separate and independent requirement under the Commission's rules, and the same conclusion is equally applicable to Section 274(b).

The specific prohibitions in the nine subsections of Section 274(b) must be interpreted and applied to achieve the overriding congressional requirement of operational independence between a BOC and any separated affiliate or joint venture engaged in electronic publishing. Accordingly, the Commission should avoid unduly narrow interpretations of those subsections that would nullify the statutory requirements and limit the Commission's ability to deal with future BOC attempts to circumvent the intent of the "operated independently" requirement.[35] For example, the Commission should reject the attempt by the BOCs[36] to gut the effectiveness of the prohibition against owning property in common in Section 274(b)(5)(B) by narrowly construing it to apply only to ownership in fee and not to any form of leasing or other types of sharing arrangements that the BOCs may come up with in the future.[37] Similarly, the

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[35] See AT&T, p. 14; Time Warner, pp. 13-15.

[36] See Ameritech, p. 13; BellSouth, p. 15; NYNEX. p. 9; PacTel, p. 11; SBC, p. 8; US West, p. 18; NAA, p. 5; USTA, p. 4.

[37] See AT&T, pp. 16-17; Time Warner, p. 17.

Commission should reject the BOCs' attempts to circumvent the prohibition in Section 274(b)(7)(C) against BOC research and development on behalf of a separated affiliate through hypertechnical constructions.[38]

Section 274(b) also clearly and explicitly states that the "operated independently" requirement is equally applicable to both separated affiliates and electronic publishing joint ventures. Contrary to the contention of some of the BOCs,[39] therefore, the fact that some of the specific requirements in subsections (5) and (7) are mandated by Congress only for separated affiliates does not mean that the BOCs and their electronic publishing joint ventures are free to disregard those restrictions without limitation. While not barred absolutely in subsection (5) from sharing common personnel or owning property in common with the BOC, or from having the BOC perform the functions listed in subsection (7), electronic publishing joint ventures remain fully subject to the broader requirement of Section 274(b) that they must be "operated independently" from the BOC. Accordingly, if the Commission determines that a particular sharing of personnel or property between a BOC and its electronic publishing joint venture will prevent or interfere with the necessary independent operation of the joint venture,

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[38] See PacTel, p. 13; SBC, p. 10; US West, p. 20.

[39] See BellSouth, p. 11; Ameritech, pp. 12-14; Bell Atlantic, p. 5; PacTel, pp. 10, 12; SBC, pp. 7, 9.

the Commission has the authority to proscribe such sharing under Section 274(b).[40]

2. The Joint Marketing Restrictions Of Section 274(c).

The BOCs also attempt to nullify the prohibition against joint marketing in Section 274(c) through a creative variety of different contentions. For example, Ameritech conjures up from nowhere a "unilateral exception" to Section 274(c)(1) that would permit a BOC freely to market the electronic publishing services of its separated affiliate so long as it does not "coordinate" its promotional activities with its affiliate[41] -- a contention that is wholly devoid of any statutory basis. Similarly, other BOCs argue that the prohibitions against joint marketing in Section 274(c)(1) apply only to the BOC itself and impose "no restrictions" whatsoever on joint marketing of electronic publishing and BOC services by the BOC's separated affiliate[42] -- an interpretation that would allow the BOC to move its entire marketing department into the separated affiliate in clear violation of the statutory prohibition against a BOC carrying out any marketing "in conjunction with" its separated affiliate.[43]

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[40] See MCI, pp. 4-5; Time Warner, pp. 10-11, 14-15, 18, 20.

[41] See Ameritech, pp. 16-17.

[42] See NYNEX, p. 18; Bell Atlantic, p. 9; USTA, p. 5.

[43] A more appropriate reading of Section 274(c)(1) is that a separated affiliate is not prohibited from reselling those telecommunications transmission services of the BOC that are necessary to provide access to its electronic publishing

(continued...)

The BOCs also contend that the narrow exception to the general prohibition against joint marketing for "inbound telemarketing or referral services" by a BOC in Section 274(c)(2)(A) should be interpreted as an open-ended authorization for the BOCs to market the electronic publishing services of their separated affiliates[44] -- an interpretation that would make a mockery of the limited exception intended by Congress as reflected in the legislative history of Section 274(c)(2)(A)[45] and effectively result in the exception swallowing up the rule.[46] According to the BOCs, nothing should prevent them from offering "one-stop shopping"[47] -- including the limitations enacted by Congress. In light of these and other attempts by the BOCs to escape the statutory prohibition against the joint marketing of electronic publishing services, the Commission should exercise

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[43] (...continued)
services, thereby enabling the separated affiliate to offer a complete service to its customers.

[44] See NYNEX, pp. 20-21 ("Congress did not restrict the inbound telemarketing services a BOC may provide to a separated affiliate in any way"); Ameritech, p. 19 ("the term 'marketing' as used in Section . . . 274(c)(2)(A) contemplates a wide variety of services, including all aspects of promotion and selling"); PacTel, p. 15; SBC, pp. 13-14.

[45] See H.R. Rep. 104-204, 104th Cong., 1st Sess. 86 (1995); NPRM ¶ 55; AT&T, pp. 20-21.

[46] See, e.g., SBC, p. ii ("The specific Section 274(c)(2) provisions granting broad joint marketing freedoms should prevail over the general Section 274(c)(1) joint marketing prohibitions"); Ameritech, p. 3 ("permissible joint marketing activities . . . override any restrictions"). Indeed, SBC further contends that the joint marketing exceptions in Section 274(c)(2) also override the specific structural and transactional prohibitions of Section 274(b). See SBC, pp. 7, 9.

[47] See, e.g., SBC, pp. ii, 16; NYNEX, p. 3; Ameritech, p. 20.

extreme caution in authorizing any BOC activity under Section 274(c).

3. The Gateway Exception Of Section 274(h)(2)(C).

Some of the BOCs also attempt to avoid the requirements of Section 274 through an overly expansive interpretation of the services excluded from the definition of "electronic publishing" by the "gateway" exception in Section 274(h)(2)(C). For example, the Joint Parties contend that the "gateway" exception would permit the BOCs to provide their own "site descriptions," "categorization[s]," rankings of the BOC's "choices," and other BOC-provided information content.[48] As an illustration, the Joint Parties claim that a BOC -- as an Internet "gateway" service -- could publish its own restaurant review identifying its choices of the ten best Italian restaurants in a city, provide descriptions of those restaurants, and link the user to the Internet sites of those ten restaurants.[49] This claim is

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[48] Joint Parties, p. 4. See also Bell Atlantic, p. 5; PacTel, p. 3 n.4.

[49] Joint Parties, p. 4. Similarly, Bell Atlantic's description of its Internet access site resembles an online version of a city magazine such as Washingtonian. See URL: http://www.bell-atlantic.net/tour/page04.html ("The categories included in the Local Living area can help you plan all your weekend activities without leaving your chair. . . . For the latest in up-to-date happenings in your local area, check out these items. We have movie listings for local theaters, restaurant guides, TV listings, schools, jobs and local sports - just to name a few. . . . We've collected local resources and combined them with easy to use reference material, providing a one-stop shopping place for your day to day personal, family or business needs"). See also description of NYNEX Interactive Yellow Pages in "Surfing the Yellow Pages," LAN Magazine (June 1996), which NYNEX concedes is electronic publishing. See NYNEX Press Release, Business Wire, Inc. (released April 23, 1996).

plainly contrary to the clear language of the "gateway" exception, which explicitly states that it does not apply where the BOC is involved in "the generation or alteration of the content of information" or where the BOC "affect[s] the presentation" of information provided by others.[50]

4. The Nondiscrimination Requirements Of Section 274(d).

Like the absolute prohibition in Section 260 against discrimination or preferences by the LECs in favor of their own telemessaging services, Section 274(d) absolutely prohibits price discrimination by the BOCs in the provision of basic telephone services to electronic publishers.[51] Further, contrary to the contention of some BOCs,[52] the comments support the Commission's tentative conclusion (NPRM ¶ 67) that the requirement of Section 274(d) that the rates charged by the BOCs to an electronic publisher must be "not higher on a per-unit basis than those

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[50] 47 U.S.C. § 274(h)(2)(C). See also Ameritech, p. 9 ("The key to the ["gateway"] definition is that the content of the information is not to be generated or altered by the BOC"). Such editorial control over the content of information would also be clearly outside the scope of the gateway exception authorized by Judge Greene under the MFJ. See United States v. Western Electric Co., 673 F. Supp. 525, 595 (D.D.C. 1987). Further, as discussed above (supra n.22), even where a BOC service is exempted from the definition of electronic publishing by the "gateway" exception, a gateway service originating in the BOC's region and having interLATA transmission or access as a component will be subject to the separate affiliate requirements of Section 272 pursuant to Section 272(a)(2)(B).

[51] See Time Warner, pp. 21-22.

[52] See Bell Atlantic, pp. 11-12; PacTel, p. 22.