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FEDERAL COMMUNICATIONS COMMISSION
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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

In the Matter of)
Implementation of the Non-Accounting)
Safeguards of Sections 271 and 272 of)
the Communications Act of 1934, as)
amended)
)

CC Docket No. 96-149

COMMENTS OF MCI TELECOMMUNICATIONS CORPORATION CONCERNING
EXPEDITED RECONSIDERATION OF SECTION 272(e)(4)

MCI TELECOMMUNICATIONS CORPORATION

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SUMMARY

The Commission had it right the first time: Section 272(e)(4) is not an independent, open-ended grant of authority to the BOCs to provide interLATA facilities and services -- including in-region services -- to their separate affiliates, free of the restrictions in Sections 271 and 272 of the Act, but, rather, only establishes the nondiscrimination conditions under which the BOCs may offer interLATA facilities and services that they are otherwise permitted to provide on an unseparated basis by Sections 271 and 272.

The core of the BOCs' contrary "plain meaning" argument is that the word "any" in Section 272(e)(4) overrides any other restrictions in the Communications Act. The meaning of statutory language, "plain" or not, however, depends on the context, and courts have given the word "any" a restricted meaning in various situations where necessary to be consistent with the statute as a whole or to prevent absurd results. The BOCs' plain meaning argument must therefore be rejected.

Applying the principles of statutory construction governing ambiguous language, the text of Section 272(e)(4), its purpose and the structure of the Telecommunications Act of 1996 all support the Commission's previous interpretation. Under the BOCs' approach, the BOCs themselves would do all the work of providing and operating in-region interLATA networks for their interLATA affiliates, which would become shells, as Ameritech Communications, Inc. already has. That approach would nullify

the separation provisions of Section 272(b) and would render the joint marketing provisions of Section 272(g) superfluous. Their interpretation thus is inconsistent with the structure and purpose of Sections 271 and 272. Provision by a BOC of a customized interLATA network tailored to the needs of its affiliate and fully compatible with the BOC's network is also inherently discriminatory and therefore would violate Section 272(c)(1) as well as Section 272(e)(4) itself.

"Origination" of an interLATA service under Section 272(a)(2)(B) has nothing to do with any wholesale/retail dichotomy, but, rather, refers to any wholesale or retail service that enables an end user to originate an interLATA call. If "originat[e]" were an exclusively retail concept, Section 271(b)(1), which only allows a BOC or its affiliate to "provide interLATA services *originating* in any of its in-region States" with Commission approval, would preclude the BOCs or their affiliates from ever obtaining authority to provide interLATA service to another carrier for resale.

The threat of discrimination and cross-subsidization is equally great in the case of wholesale or retail BOC provision of in-region interLATA service, and Section 272 should therefore be applied strictly to both. There was no distinction drawn between wholesale and retail interLATA services under the MFJ, and nothing in the legislative history suggests any intent to narrow the interLATA service restriction except where explicitly so stated.

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**COMMENTS OF MCI TELECOMMUNICATIONS CORPORATION CONCERNING
EXPEDITED RECONSIDERATION OF SECTION 272(e)(4)**

Introduction

MCI Telecommunications Corporation (MCI), by its undersigned attorneys, submits these comments in response to the Commission's Public Notice¹ issued in the above-captioned proceeding pursuant to the Court's Order in the *Bell Atlantic* case.² The *Bell Atlantic* Order granted the Commission's motion requesting a voluntary remand of the issue raised in an appeal brought by Bell Atlantic and Pacific Telesis, namely, the proper interpretation of Section 272(e)(4) of the Communications Act of 1934, added by the Telecommunications Act of 1996 (1996 Act). As MCI argued in the *Bell Atlantic* case and as explained herein, the Commission's reading of Section 272(e)(4) in its First Report and Order and Further Notice of Proposed Rulemaking in this proceeding (Order)³ not only is permitted by its language, but is also the only conceivable interpretation of that provision in light of the

¹ Comments Requested in Connection with Expedited Reconsideration of Interpretation of Section 272(e)(4), DA 97-666 (released April 3, 1997).

² *Bell Atlantic Telephone Companies, et al. v. FCC*, No. 97-1067 (D.C. Cir. Mar. 31, 1997).

³ FCC 96-489 (released Dec. 24, 1996).

structure and intent of the 1996 Act.

Section 272(e)(4) states that a Bell Operating Company (BOC)

may provide any interLATA or intraLATA facilities or services to its interLATA affiliate if such services or facilities are made available to all carriers at the same rates and on the same terms and conditions, and so long as the costs are appropriately allocated.

In its Order, the Commission properly held that this provision must be read in conjunction with the overarching limitations in Sections 271 and 272(a) that a BOC may not provide certain interLATA services until it obtains authorization to do so and then only through a separate affiliate. Thus, Section 272(e)(4) only specifies the nondiscrimination conditions under which a BOC may provide interLATA facilities and services that it otherwise is permitted to provide on an unseparated basis by Sections 271 and 272(a).⁴

The Commission also correctly rejected the BOCs' alternate argument that Section 272(a) only requires BOCs to offer certain interLATA "telecommunications services" to the public through a separate affiliate and that "carrier-to-carrier" interLATA services are not subject to the separate affiliate requirement. There is nothing in the language or legislative history of the 1996 Act to suggest that the definition of "telecommunications service" was intended to restrict that term to retail services. Rather, that term was intended to draw a distinction between common carrier services, which may be offered on a retail or

⁴ Id. at ¶¶ 261-62.

wholesale basis, and such categories as information services and private carriage.⁵

In their Motion for Summary Reversal or for Expedition in the Court of Appeals, Bell Atlantic and Pacific Telesis argued that the Commission's decision was inconsistent with the plain language of Section 272(e)(4). The Court denied the Motion, finding that their positions "are not so clear as to warrant summary action."⁶ Presumably, if the plain meaning of the language of Section 272(e)(4) clearly compelled the Bell Atlantic/Pacific Telesis interpretation, as they argued in their motion, the Court would have had no hesitation in summarily reversing the Commission's interpretation in the Order. It follows that the Court concluded that the language of that provision either clearly compels the Commission's interpretation or is ambiguous. In the latter case, the Commission must interpret Section 272(e)(4) in light of its purpose and the overall structure of the 1996 Act, and such an interpretation must be accorded deference under *Chevron*.⁷

In its Public Notice, the Commission poses a series of questions relating to the interpretive issue remanded in *Bell Atlantic*. The Public Notice also invites parties to address any other relevant issues previously presented to the Court or the Commission. Before MCI responds to the individual queries raised

⁵ Id. at ¶¶ 263-65.

⁶ Bell Atlantic.

⁷ Chevron U.S.A., Inc. v. NRDC, 467 U.S. 837 (1984).

by the Commission, it would be useful to provide a context for those responses by explaining why MCI believes the Commission was correct the first time. As discussed in detail below, the BOCs' interpretation of Section 272(e)(4) is not compelled by the language of that provision; indeed, to the contrary, the language, purpose and structure of that provision, in the overall context of the 1996 Act, all support the Commission's reading.

A. THE BOCs' INTERPRETATION IS NOT COMPELLED BY THE PLAIN MEANING OF THE LANGUAGE OF SECTION 272(e)(4)

The heart of the BOCs' "plain meaning" contention is that the word "any" in Section 272(e)(4) must be given a completely open-ended interpretation that would permit the BOCs themselves, rather than their separate affiliates, to provide interLATA services, notwithstanding the general rule of separation in Section 272(a). As expressed in the Bell Atlantic/Pacific Telesis motion papers in *Bell Atlantic*, authorization to "provide any interLATA ... facilities or services to" a separate affiliate means "any," with no limitation.⁸ However, "[i]n every case . . . the meaning of statutory language, plain or not, depends on context." *Henke v. United States Dep't of Commerce*, 83 F.3d 1453, 1459 (D.C. Cir. 1996) (quoting *King v. St. Vincent's Hosp.*, 502 U.S. 215, 221 (1991)); *City of Mesa, Arizona v. FERC*, 993 F.3d 888, 893 (D.C. Cir. 1993).

⁸ Motion for Summary Reversal or for Expedition at 9, *Bell Atlantic Telephone Companies v. FCC*, No. 97-1067 (D.C. Cir. filed Feb. 11, 1997).

The D.C. Circuit has given the word "any" a limited construction in a number of cases. See, e.g., *Environmental Defense Fund, Inc. v. EPA*, 82 F.3d 451, 464 (D.C. Cir. 1996) (agency's limiting definition of phrase "support in any way" was reasonable and entitled to deference because "broadest definition" would lead to egregious consequences and would not be consistent with the remainder of the statute.); *NAACP v. Civiletti*, 609 F.2d 514, 517 (D.C. Cir. 1979) (phrase "any action" in attorney fee recovery statute could not be construed to mean actions brought against United States). Other courts have also insisted that the word "any" be interpreted consistent with the statute as a whole. See *O'Connor v. United States*, 479 U.S. 27, 31 (1986) (phrase "any taxes" could not be given expansive construction that would render other provisions "utterly implausible"); *United States v. Gertz*, 249 F.2d 662, 665 (9th Cir. 1957) ("[t]he adjective 'any' does not necessarily serve to enlarge the noun it modifies . . ." when such a construction would lead to absurd results).

Greenpeace, Inc. v. Waste Technologies Indus., 9 F.3d 1174 (6th Cir. 1993), is particularly instructive. At issue was the EPA's construction of the phrase "any person." The court first cautioned that "[w]hen confronted with such a complex statutory scheme, a court cannot discern congressional intent by reading an isolated subsection . . . without reference to other related provisions." 9 F.3d at 1179. The Court held that "any person" could not be interpreted "in a manner that renders other

provisions of the same statute inconsistent, meaningless, or superfluous" and upheld the agency's interpretation. *Ibid.* (citations omitted). That conclusion is compelled by the basic principle of statutory construction that one statutory provision should not be interpreted to render any other provision meaningless or superfluous. *Mackey v. Lanier Collections Agency & Serv.*, 486 U.S. 825, 837 (1988); *Mail Order Ass'n of Am. v. United States Postal Serv.*, 986 F.2d 509, 515 (D.C. Cir. 1993); see also *Gustafson v. Alloyd Co., Inc.*, 115 S. Ct. 1061, 1069 (1995) ("[T]he Court will avoid a reading which renders some words altogether redundant."); 2A Sutherland Statutory Construction §46.05 (5th ed. 1992). The word "any" therefore cannot bear the weight the BOCs place on it, and their plain meaning argument should be rejected again.

B. THE LANGUAGE, PURPOSE AND STRUCTURE OF THE 1996 ACT SUPPORT THE COMMISSION'S INTERPRETATION OF SECTION 272(e)(4)

Turning to the principles of statutory construction governing ambiguous language, the purpose and structure of the 1996 Act require the Commission to reaffirm its previous reading of Section 272(e)(4). The BOCs would completely eviscerate the separation and nondiscrimination requirements. Under their approach, the BOCs themselves would do all the work of the § 272 affiliates. Thus, employees of the BOC (not the § 272 affiliate) would design, construct, and operate an interLATA network tailor-made to the business plans of the interLATA affiliate. The interLATA affiliate would use the BOC's existing network to the

maximum extent that it could. When the interLATA affiliate needed capabilities that the existing BOC network does not include, the BOC would add them to its network.⁹

If Section 272(e)(4) were construed to permit a BOC to provide and operate the physical network for its interLATA affiliate, there would be nothing left for the affiliate to do. Section 272(g) permits a BOC to market and sell the services of the interLATA affiliate. Thus, under the BOCs' view, the interLATA affiliate can be nothing more than a shell -- a shell whose only function is to enter into a contract with the BOC under which the BOC handles all of the functions of the affiliate, from network design and operation to sales and marketing.

MCI's concerns are not hypothetical. It has already become evident that Ameritech is turning its designated interLATA affiliate, Ameritech Communications, Inc. (ACI), into a shell. According to an article in the trade press, a copy of which is attached as Exhibit A, the president of ACI quit after a major strategy shift reducing the role of ACI and stripping down its staff to a skeleton crew that will handle only network management and product development. If the BOCs' view of Section 272(e)(4)

⁹ See Declaration of James G. Cullen at ¶¶ 9-10, attached to Motion for Summary Reversal or for Expedition, Bell Atlantic v. FCC, No. 97-1067 (D.C. Cir. filed Feb. 11, 1997) (BOC will combine existing and new facilities to create the affiliate's interLATA network); Declaration of Philip J. Quigley at ¶¶ 4-6, attached to Motion for Summary Reversal or for Expedition, Bell Atlantic v. FCC, No. 97-1067 (D.C. Cir. filed Feb. 11, 1997) (interLATA affiliate will use BOC network facilities and BOC employees expert in managing those facilities).

prevails, all of the BOCs' separate affiliates will be hollow organizations like ACI, while the BOCs effectively provide interLATA services for their affiliates.

In order for the BOCs' extreme reading of Section 272(e)(4) to be correct, they would have to demonstrate not only that Section 272(e)(4) gives a BOC the absolute right to provide any and all interLATA facilities and services to its interLATA affiliate, notwithstanding the other provisions of Sections 271 and 272, but also that the BOC can construct and operate an interLATA network tailored to the unique needs of its interLATA affiliate without running afoul of the nondiscrimination provisions of Section 272. As already explained, the former argument cannot be sustained on the basis of any "plain meaning" argument. Moreover, neither argument is supported by the principles of statutory construction applicable to ambiguous language.

1. The BOCs' Approach Would Either Directly Violate or Render Superfluous Other Provisions of the 1996 Act

In its Order, the Commission explained why Section 272(e)(4) is properly interpreted as a limitation on interLATA authority elsewhere granted the BOCs. The BOCs' contrary interpretation violates the principles of statutory construction because it is inconsistent with the structure and purpose of Sections 271 and 272. See generally *Tataronowicz v. Sullivan*, 959 F.2d 268, 276 (D.C. Cir. 1992) ("[C]ongressional intent can be understood only in light of the context in which Congress enacted a statute and

the policies underlying its enactment."). The BOCs' interpretation would nullify myriad parts of Section 272. Although Section 272(b)(1) requires the interLATA affiliate to operate independently of the BOC with its own facilities (see Order at ¶¶ 147-70), the affiliate would use BOC facilities to provide interLATA service. Although Section 272(b)(3) requires the interLATA affiliate to have employees separate from the BOC, the BOCs' interpretation would mean that the affiliate need have no employees at all, and that all of the functions that the § 272 affiliate is supposed to perform would be carried out by BOC employees. Although Section 272(b)(4) requires the affiliate to arrange financing independent of the BOC, the BOC would make all the investments necessary for the affiliate to provide interLATA service.

The BOCs' interpretation of Section 272(e)(4) is also contrary to the teaching of the cases cited above because it would make entirely unnecessary the exception in Section 272(g) to the general rule of separation. Section 272(g) permits a BOC to market or sell the interexchange services of its § 272 affiliate. See Section 272(g)(3) (referring to the marketing and sale of services "permitted under this subsection"). If Section 272(e)(4) already permitted a BOC to provide any interLATA service to its affiliate, it would permit the BOC to provide marketing services on a wholesale basis to its affiliate, since the provision of marketing services to the interLATA affiliate is one component of providing interLATA services. The fact that

Congress found it necessary to grant BOCs the interLATA marketing authority contained in Section 272(g)(2) means that Congress did not grant broader authority including this authority in Section 272(e)(4).

Moreover, as explained above, the BOCs' proposed interpretation would eviscerate Section 272 by leaving the affiliate as nothing more than a shell. Congress sharply limited the interexchange functions that a BOC may perform because there is no effective way to prevent a BOC that provides both local and interLATA services from engaging in discrimination and cross-subsidy. For the reasons described below, it is inherently and inescapably discriminatory for a BOC to design, construct, and operate an interLATA network on a coordinated and integrated basis with its interLATA affiliate. The Court sitting *en banc* rejected an interpretation of a statutory provision where it was generally inconsistent with other statutory provisions and where "the exception in these provisions would consume the rule" if that interpretation were adopted. *Church of Scientology of Cal. v. IRS*, 792 F.2d 153, 158 (D.C. Cir. 1986) (*en banc*).

The BOCs would interpret Section 272(e)(4) as if it provided, "*Notwithstanding any other provision of this act, a Bell operating company . . . may provide any interLATA facilities or services*" under the specified conditions. When Congress inserted an exception to the general rule that only BOC affiliates, and not the BOCs themselves, may perform interLATA functions, it included just such explicit language to make clear

what it was about. See Section 272(g)(3) (joint marketing permitted under Section 272(g)(2) shall not be considered to violate nondiscrimination provisions of Section 272(c)).

2. The BOCs' Scheme Would Violate the Nondiscrimination Requirement of Section 272

The BOCs' approach requires not only an acceptance of their view that Section 272(e)(4) overrides the separation and other requirements of Sections 271 and 272, but also that the explicit nondiscrimination requirement in Section 272(e)(4) itself can be ignored. As stated in their motion papers in the *Bell Atlantic* case, Bell Atlantic and Pacific Telesis want to spend tens of millions of dollars designing, building, and operating an interLATA network customized for their interLATA affiliates. BOC employees providing these engineering functions for the interLATA business will inevitably use their unique knowledge about the capabilities of BOC local networks. Their charter is to use that knowledge to minimize the costs of the interLATA affiliate and to maximize the integration and compatibility of the interLATA network and the local network as it exists today and as it will evolve tomorrow.

It should be noted that in the months preceding the release of the Order, while the BOCs were apparently scrambling to create the interLATA operations that their to-be-created affiliates would eventually utilize, the BOCs never offered these services to MCI. They never gave MCI the opportunity to contract with them to build interLATA networks to MCI's specifications.

The BOCs obviously are making all of their technical and financial resources available on an exclusive basis to their interLATA affiliates. They have no intention whatsoever of making the BOCs' services available to unaffiliated interLATA companies on anything remotely approaching a comparable basis. Perhaps they will allow unaffiliated carriers to lease surplus facilities or resell services that their interLATA affiliates if capacity permits, but no more.

This scheme plainly and patently violates Section 272. The Commission ruled that the absolute nondiscrimination provisions in Section 272 are more stringent than that in Section 202(a), which prohibits only unjust and unreasonable discrimination. Order at ¶¶ 15, 197. Equally important, "the protection of section 272(c)(1) extends to any good, service, facility, or information that a BOC provides to its section 272 affiliate." Order at ¶ 210 (footnote omitted). Accordingly, "to the extent a BOC develops new services for or with its Section 272 affiliate, it must develop new services for or with unaffiliated entities in the same manner," *ibid.*, and Sections 272(c)(1) and 201(a) prohibit any "strategic behavior" that benefits the § 272 affiliate. Order at ¶ 211. The BOCs' claim that a BOC can provide customized facilities and services to its § 272 affiliate simply cannot be squared with these provisions.

C. RESPONSES TO THE COMMISSION'S QUESTIONS

With the above overview, MCI submits the following responses

to the Commission's four sets of questions in the Notice.

1. What is the meaning and significance of the term "originating" or "origination" in Sections 271 and 272 of the Act?

The petitioners argued in *Bell Atlantic* that the "[o]riginating" of interLATA services is only a retail concept and that any restrictions on the origination of interLATA services thus would not apply to their provision of such services to their separate affiliates. There is nothing in the definitions in the 1996 Act or any other provision that requires such an interpretation. The origination of an interLATA service under Section 272(a)(2)(B) or the provision of interLATA service originating in an in-region state under Section 271(b)(1) simply means the provision of a service that permits a call to be originated in an in-region state. A service that is resold to permit the retail customer to originate a call is as much an originating service as the service sold directly to the retail customer. In fact, resellers may buy exactly the same service under exactly the same tariff that end users take to originate calls. Thus, if the separate affiliate is reselling "originating" interLATA service to end users, the BOC must be providing "originating" interLATA service to the affiliate.

The BOCs' approach is also rebutted by application of their reading of "originating" to Section 271(b)(1), which prohibits a BOC or its affiliate from providing "interLATA services originating in any of its in-region States" prior to Commission

approval. Bell Atlantic and Pacific Telesis admitted in their motion papers in *Bell Atlantic* that Section 271(a) applies broadly to all provision of interLATA services, whether provided on a wholesale or retail basis, and Sections 271(a) and (b) thus prevent the BOCs from providing in-region wholesale interLATA services to their affiliates prior to Commission approval.¹⁰ It would also follow from their approach, however, that those provisions would prohibit the BOCs from ever providing such services to their affiliates. Section 272(b)(1) allows a BOC or its affiliate only to "provide interLATA services *originating* in any of its in-region States" with Commission approval. If "originating" is a retail-only concept and does not include the wholesale provision of interLATA service to an affiliate, Section 272(b)(1) would never allow the BOC (or, for that matter, its affiliate) to provide interLATA service to another carrier for resale. If, on the other hand, "originating" is not a retail-only concept in Section 271(b)(1), the BOCs have offered no justification for treating "origination" as a retail-only concept in Section 272(a).

Moreover, the BOCs' theory runs into Section 271(j) of the Act, which requires that interLATA private line services between any point within a BOC's service region and any other point to be treated as "in-region" interLATA services for purposes of Section

¹⁰ Reply in Support of Motion for Summary Reversal and Response to Motion for Remand at 6, Bell Atlantic Telephone Companies, et al. v. FCC, No. 97-1067 (D.C. Cir. filed Feb. 28, 1997).

271(b)(1). There is no mention of "originating" or the "origination" of such services in Section 271(j). The reason for the omission of those terms is that private line service is essentially transmission capacity that can be used in any way by the customer. Since private line services have no "originating" end, those terms are irrelevant to such services and thus were not used in Section 271(j). That provision thus makes it clear that those terms have nothing to do with any wholesale/retail dichotomy, but, rather, identify a category of interLATA services that permit transmissions to begin from a point within a BOC's region. "Originating" switched interLATA services, like interLATA private line services, may be provided on a wholesale or retail basis, and, thus, a BOC's provision of such services to its affiliate is restricted by Sections 271 and 272 to the same extent as a BOC's provision of such services to end users.

The same is true where a BOC's separate affiliate leases network facilities from the BOC in order to provide interLATA service. When a BOC provides network facilities that are used to provide originating interLATA service, the BOC is providing originating interLATA service in conjunction with its affiliate. Thus, Section 272(e)(4) does not provide authority to a BOC to lease network facilities to be used by its separate affiliate for in-region interLATA service, since that is prohibited by Section 272(a). Any other conclusion would elevate form over substance and eviscerate the Section 272 separation and nondiscrimination requirements.

There is ample precedent for treating the provision of network facilities like the provision of services. The Commission has characterized agreements for interconnection or for the lease of facilities as serving "in lieu of tariffs."¹¹ In *MCI Telecommunications Corp. v. FCC*, 842 F.2d 1296 (D.C. Cir. 1988), the Court rejected the Commission's finding that certain facilities leases and tariffed special access services were not "like" services for purposes of Section 202(a), since the Commission had not examined the leases to determine whether, in fact, they were like special access services. *Id.* at 1305. Moreover, the Commission conceded in that case that facilities leases and tariffed services were not necessarily unlike simply because one involves the leasing of facilities and the other the provision of services. *Id.*

Thus, given the Commission's and courts' long-standing views as to the functional similarity of facilities leases and tariffed services, it is clear that the prohibition in Section 272 against BOC unseparated provision of in-region interLATA services must extend to BOC provision of the facilities used to provide such services as well. Permitting BOCs to make arbitrary distinctions between provision of services and provision of facilities would undermine the separation requirements of Section 272. In light of their functional similarity, allowing one while prohibiting the other would create tremendous enforcement difficulties,

¹¹ Exchange Network Facilities for Interstate Access, 71 FCC 2d 440, 447 n.12 (1979).

requiring a more intrusive regulatory regime to ensure the separation of the BOC and its interLATA affiliate.

Finally, the BOCs' interpretation of "origination" is inconsistent with the purposes of the statute. As explained below in response to Question 3, the dangers of bottleneck abuse are the same whether a service is sold as a retail or wholesale service. The term "origination" or "originating" should be interpreted so as to carry out the Section 272 goal of preventing such abuse.

2. What is the legal significance, if any, of the fact that Section 272(e)(4) applies to intraLATA services and facilities as well as interLATA services and facilities?

As AT&T pointed out in *Bell Atlantic*, inclusion of the term "intraLATA" in Section 272(e)(4) demonstrates that this provision is not an independent grant of authority to the BOCs to provide facilities and services to their affiliates, since they need no authority to provide intraLATA facilities and services.¹² They have been providing such facilities and services for a century. Section 272(e)(4) thus is a limitation on BOC authority, not an expansion of it. It establishes nondiscrimination requirements for the provision of facilities and services that the BOCs were already permitted to provide, in the case of intraLATA facilities and services, or that the BOCs are authorized to provide by virtue of Sections 271 and 272, in the case of interLATA

¹² AT&T's Response to Motion for Summary Reversal or Expedition at 11, Bell Atlantic Telephone Companies, et al. v. FCC, No. 97-1067 (D.C. Cir. filed Feb. 25, 1997).

facilities and services.

3. Are the discrimination and cost misallocation concerns that underlie the Section 272 separation requirements less serious in the context of the wholesale provisioning of in-region interLATA services to affiliates than in the context of the direct retail provisioning of such services, and, if so, are they nonetheless serious enough to justify, as a policy matter, prohibiting such wholesale provisioning? What is the relevance of the fact that there was no exception in the MFJ's interLATA service restriction for wholesale services or that there is now no wholesale interLATA exception to the Section 271 requirement that a BOC obtain authority before providing in-region interLATA services? What is the relevance of the fact that once a BOC has received Section 271 authority and its separate affiliate is permitted to provide in-region interLATA services, the 1996 Act also allows the BOC to provide its affiliate various wholesale services and facilities, such as wholesale access services and wholesale access to unbundled network elements? What is the policy justification for not permitting the BOC to provide wholesale interLATA services as well to its affiliate?

The dangers against which Section 272 is intended to guard are no less serious when a BOC engages in wholesale provisioning of in-region interLATA services than when it retails such services. As explained above, if a BOC designs, constructs and operates an interLATA network for its "separate" affiliate, discrimination and cross-subsidization are inherently inevitable. The fact that the provisioning is required to take place in an ostensibly nondiscriminatory manner hardly solves the problem. As explained above, a BOC's provision of facilities to its affiliate will offer inherently unique advantages that cannot be replicated for any other entity. A superficial compliance with the nondiscrimination requirements is therefore not enough; complete separation is also required in order to place the BOC's affiliate in the same position as any other interexchange

carrier.

The separation and nondiscrimination requirements of Section 272 thus are mutually reinforcing. The separation requirements are intended to assist in creating a truly nondiscriminatory environment and to help enforce the nondiscrimination requirements. If Congress had determined that nondiscrimination alone were a sufficient safeguard, it would not have included in Section 272 the separation requirements, including the requirements of separate facilities, independent operation and separate employees.

MFJ principles provide guidance in interpreting Sections 271 and 272. The 1996 Act takes the place of the MFJ, and Section 251(g) provides that the nondiscrimination and equal access requirements of the MFJ continue to govern until explicitly superseded by new regulations. Section 271, in conjunction with Section 251(g), essentially codifies the interLATA restriction in the MFJ and was motivated by the same discrimination and cross-subsidization concerns. There is no precedent under the MFJ for drawing a distinction between wholesale and retail interLATA services. To the contrary, the MFJ restriction was broadly interpreted to prevent the BOCs from competing against interLATA carriers. See *United States v. Western Elec. Co.*, 969 F.2d 1231, 1242 (D.C. Cir. 1992), cert. denied, 113 S. Ct. 1363 (1993); *United States v. Western Elec. Co.*, 907 F.2d 160, 163 (D.C. Cir. 1990), cert. denied, 498 U.S. 1109 (1991); *United States v. Western Elec. Co.*, 627 F. Supp. 1090, 1100 (D.D.C.), appeal

dism'd on other grounds, 797 F.2d 1082 (D.C. Cir. 1986). *Cf. United States v. Western Elec. Co.*, 894 F.2d 1387 (D.C. Cir. 1990) (broadly interpreting the manufacturing restriction consistently with the purposes of the Decree). Under the BOCs' interpretation of Section 272(e)(4), the BOCs themselves -- not just their interLATA affiliates -- would be competing against facilities-based interLATA carriers that also provide facilities and services on a wholesale basis to resellers and other interLATA carriers.

Moreover, nothing in the legislative history of the 1996 Act suggests that Congress intended to narrow the interLATA exception except where it explicitly so provided in Section 271 (by allowing, for example, BOCs to provide incidental interLATA services immediately). That there is no explicit wholesale interLATA services exception to Section 271's prohibition on the provision of in-region interLATA services prior to Commission approval is further proof that such wholesale services would lead to the same types of discrimination and cross-subsidization that motivated the Section 271 restrictions and the separation requirements of Section 272.

That a BOC is permitted to provide wholesale local exchange and access services to its separate affiliate, as well as network elements to be used by the affiliate in the provision of such services, is hardly relevant to the wholesale provision of interLATA services. Very simply, BOCs need no additional authorization to provide local exchange or access services,