introduced by severing all marketing and consumer demand expertise from the BOC engineering and planning functions expected to produce efficient network design and capital investment decisions. As a consequence, requiring structural separation for BOC information services marketing would weaken BOCs' market presence relative to their competitors.

BOCs are already at a significant disadvantage relative to their competitors in marketing enhanced and information services. BOC competitors routinely market numerous telecommunications products and services jointly. These suppliers also offer bundles of services which BOCs are legally prevented from offering. In fact, today's consumers can find a wide range and multiple combinations of bundled services and products (including local exchange, long distance, cellular and information services, and CPE). They find these one-stop opportunities far more attractive than searching the marketplace to piece together service and equipment packages from several different suppliers. BOCs' relative marketing disadvantages should not be increased without substantial proof of egregious and willful anticompetitive conduct. There is no such proof. Rather, the BOCs' integrated provision and joint marketing of enhanced and information services have produced no negative effects on the growth of demand for these services, the rate at which new services are introduced, or the ability of numerous firms to enter this market profitably.

ATSI's claims are thus insufficient, as a matter of law, to justify a prospective rule. Reduced to is simplest terms, ATSI asks for "functional equivalence for unaffiliated telemessaging providers"[56] by denying the BOCs the opportunity to market jointly their

[56]Implementation of the Telecommunications Act of 1996: Telemessaging, Electronic

telecommunications and information services. But nothing prevents ISPs and CLECs from jointly marketing their services, and many do so. In any case, the Commission only last year concluded that Section 260(a)(2) of the telemessaging statute "is not a guarantee of functional equivalence" and that precedent controls here.[57] Moreover, the Commission then also rejected Voice-Tel's claim that the BOCs should be required to market unaffiliated ISPs' services.[58] An outright bar on BOC joint marketing would be even more draconian, and clearly not justifiable in view of this prior conclusion. Even to the extent that any of its individual accusations may be cognizable, ATSI should be required to prove them up in a complaint proceeding directed to the allegedly offending carriers.

VI. SECTION 251-TYPE UNBUNDLING RIGHTS OBVIATE THE NEED FOR ONA BUT SHOULD NOT BE EXTENDED TO PURE ISPs.

As stated elsewhere herein, Section 251 of the Act extends various unbundling rights to telecommunications carriers, including those who may also provide information services. ONA unbundling is no longer necessary for ISPs that are also telecommunications carriers to whom Section 251-type unbundling rights must be extended.[59] That does not mean, however, that pure ISPs can or should obtain the benefits of Section 251 without more. In order to obtain such benefits, ISPs should be obligated to become telecommunications carriers or, at a minimum, partner with or obtain basic services from such carriers.

Publishing, and Alarm Monitoring Services, 12 FCC Rcd 5361 (1997), at ¶217.

[57] *Id.*

[58] *Id.*, at ¶¶224, 228.

[59] FNPRM, ¶95.

Section 251(c) of the Act requires incumbent LECs, including the BOCs and GTE, to provide interconnection and access to unbundled network elements, and to offer telecommunications services for resale, to "telecommunications carriers."[60] A "telecommunications carrier" is statutorily defined as "any provider of telecommunications services, [except telecommunications services aggregators]."[61] As the Commission concluded in the *Local Competition Order*, ISPs that do not also provide domestic or international telecommunications are not included within the term "telecommunications carrier."[62] Accordingly, companies providing both information and telecommunications services are the beneficiaries of Section 251, but companies that provide only information services (i.e., "pure ISPs") have no such rights under Section 251.

The various ways by which pure ISPs may "indirectly" benefit from Section 251 represent the full extent of their rights under that section. Congress could well have included information service providers among those who would be accorded rights under Section 251, but it chose not to do so. Congress' choice is particularly significant given that unbundling under Section 251 is quite different and more extensive than the level of unbundling ISPs are entitled to under the Commission's ONA regime. For example, as the Commission notes, unbundling under Section 251 reaches the underlying facilities in a carrier's network, while unbundling under ONA is

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[60] 47 U.S.C. §251(c).

[61] 47 U.S.C. §153(44).

[62] *Local Competition Order*, 11 FCC Rcd at 15990, ¶995.

limited to the unbundling of basic services.[63] Furthermore, ONA unbundling does not also mandate interconnection on a carrier's premises of facilities owned by others.[64] Congress could well have granted pure ISPs the more extensive Section 251-type unbundling rights, but it clearly chose not to do so. That choice must be respected.

Nor should the Commission, pursuant to its general rulemaking authority, extend some or all of the rights accorded by Section 251 to pure ISPs. Doing so would be tantamount to imposing additional obligations under Section 251 that Congress did not intend to exact from BOCs. Moreover, as a matter of comity between two branches of government, where Congress has spoken directly to a specific subject, an agency should not employ general rulemaking authority to expand legal obligations beyond those intended by Congress.

VII. WHERE BOTH THE INTRALATA AND INTERLATA COMPONENTS OF AN INFORMATION SERVICE ARE PROVIDED BY A BOC's SECTION 272 SEPARATE AFFILIATE, NO ONA REQUIREMENTS SHOULD APPLY.

Section 272 of the Act sets out the requirements applicable to a BOC's provision of interLATA information services. Nowhere does Section 272 impose the ONA framework with respect to those services. This omission constitutes a plain indication that Congress did not intend to apply the ONA framework to such interLATA information services. Moreover, imposition of the ONA framework in these circumstances would be unnecessary to protect the public interest.

The Bell Operating Company ex parte presentation of April 25, 1997, compared in

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[63]FNPRM, ¶93.

[64]*Id.*

significant detail the various safeguards and related provisions associated with this CI-III ONA regime and the provisions of Section 272.[65] These provisions involve the various safeguards, including but not limited to, nondiscrimination generally, installation, maintenance, and repair reporting, and accounting safeguards. These comparisons demonstrate that Section 272's protections largely obviate the need for ONA with respect to the intraLATA component of information services offered by BOCs.[66]

In addition, where a BOC provides information services on a interLATA basis, and thus establishes a separate affiliate to do so in accordance with Section 272, the BOC should be permitted to "elect" into Section 272 regulation with respect to the intraLATA component of such information service. In that event, the BOC would be required to abide by all provisions of Section 272, even with respect to the intraLATA component of the service. On the other hand, assuming such additional obligation should mean that the BOC would be relieved from ONA/CEI-related obligations with respect to that same intraLATA component. In this regard, it should be observed that Congress specifically considered and then decided the structural and non-structural safeguards applicable to interLATA information services, and there is no public policy or other reason to conclude that more stringent obligations are needed with respect to the intraLATA information service market.

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[65]In the Matter of Computer III Further Remand Proceedings: Bell Operating Company Provision of Enhanced Services, CC Docket No. 95-20, SBC Ex Parte of April 25, 1997, p. 13.

[66]Within the past two years, SWBT has not received even a single request for a new ONA capability. In the past year, SWBT has received a total of only four requests for ONA Services Users Guide Diskettes, and PacBell only one request.

Of course, a BOC may, depending upon marketplace and other considerations, choose to offer an information service exclusively on an intraLATA basis. In such a case, Section 272 would not, by its terms, apply to the provision of such service. Therefore, where a BOC offers an information service on an exclusively intraLATA basis, the ONA regime should govern the provision of that service.

VIII. THE CEI PLAN PROCESS SHOULD BE ELIMINATED IN ITS ENTIRETY.

For several reasons, the Commission should eliminate the requirement that BOCs file and obtain Common Carrier Bureau ("Bureau") approval of a CEI plan before providing each new intraLATA information service. Experience has shown that the CEI process is time-consuming, costly and cumbersome. Further, in recent years, it has been of no particular benefit to anyone other than those who oppose CEI plan filings simply to slow BOC delivery of useful and innovative information services to consumers.

A. The Administrative and Other Burdens Associated with the CEI Plan Filing and Approval Process Far Outweigh Any Incremental Benefits.

The CEI process -- involving the preparation, filing, review, analysis and approval of CEI plans -- requires great investments of time, personnel and money, both by the BOCs and various organizations within the Commission. Even though very few objections to Bureau approval of these plans have been sustained over recent years, the CEI process has denied the BOCs a speedy "time to market" (i.e., a "delay in the introduction of new information services"[67]) relative to the information service offerings of competitors who suffer no such regulatory constraints. These

[67]FNPRM, ¶63.

delays are consuming increasingly greater periods of time, as shown by the following representative list of Southwestern Bell Telephone Company ("SWBT") CEI plan filings and approvals:

Voice Messaging - filed April 1, 1988 - approved September 29, 1988 (6 months)
Protocol Conversion - filed December 31, 1988 - approved March 9, 1989 (3 months)
Payment Processing - filed March 13, 1995 - approved October 31, 1995 (7 months)
Facsimile - filed August 3, 1995 - approved June 11, 1996 (10 months)
PC Backup/Recovery - filed August 3, 1995 - approved June 11, 1996 (10 months)
Security - filed April 4, 1996 - approved May 16, 1997 (13 months)
Internet Access - filed June 21, 1996 - not yet approved (already pending 9 months)

Competitors in a robust market generally are not and should not be treated disparately -- whether with regard to cost, "time to market," or other considerations -- by regulation. No different result should obtain in the "robust information services market."[68] Customers' purchasing decisions should be based on the relative merits of all services and products that technology can make available to them "up to the moment." Customers expect no less, and the range of choice available to them should not be limited without compelling public interest reasons.

In the same vein, the BOCs' competitors should not be permitted, under the guise of the CEI plan regime, to interpose objections to individual plans based on non-CEI-related considerations, such as the 1996 Act. Thus, to the extent that some in the industry have abused the process in this way, eliminating the process will remove competitors' ability to strategically stall BOC introduction of worthwhile services that meet all CEI-based concerns.[69]

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[68] *Id.*, ¶ 1.

[69] *See, e.g.*, Southwestern Bell Telephone Company's Comparably Efficient Interconnection Plan for Security Service, CC Docket Nos. 85-229, 90-623, and 95-20, *Order*, DA 97-1029, released May 16, 1997, at ¶¶15-16 (noting that objections to Bureau approval of

No discernible public policy or other consideration outweighs the administrative and marketplace burdens imposed by the current CEI process. As the Commission correctly observes, CEI plans were always intended to be but an interim measure, and are not necessary to protect against access discrimination by BOCs required to provide information services only pursuant to approved ONA plans. ONA provides ISPs even greater protection in this regard. Not only does ONA require BOCs to offer ISPs competing network services (the "CEI" obligation), it also requires the unbundling and tariffing of key BOC network service elements beyond those ISPs use to provide their own information service offerings.[70] The multitude of competitors in the information services market is a testament to the success of ONA, and the CEI plan approval process provides no incremental benefit that would justify its preservation.

In addition, any possibility of access discrimination generally is further diminished, if not eliminated, by the unbundling and network disclosure requirements of Section 251 of the 1996 Act. These statutory provisions direct BOCs to open the local exchange market to competition, and ensure that BOCs timely and publicly disclose information about their basic network

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SWBT's plan were based on Section 275 of the Act); Bell Atlantic Telephone Companies Offer of Comparably Efficient Interconnection to Providers of Internet Access Services, CCBPol 96-09, *Order*, DA 96-891, released June 6, 1996, at ¶47 (concluding that arguments regarding Sections 251 and 252 of the Act were beyond the scope of the CEI proceeding). Similarly, SWBT's Internet Access CEI Plan meets all pertinent CEI parameters and nonstructural safeguards, yet remains unapproved because of non-CEI-related objections. There are several avenues available to correct any BOC shortcomings with respect to compliance with the 1996 Act, including, for example, commencement of complaint or enforcement proceedings. No parties' rights would be compromised were the Commission to eliminate the CEI plan process.

[70]FNPRM, ¶61.

services. ISPs are indirect beneficiaries of these rights, which are sufficient for their purposes.[71] Current legal requirements therefore afford ISPs adequate protection against any potential access discrimination.

Lifting the CEI plan filing and approval requirements in their entirety is appropriate under the circumstances.[72] Moreover, doing so would further the Commission's statutory obligation to eliminate regulations that are "no longer in the public interest."[73]

B. The BOCs Should Be Relieved of the Requirement to File Amendments to CEI Plans for Payphone Service.

To the extent that the Commission eliminates CEI plan filing requirements generally, it should also apply this action to the payphone arena. Specifically, BOCs should be relieved from filing any amendments to their already-approved payphone CEI plans.[74]

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[71] *Id.*, ¶62; *see also*, Section III, *supra*.

[72] At the same time that the Commission eliminates the CEI plan filing requirement for the BOCs, it should also dismiss all pending CEI matters (including pending CEI plans and plan amendments, and requests for CEI plan waivers), on the condition that the BOCs comply with any new or modified final rules that may be established as a result of this proceeding. FNPRM, ¶75. Alternatively, the Commission should dismiss all pending CEI matters that do not raise bona fide issues "directly related to" CEI requirements. *Id.* Currently, only one CEI plan submitted by SBC's BOCs is pending with the Common Carrier Bureau. *See* Southwestern Bell Telephone Company's Comparably Efficient Interconnection Plan for Internet Support Services, CC Docket Nos. 85-229, 90-623, and 95-20, filed June 21, 1996. As SWBT has pointed out in the context of that proceeding, no party claims that SWBT's plan is objectionable under the Commission's *Computer III* requirements. SWBT's Comments in Opposition to Petition to Consolidate Proceedings, filed August 5, 1996. Accordingly, whether the Commission acts with respect to all pending CEI matters, or only with respect to those whose issues are not directly related to CEI requirements, the Commission should dismiss the pending SWBT Internet CEI plan proceeding.

[73] *See*, 47 U.S.C. §161; FNPRM, ¶64.

[74] FNPRM, ¶77.

In its 1996 *Payphone Order*, the Commission concluded that *Computer III* and ONA nonstructural safeguards would provide an appropriate regulatory framework within which to ensure that BOCs would not discriminate or cross-subsidize in their provision of payphone service.[75] The Commission remains free to modify the CEI-related aspect of this holding, and it should do so.

First, the general considerations outlined in Section A, above, are no less applicable to CEI plans for payphone operations. Second, as the ONA regime and accounting safeguards would provide sufficient protection to competing payphone providers, eliminating CEI plan amendment filing requirements would be in harmony with Congress' directive to review and eliminate unnecessary regulation.

Finally, such Commission action would not be inconsistent with Section 276 of the Act, which requires that the Commission prescribe a set of nonstructural safeguards for BOC provision of payphone service. Specifically, Section 276(b)(1)(C) requires that these safeguards "shall, at a minimum, include the nonstructural safeguards equal to those adopted in the Computer Inquiry-III (CC Docket No. 90-623) proceeding."

This language does not mean that the safeguards governing BOC provision of payphone services must include all of the CEI and ONA safeguards, nor should it be so construed. The safeguards actually "adopted" in the CC Docket No. 90-623 proceeding did not include CEI plans. To the contrary, the Commission on the one hand concluded that ONA constituted an

[75]Implementation of the Pay Telephone Reclassification and Compensation Provisions of the Telecommunications Act of 1996, CC Docket Nos. 96-128 and 91-35, *Report and Order*, FCC 96-388, released September 20, 1996 ("*Payphone Order*"), at ¶199.

effective safeguard, and on the other expressly recognized that its waiver to allow the filing and approval of CEI plans was but "interim" in nature and represented only a "transitional phase."[76]

Where, as here, ONA provides even greater protection to payphone service providers than they would receive pursuant to the CEI regime, elimination of the CEI regime fully comports with Section 276 of the Act and is otherwise in the public interest.

C. BOCs Should Be Relieved of CEI Requirements for IntraLATA Information Services Offered Through Their Section 272 Affiliates In Any Event.

Even if the Commission does not eliminate CEI plan filing requirements for the BOCs in all circumstances, it should nonetheless eliminate such requirements with respect to any intraLATA information services offered by a BOC's Section 272 affiliate.[77] Both regulatory and marketplace considerations support such action.

Any concerns regarding potential access discrimination and cost misallocation in connection with the intraLATA components of a combined intraLATA/interLATA information service are sufficiently addressed by the accounting and non-accounting requirements of Section

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[76]Computer III Remand Proceedings: Bell Operating Company Safeguards and Tier 1 Local Exchange Company Safeguards, 6 FCC Rcd 7571 (1991) ("*BOC Safeguards Order*"), at ¶¶5, 62, 108 & n. 105.

[77]FNPRM, ¶68. SBC understands that the issue presented is limited to the provision of intraLATA (not interLATA) information services, though not expressly acknowledged in the FNPRM. In the *Non-Accounting Safeguards Order*, the Commission concluded that the *Computer II*, *Computer III* and ONA requirements would "continue to govern BOC provision of intraLATA information services," and that the FNPRM in this proceeding would determine "how to regulate BOC provision of intraLATA information services in light of the 1996 Act." *Non-Accounting Safeguards Order*, at ¶¶132-133. Further, the FNPRM tentatively opines that it is unnecessary "[f]or the Commission to require that the BOCs also receive approval under a CEI plan for the intraLATA component of such service" that would combine both the intraLATA and

272 and the Commission's orders implementing those requirements.[78] As discussed in Section III, *supra*, these considerations justify relieving BOCs of any ONA/CEI-related burdens where BOCs would commit to the Section 272 requirements for combined intraLATA/interLATA information services offered through a Section 272 affiliate.

In addition, as noted in Section V, a BOC may want to provide a seamless information service to customers that would combine both the interLATA and intraLATA components of an information service. In such instances, the BOC's ability to compete in the information services market and, in particular, its ability to introduce new information services in a timely manner, should not be burdened by CEI requirements that are inapplicable to the interLATA component of a combined service. Moreover, consumers expect new and innovative services to be developed and brought to market within timelines driven by technology and market demand, not regulatory constraints uniquely applicable to noncompetitive markets. Thus, the Commission is quite correct in its view that a BOC's awaiting CEI approval is "likely to delay the provision of integrated services that would be beneficial to consumers."[79]

Regardless whether the Commission eliminates the CEI regime in all contexts, it should surely eliminate it as to intraLATA information services offered by a BOC's Section 272 affiliate.

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interLATA components. FNPRM, ¶69.

[78]*Non-Accounting Safeguards Order*, at ¶¶146-191, 194-236, 272-292; Implementation of the Telecommunications Act of 1996: Accounting Safeguards Under the Telecommunications Act of 1996, 11 FCC Rcd 17539 (1996) ("*Accounting Safeguards Order*"), at ¶¶167-170.

[79]FNPRM, ¶69.

D. BOCs Should Be Relieved of CEI Requirements for IntraLATA Information Services Offered Through Their Section 274 Affiliates In Any Event.

Even if the Commission does not eliminate CEI plan filing requirements for the BOCs in all circumstances, it should at least eliminate them with respect to any intraLATA information services, including any intraLATA electronic publishing services, that may be offered by a BOC's Section 274 separate affiliate.[80] Reasons similar to those identified in Section C, *supra*, clearly support taking such action.

First, Section 274 separation and nondiscrimination requirements, and the Commission's rules implementing those requirements,[81] are sufficient to address any concerns regarding the potential for BOC access discrimination and misallocation of costs. The Commission specifically held that Section 274 applies to both interstate and intrastate electronic publishing services, and further that the nondiscrimination requirements of Section 274(d) apply to both intraLATA and interLATA electronic publishing services.[82]

Second, of all of the provisions of the 1996 Act made specifically applicable to BOCs, Section 274 may well be regarded as the most detailed and comprehensive. As noted by the Commission, Congress' having set forth detailed rules for the specific provision of electronic publishing services by BOCs militates in favor of eliminating any CEI requirements that

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[80] *Id.*, ¶72.

[81] Implementation of the Telecommunications Act of 1996: Telemessaging, Electronic Publishing, and Alarm Monitoring Services, 12 FCC Rcd 5361 (1997), at ¶¶58-115.

[82] *Id.*, ¶¶15, 200.

otherwise would have been applicable.[83] Indeed, to the extent that the Commission's decision applying Section 274(d) to intraLATA services rests on its assessment that Congress intended that application, such an assessment implicitly assumes that Congress did not intend for other rules (e.g., ONA/CEI) to apply as well.

IX. CONCLUSION

The Commission should allow BOC integration of intraLATA information services, and should allow a BOC to elect into the Section 272 interLATA information service requirements for any intraLATA component of such a mixed inter/intraLATA information service. Section 251 unbundling obligations obviate the need for ONA but should not/need not be extended to

[83]FNPRM, ¶73.

ISPs. The CEI plan filing and approval process should now (again) be eliminated. These Commission actions will ensure continued expansion of information service competition, to the benefit of all consumers.

Respectfully submitted,
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CERTIFICATE OF SERVICE

I, Katie M. Turner, hereby certify that the foregoing, "COMMENTS OF SBC COMMUNICATIONS, INC." in CC Docket No. 95-20 has been filed this 27th day of March, 1998 to the Parties of Record.

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