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Before the  
FEDERAL COMMUNICATIONS COMMISSION  
Washington, D C 20554

In the Matter of )  
 )  
Deployment Of Wireline Services Offering ) CC Docket No. 98-147  
Advanced Telecommunications Capability )

COMMENTS OF AT&T CORP.

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## SUMMARY

AT&T strongly supports the Commission's efforts to accelerate the availability of advanced services to small business and residential customers. New technologies and transmission methods make it possible for customers to receive high-speed data services over existing loops. As the Commission's NPRM recognizes, however, these expanded capabilities will produce truly competitive offerings of these new services only if the Commission ensures nondiscriminatory access to unbundled network elements and collocation space in ILEC central offices and remote terminals. Without question, then, the Commission's tentative conclusions that entrants must have heightened access to essential network facilities -- as well as to the information necessary to use those facilities efficiently -- are correct.

AT&T believes, however, that the limited separation requirements that the NPRM proposes for ILEC advanced services affiliates are legally deficient and would undermine competition. Section 272 of the 1996 Act, on which the NPRM's proposal is modeled, was designed not to permit ILECs to avoid § 251(c), but rather to eliminate restrictions on the Bell Operating Companies' provision of in-region interLATA services -- and to do so only after the BOCs have irreversibly opened their markets to local competition pursuant to the rigorous standards of § 271. The Commission's proposed separation requirements improperly seek to employ § 272 as a benchmark for ascertaining whether or not an ILEC affiliate is an "incumbent local exchange carrier" under the definition provided in § 251(h) -- a result Congress neither foresaw nor intended in enacting the 1996 Act. The proposed rules would permit ILECs to evade the Act's unbundling and resale requirements while their market power continues unabated, merely by operating via an entity that they completely own and control. The legal and practical inadequacy of the NPRM's proposal is starkly apparent. An ILEC could, for example, engage in a

classic price squeeze by charging supracompetitive rates for unbundled network elements while directing its separate affiliate to charge low retail prices that its competitors -- wholly dependent on the ILEC's overpriced essential facilities -- could not profitably match.

If the Commission nonetheless allows ILECs to offer advanced services through a separate affiliate (as AT&T believes it should not), the Commission should significantly augment its proposed safeguards and restrictions. Specifically, the Commission should: (i) clarify that an ILEC must obtain Commission approval before it may provide advanced services through an affiliate that is exempt from § 251(c); (ii) require a meaningful quantum of outside ownership of such affiliates; (iii) strengthen and clarify its proposed transaction disclosure safeguards; (iv) apply the same separations requirements to all ILECs and their affiliates regardless of size; (v) refuse to promulgate an automatic sunset provision for its separation requirements; (vi) prohibit advanced services affiliates from offering service through resale; and (vii) bar virtual collocation arrangements between ILECs and their advanced services affiliates.

AT&T's attempts to enter local markets over the past two-and-one-half years also have starkly revealed the need to strengthen existing local competition rules if customers are to have a meaningful choice among advanced services providers. Currently, ILECs are restricting access to loops, to information about existing loops, to collocation space, and, on the basis of flawed intellectual property claims, to other network elements as well. AT&T's Comments provide extensive details on how the Commission can discourage these anticompetitive practices and promote the nondiscriminatory access mandated by the Act. While the existing rules governing network elements, unbundling, collocation, and resale constitute a good foundation for advanced services competition, the Commission has correctly identified in the NPRM areas where existing rules must be supplemented or clarified in order to constrain ILECs' market power.

To that end, AT&T recommends that the Commission identify three loop types --a basic loop, an xDSL capable loop, and an xDSL equipped loop. A basic loop supports voice-grade service. An xDSL capable loop is a basic loop conditioned (i.e., stripped of any equipment the ILEC has placed on the loop that limits its features, functions, and capabilities), and tested to support advanced services. An xDSL equipped loop is a basic loop conditioned and tested to support advanced services that is already equipped with any transmission-enhancing equipment, such as a DSLAM, necessary to provide an advanced data service. Obviously, it would be discriminatory for an ILEC to make any of these loop types available to itself or to its separate affiliate without also making them available to CLECs. AT&T proposes (i) definitions of these three loop types and (ii) specific rebuttable presumptions regarding the data transmission speed capabilities of xDSL capable and equipped loops.

As the Commission recognizes, the advent of advanced services offered over traditional local loops also expands the breadth of information that OSS interfaces must provide to entrants. For example, if the ILEC knows that characteristics of a particular loop and its ability to support ADSL, entrants must have access to that information in a nondiscriminatory manner. If not, an entrant would be in the untenable position of having to lease a loop, subsequently determine if the loop was engineered with load coils or bridge taps, test its capability to support ADSL, and then -- if it passes all these hurdles -- subject it to potential rejection under spectrum management standards. By contrast, the ILEC may only need to make a quick electronic query whether the loop in question is pre-qualified for the advanced data service. In this situation, the CLEC would not be able to tell a potential customer for days or even weeks whether or not an advanced service is available at the customer location, while the ILEC could answer that question immediately. Nondiscriminatory access to an incumbent's electronic and non-electronic loop

information, therefore, will help reduce an entrant's competitive disadvantage.

But information alone will not be enough to prevent incumbents from imposing handicaps on potential competitors. For example, ILECs can engage in a variety of anticompetitive activities under the rubric of "spectrum management." While spectrum management is inarguably necessary to promote efficient and safe network use, it could also be used unreasonably to limit an entrant's ability to offer advanced services over unbundled loops. AT&T urges the Commission to convene an industry forum to oversee the development of spectrum management standards. Those standards should include technical interference criteria and should clearly define how those technical criteria will be applied to ILECs, CLECs, and ILEC affiliates in a nondiscriminatory manner. The Commission's recently announced advanced services technical roundtables, including one on spectrum interference, represent a positive first step in the development of industry standards.

The sensitivity of advanced data service transmission speed to the length of the copper wires between the customer premises and DSLAM-type equipment will encourage ILECs to accelerate their already rapid deployment of digital loop carrier ("DLC") configured loops. Instead of installing transmission-enhancing equipment in their central offices, ILECs increasingly are seeking to place DSLAMs in remote terminals. Unless the Commission clarifies its existing rules, however, ILECs will be able to transform these quality-enhancing loop configurations into a highly effective means to eliminate competition. AT&T urges the Commission to rule that when a loop passes through a remote terminal, the ILEC must provide, upon request, an unbundled (i) xDSL capable "home run" copper loop, (ii) xDSL equipped loop, or (iii) basic loop, if the requested unbundled loop configuration is available. The Commission also should hold that it is

technically feasible for CLECs to interconnect at remote terminals using either copper or fiber cables.

ILECs also frequently have used collocation restrictions as a means to thwart competition. The Commission should augment its national collocation standards to inhibit the incumbents' ability to anticompetitively restrict access to their central office and remote terminal space. At a minimum, these national standards should seek to maximize available space and to allocate space in a competitively neutral manner. ILECs should not be permitted to reject a collocation request unless they can show that they have removed all obsolete, out-of-service, and non-network related equipment. At the same time, the Commission should expand the types of equipment that entrants can install to include remote switching modules ("RSM") and equipment used to provide advanced services. The Commission should also find that "cageless" and shared collocation arrangements are permissible. These arrangements save space, reduce cost, and present no significant security risk. To ensure competitive opportunities for new entrants, the Commission should limit the amount of available space an incumbent's advanced services affiliate can occupy in a central office or remote terminal.

The Commission should clarify that it is unlawful for an ILEC to impose additional criteria that a CLEC must satisfy before the ILEC will unbundle a network element for advanced services. Hence, under the Commission's rules, it is clear that ILECs should unbundle packet switching because it is technically feasible and, like local and tandem switching, clearly a network element. Just as plainly, the Commission should not -- indeed, cannot -- forebear from applying § 251(c) to an ILEC's network elements used to offer advanced services.

The Commission also should use this proceeding to clarify that the Act prohibits ILECs from denying access to unbundled network elements on the basis of intellectual property

claims. ILECs have a statutory obligation to make UNEs available upon request even if they must modify their facilities to do so. This requirement necessarily includes obtaining any necessary licenses.

As the Commission has recognized, its authority under the 1996 Act to modify LATA boundaries is limited to the types of changes made under the Modification of Final Judgment. Section 10(b) of the Act forecloses forbearance of § 271's requirements until those requirements have been "fully implemented." Accordingly, § 706 does not authorize LATA boundary modifications that would undermine § 271.

Finally, it is beyond serious dispute that ILECs' advanced services are subject to the Act's resale requirements. By its plain terms, § 251(c)(4) imposes on ILECs the duty "to offer for resale at wholesale rates any telecommunications service that the carrier provides at retail to subscribers who are not telecommunications carriers."

Adoption of the recommendations set forth in AT&T's Comments will strengthen the Commission's already-significant proposals to open monopoly local facilities to competitors. By strengthening the Commission's Section 251 rules as suggested herein -- and by holding the incumbent LECs to meeting those obligations before they are allowed any relief from unbundling and resale for "advanced telecommunications services" -- the Commission will vastly improve the marketplace conditions conducive to the nationwide deployment of advanced telecommunications services, as is its mandate under Section 706 of the Act.

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Advanced Telecommunications Capability )

COMMENTS OF AT&T CORP.

Pursuant to the Revised Public Notice released on August 12, 1998, AT&T Corp. ("AT&T") respectfully submits these comments on the Commission's Notice of Proposed Rulemaking ("NPRM") regarding rules the Commission may adopt to encourage competition in, and timely deployment of, advanced telecommunications capabilities

INTRODUCTION

The NPRM requests comment on a range of proposals that seek to "stimulate competition" for advanced telecommunications services and to "ensure that the marketplace is conducive to investment, innovation, and meeting the needs of consumers" for such services.<sup>1</sup> This is an important proceeding, because the rapid pace of technological development in telecommunications means that at least some of what are today considered "advanced services" could soon become commonplace and widely used by consumers. The rules adopted here will play a significant role in shaping whether and to what extent that occurs, for while it is ultimately

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<sup>1</sup> Memorandum Opinion And Order, And Notice Of Proposed Rulemaking, Deployment of Wireline Services Offering Advanced Telecommunications Capability, CC Docket No. 98-147, FCC 98-188 ("NPRM"), ¶¶ 1-2 (released August 7, 1998).

the investments and choices made by private actors -- consumers and industry participants -- that will determine how the marketplace evolves, the nature of their options and the decisions they make will be heavily influenced by the regulatory framework under which they proceed.

AT&T agrees with the Commission that the 1996 Act establishes the "blueprint" for the rules it should adopt.<sup>2</sup> The fundamental challenge in fostering a competitive marketplace in telecommunications is the same for advanced services as for other services: the control exercised by incumbent monopolists over essential inputs needed by all potential competitors. The unbundling, collocation, resale, and other market-opening measures of the Act address that challenge by creating a framework in which those inputs must be shared among all entrants on nondiscriminatory terms. Those provisions, and the Commission's existing local competition rules, embody the principles that should be applied here

AT&T therefore strongly supports the Commission's effort to refine its local competition rules to address the specific issues that arise in connection with competition in the provision of advanced services. The existing rules already provide a strong foundation for this proceeding, and they should now be supplemented both to address issues that have arisen since their adoption and to specifically address their application to advanced services. AT&T's comments describe some of the ways in which those rules should be clarified or modified in order to achieve the objectives of this proceeding. Further, because many of these services are still in the early stages of development, the Commission should initiate a follow-on rulemaking proceeding in another eighteen months to assess how well the rules it adopts here are working

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<sup>2</sup> Id., ¶ 1.

and determine what further modifications are necessary in light of the knowledge that will be gained in the intervening months.

These comments are divided into six parts. Part I addresses the NPRM's proposal to permit ILECs to establish advanced services affiliates that would be exempted from the requirements imposed by the 1996 Act on incumbent ILECs. The safeguards and separation requirements the NPRM proposes are necessary, but far from sufficient, to render an ILEC affiliate sufficiently separate to escape treatment as an ILEC pursuant to § 251(h). Although the NPRM seeks to rely on § 272 as its model, Congress did not intend that section to serve as the measure of an affiliate's status as an "incumbent." Moreover, § 272 permits BOCs to provide in-region interLATA services via a separate affiliate only after those ILECs have irreversibly opened their local exchange markets to competition in accordance with the rigorous criteria of § 271. In stark contrast, the NPRM proposes to permit ILEC affiliates to operate during a period when an ILEC's market power is unabated. Even if it were otherwise proper to rely on § 272 in this context, the BOCs have openly flouted the Commission's rules implementing that section, and there is thus no reasoned basis to conclude that those regulations can prevent ILECs from engaging in anticompetitive activities in conjunction with their advanced services affiliates.

In order to deem an advanced services affiliate "truly separate" from its ILEC parent, the Commission must strengthen and expand the requirements the NPRM proposes. The Commission should require that such affiliates have a meaningful quantum of outside ownership in order to deter an ILEC from operating a wholly-owned affiliate in a manner that simply maximizes the ILEC's own profits, while squeezing out competitors. In addition, the Commission should, among other things, (1) impose specific and meaningful transaction disclosure requirements on ILECs and their advanced services affiliates; (2) bar advanced services affiliates

from offering services via resale; (3) prohibit advanced services affiliates from entering into virtual collocation arrangements with affiliated ILECs; (4) prohibit any transfer of network elements from an ILEC to its advanced services affiliate; and (5) require ILECs to warrant, before providing any UNE to an advanced services affiliate, that CLECs can obtain, on the same terms and conditions as the affiliate, the same intellectual property rights associated with the UNE that the affiliate uses.

Part II recommends that the Commission supplement its existing loop rules to foster nondiscriminatory access to loop facilities for the provision of advanced services. Specifically, AT&T proposes additional rules and policies to (1) supplement the existing loop definition, (2) establish presumptions for loop performance, (3) specify further requirements for nondiscriminatory access to operations support systems ("OSS"), (4) address the potential for use of "spectrum management" claims to impede competition, and (5) clarify its existing rules on interconnection and unbundling of network elements in a remote terminal configuration.

Part III addresses the additional collocation rules that the Commission should adopt to address practices that ILECs have followed that serve only to impose added costs and obstacles to entrants seeking to compete. In particular, the Commission should (1) expand the types of equipment that new entrants must be permitted to include in collocation space, (2) expand the types of collocation arrangements that should be available to new entrants to include additional options, such as cageless collocation, and (3) take steps to maximize the space available for collocation.

Part IV responds to the Commission's inquiry whether its unbundling rules should be modified to consider additional factors in determining what network elements must be made available, and explains that no such modifications are necessary. It is appropriate, however, to

clarify the existing rules regarding intellectual property. As the comments explain, ILECs have claimed that their network elements contain the intellectual property of third party vendors and therefore cannot be provided on a nondiscriminatory basis, and have denied their obligation to obtain any licenses that might be necessary to enable them to comply with their nondiscrimination obligations. This is an obstacle to competition both for advanced services and for other services. The Commission should confirm, either in this proceeding or in the separate proceeding on this subject initiated by MCI, that it is the ILECs' obligation to obtain any necessary licenses.

Finally, Parts V and VI address the Commission's proposals for "targeted interLATA relief" and resale. Part V explains why it would be neither lawful nor sound policy to grant what would amount to piecemeal waivers of § 271 by modifying LATA boundaries in the manner suggested by the NPRM. Part VI supports the Commission's conclusion that advanced telecommunications services are fully subject to the resale obligations of § 251(c)(4).

I. THE NPRM'S PROPOSED SEPARATION REQUIREMENTS SHOULD BE EXPANDED AND STRENGTHENED

A. The NPRM's Proposed Separation Requirements Are Inadequate To Support A Finding That An Advanced Services Affiliate Is Not An ILEC "Successor Or Assign" Pursuant To § 251(h).

The NPRM seeks comment on the Commission's conclusion that a "truly separate" ILEC advanced services affiliate, which "function[s] just like any other competitive LEC and [does] not derive unfair advantages from the incumbent LEC," would not be within § 251(h)'s definition of an "incumbent local exchange carrier," and therefore would not be subject to the

interconnection, unbundling, and resale obligations of § 251(c).<sup>3</sup> AT&T agrees that an affiliate that is sufficiently separate from an ILEC parent could in some circumstances escape treatment as a "successor or assign" of the ILEC under § 251(h)(1). However, the separation requirements and safeguards the NPRM proposes are not adequate to permit an advanced services affiliate to be deemed a non-ILEC.

1. Section 251(h)'s definition of ILEC to include "successors or assigns" should be given its naturally broad meaning so as to effectuate the market-opening goals of sections 251 and 252.

On its face, § 251(h) is unmistakably broad in its reach. That section defines "incumbent local exchange carrier" to include not only ILECs that were deemed to be members of the exchange carrier association under 47 C.F.R. § 69.601(b) when the 1996 Act was enacted, but also any entity that becomes a "successor or assign" of such carriers.<sup>4</sup> The Commission also has sweeping authority to treat "comparable" local exchange carriers as ILECs,<sup>5</sup> clearly indicating that Congress intended the unique restrictions and obligations applicable to incumbent LECs to be applied in a sufficiently flexible manner to accomplish the 1996 Act's core purpose of opening local markets to competition. No reasonable reading of the plain language of § 251(h) can exclude from its scope a 100%-owned subsidiary of an ILEC (or an ILEC's parent) that provides local exchange or exchange access services within the ILEC's territory.<sup>6</sup>

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<sup>3</sup> NPRM, ¶¶ 87, 92, 94

<sup>4</sup> 47 U.S.C. § 251(h)(1).

<sup>5</sup> 47 U.S.C. § 251(h)(2).

<sup>6</sup> Congress' understanding of the broad reach of "successor or assign" is evident in the Act's definition of "Bell Operating Company," which similarly includes "successors or assigns"

(footnote continued on following page)

Ultimately, as the Commission recognizes, the phrase "successor or assign" is not capable of a single definition. Instead, a determination of its meaning "must be based on the facts of each case and the particular legal obligation which is at issue."<sup>7</sup> In the case of § 251(h), the Commission's determination must be based on the purposes of sections 251 and 252 and on the legal obligations they impose.

The core purpose of sections 251(c) and 252 is to open the local exchange market to competition by mandating that ILECs give CLECs nondiscriminatory access to their monopoly-controlled bottleneck local exchange networks. By receiving such open, nondiscriminatory access, CLECs can compete directly against the ILEC in the local exchange and exchange access market using parts of the ILEC's own network, either by using UNEs or by reselling ILEC services. The determination whether an ILEC affiliate is sufficiently separated from an ILEC so as not to be deemed a "successor or assign" necessarily must focus on the impact particular separation requirements would have on the market-opening goals of sections 251 and 252. As the Commission already has found, there is no legal or technical basis to distinguish between local exchange or exchange access services and "advanced services," and the technologies used for advanced services are fully capable of transmitting voice

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(footnote continued from previous page)

of the BOCs. The 1996 Act defines BOC so as to expressly exclude BOC affiliates that do not provide wireline services, which companies Congress plainly understood would otherwise be deemed BOC "successors or assigns." In contrast, the Act's definition of ILEC does not contain a similar limitation, reflecting Congress' intent to subject a broader array of carriers to the obligations of sections 251(c) and 252.

<sup>7</sup> NPRM, ¶ 104, n.202 (internal quotation omitted)

communications.<sup>8</sup> Thus, the Commission's determination of the separation requirements necessary to ensure a "truly separate" affiliate cannot rest on the fact that the affiliate provides advanced services rather than (or in addition to) other forms of local exchange and exchange access. Instead, the Commission must use the same rigorous standards that would apply if an ILEC sought to establish an affiliate exempted from § 251(c) simply for the purpose of providing ordinary local POTS service within the ILEC's monopoly service territory.

2. Section 272's separation requirements are necessary, but not sufficient, to ensure that an ILEC advanced services affiliate is "truly separate."

The NPRM's proposed advanced services affiliate is modeled on the separation requirements imposed on certain BOC affiliates by § 272. While the § 272 restrictions represent necessary conditions that any ILEC affiliate should meet in order to fall outside the ambit of § 251(h), those requirements are by no means sufficient to ensure separation so complete that an advanced services affiliate functions "like any other competitive LEC," and derives no "unfair advantages from the incumbent LEC."<sup>9</sup> First, § 272 simply was not intended to outline the criteria necessary to escape treatment as an ILEC. Second, even to the extent that § 272 is pertinent to the NPRM's inquiry, that section was intended to permit a BOC to operate a separate affiliate only after a BOC had opened its local market to competition by fully satisfying the rigorous requirements of § 271.

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<sup>8</sup> Id., ¶¶ 35-37, 40-44.

<sup>9</sup> Id., ¶ 87.

- a. Section 272 was not intended as a means to determine whether an affiliate is an ILEC pursuant to § 251(h) . . . . .

Although § 272 provides important guidance for the NPRM's attempt to outline separation requirements, the 1996 Act does not provide that an affiliate that satisfies § 272 is not an ILEC pursuant to § 251(h). The Non-Accounting Safeguards Order<sup>10</sup> nowhere found that a BOC affiliate that satisfied the § 272 requirements would be deemed a non-ILEC. Rather, in that Order the Commission affirmed the broad reach of § 251(h) by holding that the transfer from a BOC to any affiliate (including non-§ 272 affiliates) of any network element subject to the unbundling requirements of § 251(c)(3) will cause that affiliate to be deemed an "assign" of the BOC.<sup>11</sup>

As the Commission recognized in its Non-Accounting Safeguards Order, sections 251 and 272 have "different underlying purposes"<sup>12</sup> Congress tailored the § 272 requirements to reduce the risks that a BOC entering the interLATA market would use its market power over local exchange facilities to undermine competition.<sup>13</sup> There is simply no basis to presume that the § 272 requirements can -- or that Congress intended them to -- serve § 251(c)'s separate purpose to "ensure that ILECs do not discriminate in opening their bottleneck facilities

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<sup>10</sup> Implementation of the Non-Accounting Safeguards of Sections 271 and 272 of the Communications Act of 1934, as amended, 11 FCC Rcd 21905 (1996) ("Non-Accounting Safeguards Order").

<sup>11</sup> See 47 C.F.R. § 53.205; Non-Accounting Safeguards Order, ¶ 309.

<sup>12</sup> Non-Accounting Safeguards Order, ¶ 205.

<sup>13</sup> See id., ¶ 206.

to competitors."<sup>14</sup> This purpose, of course, includes permitting competitors to access ILECs' networks in order to provide both traditional and advanced services.<sup>15</sup> Congress enacted both sections 251(c) and 272 in the 1996 Act, and applied each to different classes of ILECs in order to accomplish different goals. The Commission is not at liberty to rewrite the Act by substituting one of its provisions for another

- b. Section 272 permits BOCs to operate in-region interLATA affiliates only after they have opened their local markets to competition by, *inter alia*, fully complying with § 251(c)(3).

Section 272 permits the BOCs to operate in-region interLATA affiliates only after the Commission finds that the local exchange market in a particular state has been fully and irrevocably opened to competition pursuant to the requirements of § 271. In stark contrast, the NPRM's proposed advanced services affiliate would be allowed to commence operations within its ILEC parent's monopoly territory even though the ILEC's market power is unabated. Congress envisioned that § 271 would foster vigorous competition in the local exchange market, which would work in conjunction with the § 272 requirements to constrain a BOC's ability to abuse its market power. Under the NPRM's proposal there would be no such competitive

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<sup>14</sup> Id., ¶ 205. In addition, the Act lists different separation requirements for BOC affiliates engaged in manufacturing (§ 273) and electronic publishing (§ 274), and the Commission has made clear that each of these sections imposes independent and distinct obligations on BOCs entering those fields. The Commission has even gone so far as to hold that the phrase "operate independently" in § 272(b)(1) should not be read to impose the same obligations as "operated independently" in § 274(b). See id., ¶ 157. The Act therefore provides no basis to conclude that an ILEC affiliate may be deemed a non-ILEC under § 251(h) by complying with only the separation requirements of § 272.

<sup>15</sup> See, e.g., NPRM, ¶ 57 ("all equipment and facilities used in the provision of advanced services are network elements" subject to § 251(c))

restraints on an ILEC advanced services affiliate. It is beyond serious dispute that no ILEC has yet fully complied with § 251(c)(3) or the other market-opening provisions of the 1996 Act. Accordingly, while the § 272 safeguards provide a useful starting point, they plainly are inadequate to permit an ILEC affiliate to be treated as a non-ILEC.

- c. The Commission's § 272 rules are largely untested and have been openly flouted by the BOCs.

Because no BOC has been authorized to provide in-region interLATA service pursuant to § 271, the Commission has no record as to whether its § 272 rules effectively deter and detect anticompetitive conduct.<sup>16</sup> In addition, as Commissioner Tristani observed in connection with the current proceeding, "state commissions have not had a full opportunity to evaluate the idea of separate affiliates and to advise [the Commission] of their views."<sup>17</sup>

Indeed, the evidence the Commission does have to date strongly suggests that its existing § 272 regime is patently inadequate to deter BOC misconduct. The records compiled in the five § 271 applications brought before the Commission to date clearly demonstrate that the BOCs are both willing and able to evade -- or openly defy -- § 272's requirements.

To take the most obvious example of the BOCs' blatant refusal to comply with federal law, the BOCs continue to assert that they are not subject to § 272 until they have been

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<sup>16</sup> Further, the Commission's Non-Accounting Safeguards and Accounting Safeguards Orders are currently subject to petitions for reconsideration contending that § 272 requires the Commission to significantly strengthen its rules interpreting that section. See, e.g., AT&T Petition For Reconsideration, filed February 20, 1997, at pp. 3-4, in Non-Accounting Safeguards Order (contending, *inter alia*, that Commission's rules are inconsistent with the plain language of § 272(b)(1))

<sup>17</sup> NPRM, Statement of Commissioner Tristani, at 2

granted interLATA authority,<sup>18</sup> a position that completely disregards the Commission's ruling in the August 1997 Ameritech Michigan Order that the § 272 restrictions and safeguards have applied to the BOCs since the 1996 Act's date of enactment.<sup>19</sup> The BOCs have not requested that the Commission reconsider its conclusion as to § 272's effective date; rather, they have defiantly stated that they simply do not intend to comply with the law<sup>20</sup>

The BOCs similarly have refused to comply with the unequivocal requirements imposed in the Accounting Safeguards Order<sup>21</sup> -- and reiterated in the Ameritech Michigan Order<sup>22</sup> -- that they disclose all transactions with their affiliates and that they provide detailed

<sup>18</sup> E.g., Brief in Support of Second Application by BellSouth for Provision of In-Region, InterLATA Services in Louisiana, CC Docket No. 98-121, Appendix A, Tab 4, Cochran Aff. ¶¶ 9,21 (filed July 9, 1998); Brief in Support of Application by SBC for Provision of In-Region, InterLATA Services in California, Calif. PUC, R.93-04-003, I.93-04-002, R.95-04-044, at 69, 71 (filed March 31, 1998) ("[T]he 1996 Act does not require Pacific Bell to satisfy the disclosure requirements of section 272(b)(5) prior to receiving authorization . . ."); see also Investigation into U.S. West Communications, Inc.'s Complaint with Section 271(c) of the Telecommunications Act Of 1996, Montana PSC, Docket No. D97.5.87, Rebuttal Testimony of T. Million, U S WEST, at 11 (filed July 31, 1998) (stating that transactions will be posted on U S WEST's Internet Home Page only "upon approval of U S WEST LD as a Section 272 affiliate").

<sup>19</sup> Memorandum Opinion and Order, Application of Ameritech Michigan Pursuant to Section 271 of the Communications Act of 1934, As Amended, to Provide In-Region, InterLATA Services in Michigan, 12 FCC Rcd 20543 (August 19, 1997), ¶ 371 ("Ameritech Michigan Order").

<sup>20</sup> Of course, even to extent that a BOC seeks reconsideration of a Commission decision, the Communications Act provides that it is nevertheless bound to comply with the provisions it challenges. See 47 U.S.C. § 405.

<sup>21</sup> Report and Order, Accounting Safeguards Under the Telecommunications Act of 1996, 11 FCC Rcd 17539 (1996) ("Accounting Safeguards Order"), ¶ 122.

<sup>22</sup> Ameritech Michigan Order, ¶¶ 367, 369-370.

information about those dealings.<sup>23</sup> These incidents do not involve disputed issues of fact or otherwise require the Commission to exercise judgment. In § 271 application after § 271 application, the BOCs have openly refused to comply with the Commission's repeated admonitions that they fully disclose their dealings with their affiliates as mandated by § 272(b)(5). The Commission has thus far been unable to ensure compliance with this basic cornerstone of Congress' § 272 affiliate regime. Moreover, the fact that the BOCs have refused to disclose this critical information makes it very likely that other abuses have gone undetected, as § 272's disclosure requirements are primarily intended to deter and detect violations of the Act's requirements.

The above examples are only the beginning. Among other abuses that have been detailed in the § 271 proceedings before the Commission to date:

- BOCs have entered into collocation arrangements with their § 272 affiliates that are discriminatory on their face.<sup>24</sup>

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<sup>23</sup> See, e.g., Comments of AT&T Corp. in Opposition to BellSouth's Second Section 271 Application for Louisiana, CC Docket No. 98-121, at 80 (filed Aug. 4, 1998); Comments of AT&T Corp. in Opposition to Pacific's Proposed Section 271 Application, Calif. PUC, Calif. PUC, R.93-04-003, I.93-04-002, R.95-04-044, at 68-70 (filed April 30, 1998); Comments of AT&T Corp. in Opposition to BellSouth's Section 271 Application for South Carolina, CC Docket No. 97-208, 55-57 (filed Oct. 20, 1997); Investigation Into U S WEST Communications, Inc.'s Compliance with Section 271(c), of the Telecommunications Act of 1996, Montana PSC, Docket No. 97.5.87, Prehearing Brief of AT&T Communications of the Mountain States, Inc., at 29 (filed Aug. 10, 1998) ("U S WEST has provided only minimal records of transactions with its affiliates").

<sup>24</sup> Comments of AT&T Corp. in Opposition to BellSouth's Second Section 271 Application for Louisiana, CC Docket No. 98-121, Tab O. Affidavit of P. McFarland, ¶¶ 42-46 (filed Aug. 4, 1998) (noting that BellSouth/BSLD physical collocation agreement provides for facially discriminatory term commitments not offered to other CLECs).

- One BOC "loaned" at least \$90 million to its § 272 affiliate pursuant only to an oral agreement that specified no payback term and no interest rate.<sup>25</sup>
- One BOC issued a tariff that, although neutral on its face, discriminated in favor of its § 272 affiliate by providing substantial discounts and free network management services only if the customer accepted term and growth commitments that only an affiliate would find attractive.<sup>26</sup>
- BOCs repeatedly have failed to comply with the basic Internet posting requirements for transactions with their § 272 affiliates, with most largely ignoring this requirement until shortly before they file applications for interLATA relief, and even then making inadequate disclosure.<sup>27</sup>

<sup>25</sup> Comments of Teleport Communications Group, Inc. in Opposition to Ameritech's Section 271 Application for Michigan, CC Docket 97-137, at 32-33 (filed June 10, 1997) [CHECK CITE].

<sup>26</sup> Comments of AT&T Corp. in Opposition to Ameritech's Section 271 Application for Michigan, CC Docket No. 97-137, Exhibit O, Aff. of D. Goodrich and L. McClelland, ¶ 42 (filed June 10, 1997). The tariff, issued by Ameritech, provided beneficial discounts and services only if the customer made a five-year commitment to provide 100% of all growth in business to Ameritech, maintained all current service with Ameritech, and converted current service to sixty-month plans). See FCC Transmittal No. 1040 (filed Dec. 27, 1996).

<sup>27</sup> See, e.g., Comments of AT&T Corp. in Opposition to BellSouth's Second Section 271 Application for Louisiana, CC Docket No. 98-121, at 81-82 (filed Aug. 4, 1998) (noting that BellSouth's Internet site, besides providing inadequate information, did not contain any information regarding certain transactions until after BellSouth filed its application); Comments of AT&T Corp. in Opposition to Pacific's Proposed Section 271 Application, Calif. PUC, R.93-04-003, I.93-04-002, R.95-04-044, Tab [ ], Affidavit of R. Kargoll, ¶¶ 38-44 (filed April 30, 1998) (showing that information on Pacific's Internet site was inadequate, and noting that Pacific had not posted any information until after December 1997); Comments of AT&T Corp. in Opposition to BellSouth's Section 271 Application for South Carolina, CC Docket No. 97-208, 55-57 (filed Oct. 20, 1997); Investigation Into U S WEST Communications, Inc.'s Compliance with Section 271(c), of the Telecommunications Act of 1996, Montana PSC, Docket No. 97.5.87, Rebuttal Testimony of T. Million, U S WEST, at 11 (filed July 31, 1998) (stating U S WEST's position that it intends to post information on the Internet only once it receives interLATA authority)