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August 26, 2002

Via the Electronic Comments Filing System
Marlene H. Dortch
Secretary
Federal Communications Commission
445 12th Street, SW, Room TWB-204
Washington, DC 20554

Re: Notice of Proposed Rulemaking In the Matter of Section 272(f)(1) Sunset of the BOC Separate Affiliate and Related Requirements
WC Docket No. 02-112

Dear Ms. Dortch:

Enclosed, please find Reply Comments filed on behalf of the New Jersey Division of the Ratepayer Advocate in response to the above-captioned Federal Communications Commission's Notice of Proposed Rulemaking.

Very truly yours,

Seema M. Singh, Esq.
Acting Ratepayer Advocate and Director

By: /s/ Lawanda R. Gilbert
Lawanda R. Gilbert, Esq.
Deputy Ratepayer Advocate

cc: Judith B. Herman (via electronic mail)
Jeanette Thornton (via electronic mail)

Before the
Federal Communications Commission
Washington, D.C.

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	)	
Notice of Proposed Rulemaking:	)	
	)	**WC Docket No. 02-112**
In the Matter of Section 272(f)(1)	)	
Sunset of the BOC Separate Affiliate and	)	
Related Requirements	)	

Reply Comments
of the New Jersey Division of the Ratepayer Advocate

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On the Comments

August 26, 2002

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I. Summary

A review of the initial comments filed by interested parties in response to the Notice of Proposed Rulemaking ("NPRM") reveals a glaring dichotomy. On the one hand, there are the Regional Bell Operating Companies[1] who seek to preserve their strongholds over the local exchange bottleneck facilities; on the other hand, nearly all other commenters, including Competitive Local Exchange Carriers ("CLECs"), regulatory authorities and consumer advocates, opine that sunset of the Section 272 requirements is inappropriate because there does not exist the level of competition envisioned by the Federal Telecommunications Act of 1996 ("Act").[2]

The BOCs' interpretation that immediate sunset is required, and that the level of local competition is irrelevant, is flawed and misplaced. Their contentions avoid the express statutory language and operative clause of Section 272 – "*unless the Commission extends such 3-year period by rule or order*." Moreover, there is no reasonable or acceptable rationale for consideration of the sunset provision other than on a state-by-state basis, consistent with the manner in which the Federal Communications Commission ("FCC") has granted Section 271 authority.

The BOCs' market power is clearly identified by commenters as the best indication of whether or not to sunset the Section 272 requirements. The proposal by the Ratepayer Advocate in its initial comments stands as a reasonable, appropriate, and valuable tool to measure and analyze the BOCs' market power in a given state. The core issue is whether there exists sufficient competition to warrant the sunset of the structural separation requirements; the market can ill afford those requirements to sunset if market power continues to reside in the BOCs.

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[1] The Regional Bell Operating Companies ("BOCs") are Qwest Services, Corporation, ("Qwest"), SBC Communications, Inc. ("SBC"), Verizon Companies ("Verizon"), and BellSouth Corporation ("BellSouth").

[2] Telecommunications Act of 1996, Pub. L. 104-104, Feb. 8, 1996, 110 Stat. 56, codified at 47 U.S.C. § 151 *et seq.*

Also untenable is the BOCs' argument that the safeguards of the Act are too costly and have no further necessity. As long as the BOCs persist in their control and power in the market, there exists the continuing need to maintain the last bastions of regulatory oversight that can assure an even playing field for competitors. The requirements of Section 272 represent the necessary counterweight to equalize the historic power, control, and economies of scale that the BOCs are able to exert on the telecommunications market. In its absence, monopolistic tendencies will flourish to the detriment of the underpinnings of the Act. In addition, the BOCs have not supplied verifiable data on the cost of structural separation. Nevertheless, the BOCs present only estimates and not actual data. Therefore, their contentions about the costs for structural separation are unsupported.

Once sunset is found to be appropriate in a particular state, however, there is a commensurate obligation to assure that backsliding does not occur, and that the full spirit of the Act takes hold in favor of competition. Assurances of continuing competitive growth based purely on market forces are unreliable in the absence of performance measures, standards and self-executing remedies and penalties that dissuade the resurgence of anti-competitive behavior and discriminatory actions.

II. The Requirements of Section 272(b) Should be Extended in Accordance With the Recommendations of the Ratepayer Advocate

A. The BOCs' and USTA's Interpretation of Section 272(f)(1) is Misplaced and Section 272(f)(1) Should be Applied on a State-By-State Basis

In their response to the NPRM, the BOCs and the United States Telecom Association ("USTA") assert that the sunset provision contained in Section 272(f)(1) of the Act should be applied on a Bell Operating Company by Bell Operating Company ("BOC-by-BOC") basis. They argue that Congress anticipated the development of competition in the years following the grant of 271 authority. According to the BOCs, Congress balanced the competing needs of the BOCs with

those of competitors and determined that the structural safeguard requirements would "cease to apply" for the whole region in which the BOC provides services, three years after the date that it obtains Section 271 authority in its first state.[3] As a result, they conclude that the structural separation requirements should sunset automatically after three years.[4] They assert that the plain language of Section 272(f)(1), and the legislative history indicate that sunset applies to each BOC and that the three year sunset was to be the general rule.[5] The Ratepayer Advocate submits that their interpretation is flawed, otherwise inconsistent with the Act, and ignores the deference afforded the FCC under *Chevron U.S.A. v. NRDC, Inc.*[6] In both *Bell Atlantic Tel. Co. v. FCC* and *AT&T Corp. v. Iowa Util. Bd.*, the BOC made similar arguments that the FCC's construction of portions of the Act were contrary to the plain language of the statute, violated statutory constructions, and was inconsistent with the legislative history. The Court rejected those arguments. For the reasons discussed below, the BOCs arguments in this instance fare no better.

The Ratepayer Advocate submits that Section 272(f)(1) must be read in the context of and with consideration of Section 271 of the Act. Section 271 authority is granted on a state-by-state basis. Section 272 is intended to impose structural separation requirements as safeguards once 271 authority is granted. The FCC's interpretation to apply the sunset requirements of Section 272(f)(1) on a state-by-state basis is not only reasonable, it is the most readily apparent interpretation consistent with the statutory language.

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[3] Comments of SBC at 4, 18-23, Comments of BellSouth at 4-9, Comments of Verizon at 1-11, Comments of Qwest at ii, 16, and Comments of USTA at 3-6.

[4] *Id.*

[5] *Id.*

[6] 467 *U.S.* 837, 842-845 (1984) ("*Chevron*"); *accord Bell Atlantic Tel. Co. v. FCC*, 131 F.3d 1044 (D.C. Cir. 1997); *accord AT&T Corp. v. Iowa Util. Bd.,* 525 U.S. 366, 397 (1999).

The BOCs' and the USTA's arguments ignore the operative clause of Section 272(f)(1): "*unless the Commission extends such 3-year period by rule or order*." (emphasis added). This language did not exist in any of the versions discussed in the legislative history they cited. Therefore, this language must be considered in understanding the plain meaning of this Section. When Sections 271 and 272 are read as a whole, the FCC's interpretation is consistent with both Sections. More importantly, they can point to no legislative history that supports their claim that Congress intended to reject a state-by-state application in favor of a BOC-by-BOC application. The differences in the House and Senate versions involve whether the sunset period is 18 months or some other period. The plain language of the Act states that the sunset period is three years, unless extended by rule or order.

Even assuming *arguendo* that there exists some ambiguity in the statutory language, and that their interpretation is reasonable, the FCC's interpretation is equally reasonable. When faced with competing interpretations, the FCC's interpretation prevails under *Chevron*. As the Supreme Court stated in *AT&T Corp. v. Iowa Util. Bd.*, "the 1996 Act is not a model of clarity" and "[i]t is in many important respects a model of ambiguity, or indeed even self-contradiction."[7] When ambiguities exist in a statute, the agency charged with implementing the statute is entitled to deference under *Chevron*. The BOCs' arguments to the contrary do not change the fact that the FCC has resolved the issue, but apparently not to the satisfaction of the BOCs.

1. Section 10 Of The Act Provides an Alternative Basis For the FCC to Preclude Sunset of the Section 272 Requirements

The Ratepayer Advocate submits that Section 10 of the Act provides an alternative basis for the FCC to continue the Section 272(f)(1) requirements. Section 10(a) permits the FCC to forbear

[7] *AT&T Corp.,* 525 U.S. at 397.

from applying any regulation or any provision of the Act to any telecommunications carrier, to telecommunications service, or class of telecommunications carriers or services in any or some of its or their geographic market. Section 10(a) provides as follows:

> *REGULATORY FLEXIBILITY.- Notwithstanding section 332(c)(1)(A) of this Act, the Commission shall forbear from applying any regulation or any provision of this Act to a telecommunications carrier or telecommunications service, or class of telecommunications carriers or telecommunications services, in any or some of its or their geographic markets, if the Commission determines that--*
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> *(1) enforcement of such regulation or provision is not necessary to ensure that the charges, practices, classifications, or regulation by, for, or in connection with that telecommunications carrier or telecommunications services are just and reasonable and are not unjustly or unreasonably discriminatory;*
>
> *(2) enforcement of such regulation or provision is not necessary for the protection of consumers; and*
>
> *(3) forbearance from applying such provision or regulation is consistent with the public interest.*

The Ratepayer Advocate submits that Section 10 of the Act could be invoked to preclude permitting the sunset of the structural separation requirements of Section 272. Granting forbearance would promote competition consistent with Section 10(b),[8] thereby satisfying the public interest requirement of condition 3 of Section 10(a) of the Act. In addition, forbearance would protect against the market power of a BOC until such time as a BOC no longer has market power and provide an environment for competition. The continued application of the structural separation requirements of Section 272(b) would ensure that consumers are protected from the market power

[8] Section 10(b) requires the FCC to consider whether exercising forbearance will promote competitive market conditions, including the extent to which such forbearance will enhance competition among providers of telecommunications services. In the event the FCC determines that forbearance will promote competition among providers of telecommunications services, that determination may be the basis for a finding that forbearance is in the public interest. In our opinion, this Section (b) does not preclude the FCC on its own or another person from filing a petition for forbearance. Section 10(b) confers specific rights on telecommunications carriers and classes of telecommunications carriers, but does not indicate that only the identified carriers are permitted to seek relief under this Section of the Act.

of the BOCs, thereby also satisfying both conditions 1 and 2 of Section 10(a). As a result, the FCC could decline to apply Section 272(f)(1) to any BOC that has market power. This could provide an independent basis for maintaining the structural separation protections.

B. Contrary to the BOCs' Claim that Sunset Should Occur After Three Years, Sunset Should Not Occur Until BOCs No Longer Have Market Power

The BOCs and the USTA want the sunset of Section 272(b) to occur at the end of three years and not be extended. This ignores the fact that the statute permits the FCC to extend the safeguards of Section 272(b) and also ignores the fact that BOCs are still dominant carriers and possess market power in their local exchange markets. Significantly, nearly all commenters, include state commissions, CLECs, Incumbent Local Exchange Carriers ("ILECs"), and consumer advocates oppose the sunset of Section 272(b) safeguards, and recommend extension of the Section 272(b) requirements beyond three years.[9] (The one exception is the New York Public Service Commission,

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[9] Comments of Time Warner at 1-16 (retaining Section 272(b)); Comments of ALTS at 1-2 (extending the safeguards); Comments of Comptel at 20-22 (extending for three years); Comments of Sprint at 3, 6-7 (extending to 3 years after the BOC receives 271 authority in the last state and condition it on two subsequent biennial audits); Comments of Sprint at 14-16 (asserting BOCs recent behavior do not justify relaxing regulatory safeguards); Comments of Sprint at 4-6 (proposing a broad procedural framework for evaluating sunset but not on a state by state basis); Comments of Washington Utilities and Transportation Commission at 1-3 (retaining beyond the 3 years and apply on a state by state basis); Comments of Texas Public Utility Commission at 1-3 (extending for one year or until the second audit is complete 8-9), Comments of Texas Public Utility Commission at 9 (asserting sunset under the plain language of the section would mean sunset of safeguards and audit but do not reach until competitive market is viable); Comments of Wyoming PSC at 1-3 (extending for one year after the last BOC state is approved and requiring a second audit); Comments of New York Public Service Commission at 1-2 (arguing the issues are not ripe because Verizon has no plans to integrate long distance into network operations); Comments of Pennsylvania Public Utility Commission at 2-4 (recommending extension and applying on a state by state basis); Comments of Pennsylvania Public Utility Commission at 5 (recommending at least a one year extension and keeping the safeguards until the time period expires in the last state for a BOC); Comments of Missouri Public Service Commission at 2-3 (supporting an examination of the level of competition prior to sunset; Missouri states that effective competition is limited in certain exchanges in Missouri and does not exist in the switched exchange access markets in Missouri); Comments of Missouri Public Service Commission at 4 (recommending at least a one year extension now which will permit a second audit and that should the audit results, performance measurement trends and a review of the status of competition within the state not show favorable trends over the four year period, the structural separation requirements should be retained on an annual basis until the BOC no longer has an incentive and the ability to discriminate against long distance competitors or to engage in anti-competitive conduct); Comments of Wisconsin Public Service Commission at 2 (rejecting allowing everything to sunset); Comments of Touch America Holding, Inc., the parent of Touch America, Inc. at 2-7 (arguing that the structural separation requirements should continue indefinitely until real and substantial competition has come to the local markets), AT&T at 4, 48-50 (arguing for a fixed three year extension).

which argues that the matter is premature and not ripe because Verizon has not indicated it intends to reintegrate its operations.)

Several BOCs argue that competition, *i.e.* market share in the local exchange market, should not be considered.[10] The assertion that market share is not relevant to the issue is a blatant attempt to divert attention from the undisputed fact that they continue to have market power. That argument must be rejected. Overwhelmingly, commenters express concern over the market power of the BOCs and their continuing ability to use that market power to the detriment of competition.[11]

Section 272 of the Act was intended to institute safeguards to counter the market power of the BOCs. The public interest is not served if the safeguards contained in Section 272(b) lapse. As recently as June 2002, the FCC used market dominance as the basis for extending the ban on exclusive programming contracts for cable. The FCC extended the prohibitions related to exclusive programming contracts contained in Section 628(c)(2)(D) of the Act.[12] In the *Report and Order*,

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[10] *See* Comments of Qwest at 4-5, 12-13, Comments of BellSouth at 14-17, and Comments of SBC at 15-18.

[11] Comments of Time Warner at 21-25 (recommending retention of Section 272(b) until BOC is non-dominant; BOCs have market power as noted by the New York Public Service Commission and the D.C. Circuit Court); Comments of Covad at 2-4 (stating that the BOCs have market power); Comments of Focal Communications, Pac-West Telecomm and US LEC (joint comments) at 2-3 (stating that the BOCs have market power); Comments of Comptel at 1-18; Comments of NASUCA at 3-6 (stating that the BOCs have monopoly power); Comments of NASUCA at 6-8 (recommending the lift of Section 272 requirements on a state by state basis only upon a showing that the BOC is no longer dominant); Comments of WorldCom at 1-6 (recommending the retention of Section 272 until the BOC is no longer dominant and also apply the requirements set forth in the *Fifth Carrier Competitive Order, see infra.* footnote 21); Comments of Sprint at 7-11 (stating that BOCs are still dominant with the potential to discriminate); Comments of Texas Public Utility Commission at 3-5 (recommending the continuation of the Section 272 requirements until the market place is more competitive); Comments of Pennsylvania Public Utility Commission at 2 (acknowledging that Section 272(b) was intended to address the market power of BOCs and their ability to discriminate); Comments of Touch America at 5 (stating that BOCs have monopoly power over local exchange); Comments of AT&T at 7-44 (claiming that BOCs retain significant market power in all markets and the BOCs continue to misallocate costs and to discriminate against competitors).

[12] *See I/M/O Implementation of the Cable Television Consumer Protection and Competition Act of 1992; Development of Competition and Diversity in Video Programming Distribution: Section 628(c)(5) of the Communications Act; Sunset of Exclusive Contract Prohibition*, Docket No. 01-290, Report and Order, FCC 02-176 (rel. June 28, 2002) (*Report and Order*).

the FCC concluded that even though cable's market share dropped from 95% to 78% since 1992, cable operators continue to dominate the market in a manner that would allow them to act in an anticompetitive manner.[13] Accordingly, the Ratepayer Advocate submits that the Section 272(b) safeguards must remain in effect as long as a BOC has market power.

Qwest asserts that the antitrust laws offer sufficient protection to protect competition in the local exchange market.[14] The Ratepayer Advocate disagrees. The Ratepayer Advocate notes that several cable competitors in the *Report and Order* noted that extension of the programming prohibition was necessary even though antitrust laws are available. Those commenters argued that the antitrust laws are not adequate to protect the public from adverse effects. They concluded that the antitrust laws only provide an after-the-fact remedy for anticompetitive conduct and are not a substitute for Commission policies designed to level the playing field.[15] The Ratepayer Advocate submits that the analysis of those commenters in the *Report and Order* is correct and Qwest's reliance on the antitrust laws to preclude discriminatory conduct is misplaced. In addition, there is considerable disagreement among courts over whether CLECs can bring antitrust actions against BOCs as it relates to implementation of the 1996 Act.[16]

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[13] See *Report and Order* at ¶ 46, 48.

[14] Comments of Qwest at 13.

[15] See *Report and Order* at ¶ 51.

[16] *See Trniko v. Bell Atlantic Corp.*, Docket No. 01-7746, ____ F.3d ___ (2nd Cir. June 2002) (reinstating an antitrust claim that was dismissed by the lower Court); *Goldwasser v. Ameritech Corp.*, 222 F.3d 390 (7th Cir. 2000) (dismissing an antitrust claim brought by a CLEC); *Cavalier Telephone, LLC v. Verizon Virginia, Inc.*, Docket No. 01CV736, 2002 WL1008380, ___ F. Supp.2d ___, Mar. 27, 2002 (E.D. Va.) (finding that a CLEC could not state a claim under Section 2 of the Sherman Act for violations of affirmative duties created by the Telecommunications Act); *Covad Communications, et. al. v. BellSouth Corporation*, ____ F. 3d ___ (11th Cir. Aug. 2, 2002) (Docket No. 01-16064) (overturning the district court dismissal of plaintiffs' antitrust claims); *see also Verizon New Jersey, et al. v. Ntegrity Telecontent Services, Inc.,* Docket No. 99-5366, 2002 WL 1835433 (D.N.J. Aug. 12, 2002) (dismissing Ntegrity's claims because such claims arise under performance of an interconnection agreement).

Qwest also argues that it has no incentive to shift costs under price cap rules.[17] This position is not correct for the reasons set forth in the Comments of Time Warner.[18] In addition, the Ratepayer Advocate submits that the existence of price caps in a declining cost industry does not prevent a BOC from increasing prices to the level of the cap even though the cost of service is substantially below the cap.

As a result, the protections afforded by Section 272(b) should remain in place until such time as a BOC can show it no longer has market power. In order to implement this approach, the recommendations outlined in the initial comments of the Ratepayer Advocate should be adopted. A further NPRM should be issued which will establish the multifactor analysis to be used in establishing whether a BOC no longer has market power. Any other action would be inconsistent with Section 272 of the Act and otherwise not in the public interest.

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[17] See Comments of Qwest at 10.

[18] See Comments of Time Warner at 12-14.

III. Stronger Non-Structural Safeguards Must be Implemented In the Event Sunset Occurs

It is no surprise that the BOC commenters strongly oppose the imposition of additional safeguards or the strengthening of existing safeguards to prevent backsliding behavior. However, given the current economic climate in the telecommunications industry including the exit of several CLECs from the market, BOCs have greater incentives to act in a non-competitive manner due to their continued dominance in the local exchange and exchange access markets. Therefore, when sunset occurs, the FCC cannot allow the BOCs to operate unbridled without scrutiny. Stronger safeguards are required to prevent future abuses of market power by BOCs.

The Ratepayer Advocate maintains, and several parties agree,[19] that if the FCC removes the Section 272 safeguards, then the FCC must, at the very least, adopt reporting requirements, metrics, standards, and penalties to ensure the BOCs provide nondiscriminatory access to their facilities. As the Ratepayer Advocate proposed in initial comments, BOCs would be required to file quarterly performance reports to the FCC in order to comply with Sections 272(e)(1) and (e)(3). These reporting requirements accompanied by self-executing remedies and penalties would equip the FCC with the necessary tools to detect instances of discrimination and cost misallocation by the BOC and to address BOC misbehavior. Moreover, in order to prevent the performance-reporting regime from being undermined, the Ratepayer Advocate recommends that the FCC conduct a comprehensive annual audit of the quarterly reporting requirements of Sections 272(e)(1) and (e)(3). Lastly, the

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[19] *See* Comments of Time Warner Telcom at 25-28(stating that performance reporting, measurements, and penalties must be established for special access wholesale provisioning); Comments of Worldcom at 10-12 (recommending the adoption of comprehensive special access performance measures, performance requirements, and remedies which they claim should not be a substitute for Section 272 safeguards but serve as a complement to them); Comments of ALTS at 3-4 (claiming that if the FCC removes the Section 272 safeguards, it must immediately adopt reporting requirements, metrics, and standards for special access and UNE provisioning); Comments of Sprint at 12 (stating that performance measurements and enforcement mechanisms are essential to deterring abuses); Comments of Focal Communications et al at 6-7 (recommending the FCC promulgate performance standards for both UNEs and special access services to prevent discrimination against long distance competitors); Comments of Covad at 3 (proposing

Ratepayer Advocate submits that the non-structural separation requirements of Section 64.1903[20] should be applied to the BOCs post-sunset in order to provide disincentives to engage in discriminatory behavior.

Several of the BOC commenters voice strong opposition to increased regulatory oversight once sunset occurs,[21] and submit that they do not need to be subject to additional or stronger safeguards. The Ratepayer Advocate finds none of the BOC's arguments compelling.

SBC contends there is no need for the FCC to impose additional nonstructural safeguards, because "competition itself is the ultimate safeguard in any market."[22] This is erroneous. The FCC is aware that BOCs still control a huge share of the local exchange markets, thereby stifling the development of robust competition in those markets. In short, the local competition that could ideally provide safeguards against BOC anticompetitive behavior has yet to be achieved, and therefore current levels of competition are too miniscule and cannot be relied upon by the FCC as sufficient to deter discrimination and cost misallocation.

SBC also contends that the overriding concern that BOCs have the incentive and ability to discriminate is unwarranted because the BOCs are interested in building goodwill, which would be destroyed by any attempt to provide inferior service to competitors.[23] SBC also asserts that if they provide inferior service to other interexchange carriers, then the customers of that interexchange

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that once sunset occurs , the FCC should develop national performance metrics and impose national performance standards for the BOC provision of UNEs to competitors).

[20] *See Policy and Rules Concerning Rates for Competitive Carrier Services and Facilities Authorizations Therefor: Fifth Report and Order*, CC Docket No. 79-252, 98 FCC2d 1191, ¶ 9 (1984) ("*Fifth Carrier Competitive Order"*).

[21] Comments of Verizon at 13-5; Comments of SBC at 10-12; Comments of BellSouth at 12-13; Comments of Qwest at 5-7.

[22] Comments of SBC at 10.

[23] *Id.*

competitor will assume that the BOC caused the poor service instead of the competitor.[24] This argument is entirely without merit. A BOC enjoys the benefits of consumer brand loyalty derived from its longstanding monopoly status in the market place. As a result, a BOC that provides inferior service to an interexchange competitor does not run the risk of harming its relationship with its core local exchange customers because they are not adversely affected by the discriminatory conduct of the BOC towards the interexchange competitor. To the contrary, a competitor's goodwill can be severely and irreparably harmed when the BOC provides inferior services, because the competitor's customers in turn receive poor service, and those customers invariably assign blame to the interexchange carrier, and not to the BOC.

BellSouth argues against continuing the biennial audit to measure compliance with Sections 272(e)(1) and (e)(3) because the costs would outweigh the benefits and there are less costly and efficient methods of ensuring compliance with these Sections.[25] BellSouth asserts that the complaint process operates as a check to ensure that BOCs satisfy the requirements of Section 272(e)(1) to fulfill requests from unaffiliated carriers in the same time frame it does for itself or its affiliate. Regarding Section 272(e)(3), BellSouth asserts that the existing tariff requirements should be sufficient to ensure compliance with this provision. However, the methods proposed by BellSouth will not effectively ensure compliance with Sections 272(e)(1) and (e)(3) because they lack the requisite ability to successfully constrain the BOC's discriminatory behavior and potential for cost misallocation. Moreover, under the performance-reporting scheme proposed by the Ratepayer Advocate and other commenters, an audit is crucial to determining compliance with the requirements of Sections 272(e)(1) and (e)(3). The audit would include a comprehensive review of

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[24] *Id*. at 11.

[25] Comments of BellSouth at 12.

the BOCs' procedures for complying with the reporting guidelines, in addition to reviewing the data reported by the BOCs for accuracy. An audit to determine compliance with Sections 272(e)(1) and (e)(3) is also vital because it will serve to detect when a BOC intentionally submits false data, causing that BOC to be subject to significant penalties.

Verizon, as well, is not in favor of implementation of less stringent separations requirements under Section 64.1903[26] post-sunset because they consider the requirements unnecessary and overly burdensome.[27] The Ratepayer Advocate submits that the Section 64.1903 requirements become critical when and if BOCs are relieved of structural separation requirements because a BOC's interLATA competitors remain dependent on BOC facilities to reach their customers. That dependence gives the BOC the ability to discriminate against those competitors. The Section 64.1903 requirements give the FCC the added assurance that once sunset occurs, the BOC will allow non-discriminatory access to its network, and will not engage in non-competitive practices. In all, the costs incurred by the BOC in complying with the Section 64.1903 requirements are minimal, will not interfere with the BOC's ability to compete, and are far outweighed by the benefits to competition.

Both Verizon and SBC contend that the FCC should eliminate the Operation, Installation & Maintenance ("OI&M") restriction that prohibits the long distance affiliate from sharing central office, network operations center, and field personnel with the BOC.[28] They both claim that the OI&M restriction results in duplication of efforts and denies consumers the ability to achieve

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[26] See *Fifth Carrier Competitive Order*, requiring interexchange carriers to (a) maintain separate books of accounts, (b) not jointly own transmission or switching facilities with affiliated exchange telephone companies, and (c) acquire any services from affiliated exchange telephone companies at tariffed rates, terms, and conditions.

[27] Comments of Verizon at 13.

[28] Comments of Verizon at 15; Comments of SBC at 9.

seamless end-to-end service from one provider.[29] However, the OI&M prohibition is not contained anywhere in Section 272, and was adopted by the FCC when it adopted rules to implement the requirement in Section 272(b)(1) that long distance affiliates "operate independently" of the BOC.[30] As such, the OI&M restriction does not fall under the purview of the instant NPRM, and requires a separate NPRM to fully address the concerns of parties regarding the OI&M restriction.[31] Therefore, the FCC should refuse to consider requests by Verizon and SBC to eliminate the OI&M restriction at this time.

IV. BOC Allegations Regarding the Costs of Structural Separation Fail for Lack of Supportive Data

The NPRM requested comments on the cost of structural separation. Several commenters allege that the costs of structural separation are too high and justify removal of the requirements. These commenters, however, fail to provide specific data or other supporting information to prove their point. The FCC should therefore disregard these unsupported assertions.

Qwest speaks of alleged costs stemming from inefficiencies, general compliance and training activities, and redundancies.[32] Yet, nowhere does Qwest approach any quantification of these costs. Instead, Qwest would apparently have the FCC and other interested parties accept on faith the company's assertions. Similarly, SBC claims that it would enjoy savings in many personnel-related

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[29] Comments of Verizon at 15; Comments of SBC at 10.

[30] Comments of Verizon at 15-16.

[31] It is noteworthy that on August 5, 2002, Verizon filed a Petition for Forbearance, asking the FCC to forbear from applying section 53.203(a)(2) of its rules to Verizon with regard to the sharing of OI&M services. Comments are due on September 9, 2002 and reply comments on September 24, 2002. *See Comments on Verizon's Petition for Forbearance from the Prohibition of Sharing Operating, Installation and Maintenance Functions,* CC Docket No. 96-49, Public Notice, DA 02-1989 (rel. Aug., 9, 2002).

[32] Comments of Qwest at 13-15.

areas.[33] But, SBC does not provide any supporting data. Instead, it relies upon general percentages it claims would be saved. Without supporting data, however, these claims do not warrant consideration. Cost estimates are essentially useless absent the actual costs that a BOC incurs in the maintenance of separate subsidiaries and in the provision of service.

Verizon attempts to support its claim that structural separation will cause BOCs to incur excessive maintenance costs by merely providing cost estimates. Yet Verizon's figures are related to the costs of *implementing* structural separation in order to prepare for Section 271 authority.[34] The numbers do not disclose what, if any, costs are incurred by maintaining those functions. Furthermore, the fact that Verizon maintains multiple separate Section 272 affiliates undermines its arguments. Verizon claims "it was more efficient to focus these companies on specific market sectors rather than immediately combine them into a single section 272 affiliate at this time."[35] These affiliates are separately responsible for the network, residential and small business customers, large business customers, pre-paid calling cards, and international networks for other Verizon affiliates.[36] Accordingly, any claim that the maintenance of separate affiliates incurs harmful costs fails under the weight of Verizon's corporate structure. It is disingenuous for Verizon to argue that "structural separation requirements impose significant costs on the public"[37] while it voluntarily maintains multiple legally unnecessary separate affiliates. Verizon's claim that the separate

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33 Comments of SBC at 6-7.

34 Comments of Verizon at 9-7.

35 Comments of Verizon at note 6.

36 *Id*.

37 Comments of Verizon at 9, quoting *Amendment of Sections 64.702 of the Commission Rules and Regulations: Report and Order - Phase I*, CC Docket No. 85-229, 104 FCC 2d 958, & 3 (1986).

affiliates are more efficient "at this time" refutes the company's unqualified assertion that separate affiliate requirements impose inefficient costs.

The provision of general costs estimates is not sufficient. As the Ratepayer Advocate stated in its Comments, BOCs must (1) quantify with verifiable data the direct and indirect costs of maintaining a separate affiliate, (2) provide the projected costs of conversion from separate to integrated affiliates, (3) demonstrate that discontinuance of a separate affiliate will result in cost savings that will be passed on to customers, and (4) demonstrate that maintenance of the separate affiliate will have a material and adverse affect on the rates of return of the long distance affiliate.[38] None of the BOC commenters in this proceeding have provided information at any level of detail that begins to approach these standards.[39] Accordingly, the Ratepayer Advocate recommends that the FCC protect the public interest by requiring BOCs to provide detailed and verifiable data in support of any claims related to the costs of maintaining Section 272 affiliates, when and if a BOC files a petition for sunset.

V. Conclusion

For the reasons set forth herein and in its initial Comments, the Ratepayer Advocate respectfully submits that it is imperative that the Section 272(b) requirements be extended by rule. BOCs must be required to file petitions for sunset on a state-by-state basis, with the BOC bearing the burden of proof to affirmatively demonstrate that it no longer has market power in a particular state in accordance with the multifactor analysis proposed by the Ratepayer Advocate. Only upon an affirmative showing of lack of market power should the requirements of Section 272(b) sunset

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[38] Comments of the Ratepayer Advocate at 20.

[39] *See* NPRM at ¶¶ 17 and 21, requesting information related to cost/benefit analyses and the administrative, regulatory, or economic costs associated with the use of a separate affiliate. This cost information resides

for a particular BOC. The Ratepayer Advocate further submits that regulatory oversight of the BOCs should not end with sunset, and requests that the FCC establish additional performance measures, standards and self-executing remedies and penalties, including imposition of the requirements set forth in Section 64.1903 of the FCC rules, as outlined by the Ratepayer Advocate in its initial Comments. Such action will provide adequate safeguards to prevent BOCs from engaging in anti-competitive behavior and discriminatory conduct in the future.

Respectfully submitted,

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within the control of the BOCs. A cost/benefit analysis requires input of actual cost data, not general estimates as provided by certain of the commenters in this proceeding.