BEFORE THE

Federal Communications Commission

WASHINGTON, D.C.

In the Matter of	)	
	)	
Section 272(f)(1) Sunset of the BOC Separate Affiliate and Related Requirements	))	WC Docket No. 02-112
	)	
2000 Biennial Regulatory Review Separate Affiliate Requirements of Section 64.1903 of the Commission's Rules	)))	CC Docket No. 00-175

REPLY COMMENTS OF TIME WARNER TELECOM

WILLKIE FARR & GALLAGHER
1875 K Street, N.W.
Washington, D.C. 20006-1238
(202) 328-8000

ATTORNEYS FOR
TIME WARNER TELECOM

July 28, 2003

TABLE OF CONTENTS

PAGE

I. INTRODUCTION AND SUMMARY 1

II. DISCUSSION 2

III. CONCLUSION 19

BEFORE THE

Federal Communications Commission

WASHINGTON, D.C.

In the Matter of	)	
	)	
Section 272(f)(1) Sunset of the BOC Separate Affiliate and Related Requirements	))	WC Docket No. 02-112
	)	
2000 Biennial Regulatory Review Separate Affiliate Requirements of Section 64.1903 of the Commission's Rules	)))	CC Docket No. 00-175

REPLY COMMENTS OF TIME WARNER TELECOM

Time Warner Telecom Corporation ("TWTC"), by its attorneys, hereby submits these reply comments in response to the Further Notice of Proposed Rulemaking[1] in the above-referenced proceeding.

I. INTRODUCTION AND SUMMARY

In the *Further Notice*, the Commission has sought comment on an issue that it should not even be addressing at this point: how to regulate the BOCs' provision of in-region long distance service after Section 272 requirements have sunset. The Commission should retain Section 272 requirements, because the BOCs continue to possess overwhelming market power in the provision of special access end-user connections and in the local voice market. As the FCC has repeatedly recognized in the past and as the Texas PUC has appropriately observed in comments filed in this proceeding, these forms of market power give the BOCs powerful incentives to

---

1 *See Section 272(f)(1) Sunset of the BOC Separate Affiliate and Related Requirements*, WC Docket No. 02-112; *2000 Biennial Regulatory Review Separate Affiliate Requirements of Section 64.1903 of the Commission's* Rules, CC Docket No. 00-175, Further Notice of Proposed Rulemaking, FCC 03-111 (rel. May 19, 2003).

discriminate and cross-subsidize, and opportunities to act on those incentives cannot be adequately limited without structural separation requirements like those in Section 272.

Nevertheless, if the Commission continues to allow those requirements to sunset, it must at least subject all long distance services offered by the BOCs to dominant carrier regulation, and it must establish comprehensive service quality performance measurements and standards for the provision of special access as well as meaningful penalties for failure to comply with performance standards. These are the only possible means of limiting the BOCs' incentive to engage in anticompetitive behavior in the absence of structural separation rules.

II. DISCUSSION

Although the Commission has sought comment on the appropriate regulation of BOC in-region long distance service in the absence of Section 272 separate affiliate requirements, this is clearly an inappropriate way to frame the question of how to regulate in-region BOC long distance services. There is simply no basis for removing the Section 272 structural safeguard requirements while the BOCs retain their overwhelming market power in the provision of interstate access and local exchange services. It is well understood that (1) the BOCs in fact retain such market power; (2) such market power gives the BOCs the incentive to raise their rivals' costs through price and non-price discrimination and to misallocate the costs of competitive services; and (3) the most effective means of limiting the BOCs' opportunities to act on these incentives is structural separation.

The source of ILEC market power that is of greatest concern to TWTC is in special access circuits used to serve business customers. TWTC both competes in the provision of such circuits and purchases them from the incumbent LECs in situations where TWTC is unable to construct its own end-user connections (due to problems associated with building access, access to public rights-of-way, the need to serve customers outside TWTC's network footprint, and the need to provision services more quickly than construction will permit). The record in this proceeding again demonstrates that the incumbent LECs in general and the BOCs in particular have market power over end-user connections used to provide special access. For example, AT&T has determined that "Verizon is the only available facilities-based option in 85.9 percent of the buildings served by AT&T in New York and 86.5 percent of the buildings served by AT&T in Boston, and SBC is the only available facilities-based option in 95.4 percent of the buildings served by AT&T in Los Angeles and 94 percent of the buildings served by AT&T in Chicago." AT&T Comments at 21-22 (citations omitted). Sprint estimates that non-ILECs provide end-user connections to only 4.4 percent of the commercial and office buildings in the country. Sprint Comments at 8. Thus, while companies like TWTC are trying to construct end-user connections to buildings wherever possible, the vast majority of buildings in the country are still served only by BOC end-user connections.

Moreover, the Commission continues, appropriately, to classify the BOCs as dominant in the provision of special access. In the *Pricing Flexibility Order*, the Commission concluded that, even where an ILEC has received Phase II relief, it may still charge "an unreasonably high rate for access to an area that lacks a competitive alternative."[2] Indeed, ILECs are required to

---

[2] *Access Charge Reform; Price Cap Performance Review for Local Exchange Carriers; Interexchange Carrier Purchases of Switched Access Services Offered by Competitive Local Exchange Carriers; Petition of US*

maintain their existing tariffed rates to preclude them from "abusing their *market power* by charging dramatically higher rates to customers that lack competitive alternatives." *Pricing Flexibility Order* ¶ 79 (emphasis added).

The ILECs have offered no basis for revisiting this conclusion. Verizon asserts that there has been "an explosion of alternative special access capacity" in the last four years. Verizon Comments at 17. Its support for this conclusion is the increase in the number of total route miles of fiber deployed and the number of competitive providers that have entered the market. *See id.* at 17-18. But these statistics say nothing about whether that fiber and those carriers provide end-user connections, which are of course the source of the ILECs' enduring market power. Verizon also cites to competitive special access carriers' revenue, *id.* at 18, but ignores the fact that such competitors must often resell ILEC end-user connections to provide competitive service. Finally, Verizon asserts that competitors' collocation in many markets reflects competitive entry, *id.,* but again (as the FCC has held) such collocation does not eliminate ILECs' market power, not least because it offers no basis for concluding that collocators have built end-user connections. Similarly, Bell South dusts off a discredited report submitted in the Special Access Performance Measurement proceeding, which again relies on collocation statistics and fiber

---

West Communications, Inc. for Forbearance from Regulation as a Dominant Carrier in the Phoenix, Arizona MSA, Fifth Report and Order and Further Notice of Proposed Rulemaking, 14 FCC Rcd 14221, ¶ 144 (1999) ("*Pricing Flexibility Order*"), *aff'd, WorldCom, Inc. v. FCC*, 238 F.3d 449 (D.C. Cir. 2001).

deployment in general, neither of which bears any logical connection to the extent to which competitors have deployed end-user connections.[3]

The record in this proceeding also demonstrates that the incumbent LECs in general and the BOCs in particular retain market power in the local exchange market. For example, MCI explains that, even in states with the most local competition, incumbent LECs' market share in the local voice market remains overwhelming (75 percent in New York and 83 percent in Texas). MCI Comments at 4. Moreover, MCI points out CLEC market share has remained essentially stagnant over the past two years. *See id*. at 4-5.

These two forms of market power give the BOCs powerful incentives to engage in inefficient and extremely harmful behavior. As the Commission has recognized, firms with control over bottleneck facilities in an upstream wholesale market have the incentive to raise their rivals' costs (and thereby force them to restrict output).[4] The Texas PUC reaffirms this point in its comments in the instant proceeding. *See* Texas PUC Comments at 3, 5. By raising rivals' costs, dominant firms -- like the BOCs in the special access market -- can keep prices well above cost without losing market share.

---

[3] *See* Bell South Comments at 13-14 (citing "Special Access Competition," The Eastern Management Group, at 2 (Jan. 22, 2002)); TWTC & XO Joint Reply Comments, CC Docket No. 01-321 at 10 (Feb. 12, 2002).

[4] *See Applications of Ameritech Corp. and SBC Communications Inc. for Consent to Transfer Control of Corporations Holding Commission Licenses and Lines Pursuant to Sections 214 and 310(d) of the Communications Act and Parts 5, 22, 24, 25, 63, 90, 95, and 101 of the Commission's Rules,* Memorandum Opinion and Order, 14 FCC Rcd 14712, ¶ 107 (1999) ("*SBC/Ameritech Order*"), *vacated on other grounds, Ass'n of Communications Enterprises v. FCC*, 235 F.3d 662 (D.C. Cir. 2001); *Review of Regulatory Requirements for Incumbent LEC Broadband Telecommunications Services*, Notice of Proposed Rulemaking, 16 FCC Rcd 22745, ¶ 29 (2001) (stating that "an incumbent LEC might improperly exercise its existing market power through cross-subsidization, raising its rivals' costs, or improper discrimination.") (citations omitted).

For example a BOC can raise the price that its competitor pays for an input. Dominant firms generally prefer this approach, since it allows them to make money while at the same time limiting their competitors' output. Moreover, where, as in the interLATA market, the BOC competes with the purchaser of special access in a downstream market, the BOC has the incentive to engage in price squeeze tactics by raising its wholesale price and lowering its retail prices. In those cases where regulation constrains a BOC's ability to engage in price discrimination, it will look to the second basic strategy for raising rivals' costs – unreasonable and discriminatory service quality.

Rather than viewing special access purchasers as "customers," ILECs now view CLECs and IXCs as existing and/or potential competitors for local market and toll revenues. The Commission has recognized as much in prior orders.[5] As the BOCs gain approval to enter the in-region interLATA market in more states, their incentives only worsen.[6] Nor does the Section 271 process do anything to correct these anticompetitive incentives. The Commission has expressly found that special access service is not covered by the competitive checklist.[7] Thus,

---

[5] *See SBC/Ameritech Order* ¶ 107 ("[ILECs], which are both competitors and suppliers to new entrants, have strong economic incentive to preserve their traditional monopolies over local telephone service and to resist the introduction of competition that is required by the 1996 Act.") (citation omitted).

[6] *See* Marius Schwartz, *The Economic Logic for Conditioning Bell Entry into Long Distance on the Prior Opening of Local Markets*, 18 Journal of Regulatory Economics 247, 265-66 (Nov. 2000) ("Schwartz Paper").

[7] *See, e.g., Application by Bell Atlantic New York for Authorization Under Section 271 of the Communications Act to Provide In-Region, InterLATA Service in the State of New York*, Memorandum Opinion and Order, 15 FCC Rcd 3953, ¶ 340 (1999) ("*New York Order*"), *aff'd sub. nom., AT&T v. FCC*, 220 F.3d 607 (D.C. Cir. 2000) (finding that "[w]e cannot accept the assertion by a number of these parties that the provision of special access should be considered for purposes of determining checklist compliance.") (citation omitted); *Application by SBC Communications Inc., Southwestern Bell Telephone Company, and Southwestern Bell Communications Services, Inc. d/b/a Southwestern Bell Long Distance, Pursuant to Section 271 of the Telecommunications Act of*

the BOCs' incentive to discriminate in the provision of special access is very substantial and increasing. Until facilities-based competitors for special access services are able to offer a meaningful alternative to the BOCs in more than a select few large buildings in downtown areas, it is critical that mechanisms, such as separate affiliate requirements (and, as described below, performance measurements), are in place to deter these anticompetitive incentives.

Moreover, this is especially the case with regard to ILECs with large service areas such as SBC and Verizon. As the Commission has found, the larger an ILEC's network footprint, the greater its incentive is to engage in anticompetitive behavior.[8] This is because a larger network footprint allows the ILEC to capture a greater share of the benefits of such behavior. For example, if an ILEC degrades the quality of a competitor's special access in one part of its service territory, that competitor may be disinclined to enter wherever the ILEC operates. The larger the ILEC's territory, the greater the benefit the ILEC gains from the CLEC's decision not to compete.

1996 to Provide In-Region, InterLATA Services in Texas, Memorandum Opinion and Order, 15 FCC Rcd 18354, ¶ 335 (2000) ("*Texas Order*") (stating that "we do not consider the provision of special access services pursuant to a tariff for purposes of determining checklist compliance.") (citation omitted).

[8] *See SBC/Ameritech Order* ¶ 60 (observing that the merger "would increase the incentives and ability of the larger merged entity to discriminate against rivals in retail markets where the new SBC will be the dominant incumbent LEC. . . . The increase in the number of local areas controlled by SBC as a result of the merger will increase its incentive and ability to discriminate against [competing] carriers."); *Application of GTE Corp., Transferor, and Bell Atlantic Corp., Transferee, for Consent to Transfer Control of Domestic and International Sections 214 and 310 Authorizations and Application to Transfer Control of a Submarine Cable Landing License*, Memorandum Opinion and Order, 15 FCC Rcd 14032, ¶ 96 (2000) ("*Bell Atlantic/GTE Order*") (concluding that "the increase in the number of local calling areas controlled by Bell Atlantic as a result of the merger will increase its incentive and ability to discriminate against carriers competing in retail markets that depend upon access to Bell Atlantic's inputs in order to provide services.") (citation omitted).

These inefficient incentives are highly relevant to the ATM and Frame Relay markets and are not limited to voice services.[9] Although the Commission has held that BOC Section 272 affiliates are non-dominant in the provision of interexchange ATM, Frame Relay, and other forms of interLATA data transmission (a finding that must obviously be reconsidered if separate affiliate requirements are eliminated), they continue to have market power over the end-user connections that competitors need to provide these services. Given that those services are generally provided on an interexchange basis, the BOCs must continue to be subject to structural separation, affiliate transaction, and nondiscrimination requirements in the provision of those services. These requirements are necessary to limit the BOCs' ability to leverage their control over bottleneck end-user connections to harm competition in downstream markets.

Second, the BOCs' market power in the regulated retail local exchange service market gives them the incentive to misallocate costs of competitive and unregulated services.[10] As the Commission has recognized, a BOC "may have an incentive to allocate improperly to its regulated core business costs that would be properly attributable to its competitive ventures."[11]

---

9 *See* TWTC Comments, CC Docket No. 01-337 at 10-13 (filed Mar. 1, 2002).

10 As recently as October 1999, the Commission reaffirmed the need to retain regulations established under Section 272 designed to limit BOC opportunities to misallocate the costs of providing interLATA service. *See Implementation of the Non-Accounting Safeguards of Sections 271 and 272 of the Communications Act of 1934, as amended,* Third Order on Reconsideration, 14 FCC Rcd 16299, ¶ 20 (1999) ("*Non-Accounting Safeguards Third Order on Reconsideration*"). *See also California v. FCC*, 905 F.2d 1217, 1224 (9th Cir. 1990); *Policy and Rules Concerning the Furnishing of Customer Premises Equipment, Enhanced Services, and Cellular Communications Services by Bell Operating Companies,* Report and Order, 95 FCC 2d 1117, 1138-52 (1983).

11 *Implementation of the Non-Accounting Safeguards of Section 271 and 272 of the Communications Act of 1934, as Amended*, First Report and Order and Further Notice of Proposed Rulemaking, 11 FCC Rcd 21905, ¶ 10 (1996) ("*Non-Accounting Safeguards Order*") (subsequent history omitted).

The ultimate source of this incentive is the regulation of the BOCs' local and access rates that they charge to customers for a service over which they have unquestioned market power. As long as the BOCs retain their dominance in the local market and their local and access rates are regulated, they will look for ways to increase their rates by padding the regulated rate base.

Contrary to ILEC arguments in this proceeding,[12] changes in rate regulation have not eliminated the incentive to cross-subsidize. Replacing rate of return regulation with price caps reduces but does not eliminate the incentive to cross-subsidize. A regulated firm has the incentive to cross-subsidize a competitive service where it can misallocate the costs of such service to less competitive services and be assured that it can raise prices (over the level that would otherwise apply under existing regulation) on monopoly services and earn a profit on the misallocated costs.[13] Although price caps sever the immediate connection between costs and prices, they do not eliminate the connection. *See* Schwartz Paper at 263-64; *ILEC Classification Order* n.289. Rather, the inevitable periodic review of the reasonableness of price cap levels (such as the recent *CALLS* proceeding) causes regulators to review the rate of return an ILEC

---

[12] *See, e.g.,* Verizon Comments at 20.

[13] *See Regulatory Treatment of LEC Provision of Interexchange Services Originating in the LEC's Local Exchange Area; Policy and Rules Concerning the Interstate, Interexchange Marketplace*, Second Report and Order in CC Docket No. 96-149 and Third Report and Order in CC Docket No. 96-61, 12 FCC Rcd 15756, ¶ 103, n.276 (1997) ("*ILEC Classification Order*"); *Non-Accounting Safeguards Order* ¶ 180. Moreover, this practice not only harms ratepayers but also harms competition in general by giving the incumbent an unfair advantage over its competitors. *See ILEC Classification Order* ¶ 103; Reply Comments of U.S. Dept. of Justice, CC Dkt. Nos. 96-149, 96-61 at 23-26 (filed Aug. 30, 1996).

earns on investments. A high rate of return leads to the conclusion that prices are unreasonably high and must be reduced (exactly what occurred in *CALLS*).[14]

Thus, even under price caps, ILECs have the incentive to pad the rate base with artificial increases in costs to make it look as though they earn only a reasonable profit on regulated service. The result is that regulated ratepayers, in markets where the ILEC has market power, pay inefficiently high rates for their service and competition in the provision of the subsidized services is distorted because the regulated firm has artificially low costs and can charge low prices regardless of whether its true costs would allow it to do so.

As the Commission has recognized, structural separate requirements like those in Section 272 are by far the most effective way to limit the BOCs' opportunities to act on these inefficient incentives. For example, the Commission concluded that the nondiscrimination requirements of Section 272 could only be meaningful where a BOC must provide in-region interLATA service through a separate affiliate that must obtain transmission and switching facilities from a BOC on an arm's length basis:

> Section 272(c)(1) and (e) require a section 272 affiliate to obtain services and facilities on the same rates, terms, and conditions available to unaffiliated entities. Contrary to the suggestion of some commenters, those nondiscrimination safeguards *would offer little protection if a BOC and its section 272 affiliate were*

---

[14] *See Access Charge Reform; Price Cap Performance Review for Local Exchange Carriers, Low-Volume Long Distance Users, Federal-State Joint Board on Universal Service*, Sixth Report and Order in CC Docket Nos. 96-262 and 94-1; Report and Order in CC Docket No. 99-249; Eleventh Report and Order in CC Docket No. 96-45, 15 FCC Rcd 12962 (2000) ("*CALLS*") (subsequent history omitted). Importantly, the ILECs have for years argued that states must rebalance local rates so that residential rates are increased to a level that recovers the true cost of providing such service. *See, e.g.,* SBC Comments, CC Dkt No. 01-92, at 9-11 (filed Aug. 21, 2001). Such rate rebalancing would almost certainly cause state commissions to review the costs allocated to residential service. This fact again illustrates the immediate relevance of the incentive to misallocate costs to regulated services.

> *permitted to own transmission and switching facilities jointly*. To the extent that a section 272 affiliate jointly owned transmission and switching facilities with a BOC, the affiliate would not have to contract with the BOC to obtain such facilities, thereby precluding a comparison of the terms of transactions between a BOC and a section 272 affiliate with the terms of transactions between a BOC and a competitor of the section 272 affiliate. *Together*, the prohibition on joint ownership of facilities and the nondiscrimination requirements should ensure that competitors can obtain access to transmission and switching facilities equivalent to that which section 272 affiliates receive.

Non-Accounting Safeguards Order ¶ 160 (emphasis added).

Separate ownership of land and buildings where transmission and equipment are located was also deemed necessary to limit the opportunities for discrimination. Such separate ownership "should ensure that collocation agreements between a BOC and its section 272 affiliate are reached pursuant to arm's length negotiations and that the same collocation opportunities are available to similarly situated non-affiliated entities." *Non-Accounting Safeguards Order* ¶ 161.

Similarly, the Commission decided that the prohibition on allowing the same personnel to perform the operating, installation, and maintenance services for equipment owned or leased by a BOC and its Section 272 affiliate was "*necessary* to ensure that a BOC complies with the nondiscrimination requirements of section 272." *Non-Accounting Safeguards Order* ¶ 163 (emphasis added). Indeed, "[a]llowing a BOC to contract with the section 272 affiliate for operating, installation, and maintenance of services would *inevitably* afford the affiliate access to the BOC's facilities that is superior to that granted to the affiliate's competitors." *Non-Accounting Safeguards Order* ¶ 163 (emphasis added). The Texas PUC has reiterated these points in its comments in this proceeding, noting that "structural separation remains the most effective means of assessing the BOCs' compliance with the statutory obligation not to discriminate against other entities in favor of its affiliates." Texas PUC Comments at 4.

These observations refute the ILECS' argument that there is no need to retain separate affiliate requirements in order to ensure compliance with the prohibition against unreasonable discrimination. For example, in a paper prepared for SBC, Verizon and Qwest, Dennis Carlton, Hal Sider, and Allan Shampine discount the likelihood of discrimination based on the assumption that regulators could detect any significant differences in treatment between competitors and ILECs. *See* Declaration of Dennis W. Carlton, Hal Sider and Allan Shampine ¶ 47. But, as explained, the regulators themselves have found that they cannot effectively police discrimination against competitors in the absence of separate affiliate requirements -- separation requirements are "necessary" and their elimination would "inevitably" result in discrimination. The FCC may not ignore these conclusions where the factual predicate upon which they are based (most importantly enduring control over bottleneck end-user connections) is unchanged.

Moreover, the Commission similarly concluded that the Section 272 separate affiliate requirement is essential to limit the BOCs' opportunities to engage the misallocation of the costs of providing in-region interLATA service. This is particularly true with regard to the requirement that the BOC and the Section 272 affiliate not jointly own transmission and switching equipment. As the Commission explained,

> [i]mposing a prohibition on such joint ownership [of switching and transmission equipment] also avoids the need to allocate the costs of such transmission and switching facilities between BOC activities and the competitive activities in which a section 272 affiliate may be involved. We agree with the claims of some commenters that, because the costs of wired telephony networks and network

> premises are largely fixed and largely shared among local, access, and other services, sharing of switching and transmission facilities may provide a significant opportunity for improper allocation of cost between the BOC and its section 272 affiliate.

Non-Accounting Safeguards Order ¶ 159.

It is clear therefore that there is no basis for eliminating the Section 272 affiliate requirements. Congress allowed for the sunset of Section 272 affiliate requirements after three years so that the FCC would have an administratively efficient means of eliminating such regulations (without conducting more burdensome forbearance proceedings) if the BOCs' market power had in fact abated enough to justify this step. That factual predicate simply does not exist. Accordingly, TWTC urges the Commission not to allow Section 272 requirements to sunset, until the sources of the BOCs' powerful inefficient incentives are dissipated: that is, until a BOC is nondominant in the provision of special access and faces substantial competition in the provision of local service in a particular state. Indeed, the Commission repeatedly recognized in the *Non-Accounting Safeguards Order* that the Section 272 requirements remain essential unless and until a BOC's market power is significantly diminished by competition. For example, the Commission explained that,

> [i]n enacting section 272, Congress recognized that the local exchange market will not be *fully competitive* immediately upon its opening. Congress, therefore, imposed in section 272 a series of separate affiliate requirements applicable to the BOCs' provision of certain new services and their engagement in certain new activities. These requirements are designed, *in the absence of full competition* in the local exchange marketplace, to prohibit anticompetitive discrimination and cost-shifting, while still giving consumers the benefit of competition.

Non-Accounting Safeguards Order ¶ 9 (emphasis added). Moreover, the Commission clarified that resale (or UNE-P) competition was insufficient to reduce the BOC's market power, at least insofar as that market power gives the BOC the incentive to discriminate. As the Commission stated, "[t]he rules and policies adopted in this order seek to preserve the carefully crafted statutory balance to the extent possible until *facilities-based alternatives* to the local exchange and exchange access services of the BOCs *make those safeguards no longer necessary*." *Id.* ¶ 13 (emphasis added).

However, notwithstanding the BOCs' market power and the need to retain structural safeguards as a means of preventing the harmful consequences of such market power, the Commission has, without offering any analysis to justify its decision, already allowed the Section 272 affiliate requirement to sunset in New York.[15] It also appears poised to allow a similar result in Texas as well as other states. Given this reality, the question is what remaining regulatory tools can the Commission use to try to limit BOC opportunities to engage in anticompetitive behavior. Without structural separation, regulation will undoubtedly be far less effective. Nevertheless, the Commission can at least regulate somewhat the BOCs' behavior by applying dominant carrier regulation to all in-region long distance services offered by BOCs and by imposing regulations designed to limit the BOCs' opportunities to engage in non-price discrimination.[16]

---

15 *See* Public Notice*, Section 272 Sunsets for Verizon in New York State by Operation of Law on December 23, 2002 Pursuant to Section 272(f)(1),* WC Docket No. 02-112, 17 FCC Rcd 26,864 (2002), *petition for review pending sub nom, AT&T Corp., v. Fcc,* No. 03-1035 (D.C. Cir. filed Feb. 21, 2003).

16 It is worth noting that the FCC would completely undermine its ability to limit the harmful consequences of BOC market power if it were to reclassify the transmission inputs used to provide BOC broadband internet access in CC Docket No. 02-33. Such relief would open the door to ILEC discrimination by allowing them to target all network upgrades to unregulated Title I facilities while allowing regulated offerings to become gradually degraded.

First, dominant carrier regulation can at least go some way toward reducing BOCs' opportunities to misallocate costs and engage in price discrimination against their rivals. As AT&T points out, tariff filing requirements themselves may deter a certain amount of BOC anticompetitive behavior because they would be forced to justify their prices with cost-based showings. AT&T Comments at 49-50. The tariff process would also offer the FCC at least some opportunity to ensure that the BOCs impute the price of their access services to their retail interexchange services and that they do not allocate an unreasonable portion of their joint and common costs to local exchange services. *See id.* at 50-52.

Second, the Commission must limit the BOCs' opportunity to engage in non-cost discrimination by imposing performance requirements on interstate special access. Indeed, while the nondiscrimination requirements of Section 272(e) will remain after other aspects of Section 272 sunsets (*see* 47 U.S.C. § 272(f)), those requirements can only be effective if accompanied by specific performance measurements, reporting requirements, standards and meaningful penalties for failure to comply. [17]

The Commission has already determined that some reporting requirements are essential for the enforcement of Section 272 behavioral requirements. Section 272(e)(1) states that a BOC

---

[17] ILEC arguments to the contrary, *see, e.g.,* SBC Comments at 42, Bell South Comments at 12-13, 17-18, are meritless for the reasons explained herein. Equally meritless is the assertion that national carriers like AT&T, MCI, Sprint and TWTC can monitor BOCs' performance by "benchmarking" them against each other. *See* Declaration of Dennis W. Carlton, Hal Sider and Allan Shampine at ¶ 47. As TWTC has explained at length elsewhere, the absence of national requirements that BOCs report their performance in provisioning special access using clear and uniform reporting categories, benchmarks and standards prevents wholesale customers from comparing the performance of one BOC to another, or the performance a single BOC provides to itself and its competitors. *See* TWTC & XO Joint Comments, CC Docket No. 01-321 at 41-55 (Jan 22, 2003).

and a BOC affiliate subject to Section 251(c) "shall fulfill any requests from an unaffiliated entity for telephone exchange service and exchange access within a period no longer than the period in which it provides such telephone exchange service and exchange access to itself or to its affiliates." 47 U.S.C. § 272(e)(1). The Commission determined that this provision could not be enforced unless the BOCs provide reports on the time it takes them to fulfill local exchange and exchange access requests for themselves and their affiliates. As the Commission explained, absent such reports, "the information necessary to detect violations of [Section 272(e)(1)] will be unavailable to unaffiliated entities." *Non-Accounting Safeguards Order* ¶ 242. Moreover, as the Commission explained, "[i]f competitors can easily obtain data about a BOC's compliance with section 272(e)(1), this increases the likelihood that potential discrimination can be detected and penalized; this in turn, decreases the danger that discrimination will occur in the first place." *Id.* ¶ 243. Nor was the Commission persuaded by the BOCs' argument that discrimination was not likely because their provisioning and maintenance systems are designed not to differentiate among those receiving service: "Although the BOCs' use of nondiscriminatory, automated order processing systems is important for meeting the requirements to Section 272(e)(1), the existence of these systems does not guarantee that requests placed via these systems are actually completed within the requisite period of time." *Id.*

Notwithstanding these conclusions, the Commission has not gone nearly far enough in the area of establishing performance reporting, measurements, and penalties to ensure nondiscriminatory provision of special access. To begin with, although the Commission determined that, in principle, BOCs should be required to provide reports regarding the provision of exchange access and local exchange service to themselves and their affiliates, no specific rules were ever established to implement that decision.[18] The Commission determined that the term "requests" in Section 272(e)(1) "should be interpreted broadly, and that it includes, but is not limited to, initial installation requests, subsequent requests for improvement, upgrades or modifications of service, or repair and maintenance of these services." *Id.* ¶ 239. This list of functionalities is simply too vague a basis for establishing specific reporting requirements. In addition, the Commission did not require that the BOCs report on the timeliness of their provision of exchange access and local exchange service for unaffiliated carriers. Yet absent such a requirement, a competitor is unlikely to be able to "obtain data about a BOC's compliance with section 272(e)(1)." This is because BOC internal measurements for reporting are likely to differ from those used by a competitor, thus leading to endless disputes regarding whether the data yields apples-to-apples comparisons. In addition, only the BOCs have access to the level of performance provided to all competitors (which is essential to determining whether a BOC is discriminating among competitors).[19]

---

18 In the *Non-Accounting Safeguards Third Order on Reconsideration*, the Commission determined that it was not yet ready to establish reporting requirements under Section 272(e)(1). *See Non-Accounting Safeguards Third Order on Reconsideration* ¶¶ 33-35. Of course, the Commission has relied heavily on performance measurements, reporting, and associated penalties to ensure compliance with the requirement of Section 251. *See, e.g., New York Order* ¶¶ 63-366; *SBC/Ameritech Order* ¶¶ 377-380. The Commission has also wisely commenced a proceeding to establish similar performance requirements for special access. *See Performance Measurements and Standards for Interstate Special Access Services*, Notice of Proposed Rulemaking, 16 FCC Rcd 20896 (2001).

19 It is also important to note that the FCC has before it two comprehensive proposals for special access performance measurements. *See* Letter from William W. Jordan to Ms. Marlene H. Dortch, CC Docket Nos. 01-321, 01-338 (Aug. 26, 2002) (submitting joint TWTC-BellSouth special access performance measurement proposal); Letter from Gil M. Strobel to Ms. Marlene H. Dortch, CC Docket No. 01-321 (June 23, 2003) (attaching most recent iteration of the Joint Competitive Industry Group's proposed special access performance rules).

Furthermore, the Commission has construed the language of Section 272 nondiscrimination provisions to address only those functions that BOCs provide themselves or by their affiliates.[20] Those provisions do not address wholesale functionalities the BOCs provide to competitors that are different from the functionalities the BOCs provide to themselves and their affiliates. This is a critical omission, since the BOCs have argued strenuously that the wholesale services they provide for competitors are different from the services that they provide to themselves or their affiliates.[21]

In sum, comprehensive performance measurements and reporting requirements (as well as penalties for failure to meet these requirements) are necessary to enforce the requirements of Section 272 and to address wholesale functionalities not addressed by that provision. The Commission must therefore establish performance requirements for special access in all events, but especially if it decides to eliminate Section 272 structural separation. In the absence of such separation, the BOCs' opportunities to engage in discrimination will increase significantly (as explained). It is therefore imperative that the BOCs' provisioning be subject to comprehensive performance rules to ensure adequate policing of discrimination by both regulators and competitors.

---

20 *Non-Accounting Safeguards Order* ¶ 204 (construing Section 272(c)(1) to require only "that unaffiliated entities receive the same treatment as the BOC gives to its section 272 affiliate"); *id.* ¶¶ 239-40 (characterizing Section 272(e)(1) as addressing only requests from unaffiliated carriers that are "equivalent" to services provided by the BOC to itself or its affiliates).

21 *See, e.g.,* Verizon Comments, CC Docket No. 01-321 at 14-19 (filed Jan. 22, 2002).

III. CONCLUSION

There is no basis for the Commission to remove the Section 272 affiliate requirements until a BOC is non-dominant in the provision of special access service and faces substantial competition in the provision of local service in a particular state. Nevertheless, if the Commission does eliminate these requirements prematurely, it must at the very least regulate BOC in-region long distance services as dominant and impose performance measurement, reporting and standard requirements on BOC special access as well as meaningful penalties for failure to meet those requirements.

Respectfully submitted,

/s/Thomas Jones

Thomas Jones
Robert Millar
WILLKIE FARR & GALLAGHER
1875 K Street, N.W.
Washington, D.C. 20006-1238
(202) 328-8000

ATTORNEYS FOR
TIME WARNER TELECOM

July 28, 2003