Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

In the Matter of

	)	
Section 272(b)(1)'s "Operate Independently"	)	**WC Docket No. 03-228**
Requirement for Section 272 Affiliates	)	
	)	

MCI COMMENTS

WorldCom, Inc. d/b/a MCI (MCI) hereby submits its comments on the Notice of Proposed Rulemaking in the above-captioned proceeding.

I. The Ban on OI&M Sharing is Required by Section 272(b)(1)

The Commission's proposals to eliminate the ban on OI&M sharing, or to eliminate both the ban on OI&M sharing and the ban on joint facilities ownership, cannot be squared with the requirements of section 272(b)(1). As an initial matter, it is clear that the Commission cannot eliminate rule 53.203(a) in its entirety, i.e., eliminate both the ban on joint ownership of facilities and the ban on OI&M sharing. As the Commission found in the Non-Accounting Safeguards Order,[1] principles of statutory construction require that the statute be interpreted to give effect to each of its provisions.[2]

Moreover, it is equally clear that it would not be reasonable for the Commission to reinterpret section 272(b)(1) as imposing only a ban on joint ownership of facilities,

---

[1] Implementation of the non-Accounting Safeguards of Sections 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 (1996) (Non-Accounting Safeguards Order).
[2] Non-Accounting Safeguards Order at ¶ 156.

land, and buildings, i.e., to retain section 53.203(a)(1) while eliminating the section 53.203(a)(2)-(3) ban on OI&M sharing. Analysis of the statutory language, legislative history, and purpose of section 272(b)(1) shows that Congress intended the "operate independently" requirement to impose a greater degree of structural separation than simply a ban on joint ownership of switches, transmission equipment, and land and buildings.

First, even if it is true that the term "operate independently" is sufficiently ambiguous to allow sharing of administrative services – a conclusion with which MCI continues to disagree – "operate independently" is not sufficiently ambiguous to allow the sharing of OI&M services as well. When used in the context of telecommunications networks, the term "operate" is ordinarily defined to encompass, at a minimum, all functions directly associated with network operations, i.e., the OI&M functions performed by carrier personnel and OSS and the functions performed by switches and transmission facilities. Illustrating that the ordinary usage of the term "operate" includes OI&M, the Commission referred in the Non-Accounting Safeguards Order to OI&M services as among the "operating functions" of the BOC's network.[3] To the extent there was any ambiguity in the term "operate," it concerned solely whether "administrative and other services" were encompassed by that term.[4]

Second, elimination of the ban on OI&M sharing would result in BOC employees performing virtually all functions of the long distance affiliate – an outcome that is plainly inconsistent with any reasonable definition of the term "operate independently." The BOC long distance affiliates – which even today have no more

[3] Non-Accounting Safeguards Order at ¶ 163.

than a few hundred employees of their own[5] – would be reduced to shell companies with a handful of figurehead executives as their only employees.

Third, the text of closely-related section 274(b) confirms that Congress used the term "operate independently" to mean more than simply a ban on joint facilities ownership: in section 274(b), a ban on common facilities ownership is only one of many elements that defines "operated independently." And section 274(b)(5)(B) demonstrates that if Congress had intended to do no more than ban joint facilities ownership it was quite capable of saying so directly.

Fourth, interpreting the term "operate independently" as permitting OI&M sharing would not be consistent with the purpose of section 272. As the Commission has found, "operate independently" should be interpreted to "ensure that a section 272 affiliate and its competitors enjoy the same level of access to the BOC's transmission and switching facilities."[6] Consequently, "operate independently" cannot be interpreted in a manner that ignores the BOC personnel and systems that provide the affiliate and competitors with access to BOC transmission and switching facilities, i.e., the provisioning and maintenance functions encompassed by "OI&M." An interpretation of "operate independently" that is limited to a ban on joint facilities ownership would only tangentially address such provisioning and maintenance functions, and is therefore inconsistent with the purpose of section 272(b)(1).

II. The Ban on OI&M Sharing is Necessary to Guard Against Discrimination

---

[4] Non-Accounting Safeguards Order at ¶ 168.

[5] See, e.g., letter from Dee May, Verizon, to Marlene H. Dortch, FCC, June 24, 2003, Attachment at 13 (Verizon's long distance affiliate "has roughly 650 employees out of approximately 250,000 Verizon

Because elimination of the ban on OI&M sharing would not be consistent with any reasonable interpretation of the term "operate independently," the Commission need not determine whether the OI&M sharing ban strikes an appropriate balance between allowing the BOCs to achieve cost efficiencies and protecting ratepayers against improper cost allocation and competitors against discrimination.[7] Congress has already weighed the costs and benefits of the ban on sharing operations, installation, and maintenance services, and has found that the benefits outweigh the costs.

Even if section 272(b)(1) could reasonably be reinterpreted to permit elimination of the OI&M sharing ban – which it cannot – the Commission would have no reasoned basis for doing so. In particular, there are no changed circumstances to which the Commission can point as a reasoned basis for reconsidering the Non-Accounting Safeguards Order's finding that OI&M sharing would "inevitably afford the affiliate access to the BOC's facilities that is superior to that granted to the affiliate's competitors."[8]

Clearly, the Non-Accounting Safeguards Order's analysis of the risks associated with OI&M sharing was correct. Elimination of the ban on OI&M sharing would "inevitably" provide the affiliate with superior access to the BOC's facilities because only the affiliate would enjoy the benefits of using the same (BOC) personnel and systems for both access and long distance provisioning.

In fact, the RBOC forbearance petitions inadvertently serve to illustrate the unique benefits that the RBOCs would gain if the OI&M sharing ban were eliminated.

---

employees . . . .")

[6] Non-Accounting Safeguards Order at ¶ 158.

[7] Notice at ¶ 6.

In those petitions, the RBOCs emphasized that they sought to eliminate the OI&M sharing ban in order to avoid the need for "handoffs" and "coordination" between the BOC's access provisioning and repair functions and the long distance affiliate's provisioning and repair functions.[9] But every unaffiliated carrier must follow such handoff and coordination procedures when obtaining access services from the BOCs. MCI alone requires a substantial number of employees whose sole task is to negotiate and coordinate with the BOCs throughout the access circuit installation and repair process. If the OI&M sharing ban were eliminated, and the RBOCs could use the same employees for both access and long distance provisioning and maintenance, only the RBOCs would be in a position to avoid the need for such handoffs and coordination.

Contrary to the RBOCs' claims in the forbearance proceedings, automated systems would not, by themselves, guard against discriminatory behavior if the OI&M ban were lifted. First, the Commission has suggested that BOCs may not be required to use the same automated systems for their affiliates as for unaffiliated carriers,[10] and the BOCs would be far more likely to employ different systems if the OI&M sharing ban were lifted. Second, the Commission has never been persuaded that the use of automated systems eliminates concerns about discrimination.[11]

More importantly, the access provisioning and repair process is not as automated and predictable as the RBOCs suggest. If the process were entirely automated and predictable, then the RBOCs would have little or no reason to complain about the

---

[8] Non-Accounting Safeguards Order at ¶ 163.
[9] Verizon Forbearance Petition at 7 ("The section 272 rules result in a set of hand-offs of customer requests for service and repair that lead to less than optimal results."); Verizon Forbearance Petition, McCully Declaration at 3; letter from Ann D. Berkowitz, Verizon, to Marlene H. Dortch, CC Docket No. 96-149, May 19, 2003; SBC Forbearance Petition at 17-19.
[10] Non-Accounting Safeguards Order at ¶ 241.

burdens they face when coordinating access and long distance provisioning. The "handoff" and "coordination" issues about which the RBOCs complain exist solely because the access provisioning and repair process is complex and frequently requires substantial manual intervention and coordination. And, because lifting the OI&M sharing ban would result in the RBOCs alone being able to use the same employees for both access and long distance provisioning, every instance of manual intervention inherently provides the BOC with multiple opportunities to provide its affiliate with superior access to BOC facilities.

There are no changed circumstances that would enable the Commission to now find that other provisions of the Act or the Commission's rules are sufficient to guard against such "inevitable" discrimination in the absence of an OI&M sharing ban. In particular, the nondiscrimination requirements of section 272(c)(1) and (e)(1), or the section 272(d) audit requirement, were in place and were necessarily taken into account by the Commission when the Commission found that discrimination would be "inevitable" in the absence of the OI&M sharing ban.

In any event, the Commission has still not put in place rules necessary to effectively enforce the section 272(e)(1) nondiscrimination requirement. Although the Commission found in the Non-Accounting Safeguards Order that performance metrics were necessary to implement section 272(e)(1),[12] the Commission still has not adopted such metrics. And the CC Docket No. 01-321 special access metrics proceeding has been pending for over two years without Commission action.

---

[11] Non-Accounting Safeguards Order at ¶ 243.
[12] Non-Accounting Safeguards Order at ¶¶ 242-244.

Currently, the only performance data that compares installation and repair performance provided to section 272 affiliates with the performance provided to unaffiliated carriers is published in the section 272(d) audit reports. But in its review of the first Verizon audit report, the Commission found that the performance metrics in that report were inadequate to determine whether Verizon was in fact complying with section 272(e)(1).[13] And even if the data published in the audit reports were useful, the Commission has found that the lag in disseminating that data to the public – up to two and a half years – is too long to be of any real value in detecting and deterring discriminatory conduct by the BOCs.[14]

Finally, it is clear that the benefits of the OI&M sharing ban far outweigh whatever modest costs the rule may impose. Not only does the OI&M sharing ban remain "necessary" to prevent discrimination, but the performance of the RBOCs in the long distance market demonstrates that the costs associated with the rule are not material. Even with the OI&M rule and other section 272 safeguards in place, the RBOCs have gained long distance market share at an unprecedented rate.

---

[13] Verizon Telephone Companies, Apparent Liability for Forfeiture at ¶ 6 n.18, released September 8, 2003.

[14] Non-Accounting Safeguards Order at ¶ 242.

III. Conclusion

For the reasons stated herein, the Commission should retain section 53.203(a) of its rules in its entirety.

Respectfully submitted,
WORLDCOM, INC. d/b/a MCI

/s/ Alan Buzacott

Alan Buzacott
1133 19th Street, N.W.
Washington, DC 20036
(202) 887-3204

December 10, 2003