

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554**

_____)
In the Matter of)
)
Extension Of Section 272 Obligations)
Of Southwestern Bell Telephone Co.)
In The States Of Arkansas and Missouri)
_____)

WC Docket No. 02-112

REPLY COMMENTS OF AT&T CORP.

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October 20, 2004

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GLOSSARY OF COMMISSION ORDERS

SHORT CITE	FULL CITE
<i>Access Reform Order</i>	First Report And Order, <i>Access Charge Reform et. al.</i> , 12 FCC Rcd. 15982 (1997)
<i>Ameritech-SBC Merger Order</i>	Memorandum Opinion And Order, <i>Applications Of Ameritech Corp., Transferor, And SBC Communications Inc., Transferee, For Consent To Transfer Control Of Corporations</i> , 14 FCC Rcd. 14712 (1999)
<i>Bundling Order</i>	Report and Order, <i>Policy and Rules Concerning the Interstate, Interexchange Marketplace; Implementation of Section 254(G) of the Telecommunications Act of 1934, As Amended</i> , 16 FCC Rcd. 7418 (2001)
<i>Forfeiture Order</i>	Forfeiture Order, <i>Matter of SBC Communications, Inc.</i> , 17 FCC Rcd. 14712 (2002)
<i>Kansas/Oklahoma Section 271 Order</i>	Memorandum Opinion and Order, <i>In the Matter of Joint Application by SBC Communications Inc., Southwestern Bell Telephone Company, and Southwestern Bell Communications Services, Inc. d/b/a Southwestern Bell Long Distance for Provision of In-Region, InterLATA Services in Kansas and Oklahoma</i> , CC Docket No. 00-217, 16 FCC Rcd. 6237 (2001)
<i>Interim Order NPRM</i>	Order and Notice of Proposed Rulemaking, <i>Unbundled Access to Network Elements</i> , WC Docket No. 04-313, CC Docket No. 01-338, FCC 04-179 (rel. Aug. 20, 2004)
<i>LEC Classification Order</i>	Second Report and Order, <i>Regulatory Treatment of LEC Provision of Interexchange Services Originating in the LEC's Local Exchange Area</i> , 12 FCC Rcd. 15756 (1997)
<i>Non-Accounting Safeguards Order</i>	First Report and Order and Further Notice of Proposed Rulemaking, <i>Implementation of Non Accounting Safeguards of Sections 271 and 272 of the Communications Act of 1934, as amended</i> , 11 FCC Rcd. 21905 (1996)
<i>Non-Dominance FNPRM</i>	Further Notice of Proposed Rulemaking proceeding in FCC WC Docket No. 02-112 and CC Docket No. 00-175, FCC 03-111 (rel. May 19, 2003)

SHORT CITE	FULL CITE
<i>SBC OI&M Proceeding</i>	<i>Petition of SBC for Forbearance from the Prohibition of Sharing Operating, Installation, and Maintenance Functions Under Section 53.203(a)(2) and 52.203(a)(3) of the Commission's Rules and Modification of Operating, Installation and Maintenance Conditions Contained In the SBC/Ameritech Merger Order, CC Docket No. 96-149, 98-141</i>
<i>SWBT Arkansas/Missouri Order</i>	<i>Memorandum Opinion and Order, Joint 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 1996 to Provide In-Region, InterLATA Services in Arkansas and Missouri, WC Docket No. 01-194, 16 FCC Rcd 20719 (2001)</i>
<i>Sunset NPRM</i>	<i>Notice of Proposed Rulemaking, Section 272(f)(1) Sunset of the BOC Separate Affiliate and Related Requirements, WC Docket No. 02-112 (rel. May 24, 2002)</i>
<i>Texas Section 272 Extension Proceeding</i>	<i>Extension Of Section 272 Obligations Of Southwestern Bell Telephone Co. In The State Of Texas, WC Docket No. 02-112; Public Notice, 18 FCC Rcd. 13566 (2003)</i>
<i>Verizon OI&M Proceeding</i>	<i>Verizon Petition for Forbearance from the Prohibition of Sharing Operating, Installation, and Maintenance Functions Under Section 53.203(a)(2) of the Commission's Rules, ("Verizon Forbearance Proceeding") CC Docket No. 96-149</i>

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REPLY COMMENTS OF AT&T CORP.

AT&T Corp. (“AT&T”) respectfully submits these reply comments in support of its Petition requesting that the Commission extend application of the separate affiliate and other safeguards of 47 U.S.C. § 272 to Southwestern Bell Telephone Co. (“SWBT”) in Arkansas and Missouri for an additional three years.

INTRODUCTION AND SUMMARY

In its comments, SBC Communications Inc. (“SBC”), SWBT’s parent, argues that it no longer has market power in Arkansas and Missouri. To do so, SBC mischaracterizes and then dismisses the Commission’s most recent report showing very limited, and stagnant, local competition in those two states. Indeed, SBC now claims that local competition is increasing in Arkansas and Missouri. However, SBC’s claim is based on gerrymandered “market share” data derived from its self-serving “E 911 methodology,” rather than from public verified sources. Moreover, SBC ignores completely AT&T’s showing that SBC possesses, and is abusing, market power over special access. SBC thus ignores AT&T’s evidence that SBC and its BOC subsidiaries are using their local bottlenecks to engage in price squeezes against rivals and that

the reports of SBC's own hand-picked auditors demonstrate that SBC has persistently provided its long distance rivals with network access that is manifestly inferior to the access it provides to its own long distance affiliate.¹

Unable to rebut AT&T's evidence, SBC falls back to its shop-worn arguments: (1) that the section 272 safeguards should be eliminated because other safeguards, present in 1996 when Congress mandated the section 272 safeguards, are sufficient protection against SWBT's conceded market power; and (2) that the section 272 safeguards hobble SBC's ability to compete in long distance markets. Indeed, SBC contends that the fact that it has been able successfully to engage in the very discrimination prohibited by the 1996 Act, despite the section 272 safeguards, justifies their elimination.² This is akin to a petty thief arguing that all criminal laws should be eliminated because not every criminal is successfully prosecuted. The Commission should not countenance such a result. Moreover, contrary to SBC's claim, AT&T does not seek to "raise the costs of its rivals" by subjecting them to constraints "to which AT&T is not subject."³ Rather, extension of the section 272 safeguards is necessary in Arkansas and Missouri to ensure that the BOCs compete on a *level playing field*, by placing BOCs and their affiliates in the same position as their competitors in the local and interLATA markets. And, the need for a level playing field is as necessary in the business market as in the residential market, because SBC and the other BOCs maintain a firm monopolistic grip on critical inputs in the business market, such as special access.

¹ For its part, Verizon trots out the misleading Fact Report submitted in the *Interim Order NPRM*.

² SBC Comments at 8-9.

³ *Id.* at 1.

As the record shows, even three years after SBC's markets in Arkansas and Missouri were deemed to be open to the *possibility* of competition, SBC retains the market power that the Commission has long recognized necessitates the unique section 272 requirements that were expressly designed to allow the Commission and state regulators to monitor the competitive landscape, detect and deter market power abuses, and ensure that competition in long distance occurred on a level playing field. The Commission therefore should grant AT&T's Petition to retain the section 272 safeguards in Arkansas and Missouri for at least another three years.

ARGUMENT

I. THE COMMENTS CONFIRM THAT THE SECTION 272 SAFEGUARDS REMAIN CRITICALLY IMPORTANT IN ARKANSAS AND MISSOURI.

A. The Record Is Clear That SWBT Possesses Such Dominant Market Power That Retention Of Section 272 Safeguards Is Necessary To Promote Competition In Arkansas and Missouri.

AT&T's Petition demonstrated that SWBT dominates, and will continue to dominate, the in-region special access market.⁴ AT&T further showed that SWBT has overwhelming market power in Arkansas and Missouri even if one includes non-facilities-based competition. Table 7 of the Commission's most recent *Local Competition Report* ("Competitive Local Exchange Carrier Share of End-User Switched Access Lines") shows that total CLEC market share in Arkansas and Missouri was 11% as of the end of December 2003,⁵ and that CLEC local market share is likely to decline (and SWBT's market dominance increase) in light of the *USTA II*

⁴ AT&T Petition at 8, citing to Frost & Sullivan, U.S. Private Line Market, June 2004 at 15, 61 and 62.

⁵ *Id.* at 11, citing to *June 2004 FCC Local Competition Report* at Table 7.

decision⁶ and the Commission's proposed revised rules on UNE-P pricing.⁷ The Petition further demonstrated that SWBT is dominant in the local market not only for residential/small business but for larger business customers as well.⁸ SWBT's dominance was confirmed by the Public Service Commission of the State of Missouri ("MoPSC"), which filed Comments in this proceeding setting forth its findings, in its first competition case, that, except for basic local service for business customers in the St. Louis and Kansas City exchanges, and for residential customers in the St. Charles and Harvester exchanges, "competition from widely available CLEC-owned facilities did not exist for business or residential basic local customers."⁹ The MoPSC further found that SBC's switched access service is not subject to effective competition.¹⁰ Thus, "competition in Missouri had not reached the level envisioned by Congress in the Telecommunications Act of 1996."¹¹

Despite AT&T's showing of SBC's market power created by its control over special access, SBC chose not to address special access at all. This failure alone justifies extension of the section 272 safeguards. Nor does Verizon's submission cure SBC's omission. Verizon relies on its October 4, 2004 Comments in the *Interim Order NPRM*, which purportedly show "that competing providers have deployed fiber networks wherever high-capacity demand is

⁶ *Id.* at 12, citing to Wall Street Journal, August 3, 2004 at A1, "Bells Mount Two-Way Assault on Local Market" (noting that "[a] recent study by market-research company TNS Telecoms, found that for the first time in five years, the Bell companies increased their share of the home market slightly during the second quarter of 2004, in large part because of special discounts. The retail promotions are happening at the same time that SBC, Verizon and others are pushing state regulators to raise the rates they can charge to rivals to access their networks").

⁷ See *Interim Order* ¶ 29.

⁸ AT&T Petition at 11-13.

⁹ MoPSC Comments at 2-3.

¹⁰ *Id.* at 3.

¹¹ *Id.*

concentrated and that these networks are capable of and are being used to provide transport services.”¹² Verizon further argues that “[b]oth fixed wireless and cable networks provide additional competition in the supply of high-capacity loops.¹³ Finally, Verizon argues that “CLECs are taking advantage of the competitive conditions of the market to use discounted, competitively priced special access services to serve their own end-user customers.”¹⁴

However, as shown in AT&T’s Comments and Reply Comments in the *Interim Order NPRM* proceeding,¹⁵ the ILECs have grossly overstated the fiber deployment that has occurred. AT&T also showed there and here that the BOCs’ (including SBC’s) special access rates – even their “discounted” rates – are priced far above cost-based levels and can only be obtained by carriers that agree to “lock-up” their traffic for long terms or incur severe shortfall and termination penalties. The evidence thus shows that the Bells can effectively price squeeze their rivals.¹⁶ SBC has not addressed, much less refuted, any of this evidence here.

SBC instead claims that it lacks market power because it “estimates” that wireline competitors in the SBC service area in Arkansas “have achieved a 20 percent market share in the wireline market, while in Missouri they achieved a 21 percent market share.”¹⁷ However, no

¹² Verizon Comments at 2.

¹³ *Id.*

¹⁴ *Id.* at 3.

¹⁵ See, e.g., AT&T Interim Order NPRM Reply Comments at 49-62, WC Docket No. 04-313 (filed Oct. 19, 2004) (“AT&T Interim Order Reply Comments”); AT&T Petition at 6-9.

¹⁶ AT&T Interim Order Reply Comments at 65-95.

¹⁷ SBC Comments at 4, and n. 7.

weight can be given to SBC's market share assertions, which are not based on public, verified data, but rather on SBC's self-serving and inaccurate "E 911" database analysis.¹⁸

Even though Table 7 of the Commission's *Local Competition Report* shows CLEC share in both states to be 11%, SBC simply ignores this inconvenient fact. Instead, it cites to other tables in that report that *do not* measure CLEC share, but rather measure: (i) the number of lines lost by the ILEC; (ii) the percentage of CLEC lines that are provisioned over some combination of their own facilities;" or (iii) the percentage of residential and small business customers. SBC does so in order to somehow minimize the *prima facie* showing of market dominance established by the data in Table 7 of the Commission's report. But the data in those other tables cannot accomplish SBC's desired result. Thus, data in Table 9 that show that the "ILECs in Arkansas and Missouri have lost 13 and 14 percent of their access lines,"¹⁹ calculated by comparing the number of access lines in December 1999 with the number in December 2003, is not inconsistent with the 11% CLEC share shown in Table 7. Moreover, even if Table 9 somehow correlated with market share, an 86-87% share of the market still evidences dominant market power. In addition, data in Table 10 showing that less than a third of the 11% CLEC share in Arkansas, and slightly over a tenth of the 11% in Missouri "are provisioned over some combination of [the CLECs'] own facilities"²⁰ merely confirms – rather than negates – the absence of facilities-based competition for switched access.

¹⁸ In its filings in the Triennial Review proceeding, AT&T showed that the BOCs' attempts to derive competitive carrier market share using the E911 data base was irredeemably flawed and grossly overstated the extent of competitive entry. *See* AT&T Triennial Review Comments at 181-82, WC Docket No. 01-338, (filed July 17, 2002).

¹⁹ SBC Comments at 4.

²⁰ *Id.* at n.8.

Certainly on the record in this proceeding, SBC and Verizon have failed to show that they lack market power and no longer have the incentive and ability to harm unaffiliated rivals in the long distance markets.²¹ SBC argues, however, that the market share numbers do not even account for the “rapidly accelerating intermodal competition from wireless, cable companies, and providers of VoIP services.”²² But as noted in AT&T’s Petition, and as SBC has admitted, consumers have been very reluctant to substitute their wireline local service with wireless service,²³ and, on the supply side, wireless service providers are highly dependent on the BOCs’ local bottleneck.²⁴ Furthermore, VoIP and cable telephony services have an infinitesimal fraction of the customers served by the BOCs. Indeed, Verizon has referred to VoIP as a “‘niche product’ that may not live up to the considerable hype” surrounding it.²⁵

B. The Record Is Clear That SWBT Continues To Misallocate Costs And Discriminate Against Unaffiliated InterLATA Competitors.

AT&T’s Petition showed that despite serious design or reporting flaws in the second SBC section 272 audit, that audit showed discrimination and cost misallocation in both Arkansas and

²¹ In this regard, even the BOCs’ § 272 affiliates would currently be deemed dominant were it not for section 272 safeguards, including the OI&M restrictions. The Commission is currently considering in another proceeding whether to deem the § 272 affiliates non-dominant even if § 272 safeguards have sunset, but whatever the outcome there, the Commission could not possibly find in this proceeding that the BOCs themselves lack market power.

²² *Id.* at 5.

²³ AT&T Petition at 10, citing to Jon Van, “Demand lacking for home-to-cell phone number moves” Chicago Tribune, 2003 WL 69403754, (December 12, 2003) (“Local phone companies had predicted that hundreds of thousands -- possibly even millions -- of customers would abandon wired phone service when new federal rules allowing such a switch took effect two weeks ago. But the number who actually have taken the plunge is very small, numbering in the hundreds, SBC Communications Inc. reported Tuesday”).

²⁴ *Id.*, citing to AT&T Wireless Comments, *Non-Dominance FNPRM* (filed June 30, 2003) at 8 (wireless carriers are highly dependent on ILEC local bottleneck facilities to connect end users to their points of presence and to carry traffic between their switches and the cell stations where antennas establish connections to users and wireless carriers’ dependence on ILEC facilities will only increase in the future as wireless carriers expand their networks).

²⁵ <http://www.reuters.com/newsArticle.jhtml?type=internetNews&storyID=5788517>.

Missouri. The installation metric results were consistently worse for nonaffiliated carriers than for SBC's section 272 affiliate, SBCS, for almost all combinations of services in both states. There was also strong and consistent evidence of discrimination in both states with respect to the repair metrics for both DS0 and DS1 service.²⁶ AT&T's Petition also noted that SBC's persistent violations of the Internet posting requirements precluded non-affiliated carriers from subscribing to those services, and frustrated any effort to identify and deter below cost arrangements with the section 272 affiliate, leading to price squeezes against the section 272 affiliate's competitors. AT&T also provided specific evidence of how SBC has used its monopoly power in special access to engage in price squeezes.

Thus it is not surprising that the MoPSC stated that it "is concerned about potential discrimination beyond the sunset of section 272 and the expiration of the M2A [the Missouri 271 Agreement] absent a further investigation into the state of competition in Missouri," and that "without the section 272 audit process, there is no way to detect and deter discrimination and anticompetitive behavior."²⁷

As discussed above, SBC fails to address the price squeeze data at all. Instead, SBC relies on the fact that the Commission initiated a one year review to determine SBC's compliance with section 271 conditions after obtaining in-region entry, including Arkansas and Missouri, and has taken no action since then indicating non-compliance. SBC Comments at 2 and n. 3. Yet, this review is not a matter of public record, and AT&T thus is unaware of what information was sought or provided. Moreover, the Biennial audit data, which collected data

²⁶ AT&T Petition at 15.

²⁷ MoPSC Comments at 4.

two years after entry, clearly showed discrimination, although the Commission has, again, abdicated its responsibility to make any determination in that proceeding.

SBC discounts the section 272 audit results, arguing that the Commission, in its *Operate Independently Order*, “commented that the audit report did not disclose ‘systemic or significant issues warranting enforcement action.’”²⁸ SBC does not respond at all to the repair metric data from that audit and concedes differences in the installation data – *i.e.*, that the “performance metrics show that for some months and some measures the BOC performed better for its own affiliates” – although it claims that non-affiliates also received preferential treatment.²⁹ But as Dr. Bell noted in his Declaration, taking all the data into account, the audit showed “large, systemic discrimination against non-affiliates compared with affiliates for most of the performance measures.”³⁰ And Dr. Bell found the results statistically significant despite the difference in volume data.³¹ Nor, as shown in AT&T’s Comments thereto, were the explanations proffered by SBC substantiated or credible.

SBC argues that “[a]ny attempt by a BOC to provide inferior service to other interexchange carriers – thereby creating inferior service for its local exchange customers – is more likely to alienate local exchange customers than win new interexchange customers.”³² As AT&T explained in its Petition, this argument is flawed on multiple levels. First, the section 272 safeguards were designed, *inter alia*, to detect and prevent *price* discrimination such as when a

²⁸ SBC Comments at 9, citing to ¶ 21. The Commission’s discussion, however, was essentially limited to OI&M services. Moreover, the Commission has issued two Notices of Apparent Liability against Verizon.

²⁹ SBC Comments at 9.

³⁰ Bell Declaration ¶ 13.

³¹ *Id.*

³² SBC Comments at 6.

BOC uses its above-cost access charges to price squeeze long distance rivals – something which does not “alienate” a BOC’s local customers, but which can devastate long distance competition. Second, a BOC can engage in non-price discrimination, by providing superior service to its long distance affiliate, while providing its rivals with minimally acceptable service. Again, such discrimination adversely affects a long distance competitor’s customers, not the BOC’s customers. SBC also contends that if large numbers of customers shift to SBC’s long distance affiliate, interexchange carriers would bring this phenomenon to the attention of regulators. *Id* at n.12. Of course, large numbers of customers have shifted to SBC’s long distance affiliate precisely because of SBC’s abuse of its market power. Filing complaints to capture the various ways in which the BOCs engage in discriminatory pricing is time consuming and difficult. Even then, BOCs can pursue their improper conduct until caught by a complaint and then proceed with other impermissible conduct that has to be independently challenged, with the requisite need to develop a record.³³

Finally, SBC argues that even if it engages in misconduct, the parties harmed by such misconduct must prove that structural separation would absolutely bar such violations of the law. SBC Comments at 8. Indeed, SBC contends that continuation of the section 272 safeguards cannot be appropriate because it has managed successfully to engage in prohibited conduct

³³ And as noted above, SBC has reported that customers have not been swapping their landline local service for wireless service, and Verizon has similarly argued that VoIP is not currently a threat to landline local service. SBC also argues that “[i]n order for discrimination to affect customer decisions in the marketplace, that discrimination would have to be evident to customers ... if customers themselves are aware of discrimination, interexchange carriers would also be aware of the discrimination, and they would surely bring it to the attention of appropriate regulatory authorities.” *Id* at 6. However, the delay inherent in both identifying such discrimination and collecting sufficient evidence to prove it makes it difficult to both detect and deter such misconduct. The only effective alternative to structural separation is the substantially more onerous “burdensome regulatory involvement” that the Commission has expressly eschewed. *Third Order on Reconsideration* ¶ 20 (citing *Non-Accounting Safeguards Order* ¶ 163).

despite the existence of the safeguards. *Id.* at 8-9. SBC's argument is absurd. It is akin to a petty thief arguing that all criminal laws should be eliminated because not every criminal is successfully prosecuted. Section 272, when properly and vigorously enforced, can be an important tool for regulators and rivals to detect BOC anticompetitive conduct. The fact that violations occurred despite the section 272 safeguards demonstrates that regulators should take decisive and prompt action to punish such violations and to extend and strengthen the safeguards to deter, detect, and punish future violations. Indeed, the evidence of SWBT's persistently discriminatory conduct, despite section 272 safeguards, demonstrates that SWBT would undertake a broader array of anticompetitive practices if these "crucial[ly] important[]" safeguards were gutted, as SBC now urges. Indeed, that the BOCs have fought so hard to eliminate these safeguards is itself probative of the fact that they view them as constraining their ability to exploit fully their market power.

II. SBC FAILS TO OFFER ANY PLAUSIBLE JUSTIFICATION FOR SUNSETTING CORE SECTION 272 SAFEGUARDS

A. SBC's Claims That Section 272 Safeguards Are Too Costly Are Contrary To Theory And Fact.

SBC claims that the section 272 safeguards should be eliminated because the costs of structural separation exceed its benefits.³⁴ In making that claim, SBC relies on its and Verizon's assertions about the costs of section 272 safeguards, particularly those related to the prohibition of sharing operation, installation and maintenance services.³⁵ As AT&T has shown, however,

³⁴ SBC Comments at 10-13.

³⁵ *See* SBC Comments at 10. However, as AT&T previously explained, the Verizon declarations are little more than conclusory statements that opine generally about costs, without any specific discussion of how those costs were derived and without any backup material that could be used to verify independently these claims. *See* AT&T 272 Sunset Reply Comments at 18, WC Docket No. 02-112 (filed Aug. 26, 2002).

those purported costs were vastly exaggerated. AT&T Sunset NPRM Reply Comments at 17-22. Moreover, SBC ignores the fact that the Commission has loosened many of the restrictions that it complains about. As to SBC's claim that the BOCs are "severely restricted in their offerings of competitive bundled services,"³⁶ the Commission has largely eliminated restrictions on bundling, even by dominant carriers like SBC.³⁷ Thus, SBC and the other RBOCs today offer customers a broad array of bundled offerings, including combinations of local, long distance, data and wireless.³⁸ Indeed, SBC's recent briefing to Wall Street analysts and investors states that "the key, of course, to our strategy is to bundleThese charts tell the story – 68% of all of our customers held some form of bundle."³⁹

Similarly, the Commission's orders implementing section 272 already have provided numerous opportunities for SBC and its 272 affiliates to share services and take advantage of other economies.⁴⁰ Even though these joint activities present risks of anticompetitive behavior, and could also easily have been prohibited entirely, the Commission permitted such activities, which substantially reduced the BOCs' costs of compliance with section 272. Although SBC complains (without any hard evidence or supporting declaration) that even these reduced

³⁶ *Id.*

³⁷ *See generally Bundling Order.*

³⁸ *See, e.g.,* http://www01.sbc.com/Products_Services/Residential/1,,616--6-3-1,00.html (SBC's bundled offering).

³⁹ CCBNStreetEvents, Event Transcript, SBC Communications Analyst Meeting, November 13, 2003, 1:30PM ET, appended hereto as Attachment 7 at 4. *See also* at 5: "As you add additional products to the bundle the impact on retention is enormous. Long distance alone reduces the rate of churn by 9%, DSL lowers the churn by 61%, and put the two together and you've cut churn by 73%."

⁴⁰ *See, e.g.,* WorldCom 272 Sunset Comments at 7-9, WC Docket No. 02-112 (filed Aug. 5, 2002) ("WorldCom 272 Sunset Comments"); Time Warner 272 Sunset Comments at 17-20, WC Docket No. 02-112 (filed Aug. 5, 2002).

obligations are too burdensome,⁴¹ the fact is that the BOCs have been able to capture unprecedented dominant long distance market shares using affiliates that have only a small fraction of the employees of established long distance carriers.⁴²

B. The Existence Of Other Regulatory Protections Is Not A Reason To Sunset Section 272

Finally, SBC renews its argument that, despite Congress' decision to impose detailed structural, accounting and transactional safeguards in section 272, the benefits provided by those safeguards are minimal, and can be obtained instead by relying on other provisions of the Act and Commission rules. SBC argues that "the substantial costs of structural separation are unnecessary and that anticompetitive conduct can be deterred through non-structural mechanisms," relying on *Computer III*.⁴³ But this is not the balance Congress struck, and in light of the fact that the BOCs' still retain the market power that prompted the section 272 safeguards, the safeguards Congress established should remain in place. Indeed, given that most of the rules that SBC cites were in effect in 1996, Congress would not even have enacted section 272 if it believed the preexisting rules could be effective in policing the BOCs' misconduct and eliminating discrimination and cost misallocation. Rather, section 272, when properly implemented and vigorously enforced, provides substantial and unique benefits that promote competition in telecommunications markets.

In particular, the state commission comments previously filed in this docket confirm the enormous value of the section 272 safeguards in detecting, deterring and remedying BOC

⁴¹ See, e.g., SBC Comments at 12, complaining that "section 272 requires the BOC to share, on a nondiscriminatory basis, any non-public BOC information that it shares with its section 272 affiliates."

⁴² See WorldCom 272 Sunset Comments at 8; see also AT&T 272 Sunset Reply Comments, Selwyn Reply Dec ¶¶ 6-8.

⁴³ SBC Comments at 10.

misconduct. Thus, as the Texas PUC concluded, if section 272 safeguards are eliminated, regulators “will lose a valuable means to ensure [the BOC’s] compliance with its obligations to provide access to the local exchange and exchange access markets that [the BOC] controls.”⁴⁴ The Missouri Public Service Commission reported that “without the section 272 audit process, there is no way to detect and deter discrimination and anti-competitive behavior.”⁴⁵ Further, the Pennsylvania Public Utilities Commission reported that the separate structure and accounting provisions of section 272 “assist[] the PA PUC in its ability to design rates,” and the “ability to readily identify costs and revenues from the business segment is *critical* to ongoing rate review.”⁴⁶ And more generally, the Pennsylvania commission asserted that the collapse of separate affiliate requirements would “perpetuate[] what appears to be a continual reduction in available information.” *Id.* at 4. As these comments show, section 272 provides unique, pro-competitive benefits that, contrary to the BOCs’ claims, cannot be obtained from other existing rules and provisions of the Act.⁴⁷

In all events, the Commission itself rejected the argument that its existing safeguards are a more effective and less costly mechanism for preventing discrimination than structural

⁴⁴ Texas PUC 272 Sunset Comments at 3; *see also* Washington UTC 272 Sunset Comments at 3, WC Docket No. 02-112 (filed Aug. 5, 2002).

⁴⁵ Missouri PSC 272 Sunset Comments at 4, WC Docket No. 02-112 (filed Aug. 5, 2002); *see also* Washington UTC 272 Sunset Comments at 3 (“maintaining a separate affiliate makes the audit process easier and provides more transparency to the transactions to be audited”); Pennsylvania PUC 272 Sunset Comments at 4, WC Docket No. 02-112 (filed Aug. 5, 2002) (“audits can produce useful information for policymakers such as the PUC”).

⁴⁶ Pennsylvania PUC 272 Sunset Comments at 5.

⁴⁷ In this regard, SBC relies heavily on the pro-competitive safeguards found in section 251(g) and in section 251(c), which it asserts will continue to apply and protect competition after section 272 is allowed to sunset. *See* SBC 272 Sunset Comments at 7. But that claim is disingenuous, because SBC and the other BOCs have vigorously contended in other Commission proceedings that the Commission’s requirements under those sections should be eliminated or at least drastically cut back.

separation. In the *SBC-Ameritech Merger Order*, the Commission determined that adopting the proposed separate affiliate structure benefited competition because “reliance on existing regulatory safeguards is misplaced.”⁴⁸ That is because even though the Commission “issues rules to prevent discrimination,” it is “impossible for the Commission to foresee every possible type of discrimination.”⁴⁹ Accordingly, the Commission found that “SBC’s offer to establish a separate subsidiary for advanced services is directly responsive” to concerns regarding the Commission’s ability to detect discrimination – but achieves that goal in a way that avoids “engaging in detailed regulatory oversight.”⁵⁰

CONCLUSION

For the foregoing reasons, the Commission should issue a rule extending application of section 272 to SWBT in Arkansas and Missouri for an additional three years.

Respectfully submitted,

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October 20, 2004

⁴⁸ *Ameritech-SBC Merger Order* ¶ 206.

⁴⁹ *See id.* ¶ 220.

⁵⁰ *Id.* ¶ 211.

CERTIFICATE OF SERVICE

I hereby certify that on this 20th day of October, 2004, I caused true and correct copies of the foregoing Reply Comments of AT&T Corp. to be served on all parties by mailing, postage prepaid to their addresses listed on the attached service list.

Dated: October 20, 2004

/s/ Karen Kotula

Karen Kotula

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