(9) *Vaccine-strain measles viral infection.* This term is defined as a disease caused by the vaccine-strain that should be determined by vaccine-specific monoclonal antibody or polymerase chain reaction tests.

(10) *Vaccine-strain polio viral infection.* This term is defined as a disease caused by poliovirus that is isolated from the affected tissue and should be determined to be the vaccine-strain by oligonucleotide or polymerase chain reaction. Isolation of poliovirus from the stoll is not sufficient to establish a tissue specific infection or disease caused by vaccine-strain poliovirus.

(11) *Early-onset Hib disease.* This term is defined as invasive bacterial illness associated with the presence of Hib organism on culture of normally sterile body fluids or tissue, or clinical findings consistent with the diagnosis of epiglottitis. Hib pneumonia qualifies as invasive Hib disease when radiographic findings consistent with the diagnosis of pneumonitis are accompanied by a blood culture positive for the Hib organism. Otitis media, in the absence of the above findings, does not qualify as invasive bacterial disease. A child is considered to have suffered this injury only if the vaccine was the first Hib immunization received by the child.

(c) *Effective date provisions.* (1) Except as provided in paragraph (c)(2) of this section, the revised Table of Injuries set forth in paragraph (a) of this section and the Qualifications and Aids to Interpretation set forth in paragraph (b) of this section apply to petitions for compensation under the Program filed with the United States Court of Federal Claims on or after March 24, 1997. Petitions for compensation filed before such date shall be governed by section 2114(a) and (b) of the Public Health Service Act as in effect on January 1, 1995, or by § 100.3 as in effect on March 10, 1995 (see 60 FR 7678, *et seq.*, February 8, 1995), as applicable.

(2) The inclusion of hepatitis B, Hib, and varicella vaccines and other new vaccines (Items VIII, IX, X, XI and XII of the Table) will be effective on the effective date of a tax enacted to provide funds for compensation paid with respect to such vaccines. A notice will be published in the Federal Register to announce the effective date of such a tax.

[FR Doc. 97–4088 Filed 2–19–97; 8:45 am]

BILLING CODE 4160–15–M

FEDERAL COMMUNICATIONS COMMISSION

47 CFR Chapter I

[CC Docket No. 96–152; FCC 97–35]

Implementation of the Telecommunications Act of 1996: Telemessaging, Electronic Publishing, and Alarm Monitoring Services

AGENCY: Federal Communications Commission.

ACTION: Final rule; Clarification and interpretation.

SUMMARY: The First Report and Order (Order), released February 7, 1997, implements the non-accounting requirements prescribed by Congress in sections 260 and 274 of the Telecommunications Act of 1996 (the Act), which respectively govern the provision of telemessaging and electronic publishing services. The Order promotes the pro-competitive and deregulatory objectives of the Act.

EFFECTIVE DATE: March 24, 1997. The information collections in this Order will not become effective until at least May 1, 1997.

FOR FURTHER INFORMATION CONTACT: Lisa Sockett, Attorney, Common Carrier Bureau, Policy and Program Planning Division, (202) 418–1580. For additional information concerning the information collections contained in this Order contact Dorothy Conway at (202) 418–0217, or via the Internet at dconway@fcc.gov.

SUPPLEMENTARY INFORMATION: This is a summary of the Commission's Order adopted February 6, 1997, and released February 7, 1997. The full text of this Order is available for inspection and copying during normal business hours in the FCC Reference Center, 1919 M St., NW., Room 239, Washington, DC. The complete text also may be obtained through the World Wide Web, at http://www.fcc.gov/Bureaus/Common Carrier/Orders/fcc9735.wp, or may be purchased from the Commission's copy contractor, International Transcription Service, Inc., (202) 857–3800, 2100 M St., NW., Suite 140, Washington, DC 20037.

This Order contains new or modified information collections subject to the Paperwork Reduction Act of 1995 (PRA). It has been submitted to the Office of Management and Budget (OMB) for review under the PRA. OMB, the general public, and other federal agencies are invited to comment on the proposed or modified information collections contained in this proceeding.

Regulatory Flexibility Certification

As required by the Regulatory Flexibility Act, the Order contains a Final Regulatory Flexibility Certification which is set forth in the Order. A brief description of the certification follows.

The Commission certifies, pursuant to 5 U.S.C. 605(b), that the clarification and interpretation adopted in this Order will not have a significant economic impact on a substantial number of ''small entities,'' as this term is defined in 5 U.S.C. 601(6). The Commission therefore is not required to prepare a final regulatory flexibility analysis of the clarification and interpretation adopted in this Order. This certification and a statement of its factual basis are set forth in the Order, as required by 5 U.S.C. 605(b).

Paperwork Reduction Act

This Order contains either a new or modified information collection. The Commission, as part of its continuing effort to reduce paperwork burdens, invites the general public and OMB to comment on the information collections contained in this Order, as required by the Paperwork Reduction Act of 1995, Public Law No. 104–12. Written comments by the public on the information collections are due March 24, 1997. OMB notification of action is due April 21, 1997. Comments should address: (a) Whether the new or modified collection of information is necessary for the proper performance of the functions of the Commission, including whether the information shall have practical utility; (b) the accuracy of the Commission's burden estimates; (c) ways to enhance the quality, utility, and clarity of the information collected; and (d) ways to minimize the burden of the collection of information on the respondents including the use of automated collection techniques or other forms of information technology.

OMB Approval Number: 3060–0738

Title: Implementation of the Telecommunications Act of 1996: Telemessaging, Electronic Publishing, and Alarm Monitoring Services, CC Docket No. 96–152.

Form No.: N/A.

Type of Review: Revision.

Respondents: Business or other for profit.

Public reporting burden for the collection of information is estimated as follows:

Information collection	Number of respondents (approx.)	Annual hour burden per response	Total annual burden
Third-party disclosure requirement: To the extent a BOC refers a customer to a separated affiliate, electronic publishing joint venture or affiliate during the normal course of its telemarketing operations, it must refer that customer to all unaffiliated electronic publishers requesting the referral service. In particular, the BOC must provide the customer the names of all unaffiliated electronic publishers requesting the referral service, as well as affiliated electronic publishers, in random order.	7 BOCs	1,200 to 30,000 calls per BOC per year × 1/10th hour per response = 120 to 3,000 hours.	7 × 120 to 3,000 = 840 to 21,000 burden hours.

Total Annual Burden: 3,000 burden hours.

Estimated Costs Per Respondent: $0.

Needs and Uses: The attached item imposes a third-party disclosure requirement on BOCs in order to implement the nondiscrimination requirement of section 274(c)(2)(A) of the Act.

Synopsis of First Report and Order

I. Introduction

1. In February 1996, the ''Telecommunications Act of 1996'' became law. The intent of the 1996 Act is ''to provide for a pro-competitive, deregulatory national policy framework designed to accelerate rapidly private sector deployment of advanced telecommunications and information technologies and services to all Americans by opening all telecommunications markets to competition.''

2. On July 18, 1996, the Commission released a Notice of Proposed Rulemaking. 61 FR 39385 (July 29, 1996), (''*NPRM*'') regarding implementation of sections 260, 274, and 275 of the Communications Act addressing telemessaging, electronic publishing, and alarm monitoring services, respectively. This Order implements the non-accounting requirements of sections 260 and 274. We address in separate proceedings the alarm monitoring provisions of section 275 and the enforcement issues related to sections 260, 274, and 275. In addition, the accounting safeguards required to implement sections 271 through 276 and section 260 are addressed in a separate proceeding.

3. The 1996 Act opens local markets to competing providers by imposing new interconnection, unbundling, and resale obligations on existing providers of local exchange services. In enacting sections 260 and 274, Congress recognized that the local exchange market will not be fully competitive immediately. Congress therefore imposed requirements applicable to local exchange carriers' (LECs') provision of telemessaging services in section 260, and a series of requirements applicable to Bell Operating Companies' (BOCs') provision of electronic publishing services in section 274. Collectively, these requirements are designed to prevent, or facilitate the detection of, improper cost allocation, discrimination, or other anticompetitive conduct.

4. Section 260 permits incumbent LECs (including BOCs) to provide telemessaging service subject to certain nondiscrimination safeguards. Section 274 allows a BOC to provide electronic publishing service disseminated by means of its basic telephone service only through a ''separated affiliate'' or an ''electronic publishing joint venture'' that meets the separation, joint marketing, and nondiscrimination requirements in that section. BOCs that were offering electronic publishing services at the time the 1996 Act was enacted must comply with section 274 by February 8, 1997. As noted in part VII, *infra,* the requirements of this *Order* will become effective 30 days after publication of a summary in the Federal Register. In addition, the collection of information contained in this *Order* is contingent upon approval by the Office of Management and Budget (OMB). Accordingly, we do not anticipate taking any enforcement action based on these requirements until they become effective. The requirements under section 274 expire on February 8, 2000.

5. In this proceeding, our goal is to implement the non-accounting requirements in sections 260 and 274 in a manner that is consistent with the fundamental goal of the 1996 Act—to open all telecommunications markets to robust competition. By fostering competition in these markets, we seek to produce maximum benefits for consumers of telemessaging and electronic publishing services.

II. Scope of the Commission's Authority

A. Electronic Publishing

1. Background

6. In the *NPRM,* we sought comment on the extent to which section 274 grants the Commission authority over the intrastate provision of electronic publishing services. We noted that section 274(b)(4) specifically refers to ''such regulations as may be prescribed by the Commission or a State commission'' for the valuation of BOC assets. We therefore tentatively concluded that the Commission may not have exclusive jurisdiction over all aspects of intrastate services provided pursuant to section 274.

7. In addition, apart from any intrastate jurisdiction conferred by section 274 itself, we sought comment on the extent to which the Commission may have the authority to preempt inconsistent state regulations with respect to matters addressed by section 274.

2. Comments

(Parties that filed comments and replies are listed in the Attachment below.)

8. AT&T contends that section 274 covers both interstate and intrastate provision of electronic publishing services, and that this section confers on the Commission general jurisdiction over the provision of intrastate electronic publishing services. In support of its position, AT&T points to several sections that, in its view, refer to Commission authority over intrastate electronic publishing, including: (1) Section 274(e), which authorizes the Commission to hear complaints for violations of section 274; (2) section 274(f), which requires all separated BOC affiliates engaged in electronic publishing to file reports with the Commission; and (3) section 274(c)(2)(C), which grants the Commission the authority to determine whether the BOCs may be authorized to have a greater financial control of a joint venture with small, local electronic publishers. AT&T further maintains that the reference to valuation of BOC assets by state commissions in section 274(b)(4) does not restrict the Commission's general regulatory authority to establish rules, but merely indicates that, if a state commission has its own accounting rules, those rules

should be applied to the extent they are not inconsistent with the Commission's rules.

9. NAA contends that, because section 274 is silent with respect to whether it covers interstate or intrastate, and interLATA or intraLATA electronic publishing, and because electronic publishing services are not regulated telecommunications services, the Commission's authority under section 274 is limited to enforcing BOC compliance with the section's requirements that BOCs operate through a separated affiliate or electronic publishing joint venture and make various filings and reports. NAA further asserts that the Commission has authority to adjudicate complaints and requests for cease and desist orders with respect to violations of section 274, whether interstate or intrastate, but that states are not precluded from also enforcing this law. NAA also contends that states should be allowed to continue to use their cost allocation procedures for intrastate purposes.

10. A number of BOCs and state commissions, on the other hand, argue that section 274 does not give the Commission authority over intrastate electronic publishing services. Some of these commenters argue that section 274 covers such intrastate services, but that this section does not divest the states of their authority over intrastate services under section 2(b) of the Communications Act. These latter commenters argue that section 274 contains new requirements that state commissions will implement in their traditional role of regulating intrastate electronic publishing services.

11. These BOCs and state commissions also argue that section 2(b) of the Communications Act and section 601(c) of the 1996 Act bar the Commission from exercising authority under section 274 with respect to intrastate electronic publishing services absent an express grant of authority from Congress. PacTel and Ameritech contend that such a grant of authority is provided in section 274 in limited circumstances, including receiving BOC filings, prescribing regulations to value BOC asset transfers, and acting on complaints and applications for cease-and-desist orders. The California Commission argues that, although section 274(e) clearly supports our jurisdiction over complaints alleging violations of section 274, that section does not preclude states from trying to resolve disputes prior to the filing of a complaint or lawsuit in the federal arena. BellSouth disputes even this limited grant of authority over intrastate electronic publishing services, arguing that section 274(e) does not give the Commission either explicit or implicit statutory jurisdiction over intrastate electronic publishing services.

12. Several BOCs and state commissions claim that the Commission may preempt state regulations and exercise jurisdiction over intrastate electronic publishing only to the extent that such services are inseparably mixed interstate-intrastate communications, pursuant to the standard set forth in *Louisiana PSC.* The New York and California Commissions further argue that the Commission currently has no basis to make the showing necessary to preempt state regulation of intrastate electronic publishing.

13. AT&T and MCI contend that the Commission retains the authority to preempt state regulatory requirements relating to electronic publishing that are inconsistent with its policies and rules. AT&T further argues that, because the interstate and intrastate aspects of electronic publishing cannot be separated, the Commission's jurisdiction over interstate electronic publishing services extends to such intrastate services as well.

3. Discussion

14. As discussed above, in the *NPRM,* we tentatively concluded that the Commission may not have exclusive jurisdiction over all aspects of intrastate services provided pursuant to section 274, based on the language of section 274(b)(4). This section provides that BOCs and their separated affiliates or electronic publishing joint ventures must ''value any assets that are transferred * * * and record any transactions by which such assets are transferred, in accordance with such regulations as may be prescribed by the Commission or a State commission to prevent improper cross subsidies.'' After examining the language of the statute and the comments filed in this proceeding, we conclude, for the reasons set forth below, that the Commission's authority under section 274 applies to the provision of intrastate as well as interstate electronic publishing services. We conclude, therefore, that while states may impose regulations with respect to BOC provision of electronic publishing services, those regulations must not be inconsistent with section 274 and the Commission's rules thereunder. We emphasize, however, that the scope of the Commission's authority under section 274 extends only to matters covered by that section.

15. Thus, we agree with AT&T and Bell Atlantic that section 274 applies not only to the provision of interstate electronic publishing services, but also to such services when they are provided on an intrastate basis. The language in section 274 expressly demonstrates that Congress intended this section to reach intrastate electronic publishing services. For example, section 274(c)(2)(C) expressly limits the permissible participation of a BOC or affiliate in electronic publishing joint ventures to an interest of 50 percent or less, but also provides that, ''[i]n the case of joint ventures with small, local electronic publishers, the Commission for good cause shown may authorize [a BOC] or affiliate to have a larger equity interest.'' Notwithstanding the local nature of small, local electronic publishers, which suggests that they provide intrastate services, this section confers authority on the Commission to determine whether BOCs may have a greater interest in electronic publishing joint ventures with such electronic publishers.

16. In addition, section 274 requires that a BOC or BOC affiliate engage in the provision of electronic publishing services disseminated by means of that BOC or its affiliate's ''basic telephone service'' only through a ''separated affiliate'' or an electronic publishing joint venture.'' The statute defines ''basic telephone service'' to mean ''any wireline telephone exchange service, or wireline telephone exchange service facility * * *.'' The term ''telephone exchange service,'' as defined in section 3(47), is a primarily intrastate service. As we noted in the *Accounting Safeguards Order* (62 FR 2918 (January 21, 1997)), these references to primarily intrastate services clearly indicate that the scope of section 274 encompasses intrastate matters.

17. We further conclude that, given the jurisdiction granted by section 274, the Commission also has jurisdiction under the Communications Act to establish rules applicable to intrastate electronic publishing services. Sections 4(i), 201(b), and 303(r) of the Act authorize the Commission to adopt any rules it deems necessary or appropriate in order to carry out its responsibilities under the Act, so long as those rules are not otherwise inconsistent with the Act. Nothing in section 274 bars the Commission from clarifying and implementing the requirements of section 274. Moreover, courts repeatedly have held that the Commission's general rulemaking authority is ''expansive'' rather than limited. In addition, it is well-established that an agency has the authority to adopt rules to administer congressionally mandated requirements.

18. Our conclusion that the Commission has jurisdiction under the

Communications Act to establish rules applicable to the full scope of section 274, including intrastate electronic publishing services, is particularly appropriate where, as here, the Commission is authorized to adjudicate complaints alleging violations of section 274. Section 274(e) provides a private right of action to any person claiming that an act or practice of a BOC, affiliate, or separated affiliate has violated any requirement of section 274. Under section 274(e)(1), such person may file a complaint with the Commission or bring suit in a U.S. District Court as provided in section 207. In addition to damages, section 274(e)(2) permits an aggrieved person to apply to the Commission for a cease-and-desist order or to a U.S. District Court for an injunction or an order compelling compliance. We find that it serves the public interest for us to clarify in advance the section 274 requirements imposed on the BOCs that parties may ask us to enforce later. Such clarification of the requirements will reduce uncertainty, aid BOCs and their affiliates in complying with the requirements of section 274, and facilitate the prompt resolution of compliance disputes that may be presented in complaint proceedings.

19. We reject the argument that section 2(b) of the Communications Act requires the conclusion that section 274, and the Commission's authority thereunder, apply only to the provision of interstate electronic publishing services. As demonstrated, for example, by section 274(c)(2)(C)'s grant of authority to the Commission to alter the maximum interest that a BOC may hold in electronic publishing joint ventures with small, local electronic publishers, Congress gave the Commission intrastate jurisdiction without amending section 2(b). Thus, we find that, in enacting section 274 after section 2(b), and squarely addressing therein the issues before us by using the statutory language discussed above, Congress intended for section 274 to take precedence over any contrary implications based on section 2(b).

20. We similarly are not persuaded that section 601(c) of the 1996 Act evinces an intent by Congress to preserve states' authority over intrastate matters arising under section 274. Section 601(c) of the 1996 Act provides that the Act and its amendments ''shall not be construed to modify, impair, or supersede Federal, State, or local law unless expressly so provided in such Act or amendments.'' As discussed above, we conclude that section 274 expressly modifies federal law, and the Commission's statutory authority thereunder, to reach intrastate electronic publishing services.

B. Telemessaging

1. Background

21. In the *NPRM,* we sought comment on the extent to which section 260 grants the Commission statutory authority over the intrastate provision of telemessaging services. We stated that telemessaging is an information service that, when provided by a BOC or its affiliate on an interLATA basis, is subject to the requirements of section 272 in addition to the requirements of section 260. We also noted that, in the *Non-Accounting Safeguards NPRM* (61 FR 39397 (July 29, 1996)), we tentatively concluded that the Commission's authority under sections 271 and 272 applies to interstate and intrastate interLATA information services provided by BOCs or their affiliates. Further, we pointed out that section 260 applies not only to BOCs and their affiliates, but also to all incumbent LECs. Finally, apart from any intrastate jurisdiction conferred by section 260 itself, we sought comment in the *NPRM* on the extent to which the Commission may have the authority to preempt inconsistent state regulations with respect to matters addressed by section 260.

2. Comments

22. AT&T, ATSI, and Voice-Tel contend that section 260, and the Commission's authority thereunder, apply to all telemessaging services provided by incumbent LECs, including interstate and intrastate, as well as interLATA and intraLATA, telemessaging services. ATSI contends that any attempt to limit the applicability of section 260 would deny providers of telemessaging a remedy against anticompetitive practices that Congress intended to provide them. AT&T further contends that section 260 is an independent grant of authority to the Commission and is not restricted in any way by sections 271 and 272. Rather, AT&T contends that sections 271 and 272 complement section 260 by imposing additional requirements on the BOCs.

23. Some BOCs and state commissions, on the other hand, argue that section 2(b) of the Communications Act and section 601(c) of the 1996 Act bar the Commission from exercising authority under section 260 with respect to any intrastate telemessaging services absent an express grant of authority from Congress. Some of these commenters contend that nothing in section 260 gives the Commission authority over any intrastate telemessaging services. Ameritech argues that section 260 grants the Commission limited jurisdiction over both interLATA and intraLATA telemessaging services, but only to the extent necessary to adjudicate complaints by other telemessaging providers that an incumbent LEC has improperly subsidized its telemessaging services or discriminated against other telemessaging services in violation of section 260. BellSouth argues that, although sections 271 and 272 give the Commission limited reach over intrastate interLATA telemessaging services, such jurisdiction is not comprehensive and does not reach intrastate intraLATA telemessaging services.

24. Several BOCs and state commissions claim that the Commission may preempt state regulations and exercise jurisdiction over intrastate telemessaging services only subject to the *Louisiana PSC* exception for inseparably mixed interstate-intrastate communications. The New York Commission and BellSouth further argue that the Commission currently has no basis to make the showing necessary to preempt state regulation of intrastate telemessaging services.

25. AT&T, MCI, and Voice-Tel contend that the Commission has authority to preempt state regulatory requirements relating to telemessaging services that are inconsistent with its policies and rules. Voice-Tel and AT&T further argue that, because the interstate and intrastate aspects of telemessaging services cannot be separated, the Commission's jurisdiction over interstate telemessaging services extends to such intrastate services as well.

26. Cincinnati Bell argues that the Commission should preempt state regulations that restrict the ability of small and mid-sized incumbent LECs to provide telemessaging services on an integrated basis.

3. Discussion

27. For the reasons set forth below, we conclude that section 260, and the Commission's authority thereunder, apply to the provision of intrastate as well as interstate telemessaging services. Consequently, we find that section 2(b) of the Communications Act does not bar the Commission from establishing regulations to clarify and implement the requirements of section 260 that apply to intrastate services. We conclude, therefore, that the rules we may establish to implement section 260 are binding on the states, and that the states may not impose regulations with respect

to incumbent LEC provision of telemessaging services that are inconsistent with section 260 and the Commission's rules thereunder.

28. In the *Non-Accounting Safeguards Order* (62 FR 2927 (January 21, 1997)), we concluded that telemessaging is an information service that, when provided by a BOC or its affiliate on an interLATA basis, is subject to the requirements of section 272. We further concluded that section 272 applies to both intrastate and interstate interLATA information services. We have therefore already concluded that the Commission has jurisdiction over certain aspects of intrastate telemessaging services.

29. Section 260 not only imposes additional obligations on BOCs to prevent unlawful subsidization, and discrimination in favor, of its telemessaging service, but also extends its requirements beyond BOCs and their affiliates to all incumbent LECs. We conclude that section 260 applies to the provision of all telemessaging services by incumbent LECs, whether interstate or intrastate, and for BOCs, whether interLATA or intraLATA. This conclusion is supported by the terms of the statute. Specifically, section 260 prohibits an incumbent LEC from, among other things, subsidizing its telemessaging service from its ''telephone exchange service or its exchange access.'' ''Telephone exchange service,'' as defined in section 3(47), is a primarily intrastate service. As we noted in the *Accounting Safeguards Order*, this reference to a primarily intrastate service clearly indicates that the scope of section 260 encompasses intrastate matters.

30. We reject BellSouth's argument that section 260 does not apply to intrastate intraLATA services. As discussed below, section 260, unlike section 272, does not make a distinction between interLATA and intraLATA services. Moreover, the terms in section 260 encompass both interLATA and intraLATA services.

31. We further conclude that, given the jurisdiction granted by section 260, the Commission also has jurisdiction under the Communications Act to establish rules applicable to intrastate telemessaging services. As noted above, sections 4(i), 201(b), and 303(r) of the Act authorize the Commission to adopt any rules it deems necessary or appropriate to carry out its responsibilities under the Act, so long as those rules are not otherwise inconsistent with the Act. Nothing in section 260 bars the Commission from clarifying and implementing the requirements of this section.

32. Our conclusion that the Commission has jurisdiction to establish rules applicable to intrastate telemessaging services is particularly appropriate where, as here, the Commission exercises an adjudicatory function. Section 260(b) requires that the Commission establish expedited procedures for the receipt and review of complaints alleging violations of the nondiscrimination provisions in section 260(a), or regulations adopted pursuant thereto, that result in ''material financial harm'' to a provider of telemessaging service. As in our discussion of section 274 above, we find that it serves the public interest for us to clarify in advance the section 260 requirements that are imposed on incumbent LECs and that parties may ask us to enforce later. Such clarifications will reduce uncertainty, aid incumbent LECs in complying with the requirements of section 260, and facilitate the prompt resolution of compliance disputes that may be presented in complaint proceedings.

33. We reject the argument that section 2(b) of the Communications Act requires the conclusion that section 260, and the Commission's authority thereunder, apply only to the provision of interstate telemessaging services. Rather, as discussed above with respect to electronic publishing under section 274, we find that, in enacting section 260 after section 2(b), and squarely addressing therein the issues before us, Congress intended for section 260 to take precedence over any contrary implications based on section 2(b).

34. We similarly are not persuaded that section 601(c) of the 1996 Act evinces an intent by Congress to preserve states' authority over intrastate matters arising under section 260. Section 601(c) of the 1996 Act provides that the Act and its amendments ''shall not be construed to modify, impair, or supersede Federal, State, or local law unless expressly so provided in such Act or amendments.'' As discussed above, we conclude that section 260 expressly modifies federal law, so that both federal law, and the Commission's authority thereunder, apply to both interstate and intrastate provision of telemessaging services.

C. Constitutional Issues

35. BellSouth and U S WEST raise constitutional concerns with respect to our implementation of sections 260 and 274. BellSouth contends that the Commission must be ''circumspect'' in its construction of sections 260 and 274 because both the separate affiliate requirement of section 272 that we proposed applying to BOCs' interLATA telemessaging services and the separated affiliate requirement of section 274 ''impose impermissible prior restraints on BOCs' speech activities,'' in violation of the First Amendment. Further, it maintains that sections 260 and 274, as well as other sections of the Act, are unconstitutional ''bills of attainder'' to the extent they single out BOCs by name and impose restrictions on them alone. Recognizing that we have no discretion to ignore Congress' mandate to apply sections 260 and 274, BellSouth urges us to construe these sections, and others, narrowly. U S WEST concurs with BellSouth and urges the Commission not to adopt any structural rules beyond the express terms of the statute.

36. NAA, in reply, dismisses BellSouth's constitutional arguments. It rejects as frivolous the argument that the electronic publishing safeguards are an unconstitutional prior restraint on BOCs' speech activities. It further states that the separated affiliate requirement (1) is a ''reasonable approach to detecting and preventing cross-subsidy and discrimination that does not unnecessarily burden the BOCs' right to speak;'' (2) does not violate the First Amendment because it expires four years after enactment of the Act and serves important government interests; and (3) is not a bill of attainder because BOCs are only singled out for ''temporary, narrowly-focused, economic regulation.''

37. Although decisions about the constitutionality of congressional enactments are generally outside the jurisdiction of administrative agencies, we have an obligation under Supreme Court precedent to construe a statute ''where fairly possible to avoid substantial constitutional questions'' and not to ''impute to Congress an intent to pass legislation that is inconsistent with the Constitution as construed by the [Supreme Court].'' As BellSouth concedes, we have no discretion to ignore Congress' mandate respecting these sections or any other sections of the Act. Nevertheless, we find BellSouth's argument to be without merit.

38. With respect to section 274, we reject the argument that requiring BOCs to provide electronic publishing services through a separated affiliate violates the First Amendment. BellSouth bases its argument on an assertion that, as ''content-related'' services, electronic publishing services are commercial speech entitled to First Amendment protection. We conclude that, to the extent that BOC provision of electronic publishing services constitutes speech for First Amendment

purposes, the section 274 separated affiliate requirement neither prohibits the BOCs from providing such services, nor places any restrictions on the content of the information the BOCs may provide. Instead, the section 274 separated affiliate requirement is a content-neutral restriction on the manner in which BOCs may provide electronic publishing services that are disseminated by means of a BOC's basic telephone service. These restrictions address the important governmental interest of protecting against improper cost allocation and discrimination by the BOCs, and they do so in a narrowly-tailored, content-neutral manner. Thus, we conclude that the separated affiliate requirement imposed by section 274 on BOC provision of electronic publishing services does not violate the First Amendment.

39. Similarly, we reject BellSouth and U S WEST's argument that section 274 is an unconstitutional ''bill of attainder'' because the statute singles out BOCs by name and imposes restrictions on them alone. We conclude that section 274 is not an unconstitutional bill of attainder simply because it applies only to the BOCs. Rather, judicial precedent teaches that, in determining whether a statute amounts to an unlawful bill of attainder, we must consider whether the statute ''further[s] nonpunitive legislative purposes,'' and whether Congress evinced an intent to punish. As noted above, the section 274 restrictions on BOC provision of electronic publishing services are temporary requirements aimed at protecting against improper cost allocation and discrimination by the BOCs. Moreover, we find no evidence, and BellSouth and US WEST have offered none, that would support a finding that Congress enacted section 274 to punish the BOCs. In fact, in enacting the 1996 Act, Congress freed BOCs from the terms of an antitrust consent decree. Thus, we conclude that the section 274 restrictions imposed on BOCs do not violate the Bill of Attainder Clause.

40. With respect to section 260, BellSouth raises constitutional issues in this proceeding regarding the tentative conclusion in the *Non-Accounting Safeguards NPRM* that, under section 272, BOCs must provide interLATA telemessaging services through a separate affiliate. We find no merit in BellSouth's arguments for the same reasons discussed above and in the *Non-Accounting Safeguards Order.*

III. BOC Provision of Electronic Publishing—Section 274

A. Definition of Electronic Publishing

1. Electronic Publishing Services Under Section 274(h)

a. Background

41. Section 274(h)(1) defines ''electronic publishing'' as: the dissemination, provision, publication, or sale to an unaffiliated entity or person, of any one or more of the following: news (including sports); entertainment (other than interactive games); business, financial, legal, consumer, or credit materials; editorials, columns, or features; advertising; photos or images; archival or research material; legal notices or public records; scientific, educational, instructional, technical, professional, trade, or other literary materials; or other like or similar information.

Section 274(h)(2) also lists specific services that are excluded from the definition of electronic publishing. These excepted services include, among other things, common carrier provision of telecommunications service, information access service, information gateway service, voice storage and retrieval, electronic mail, certain data and transaction processing services, electronic billing or advertising of a BOC's regulated telecommunications services, language translation or data format conversion, ''white pages'' directory assistance, caller identification services, repair and provisioning databases, credit card and billing validation for telephone company operations, E 911 and other emergency assistance databases, and video programming and full motion video entertainment on demand.

42. In the *NPRM,* we sought comment on how to distinguish the services that are properly included in the definition of electronic publishing in section 274(h)(1) from those services that are excluded under 274(h)(2). We asked parties to identify any enhanced services that BOCs currently provide that appear to meet the definition of an electronic publishing service under section 274. To the extent it is unclear whether a particular service, or a particular group of services, is encompassed by the statutory definition of electronic publishing, we invited parties to identify the basis for the ambiguity and to make recommendations on how the service, or services, should be classified. For example, we cited the *Non-Accounting Safeguards NPRM,* which sought comment on whether we should classify as ''electronic publishing'' services those services for which the carrier ''controls, or has a financial interest in, the content of the information transmitted by the service.''

43. In addition, we observed in the *NPRM* that, although electronic publishing is specifically included in the definition of information services, BOC provision of electronic publishing is explicitly exempted from the separate affiliate and nondiscrimination requirements of section 272 that apply to BOC provision of interLATA information services. We noted that, in contrast to section 272, which applies only to BOC provision of interLATA information services, section 274 does not distinguish between the intraLATA and interLATA provision of electronic publishing services. We sought comment, therefore, on whether section 274 applies to BOC provision of both intraLATA and interLATA electronic publishing services.

b. Comments

44. NAA asserts that the definition of electronic publishing in section 274(h) is clear and detailed; therefore, it contends, there is no need to anticipate ambiguous services at this time. Other commenters agree that the definition of electronic publishing in section 274(h)(1) is clear, but suggest that Commission clarification of some of the exceptions to electronic publishing in section 274(h)(2) would be appropriate. For example, several parties ask us to clarify that the ''gateway'' exception in section 274(h)(2)(C) includes access to a home page that electronically links selected Internet sites or other home pages. Similarly, they contend that introductory information regarding an Internet service provider's services and electronic linkage to these services should also be included in the ''gateway'' exception. In addition, they contend that software browsers should be considered ''navigational systems,'' which are also excluded from the definition of electronic publishing under section 274(h)(2)(C). AT&T notes, however, that, even where particular BOC services are exempt from the requirements of section 274, the separate affiliate requirements of section 272 may still apply.

45. Some commenters also ask us to clarify that BOC transmission of information that falls within the definition of electronic publishing under section 274(h)(1) does not make the BOC's transmission of such information subject to the requirements of section 274 unless the BOC has control of, or a financial interest in, the content of the information transmitted. Those situations where a BOC merely

provides access to another entity's content, they argue, should not be considered electronic publishing.

c. Discussion

46. We find, as the commenters indicate, that electronic publishing services may include services provided through the Internet or through proprietary data networks. We also find that, although the definition of electronic publishing in section 274(h) is quite detailed, clarification of the ''gateway'' exception of section 274(h)(2)(C) is appropriate. Section 274(h)(2)(C) provides that electronic publishing shall not include:

The transmission of information as part of a gateway to an information service that does not involve the generation or alteration of the content of information, including data transmission, address translation, protocol conversion, billing management, introductory information content, and navigational systems that enable users to access electronic publishing services, which do not affect the presentation of such electronic publishing services to users.

We conclude, consistent with the comments on this issue, that a BOC's provision of access to introductory World Wide Web home pages, other types of introductory information, and software (such as browsers) does not constitute the provision of electronic publishing services under section 274(h)(2)(C). We find that, as long as a BOC merely provides access to a home page, or an initial screen that does not include any of the enumerated content types in section 274(h)(1), it is engaged in the provision of ''gateway'' services that section 274(h)(2)(C) excludes from the definition of electronic publishing services. Further, the statute expressly excludes ''introductory information content'' from the definition of electronic publishing services. Similarly, we find that end user software products, such as World Wide Web browsers, to the extent they enable users ''to access electronic publishing services'' and do not themselves incorporate the content types listed in section 274(h)(1), constitute ''navigational systems'' that are excepted from the definition of electronic publishing. Further, we conclude that hypertext ''links,'' and other pointers, from any gateway or navigational system to electronic publishing content are similarly ''navigational'' systems and thus are not electronic publishing services under section 274(h)(1).

47. Moreover, we find that, to the extent BOCs engage in activities that are excluded from the definition of electronic publishing under section 274(h), they are not subject to the joint marketing restrictions of section 274(c) with respect to those activities. We find, however, that certain activities that are excluded from the definition of electronic publishing may still be information services subject to the separate affiliate, nondiscrimination, and joint marketing requirements of section 272. For example, although ''gateway'' services, as discussed above, are generally excluded from the definition of electronic publishing services, in the *Non-Accounting Safeguards Order* we found that certain BOC-provided Internet access services may be interLATA information services subject to the requirements of section 272.

48. As to services that are neither expressly included nor excluded from the definition of electronic publishing, or services whose proper classification may be otherwise ambiguous, it would be speculative for us to determine at this time whether such services are electronic publishing services. Rather, we find that the appropriate classification of an ambiguous service will necessarily involve a fact-specific analysis that is best performed on a case-by-case basis. Moreover, we decline to adopt NAA's proposal that we rely solely on whether such service involves ''the generation or alteration of the content of information.'' Although we recognize that Congress used this language in describing several exceptions to the definition of electronic publishing, we do not find this fact to be dispositive in itself. There is no indication in section 274 or its legislative history that Congress intended the ''generation or alteration'' language to be the controlling factor in determining the nature of ambiguous services. We may, nevertheless, take it into consideration in any determination we make concerning the classification of an ambiguous service.

49. As to the electronic publishing services described in section 274(h)(1), we conclude, for the reasons discussed below, that a BOC must control, or have a financial interest in, the content of information transmitted over its basic telephone service in order to be subject to the requirements of section 274. We therefore agree with those parties that argue that a BOC is not subject to section 274 requirements merely because it provides the transmission component of an electronic publishing service offered by an unaffiliated entity to end users. We find support for our conclusion in two of the exceptions to the definition of electronic publishing—section 274(h)(2)(B), which excepts from the definition of electronic publishing ''[t]he transmission of information as a common carrier,'' and section 274(h)(2)(M), which excludes ''[a]ny other network service of a type that is like or similar to these network services and that does not involve the generation or alteration of the content of information.'' We note further that this ''control or financial interest'' test is consistent with the definition of electronic publishing in the Modification of Final Judgment (MFJ). The MFJ, among other things, prohibited AT&T from engaging in electronic publishing over its own transmission facilities. It defined ''electronic publishing'' as the ''provision of any information which AT&T or its affiliates has, or has caused to be, originated, authored, compiled, collected, or edited, *or in which it has a direct or indirect financial or proprietary interest*, and which is disseminated to an unaffiliated person through some electronic means.'' See *United States* v. *Western Electric*, 552 F. Supp. 131, 180–81 (D.D.C. 1982) (emphasis added), *aff'd sub nom. Maryland* v. *United States*, 460 U.S. 1001 (1983). As discussed below, however, because we received very few comments on the exact meaning of ''control'' and ''financial interest,'' we are seeking additional comment on this issue in a *Further Notice of Proposed Rulemaking* (''*FNPRM*'').

50. Finally, we conclude that section 274 applies to a BOC's provision of both intraLATA and interLATA electronic publishing services. Nothing in the statute or its legislative history suggests that Congress intended to distinguish between intraLATA and interLATA electronic publishing services. We therefore agree with those commenters that argue that, if Congress had intended to distinguish between intraLATA and interLATA electronic publishing as it did in describing information services subject to section 272, it would have done so.

2. Dissemination by Means of ''Basic Telephone Service''

a. Background

51. Section 274 prescribes the terms under which a BOC may offer electronic publishing. Section 274(a) states that no BOC or BOC affiliate ''may engage in the provision of electronic publishing that is disseminated by means of such [BOC's] or any of its affiliates' basic telephone service, except that nothing in this section shall prohibit a separated affiliate or electronic publishing joint venture operated in accordance with

this section from engaging in the provision of electronic publishing.'' In the *NPRM,* we tentatively concluded that a BOC or BOC affiliate may engage in the provision of electronic publishing services disseminated by means of a BOC or its affiliate's basic telephone service only through a ''separated affiliate'' or an ''electronic publishing joint venture.''

b. Comments

52. No commenters disagree with our tentative conclusion that a BOC or BOC affiliate may engage in the provision of electronic publishing services disseminated by means of a BOC or its affiliate's basic telephone service only through a ''separated affiliate'' or an ''electronic publishing joint venture.'' The majority of BOCs point out, however, that electronic publishing *not* disseminated via the basic telephone service of a BOC or its affiliate is not subject to the requirements of section 274. For example, PacTel maintains that a BOC or its affiliate may engage in the provision of electronic publishing service disseminated by means of telephone exchange service or facilities provided by a competitive wireline telephone service provider without having to create a separated affiliate or electronic publishing joint venture under section 274(a).

53. Similarly, Ameritech asserts, and SBC agrees, that if a BOC only provides exchange access, and not basic telephone service, it is not subject to section 274 requirements. For example, Ameritech contends that, if a BOC originates or terminates a toll call disseminating electronic publishing information, the BOC is providing ''exchange access,'' not exchange service. In response, AT&T asserts that ''basic telephone service'' under section 274 extends to any electronic publishing disseminated by means of either the BOC or its affiliate's local exchange service or local exchange facilities. This definition, AT&T argues, would include the exchange access service of a BOC or its affiliate.

c. Discussion

54. We affirm our tentative conclusion that, pursuant to the plain language of section 274(a), a BOC or BOC affiliate may engage in the provision of electronic publishing services disseminated by means of a BOC or its affiliate's basic telephone service only through a ''separated affiliate'' or an ''electronic publishing joint venture.'' Moreover, in reading section 274(a) together with the definition of ''basic telephone service'' in section 274(i)(2), we conclude that a BOC or BOC affiliate is not required to provide electronic publishing services through a separated affiliate or electronic publishing joint venture if it disseminates its electronic publishing via the basic telephone service of a competing wireline local exchange carrier or commercial mobile radio service provider. We find that dissemination via the basic telephone service of competing, unaffiliated providers significantly reduces the ability of the BOC to allocate costs improperly and to discriminate in favor of its affiliate. We therefore decline to apply the requirement that a BOC provide electronic publishing services through a separated affiliate or electronic publishing joint venture where Congress did not. We also conclude that, with respect to electronic publishing services provided through the Internet, ''dissemination'' means the transmission of information via a BOC or its affiliate's basic telephone service to the Internet, rather than the transmission of information to the end user. Thus, a BOC that is providing Internet access services to end users, and nothing more, is not engaged in the provision of electronic publishing pursuant to section 274.

55. We reject Ameritech's assertion, however, that a BOC's dissemination of electronic publishing services through its exchange access service is exempt from the requirements of section 274. Pursuant to section 274(a), BOCs that provide electronic publishing services disseminated via their own ''basic telephone service'' must do so through a separated affiliate or electronic publishing joint venture. Section 274(i)(2) defines ''basic telephone service'' as ''any wireline telephone exchange service, or *wireline telephone exchange service facility,* provided by a [BOC] in a telephone exchange area.'' We find that, when a BOC provides exchange access service, it uses its telephone exchange service facilities. Indeed, ''exchange access'' is defined in section 153(16) as ''the offering of access to telephone exchange services *or facilities* for the purpose of the origination or termination of telephone toll services.'' Since the definition of ''basic telephone service'' in section 274(i)(2) encompasses both the telephone exchange service and the exchange service *facility,* the use of exchange access service, which in turn uses the BOC's telephone exchange service facilities, for the dissemination of electronic publishing falls within this definition and must be provided in accordance with the requirements of section 274. This conclusion is appropriate as a matter of policy, too, since the BOCs' near-monopoly over exchange access service as well as local exchange service gives them an incentive to allocate costs improperly and discriminate against unaffiliated electronic publishing entities.

56. We conclude therefore that, to be engaged in the provision of electronic publishing services subject to section 274, the BOC must disseminate the information via its basic telephone service (as defined by 274(i)(2)) and have control of, or a financial interest in, the content of the information being provided. Similarly, we also conclude that control of, or a financial interest in, the content of the information alone, without BOC dissemination of information, is not electronic publishing under section 274.

57. We note that, to the extent a BOC disseminates electronic publishing services through the facilities of a competing wireline local exchange carrier, or commercial mobile service provider, and thus is not required to provide such services through a separated affiliate or electronic publishing joint venture, it may still be subject to the joint marketing prohibition of section 274(c)(1)(B). As discussed below, this section contemplates situations in which a BOC affiliate is involved in the provision of services that are ''related to'' the provision of electronic publishing, but does not provide electronic publishing services disseminated by means of a BOC or its affiliate's basic telephone service.

B. ''Separated Affiliate'' and ''Electronic Publishing Joint Venture'' Requirements of Section 274

1. The ''Operated Independently'' Requirement of Section 274(b)

a. Background

58. Section 274(b) states that a separated affiliate or electronic publishing joint venture established to provide electronic publishing services pursuant to section 274(a) shall be ''operated independently'' from the BOC. Subsections 274(b) (1)–(9) then list nine structural separation and transactional requirements that apply to the separated affiliate or electronic publishing joint venture. In the *NPRM* we addressed only the structural separation requirements of section 274(b) and only those requirements are addressed herein. Subsections 274(b) (1), (3), (4), (8), and (9) are transactional requirements that are addressed in the *Accounting Safeguards Order.* We observed in the NPRM that the structural separation requirements of section 274(b) do not refer, in all

instances, to both separated affiliates and electronic publishing joint ventures. We, therefore, sought comment on whether Congress intended the phrase ''operated independently'' to have a different meaning for separated affiliates and for electronic publishing joint ventures. We also sought comment in the *NPRM* on whether the Commission should adopt additional regulatory requirements to ensure compliance with the ''operated independently'' requirement of section 274(b).

b. Comments

59. Several commenters argue that Congress intended the phrase ''operated independently'' to have the same meaning for separated affiliates and electronic joint publishing ventures when subsections 274(b) (1)–(9) refer to both separated affiliates and electronic publishing joint ventures. They note, however, that some of the requirements of section 274(b) do not apply to electronic publishing joint ventures. Where the statutory language does not refer to both separated affiliates and electronic publishing joint ventures, these commenters maintain that the phrase ''operated independently'' should not be read to render all the requirements in subsections (b)(1)–(9) applicable to both separated affiliates and electronic publishing joint ventures; they contend, for example, that sections 274(b)(5) and 274(b)(7) are inapplicable to electronic publishing joint ventures since those subsections refer only to separated affiliates. Other commenters argue that the language ''operated independently'' compels us to apply all of the section 274(b) requirements to separated affiliates and electronic publishing joint ventures.

60. As to the issue of whether we should adopt regulatory requirements to ensure compliance with the ''operated independently'' requirement of section 274(b), BOCs and several trade associations argue that the structural and transactional safeguards of section 274 are clear, self-executing and comprehensive. They assert that Congress could have expressly provided for additional requirements had it deemed them necessary to ensure the operational independence of BOCs from their separated affiliates and electronic publishing joint ventures. They further assert that the phrase ''operated independently'' is not a separate substantive restriction, as their competitors maintain, but that subsections 274(b) (1)–(9) reflect Congress' determination of the requirements necessary to achieve operational independence. Several of these commenters observe that this position is consistent with the Commission's interpretation of the same language in *Computer II* and the cellular separation rules, where ''operate independently'' is not given an independent meaning. Finally, several commenters assert that Congress did not grant the Commission authority to adopt additional regulations in section 274(b).

61. Other commenters contend that the inclusion of the phrase ''operated independently,'' in addition to the requirements in subsection 274(b) (1)–(9), supports the conclusion that we are authorized to and should adopt additional regulations to ensure compliance with section 274(b). They maintain that the ''operated independently'' language is a separate substantive requirement from those restrictions in subsections 274(b) (1)–(9). These commenters urge us to read the ''operated independently'' language as authorizing us to adopt additional rules such as those adopted in *Computer II.* Specifically, they urge us to adopt regulations precluding the separated affiliated or joint venture from: (1) Leasing or sharing physical space collocated with regulated transmission facilities used to provide basic service; (2) sharing computer facilities with the local exchange carrier; (3) developing software jointly with the regulated entity; and (4) marketing any other equipment or services to any affiliate. Time Warner further proposes that we adopt regulations precluding the separated affiliate or electronic publishing joint venture from constructing, owning or operating its own transmission facilities, thereby requiring the separated affiliate or joint venture to purchase its capacity from the regulated carrier under tariff and ensuring ''that local exchange monopoly power is not leveraged into the provision of electronic publishing.''

c. Discussion

62. We conclude that the ''operated independently'' requirement of section 274(b) obligates a separated affiliate to comply with all the requirements of subsections 274(b) (1)–(9). We further conclude that an electronic publishing joint venture, to comply with the ''operated independently'' requirement of section 274(b), need only satisfy the requirements of subsections 274(b) (1)–(4), (6), and (8)–(9), since subsections 274(b)(5) and 274(b)(7) specifically refer to separated affiliates and not to electronic publishing joint ventures. We discuss more fully below the structural separation requirements of section 274(b), *i.e.*, subsections 274(b) (2), and (5)–(7). As noted above, the transactional requirements of section 274(b), *i.e.*, subsections 274(b) (1), (3), (4), (8), and (9), are discussed in the *Accounting Safeguards Order.*

63. We reject the arguments made by certain commenters that the phrase ''operated independently'' is a separate substantive restriction that requires us to apply subsections 274(b) (1)–(9) to both separated affiliates and electronic publishing joint ventures even where the statute refers only to a separated affiliate. We see no reason for Congress to have expressly referred in section 274(b)(5) and section 274(b)(7) to separated affiliates if the restrictions in those subsections were intended to apply to both separated affiliates and electronic publishing joint ventures.

64. We also reject the similar argument that the phrase ''operated independently'' is a separate substantive restriction authorizing us to adopt additional restrictions beyond those in subsections 274(b) (1)–(9). There is no evidence in the statute or its legislative history that Congress intended the restrictions in section 274(b) merely to be a list of minimum requirements that need to be supplemented by additional rules to be imposed on separated affiliates or electronic publishing joint ventures. We find, therefore, that the ''operated independently'' requirement in section 274(b) is satisfied if a BOC and its separated affiliate or electronic publishing joint venture comply with the applicable restrictions in subsections 274(b) (1)–(9), as noted above. While we decline to adopt additional restrictions beyond those in subsections 274(b) (1)–(9), we reject the argument that Congress did not grant the Commission the authority to do so.

65. This interpretation of the ''operated independently'' requirement in section 274(b) is not inconsistent with our determination in the *Non-Accounting Safeguards Order* that the section 272(b)(1) ''operate independently'' provision imposes requirements beyond those contained in subsections 272(b)(2)–(5). The ''operated independently'' requirement in section 274(b) is followed by nine substantive restrictions that we read as the criteria to be satisfied to ensure operational independence between a BOC and its electronic publishing entity created pursuant to section 274(a). In contrast, the ''operate independently'' provision in section 272 appears in subsection 272(b)(1), which is one of five separate substantive requirements in section 272(b).

2. Section 274(b)(2)

a. Background

66. Section 274(b)(2) provides that a separated affiliate or electronic publishing joint venture and the BOC with which it is affiliated shall ''not incur debt in a manner that would permit a creditor of the separated affiliate or joint venture upon default to have recourse to the assets of the [BOC].'' We sought comment in the *NPRM* on the types of activities a BOC, a separated affiliate, or an electronic publishing joint venture are precluded from engaging in under section 274(b)(2). We tentatively concluded that a BOC may not cosign a contract, or any other instrument, with a separated affiliate or an electronic publishing joint venture by which it would incur debt in violation of section 274(b)(2). We also sought comment on: whether this subsection affects a separated affiliate differently than an electronic publishing joint venture because of their different corporate relationships to the BOC, and whether we should establish specific requirements regarding the types of activities contemplated by section 274(b)(2).

b. Comments

67. A number of commenters generally agree with our tentative conclusion that section 274(b)(2) prohibits a BOC from cosigning with a separated affiliate or an electronic publishing joint venture a contract, or any other instrument, that allows a creditor, upon default, to have recourse to the assets of the BOC. AT&T and MCI maintain that we should also interpret section 274(b)(2) to prohibit a BOC's parent holding company from co-signing a debt of a separated affiliate or electronic publishing joint venture. The BOCs, in reply, assert that interpreting section 274(b)(2) to preclude a BOC's parent company from cosigning a contract or any other instrument with a BOC's separated affiliate or electronic publishing joint venture is neither supported by the statutory language nor public policy. They further state that there is no need for additional regulations to effectuate section 274(b)(2).

c. Discussion

68. As stated in the *NPRM*, we find that the intent of section 274(b)(2) is to protect BOC local exchange and exchange access service subscribers from bearing the cost of default by BOC affiliates. We adopt our tentative conclusion that section 274(b)(2) prohibits a BOC from cosigning with a separated affiliate or an electronic publishing joint venture a contract, or any other instrument, that would incur debt in a manner that grants the creditor recourse, upon default, against the assets of a BOC. Consistent with this conclusion, we further conclude that a BOC's parent is precluded from cosigning a contract or other instrument for a BOC's separated affiliate or electronic publishing joint venture, if the effect is to provide its creditor with recourse, upon default, to a BOC's assets. We reject, however, the arguments urging us to extend the restrictions in section 274(b)(2) to preclude a BOC's section 274 separated affiliate or electronic publishing joint venture from incurring debt in a manner that would permit a creditor, upon default, to have recourse to the assets of a BOC's parent holding company, provided that this recourse does not effectively result in recourse to the assets of the BOC. The text of the statute does not support the proposed restriction. Moreover, it would leave section 274 separated affiliates and electronic publishing joint ventures at a disadvantage as compared with other electronic publishing companies that are permitted to rely upon the credit of their parent corporations.

69. We decline to apply this section differently as to separated affiliates and electronic publishing joint ventures. No arguments were advanced supporting the need for different treatment with respect to these alternate vehicles for providing electronic publishing services, and we see no evidence at this time indicating that this subsection affects these entities differently. In this regard we agree with SBC that ''no useful purpose would be served by * * * speculating as to whether the subsection might affect a separated affiliate differently than a joint venture,'' and that we should proceed on a case-by-case basis, rather than adopt a ''one size fits all'' rule.

70. We reject AT&T's proposal that we require contracts or other instruments through which a separated affiliate or electronic publishing joint venture obtains credit to provide expressly that the creditor has no recourse either to the assets of a BOC or to the assets of the parent holding company of a BOC. As stated above, we do not read section 274(b)(2) to preclude a creditor of a separated affiliate or electronic publishing joint venture from having recourse, upon default, to the assets of a BOC parent holding company. Further, given the clarity of section 274(b)(2), we see no need to adopt a rule at this time requiring contracts through which a separated affiliate or electronic publishing joint venture obtains credit to provide expressly that the creditor has no recourse to the assets of a BOC. BOCs, nevertheless, may include such a provision in their contracts, if they so choose.

3. Section 274(b)(5) and Shared Services

a. Background

71. Section 274(b)(5) provides that a separated affiliate and a BOC shall ''(A) have no officers, directors, and employees in common after the effective date of this section; and (B) own no property in common.'' We tentatively concluded in the *NPRM* that, since this subsection does not specifically refer to electronic publishing joint ventures, BOCs are not precluded from sharing officers, directors, and employees with an electronic publishing joint venture. We also tentatively concluded in the *NPRM* that section 274(b)(5) does not preclude a BOC from owning property in common with an electronic publishing joint venture.

72. We also sought comment on the extent of the separation between a BOC and a separated affiliate required by section 274(b)(5)(A). We noted, for example, ''that section 274(c)(2) permits joint marketing activities between a BOC and either a separated affiliate or electronic publishing joint venture under certain conditions.'' With respect to a BOC and a separated affiliate, we sought comment on ''whether, to the extent that they are engaged in permissible joint marketing activities, the separated affiliate may share marketing personnel with the BOC.'' We further sought comment on ''how BOCs may engage in joint marketing activities with a separated affiliate pursuant to section 274(c)(2)(A) if they cannot share marketing personnel.''

73. We invited comment on the types of property encompassed by the phrase ''property in common.'' We tentatively concluded that section 274(b)(5)(B) prohibits a BOC and its separated affiliate from jointly owning goods, facilities, and physical space. We also tentatively concluded that it prohibits the joint ownership of telecommunications transmission and switching facilities, one of the separation requirements we adopted for independent LECs in the *Competitive Carrier Fifth Report and Order* (49 FR 34824 (September 4, 1984)). Finally, we sought comment on whether the section 274(b)(5) prohibition on joint ownership of property between a BOC and its separated affiliate also precludes a BOC and a separated affiliate from sharing the use of property owned by one entity or the other and from jointly leasing any property.

b. Comments

74. *Applicability of Section 274(b)(5) to Electronic Publishing Joint Ventures.* The BOCs and NAA agree with our tentative conclusion that section 274(b)(5) does not preclude a BOC from having officers, directors, or employees in common with an electronic publishing joint venture. These parties also agree with our tentative conclusion that this section does not bar a BOC from owning property in common with its electronic publishing joint venture. Other commenters disagree with our tentative conclusions. MCI and Time Warner maintain that section 274(b)(5) should apply to both separated affiliates and electronic publishing joint ventures and that interpreting this section to apply only to BOCs and their separated affiliates would undermine what they consider to be the separate substantive ''operate independently'' requirement of section 274(b). AT&T recognizes that section 274(b)(5), on its face, does not prohibit a BOC from sharing common personnel or owning property in common with an electronic publishing joint venture, but argues that we have authority to proscribe such sharing arrangements or ownership under section 274(b)(5), if necessary to ensure compliance with the ''operated independently'' language.

75. *Extent of the Separation Required Between a BOC and a Separated Affiliate.* Several BOCs state that section 274(b)(5)(A) should not be interpreted to act as a limitation upon the permissible joint marketing activities in section 274(c)(2). They contend that it is not necessary for a BOC and its separated affiliate to have employees in common to engage in the joint marketing activities permitted by section 274(c)(2). According to these commenters, employees of one entity may perform inbound telemarketing or referral services permitted under section 274(c)(2)(A) and (B) for the other entity.

76. SBC argues that a BOC and a separated affiliate, to the extent they engage in permissible joint marketing activities, should be allowed to employ individuals in common. Specifically, it states that ''where there is a conflict between the authority conferred by [s]ection 274(c)(2) and the general operational independence requirements of Section 274(b), the former, more specific provisions should control.''

77. AT&T states that section 274(b)(5) ''prohibit[s] BOC personnel from participating in the operation, planning, marketing or other activities of the separated affiliate, and vice versa * * *.'' MCI states that a BOC should only be allowed to provide telemarketing services pursuant to nondiscriminatory, publicly disclosed contracts.

78. ''*Property in Common.*'' No commenters oppose and some commenters agree with our tentative conclusion that section 274(b)(5)(B) prohibits a BOC and its separated affiliate from jointly owning goods, facilities, and physical space. They further agree that this section prohibits the joint ownership of telecommunications transmission and switching facilities.

79. *Shared Use or Joint Leasing of Property.* The BOCs argue that section 274(b)(5)(B) does not prohibit a BOC and its separated affiliate from sharing the use of property owned by one of the entities, or from jointly leasing property. They maintain that section 274(b)(5)(B) pertains only to ownership of property. Several BOCs note that potential concerns arising from shared use of property are addressed by the requirements of section 274(b)(3). AT&T and Time Warner, on the other hand, urge us to interpret section 274(b)(5)(B) to prohibit a BOC and its separated affiliate both from sharing property owned by one of the entities and from jointly leasing property. MCI does not address whether this section permits joint leasing of property. It states, however, that joint use of property would invite the improper allocation of costs against which the separated affiliate requirement is intended to protect. MCI and Time Warner specifically contend that a separated affiliate should not be permitted to collocate its equipment with BOC local exchange and exchange access equipment or to share computer facilities.

80. *Sharing of Services.* NYNEX and Ameritech argue that neither the Act nor its legislative history can be read to prohibit a BOC and its separated affiliate from utilizing the administrative and corporate governance functions provided by their parent holding company. AT&T argues that we should prohibit, pursuant to section 274(b)(5), a BOC from establishing a second affiliate to perform services or own property for both the BOC and its separated affiliate. MCI, in reply to the BOCs' comments, states that we should preclude the sharing of in-house functions, either by having one entity perform such functions for the other or by having another affiliate, or the parent, perform them for both a BOC and its separated affiliate.

81. *Other Activities.* AT&T argues that we ''should prohibit the BOCs from using any compensation system that directly or indirectly bases the compensation of BOC officers, directors, or other employees on the performance of the affiliate, or vice versa.'' The BOCs generally reply that there is no statutory basis for such a requirement, which would effectively preclude BOCs from offering stock options, other forms of deferred compensation, and bonuses which are commonly used in industry and frequently are based, in part, upon the performance of entities within a corporate family.

c. Discussion

82. *Applicability of Section 274(b)(5) to Electronic Publishing Joint Ventures.* We adopt our tentative conclusion that section 274(b)(5)(A) does not preclude a BOC from having officers, directors, and employees in common with an electronic publishing joint venture. We also adopt our tentative conclusion that section 274(b)(5)(B) does not preclude a BOC from owning property in common with an electronic publishing joint venture. Congress expressly limited the scope of these restrictions to a BOC's separated affiliate. Moreover, we find no basis in this record for extending these restrictions to a BOC's electronic publishing joint venture. This determination is consistent with our finding above that the phrase ''operated independently'' in section 274(b) is not a separate substantive restriction and, therefore, does not provide a basis for making section 274(b)(5) applicable to electronic publishing joint ventures.

83. *Extent of the Separation Required Between a BOC and a Separated Affiliate.* We find that section 274(b)(5)'s provision barring a BOC and its separated affiliate from having ''officers, directors, and employees in common'' does not limit the permissible joint activities set forth in section 274(c)(2). As certain commenters note, it is not necessary for a BOC and its separated affiliate to have employees in common to engage in the joint activities permitted under section 274(c)(2). For this reason, we reject those comments urging us to read section 274(c)(2) as allowing a BOC and its separated affiliate to have personnel in common for the purpose of engaging in permissible joint activities. Such an exception to the prohibition in section 274(b)(5) is not necessary to give effect to sections 274(b)(5) and 274(c)(2) and is not supported by the statutory language. While our interpretation of the interplay between section 274(b)(5) and section 274(c)(2) may result in some reduced efficiency in engaging in the joint activities permitted under section 274(c)(2), we are not convinced that it will be substantial enough to warrant our reading into section 274(b)(5) an

exception where none exists in the statutory language.

84. ''*Property in Common.*'' We adopt our tentative conclusion that section 274(b)(5) prohibits a BOC and its separated affiliate from jointly owning goods, facilities, and physical space, including telecommunications transmission and switching facilities. The prohibition against joint ownership of goods, facilities and physical space is clear on the face of the statute. Moreover, none of the commenters disagree with this tentative conclusion.

85. *Shared Use or Joint Leasing of Property.* We agree with the BOCs that the statutory prohibition in section 274(b)(5) does not preclude a BOC and its separated affiliate from either sharing the use of property owned by either a BOC or its separated affiliate or jointly leasing property. For example, we find that section 274(b)(5) permits a separated affiliate to collocate its equipment in end offices or on other property owned or controlled by the BOC, as long as such collocation agreements satisfy section 274(b)(3). We also find that this section permits a BOC and its separated affiliate to contract with each other for the use of joint transmission and switching equipment, again subject to the requirements of section 274(b)(3). Those commenters arguing for an expanded interpretation of ''own'' to include a prohibition against shared use of property and joint leasing of property offer no statutory support for their position. We are unwilling to assume that Congress intended the prohibition against ownership of property in section 274(b)(5) to include leaseholds and the shared use of property owned by either a BOC or its separated affiliate. Further, we find that allowing shared use of property and joint leases between a BOC and its separated affiliate enables the BOC to take advantage of economies of scale and scope. Concerns about anticompetitive behavior can be addressed through the transactional requirements of section 274(b)(3), the nondiscrimination requirements of section 274(d), and the Commission's affiliate transaction rules.

86. *Sharing of Services.* The prohibition in section 274(b)(5)(A) against a BOC and its separated affiliate having ''officers, directors, and employees in common'' is worded slightly differently from the requirement in section 272(b)(3) that a BOC and its separate affiliate have ''separate officers, directors, and employees.'' We interpret, however, these two provisions to have the same substantive meaning. Both sections 272 and 274 preclude the same person from serving simultaneously as an officer, director, or employee of both a BOC and its section 272 or 274 affiliate, respectively. Thus, an individual may not be on the payroll of both entities. Based on the record before us, we decline to read section 274(b)(5)(A) to prohibit a BOC and its separated affiliate from utilizing the administrative and corporate governance functions provided by their parent holding company or another BOC affiliate. Section 274 does not address whether the parent company of a BOC and its separated affiliate or another BOC affiliate is permitted to perform functions for both a BOC and its separated affiliate. There is no basis in the record for concluding that administrative and corporate governance functions provided to a BOC and its separated affiliate by a parent company or another BOC affiliate would result in the BOC and its separated affiliate violating section 274(b)(5)(A)'s prohibition on having ''officers, directors, and employees in common.'' Further, a parent company that performs services for both a BOC and its section 274 separated affiliate must fully document and properly apportion the costs incurred in furnishing such services.

87. *Other Activities.* We reject AT&T's request that we interpret section 274(b)(5)(A) to prohibit compensation schemes that base the level of remuneration of BOC officers, directors, and employees on the performance of the section 274 separated affiliate, or vice versa. We find that tying the compensation of an employee of a section 274 separated affiliate to the performance, for example, of the BOC's parent holding company and all of its enterprises as a whole, including the performance of the BOC, does not make that individual an employee of the BOC for purposes of section 274(b)(5)(A). Nor does such a compensation arrangement for a BOC employee make that individual an employee of the section 274 separated affiliate. Further, we agree with those commenters stating that such a scheme would effectively preclude BOCs from offering stock options, other forms of deferred compensation, and bonuses, which are commonly used in industry and frequently are based, in part, upon the performance of entities within a corporate family. Indeed, as PacTel notes, ''[i]t is common for corporations to have compensation systems that base a portion of compensation, especially for officers and directors, on the performance of the corporation as a whole. This is consistent with the fiduciary duty of corporate officers and directors * * * .''

4. Section 274(b)(6)

a. Background

88. Section 274(b)(6) states that a separated affiliate or electronic publishing joint venture and the BOC with which it is affiliated shall ''not use for the marketing of any product or service of the separated affiliate or joint venture, the name, trademarks, or service marks of an existing [BOC] except for names, trademarks, or service marks that are owned by the entity that owns or controls the [BOC].'' We tentatively concluded that this provision is sufficiently precise as to make unnecessary the adoption of implementing regulations.

b. Comments

89. Time Warner asks us to clarify that the prohibition in section 274(b)(6) prevents a BOC from sharing a name, trademark, or service mark with the Regional Bell Holding Company (''RBOC''). It argues that the exception in section 274(b)(6) permitting the separated affiliate or electronic publishing joint venture to use the name, trademark, or service mark of the RBOC would ''vitiate the general prohibition against cross-labeling if the BOC affiliates or joint ventures were permitted to use names, trademarks, or service marks that are shared by an operating company and the [RBOC].''

90. The BOCs and YPPA, in reply, state that Time Warner's suggestion is unsupported by the statutory language and would eliminate the express statutory exception Congress created in section 274(b)(6).

c. Discussion

91. We adopt our tentative conclusion that section 274(b)(6) does not require the adoption of implementing regulations. We find that Time Warner's suggestion is contradicted by the statutory language and legislative history that expressly allow a separated affiliate or electronic publishing joint venture to use ''the names, trademarks, or service marks that are owned by the entity that owns or controls the [BOC].'' We agree with BellSouth that the adoption of Time Warner's suggestion ''would require the Commission to assume that Congress was unaware that four of the seven [RBOCs] share their names with their BOC subsidiaries.'' We decline to make this assumption.

5. Section 274(b)(7)

a. Background

92. Section 274(b)(7) states that a BOC is not permitted ''(A) to perform hiring or training of personnel on behalf of a separated affiliate; (B) to perform the purchasing, installation, or maintenance of equipment on behalf of a separated affiliate, except for telephone service that it provides under tariff or contract subject to the provisions of this section; or (C) to perform research and development on behalf of a separated affiliate.'' Since this subsection does not specifically refer to electronic publishing joint ventures, we tentatively concluded that BOCs are permitted to perform these functions on behalf of an electronic publishing joint venture. In addition, we sought comment on whether, ''[t]o the extent that a BOC and a separated affiliate are engaged in permissible joint marketing activities,'' a BOC may perform the hiring or training of marketing personnel on behalf of its separated affiliate under section 274(b)(7)(A). We also sought comment on the type of ''equipment'' encompassed by section 274(b)(7)(B). We asked, for example, whether a BOC providing telephone service to a separated affiliate under tariff or contract subject to the requirements of section 274 is permitted under section 274(b)(7)(B) to purchase, install, and maintain transmission equipment for the separated affiliate.

93. With respect to section 274(b)(7)(C), we asked whether there are any circumstances under which a BOC may share its research and development with its separated affiliate. Specifically, we sought comment on whether this provision simply limits a BOC's ability to perform research and development for the sole and exclusive use of a separated affiliate, or whether it requires a BOC to refrain from performing any research and development that may be potentially useful to a separated affiliate. We also asked about other ways in which this provision may limit a BOC's ability to perform research and development for the separated affiliate.

b. Comments

94. *Applicability of Section 274(b)(7) to Electronic Publishing Joint Ventures.* The BOCs and NAA agree with our tentative conclusion that BOCs are permitted to perform the functions in section 274(b)(7) on behalf of an electronic publishing joint venture. Time Warner and AT&T disagree with our tentative conclusion. They maintain, consistent with their argument respecting section 274(b)(5), that section 274(b)(7) should apply to both a separated affiliate and an electronic publishing joint venture. They state that this interpretation is necessary to give effect to what they consider a separate substantive requirement that a BOC be ''operated independently'' from its electronic publishing joint venture.

95. *Relationship Between Section 274(b)(7)(A) and Section 274(c)(2).* Several commenters argue that there is no exception in section 274(b)(7) for permissible joint marketing activities in section 274(c)(2) and, therefore, we should not permit a BOC, when engaged in permissible joint marketing with its separated affiliate, to perform the hiring or training of marketing personnel on behalf of the separated affiliate. SBC, however, argues that we should allow a BOC to hire and train marketing personnel to carry out the permissible joint marketing activities in section 274(c)(2). It states that this approach is not anticompetitive because teaming or other business arrangements entered into by a BOC pursuant to section 274(c)(2)(B) must be conducted on a nondiscriminatory basis.

96. *The Type of ''Equipment'' Encompassed by Section 274(b)(7)(B).* The majority of commenters agree that section 274(b)(7)(B) permits a BOC to purchase, install, and maintain transmission equipment for its separated affiliate if the BOC is providing telephone service to the separated affiliate under tariff or contract. Bell Atlantic urges us to differentiate between ''provision of a *service* that uses equipment owned by the BOC, an arrangement specifically permitted under this subsection, from the purchasing, installation, and maintenance of *equipment* 'on behalf of' the affiliate, which is barred.'' The distinction, according to Bell Atlantic, is that in the latter situation, the equipment would be owned by the separated affiliate. U S WEST similarly states that this section prohibits a BOC from providing any depreciable equipment to be used by its separated affiliate in conducting the affiliate's business, but that it does not prohibit a BOC from providing services to its section 274 affiliate operation. Several other BOCs argue that the provision of telephone services includes purchasing, installation, or maintenance of transmission equipment, and any other equipment necessary or incidental to providing such service. They note that section 274(b)(3) ensures that there are ample safeguards that such transactions are conducted at arm's length. Other commenters state only that section 274(b)(7)(B) requires BOCs to provide telephone service pursuant to section 274(d). Time Warner specifically urges us to require BOCs to provide unaffiliated electronic publishers with the same access to wireline telephone exchange services that they provide to their in-region separated affiliate or electronic publishing joint venture.

97. *Limitations on Research and Development.* The BOCs, NAA, and USTA generally argue that section 274(b)(7)(C) only limits their ability to perform research and development for the sole and exclusive use of the separated affiliate. They contend that it would be against public policy to restrict BOCs from performing research and development simply because the results might, at some later date, be applied to electronic publishing. Time Warner argues that the statutory language of section 274(b)(7)(C) should lead us to prohibit BOCs, under any circumstances, from sharing any research and development work or results with their in-region electronic publishing affiliates. It further states that we should adopt the *Computer II* rules that preclude specific research and development by the regulated entity on behalf of the competitive affiliate. AT&T, in reply to the BOCs' comments, states only that we ''should reject the BOCs' attempts to circumvent the prohibition in [s]ection 274(b)(7)(C) against BOC research and development on behalf of a separated affiliate through hypertechnical constructions.''

c. Discussion

98. *Applicability of Section 274(b)(7) to Electronic Publishing Joint Ventures.* We adopt our tentative conclusion that section 274(b)(7) does not preclude a BOC from performing the activities in section 274(b)(7) on behalf of an electronic publishing joint venture. The reasons supporting this determination are the same as those supporting our determination that section 274(b)(5) is inapplicable to electronic publishing joint ventures.

99. *Relationship Between Section 274(b)(7)(A) and Section 274(c)(2).* We agree with those commenters asserting that the restrictions in section 274(b)(7)(A) on a BOC performing the hiring or training of personnel on behalf of a separated affiliate apply even when the BOC is engaged in permissible joint activities pursuant to section 274(c)(2). Reading an exception into section 274(b)(7)(A) for the joint activities permitted under section 274(c)(2) is neither supported by the statutory language, nor necessary to give effect to that section and section 274(c)(2). Thus, a BOC may not perform the hiring or training of personnel on behalf of its separated affiliate, even though it may

be engaged in permissible joint activities under section 274(c)(2), such as providing inbound telemarketing services or engaging in nondiscriminatory teaming or business arrangements, as discussed below.

100. *The Type of ''Equipment'' Encompassed by Section 274(b)(7)(B).* We find that section 274(b)(7)(B) prohibits a BOC from purchasing, installing, or maintaining equipment on behalf of its separated affiliate, except for the telephone service that it provides under tariff or contract. We agree with the position of several commenters that the provision of telephone service includes purchasing, installing, and maintaining equipment necessary or incidental to providing such service. As long as the equipment providing the telephone service is owned by a BOC, and not its separated affiliate, such activities are permissible under this section. We note, as some commenters suggest, that, even when engaging in permissible activities under section 274(b)(7), BOCs remain subject to the nondiscrimination requirements in section 274(d).

101. *Limitations on Research and Development.* We conclude that the prohibition in section 274(b)(7)(C) on a BOC performing research and development ''on behalf of'' its separated affiliate precludes a BOC, at a minimum, from performing research and development for the sole and exclusive use of the separated affiliate. We also find that it precludes a BOC from performing research and development for the use or benefit of its section 274 separated affiliate together with other affiliates. We further conclude, however, that the prohibition in section 274(b)(7)(C) on a BOC performing research and development ''on behalf of'' its separated affiliate, as interpreted herein, does not limit a BOC's ability to perform research and development simply because the results might, at a future date, be applied to electronic publishing. We agree with those commenters arguing that such an interpretation ''would not serve the public's continued desire for new and different communications solutions'' and would be ''antithetical to the public interest and national policy under Section 7 of the Communications Act.'' We also find that it would be impractical for a BOC to anticipate all potential uses of research and development activities it might undertake. We recognize that these principles may not address all of the possible scenarios that may arise. Such determinations are fact specific and will need to be made on a case-by-case basis.

102. Further, we disagree with Time Warner that prohibiting a BOC from sharing any research and development work or results with its separated affiliate is supported by the statutory language. Time Warner and AT&T fail to offer any persuasive statutory or policy arguments in support of their position.

6. Comparison with ''Separate Affiliate'' Requirement of Section 272

a. Background

103. We sought comment in the *NPRM* on the interrelationship between the requirements for a ''separate affiliate'' in section 272(b) and the requirements for a ''separated affiliate'' and ''electronic publishing joint venture'' in section 274(b). To the extent that certain BOCs currently are providing all of their information services on an integrated basis, we sought comment on what modifications these BOCs would have to make to their current provision of service in order to provide electronic publishing services in compliance with the separated affiliate or electronic publishing joint venture requirements of section 274.

104. We also sought comment on whether a BOC may provide electronic publishing services through the same entity or affiliate through which it provides in-region interLATA telecommunications services, manufacturing activities, and interLATA information services. In addition, we sought comment on whether a BOC providing any or all of its section 272 services and its section 274 electronic publishing services through the same entity would have to comply with the requirements of section 272, section 274, or both.

b. Comments

105. There were few comments on the interrelationship between the requirements in sections 272(b) and 274(b). Ameritech states that the requirements of section 272(b) are a subset of those found in section 274(b), but that section 274(b) imposes additional requirements beyond those in section 272(b). It notes that another principal difference between the separation requirements of the two sections is that a section 272 separate affiliate may own or be owned by a BOC as long as the separation requirements of that section are satisfied; however, a section 274 separated affiliate may not own or be owned by the BOC entity. NYNEX states that sections 272 and 274 deal with considerably different affiliate activities and should be construed to be independent of each other. PacTel states that, to the extent there are similarities in the requirements specified in sections 272(b) and 274(b), those requirements should be interpreted consistently.

106. AT&T also notes that several of the requirements in the two sections overlap, but, like Ameritech states, that section 274(b) imposes additional requirements having no counterpart in section 272(b). AT&T further asserts that all interLATA electronic publishing services should be subject to the requirements of section 272, and that section 274 merely supplements the requirements of section 272. In reply, Bell Atlantic and YPPA state that a section 274 separated affiliate need not also comply with section 272, even if the electronic publishing services are interLATA. They maintain that Congress, in enacting section 272(a)(2)(C), expressly exempted interLATA electronic publishing services from the requirements of section 272.

107. All of the commenters agree that a BOC may provide electronic publishing services through the same entity or affiliate through which it provides section 272 services. They disagree, however, on whether an affiliate providing both section 272 and section 274 services must comply with all of the requirements of both sections. AT&T, MCI and Time Warner state that a BOC offering electronic publishing services and section 272 services through the same affiliate must comply with all of the requirements of sections 272 and 274, *i.e.*, the structural separation and transactional requirements, as well as the joint marketing and nondiscrimination provisions of both sections.

108. The BOCs and YPPA disagree with the other commenters. They argue that a BOC providing electronic publishing services through the same entity or affiliate through which it provides section 272 services must comply with the separation requirements in both sections 272(b) and 274(b) on a service-by-service basis. Specifically, they maintain that the entity providing both section 272 services and electronic publishing services must comply only with the requirements of each section relevant to the particular service (*i.e.*, a section 272 service or electronic publishing services) being provided. They further argue that a BOC need only comply with the joint marketing and nondiscrimination restrictions of sections 272 and 274 on a service-by-service basis.

109. There is some disagreement among the BOCs as to those requirements in section 274(b) that they deem applicable when providing

section 272 and section 274 services through the same entity. Several BOCs assert that the separation requirements unique to either section 272 or section 274 would apply only to those services specified in their respective sections, *e.g.*, because section 272 does not prohibit the hiring and training of personnel, section 274(b)(7)(A) would only apply with respect to the entity's electronic publishing activities. U S WEST categorizes those requirements that the entity must comply with in sections 272(b) and 274(b) as structural separation requirements, arguing that compliance with the ''transactional'' requirements of either section is necessitated on a service-by-service basis. It categorizes section 274(b)(7)(A) as an example of a transactional requirement. YPPA, too, distinguishes between the structural separation requirements and the affiliate transaction requirements of sections 272(b) and 274(b), arguing that the latter need only be complied with on a service-by-service basis. It cites sections 272(b)(5) and 274(b)(3) as examples of affiliate transaction requirements that need only be complied with on a service-by-service basis.

c. Discussion

110. We conclude that a BOC may provide electronic publishing services and section 272 services through the same entity or affiliate. Nothing in the Act or its legislative history suggests otherwise. We further conclude that the BOC or the entity providing both section 272 and section 274 services, as applicable, must comply with the requirements of both these sections, including: (1) all of the requirements of section 272(b) and section 274(b); (2) all applicable requirements of section 272(g) and section 274(c); and (3) all applicable requirements of section 272(c) and section 274(d). To the extent there is a conflict between the provisions of sections 272 and 274, the BOC or the entity providing both section 272 and 274 services, as applicable, must comply with the more stringent requirement of either section. These conclusions are discussed more fully below. We specifically reject AT&T's contention that electronic publishing services are subject to the section 272 separate affiliate requirements, pursuant to section 272(a)(2)(B), which imposes a separate affiliate requirement on interLATA telecommunications services. Electronic publishing services are included within the statutory definition of information services in section 153(20). They are specifically excluded, however, from the section 272 separate affiliate requirement pursuant to section 272(a)(2)(C).

111. *Section 272(b) and Section 274(b) Requirements.* We agree with those commenters asserting that a BOC providing electronic publishing services through the same entity or affiliate through which it provides section 272 services must comply with all of the requirements of both section 272(b) and section 274(b). Allowing the BOCs to comply with the requirements of sections 272(b) and 274(b) on a service-by-service basis is likely to lead to *ad hoc* determinations as to those requirements in both sections 272(b) and 274(b) with which the entity must comply.

112. We find that allowing the entity performing section 272 and section 274 services to determine how to comply with the section 272(b) and section 274(b) requirements creates the potential for administrative and enforcement problems. As a practical matter, however, requiring the entity providing both section 272 and section 274 services to comply with all the requirements of sections 272(b) and 274(b) will not be substantially more onerous than requiring the entity to comply with only those provisions of one section or the other. We determined in the *Non-Accounting Safeguards Order* that the ''operate independently'' requirement of section 272(b)(1) imposes requirements beyond those listed in subsections 272(b)(2)–(5). We therefore adopted additional requirements in our rules to implement section 272(b) to ensure operational independence between a BOC and its section 272 affiliate; several of these are parallel to provisions in section 274(b). Thus, BOCs providing section 272 and section 274 services are already required to comply with many of the same requirements; and to the extent these services are combined the complications of complying with both sections 272(b) and 274(b) will be few.

113. *Joint Marketing and Nondiscrimination Provisions in Sections 272 and 274.* As noted above, while a BOC may provide both section 272 services and electronic publishing services through the same entity, it must comply with the applicable joint marketing and nondiscrimination provisions in both sections 272 and 274. With respect to the joint marketing provisions, if a BOC chooses to provide section 272 services together with its electronic publishing services, it must comply with the joint marketing restrictions of section 274(c)(1)(A) and section 272(g). Section 274(c)(1)(A) precludes the BOC from carrying out any ''promotion, marketing, sales, or advertising for or in conjunction with a separated affiliate.'' An entity established by a BOC to provide section 272 services and electronic publishing services is a section 274 ''separated affiliate'' for purposes of section 274(c)(1)(A), as it will be a ''corporation * * * that engages in the provision of electronic publishing services.'' The BOC, therefore, must comply with all the section 274 joint marketing provisions pertaining to its ''separated affiliate.'' In addition, since the entity is also providing section 272 services, the joint marketing provisions in section 272(g) would apply as well.

114. The statutory language in sections 272(c) and 274(d) also requires that a BOC providing both section 272 services and electronic publishing services together in one entity comply with the nondiscrimination provisions in both sections 272 and 274. To the extent that a BOC under ''common ownership or control with a separated affiliate or electronic publishing joint venture'' provides ''network access and interconnections for basic telephone service to electronic publishers,'' it must do so subject to the nondiscrimination requirements in section 274(d). In addition, section 272(c) imposes certain nondiscrimination safeguards on a BOC's dealings with an affiliate providing section 272 services. The nondiscrimination safeguards of section 272(c) thus pertain to the BOC's dealings with an entity or affiliate providing both section 272 services and electronic publishing services.

115. In sum, we find that a BOC may provide both section 272 and section 274 services through the same entity, but in doing so, must comply with the applicable joint marketing and nondiscrimination requirements in each of those sections. We find that the express statutory language in each of those sections compels this result. As noted above, to the extent there is a conflict between the provisions of sections 272 and 274, the BOC or the entity providing both section 272 and 274 services, as applicable, must comply with the more stringent requirement of either section. For example, if a BOC is permitted to engage in a joint marketing activity under section 272(g), but that activity is barred under section 274(c)(1)(A), the latter provision would preclude the BOC from engaging in that activity.

C. Joint Marketing

1. Restrictions on Joint Marketing Activities—Section 274(c)(1)

a. Scope of Section 274(c)(1)(B)

(1) Background

116. Section 274(c)(1) of the Act establishes several restrictions on joint marketing activities in which a BOC may engage with either a ''separated affiliate'' or an ''affiliate.'' In particular, section 274(c)(1)(A) provides that ''a [BOC] shall not carry out any promotion, marketing, sales, or advertising for or in conjunction with a separated affiliate.'' Section 274(c)(1)(B) states that ''a [BOC] shall not carry out any promotion, marketing, sales, or advertising for or in conjunction with an affiliate that is related to the provision of electronic publishing.''

117. In the *NPRM*, we observed that the clause ''that is related to the provision of electronic publishing'' in section 274(c)(1)(B) may be interpreted to modify either the ''promotion, marketing, sales, or advertising'' activities that are circumscribed by that section, or the word ''affiliate.'' We also noted that the definition of ''affiliate'' in section 274 expressly excludes a ''separated affiliate.'' We therefore sought comment on the proper interpretation of section 274(c)(1)(B).

(2) Comments

118. Several commenters argue that section 274(c)(1)(B) of the Act should be interpreted to prohibit a BOC from carrying out joint marketing activities for or in conjunction with an affiliate if the *activities* of the BOC relate to the provision of electronic publishing. In particular, BellSouth argues that section 274(c)(1)(B) is intended to address situations in which a BOC affiliate offers electronic publishing services or services related to electronic publishing, and non-electronic publishing services, *i.e.*, an affiliate that provides print directory services as well as electronic publishing services. BellSouth contends that, by omitting the word ''separated'' in subsection (c)(1)(B), Congress clarified that some activities of a BOC affiliate that is engaged in the provision of electronic publishing services may be unrelated to electronic publishing. According to BellSouth, a BOC therefore may engage in joint marketing activities with its directory affiliate so long as such activities ''relate to the traditional directory products of the directory affiliate rather than any electronic directory products.'' SBC argues that section 274(c)(1)(B) does not apply if a BOC performs services for an affiliate that are unrelated to the provision of electronic publishing.

119. U S WEST, in contrast, argues that the phrase ''that is related to the provision of electronic publishing'' modifies ''affiliate'' because such an interpretation provides BOCs with greater flexibility in organizing their businesses and is consistent with congressional intent. For example, U S WEST contends that, if we adopt this interpretation, a BOC choosing to provide electronic publishing services through a section 272 affiliate would be subject to the joint marketing provisions of section 274(c)(1)(B), rather than section 272.

(3) Discussion

120. We conclude that the phrase ''that is related to the provision of electronic publishing'' modifies the ''promotion, marketing, sales, or advertising'' activities that are circumscribed by section 274(c)(1)(B). As such, we interpret section 274(c)(1)(B) of the Act to prohibit a BOC from carrying out any promotion, marketing, sales or advertising activities with an affiliate, if such activities ''relate to'' the provision of electronic publishing. As an initial matter, we find that the joint marketing prohibition in section 274(c)(1)(B) is intended to address situations that are not otherwise covered by section 274(c)(1)(A). Consequently, we conclude that section 274(c)(1)(B) contemplates situations in which a BOC affiliate is involved in the provision of services that are in some manner ''related to'' the provision of electronic publishing, but does not provide electronic publishing services disseminated by means of a BOC's or any of its affiliates' basic telephone service. Because a BOC or BOC affiliate may engage in the provision of electronic publishing that is disseminated by means of such BOC's or any of its affiliates' basic telephone service only through a separated affiliate or an electronic publishing joint venture, a BOC ''affiliate'' that falls under section 274(c)(2)(B) of the Act, by definition, must not engage in such provision of electronic publishing. A BOC affiliate that provides electronic publishing services by means of its basic telephone service would constitute a ''separated affiliate'' subject to the joint marketing restriction in section 274(c)(1)(A).

121. Consequently, section 274(c)(2)(B) addresses situations in which a BOC may have, for example, an affiliated holding company that, in turn, holds an ownership interest in a separated affiliate. Such a BOC would be precluded from carrying out any promotion, marketing, sales or advertising activities for or in conjunction with that affiliated holding company if and to the extent that such activities are ''related to the provision of electronic publishing.'' A BOC, however, would not be prohibited from engaging in marketing activities with the affiliated holding company that are unrelated to the provision of electronic publishing. This interpretation of section 274(c)(1)(B) effectively would prevent the BOCs from indirectly promoting, marketing, selling, or advertising the electronic publishing services of a separated affiliate.

122. We reject U S WEST's contention that section 274(c)(1)(B) prohibits a BOC from carrying out marketing activities for or with an *affiliate* that is related to the provision of electronic publishing. Given the definition of ''separated affiliate,'' which contemplates the provision of electronic publishing services by such entity, it is difficult to conceive of an affiliate ''related to the provision of electronic publishing'' that would not otherwise constitute a separated affiliate, and thus be subject to the joint marketing restriction in section 274(c)(1)(A). We also reject BellSouth's contention that section 274(c)(1)(B) of the Act is intended to address situations in which a BOC provides electronic publishing and non-electronic publishing services through one affiliate. As noted above, a BOC affiliate that provides electronic publishing services through the BOCs' or any of its affiliates' basic telephone service would constitute a ''separated affiliate'' that would be subject to the joint marketing prohibition in section 274(c)(1)(A).

b. Scope of Section 274(c)(1)(A)

(1) Background

123. We sought comment in the *NPRM* on whether a BOC can carry out both section 272 and section 274 activities through one entity or affiliate, and, if so, whether the affiliate would have to comply with the requirements of section 272, section 274, or both. We conclude in this *Order* that a BOC may provide both section 272 and section 274 services through the same affiliate. In so doing, however, a BOC must comply with the structural and transactional requirements of both sections 272(b) and 274(b). We also conclude that a BOC providing section 272 and section 274 services through the same affiliate must comply with the applicable joint marketing provisions and nondiscrimination provisions of both those sections.

124. Some parties raised the issue of whether and to what extent the joint marketing restrictions of section 274 apply in cases where a BOC provides through the same affiliate electronic publishing services and non-electronic publishing services, *i.e.*, print directory services, that do not fall under section 272 of the Act. Because BOCs currently may be providing electronic publishing and such non-electronic publishing services through one affiliate, or may wish to provide such services through one entity in the future, we address that issue in this *Order.*

(2) Comments

125. U S WEST and BellSouth argue that, if a BOC provides electronic publishing services and non-electronic publishing services, such as print directory services, through the same affiliate, the joint marketing restrictions of section 274 would apply *only* to the electronic publishing activities of the affiliate. U S WEST argues, *inter alia,* that Congress, in adopting the prohibitions in section 274(c)(1) of the Act, intended to circumscribe, for a limited time, joint marketing activities between a BOC and its section 274 separated affiliate because such affiliate would use the BOC's basic telephone service to disseminate its electronic publishing services. U S WEST argues that the section 274 joint marketing prohibitions thus were intended to restrict the BOCs' ability to ''leverage those basic services to favor its electronic publishing services which use [such] services.'' U S WEST maintains therefore that, absent a connection between a publishing activity and the BOC's network operations, there is no indication that Congress meant to impede commercial speech activities engaged in by a BOC corporate enterprise.

(3) Discussion

126. We conclude that, while a BOC may provide through the same affiliate both electronic publishing services and non-electronic publishing services, such as print directory services, which do not fall under section 272 of the Act, it must comply with the joint marketing requirements of section 274. The plain language of section 274(c)(1)(A) states that ''a [BOC] shall not carry out any promotion, marketing, sales, or advertising for or in conjunction with a *separated affiliate.*'' Section 274(c)(1)(A), therefore, precludes a BOC from engaging in certain activities with a separated affiliate as a corporate entity, even in connection with non-electronic publishing services.

127. While our interpretation could provide a disincentive for BOCs to offer electronic publishing and non-electronic publishing services through the same affiliate, as U S WEST points out, the unambiguous statutory language requires this interpretation. We thus conclude that section 274(c)(1)(A) prohibits marketing and sales-related activities carried out by a BOC for or in conjunction with a separated affiliate, irrespective of whether such affiliate provides both electronic publishing services and non-electronic publishing services, such as print directory services, that do not fall under section 272 of the Act.

c. Activities Prohibited under Section 274(c)(1)

(1) Background

128. In the *NPRM,* we observed that the activities proscribed by section 274(c)(1) include the ''promotion, marketing, sales, or advertising'' by a BOC for or with an affiliate. We tentatively concluded that such activities ''encompass prohibitions on advertising the availability of local exchange or other BOC services together with the BOC's electronic publishing services, making those services available from a single source and providing bundling discounts for the purchase of both electronic publishing and local exchange services.'' We sought comment on that tentative conclusion and on whether any other types of prohibitions were contemplated.

(2) Comments

129. Ameritech, AT&T and NAA generally agree with our tentative conclusion regarding the types of activities that are prohibited under sections 274(c)(1)(A) and (B) of the Act. Ameritech also argues, however, that the only prohibited marketing activities are those that ''involve the BOC and the electronic publishing affiliate working together,'' and therefore nothing precludes unilateral marketing, promotion, or sales activities by either the BOC or its separated affiliate. In addition, Ameritech contends that bundling discounts may be offered in all cases of permissible joint marketing activities. According to Ameritech, ''while the BOC requires regulatory authority to discount regulated services, the electronic publisher is free to set its unregulated price—and any promotional discounts—as it sees fit.'' AT&T disputes Ameritech's contention that section 274(c)(1) of the Act permits a BOC to market the electronic publishing services of its separated affiliate so long as it does not ''coordinate'' its promotional activities with such affiliate.

130. U S WEST generally agrees that the activities prohibited under sections 274(c)(1)(A) and (B) of the Act include making local exchange or other BOC services available together with electronic publishing services, but states that this prohibition is subject to the inbound telemarketing exception in section 274(c)(2)(A) of the Act. PacTel argues that a separated affiliate, electronic publishing joint venture, teaming or other business entity is not precluded from purchasing the telecommunications services of a BOC and then advertising such services with electronic publishing services, making the services available from a single entity, and providing bundled discounts.

131. A number of parties contend that sections 274(c)(1)(A) and (B) of the Act prohibit only the BOCs from carrying out certain joint marketing activities, and that the provisions should not be interpreted to restrict the joint marketing activities that may be carried out by either a ''separated affiliate'' under section 274(c)(1)(A), or an ''affiliate'' under section 274(c)(1)(B). SBC specifically argues that the statute should not be interpreted to impose any restrictions on a separated affiliate's ability ''to market and sell services or products of the BOC, or those of any other affiliate or an unrelated party.'' Bell Atlantic similarly contends that an affiliate is not prohibited under the statute ''from marketing the BOC's services and products or acting as a single point of contact for the customer.''

132. NYNEX and YPPA argue that permitting a separated affiliate to market jointly its electronic publishing services with BOC telecommunications services would allow customers to realize the benefits of one-stop shopping. In addition, NYNEX and PacTel maintain that imposing marketing restrictions on a BOC separated affiliate that do not also apply to such affiliate's competitors would place the separated affiliate at a competitive disadvantage. A number of parties also contend that nothing in the Act prohibits a BOC affiliate from carrying out joint marketing activities as an agent for either or both the BOC and the separated affiliate.

133. Conversely, AT&T and Time Warner argue that the marketing prohibitions in section 274(c)(1) should not be construed to apply only to the marketing activities of the BOC. According to AT&T, allowing a separated affiliate to market jointly its electronic publishing services with BOC telecommunications services would

allow the BOC to ''move its entire marketing department into the separated affiliate'' in violation of the statutory prohibition against a BOC carrying out any marketing in conjunction with' a separated affiliate. Time Warner similarly states that interpreting section 274(c)(1) to apply only to the BOCs would allow the BOCs to circumvent the joint marketing restrictions of section 274.

(3) Discussion

134. As an initial matter, we conclude that the prohibitions in section 274(c)(1) apply only to activities carried out by a BOC. Sections 274(c)(1)(A) and (B) of the Act only proscribe BOC activities. We also find that neither a separated affiliate under section 274(c)(1)(A), nor an affiliate under section 274(c)(1)(B), is prohibited from marketing its services together with BOC telecommunications services, so long as such marketing activity is performed unilaterally by the separated affiliate or affiliate, respectively. Thus, a separated affiliate or affiliate is permitted under sections 274(c)(1)(A) and (B) to market its electronic publishing services with basic telephone service purchased from the BOC. We conclude that this type of marketing, in which a separated affiliate or affiliate unilaterally markets BOC local exchange service as an input to its electronic publishing services, is not prohibited under sections 274(c)(1)(A) or (B). We specify that marketing by the separated affiliate or affiliate must be unilateral not because section 274(c)(1) directly imposes any marketing restrictions on such entities, but, as a practical matter, because section 274(c)(1) bars a BOC from carrying out ''marketing . . . for or in conjunction with'' such separated affiliates or affiliates.

135. We reject AT&T's and Time Warner's contention that permitting a separated affiliate to market BOC telecommunications services would allow a BOC to circumvent the restrictions of section 274. As noted above, section 274(c)(1), by its terms, applies only to activities carried out by a BOC. While AT&T's and Time Warner's arguments pertain only to a ''separated affiliate,'' we have no basis for concluding that Congress intended to apply the restrictions in sections 274(c)(1)(A) and (B) to either separated affiliates or affiliates, respectively. Moreover, based on the plain language of sections 274(c)(1)(A) and (B), which prohibits a BOC from carrying out any ''promotion, marketing, sales, or advertising for or *in conjunction with*'' a separated affiliate or affiliate, a BOC would be precluded from, for example, ''moving its entire marketing department into the separated affiliate'' in order to circumvent the section 274(c)(1) restrictions.

136. Based on the above analysis, we also find that a BOC affiliate may carry out ''promotion, marketing, sales, or advertising'' activities as an agent for either a ''separated affiliate'' under section 274(c)(1)(A), or another ''affiliate'' under section 274(c)(1)(B). Because neither a separated affiliate nor an affiliate is subject to the restrictions in sections 274(c)(1)(A) and (B) of the Act, a BOC affiliate that acts as an agent for such separated affiliate or affiliate also is not subject to those restrictions. As in the case of a separated affiliate or affiliate, however, the scope of the agent's activities may be limited, as a practical matter, by the legal bar on a BOC carrying out promotion, marketing, sales or advertising activities ''for or in conjunction with'' such affiliates. We conclude, however, that because section 274(c)(1)(A) applies to activities carried out by BOCs, a BOC affiliate is prohibited from acting as an agent for the BOC in performing marketing and sales-related activities under that section, contrary to arguments raised by some parties. We also note that, under the definition of ''Bell operating company'' in section 274(i)(10), a BOC includes ''any entity or corporation that is owned or controlled by'' such BOC. As such, the section 274(c)(1) joint marketing prohibitions applicable to BOCs also would apply to entities that are owned or controlled by a BOC, such as an entity that acts as an agent for a BOC.

137. We also conclude, based on their language, that sections 274(c)(1)(A) and (B) of the Act prohibit a BOC or BOC agent from advertising local exchange or other BOC services together with electronic publishing services, making those services available from a single point of contact and providing bundling discounts for the purchase of both electronic publishing and local exchange services, except as permitted under section 274(c)(2) of the Act. Since section 274 only proscribes BOC activities, however, we conclude, consistent with our discussion above, that these activities may be carried out by a separated affiliate or affiliate, subject only to the practical limitation that a BOC may not participate owing to the legal bar on its ability to carry out promotion, marketing, sales or advertising activities ''for or in conjunction with'' a separated affiliate or an affiliate.

138. In our *Non-Accounting Safeguards Order* implementing sections 271 and 272 of the Act, we recognized that ''bundling'' contemplates the offering of BOC resold local exchange services and interLATA services as a package under an integrated pricing schedule. As a result, we concluded that the concept of ''bundling'' includes ''providing a discount if a customer purchases both interLATA services and BOC resold local services, conditioning the purchase of one type of service on the purchase of the other, and offering both interLATA services and BOC resold local services as a single combined product.''

139. Based on the definition of ''bundling'' in our *Non-Accounting Safeguards Order,* we conclude that ''bundling'' refers to the offering by a BOC or BOC agent of BOC local exchange and electronic publishing services as a package under an integrated pricing schedule. This restriction flows not only from section 274(c)(1), but from the fact that a BOC is forbidden by section 274(a) to engage in the provision of electronic publishing disseminated by means of its basic telephone service except through a separated affiliate or an electronic publishing joint venture. By providing such bundled services, the BOC or its agent would be engaged in the provision of electronic publishing in contravention of section 274(a). We further find, consistent with the *Non-Accounting Safeguards Order,* that sections 274(c)(1)(A) and (B) of the Act prohibit a BOC or BOC agent from providing customer discounts for the purchase of local exchange and electronic publishing services, conditioning the purchase of one type of service on the other, or offering both electronic publishing and local exchange services as one product. Moreover, we conclude, based on the explicit language of section 274(c)(1), that sections 274(c)(1)(A) and (B) of the Act prohibit a BOC or BOC agent not only from offering for sale both local exchange and electronic publishing services, but also from advertising those services in a single advertisement, and from selling both services through a single point of contact, *e.g.*, a single sales agent, except as permitted under section 274(c)(2). We find that Congress intended to proscribe those activities in adopting sections 274(c)(1)(A) and (B) of the Act.

d. Interplay Between Section 274 Joint Marketing Provisions and Other Provisions of the Act

(1) Background

140. In the *NPRM,* we sought comment on whether and to what extent

the joint marketing provisions in section 272(g) and the customer proprietary network information (CPNI) provisions in section 222 of the Act affect implementation of section 274.

(2) Comments

141. NYNEX argues that, because the marketing provisions in sections 272 and 274 of the Act apply to different services, the restrictions in section 274 should not be applied to the services and facilities provided under section 272. PacTel maintains that sections 272(g) and 222 of the Act do not affect implementation of section 274. U S WEST maintains that, based on implied consent gleaned from either the business relationship or customer notification, CPNI may be used by the BOC in marketing a separated affiliate's electronic publishing offerings. U S WEST also contends that, under section 222(d)(3) of the Act, a BOC could use CPNI on an inbound telemarketing call for both telecommunications and electronic publishing services of the BOC and third parties, provided the customer consented to such use on the call.

(3) Discussion

142. As discussed above, we conclude that, while a BOC may provide through the same affiliate both section 272 and section 274 services, it must comply with the applicable joint marketing restrictions of both those sections. We decline to address arguments raised in this proceeding regarding the interplay between section 274 and section 222 of the Act, relating to privacy of customer information. The Commission has pending a proceeding to implement section 222 of the Act. Until the completion of that proceeding, we defer any decision on the extent, if any, that section 222 of the Act affects implementation of section 274. As noted in the *CPNI NPRM* (61 FR 26483 (May 28, 1996)), the CPNI requirements the Commission previously established in the *Computer II* and *Computer III* proceedings remain in effect pending the outcome of the CPNI proceeding, to the extent that they do not conflict with section 222 of the Act.

2. Permissible Joint Activities—Section 274(c)(2)

a. Joint Telemarketing—Section 274(c)(2)(A)

(1) Background

143. As we observed in the *NPRM*, section 274(c)(2) of the Act permits three types of joint activities between a BOC and a separated affiliate, electronic publishing joint venture, affiliate, or unaffiliated electronic publisher under specified conditions. Under section 274(c)(2)(A) of the Act, a BOC may provide ''inbound telemarketing or referral services related to the provision of electronic publishing for a separated affiliate, electronic publishing joint venture, affiliate or unaffiliated electronic publisher: *[p]rovided,* [t]hat if such services are provided to a separated affiliate, electronic publishing joint venture, or affiliate, such services shall be made available to all electronic publishers on request, on nondiscriminatory terms.''

144. We stated in the *NPRM* that the statute is silent as to the specific obligations section 274(c)(2)(A) imposes on a BOC. We noted that the term ''inbound telemarketing'' is defined in section 274(i)(7) as ''the marketing of property, goods, or services by telephone to a customer or potential customer who initiated the call.'' The term ''referral services,'' however, is not defined in the statute. As we discussed in the *NPRM*, the Joint Explanatory Statement states that the Conference Committee adopted the provisions of the House bill relating to electronic publishing, with some modifications relating to sunset of the section 274 requirements and use of BOC trademarks by separated affiliates and electronic publishing joint ventures. The provision of the House bill relating to electronic publishing joint ventures was identical to the provision ultimately adopted by the Conference Committee.

145. The Committee Report accompanying H.R. 1555 states that:

> Subsection (c)(2)(A) permits a BOC to provide inbound telemarketing or referral services related to the provision of electronic publishing, if the BOC provides the same service on the same terms and conditions, and prices to non-affiliates as to its affiliates. The term 'inbound telemarketing or referral services' is defined . . . to mean 'the marketing of property, goods, or services by telephone to a customer or potential customer who initiated the call.' Thus, a BOC may refer a customer who seeks information on an electronic publishing service to its affiliate, but must make sure that the referral service is available to unaffiliated providers. No outbound telemarketing or similar activity, under which the call is initiated by the BOC or its affiliate or someone on its behalf, is permitted.

In the *NPRM,* we sought comment on whether the conditions imposed on inbound telemarketing discussed in the House Report should be adopted, and whether we should adopt any regulations pertaining to outbound telemarketing.

(2) Comments

146. AT&T argues that we should adopt the conditions on inbound telemarketing discussed in the House Report, *i.e.*, that a BOC may offer inbound telemarketing services to its affiliate only if it makes those services available to unaffiliated providers of electronic publishing services on the same terms, conditions and prices. In addition, it contends that a BOC should be prohibited from engaging in outbound telemarketing, consistent with the House Report. AT&T argues that section 274(c)(2)(A) should not be construed as an ''open-ended authorization for the BOCs to market the electronic publishing services of their separated affiliates'' because such an interpretation would result in the exception swallowing the rule. While NAA agrees that we should adopt the conditions on inbound telemarketing discussed in the House Report, it also argues that a BOC may provide outbound telemarketing services to an electronic publishing joint venture under section 274(c)(2)(C).

147. Conversely, the BOCs generally contend that they are permitted to engage in a broader range of marketing activities under section 274(c)(2)(A). In particular, Ameritech argues that section 274(c)(2)(A) expressly authorizes a BOC to handle all aspects of the electronic publisher's sales process while on an inbound telephone call. NYNEX similarly maintains that section 274(c)(2)(A) does not restrict in any way the inbound telemarketing services that a BOC may provide to a separated affiliate, electronic publishing joint venture or affiliate, except to require the BOC to make such services available to all electronic publishers ''on request, on nondiscriminatory terms.'' In addition, SBC argues that section 274(c)(2)(A) allows a BOC not only to refer a customer who requests information regarding an electronic publishing service to its affiliate, but also permits a BOC to market electronic publishing services to customers who inquire about them. SBC also argues that section 274(c)(2)(A) ''allow[s] a separated affiliate or a BOC to advertise a BOC call-in number to which potential customers might choose to initiate a call.'' BellSouth argues that section 274(c)(2)(A) of the Act is clear on its face, and therefore ''no further elucidation'' of that section is necessary.

148. PacTel argues that section 274(c)(2)(A)'s requirement that inbound telemarketing or referral services ''be made available to all electronic publishers on request, on nondiscriminatory terms'' means that

the terms of the service must be generally available to all *similarly situated* electronic publishers. U S WEST argues that the requirement should be construed to apply only to services that are of ''like kind.'' PacTel contends that section 274(c)(2)(A), like section 202(a) of the Act, allows reasonable discrimination. Conversely, Time Warner argues that nothing in the Act indicates that Congress intended to limit the provision of inbound telemarketing or referral services required by section 274(c)(2)(A) to competing electronic publishers offering services ''comparable'' to those offered by a BOC separated affiliate.

(3) Discussion

149. We conclude that a BOC may, pursuant to section 274(c)(2)(A), both provide ''referral services'' and ''market'' property, goods, or services related to the provision of electronic publishing by telephone to a customer or potential customer who initiated the call. This is consistent with the plain language of the statute, including the definition of ''inbound telemarketing'' in section 274(i)(7), and with the legislative history interpreting section 274(c)(2)(A). We also conclude, however, consistent with the clear language of the statute and with the House Report, that, to the extent a BOC provides inbound telemarketing or referral services for a separated affiliate, electronic publishing joint venture, or affiliate, it must make available ''such services . . . to all electronic publishers on request, on nondiscriminatory terms.'' Consistent with the legislative history, this means that the BOC must offer ''the same service on the same terms and conditions, and prices to non-affiliates as to its affiliates.''

150. A BOC may choose to provide inbound telemarketing or referral services either pursuant to a contractual arrangement or during the normal course of its inbound telemarketing operations. To the extent a BOC chooses either or both of these approaches in providing inbound telemarketing or referral services to a separated affiliate, electronic publishing joint venture or affiliate, we conclude, based on the nondiscrimination proviso in section 274(c)(2)(A), that it must make available the same approach to unaffiliated electronic publishers.

151. With regard to inbound telemarketing or referral services provided by a BOC to its separated affiliate, electronic publishing joint venture, or affiliate pursuant to a contractual arrangement, we find that the BOC must make available the same terms, conditions, and prices for such services to unaffiliated electronic publishers, except to the extent legitimate price differentials may exist. For example, such price differentials may reflect differences in cost, or may reflect the fact that an unaffiliated electronic publisher has requested superior or less favorable treatment in exchange for paying a higher or lower price to the BOC. As we stated in the *First Interconnection Order* (61 FR 45476 (August 29, 1996)), where costs differ, rate differences that accurately reflect those differences are not unlawfully discriminatory. We similarly conclude that price differences, ''when based upon legitimate variations in costs, are permissible under the 1996 Act when justified.'' PacTel's argument that the ''nondiscriminatory'' requirement in section 274(c)(2)(A) means that the terms of the service must be generally available to all ''similarly situated'' electronic publishers, therefore, has merit to the extent that price differences among electronic publishers reflect legitimate differences in cost.

152. The statute requires that, to the extent a BOC markets property, goods or services related to the provision of electronic publishing to a customer, or refers a customer to a separated affiliate, electronic publishing joint venture or affiliate during the normal course of its telemarketing operations, it must provide such marketing or referral services to all unaffiliated electronic publishers requesting such services, on nondiscriminatory terms. Thus, to the extent that a BOC provides referral service if a customer has not initially independently requested a specific referral to the BOC affiliate, a BOC must provide the names of all such unaffiliated electronic publishers, as well as its own affiliated electronic publishers, in random order, to the customer. A similar standard may also be appropriate for particular inbound telemarketing activities. We find that our interpretation is consistent with the intent of section 274(c)(2)(A) to ensure that a BOC providing inbound telemarketing or referral services to a separated affiliate provides such services on a nondiscriminatory basis to all unaffiliated electronic publishers.

153. We reject U S WEST's argument that imposing such a requirement on the BOCs with respect to referral services would be overly burdensome. We note, for example, that BOCs currently are subject to similar requirements in cases where a new local exchange customer of the BOC requests information regarding interexchange service. In such cases, BOCs are required, *inter alia*, to provide customers with the names and, if requested, the telephone numbers of carriers offering interexchange services. As part of this requirement, a BOC must ensure that the names of the interexchange carriers are provided in random order.

154. We disagree with U S WEST's contention that a BOC's obligation to provide inbound telemarketing or referral services under section 274(c)(2)(A) applies only with respect to services that are ''comparable'' to those of its separated affiliate. We conclude that a BOC's obligation under section 274(c)(2)(A) to make available inbound telemarketing and referral services on a nondiscriminatory basis requires that a BOC make available to unaffiliated electronic publishers the same services it provides to an affiliated electronic publisher, regardless of whether the unaffiliated electronic publishers offer services that are ''comparable'' to those of the BOC. Nothing in the statute or its legislative history indicates that a BOC must make available inbound telemarketing and referral services only to electronic publishing entities providing services ''comparable'' to those of the BOC's affiliate. To the extent that a BOC's agreement with its affiliated electronic publisher is limited to certain types of marketing or referral services, however, the BOC is then only obligated to make the same types of marketing or referral services available to unaffiliated electronic publishers.

155. With respect to AT&T's concern that interpreting section 274(c)(2)(A) to allow BOCs to ''market'' the electronic publishing services of their separated affiliates would circumvent the joint marketing prohibitions in section 274(c)(1), we find that the unambiguous statutory definition of ''inbound telemarketing'' in section 274(i)(7), and the fact that the general prohibition in section 274(c)(1) applies ''except as provided in paragraph (2) [274(c)(2)],'' requires this interpretation. We note that the statutory language allows BOCs to provide such marketing services only on nondiscriminatory terms, as discussed above. In addition, while our interpretation of the nondiscrimination requirement may serve as a disincentive for certain BOCs to market the services of an affiliated electronic publisher on an inbound call, we find that the statutory language compels this interpretation.

156. Finally, we conclude that section 274(c)(2)(A) prohibits outbound telemarketing or similar activities in which a call is initiated by a BOC, its affiliate, or someone on its behalf. Because section 274(c)(2)(A), by its terms, applies only to ''inbound telemarketing'' or referral services

related to the provision of electronic publishing, we believe that Congress did not intend to permit BOCs to engage in outbound telemarketing activities in adopting section 274(c)(2)(A). To the extent that the statutory language leaves any ambiguity on this question, the House Report supports our interpretation that a BOC is prohibited under section 274(c)(2)(A) from engaging in outbound telemarketing. We also believe that allowing a BOC to engage in outbound telemarketing activities to promote the electronic publishing services of its separated affiliate would eviscerate the general prohibition on BOC joint marketing activities in section 274(c)(1)(A) of the Act.

b. Teaming Arrangements—Section 274(c)(2)(B)

(1) Background

157. In the *NPRM*, we observed that, in addition to certain joint telemarketing activities, a BOC is permitted to engage in ''teaming'' or ''business arrangements'' to provide electronic publishing services under certain conditions pursuant to section 274(c)(2)(B). Section 274(c)(2)(B) specifically states that a ''[BOC] may engage in nondiscriminatory teaming or business arrangements to engage in electronic publishing with any separated affiliate or with any other electronic publisher if (i) the [BOC] only provides facilities, services, and basic telephone service information as authorized by this section, and (ii) the [BOC] does not own such teaming or business arrangement.''

158. We sought comment in the *NPRM* on what types of arrangements are encompassed by the terms ''teaming'' or ''business arrangements,'' and on the significance of section 274(c)(2)(B)'s placement under the ''Joint Marketing'' provisions in section 274(c). We also sought comment on what regulations, if any, are necessary to ensure that the arrangements in which BOCs engage pursuant to section 274(c)(2)(B) are ''nondiscriminatory,'' and on how the provision of ''basic telephone service information'' under that section relates to the requirements in section 222 for access to and use of CPNI.

(2) Comments

159. Ameritech, NAA, NYNEX, and PacTel generally argue that the terms ''teaming'' or ''business arrangements'' in section 274(c)(2)(B) contemplate a broad range of permissible activities. Ameritech argues that, so long as all the conditions under section 274(c)(2)(B) are met and the requirements of section 274 are otherwise satisfied, a BOC should be free to enter into a teaming or business arrangement with a separated affiliate or electronic publishing joint venture to jointly market electronic publishing services. NYNEX contends that teaming arrangements provide another form of ''one-stop shopping'' for consumers and present minimal risk of anticompetitive behavior. PacTel argues that the language of section 274(c)(2)(B) is so broad that it includes any activity other than the provision of electronic publishing itself, including promotion, marketing, sales and advertising activities. SBC argues that section 274(c)(2)(B) should be interpreted to permit a BOC and its separated affiliate jointly to promote, market, sell, and advertise their respective services pursuant to *any* form of business arrangement.

160. Bell Atlantic argues that the term ''teaming or business arrangements'' as used in section 274(c)(2)(B) encompasses myriad arrangements which include, but are not limited to, marketing proposals in which a BOC and an electronic publisher each prepares its portion of a joint bid to a customer. BellSouth contends that a teaming or business arrangement is more substantial than a coordinated joint marketing or sales campaign or joint bid preparation arrangement, given the statute's reference to BOC ownership in section 274(c)(2)(B). YPPA argues that teaming arrangements, which it asserts were permissible under the MFJ, are any arrangements whereby ''two businesses act independently to provide related products or services, but coordinate their activities so that the customer obtains a 'complete' package of the desired products or services.'' According to YPPA, ''teaming'' may include joint sales activities (including joint planning for sales calls), through advertising, premise visits or telemarketing.''

161. Conversely, Time Warner argues that section 274(c)(2)(B) permits a BOC to engage in a non-BOC owned teaming or business arrangement to provide its electronic publishing affiliate with the necessary facilities and telephone service for electronic publishing, provided that such facilities and services are offered on a nondiscriminatory basis pursuant to tariffed rates and conditions.

162. Bell Atlantic argues that, by placing section 274(c)(2)(B) under the ''Joint Marketing'' provisions in section 274(c), Congress intended to clarify that ''teaming or business arrangements'' are not to be considered joint marketing activities. PacTel argues that ''teaming arrangements'' are included under the heading of ''Joint Marketing'' because such arrangements are one of the three categories of exceptions listed under that heading.

163. PacTel argues that the nondiscrimination requirement for teaming and other business arrangements relates to how a BOC provides facilities, services and basic telephone service information to electronic publishers, not to a BOC's choice of teaming partners. Even if the nondiscrimination requirement were interpreted to apply to a BOC's choice of teaming partners, PacTel argues, a BOC nevertheless would retain discretion to team only with electronic publishers that met its reasonable standards. BellSouth similarly contends that the nondiscrimination obligation of section 274(c)(2)(B) precludes a BOC from giving preference to the teaming or business arrangement in the conduct of its regulated common carrier activities, but does not impose on the BOC an obligation to invest in a particular entity. SBC argues that the nondiscrimination requirement in section 274(c)(2)(B) ''provide[s] evenhandedness in the BOCs' provision of marketing and other services to [unaffiliated] electronic publishers.'' YPPA argues that the nondiscrimination requirement means that a teaming arrangement between a BOC and its separated affiliate ''cannot be markedly different'' from teaming arrangements made available to other electronic publishers.

164. NAA argues that, if a BOC uses its CPNI to provide ''basic telephone service information'' as part of a teaming arrangement, it is subject to the privacy requirements in section 222 for access to and use of the CPNI. PacTel states that section 274(c)(2)(B) allows a BOC to use CPNI as part of a teaming arrangement, consistent with section 222 of the Act. PacTel therefore argues that ''BOCs can use CPNI with the type of telecommunications service from which the information was derived, and with customer authorization can use it with any service.'' PacTel maintains that, to the extent that ''basic telephone service information'' is also CPNI, section 222 of the Act and any implementing regulations the Commission adopts govern the use of such information. To the extent such information is not CPNI, but network information, PacTel argues that a BOC is required to share such information with all electronic publishers with which the BOC teams. SBC argues that, where information qualifies as both ''basic telephone service information'' under section 274(i)(3) as well as CPNI under

section 222(f)(1), the terms of section 274 should prevail over the general terms in section 222 of the Act. SBC points out that section 274 of the Act contains no ''approval'' requirement as a precondition for using, disclosing, or accessing basic telephone service information. As such, SBC argues, a BOC should be permitted to use such information without first obtaining approval under section 222(c)(1) when engaged in permissible teaming or business arrangements.

(3) Discussion

165. We decline at this time to adopt specific regulations clarifying the types of arrangements that are contemplated by the terms ''teaming or business arrangements'' in section 274(c)(2)(B) of the Act. We conclude that those terms, which are not defined in the statute, may encompass a broad range of permissible marketing activities because section 274(c)(2)(B) imposes no explicit marketing limitations. At the same time, however, this provision contains no language that operates to remove business or teaming arrangements from the scope of the prohibitions in section 274(c)(1). We thus find that Congress, in including the general terms ''teaming or business arrangements'' in section 274(c)(2)(B), did not intend to limit or expand the types of marketing activities in which BOCs could engage under that section other than those specifically restricted or authorized elsewhere in section 274 (*e.g.*, in section 274(c)(1)).

166. Under section 274(c)(2)(B), therefore, a BOC providing telecommunications services and the electronic publishing provider with which it teams are limited to marketing their respective services. This interpretation is supported by the plain language of section 274(c)(2)(B), which generally provides that a BOC may engage in teaming or business arrangements if such BOC ''only provides facilities, services, and basic telephone service information as authorized by [section 274].'' Under this interpretation, a BOC is permitted to market only the facilities, services and basic telephone service information that section 274(c)(2)(B) permits the BOC to provide. This interpretation also is supported by a comparison of the text in section 274(c)(2)(B) with the text of sections 274(c)(2)(A) and (C), relating to inbound telemarketing and electronic publishing joint ventures, respectively. Unlike section 274(c)(2)(C), section 274(c)(2)(B) does not specifically permit the authorized entity to engage in joint marketing activities otherwise prohibited to the BOC by section 274(c)(1), *i.e.*, promotion, marketing, sales, and advertising activities. In addition, unlike section 274(c)(2)(A), section 274(c)(2)(B) contains no language that explicitly addresses marketing. We therefore conclude that a BOC participating in a teaming arrangement may not market the electronic publishing services of an electronic publishing provider with which it teams. In addition, the restrictions specifically set forth in section 274(c)(2)(B) would apply, *i.e.*, that such BOC only provide facilities, services and basic telephone service information as authorized by section 274, that the BOC not ''own'' the teaming or business arrangement, and that the teaming arrangement be ''nondiscriminatory.''

167. As noted above, a few commenters provide examples of the types of activities they believe are permissible under section 274(c)(2)(B) as a ''teaming or business arrangement.'' Bell Atlantic, for example, contends that such arrangements include, but are not limited to, marketing proposals in which a BOC and an electronic publisher each prepares its portion of a joint bid to a customer. In addition, YPPA argues that a teaming arrangement is any arrangement whereby ''two businesses act independently to provide related products or services, but coordinate their activities so that the customer obtains a 'complete' package of the desired products or services.'' YPPA states, for example, that a BOC may engage in a teaming arrangement with a separated affiliate whereby the BOC provides a customer with regulated telephone service and the separated affiliate provides the same customer with electronic publishing services. We conclude that nothing in the statute prohibits a BOC from engaging in the types of activities proposed by these commenters, so long as all of the requirements of section 274, including section 274(c)(2)(B), are satisfied. To the extent issues arise in the future as to whether certain other activities are permissible under section 274(c)(2)(B) as ''teaming or business arrangements,'' we intend to address those issues on a case-by-case basis.

168. We also conclude that section 274(c)(2)(B)'s requirement that a BOC only engage in teaming or business arrangements that are ''nondiscriminatory'' means that a BOC may provide to the teaming arrangement the necessary facilities, services and basic telephone service information for electronic publishing, provided that such facilities, services and information are offered on a nondiscriminatory basis both to other teaming arrangements and to unaffiliated electronic publishers. Under this interpretation, for example, a BOC would be prohibited from favoring a teaming arrangement with a separated affiliate over an arrangement with an unaffiliated electronic publishing provider in the provision of the BOC's facilities, services and basic telephone service information under section 274(c)(2)(B). We agree with PacTel and BellSouth that section 274(c)(2)(B) of the Act does not require a BOC to participate in a teaming arrangement with, or to invest in, an electronic publishing provider. Given that a ''teaming arrangement'' under section 274(c)(2)(B) contemplates that a BOC may hold less than a 10 percent interest in such arrangement, we believe that Congress did not intend to compel a BOC to acquire such an interest in other arrangements simply because the BOC has chosen to participate in a teaming arrangement with an electronic publisher of its choice. In addition, we find that such an interpretation would provide a disincentive for BOCs to engage in teaming arrangements in contravention of the plain language of section 274(c)(2)(B) and the pro-competitive goals of the 1996 Act.

169. We defer to our pending CPNI proceeding the question of whether the term ''basic telephone service information'' as defined in section 274(i)(3) of the Act includes CPNI as defined in section 222 of the Act. Based on the definition of ''basic telephone service information'' in section 274(i)(3), however, we conclude that the term includes network information of the BOC. We also defer to our CPNI proceeding the issue of whether section 222 requires a BOC engaged in permissible marketing activities under section 274(c)(2) to obtain customer approval before using, disclosing, or permitting access to CPNI. In particular, we defer to that proceeding the issue of whether or to what extent section 274(c)(2)(B) of the Act imposes any obligations on BOCs that use, disclose, or permit access to CPNI pursuant to a teaming arrangement. As noted above, however, the CPNI requirements the Commission previously established in the *Computer II* and *Computer III* proceedings remain in effect, pending the outcome of the CPNI proceeding, to the extent that they do not conflict with section 222 of the Act. Because we conclude that ''basic telephone service information'' under section 274(i)(3) includes network information, BOCs that provide network information as part of a teaming arrangement are required to provide such information to other teaming arrangements on a

nondiscriminatory basis pursuant to section 274(c)(2)(B).

c. Electronic Publishing Joint Ventures—Section 274(c)(2)(C)

(1) Permissible Level of BOC Ownership Interest in Electronic Publishing Joint Venture and Waiver for ''Good Cause''

(a) Background

170. Section 274(c)(2)(C) of the Act expressly permits a BOC or affiliate to ''participate on a nonexclusive basis in electronic publishing joint ventures with entities that are not a [BOC], affiliate, or separated affiliate to provide electronic publishing services.'' The BOC or affiliate, however, may not hold more than a 50 percent direct or indirect equity interest (or the equivalent thereof) or the right to more than 50 percent of the voting control over the joint venture. In addition, officers and employees of a BOC or affiliate participating in an electronic publishing joint venture may hold no greater than 50 percent of the voting control over the joint venture. The House Report clarifies that this restriction prohibits officers and employees of a BOC from ''*collectively* having more than 50 percent of the voting control of the venture.'' In the *NPRM*, we tentatively concluded that a BOC is deemed to ''own'' an electronic publishing joint venture ''if it holds greater than a 10 percent but not more than a 50 percent direct or indirect equity interest in the venture, or has the right to greater than 10 percent but not more than 50 percent of the venture's gross revenues.'' We sought comment on that tentative conclusion.

171. Section 274(c)(2)(C) also provides that, ''[i]n the case of joint ventures with small, local electronic publishers, the Commission for good cause shown may authorize [a BOC] or affiliate to have a larger equity interest, revenue share, or voting control but not to exceed 80 percent.'' As we observed in the *NPRM*, although the term ''small, local electronic publisher'' is not defined in the statute, the House Report indicates that the term was intended to apply to publishers serving communities of fewer than 50,000 persons. We sought comment in the *NPRM* on how we should determine the service area of a ''small, local electronic publisher'' for the purpose of applying the 80 percent threshold. In addition, we sought comment on whether it would be consistent with congressional intent to adopt additional standards for determining which electronic publishers are subject to the 80 percent threshold, and, if so, what such standards should be. We also sought comment on how we should define ''local'' under section 274(c)(2)(C).

172. With regard to section 274(c)(2)(C)'s provision allowing waiver of the 50 percent equity interest and revenue share limitation in the case of joint ventures with small, local electronic publishers for ''good cause shown,'' we sought comment on the ''good cause'' showing that is required under that provision, and whether any additional regulations are necessary to implement the provision.

(b) Comments

173. The Joint Parties agree that a minimum 10 percent equity interest or gross revenue share by a BOC is sufficient to constitute ownership of an electronic publishing joint venture. NAA states that a BOC must ''own'' an electronic publishing joint venture, which means it must hold greater than a 10 percent direct or indirect equity interest in the venture, or have the right to greater than 10 percent of the venture's gross revenues. NAA also points out that, except for joint ventures with small, local electronic publishers, a BOC is limited to a minority stake in the electronic publishing joint venture. NAA argues that we should not adopt any standards at this time for determining what constitutes a ''small, local electronic publisher'' under section 274(c)(2)(C), but instead should address the issue in the context of specific waiver applications. NAA maintains that, in such cases, the ''good cause'' showing that is required under section 274(c)(2)(C) would be satisfied by demonstrating that greater participation by the BOC ''is needed to enable the [electronic publishing] service to be provided to the public.''

(c) Discussion

174. We conclude that a BOC may hold greater than a 10 percent but not more than a 50 percent direct or indirect equity interest in an electronic publishing joint venture under section 274(c)(2)(C) of the Act, or may have the right to greater than 10 percent but not more than 50 percent of the venture's gross revenues. Therefore, while a BOC may ''own'' an electronic publishing joint venture, it is limited to a 50 percent stake in such venture. Our interpretation is consistent with the definition of ''electronic publishing joint venture'' in section 274(i)(5) of the Act, which contemplates a degree of ownership by a BOC or affiliate, the definition of ''own'' in section 274(i)(8), and with the plain language of section 274(c)(2)(C), which restricts a BOC's ownership or revenue share interest in an electronic publishing joint venture to 50 percent.

175. We decline at this time to adopt any standards for determining which entities constitute ''small, local electronic publishers'' for the purpose of applying the 80 percent threshold in section 274(c)(2)(C) of the Act. While the House Report indicates that the term was intended to apply to publishers serving communities of fewer than 50,000 persons, it is difficult from a practical standpoint to define the service area of such publishers, given that electronic publishing services, by definition, contemplate the dissemination of information to the general public. Moreover, the term ''small'' may be defined based on a variety of standards, including the size of the community served, the gross revenues of the electronic publishing entity, or other factors. Given the difficulties with establishing standards at this time for determining what constitutes a ''small, local electronic publisher'' under section 274(c)(2)(C), we conclude that it is best to clarify this phrase on a case-by-case basis.

176. With regard to the ''good cause'' showing that is required for a BOC to hold a greater interest in an electronic publishing joint venture with a small, local electronic publisher under section 274(c)(2)(C) of the Act, one factor we may consider in determining whether a BOC has satisfied this standard is whether increased investment by the BOC is necessary to enable the joint venture to provide electronic publishing services. In adopting section 274(c)(2)(C), we believe that Congress intended, *inter alia*, to encourage market participation by small, local electronic publishing entities in the provision of electronic publishing services by allowing a BOC to hold a greater ownership interest in electronic publishing joint ventures with such entities. We emphasize, however, that this is only one factor we may consider in determining whether a BOC satisfies the ''good cause'' standard under section 274(c)(2)(C), and that other circumstances may exist that militate for or against a finding of ''good cause.'' We thus conclude that the issue of what constitutes ''good cause'' under section 274(c)(2)(C) should be addressed on a case-by-case basis in the context of fact-specific waiver applications.

(2) BOC Participation on a ''Nonexclusive'' Basis

(a) Background

177. In the *NPRM*, we also sought comment on what regulations, if any, are necessary to ensure that a BOC

participates in an electronic publishing joint venture on a ''nonexclusive'' basis. We noted that this provision appears to prohibit arrangements whereby a BOC participates in an electronic publishing joint venture with an electronic publishing entity to the exclusion of all other such entities. We also sought comment on whether the provision prohibits contracts between a BOC and an electronic publisher whereby the electronic publisher is committed to purchase basic transmission services necessary to provide electronic publishing exclusively from such BOC, or whether the provision contemplates other types of prohibitions.

(b) Comments

178. BellSouth, NAA, and NYNEX argue that the ''nonexclusive'' requirement in section 274(c)(2)(C) precludes a BOC from entering into an electronic publishing joint venture with one entity to the exclusion of all others. PacTel similarly states that a BOC and its affiliate are prohibited under the provision from entering into an agreement that either prohibits other parties from participating in the joint venture or precludes the BOC or its affiliate from participating in other electronic publishing joint ventures with other parties. BellSouth states, however, that a BOC is not obligated to participate in more than one electronic publishing joint venture. BellSouth and NAA also argue that the provision does not preclude a BOC from insisting, as a condition of its participation in the electronic publishing joint venture, that the joint venture purchase basic transmission services exclusively from the BOC in order to provide electronic publishing services. NAA and PacTel contend that the provision does not require an electronic publishing joint venture to be open to all, nor does it prelude a BOC from exercising its business judgment regarding its joint venture partners.

(c) Discussion

179. We conclude that the section 274(c)(2)(C) requirement that a BOC or affiliate participate in an electronic publishing joint venture on a ''nonexclusive'' basis prohibits a BOC or affiliate from entering into an agreement with its joint venture partner that precludes either entity from participating in other such ventures with other parties. The ''nonexclusive'' requirement in section 274(c)(2)(C) protects against the potential that a BOC could place competing local exchange providers at a competitive disadvantage by preventing its joint venture partners from aligning with such providers in other electronic publishing joint ventures. We note, however, that while section 274(c)(2)(C) of the Act proscribes these types of exclusive arrangements, it does not prevent a BOC from agreeing with its joint venture partner to exclude other parties from that particular venture. In addition, we find that section 274(c)(2)(C) does not require that an electronic publishing joint venture be open to any and all potential venture participants, nor does it preclude a BOC from exercising its business judgment regarding its joint venture partners. As noted above, because an ''electronic publishing joint venture'' as defined in section 274(i)(5) of the Act, contemplates some degree of BOC ownership, a BOC should be allowed to retain discretion regarding its joint venture partners. Requiring a BOC to take an ownership interest in a joint venture in which it was not free to select its partner would discourage BOCs from participating in such ventures and restrict competition in the provision of electronic publishing services.

180. We also find that the ''nonexclusive'' requirement in section 274(c)(2)(C) of the Act does not require a BOC or BOC affiliate to participate in more than one electronic publishing joint venture. As BellSouth points out, such an interpretation could be viewed as precluding a BOC from consummating an electronic publishing joint venture arrangement with its joint venture partner until the BOC had located and negotiated with another partner with whom to establish a joint venture. A BOC thus may refuse to participate in a second electronic publishing joint venture that is proposed to it after it has entered into an electronic publishing joint venture with another unaffiliated entity. Given that Congress, in adopting section 274 of the Act, sought to promote competition in the provision of electronic publishing services by allowing BOCs to provide such services subject to certain safeguards, we conclude that section 274(c)(2)(C) was not intended to require a BOC to participate in more than one electronic publishing joint venture. Such a requirement could restrict competitive entry into the provision of electronic publishing services by hampering BOC participation in electronic publishing joint ventures.

181. We also conclude that section 274(c)(2)(C) does not preclude a BOC from requiring an electronic publishing joint venture to purchase basic transmission services exclusively from the BOC as a condition of the BOC's participation in the joint venture. The express language of section 274(a) of the Act contemplates the provision by an electronic publishing joint venture of electronic publishing services that are disseminated by means of the BOC or BOC affiliate's basic telephone service. Moreover, nothing in section 274(a) indicates that Congress intended to prohibit a BOC participating in an electronic publishing joint venture from requiring that the joint venture purchase basic telephone service exclusively from the BOC.

(3) Interplay Between Section 274(c)(1)(B) and Section 274(c)(2)(C)

(a) Background

182. We noted in the *NPRM* that the joint marketing prohibitions in section 274(c)(1) of the Act appear not to apply to an electronic publishing joint venture. We also sought comment on the extent to which section 274(c)(2)(C), which allows a BOC to participate in electronic publishing joint ventures under certain conditions, permits a BOC to market jointly with an electronic publishing joint venture in light of other provisions in section 274 that prohibit certain marketing activities. We noted, for example, that section 274(b)(6) prohibits an electronic publishing joint venture from using the ''name, trademark, or service marks of an existing [BOC]'' for the marketing of any product or service, while section 274(c)(2)(A) permits a BOC to provide inbound telemarketing services for, among other things, an electronic publishing joint venture, but only under certain conditions. In addition, we sought comment in the *NPRM* on the distinction, if any, between the term ''carry out'' in sections 274(c)(1)(A) and (B), which set forth the general marketing prohibitions on BOCs, and the term ''provide'' in section 274(c)(2)(C).

(b) Comments

183. A number of commenters argue that section 274(c)(2)(C) is an exception to the general joint marketing prohibitions in section 274(c)(1) of the Act and thus permits a BOC to provide promotion, marketing, sales and advertising services to an electronic publishing joint venture. SBC argues that, because section 274(c)(2)(C) authorizes a BOC participating in an electronic publishing joint venture to ''provide promotion, marketing, sales, or advertising *personnel and services*,'' the venture itself may be staffed by BOC marketing and sales personnel. Ameritech argues that joint marketing activities otherwise prohibited under section 274(c)(1) are permitted to the extent they come under one of the three

categories of permissible joint marketing activities in section 274(c)(2) of the Act. NAA argues that section 274(c)(2)(C) permits a BOC to market jointly with an electronic publishing joint venture subject to the restrictions in section 274(b)(6) on use of names and trademarks. In addition, NAA contends that the use of the terms ''carry out'' in section 274(c)(1) and ''provide'' in section 274(c)(2)(C) was not intended to limit the services a BOC may perform for an electronic publishing joint venture.

184. Conversely, Time Warner argues that a BOC is prohibited from jointly marketing its local exchange services with the electronic publishing services of an electronic publishing joint venture, and vice versa. According to Time Warner, if a joint venture were permitted to jointly market its electronic publishing services with the BOC's local exchange services, ''the ability to leverage the BOC's local exchange monopoly into the electronic publishing market would remain.''

185. Bell Atlantic contends that sections 274(b)(6) and (c)(2)(A) of the Act do not affect the right of a BOC to provide marketing services for an electronic publishing joint venture. According to Bell Atlantic, the statute prohibits the joint venture, not the BOC, from using the BOC's name, trademark or service marks. To the extent the BOC is providing services to the joint venture, Bell Atlantic argues, it is free to use its own name, trademark and service marks. Bell Atlantic also maintains that it is subject to the conditions on inbound telemarketing in section 274(c)(2)(A) of the Act to the extent it performs inbound telemarketing activities for a joint venture.

(c) Discussion

186. We conclude that section 274(c)(2)(C) provides an exception to the general joint marketing prohibitions imposed on BOCs in section 274(c)(1) of the Act. As some commenters point out, the introductory clause in section 274(c)(1) of the Act indicates that subsections (c)(1)(A) and (B) prohibit BOCs from carrying out certain types of joint marketing activities ''[e]xcept as provided in [section 274(c)(2)].'' Therefore, while section 274(c)(1)(B) of the Act might otherwise be interpreted to prohibit a BOC from carrying out joint marketing activities with an electronic publishing joint venture, section 274(c)(2)(C) provides a clear exception that allows a BOC to engage in such activities. In particular, section 274(c)(2)(C) of the Act expressly permits a BOC participating in an electronic publishing joint venture to provide ''promotion, marketing, sales or advertising personnel and services'' to such joint venture.

187. Given the plain language of section 274(c)(2)(C), which allows a BOC participating in an electronic publishing joint venture to provide ''promotion, marketing, sales or advertising *personnel* and services'' to such joint venture, we agree with SBC that an electronic publishing joint venture may be staffed by BOC marketing and sales personnel. Moreover, we agree with NAA that use of the terms ''carry out'' in section 274(c)(1) and ''provide'' in section 274(c)(2)(C) was not intended to limit the services a BOC may perform for an electronic publishing joint venture. To the contrary, based on the more specific language of the statute, which allows BOC provision of marketing *personnel* as well as services, we conclude that section 274(c)(2)(C) contemplates a broader range of BOC marketing activities than those proscribed in section 274(c)(1) of the Act.

188. We also conclude that section 274(c)(2)(C) does not override the general prohibition in section 274(b)(6) of the Act on the use of ''name, trademarks, or service marks of an existing [BOC]'' by an electronic publishing joint venture and a BOC for the marketing of any product or service of the joint venture. Nothing in section 274 of the Act indicates that Congress intended section 274(c)(2)(C) to provide an exception to the broad restriction in section 274(b)(6) on the use of an existing BOC's name, trademarks and service marks. As such, to the extent a BOC engages in marketing activities permissible under section 274(c)(2)(C) of the Act, it must still comply with section 274(b)(6), as well as all other applicable provisions in section 274. For example, we agree with Bell Atlantic that a BOC is subject to the conditions in section 274(c)(2)(A) of the Act to the extent it performs inbound telemarketing activities for an electronic publishing joint venture.

D. Nondiscrimination Safeguards

1. Background

189. Section 274(d) requires a BOC ''under common ownership or control with a separated affiliate or electronic publishing joint venture [to] provide network access and interconnections for basic telephone service to electronic publishers at just and reasonable rates that are tariffed (so long as rates for such services are subject to regulation) and that are not higher on a per-unit basis than those charged for such services to any other electronic publisher or any separated affiliate engaged in electronic publishing.'' Prior to the Act, electronic publishing services were regulated as enhanced services and were subject to the nondiscrimination requirements established under the Commission's *Computer II* and *Computer III* regimes. Under *Computer III* and *Open Network Architecture*, BOCs have been permitted to provide enhanced services on an integrated basis. Moreover, BOCs have been required to provide at tariffed rates nondiscriminatory interconnection to unbundled network elements used to provide enhanced services.

190. We concluded in the *NPRM* that the *Computer III/ONA* requirements should continue to apply to the extent that such requirements are not inconsistent with the Act. We sought comment on whether the requirements of *Computer III/ONA* are consistent with the nondiscrimination requirements of section 274(d). To the extent that commenters argue that the *Computer III/ONA* requirements are inconsistent, we sought comment on whether and to what extent regulations are necessary to implement section 274(d).

191. We also tentatively concluded in the *NPRM* that section 274(d) prohibits BOCs under common ownership or control with a separated affiliate or electronic publishing joint venture from providing volume discounts, term discounts, or other preferential rates for basic telephone service to electronic publishers. In reaching this tentative conclusion, we reasoned that any such discount would be unlawful because section 274(d) prohibits BOCs from providing basic telephone services to some electronic publishers at rates that are ''higher on a per-unit basis'' than rates charged to other electronic publishers. We also tentatively concluded that section 274(d) does not require BOCs to file tariffs for services that no longer are subject to tariff regulation. Finally, we sought comment on the meaning of the requirement that access and interconnection be provided to electronic publishers ''at just and reasonable rates that are tariffed (so long as rates for such services are subject to regulation).''

2. Comments

192. The parties generally agree that the language of section 274(d) is sufficiently clear and that there is no need for the Commission to adopt additional rules to implement this provision of the statute. If the Commission nonetheless adopts rules to implement section 274(d), Cincinnati Bell would exempt ''any LEC with less

than 2% of the nation's access lines.'' MCI contends that the BOCs, in complying with section 274(d), must provide competitors with ''functional equality or service of equal quality relative to the services the BOCs provide their affiliates.''

193. In addition, the commenters generally agree that the *Computer III/ONA* nondiscrimination requirements are consistent with section 274(d), but they disagree on whether we should continue to apply these requirements to BOC intraLATA electronic publishing services. Some of the BOCs argue that application of the *Computer III/ONA* requirements is unnecessary because section 274 imposes a separate affiliate requirement on BOCs that is similar to the structural separation requirements of *Computer II.* Ameritech supports elimination of the *Computer III/ONA* requirements, claiming that they ''were, and are, simply a solution in search of a problem.'' Other commenters, in contrast, support retaining the *Computer III/ONA* requirements. Time Warner argues that, although the *Computer III/ONA* requirements ''have not been useful to enhanced service providers,'' these requirements will be more effective if combined with the structural separation and nondiscrimination requirements of section 274. MCI and AT&T observe that there is no evidence that Congress intended to displace the *Computer III/ONA* requirements for electronic publishing services, although MCI states that the requirements are ''inadequate to prevent discrimination.''

194. With regard to preferential rates, AT&T and Time Warner agree with our tentative conclusion that section 274(d) prohibits BOCs under common ownership or control with a separated affiliate or electronic publishing joint venture from providing volume and term discounts for network access and interconnections for basic telephone service to electronic publishers. They contend that, because the rates charged to one electronic publisher must not be higher on a ''per-unit basis'' than the rates charged to other electronic publishers, the statute requires uniform rates for such services. A number of BOCs, on the other hand, argue that volume and term discounts are permitted so long as the BOC offers the same discount to other electronic publishers on the same terms and conditions.

195. PacTel also argues that Congress did not define the term ''units'' for purposes of calculating per-unit rates. PacTel notes that it provides transport in units such as DS0, DS1, and DS3, which are priced differently based on its cost savings. PacTel further asserts that a group of minutes of use, when sold together as a block, could constitute a unit, which presumably would cost less than buying the minutes of use individually. It thus asserts that BOCs may continue to create reasonable units or groups of services, and must only offer such units to all electronic publishers at the same price.

196. Time Warner also argues that the requirement that rates be just and reasonable and nondiscriminatory should apply independently of any decision to reduce or eliminate tariff filing requirements. In order to enforce this requirement in the event of detariffing, Time Warner contends that the Commission should require BOCs to file with the Commission, and furnish to any electronic publisher upon request, a list of rates charged to electronic publishers. Several BOCs, on the other hand, argue that filing a rate list is unnecessary because, under section 274(b)(3)(B), if a particular service is not subject to tariffing requirements, the transaction must be reduced to writing and made publicly available. Moreover, some commenters note that, since section 274(d) does not require BOCs to file tariffs for services that are no longer subject to tariff filing requirements, a separate rate list requirement would be both inconsistent with the statute and overly regulatory.

197. PacTel and YPPA further argue that, once the rates for basic telephone service are no longer subject to regulation, section 274(d) is no longer applicable. These commenters contend that the Commission detariffs services when it determines that competition will keep rates just and reasonable, and therefore that the market, rather than tariff filings or other regulatory requirements, will ensure that rates are just and reasonable.

3. Discussion

198. We decline to adopt rules to implement section 274(d), based on the record before us; we will reconsider this decision if circumstances warrant. We find that the language of section 274(d) is sufficiently clear to ensure that BOCs provide unaffiliated electronic publishers with network access and interconnections for basic telephone service that are equal in quality, and at nondiscriminatory terms, relative to those it provides to electronic publishers affiliated with the BOC. We reject MCI's contention, however, that section 274(d) is a guarantee of functional equivalence for unaffiliated electronic publishers. We find that neither the statute nor its legislative history supports such an interpretation.

199. We also conclude that the *Computer III/ONA* requirements are consistent with the requirements of section 274(d). The parties have not indicated that there is any inconsistency between the nondiscrimination requirements of *Computer III/ONA* and section 274(d). Section 274(d), moreover, does not repeal or otherwise affect the *Computer III/ONA* requirements.

200. We recognize, however, that section 274(b) imposes certain structural separation requirements on BOC provision of electronic publishing services. Under our current regulatory regime, a BOC must comply fully with the *Computer II* separate subsidiary requirements in providing an information service to be relieved of the obligation to file a Comparably Efficient Interconnection (CEI) plan to provide that service on an integrated basis pursuant to *Computer III.* The record in this proceeding, however, is insufficient to support a finding, as NYNEX proposes, that BOC electronic publishing services that are offered through a section 274 separated affiliate satisfy all the relevant requirements of *Computer II.* Instead, we will consider this issue, as well as issues raised regarding the revision or elimination of the *Computer III/ONA* requirements, in the context of the *Computer III Further Remand* proceeding. We conclude, therefore, that *Computer II, Computer III,* and *ONA* requirements continue to govern the BOCs' provision of intraLATA electronic publishing services. We also note that the nondiscrimination requirements of section 274(d) apply to the BOCs' provision of both intraLATA and interLATA electronic publishing services.

201. We further conclude that section 274(d) prohibits preferential rates, including volume or term discounts. This section expressly requires that a BOC under common ownership or control with a separated affiliate or electronic publishing joint venture must provide other electronic publishers network access and interconnections for basic telephone service at rates ''that are not higher on a per-unit basis than those charged for such services'' to its own affiliates or other competing electronic publishers. We conclude from the plain language of the statute that Congress intended that BOCs under common ownership or control with a separated affiliate or electronic publishing joint venture must charge electronic publishers a uniform per-unit rate for a service. We find further support for this interpretation in a floor statement that Congressman Hyde made regarding the

purpose of the amendment that contained the ''not higher on a per-unit basis'' language:

> In the development of the manager's amendment to be offered by Chairman Bliley, the Judiciary Committee has worked closely with the Commerce Committee to improve H.R. 1555 in areas that are of particular concern to, and under the jurisdiction of the Judiciary Committee. * * * Under the manager's amendment, *the Bell companies will be required to provide services to small electronic publishers at the same per-unit prices that they give to larger publishers.* This will allow the small newspapers and other electronic publishers to bring the information superhighway to rural areas that might otherwise be passed by.

141 Cong. Rec. H8292–93 (daily ed. Aug. 2, 1995) (statement of Rep. Hyde, Chairman of the House Committee on the Judiciary) (emphasis added)

202. We conclude, however, that section 274(d) only prohibits discounts for network access and interconnections for basic telephone service used in the provision of electronic publishing services. Thus, under this section, BOCs may offer discounts for the provision of such services to an electronic publisher for use in any of its other non-electronic publishing activities. Otherwise, an entity that engages in electronic publishing as well as other activities would be prohibited from obtaining a volume discount or term discount for any basic telephone service it purchases for any of its activities, whether or not related to its electronic publishing services. There is no indication that Congress intended to prohibit such discounts for an electronic publisher's non-electronic publishing activities, thereby putting such electronic publisher at a competitive disadvantage vis-a-vis its non-electronic publishing competitors.

203. Moreover, we find that section 274(d) does not require a BOC under common ownership or control with a separated affiliate or electronic publishing joint venture to charge electronic publishers the same per-unit price for different services, particularly when those services use different facilities and impose different costs on the BOCs. Ignoring such cost disparities for providing different services would remove the incentive to use the most efficient service and could increase costs for all electronic publishers as well as hamper competition in the electronic publishing market.

204. We agree with PacTel that the statute does not define the term ''units,'' for purposes of calculating per-unit rates. BOCs, therefore, may charge a flat rate or, in the alternative, a rate based on usage for a service, each of which would have a different base unit. We reject, however, PacTel's argument that a group of minutes of use, for example, could constitute a unit, unless such a group of minutes is both the smallest unit of minutes offered to electronic publishers and accommodates the needs of small electronic publishers. In this manner, such a group of minutes would neither constitute a volume discount nor disadvantage small electronic publishers.

205. We also adopt our tentative conclusion that section 274(d) does not require BOCs to file tariffs for services that are not subject to rate regulation. Section 274(d) is clear that BOCs subject to the requirements in this section file tariffs for services only ''so long as rates for such services are subject to regulation.'' No commenter disagrees with this conclusion.

206. In addition, we reject the argument that, because competition will be sufficient to ensure that a detariffed service's rates are just and reasonable, section 274(d) is inapplicable to such services. We find that the ''just and reasonable'' and ''per-unit'' requirements in section 274(d) are independent of the requirement that rates be tariffed ''so long as rates for such services are subject to regulation.'' Thus, the section 274(d) nondiscrimination requirements will continue to apply, regardless of whether the service is tariffed or no longer subject to regulation, until the sunset date of this provision in February, 2000.

207. We decline at this time to address Time Warner's argument that the Commission should require BOCs to file rates for network access and interconnections for basic telephone service provided to electronic publishers even after elimination of tariff filing requirements. We note that BOCs currently are required to file state and federal tariffs for ONA services, which are the tariffed services generally used by enhanced service providers, such as electronic publishers, to provide their services to customers. The Commission will determine whether additional filing or regulatory requirements are necessary if and when a service that is currently subject to tariff filing requirements is detariffed. Further, several BOCs stated that section 274(b)(3)(B) eliminates the need for additional regulatory requirements because under that section, if a particular service is not subject to tariffing requirements, the transaction between a BOC and its separated affiliate or joint venture must be pursuant to a written contract that is publicly available. As discussed below, we are issuing a *Further NPRM* in this proceeding to seek additional comments on the meaning of section 274(b)(3)(B).

IV. Telemessaging

A. Application of Sections 260 and 272 to BOC InterLATA Telemessaging Services

1. Background

208. We stated in our *NPRM* that section 260 sets forth various requirements for the provision of telemessaging service by LECs subject to the requirements of section 251(c), *i.e.*, incumbent LECs. The Commission's current rules permit BOCs to provide telemessaging services on an integrated basis, subject to the *Computer III/ONA* requirements. Other LECs have been permitted to provide telemessaging services subject only to the requirements of sections 201 and 202, which apply to all common carriers, including the BOCs. The *NPRM* also recognized that section 260 does not distinguish between intraLATA and interLATA provision of telemessaging services. We therefore sought comment on whether section 260 applies to BOC provision of telemessaging services, both on an intraLATA and interLATA basis. We also noted that, in the *Non-Accounting Safeguards NPRM,* we tentatively concluded that telemessaging is an information service subject to the separate affiliate and nondiscrimination requirements of section 272 and, therefore, we tentatively concluded that BOC provision of interLATA telemessaging services is subject to the requirements of section 272 in addition to the requirements of section 260. We sought comment on whether, if we decided not to adopt this tentative conclusion, BOCs providing telemessaging services on either an intraLATA or interLATA basis would be subject only to the requirements of section 260.

2. Comments

209. Commenters generally agree that section 260 applies to all incumbent LEC provision of telemessaging, both on an intraLATA and interLATA basis. Commenters disagree, however, on whether BOC provision of interLATA telemessaging services is subject to both sections 272 and 260. MCI, U S WEST, and Voice-Tel state that BOC provision of interLATA services is subject to both sections 272 and 260, because telemessaging service is an ''information service'' and thus falls within the terms of section 272(a)(2)(C). BellSouth and PacTel agree with this point, but argue that Congress, in enacting a separate provision for telemessaging services, did not intend BOC provision of interLATA

telemessaging services to be subject to the requirements of section 272.

3. Discussion

210. We conclude that section 260 applies to all incumbent LEC provision of telemessaging services, both on an intraLATA and interLATA basis. We find that neither the statute nor its legislative history evinces an intent by Congress to distinguish between BOCs and other LECs, or between intraLATA and interLATA services. Moreover, because we concluded in the Commission's *Non-Accounting Safeguards Order* that telemessaging service is an ''information service,'' BOC provision of telemessaging service on an interLATA basis is subject to the requirements of section 272 in addition to the requirements of section 260.

B. Definition of ''Telemessaging Service''

1. Background

211. Section 260(c) defines ''telemessaging service'' as ''voice mail and voice storage and retrieval services, any live operator services used to record, transcribe, or relay messages (other than telecommunications relay services), and any ancillary services offered in combination with these services.'' We sought comment in the *NPRM* on whether rules are necessary to clarify any ambiguities in this definition. We also sought comment on the types of services contemplated by the term ''ancillary services.''

2. Comments

212. None of the commenters identifies any ambiguities in the definition of ''telemessaging service'' in section 260(c). Some commenters state generally that the language of section 260 is clear and that no rules are needed to implement this provision. ATSI states that ''ancillary services'' are ''all value-added services in addition to those primary [telemessaging] services, offered by telemessagers to the communications customer.'' ATSI lists specific examples, but recommends against establishing a comprehensive list of primary or ancillary telemessaging services, since new services are created as technology and consumer demands change.

3. Discussion

213. We conclude that the definition of ''telemessaging service'' in section 260(c) is sufficiently clear and therefore decline to establish an exclusive list of ''telemessaging services'' or ''ancillary services.'' We note that BellSouth asks us to clarify that live operator services do not fall within the Commission's definition of ''enhanced'' services, because they do not employ ''computer processing applications.'' *See* BellSouth at 26. We concluded in the *Non-Accounting Safeguards Order* that live operator services ''are an example of one area in which the 'information service' definition is broader than that of 'enhanced services.' '' *Non-Accounting Safeguards Order* at ¶§ 145 n.342. We will determine whether any individual service is a ''telemessaging service'' or ''ancillary service'' as necessary on a case-by-case basis. We note that BellSouth asks us to clarify that live operator services do not fall within the Commission's definition of ''enhanced'' services, because they do not employ ''computer processing applications.'' *See* BellSouth at 26. We concluded in the *Non-Accounting Safeguards Order* that live operator services ''are an example of one area in which the 'information service' definition is broader than that of 'enhanced services.' ''

C. Nondiscrimination Requirements

1. Section 260(a)(2) and Sections 201 and 202

a. Background

214. Section 260(a)(2) provides that an incumbent LEC ''shall not prefer or discriminate in favor of its telemessaging service operations in its provision of telecommunications services.'' We sought comment in the *NPRM* on the extent to which section 260(a)(2) imposes greater obligations on LECs providing telemessaging services than currently exist under sections 201 and 202 of the Act.

b. Comments

215. Some commenters assert that section 260(a)(2) imposes greater obligations on LECs providing telemessaging services than currently exist under sections 201 and 202 of the Act, based on the broad, unqualified language in section 260(a)(2). Some of the BOCs, however, disagree, asserting that section 260(a)(2) merely duplicates the requirements of sections 201 and 202 for incumbent LEC provision of telemessaging services. Voice-Tel contends that, in complying with section 260(a)(2), ''it is not sufficient for the interconnections offered to be comparable if the result is that the competitor is put at any disadvantage.''

c. Discussion

216. As noted above, section 260(a)(2) states that an incumbent LEC ''shall not prefer or discriminate in favor of its telemessaging service operations in its provision of telecommunications services.'' Section 202(a), in contrast, prohibits ''any unjust or unreasonable discrimination * * *, or * * * any undue or unreasonable preference or advantage'' by common carriers providing interstate communications services. Because the section 260(a)(2) nondiscrimination bar, unlike that of section 202(a), is not qualified by the terms ''unjust and unreasonable,'' we conclude that Congress did not intend section 260(a)(2) to be synonymous with the nondiscrimination standard in section 202(a), but intended a more stringent standard. This conclusion is consistent with our interpretation of similar language in sections 251(c)(2) and 272(c)(1). We therefore reject claims that section 260(a)(2) merely duplicates the nondiscrimination bar of section 202(a) for the provision of telemessaging services by incumbent LECs.

217. We also conclude that section 260(a)(2) is not a guarantee of functional equivalence for unaffiliated telemessaging providers, as Voice-Tel contends. We find that neither the statute nor its legislative history supports such an interpretation. We note that the Joint Explanatory Statement states only that section 260(a)(2) prohibits incumbent LECs ''from discriminating against nonaffiliated entities with respect to the terms and conditions of any network services they provide to their own telemessaging operations.'' To the extent that competitors require different telecommunications services than the LEC provides to its own telemessaging operations, we note that other nondiscrimination requirements in the Act and analogous state nondiscrimination laws may apply to such requests. In addition, the Commission's *ONA* rules require the BOCs and GTE to unbundle network services useful to enhanced service providers.

2. Section 260(a)(2) and *Computer III/ONA* Requirements

a. Background

218. We concluded in the *NPRM* that the nondiscrimination requirements of *Computer III/ONA* should continue to apply to the extent they are not inconsistent with section 260(a)(2). We sought comment on whether the nondiscrimination provisions of *Computer III/ONA* are consistent with section 260(a)(2), and whether these provisions should be applied only to the BOCs or to all incumbent LECs to fulfill the requirements of section 260(a)(2).

b. Comments

219. Most commenters agree that the *Computer III/ONA* nondiscrimination requirements are consistent with section 260(a)(2) and assert that these requirements should continue to apply to BOC intraLATA telemessaging services. MCI and AT&T observe that there is no evidence that Congress intended to displace the *Computer III/ONA* requirements for telemessaging services. Similarly, ATSI asserts that ''[s]ection 260 is not limited by existing rules or other provisions of the Act.'' The commenters disagree, however, on whether the current scope of the *Computer III/ONA* requirements should be extended to include all incumbent LECs, not just the BOCs. Cincinnati Bell asserts that the *Computer III/ONA* requirements should not be extended beyond their current scope, while PacTel and U S WEST argue that they should be extended to include all incumbent LECs. AT&T would extend the *Computer III/ONA* requirements to all incumbent LECs ''possess[ing] substantial market power as a result of [their] bottleneck control over local exchange facilities in a significant service area (*e.g.*, SNET, GTE, and other Tier I LECs),'' while USTA would exempt small and mid-sized LECs from these requirements.

220. Several commenters argue that the *Computer III/ONA* requirements should be revised or eliminated. Although MCI supports continued application of the *Computer III/ONA* requirements, it states that they ''are inadequate to prevent access discrimination.'' Ameritech supports elimination of the *Computer III/ONA* requirements, claiming that they ''were, and are, simply a solution in search of a problem.'' Bell Atlantic argues that the *Computer III/ONA* rules are unnecessary, given that price caps and sections 202(a) and 251 ''fully protect against discrimination.''

c. Discussion

221. We conclude that the *Computer III/ONA* requirements are consistent with the requirements of section 260(a)(2). We affirm our conclusion, therefore, that *Computer III/ONA* requirements continue to govern the BOCs' provision of intraLATA telemessaging services. In addition, we note that the Commission's *Computer II* requirements also continue to govern BOC provision of intraLATA information services, including telemessaging. We also note that the nondiscrimination requirements of section 260(a)(2) apply to the BOCs' provision of both intraLATA and interLATA telemessaging services, as well as other incumbent LECs' provision of telemessaging services. The parties have not indicated that there is any inconsistency between the nondiscrimination requirements of *Computer III/ONA* and section 260(a)(2). Section 260(a)(2), moreover, does not repeal or otherwise affect the *Computer III/ONA* requirements. We will consider in the Commission's *Computer III Further Remand* proceeding whether the *Computer III/ONA* requirements need to be revised or eliminated. For the same reason, we also decline to extend the *Computer III/ONA* requirements to entities other than BOCs, as recommended by some commenters.

3. Section 260(a)(2) and Adoption of Rules

a. Background

222. We sought comment in the *NPRM* on whether and what types of specific regulations may be necessary to implement section 260(a)(2).

b. Comments

223. The BOCs argue that the language of section 260(a)(2) is sufficiently clear and thus there is no need for the Commission to adopt rules to implement this provision. ATSI and Voice-Tel, on the other hand, argue that the Commission should adopt rules to implement section 260(a)(2). Voice-Tel states that Commission rules will ensure that complaints of discrimination are treated consistently and will help the Commission administer the Act efficiently. SBC argues that any rules adopted by the Commission must apply to all incumbent LECs, while Cincinnati Bell would exempt any LEC with less than two percent of the nation's access lines.

224. Voice-Tel argues that the ''broad language'' of the nondiscrimination requirement in section 260(a)(2) ''makes *any* discrimination in pricing or other behavior unlawful,'' including the marketing of voice messaging services. Some BOCs, on the other hand, argue that the scope of section 260(a)(2) is limited to the provision of ''telecommunications services,'' which, as defined in section 3(46) of the Act, does not include marketing-related activities.

225. Voice-Tel also would require all incumbent LECs to establish a separate affiliate to provide telemessaging services, in order to ensure that incumbent LECs comply with section 260(a)(2). Voice-Tel claims that nothing in the Act prevents the Commission from imposing this measure. The BOCs argue, in contrast, that, if Congress had intended to establish a separate affiliate requirement, it would have expressly said so, as it did for certain information services in section 272 and for electronic publishing services in section 274.

c. Discussion

226. We conclude that no rules are necessary to implement section 260(a)(2), based on the record before us; we will reconsider this decision if circumstances warrant. We therefore decline to adopt the specific rules proposed by certain commenters.

227. In particular, we decline to impose a separate affiliate requirement on all incumbent LECs providing telemessaging services. We find that the safeguards expressly established by Congress in section 260 are sufficient to guard against discriminatory behavior by incumbent LECs in favor of their own telemessaging operations. In addition, we find it significant that Congress limited the separate affiliate requirement in section 272 to BOC provision of interLATA information services (including interLATA telemessaging services), interLATA telecommunications services, and manufacturing, and in section 274 to BOC provision of electronic publishing services.

228. Further, we conclude that the scope of section 260(a)(2) is limited, by its terms, to the provision of ''telecommunications services,'' which, as defined in section 3(46) of the Act, does not include marketing-related activities. Accordingly, we reject Voice-Tel's argument that marketing is included within the scope of 260(a)(2).

V. Final Regulatory Flexibility Certification

229. The Commission certified in the *NPRM* that the conclusions it proposed to adopt would not have a significant economic impact on a substantial number of small entities because the proposed conclusions did not pertain to small entities. No comments were submitted in response to the Commission's request for comment on its certification. For the reasons stated below, we certify that the conclusions adopted herein will not have a significant economic impact on a substantial number of small entities. This certification conforms to the Regulatory Flexibility Act (RFA), as amended by the Small Business Regulatory Enforcement Fairness Act of 1996 (SBREFA).

230. The RFA provides that the term ''small business'' has the same meaning as the term ''small business concern''

under the Small Business Act. The Small Business Act defines a ''small business concern'' as one that is independently owned and operated; is not dominant in its field of operation; and meets any additional criteria established by the Small Business Administration (SBA). SBA has not developed a definition of ''small incumbent LECs.'' The closest applicable definition under SBA rules is for Standard Industrial Classification (SIC) code 4813 (Telephone Communications, Except Radiotelephone). The SBA has prescribed the size standard for a ''small business concern'' under SIC code 4813 as 1,500 or fewer employees.

231. The conclusions we adopt in this *Order* to implement section 274 apply only to the BOCs which, because they are large corporations that are dominant in their field of operation and have more than 1,500 employees, do not fall within the SBA's definition for a ''small business concern.'' The conclusions we adopt pursuant to section 260, however, apply to all incumbent LECs. Some of these incumbent LECs may have fewer than 1,500 employees and thus meet the SBA's size standard to be considered ''small.'' Because such incumbent LECs, however, are either dominant in their field of operations or are not independently owned and operated, consistent with our prior practice, they are excluded from the definition of ''small entity'' and ''small business concerns.'' Accordingly, our use of the terms ''small entities'' and ''small businesses'' does not encompass small incumbent LECs. Out of an abundance of caution, however, for regulatory flexibility analysis purposes, we will consider small incumbent LECs within this analysis and use the term ''small incumbent LECs'' to refer to any incumbent LECs that arguably might be defined by SBA as ''small business concerns.''

232. With respect to section 260, the most reliable source of information regarding the number of LECs nationwide of which we are aware appears to be the data that we collect annually in connection with the Telecommunications Relay Service (TRS). According to our most recent data, 1,347 companies reported that they were engaged in the provision of local exchange services. Although it seems certain that some of these carriers are not independently owned and operated, or have more than 1,500 employees, we are unable at this time to estimate with greater precision the number of LECs that would qualify as small business concerns under SBA's definition. Consequently, we estimate that there are fewer than 1,347 small incumbent LECs that may be affected by the conclusions adopted in this *Order*.

233. The Commission adopts the conclusions in this *Order* to ensure the prompt implementation of sections 260 and 274 of the Act. Section 260 permits incumbent LECs, including the BOCs, to provide telemessaging service subject to certain nondiscrimination safeguards. We certify that although there may be a substantial number of small incumbent LECs affected by the conclusions adopted in this *Order* to implement section 260, these conclusions will not have a significant economic impact on those affected small incumbent LECs.

234. We decline to elaborate on the definition of ''telemessaging service'' prescribed by Congress or to establish a list of services that fall within section 260(c), for the reasons set forth in Part IV.B. Because we take no action pursuant to section 260(c) in this *Order*, there will be no significant economic impact on a substantial number of small entities.

235. Our conclusion that section 260(a)(2) imposes a more stringent standard for determining whether discrimination is unlawful than that which already exists under sections 201 and 202 and applies to all incumbent LECs will not have a significant economic impact on small incumbent LECs. Incumbent LECs, including small incumbent LECs, are subject to other nondiscrimination requirements in the Act and state law and therefore already are required to respond to complaints of discriminatory behavior or limit their participation in discriminatory activities. We therefore find that the impact on incumbent LECs, including small incumbent LECs, of the more stringent standard of section 260(a)(2) will most likely be minimal.

236. Our decision not to extend the *Computer III/ONA* nondiscrimination requirements to all incumbent LECs, as well as our decision not to adopt rules implementing the nondiscrimination requirement of section 260(a)(2), as noted in Section IV.C, will prevent any significant economic impact on incumbent LECs, particularly small incumbent LECs. Thus, although their conduct will be subject to the requirements of section 260, small incumbent LECs will be spared the regulatory burdens and economic impact of complying with additional rules.

237. Section 274 of the Act allows BOCs to provide electronic publishing service disseminated by means of its basic telephone service only through a ''separated affiliate'' or an ''electronic publishing joint venture'' that meets the separation, joint marketing, and nondiscrimination requirements prescribed by that section. BOCs that were offering electronic publishing services at the time the 1996 Act was enacted have until February 8, 1997, to meet those requirements, which expire on February 8, 2000. Because section 274 applies only to BOCs, which, as noted above, do not fall within the SBA's definition for a ''small business concern,'' the conclusions we adopt in this *Order* implementing this section have no significant economic impact on a substantial number of small entities.

238. The Commission shall send a copy of this certification, along with this *Order*, in a report to Congress pursuant to the SBREFA, 5 U.S.C. 801(a)(1)(A). A copy of this certification will also be provided to the Chief Counsel for Advocacy of the Small Business Administration, and will be published in the Federal Register.

VI. Final Paperwork Reduction Analysis

239. As required by the Paperwork Reduction Act of 1995, Public Law 104–13, the *NPRM* invited the general public and the OMB to comment on proposed changes to the Commission's information collection requirements contained in the *NPRM*. Specifically, the Commission proposed to extend various reporting requirements, which apply to the BOCs under *Computer III*, to all incumbent LECs pursuant to section 260(a)(2). OMB approved all of the proposed changes to the Commission's information collection requirements in accordance with the Paperwork Reduction Act. In approving the proposed changes, OMB ''encourage[d] the [Commission] to investigate the potential for sunsetting these requirements as competition and other factors allow.''

240. In this *Order*, the Commission adopts none of the changes to our information collection requirements proposed in the *NPRM*. We therefore need not address the OMB's comment, although we note that our decision is consistent with the OMB's recommendation.

241. We conclude, however, that to the extent a BOC refers a customer to a separated affiliate, electronic publishing joint venture or affiliate during the normal course of its telemarketing operations, the BOC must refer that customer to all unaffiliated electronic publishers requesting the referral service, on nondiscriminatory terms. As part of this requirement, BOCs must provide the names of all such unaffiliated electronic publishers, as well as its own affiliated electronic

publishers, in random order, to the customer. Implementation of this requirement is subject to OMB approval as prescribed by the Paperwork Reduction Act.

VII. Ordering Clauses

242. Accordingly, *It is ordered* that pursuant to sections 1, 2, 4, 201, 202, 260, 274 and 303(r) of the Communications Act of 1934, as amended, 47 U.S.C. 151, 152, 154, 201, 202, 260, 274, and 303(r), the Report and Order is Adopted, and the clarification and interpretation contained herein will become effective March 24, 1997. The collection of information contained within is contingent upon approval by the OMB.

243. *It is further ordered* that the Secretary shall send a copy of this Report and Order, including the final regulatory flexibility certification, to the Chief Counsel for Advocacy of the Small Business Administration, in accordance with paragraph 605(b) of the Regulatory Flexibility Act, 5 U.S.C. 601 *et seq.*

Federal Communications Commission.

William F. Caton,

Acting Secretary.

Note: This Attachment will not appear in the Code of Federal Regulations.

Attachment—List of Commenters in CC Docket No. 96–152

Alarm Detection Systems, Inc.
Alarm Industry Communications Committee
Alert Holding Group, Inc.
Ameritech
Association of Directory Publishers (ADP)
Association of Telemessaging Services International (ATSI)
AT&T Corporation (AT&T)
Atlas Security Service, Inc.
Bell Atlantic Telephone Companies (Bell Atlantic)
BellSouth Corporation (BellSouth)
Checkpoint Ltd.
Cincinnati Bell Telephone (Cincinnati Bell)
Commercial Instruments & Alarm Systems, Inc.
Commonwealth Security Systems, Inc.
ElectroSecurity Corporation
Entergy Technology Holding Company
George Alarm Company, Inc.
Information Industry Association (IIA)
Joint Parties (Bell Atlantic and Newspaper Association of America)
MCI Telecommunications Corporation (MCI)
Merchant's Alarm Systems
Midwest Alarm
Morse Signal Devices
National Security Service
New York State Department of Public Service (New York Commission)
Newspaper Association of America (NAA)
NYNEX Corporation (NYNEX)
Pacific Telesis Group (PacTel)
Peak Alarm
People of the State of California/California PUC (California Commission)
Per Mar Security Services
Post Alarm Systems
Rodriguez, Francisco
Safe Systems
Safeguard Alarms, Inc.
SBC Communications, Inc. (SBC)
SDA Security Systems, Inc.
Security Systems by Hammond, Inc.
Sentry Alarm Systems of America, Inc.
Sentry Protective Systems
Smith Alarm Systems
Superior Monitoring Service, Inc.
SVI Systems, Inc.
Time Warner Cable (Time Warner)
United States Telephone Association (USTA)
U S West, Inc. (U S WEST)
Valley Burglar & Fire Alarm Co., Inc.
Vector Security
Voice-Tel
Wayne Alarm Systems
Yellow Pages Publishers Association (YPPA)

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