SEPARATE STATEMENT OF
COMMISSIONER KATHLEEN Q. ABERNATHY

Re: Section 272(b)(1)'s "Operate Independently" Requirement for Section 272 Affiliates; Petition of SBC for Forbearance from the Prohibition of Sharing Operating, Installation, and Maintenance Functions Under Sections 53.203(a)(2) and 53.203(a)(3) of the Commission's Rules and Modification of Operating, Installation, and Maintenance Conditions Contained in the SBC/Ameritech Merger Order; Petition of BellSouth Corp. for Forbearance from the Prohibition of Sharing Operating, Installation, and Maintenance Functions Under Section 53.203(a)(2)-(3) of the Commission's Rules; Review of Regulatory Requirements for Incumbent LEC Broadband Telecommunications Services, Report and Order and Memorandum Opinion and Order (adopted Mar. 11, 2004).

I support the Commission's decision to eliminate the prohibition on the sharing of operating, installation, and maintenance functions by Bell operating companies and their affiliates (the "OI&M rule"). I believe the costs of the OI&M rule clearly outweigh its benefits. If the Bell companies are going compete effectively in the market for long-distance services, including enterprise broadband services, they cannot be required to duplicate functions unnecessarily. The OI&M rule is not necessary to prevent anticompetitive conduct because we have preserved the prohibition on joint ownership of transmission and switching facilities and also maintained various non-structural safeguards. These safeguards include the requirements to conduct all transactions at arm's length and to disclose the details of such transactions on the Internet, as well as obligation to make OI&M services available to unaffiliated rivals on a nondiscriminatory basis. These measures are sufficient to ensure that the BOCs "operate independently" from their long-distance affiliates, as the statute requires (until this requirement sunsets pursuant to section 272(f)).

My only concern is the tension between this Order and the Commission's recent decision rejecting a request for forbearance from the OI&M rule.[1] Today, the Commission correctly concludes that the OI&M rule is not compelled by the language of section 272(b)(1); we are free to abandon it since other safeguards are sufficient to ensure that a BOC and its long-distance affiliate "operate independently." *See* Report and Order, ¶ 7. Four months ago, however, the Commission reached the opposite conclusion. The Commission held that section 10(d) precluded us from forbearing from the OI&M rule, on the theory that the rule was a "requirement" of section 271 and that section, in the Commission's view, has not yet been "fully implemented" (despite the fact that Verizon had already been granted section 271 authority in each of its states).[2] As my dissent pointed out, since the OI&M rule is not in fact a "requirement" of section 271,

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[1] *Petition of Verizon for Forbearance from the Prohibition of Sharing Operating, Installation, and Maintenance Functions Under Section 53.203(a)(2) of the Commission's Rules*, Memorandum Opinion and Order, 18 FCC Rcd 23525 (rel. Nov. 4, 2003) (*OI&M Forbearance Denial Order*).

[2] *OI&M Forbearance Denial Order*, 18 FCC Rcd at 23527, ¶ 8.

section 10(d) posed no bar to forbearance. While I am pleased that the Commission has now come around to recognize that the OI&M rule was but one choice among a range of permissible safeguards, I believe we should expressly overrule the earlier interpretation. The damage has been effectively undone in this context (since the rule change obviates the need for forbearance), but the Commission's erroneous conclusion that it cannot forbear from *any* rule adopted pursuant to section 271 or 251(c) prior to "full implementation" of those sections — even where the rule is not compelled by the statutory text — could prevent us from taking appropriate deregulatory action in future proceedings.