

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of
Accounting Safeguards
Under the Telecommunications Act of 1996:
Section 272(d) Biennial Audit Procedures
CC Docket No. 96-150

MEMORANDUM OPINION AND ORDER

Adopted: January 9, 2002

Released: January 10, 2002

By the Commission:

I. INTRODUCTION AND BACKGROUND

1. In this Order, we address the status of the audit reports filed under section 272(d) of the Communications Act of 1934, as amended (the Act). In particular, we deny the request of Verizon Communications, Inc. (Verizon) for confidential treatment of information contained in the section 272(d) audit report arising out of the first biennial audit.

2. Section 272 establishes certain structural, transactional, and nondiscrimination safeguards that govern the relationship between a Bell Operating Company (BOC) and its affiliate after the BOC receives authorization for providing in-region interLATA telecommunications services pursuant to section 271 of the Act. Section 272(d) requires a BOC (after receiving section 271 authorization) to obtain a joint Federal/State audit conducted by an independent auditor to determine whether the BOC complies with section 272 and the Commission's implementing regulations.

3. In a series of orders, the Commission promulgated regulations implementing the separate affiliate safeguards mandated by the statute. These regulations are intended to deter conduct that would

1 47 U.S.C. § 272.

2 The Commission considers a BOC's compliance with section 272 during the section 271 application process. See, e.g., Application of Bell Atlantic New York for Authorization under Section 271 of the Communications Act to Provide In-Region, InterLATA Service in the State of New York, CC Docket No. 99-295, Memorandum Opinion and Order, 15 FCC Rcd 3953, paras. 401-21 (1999).

3 See Accounting Safeguards Under the Telecommunications Act of 1996, Report and Order, 11 FCC Rcd 17359 (1996) (Accounting Safeguards Order), Second Order on Reconsideration, 15 FCC Rcd 1161 (2000); Implementation of the Non-Accounting Safeguards of Sections 271 and 272 of the Communications Act of 1934, as Amended, First Report and Order and Further Notice of Proposed Rulemaking, 11 FCC Rcd 21905 (1996) (Non-Accounting Safeguards Order), First Order on Reconsideration, 12 FCC Rcd 2297 (1997), Second Order on Reconsideration, 12 FCC Rcd 8653 (1997), aff'd sub nom. Bell Atlantic Telephone Companies v. FCC, 131 F.3d

provide an unfair competitive advantage to a BOC's newly established in-region interLATA operations, such as cost misallocation or discrimination in favor of the BOC's section 272 affiliate.<sup>4</sup> After notice and comment, the Commission adopted rules in the *Accounting Safeguards Order* governing the conduct of the section 272(d) biennial audit, the oversight of the independent auditor, and the filing of the audit report.<sup>5</sup> Subsequently, the audit staff of the Common Carrier Bureau (Bureau) and participating state commissions developed the general audit program in conjunction with the BOCs and other interested parties. The general audit program has been publicly available since 1997.<sup>6</sup>

4. On June 11, 2001, Verizon submitted its first section 272(d) biennial audit report, which it supplemented with additional information on June 18, 2001. Consistent with the relevant auditing standards, the final audit report provides facts concerning the compliance of several Verizon affiliates that were providing in-region interLATA telecommunications in New York pursuant to Verizon's section 271 authorization. With its submission, Verizon requested confidential treatment for information on twenty-eight of eighty-seven pages in the June 11, 2001 audit report and for information on twelve of forty-five pages in the June 18, 2001 supplement to the final audit report.<sup>7</sup> Thus, Verizon submitted two versions of its section 272(d) final audit report, i.e., a publicly available report with redactions and a version submitted under seal. In August 2001, AT&T Corporation (AT&T) and the Competitive Telecommunications Association (Comptel) submitted letters requesting access to the redacted information.<sup>8</sup>

## II. DISCUSSION

### A. Section 272(d) Audit Requirements

5. We deny Verizon's request for confidential treatment of the information contained in the final section 272(d) audit report.<sup>9</sup> Section 272(d)(1) requires the audit report to address a BOC's compliance with all of the separate affiliate safeguards. Section 272(d)(2) states that the independent auditor "shall submit the results of the audit to the Commission and to the State commission of each State in which the company audited provides service, which shall make such results available for public inspection."<sup>10</sup> The statute further states that "[a]ny party may submit comments on the final audit

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1044 (D.C. Cir. 1997), *Third Order on Reconsideration*, 14 FCC Rcd 16299 (1999); see also 47 C.F.R. §§ 32.27, 53.1-53.213, 64.901-64.904.

<sup>4</sup> See *Accounting Safeguards Order* at para. 13; see also *Non-Accounting Safeguards Order* at paras. 15-16.

<sup>5</sup> 47 C.F.R. §§ 53.209-213; see *Accounting Safeguards Order* at paras. 197-205.

<sup>6</sup> See Proposed Model for Preliminary Biennial Audit Requirements, *Public Notice*, 12 FCC Rcd 13132 (1997) (*Proposed Model Biennial Audit Requirements*).

<sup>7</sup> See Letter from Joseph DiBella, Regulatory Counsel, Verizon Communications, Inc. to Magalie Roman Salas, Secretary, FCC (June 11, 2001) (*Verizon June 11, 2001 Letter*); Letter from Gerald Asch, Director – Federal Regulatory, Verizon Communications, Inc. to Hugh Boyle, Chief, Audits Branch, Common Carrier Bureau, FCC (Aug. 15, 2001).

<sup>8</sup> Letter from Joan Marsh, Director, AT&T Corporation to Magalie Roman Salas, Secretary, FCC (Aug. 7, 2001) (*AT&T August 7, 2001 Letter*); Letter from Maureen Flood, Director, Competitive Telecommunications Association to Hugh Boyle, Chief, Audits Branch, Accounting Safeguards Division, FCC (Aug. 21, 2001) (*Comptel August 21, 2001 Letter*).

<sup>9</sup> By "final audit report," we mean the report submitted on June 11, 2001 and the supplemental report submitted on June 18, 2001. Together, the two filings comprise the "final audit report" addressing Verizon's compliance with the section 272 separate affiliate requirements.

<sup>10</sup> 47 U.S.C. § 272(d)(2). Congress directed both this Commission and the State commissions to make the audit results available for public inspection.

report.”<sup>11</sup> On its face, the plain language of section 272(d)(2) mandates public disclosure of the results of the audit, which are contained in the final audit report.

6. The results of the section 272(d) biennial audit are contained in a final audit report developed consistent with standard auditing procedures. Working under delegated authority, the Bureau developed the audit procedures to be performed by the independent auditor in consultation with the BOCs, state commissions, and other interested parties.<sup>12</sup> The Bureau sought comment on proposed section 272(d) audit procedures and revised the general audit program in response to suggestions from interested parties.<sup>13</sup> As a result of this consultation process, the Bureau selected the agreed-upon procedures (AUP) type of audit, which requires a report that presents the audit procedures and the auditor’s findings.<sup>14</sup> Standard auditing procedures for AUP engagements require the auditor to “report all findings” arising from its application of the audit procedures.<sup>15</sup> The AUP format necessarily requires disclosure of facts because the users of the report (i.e., the Commission, the state commissions, and the public) make judgments and determinations concerning the audit results and compliance with section 272. Making these judgments is not the responsibility or role of the independent auditor.<sup>16</sup> We disagree with Verizon that the information contained in the section 272(d) audit report “is not normally included in an audit report.”<sup>17</sup> Although some audit reports contain different or less information, other audit reports contain more.<sup>18</sup>

7. The purpose of the audit report is to assist the Commission, the state commissions, and the public in evaluating a BOC’s compliance with the section 272 separate affiliate requirements.<sup>19</sup>

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<sup>11</sup> *Id.*

<sup>12</sup> See 47 C.F.R. § 53.209(d) (delegating authority to the Bureau to establish a joint audit team and to oversee the conduct of the section 272(d) audits); *Accounting Safeguards Order* at para. 198.

<sup>13</sup> See *Proposed Model Biennial Audit Requirements*, 12 FCC Rcd at 13132a (noting that “a coalition of BOCs has submitted a model for the preliminary audit requirements”), 13133 (establishing a comment cycle on proposed section 272(d) audit procedures). In addition, after obtaining section 271 authorization, the Bureau, participating state commissions, and the recently-approved BOC meet to review the proposed audit requirements and further revise the section 272(d) audit program.

<sup>14</sup> See American Inst. of Certified Pub. Accountants, ATTESTATION STANDARDS: REVISION AND RECODIFICATION §§ 2.03, .24-.25, .31 (Jan. 2001) (AICPA ATTESTATION STANDARDS) (describing AUP engagements and reports); see also *Proposed Model Biennial Audit Requirements*, 12 FCC Rcd at 13134 (noting that the section 272(d) biennial audit will be performed as an AUP engagement).

<sup>15</sup> See AICPA ATTESTATION STANDARDS at § 2.25; see also *Proposed Model Biennial Audit Requirements*, 12 FCC Rcd at 13134 (noting that “the independent auditor must report all errors or discrepancies discovered while performing the AUP engagement”).

<sup>16</sup> See *Proposed Model Biennial Audit Requirements*, 12 FCC Rcd at 13134. The other type of compliance audit, i.e., examination engagements, requires the independent auditor to express an opinion concerning compliance based on the auditor’s own judgment. Although the auditing standards allow supplemental information to be included with examination engagement reports, such reports typically withhold the audit program, testing procedures, and other information required under our Part 53 audit rules. See 47 C.F.R. §§ 53.209-213; see also *Accounting Safeguards Order* at para. 201.

<sup>17</sup> See Verizon Letter at 2.

<sup>18</sup> Because Verizon is the first BOC to submit a section 272(d) audit report, there is no precedent for the type of information contained in the audit report required by section 272(d), other than the general categories established in the *Accounting Safeguards Order*. We expect to modify the section 272(d) audit procedures (and thus, the information contained in the audit report) as we learn from our experience.

<sup>19</sup> *Accounting Safeguards Order* at para. 197 (concluding that the purpose of the section 272(d) audit is to determine whether the BOCs and their separate affiliates are complying with the section 272 requirements); *Non-Accounting* (continued....)

Section 272(d) envisions that public comment better enables the Commission and states to make these determinations and therefore specifically provides for public comment on the audit report. However, for “any party” to offer meaningful comments on the audit findings, and thereby assist the Commission and states in evaluating compliance, the public must have access to sufficient information to assess whether a BOC is adhering to the section 272 structural, transactional, and nondiscrimination safeguards. When adopting rules governing the section 272(d) biennial audit, the Commission thus stated that the audit report “will become a single source for the audit findings” and expressed its desire that interested parties be able to “obtain this information without difficulty.”<sup>20</sup> Ensuring public disclosure of the information contained in the audit report therefore is fully consistent with the underlying purpose of the section 272(d) audit provisions.

8. Verizon’s request for confidential treatment reads the public comment process on the audit results out of the statute.<sup>21</sup> Allowing BOCs to withhold information from the final section 272(d) audit report would prevent parties from exercising their statutory right to comment on the audit results. Verizon requests confidential treatment for information relevant to its compliance with, among other things, the section 272(b)(1) requirement to operate independently, the section 272(b)(3) requirement to use separate employees, the section 272(b)(4) requirement addressing credit arrangements, the section 272(b)(5) and (c)(2) accounting requirements, the section 272(c)(1) nondiscrimination safeguards, and the section 272(e) nondiscrimination safeguards. The information at issue is not raw data, such as complete records of individual transactions, but rather aggregated information that summarizes and reformats detailed findings.<sup>22</sup> Without reviewing the information in the audit report, parties cannot reasonably be expected to evaluate and comment on Verizon’s compliance with these requirements. For example, parties cannot comment on Verizon’s compliance with the section 272(e)(1) nondiscrimination safeguards because Verizon requested confidential treatment of the information used to evaluate compliance, i.e., Verizon’s performance towards its own operations.<sup>23</sup> Similarly, without certain financial information, parties cannot ascertain whether Verizon’s affiliates paid the same amount for exchange access services as unaffiliated entities,<sup>24</sup> or determine whether Verizon’s affiliate received goods and services at preferential rates, terms, or conditions.<sup>25</sup> In addition, Verizon requested confidential treatment of portions

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*Safeguards Order* at para. 323 (concluding that the “broad audit requirement is intended to verify BOC compliance with the accounting and non-accounting requirements”).

<sup>20</sup> *Id.* at para. 200.

<sup>21</sup> See 47 U.S.C. § 272(d)(2) (stating “[a]ny party may submit comments on the final audit report.”).

<sup>22</sup> The Commission has stated that audit data in “aggregate form” is generally not protected from disclosure because it does not result in disclosure of competitively sensitive information. See Examination of Current Policy Concerning the Treatment of Confidential Information Submitted to the Commission, *Report and Order*, 13 FCC Rcd 24816, para. 55 (1998) (*Confidential Treatment Order*), order on reconsideration, 14 FCC Rcd 20128 (1999).

<sup>23</sup> See 47 U.S.C. § 272(e)(1); *Non-Accounting Safeguards Order* at para. 240; see also Verizon § 272(d) Audit Report at App. A, 36 (requesting redactions of Verizon’s provisioning and repair performance for its own operations). In this section, interested parties can only see the aggregate results for unaffiliated carriers. Evaluating compliance with the section 272(e) nondiscrimination safeguards requires, however, a comparison of the results for unaffiliated carriers with the results for Verizon’s own operations. Without knowing the results for Verizon’s own operations, parties simply cannot make a useful comparison.

<sup>24</sup> See 47 U.S.C. § 272(e)(3); *Non-Accounting Safeguards Order* at paras. 256-58; see also Verizon § 272(d) Audit Report at App. A, 48 (requesting redactions for the “Amount Recorded and Paid by Section 272 Affiliate” for exchange access services and local exchange services).

<sup>25</sup> See 47 U.S.C. § 272(c)(1) (establishing a nondiscrimination requirement); *Non-Accounting Safeguards Order* at para. 202 (concluding that a BOC must “provide to unaffiliated entities the same goods, services facilities, and information that it provides to its section 272 affiliate at the same rates, terms, and conditions.”); see also Verizon §

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of its responses to the independent auditor's findings, thus hampering parties' ability to evaluate the scope and seriousness of the facts in the audit report. The fact that some information in the audit report is accounting and financial information (e.g., the prices charged to Verizon's affiliate) does not sway our analysis. The public, the Commission, and the states need to review the pertinent accounting and financial information in the audit report to evaluate the BOC's compliance with the section 272 accounting requirements, including the duty to conduct all transactions with the affiliates at arms length.<sup>26</sup>

9. We disagree with Verizon that the information contained in the section 272(d) biennial audit report is protected from disclosure by another section in the Act, i.e., section 220(f). The biennial audit of a BOC's compliance with the section 272 separate affiliate requirements is conducted under the specific authority of section 272(d), not the general authority of section 220.<sup>27</sup> Thus, the specific audit and disclosure provisions of section 272(d) override the more general audit authority of section 220. In addition, we note that section 220 does not prevent disclosure of information gathered in audits; rather, it allows the Commission to disclose audit information pursuant to certain procedures.<sup>28</sup>

10. We further disagree with Verizon that section 272(d)(3) automatically prevents disclosure of the information contained in the final audit report merely because the information is gathered or derived from the independent auditor's workpapers.<sup>29</sup> Section 272(d)(3)(A) ensures that the Commission, the state commissions, and the auditor have access to the accounts and records of the BOC and its affiliates. Section 272(d)(3)(B) expressly authorizes access by the Commission and the state commissions to the "working papers and supporting materials" of the independent auditor.<sup>30</sup> Section 272(d)(3)(C) requires state commissions to "implement appropriate procedures to ensure the protection of any proprietary information" submitted to it during the audit.<sup>31</sup> None of the provisions of section

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272(d) Audit Report at App. A, 24-25 (requesting redactions for amounts billed by the BOC to the affiliate and the amount not paid by the affiliate).

<sup>26</sup> See 47 U.S.C. §§ 272(b)(5) (requiring all transactions between the BOC and the section 272 affiliate to be at arm's length and reduced to writing), 272(d)(1). In fact, Congress singled out the section 272 accounting safeguards as one purpose of the biennial audit. The statute states that the purpose of the audit is to determine whether the BOC complied with section 272 "and particularly whether such company has complied with the separate accounting requirements." For obvious reasons, parties need access to accounting and financial data to evaluate whether a BOC complied with the section 272 accounting requirements. See *AT&T August 7, 2001 Letter* at 2-3 (requesting information needed to evaluate compliance with the Commission's affiliate transactions rules); see also Verizon § 272(d) Audit Report at App. A, 23-24 (requesting redactions for transactions in which the BOC charged an amount other than fully distributed cost).

<sup>27</sup> See *Accounting Safeguards Order* at para. 203 (declining to order an annual audit "under our general accounting powers").

<sup>28</sup> Section 220(f) prevents disclosure of information gathered during audits pursuant to section 220 except as directed by the Commission or a court. 47 U.S.C. § 220(f); see *Qwest Communications International, Inc. v. FCC*, 229 F.3d 1172, 1178-79 (2000) (*Qwest Communications*). Disclosure here of the information at issue is consistent with section 220(f).

<sup>29</sup> See *Verizon June 11, 2001 Letter* at 1-2.

<sup>30</sup> Without the express authorization under section 272(d)(3)(B), the independent auditor might attempt to deny access to its workpapers. See American Inst. of Certified Pub. Accountants, WORKING PAPERS: AUDITING INTERPRETATIONS OF SECTION 339, AUI § 339.01-.04, .11-.15. Denying access to Federal and state authorities could impair the evaluation of the audit.

<sup>31</sup> See 47 U.S.C. § 272(d)(3)(C). The requirement for state commissions to implement procedures for protecting proprietary information applies to the auditor's workpapers (and supporting material therein), not the results of the audit. In the *Accounting Safeguards Order*, the Commission concluded that the "[w]orkpapers related to the biennial audits, including material obtained from the examined entities, will receive confidential treatment consistent

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272(d)(3) classify information as proprietary or confidential. Nowhere does section 272(d)(3) state, for example, that information contained in the independent auditor's workpapers is *per se* confidential or that a certain type of information (e.g., affiliate transactions data) is *per se* proprietary. As stated in the *Accounting Safeguards Order*, the independent auditor's workpapers – not the audit report itself – receive confidential treatment in accordance with our usual processes and procedures.<sup>32</sup> Verizon's view would render the final audit report useless because the report would (as all audit reports do) contain information also found in the auditor's workpapers and Verizon would automatically exempt such information from disclosure. This is not a sensible construction of the section 272(d) audit requirements.

11. We are not making public any of the independent auditor's workpapers with this action. We are only releasing information contained in the final audit report that is derived from some selected workpapers so that we can implement section 272(d)(2)'s requirement to make the audit results available for public inspection. Even then, the information being released is in an aggregated format that would raise no competitive harm issues even in the absence of section 272(d)'s express mandate for disclosure.<sup>33</sup> Auditing industry standards define workpapers as “records kept by the auditor of the procedures applied, the tests performed, the information obtained, and the pertinent conclusions reached in the engagement.”<sup>34</sup> For the section 272(d) biennial audits, the workpapers contain, among other things, the following detailed information: (i) balance sheets, general ledgers, and detailed fixed asset listings of the section 272 affiliates; (ii) the section 272 affiliates' written accounting procedures and policies; (iii) the minutes of the board of director's meetings for the BOCs and its affiliates; (iv) debt agreements of the affiliates; (v) lease agreements of the affiliates; and (vi) the BOC's written procurement procedures, practices, and policies.<sup>35</sup> This information is summarized and aggregated in the audit report itself.<sup>36</sup> Although the detailed information contained in the workpapers is critical for ensuring the audit was performed properly, it is generally more than what is required to evaluate a BOC's compliance.<sup>37</sup> Congress intended for the audit

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with section 220(f) and the Commission's policy for Part 64 audits.” *Accounting Safeguards Order* at para. 204. In the context of a joint Federal/State audit, this requirement is needed to facilitate access to information during the audit by state commissions and to ensure consistent treatment of information by Federal and state authorities. *See id.* at para. 204 (“[a]ny State commission having access to the audit workpapers should have provisions in place to ensure the protection of proprietary information as required by section 272(d)(3)(C)”). As noted below, the Commission has discretionary authority to release information under section 220(f). *See infra* para. 14.

<sup>32</sup> *Accounting Safeguards Order* at para. 204; *see id.* at n. 509 (noting that section 272(d)(2) requires the results of the final audit report “be made available for public inspection”). We may also release more detailed information contained in the workpapers under certain circumstances (e.g., the need to facilitate enforcement action). *See Qwest Communications*, 229 F.3d at 1180.

<sup>33</sup> *See Confidential Treatment Order* at para. 55 (stating that audit data in “aggregate form” is generally not protected from disclosure).

<sup>34</sup> American Inst. of Certified Pub. Accountants, WORKING PAPERS, AU § 339.03; *see also* AICPA ATTESTATION STANDARDS at § 1.101. The AICPA standards provide several examples, including audit programs, analyses, memoranda, letters of representation, schedules, and commentaries. *Id.* A standard audit textbook states that workpapers “contain virtually everything involved in the audit.” Arens, Alvin A. and Loebbecke, James K., AUDITING: AN INTEGRATED APPROACH (7<sup>th</sup> ed. 1997).

<sup>35</sup> *See* VZ Section 272(d) Audit Report at App. A, 5, 7, 9, 12, 25, and 27. When the independent auditor uses the phrase “we obtained” in the audit report, that means the independent auditor obtained information for inclusion in its workpapers.

<sup>36</sup> *See, e.g., id.* at 3 (describing the corporate reporting relationship of VZ's section 272 affiliates), 5 (summarizing financial information of VZ's section 272 affiliates), 7 (describing the accounting systems and procedures of VZ's section 272 affiliates).

report to serve that purpose, and for Federal/State oversight of the audit process to ensure the public receives the results of the audit.

12. By adhering to the statutory requirement for disclosing the audit results, we are not deviating from our general policy concerning audits and information obtained during audits conducted under section 220.<sup>38</sup> As Verizon notes, the Commission codified its general policy governing the confidential nature of “[i]nformation submitted in connection with audits, investigations, and examinations of records pursuant to 47 U.S.C. § 220.”<sup>39</sup> The Commission and the state commissions did not conduct this audit pursuant to section 220, but rather under the specific authority granted in section 272(d) – authority that also requires public comment on the results of the audit. The broad section 272(d) audit requirement and the mandatory public comment process are critical components in ensuring compliance with the separate affiliate safeguards and promoting competition in the market for in-region interLATA telecommunications.<sup>40</sup> Indeed, the heightened transparency between the BOC and its affiliate is intended to establish a level playing field in the long distance market.

### **B. Verizon’s Showing Under the Commission’s Rules**

13. As explained below, we decline to grant Verizon’s request for confidential treatment under our rules. We base confidentiality determinations under section 0.459 on Exemption 4 of the Freedom of Information Act (FOIA),<sup>41</sup> which permits us to withhold “trade secrets and commercial or financial information obtained from a person and privileged or confidential.” Under Exemption 4 of the FOIA, commercial or financial materials are held to be confidential when disclosure would be likely to substantially harm the competitive position of the submitter.<sup>42</sup> It is the submitter’s responsibility to explain the degree to which the information is commercially-sensitive (or contains trade secrets) and the manner in which the subject data could be used by competitors to inflict substantial competitive harm.<sup>43</sup> Without such information, the Commission cannot conduct a reasoned analysis as to whether materials submitted in confidence may, in fact, be properly withheld under Exemption 4.

14. The Commission may, of course, release information that is commercially sensitive or contains trade secrets under certain circumstances. The discretionary authority contained in section

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<sup>37</sup> Some information contained in the auditor’s workpapers may arguably be competitively sensitive (e.g., minutes of the board of directors meetings in which marketing strategies or competitive abilities are discussed). Even assuming such information would be competitively sensitive, nothing in this decision allows access to this type of information.

<sup>38</sup> See *Confidential Treatment Order* at paras. 54-55 (addressing the Commission’s general policy regarding audit information).

<sup>39</sup> 47 C.F.R. 0.457(d)(1)(iii).

<sup>40</sup> See *Non-Accounting Safeguards Order* at para. 323 (concluding that the “broad audit requirement is intended to verify BOC compliance with the accounting and non-accounting requirements of section 272”); *Accounting Safeguards Order* at para. 197; see also Application by Bell Atlantic New York for Authorization Under Section 271 of the Communications Act To Provide In-Region InterLATA Service in the State of New York, *Memorandum Opinion and Order*, 15 FCC Rcd 3953, para. 416 (1999) (noting use of the section 272(d) audit for post-entry oversight); In the Matter of Regulatory Treatment of LEC Provision of Interexchange Services Originating in the LEC’s Local Exchange Area, *Second Report and Order in CC Docket No. 96-149 and Third Report and Order in CC Docket No. 96-61*, 12 FCC Rcd 15756 (1997) (noting use of the section 272(d) audit to detect potential “predatory behavior”).

<sup>41</sup> 5 U.S.C. § 0.552(b)(4).

<sup>42</sup> See *National Parks and Conservation Ass’n v. Morton*, 498 F.2d 765, 770 (D.C. Cir. 1974).

<sup>43</sup> See 47 C.F.R. §§ 0.459(b)(3), (b)(5).

220(f), for example, permits the Commission to disclose information gathered in audits. As the *Qwest Communications* court held, the Commission's discretionary authority under section 220(f) to disclose audit information is consistent with the Trade Secrets Act.<sup>44</sup> The issue before us similarly supports disclosure because section 272(d) expressly mandates public release. Indeed, congressional intent to disclose the section 272(d) audit results is explicit.<sup>45</sup> We therefore conclude that the disclosure called for under section 272(d) is consistent with the Trade Secrets Act and the FOIA.

15. With respect to Verizon's request for confidential treatment, we note that Verizon has not attempted to support its claim of confidentiality for each of the forty pages for which it requested confidential treatment. Instead, Verizon argues generally that "[i]f competitors were provided this information, it would allow them to evaluate the present and future plans of Verizon's long distance affiliates, giving them insight into the affiliates' financial status, market plans, growth potential, and technical capabilities."<sup>46</sup> We have difficulty evaluating Verizon's claim because Verizon only refers generally to its redactions in the audit report and does not explain how specific information at issue (e.g., number of employees, average repair intervals, etc) could cause competitive harm.<sup>47</sup> We note that Verizon has declined the opportunity to respond to the issues raised by AT&T.<sup>48</sup> Still, Verizon does present three more specific arguments. For the reasons explained below, we deny Verizon's request for confidential treatment under section 0.459 of our rules.

16. First, Verizon contends that knowledge of the affiliate's financial position, the types of services bought by the affiliate from the BOC, and the amount the affiliate pays for goods and services purchased from affiliated and non-affiliated vendors might provide competitors a negotiating advantage in certain circumstances.<sup>49</sup> The Commission's rules already require Verizon to publicly disclose information concerning the goods and services a BOC's section 272 affiliate buys from the BOC.<sup>50</sup> The purpose of the existing section 272(b)(5) disclosure requirement is to ensure that the BOC's affiliate does not obtain preferential rates, terms, or conditions to goods and services provided by the BOC. With the required disclosures and the information in the section 272(d) audit report, parties can evaluate their own circumstances and seek redress in the event of potential discrimination. The information about the section 272 affiliate's financial position is at an aggregated level and is needed to evaluate compliance with the

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<sup>44</sup> 18 U.S.C. § 1905; *see Qwest Communications*, 229 F.3d at 328-31. The Trade Secrets Act makes it a misdemeanor for any agency employee to "make[e] known in any manner or to any extent not *authorized by law* any information coming to him in the course of his employment . . . concern[ing] or relat[ing] to trade secrets" and related confidential data. 18 U.S.C. § 1950 (emphasis added). The *Qwest Communications* court found that the Act and the Commission's regulations satisfied the "authorized by law" requirement. *Qwest Communications*, 229 F.3d at 328-31.

<sup>45</sup> As discussed above, section 272(d)(2) requires the independent auditor to submit the "results of the audit to the Commission and to the State commission of each State in which the company audited provides service, *which shall make such results available for public inspection.*" 47 U.S.C. § 272(d)(2) (emphasis added).

<sup>46</sup> Verizon Letter at 4.

<sup>47</sup> *Id.* at 3 (stating that "Verizon requests that the information marked as 'proprietary' in the attached redacted versions of the audit report and of Verizon's comments be treated as confidential").

<sup>48</sup> In its letter, AT&T explains that it needs access to the redacted information to offer meaningful comments on the report. *See AT&T August 7, 2001 Letter* at 2-3.

<sup>49</sup> Verizon Letter at 4.

<sup>50</sup> The Commission's rules implementing section 272(b)(5) require a BOC's section 272 affiliate to disclose the rates, terms, conditions, and other information needed to make a purchasing decision. *See* 47 C.F.R. 53.203(e); *see also* Application of BellSouth Corporation, BellSouth Telecommunications, Inc., and BellSouth Long Distance, Inc. or Provision of In-Region, Inter-LATA Services in Louisiana, *Memorandum Opinion and Order*, 13 FCC Rcd 20599, paras. 332-39 (1998) (*Second BellSouth Louisiana Order*).



section 272 accounting safeguards. The references to third-party vendors in the section 272(d) audit report exist only because the independent auditor could not confirm that certain assets were obtained independently of the BOC. Because the information referred to in Verizon's request is either required to be disclosed under the Commission's rules or disclosed at an aggregated level, we decline to grant Verizon's request for confidential treatment.

17. Second, Verizon argues that competitors could develop marketing strategies and plans based on knowledge of Verizon affiliates' success in attracting customers and processing orders. None of the information contained in the audit report, however, describes Verizon's long distance marketing plans, its advertising program, or its pricing strategies. With respect to "processing orders," there is some aggregated performance measurement information concerning the quality of service experienced by Verizon's affiliate and retail operations.<sup>51</sup> As noted earlier, these performance data are necessary to evaluate Verizon's compliance with the section 272 nondiscrimination safeguards. Moreover, this type of operational data is publicly disclosed in other contexts.<sup>52</sup> For these reasons, we decline to grant confidential treatment of the information contained in the section 272(d) audit report.

18. Finally, Verizon contends that long distance affiliates do not have access to similar information about their competitors. At the outset, we note that Verizon and its affiliates will receive similar information about certain competitors; namely, other BOCs. Although similar information is not available about all Verizon's long distance competitors (e.g., those without dominant carrier affiliates), we conclude that congressional intent for transparency is clear. Not only did Congress require a publicly available audit report disclosing the results of the section 272(d) audit, but Congress also required public disclosure of information about all transactions between the BOCs and their section 272 affiliates.<sup>53</sup> As noted elsewhere, the BOCs are dominant providers of certain telecommunications services, and the section 272 requirements are intended to deter misuse of that position and thereby assure a level playing field.<sup>54</sup> Thus, we are not persuaded to grant confidential treatment of the information in the section 272(d) audit report on the grounds that Verizon and its affiliates do not receive information about other long distance providers.

19. We believe that any potential harm from disclosure of aggregated information used to evaluate Verizon's compliance with section 272 is eliminated because the information in the audit report is already dated. As Verizon points out, the long distance market is highly competitive and consumers frequently change long distance providers.<sup>55</sup> All of the information contained in the audit report is for the audit period, i.e., January 2000 through December 2000.

20. For the foregoing reasons, we decline to grant Verizon's request for confidential

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<sup>51</sup> See Verizon § 272(d) Audit Report at App. A, 33-37 (describing performance measurements program and listing aggregated results for Verizon and non-affiliated carriers).

<sup>52</sup> See Applications of GTE Corporation, Transferor, and Bell Atlantic Corporation, Transferee, For Consent to Transfer Control of Domestic and International Sections 214 and 310 Authorizations and Application to Transfer Control of a Submarine Cable Landing License, CC Docket No. 98-184, *Memorandum Opinion and Order*, 15 FCC Rcd 14032, Appendix D at Attach. A (2000) (*Bell Atlantic/GTE Merger Order*) (describing Carrier-to-Carrier Performance Plan). In its Carrier-to-Carrier Performance Plan, Verizon reports on a monthly basis its service quality provided to its own retail operations and to unaffiliated carriers. The wholesale service quality provided to unaffiliated carriers is compared to the quality Verizon provides its own retail operations (and sometimes its separate affiliate). Depending on the result of the comparison, Verizon could incur payment obligations to the U.S. Treasury under the *Merger Conditions*.

<sup>53</sup> See 47 U.S.C. § 272(b)(5).

<sup>54</sup> See *Non-Accounting Safeguards Order* at paras. 9-18.

<sup>55</sup> Verizon Letter at 3.

treatment of the information contained in the final section 272(d) audit report.

### C. Other Issues

21. As a final matter, we conclude that Verizon does not provide a satisfactory explanation of how information contained in the audit report would be barred from disclosure by section 222 of the Act or the Commission's rules for customer proprietary network information (CPNI).<sup>56</sup> Verizon argues that "most" of the information contained in the audit report is CPNI, but does not provide an explanation or description of which information could fall within the scope of section 222 or the Commission's CPNI rules. Without more information, we cannot evaluate Verizon's claim. We note, however, that section 222(c)(1) prohibits disclosure of CPNI "[e]xcept as required by law."<sup>57</sup> As discussed above, section 272(d) requires public disclosure of the information contained in the audit report.

### III. ORDERING CLAUSES

22. Accordingly, IT IS ORDERED, pursuant to sections 4(i), 220, and 272(d) of the Act, 47 U.S.C. §§ 4(i), 220, and 272(d), that Verizon's request for confidential treatment of the section 272(d) audit report, as noted and described herein, IS DENIED for the reasons indicated in this Order.

23. IT IS FURTHER ORDERED, pursuant to sections 4(i), 220, and 272(d) of the Act, 47 U.S.C. §§ 4(i), 220, and 272(d), that the unredacted version of the final section 272(d) audit report be filed in this docket within ten days, subject to paragraph 24 below.

24. IT IS FURTHER ORDERED, pursuant to 0.459(g) of the Commission's rules, 47 C.F.R. § 0.459(g), that Verizon has five working days from telephone notice of decision to seek a stay of this decision. If Verizon seeks a judicial stay, the information in the section 272(d) audit report for which confidentiality is requested will be treated as confidential until a court acts on any timely motion for a stay.

FEDERAL COMMUNICATIONS COMMISSION

Magalie Roman Salas  
Secretary

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<sup>56</sup> *Verizon June 11, 2001 Letter* at 3.

<sup>57</sup> 47 U.S.C. § 222(c)(1).