Inc., 2100 M Street, NW., Suite 140, Washington, DC 20037. Comments and reply comments will be available for public inspection during regular business hours in the FCC Reference Center, 1919 M Street, NW., Room 239, Washington, DC 20554.

90. In order to facilitate review of comments and reply comments, both by parties and by Commission staff, we require that comments be no longer than thirty-five (35) printed pages and reply comments be no longer than twenty-five (25) printed pages. Page limits do not include proposed rules, which parties are encouraged to submit. Comments and reply comments must include a short and concise summary of the substantive arguments raised in the pleading. Comments and reply comments must also comply with Section 1.49 and all other applicable sections of the Commission's Rules. We also direct all interested parties to include the name of the filing party and the date of the filing on each page of their comments and reply comments. Comments and reply comments must clearly identify the specific portion of this Notice to which a particular comment or set of comments is responsive. If a portion of a party's comments does not fall under a particular topic listed in the Table of Contents of this Notice, such comments must be included in a clearly labelled section at the beginning or end of the filing. Parties may not file more than a total of ten (10) pages of *ex parte* submissions, excluding cover letters. This 10 page limit does not include: (1) Written *ex parte* filings made solely to disclose an oral *ex parte* contact; (2) written material submitted at the time of an oral presentation to Commission staff that provides a brief outline of the presentation; or (3) written materials filed in response to direct requests from Commission staff. *Ex parte* filings in excess of this limit will not be considered as part of the record in this proceeding.

91. Parties are also asked to submit comments and reply comments on diskette. Such diskette submissions would be in addition to and not in lieu of the formal filing requirements addressed above. Parties submitting diskettes should submit them to Janice Myles of the Common Carrier Bureau, 1919 M Street, NW., Room 544, Washington, DC 20554. Such submission should be on a 3.5 inch diskette formatted in an IBM compatible form using MS DOS 5.0 and WordPerfect 5.1 software. The diskette should be submitted in ''read only'' mode. The diskette should be clearly labelled with the party's name, proceeding, type of pleading (comment or reply comments) and date of submission. The diskette should be accompanied by a cover letter.

92. Written comments by the public on the proposed and/or modified information collections are due on September 4, 1996. Written comments must be submitted by the Office of Management and Budget (OMB) on the proposed and/or modified information collections on or before September 27, 1996. In addition to filing comments with the Secretary, a copy of any comments on the information collections contained herein should be submitted to Dorothy Conway, Federal Communications Commission, Room 234, 1919 M Street, NW., Washington, DC 20554, or via the Internet to dconway@fcc.gov and to Timothy Fain, OMB Desk Officer, 10236 NEOB, 725—17th Street, NW., Washington, DC 20503 or via the Internet to fain__t@al.eop.gov.

IX. Ordering Clauses

93. Accordingly, *it is ordered* that pursuant to sections 1, 4, 260, 274, 275, and 303(r) of the Communications Act of 1934, as amended, 47 U.S.C. §§ 151, 154, 260, 274, 275, and 303(r), a Notice of Proposed Rulemaking is hereby Adopted.

94. *It is Further Ordered* that, the Secretary shall send a copy of this Notice of Proposed Rulemaking, including the regulatory flexibility certification, to the Chief Counsel for Advocacy of the Small Business Administration, in accordance with paragraph 603(a) of the Regulatory Flexibility Act, 5 U.S.C. 601 *et seq.* (1981).

Federal Communications Commission.

William F. Caton,

Acting Secretary.

[FR Doc. 96–19136 Filed 7–25–96; 8:45 am]

BILLING CODE 6712–01–P

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47 CFR Chapter I

[CC Docket No. 96–149, FCC 96–308]

Implementation of the Non-Accounting Safeguards of Sections 271 and 272 of the Communications Act of 1934, as Amended; and Regulatory Treatment of LEC Provision of Interexchange Services Originating in the LEC's Local Exchange Area

AGENCY: Federal Communications Commission.

ACTION: Proposed rule.

SUMMARY: The Commission is issuing this Notice of Proposed Rulemaking seeking comment on proposed regulations to implement, and, where necessary, to clarify the non-accounting separate affiliate and nondiscrimination safeguards prescribed by Congress in section 272 of the Telecommunications Act of 1996. Congress enacted these safeguards to help prevent Bell Operating Companies (BOCs) from improperly using their market power in the local telephone market to gain an unfair advantage over their rivals in the in-region interLATA service markets and certain other businesses, such as the manufacturing of telecommunications equipment. These safeguards are intended to encourage the development of robust competition in all telecommunications markets. The Commission also seeks comment on whether to relax the dominant carrier classification that currently applies to the (BOCs) provision of in-region, interstate, domestic interLATA services, as well as whether it should modify its existing rules for regulating independent local exchange carriers' (LECs) provision of interstate, interexchange services in areas where those LECs provide local telephone service. The Commission also considers whether to apply the same regulatory classification to BOC and independent LEC provision of in-region international service as the Commission adopts for their provision of in-region, interstate, domestic, interLATA services and in-region, interstate, domestic, interexchange services, respectively.

DATES: Comments are due on or before August 15, 1996 and Reply Comments are due on or before August 30, 1996. Written comments by the public on the proposed and/or modified information collections are due August 15, 1996. Written comments must be submitted by the Office of Management and Budget (OMB) on the proposed and/or modified information collections on or before September 27, 1996.

ADDRESSES: Comments and reply comments should be sent to Office of the Secretary, Federal Communications Commission, 1919 M Street, NW., Room 222, Washington, DC 20554, with a copy to Janice Myles of the Common Carrier Bureau, 1919 M Street, NW., Room 544, Washington, DC 20554. Parties should also file one copy of any documents filed in this docket with the Commission's copy contractor, International Transcription Services, Inc., 2100 M Street, NW., Suite 140, Washington, DC 20037. In addition to filing comments with the Secretary, a copy of any comments on the information collections contained herein should be submitted to Dorothy Conway, Federal Communications

Commission, Room 234, 1919 M Street, NW., Washington, DC 20554, or via the Internet to dconway@fcc.gov, and to Timothy Fain, OMB Desk Officer, 10236 NEOB, 725–17th Street, NW., Washington, DC 20503 or via the Internet to fain—t@al.eop.gov.

FOR FURTHER INFORMATION CONTACT: Melissa Waksman, Attorney, Common Carrier Bureau, Policy and Program Planning Division, (202) 418–1580, or Radhika Karmarkar, Attorney, Common Carrier Bureau, Policy and Program Planning Division, (202) 418–1580. For additional information concerning the information collections contained in this NPRM 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 Notice of Proposed Rulemaking adopted July 17, 1996 and released July 18, 1996 (FCC 96–308). This NPRM contains proposed 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. The full text of this Notice of Proposed Rulemaking is available for inspection and copying during normal business hours in the FCC Reference Center (Room 239), 1919 M St., NW., Washington, DC. The complete text also 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.

Paperwork Reduction Act

This NPRM contains either a proposed or modified information collection. The Commission, as part of its continuing effort to reduce paperwork burdens, invites the general public and the Office of Management and Budget (OMB) to comment on the information collections contained in this NPRM, as required by the Paperwork Reduction Act of 1995, Public Law No. 104–13. Public and agency comments are due at the same time as other comments on this NPRM; OMB notification of action is due September 27, 1996. Comments should address: (a) Whether the proposed 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: None.

Title: Implementation of the Non-Accounting Safeguards of Sections 271 and 272 of the Communications Act of 1934, as amended; and Regulatory Treatment of LEC Provision of Interexchange Services Originating in the LEC's Local Exchange Area.

Form No.: N/A.

Type of Review: New collection.

Information collection	Number of respondents (approx.)	Estimated time per response (hours)	Total annual burden (hours)
Network disclosure	5	48	240
Installation and maintenance reporting—timeliness	5	8	40
Installation and maintenance reporting—quality	5	1	5
Procurement procedure	5	2	10
Nondiscriminatory information provision	5	36	180
Third party reporting, compliance monitoring, and other information collection	5	16	80

Total Annual Burden: 555 hours.

Respondents: Bell Operating Companies.

Estimated costs per respondent: $0.

Needs and Uses: The NPRM seeks comment on a number of issues, the result of which could lead to the imposition of information collections. The NPRM seeks comment on certain reporting requirements to implement the non-accounting nondiscrimination requirements of the 1996 Act.

SYNOPSIS OF NOTICE OF PROPOSED RULEMAKING

I. Introduction

1. In February 1996, Congress passed and the President signed the ''Telecommunications Act of 1996.'' This legislation makes sweeping changes affecting all consumers and telecommunications service providers. The intent of this legislation is ''to provide for a pro-competitive, de-regulatory 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.'' Upon enactment, the 1996 Act permitted the Bell Operating Companies (BOCs) to provide interLATA services that originate outside of their in-region states. The 1996 Act permits the BOCs to provide in-region interLATA services upon our finding that they have met the requirements of new section 271 of the Communications Act. Under section 271, we must determine, among other things, whether a BOC seeking to provide in-region interLATA services has complied with the safeguards imposed by new section 272 of the Communications Act and the rules that we adopt to implement the provisions of that section.

Under the 1996 Act, a ''local access and transport area'' (LATA) is ''a contiguous geographic area (A) established before the date of enactment of the [1996 Act] by a [BOC] such that no exchange area includes points within more than 1 metropolitan statistical area, consolidated metropolitan statistical area, or State, except as expressly permitted under the AT&T Consent Decree; or (B) established or modified by a [BOC] after such date of enactment and approved by the Commission.'' 47 U.S.C. § 153(25). LATAs were created as part of the Modification of Final Judgment's (MFJ) ''plan of reorganization'' by which the BOCs were divested from AT&T. Pursuant to the MFJ, ''all BOC territory in the continental United States [was] divided into LATAs, generally centering upon a city or other identifiable community of interest.'' *United States* v. *Western Elec. Co.*, 569 F. Supp. 990, 993 (D.D.C. 1983). The purpose of establishing the LATAs was only to delineate the areas within which the respective BOCs would be permitted to provide telecommunications services (i.e., intraLATA services); it was ''not to distinguish the area in which a telephone call [would] be 'local' from

that in which it [would] become a 'toll' or long distance call.'' *Id*. at 995. LATAs are comprised of combinations of local exchanges, and are generally much larger than the traditional local exchange areas and local calling areas defined by local regulators. While AT&T proposed to create 161 LATAs to cover the BOCs' territory, there were, at the time of the plan of reorganization, approximately 7,000 local exchanges within that territory. *Id*. at 993 n.9. There are currently 182 BOC LATAs. Bell Communications Research, *Local Exchange Routing Guide*, § 1, at 1–2 (Mar. 1, 1996) (*Local Exchange Routing Guide*).

3. In this Notice of Proposed Rulemaking (NPRM), we consider rules to implement, and, where necessary, to clarify the non-accounting separate affiliate and nondiscrimination safeguards prescribed by Congress in section 272. That section addresses the BOCs' provision of interLATA telecommunications services originating in states in which they provide local exchange and exchange access services, interLATA information services, and BOC manufacturing activities. The MFJ prohibited the BOCs from providing information services, providing interLATA services, or manufacturing and selling telecommunications equipment or manufacturing customer premises equipment (CPE). This prohibition was based on the theory that the BOCs could leverage their market power in the local market to impede competition in the interLATA services, manufacturing and information services markets. The information services restriction was modified in 1987 to allow BOCs to provide voice messaging services and to transmit information services generated by others. We also seek in this proceeding to determine whether to relax the dominant carrier classification that currently applies to the BOCs' provision of in-region, interstate, domestic interLATA services, and whether to apply the same regulatory classification to the BOCs' provision of in-region, international services.

4. This proceeding is one of a series of interrelated rulemakings that collectively will implement the 1996 Act. Certain of these proceedings focus on opening markets to entry by new competitors. Other proceedings will establish fair rules for competition in these markets that are opened to competitive entry, and yet other proceedings will focus on lifting outmoded legal and regulatory constraints. We seek in the instant rulemaking to adopt safeguards to govern the BOCs' entry into certain new markets. Specifically, this proceeding focuses on the non-accounting BOC separate affiliate and nondiscrimination safeguards that Congress adopted in the 1996 Act to foster the development of robust competition in all telecommunications markets. As discussed more fully below, these safeguards are intended both to protect subscribers to BOC monopoly services, such as local telephony, against the potential risk of having to pay costs incurred by the BOCs to enter competitive services, such as interLATA services and equipment manufacturing, and to protect competition in those markets from the BOCs' ability to use their existing market power in local exchange services to obtain an anticompetitive advantage in those new markets the BOCs seek to enter.

5. This proceeding also examines whether the potential risks of BOCs' using market power in local exchange and exchange access services to obtain an advantage in the markets for BOC affiliates that provide in-region, interstate, domestic, interLATA services will be sufficiently limited such that we can relax the dominant carrier classification that under our current rules would apply to such interLATA services provided by a BOC affiliate. We also consider whether we should modify our existing rules for regulating the provision of in-region, interstate, interexchange services by an independent LEC (an exchange telephone company other than a BOC). Finally, we consider whether to apply the same regulatory treatment to the BOC affiliates' and independent LECs' provision of in-region, international services, as we adopt for their provision of in-region, interstate, domestic, interLATA and in-region, interstate, domestic, interexchange services, respectively.

6. We use the term ''independent LECs'' to refer to both the independent LECs and their affiliates. For purposes of this proceeding, we define an independent LEC's ''in-region services'' as telecommunications services originating in the independent LEC's local exchange areas or 800 service, private line service, or their equivalents that: (1) terminate in the independent LEC's local exchange areas, and (2) allow the called party to determine the interexchange carrier, even if the service originates outside the independent LEC's local exchange areas.

A. Background

The 1996 Act seeks to eliminate artificial legal and regulatory barriers, as well as economic impediments, to entry into telecommunications markets. This new scheme permits the BOCs to engage in the activities from which they were barred by the MFJ if they satisfy certain statutory conditions that are intended to prevent them from improperly using their market power in the local exchange market against their competitors in the interLATA telecommunications services, interLATA information services, and manufacturing markets, and from improperly allocating the costs of their new ventures to subscribers to local exchange access services, and if they have taken sufficient steps to open their local exchange networks to competition.

8. Enactment of the 1996 Act opens the way for BOCs to provide interLATA services in states in which they currently provide local exchange and exchange access services. Their provision of such interLATA services offers the prospect of increasing competition among providers of such services. BOCs can offer a widely recognized brand name that is associated with telecommunications services, the ability for consumers to purchase local, intraLATA and interLATA telecommunications services from a single provider (i.e., ''one-stop shopping''), and other advantages of vertical integration. Similar benefits could follow from BOC provision of interLATA information services and BOC manufacturing activities.

9. In lifting or modifying the restrictions on the BOCs, the new regulatory scheme established by the 1996 Act indicates that BOC entry into in-region interLATA services raises issues for competition and consumers, even after a BOC has satisfied the requirements of section 271(d)(3)(A) and (C). BOCs currently provide an overwhelming share of local exchange and exchange access services in areas where they provide such services—approximately 99.5 percent of the market as measured by revenues. If it is regulated under rate-of-return regulation, a price caps structure with sharing (either for interstate or intrastate services), a price caps scheme that adjusts the X-factor periodically based on changes in industry productivity, or if its entitlement to any revenues is based on costs recorded in regulated books of account, a BOC may have an incentive to improperly allocate to its regulated core business costs that would be properly attributable to its competitive ventures.

10. In addition, a BOC may have an incentive to discriminate in providing exchange access services and facilities that its affiliate's rivals need to compete in the interLATA telecommunications and interLATA information services

markets. For example, a BOC could seek to grant undue preferences to its interLATA affiliate in furnishing such services and facilities, in order to gain a competitive advantage for its interLATA affiliate. Moreover, to the extent carriers offer both local and interLATA services as a bundled offering, if a BOC were to discriminate, it could entrench its position in local markets by making its rivals' offerings less attractive alternatives for local and access services. With respect to BOC manufacturing activities, a BOC may have an incentive to purchase only its own equipment, even if such equipment is more expensive or of lower quality than that available from other manufacturers. Although the 1996 Act permits the BOCs to engage in previously restricted activities, it imposes a mix of structural and non-structural safeguards that are intended to protect subscribers to BOC monopoly services and competitors against potential improper cost allocation and discrimination. Our goal in this proceeding is to establish non-accounting separate affiliate and nondiscrimination safeguards to implement Congress's objectives.

11. The emergence of efficient, facilities-based alternatives to the local exchange and exchange access services offered by the BOCs will, over time, eliminate the need for safeguards that Congress prescribed in the 1996 Act and the implementing rules that we will adopt in this proceeding. We began the movement toward that ultimate goal when we adopted our NPRM to implement new section 251 of the Communications Act. Other proceedings, such as our upcoming access reform rulemaking and the jurisdictional separations reform proceeding, also will contribute to achieving our goal of fostering efficient competition in local telecommunications markets. Until we reach that goal, we seek to minimize the burden on the BOCs of the rules that we adopt in this proceeding, but at the same time we seek to avoid the potential exposure of both ratepayers in local markets controlled by the BOCs and competitors of the new BOC service providers to the potential risk of improper cost allocations and unlawful discrimination.

B. Overview of Sections 271 and 272

12. The 1996 Act conditions BOC entry into in-region interLATA service on compliance with certain provisions of sections 271 and 272. Section 271 sets forth prerequisites, including a competitive checklist requiring compliance with certain provisions in sections 251 and 252, for approval of a BOC's application to provide in-region interLATA service. Section 271(b)(1) conditions a BOC's ability to provide interLATA service originating in its region upon receipt of Commission approval under section 271(d)(3). Section 271(d)(3), in turn, requires the Commission to make three findings before approving BOC entry. First, the Commission must find that the interconnection agreements or statements approved at the state level under section 252 satisfy the competitive checklist contained in section 271(c)(2)(B). Second, the Commission must ensure that the structural and nondiscrimination safeguards mandated in section 272 will be met. Finally, the Commission must find that BOC entry into the in-region interLATA market is ''consistent with the public interest, convenience, and necessity.'' In acting on a BOC's application for authority to provide in-region interLATA services, the Commission must consult with the Attorney General and give substantial weight to the Attorney General's evaluation of the BOC's application. In addition, the Commission must consult with the applicable state commission to verify that the BOC complies with the requirements in subsection (c).

13. Section 272 establishes separate affiliate requirements that apply to BOC provision of manufacturing of telecommunications equipment and CPE, interLATA telecommunications services that originate in-region (other than certain previously authorized activities and certain incidental interLATA services), and interLATA information services (in-region and out-of-region). The statutory separate affiliate requirements for manufacturing and in-region interLATA telecommunications services expire three years after a BOC or any BOC affiliate is authorized to provide in-region interLATA services. The statutory interLATA information services separate affiliate requirement expires four years after enactment of the 1996 Act. The statute gives the Commission the discretion to extend either of these periods by rule or order. This NPRM concerns the non-accounting separate affiliate and nondiscrimination requirements of sections 271 and 272.

14. The structural separation requirements of section 272 are intended to prevent potential improper cost allocations by the BOCs in two principal ways. First, by requiring the BOCs and their separate affiliates to use different employees for their respective activities, section 272 allows the cost of each employee to be assigned directly to the appropriate entity thereby reducing the joint and common costs that require allocation between the telephone operating companies and the affiliates engaged in competitive businesses. Second, by requiring a BOC to maintain appropriate records documenting transactions between the BOC and its affiliate, section 272 discourages the improper allocation of costs between the two entities by making detection of such practices easier.

15. The structural separation requirements of section 272, in conjunction with the affirmative nondiscrimination obligations imposed by that section, are intended to address concerns that the BOCs could potentially use local exchange and exchange access facilities to discriminate unlawfully against competitors in order to gain a competitive advantage for their affiliates that engage in competitive activities. These safeguards seek to prevent a BOC from discriminating in favor of its affiliates by, for example: 1) providing exchange access services to its interLATA service affiliate at a lower rate than the rate offered to competing interLATA service providers; 2) providing a higher quality service to its interLATA service affiliate than the service it provides to competing interLATA service providers at the same price; 3) purchasing products needed for its local exchange network that are manufactured by its affiliate even when the affiliate's competitors offer the same or higher quality product at a lower price, or a higher quality product at the same price charged by the affiliate; or 4) providing advance information about network changes to its competitive affiliates.

16. If a BOC charges its competitors prices for inputs that are higher than the prices charged, or effectively charged, to the BOC's affiliate, then the BOC can create a ''price squeeze.'' In that circumstance, the BOC affiliate could lower its retail price to reflect its unfair cost advantage, and competing providers would be forced either to match the price reduction and absorb profit margin reductions or maintain their retail prices at existing levels and accept reductions in their market shares. If the price squeeze was severe enough and continued long enough, the BOC affiliate's market share could become so large, and the competitors so weakened, that the affiliate could unilaterally raise and sustain a price above competitive levels by restricting its output. Alternatively, the BOC affiliate could simply match its competitors' prices and extract supracompetitive profits.

Unlawful discriminatory preferences in the quality of the service or preferential dissemination of information provided by BOCs to their affiliates, as a practical matter, can have the same effect as charging unlawfully discriminatory prices. If a BOC charged the same rate to its affiliate for a higher quality access service than the BOC charged to non-affiliates for a lower quality service, or disclosed information concerning future changes in network architecture to its manufacturing affiliate before the BOC disclosed it to others, the BOC could effectively create the same ''price squeeze'' discussed above.

C. Classification of Carriers as Dominant or Non-Dominant

17. Between 1979 and 1985, the Commission conducted the *Competitive Carrier* proceeding, in which it examined how its regulations should be adapted to reflect and promote increasing competition in telecommunications markets. In a series of orders, the Commission distinguished two kinds of carriers—those with market power (dominant carriers) and those without market power (non-dominant carriers). In the *Competitive Carrier Fourth Report and Order* (48 FR 52452 (November 18, 1983)), the Commission defined market power alternatively as ''the ability to raise prices by restricting output'' and as ''the ability to raise and maintain price above the competitive level without driving away so many customers as to make the increase unprofitable.'' The Commission recognized that, in order to assess whether a carrier possesses market power, one must first define the relevant product and geographic markets. Throughout the *Competitive Carrier* proceeding, the Commission relaxed its tariff filing and facilities authorization requirements for non-dominant carriers and focused its regulatory efforts on constraining the ability of dominant carriers to exercise market power.

18. This proceeding considers whether we should relax the dominant carrier regulation that under our current rules would apply to in-region, interstate, domestic, interLATA services provided by the BOCs' interLATA affiliates. As a preliminary matter, we note that there are two ways in which a carrier can profitably raise and sustain prices above competitive levels and thereby exercise market power. First, a carrier may be able to raise and sustain prices by restricting its own output (which usually requires a large market share); second, a carrier may be able to raise and sustain prices by increasing its rivals' costs or by restricting its rivals' output through the carrier's control of an essential input, such as access to bottleneck facilities, that its rivals need to offer their services. We seek comment on whether the BOC affiliates should be classified as dominant carriers under our rules only if we find that they have the ability profitably to raise and sustain prices of in-region, interstate, domestic, interLATA services significantly above competitive levels by restricting their own output, or whether the affiliates should be classified as dominant if the BOCs have the ability to raise and sustain prices of such interLATA services significantly above competitive levels by raising the costs of their affiliates' interLATA rivals.

19. We then seek comment, with respect to both types of market power, on whether the BOC affiliates should be classified as dominant or non-dominant. In considering whether a BOC affiliate could raise its prices by restricting its own output, we seek comment on whether, in light of the requirements established by, and pursuant to, sections 271 and 272, together with other existing Commission rules, the BOCs will be able to use, or leverage, their market power in the local exchange and exchange access markets to such an extent that their interLATA affiliates could profitably raise and sustain prices of in-region, interstate, domestic, interLATA services significantly above competitive levels by restricting their own output. In considering whether a BOC affiliate could cause increases in prices for in-region, interstate, domestic, interLATA services by raising the costs of its affiliate's interLATA rivals, we seek comment whether the statutory and regulatory safeguards will prevent a BOC from engaging in unlawful discrimination or other anticompetitive conduct that will raise its affiliate's rivals' costs. We also seek comment on whether regulating BOC in-region interLATA affiliates as dominant would help to prevent improper allocations of costs or discrimination by the BOCs in favor of their interLATA affiliates, or would at least mitigate the effects of such activities. We also consider whether we should modify our existing rules for regulating independent LECs' provision of in-region, interstate, interexchange services.

20. In our recent order addressing BOC provision of interLATA services originating out-of-region, we considered whether, on an interim basis, BOC provision of out-of-region services should remain subject to dominant carrier regulation. *Interim BOC Out-of-Region Order* (61 FR 35964 (July 9, 1996)) at ¶ 2. We found, *inter alia*, that, on an interim basis, if a BOC provides out-of-region domestic, interstate, interexchange services offered through an affiliate that satisfies the separation requirements imposed on independent LECs in the *Competitive Carrier Fifth Report and Order* (49 FR 34824 (September 4, 1984)), we would remove dominant carrier regulation for such services. *Id*. In the *Interexchange NPRM* (61 FR 14717 (April 3, 1996)), we asked whether we should modify or eliminate the separation requirements imposed as a condition for non-dominant treatment of independent LEC provision of interstate, interexchange services originating outside their local exchange areas. *Interexchange NPRM* at ¶ 61. We also sought comment on whether, if we modify or eliminate these separation requirements for independent LECs, we should apply the same requirements to BOC provision of out-of-region interstate, interexchange services. *Id*.

21. Finally, we consider whether to apply the same regulatory classification to the BOC affiliates' and independent LECs' provision of in-region, international services as we adopt for their provision of in-region, interstate, domestic, interLATA services and in-region, interstate, domestic, interexchange services, respectively. In doing so, we emphasize that there is more than one basis for finding a United States (U.S.) carrier dominant in the provision of international services. The issue we address in this NPRM is whether a BOC affiliate or independent LEC should be regulated as dominant in the provision of in-region, international services because of the BOC or independent LEC's current retention of bottleneck facilities on the U.S. end of an international link. The separate issue of whether a BOC, an independent LEC, or any other U.S. carrier should be regulated as dominant in the provision of international services because of the market power of an affiliated foreign carrier in a foreign destination market was addressed by the Commission last year in the *Foreign Carrier Entry Order* (61 FR 4937 (February 9, 1996)). That decision adopted a separate framework for regulating U.S. international carriers (including BOCs or independent LECs ultimately authorized to provide in-region international services) as dominant on routes where an affiliated foreign carrier has the ability to discriminate in favor of its U.S. affiliate through control of bottleneck services or facilities in the foreign destination market. No carriers are exempt from this policy to the extent they have foreign affiliations.

II. Scope of the Commission's Authority

22. As a preliminary matter, we address the scope of the Commission's

authority to adopt rules implementing the non-accounting provisions of sections 271 and 272 of the Communications Act, as amended. In the following subsections, we address the scope of the Commission's authority over interLATA services and interLATA information services and its authority over manufacturing activities.

A. InterLATA Services and InterLATA Information Services

23. Sections 271 and 272 by their terms address BOC provision of ''interLATA'' services and ''interLATA'' information services. Many states contain more than one LATA, and thus, interLATA traffic may be either interstate or intrastate. Accordingly, we must determine whether sections 271 and 272, and our authority pursuant to those sections, apply only to interstate interLATA services and interstate interLATA information services, or to interstate and intrastate interLATA services and interstate and intrastate interLATA information services.

24. The MFJ, when it was in effect, governed BOC provision of both interstate and intrastate services. The 1996 Act provides:

> Any conduct or activity that was, before the date of enactment of this Act, subject to any restriction or obligation imposed by the [MFJ] shall, on and after such date, be subject to the restrictions and obligations imposed by the Communications Act of 1934 as amended by this Act and shall not be subject to the restrictions and the obligations imposed by [the MFJ].

This section supersedes the MFJ, and explains that the Communications Act is to serve as its replacement. As set forth below, we believe that section 271 and 272 of the Act were intended to replace the MFJ as to both interstate and intrastate interLATA services and interLATA information services. Thus, we propose that our rules implementing these sections apply to both interstate and intrastate services. We seek comment on this tentative conclusion, on our analysis, and on any alternative views that commenters may propose.

25. Sections 271 and 272 make no explicit reference to interstate and intrastate services, but they do make reference to a different geographic boundary—the LATA, as originally defined by the MFJ and now by the 1996 Act. The interLATA/intraLATA distinction appears to some extent to have supplanted the traditional interstate/intrastate distinction for purposes of these sections.

26. As to interLATA services, the MFJ prohibited the BOCs and their affiliates from providing any interLATA services, interstate or intrastate, unless specifically authorized by the MFJ or a waiver thereunder. Reading sections 271 and 272 as applying to all interLATA services fits well with the structure of the statute as a whole. Sections 251 and 252 of the Act establish rules and procedures for competitive entry into local exchange markets. In the *Interconnection NPRM* (61 FR 18311 (April 25, 1996)), we tentatively concluded that Congress intended these sections to apply to both interstate and intrastate aspects of interconnection. These new obligations imposed on BOCs (as well as other LECs), enacted at the same time as sections 271 and 272, clearly are part of the process for entry into the interLATA marketplace. Indeed, BOCs are permitted to provide in-region interLATA services only after they have met the requirements of section 271, including a competitive checklist requiring compliance with certain provisions in sections 251 and 252.

27. We note also that the structure of sections 271 and 272 themselves indicates that these sections were intended to address both interstate and intrastate services. For instance, BOCs are directed to apply for interLATA entry on a state-by-state basis, and the Commission is directed to consult with the relevant State Commission before making any determination with respect to an application in order to verify the BOC's compliance with the requirements for providing in-region interLATA services. As we believe it did in sections 251 and 252, Congress appears to have put in place rules to govern both interstate and intrastate services, and provided a role for both the Commission and the states in implementing those rules.

28. By contrast, reading sections 271 and 272 as limited to the provision of interstate services would mean that the BOCs would have been permitted to provide in-region, intrastate, interLATA services upon enactment and without any guidance from Congress as to entry requirements or safeguards, subject only to any pre-existing state rules on interexchange entry. Any such rules, presumably, would not have been directed at BOC entry, which had for many years been prohibited. Concerns about BOC control of bottleneck facilities over the provision of in-region interLATA services are equally important for both interstate and intrastate services. Thus, the reasons for imposing the procedures and safeguards of sections 271 and 272 apply equally to the BOCs' provision of both intrastate and interstate, in-region, interLATA services. We find it implausible that Congress could have intended to lift the MFJ's ban on BOC provision of interLATA services without making any provision for orderly entry into intrastate interLATA services, which constitute approximately 30 percent of interLATA traffic. Based on the preceding analysis, we tentatively conclude that our authority under sections 271 and 272 applies to intrastate and interstate interLATA services and intrastate and interstate interLATA information services provided by the BOCs or their affiliates.

29. We believe that section 2(b) of the Communications Act does not require a contrary result. Section 2(b) provides that, except as provided in certain enumerated sections not including sections 271 and 272, ''nothing in [the Communications Act] shall be construed to apply or to give the Commission jurisdiction with respect to * * * charges, classifications, practices, services, facilities, or regulations for or in connection with intrastate communications service by wire or radio of any carrier * * *.'' In enacting sections 271 and 272 after section 2(b) and squarely addressing therein the issues before us, we tentatively conclude that Congress intended for sections 271 and 272 to take precedence over any contrary implications based on section 2(b). We note also, that in enacting the 1996 Act, there are instances where Congress indisputably gave the Commission intrastate jurisdiction without amending section 2(b). Thus, we believe that the lack of an explicit exception in section 2(b) should in this instance create less of a presumption that the Commission's jurisdiction under sections 271 and 272 is limited to interstate services than would ordinarily be the case.

30. We seek comment on the jurisdictional analysis set forth above. In particular, we ask that parties disagreeing with this analysis set forth their own alternative analysis of how sections 271 and 272 apply to interstate and intrastate interLATA services and interLATA information services.

31. To the extent that commenters disagree with the analysis set forth above, we also seek comment on the extent to which the Commission may have authority to preempt state regulation with respect to some or all of the non-accounting matters addressed by sections 271 and 272. The Commission has authority to preempt state regulation of intrastate communications services where such state regulation would thwart or impede the Commission's exercise of its lawful authority over interstate communications services, such as when it is not ''possible to separate the

interstate and intrastate portions of the asserted FCC regulation.'' Thus, we seek specific comment on (1) the extent to which it may not be possible to separate the interstate and intrastate portions of the regulations we propose here to implement sections 271 and 272, and (2) the extent to which state regulation inconsistent with our regulations may thwart or impede the Commission's exercise of lawful authority over interstate interLATA services. We seek comment, for example, on potentially inconsistent state regulations regarding: (1) a BOC affiliate's ability to use, co-use, or co-own facilities with the BOC; (2) a BOC affiliate's ability to share personnel with the BOC; and (3) a BOC's ability to discriminate in favor of its affiliate.

32. We note that when the Commission adopted rules to govern the BOCs' provision of enhanced services rules prior to the enactment of the 1996 Act, it preempted certain inconsistent state structural separation requirements dealing with the intrastate portion of jurisdictionally mixed enhanced services. The U.S. Court of Appeals for the Ninth Circuit upheld this exercise of our preemption authority, agreeing that the state separation requirements would essentially negate the Commission's goal of allowing BOC provision of interstate enhanced services on a non-separated basis. Along the same lines, it is conceivable that a state may try to impose separate affiliate or nondiscrimination requirements on the intrastate portion of jurisdictionally mixed services that are inconsistent with the requirements in section

33. We believe that *California* III may provide support for Commission preemption of such inconsistent state regulations, to the extent that the regulations would thwart or impede the Commission's exercise of its authority over interstate interLATA services or interstate interLATA information services pursuant to sections 271 and 272. We seek comment on this analysis. We also seek comment on whether state regulation of intrastate services that is less stringent than the Commission's regulation of interstate services could thwart or impede the Commission's exercise of its authority over interstate, interLATA, information services.

B. Manufacturing Activities

34. To the extent that sections 271 and 272 address BOC manufacturing activities, we believe that the same statutory analysis set forth above would apply. We see no basis for distinguishing among the various subsections of sections 271 and 272. Even apart from that analysis, however, we believe that the provisions concerning manufacturing clearly apply to all manufacturing activities. Section 2(b) of the Communications Act limits the Commission's authority over ''charges, classifications, practices, services, facilities, or regulation for or in connection with intrastate communications service.'' We believe that the manufacturing activities addressed by sections 271 and 272, however, are not within the scope of section 2(b). Alternatively, if section 2(b) applies with respect to BOC manufacturing, we believe that such manufacturing activities plainly cannot be segregated into interstate and intrastate portions. Thus, any state regulation inconsistent with sections 271 and 272 or our implementing regulations would necessarily thwart and impede federal policies, and should be preempted. We tentatively conclude, therefore, that our authority under section 272 extends to all BOC manufacturing of telecommunications equipment and CPE. We seek comment on this tentative conclusion.

III. Activities Subject to Section 272 Requirements

35. Section 272 provides that a BOC (including any affiliate) that is a LEC subject to the requirements of section 251(c) may provide certain services only through a separate affiliate. Under section 272, BOCs (or BOC affiliates) may engage in the following activities only through one or more affiliates that are separate from the incumbent LEC entity: (A) manufacturing activities; (B) interLATA telecommunications services that originate in-region; and (C) interLATA information services. We discuss each of these activities separately below and seek comment where necessary about which activities are subject to the section 272 separate affiliate requirements. Section 272(a)(2)(B) exempts from the separate affiliate requirement for interLATA telecommunications services certain incidental interLATA services (as described in sections 271(g)(1), (2), (3), (5), and (6)), out-of-region services (as described in section 271(b)(2)), and previously authorized activities (as described in section 271(f)). Although they are information services, electronic publishing (as defined in section 274(h)) and alarm monitoring services (as defined in section 275(e)) are exempted from the section 272 separate affiliate requirements, and are subject to their own specific statutory separate affiliate and/or nondiscrimination requirements.

36. We tentatively conclude that the separate affiliate and nondiscrimination safeguards adopted in this proceeding pursuant to section 272 will apply to a BOC's provision of both domestic and international interLATA telecommunications services that originate in a BOC's in-region states. The 1996 Act defines ''interLATA services'' as ''telecommunications between a point located in a local access and transport area and a point located outside such area.'' Because this definition does not distinguish between domestic and international calls, we tentatively conclude that Congress intended to apply the same safeguards to BOC provision of domestic and international interLATA services that originate in-region. Similarly, in the provisions concerning interLATA information services, Congress has not distinguished between domestic and international provision of these services. The 1996 Act does not specify a definition for ''interLATA information services.'' Consequently, we tentatively conclude that the safeguards adopted in this proceeding will apply to BOC provision of both domestic and international interLATA information services. We seek comment on these tentative conclusions.

37. As a threshold matter, we note that section 272(a)(1) requires a BOC to provide services subject to the section 272 separate affiliate requirements through ''one or more affiliates.'' Based on this statutory language, we tentatively conclude that a BOC may, if it chooses, conduct all, or some combination, of its manufacturing activities, interLATA telecommunications services, and interLATA information services in a single separate affiliate, as long as all the requirements imposed pursuant to the statute and our regulations are otherwise met. We seek comment on this tentative conclusion. If a BOC places its local exchange operations in a separate affiliate, pursuant to section 272(a)(1), the local exchange affiliate must be separate from the BOC affiliate or affiliates engaged in covered competitive activities.

38. Section 272(h) provides that ''[w]ith respect to any activity in which a Bell operating company is engaged on the date of enactment of the Telecommunications Act of 1996, such company shall have one year from such date of enactment to comply with the requirements of this section.'' Section 271(f) states ''[n]either [section 271(a)] nor section 273 shall prohibit a [BOC] from engaging, at any time after the date of enactment of the [1996 Act], in any activity to the extent authorized by, and subject to the terms and conditions contained in'' an order of the MFJ Court. As further discussed below, section

272(h) appears to cover activities included in the definition of ''previously authorized activities'' described in section 271(f). We therefore seek comment on whether, subject to the exceptions discussed below, section 272(h) applies to the activities listed in section 272(a)(2)(A)-(C) that the BOCs were providing on the date the 1996 Act was passed. Parties contending that section 271(f) bars the Commission from applying section 272(h) to such activities should explain their interpretation of the requirements of section 272(h).

A. Manufacturing

39. Section 273(a) allows a BOC to manufacture and provide telecommunications equipment, and to manufacture CPE, if the Commission has authorized that BOC or any BOC affiliate to provide in-region interLATA services under section 271(d). BOCs may only engage in manufacturing activities through a separate affiliate that meets the requirements of section 272. Section 273 sets out certain additional safeguards and nondiscrimination requirements applicable to BOC entry into manufacturing activities, including separate affiliate requirements applicable to entities that certify either telecommunications equipment or CPE manufactured by unaffiliated entities. As noted above, in this NPRM we address the non-accounting separate affiliate and nondiscrimination requirements of sections 271 and 272; we will address the additional safeguards established in section 273 in a separate proceeding.

B. InterLATA Telecommunications Services

40. Section 271 addresses the entry of the BOCs into the provision of three categories of interLATA telecommunications services: services that originate in-region, services that originate out-of-region, and incidental interLATA services. Section 272, in turn, requires a BOC to establish a separate affiliate for:

> (B) Origination of interLATA telecommunications services, other than-
>
> (i) incidental interLATA services described in paragraphs (1), (2), (3), (5), and (6) of section 271(g);
>
> (ii) out-of-region services described in section 271(b)(2); or (iii) previously authorized activities described in section 271(f). *Id*. § 272(a)(2)(B).

The 1996 Act defines ''telecommunications'' as ''the transmission, between or among points specified by the user of information of the user's choosing without change in the form or content of the information as sent and received.'' ''Telecommunications service'' is defined as ''the offering of telecommunications for a fee directly to the public or to such classes of users as to be effectively available directly to the public regardless of facilities used.''

41. Section 271(g) provides:

> For purposes of this section, the term ''incidental interLATA services'' means the interLATA provision by a Bell operating company or its affiliate—
>
> (1)(A) of audio programming, video programming, or other programming services to subscribers to such services of such company or affiliate;
>
> (B) of the capability for interaction by such subscribers to select or respond to such audio programming, video programming, or other programming services;
>
> (C) to distributors of audio programming or video programming that such company or affiliate owns or controls, or is licensed by the copyright owner of such programming (or by an assignee of such owner) to distribute; or
>
> (D) of alarm monitoring services;
>
> (2) of two-way interactive video services or Internet services over dedicated facilities to or for elementary and secondary schools as defined in section 254(h)(5);
>
> (3) of commercial mobile services in accordance with section 332(c) of this Act and with the regulations prescribed by the Commission pursuant to paragraph (8) of such section;
>
> (4) of a service that permits a customer that is located in one LATA to retrieve stored information from, or file information for storage in, information storage facilities of such company that are located in another LATA;
>
> (5) of signaling information used in connection with the provision of telephone exchange services or exchange access by a local exchange carrier; or
>
> (6) of network control signaling information to, and receipt of such signaling information from, common carriers offering interLATA services at any location within the area in which such Bell operating company provides telephone exchange services or exchange access.

42. Under the 1996 Act, BOC provision of ''incidental interLATA services'' is treated differently than BOC provision of other in-region interLATA telecommunications services in two respects. First, section 271(b)(3) specifies that a BOC, or any BOC affiliate, may provide incidental interLATA services originating in any state immediately after the date of enactment of the 1996 Act, while section 271(b)(1) conditions BOC provision of other in-region interLATA services upon prior approval by the Commission. Second, section 272(a)(2)(B)(i) exempts from the section 272 separate affiliate requirement all of the incidental interLATA telecommunications services listed in subsection 271(g), except a BOC's provision of a service ''that permits a customer that is located in one LATA to retrieve stored information from, or file information for storage in, information storage facilities of such company that are located in another LATA.'' Section 271(h) requires that the Commission ensure that the provision of incidental services by a BOC or its affiliate ''will not adversely affect telephone exchange service ratepayers or competition in any telecommunications market,'' and states that the provisions of section 271(g) ''are intended to be narrowly construed.'' We seek comment on what, if any, non-accounting structural or nonstructural safeguards the Commission should establish to implement the requirements of section 271(h). We seek comment regarding the interplay between section 271(h) and section 254(k), which prohibits telecommunications carriers from ''us[ing] services that are not competitive to subsidize services that are subject to competition.'' Parties proposing that the Commission adopt specific safeguards to implement section 271(h) should explain how these safeguards would be consistent with section 272(a)(2)(B)(i), which exempts incidental interLATA services from the section 272 separate affiliate requirements.

43. Section 272(a)(2)(B)(iii) exempts from ''origination of interLATA telecommunications services'' for which a separate affiliate is required ''previously authorized activities described in section 271(f).'' We seek comment on whether, in light of section 272(h), Congress intended section 272(a)(2)(B)(iii) to grant a permanent exemption for previously authorized activities from the separate affiliate requirements of section 272.

44. We note that section 272(a)(2)(B)(iii) refers to ''previously authorized activities'' as defined in section 271(f), which includes manufacturing activities and interLATA information services. We also note that section 272(a)(2)(A) and (C) expressly require the BOCs to engage in manufacturing activities and the provision of interLATA information services in accordance with section 272. Therefore, we seek comment on whether sections 272(a)(2)(A) and (C), in combination with section 272(h), require that BOCs come into compliance with section 272, within one year of the date of passage of the 1996 Act, with respect to any manufacturing activities or interLATA information services in which they were engaged on the date of passage. We seek comment, in particular, on whether Congress

intended to treat previously authorized manufacturing and interLATA information services differently from previously authorized interLATA telecommunications services.

45. Subject to the exceptions discussed in the preceding paragraphs, section 272 safeguards apply to interLATA telecommunications services which originate within a BOC's region. Section 271(i)(1) defines an in-region state as ''a State in which a Bell operating company or any of its affiliates was authorized to provide wireline telephone exchange service pursuant to the reorganization plan approved under the AT&T Consent Decree, as in effect on the day before the date of enactment of the Telecommunications Act of 1996.'' Section 153(4)(B) indicates that the definition of a BOC includes ''any successor or assign of any such company that provides wireline telephone exchange service.'' We note that two pairs of BOCs have proposed to merge their operations (through both mergers and acquisitions). If these or other mergers among the BOCs are completed, we believe, pursuant to section 153(4)(B), that the in-region states of the merged entity shall include all of the in-region states of each of the BOCs involved in the merger. We seek comment on this interpretation. We are concerned, however, that our existing and proposed safeguards may not be sufficient to address potential concerns about the practices of proposed merger partners during the pendency of the merger. Specifically, a BOC could potentially discriminate, during this period, in favor of the interLATA affiliate of the BOC's future merger partner that is offering service in the BOC's in-region area. Therefore, we seek comment on what effect, if any, the entry into a merger agreement by two or more of the BOCs has upon the application of the section 271 and 272 non-accounting separate affiliate and nondiscrimination requirements to the BOCs that are parties to the agreement, and what, if any, additional safeguards are required to ensure that these BOCs do not provide the affiliates of their merger partners with an unfair competitive advantage during the pendency of their merger agreement. We note also the possibility that the BOCs may enter into joint ventures for the provision of interLATA services. We seek comment regarding what effect, if any, joint venture arrangements involving two or more of the BOCs have upon the application of the section 271 and 272 requirements to those BOCs.

C. InterLATA Information Services

46. The MFJ originally barred the BOCs from providing information services. This restriction was subsequently narrowed, and then eliminated entirely in 1991. As a consequence, the BOCs were providing information services at the time the 1996 Act became law. We note that, although the 1996 Act distinguishes between in-region interLATA telecommunications services and out-of-region interLATA telecommunications services, no such distinction is made with respect to interLATA information services. The 1996 Act defines ''interLATA service'' as referring to telecommunications service. Thus, where the 1996 Act draws distinctions between in-region and out-of-region ''interLATA services,'' as it does in section 271(b), these distinctions do not apply to information services. Specifically, section 272(a)(2)(B) excepts out-of-region interLATA telecommunications services described in section 271(b)(2) from the section 272 separate affiliate requirements. By contrast, section 272(a)(2)(C) states that a separate affiliate is required to provide ''[i]nterLATA information services, other than electronic publishing (as defined in section 274(h)) and alarm monitoring services (as defined in section 275(e)).'' Based on the statutory language, we tentatively conclude that the BOCs must provide interLATA information services through a separate affiliate, regardless of whether these services are provided in-region or out-of-region. We seek comment on this tentative conclusion.

1. Definition of ''Information Services''

47. The 1996 Act defines ''information service'' as ''the offering of a capability for generating, acquiring, storing, transforming, processing, retrieving, utilizing, or making available information via telecommunications, and includes electronic publishing, but does not include any use of any such capability for the management, control, or operation of a telecommunications system or the management of a telecommunications service.'' We seek comment on what services are included in the statutory definition of information services. In this regard, we note that in the *Computer III* proceeding, the Commission established rules for BOC provision of ''enhanced services,'' pursuant to which the BOCs were permitted to provide certain enhanced services prior to the passage of the 1996 Act.

48. The Commission's existing regulatory framework distinguishes between ''basic'' services and ''enhanced'' services. Basic services are common carrier transmission services, and are subject to Title II regulation. Enhanced services, which combine common carrier services with non-common carrier services, are not subject to Title II regulation. Under the Commission's rules, the term ''enhanced services'' refers to ''services, offered over common carrier transmission facilities used in interstate communications, which employ computer processing applications that act on the format, content, code, protocol or similar aspects of the subscriber's transmitted information; provide the subscriber additional, different, or restructured information; or involve subscriber interaction with stored information.''

49. We seek comment on whether all activities that the Commission classifies as ''enhanced services'' fall within the statutory definition of ''information service.'' Prior to passage of the 1996 Act, neither the Commission nor the MFJ court resolved the question of whether enhanced services were equivalent to information services under the MFJ. We note that the Joint Explanatory Statement states that the definition of ''information services'' used in the 1996 Act was based on the definition used in the MFJ. If parties contend that ''information services'' differ from ''enhanced services'' in any regard, they should identify the distinctions that should be drawn between the two categories, describe any overlap between the two categories, and delineate the particular services that would come within one category and not the other.

2. InterLATA Nature of Information Services

50. Section 272(a)(2)(C) requires that a BOC provide interLATA information services only through a separate affiliate. In contrast, the 1996 Act does not establish any separate affiliate requirement for the provision of intraLATA information services. Under the Commission's existing regulatory scheme, enhanced services have not been regulated under Title II. Thus, the Commission previously has not made a regulatory distinction between intraLATA and interLATA information services, as the 1996 Act now does.

51. In order to determine which activities are subject to the separate affiliate requirement, we invite parties to comment on how we should distinguish between an interLATA information service and an intraLATA information service. In general, BOC provision of information services

involves both basic underlying transmission components, which transmit end-user information without change in the form or content of the information, and enhanced or information service functionality, which generates, acquires, stores, transforms, processes, retrieves, utilizes or makes available end-user information. We seek comment regarding whether an information service (such as voicemail) should be considered an interLATA service only when the service actually involves an interLATA telecommunications transmission component. In the alternative, should we classify as an interLATA information service any information service that potentially involves an interLATA telecommunications transmission component (e.g., the service can be accessed across LATA boundaries)? We ask parties to comment with specificity upon the types of services that should be classified as interLATA or intraLATA information services.

52. We further request comment regarding whether and how the manner in which a BOC structures its provision of an information service affects whether the service is classified as interLATA, and thus subject to the separate affiliate and nondiscrimination requirements of the Communications Act. For example, if the non-transmission computer facilities that a BOC uses to provide an information service are located in a different LATA from the end-user, should that service be classified as an interLATA information service? Alternatively, must an interLATA information service incorporate non-transmission components or functionalities that are located in different LATAs?

53. We seek comment on the relevance of what BOCs have done in the past in determining now what activities may only be offered through a separate affiliate. We note that, prior to the 1996 Act, some BOCs received MFJ waivers in order to employ transmission services that crossed LATA boundaries for the provision of certain enhanced services. We seek comment regarding whether the fact that a BOC in the past applied for or received an MFJ waiver for the provision of a particular enhanced service presumptively renders that service an interLATA information service subject to the separate affiliate requirements of section 272.

54. All of the BOCs currently are providing enhanced services in some or all of their in-region states, pursuant to comparably efficient interconnection (CEI) plans approved by the Commission's Common Carrier Bureau. Because the MFJ barred BOC provision of interLATA services, we seek comment regarding whether, when a BOC has not applied for or received an MFJ waiver to provide a particular enhanced service, but instead is providing that enhanced service pursuant to a CEI plan approved prior to the enactment of the 1996 Act, we should presume that enhanced service to be an intraLATA information service that is not subject to the separate affiliate requirements of section 272. To the extent that existing services offered pursuant to approved CEI plans are not subject to section 272, we seek comment regarding whether passage of the 1996 Act directly or indirectly affects how we should treat such services.

3. Impact of the 1996 Act on Existing Commission Requirements for Information Services

55. Because the 1996 Act does not establish regulatory requirements for BOC provision of intraLATA information services, we conclude that, with respect to these services, our existing *Computer II, Computer III,* and *ONA* requirements remain in place to the extent that they are consistent with the 1996 Act. The Commission developed those requirements to address the same concerns that Congress sought to address through the establishment of separate affiliate and nondiscrimination requirements in sections 271 and 272. We note that the combination of our *Computer II, Computer III,* and *ONA* proceedings established various unbundling and interconnection requirements for BOC provision of enhanced services. Under *Computer II,* the BOCs and other facilities-based carriers must unbundle their basic services from their enhanced services. Under *Computer III* and *ONA,* the BOCs must further unbundle the manner in which they provide basic services and make these unbundled basic services available to competing ESPs. Under our rules, these interconnection and unbundling requirements associated with the provision of enhanced services continue to apply to the BOCs regardless of whether they provide enhanced services on an integrated or a separated basis.

56. We conclude that we should continue to enforce those existing *Computer II, Computer III,* and *ONA* requirements that are consistent with the 1996 Act, and we ask commenters to specify whether, and to what extent, the existing requirements are inconsistent with the 1996 Act. If parties contend that the statute supersedes our *Computer II, Computer III,* and *ONA* unbundling and interconnection requirements for BOC provision of intraLATA information services, they should identify the specific provisions of section 271 and 272 that they believe supersede our requirements, as well as the specific unbundling and interconnection requirements they believe these provisions impose upon the BOCs.

57. We recognize that some of the anticompetitive concerns we sought to address through the establishment of the *Computer II, Computer III,* and *ONA* requirements may now be addressed by new statutory provisions or by the anticipated competition that implementation of the statute should foster. We consequently seek comment on which, if any, of our *Computer II, Computer III,* and *ONA* rules may have been rendered unnecessary by the 1996 Act. Parties should also address the possible impact of the statutory requirements on our pending *Computer III Further Remand Proceedings.*

D. Overlap Between InterLATA Information Services and Services Subject to Other Statutory Requirements

58. Under the 1996 Act, electronic publishing is specifically included within the category of information services. InterLATA provision of electronic publishing, however, is specifically exempted from the separate affiliate requirements of section 272. Instead, section 274 establishes specific separate affiliate and nondiscrimination requirements which apply to the provision of electronic publishing services by the BOCs.

59. The 1996 Act defines ''electronic publishing'' to mean:

> 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.

The 1996 Act lists specific services that do not fall within 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, 911–E and other emergency assistance databases, video programming and full motion video entertainment on demand.

60. We will examine the meaning of the phrase ''electronic publishing'' in greater depth in a separate proceeding on the section 274 separate affiliate and nondiscrimination requirements. For the purposes of this proceeding, we seek comment in order to distinguish information services that are subject to the section 272 requirements from electronic publishing services that are subject to the section 274 requirements. We anticipate that this issue will arise with respect to services that are neither clearly encompassed by the statutory definition of ''electronic publishing'' nor specifically listed in the delineated exceptions to that definition. We seek comment on whether, where such classification questions arise, we should classify as ''electronic publishing'' services those services for which the carrier controls, or has a financial interest in, the content of information transmitted by the service. We note that under the MFJ, ''electronic publishing'' was defined as ''the provision of any information which a provider or publisher has, or has caused to be originated, authored, compiled, collected, or edited, or in which he has a direct or indirect financial or proprietary interest, and which is disseminated to an unaffiliated person through some electronic means.'' *United States* v. *Western Elec. Co.*, 552 F. Supp. 131, 178, 181 (D.D.C. 1982).

61. The 1996 Act defines ''telemessaging'' 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 tentatively conclude that telemessaging is an information service. Unlike electronic publishing and alarm monitoring services, which are information services that are specifically exempted from the section 272(a) separate affiliate requirements, BOC provision of telemessaging services is not specifically exempted from these requirements. Therefore, we tentatively conclude that BOC provision of telemessaging on an interLATA basis is subject to the section 272(a) separate affiliate requirements, in addition to the section 260 safeguards, which apply to all incumbent LECs, including the BOCs. We seek comment on this tentative conclusion.

IV. Structural Separation Requirements of Section 272

62. Section 272(b) of the Communications Act establishes five structural and transactional requirements for the separate affiliate (or affiliates) established pursuant to section 272(a). Specifically, the 1996 Act requires that the separate affiliate:

(1) shall operate independently from the [BOC];

(2) shall maintain books, records, and accounts in the manner prescribed by the Commission which shall be separate from the books, records, and accounts maintained by the [BOC] of which it is an affiliate;

(3) shall have separate officers, directors, and employees from the [BOC] of which it is an affiliate;

(4) may not obtain credit under any arrangement that would permit a creditor, upon default, to have recourse to the assets of the [BOC]; and

(5) shall conduct all transactions with the [BOC] of which it is an affiliate on an arm's length basis with any such transactions reduced to writing and available for public inspection.

We discuss each of these requirements below.

63. We note that section 272(a)(1) requires a BOC to provide services subject to the section 272 separate affiliate requirements through ''one or more affiliates.'' As we tentatively concluded above, a BOC may, if it chooses, conduct all, or some combination, of its manufacturing activities, interLATA telecommunications services, and interLATA information services in a single separate affiliate. A BOC's potential incentive and ability to favor its affiliate and to improperly allocate costs may vary, however, depending on the activity involved. For this reason, the structural and transactional requirements of section 272(b) may need to be implemented differently with respect to the three activities enumerated in the statute. We seek comment on whether the 1996 Act permits us to, and if so, whether we should, interpret or apply any of the section 272(b) requirements differently with respect to BOC provision of services regulated under Title II (namely, provision of interLATA telecommunications services) as opposed to nonregulated activities (namely, manufacturing and interLATA information services). In addition, we seek comment on how such different regulatory requirements could be imposed on the three activities if all three are provided through one affiliate.

A. Section 272(b)(1)

64. Section 272(b)(1) states that the separate affiliate ''shall operate independently from the [BOC].'' The 1996 Act does not elaborate on the meaning of the phrase ''operate independently.'' Under principles of statutory construction, a statute should be interpreted so as to give effect to each of its provisions. Accordingly, we tentatively conclude that we should interpret the ''operate independently'' requirement in section 272(b)(1) as imposing requirements beyond those listed in subsections 272(b)(2)–(5). We seek comment on this tentative conclusion. We also seek comment on what requirements the Commission should adopt to implement the statutory requirement that affiliates operate independently.

65. In the *Computer II* proceeding, the Commission required AT&T to provide CPE and enhanced services through separate subsidiaries. The Commission extended the *Computer II* requirements to the BOCs after divestiture. *Computer II* mandated ''maximum separation,'' based on a determination that structural separation was an effective means of ensuring that the BOCs treated unaffiliated ESPs and CPE vendors identically to their own affiliated enhanced service and CPE operations. Under *Computer II*, the BOC's enhanced services subsidiary could not construct, own, or operate its own transmission facilities, and was required to obtain basic transmission capacity from the regulated carrier pursuant to tariff. In addition, the Commission prohibited the regulated entity and unregulated subsidiaries from using in common any leased or owned physical space or property on which was located transmission equipment or facilities used to provide basic transmission services. In *Computer II*, the Commission also required the BOC to provide unregulated services through computer facilities that were separate from those used to provide regulated services. In addition, the Commission prohibited the regulated entity and the unregulated subsidiaries from developing software for each other. In *Computer II*, the Commission also prohibited a subsidiary that provided both CPE and enhanced services from marketing any other equipment to affiliated entities—e.g., transmission or other network equipment. We noted, however, that BOC manufacturing affiliates could continue to sell directly to affiliated carriers.

66. In the *Competitive Carrier* proceeding, the Commission also established certain separation

requirements that independent LECs need to meet in order to be regulated as non-dominant in the provision of interstate interexchange services. These requirements are less stringent than the *Computer II* separate subsidiary requirements. In *Competitive Carrier*, the Commission required, in order for independent LECs to be non-dominant, that they provide interstate interexchange services through an affiliate and that the affiliate: 1) maintain separate books of account; 2) not jointly own transmission or switching facilities with the exchange telephone company; and 3) obtain any exchange telephone company services at tariffed rates and conditions. We seek comment on whether the ''operate independently'' requirement in section 272(b)(1) should be interpreted as imposing one or more of the separation requirements established in *Computer II* or *Competitive Carrier.*

67. We note that section 274(b) states that ''[a] separated affiliate or electronic publishing joint venture shall be operated independently from the [BOC],'' and then prescribes specific activities that the electronic publishing affiliate can and cannot perform. We seek comment on the relevance of the ''operated independently'' requirement in section 274(b) when construing what Congress intended in section 272(b)(1). For example, among other restrictions, section 274(b) prohibits a BOC from ''perform[ing] hiring or training of personnel on behalf of a separated affiliate,'' as well as ''perform[ing] research and development on behalf of a separated affiliate.''

B. Section 272(b)(2)

68. Section 272(b)(2) states that the affiliate shall maintain separate books, records, and accounts in the manner prescribed by the Commission. As noted above, we will address the implementation issues associated with this section in a separate rulemaking.

C. Section 272(b)(3)

69. Section 272(b)(3) states that the affiliate ''shall have separate officers, directors, and employees from the [BOC] of which it is an affiliate.'' In *Computer II*, the Commission required the separate subsidiary to have its own operating, marketing, installation, and maintenance personnel for the services and equipment it offered./ Under *Computer II*, however, the Commission permitted certain administrative services to be shared on a cost reimbursable basis. Specifically, the Commission permitted the sharing of the following administrative services: accounting, auditing, legal services, personnel recruitment and management, finance, tax, insurance, and pension services. We tentatively conclude that section 272(b)(3) prohibits the sharing of in-house functions such as operating, installation, and maintenance personnel, including the sharing of administrative services that are permitted under *Computer II* if those services are performed in-house. We seek comment on whether section 272(b)(3) prohibits the BOC and an affiliate from sharing the same *outside* services, such as insurance or pension services. We also seek comment on what other types of personnel sharing may be prohibited by section 272(b)(3).

D. Section 272(b)(4)

70. Section 272(b)(4) states that the affiliate ''may not obtain credit under any arrangement that would permit a creditor, upon default, to have recourse to the assets of the [BOC].'' This restriction appears to be designed to protect subscribers to a BOC's exchange and exchange access services from bearing the cost of default by BOC affiliates. We tentatively conclude that a BOC may not co-sign a contract, or any other instrument with a separate affiliate that would allow the affiliate to obtain credit in a manner that violates section 272(b)(4). We seek comment on this tentative conclusion and on what other types of activities are prohibited by this provision. Parties are invited to comment on whether we should establish specific requirements regarding the types of activities that are contemplated by arrangements that are consistent with the requirements of section 272(b)(4). To the extent that there are a range of options, we seek comment on the relative costs and benefits of each.

E. Section 272(b)(5)

71. Section 272(b)(5) states that the affiliate ''shall conduct all transactions with the [BOC] of which it is an affiliate on an arm's length basis with any such transactions reduced to writing and available for public inspection.'' As previously noted, we will address the implementation issues associated with this accounting requirement in a separate rulemaking. We seek comment, however, in this NPRM about whether implementation of the ''arm's length'' requirement specified in section 272(b)(5) necessitates any non-accounting safeguards.

V. Nondiscrimination Safeguards

A. Nondiscrimination Provisions of Section 272

72. After a BOC affiliate enters competitive markets, that BOC will become subject to the economic incentives of the marketplace and therefore may have an incentive to favor its competitive affiliate or to take actions that could weaken the affiliate's rivals. As previously noted, a BOC's control of essential local exchange facilities provides a BOC with the opportunity to take these actions. In brief, a BOC could provide inferior service to, charge higher prices to, withhold cooperation from, or fail to share information with its rivals in competitive markets. If a BOC were to provide inferior service to a rival, the quality of the rival's interLATA telecommunications service or information service would be degraded, making the rival less attractive to customers and lowering the prices the rival could charge. If a BOC were to charge higher prices to the rival, the rival would have to charge higher prices to customers and consequently lose market share or accept lower profits. In another example, a BOC could possibly withhold cooperation from an interexchange carrier that needs the BOC's assistance to introduce an innovative new service, until the BOC's affiliate is ready to initiate the same innovative service. A BOC could also share information with its manufacturing affiliate or set standards that enable its manufacturing affiliate to produce equipment at a lower cost or with superior compatibility with the BOC's network as compared to that of competing manufacturers. A BOC's behavior in one area could affect a rival in its provision of multiple services. For example, a BOC's provision of degraded local service could affect the rival's provision of telecommunications and information services.

73. Sections 272(c)(1) and (e) set forth nondiscrimination safeguards that apply to BOC provision of manufacturing, interLATA telecommunications services, and interLATA information services. Section 272(c)(1) sets forth broad nondiscrimination safeguards that govern a BOC's dealings with its section 271(a) affiliate and is subject to the sunset provisions set forth in section 272(f). Section 272(e), on the other hand, establishes more specific duties that must be fulfilled by the BOC and its affiliates that are subject to section 251(c), and is specifically excepted from the sunset provisions that apply to the other requirements in section 272. We seek comment on whether, before

sunset, the non-accounting requirements of section 272(e) are subsumed completely within the requirements of section 272(c)(1). In addition, we invite parties to comment on any additional interplay between sections 272(c)(1) and 272(e) that are not specifically addressed below.

74. A number of terms and requirements in section 272(c)(1) overlap with the terms and requirements of section 272(e)(1)–(4). In addition, some of these terms appear in other sections of the 1996 Act, in particular, section 251. We seek comment on the interplay between the definitions of the terms ''services,'' ''facilities,'' and ''information'' in various subsections of 272, and between section 272 and section 251(c). We seek comment on what regulations, if any, are necessary to clarify the types or categories of services, facilities, or information that must be made available under section 272(c)(1) and (e) in light of section 251(c). In particular, we seek comment on whether Congress meant something different by the terms ''services'' and ''facilities'' as used in section 271(c)(1) and (e). Additionally, variations on some of these terms appear in the four subsections of section 272(e), and we seek comment on the significance of these differences. We seek comment on whether further defining these terms, and the term ''goods,'' would enable competing providers to detect violations of this section by enabling them to compare more accurately a BOC's treatment of its affiliates with a BOC's treatment of unaffiliated competing providers. We note that, for example, a requesting entity may have equipment with different technical specifications from a BOC affiliate's equipment. Therefore, we further seek comment on whether the terms of sections 272(c)(1) and (e) could be construed to require a BOC to provide a requesting entity with a quality of service or functional outcome identical to that provided to its affiliate even if this would require the BOC to provide goods, facilities, services, or information to the requesting entity that are different from those provided to the BOC affiliate.

75. The 1996 Act allows certain entities to interconnect with the local exchange carrier's network and to ''acquire access to network elements on an unbundled basis'' under just, reasonable, and nondiscriminatory terms and conditions.'' In *Computer III*, the Commission imposed unbundling and interconnection requirements which allowed ESPs to acquire unbundled basic services from the BOCs, AT&T, and GTE in order to provide enhanced services. Sections 272(c)(1) and 272(e) require that varying categories of entities receive nondiscriminatory treatment from the BOCs. The unbundling required by our *Computer III* and *ONA* rules, and the provisions of sections 251, 272(c)(1), and 272(e) are all available to different categories of entities. We seek comment on the impact of the variations between these categories of entities when implementing sections 272(c)(1) and (e), and the applicability of these sections to ESPs that are currently able to obtain unbundled network services under *Computer III* and *ONA*.

B. Applicability of Pre-Existing Nondiscrimination Requirements

76. Although the 1996 Act imposes specific nondiscrimination requirements on BOCs and their section 272(a) affiliates, we note that certain statutory provisions that predate the 1996 Act also impose nondiscrimination requirements on all common carriers. Under section 201, all common carriers have a duty ''to establish physical connections with other carriers,'' and to furnish telecommunications services ''upon reasonable request therefor.'' Section 201 also requires that ''[a]ll charges, practices, classifications, and regulations . . . shall be just and reasonable.'' In addition, section 202 makes it unlawful for any common carrier ''to make any unjust or unreasonable discrimination in charges, practices, classifications, regulations, facilities, or services,'' or ''to make or give any unreasonable preference or advantage to any particular person, class of persons, or locality.'' Pursuant to these statutory provisions, the Commission established requirements for interconnection between local exchange carriers and interexchange telecommunications service providers, and for interconnection between BOCs and ESPs. We seek comment on the relationship between the nondiscrimination obligations imposed by sections 272(c)(1) and 272(e) and the Commission's pre-existing nondiscrimination provisions. In particular, we seek to determine what non-accounting nondiscrimination rules, if any, are necessary to implement the section 272(c)(1) and 272(e) nondiscrimination requirements.

77. The nondiscrimination provisions of sections 272(c)(1) do not apply to the conduct of BOC affiliates, and the nondiscrimination provisions of section 272(e) do not apply to BOC affiliates that are not subject to section 251(c). By its terms, section 272(c) applies to the conduct of a BOC alone. Section 272(e) applies to the conduct of a BOC or a BOC affiliate that is subject to section 251(c) (i.e. an affiliate that is an incumbent LEC). For this reason, a BOC might have the incentive and ability to transfer network capabilities of its local exchange company to the operations of its competitive affiliates to avoid the nondiscriminatory provision of these capabilities as required by sections 272(c)(1) and (e). Section 272(a), however, requires any BOC affiliate that is a local exchange carrier subject to section 251(c) to be separate from the section 272(a) affiliates required for the provision of competitive activities. We tentatively conclude, therefore, that any transfer by a BOC of existing network capabilities of its local exchange entity to its affiliates is prohibited by section 272(a), and we seek comment on this tentative conclusion. In addition, section 153(4)(B) states that the definition of a BOC includes ''any successor or assign of any such company that provides wireline telephone exchange service.'' Thus, we seek comment regarding whether, in the alternative, a transfer by a BOC of network capabilities to a competitive affiliate would qualify that affiliate as a successor or assign of the BOC under section 153(4)(B), thus subjecting the competitive affiliate to the nondiscrimination requirements of sections 272(c)(1) and 272(e).

78. If parties do not believe that section 272(a) and section 153(4)(B) prevent such transfers of local exchange network capabilities, we seek comment on whether additional regulations are necessary to prevent discriminatory practices in the provision of these capabilities by BOC affiliates. Because a BOC affiliate's provision of interLATA telecommunications services is subject to sections 201 and 202 of the Communications Act, we seek comment as to whether those nondiscrimination obligations would provide sufficient protection against discriminatory practices by a BOC interLATA telecommunications affiliate, or whether we should impose additional non-accounting safeguards to prevent a BOC from discriminatorily providing these network capabilities through its interLATA telecommunications affiliate. In contrast, information services affiliates and manufacturing affiliates, because they are not ''common carriers'' under the Communications Act, are not subject to sections 201 and 202. Therefore, we seek comment as to whether other provisions of the Communications Act permit us to, and if so whether we should, place any additional nondiscrimination requirements on affiliates that engage in

these activities. We also seek comment on whether nondiscrimination provisions that are established in other sections of the Communications Act, for example the restrictions on manufacturing affiliates in section 273 or those on electronic publishing affiliates in section 274, affect our treatment of other services under sections 272(c)(1) and 272(e), particularly when one affiliate engages in multiple activities.

C. Section 272(c)(1)

79. Section 272(c)(1) provides that, in its dealings with its affiliate, a BOC ''may not discriminate between that company or affiliate and any other entity in the provision or procurement of goods, services, facilities, and information, or in the establishment of standards.'' As noted above, section 202 of the Communications Act makes it unlawful for any common carrier ''to make any *unjust or unreasonable* discrimination in charges, practices, classifications, regulations, facilities, or services.'' We seek comment, therefore, on whether Congress intended to impose a stricter standard for compliance with section 272(c)(1) by enacting this flat prohibition on discrimination.

80. We tentatively conclude that the prohibition against discrimination in section 272(c)(1) means, at minimum, that BOCs must treat all other entities in the same manner as they treat their affiliates, and must provide and procure goods, services, facilities and information to and from these other entities under the same terms, conditions, and rates. We seek comment on this tentative conclusion, as well as on what regulations, if any, are necessary to implement this provision. Comments should be specific in terms of needed regulations, the problem they would address, and how they would address the identified problem. We also seek comment on whether a BOC can treat unaffiliated entities differently with respect to the activities at issue in section 272(c)(1), as long as such disparate treatment is justified upon an appropriate showing of differences between the unaffiliated entities (e.g., such as differences in the unaffiliated entities' network architecture). We also seek comment on whether the nondiscrimination safeguards should vary based on whether the affiliate is providing interLATA telecommunications services, interLATA information services, or manufacturing. In particular, we seek comment on whether, in addition to any tariffing or structural separation requirements proposed in this NPRM, any specific non-accounting safeguards are needed to enforce the nondiscriminatory pricing requirement of section 272(c)(1).

81. Section 272(c)(1) states, *inter alia*, that a BOC may not discriminate in the provision of goods, services, facilities, and information. As BOCs enter competitive markets, they may have additional incentives and opportunities to discriminate in favor of their affiliates in violation of section 272. As indicated above, a BOC could provide unaffiliated telecommunications carriers or information service providers with inferior connections, or could disclose information to its affiliates before disclosing this information to unaffiliated carriers, providers, or manufacturers.

82. The Commission has previously adopted a regulatory scheme to ensure that the BOCs do not discriminate in the provision of basic services used to provide enhanced services or in disclosing changes in the network that are relevant for the competitive manufacture of CPE. We believe that the existing *Computer III* regulatory scheme contains non-accounting safeguards that provide protection against the type of BOC behavior that section 272(c)(1) seeks to curtail. The *Computer III* requirements provide for nondiscriminatory access to unbundled network services as well as nondiscriminatory access to the same quality of service, installation, and maintenance. In addition, BOCs are required to provide information to third parties regarding information on changes to the network and new network services. BOCs are also required to report on the quality and timeliness of installation and maintenance. We seek comment on whether any of the nondiscrimination safeguards that the Commission applied to the BOCs in the *Computer III* and *ONA* proceedings, which were adopted in lieu of the structural separation requirements of *Computer II*, are sufficient to implement section 272(c)(1).

83. We further seek comment on the scope of the term ''goods, services, facilities and information'' for which the 1996 Act prohibits discrimination. We note that our *Computer III* requirements do not specifically address ''goods,'' and therefore seek comment on what regulations, if any, would be necessary to define that term. We also seek comment on whether the separate customer proprietary network information (CPNI) provisions of the 1996 Act affect the requirement to provide information on a nondiscriminatory basis in this section.

84. Section 272(c)(1) requires, *inter alia*, that the BOCs not discriminate with regard to their procurement of goods, services, facilities, and information. We note that this provision prohibits, for example, a BOC from purchasing manufactured network equipment solely from its affiliate, purchasing the equipment from the affiliate at inflated prices, or giving any preference to the affiliate's equipment in the procurement process and thereby excluding rivals from the market in the BOC's service area and undermining competition. We seek comment on how the BOCs could establish nondiscriminatory procurement procedures designed to ensure that other entities are treated on the same terms and conditions as a BOC affiliate in the procurement of goods, services, facilities, and information. We also seek comment on the nature and extent of rules necessary to ensure that such procedures are implemented.

85. Section 272(c)(1) also prohibits a BOC from discriminating in the establishment of standards. We seek comment on what ''standards'' are encompassed by this provision. We also seek comment on what procedures, if any, we should implement to ensure that the BOC does not discriminate between its affiliate and other entities in setting standards. For instance, should BOCs be required to participate in standard-setting bodies in the development of standards covered by this section? We note that, for example, a BOC could act anticompetitively by creating standards that require or favor equipment designs which are proprietary to its affiliate. A BOC's knowledge of both its affiliate's and its competitors' networks might also allow a BOC to adopt or modify equipment standards that its affiliates would be able to comply with more easily, or at less cost, than could unaffiliated carriers. We seek comment on what regulations, if any, are necessary to implement this nondiscrimination safeguard.

86. We note that the difference in language between section 272(c) and sections 272(a) and (e) might appear to allow a BOC affiliate that provides local exchange services to avoid compliance with section 272(c). Although sections 272(a) and 272(e) apply to a BOC and an affiliate subject to 251(c), section 272(c) refers only to the ''dealings'' by a ''*Bell operating company*'' with its section 272(a) affiliates. Section 153(4), however, states that a ''Bell operating company'' includes ''any successor or assign [of a BOC] * * * that provides wireline telephone exchange service.'' Reading these sections together, we

tentatively conclude that Congress did not intend for a BOC to be able to move its incumbent local exchange operations to an affiliate in order to avoid complying with section 272(c). Thus, we tentatively conclude that, if a BOC affiliate is engaged in local exchange activities and is therefore subject to section 251(c), then the local exchange affiliate would be subject to 272(c) requirements when dealing with BOC affiliates engaged in competitive activities.

D. Section 272(e)

87. Section 272(e) of the Communications Act places several additional obligations on BOCs and BOC affiliates that are subject to the requirements of section 251(c). Sections 272(f)(1) and 272(f)(2) provide that the requirements of section 272(e) do not sunset. Some of the provisions in section 272(e), however, could be interpreted as subject to sunset because their requirements are contingent on the existence of a separate affiliate. Section 272(e)(2) states that the BOC ''shall not provide any facilities, services, or information concerning its provision of exchange access to the *affiliate described in subsection (a)* unless such facilities, services, or information are made available to other providers of interLATA services in that market on the same terms and conditions.'' Similarly, section 272(e)(4) states that the BOC ''may provide any interLATA or intraLATA facilities or services to its *interLATA affiliate* if such services or facilities are made available to all carriers at the same rates and on the same terms and conditions, and so long as the costs are appropriately allocated.'' If the BOCs did not maintain section 272(a) separate affiliates after that requirement expired, it is unclear whether the nondiscrimination requirements of sections 272(e) (2) and (4) would be maintained. We seek comment on whether Congress intended to sunset the requirements in sections 272(e) (2) and (4) if the BOCs eliminated their section 272(a) separate affiliates. Commenters claiming that the requirements of those sections survive the elimination of the section 272(a) separate affiliates should explain in detail how these requirements should be applied in those circumstances.

1. Section 272(e)(1)

88. Pursuant to section 272(e)(1), ''[a BOC] and an affiliate that is subject to the requirements of section 251(c) shall fulfill any requests from an unaffiliated entity for telephone exchange service and exchange access within a period no longer than the period in which it provides such telephone exchange service and exchange access to itself or to its affiliates.''

89. In the 1996 Act, ''affiliate'' is defined as:

> a person that (directly or indirectly) owns or controls, is owned or controlled by, or is under common ownership or control with, another person. For purposes of this paragraph, the term 'own' means to own an equity interest (or the equivalent thereof) of more than 10 percent.

We tentatively conclude we should interpret ''an unaffiliated entity'' to include any entity, regardless of line of business, that is not affiliated with a BOC under the foregoing statutory definition. We seek comment on this tentative conclusion.

90. We seek comment on the scope of the term ''requests'' under this subsection. We seek comment on whether these requests should include, *inter alia,* initial installation requests, as well as any subsequent requests for improvement, upgrades or modifications of service, or repair and maintenance of these services.

91. We tentatively conclude that section 272(e)(1) requires BOCs to treat unaffiliated entities nondiscriminatorily in the provision of exchange services or exchange access in terms of timing, but does not create any additional rights beyond those granted to unaffiliated entities through the 1996 Act, pre-existing provisions of the Communications Act, or other Commission rules. We seek comment on this tentative conclusion.

92. We additionally seek comment on how to implement the phrase ''a period no longer than the period in which it provides such * * * service to itself or to its affiliates'' and whether rules are needed to enforce this requirement. We note that, in offering new and advanced services, slow provision of telephone exchange service or access service may delay the offering of services by unaffiliated entities and thus reduce their ability to compete. We seek comment on what mechanisms, if any, we should establish in order to ensure that a BOC fulfills service requests in compliance with this section. We further seek comment on whether reporting requirements for service intervals analogous to those imposed by *Computer III* and *ONA* would be sufficient to implement this provision.

2. Section 272(e)(2)

93. Section 272(e)(2) states that a BOC and an affiliate that is subject to the requirements of section 251(c) ''shall not provide any facilities, services, or information concerning its provision of exchange access to [a section 272(a) affiliate] unless such facilities, services, or information are made available to other providers of interLATA services in that market on the same terms and conditions.'' We seek comment on what regulations, if any, we should adopt to implement this statutory requirement.

94. We seek comment on the scope of the term ''facilities, services or information concerning [the] provision of exchange access.'' We also seek comment on how to interpret the phrase ''other providers of interLATA services in that market.'' We further seek comment on the relevance of previous Commission proceedings or provisions of the MFJ governing BOC provision of facilities, services or information when implementing this section.

3. Section 272(e)(3)

95. Section 272(e)(3) provides that a BOC and an affiliate that is subject to the requirements of section 251(c) ''shall charge [a section 272(a) affiliate], or impute to itself (if using the access for its provision of its own services), an amount for access to its telephone exchange service and exchange access that is no less than the amount charged to any unaffiliated interexchange carrier for such services.'' We tentatively conclude that the BOCs' provision of telephone exchange and exchange access services under tariffed rates, including their affiliates' purchase at these rates pursuant to tariff or imputation of these rates to the BOCs, is sufficient to implement this provision. We also seek comment on the appropriate mechanism to enforce this provision in the absence of tariffed rates for the specified services. We seek comment on what additional regulations, if any, are necessary to implement this statutory provision.

4. Section 272(e)(4)

96. Section 272(e)(4) states that a BOC and an affiliate that is subject to the requirements of section 251(c) ''may provide any interLATA or intraLATA facilities or services to its interLATA affiliate if such services or facilities are made available to all carriers at the same rates and on the same terms and conditions, and so long as the costs are appropriately allocated.'' We seek comment regarding the scope of the term ''interLATA or intraLATA facilities or services.'' For example, does it include information services and all facilities used in the delivery of such services? We seek comment on what additional regulations, if any, are necessary to implement this statutory provision.

VI. Marketing Provisions of Sections 271 and 272

97. Section 272(g)(1) provides that ''[a] Bell operating company affiliate required by this section may not market or sell telephone exchange services provided by the Bell operating company unless that company permits other entities offering the same or similar service to market and sell its telephone exchange services.'' We seek comment on what regulations, if any, are necessary to implement this provision.

98. Section 271(e) restricts joint marketing by certain large telecommunications carriers:

> Until a Bell operating company is authorized pursuant to subsection (d) to provide interLATA services in an in-region State, or until 36 months have passed since the date of enactment of the Telecommunications Act of 1996, whichever is earlier, a telecommunications carrier that serves greater than 5 percent of the Nation's presubscribed access lines may not jointly market in such State telephone exchange service obtained from such company pursuant to section 251(c)(4) with interLATA services offered by that telecommunications carrier.

Section 272(g)(2) states that ''[a BOC] may not market or sell interLATA service provided by an affiliate required by this section within any of its in-region States until such company is authorized to provide interLATA services in such State under section 271(d).'' Sections 271(e) and 272(g)(2) appear to be parallel provisions that are intended to prevent BOCs and the largest interexchange carriers from marketing local and long distance services jointly prior to the BOCs' entry into in-region interLATA service, if the interexchange carrier is purchasing incumbent LEC services pursuant to section 251(c)(4) for resale. We note that, on its face, this provision does not preclude a covered interexchange carrier from jointly marketing local exchange services provided through interconnection of the interexchange carrier's facilities with an incumbent LEC pursuant to section 251(c)(2), or through purchase of unbundled network elements pursuant to section 251(c)(3). We tentatively conclude that the term ''market or sell'' in section 272(g)(2) should be construed similarly to the term ''jointly market'' in section 271(e). We seek comment on this tentative conclusion. We also seek comment on whether these sections encompass such prohibitions as, for example, advertising the availability of interLATA services combined with local exchange services, making these services available from a single source, or providing bundling discounts for the purchase of both services.

99. Section 272(g)(2) allows the BOC to market and sell the interLATA services of its affiliate after the BOC enters the interLATA market pursuant to section 271(d). Section 272(g)(3) provides that ''[t]he joint marketing and sale of services permitted under this subsection shall not be considered to violate the nondiscrimination provisions of subsection (c).'' Section 272(b)(3) requires the BOC and its affiliate to maintain separate officers, directors, and employees, and section 272(b)(5) requires a section 272(a) affiliate to conduct ''all transactions with the [BOC] * * * on an arm's length basis with any such transactions reduced to writing and available for public inspection.'' We invite parties to comment on the corporate and financial arrangements that are necessary to comply with sections 272(g)(2), 272(b)(3), and 272(b)(5). We seek comment on whether the affiliate must purchase marketing services from the BOC on an arm's length basis pursuant to section 272(b)(5). We further seek comment on whether, instead of allowing BOC personnel to market its affiliate's services at arm's length, it is necessary to require a BOC and its affiliate to jointly contract to an outside marketing entity for joint marketing of interLATA and local exchange service in order to comply with the provisions of section 272(b)(3).

100. We seek comment on additional issues raised by the marketing provisions of the 1996 Act. We seek comment on the interplay between the joint marketing provisions in sections 271 and 272 and the CPNI provisions set forth in section 222 that are the subject of a separate proceeding. We also seek comment on whether the joint marketing provision in section 274(c) has any indirect bearing on how we should apply the joint marketing provisions in sections 271 and 272.

VII. Enforcement of Sections 271 and 272

A. Mechanisms to Facilitate Enforcement of the Separate Affiliate and Nondiscrimination Safeguards of Sections 271 and 272

101. Enforcement of the statutory separate affiliate and nondiscrimination safeguards established by sections 271 and 272 and the rules that we may adopt to implement those provisions will be critical to ensuring the full development of competition in the local and interexchange telecommunications markets. We seek comment generally on the mechanisms necessary to facilitate the detection and adjudication of violations of these safeguards and, specifically, on how the Commission should exercise its enforcement powers under section 271(d)(6).

102. We seek comment on what requirements or mechanisms are necessary to facilitate detection and adjudication of violations of the separate affiliate and nondiscrimination requirements discussed above. For instance, should we impose reporting requirements on BOCs analogous to those requirements imposed by our CEI plans and ONA plans under *Computer III*? We recognize, however, that this will impose burdens on the BOCs as well as the Commission. Alternatively, would a third party compliance monitoring or reporting system be a more effective method of detecting violations of these provisions?

103. We seek comment on what mechanisms, other than reporting requirements imposed on BOCs or their affiliates, would facilitate detection and adjudication of violations of sections 271 and 272, by both the Commission and third parties. In particular, we seek comment on mechanisms that would allow third parties to identify the goods, services, facilities, or information that have been provided to BOC affiliates or other parties. For example, are the disclosure requirements under section 272(b)(5) a sufficient means of detecting violations? We seek comment on whether we should determine that a BOC or its affiliate would be in violation of sections 272(c)(1) and (e) if a BOC provides varying levels of service between its affiliate and third parties as well as between third parties themselves. We also seek comment on whether there are reasonable grounds by which a BOC or its affiliate could justify deviation from a rate, term or condition established under sections 272(c)(1) and (e). In proposing regulations for this section, commenting parties should state specifically what regulations or procedures should be required and how a specific provision of sections 272(c)(1) or (e) make them necessary.

B. Section 271 Enforcement Provisions

104. Section 271(d)(6) of the Communications Act gives the Commission specific authority to enforce the conditions that a BOC is required to meet in order for the Commission to grant the BOC authorization to provide in-region interLATA services. Specifically, section 271(d)(6) states:

> (A) COMMISSION AUTHORITY.—If at any time after the approval of an application under [section 271(d)(3)], the Commission determines that a [BOC] has ceased to meet

any of the conditions required for such approval, the Commission may, after notice and opportunity for a hearing—

(i) issue an order to such company to correct the deficiency;

(ii) impose a penalty on such company pursuant to title V; or

(iii) suspend or revoke such approval.

(B) RECEIPT AND REVIEW OF COMPLAINTS.—The Commission shall establish procedures for the review of complaints concerning failures by [BOCs] to meet conditions required for approval under [section 271(d)(3)]. Unless the parties otherwise agree, the Commission shall act on such complaint within 90 days.

We seek to clarify the relationship between this section and the Commission's existing enforcement authority under sections 206–209 of the Communications Act. Section 206 provides that, ''any common carrier'' found to be in violation of the Communications Act shall ''be liable to the person or persons injured thereby for the full amount of damages sustained in consequence of any such violation.'' Section 207 of the Communications Act permits any person ''damaged'' by the actions of any common carrier to bring suit for the recovery of these damages. Section 208(a) authorizes complaints by any person ''complaining of anything done or omitted to be done by any common carrier'' subject to the Communications Act or its provisions. Section 209 specifies that the Commission will ''make an order directing the carrier to pay to the complainant'' any damages amount a complainant successfully establishes. We tentatively conclude that, in the context of ''complaints concerning failures by [BOCs] to meet the conditions required for approval under [section 271(d)(3)],'' section 271(d)(6) generally augments the Commission's existing enforcement authority. For example, we believe that, in a situation where a complainant successfully establishes conduct (such as a failure to provide nondiscriminatory access to operator call completion services) that would constitute both a failure by the BOC to meet the conditions of its approval, as well as the basis for financial harm, the Commission could impose any of the sanctions specified in section 271(d)(6)(A), and could also award damages pursuant to its preexisting authority under section 209. We seek comment on this tentative conclusion. We also seek comment on whether, in a situation where a complaint alleges that a BOC has ceased to meet the conditions for approval to provide in-region interLATA telecommunications services and seeks damages as a result of the underlying alleged violative conduct, a Commission determination that the BOC has ceased to meet the conditions and the imposition of a section 271(d)(6)(A) sanction would fulfill the Commission's duty to ''act on such complaint within 90 days.''

105. In order to approve a BOC's application to provide in-region interLATA services pursuant to section 271(d)(3), the Commission must determine that the BOC: meets the requirements of section 271(c)(1); satisfies the competitive checklist in section (c)(2)(B); complies with the requirements of section 272; and demonstrates that the approval of its application is consistent with the public interest, convenience, and necessity. Section 271(d)(6)(A) sets forth various actions the Commission may take at any time after the approval of an application, and after notice and opportunity for a hearing, if it determines that a BOC has ceased to meet any of these conditions. We believe that there are two ways in which the Commission may determine that a BOC has ceased to meet the conditions of its approval. First, the Commission could make such a determination via the resolution of an expedited complaint proceeding pursuant to section 271(d)(6)(B). Second, the Commission could make such a determination on its own motion. We seek comment on this interpretation.

106. In addition, we seek comment on what legal and evidentiary standards are necessary to establish that a BOC has ceased to meet the conditions required for its approval to provide in-region interLATA service. As noted above, in order to establish a violation of section 201, a complainant must show that the defendant's terms of service and charges are ''unjust and unreasonable.'' Similarly, in order to establish a violation of section 202(a), a complainant must demonstrate ''unjust and unreasonable discrimination.'' Sections 271(c)(1), (c)(2)(B), and 272, in contrast, set forth no such standards that we must apply to complaints arising under these sections. We seek comment, therefore, on the types of showings that should be required of a complainant and a defendant BOC in order to ensure a full and fair resolution, within the 90-day statutory window, of a complaint alleging that a BOC has ceased to meet the conditions required for approval to provide in-region interLATA services.

107. In the context of a complaint proceeding, we seek comment on what constitutes a *prima facie* showing that a BOC has ceased to meet any or all of the conditions for interLATA entry. Is it enough for complainants invoking the expedited complaint procedures under section 271(d)(6)(B) to plead, along with proper supporting evidence, ''facts which, if true, are sufficient to constitute a violation of the Act or Commission order or regulation'' in order to establish a *prima facie* showing that the BOC has ceased to meet the conditions for approval in section 271(d)(3)? Is such a broad, generally applicable, standard more likely to engender frivolous complaints, or is it more likely to facilitate a complainant's ability to bring anti-competitive behavior by a BOC to the attention of the Commission? In the alternative, should the *prima facie* showing required be specific to the particular condition at issue, i.e., the requirements of section 271(c)(1), the conditions set forth in the competitive checklist of section 271(c)(2)(B), and the requirements of section 272? If so, commenters should describe what specific acts or omissions are sufficient to establish a *prima facie* showing that each of these conditions is no longer met.

108. Currently, in a typical complaint proceeding, the complainant generally has the burden of establishing that a common carrier has violated the Communications Act or a Commission rule or order. Ordinarily, this burden of proof does not, at any time in the proceeding, shift to the defendant carrier. In the case of section 202(a) complaints, however, once a complainant alleging a violation establishes that the services are like and that discrimination exists between them, the burden shifts to the defendant carrier to show that the discrimination is justified and, therefore, not unreasonable within the meaning of section 202(a). In some instances, parties who have initiated formal complaint proceedings with the Commission have expressed concern that defendant carriers, in particular the BOCs, have an inherent advantage in the proceedings because of their control over the information regarding their service offerings and related practices necessary for a full and fair resolution of the disputed issues. These parties have further complained that the discovery mechanism contained in the Commission's formal complaint rules of practice and procedure is cumbersome and seldom produces on a timely basis information of decisional significance. We, therefore, seek to assist parties in their pursuit of complaints before the Commission that BOCs have ceased to meet the conditions for interLATA entry, by ensuring the prompt and fair resolutions these complaints within the statutory 90-day period.

109.With this objective in mind, we believe it appropriate to inquire into whether the pro-competitive goals of the 1996 Act are advanced by shifting the ultimate burden of proof from the complainant to a defendant BOC, not just in complaints alleging discrimination under section 202(a), but in all complaints alleging that a BOC has ceased to meet any of the conditions for its approval to provide interLATA services under section 271(d)(3). Because the defendant BOC is likely to be in sole possession of information relevant to the complainant's case, and because the complaint must be acted upon in 90 days, we believe that shifting the burden may be an efficient way of resolving complaints invoking the expedited procedures of section 271(d)(6). We also find that by alleviating the burden on the complainant, burden-shifting may be a means of facilitating the detection of alleged anti-competitive behavior by the BOCs. We, therefore, seek comment on whether the burden should shift to the defendant BOC once the complainant makes a *prima facie* showing that a BOC has ceased to meet the conditions of section 271(d)(3), as it does when a complainant makes a *prima facie* showing of discrimination under section 202(a). If the burden should not shift upon a *prima facie* showing, we seek comment on what particular facts or circumstances established by the complainant, if any, would warrant shifting the burden of proof to a defendant BOC.

110. If we were to establish a rebuttable presumption, i.e., a shift in the burden of proof to the BOC upon a particular showing by the complainant, we seek comment on the type of evidentiary showing the defendant BOC must make in order to rebut the presumption that it has ceased to meet the conditions for approval. For example, is it enough for the BOC to establish the propriety of its conduct? Further, we invite parties to comment on whether the burden should shift to the defendant for any and all alleged violations of sections 271 or 272. Or, should rebuttable presumptions exist only for some of the requirements of 271 and 272, such as the competitive checklist requirements of section 271 and the nondiscrimination provisions of section 272? If commenters believe that a rebuttable presumption should exist for certain requirements but not others, they should explain with specificity why violations of some requirements warrant a rebuttable presumption and violations of others do not. In addition, we ask parties to comment on whether there are other mechanisms, instead of burden-shifting, that will facilitate the ability of a complainant to obtain a full and fair resolution of its complaint within the 90-day statutory window.

111. The Commission has effectively established a rebuttable presumption under sections 201(b) and 202(a) whereby the rates and practices of non-dominant carriers are presumed to be lawful. A complainant challenging a non-dominant carrier's rates or practices under these sections, therefore, must overcome this presumption of lawfulness in order to bring a successful action. A dominant carrier, on the other hand, is afforded no such presumption of lawfulness. We tentatively conclude that, in the context of complaints alleging that a BOC has ceased to meet the conditions required for the provision of in-region interLATA services, we will not employ a presumption of reasonableness in favor of the BOC or BOC affiliate, regardless of whether the BOC or BOC affiliate is regulated as a dominant or non-dominant carrier. We seek comment on this tentative conclusion.

112. Section 271(d)(6)(A) provides that if, at any time after approval of a BOC application, the Commission determines that the BOC has ceased to meet any of the conditions of its approval to provide interLATA services, the Commission may, after notice and opportunity for a hearing: (1) Issue an order to the BOC to ''correct the deficiency;'' (2) impose a penalty pursuant to Title V; or (3) suspend and revoke the BOC's approval to provide in-region interLATA services. Pursuant to section 503(b)(1)(B), a person who ''willfully or repeatedly'' fails to comply with any of the provisions of the Communications Act or any rule, regulation, or order issued by the Commission under the Communications Act, is liable to the United States for a forfeiture penalty. Section 503(b)(2)(B) authorizes the Commission to assess forfeitures against common carriers of up to one hundred thousand dollars for each violation, or each day of a continuing violation, up to a statutory maximum of one million dollars for a single act or failure to act. In exercising such authority, the Commission is required to take into account ''the nature, circumstances, extent, and gravity of the violation and, with the respect to the violator, the degree of culpability, any history of prior offenses, ability to pay, and such other matters as justice may require.''

113. We tentatively conclude that we will follow the procedures set forth in Title V to impose Title V penalties, including forfeitures, under this section. As to the non-forfeiture sanctions, we seek comment on whether the Commission should exercise its enforcement discretion and impose these sanctions on an individual case basis or whether we should establish specific legal and evidentiary standards for each type of sanction. Further, we seek comment on the appropriate ''notice and opportunity for a hearing'' for the imposition of these non-forfeiture sanctions both in the context of a complaint proceeding and on the Commission's own motion. We interpret ''opportunity for hearing'' not to require a trial-type hearing before an Administrative Law Judge (ALJ) (an APA hearing), and invite comment on this interpretation. In coming to this view, we note that section 271(d)(6)(A) does not require a ''hearing on the record,'' which would trigger these extensive procedural requirements under the APA. Moreover, although proceedings under sections 204 and 205 of the Communications Act are generally conducted as rulemakings, these sections use similar language with respect to hearing requirements, and proceedings pursuant to sections 204 and 205 generally occur through written responses. In addition, we note that, in allowing for forfeitures, section 271(d)(6)(A) specifically requires the Commission to impose forfeitures pursuant to Title V of the Communications Act. Section 503(b) of the Communications Act, the general forfeiture provision, although leaving the choice to Commission discretion, allows for either an adjudicatory proceeding before an ALJ (an APA hearing) or a paper hearing before the Commission pursuant to notice of apparent liability procedures. We also tentatively conclude that Congress, by imposing a 90-day deadline for complaints, did not intend to afford the BOCs trial-type hearings in enforcement proceedings pursuant to section 271(d). Finally, we also tentatively conclude that the filing of a complaint invoking the expedited procedures of section 271(d)(6)(B) may trigger a hearing under section 271(d)(6)(A) and that the written response by a BOC will generally afford the BOC sufficient hearing rights to allow the Commission to impose non-forfeiture sanctions. We invite comment on these tentative conclusions.

114. We seek comment broadly on whether there are other ways, in addition to the sanctions listed in section 271(d)(6)(A), by which the Commission can create incentives for the BOCs to ensure that they continue to meet the conditions required for approval under section 271(d)(3). For

example, would the adoption of alternative dispute resolution procedures, analogous to those mandated under section 273(d)(5) of the Communications Act, facilitate resolution of complaints alleging a violation of any of these conditions? As we note above, section 271(d)(6)(B) of the Communications Act prescribes expedited procedures for the review of complaints alleging that a BOC has ceased to meet the conditions required for approval to provide in-region interLATA services. Are there other ways to expedite the resolution of such complaints? We seek comment on what else the Commission can do to facilitate the ability of a complainant to obtain a determination that a BOC has ceased to meet the conditions, which can then provide a basis for pursuing a private right of action for the recovery of damages in federal district court under section 207 of the Communications Act.

VIII. Classification of LECS and Their Affiliates as Dominant or Non-Dominant Carriers

115. In this section, we seek comment on whether we should regulate the BOC affiliates as non-dominant carriers in the provision of in-region, interstate, domestic, interLATA services. We also seek comment on whether we should continue to apply to independent LECs (i.e., LECs, other than the BOCs) the existing separation requirements established in the *Competitive Carrier Fifth Report and Order,* which are a prerequisite for independent LECs to qualify as non-dominant carriers in the provision of interstate, domestic, interexchange services originating in their local exchange areas. Finally, we consider whether to apply the same regulatory classification to the BOC affiliates' and independent LECs' provision of in-region, international services as we adopt in this proceeding for their provision of in-region, interstate, domestic, interLATA services and in-region, interstate, domestic, interexchange services, respectively.

A. Background

116. Under our rules, non-dominant carriers are not subject to rate regulation, and may file tariffs that are presumed lawful on one day's notice and without cost support. Non-dominant carriers are also subject to streamlined section 214 requirements. In contrast, dominant carriers are subject to price cap regulation, as specified by Commission order, and must file tariffs on 14, 45, or 120 days' notice, with cost support data for above-cap and out-of-band tariff filings, and with additional information for new service offerings. Dominant domestic carriers must also obtain specific prior Commission approval to construct a new line, to extend a line or to acquire, lease or operate any line, as well as to discontinue, reduce, or impair service.

117.In the *Competitive Carrier First Report and Order* (45 FR 76148 (November 18, 1980)), the Commission classified LECs and pre-divestiture AT&T as dominant, with respect to both local exchange and interstate long distance services, and therefore subject to the ''full panoply'' of then-existing Title II regulation. In contrast, the Commission classified MCI, Sprint, and other ''miscellaneous common carriers'' as non-dominant carriers.

118. Later in the *Competitive Carrier* proceeding, the Commission reconsidered how it should regulate the provision of interstate, interexchange services by independent LECs. In the *Competitive Carrier Fourth Report and Order,* the Commission determined that interexchange carriers affiliated with independent LECs would be regulated as non-dominant interexchange carriers. In the *Competitive Carrier Fifth Report and Order,* the Commission clarified that an ''affiliate'' of an independent LEC was ''a carrier that is owned (in whole or in part) or controlled by, or under common ownership (in whole or in part) or control with, an exchange telephone company.'' The Commission further clarified that, in order to qualify for non-dominant treatment, the affiliate providing interstate, interexchange services must: (1) maintain separate books of account; (2) not jointly own transmission or switching facilities with its affiliated exchange telephone company; and (3) acquire any services from its affiliated exchange telephone company at tariffed rates, terms and conditions. The Commission added that any interstate, interexchange services offered directly by an independent LEC (rather than through a separate affiliate) or through an affiliate that did not satisfy the specified conditions would be subject to dominant carrier regulation. The Commission observed that these separation requirements would provide some ''protection against cost-shifting and anticompetitive conduct'' by an independent LEC that could result from its control of local bottleneck facilities.

119. In the *Competitive Carrier Fifth Report and Order,* the Commission also addressed the possible entry of the BOCs into interstate, interLATA services in the future:

> The BOCs currently are barred by the [MFJ] from providing interLATA services * * *. If this bar is lifted in the future, we would regulate the BOCs' interstate, interLATA services as dominant until we determined what degree of separation, if any, would be necessary for the BOCs or their affiliates to qualify for nondominant regulation.

120.Because the 1996 Act has superseded the MFJ's prohibition against the BOCs' provision of interLATA services, we determine in this proceeding whether we should regulate the BOCs or their affiliates as dominant in the provision of in-region, interstate, domestic, interLATA services. We also consider in this section whether we should modify our existing rules that require independent LECs to comply with the separation requirements described above in order to qualify for non-dominant regulatory treatment in the provision of interstate, domestic interexchange services that originate in their local exchange areas.

121. Our rules define a dominant carrier as one that possesses market power, and a non-dominant carrier as a carrier not found to be dominant (i.e., one that does not possess market power). As noted, in the *Competitive Carrier Fourth Report and Order,* the Commission defined market power alternatively as ''the ability to raise prices by restricting output'' and ''the ability to raise and maintain price above the competitive level without driving away so many customers as to make the increase unprofitable.'' In determining whether the BOC affiliates or independent LECs should be classified as dominant or non-dominant, it is first necessary to define the appropriate product and geographic markets for assessing the market power of BOC affiliates in the provision of in-region, interstate, domestic, interLATA services and the market power of independent LECs in the provision of interstate, domestic, interexchange services originating in areas where they control local exchange facilities. We also address the relevant product and geographic market definitions for assessing the market power of BOC affiliates and independent LECs in their provision of in-region, international services.

B. Definition of the Relevant Product and Geographic Markets

122. In the *Interexchange NPRM,* we sought comment on whether we should retain the relevant product and geographic market definitions adopted in the *Competitive Carrier* proceeding with respect to the provision of domestic interexchange services. Based on the analysis set forth in the *1992 Merger Guidelines,* we tentatively concluded that, under certain circumstances, we should use narrower market definitions than those adopted

in the *Competitive Carrier* proceeding. In this NPRM, we seek comment on how we should apply in this proceeding the market definition approaches that we proposed in the *Interexchange NPRM*, assuming they are adopted. We also seek comment on how, if we do not adopt the approach proposed in the *Interexchange NPRM*, we should define the relevant product and geographic markets for purposes of this proceeding.

1. Relevant Product Markets

123. In the *Competitive Carrier* proceeding, the Commission defined the relevant product market, for purposes of assessing the market power of domestic interexchange carriers covered by that proceeding, as ''all interstate, domestic, interexchange telecommunications services'' and concluded that there were no relevant submarkets. In the *Interexchange NPRM*, we questioned whether a narrower product market definition might provide a ''more refined analytical tool'' for evaluating whether a carrier or group of carriers together possess market power.

124. Under the *1992 Merger Guidelines*, ''[m]arket definition focuses solely on demand substitution factors—i.e., possible consumer responses.'' *1992 Merger Guidelines* at 20,571. However, ''[s]upply substitution factors—i.e., possible production responses—are considered . . . in the identification of firms that participate in the relevant market and the analysis of entry.'' *Id*. In the *Interexchange NPRM*, we noted that consideration of substitutability of demand supports the use of a narrower relevant product market than that defined in the *Competitive Carrier* proceeding. Based on this analysis, we stated that ''we believe that we should define as a relevant product market an interstate, interexchange service for which there are no close substitutes or a group of services that are close substitutes for each other, but for which there are no other close substitutes.''

125. We acknowledged, however, that it might be impracticable to delineate all relevant product markets for interstate, domestic, interexchange services. We also stated our belief that we need not do so, in light of our previous finding that substantial competition exists with respect to most interstate, domestic, interexchange service offerings. We tentatively concluded that we should address the question of whether a specific interstate, domestic, interexchange service (or group of services) constitutes a separate relevant product market ''only if there is credible evidence suggesting that there is or could be a lack of competitive performance with respect to that service (or group of services).'' We sought comment on this tentative conclusion in the *Interexchange NPRM*.

126. Applying the approach proposed in the *Interexchange NPRM*, we note that, at this time, we are not aware of any evidence suggesting that there is a particular interLATA service or group of services that is or will be provided by the BOC affiliates or the independent LECs with respect to which ''there is or could be a lack of competitive performance.'' We therefore tentatively conclude that, if we adopt the approach to product market definition outlined above (and proposed in the *Interexchange NPRM*), we should treat all interstate, domestic, interLATA telecommunications services as the relevant product market for purposes of determining whether the BOC affiliates have market power in the provision of interstate, domestic, interLATA services; for independent LECs, we likewise tentatively conclude that we should treat all interstate, domestic, interexchange telecommunications services as the relevant product market. We seek comment on this tentative conclusion. We also seek comment on whether credible evidence exists that suggests that there is a particular interexchange service or group of services that is or will be provided by the BOC affiliates or the independent LECs with respect to which ''there is or could be a lack of competitive performance.'' Parties recommending that particular services be grouped in narrower relevant product markets should substantiate this contention with relevant evidence. Specifically, in order to make such a showing, in this proceeding or in the future, a party must present pricing or performance data or an analysis of structural factors that, in either case, show that the service or group of services is not competitive.

127. We also seek comment on alternative approaches to product market definition (including the product market definition established in the *Competitive Carrier* proceeding) that we should adopt in this proceeding if we decide not to adopt the approach proposed in the *Interexchange NPRM*. Parties should also discuss how these alternative approaches to product market definition should be applied in this proceeding.

128. In the *International Competitive Carrier Order* (50 FR 48191 (November 22, 1985)), the Commission determined that, for international service, demand and supply elasticity revealed distinct product markets, international message telephone service (IMTS) and non-IMTS. The Commission concluded that (a) AT&T was dominant in the provision of IMTS, and (b) all other IMTS providers (*e.g.*, Sprint and MCI), except the non-contiguous domestic carriers, were not dominant. No carrier, the Commission found, was dominant in the provision of non-IMTS service. The Commission subsequently found AT&T to be non-dominant in the provision of IMTS. We tentatively conclude that we should retain the same product definition for the provision of international services by the BOCs' affiliates and the independent LECs. We seek comment on this tentative conclusion.

2. Relevant Geographic Markets

129. In the *Competitive Carrier* proceeding, the Commission concluded that there was ''a single national relevant geographic market (including Alaska, Hawaii, Puerto Rico, U.S. Virgin Islands, and other U.S. offshore points) for interstate, domestic, interexchange telecommunications services, with no relevant submarkets.'' In the *Interexchange NPRM*, we observed that ''more sharply focused market definitions will aid us in evaluating whether the BOCs possess market power with respect to the provision of interLATA services in areas where they provide local access service.''

130. As previously noted, the *1992 Merger Guidelines* focus on demand substitution factors for purposes of market definition. In considering these factors in the *Interexchange NPRM*, we noted that, at its most fundamental level, interexchange calling involves a customer making a connection from a specific location to another specific location. We also expressed the view that most telephone customers do not view interexchange calls originating in different locations to be substitutes for each other. Accordingly, we tentatively concluded that ''the relevant geographic market for interstate, interexchange services should be defined as all calls from one particular location to another particular location.'' We sought comment on this tentative conclusion in the *Interexchange NPRM*.

131. We recognized, however, that it would be impracticable to conduct a market power analysis in each geographic market implied by this point-to-point market definition. We also stated our belief that, in the majority of cases, economic factors and the realities of the marketplace should cause point-to-point markets to behave in a sufficiently similar manner to allow us to evaluate broader, more manageable groups of markets for purposes of market power analysis. We tentatively concluded that we should generally continue to treat interstate,

interexchange services as a single national market when examining whether a carrier or group of carriers acting together has market power. We expressed the belief, however, that there may be special circumstances that require us to examine an area smaller than the entire nation, for purposes of market power analysis. We therefore proposed ''to examine a particular point-to-point market (or group of markets) for the presence of market power if there is credible evidence suggesting that there is or could be a lack of competition in that market (or group of markets) and there is a showing that geographic rate averaging will not sufficiently mitigate the exercise of market power (if it exists) in that market (or group of markets).''

132. In applying that approach, we believe that there are special circumstances that make it appropriate for us to examine an area smaller than the entire nation for purposes of assessing the market power of a BOC affiliate or independent LEC. As discussed above, it is possible that a BOC, through cost misallocation or discrimination, may be able to use its market power in local exchange and exchange access services to disadvantage the BOC affiliate's interexchange competitors. Such cost misallocation or discrimination conceivably could enable the BOC affiliate eventually to obtain the ability to raise unilaterally its price for in-region, interstate, domestic, interLATA services above competitive levels by restricting its output. With respect to each originating in-region location, the determination of whether a BOC affiliate or independent LEC possesses market power in that market will turn on the same issue—whether the BOC or independent LEC can leverage the market power arising from its control of access facilities sufficiently to give the BOC affiliate or independent LEC affiliate, respectively, market power in that point-to-point market in the provision of interstate, domestic, interLATA services or interstate, domestic, interexchange services, respectively. We believe that, given the BOCs' and independent LECs' current retention of monopoly control over bottleneck facilities, a BOC or independent LEC can exercise market power in either all or none of these point-to-point markets originating in the areas where the BOC or independent LEC controls local exchange facilities. We also recognize that geographic rate averaging of interstate long distance services alone may not be sufficient to offset the anticompetitive effects of a BOC's or independent LEC's use of the market power resulting from its control over local access facilities.

133. We tentatively conclude, therefore, that, at this stage, the BOCs' current monopoly control of bottleneck facilities constitutes ''credible evidence suggesting that there is or could be a lack of competition'' with respect to interstate, domestic, interLATA services originating in a BOC's in-region area. Consequently, we tentatively conclude that we should evaluate a BOC's point-to-point markets in which calls originate in-region separately from its point-to-point markets in which calls originate out-of-region, for the purpose of determining whether a BOC interLATA affiliate possesses market power in the provision of in-region, interstate, domestic, interLATA services. Similarly, we tentatively conclude that we should evaluate an independent LEC's point-to-point markets in which calls originate in its local exchange areas separately from its markets in which calls originate outside those areas, for the purpose of determining whether an independent LEC possesses market power in the provision of in-region, interstate, domestic, interexchange services.

134. We seek comment on this proposed approach. We invite parties to discuss why they believe we should examine smaller or larger areas for purposes of determining whether a BOC affiliate or independent LEC possesses market power in the provision of interstate, domestic, interLATA services or interstate, domestic, interexchange services, respectively.

135. We seek comment on alternative approaches to geographic market definition that we should adopt in this proceeding (including the geographic market definition established in the *Competitive Carrier* proceeding) if we decide not to adopt the approach proposed in the *Interexchange NPRM*. Parties should also discuss how these alternative approaches to geographic market definition should be applied in this proceeding.

136. In the *International Competitive Carrier Order*, the Commission determined that, for international service, every destination country constituted a separate geographic market based ''primarily on the need for a carrier to obtain an operating agreement prior to providing service to a given country.'' With the possible exception of routes where a BOC affiliate or independent LEC is affiliated with one or more foreign carriers, we believe that there are no critical distinctions on the basis of a BOC affiliate's or independent LEC's market shares, their respective sizes and resources, demand and supply elasticities, or conditions of entry from one destination country to another which would require a route-by-route analysis of these carriers' market positions. Further, the Commission recently determined that there is no evidence to ''suggest[ ] that entry barriers vary substantially among geographic markets.'' Thus, we tentatively conclude that, for purposes of this proceeding, we can analyze the market power of the BOC affiliates and independent LECs on a worldwide basis, and need not generally make route-by-route findings, with the exception of routes in which the carriers are affiliated with foreign carriers in the destination market. We seek comment on this tentative conclusion. We also invite parties to discuss why they believe we should examine smaller areas for purposes of determining whether a BOC affiliate or independent LEC possesses market power in the provision of in-region, international services.

C. Classification of BOC Affiliates

137. In this section, we consider whether we should relax the dominant carrier regulation that under our current rules would apply to in-region, interstate, domestic, interLATA services provided by BOC affiliates. In order to do so, our rules require us to determine that the BOC affiliates will not possess market power in the provision of those services in the relevant product and geographic markets. We also consider whether to apply the same regulatory classification to the BOC affiliates' provision of in-region, international services as we impose on their provision of in-region, interstate, domestic, interLATA services.

138. As a preliminary matter, we note that there are two ways in which a carrier can profitably raise and sustain prices above competitive levels and thereby exercise market power. For convenience, we refer in the following discussion to a carrier's ability to engage in such a strategy as the ability to ''raise prices.'' First, a carrier may be able to raise prices by restricting its own output (which usually requires a large market share); second, a carrier may be able to raise prices by increasing its rivals' costs or by restricting its rivals' output through the carrier's control of an essential input, such as access to bottleneck facilities, that its rivals need to offer their services.

139. Courts, applying the Sherman Act, have long distinguished between the ability of a firm to restrict output and raise its price above the competitive

level and the ability of a firm to leverage its market power in one market to gain a competitive advantage in a second market. *See, e.g., United States* v. *Griffith*, 334 U.S. 100, 107–08 (1948) (holding that monopoly power had been illegally used ''to beget monopoly''); *Berkey Photo, Inc.*v. *Eastman Kodak Co.*, 603 F.2d 263, 275–76 (2d Cir. 1979), *cert. denied*, 444 U.S. 1093 (1980); *Viacom Intern'l Inc.* v. *Time Inc.*, 785 F. Supp. 371 (S.D.N.Y. 1992). Although a number of courts have disagreed with *Berkey's* conclusion that ''the use of monopoly power attained in one market to gain a competitive advantage in another is a violation of section 2 [of the Sherman Act], *even if there has not been an attempt to monopolize the second market*,'' *Berkey*, 603 F.2d at 276 (emphasis added), these courts have not questioned the distinction described above. *See, e.g., Alaska Airlines, Inc.* v. *United Airlines, Inc.*, 948 F.2d 536, 547 (9th Cir. 1991); *Fineman* v. *Armstrong World Indus., Inc.*, 980 F.2d 171, 206 (3d Cir. 1992). Economists likewise have recognized such a distinction by distinguishing between ''Stiglerian'' market power, which is the ability of a firm profitably to raise and sustain its price significantly above the competitive level by restricting its output, and ''Bainian'' market power, which is the ability of a firm profitably to raise and sustain its price significantly above the competitive level by raising its rivals' costs and thereby causing the rivals to restrain their output. T.G. Krattenmaker, R.H. Lande, and S.C. Salop, *Monopoly Power and Market Power in Antitrust Law*, 76 Geo. L.J. 241, 249–253 (1987). We note that raising rivals' costs does not necessarily result in an increase in prices. If a BOC raises the costs of its affiliate's rivals so that the rivals raise their prices, the affiliate could choose not to raise its prices, in order to increase its market share. The exercise of this type of market power could also delay the introduction of new technologies or degrade the quality of service that a BOC affiliate's interLATA competitors would otherwise provide.

140. We seek comment on whether the BOC affiliates should be classified as dominant carriers in the provision of in-region, interstate, domestic, interLATA services under our rules only if we find that they have the ability to raise prices of those services by restricting their own output, or whether the affiliates should be classified as dominant if the BOCs have the ability to raise prices by raising the costs of their affiliates' interLATA rivals. We believe that our regulations associated with the classification of a carrier as dominant generally are designed to prevent a BOC affiliate from raising price by restricting its output rather than to prevent a BOC from raising price by raising its rivals' costs. For example, price cap regulation of a BOC affiliate's retail rates for in-region, interLATA services should prevent the affiliate from achieving higher retail interLATA prices, but generally would not prevent the BOC from raising its affiliate's rivals' costs through discrimination or other anticompetitive conduct. Although price cap regulation could limit a BOC affiliate's ability to raise its interLATA rates if the BOC caused the affiliate's rivals to raise their prices by increasing their costs, price regulation would not prevent the affiliate from profiting from the BOC's raising of rivals' costs through increased market share. Such behavior would be profitable if the BOC were thereby able to retard a rival's innovation or cause its affiliate's rivals to lose market share to the affiliate. We note that this form of anticompetitive conduct might well involve increasing the affiliate's own output. We also note that the definitions of market power cited by the Commission in the *Competitive Carrier Fourth Report and Order* referred to the concept of a carrier raising price by restricting its own output.

141. In determining whether a firm possesses market power, the Commission previously has focused on certain well-established market features, including market share, supply and demand substitutability, the cost structure, size, or resources of the firm, and control of bottleneck facilities. All but the last of these features, bottleneck control, appear to focus exclusively on whether the carrier has the ability to raise price by restricting its own output. With respect to the first index, market share, we believe that the fact that each BOC affiliate initially will have zero market share in the provision of in-region, interstate, domestic, interLATA services suggests that the affiliate initially will not be able profitably to raise and sustain its price by restricting its output. Because, however, the affiliate's zero market share results from its exclusion from the market until now, it says little about whether the affiliate would quickly achieve the ability to raise price by restricting output. Although our analysis below focuses on the possibility that a BOC affiliate would gain such ability through anticompetitive activity by the BOC, we recognize and seek comment on the possibility that an affiliate could gain such ability through means other than anticompetitive conduct. For example, the strength of a BOC's brand identity in its region alone might enable its affiliate to gain substantial market share quickly, thereby giving it the ability to raise price by restricting its output. As to supply substitutability, since all interLATA customers currently are served by the affiliates' competitors and could continue to be served by them after BOC affiliates enter the domestic interLATA market, we believe that the availability of this transmission capacity will constrain the BOC affiliates' ability to raise its domestic interLATA prices. Moreover, we recently found that the purchasing decisions of most customers of domestic interexchange services are sensitive to changes in price and would be willing to shift their traffic to an interexchange carrier's rival if the carrier raises its prices. We also believe that the cost structure, size, and resources of the BOC affiliates are not likely to enable them to raise prices for their domestic interLATA services. In the *AT&T Reclassification Order*, the Commission noted that the issue is whether a carrier's ''lower costs, sheer size, superior resources, financial strength, and technical capabilities'' ''are so great to preclude the effective functioning of a competitive market.'' We seek comment on this analysis.

142. As noted above, in assessing whether a BOC affiliate would quickly achieve market power in the provision of in-region, interstate, domestic, interLATA services, we must also consider the significance of the BOCs' current control of bottleneck access facilities. We noted earlier that a BOC's control of access facilities poses two principal problems as the BOC enters markets from which it has previously been prohibited—improper allocation of costs and unlawful discrimination. The BOCs' control of access facilities is a factor in both types of market power discussed above. In analyzing whether a BOC affiliate could raise its prices by restricting its own output, the primary inquiry is whether the safeguards in the 1996 Act and any Commission rules implementing these safeguards, coupled with other provisions of the Communications Act and Commission regulations, will sufficiently constrain a BOC's ability to improperly allocate costs, discriminate unlawfully, or engage in other anticompetitive conduct such that its affiliate would not quickly gain the ability to raise price by restricting its output of in-region, interstate, domestic, interLATA services. In analyzing whether a BOC could cause increases in the prices for in-region, interstate, domestic, interLATA services by raising the costs

of its affiliate's interLATA rivals, the inquiry focuses on whether the statutory and regulatory safeguards will prevent a BOC from engaging in unlawful discrimination or other anticompetitive conduct that would raise its affiliate's rivals' costs.

143. As noted above, improper allocation of costs by a BOC is of concern because such action may allow a BOC to recover costs incurred by its affiliate to provide interstate, domestic, interLATA services from subscribers to the BOC's local exchange and exchange access services, in order to give the affiliate an unfair advantage over its competitors. For purposes of market power analysis, however, we are concerned with improper allocation of costs only to the extent it enables a BOC affiliate to set retail interLATA prices at predatory levels (i.e., below the costs incurred to provide those services), drive out its interLATA competitors, and then raise and sustain retail interLATA prices significantly above competitive levels. A BOC may be more likely to attempt to improperly allocate costs to the extent the BOC and BOC affiliate share common facilities and personnel. As discussed above, section 272 imposes structural safeguards to prevent a BOC from improperly allocating costs among its affiliate's interLATA services and services provided by the BOC. Specifically, the statute requires a BOC affiliate to ''operate independently'' from the BOC, maintain separate books, records, and accounts from the BOC, and have separate officers, directors, and employees. In addition, a BOC affiliate must conduct all transactions with the BOC on an arm's length basis, and all such transactions must be reduced to writing and made available for public inspection. We believe that these safeguards will constrain a BOC's ability to improperly allocate costs and make it easier to detect any improper allocation of costs that may occur.

144. We believe that price cap regulation of the BOC's access services also reduces the potential that the BOCs would improperly allocate the costs of their affiliates' interLATA services. As the Commission previously explained, ''[b]ecause price cap regulation severs the direct link between regulated costs and prices, a carrier is not able to recoup misallocated nonregulated costs by raising basic service rates, thus reducing the incentive for the BOCs to allocate nonregulated costs to regulated services.'' We recognize that under our current interim LEC price cap rules, a BOC could select an X-factor option that requires it to share interstate earnings with its customers that exceed specified benchmarks and permit the BOC to make a low-end adjustment if interstate earnings fall below a specified threshold. Consequently, this regime may create some incentive for a BOC to allocate costs from interLATA services to access services in order to reduce the amount of profits the BOC is required to share with its interstate access service customers. Similarly, the possibility of future re-calibration of price cap levels also implies that price cap regulation does not fully sever the link between regulated costs and prices. We note, however, that we have tentatively concluded in the *BOC Accounting Safeguards NPRM* that we should apply our affiliate transaction rules to transactions between the BOCs and their interLATA affiliates, in order to make it more difficult for a BOC to allocate to its regulated local exchange and exchange access services costs that should be assigned to its affiliate's in-region, interLATA activities.

145. In addition, we note that, even if a BOC is able to allocate improperly the costs of its affiliate's interLATA services, it is questionable whether a BOC affiliate could successfully engage in predation. At least three interexchange carriers—AT&T, MCI, and Sprint—have nationwide or near-nationwide network facilities. These are large well-established companies with customers throughout the nation. It may be unlikely, therefore, that a BOC affiliate, whose customers presumably would be concentrated in one geographic region, could drive one or more of these companies from the market. Even if it could do so, there is a question whether the BOC affiliate would later be able to raise prices in order to recoup lost revenues. As Professor Spulber has observed, ''[e]ven in the unlikely event that [a BOC affiliate] could drive one of the three large interexchange carriers into bankruptcy, the fiber-optic transmission capacity of that carrier would remain intact, ready for another firm to buy the capacity at a distress sale and immediately undercut the [affiliate's] noncompetitive prices.'' We recognize that action taken in concert by two or more BOCs could have a more significant impact on interLATA competitors. In paragraph , infra, we seek comment on the effect, if any, that a merger of or joint venture between two or more BOCs should have on our determination of whether to classify one of the BOC's interLATA affiliate as dominant or non-dominant.

146. We seek comment on whether the structural safeguards in section 272, price cap regulation of the BOC's access services, and the accounting safeguards proposed in the *Accounting Safeguards NPRM* are sufficient to prevent the BOCs from improperly allocating costs between monopoly local exchange and exchange access services and their affiliates' competitive interLATA services to such an extent that their interLATA affiliates would quickly gain the ability profitably to raise and sustain prices of in-region, interstate, domestic, interLATA services significantly above competitive levels by restricting its output of these services. If so, we seek comment on whether regulation of a BOC's interLATA affiliate as a dominant carrier would prevent the BOC affiliate from engaging in such pricing practices. We seek comment on whether a BOC's ability improperly to allocate the costs between interLATA and exchange access services would enable the BOC to raise the costs of its affiliate's interLATA competitors.

147. In addition to improper allocation of costs, a BOC potentially could use its market power in the provision of local exchange and exchange access services to the advantage of its interLATA affiliate by discriminating against the affiliate's interLATA competitors with respect to the provision of exchange and exchange access services. As previously discussed, there are various ways in which a BOC could attempt to discriminate against unaffiliated interLATA carriers. For example, a BOC could provide its affiliate's interLATA competitors with poorer quality interconnection to the BOC's local network than it provides to its affiliate, or it could unnecessarily delay satisfying its competitors' requests to connect to the BOC's network. As a more specific example, the BOC may fail to cooperate with an interLATA carrier that is introducing an innovative new service until the BOC's interLATA affiliate is ready to initiate the same service. To the extent that interexchange customers believe that the BOC affiliate offers a higher quality of service, the BOC affiliate may be able to raise its interLATA rates. Moreover, even occasional disruptions of a competing carrier's services may cause customers to choose another carrier. We believe that these and other forms of discrimination may be difficult to police, particularly in situations where the level of the BOC's ''cooperation'' with unaffiliated interLATA carriers is difficult to quantify. To the extent customers value ''one-stop shopping,'' degrading a carrier's interexchange service may also undermine the attractiveness of the carrier's interexchange/local exchange package

and thereby strengthen the BOC's dominant position in the provision of local exchange services.

148. As previously noted, sections 272 (c) and (e) set forth both general and specific nondiscrimination safeguards that apply to BOC provision of in-region interLATA telecommunications service and other services. For example, section 272(e)(3) requires that a BOC charge its affiliate ''an amount for access to its telephone exchange service and exchange access that is no less than the amount [that the BOC charges] any unaffiliated interexchange carriers for such services.'' Section 272 also restricts the ability of a BOC to provide ''facilities, services, or information concerning its provision of exchange access to [its affiliate,] unless [it makes] such facilities, services, or information * * * available to other providers of interLATA services in that market on the same terms and conditions.'' Section 272(e)(1) explicitly prohibits a BOC from discriminating against unaffiliated carriers by delaying their requests for exchange service and exchange access. The statute also includes joint marketing restrictions to preclude, for example, a BOC affiliate from bundling long distance service with its affiliated BOC's local service, unless competing interexchange carriers have the same ability to bundle their long distance service with the BOC's local services. As noted, we recognize that the nondiscrimination requirements in section 272 will not eliminate the BOCs' incentive to discriminate against competing interexchange carriers. We seek comment, however, on whether and the extent to which these safeguards would prevent the BOCs from gaining the two types of market power discussed above. Specifically, we seek comment on whether these safeguards would prevent a BOC from raising the costs of its affiliate's interLATA rivals by discriminating against those competitors, and on whether these safeguards would prevent a BOC from discriminating to such an extent that its interLATA affiliate would quickly acquire the ability profitably to raise and sustain the price of in-region, interstate, domestic, interLATA services significantly above competitive levels by restricting their output.

149. There is at least one other way, in addition to the improper allocation of costs and discrimination, in which a BOC could use the market power that arises from its control of local bottleneck facilities to give its affiliate a competitive advantage in the provision of in-region, interstate, domestic, interLATA services. Absent appropriate regulation, a BOC could potentially raise the price of access to all interexchange carriers, including its affiliate. Equivalently, a BOC could fail to pass through to interexchange carriers a reduction in the cost of providing access services. Price cap regulation would not be effective in eliminating the effect of a price squeeze initiated under these circumstances. This would cause competing interLATA carriers to raise their retail interLATA rates in order to remain profitable. The BOC affiliate could then capture additional market share by not raising its prices to reflect the increase in access charges. This process is known as a price squeeze. Although the BOC affiliate would report little or no profit, the BOC firm as a whole would receive higher access revenues from unaffiliated interexchange carriers and increased revenues from the affiliate's interLATA services causes by its increased share of interLATA traffic. If the BOC were to raise its access rates high enough, it would be impossible for the interexchange competitors to compete effectively. Thus, the entry of a BOC's affiliate into the provision of in-region, interstate, domestic, interLATA services gives the BOC an incentive to raise its price for access services in order to disadvantage its affiliate's rivals, increase its affiliate's market share, and increase the profits of the BOC overall. One constraint on the BOC's ability to engage in such conduct is the Commission's price cap regulation of the BOCs' access services. We seek comment on whether price cap regulation of the BOCs' access services prevents a BOC from raising its affiliate's rivals' costs by raising the price of access. We also seek comment on whether price cap regulation will sufficiently constrain a BOC from raising the price of access to such an extent that its interLATA affiliate would quickly gain the ability profitably to raise and sustain the price of in-region, interstate, domestic, interLATA services significantly above competitive levels by restricting its output. Parties arguing that price cap regulation is not a sufficient constraint on such anticompetitive behavior should also comment on what, if any, mechanisms could be implemented to address this issue.

150. Based on the preceding discussion of the ramifications of the BOCs' control of local facilities, we seek comment on whether the statutory and regulatory safeguards currently imposed on the BOCs and their affiliates are sufficient for us to relax the dominant carrier regulation that under our current rules would apply to in-region, interstate, domestic, interLATA services provided by the BOC affiliates. Parties should address this issue with respect to both types of market power discussed above—raising price by restricting output and raising price by raising rivals' costs. Parties contending that the safeguards are not sufficient, and therefore that we should classify the BOC affiliates as dominant, should also comment with specificity on whether we should impose price cap regulation on those affiliates.

151. Parties should also address whether regulating BOC affiliates as dominant carriers, including imposing price cap regulation on their in-region, interstate, domestic, interLATA services, would provide any additional protection against a BOC affiliate gaining market power in the provision of these services, beyond that provided by the safeguards established by the 1996 Act, our implementing rules, and our existing regulations. We thus seek comment on whether imposing dominant carrier regulation, including price cap regulation, on a BOC affiliate would limit the incentive and ability of the BOC parent to engage in improper allocation of costs, discrimination, or other anticompetitive conduct. As previously discussed, dominant carrier regulation of the BOC interLATA affiliates may subject the affiliates' interLATA services to price cap regulation, as specified by Commission order, would require the affiliates to file interLATA tariffs with cost support data and on longer notice periods, and would impose more stringent section 214 requirements on the affiliates than those that apply to non-dominant carriers. Although we currently review complaints against dominant carriers under a different standard than complaints against non-dominant carriers (non-dominant carriers rates and practices are presumed lawful, while non-dominant carriers receive no presumption of lawfulness), we have tentatively concluded in this NPRM that, in the context of complaints alleging that a BOC has ceased to meet the conditions required for the provision of in-region interLATA services, we will not employ a presumption of reasonableness in favor of the BOC or BOC affiliate, regardless of whether it is regulated as a dominant or non-dominant carrier. Commenters should discuss which, if any, of the regulations that would be applicable to BOC affiliates as dominant carriers would constrain the ability of the BOCs to engage in improper allocation of costs, discrimination, or other anticompetitive conduct to the extent

that the affiliate would gain market power. Commenters should also address any other costs or benefits of imposing dominant carrier regulation on BOC affiliates. Finally, parties that favor dominant carrier regulation of the BOCs' in-region interLATA affiliates should comment on whether there are additional, administratively workable and less burdensome safeguards that would permit us to regulate the affiliates as non-dominant carriers.

152. The entry of the BOCs into in-region interLATA services does not mark the first occasion when this Commission has considered the safeguards that are needed when a LEC provides a competitive service that uses the LEC's exchange access service. In the *Competitive Carrier* proceeding, the Commission examined the safeguards that would be required when an independent LEC provided interstate, domestic, interexchange services. The Commission initially concluded in the *Competitive Carrier First Report and Order* that it would regulate the independent LECs' interstate long distance services as dominant carrier offerings because of their control over bottleneck local exchange and exchange access facilities. Subsequently, the Commission relaxed its regulation of interstate, domestic, interexchange services provided by an affiliate of an independent LEC, subject to the conditions discussed above, but affirmed its regulation of such services under dominant carrier rules if the independent LEC offered the service directly.

153. The Commission adopted a similar approach to BOC entry into the provision of enhanced services. As noted, the Commission in the *Computer II* rulemaking initially imposed rigorous structural separation requirements on the BOC and its enhanced services affiliate. The Commission later replaced these structural separation safeguards with the non-structural safeguards adopted in *Computer III.* Based on its experience in administering the *Computer II* requirements, the Commission concluded that non-structural safeguards could furnish adequate protections against the risk of the BOCs engaging in anticompetitive improper allocation of costs and discriminatory practices in order to achieve an unfair advantage over competing enhanced services providers. Although the U.S. Court of Appeals for the Ninth Circuit vacated portions of the Commission's *Computer III* decisions in three separate decisions, *see supra* n.88, the most recent decision found that the Commission had justified its elimination of structural separation. *California* v. *FCC,* 39 F.3d 919, 923 (9th Cir. 1994).

154. Our experience with regulating the independent LECs' provision of interstate, domestic, interexchange services and the BOCs' provision of enhanced services suggests that our existing safeguards have worked reasonably well and generally have been effective, in conjunction with our regular audits of the BOCs, in deterring the improper allocation of costs and unlawful discrimination. To be sure, we have found instances where individual BOCs may not have complied with our non-structural safeguards in providing non-regulated services. Our experience to date, however, has not disclosed a systematic pattern of anticompetitive abuses by independent LECs or the BOCs that would indicate that our safeguards are ineffective.

155. We recognize, however, that our experience in regulating the independent LECs' provision of interstate, domestic, interexchange services and the BOCs' provision of enhanced services may not be directly relevant to our analysis of the effectiveness of our existing and proposed safeguards that would apply to the BOCs' provision of in-region, interstate, domestic, interLATA service. The BOCs' local exchange and exchange access bottleneck facilities extend over much larger geographic areas than the independent LECs' facilities. Moreover, because the BOCs are likely to offer local exchange and interLATA services as integrated offerings to end users, they may have a greater incentive and ability to use their control over local bottlenecks to obtain anticompetitive advantages over their interLATA rivals. Indeed, to the extent that both the BOCs and their competitors offer local and long distance services as a unified package, BOC practices that reduce the attractiveness of their competitors' long distance offerings would make the package of services as a whole less attractive. We invite parties to comment on this assessment.

156. As noted, two pairs of BOCs have proposed to merge their operations, which would result in merged BOCs of greater size and with larger in-region areas. We seek comment on what effect, if any, a merger of or joint venture between two or more BOCs should have on our determination whether to classify the interLATA affiliate of one of those BOCs as dominant or non-dominant. Parties should also discuss what effect, if any, such a proposal to merge or to enter into a joint venture should have on this determination.

157. We also seek comment on whether, if we decide not to adopt the domestic market definition approaches discussed in the previous section of this NPRM, we should classify the BOC affiliates as dominant or non-dominant in the provision of in-region, interstate, domestic, interLATA services. Parties are invited to discuss how alternative approaches to market definition should affect how we classify the BOC affiliates in the provision of those services.

158. With respect to in-region, international services, we tentatively conclude that we should apply the same regulatory treatment for the BOC affiliates' provision of in-region, international services as we apply for their provision of in-region, interstate, domestic, interLATA services. The relevant issue in both contexts is whether the BOC affiliate can leverage its market power in local exchange and exchange access services to raise prices (by restricting its own output or by raising the costs of its rivals) in another market (the domestic interLATA or international market). We find no practical distinctions between a BOC's ability and incentive to use its market power in the provision of local exchange and access services to improperly allocate costs, discriminate against, or otherwise disadvantage unaffiliated domestic interexchange competitors as opposed to international service competitors. We thus tentatively conclude that we should apply the same regulatory treatment for BOC affiliates' provision of in-region, international services as we adopt for their provision of in-region, interstate, domestic, interLATA services. We seek comment on this tentative conclusion.

159. This tentative conclusion presumes that a BOC or BOC affiliate does not have an affiliation with a foreign carrier that has the ability to discriminate in favor of the BOC or an affiliate of the BOC through control of bottleneck services or facilities in a foreign destination market. Our proposal to adopt the same regulatory classification for a BOC affiliate's provision of in-region, international services as for its provision of in-region, interstate, domestic, interLATA services does not modify our decision to regulate a U.S. international carrier as dominant on those U.S. international routes where an affiliated foreign carrier has the ability to discriminate against unaffiliated U.S. international carriers through control of bottleneck services or facilities in the foreign market. The safeguards that we apply to carriers that we classify as dominant based on a foreign carrier affiliation are contained in Section 63.10(c) of the our rules and are designed to address the incentive and ability of the foreign carrier to

discriminate in favor of its U.S. affiliate in the provision of services or facilities necessary to terminate U.S. international traffic. This framework for addressing issues raised by foreign carrier affiliations will apply to the BOCs' provision of U.S. international services as an additional component of our regulation of the U.S. international services market.

160. Finally, we observe that most of the section 272 safeguards will cease to apply to a BOC three years after the BOC or its affiliate is authorized to provide interLATA services under section 271(d), unless the Commission extends such period by rule or order. To the extent effective local competition develops, the need for many of the section 272 safeguards will wane. We have no way of knowing at this time, however, the rate at which local competition will occur. We also intend to monitor the performance of the BOCs in the interexchange marketplace, including their affiliates' market share in the provision of in-region, interLATA services and in-region, international services. We may therefore consider in a later proceeding, if necessary, the impact that the removal of the section 272 safeguards pursuant to section 272(f)(1) would have on our regulation of BOC provision of in-region, interstate, domestic interLATA services and in-region, international services.

D. Classification of Independent LECs or Their Affiliates

161. In this section we consider whether we should modify our existing rules that require independent LECs (exchange telephone companies other than the BOCs) to comply with certain specified separation requirements in order to qualify for non-dominant regulatory treatment in the provision of in-region, interstate, domestic, interexchange services. We also consider whether to apply the same regulatory classification to the independent LECs' provision of in-region, international services as we adopt in this proceeding for their provision of in-region, interstate, domestic, interexchange services. For purposes of this analysis, we tentatively conclude that, because control of local exchange and exchange access facilities is our primary rationale for imposing a separate affiliate requirement on independent LECs, we should limit application of these requirements to incumbent independent LECs that control local exchange and exchange access facilities. For purposes of determining which independent LECs are ''incumbent,'' we propose to use the definition of ''incumbent local exchange carrier'' as provided in Section 251(h) of the Communications Act. Section 251(h) provides that a LEC is an incumbent LEC, with respect to a particular area, if: (1) the LEC provided telephone exchange service in that area on the date of enactment of the 1996 Act (February 8, 1996), and (2) the LEC was deemed to be a member of NECA on the date of enactment or the LEC became a successor or assign of a NECA member after the date of enactment. By limiting application of the separate affiliate requirements to incumbent independent LECs, we will avoid imposing unnecessary regulation on new entrants in the local exchange market, such as interexchange carriers, cable television companies, and CMRS providers, that will not have control of local exchange and exchange access facilities. We seek comment on this tentative conclusion.

162. Under the current rules as set forth in the *Competitive Carrier Fifth Report and Order,* independent LEC provision of interstate, domestic, interexchange services is subject to non-dominant treatment if such services are offered through an affiliate that meets certain requirements. For purposes of qualifying for regulation as a non-dominant carrier, an ''affiliate'' of an independent LEC is ''a carrier that is owned (in whole or in part) or controlled by, or under common control with, an exchange telephone company.'' Specifically, in order to qualify for non-dominant treatment, the affiliate must: (1) maintain separate books of account; (2) not jointly own transmission or switching facilities with the exchange telephone company; and (3) obtain any exchange telephone company services at tariffed rates and conditions. If an independent LEC provides interstate, domestic, interexchange services directly, those services are subject to dominant regulation. The *Fifth Report and Order* separation requirements apply to all independent LECs, regardless of their size. We note that some of our accounting rules relating to the *Competitive Carrier Fifth Report and Order* separation requirements do recognize a distinction between larger and smaller independent LECs. At this time, there are no independent LECs that are regulated as dominant in the provision of interstate, domestic, interexchange services. In other words, every LEC that provides such services has elected to do so through an affiliate satisfying the *Competitive Carrier* requirements, rather than providing those services directly subject to dominant regulation.

163. We believe that it is appropriate at this time to review the regulatory treatment of independent LEC provision of interstate, domestic, interexchange services. Although the 1996 Act does not alter the application of the *Competitive Carrier* separation requirements to independent LECs, it does remove the restriction on BOC provision of interLATA services, and specifies a new regulatory regime to govern BOC provision of these services. In addition, in our recent *Interexchange NPRM,* we addressed whether we should modify or eliminate the separation requirements currently imposed upon independent LECs in order to qualify for non-dominant treatment in the provision of interstate, domestic, interexchange services that originate *outside* the areas in which they control local access facilities. We have concluded, in the *Interim BOC Out-of-Region Order,* that, for now, we would remove dominant carrier regulation for BOC out-of-region, interstate, domestic, interexchange services when offered through an affiliate that meets the *Competitive Carrier* separation requirements. In light of these regulatory changes, and in order to effect a comprehensive review of the appropriate regulatory framework to govern the provision of interstate, domestic, interexchange services by local exchange companies (or their affiliates), we believe it is important to evaluate whether we should continue to classify independent LECs as dominant in the provision of in-region, interstate, domestic, interexchange services, if they provide those services directly. We also believe it is appropriate to evaluate the continuing necessity of applying the *Competitive Carrier* requirements to the provision of those services by independent LECs.

164. In the previous section, we sought comment on whether the BOC's interLATA affiliates should be classified as dominant carriers under our rules only if we find that they have the ability to raise prices of in-region, interstate, domestic, interLATA services by restricting their own output of these services, or, in the alternative, whether the affiliates should be classified as dominant if the BOCs have the ability to raise prices by raising the costs of their affiliates' interLATA rivals. We recognized that a BOC's control of local exchange and exchange access facilities potentially gives a BOC an incentive and ability to disadvantage its affiliate's interexchange competitors through improper allocation of costs, discrimination, or other anticompetitive conduct. We therefore sought comment on whether, despite the statutory and regulatory safeguards currently imposed on the BOCs, a BOC would be able to

disadvantage its affiliate's rivals to such an extent that the affiliate would quickly gain the ability profitably to raise price above competitive levels by restricting its output, and, in the alternative, whether the safeguards would prevent the BOCs from raising their rivals' costs.

165. We believe that we should apply a similar analysis for determining whether we should continue to classify an independent LEC as dominant if it provides in-region, interstate, domestic, interexchange services directly (rather than through an affiliate complying with the *Competitive Carrier* requirements). We therefore seek comment on whether, absent the *Competitive Carrier* requirements, an independent LEC would be able to use its market power in local exchange and exchange access services to disadvantage its interexchange competitors to such an extent that it will quickly gain the ability profitably to raise the price of in-region, interstate, domestic, interexchange services significantly above competitive levels by restricting output. We also seek comment whether, absent the *Competitive Carrier* requirements, an independent LEC would be able to raise its rivals' costs.

166. We believe that, regardless of our determination of whether the independent LECs should be classified as dominant or non-dominant if they provide in-region, interstate, domestic, interexchange services directly, some level of separation may be necessary between an independent LEC's interstate, domestic, interexchange operations and its local exchange operations. This separation may be necessary in order to minimize the potential that an independent LEC could use its control of local bottleneck facilities to improperly shift costs or discriminate against interexchange competitors. Such anticompetitive conduct would be of concern irrespective of whether such an exercise provides a basis for classifying the BOC affiliates as dominant carriers under our current rules. Accordingly, we seek comment on whether we should require independent LECs to provide in-region, interstate, domestic, interexchange services subject to the *Competitive Carrier* separation requirements or a variation of those requirements. We seek comment on whether the existing *Competitive Carrier* requirements are sufficient safeguards to apply to independent LECs to address any potential competitive concerns. Commenters proposing to modify or add to these requirements should address the extent to which there is a possibility of improperly allocating costs or other discriminatory or anticompetitive conduct, and if so, specifically how the proposed modification or addition would mitigate such conduct.

167. We also invite comment on whether there are certain circumstances that warrant different regulatory treatment among the independent LECs. For example, does the size of an independent LEC make a difference in determining what type of separation requirements should apply? We believe that, in principle, the size of a LEC will not affect its incentives to engage in cross subsidization between its monopoly services and its competitive services. It may be the case, however, that for small or rural independent LECs, the benefits to rate-payers of a separate affiliate requirement may be less than the costs imposed by such a requirement. For example, certain of our accounting rules, such as cost allocation manual filings and annual independent audit requirements, apply only to larger LECs (those with annual operating revenues of $100 million or more), in recognition that the costs of compliance with such requirements could be potentially burdensome on smaller independent LECs. We therefore seek comment on whether there is some minimum independent LEC size below which the separation requirements, if any are retained, should not apply.

168. For the reasons expressed earlier, we tentatively conclude that we should apply the same regulatory approach that we adopt for an independent LEC's provision of interstate, domestic, interexchange services originating within its local service area to an independent LEC's provision of international services originating within its local service area. The rules we adopt in this proceeding will be designed to protect against leveraging of market power from one market (the local exchange and exchange access market) to gain market power in other markets (the domestic interexchange and international services markets). We seek comment on this proposed approach.

169. As indicated above, our proposal to adopt the same regulatory approach for an independent LEC's provision of in-region, international services does not modify our decision to regulate a U.S. international carrier as dominant on those U.S. international routes where an affiliated foreign carrier has the ability to discriminate against unaffiliated U.S. international carriers through control of bottleneck services or facilities in the foreign market. In addition, our proposal for the regulation of the independent LECs would not modify the regulatory treatment of the noncontiguous domestic carriers to the extent they are regulated as dominant due to a lack of competition in their IMTS markets.

170. Finally, we seek comment on whether any or all of the separate affiliate requirements that we may ultimately decide to apply, or to continue to apply, to independent LECs should be subject to some type of sunset, such as the sunset provision applicable to BOCs under Section 272(f)(1) of the Communications Act.

IX. Conclusion

171. We seek comment on the foregoing issues regarding the implementation of Sections 271 and 272 of the 1996 Act and our proposed regulatory regime to govern the BOC affiliates' provision of in-region interstate, interLATA services pursuant to the terms of the 1996 Act. Any party disagreeing with our tentative conclusions should explain with specificity in terms of costs and benefits its position and suggest alternative policies.

X. Procedural Issues

A. Ex Parte Presentations

172. This is a non-restricted notice-and-comment rulemaking proceeding. *Ex parte* presentations are permitted, in accordance with the Commission's rules, provided that they are disclosed as required. *See generally* 47 CFR §§ 1.1200, 1.1202, 1.1204, 1.1206.

B. Regulatory Flexibility Analysis

173. Section 603 of the Regulatory Flexibility Act, as amended, requires an initial regulatory flexibility analysis in notice and comment rulemaking proceedings, unless we certify that ''the rule will not, if promulgated, have a significant economic impact on a significant number of small entities.'' The Regulatory Flexibility Act generally defines the term ''small entity'' as having the same meaning as ''small-business concern'' under the Small Business Act, which defines ''small-business concern'' as ''one which is independently owned and operated and which is not dominant in its field of operation * * *.'' This proceeding pertains to the BOCs and other ILECs which, because they are dominant in their field of operations, are by definition not small entities under the Regulatory Flexibility Act. We therefore certify, pursuant to Section 605(b) of the Regulatory Flexibility Act, that the rules will not, if promulgated, have a significant economic impact on a substantial number of small entities. The Secretary shall send a copy of this NPRM, including this certification and

statement, to the Chief Counsel for Advocacy of the Small Business Administration. A copy of this certification will also be published in the Federal Register notice.

C. Initial Paperwork Reduction Act of 1995 Analysis

174. This NPRM contains either a proposed or modified information collection. As part of its continuing effort to reduce paperwork burdens, we invite the general public and the Office of Management and Budget (OMB) to take this opportunity to comment on the information collections contained in this NPRM, as required by the Paperwork Reduction Act of 1995, Public Law No. 104–13. Public and agency comments are due August 15, 1996; OMB comments are due September 27, 1996. Comments should address: (a) Whether the proposed 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.

D. Comment Filing Procedures

175. Pursuant to applicable procedures set forth in Sections 1.415 and 1.419 of the Commission's rules, 47 CFR §§ 1.415, 1.419, interested parties may file comments on or before August 15, 1996, and reply comments on or before August 30, 1996. To file formally in this proceeding, you must file an original and six copies of all comments, reply comments, and supporting comments. If you want each Commissioner to receive a personal copy of your comments, you must file an original and eleven copies. Comments and reply comments should be sent to Office of the Secretary, Federal Communications Commission, 1919 M Street, NW., Room 222, Washington, DC 20554, with a copy to Janice Myles of the Common Carrier Bureau, 1919 M Street, NW., Room 544, Washington, DC 20554. Parties should also file one copy of any documents filed in this docket with the Commission's copy contractor, International Transcription Services, Inc., 2100 M Street, NW., Suite 140, Washington, DC 20037. Comments and reply comments will be available for public inspection during regular business hours in the FCC Reference Center, 1919 M Street, NW., Room 239, Washington, DC 20554.

176. In order to facilitate review of comments and reply comments, both by parties and by Commission staff, we require that comments be no longer than eighty (80) pages and reply comments be no longer than forty (40) pages, including exhibits, appendices, affidavits, or other attachments. Empirical economic studies, technical drawings, and copies of relevant state orders will not be counted against these page limits. These page limits will not be waived and will be strictly enforced. Comments and reply comments must include a short and concise summary of the substantive arguments raised in the pleading. Comments and reply comments must also comply with Section 1.49 and all other applicable sections of the Commission's Rules. *See* 47 CFR § 1.49. However, we require here that a summary be included with all comments and reply comments, regardless of length, although a summary that does not exceed three pages will not count toward the page limit for comments or reply comments. This summary may be paginated separately from the rest of the pleading (*e.g.*, as ''i, ii''). We also direct all interested parties to include the name of the filing party and the date of the filing on each page of their comments and reply comments. Comments and reply comments must clearly identify, in their Table of Contents, the specific paragraphs or sections of this NPRM to which a particular comment or set of comments is responsive. If a portion of a party's comments does not fall under a particular topic listed in the Table of Contents of this NPRM, such comments must be included in a clearly labelled section at the beginning or end of the filing. All parties are encouraged to utilize a table of contents, regardless of the length of their submission. Parties may not file more than a total of ten (10) pages of *ex parte* submissions, excluding cover letters. This 10 page limit does not include: (1) Written *ex parte* filings made solely to disclose an oral *ex parte* contact; (2) written material submitted at the time of an oral presentation to Commission staff that provides a brief outline of the presentation; or (3) written materials filed in response to direct requests from Commission staff. *Ex parte* filings in excess of this limit will not be considered as part of the record in this proceeding.

177. Parties are also asked to submit comments and reply comments on diskette. Such diskette submissions would be in addition to and not a substitute for the formal filing requirements addressed above. Parties submitting diskettes should submit them to Janice Myles of the Common Carrier Bureau, 1919 M Street, NW., Room 544, Washington, DC 20554. Such a submission should be on a 3.5 inch diskette formatted in an IBM compatible form using MS DOS 5.0 and WordPerfect 5.1 software. The diskette should be submitted in ''read only'' mode. The diskette should be clearly labelled with the party's name, proceeding, type of pleading (comment or reply comments) and date of submission. The diskette should be accompanied by a cover letter.

178. Written comments by the public on the proposed and/or modified information collections are due August 15, 1996, and reply comments must be submitted not later than August 30, 1996. Written comments must be submitted by the Office of Management and Budget (OMB) on the proposed and/or modified information collections on or before 60 days after date of publication in the Federal Register. In addition to filing comments with the Secretary, a copy of any comments on the information collections contained herein should be submitted to Dorothy Conway, Federal Communications Commission, Room 234, 1919 M Street, NW., Washington, DC 20554, or via the Internet to dconway@fcc.gov and to Timothy Fain, OMB Desk Officer, 10236 NEOB, 725 17th Street, NW., Washington, DC 20503 or via the Internet to fain__t@al.eop.gov.

XI. Ordering Clauses

179. Accordingly, *it is ordered* that pursuant to Sections 1, 2, 4, 201–205, 215, 218, 220, 271, 272, and 303(r) of the Communications Act of 1934, as amended, 47 U.S.C. §§ 151, 152, 154, 201–205, 215, 218, 220, 271, 272, and 303(r), a Notice of Proposed Rulemaking is hereby adopted.

180. *It is further ordered* that, the Secretary shall send a copy of this Notice of Proposed Rulemaking, including the regulatory flexibility certification, to the Chief Counsel for Advocacy of the Small Business Administration, in accordance with paragraph 603(a) of the Regulatory Flexibility Act, 5 U.S.C. 601 *et seq.* (1981).

Federal Communications Commission

William F. Caton,

Acting Secretary.

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