

coincided with rapid expansion of BOC enhanced services, and with continued growth in the availability of enhanced services. In 1990, the BOCs reported only 160,000 customers.⁹² In 1994, according to the Interim Waiver Petition, BOCs provided enhanced services to approximately five million customers.⁹³ BOCs are currently providing enhanced services such as voice messaging, videotext gateways, electronic mail service, and on-line database transactions, as well as testing enhanced services associated with the provision of video dialtone service.⁹⁴

38. On the other hand, various parties have suggested that structural separation should be reimposed for BOC enhanced services because of anticompetitive behavior by the BOCs. In the MemoryCall case cited in California III, the Georgia Public Service Commission concluded that BellSouth had manipulated the timing of the unbundling of certain network services in order to maximize its competitive advantage over competing voice messaging providers, and that BellSouth had failed to rectify technical limitations of its network that disadvantaged competing ESPs.⁹⁵ The Association of Teleessaging Services International describes problems raised by its independent messaging service companies in obtaining network services, and alleges that BOCs have misused CPNI and provided incorrect information to customers in order to prevent ESPs from offering competitive services.⁹⁶ The Newspaper Association of America argues that the Commission needs to look more closely at particular services such as electronic publishing that it claims may be offered separately without substantial costs and that present a greater need for protection against cross-subsidization and discrimination.⁹⁷ Other parties argue that structural safeguards are the "most effective and the least regulatorily intrusive" means of ensuring that the BOCs do not discriminate or cross-subsidize when they provide enhanced services. They argue further that structural separation would "promote innovation,"

California I decision.

⁹² Interim Waiver Petition at 13.

⁹³ Id. at 4.

⁹⁴ Id. at Exhibit A.

⁹⁵ California III, 39 F.3d at 929.

⁹⁶ Letter from Robert J. Butler, Wiley, Rein & Fielding, to William F. Caton, Acting Secretary, FCC, December 13, 1994.

⁹⁷ Letter from Richard E. Wiley, Wiley, Rein & Fielding, to Reed E. Hundt, Chairman, FCC, November 30, 1994.

ensure a "competitive marketplace," and "facilitate the development" of the National Information Infrastructure.⁹⁸

39. To obtain further information and more detailed evidence on these issues, we ask parties to comment on the relative costs and benefits of structural and nonstructural safeguards for the provision of enhanced services by the BOCs. We also seek comment on the protection against discrimination necessary to allow ESPs and BOCs to compete effectively without creating unnecessary burdens, whether certain types of enhanced services may require greater protection than others, and whether structural separation or additional nonstructural safeguards are needed for specific enhanced services. We ask parties to identify specifically both the problems attendant upon integrated BOC provision of enhanced services, and the appropriate means to address those problems. We also ask parties to identify any specific unbundled network services, not now available to ESPs, that are of use in designing new and innovative enhanced services and that satisfy the four criteria of the Computer III Phase I Order.⁹⁹ We seek comment on how best we can ensure their availability. To the extent that parties propose a reimposition of structural separation, we ask that they identify the benefits that they believe will accrue for the provision of enhanced services to consumers from such action, and articulate why these benefits cannot be achieved under a regime of nonstructural safeguards.

40. Our cost-benefit calculus must include a recognition that all the BOCs are currently offering some enhanced services on a structurally integrated basis subject to their approved ONA plans. A return to some form of structural separation requirements at this time would impose certain transition costs on the BOCs, and could result in service disruption and customer confusion. Some of these costs were detailed in the Interim Waiver Petition. The BOCs indicated that they would have to relocate hundreds of pieces of enhanced services equipment, transfer or hire hundreds of dedicated

⁹⁸ Letter from Randolph J. May, Sutherland, Asbill & Brennan to William F. Caton, Acting Secretary, FCC, November 29, 1994. This letter was written on behalf of the following non-BOC ESPs and other organizations: Ad Hoc Telecommunications Users Committee, Association of Telemessaging Services International, CompuServe Incorporated, Consumer Federation of America, EDS Corporation, First Financial Management Corporation, Information Industry Association, Information Technology Association of America, International Communications Association, MCI Telecommunications Corporation, Prodigy Services Company, and Tele-Communication Association.

⁹⁹ Phase I Order, 104 FCC 2d at 1065, para. 217.

enhanced services personnel and replace integrated sales personnel with a dedicated direct sales force.¹⁰⁰ In 1991, US West and Pacific Bell estimated one time costs of transferring and/or duplicating facilities and personnel for the provision of structurally separate voice mail to be as high as \$10-\$15 million.¹⁰¹ BOCs also estimated that overall costs for providing enhanced services on a separate basis would be up to 68% higher than integrated provision of those services and would result in price increases between 30% and 80%.¹⁰² We seek comment as to what the costs of returning to structural separation would be today. We ask parties to identify transitional expenses that would be borne by customers of BOC enhanced services, and to indicate whether a return to structural separation requirements would result in disruptions of service or confusion among customers. To the extent that parties believe structural separation is appropriate, we ask them to describe particular scenarios and timetables under which BOCs would be required to move from the existing partially integrated CEI plan regime, and to identify the specific costs and benefits of those scenarios. Parties should also comment under what circumstances BOCs would be permitted to provide integrated enhanced services under any service-specific Computer II waivers.

V. EX PARTE PRESENTATIONS

41. This Notice of Proposed Rulemaking is a non-restricted notice and comment rulemaking proceeding. Ex parte presentations are permitted, except during the Sunshine Agenda period, provided that they are disclosed as provided in the Commission's rules.¹⁰³

VI. REGULATORY FLEXIBILITY ANALYSIS

42. We certify that the Regulatory Flexibility Act¹⁰⁴ is not applicable to the rule changes we are proposing in this proceeding. If the proposed rule changes are promulgated, there will not be a significant economic impact on a substantial number of small business entities, as defined by Section 601(3) of the Regulatory Flexibility Act. The BOCs are dominant carriers under the Commission's Rules and are not small entities as defined by the

¹⁰⁰ Interim Waiver Petition at Exhibit B.

¹⁰¹ BOC Safeguards Order, 6 FCC Rcd at 7621, para. 104.

¹⁰² Id.

¹⁰³ See generally 47 C.F.R. §§ 1.1202, 1.1203, and 1.1206(a).

¹⁰⁴ 5 U.S.C. §§ 601-12.

Regulatory Flexibility Act. Thus, the parties directly subject to the proposals do not fall within the Act's definition of a small entity.¹⁰⁵ Accordingly, this Commission is not required to apply the formal procedures set forth in the Regulatory Flexibility Act. We are nevertheless committed to reducing the regulatory burdens on small telephone companies whenever possible consistent with our other public interest responsibilities. The Secretary shall send a copy of the Notice to the Chief Counsel for Advocacy of the Small Business Administration in accordance with Section 603(a) of the Regulatory Flexibility Act, 5 U.S.C. § 601, et seq.

VII. COMMENT FILING DATES

43. Pursuant to applicable procedures set forth in Sections 1.415 and 1.419 of the Commission's rules, 47 C.F.R. §§ 1.415, 1.419, interested parties may file comments with the Office of the Secretary, Federal Communications Commission, Washington, D.C. 20554 on or before April 7, 1995, and reply comments on or before April 28, 1995. To file formally in this proceeding, participants must file an original and four copies of all comments, reply comments, and supporting comments. If participants want each Commissioner to receive a personal copy of their comments, an original and nine copies must be filed. In addition, parties should file a copy of any such pleadings with Peggy Reitzel of the Policy and Program Planning Division, Common Carrier Bureau, Room 544, 1919 M Street, N.W., Washington, D.C. 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, N.W., Suite 140, Washington, D.C. 20037. Comments and reply comments will be available for public inspection during regular business hours in the FCC Reference Center (Room 239), 1919 M Street, N.W., Washington, D.C.

¹⁰⁵ Id. § 601. See MTS and WATS Market Structure, Third Report and Order, CC Docket No. 78-72, Phase I, 93 FCC 2d 241, 338-39, paras. 358-62 (1983).

VIII. ORDERING CLAUSE

44. Accordingly, IT IS ORDERED that, pursuant to the authority contained in Sections 1, 4, and 201-205 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 151, 154, and 201-205, a NOTICE OF PROPOSED RULEMAKING IS HEREBY ADOPTED.

FEDERAL COMMUNICATIONS COMMISSION

William F. Caton
William F. Caton
Acting Secretary