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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

FCC 96-123

In the Matter of)	
)	
Policy and Rules Concerning the)	CC Docket No. 96-61
Interstate, Interexchange Marketplace)	
)	
)	
Implementation of Section 254(g) of the)	
Communications Act of 1934, as amended)	

NOTICE OF PROPOSED RULEMAKING

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By the Commission: Commissioners Quello, Barrett, Ness and Chong issuing separate statements.

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I. INTRODUCTION

1. On February 8, 1996, the Telecommunications Act of 1996 (1996 Act)¹ became law. The 1996 Act seeks "to provide for a pro-competitive, de-regulatory national policy framework" designed to make available to all Americans advanced telecommunications and information technologies and services "by opening all telecommunications markets to competition."² Integral to achieving this goal, the 1996 Act requires the Commission to forbear from applying any provision of the Communications Act of 1934, as amended (Communications Act), or our regulations, to a telecommunications carrier or telecommunications service, or class thereof, if the Commission makes certain specified findings with respect to such provisions or regulations.³ In addition, the 1996 Act provides for the entry of the Bell Operating Companies (BOCs) and their affiliates⁴ into the interstate, interexchange market, after certain preconditions are satisfied.⁵ This entry can be expected to intensify competition in the interstate, domestic, interexchange market.

2. Consistent with the thrust of the 1996 Act, the Commission has long pursued policies designed to facilitate the growth of competition in the domestic long-distance market. In 1979, the Commission commenced the Competitive Carrier proceeding⁶ in which it

¹ Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56 (1996) (hereafter cited as "1996 Act").

² See S. Conf. Rep. No. 230, 104th Cong., 2nd Sess. 1 (1996).

³ 1996 Act at § 401 (adding § 10(a) to the Communications Act of 1934, as amended). Hereafter, all citations noting additions are additions to the Communications Act of 1934, as amended, codified at 47 U.S.C. § 151 *et seq.*

⁴ 1996 Act at § 151 (adding § 271). For purposes of this proceeding, we generally use the term "BOCs" as that term is defined in Section 3(a)(35) of the Communications Act of 1934, as amended. In a few instances, however, we use the term "BOCs" also to encompass BOC affiliates, such as are contemplated by Section 272 of the Communications Act of 1934, as amended.

⁵ The preconditions specified in the 1996 Act apply to a BOC's provision of interLATA services originating in any of its in-region states. 1996 Act at § 151 (adding § 271); see also n.9 *infra*.

⁶ Policy and Rules Concerning Rates for Competitive Common Carrier Services and Facilities Authorizations Therefor, CC Docket No. 79-252, Notice of Inquiry and Proposed Rulemaking, 77 FCC 2d 308 (1979) (Competitive Carrier NPRM); First Report and Order, 85 FCC 2d 1 (1980) (First Report and Order); Further Notice of Proposed Rulemaking, 84 FCC 2d 445 (1981) (Competitive Carrier Further NPRM); Second Further Notice of Proposed Rulemaking, FCC 82-187, 47 Fed. Reg. 17,308

considered how its regulations should be modified to reflect and promote competition in this market.⁷ In succeeding years, in part as a result of reforms adopted in the Competitive Carrier proceeding, the interstate, domestic, interexchange market has evolved from a market of fledgling competitors overshadowed by a single, dominant service provider to a market characterized by substantial competition. The Commission explicitly acknowledged these dramatic changes when, in October 1995, we concluded that AT&T Corporation (AT&T) no longer possessed individual market power in the domestic long-distance market taken as a whole and, accordingly, reclassified AT&T as a non-dominant carrier for interstate, domestic, interexchange services.⁸

3. The 1996 Act builds upon the progress made to date in facilitating competition in the domestic long-distance market, and provides a framework for raising competition to a higher plane. In light of the passage of the 1996 Act, changes in the interexchange market over the past decade, and our recent reclassification of AT&T as a non-dominant carrier, we believe it is timely to review our regulatory regime for interstate, domestic, interexchange telecommunications services. In this proceeding, we therefore examine whether and how our policies and rules should be changed, consistent with the intent of the 1996 Act.

4. Specifically, we propose, pursuant to the forbearance authority provided in the 1996 Act, to adopt a mandatory detariffing policy for domestic services of non-dominant, interexchange carriers. We also propose to eliminate the prohibition against bundling customer premises equipment with the provision of interstate, interexchange services by non-dominant interexchange carriers. In addition, we consider whether to reduce or eliminate the separation requirements for non-dominant treatment of local exchange carriers in their provision of certain interstate, interexchange services. By these proposals, we seek to promote competition by reducing or eliminating existing regulations that may no longer be in the public interest in the increasingly competitive interexchange marketplace.

(1982); Second Report and Order, 91 FCC 2d 59 (1982); Order on Reconsideration, 93 FCC 2d 54 (1983); Third Further Notice of Proposed Rulemaking, 48 Fed. Reg. 28,292 (1983); Third Report and Order, 48 Fed. Reg. 46,791 (1983); Fourth Report and Order, 95 FCC 2d 554 (1983) (Fourth Report and Order), vacated AT&T v. FCC, 978 F.2d 727 (D.C. Cir. 1992), cert. denied, MCI Telecommunications Corp. v. AT&T, ___ U.S. ___, 113 S. Ct. 3020 (1993); Fourth Further Notice of Proposed Rulemaking, 96 FCC 2d 1191 (1984); Fifth Report and Order, 98 FCC 2d 1191 (1984) (Fifth Report and Order); Sixth Report and Order, 99 FCC 2d 1020 (1985) (Sixth Report and Order), vacated MCI Telecommunications Corp. v. FCC, 765 F.2d 1186 (D.C. Cir. 1985) (collectively referred to as the Competitive Carrier proceeding).

⁷ Competitive Carrier NPRM, 77 FCC 2d at 309-10.

⁸ See Motion of AT&T Corp. to be Reclassified as a Non-Dominant Carrier, FCC 95-427 (rel. Oct. 23, 1995) (AT&T Reclassification Order), recon. pending.

5. We also reexamine other aspects of our oversight of the interstate, interexchange market. In this respect, we consider whether we should more narrowly focus our definitions of relevant product and geographic markets for interexchange services to reflect current and future market conditions. We also address issues related to residential services pricing, including allegations of tacit price coordination in the interexchange market, and inquire how additional facilities-based competition pursuant to the 1996 Act affects this issue. We also consider other issues, including tariff-related issues that would remain relevant if we determine not to forbear from requiring non-dominant interexchange carriers to file tariffs, or if we decide to adopt a permissive detariffing policy. Finally, as required by the 1996 Act, we propose rules to implement the 1996 Act's provisions relating to geographic rate averaging and rate integration.

II. BACKGROUND

A. The Telecommunications Act of 1996

6. The 1996 Act significantly alters the legal framework governing the interstate, interexchange market. The new statutory provisions should generally promote facilities-based competition in the interexchange market and open the door for new entrants to compete with existing service providers. For example, the 1996 Act, *inter alia*, permits the BOCs immediately to provide interLATA telecommunications services originating outside their in-region states, as well as "incidental" interLATA services.⁹ More significantly, after fulfilling

⁹ The 1996 Act defines "incidental interLATA services" as the interLATA provision by a BOC 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 the 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;

specified preconditions, BOCs may provide interLATA telecommunications services originating inside their in-region states.¹⁰ In addition, the 1996 Act provides regulatory flexibility by requiring the Commission to forbear from applying any regulation or any provision of the Communications Act to telecommunications carriers or telecommunications services, or classes thereof, if the Commission determines that certain specified conditions are satisfied.¹¹ The forbearance authority applies to all provisions of the Communications Act, except the provisions added by the 1996 Act relating to interconnection and BOC entry into long-distance services.¹²

B. The Competitive Carrier Proceeding

7. The Commission, since 1979, has pursued, in the Competitive Carrier proceeding, pro-competitive and deregulatory goals similar to those now underlying the 1996

(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.

1996 Act at § 151 (adding § 271(g)).

¹⁰ See id. (adding § 271). For purposes of this proceeding, we define the terms "in-region state," "interLATA service," and "LATA" as those terms are defined in Sections 271(i)(1), 3(a)(42), and 3(a)(43), respectively, of the Communications Act, as amended. We note that Section 271(j) of the Communications Act, as amended, provides that a BOC's in-region services include 800 service, private line service, or their equivalents that terminate in an in-region state of that BOC and that allow the called party to determine the interLATA carrier, even if such service originates out-of-region.

¹¹ Id. at § 401 (adding § 10).

¹² Id. (adding § 10(d)). We note that, under the 1996 Act, interexchange carriers, as "telecommunications carriers," are now subject to certain interconnection obligations established under new Section 251(a). Id. at § 101 (adding § 251(a)), and § 3(a)(49). We will address issues relating to the interconnection obligations of interexchange carriers in a separate proceeding implementing new Section 251.

Act. The Commission there examined how its regulations should be adapted to reflect and promote increasing competition in interexchange telecommunications markets, and sought to reduce or eliminate the application of economic regulation to new competitive entrants.¹³ In these efforts, the Commission pursued a forbearance policy, encompassing both permissive and mandatory detariffing. Upon judicial review, however, the Court found that the Communications Act, at that time, did not provide the Commission with the requisite authority to do so.¹⁴

8. In its Competitive Carrier orders, the Commission distinguished two kinds of carriers --those with market power (dominant carriers) and those without market power (non-dominant carriers).¹⁵ In determining whether a firm possessed market power, the Commission focused on certain "clearly identifiable market features," including the number and size distribution of competing firms, the nature of barriers to entry, the availability of reasonably substitutable services, and whether the firm controlled bottleneck facilities.¹⁶ 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 firms to act contrary to consumer welfare.¹⁷

9. Under the streamlined regulatory procedures for non-dominant carriers established in the Competitive Carrier proceeding, such carriers are not subject to price cap regulation, and their tariff filings are presumed to be lawful. In addition, tariff filings of

¹³ See, e.g., First Report and Order, 85 FCC 2d at 5-8.

¹⁴ See Section III.B.1. infra, discussing the history of the Commission's prior tariff forbearance policy.

¹⁵ Id. at 20-21. See also 47 C.F.R. § 61.3(o) ("[D]ominant carrier" is defined as a "carrier found by the Commission to have market power (i.e., power to control prices)").

¹⁶ First Report and Order, 85 FCC 2d at 20-21.

¹⁷ The Commission concluded that market forces, together with the Section 208 complaint process and the Commission's ability to reimpose tariff-filing and facilities-authorization requirements, were sufficient to protect the public interest with respect to non-dominant carriers subject to forbearance. Fourth Report and Order, 95 FCC 2d at 579. The Commission also noted that the rates of non-dominant carriers would effectively be capped by the rates of dominant carriers. Sixth Report and Order, 99 FCC 2d at 1028 n.29 (noting that firms lacking market power cannot charge unlawful rates because customers can always turn to competitors).

non-dominant carriers take effect on one day's notice¹⁸ and do not require cost support data.¹⁹ Non-dominant carriers also are subject to streamlined Section 214 procedures for the construction, extension or operation of new transmission facilities, as well as for the proposed reduction or discontinuance of service.²⁰

10. In contrast, our rules subject dominant interexchange carriers to price cap regulation,²¹ and tariff notification periods of 14, 45 or 120 days' notice.²² Dominant carriers that are subject to price caps are also required to file cost support data for above-cap and out-of-band tariff filings, and additional information for new service offerings.²³

¹⁸ In the First Report and Order, the Commission required non-dominant carriers to file tariffs on 14 days' notice. First Report and Order, 85 FCC 2d at 35. The Commission later shortened the notice period to one day. Tariff Filing Requirements for Nondominant Common Carriers, CC Docket No. 93-36, Memorandum Opinion and Order, 8 FCC Rcd 6752 (1993) (Nondominant Filing Order), vacated on other grounds, Southwestern Bell Corporation v. FCC, 43 F.3d 1515 (D.C. Cir. 1995). In its decision vacating the Nondominant Filing Order, the court found that the range of rates provision adopted in that order violated Section 203(a) of the Communications Act. Southwestern Bell Corporation v. FCC, 43 F.3d at 1520. The Commission subsequently eliminated the range of rates provision and reinstated the other tariff filing requirements, including the one-day notice period, adopted in the Nondominant Filing Order. Tariff Filing Requirements for Nondominant Common Carriers, CC Docket No. 93-36, Order, 10 FCC Rcd 13,653 (1995) (Nondominant Filing Order II).

¹⁹ First Report and Order, 85 FCC 2d at 34.

²⁰ See id. at 39-49. We note that, pursuant to Section 402(b)(2)(A) of the 1996 Act (to be added as a note to Section 214), the Commission is required to "permit any common carrier . . . to be exempt from the requirements of section 214 of the Communications Act of 1934 for the extension of any line." We will address the implementation of Section 402(b)(2)(A), including the issue of what constitutes an "extension of any line," in an upcoming proceeding.

²¹ See 47 C.F.R. § 61.41. We note that, even with the reclassification of AT&T as a non-dominant carrier, our dominant carrier rules remain relevant to the interstate, interexchange industry, because, inter alia, they continue to apply to international interexchange carriers, to local exchange companies other than the BOCs that provide domestic, interstate, interexchange services directly to customers (rather than through an affiliate), and currently to BOCs to the extent they provide domestic, interstate, interexchange services.

²² See id. at § 61.58(c).

²³ See id. at §§ 61.38, 61.41-61.44, 61.49.

Moreover, dominant carriers must obtain prior Commission approval to construct a new line, to extend a line, or to acquire, lease or operate any line,²⁴ as well as to discontinue, reduce or impair service.²⁵

C. The Interexchange Competition Proceeding

11. In 1990, the Commission commenced the Interexchange Competition proceeding to examine the state of competition in the interstate, long-distance marketplace, and to assess the efficacy of existing regulation in light of this competition.²⁶ In the First Interexchange Competition Order, the Commission found that business services (except analog private line services) had become "substantially competitive."²⁷ The Commission accordingly streamlined its regulation of those AT&T services.²⁸ For services subject to "streamlined" regulation, AT&T was allowed to file tariffs on 14 days' notice, without cost support, and such tariffs were presumed lawful.²⁹ In addition, price cap ceilings, bands and rate floors did not apply to streamlined services. Later, the Commission, after ordering 800 number portability, found that 800 services (except 800 directory assistance services) were

²⁴ Id. at §§ 63.01 et seq. A dominant carrier may file an annual "blanket" Section 214 application for construction planned for the year. Id. at § 63.06. Any additional, unplanned project costing more than \$2 million requires a separate formal application. Id. at § 63.01. With certain, limited exceptions, for unplanned construction projects under \$2 million, dominant carriers may file an informal application under which the addition is presumed lawful. Id. at §§ 63.02-63.03. But see n.20 supra.

²⁵ See 47 C.F.R. § 63.62.

²⁶ Competition in the Interstate Interexchange Marketplace, CC Docket No. 90-132, Notice of Proposed Rulemaking, 5 FCC Rcd 2627 (1990) (Interexchange Competition NPRM); Report and Order, 6 FCC Rcd 5880 (1991) (First Interexchange Competition Order); Order, 6 FCC Rcd 7255; Memorandum Opinion and Order, 6 FCC Rcd 7569 (1991); Memorandum Opinion and Order, 7 FCC Rcd 2677 (1992); Memorandum Opinion and Order on Reconsideration, 8 FCC Rcd 2659 (1993); Second Report and Order, 8 FCC Rcd 3668 (1993) (Second Interexchange Competition Order); Memorandum Opinion and Order, 8 FCC Rcd 5046 (1993); Memorandum Opinion and Order on Reconsideration, 10 FCC Rcd 4562 (1995) (February 1995 Interexchange Reconsideration Order) (collectively referred to as the Interexchange Competition proceeding).

²⁷ First Interexchange Competition Order, 6 FCC Rcd at 5887.

²⁸ Id. at 5894.

²⁹ Id.

also subject to substantial competition, and streamlined regulation of those AT&T services as well.³⁰

12. In the First Interexchange Competition Order, the Commission also authorized all interexchange carriers to offer services pursuant to individually negotiated, contract-based tariffs, provided they make such rates generally available to similarly situated customers.³¹ The Commission found such arrangements would allow customers to negotiate service arrangements that best addressed their particular needs and would unleash competition by allowing AT&T to offer the same type of contract arrangements its competitors were already offering.³²

D. The AT&T Reclassification Order

13. On October 23, 1995, we issued an order granting AT&T's motion to be reclassified as a non-dominant carrier, based upon our finding that AT&T no longer possessed individual market power in the interstate, domestic, interexchange market taken as a whole.³³ As a result, AT&T is now generally subject to the same regulations as its long-distance competitors.³⁴ Like other non-dominant carriers, AT&T is still subject to regulation under Title II of the Communications Act. Thus, it is required to do the following: offer interstate services under rates, terms and conditions that are just, reasonable and not unduly discriminatory;³⁵ file tariffs;³⁶ and give notice prior to any discontinuance, reduction or

³⁰ Second Interexchange Competition Order, 8 FCC Rcd at 3671.

³¹ First Interexchange Competition Order, 6 FCC Rcd at 5897, 5899-5900. The Commission permitted AT&T to include in contract-based tariffs only services that the Commission found were subject to substantial competition and therefore were subject to streamlined regulation; other interexchange carriers were permitted to include any service in their contract-based tariffs. Id. at 5897, 5900; see February 1995 Interexchange Reconsideration Order, 10 FCC Rcd at 5881-82 n.6.

³² First Interexchange Competition Order, 6 FCC Rcd at 5899.

³³ AT&T Reclassification Order, at ¶ 35. The Commission deferred consideration of AT&T's market power in international markets. Id. at ¶ 2.

³⁴ We note, however, that AT&T made certain voluntary commitments, discussed below, which relate, inter alia, to the filing of tariffs, geographic rate averaging, and the reduction or discontinuance of service. See AT&T Reclassification Order, Appendix C.

³⁵ 47 U.S.C. §§ 201, 202.

impairment of service.³⁷ Moreover, like other non-dominant carriers, AT&T continues to be subject to the Commission's complaint process.³⁸

14. In the AT&T Reclassification proceeding, AT&T made certain voluntary commitments, which AT&T stated were intended to serve as transitional arrangements to address concerns expressed by parties about possible adverse effects of reclassifying AT&T.³⁹ These commitments concerned: service to low-income and other customers;⁴⁰ analog private line and 800 directory assistance services;⁴¹ service to and from the State of Alaska and other regions subject to our rate integration policy;⁴² geographic rate averaging;⁴³ changes to contract tariffs that adversely affect existing customers;⁴⁴ and dispute resolution procedures for reseller customers.⁴⁵ In the AT&T Reclassification Order, we accepted AT&T's commitments and ordered AT&T to comply with those commitments.⁴⁶

³⁶ Id. at § 203. Non-dominant carriers currently are subject to streamlined tariff requirements. See ¶ 9 *supra*.

³⁷ 47 U.S.C. § 214.

³⁸ Id. at §§ 206-09.

³⁹ AT&T Reclassification Order, at ¶ 17, and Appendix C.

⁴⁰ AT&T committed for a period of three years to offer optional calling plans, whose rates are constrained, to residential subscribers, and to provide advance notice of changes to such plans. Id. at ¶¶ 84-87, and Appendix C at ¶ 5.

⁴¹ AT&T committed for a period of three years to limit rate increases for these services to the rate of increase of the Consumer Price Index, and to provide advance notice of such rate increases. Id. at ¶ 106, and Appendix C at ¶ 4.

⁴² AT&T committed to continue to comply with the Commission's rate integration policies and with the Commission's orders regarding AT&T's purchase of Alascom, Inc. Id. at ¶ 114, and Appendix C at ¶¶ 1-2.

⁴³ AT&T committed, *inter alia*, to provide advance notice of any tariffs that deaverage interstate, residential direct dial rates. Id. at ¶¶ 114, 146, and Appendix C at ¶ 3.

⁴⁴ AT&T committed, *inter alia*, to comply with an agreement, for twelve months, between AT&T and the Telecommunications Resellers Association regarding changes to existing term plans. Id. at ¶¶ 134-35, and Appendix C at ¶¶ 6-8.

⁴⁵ AT&T committed, *inter alia*, to establish a quick and efficient process to resolve disputes with resellers. Id. at ¶ 135, and Appendix C at ¶ 10.

⁴⁶ Id. at ¶¶ 37, 163, 170.

15. In the AT&T Reclassification Order, we stated that we would consider the following issues relevant to the interstate, domestic, interexchange market as a whole in this proceeding: (1) whether there is tacit price coordination in the interexchange market;⁴⁷ (2) how changes in the interexchange market affect our rate integration and geographic averaging policies;⁴⁸ (3) reseller and large user concerns regarding contract tariffs;⁴⁹ and (4) the application of the filed rate doctrine to contract tariff arrangements.⁵⁰

E. Need for Review of Commission Regulation of the Interexchange Market

16. The Commission's obligation to be responsive to the dynamic nature of the communications industry has long been recognized.⁵¹ The passage of the 1996 Act, the dramatic changes in the interstate, domestic, interexchange telecommunications services market since the Interexchange Competition proceeding, and our reclassification of AT&T as a non-dominant carrier in the overall interstate, domestic, interexchange market, make it timely for us to reexamine our policies and rules in light of the goals of the 1996 Act. In pursuing the pro-competitive policy established by the 1996 Act, we intend to examine existing regulations to see whether they can be reduced or eliminated consistent with our public interest responsibilities.

III. REGULATORY FORBEARANCE

A. Introduction

17. The 1996 Act amends the Communications Act to require the Commission to:

[F]orbear from applying any regulation or any provision of this Act to a telecommunications carrier or telecommunications service, or class of telecommunications carriers or telecommunications services, in any or some of its or their geographic markets, if the Commission determines that --

(1) enforcement of such regulation or provision is not necessary to ensure that the charges, practices, classifications or regulations by, for, or in connection with that

⁴⁷ Id. at ¶ 83.

⁴⁸ Id. at ¶¶ 115, 146.

⁴⁹ Id. at ¶ 131.

⁵⁰ Id. at ¶ 137.

⁵¹ First Report and Order, 85 FCC 2d at 12.

telecommunications carrier or telecommunications service are just and reasonable, and are not unjustly or unreasonably discriminatory;

(2) enforcement of such regulation or provision is not necessary for the protection of consumers; and

(3) forbearance from applying such provision or regulation is consistent with the public interest.⁵²

In addition, in determining whether forbearance from enforcing a particular provision or regulation is in the public interest, the Commission is specifically required to consider whether forbearance will promote competitive market conditions, including the extent to which forbearance will enhance competition among providers of telecommunications services.⁵³

18. Accordingly, with respect to each of the existing regulations examined in this proceeding, we invite parties to comment on whether we should forbear from applying such regulations to some or all interexchange carriers or services, in particular geographic areas or regions. With respect to each issue, parties should specify the bases on which they believe we can make the findings required to meet the statutory criteria for forbearance.

19. We address below whether, given the current domestic, interstate, interexchange market, the 1996 Act requires the Commission to forbear from requiring non-dominant interexchange carriers to file tariffs for domestic services. Based on the Commission's analyses and findings in prior proceedings, we tentatively conclude that: (1) applying tariff filing requirements to non-dominant interexchange carriers is not necessary to ensure that such carriers' charges, practices, or classifications are just and reasonable, and are not unjustly or unreasonably discriminatory; (2) applying tariff filing requirements to non-dominant interexchange carriers is not necessary for the protection of consumers; and (3) forbearing from applying tariff filing requirements to non-dominant interexchange carriers is

⁵² 1996 Act at § 401 (adding § 10(a)). Section 401 of 1996 Act also provides that the Commission may not forbear from applying the requirements of the provisions of new Section 251 related to interconnection (except as provided in Section 251(f)) and of new Section 271 related to BOC provision of interLATA services until the Commission determines that those requirements have been fully implemented. Id. (adding § 10(d)).

⁵³ Id. (adding § 10(b)). New Section 10(b) also provides that, "[i]f the Commission determines that such forbearance will promote competition among providers of telecommunications services, that determination may be the basis for a Commission finding that forbearance is in the public interest." Id.

consistent with the public interest. We, therefore, tentatively conclude that we are required by the 1996 Act to forbear from applying the Section 203 tariff filing requirements to non-dominant interexchange carriers for domestic interexchange services.

20. We note that we do not address here the issue of forbearance from applying Section 226 of the Act, which requires operator service providers to file informational tariffs. That issue will be addressed in a separate upcoming proceeding.

B. Forbearance from Tariff Filing Requirements for Non-Dominant Interexchange Carriers

1. Background

21. In the Competitive Carrier proceeding, the Commission explored the cost of imposing Title II regulation on entities lacking market power. In the Competitive Carrier Further NPRM, the Commission suggested that tariff filing requirements for non-dominant carriers could harm consumers by slowing "the introduction of new services, dampening competitive responses and ultimately encouraging price collusion through the forced publication of charges."⁵⁴ The Commission accordingly, in a series of orders, established a permissive tariff forbearance policy for non-dominant carriers.⁵⁵ The Commission found that "there was no evidence that it is in the public interest for us to continue receiving streamlined tariff and Section 214 filings from certain specialized common carriers to prevent them from charging unjust and unreasonable rates or making service unavailable."⁵⁶ The Commission also addressed the treatment of international services of carriers covered by the order, and concluded that these international services would be subject to dominant carrier regulation.⁵⁷

⁵⁴ Competitive Carrier Further NPRM, 84 FCC 2d at 471.

⁵⁵ See Second Report and Order, 91 FCC 2d 59 (applying permissive detariffing to resellers of terrestrial common carrier services); Fourth Report and Order, 95 FCC 2d 554 (applying permissive detariffing to all other resellers and specialized common carriers, including MCI and GTE Sprint); Fifth Report and Order, 98 FCC 2d 1191 (applying permissive detariffing to domestic satellite carriers, miscellaneous common carriers, carriers providing domestic, interstate and interexchange digital transmission services, and certain affiliates of exchange carriers offering interstate, interexchange services).

⁵⁶ Fourth Report and Order, 95 FCC 2d at 578.

⁵⁷ Fifth Report and Order, 98 FCC 2d at 1204 n.41.

22. In the Sixth Report and Order, the Commission established a mandatory detariffing policy for non-dominant carriers.⁵⁸ The Commission concluded that tariff filings were not essential to its ability to ensure that non-dominant carriers do not unjustly discriminate in their rates, and that other means were available to ensure that the Commission fulfilled its mandate under the Communications Act.⁵⁹ The Commission noted that this decision furthered its objectives to achieve just and reasonable rates, and that it would continue to administer the Section 208 complaint process and could reimpose tariff requirements if necessary.⁶⁰ The Commission also noted that carriers had an obligation to keep price and service information on file in their offices that can be produced readily upon inquiry from the Commission in order to substantiate the reasonableness and justness of carriers' rates, terms and conditions.⁶¹

23. The Sixth Report and Order subsequently was vacated and remanded by the U.S. Court of Appeals for the D.C. Circuit.⁶² The court held that the Commission lacked statutory authority to prohibit carriers from filing tariffs.⁶³ The court, however, did not reach the issue of whether the Commission's earlier permissive detariffing orders were valid.⁶⁴ The Commission, accordingly, continued to apply permissive detariffing for non-dominant carriers. The Commission's permissive detariffing regime subsequently was invalidated by the U.S. Court of Appeals for the D.C. Circuit in 1992. The court, in reviewing and disposing of a complaint filed by AT&T against MCI, vacated the

⁵⁸ Sixth Report and Order, 99 FCC 2d at 1021-22. Carriers subject to forbearance were required to file supplements canceling their tariffs on file with the Commission within six months of the effective date of the Sixth Report and Order.

⁵⁹ Id. at 1029. The Commission stated: "Throughout this rulemaking, we have determined that enforcement of Sections 201 and 202 objectives of just and reasonable rates could be effectuated for certain carriers without the filing of tariffs and through market forces and the administration of the complaint process." Id. at n.33.

⁶⁰ Id. at 1028. With respect to carriers that had "mixed tariffs" that included services subject to different degrees of regulation, such as international services, the Commission required those carriers either to: (1) cancel the entire tariff and refile a new tariff for only those services subject to dominant or streamlined regulation; or (2) issue revised pages canceling the material that pertains to services or service points subject to forbearance. Id. at 1034.

⁶¹ Id. at 1028.

⁶² MCI Telecommunications Corp. v. FCC, 765 F.2d 1186 (D.C. Cir. 1985).

⁶³ Id. at 1192.

⁶⁴ Id. at 1196.

Commission's Fourth Report and Order, thereby invalidating the Commission's tariff filing forbearance policy for non-dominant carriers.⁶⁵ While stating that it had no "quarrel with the Commission's policy objectives," the court found that the Communications Act did not give the Commission authority to adopt such a policy.⁶⁶

24. Prior to the U.S. Court of Appeals' vacation of the Fourth Report and Order, the Commission adopted a Report and Order in a rulemaking proceeding commenced in response to AT&T's complaint.⁶⁷ The Commission again determined that permissive detariffing was within its authority under the Communications Act.⁶⁸ The U.S. Court of Appeals for the D.C. Circuit granted summary reversal of the Commission's order based on the court's earlier ruling.⁶⁹ In affirming the U.S. Court of Appeal's ruling, the Supreme Court found that Section 203(b)(2) of the Communications Act gave the Commission authority to modify the Act's tariff filing requirement, but not to eliminate it entirely.⁷⁰ The Commission thereafter established a one-day tariff notice period for all non-dominant carriers after again concluding that traditional tariff regulation of non-dominant carriers is not necessary to ensure just and reasonable rates.⁷¹

⁶⁵ AT&T v. FCC, 978 F.2d 727, 737 (D.C. Cir. 1992), cert. denied MCI Telecommunications Corp. v. AT&T, ___ U.S. ___, 113 S.Ct. 3020 (1993).

⁶⁶ Id. at 736.

⁶⁷ See Tariff Filing Requirements for Interstate Common Carriers, CC Docket No. 92-13, Report and Order, 7 FCC Rcd 8072 (1992). While adopted prior to the court's finding that the Commission's permissive detariffing policy exceeded the Commission's statutory authority, the order was released after the court vacated the Fourth Report and Order.

⁶⁸ Id. at 8074.

⁶⁹ AT&T v. FCC, 978 F.2d 727 (D.C. Cir. 1992).

⁷⁰ MCI Telecommunications Corp. v. AT&T, ___ U.S. ___, 114 S.Ct. 2223, 2229-31 (1994).

⁷¹ Nondominant Filing Order, 8 FCC Rcd at 6756-57, vacated on other grounds, Southwestern Bell Corporation v. FCC, 43 F.3d 1515 (D.C. Cir. 1995) (finding the range of rates provision in the Nondominant Filing Order violated Section 203(a) of the Act). The Commission subsequently eliminated the range of rates provision and reinstated the other tariff filing requirements adopted in the Nondominant Filing Order. Nondominant Filing Order II, 10 FCC Rcd 13,653.

25. Against this background, Congress enacted Section 401 of the 1996 Act, adding Section 10(a) to the Communications Act, to grant the Commission authority to forbear from applying the provisions of Title II, subject to certain, limited exceptions.⁷²

2. Discussion

26. As noted above, the 1996 Act requires the Commission to forbear from applying to a telecommunications carrier or telecommunications service any regulation or any provision of the Communications Act, if the Commission makes the three specified determinations.⁷³

27. We believe, based on the Commission's prior analyses and findings, that we can make the determinations necessary in order to forbear from enforcing Section 203's tariffing requirements with respect to the domestic services offered by non-dominant, interexchange carriers. Specifically, we tentatively find that enforcement of the Section 203 tariffing requirements with respect to non-dominant interexchange carriers: (1) is not necessary to ensure that non-dominant interexchange carriers' charges, practices, or classifications are just and reasonable, and are not unjustly or unreasonably discriminatory; and (2) is not necessary for the protection of consumers. We also tentatively find that forbearing from enforcing Section 203 tariffing requirements with respect to non-dominant interexchange carriers is consistent with the public interest. Accordingly, we tentatively conclude that we must forbear from applying Section 203 tariff filing requirements to non-dominant interexchange carriers for domestic services. Each of these tentative determinations is discussed below.

28. We tentatively conclude that tariff filings for non-dominant interexchange carriers are not necessary to ensure that the charges, and practices of a telecommunications carrier or telecommunications service are just and reasonable and are not unjustly or unreasonably discriminatory. As the Commission stated in the First Report and Order:

The economic underpinning of our proposal to streamline the regulatory procedures for non-dominant carriers flows from the fact that firms lacking market power simply cannot rationally price their services in ways which, or impose terms and conditions which, contravene Sections 201(b) and 202(a) of the Act.⁷⁴

⁷² 1996 Act at § 401 (adding § 10).

⁷³ Id.

⁷⁴ First Report and Order, 85 FCC 2d at 31.

Two years ago, in adopting a mandatory detariffing policy for providers of domestic commercial mobile radio service (CMRS), the Commission reiterated its conclusion that "non-dominant carriers are unlikely to behave anticompetitively, in violation of Sections 201(b) and 202(a) of the Act, because they recognize that such behavior would result in a loss of customers."⁷⁵ Based on the Commission's experience under its prior tariff forbearance policy for non-dominant interexchange carriers, as well as the Commission's findings in the Regulatory Treatment of Mobile Services proceeding, we continue to believe that non-dominant carriers are unlikely to price their services in ways which, or to impose terms and conditions which, violate Section 201(b) and Section 202(a) of the Act.⁷⁶ Similarly, we continue to believe that the Communications Act's objectives of just, reasonable, and not unjustly or unreasonably discriminatory rates can be achieved effectively through market forces and the administration of the complaint process.⁷⁷

⁷⁵ Implementation of Sections 3(n) and 332 of the Communications Act, Regulatory Treatment of Mobile Services, GN Docket No. 93-252, Second Report and Order, 9 FCC Rcd 1411, 1478 (1994) (Regulatory Treatment of Mobile Services) (citing Competitive Carrier First Report and Order, 85 FCC 2d at 31); Erratum, 9 FCC Rcd 2035 (1994); Erratum, 9 FCC Rcd 2156 (1994); Further Notice of Proposed Rulemaking, 9 FCC Rcd 2863 (1994); Implementation of Sections 3(n) and 332 of the Communications Act, Regulatory Treatment of Mobile Services, Amendment of Part 90 of the Commission's Rules to Facilitate Future Development of SMR Systems in the 800 MHz Frequency Band, Amendment of Parts 2 and 90 of the Commission's Rules to Provide for the Use of 200 Channels Outside the Designated Filing Areas in the 896-901 MHz and 935-940 MHz Band Allotted to the Specialized Mobile Radio Pool; GN Docket No. 93-252, PR Docket No.s 93-144, 89-553, Third Report and Order, 9 FCC Rcd 7988 (1994).

⁷⁶ In August 1993, we similarly stated:

On the basis of the extensive record developed in response to the Notice, we now reaffirm our policy findings, adopted nearly a decade ago in Competitive Carrier, and conclude that, while tariff regulation is required by the Act, traditional tariff regulation of nondominant carriers is not only unnecessary to ensure just and reasonable rates, but is actually counterproductive since it can inhibit price competition, service innovation, entry into the market, and the ability of carriers to respond quickly to market trends.

Nondominant Filing Order, 8 FCC Rcd at 6752, vacated on other grounds.

⁷⁷ Sixth Report and Order, 99 FCC 2d at 1029 (concluding that tariffs "are not essential" to the Commission's ability to ensure that carriers' rates comply with the Act, because the Commission has "other means to ensure our enforcement of the

29. We also tentatively conclude that requiring non-dominant interexchange carriers to file tariffs for domestic offerings is not necessary for the protection of consumers of interexchange services. To the contrary, we believe a tariff filing requirement harms consumers by undermining the development of vigorous competition. The Commission previously has found, in the Second Report and Order, that applying tariff requirements to competitive entities is superfluous as a consumer protection device, since competition circumscribes the prices and practices of these companies.⁷⁸ Moreover, beginning with the Second Report and Order and as recently as the 1994 Regulatory Treatment of Mobile Services Order, the Commission has consistently found that the imposition of tariff obligations in these circumstances stifles price competition and service and marketing innovations.⁷⁹ We tentatively find that these conclusions remain valid in today's more competitive domestic, interexchange market.

30. Finally, we tentatively conclude that forbearing from imposing tariff filing requirements on non-dominant interexchange carriers is consistent with the public interest. As part of the determination of whether forbearance is consistent with public interest, the 1996 Act requires the Commission to consider "whether forbearance from enforcing the provision or regulation will promote competitive market conditions, including the extent to which forbearance will enhance competition among providers of telecommunications services."⁸⁰ We believe that forbearance from requiring tariff filings for non-dominant carriers will promote competition and deter price coordination. In the Sixth Report and Order, the Commission found that requiring non-dominant carriers to file tariffs can: (1) take away carriers' ability to make rapid, efficient responses to changes in demand and cost; (2) impede and remove incentives for competitive price discounting; and (3) impose costs on

mandates of the Act," including the Commission's Section 208 complaint process); see Second Report and Order, 91 FCC 2d at 69 (concluding that "competitive forces in the marketplace would serve to ensure, in the first instance, carrier compliance" with the Act, and noting that the Commission can "remedy any irrational carrier conduct or aberrations that might occur . . . through the complaint process"); see also Regulatory Treatment of Mobile Services, 9 FCC Rcd at 1478-79.

⁷⁸ Second Report and Order, 91 FCC 2d at 71. See also Sixth Report and Order, 99 FCC 2d at 1030 (where the Commission suggested that required tariff filings could have the following adverse effects: "(1) taking away carriers' ability to make rapid, efficient responses to changes in demand and cost; (2) impeding and removing incentives for competitive price discounting; [and] (3) imposing costs on carriers that attempt to make new offerings").

⁷⁹ Second Report and Order, 91 FCC 2d at 71; Nondominant Filing Order, 8 FCC Rcd at 6752, vacated on other grounds; Regulatory Treatment of Mobile Services, 9 FCC Rcd at 1479.

⁸⁰ 1996 Act at § 401 (adding § 10(b)).

carriers that attempt to make new offerings.⁸¹ The Commission also concluded that continuing to require non-dominant carriers to file tariffs presents an opportunity for collusive pricing by competing carriers because carriers can ascertain their competitors' existing rates and keep track of any changes by reviewing filed tariffs.⁸² The Commission indicated that this may encourage carriers to maintain rates at artificially high levels.⁸³

31. The Commission recently reiterated, in the Regulatory Treatment of Mobile Services Order, its findings in the Sixth Report and Order.⁸⁴ We believe that forbearance from tariff filing requirements will promote competition by enabling non-dominant carriers to respond quickly to changes in the market, and reducing administrative costs on carriers making new offerings. We also believe that, without pricing and other material information available from the public tariffs of their rivals, non-dominant interexchange carriers are more likely to initiate price reductions and other competitive programs. Accordingly, we tentatively conclude that forbearing from requiring non-dominant carriers to file tariffs for interexchange services promotes competitive market conditions, and therefore is in the public interest.

32. Based on the foregoing tentative determinations, we tentatively conclude that we are required by Section 10 of the Communications Act, as amended, to forbear from requiring non-dominant interexchange carriers to file tariffs for domestic services. We invite comment on all of these tentative conclusions.

33. We note that many carriers currently file bundled tariffs that include both domestic and international services. We therefore seek comment as to whether the Commission should forbear from requiring these non-dominant firms to file tariffs for the international portions of their offerings as well. We reserve for another day, in a separate proceeding, the broader question of whether the Commission should consider generally forbearing from requiring tariffs for international service provided by a non-dominant carrier, given current market conditions in the international market.⁸⁵

⁸¹ Sixth Report and Order, 99 FCC 2d at 1030.

⁸² Id.

⁸³ Id.

⁸⁴ 9 FCC Rcd at 1479.

⁸⁵ As stated in an order adopted earlier this month, we "anticipate review of our international Section 214 authorization and tariffing procedures to identify new areas where additional streamlining may be appropriate [S]uch steps should be taken in the context of a new proceeding where we can make additional determinations about the state of competition in the international market and receive more public input." Streamlining the International Section 214 Authorization Process and Tariff

34. We also tentatively conclude that forbearance from tariff filing requirements for domestic services of non-dominant interexchange carriers should be implemented on a mandatory basis. Permitting non-dominant interexchange carriers to file tariffs in this context does not appear to be in the public interest. We believe that a regime without non-dominant interexchange carrier tariffs is the most pro-competitive, deregulatory regime. The risk of anticompetitive conduct inherent in, and the costs associated with, tariff filings by non-dominant interexchange carriers, discussed above, would persist if carriers were permitted to file tariffs voluntarily. In addition, the absence of tariffs would eliminate possible invocation by carriers of the filed rate doctrine, which allows carriers certain rights unilaterally to change rates, terms, and conditions of contract tariffs and other long-term service arrangements,⁸⁶ and to limit their liability for damages.⁸⁷ Absent filed tariffs, the legal relationship between carriers and customers will much more closely resemble the legal relationship between service providers and customers in an unregulated environment. Therefore, to establish a more market-based environment that will help prevent these possible anti-competitive practices and better protect consumers, we tentatively conclude that it would be in the public interest to prohibit non-dominant interexchange carriers from filing tariffs with respect to domestic interstate, interexchange services.

35. Our proposal to adopt a mandatory tariff forbearance policy for non-dominant interexchange carriers is supported by the Commission's adoption of a mandatory tariff forbearance policy for domestic CMRS,⁸⁸ in response to a similar grant of forbearance authority with respect to CMRS providers and services in Section 6002(b) of the Omnibus Budget Reconciliation Act of 1993 (OBRA).⁸⁹ In Regulatory Treatment of Mobile Services,

Requirements, IB Docket No. 95-118, Report and Order, at ¶ 86 (rel. Mar. 13, 1996).

⁸⁶ See Section IX, infra, addressing issues related to the filed rate doctrine.

⁸⁷ See, e.g., Western Union Tel. Co. v. Esteve Bros. & Co., 256 U.S. 566, 571 (1921); Western Union Tel. Co. v. Priester, 276 U.S. 252, 259 (1928). See Richman Bros. Records, Inc. v. U.S. Sprint Communications Co., Inc., 10 FCC Rcd 13,639, 13,641 (1995).

⁸⁸ Regulatory Treatment of Mobile Services, 9 FCC Rcd 1411 (1994).

⁸⁹ Omnibus Budget Reconciliation Act of 1993, Pub. L. No. 103-66, Title VI, § 6002(b)(2)(A), 6002(b)(2)(B), 107 Stat. 312, 392 (1993). Similar to the forbearance provision of the 1996 Act, Section 332 of the Communications Act, as amended by OBRA, authorizes the Commission to specify by regulation any provision of Title II, subject to certain limitations, as "inapplicable to [any commercial mobile] service or person" engaged in the provision of commercial mobile service, otherwise treated as a common carrier. 47 U.S.C. § 332(c)(1)(A). Section 332(c)(1)(A) requires that before forbearing from applying any section of Title II the Commission must find that

the Commission concluded that, in a competitive environment, voluntary tariff filings would create a risk that competitors would use tariff filings "merely to send price signals and thereby manipulate prices."⁹⁰ It also found that forbearance would promote competition by enabling providers of CMRS to respond quickly to competitors' price packages and reducing administrative costs.⁹¹ To prevent collusive pricing practices, and to protect consumers and the public interest, the Commission determined that it would "forbear from requiring or permitting tariffs for interstate service offered directly by CMRS providers to their customers."⁹²

36. We seek comment on our tentative conclusion that we should adopt a mandatory detariffing policy for the domestic services offered by non-dominant interexchange carriers. We also seek comment on whether the Commission has the authority pursuant to

each of the following conditions applies:

- (1) enforcement of such provision is not necessary in order to ensure that the charges, practices, classifications, or regulations for or in connection with that service are just and reasonable and are not unjustly or unreasonably discriminatory;
- (2) enforcement of such provision is not necessary for the protection of consumers; and
- (3) specifying such provision is consistent with the public interest.

Id. In evaluating the public interest, Section 332(c)(1)(C) requires the Commission to consider:

whether the proposed regulation . . . will promote competitive market conditions, including the extent to which such regulation . . . will enhance competition among providers of commercial mobile service. If the Commission determines that such regulation . . . will promote competition among providers of commercial mobile services, such determination may be the basis for a Commission finding that such regulation . . . is in the public interest.

47 U.S.C. § 332(c)(1)(C).

⁹⁰ Regulatory Treatment of Mobile Services, 9 FCC Rcd at 1479.

⁹¹ Id.

⁹² Id. at 1480. The Commission ruled that CMRS providers with tariffs on file for domestic CMRS services had to cancel those tariffs within 90 days of publication of the Commission's order in the Federal Register. Id.

the Communications Act, as amended, to prohibit carriers from filing tariffs. We tentatively conclude that, if we adopt a mandatory or a permissive detariffing policy, non-dominant carriers should be required to maintain at their premises price and service information regarding all of their interstate, interexchange offerings, that they can submit to the Commission upon request.⁹³ We seek comment on this tentative conclusion.

37. We recognize that the Commission gradually relaxed its regulation of non-dominant carriers in the Competitive Carrier proceeding in part because it concluded that the availability of service from a nationwide dominant carrier subject to close regulation would effectively constrain the rates that could be charged by non-dominant carriers.⁹⁴ Given the recent reclassification of AT&T, there currently are no nationwide dominant interstate, domestic, interexchange carriers. While we still believe that non-dominant carriers lacking market power cannot rationally price services anticompetitively, we seek comment on whether the absence of a nationwide dominant carrier should affect our tentative conclusion to forbear from requiring non-dominant interexchange carriers to file tariffs, and if so, how.

38. We note that market conditions or other circumstances may change in the future. In the event of changed circumstances, such that the statutory prerequisites for forbearance are no longer present, the Commission can revisit tariff forbearance to consider whether it continues to meet the statutory criteria.

39. Finally, in the AT&T Reclassification proceeding, AT&T made certain voluntary commitments regarding its provision of interstate analog private line and 800 directory assistance services. Specifically, AT&T committed, for a period of three years, to limit any price increases for these services to a maximum increase in any year of no more than the increase in the consumer price index.⁹⁵ AT&T also committed, for a period of three years, to file tariff changes increasing the prices of these services on not less than five business days' notice, and to identify clearly such tariff transmittals as affecting the provisions of this commitment.⁹⁶ We believe that it would be consistent with AT&T's intent that its commitments act as a transitional mechanism for AT&T to continue to tariff these services in accordance with its commitments. Accordingly, we tentatively conclude that, even if we decide to forbear from requiring non-dominant interexchange carriers to file tariffs, AT&T should remain subject to its prior commitments, and our corresponding order,

⁹³ In adopting its prior mandatory detariffing policy, the Commission required affected carriers to maintain such information at whatever company location they desired. Sixth Report and Order, 99 FCC 2d at 1034.

⁹⁴ See, e.g., First Report and Order, 85 FCC 2d at 28.

⁹⁵ AT&T Reclassification Order, at ¶ 106, and Appendix C at ¶ 4.

⁹⁶ Id. at ¶106, and Appendix C at ¶ 4.

that AT&T file tariffs with respect to these services for the specified term of the commitments. We seek comment on these tentative conclusions.

IV. DEFINITION OF RELEVANT PRODUCT AND GEOGRAPHIC MARKETS

40. In the Competitive Carrier proceeding, the Commission found, for purposes of assessing the market power of interexchange carriers covered by that proceeding, that: "(1) interstate, domestic, interexchange telecommunications services comprise the relevant product market, and (2) the United States (including Alaska, Hawaii, Puerto Rico, U.S. Virgin Islands, and other U.S. offshore points) comprises the relevant geographic market for this product, with no relevant submarkets."⁹⁷ In this section, we consider whether we should reexamine the geographic and product market definitions that the Commission adopted in the Competitive Carrier proceeding. We believe 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.⁹⁸ Moreover, evidence in the recent AT&T Reclassification proceeding suggests that the market definitions adopted in the Competitive Carrier proceeding might be more narrowly drawn to provide us with a more refined analytical tool for evaluating whether a carrier or group of carriers has market power. For example, there was evidence that suggested that AT&T might possess the ability to raise and sustain prices for 800 directory assistance and analog private line services above competitive levels without making the price increase unprofitable,⁹⁹ which may imply that these services might constitute separate relevant product markets.

41. We invite comment on whether we should retain the relevant product and geographic market definitions adopted in the Competitive Carrier proceeding. We tentatively conclude that we should follow the approach taken in the U.S. Department of Justice/Federal Trade Commission 1992 Merger Guidelines (the "Guidelines")¹⁰⁰ for defining relevant markets. "In many respects the . . . Guidelines and the scholarship on which they are based offer important insights and substantially improved formulations of relevant market issues."¹⁰¹

⁹⁷ Fourth Report and Order, 95 FCC 2d at 563.

⁹⁸ See 1996 Act at § 151 (adding § 271) (permitting the BOCs to provide in-region interLATA services upon satisfaction of certain conditions).

⁹⁹ AT&T Reclassification Order, at ¶¶ 102-05.

¹⁰⁰ 1992 U.S. Department of Justice/Federal Trade Commission Merger Guidelines, 4 Trade Reg. Rep. (CCH) ¶ 13,104, at p. 20,569 (1992 Merger Guidelines).

¹⁰¹ Robert Pitofsky, New Definitions of Relevant Market and the Assault on Antitrust, 90 Colum. L. Rev. 1805, 1808 (1990). See also Price Cap Performance Review for Local Exchange Carriers, Second Further Notice of Proposed Rulemaking in CC Docket No. 94-1, Further Notice of Proposed Rulemaking in CC Docket No. 93-124,

Moreover, courts have increasingly relied on the Guidelines' approach in defining relevant markets.¹⁰² We believe the Guidelines' approach suggests 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. We tentatively conclude, however, that we need not address the issue of delineating the boundaries of specific product markets, except where there is credible evidence suggesting that there is or could be a lack of competitive performance with respect to a particular service or group of services.

42. With respect to the relevant geographic market, we tentatively conclude that we should define a relevant geographic market for interstate, interexchange services as all calls (in the relevant product market) between two particular points. However, geographic rate averaging and other factors imply that a carrier or group of carriers cannot change interexchange rates for calls between two particular points without changing rates nationwide for calls of that distance. For purposes of market power analysis, we tentatively conclude to treat interstate, interexchange calling generally as one national market, as the Commission did in the Competitive Carrier proceeding. If there is credible evidence suggesting that there is or could be a lack of competition in a particular point-to-point 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), however, we propose to examine individually that market (or group of markets) for the presence of market power.

43. We note that comments and reply comments on this section are due April 19, 1996; reply comments are due May 3, 1996.¹⁰³

A. Relevant Product Market

44. For the reasons discussed above, we tentatively conclude that we should follow the Guidelines' approach for defining the relevant product market. In the Competitive Carrier proceeding, the Commission defined the relevant product market as "all interstate, domestic, interexchange telecommunications services" and concluded that there were no relevant submarkets.¹⁰⁴ Although we recently used this product market definition to

and Second Further Notice of Proposed Rulemaking in CC Docket No. 93-197, at ¶ 116 (rel. Sept. 20, 1995) (relying on the 1992 Merger Guidelines' approach to defining the relevant market).

¹⁰² ABA Antitrust Section, Antitrust Law Developments 298 (3d ed. 1992); Steven A. Newborn & Virginia L. Snider, The Growing Judicial Acceptance of the Merger Guidelines, 60 Antitrust L.J. 849 (1992).

¹⁰³ See also Section X.D. infra regarding requirements for all pleadings.

¹⁰⁴ Fourth Report and Order, 95 FCC 2d at 563.