

reclassify AT&T as non-dominant,¹⁰⁵ we question whether a narrower product market definition might provide us with a more refined analytical tool for evaluating whether a carrier or group of carriers together are exerting market power. For example, our finding that the prices of 800 directory assistance and analog private line services could profitably be raised above competitive levels may imply these services constitute distinct relevant product markets.¹⁰⁶

45. The Guidelines define the relevant product market as "the product or group of products such that a hypothetical profit maximizing firm that was the only present and future seller of those products ('monopolist') would impose at least a 'small but significant and nontransitory' increase in price."¹⁰⁷ Accordingly, in defining the relevant product market, one must examine whether a "small but significant and nontransitory" increase in the price of the relevant product would cause enough buyers to shift their purchases to a second product, so as to make the price increase unprofitable. If so, the two products should be considered to be in the same product market.¹⁰⁸

46. Under the Guidelines, "[m]arket definition focuses solely on demand substitution factors -- i.e., possible consumer responses."¹⁰⁹ Consideration of substitutability of demand supports the use of narrower relevant product markets than the "all services" product market defined in the Competitive Carrier proceeding. It appears unlikely, for example, that a substantial number of residential customers would switch from residential service to 800 service in response to a small but significant nontransitory increase in the price of residential service.¹¹⁰ Thus, these two services may fall in different product markets. On the other hand, it appears that defining each interexchange service as a separate relevant product market would result in relevant markets that are too narrow. Business customers, in particular, may view certain interexchange services as sufficiently close substitutes that, if an interexchange carrier raised the price of one of the services, customers

¹⁰⁵ AT&T Reclassification Order, at ¶ 22.

¹⁰⁶ See id. at ¶¶ 102-05.

¹⁰⁷ 1992 Merger Guidelines, at p. 20,572. Such a price increase will be profitable only if it applies to all products that are good substitutes for the product or products at issue. If it does not, the price increase generally will cause buyers to switch to one or more of the substitute products.

¹⁰⁸ Id.

¹⁰⁹ Id. at p. 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.

¹¹⁰ See id.

would switch to one of the substitute services. Based on this analysis, 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.

47. We believe that it would be administratively burdensome to delineate all relevant product markets for interstate, interexchange services. The fact that we have previously found that there is substantial competition with respect to most interstate, domestic, interexchange service offerings suggests that we do not need to do so at this time.¹¹¹ Accordingly, we tentatively conclude that we should address the question whether a specific interstate, interexchange service (or group of services) constitutes a separate 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 seek comment on this approach and invite parties to suggest other approaches. Interested parties should provide support for the position they advocate. Parties recommending that services be grouped in relevant product markets should identify the services that should be grouped together, as well as providing evidence that there is or could be a lack of competitive performance with respect to those services. We also seek comment on what factors we should consider in defining relevant product markets, as well as what obstacles, problems, or administrative burdens we are likely to face in adopting narrower market definitions.

B. Relevant Geographic Market

48. The Merger Guidelines define the relevant geographic market as the "region such that a hypothetical monopolist that was the only present or future producer of the relevant product at locations in that region would profitably impose at least a 'small but significant and nontransitory' increase in price, holding constant the terms of sale for all products produced elsewhere."¹¹² This definition focuses on whether products in one region are good substitutes for products in other regions. Accordingly, in defining the relevant geographic market, one must examine whether a "small but significant and nontransitory" increase in the price of the relevant product at a particular location would cause a buyer to shift his purchase to a second location, so as to make the price increase unprofitable.¹¹³ If so, the two locations should be considered to be in the same geographic market.¹¹⁴

49. In applying the principles in the Guidelines, we note that, at its most fundamental level, interexchange calling involves a customer making a connection from a

¹¹¹ See AT&T Reclassification Order, at ¶¶ 74-116.

¹¹² 1992 Merger Guidelines, at p. 20,573.

¹¹³ Id.

¹¹⁴ Id. at pp. 20,573 - 20,573-3.

specific location to another specific location.¹¹⁵ We believe that most telephone customers do not view interexchange calls originating in different locations to be close substitutes for each other. For example, it is unlikely that a person living in Chicago who wishes to make a telephone call to San Francisco will be willing to travel to another location to make the call for a lower price. Similarly, a customer will not view a call that terminates in a place other than the location of the person to whom he or she is calling to be a good substitute for a call to that person. Thus, applying the Merger Guidelines principles, we tentatively conclude that the relevant geographic market for interstate, interexchange services should be defined as all calls from one particular location to another particular location.¹¹⁶

50. We recognize that it would be impracticable to conduct a market power analysis in each individual market implied by a point-to-point market definition for interstate, interexchange services. We believe that, in the majority of cases, economic factors and the realities of the marketplace will cause these markets to behave in a sufficiently similar manner to allow us to aggregate them into broader, more manageable groups of markets for purposes of market power analysis. For example, residential interexchange service can be thought of as a bundle of all possible interexchange calls originating from a single point and terminating anywhere, and 800 service as a bundle of interstate, interexchange calls originating from a certain geographic region and terminating at a specific point. Similarly, the "single nationwide geographic market" the Commission adopted in the Competitive Carrier proceeding can be viewed as an aggregate of the point-to-point markets encompassing all points in the United States.

51. We tentatively conclude for the following reasons that, in most cases, we should 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. First, geographic rate averaging reduces the likelihood that a carrier could exercise market power in a single point-to-point market. Because the prices a carrier can charge in a particular

¹¹⁵ For wireless services, the originating and terminating locations are not necessarily stationary or fixed.

¹¹⁶ We note that defining a relevant geographic market as transport between two specific points is well established in other contexts. For example, the Department of Justice has used city pairs as the relevant geographic market for evaluating mergers in the airline industry. See, e.g., Robert D. Willig, Antitrust Lessons from the Airline Industry: The DOJ Experience, 60 Antitrust L.J. 695, 697-98 (1991). Similarly, in the International Competitive Carrier proceeding, the Commission found that each country pair constitutes a separate geographic market. See International Competitive Carrier Policies, CC Docket No. 85-107, Report and Order, 102 FCC 2d 812 (1985). Thus, one geographic market consists of calls between the U.S. and France, and another consists of calls between the U.S. and Great Britain.

market are linked to the prices it charges in all other markets,¹¹⁷ it generally would not be profitable for a carrier to raise its prices throughout the nation (with a resulting loss of market share in some areas) to take advantage of market power between two particular cities. Second, customers typically purchase ubiquitous calling that enables them to make calls to all domestic locations. Thus, because of geographic rate averaging, a price change in one point-to-point market would require such price changes to be extended to all residential customers.

52. Another reason we can treat the relevant geographic market as a national market is that price regulation of access services and excess capacity in interstate transport further reduce the likelihood that an interexchange carrier could exercise market power in most point-to-point markets. In making this determination, we recognize that an interstate, interexchange call from point A to point B requires three separate inputs, each of which is sold in a separate input market: (1) originating access from point A; (2) interstate transport from point A to point B;¹¹⁸ and (3) terminating access to point B. The ability to raise the price for any of the inputs above the competitive level or to prevent competitors from assembling inputs to provide retail service would enable a firm unilaterally to raise the retail price of and thereby exercise market power with respect to interexchange calls between points A and B. We note, however, that all originating and terminating access services are currently subject to some form of price regulation,¹¹⁹ which constrains a LEC's ability to raise access prices to monopoly levels.¹²⁰ While interstate transport service is not subject to

¹¹⁷ The 1996 Act specifically directs the Commission to adopt rules to require interexchange carriers to provide interstate, interexchange services "to its subscribers in each State at rates no higher than the rates charged to its subscribers in any other State." 1996 Act at § 101 (adding § 254(g)). See Section VI *infra*, implementing new Section 254(g) of the Communications Act.

¹¹⁸ This input market includes all means of connecting point A and point B -- wireline or wireless -- and all network paths between those points. In the future, cellular, PCS, or other wireless interexchange services may provide an effective substitute for interexchange wireline service.

¹¹⁹ The BOCs and GTE are subject to price cap regulation (Policy and Rules Concerning Rates for Dominant Carriers, CC Docket No. 87-313, Second Report and Order, 5 FCC Rcd 6786 (1990) (LEC Price Cap Order); Order on Reconsideration, 6 FCC Rcd 2637 (1991), *aff'd sub nom.*, National Rural Telecom. Ass'n v. FCC, 988 F.2d 174 (D.C. Cir. 1993)), while other LECs are subject to price cap regulation, rate-of-return regulation, or regulation as an average-schedule company. LEC Price Cap Order, 5 FCC Rcd at 6818.

¹²⁰ We also note that there are ways in which a LEC could exercise market power without raising the price of interstate, interexchange services. For example, a LEC could raise its interexchange rivals' costs by providing poorer interconnection to the LEC's network facilities than the LEC provides to itself or its affiliate, or by delaying

price regulation, we concluded in the AT&T Reclassification Order that, between most points, excess transport capacity undermines the ability of any carrier to raise and maintain the price of interstate transport above the competitive level.¹²¹ Thus, because the prices of access and transport services are similarly constrained in all point-to-point markets, we believe we can generally examine simply whether a carrier has market power in the group of point-to-point markets that comprise the "nationwide geographic market."

53. Nevertheless, we believe there may be special circumstances in which treating interexchange services as a national market will not be sufficient for purposes of market power analysis. For example, the BOCs' control of access facilities in their local service regions may require us to examine those regions individually in determining whether the BOCs have market power with respect to in-region interexchange services.¹²² If market power were found to exist in such a large region, there is no guarantee that geographic rate averaging would provide a credible check on the exercise of such power. For instance, if a BOC's interexchange customers and traffic are concentrated in one region, the BOC might find it profitable to raise prices above competitive levels, even if geographic rate averaging might cause it to lose market share outside that region. We therefore propose 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).

54. We seek comment on the proposed approach. We also seek comment on how narrowly we would need to define points of origination and termination if we adopt this

fulfillment of its rivals' requests to connect to the LEC's network. We will be addressing these issues in upcoming proceedings that address implementation of new Sections 251 and 272 of the Communications Act, as amended.

¹²¹ We found that AT&T's competitors have enough readily available excess capacity to constrain the retail pricing behavior of AT&T, the nation's largest interexchange carrier. AT&T Reclassification Order, at ¶ 58. We noted, for example, that AT&T's largest competitors could absorb almost one-third of AT&T's existing traffic within 90 days and two-thirds of that traffic within twelve months. Id. at ¶ 59. Evidence was also presented that AT&T faced at least three national facilities-based competitors, dozens of regional carriers providing service in at least four states, and more than 500 carriers providing long-distance service in the United States. Id. at ¶¶ 46, 60-61.

¹²² We are not addressing in this proceeding the circumstances, if any, in which a BOC or independent LEC should be classified as a dominant carrier with respect to the provision of interstate, interexchange services in areas where it provides local access services. We intend to address these questions in an upcoming proceeding.

approach. Because it would be administratively infeasible to conduct a market power analysis that defines separate geographic markets between each pair of individual locations (such as homes), we need to adopt somewhat broader definitions for this situation. One possibility is to define geographic markets between two local exchange areas. An alternative approach might be to use geographic areas currently used by the Commission, such as Major Trading Areas (MTAs), Basic Trading Areas (BTAs), or Metropolitan Statistical Areas (MSAs).¹²³ Commenters should explain why the geographic market definition they recommend is appropriate and should address the administrative benefits or burdens of their proposed definition.

55. We also invite parties to suggest alternative approaches they believe better characterize the relevant geographic market for interstate, interexchange services, than the point-to-point market definition we have proposed. Parties should explain how the market definition they recommend reflects the market for interexchange services and should describe the likely administrative benefits or burdens of their proposal. Finally, parties should discuss the factors that we should consider in defining the relevant geographic market for interstate, domestic, interexchange services.

V. SEPARATION REQUIREMENTS FOR INDEPENDENT LOCAL EXCHANGE CARRIER AND BELL OPERATING COMPANY PROVISION OF "OUT-OF-REGION" INTERSTATE, INTEREXCHANGE SERVICES

56. The 1996 Act authorizes the BOCs, upon enactment, to provide interLATA services originating outside their in-region states.¹²⁴ In a recent Notice of Proposed Rulemaking, we considered what regulatory regime we should apply to BOC provision of such "out-of-region" interstate, interexchange services.¹²⁵ Specifically, we considered

¹²³ We note that Rand McNally & Company is the copyright owner of the Basic Trading Area and Major Trading Area Listings, which list the counties contained in each BTA, as embodied in Rand McNally's Trading Area System Diskette and Atlas & Marketing Guide. Rand McNally has licensed the use of its copyrighted MTA/BTA listings and maps for certain wireless telecommunications services. See 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 the 935-940 MHz Bands Allotted to the Specialized Mobile Radio Pool, PR Docket No. 89-553, Second Report and Order and Second Further Notice of Proposed Rulemaking, 10 FCC Rcd 6884, 6895-56 (1995).

¹²⁴ 1996 Act at § 151 (adding § 271(b)(2)).

¹²⁵ Bell Operating Company Provision of Out-of-Region Interstate, Interexchange, Services, CC Docket No. 96-21, Notice of Proposed Rulemaking, FCC 96-59 (rel. February 14, 1996) (BOC Out-of-Region NPRM). Prior to the 1996 Act, the BOCs were prohibited from providing interLATA services by the terms of the Modification

whether such services should be subject to dominant carrier or non-dominant carrier regulation.¹²⁶ In that Notice, we tentatively concluded that the separation requirements imposed for non-dominant treatment of independent LEC¹²⁷ provision of interexchange services, presented a useful model upon which to base, on an interim basis, oversight of BOC provision of out-of-region interstate, interexchange services.¹²⁸

57. The separation requirements imposed on independent LECs were established by the Commission in the Competitive Carrier proceeding. The Commission there determined that interexchange carriers affiliated with independent LECs would be regulated as non-dominant carriers.¹²⁹ In the Fifth Report and Order, the Commission specified 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."¹³⁰ The Commission further clarified that, 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.¹³¹ The

of Final Judgment (MFJ). The BOCs were not barred by the MFJ from providing interstate, interexchange services within a LATA boundary. See United States v. Western Electric Co., 552 F. Supp. 131 (D.D.C. 1982), aff'd sub nom. Maryland v. United States, 460 U.S. 1001 (1983) (approving MFJ); United States v. AT&T, 569 F. Supp. 1057 (D.D.C. 1983) (Plan of Reorganization), aff'd sub nom. California v. United States, 464 U.S. 1013 (1983). BOC provision of interstate, intraLATA, interexchange services was subject to dominant carrier regulation. See Fourth Report and Order, 95 FCC 2d 554.

¹²⁶ The BOC Out-of-Region NPRM addresses only BOC provision of out-of-region interstate, interexchange services; BOC provision of in-region interstate, interexchange services will be considered in a separate proceeding.

¹²⁷ By "independent LECs" we refer to exchange telephone companies other than the BOCs.

¹²⁸ BOC Out-of-Region NPRM, at ¶ 11.

¹²⁹ Fourth Report and Order, 95 FCC 2d at 575-79.

¹³⁰ Fifth Report and Order, 98 FCC 2d at 1198.

¹³¹ Id.

Commission also stated that any interstate service offered directly by an independent LEC, rather than through a separate affiliate, would be regulated as dominant.¹³²

58. The Commission observed that the separation requirements would provide some "protection against cost-shifting and anticompetitive conduct" by an independent LEC that could result from using its control of local bottleneck facilities.¹³³ Noting that the requirements it had specified were less stringent than those established in the Second Computer Inquiry,¹³⁴ the Commission concluded that the separation requirements would not impose excessive burdens on independent LECs.¹³⁵

59. The Commission stated in the Fifth Report and Order that the non-dominant treatment accorded to interexchange carriers affiliated with independent LECs did not apply to the BOCs, which, the Commission noted, were then prohibited from offering interLATA services.¹³⁶ The Commission added that, "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."¹³⁷

60. As noted, in the BOC Out-of-Region NPRM, we tentatively concluded that the separation requirements imposed upon independent LECs providing interexchange services,

¹³² Id. at 1198-99 (emphasis added).

¹³³ Id.

¹³⁴ Amendment of Section 64.702 of the Commission's Rules and Regulations, CC Docket No. 20828, Final Decision, 77 FCC 2d 384 (1980) (Second Computer Inquiry); Memorandum Opinion and Order on Reconsideration, 84 FCC 2d 50 (1980); Memorandum Opinion and Order on Further Reconsideration, 88 FCC 2d 512 (1981), aff'd sub nom., Computer and Communications Industry Ass'n v. FCC, 693 F.2d 198 (D.C. Cir. 1982), cert. denied sub nom., Louisiana Public Service Comm'n v. FCC, 461 U.S. 938 (1983); Memorandum Opinion and Order on Further Reconsideration, FCC 84-190 (rel. May 4, 1984).

¹³⁵ Fifth Report and Order, 98 FCC 2d at 1198. We note that the Fifth Report and Order separation requirements are also less stringent than the separation safeguards established in the 1996 Act for BOC provision of manufacturing activities, in-region interLATA services, interLATA information services, and electronic publishing. See 1996 Act at § 151 (adding §§ 272, 274).

¹³⁶ Fifth Report and Order, 98 FCC 2d at 1198-99 n.23 (citing United States v. Western Electric Co., 552 F. Supp. 131 (D.D.C. 1982)).

¹³⁷ Id.

presented a useful model upon which to base, on an interim basis, oversight of BOC provision of out-of-region interstate, interexchange services.¹³⁸ Accordingly, we tentatively concluded that, if a BOC provides out-of-region interstate, interexchange services through an affiliate that satisfies the separation requirements established in the Competitive Carrier Fifth Report and Order, the BOC affiliate should be regulated as a non-dominant carrier.¹³⁹ We also tentatively concluded that, if a BOC provides out-of-region interstate, interexchange services directly, or through an affiliate that does not meet the separation requirements, those services should be regulated as dominant carrier offerings.¹⁴⁰

61. We stated in that Notice, however, our intent to consider in this proceeding whether it may be appropriate at some future date to modify or eliminate the separation requirements that are currently imposed upon independent LECs, and that we tentatively concluded should be imposed on BOCs, in order to qualify for non-dominant treatment in the provision of out-of-region interstate, interexchange services.¹⁴¹ Accordingly, we now seek comment on whether we should modify or eliminate these separation requirements as a condition for non-dominant treatment of independent LEC provision of interstate, interexchange services outside their local exchange areas. We also seek comment on whether, if we modify or eliminate these separation requirements for non-dominant treatment of independent LEC provision of interstate, interexchange services outside their local exchange areas, we should apply the same requirements to BOC provision of out-of-region interstate, interexchange services. We defer to another proceeding consideration of the appropriate regulatory treatment of BOCs that provide in-region interstate, interexchange services¹⁴² and independent LECs that provide interstate, interexchange services within the area in which they also provide local exchange service.

62. Parties should identify the requirement or requirements that they believe should be modified or eliminated, and offer support for their positions. Parties should comment on whether complying with the separation requirements would create an unnecessary burden for LECs subject to those requirements. Parties should also comment on whether there is a possibility of cost-shifting or other anti-competitive conduct that could

¹³⁸ BOC Out-of-Region NPRM, at ¶ 11.

¹³⁹ Id. at ¶ 13.

¹⁴⁰ Id.

¹⁴¹ Id. at ¶ 11.

¹⁴² See 1996 Act at § 151 (adding § 271) (permitting BOCs to offer interLATA services originating within their regions upon obtaining Commission approval that they meet the requirements, including the "competitive checklist," established in the 1996 Act for such service, and that such service is in the public interest).

result if the separation requirements are modified or eliminated, and if so, how we can or should address such conduct.

63. We note that comments and reply comments on this section are due April 19, 1996; reply comments are due May 3, 1996.¹⁴³

VI. RATE AVERAGING AND INTEGRATION REQUIREMENTS OF 1996 ACT

64. Section 254(g) of the Communications Act, as amended by the 1996 Act, provides that the Commission, within six months after the date of enactment, must:

[A]dopt rules to require that the rates charged by providers of interexchange telecommunications services to subscribers in rural and high cost areas shall be no higher than the rates charged by each such provider to its subscribers in urban areas. Such rules shall also require that a provider of interstate interexchange telecommunications services shall provide such services to its subscribers in each State at rates no higher than the rates charged to subscribers in any other State.¹⁴⁴

Accordingly, we propose and address here the rules necessary to implement these requirements.

65. We note that comments and reply comments on this section implementing Section 254(g) of the Communications Act, as amended, are due April 19, 1996; reply comments are due May 3, 1996.¹⁴⁵

A. Geographic Rate Averaging

66. We first address the statutory requirement that the rates charged by providers of interexchange telecommunications services to subscribers in rural and high cost areas not be higher than the rates charged to subscribers in the interexchange carrier's urban areas (*i.e.*, that rates be geographically averaged).¹⁴⁶ The Commission has long supported a policy of geographic rate averaging for interstate, domestic, interexchange services. As the Commission stated in 1989:

¹⁴³ See also Section X.D. *infra* regarding requirements for all pleadings.

¹⁴⁴ 1996 Act at § 101 (adding § 254(g)).

¹⁴⁵ See also Section X.C. *infra* regarding requirements for all pleadings.

¹⁴⁶ 1996 Act at § 101 (adding § 254(g)).

This Commission has repeatedly voiced our support for rate averaging. . . . Geographic rate averaging redounds to the benefit of rural ratepayers, and customers of high cost local exchange carriers. First, geographic rate averaging ensures that interexchange rates for rural areas, or areas served by high cost companies, will not reflect the disproportionate burdens that may be associated with common line cost recovery in these areas. Thus, geographic rate averaging furthers our goal of providing a universal nationwide telecommunications network. Second, geographic rate averaging ensures that ratepayers share in the benefits of nationwide interexchange competition. If prices are falling due to competition in the corridors carrying the most traffic, prices will also fall for rural Americans. An additional benefit of rate averaging has been its contribution to the simplicity of [message toll service] rates. Customers seeking to compare rates charged by various interexchange carriers have been substantially benefited by the relative simplicity of the existing rate structure.¹⁴⁷

As recently as the AT&T Reclassification Order, we reaffirmed our commitment to maintain our geographic rate averaging policy.¹⁴⁸

67. While the Commission has consistently endorsed a policy of geographic rate averaging, the Commission has not formally promulgated a requirement that rates be geographically averaged.¹⁴⁹ As required by the 1996 Act, we propose to adopt a rule

¹⁴⁷ Policy and Rules Concerning Rates for Dominant Carriers, CC Docket No. 87-313, Report and Order and Second Further Notice of Proposed Rulemaking, 4 FCC Rcd 2873, 3132 (1989) (AT&T Price Cap Order); Erratum, 4 FCC Rcd 3379 (1989); Memorandum Opinion and Order on Reconsideration, 6 FCC Rcd 665 (1991) (AT&T Price Cap Reconsideration Order). See Guidelines for Dominant Carriers' MTS Rates and Rate Structure Plans, CC Docket No. 84-1235, Notice of Proposed Rulemaking, 100 FCC 2d 363, 375 (1985); Policy and Rules Concerning Rates for Dominant Carriers, CC Docket No. 87-313, Further Notice of Proposed Rulemaking, 3 FCC Rcd 3195, 3450-3451 (1988).

¹⁴⁸ AT&T Reclassification Order, at ¶ 110.

¹⁴⁹ The Commission believed that carriers would continue rate averaging practices regardless of the development of competition. AT&T Price Cap Order, 4 FCC Rcd at 3130. The Commission, however, pledged that it would suspend and investigate any tariff filed by AT&T or a LEC that proposed geographically deaveraged rates. Id. at 3133; Policy and Rules Concerning Rates for Dominant Carriers, CC Docket No. 87-313, Order on Reconsideration, 6 FCC Rcd 2637, 2715 (1991); AT&T Price

requiring that the rates charged by all providers of interexchange telecommunications services to subscribers in rural and high cost areas shall be no higher than the rates charged by each such provider to its subscribers in urban areas. As established by the 1996 Act, this requirement would apply to all providers of interexchange telecommunications services. We seek comment generally on this proposed rule.

68. Section 254(g) of the Communications Act, as amended by the 1996 Act, states in part:

the Commission shall adopt rules to require that the rates charged by providers of interexchange telecommunications services to subscribers in rural and high cost areas shall be no higher than the rates charged by each such provider to its subscribers in urban areas.¹⁵⁰

Thus, the statute requires the Commission to adopt rules to require geographic rate averaging for intrastate and interstate, interexchange telecommunications services. We note that the legislative history states:

[n]ew section 254(g) is intended to incorporate the policies of geographic rate averaging . . . of interexchange services in order to ensure that subscribers in rural and high cost areas throughout the Nation are able to continue to receive both intrastate and interstate interexchange services at rates no higher than those paid by urban subscribers.¹⁵¹

We also believe, however, that Section 254(g) preempts state laws or regulations requiring intrastate geographic rate averaging only to the extent such laws or regulations are inconsistent with the rules we adopt with respect to geographic rate averaging.¹⁵² Although

Cap Reconsideration Order, 6 FCC Rcd at 679; Interexchange Competition NPRM, 5 FCC Rcd at 2646, 2649.

¹⁵⁰ 1996 Act at § 101 (adding § 254(g)).

¹⁵¹ Conference Committee, Joint Explanatory Statement on the Telecommunications Act of 1996, 104th Cong., 2nd Sess. at 132 (Joint Explanatory Statement).

¹⁵² Preemption may occur even when Congress has not fully foreclosed state regulation in a specific area if state law conflicts with federal law. See Florida Lime & Avocado Growers, Inc. v. Paul, 373 U.S. 132, 142-143 (1963) (conflict when "compliance with both federal and state regulations is a physical impossibility"); Hines v. Davidowitz, 312 U.S. 52, 67 (1941) (conflict when state law "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress").

the statute makes clear that the Commission is to establish the rules requiring geographic averaging, it does not appear to foreclose consistent state action in this area. Indeed, the Senate Report statement included in the Joint Explanatory Statement provides:

States shall continue to be responsible for enforcing this [geographic averaging provision] with respect to intrastate interexchange services, so long as the State rules are not inconsistent with Commission rules and policies on rate averaging.¹⁵³

Thus, we invite comment on these views.

69. In addition to seeking comment on preemption, we seek comment on whether there may be competitive conditions or other circumstances that could justify Commission forbearance from enforcing the proposed geographic rate averaging requirement with respect to particular interexchange telecommunications carriers or services.¹⁵⁴

70. In light of our proposal in this Notice to forbear from requiring non-dominant interexchange carriers to file tariffs, we tentatively conclude that it would not be in the public interest to attempt to enforce geographic rate averaging through the tariff process. Rather, we believe that we can ensure compliance with the proposed rate averaging requirements by requiring providers of interexchange telecommunications services to file certifications stating that they are in compliance with their statutory geographic rate averaging obligations. Such a requirement would not impose a significant burden on such providers. Accordingly, we tentatively conclude that we should require providers of interexchange telecommunications services to file such certifications. We also tentatively conclude that we should rely on the complaint process under Section 208 to bring violations to our attention.¹⁵⁵ We seek comment on these tentative conclusions. Parties challenging these tentative conclusions should suggest possible alternative enforcement mechanisms.

¹⁵³ Joint Explanatory Statement at 129. The Joint Explanatory Statement indicates that the House receded to the Senate with modifications with respect to new Communications Act Section 254. *Id.* at 130. We note that the geographic rate averaging provision of Section 254(g) contains only minor modifications from the Senate Bill geographic rate averaging provision, Section 253(h). *See* S. 652 104th Cong., 1st Sess. § 253(h) (1995).

¹⁵⁴ For example, if new entry substantially increases competition in areas with high volumes and low costs, nationwide interexchange carriers may be placed at a competitive disadvantage if they are not permitted to offer regional discounts in such areas.

¹⁵⁵ 47 U.S.C. § 208.

71. Enforcement issues similarly arise in the absence of tariff forbearance. Because non-dominant carriers currently are permitted to file tariffs on one day's notice, we seek comment on whether, in the absence of tariff forbearance, we should adopt any requirements in order to facilitate enforcement of the proposed rule that requires, inter alia, that the rates of non-dominant providers of interexchange telecommunications services be geographically averaged. Parties supporting such requirements should propose specific examples of regulatory mechanisms that could be adopted.

72. Parties in the AT&T Reclassification proceeding asserted that carriers often do not offer discount rate plans ubiquitously, and that, as a result, interexchange customers in some rural and high cost areas are forced to pay the carriers' higher basic rates, while customers in other geographic areas can take advantage of the carriers' discount plans. These parties further asserted that this disparity amounts to geographic rate deaveraging.¹⁵⁶ We seek comment on the extent to which providers of interexchange telecommunications services do not offer optional discount plans to subscribers in rural and high cost areas and, if so, the reasons for this practice. We also seek comment on whether an interexchange carrier's failure to make a promotional plan available in the entirety of its service area constitutes geographic deaveraging, and if so, whether we should require that discount rate plans be made available and advertised in the entirety of an interexchange telecommunications service provider's service area.

73. Finally, as noted above, in the AT&T Reclassification proceeding, AT&T made voluntary commitments related to geographic rate averaging. Specifically, AT&T committed to file any new geographically specific tariffs that depart from its traditional approach to geographic averaging for interstate residential direct dial services on five business days' notice.¹⁵⁷ AT&T committed that such tariff transmittals will be clearly identified as affecting the provisions of the commitment.¹⁵⁸ AT&T committed that "[t]his will continue for three years unless the Commission adopts rules addressing this issue for all carriers or there is a change in federal law addressing this issue."¹⁵⁹ We tentatively conclude that, given the specific limitation of AT&T's commitment on this issue, upon adoption of the foregoing proposed rules relating to geographic rate averaging, AT&T would be subject to those adopted rules, and would not be bound to the specific commitments it made with respect to geographic rate averaging. We seek comment on this tentative conclusion.

¹⁵⁶ AT&T Reclassification Order, at ¶ 144.

¹⁵⁷ Id., Appendix C, at ¶ 3.

¹⁵⁸ Id.

¹⁵⁹ Id.

B. Rate Integration

74. As noted above, the 1996 Act also requires that the Commission adopt rules to require that providers of interstate, interexchange telecommunications services provide such services to their subscribers in each State at rates no higher than the rates charged to their subscribers in any other State (i.e., that rates be integrated).¹⁶⁰ As with geographic rate averaging, the Commission has long maintained a rate integration policy for interexchange rates between the forty-eight contiguous states and various non-contiguous United States regions, including Alaska, Hawaii, Puerto Rico and the U.S. Virgin Islands.¹⁶¹

75. The Commission established its rate integration policy in conjunction with the introduction of satellite technology in the domestic telecommunications market in 1972. In its Domsat II order, the Commission concluded that, because the cost of providing interexchange service over satellite facilities did not vary with distance, there was a sound economic basis to support the integration into the domestic rate pattern of communications services between non-contiguous U.S. states and territories and the forty-eight contiguous states.¹⁶² The Domsat II order required any carrier that provided domestic satellite service between the contiguous forty-eight states and various non-contiguous states and United States

¹⁶⁰ 1996 Act at § 101 (adding § 254(g)).

¹⁶¹ See Establishment of Domestic Communications-Satellite Facilities by Non-Governmental Entities, Docket No. 16495, Second Report and Order, 35 FCC 2d 844 (1972) (Domsat II); Memorandum Opinion and Order, 38 FCC 2d 665 (1972) (Domsat II Reconsideration), aff'd sub nom. Network Project v. FCC, 511 F.2d 786 (D.C. Cir. 1975); Integration of Rates and Services for the Provision of Communications by Authorized Common Carriers Between the United States Mainland and the Offshore Points of Hawaii, Alaska, and Puerto Rico/Virgin Islands, File Nos. W-P-C-649, 710, 838, File Nos. I-P-C-10, 13, 14, Memorandum Opinion, Order and Authorization, 61 FCC 2d 380 (1976) (1976 Integration of Rates and Services Order); Memorandum Opinion and Order, 65 FCC 2d 324 (1977); Integration of Rates and Services for the Provision of Communications by Authorized Common Carriers Between the United States Mainland and the Offshore Points of Hawaii, Alaska, and Puerto Rico/Virgin Islands, File No. W-P-C-649 et al., Memorandum Opinion and Order, 72 FCC 2d 715 (1979); Integration of Rates and Services for the Provision of Communications by Authorized Common Carriers Between the United States Mainland and the Offshore Points of Hawaii, Alaska, and Puerto Rico/Virgin Islands, CC Docket No. 83-1376, Final Recommended Decision, 9 FCC Rcd 2196 (1993); Memorandum and Opinion, 9 FCC Rcd 3023 (1994); Application of Alascom, Inc. AT&T Corporation and Pacific Telecom, Inc. For Transfer of Control of Alascom, Inc. to AT&T Corporation, File No. W-P-C-7037 et al., Order and Authorization, 11 FCC Rcd 734 (1995).

¹⁶² Domsat II, 35 FCC 2d at 856-57.

territories to do so pursuant to a plan to integrate the carrier's rates and services.¹⁶³ The Commission also specifically required AT&T to offer services at integrated rates.¹⁶⁴ In the 1976 Integration of Rates and Services Order, the Commission restated its rate integration policy requiring that message toll telephone, private line, and specialized services of Alaska, Hawaii and Puerto Rico/Virgin Islands be integrated into the uniform mileage rate pattern applicable to the mainland.¹⁶⁵ The 1976 Integration of Rates and Services Order also noted that domestic satellite authorization to carriers serving these points was conditioned upon the submission of a specific and acceptable proposal for integration of rates and services subject to Commission approval.¹⁶⁶ As with geographic rate averaging, we reaffirmed our commitment to rate integration in our recent AT&T Reclassification Order.¹⁶⁷

76. As required by the 1996 Act, and guided by the Conference Committee's statement to incorporate the policies contained in our 1976 Integration of Rates and Services Order,¹⁶⁸ we propose to adopt a rule requiring that "a provider of interstate interexchange telecommunications services shall provide such services to its subscribers in each State at rates no higher than the rates charged to its subscribers in any other State." We seek comment on this proposed rule.

77. We note that the Communications Act, as amended, defines the term "State" as including "the District of Columbia and the Territories and possessions."¹⁶⁹ Accordingly,

¹⁶³ Id. at 857; see Domsat II Reconsideration, 38 FCC 2d at 692-697; 1976 Integration of Rates and Services Order, 61 FCC 2d at 385-390; Application of GTE Corp. and Southern Pacific Co. for Consent to Transfer Control of Southern Pacific Communications Company and Southern Pacific Satellite Company, File No. ENF-83-1, Memorandum Opinion and Order, 94 FCC 2d 235, 259-260 (1983) (obligating GTE Sprint to integrate its Mainland-to-Hawaii rates).

¹⁶⁴ Domsat II, 35 FCC 2d at 858.

¹⁶⁵ 1976 Integration of Rates and Services Order, 61 FCC 2d at 383-384.

¹⁶⁶ Id. at 383.

¹⁶⁷ AT&T Reclassification Order, at ¶ 110.

¹⁶⁸ Joint Explanatory Statement at 132. "The conferees intend the Commission's rules to require geographic rate averaging and rate integration, and to incorporate the policies contained in the Commission's proceeding entitled 'Integration of Rates and Services for the Provision of Communications by Authorized Common Carriers between the United States Mainland and the Offshore Points of Hawaii, Alaska and Puerto Rico/Virgin Islands' (61 FCC 2d 380 (1976))." Id.

¹⁶⁹ 47 U.S.C. § 153(v).

the 1996 Act extends rate integration to U.S. Territories and possessions, such as Guam and the Northern Mariana Islands, that currently are not subject to the Commission's domestic rate integration policy.¹⁷⁰ The U.S. Virgin Islands and Puerto Rico are the only territories or possessions subject to the Commission's domestic rate integration policy at the present time. We seek comment on appropriate mechanisms to implement rate integration for U.S. territories and possessions that currently are not subject to the Commission's domestic rate integration policies.

78. We tentatively conclude, in light of our proposal in this Notice to forbear from requiring non-dominant interexchange carriers to file tariffs, that it would not be in the public interest to attempt to enforce rate integration through the tariff process. Rather, we believe that we can ensure compliance with the proposed rate integration requirements by requiring providers of interstate, interexchange telecommunications services to file certifications stating that they are in compliance with their statutory rate integration obligations. Such a requirement would not impose a significant burden on such providers. Accordingly, we tentatively conclude that we should require providers of interstate, interexchange telecommunications services to file such certifications. We also tentatively conclude that we should rely on the complaint process under Section 208 to bring violations to our attention.¹⁷¹ We seek comment on these tentative conclusions. Parties challenging these tentative conclusions should suggest possible alternative enforcement mechanisms.

79. Finally, in the AT&T Reclassification proceeding, AT&T made voluntary commitments relating to service to and from the State of Alaska and other regions subject to our rate integration policy.¹⁷² Specifically, AT&T committed that it "will continue to comply with all conditions and obligations contained in the various Commission orders regarding rate integration between the contiguous forty-eight states and the states of Alaska, Hawaii, Puerto Rico and the Virgin Islands, until or unless those orders are superseded by Congressional or

¹⁷⁰ We note that currently pending before the Commission are three petitions to establish rulemakings to implement domestic rate integration policies for the Territory of Guam and the Commonwealth of the Northern Mariana Islands. See Governor's Office of the Territory of Guam Petition for Rulemaking to Integrate Rates, filed May 12, 1995, Public Notice, AAD 95-84 (rel. June 16, 1995); JAMA Corporation Petition for Rulemaking to Implement Domestic Rate Integration Policies for Guam, filed May 1, 1995, Public Notice, AAD 95-85 (rel. June 16, 1995); Commonwealth of the Northern Mariana Islands Petition for Rulemaking to Implement Domestic Rate Integration for the Commonwealth of the Northern Mariana Islands, filed June 7, 1995, Public Notice, AAD 95-86 (rel. June 16, 1995). We believe these petitions would become moot when we adopt the rules implementing new Section 254(g).

¹⁷¹ 47 U.S.C. § 208.

¹⁷² AT&T Reclassification Order, at ¶ 114, and Appendix C at ¶ 1.

Commission action."¹⁷³ We tentatively conclude that, given the specific limitation of AT&T's commitment on this issue, upon adoption of the foregoing proposed rule relating to rate integration, AT&T would be subject to that rule, and would not be bound to the specific commitment it made with respect to rate integration. We seek comment on this tentative conclusion. We note that this tentative conclusion does not apply to AT&T's separate commitment to "comply with all the conditions and obligations contained in the Commission orders associated with AT&T's purchase of Alascom, Inc." as that commitment is not limited in duration.¹⁷⁴

VII. PRICING ISSUES

80. Changes in the structure of the interexchange marketplace over the past decade have raised certain issues relating to the pricing of interexchange telecommunications services. In the AT&T Reclassification proceeding, a number of parties alleged that the interexchange market is characterized by oligopolistic price coordination, and that the reclassification of AT&T would lead to an increase in basic rates for domestic residential service. We address these issues in this section.

A. Allegations of Tacit Price Coordination

81. In the AT&T Reclassification Order, we found inconclusive and conflicting evidence in the record regarding the existence of alleged tacit price coordination among interexchange carriers for basic residential services, or residential services generally.¹⁷⁵ We concluded that, if there were tacit price coordination in the interexchange market, the problem was generic to the industry and would be better addressed by removing regulatory requirements that may have facilitated such conduct.¹⁷⁶ Our reclassification of AT&T as non-dominant removed one such regulatory requirement -- the longer advance notice period applicable only to AT&T tariff filings. In addition, we believe that the 1996 Act provides the best solution to any problem of tacit price coordination, to the extent that it exists currently, by allowing for competitive entry in the interstate interexchange market by the facilities-based BOCs and others.¹⁷⁷ Increasing the number of facilities-based carriers should make tacit price coordination more difficult. Moreover, we believe that the mandatory detariffing regime we propose in this Notice similarly will discourage price coordination by eliminating carriers' ability to ascertain their competitors' interstate rates and service

¹⁷³ Id., Appendix C at ¶ 1.

¹⁷⁴ Id. at Appendix C ¶ 2.

¹⁷⁵ Id. at ¶¶ 81-83.

¹⁷⁶ Id. at ¶ 83.

¹⁷⁷ See 1996 Act at § 151 (adding § 271).

offerings from publicly available tariffs filed with the Commission. We seek comment on these issues.

B. Residential Services Rate Plans

82. In order to alleviate concerns expressed in the AT&T Reclassification proceeding that rates for residential services would increase if AT&T were reclassified as non-dominant, AT&T voluntarily committed, for a period of three years, to offer two optional calling plans designed to mitigate the impact of future increases in basic schedule or residential rates.¹⁷⁸ The first plan is targeted to low-income customers, and the second is targeted to low-volume consumers, but is generally available to all residential customers.

83. With respect to low-income customers, in our recent Notice of Proposed Rulemaking regarding implementation of the 1996 Act's universal service directives, we solicited comment "on whether and how we should encourage domestic interstate interexchange carriers to provide optional calling plans for low-income consumers to promote the statutory [universal service] principles enumerated [in the 1996 Act]."¹⁷⁹ We anticipate resolving this issue in the Universal Service proceeding, but because the service is interstate in nature, we retain concurrent jurisdiction.

VIII. BUNDLING OF CUSTOMER PREMISES EQUIPMENT

84. In 1980, the Commission adopted a rule prohibiting common carriers from bundling the provision of customer premises equipment (CPE) with the provision of common carrier telecommunications services.¹⁸⁰ Carriers previously offered CPE as part of a package of services to subscribers.¹⁸¹ Changes in the industry, in particular the advent of competitive CPE vendors, led the Commission to conclude that carriers' continued bundling of telecommunications services with CPE could force customers to purchase unwanted CPE in

¹⁷⁸ AT&T Reclassification Order, at ¶ 84-85 (citing AT&T September 21, 1995 Ex Parte Letter, at 2-3).

¹⁷⁹ Federal-State Joint Board on Universal Service, CC Docket No. 96-45, Notice of Proposed Rulemaking and Order Establishing Joint Board, FCC 96-93, at ¶ 55 (rel. March 8, 1996).

¹⁸⁰ Second Computer Inquiry, 77 FCC 2d at 496. Section 64.702(e) of our rules provides: "Except as otherwise ordered by the Commission, after March 1, 1982, the carrier provision of customer-premises equipment used in conjunction with the interstate telecommunications network shall be separate and distinct from provision of common carrier communications services and not offered on a tariffed basis." 47 C.F.R. § 64.702(e).

¹⁸¹ See Second Computer Inquiry, 77 FCC 2d at 442.

order to obtain necessary transmission services, thus restricting customer choice and retarding the development of a competitive CPE market.¹⁸² It therefore required carriers to separate the provision of CPE from the provision of transmission services.¹⁸³

85. The Commission recognized, however, that "[i]f the markets for components of [a] commodity bundle are workably competitive, bundling may present no major societal problems so long as the consumer is not deceived concerning the content and quality of the bundle."¹⁸⁴ It further acknowledged that some consumers may believe that bundled offerings can reduce transaction costs to customers.¹⁸⁵ Bundling can also enable market participants to compete more effectively by offering attractive sales packages.¹⁸⁶

86. Since the adoption of the rule prohibiting CPE bundling in 1980, significant changes have occurred in the markets for CPE and interstate long-distance services. The CPE market is now widely recognized to be fully competitive.¹⁸⁷ In the AT&T Reclassification Order, we found that AT&T no longer possesses market power in the overall

¹⁸² Id. at 443 n.52 ("in regulated markets characterized by dominant firms [like the telecommunications industry], there may be an incentive . . . to use bundling as an anti-competitive marketing strategy, e.g., to cross-subsidize competitive by monopoly services, that restricts both consumer freedom of choice as well as the evolution of a competitive marketplace").

¹⁸³ Id. at 446-47.

¹⁸⁴ Id. at 443 n.52.

¹⁸⁵ Id.

¹⁸⁶ See Jefferson Parish Hospital District No. 2 v. Hyde, 466 U.S. 2, 11-12 (1984) (Jefferson Parish Hospital) ("Buyers often find package sales attractive; a seller's decision to offer such packages can merely be an attempt to compete effectively -- conduct that is entirely consistent with the Sherman Act").

¹⁸⁷ See, e.g., Price Cap Performance Review for Local Exchange Carriers, CC Docket No. 94-1, First Report and Order, 10 FCC Rcd 8961, 9122 (1995) ("competition today is a fact in both the customer premises equipment and the long-distance market"); Procedures for Implementing the Detariffing of Customer Premises Equipment and Enhanced Services (Second Computer Inquiry), CC Docket No. 81-893, Memorandum Opinion and Order, 8 FCC Rcd 3891, 3891 (1993) (removing the National Security and Emergency Preparedness CPE reporting requirement as unnecessary, in part, because "[t]he CPE market has been very competitive for a number of years and there are many suppliers available to provide CPE") (citations omitted).

interstate, domestic, interexchange market.¹⁸⁸ Moreover, in the Interexchange Competition Proceeding, we concluded that the business services market was "substantially competitive."¹⁸⁹

87. The Supreme Court has stated that the essential characteristic of an illegal tying or bundling arrangement "lies in the seller's exploitation of its control over [one] product to force the buyer into the purchase of a [second] product that the buyer either did not want at all or might have preferred to purchase elsewhere on different terms."¹⁹⁰ Under the "leverage theory" of tying, "tying provides a mechanism whereby a firm with monopoly power in one market can use the leverage provided by this power to foreclose sales in, and thereby monopolize, a second market."¹⁹¹

88. Based on our earlier findings regarding competition in both the CPE and interstate, interexchange services markets, we tentatively conclude that it is unlikely that non-dominant interexchange carriers can engage in the type of anticompetitive conduct that led the Commission to prohibit the bundling of CPE with the provision, inter alia, of interstate, interexchange services. We also tentatively conclude that allowing non-dominant interexchange carriers to bundle CPE with interstate, interexchange services would promote competition by allowing such carriers to create attractive service/equipment packages for customers. Accordingly, we tentatively conclude that we should amend Section 64.702(e) of the Commission's rules to allow non-dominant interexchange carriers to bundle CPE with interstate, interexchange services. We seek comment on these tentative conclusions.

89. Parties that believe we should amend Section 64.702(e) should also comment on whether we should require interexchange carriers offering bundled packages of CPE and interstate, interexchange services to continue to offer separately, unbundled interstate, interexchange services on a nondiscriminatory basis. We note that the U.S. Government has committed in the Uruguay Round Agreements of the General Agreement on Tariffs and Trade, to ensure, among other things, that "service suppliers" are permitted "to purchase or lease and attach terminal or other equipment which interfaces with the [public telecommunications transport] network and which is necessary to supply a supplier's service. . . ."¹⁹²

¹⁸⁸ AT&T Reclassification Order, at ¶ 35.

¹⁸⁹ First Interexchange Competition Order, 6 FCC Rcd at 5887.

¹⁹⁰ Jefferson Parish Hospital, 466 U.S. at 12.

¹⁹¹ Michael D. Whinston, Tying, Foreclosure, and Exclusion, 80 Am. Econ. Rev. 837, 837 (1990).

¹⁹² See Uruguay Round Agreements Act of 1994, Pub. L. No. 103-465, Section 801, 108 Stat. 4809 (1994) (to be codified at 47 U.S.C. § 309(j)(13)). "Service supplier" is defined to mean a supplier of any service in any sector except services supplied in the

We seek comment on whether this commitment implies that interexchange carriers should be required to offer separately, unbundled interstate, interexchange services on a nondiscriminatory basis if they are permitted to bundle CPE with the provision of interstate, interexchange services.

90. Parties that believe that we should not amend Section 64.702(e) as proposed should set forth specific reasons in support of their position. We also seek comment on the effect that the proposed amendment of Section 64.702(e) would have on our other policies or rules.¹⁹³ Finally, we seek comment on whether and how the anticipated entry of local exchange carriers, in particular the BOCs, into the market for interstate, interexchange services should affect our analysis.

91. We note that we intend to initiate a comprehensive proceeding to address payphone issues, and to implement the sections of the 1996 Act relating to the provision of payphone service.¹⁹⁴ In that proceeding, we intend to consider the issue of bundling of pay telephone equipment with underlying transmission capacity. Accordingly, any amendment to Section 64.702(e) of our rules adopted in this proceeding will not apply to payphone bundling.

IX. OTHER ISSUES

92. For reasons set forth above, we have tentatively concluded that we are required to forbear from requiring non-dominant interexchange carriers to file tariffs, and that such detariffing should be mandatory. In the AT&T Reclassification proceeding, commenters raised certain issues regarding contract tariffs. We deferred consideration of those issues to this proceeding because we found those issues were unrelated to the determination of whether AT&T possessed market power. We note that these issues will largely be mooted if, as proposed above, we adopt a mandatory detariffing policy. We examine those and other tariff-related issues here, however, because such issues will remain relevant if we determine not to forbear from requiring non-dominant interexchange carriers to file tariffs. In addition, if we determine to adopt a policy of permissive detariffing, it is possible that some carriers will choose to continue to file tariffs, including contract tariffs.

exercise of governmental authority.

¹⁹³ We believe that our tentative conclusions regarding CPE bundling are consistent with our nation's foreign trade policy that seeks to promote, in trade negotiations with other countries, the unbundling of telecommunications services and CPE in certain international markets where monopoly providers may exist in either the services or CPE market. As described above, our domestic CPE and interstate, domestic, interexchange markets are both subject to competition, thus we believe that the potential for anticompetitive bundling behavior is highly unlikely in the U.S. market.

¹⁹⁴ See 1996 Act at § 151 (adding § 276).

93. In the First Interexchange Competition Order, the Commission established its contract carriage regime under which interexchange carriers are permitted to offer services pursuant to individually negotiated contracts.¹⁹⁵ The Commission further found that, as long as all contracts were made generally available to similarly situated customers under substantially similar circumstances, the offering of individually-negotiated contracts for interexchange services under the contract carriage regime would comply with the nondiscrimination provisions of the Communications Act.¹⁹⁶ The Commission later found that the "contract carriage policy serves the public interest by enabling users to purchase services that match their needs in particular ways and by facilitating user and interexchange carrier planning by increasing the availability of long-term commitments and price protection."¹⁹⁷

94. The Title II statutory scheme permits carriers to make changes to their tariffs. Moreover, it is well established that, pursuant to the "filed rate doctrine," in a situation where a filed tariff rate differs from a rate set in a non-tariffed carrier-customer contract, the carrier is required to assess the tariff rate.¹⁹⁸ Consequently, if a carrier unilaterally changes a rate by filing a tariff revision, the newly filed rate becomes the applicable rate unless the revised rate is found to be unjust, unreasonable, or unlawful under the Communications Act.¹⁹⁹

¹⁹⁵ First Interexchange Competition Order, 6 FCC Rcd at 5897-5903. Because AT&T was classified at that time as a dominant carrier, AT&T's contract rates were limited to services subject to further streamlining. Id. at 5897.

¹⁹⁶ Id. at 5903.

¹⁹⁷ February 1995 Interexchange Reconsideration Order, 10 FCC Rcd at 4573.

¹⁹⁸ See Armour Packing Co. v. United States, 209 U.S. 56 (1908) (Armour Packing); American Broadcasting Cos., Inc. v. FCC, 643 F.2d 818 (D.C. Cir. 1980); see also Aero Trucking v. Regal Tube Co., 594 F.2d 619 (7th Cir. 1979), Farley Terminal Co., Inc. v. Atchison, T. & S.F. Ry., 522 F.2d 1095 (9th Cir. 1975).

¹⁹⁹ See 47 U.S.C. § 201(b); see also Maislin Industries, U.S., Inc. v. Primary Steel, Inc., 497 U.S. 116 (1990).

95. In the RCA Americom Decisions,²⁰⁰ the Commission recognized that a dominant carrier's proposal "to modify extensively a long term service tariff may present significant issues of reasonableness under Section 201(b) that are not ordinarily raised in other tariff filings."²⁰¹ Accordingly, the Commission held that a dominant carrier's unilateral tariff revisions that alter material terms and conditions of a long-term service tariff will be considered reasonable only if the carrier can make a showing of "substantial cause" for the revision.²⁰² The Commission has stated that the substantial cause test would apply to unilateral changes by dominant carriers to long-term contract tariffs.²⁰³ In the February 1995 Interexchange Reconsideration Order,²⁰⁴ the Commission indicated that the substantial cause test would also apply to unilateral tariff modifications made by non-dominant carriers.²⁰⁵

96. In the February 1995 Interexchange Reconsideration Order, we indicated that commercial contract law was highly relevant in assessing the reasonableness of a unilateral tariff revision, but we declined to declare that contract law principles constituted the sole and dispositive basis for a substantial cause showing.²⁰⁶ We seek comment on whether commercial contract law principles should be the sole criterion in applying the substantial cause test. If not, parties should suggest other factors that the Commission should consider in evaluating whether a carrier has shown substantial cause for unilaterally changing a contract tariff. We also seek comment on whether the substantial cause test should apply only to the carrier and the customer with whom it negotiated the original contract, or whether it also should apply to subsequent customers who take service under the contract

²⁰⁰ RCA American Communications Inc. Revisions to Tariff F.C.C. Nos. 1 and 2, CC Docket No. 80-766, Memorandum and Opinion, 84 FCC 2d 353 (1980); Memorandum and Opinion, 86 FCC 2d 1197 (1981); RCA American Communications Inc. Revisions to Tariff F.C.C. Nos. 1 and 2, Transmittal No. 273, Memorandum and Opinion, 2 FCC Rcd 236 (1987) (collectively RCA Americom Decisions).

²⁰¹ RCA American Communications Inc. Revisions to Tariff F.C.C. Nos. 1 and 2, Memorandum and Opinion, 84 FCC 2d at 358; Memorandum and Opinion, 86 FCC 2d at 1201.

²⁰² 86 FCC 2d at 1201-1202; see First Interexchange Competition Order, 6 FCC Rcd at 5898 n.155.

²⁰³ RCA Americom Decisions, 86 FCC 2d at 1201-1202.

²⁰⁴ February 1995 Interexchange Reconsideration Order, 10 FCC Rcd at 4573-74.

²⁰⁵ Id. at 4574 n.51.

²⁰⁶ Id. at 4574.

tariff.²⁰⁷ Commenters arguing that the substantial cause test should apply only to the initial customer, should explain how this position is consistent with the nondiscrimination requirements of Section 202 of the Communications Act. In addition, in cases in which the Commission determines that a carrier has established substantial cause for a unilateral change to a contract tariff, we seek comment on whether the modified contract tariff should be treated as a new contract tariff and should be made available to other similarly situated customers.

97. The Mobile-Sierra doctrine established a strict "public interest" standard that a carrier must meet before a regulatory agency can accept a superseding tariff that modifies the terms of a negotiated carrier-to-carrier contract.²⁰⁸ In Bell Telephone Company of Pennsylvania v. FCC,²⁰⁹ the U.S. Court of Appeals for the Third Circuit, applying the Mobile-Sierra doctrine, held that a common carrier could not abrogate a contract with another carrier simply by filing superseding tariffs.²¹⁰ We seek comment on the relationship between the substantial cause test and the Mobile-Sierra doctrine in cases where a carrier attempts through a tariff revision to abrogate an underlying carrier-to-carrier contract.

98. In the AT&T Reclassification proceeding, resellers raised various issues concerning contract tariffs. Several commenters argued that resellers and other large

²⁰⁷ We note that, in the February 1995 Interexchange Reconsideration Order, we stated that in applying the substantial cause test, we would consider whether the original tariff terms were the product of negotiation and mutual agreement. Id.

²⁰⁸ See United Gas Pipe Line Co. v. Mobile Gas Service Corp., 350 U.S. 332 (1956) (Mobile); FPC v. Sierra Pacific Power Co., 350 U.S. 348 (1956) (Sierra).

²⁰⁹ 503 F.2d 1250 (3rd Cir. 1974), cert. denied, 422 U.S. 1026 (1975), rehearing denied, 423 U.S. 886 (1975) (Bell Telephone).

²¹⁰ Id. at 1281. The court found that Sections 201(b) and 211(a) of the Communications Act clearly contemplate that carriers can enter into contracts for services with other carriers, and that such contracts would then be filed with the Commission. Id. at 1277-78. The court concluded, therefore, that the Mobile-Sierra analysis applies to such carrier-to-carrier contracts. Id. at 1279-80. Similarly, in MCI Telecommunications Corp. v. FCC, the court applied the Mobile-Sierra doctrine and reversed a Commission decision accepting a revised AT&T tariff on the ground that the revised tariff violated an underlying settlement agreement. The court stated: "A contract, such as the Agreement here, may refer to rates included in a tariff and yet continue to enjoy protection under Sierra-Mobile. . . . Contracts and tariffs are not always mutually exclusive, but may be used in concert to define the relationship of parties." MCI Telecommunications Corp. v. FCC, 665 F.2d 1300, 1302 (D.C. Cir. 1981), appealed after remand, RCA Global Communications, Inc. v. FCC, 717 F.2d 1429 (D.C. Cir. 1983).