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

In the Matter of	)	
	)	
Bell Operating Company	)	CC Docket No. 96-21
Provision of Out-of-Region	)	
Interstate, Interexchange Services	)	

REPORT AND ORDER

Adopted: June 28, 1996 Released: July 1, 1996

By the Commission:

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I. INTRODUCTION

1. In enacting the Telecommunications Act of 1996 (1996 Act),[1] Congress sought to establish "a pro-competitive, de-regulatory national policy framework" for the United States telecommunications industry.[2] The 1996 Act, among other things, provided that upon enactment the Bell Operating Companies (BOCs) could provide interLATA telecommunications services originating outside of their in-region states.[3] In response to the new legislation, the Commission released, on February 14, 1996, a Notice of Proposed Rulemaking[4] in which the Commission proposed an interim regime to govern the BOCs' provision of out-of-region domestic,[5] interstate, interexchange service. The Notice addressed all "out-of-region" interstate, interexchange services (including interLATA and intraLATA services). Eighteen parties filed comments and thirteen parties filed reply comments.[6]

2. Under our existing rules, BOC provision of out-of-region, interstate, interexchange services is subject to dominant carrier regulation. In order to facilitate the

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[1] Pub. L. No. 104-104, 110 Stat. 56 (1996) codified at 47 U.S.C. §§ 151 et seq.

[2] S. Conf. Rep. No. 104-230, 104th Cong., 2d Sess. 1 (1996).

[3] 47 U.S.C. § 271(b)(2). Prior to enactment of the 1996 Act, the BOCs were prohibited from providing interLATA services by the terms of the Modification of Final Judgment (MFJ). 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). For purposes of this proceeding, we define the terms "BOCs," "in-region state," "interLATA service," and "LATA" as those terms are defined in 47 U.S.C. §§ 153(4), 271(i)(1), 153(21) and 153(25), respectively, of the Communications Act of 1934, as amended. The 1996 Act generally defines the term "LATA" (or local access and transport area) as a "contiguous geographic area . . . established before the date of enactment of the Telecommunications Act of 1996 by a Bell operating company . . . or established or modified by a Bell operating company after such date of enactment and approved by the Commission." 47 U.S.C. § 153(25). 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. 47 U.S.C. § 271(j).

[4] Bell Operating Company Provision of Out-of-Region Interstate, Interexchange Services, CC Docket No. 96-21, FCC No. 96-59 (rel Feb. 14, 1996) (BOC Out-of-Region NPRM or Notice). A summary of the Notice appears at 61 Fed. Reg. 6607 (Feb. 21, 1996).

[5] As some commenters have correctly noted, this proceeding does not include international, interexchange services. The appropriate regulation of a BOC's provision of international services will be addressed separately.

[6] See Appendix A for a list of commenting parties.

efficient and rapid provision of out-of-region, domestic, interstate, interexchange services by the BOCs, as contemplated by the 1996 Act, while still protecting ratepayers and competition in the interexchange market, we remove dominant regulation for BOCs that provide out-of-region, interstate, interexchange services through an affiliate that complies with certain safeguards. These safeguards are the same as those that have applied for more than ten years to affiliates of independent local exchange companies (LECs)[7] that are regulated as non-dominant interexchange carriers under the rules established in the Competitive Carrier proceeding.[8] The safeguards require that the affiliate: (1) maintain separate books of account from the LEC;[9] (2) not jointly own transmission or switching facilities with the LEC; and (3) take any tariffed services from the affiliated LEC pursuant to the terms and conditions of the LEC's generally applicable tariff. We also conclude that a BOC affiliate providing out-of-region, domestic, interstate, interexchange services should be treated, for purposes of the BOCs' accounting, as a nonregulated affiliate under the Commission's joint cost and affiliate transactions rules,[10] just as independent LEC affiliates are now treated.

3. We emphasize that the regime we adopt today is expressly designed as an interim measure to facilitate the BOCs' prompt provision of out-of-region, domestic, interstate, interexchange services. In March 1996, the Commission sought comment in a Notice of Proposed Rulemaking on whether to modify or eliminate these affiliate requirements as a condition for non-dominant treatment of independent LEC provision of out-

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7 By "independent LECs" we refer to exchange telephone companies, including GTE, other than the BOCs.

8 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); First Report and Order 85 FCC 2d 1 (1980) (First Report and Order); Further Notice of Proposed Rulemaking, 84 FCC 2d 445 (1981) (Further NPRM); Second Further Notice of Proposed Rulemaking, FCC 82-187, 47 Fed. Reg. 17,308 (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, 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), vacated MCI Telecommunications Corp. v. FCC, 765 F 2d 1186 (D.C. Cir. 1985) (collectively referred to as the Competitive Carrier proceeding).

9 As explained infra at ¶ 23, we do not require that the interexchange affiliate maintain separate books of account that comply with our Part 32 rules. Instead, the separate books of account requirement refers to the fact that, as a separate corporation, the affiliate must maintain its own books of account as a matter of course.

10 See 47 C.F.R. §§ 32.27, 64.901-904; Separation of Costs of Regulated Telephone Service from Costs of Nonregulated Activities, First Report and Order, 2 FCC Rcd 1298 (1987), recon., 2 FCC Rcd 6283 (1987), further recon., 3 FCC Rcd 6701 (1988), aff'd sub nom. Southwestern Bell Corp. v. FCC, 896 F.2d 1378 (D.C. Cir. 990).

of-region, interstate, interexchange services.[11] We also sought comment on whether, if we modify or eliminate these requirements for independent LECs, we should also eliminate or modify our treatment of BOC out-of-region, interstate, interexchange services. We will establish final rules for BOC out-of-region, interstate, interexchange services in that proceeding.

II. BACKGROUND

A. The Competitive Carrier Proceeding

4. Between 1979 and 1985, the Commission conducted the Competitive Carrier proceeding, in which it examined how its regulations should be adapted to reflect and facilitate the increasing competition in telecommunications markets. In a series of orders, the Commission distinguished between carriers with market power (dominant carriers) and those without market power (non-dominant carriers).[12] The Commission gradually relaxed its regulation of non-dominant carriers because it concluded that non-dominant carriers lacked the incentive and ability to engage in conduct that might be anticompetitive or otherwise inconsistent with the public interest.[13]

5. Non-dominant carriers are not subject to price cap regulation, and their tariff filings are presumed to be lawful. In addition, tariff filings of non-dominant carriers take effect on one day's notice[14] and do not require cost support data.[15] Non-dominant carriers also are subject to streamlined Section 214 procedures for the construction, extension or

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[11] Policy and Rules Concerning the Interstate, Interexchange Marketplace and Implementation of Section 254(g) of the Communications Act of 1934, CC Docket No. 96-61, FCC 96-123 (rel. March 25, 1996) (Interexchange NPRM).

[12] See 47 C.F.R. § 61.3(o) ("Dominant carrier" is defined as "[a] carrier found by the Commission to have market power (i.e., power to control prices)").

[13] First Report and Order, 85 FCC 2d at 20-21.

[14] In the First Report and Order, the Commission required non-dominant carriers to file tariffs on 14 days' notice. 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).

[15] First Report and Order, 85 FCC 2d at 34.

operation of new transmission facilities, as well as for the proposed reduction or discontinuance of service.[16]

6. In contrast, our rules subject dominant interexchange carriers as specified by Commission order to price cap regulation,[17] and tariff notification periods of 14, 45 or 120 days' notice.[18] 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.[19] Moreover, under our rules, dominant carriers must obtain prior Commission approval to construct a new line, to extend a line, or to acquire, lease or operate any line,[20] as well as to discontinue, reduce or impair service.[21]

7. In its First Report and Order, the Commission classified AT&T and its then-affiliated local exchange companies as well as independent local exchange companies as dominant carriers and concluded that these dominant carriers should be subject to the "full panoply" of Title II regulation.[22] Recently, in light of increasing competition in the interstate, domestic, interexchange telecommunications market, and evidence that AT&T no longer possesses the ability to control prices unilaterally, the Commission reclassified AT&T as a non-dominant carrier in that market.[23]

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[16] 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 47 U.S.C. § 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.

[17] See 47 C.F.R. § 61.41.

[18] See id. at § 61.58(c).

[19] See id. at §§ 61.38, 61.41-61.44, 61.49.

[20] 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.

[21] See 47 C.F.R. § 63.62.

[22] First Report and Order, 85 FCC 2d at 22-24.

[23] Motion of AT&T Corp. to be Classified as a Non-Dominant Carrier, 11 FCC Rcd 3271 (1995) (AT&T Reclassification Order), petitions for reconsideration pending.

8. In its Fourth Report and Order, the Commission considered how it should regulate the provision of interstate, interexchange services by independent LECs.[24] Because the Modification of Final Judgment[25] prohibited BOCs from offering interLATA services, the Fourth Report and Order addressed only the interstate, interexchange offerings of independent LECs. The Commission determined that interexchange carriers affiliated with independent LECs would be regulated as non-dominant carriers.[26] In the Fifth Report and Order, the Commission explained its definition of the term "affiliate"[27] and identified three separation requirements that the affiliate must meet in order to qualify for non-dominant treatment. These requirements are that the affiliate: (1) maintain separate books of account; (2) not jointly own transmission or switching facilities with the LEC; and (3) if it uses the LEC's services, it should acquire them via the LEC's tariffs.[28] The Commission further concluded that, if the LEC provided interstate, interexchange services directly, rather than through an affiliate, those services would be subject to dominant carrier regulation.[29]

9. The Fifth Report and Order also addressed the regulation of the BOCs' provision of interLATA services:

> The BOCs currently are barred by the [Modification of Final Judgment] from providing interLATA services. . . . If this bar is lifted in the future, we would regulate the BOCs' interstate, interLATA services as dominant until we determined what degree of separation, if any, would be necessary for the BOCs or their affiliates to qualify for nondominant regulation.[30]

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[24] Fourth Report and Order, 95 FCC 2d at 557.

[25] United States v. Western Elec. Co., 552 F. Supp. 131 (D.D.C. 1982), aff'd. sub nom., Maryland v. United States, 460 U.S. 1001 (1983).

[26] Fourth Report and Order, 95 FCC 2d at 575-79.

[27] The Commission defined a carrier affiliated with an independent LEC as "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." 98 FCC 2d at 1198.

[28] Fifth Report and Order, 98 FCC 2d at 1198.

[29] Id. at 1198-99.

[30] Id. at 1198-99 n.23 (citing United States v. Western Electric Co., 552 F. Supp. 131 (D.D.C. 1982)).

B. The 1996 Act and the BOC Out-of-Region Notice of Proposed Rulemaking

10. Section 271(b)(2), added by the 1996 Act, provides:

> A Bell operating company, or any affiliate of that Bell operating company, may provide interLATA services originating outside its in-region States after the date of enactment of the Telecommunications Act of 1996, subject to subsection (j).[31]

Thus, the 1996 Act does not require a BOC to obtain Commission authorization prior to offering out-of-region, interstate, interLATA services. The 1996 Act, however, does not modify the Commission's determination in the Fifth Report and Order that BOC provision of interstate, interLATA services initially would be subject to dominant carrier regulation.

11. Immediately after the 1996 Act became law, we issued the BOC Out-of-Region NPRM, in which we proposed, under certain conditions, to remove dominant carrier regulation of the BOCs' provision of out-of-region, interstate, interexchange services. In our Notice, we tentatively concluded that, as an interim measure, if a BOC creates an affiliate to provide out-of-region, interstate, interexchange services (including interLATA and intraLATA services), and if the affiliate satisfies the minimal separation requirements set forth in the Fifth Report and Order[32] that apply to the interexchange affiliates of independent LECs, then the BOC affiliate's provision of those interexchange services would be regulated on a non-dominant basis. We also noted that LECs providing interexchange services through affiliates pursuant to the Fifth Report and Order treat those affiliates as nonregulated affiliates under the Commission's joint cost rules[33] and affiliate transactions rules[34] for exchange carrier accounting purposes. In our Notice, we sought comment on whether a BOC affiliate providing out-of-region, interstate, interexchange services also should be treated as a nonregulated affiliate for BOC accounting purposes. Finally, we tentatively concluded that, at least for now, if a BOC provides out-of-region, interstate, interexchange services directly, or through an affiliate that fails to comply with these minimal separation requirements, then dominant carrier regulation would be retained for those services.

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[31] As noted, Section 271(j) provides that "a Bell operating company application to provide 800 service, private line service, or their equivalents that . . . terminate in an in-region State of that Bell operating company, and . . . allow the called party to determine the interLATA carrier, shall be considered an in-region service subject to the requirements of subsection (b)(1)." 47 U.S.C. § 271(j).

[32] See Fifth Report and Order, 98 FCC 2d at 1198.

[33] See 47 C.F.R. §§ 64.901-904; Separation of Costs of Regulated Telephone Service from Costs of Nonregulated Activities, First Report and Order, 2 FCC Rcd 1298 (1987), recon., 2 FCC Rcd 6283 (1987), further recon., 3 FCC Rcd 6701 (1988), aff'd sub nom. Southwestern Bell Corp. v. FCC, 896 F.2d 1378 (D.C. Cir. 1990).

[34] See 47 C.F.R. § 32.27.

III. DISCUSSION

A. The Purpose of the Interim Rules

12. This proceeding is necessary to enable the BOCs to begin competing in an out-of-region area in the interexchange market on a non-dominant basis. Currently, BOC provision of interstate, interexchange service is subject to dominant carrier regulation until we determine the degree of separation, if any, necessary for non-dominant treatment.[35] Thus, BOC out-of-region services would be subject to dominant regulation, whether those services were offered directly by the BOC or through another entity, no matter how structurally separate from the BOC.[36]

13. In our Notice, we tentatively concluded that we could remove dominant carrier regulation of BOC out-of-region, interstate, interexchange services by applying to the BOCs the same rules that have worked well for independent LECs. These rules were specifically designed to impose minimal burdens on the smaller, independent LECs,[37] and thus are less stringent than the structural separation required under our Computer II regime,[38] and contain fewer restrictions than imposed by the 1996 Act for BOC provision of in-region, interLATA services.[39] At the same time, the Commission found in the Fifth Report and Order that these separation requirements provided some protection against anticompetitive abuses that could arise from the LECs' control over local bottleneck facilities.[40]

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[35] See Fifth Report and Order, 98 FCC 2d at 1198, n. 23. Cf. Fourth Report and Order, 95 FCC 2d at 557, n. 6 (BOC interstate, intraLATA services subject to dominant carrier regulation).

[36] We take no position in this proceeding on whether the structural separation requirements, other safeguards established by the 1996 Act, and our existing regulations that would apply to BOC provision of in-region services are sufficient to allow us to relax dominant carrier regulation for the separate subsidiaries through which the BOCs must provide in-region, interLATA services. See 47 U.S.C. § 272. We will address that issue in a separate proceeding.

[37] Fifth Report and Order, 98 FCC 2d at 1198 n. 23.

[38] Amendment of Section 64.702 of the Commission's Rules and Regulations (Computer II), 77 FCC 2d 384 (1980) (Final Order), recon., 84 FCC 2d 50 (1980) (Reconsideration Order), further recon., 88 FCC 2d 512 (1981) (Further Recon. Order), aff'd. sub nom., Computer and Communications Industry Ass'n v. FCC, 693 F.2d 198 (D.C. Cir. 1982), cert. denied, 461 U.S. 938 (1983). Computer II required AT&T to provide CPE and enhanced services through fully separate corporate entities with separate books, officers and employees, operating facilities, computer facilities, and physical location, as well as separate operating, marketing, installation and maintenance personnel. Joint marketing was also prohibited.

[39] Compare Fifth Report and Order, 98 FCC 2d at 1198 (identifying separation requirements for independent LEC interexchange affiliates) with 47 U.S.C. § 272(b)(1)-(5) (identifying structural and transactional requirements for BOC in-region, interexchange affiliates).

[40] Fifth Report and Order, 98 FCC 2d at 1195-98.

14. Because we believe that we should move expeditiously in order to advance the goals of the 1996 Act, we specifically stated in the Notice that the actions we take in this proceeding would be interim. By applying the well-established rules applicable to independent LECs as an interim measure, we are able to: remove dominant carrier regulation for BOC out-of-region, interstate, interexchange services, thereby facilitating prompt and competitive entry by the BOCs into those services; have the same level of assurance of protecting competition and ratepayers as we have with independent LECs and their interexchange affiliates; and avoid engaging in a protracted proceeding. We have already issued a Notice in which we initiate a more comprehensive review of the rules that are applicable to both independent LECs and the BOCs in the provision of out-of-region, interstate, interexchange services. In the Interexchange NPRM, we sought comment on whether it may be appropriate to modify or eliminate the minimal separation requirements applied to independent LEC affiliates providing interstate, interexchange services originating outside of their local exchange areas. We also sought comment on whether, if we do modify or eliminate such requirements for independent LECs, we should apply the same requirements to BOC provision of out-of-region, interstate, interexchange services.[41] We will finalize our rules governing both BOC and independent LEC provision of out-of-region, interstate, interexchange services in that proceeding.

B. Non-dominant Classification for BOC Affiliates

15. The record does not dissuade us from proceeding on an interim basis as proposed in the Notice. NYNEX and Pactel support, as an interim measure, adoption of the BOC Out-of-Region NPRM's tentative conclusions, including use of the Commission's joint cost and affiliate transactions rules. NYNEX contends that the proposed rules are "an excellent first regulatory step that the Commission can take promptly to enable BOC entry into the long distance service markets."[42] Pactel supports the rules as a method of ensuring regulatory parity among all exchange companies, BOCs and independent LECs, even though Pactel disputes that the BOCs have market power in the interexchange market.[43]

16. The remaining BOCs[44] object to removing dominant regulation only for affiliates meeting the Fifth Report and Order requirements and contend that out-of-region, interstate, interexchange services should be regulated as non-dominant even if provided on an

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[41] Interexchange NPRM, at ¶ 61.

[42] NYNEX Comments at 2.

[43] Pactel Comments at 4-5.

[44] Although the comments were filed by the seven Regional Bell companies, not by the individual Bell operating companies, we will refer to those comments as BOC comments.

unseparated basis.[45] These commenters raise essentially three arguments: (1) BOCs do not have market power in the interexchange market under the criteria, such as market share,[46] established in the Competitive Carrier proceeding and those applied in reclassifying AT&T as a non-dominant interexchange carrier; (2) BOCs have neither the ability nor the incentive to leverage their control over local facilities to impede competition in the interexchange market, especially given current regulations and the provisions of the 1996 Act that are designed to open the local market to competition; and (3) the proposed separation requirements for out-of-region interexchange services are inconsistent with the 1996 Act.

17. BellSouth additionally argues that, by proposing to regulate BOCs as dominant if they directly provide out-of-region, interexchange services based on their market power in the provision of local services, we are resurrecting the "all services" approach. BellSouth states that, in the Competitive Carrier orders, the Commission adopted an "all services" approach under which a finding that a carrier was dominant in the provision of one service subjected a carrier to dominant regulation of all services. BellSouth argues that, under this "all services" approach, the Commission ruled that bottleneck facilities were prima facie evidence of dominance in all markets.[47] BellSouth maintains that the Commission rejected this approach in the AT&T Reclassification Order.[48] We reject this analysis. The "all services" question addressed in the AT&T Reclassification Order was whether the Commission could find AT&T non-dominant only if "AT&T lacks the ability to control the price of every tariffed service in the relevant market."[49] A very different question is posed by the BOCs entry into out-of-region, interstate, interexchange services: whether a firm with market power in one relevant market (the local exchange and exchange access market) can leverage that power to gain market power or an unfair advantage in another, related market (the interexchange market).

18. As for the non-BOC commenters, MCI and TRA argue that, given the potential for the BOCs to engage in anticompetitive conduct, the BOC affiliate should be regulated as dominant.[50] Almost all of the other non-BOC commenters support non-dominant

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45 Ameritech Comments at 8; Bell Atlantic Comments at 2; BellSouth Comments at 5; SBC Comments at 2; U S West Comments at 3-5.

46 Some BOCs contend that, as new entrants starting with zero market share competing against well-established carriers such as AT&T and MCI, BOCs must be found to lack market power in the interexchange market. Therefore, the Commission cannot, even on an interim basis, subject to dominant regulation BOCs that wish to provide out-of-region interexchange services directly.

47 BellSouth Comments at 5-9.

48 Id.

49 AT&T Reclassification Order, 11 FCC Rcd at 3290 (emphasis added).

50 MCI Comments at 10-12; TRA Comments at 2. MCI further argues that the BOCs should be permitted to provide out-of-region interexchange services only through an affiliate.

regulation of BOC out-of-region services if provided through a separate affiliate, but contend that the safeguards proposed in the Notice are insufficient to protect against abuses by the BOCs.[51] Specifically, these parties claim that without these additional safeguards the BOCs could use their control over local exchange facilities to unfairly discriminate in pricing or service quality against competing interexchange carriers or could cross-subsidize their long distance operations by shifting costs to the local exchange and exchange access operations. They urge the Commission, therefore, to impose full structural separation on the out-of-region affiliate, including the separations imposed by section 272 on the in-region interexchange affiliate.[52] They also seek to bar joint marketing of local and out-of-region services or, at least, require that marketing personnel and operations be separated.[53] Some ask the Commission to require that the BOC provide all Title II services to its affiliate at the generally applicable tariffed rates and that all non-Title II services and access to information obtained by the BOC by virtue of its provision of local exchange service be provided on a non-discriminatory basis or that such information not be shared at all.[54] Finally, non-BOC commenters dispute claims that the Notice's proposals are inconsistent with the 1996 Act.

19. We adopt here the interim rules proposed in the Notice, at least until completion of our broader rulemaking proceeding, the Interexchange NPRM.[55] The Fifth Report and Order safeguards we adopt herein on an interim basis have worked relatively well since 1984 to protect against potential abuses by the independent LECs in their provision of interexchange services and we believe that they will provide adequate interim protection as the BOCs begin providing out-of-region interexchange services. As the Commission noted in the Fifth Report and Order, these safeguards provide some protection against "cost-shifting and anticompetitive conduct."[56] These safeguards have been applied to independent LEC provision of interexchange services originating in and out of their regions and should provide sufficient interim safeguards for BOC provision of solely out-of-region services. Additionally, these safeguards will be supplemented with the application of our cost

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[51] See, e.g., CWI Comments at 2-3; Comptel Comments at 2; Excel Comments at 1-2; PUCO Comments at 3-4; Sprint Comments at 3; LDDS WorldCom Reply at 2-3. UTC and Vanguard support the rules as proposed without additional safeguards, although Vanguard argues that the Commission would be justified in adopting additional safeguards if it so desired. UTC Comments at 1; Vanguard Comments at 1.

[52] See, e.g., Comptel Comments at 9; Excel Comments at 6; Sprint Comments at 3; MCI Reply at 14.

[53] See, e.g., AT&T Comments at 7-8; ALTS Comments at 4; Excel Comments at 6-7; Comptel Comments at 6-10; LDDS Worldcom Reply at 9; CWI Comments at 3-4.

[54] See, e.g., AT&T Comments at 7; Comptel Comments at 6,10; CWI Comments at 4; PUCO Comments at 6; TRA Comments at 21. Comptel argues that the Title II services should include database queries, calling card validation information, and BNA information.

[55] Policy and Rules Concerning the Interstate, Interexchange Marketplace and Implementation of Section 254(g) of the Communications Act of 1934, CC Docket No. 96-61, FCC 96-123 (rel. March 25, 1996).

[56] Fifth Report and Order 98 FCC 2d at 1198.

allocation and affiliate transaction rules, as explained below, which provide further protection against cost misallocations. Moreover, no party has presented persuasive evidence to show that, at this time, these rules will not be effective interim measures.

20. At the same time, we believe that these minimal requirements should be in place pending further analysis of these issues. Not only has the Commission adopted an NPRM to address these specific issues, but we also have launched various proceedings, and are in the process of issuing further rulemakings, relating to the implementation of various aspects of the 1996 Act. These proceedings touch upon issues raised in this proceeding, such as the proper market definition and the scope of various safeguards.[57] We believe it is prudent to assess the record in those proceedings in order to assist us in adopting a comprehensive and cohesive framework that addresses the myriad issues involving BOC provision of services that the BOCs previously have been barred from offering.

21. Thus we reject AT&T's argument that the proposed rules should not be adopted because, AT&T contends, they improperly depart from the use of a single, nationwide, interexchange market without submarkets without providing a reasoned explanation.[58] The Notice proposed to apply, on an interim basis, the same rules to BOC out-of-region services that we apply to independent LECs. We do not find that AT&T has presented persuasive reasons to depart from this prior precedent for purposes of these interim rules. Moreover, in the Notice, we explicitly proposed to address only BOC provision of out-of-region, interstate, interexchange services. At the same time, we made clear that we were planning to adopt these rules on an interim basis, pending a future proceeding to consider more fully the long-term issues raised by BOC entry into out-of-region, interstate, interexchange services. We note that on March 25, 1996, we released the Interexchange NPRM initiating that proceeding. In proposing to look only at BOC provision of out-of-region, interstate, interexchange service here, we sought to balance the goal of the 1996 Act to allow swift BOC entry into the interexchange market, subject to interim safeguards, with the need for a comprehensive review of our rules. We believe it is within our discretion to conduct our proceedings in such a manner as to accommodate these twin purposes.

22. We find that our interim plan of removing dominant carrier regulation for BOC affiliates meeting the Fifth Report and Order separation requirements and retaining dominant regulation for BOCs that provide out-of-region services directly will not impose an unreasonable burden on the BOCs. Initially, we believe it is important to clarify the scope of the Fifth Report and Order separation requirements. Most commenters refer to the Fifth Report and Order requirements as structural separation. This is true only in the sense that

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[57] See, e.g., Interexchange NPRM, at ¶¶ 40-48 (proposing revised market definitions); In the Matter of Implementation of the Telecommunications Act of 1996: Telecommunications Carriers' Use of Customer Proprietary Network Information and other Customer Information, CC Docket No. 96-115, FCC No. 96-221 (rel. May 17, 1996).

[58] AT&T Comments at 4-5.

the BOC or LEC non-dominant interexchange affiliate is a separate legal entity. In no other sense do we require "structural separation." Indeed, in the Fifth Report and Order, the Commission specifically rejected arguments that structural separation requirements should be imposed between an independent LEC and its interexchange affiliate because the Commission found that structural separation would impose unreasonable burdens on smaller, independent LECs.[59] The Commission specifically sought to avoid imposing excessive burdens and noted that the LEC affiliate qualifying for non-dominant treatment "is not necessarily structurally separated from the exchange telephone company in the sense ordered in the Second Computer Inquiry . . . (e.g., fully-separated personnel and marketing are not necessary for nondominant treatment)."[60] Thus, except for the ban on joint ownership of transmission and switching facilities, a restriction which we believe should pose little, if any, burden on the provision of out-of-region, interstate, interexchange services, the BOC and the interexchange affiliate will be able to share personnel and other resources or assets. The affiliate may be staffed by BOC personnel, housed in existing BOC offices, and use BOC marketing or other services. Providing interexchange services through such an affiliate will not impede the BOCs' ability to realize efficiencies gained through the use of joint resources. To help ensure that the BOCs properly allocate the costs of any services provided to the interexchange affiliate, however, we require that the BOC treat this affiliate for accounting purposes as a nonregulated affiliate and therefore subject to our cost allocation and affiliate transactions rules.[61]

23. Additionally, we clarify the separate books of account requirement and the requirement that to the extent the affiliate obtains BOC services it do so under the terms of the BOC's tariff. We do not require that the interexchange affiliate maintain separate books of account that comply with our Part 32 rules. Instead, the separate books of account requirement refers to the fact that, as a separate legal entity, the affiliate must maintain its own books of account as a matter of course.[62] This is consistent with the current accounting treatment of the interexchange affiliates of independent LECs. As to the tariff requirement, we clarify that this provision applies only to services for which the BOC is required to file a

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[59] 98 FCC 2d at 1195, 1198 n. 23.

[60] 98 FCC 2d at 1198.

[61] 47 C.F.R. §§ 32.27, 64.901-904. See also discussion below at ¶¶ 35-40.

[62] Books of account refer to the financial accounting system a company uses to record, in monetary terms, the basic transactions of a company. These books of account reflect the company's assets, liabilities, and equity, and the revenues and expenses from operations. Each company has its own separate books of account. The Commission's Part 32 rules, the Uniform System of Accounts (USOA), prescribe the books of account for the telephone companies. The Part 32 USOA, however, is not required to be kept by affiliates of a telephone company. These affiliates maintain their own separate books of account. We note that, if a telephone company decides to conduct out-of-region, interstate, interexchange service within the telephone company without using a separate affiliate, this activity would be reflected in the telephone company's USOA accounts, because the USOA reflects the telephone company's total operations.

tariff, not to detariffed services such as billing and collection. The provision also only applies when the affiliate obtains tariffed services from its affiliated BOC.

24. Parties have offered no credible evidence to support contentions that the Fifth Report and Order separation requirements constitute burdensome regulation. Indeed, the entry of interexchange carriers affiliated with independent LECs over the past decade serves as evidence that these conditions will not prevent the BOCs from competing effectively. Moreover, we note that several BOCs have already established, or plan to establish, subsidiaries through which they will provide interexchange services that meet or exceed these separation requirements.[63] We believe that separation requirements designed to accommodate the resources of small independent LECs will not impose an unreasonable burden on the much larger regional Bell companies, particularly on an interim basis.

25. Finally, we conclude, as an interim measure, that if a BOC chooses to offer out-of-region interstate interexchange services directly, it will be subject to dominant carrier regulation and to price cap regulation. Specifically, we require that the BOCs include such services in the price cap Basket for interexchange services.[64]

C. Consistency With the 1996 Act

26. Several BOC commenters argue that the separate affiliate requirement, even as an interim measure, is inconsistent with the provisions of the 1996 Act.[65] They contend that the 1996 Act specifically excluded out-of-region services from the separate affiliate requirement contained in new section 272.[66] Some further argue that, because dominant regulation is so onerous,[67] conditioning non-dominant treatment on complying with the separation requirements effectively requires BOCs to establish a separate affiliate to provide out-of-region interstate, interexchange services in contravention of the 1996 Act.[68] They also

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[63] NYNEX Comments at 4-5; Pactel Comments at 6. We note that prior to passage of the 1996 Act, SBC, which opposes the separation requirements, stated that it was prepared to offer out-of-region, interstate, interexchange services under substantially more stringent separation requirements, including structural separation requirements, provided that its subsidiary would be regulated as a non-dominant carrier. Southwestern Bell Communications Services, Inc. Petition to be Classified as a Non-Dominant Carrier, at 5-7 (filed Nov. 22, 1995).

[64] See 47 C.F.R. § 61.42(d)(4).

[65] Ameritech Comments at 7-8; Bell Atlantic Comments at 4-5; BellSouth Comments at 2-4; SBC Comments at 4-6; U S West Comments at 4.

[66] Ameritech Comments at 7; Bell Atlantic Comments at 4; BellSouth Comments at 2; SBC Comments at 5.

[67] See, e.g., SBC Comments at 2 4.

[68] See, e.g., Ameritech Comments at 7. See also, BellSouth Comments at 2; SBC Comments at 2-6.

argue, more generally, that the proposed rules are inconsistent with the overall deregulatory emphasis of the new legislation.[69]

27. Bell Atlantic contends that the proposed separation requirements are inconsistent with the 1996 Act for two reasons: (1) section 272(f) contains a sunset provision for the in-region affiliate whereas the proposed separation requirements are open-ended; and (2) a BOC interexchange affiliate providing out-of-region services would be barred from jointly owning transmission and switching facilities with its operating company affiliate, whereas Section 272 contains no such restriction for the in-region separate affiliate. Bell Atlantic concludes that it would have to establish two subsidiaries, one for in-region and one for out-of-region services.[70]

28. Non-BOC commenters dispute these arguments. Some argue that, because the 1996 Act is silent as to the type of regulatory regime that the Commission should impose on the BOCs' provision of out-of-region interexchange services, the statute contemplates that the Commission may apply its existing dominant/nondominant regulatory regime.[71] These parties further point out that the separate subsidiary provisions of the 1996 Act contain a savings clause which states that "[n]othing in this subsection shall be construed to limit the authority of the Commission under any other section of this Act to prescribe safeguards consistent with the public interest, convenience and necessity."[72] Vanguard contends that the BOCs are essentially arguing that the 1996 Act repealed the Commission's existing statutory authority to apply its dominant carrier rules to BOC interexchange affiliates by implication. Vanguard asserts that a statutory construction that would repeal an agency's authority by implication is "highly disfavored" by the courts except where there is an irreconcilable conflict between the two statutes or where there is compelling evidence that Congress intended to repeal the prior statute.[73] Sprint and others contend that the proposed safeguards are less burdensome than the statutory separate subsidiary requirement and note that, while the 1996 Act mandates a separate subsidiary to provide in-region services, the Commission's proposal permits the BOCs to offer out-of-region services through an affiliate or directly.

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[69] See, e.g, BellSouth Comments at 3

[70] Bell Atlantic Comments at 4-5.

[71] MCI Reply at 2-3. See also TRA Reply at 11. In support of this contention, MCI cites Section 601(c)(1) which provides that "[t]his Act and the amendments made by the Act shall not be construed to modify, impair or supersede Federal . . . law unless expressly so provided in such Act or amendments."

[72] MCI Reply at 3 (quoting Section 272(f)(3)). See also Vanguard Reply at 2-3 (arguing that nothing in the Act or the Conference Agreement suggests that Congress intended to repeal the Commission's existing authority to impose safeguards for BOC provision of interexchange services, citing Section 272(f)).

[73] Vanguard Reply at 3.

29. We reject the contention that section 272(a)(2) prohibits us from retaining the dominant/non-dominant regulatory framework which the Commission has applied to interexchange carriers prior to passage of the 1996 Act for BOC provision of out-of-region, interstate, interexchange services. More specifically, we do not agree that, by excluding out-of-region services from those services that a BOC must provide through a structurally separate affiliate, section 272(a)(2) bars the Commission from according non-dominant regulation of BOC out-of-region, interstate, interexchange services only to BOC affiliates that comply with the separation requirements we adopt in this Order. Section 272(a)(2), relied upon by the BOC commenters, provides in pertinent part that:

> The services for which a separate affiliate is required by paragraph (1) are:
>
> > (B) Origination of interLATA telecommunications services, other than -
> >
> > > (ii) out-of-region services described in section 271(b)(2).

As noted by MCI,[74] the legislation is silent on the issue of dominant/non-dominant regulation of BOC interLATA services. We conclude that Congress did not intend by implication to repeal our authority to impose dominant or non-dominant regulatory treatment as we deem necessary to protect the public interest consistent with our statutory mandates. To the contrary, Section 601(c) of the 1996 Act provides that we are not to presume that Congress intended to supersede our existing regulations unless expressly so provided.[75]

30. Nor is there any inconsistency between the separation requirements we adopt by this Order as an interim measure and the 1996 Act. We do not mandate that the BOCs provide out-of-region, interstate, interexchange services through a separate affiliate. Instead, this Order concludes that, on an interim basis, BOCs will continue to be subject to dominant carrier treatment if they offer out-of-region interstate, interexchange services directly. The same requirement has applied to all independent LECs since 1984. This order, in effect, offers the BOCs a choice of providing out-of-region, interstate, interexchange services under dominant regulation if they wish to furnish those services directly or under non-dominant

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[74] MCI Reply at 2-3. See also TRA Reply at 11. In support of this contention, MCI cites Section 601(c)(1) which provides that "[t]his Act and the amendments made by the Act shall not be construed to modify, impair or supersede Federal . . . law unless expressly so provided in such Act or amendments."

[75] Section 601(c) provides as follows:

> (c) Federal, State and Local Law.-
>
> (1) No Implied Effect.- This Act and the amendments made by this Act shall not be construed to modify, impair, or supersede Federal, State, or local law unless expressly so provided in such Act or amendments.

regulation if they wish to offer those services through a separate affiliate that meets the separation requirements.[76]

31. We also note that the 1996 Act's provisions for the structurally separate in-region subsidiary contain more restrictions than those that will apply to the BOC affiliates' provision of out-of-region, interstate, interexchange services as a non-dominant carrier. For example, the 1996 Act requires that the separate subsidiary that must be established to provide in-region interLATA services must have separate officers, directors, and employees, and may not obtain credit under any arrangement that would permit recourse to the BOC.[77] None of these requirements applies to the BOCs' out-of-region affiliate.

32. Bell Atlantic contends, however, that our proposed separation conditions are, in fact, more rigorous than those established by the 1996 Act for in-region services because we have not suggested a sunset date and have barred joint ownership of transmission and switching facilities. We are seeking comment in the Interexchange NPRM on whether to modify or eliminate the separation requirements for independent LECs in their provision of out-of-region, interstate, interexchange service as a condition for non-dominant treatment.[78] We are also seeking comments on whether, if we modify or eliminate these separation requirements for independent LECs, we should apply the same treatment to BOC provision of out-of-region, interstate, interexchange service. Bell Atlantic's argument is more appropriately addressed in that proceeding. During the interim period that will be covered by the rules we promulgate today, a prohibition on joint ownership of switching and transmission facilities should cause no hardship on the BOC provision of out-of-region services because, as the BOCs maintain, they initially will be using other carriers' facilities and because of the geographic separation of in-region facilities and out-of-region services.[79] Additionally, the fact that the 1996 Act contains a sunset provision for certain restrictions is not a basis for concluding that our interim rules for BOC out-of-region, interstate, interexchange services are inconsistent with the 1996 Act.

D. Proposed Mergers

33. After the record in this proceeding closed, SBC Communications Inc., and Pacific Telesis Group announced, on April 1, 1996, an agreement to merge their operations. Three weeks later, on April 21, 1996, Bell Atlantic and NYNEX announced that they had reached an agreement to merge. We believe that mergers such as these raise concerns with respect to the provision of out-of-region services during the pendency of the merger.

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[76] LDDS WorldCom Reply at 6; Sprint Reply at 3-4; TRA Reply at 11; Vanguard Reply at 3-4.

[77] 47 U.S.C. § 272(b).

[78] Interexchange NPRM, at ¶ 61.

[79] See Ameritech Reply at 9; BellSouth Reply at 5-6; Pactel Comments at 5; Bell Atlantic Comments at 6.

Specifically, they raise the concern that, in the period prior to a merger's consummation, one partner to the merger may act in ways to favor those out-of-region services of its merger partner that originate in the first partner's service territory. For example, BOC A may favor BOC B's long distance services originating in BOC A's territory because BOC A may eventually share in BOC B's profits. We do not believe that the record in this proceeding provides an adequate basis on which to address the specific concerns raised by such pending mergers. Accordingly, we exclude from the services covered by this Order, those out-of-region services that originate in the in-region states of a merger partner during the period prior to the consummation of the merger. Given the interim nature of the rules we are establishing in this Order, and the fact that we are not aware of plans by any of the potential merger partners to provide out-of-region services originating in their respective partners' service territories, we believe that this approach likely will not impose any burdens on the affected parties. Should such parties determine, however, to provide such services, those parties should request the Commission, on an individual case basis, for a determination of whether such services can be provided on a non-dominant basis. Because our concern relates to the incentives of one party to favor the operations of the other party during the pendency of the merger, should an announced merger not be consummated, the interim rules established in this Order for out-of-region services shall apply to all out-of-region services provided by the parties to the proposed merger.

34. Nothing in this section on proposed mergers should be construed as indicating the Commission's position with respect to mergers in other sectors of the telecommunications industry or outside of this particular and unusual context. A unique confluence of circumstances lead us to conclude that it is both reasonable and prudent to postpone our determination of the appropriate regulatory treatment for BOC out-of-region services originating in a potential merger partner's territory. These unique circumstances include: (1) the announcement of mergers, following the closure of the record in this proceeding, involving four of the seven regional Bell companies that would be subject to the rules established in this proceeding; (2) the concern that a BOC, through its position in the local telephone exchange market and its bottleneck control over inputs into the interexchange market, may have the ability, along with the incentive, to favor the out-of-region interexchange services operations of a potential merger partner; (3) the interim nature of these rules; and (4) the 1996 Act's authorization for BOCs to begin providing out-of-region services upon enactment. Given these unique circumstances, we emphasize that this action is limited to the facts and circumstances set forth in this discussion of proposed mergers.

E. Joint Cost and Affiliate Transactions Rules

35. In the BOC Out-of-Region NPRM, we stated that independent LECs providing interexchange services through affiliates pursuant to the Fifth Report and Order treat those affiliates as nonregulated affiliates under the Commission's joint cost and affiliate transactions rules for exchange carrier accounting purposes. The BOC Out-of-Region NPRM

sought comment on whether BOC out-of-region, interstate, interexchange services should be treated as nonregulated services for BOC accounting purposes.[80]

36. AT&T, Pactel, NYNEX, Comptel and Vanguard support the treatment of BOC out-of-region affiliates as non-regulated for accounting purposes. AT&T and Comptel believe such rules are necessary to constrain the BOCs' ability to cross-subsidize and to ensure that local monopoly assets are not used unfairly to advantage long distance operations.[81] Vanguard asserts that the rules would not impose a burden because BOCs account for certain services on this basis already and because such treatment would merely entail setting up the initial account for service, not changing existing procedures.[82] NYNEX states that these rules have been effective as applied to independent LECs, and thus would not be unreasonable to apply to BOCs providing similar services.[83] AT&T and Comptel also contend that some type of independent audit should be performed periodically to certify that long distance affiliates retain their financial independence.[84] Pactel supports application of the affiliate transaction rules as an interim measure.[85]

37. Ameritech opposes application of the affiliate transactions rules to BOC interexchange affiliates.[86] It contends that the joint cost and affiliate transactions rules are designed to allocate costs between regulated and nonregulated activities, not between two regulated services and that, in any event, application of those rules would be unnecessary because the Part 69 rules already require BOCs to identify separately interexchange costs.[87] At a minimum, Ameritech argues that the rules should not apply to any BOC subject to pure price cap regulation at the state and federal level.[88] The Public Utilities Commission of Ohio (PUCO) also opposes treating the affiliate as nonregulated because they contend that accounting abuses are better detected by treating the affiliate's services as regulated.

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[80] NPRM at ¶ 13.

[81] AT&T Comments at 8-9; Comptel Comments at 11.

[82] Vanguard Comments at 7

[83] NYNEX Comments at 10

[84] AT&T Comments at 8-9; Comptel Comments at 11.

[85] Pactel Comments at 7-8.

[86] Ameritech Comments at 8.

[87] Ameritech Comments at 8.

[88] Ameritech Comments at 9

38. Our existing accounting safeguards for affiliate transactions were developed in the Joint Cost Order and are codified in Parts 32 and 64 of our Rules.[89] The Part 64 cost allocation rules prescribe how carriers separate the costs of regulated activities from the costs of nonregulated activities, where the nonregulated activities are performed directly by the carrier rather than through an affiliate.[90] The Part 32 affiliate transactions rules prescribe the way costs are recorded, for Title II accounting purposes, when a regulated carrier does business with its nonregulated affiliates.[91] These rules are designed to prevent local exchange carriers from imposing the costs and risks of their competitive ventures on local telephone ratepayers. These rules do not require carriers or their affiliates to charge any particular prices for assets transferred or services provided; rather, they require carriers to use certain specified valuation methods in determining the amounts to record in their Part 32 accounts, regardless of the prices charged.[92]

39. Because the cost allocation and affiliate transactions rules are an important component of our accounting safeguards, we find that these rules should apply to BOCs providing out-of-region, interstate, interexchange services through a separate affiliate. Even though interLATA services are regulated services under Title II, under the rules we adopt herein, the BOCs, for accounting purposes, will treat the services as nonregulated, so as to make applicable our cost allocation and affiliate transaction rules. The fact that interLATA services are regulated services in and of itself does not eliminate the potential for cost misallocation between the BOCs competitive (interLATA) and noncompetitive (local exchange and exchange access) services. Thus, we believe that application of our cost allocation and affiliate transaction rules is necessary to minimize the possibility that a BOC could improperly shift the costs of its interstate, interexchange operations to its regulated local exchange and exchange access ratepayers. We also note that this requirement is consistent with the current practice of independent LECs that treat their affiliates providing interexchange services as nonregulated for exchange carrier accounting purposes.

40. We find that requiring BOCs to treat affiliates providing out-of-region services as nonregulated will not be unduly burdensome. BOCs currently have systems in place to account for transactions between their nonregulated affiliates (i.e. for transactions between a BOC and any of its information services which are not regulated under Title II). Such a requirement will not entail extensive modification of existing company procedures for the

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[89] Separation of Costs of Regulated Telephone Service from Costs of Nonregulated Activities, Report and Order, CC Docket No. 86-111, 2 FCC Rcd 1298 (1987) (Joint Cost Order) recon., 2 FCC Rcd 6283 (1987) (Joint Cost Reconsideration Order), further recon., 3 FCC Rcd 6701 (1988), aff'd sub nom. Southwestern Bell Corp. v. FCC, 896 F.2d 1378 (D.C.Cir. 1990); 47 C.F.R. Parts 32 and 64.

[90] See 47 C.F.R. §64.901.

[91] See 47 C.F.R. §32.27.

[92] See Joint Cost Order, 2 FCC Rcd at 1313, ¶ 115.

provision of interexchange services because, prior to the passage of the 1996 Act, BOCs were prohibited from providing interstate, interexchange services.

IV. ADDITIONAL ISSUES

A. Regulation of CMRS-Related InterLATA Services

41. The BOC Out-of-Region NPRM stated that "BOC provision to commercial mobile radio service customers, of interstate, interLATA services originating outside any of the BOC's in-region states, is included in the out-of-region services addressed in this proceeding."[93]

42. BellSouth argues that the language in the Notice is susceptible to two interpretations. According to Bell South, it may apply to: (1) the sale of out-of-region, interexchange service by a BOC to unaffiliated commercial mobile radio service (CMRS) customers; or (2) the provision of out-of-region, interexchange CMRS service by a BOC. BellSouth believes that the Commission intended the first of these interpretations -- BOCs offering out-of-region long distance to unaffiliated CMRS customers on a stand alone basis, not in conjunction with the BOC's provision of CMRS -- and BellSouth opposes applying the Notice's proposed rules to this service for all of the same reasons it opposes any separation requirements for out-of-region services.[94] BellSouth contends that the other interpretation -- BOC's offering interexchange, CMRS -- constitutes "incidental" CMRS interLATA services and is beyond the scope of this proceeding. To the extent that a CMRS provider offers interexchange services in conjunction with its provision of CMRS, the interexchange service is itself incidental CMRS, and thus exempted from section 272 separate affiliate requirements, according to BellSouth.[95] Bell Atlantic and SBC also oppose any restrictions on BOC provision of incidental interLATA services, including CMRS, because most of these services were excluded from the separate subsidiary requirement of 272.[96]

43. MCI contends that the scope of Section 272 is irrelevant because the 1996 Act does not prevent the Commission from imposing its own separation requirements.[97] Vanguard supports the proposed separation requirements on the assumption that they will be applied to BOC provision of interLATA services to the customers of its affiliated cellular

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[93] BOC Out-of-Region NPRM, at n.2.

[94] BellSouth Comments at 18-19.

[95] BellSouth Reply at 12.

[96] Bell Atlantic Reply at 9; SBC Reply at 11-13.

[97] MCI Reply at 4-6.

companies.[98] Vanguard argues that the interest that a BOC has in its cellular operations increases the incentives to engage in anticompetitive conduct because such conduct can benefit both its long distance operations and its cellular operations.[99] Comptel urges the Commission to apply to all incidental interLATA services the same rules applied to out-of-region interexchange services because they raise the same concerns about discrimination and cross-subsidization.[100]

44. BellSouth's interpretation of our reference to CMRS in footnote two of the BOC Out-of-Region NPRM is correct. Our statement in the BOC Out-of-Region NPRM was intended to clarify that a BOC offering out-of-region long distance service to unaffiliated CMRS customers on a stand alone basis would be considered "out-of-region" services for purposes of this rulemaking. BOC provision of interexchange services to its affiliated CMRS customers is beyond the scope of this proceeding. We also reject as beyond the scope of this proceeding Comptel's request to apply the separation requirements to all "incidental" services established under section 272(g).

B. Definition of Certain Services as In-Region Services

45. Section 271(j) provides that certain calls that originate out-of-region will be deemed in-region traffic. Specifically, this section provides that "a [BOC] application to provide 800 service, private line service, or their equivalents that terminate in an in-region State of that [BOC], and allow the called party to determine the interLATA carrier, shall be considered an in-region service subject to the requirements of subsection (b)(1)."[101]

46. Comptel argues that the Commission should declare collect and third party billed calls to numbers terminating in the BOC's region and BOC calling card calls to in-region numbers as "equivalent" services and thus be deemed in-region services. Comptel's rationale is that, like 800 number and private line services, the party paying for the call selects the interLATA carrier and thus is subject to the BOCs' local power. Comptel states that the Commission should therefore prohibit the BOC out-of-region affiliate from completing collect calls, third-party billed calls, or BOC calling card calls to terminating numbers located within the BOC's region.[102] Ameritech opposes Comptel's interpretation, and asserts that calling card, collect and third party calls that are placed from out-of-region

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[98] Vanguard Comments at 4-5 (noting as an example that NYNEX can now offer long distance services to Bell Atlantic NYNEX mobile customers outside of NYNEX's region subject only to the safeguards of this proceeding).

[99] Vanguard Comments at 5.

[100] Comptel Comments at 14.

[101] 47 U.S.C. § 271(j).

[102] Comptel Comments at 13-14.

do not fall within 271(j) because the calling party, not the called party, determines the long distance carrier. Ameritech states that the calling party decides whether to complete the call on a 0+ basis or use access codes, and if access codes are used, the calling party decides which carrier to use.[103]

47. The key factor in determining whether a service falls within the scope of section 271(j) as "equivalent" to 800 or private line service is whether the called party determines the interLATA carrier that is used. As Ameritech notes, calling card, collect and third party billed calls that originate out-of-region and terminate in-region do not fall within the scope of section 271(j) because it is the calling party, not the called party, that determines the interLATA carrier. Because the called party does not determine the interLATA carrier that is used, there is no justification for treating such calls as in-region services. Thus, we reject Comptel's proposal that we add calling card, collect and third party calls to those services classified as "in-region" under section 271(j).

V. PROCEDURAL ISSUES

A. Regulatory Flexibility Act Analysis

48. We certify that the Regulatory Flexibility Act is not applicable to the interim rules we are adopting in this proceeding. These interim rules will not result in a significant economic impact on a substantial number of small business entities, as defined by Section 601(3) of the Regulatory Flexibility Act. Entities subject to the rule changes are generally large corporations, affiliates of large corporations, or are dominant in their fields of operation, and, thus, are not "small entities" as defined by the Act.[104] We are nevertheless committed to reducing the regulatory burdens on small communications services companies whenever possible, consistent with our other public interest responsibilities. The Secretary shall send a copy of this Report and Order to the Chief Counsel for Advocacy of the Small Business Administration in accordance with Section 605(b) of the Regulatory Flexibility Act, 5 U.S.C. §§601, et seq. (1981).

B. Paperwork Reduction Act

49. The record keeping requirements in this item are contingent upon approval of the Office of Management and Budget.

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[103] Ameritech Reply at 16-17; see also Bell Atlantic Reply at 8-9.

[104] 15 U.S.C. § 632(a)(1).

VI. ORDERING CLAUSE

50. Accordingly, IT IS ORDERED that, pursuant to Sections 1, 4, 201-205, 215, 218, 220, and 271 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 151, 154, 201-205, 215, 218 and 220, the REPORT AND ORDER is hereby ADOPTED. The requirements adopted in this Report and Order shall be effective 30 days after publication in the Federal Register.

FEDERAL COMMUNICATIONS COMMISSION

William F. Caton

William F. Caton
Acting Secretary

APPENDIX A

Comments

Ameritech
The Association for Local Telecommunications Services (ALTS)
AT&T Corp. (AT&T)
Bell Atlantic Communications, Inc. (Bell Atlantic)
BellSouth Corp. (BellSouth)
Cable & Wireless, Inc. (CWI)
The Competitive Telecommunications Association (Comptel)
Excel Communications, Inc. (Excel)
MCI Telecommunications Corp. (MCI)
NYNEX Corporation (NYNEX)
Pacific Telesis Group, Inc. (Pactel)
Public Utilities Commission of Ohio (PUCO)
SBC Communications Inc. (SBC)
Sprint Communications Company, L.P. (Sprint)
The Telecommunications Resellers Association (TRA)
U S West Inc. (U S West)
The Telecommunications Association (UTC)
Vanguard Cellular Systems, Inc. (Vanguard)

Reply Comments

Ameritech
AT&T Corp. (AT&T)
Bell Atlantic Communications, Inc. (Bell Atlantic)
BellSouth Corp. (BellSouth)
MCI Telecommunications Corp. (MCI)
NYNEX Corporation (NYNEX)
Pacific Telesis Group, Inc. (Pactel)
SBC Communications Inc. (SBC)
Sprint Communications Company, L.P. (Sprint)
The Telecommunications Resellers Association (TRA)
U S West Inc. (U S West)
Vanguard Cellular Systems, Inc. (Vanguard)
Worldcom, Inc d/b/a LDDS WorldCom (LDDS WorldCom)