

independent LECs, it does remove the restriction on BOC provision of interLATA services, and specifies a new regulatory regime to govern BOC provision of these services.²⁹⁴ In addition, in our recent Interexchange NPRM, we addressed whether we should modify or eliminate the separation requirements currently imposed upon independent LECs in order to qualify for non-dominant treatment in the provision of interstate, domestic, interexchange services that originate outside the areas in which they control local access facilities.²⁹⁵ In light of these regulatory changes, and in order to effect a comprehensive review of the appropriate regulatory framework to govern the provision of interstate, domestic, interexchange services by local exchange companies (or their affiliates), we believe it is important to evaluate whether we should continue to classify independent LECs as dominant in the provision of in-region, interstate, domestic, interexchange services, if they provide those services directly. We also believe it is appropriate to evaluate the continuing necessity of applying the Competitive Carrier requirements to the provision of those services by independent LECs.

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

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

²⁹⁴ 47 U.S.C. § 271.

²⁹⁵ Interexchange NPRM at ¶¶ 56-63. We have concluded, in the Interim BOC Out-of-Region Order, that, for now, we would remove dominant carrier regulation for BOC out-of-region, interstate, domestic, interexchange services when offered through an affiliate that meets the Competitive Carrier separation requirements. Interim BOC Out-of-Region Order.

raise the price of in-region, interstate, domestic, interexchange services significantly above competitive levels by restricting output. We also seek comment whether, absent the Competitive Carrier requirements, an independent LEC would be able to raise its rivals' costs.

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

159. We also invite comment on whether there are certain circumstances that warrant different regulatory treatment among the independent LECs. For example, does the size of an independent LEC make a difference in determining what type of separation requirements should apply? We believe that, in principle, the size of a LEC will not affect its incentives to engage in cross subsidization between its monopoly services and its competitive services. It may be the case, however, that for small or rural independent LECs, the benefits to rate-payers of a separate affiliate requirement may be less than the costs imposed by such a requirement.²⁹⁶ We therefore seek comment on whether there is some minimum independent LEC size below which the separation requirements, if any are retained, should not apply.

²⁹⁶ For example, certain of our accounting rules, such as cost allocation manual filings and annual independent audit requirements, apply only to larger LECs (those with annual operating revenues of \$100 million or more), in recognition that the costs of compliance with such requirements could be potentially burdensome on smaller independent LECs. Separation of Costs of Regulated Telephone Service From Costs of Nonregulated Activities, CC Docket No. 86-111, Report and Order, 2 FCC Rcd 1298, 1304, ¶ 47 (1987); 47 C.F.R. §§64.903(a), 64.904.

160. For the reasons expressed earlier,²⁹⁷ we tentatively conclude that we should apply the same regulatory approach that we adopt for an independent LEC's provision of interstate, domestic, interexchange services originating within its local service area to an independent LEC's provision of international services originating within its local service area. The rules we adopt in this proceeding will be designed to protect against leveraging of market power from one market (the local exchange and exchange access market) to gain market power in other markets (the domestic interexchange and international services markets). We seek comment on this proposed approach.

161. As indicated above,²⁹⁸ our proposal to adopt the same regulatory approach for an independent LEC's provision of in-region, international services does not modify our decision to regulate a U.S. international carrier as dominant on those U.S. international routes where an affiliated foreign carrier has the ability to discriminate against unaffiliated U.S. international carriers through control of bottleneck services or facilities in the foreign market. In addition, our proposal for the regulation of the independent LECs would not modify the regulatory treatment of the noncontiguous domestic carriers to the extent they are regulated as dominant due to a lack of competition in their IMTS markets.²⁹⁹

162. Finally, we seek comment on whether any or all of the separate affiliate requirements that we may ultimately decide to apply, or to continue to apply, to independent LECs should be subject to some type of sunset, such as the sunset provision applicable to BOCs under section 272(f)(1) of the Communications Act.³⁰⁰

IX. CONCLUSION

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

²⁹⁷ See supra ¶ 150.

²⁹⁸ See supra ¶ 151.

²⁹⁹ See generally, International Competitive Carrier Order, 102 FCC 2d 813.

³⁰⁰ 47 U.S.C. § 272(f)(1).

X. PROCEDURAL ISSUES

A. Ex Parte Presentations

164. This is a non-restricted notice-and-comment rulemaking proceeding. Ex parte presentations are permitted, in accordance with the Commission's rules, provided that they are disclosed as required.³⁰¹

B. Regulatory Flexibility Analysis

165. Section 603 of the Regulatory Flexibility Act, as amended,³⁰² requires an initial regulatory flexibility analysis in notice and comment rulemaking proceedings, unless we certify that "the rule will not, if promulgated, have a significant economic impact on a significant number of small entities."³⁰³ The Regulatory Flexibility Act generally defines the term "small entity" as having the same meaning as "small-business concern" under the Small Business Act,³⁰⁴ which defines "small-business concern" as "one which is independently owned and operated and which is not dominant in its field of operation"³⁰⁵ This proceeding pertains to the BOCs and other incumbent LECs which, because they are dominant in their field of operations, are by definition not small entities under the Regulatory Flexibility Act. We therefore certify, pursuant to Section 605(b) of the Regulatory Flexibility Act, that the rules will not, if promulgated, have a significant economic impact on a substantial number of small entities. The Secretary shall send a copy of this NPRM, including this certification and statement, to the Chief Counsel for Advocacy of the Small Business Administration.³⁰⁶ A copy of this certification will also be published in the Federal Register notice.

C. Initial Paperwork Reduction Act of 1995 Analysis

166. This NPRM contains either a proposed or modified information collection. As part of its continuing effort to reduce paperwork burdens, we invite the general public and the Office of Management and Budget (OMB) to take this opportunity to comment on the information collections contained in this NPRM, as required by the Paperwork Reduction Act of 1995, Pub. L. No. 104-13. Public and agency comments are due at the same time as

³⁰¹ See generally 47 C.F.R. §§ 1.1200, 1.1202, 1.1204, 1.1206.

³⁰² 5 U.S.C. § 603.

³⁰³ Id. § 605(b).

³⁰⁴ Id. § 601(6), adopting 15 U.S.C. § 632(a)(1).

³⁰⁵ 15 U.S.C. § 632(a)(1).

³⁰⁶ 5 U.S.C. § 605(b).

other comments on this NPRM; OMB comments are due 60 days from date of publication of this Notice in the Federal Register. Comments should address: (a) whether the proposed collection of information is necessary for the proper performance of the functions of the Commission, including whether the information shall have practical utility; (b) the accuracy of the Commission's burden estimates; (c) ways to enhance the quality, utility, and clarity of the information collected; and (d) ways to minimize the burden of the collection of information on the respondents, including the use of automated collection techniques or other forms of information technology.

D. Comment Filing Procedures

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

168. In order to facilitate review of comments and reply comments, both by parties and by Commission staff, we require that comments be no longer than eighty (80) pages and reply comments be no longer than forty (40) pages, including exhibits, appendices, affidavits, or other attachments. Empirical economic studies, technical drawings, and copies of relevant state orders will not be counted against these page limits. These page limits will not be waived and will be strictly enforced. Comments and reply comments must include a short and concise summary of the substantive arguments raised in the pleading. Comments and reply comments must also comply with Section 1.49 and all other applicable sections of the Commission's Rules.³⁰⁷ We also direct all interested parties to include the name of the filing party and the date of the filing on each page of their comments and reply comments. Comments and reply comments must clearly identify, in their Table of Contents, the specific paragraphs or sections of this NPRM to which a particular comment or set of comments is responsive. If a portion of a party's comments does not fall under a particular topic listed in

³⁰⁷ See 47 C.F.R. § 1.49. However, we require here that a summary be included with all comments and reply comments, regardless of length, although a summary that does not exceed three pages will not count toward the page limit for comments or reply comments. This summary may be paginated separately from the rest of the pleading (e.g., as "i, ii").

the Table of Contents of this NPRM, such comments must be included in a clearly labelled section at the beginning or end of the filing. All parties are encouraged to utilize a table of contents, regardless of the length of their submission. Parties may not file more than a total of ten (10) pages of ex parte submissions, excluding cover letters. This 10 page limit does not include: (1) written ex parte filings made solely to disclose an oral ex parte contact; (2) written material submitted at the time of an oral presentation to Commission staff that provides a brief outline of the presentation; or (3) written materials filed in response to direct requests from Commission staff. Ex parte filings in excess of this limit will not be considered as part of the record in this proceeding.

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

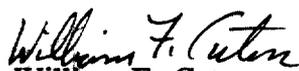
170. Written comments by the public on the proposed and/or modified information collections are due August 15, 1996, and reply comments must be submitted not later than August 30, 1996. Written comments must be submitted by the OMB on the proposed and/or modified information collections on or before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

XI. ORDERING CLAUSES

171. Accordingly, IT IS ORDERED that pursuant to Sections 1, 2, 4, 201-205, 215, 218, 220, 271, 272, and 303(r) of the Communications Act of 1934, as amended, 47 U.S.C. §§ 151, 152, 154, 201-205, 215, 218, 220, 271, 272, and 303(r), a NOTICE OF PROPOSED RULEMAKING is hereby ADOPTED.

172. IT IS FURTHER ORDERED that, the Secretary shall send a copy of this NOTICE OF PROPOSED RULEMAKING, including the regulatory flexibility certification, to the Chief Counsel for Advocacy of the Small Business Administration, in accordance with paragraph 603(a) of the Regulatory Flexibility Act, 5 U.S.C. §§ 601 et seq. (1981).

FEDERAL COMMUNICATIONS COMMISSION


William F. Caton
Acting Secretary