provides for leveraging of the LEC's local exchange market power into the more competitive cellular and, more generally, CMRS market. Because structural separation requirements have been in place for BOC cellular service since its inception, we cannot determine how differently the market would have developed absent these safeguards. We note that, during the period that structural separation has been in place, the market shares in each cellular service area have been divided on a roughly equal basis between wireline and nonwireline carriers.[87] While this indicates that, within the parameters of a duopoly market structure, some degree of competition has developed, it provides no evidence of the specific role of structural separation in promoting such competition. The question before us is whether continued requirements for separate officers, separate books of account, separate facilities and separate personnel in Section 22.903 for BOC cellular operations would have a beneficial effect for increased competition with the advent of PCS.

48. On the record before us at this time, we are not able to determine whether our current requirements or some lesser degree of separation is warranted for BOC cellular service during this period of transition to more competitive telecommunications markets. In the case of BOC cellular service without structural separation, the incumbent LEC could be integrated with its cellular affiliate, and therefore could realize efficiencies through integrated management and operations that have previously been denied. In a competitive environment, such efficiencies could promote higher-quality, lower-cost service to subscribers. On the other hand, a BOC which integrated a well-established incumbent wireless provider into its landline management and operations could possess incentives and opportunities to favor its own wireless operations while at the same time providing essential services and facilities to its cellular system's potential competitors. We are concerned about the potential for abuses in provisioning, installation, maintenance and customer network design that might not be addressed adequately by the uniform nonstructural safeguards that we propose for LEC provision of CMRS, at least during the transitional period before implementation of the 1996 Act's interconnection and network unbundling provisions.

49. We have acknowledged that broadband PCS is widely expected to provide "major new competition for cellular systems,"[88] as well as potential local loop competition.[89] Thus, because PCS is likely to be competitive with both landline local exchange and incumbent cellular service, an integrated double incumbency (BOC cellular and local exchange operations) would appear to increase the incentives and the opportunities of the BOC to act in an anticompetitive manner. Structural separation, if continued on an interim basis, could prevent, for example, the BOC from tasking a single set of officers and personnel with the

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[87] *See*, generally, *CMRS First Annual Report,* 10 FCC Rcd 8844; J. Berresford, Mergers in Mobile Telecommunications Services; A Primer on the Analysis of Their Competitive Effects, 48 Fed. Comm. L.J., 248, 256 (1996).

[88] *See CMRS First Annual Report*, 10 FCC Rcd at 8865 n. 128, 8867, *citing Broadband PCS Order*, 8 FCC Rcd at 7715.

[89] *See, e.g., Broadband PCS Notice*, 7 FCC Rcd at 5705-06; *CMRS Flexibility Notice* at paras. 10-18.

interconnection arrangements for its cellular unit's PCS competitor as well as dealings with that competitor's major customers to provide local exchange service, or cellular service, or both. The nonstructural safeguards we propose below in Section VI would not prevent such sharing of personnel and integrated management decisionmaking. We seek comment on whether such integrated operations would present realistic opportunities for anticompetitive conduct and, if so, whether safeguards less restrictive than our current structural separation rules would sufficiently constrain such conduct.

50. Costs and Benefits of Integrated Versus Structurally Separated Operations. Whatever the benefits of structural separation to BOC competitors, these requirements also place costs on the BOCs that are not borne by any other CMRS market participants. We next address the balance of costs and benefits arising from our current structural separation requirements.

51. The BOCs have sought relief from Section 22.903, both through individual waiver petitions and requests that the rule be eliminated, primarily so that they could benefit from the cost efficiencies of integrated operations, and so that their customers could benefit from "one-stop-shopping," *i.e.*, a single point of contact for all service, repair and billing needs. We recognized similar benefits in declining to adopt structural separation for LEC provision of PCS. We note, however, that that decision was in the context of a discussion of the goal of promoting a set of then-undeveloped new services where the cellular structural safeguards were to be retained and restrictions placed on cellular-PCS cross-ownership.[90] We also recognize that "one-stop-shopping" may, from the customer standpoint, constitute a valuable benefit. This point is substantially addressed by Section 601(d) of the 1996 Act, which confers upon BOCs, and other companies, the right to market jointly and sell certain landline services together with CMRS. Thus, Section 601(d) appears to have removed one of the principal "costs" to the BOCs of continued compliance with Section 22.903 of our rules. Section 601(d) increases the flexibility afforded the BOCs to meet customer demands without necessarily eliminating the remainder of the structural separation requirement. We seek comment on this analysis.

52. We also seek data on the relative benefit of integrated operations other than those relating to joint marketing. Although the BOCs have alleged that there are cost savings to be realized from integrated operations, they have not presented a quantification of either the magnitude of these overall benefits, or the costs to the BOCs to continue to maintain structurally separate corporate affiliates for cellular service. We believe that this data is essential to final evaluation of the benefits of integrated versus separated operations, and urge the parties to include such data in their comments. We therefore seek comment on specific public benefits from integrated cellular\landline operations that structural separation precludes. Parties submitting comments should provide specific instances of savings, economies of scale and/or scope, or other consumer benefits that they contend would be impossible without integrated operations. We are cognizant of the fact that many carriers may already have plans

[90] *Broadband PCS Order*, 8 FCC Rcd at 7748 & n.98.

underway for more integrated uses of landline and wireless capabilities. Therefore, we are particularly interested in receiving information and comment on the effect on our cost-benefit analysis of our recent initiatives seeking to introduce greater flexibility for CMRS licensees' use of their spectrum.[91]

E. Proposed Revisions to Section 22.903; Immediate Relief; and Implementation of Section 601(d), Section 702 and Section 251(c)(5) of the 1996 Act

53. Regardless whether we determine that the core structural separation requirements in Section 22.903 should be eliminated without delay or after some period of transition, we believe that certain aspects of the restrictions under which BOC separate cellular affiliates must operate have, over time, either become obsolete, or should be narrowed. If we retain some form of structural separation, it is our intention that the rule continue to serve the public interest by not unduly limiting the business operations of the BOCs. Therefore, we tentatively conclude that, at a minimum, certain aspects of Section 22.903 may be safely relaxed to permit the BOCs increased flexibility in meeting customer needs, while at the same time protecting BOC ratepayers and wireless competitors. We discuss in a subsequent section whether Section 22.903 should be replaced in its entirety by the uniform set of safeguards we propose to apply generally to LEC provision of CMRS.

1. Limitation of Section 22.903 to In-Region BOC Cellular Services

54. In the *SBMS Waiver Order*, we concluded that the out-of-region provision of integrated competitive landline local exchange and cellular service by a single, structurally separate BOC subsidiary, SBMS, was in the public interest because it would promote local loop competition, without raising the types of competitive concerns that would be raised by in-region integrated landline and wireless services.[92] The 1996 Act also distinguishes between the competitive risks posed by in-region versus out-of-region BOC entry into interLATA markets. Section 271(b)(2) generally permits a BOC, or any affiliate of that BOC, to provide interLATA services originating outside its "in-region" states immediately after the date of enactment of the 1996 Act. On the other hand, BOC provision of interLATA service originating, in-region is generally conditioned on compliance with the new interconnection obligations, the presence of a facilities-based competitor, or failure of one to request interconnection, and the satisfaction of a "competitive checklist."[93] Moreover, in-region

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[91] *See, e.g.*, Amendment of the Commission's Rules to Permit Flexible Service Offerings in the Commercial Mobile Radio Services, WT Docket No. 96-6, Notice of Proposed Rulemaking, FCC 96-17, 61 Fed. Reg. 6189 (Feb. 16, 1996) (*CMRS Flexibility NPRM*) (initiated a rulemaking proceeding intended to permit flexible service offerings in the commercial mobile radio services by permitting CMRS providers to offer fixed services, such as fixed wireless local loop, on a co-primary basis under their mobile licenses).

[92] *SBMS Waiver Order* at para. 20.

[93] *See* Section 271(b)(1) and (c), 47 U.S.C. § 271(b)(1) and (c).

originating interLATA services may only be provided by the BOC through a separate affiliate as specified in Section 272.[94]

55. We continue to believe, consistent, with the *SBMS Waiver Order*, that for out-of-region combined service offerings, the costs to the carrier of establishing a subsidiary in addition to their structurally separate cellular subsidiary to provide integrated competitive landline local exchange (CLLE) and cellular services outweigh any possible benefits to the public of such fragmented operations. We also believe that additional relief is warranted for BOC provision of out-of-region cellular service, and tentatively conclude that Section 22.903 should be limited in scope to in-region services of the BOC and its cellular operations, or, in the case of a joint venture between two or more BOCs, the in-region services of all of the joint venture participants together.[95] Thus, for out-of-region cellular services, BOCs would be free to provide service directly, if they so desired. We tentatively conclude that such relief would promote local exchange competition in those areas in which the affiliated LEC is not the incumbent local exchange provider. We seek comment on these tentative conclusions.

2. Interim Relief for Out-of-region Operations

56. Following issuance of the *SBMS Waiver Order*, waiver petitions were filed by U S West and Bell Atlantic seeking identical relief for out-of-region activities. No comments or oppositions were filed in response to these petitions. In this Notice, we take action that goes beyond the relief granted SBMS, and eliminates any out-of-region effect of Section 22.903, as part of our effort to narrowly tailor its restrictions to reach only the relationship between the incumbent BOC and its cellular subsidiary in the incumbent's in-region service area. As we explain above, this approach is consistent with the 1996 Act's treatment of in-region versus out-of-region BOC entry into new, or previously constrained, service.[96]

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[94] *See* 47 U.S.C. § 272.

[95] For example, in the case of Bell Atlantic NYNEX Mobile (BANM), Section 22.903 would continue to apply to the provision of cellular services in the in-region geographic exchange areas served by the two landline carriers, Bell Atlantic and NYNEX, but would cease to apply to cellular services provided by BANM in out-of-region local exchange service areas not served by either Bell Atlantic or NYNEX.

[96] Section 271(b) of the 1996 Act authorized the BOCs to begin to provide interLATA services originating outside of their in-region areas immediately. 47 U.S.C. § 271(b). In response, we recently adopted, as an interim measure, non-dominant carrier regulation for BOC provision of interstate, interexchange services originating outside of their in-region states if such services were provided through an affiliate that complied with our *Competitive Carrier* rules. *See* Bell Operating Company Provision of Out-of-Region, Interstate, Interexchange Services, *Report and Order*, CC Docket No. 96-21, FCC 96-21 (released July 1, 1996) (*BOC Out-of-Region Order*) at paras. 15-25. We believe that our treatment of BOC out-of-region cellular services here, which does not call for compliance with any separate affiliate requirement, can nevertheless be reconciled with the proposals made in the *BOC Out-of-Region Order* and is justified by the differing natures of the services and markets at issue. The BOCs have only now begun to enter the interLATA markets outside of their local exchange service areas. The relationship of these new operations to the BOCs' in-region local exchange activities is yet to be made clear. We note that interexchange carriers, including competitors with the BOCs' new out-of-region operations, are customers of the BOCs' in-region access services, which include both

57. Although this relief goes beyond the scope of the *SBMS Waiver Order*, we conclude, in light of the record accumulated to date in the various BOC waiver proceedings, and for the reasons stated in the *SBMS Waiver Order*, that the public interest would be served by granting the BOCs interim relief from the out-of-region reach of our existing Section 22.903 requirements. We conclude that immediate out-of-region relief from Section 22.903 will benefit consumers by promoting competition in those areas in which the BOC cellular operation is not affiliated with the incumbent LEC by permitting the BOCs to structure their out-of-region offerings to suit their business judgment. We further conclude that the BOCs may exercise this degree of flexibility in provisioning their out-of-region cellular services without undermining the core protections of the rule for either the BOCs' in-region local exchange ratepayers, or their cellular competitors. With respect to in-region services, the competitive threat arises primarily from the need of the non-affiliated cellular carrier to interconnect to the public switched network through its competitor's landline corporate affiliate. This crucial relationship does not obtain out-of-region. Pursuant to Sections 1.3 and 22.19 of our rules, the Commission may grant a waiver upon its own motion, for good cause shown.[97] We are hereby granting to all BOCs a waiver of the requirements of Section 22.903 with respect to the provision of cellular service outside of their in-region service areas. This action also has the effect of granting the individual waiver petitions filed by U S West and Bell Atlantic.[98]

3. Ownership of Landline Facilities

58. Section 22.903(a) prohibits, *inter alia*, BOC separate cellular affiliates from owning "any facilities for the provision of landline service." In its waiver petition, Ameritech expressly sought relief from this provision so that its in-region, but structurally separate

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originating and terminating access. A less regulatory approach is justified for out-of-region wireless activities; cellular calls seldom entail operations both outside and inside a BOC's exchange access service area, and unaffiliated, out-of-region cellular carriers normally have no need for access to BOCs' in-region local exchange facilities, with the limited exceptions of cellular long distance and roaming. (We have initiated a proceeding to address, *inter alia*, the regulation of roaming arrangements. *See* Interconnection and Resale Obligations Pertaining to Commercial Mobile Radio Services, CC Docket No. 94-54, FCC 96- XXX, *Report and Order and Third Notice of Proposed Rulemaking*, (released July __, 1996).) Commenters are free to address our analysis of these market and service relationships.

[97] *See* Sections 1.3 and 22.19, 47 C.F.R. §§ 1.3, 22.19. Section 1.3 provides, *inter alia*, that "[a]ny provision of the rules may be waived by the Commission on its own motion . . . if good cause therefor is shown." Section 22.19(a) provides that waivers may be granted by the Commission on its own motion, and that waivers will not be granted except upon an affirmative showing: "(i) That the underlying purpose of the rule will not be served, or would be frustrated, by its application in a particular case, and that grant of the waiver is otherwise in the public interest; or (ii) That the unique facts and circumstances of a particular case render application of the rule inequitable, unduly burdensome or otherwise contrary to the public interest . . . ."

[98] *See* paragraph [149] *infra*.

affiliate, ACI, could own landline facilities for the provision of competitive landline local exchange and long distance services and resell cellular service on an integrated basis.[99]

59. We propose to amend the portion of Section 22.903(a) prohibiting the cellular affiliate from owning any facilities for the provision of landline service to permit a BOC cellular affiliate to own landline facilities for the provision of landline services, including competitive landline local exchange (CLLE) and interexchange service, in the same market with the affiliated incumbent LEC. Thus, the rule would be modified only to prohibit the cellular affiliate from owning -- including jointly owning with the incumbent affiliated LEC --landline facilities that the latter uses in the provision of landline local exchange services. We believe that retention of this prohibition is appropriate for the same reasons that we propose to include a limited separate affiliate requirement in our proposed uniform LEC/CMRS safeguards *infra*, *i.e.*, to distinguish clearly between charges applied to all interconnectors and joint cost allocations resulting from integrated operations. We believe that such relief would benefit the public by enabling a new entrant to the local exchange market, such as ACI, to provide a package of services without the risk of LEC monopoly cross-subsidization or interconnection discrimination.[100] We seek comment on this proposal.

4. BOC CMRS Joint Marketing and Resale; Section 222 CPNI Requirements; and Section 251(c)(5) Network Information Disclosure Obligations

60. In this section, we explore changes to Section 22.903 to reflect the new landline/CMRS joint marketing and sale authority, and related changes with respect to CPNI and network information disclosure consistent with Sections 601(d), 702 and 251(c)(5) of the 1996 Act.[101]

(a) Joint Marketing and Promotion

61. Section 601(d). The 1996 Act expressly permits a BOC to market jointly and sell CMRS in conjunction with several types of landline service in Section 601(d).[102] Section 601(d) states: "Notwithstanding section 22.903 of the Commission's regulations (47 C.F.R. 22.903) or any other Commission regulation, a Bell operating company or any other company may, except as provided in sections 271(e)(1) and 272 of the Communications Act of 1934 as amended by this Act as they relate to wireline service, jointly market and sell commercial mobile services in conjunction with telephone exchange service, exchange access, intraLATA

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[99] Ameritech Waiver Petition at 8.

[100] Because we do not propose immediate modification of Section 22.903 with respect to the cellular subsidiaries' ownership of landline facilities, or, as discussed below, with respect to the manner in which joint marketing and sale of cellular and landline services may occur, ACI's waiver petition is not rendered moot and will be addressed in a separate order.

[101] *See* 47 U.S.C. 521(d), 222 and 251(c)(5).

[102] 47 U.S.C. § 521(d).

telecommunications service, interLATA telecommunications service, and information services."[103]

62. In its February 14, 1996 *ex parte* letter, AirTouch asserts that Section 601(d) allows LECs to market jointly CMRS and landline services, but contains no language prohibiting structural separation of CMRS provided by a LEC. AirTouch observes that when this section was proposed in the House, its sponsor specifically affirmed that the section does not lift the FCC's prohibition against the Bell operating telephone companies providing cellular and landline services on an integrated basis. Finally, AirTouch maintains, Section 601(d) is not self-executing, and that the Commission should determine the definition of joint marketing, and decide how it is to be implemented.

63. Discussion. The legislative history indicates that Section 601(d) was added to the 1996 Act specifically to provide all BOCs, and, by its text, "any other company,"[104] with the same relief from Section 22.903 that BellSouth sought in its September 25, 1995 Resale Authorization Request, discussed in Section IV, above. That is, it permits the landline LEC affiliate to market jointly and sell, or more specifically, to resell, the cellular service of its separate cellular subsidiary. We tentatively conclude that the provision does not necessarily

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[103] The Joint Explanatory Statement of the Committee of the Conference contains no reference to, nor explanation of, the purpose or scope of Section 601(d). The House of Representatives floor debate, however, contains the statement of Representative Burr on the purpose behind the introduction of the "Manager's Amendment" containing the addition of Section 601(d) to proposed H.R. 1555. *See* Cong. Rec. H8456 (daily ed. August 4, 1995) (statement of Rep. Burr). We reference the statement purely for purposes of illumination. The statement of Rep. Burr indicates that Section 601(d) was "designed to permit the Bell operating telephone companies to resell the cellular services of their cellular affiliates." In addition, Rep. Burr states:

> As with my original amendment, the primary goal of the new language is to provide the Bell operating telephone companies with sufficient relief from existing FCC rules to permit them to offer one-stop-shopping of local exchange services and cellular services. Currently, FCC rules not only prohibit those operating companies from physically providing cellular services -- that is, from owning the towers, transmitters, and switches that make up cellular services -- but also from marketing cellular services -- that is, selling cellular services. This amendment does not lift the FCC's prohibition against the Bell operating telephone companies providing the cellular services; it merely permits them to jointly market or resell their cellular affiliate's cellular services along with their local exchange services.

Two sections are cross-referenced in Section 601(d), Section 271(e)(1) sets forth limitations on joint marketing of local and long distance services by certain large national telecommunications carriers seeking to provide competitive local exchange service in a BOC's service area until that BOC is authorized pursuant to Section 271(d) to provide in-region interLATA services. Section 272 describes structural and transactional requirements for BOC provision of certain services, including inregion interLATA service, through separate corporate affiliates.

[104] The floor statement quoted above also indicates that an additional purpose of the amendment was to relieve AT&T of the restrictions on joint marketing and sale contained in the McCaw Consent Decree. *Id.*

require the elimination of the remainder of our current structural separation requirements. As support for this conclusion, we note that the authority to engage in joint marketing and sale of landline and CMRS services is expressly made subject to the provisions of Section 272, which include separate affiliate requirements. We tentatively conclude that the competitive concerns raised in response to the BellSouth Request are relevant to our regulatory response to this new statutory authority, and that we should take these into account in determining how this statutory provision affects the other provisions of Section 22.903 other than subsection (e). While the language and statutory history of Section 601(d) of the 1996 Act indicate that the provision is self-executing and thus Section 22.903(e) is now a nullity, we believe that we retain authority and responsibility to determine the scope of this statutory provision, the definition of joint marketing intended, and the rules to define the relationship between the affiliated entities engaged in such joint marketing. We seek comments on our interpretation of the effect of Section 601(d).

64. Consistent with our interpretation of the intent behind Section 601(d), we propose to define "joint marketing" as referenced in that provision as the advertising, promotion, and sale, at a single point of contact, of the CMRS, telephone exchange service, exchange access, intraLATA and interLATA telecommunications, and information services provided by the BOC. Such joint marketing also includes, but is not limited to, activities such as promotion, advertising and in-bound service marketing. We further tentatively conclude that, at a minimum, new Section 601(d) restores the ability of the BOCs to engage in the joint sale or promotion of cellular and landline service.[105] In addition, Section 601(d) expressly cross-references Section 271(e)(1)[106] and 272 of the 1996 Act.[107] Section 272(f)(3) preserves the authority of the Commission to implement safeguards consistent with the public interest, convenience and necessity. We tentatively conclude that the public interest in preventing, and permitting easy detection of, cross-subsidization requires that such joint marketing be done on behalf of the separate affiliate, subject to our affiliate transaction rules and classified as a non-regulated activity, on a compensatory, arms-length basis. This is not only consistent with the original requirements of Section 22.901, but is also consistent with new Section 272(b)(5)'s requirement that the new BOC separate affiliate required under the 1996 Act "shall conduct all transactions with the BOC of which it is an affiliate on an arm's length basis, with any such transaction reduced to writing and available for public inspection."[108] We seek comment on these tentative conclusions, and whether we should impose a requirement similar to that of Section 272(b)(5) of the 1996 Act, requiring that all transactions be reduced to writing and made available for public inspection.

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[105] This is the same ability that the BOCs had under the pre-Part 22 Rewrite version of Section 22.901(d)(1) of our rules, that is, the ability to engage in the joint sale or promotion of cellular services on behalf of the cellular affiliate "on a compensatory, arms-length basis." Section 901(d)(1); 47 C.F.R. § 22.901(d)(1) (1994).

[106] That provision governs the joint marketing of local and long distance services.

[107] *See* 47 U.S.C. §§ 271(e)(1), 272.

[108] 47 U.S.C. § 272(b)(5).

(b) Direct Sale of CMRS and Landline Services

65. The Wireless Telecommunications Bureau has previously determined that a reseller of cellular service is engaged in the "provision of cellular service" for purposes of Section 22.903.[109] In light of our tentative conclusions regarding the general meaning and scope of the authority conferred on the BOCs by Section 601(d), we find it necessary to address the question of what additional rules, if any, are required by the addition of this resale authority. We include here a summary of responses to the BellSouth Resale Request, to the extent that issues related to such authority were raised.

66. Positions of the Parties. BellSouth, in its Resale Request, argues that structurally unseparated resale presents no danger of cross-subsidy, and that existing accounting safeguards are sufficient to deter any possible cross-subsidization of cellular resale by its local exchange ratepayers. It further maintains that increasingly, Bell Companies have no meaningful source of "monopoly" funds from which to subsidize cellular service.[110] Several parties responding to the BellSouth Resale Request raised cross-subsidization concerns specifically presented by the integrated or "direct" provision of resold cellular and incumbent landline local exchange service, despite the existence of nonstructural accounting safeguards, price caps, and other related requirements.[111]

67. Discussion. Integrated sales and marketing of resold cellular and incumbent LEC landline local exchange service are clearly permitted under Section 601(d).[112] The difficult question before us is how to implement this provision in a manner consistent with the public interest and our goal to promote a vibrant, competitive commercial mobile services and local exchange marketplace. The positions of the parties with respect to the withdrawn BellSouth Request highlight the concerns of competitors, and should be taken into account as we move to implement this provision. We seek comment on whether we should impose conditions implementing the resale authority under Section 601(d) of the 1996 Act, and if so, what these conditions should be. For example, to prevent discriminatory resale practices, should we prohibit "one-of-a-kind" volume discounts for cellular service sold by the cellular affiliate to the affiliated telephone company for resale to the end user, as suggested in the record in response to the BellSouth Resale Request? Such unique discounts could offer per-unit airtime rates lower than those available to other resellers, as a practical matter, based on the affiliated telephone company's willingness to pay high guaranteed minimums to its affiliated joint marketing partner in exchange for volume commitments that might be unreasonable for a non-affiliated reseller. In addition, we seek comment on whether we should mandate public

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[109] BellSouth Corporation, BellSouth Telecommunications, Inc., BellSouth Cellular Corp., Petition for Declaratory Ruling, Order, DA 95-1401 (Wir.Tel. Bur. 1995) at para. 8.

[110] BellSouth Resale Request at 7-9.

[111] These comments are summarized in the cross-subsidization section of Appendix A.

[112] Telecommunications Act of 1996 § 601(d).

disclosure of rates, terms and conditions of service in cases where the LEC is reselling its cellular affiliate's service. In the alternative, we seek comment on whether the general proscription against unjust or unreasonable discrimination in Section 202(a) of the Communications Act and the formal complaint process are sufficient deterrents to discriminatory resale practices.

68. In addition, we seek comment as to how implementation of Section 601(d) should affect potentially related joint marketing and sale activities that are currently prohibited under Section 22.903, such as joint installation, maintenance, and repair of BOC cellular and landline local exchange services.[113] We also seek comment on the effect of the joint marketing authorization on activities such as billing and collection. We note that joint billing was initially proscribed in the *BOC Separation Order* on the grounds that the costs of providing billing services "cannot be properly allocated between unregulated and regulated operations" and because of concerns over access to CPNI.[114] Our subsequent adoption of joint cost and CPNI rules rendered these concerns moot. Moreover, in the *Billing and Collection Order*,[115] we found that a separate subsidiary requirement applicable to the detariffed provision by local exchange carriers of billing and collection services was not warranted.[116] We tentatively conclude that our reasoning in the *Billing and Collection Order* remains valid in the BOC cellular context and that the core structural separation requirements need not be expanded so as to proscribe joint billing. We find that the proper application of the requirement in Section 22.903 for separate books of account would appropriately place joint billing within the category of affiliate transactions, and that our Part 64 rules as they apply to such affiliate transactions adequately address any concern over improper cross-shifting through joint billing. We seek comment on these tentative conclusions. We address matters related to CPNI below in the context of the recent legislation affecting those matters.

(c) Privacy of Customer Information; CPNI Requirements

69. The new BOC authority to market jointly and sell CMRS together with landline services under Section 601(d) raises an issue with respect to the operation of our rules on use

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[113] *See Ex Parte* Letter from Richard M. Firestone, on behalf of SBC Communications, Inc. to Mr. William Caton, Acting Secretary, FCC, dated February 15, 1996, Re: *Ex Parte* Submission GEN. Docket No. 90-314, attaching *Ex Parte* Letter from Richard M. Firestone, on behalf of SBC Communications, Inc. to Barbara Esbin, Esq., Special Counsel for Competition, Commercial Wireless Div., Wireless Telecommunications Bureau, dated February 15, 1996, Re: *ex Parte* Submission in GEN Docket No. 90-314; Clarification of SBC's Request for Interim Relief at p. 2 (noting that the requirement that the cellular subsidiary maintain separate "marketing" personnel, which SBC interprets to mean actual sales personnel, as contained in Section 22.903(b)(3) may not be consistent with Section 601(d) of the 1996 Act).

[114] *BOC Separation Order*, 95 FCC 2d at 1141.

[115] *Detariffing of Billing and Collection Services*, 102 FCC 2d 1150 (1986), *aff'd on reconsideration*, 1 FCC Rcd 445 (1986).

[116] 102 FCC 2d at 1175.

of CPNI, and the treatment of such information under the 1996 Act. Section 22.903(f) currently prohibits the BOC from providing to its cellular affiliate any customer proprietary information unless such information is publicly available on the same terms and conditions.[117] Our treatment of the issue of customer proprietary information in other contexts, such as our decision on the AT&T/McCaw merger, was predicated on the use of safeguards developed in rulemakings for the provision by dominant landline common carriers of nonregulated enhanced services and CPE.[118] For the BOCs, the most recent iteration of the CPNI rules is contained in our decision in the *Computer III* proceeding on remand from the Ninth Circuit Court of Appeals.[119] These rules, as well as other permutations that apply in different instances to AT&T and the BOCs, permit these carriers to use the CPNI of some or all of their customers for their marketing of enhanced services and CPE, even if these customers have not authorized the use of such CPNI for such purposes, or, in some cases, have not even been apprised that they can direct the dissemination or protection of such information.[120]

70. Statutory Language. Section 702 of the 1996 Act creates a new Section 222 in Title II of the Communications Act of 1934. Section 222(c)(1), "Confidentiality of Customer Proprietary Network Information," provides:

> PRIVACY REQUIREMENTS FOR TELECOMMUNICATIONS CARRIERS.-- Except as required by law or with the approval of the customer, a telecommunications carrier that receives or obtains customer proprietary network information by virtue of its provision of a telecommunications service shall only use, disclose, or permit access to individually identifiable customer proprietary network information in its provision of (A) the telecommunications service from which such information is derived, or (B) services necessary to, or used in, the provision of such telecommunications service, including the publishing of directories.[121]

Section 222(c)(2) provides that, "[a] telecommunications carrier shall disclose customer proprietary network information, upon affirmative written request by the customer, to any

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[117] Section 22.903(f), 47 C.F.R. § 22.903(f).

[118] *See* Applications of Craig O. McCaw and American Telephone and Telegraph Co., 9 FCC Rcd 5836, 5885-86 (1994), *aff'd on reconsideration*, 10 FCC Rcd 11786, *aff'd sub nom. SBC Communications, Inc. v. FCC*, 56 F.3d 1484 (D.C. Cir. 1995) (requiring AT&T, upon the customer's request, (1) to make CPNI available to competing cellular providers, or (2) to prohibit personnel who are involved in cellular marketing from gaining access to that customer's CPNI).

[119] *BOC Safeguards Order*, 6 FCC Rcd at 7610-13 (1991), *aff'd in relevant part sub nom.* California v. FCC, 39 F.3d 919, 930-31 (9th Cir. 1994).

[120] *See, e.g.*, Amendment of Sections 64.702 of the Commission's Rules and Regulations (Third Computer Inquiry Phase II), 2 FCC Rcd 3072, 3096 (1987), *on reconsideration*, 3 FCC Rcd 1150, 1161-64 (1988).

[121] 47 U.S.C. § 222. The quoted language is found at Section 222(c)(1).

person designated by the customer." Section 222(c)(3) requires that a local exchange carrier may use, disclose, or permit access to aggregate CPNI for purposes other than those described above only if the LEC makes such information available to other parties on a nondiscriminatory basis upon request.[122]

71. Positions of the Parties. On March 20, 1996, AirTouch submitted a letter to the Wireless Telecommunications Bureau stating that the new Section 222 of the Act does not vitiate Section 22.903(f) of our Rules, and that "Section 222(c)(1) should not be read to allow unrestricted BOC access to customer CPNI in a manner that eliminates the protections of Section 22.903(f)."[123] According to AirTouch, to the extent that a customer specifically requests in writing the release of its CPNI to another person under Section 222(c)(2),[124] then the restriction in Section 22.903(f) would no longer apply. It also argues, however, that the current rule should continue to apply in cases where the customer approved, pursuant to Section 222(c)(1), the use, disclosure or access to CPNI on terms other than those set forth in that section.

72. Discussion. We have recently initiated a separate proceeding to consider the formulation of CPNI regulations to apply to all telecommunications carriers.[125] In that context, we tentatively concluded that the self-executing provisions of the new Section 222 -- which apply to all telecommunications carriers, require prior customer authorization for individual CPNI disclosure, and set the terms for disclosure of aggregate CPNI -- do not prohibit the Commission from enforcing requirements that are not inconsistent with the new statutory provisions, since nothing in the 1996 Act affects these requirements.[126] For purposes of this rulemaking, we seek comment whether our current CPNI rule in Part 22 is inconsistent with Section 222. We note that continued application of our existing rule would limit a customer's options in granting approval for use or disclosure of, or access to, individually identifiable CPNI under Section 222(c)(1) and (2). Applying our current rule in that context would mean that a customer could choose only between permitting no use of individually identifiable CPNI (except as permitted under Section 222(c)(1) and (d)) or

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[122] *Id.* at § 222(c)(2) and (3).

[123] Letter of Kathleen Q. Abernathy and David A. Gross, AirTouch Communications, to David Nall, Wireless Telecommunications Bureau, dated Mar. 20, 1996.

[124] Section 222(c)(2) states: "DISCLOSURE ON REQUEST BY CUSTOMERS.--A telecommunications carrier shall disclose customer proprietary network information, upon affirmative written request by the customer, to any person designated by the customer." 47 U.S.C. § 222(c)(2).

[125] *See* Implementation of the Telecommunications Act of 1996: Telecommunications Carriers' Use of Customer Proprietary Network Information and Other Customer Information, *Notice of Proposed Rulemaking*, CC Docket No. 96-115 FCC 96-221, (released May 17, 1996) (seeking comment on proposed regulations to specify and clarify the obligations of telecommunications carriers with respect to the use and protection of CPNI and other customer information).

[126] *Id.* at para. 38.

making this CPNI publicly available. This restriction of a customer's options would appear to alter the balance between the competitive and consumer privacy concerns embodied in Section 222. In addition, we seek comment whether we should eliminate Section 22.903(f) even if we were to determine that continued application of this rule is not inconsistent with new Section 222, on the grounds that our current rule would be superfluous in light of the comprehensive statutory scheme put in place by Section 222. We also seek comment on the approach advocated by AirTouch, described above, and, if we determine that continued application of Section 22.903(f) to the BOCs is not inconsistent with new Section 222, whether and how we should continue to apply our current CPNI rule.

73. In addition, we seek comment on whether, in considering the joint marketing authorization in Section 601(d) of the 1996 Act together with the CPNI requirements contained in the new Section 222 of the 1934 Act, we should require any particular BOC organizational structure or procedures to guard against the unauthorized disclosure of CPNI in the context of joint marketing of CMRS and other BOC-provided services. We ask for comment on the need for, and formulation of, appropriate organizational and procedural guidelines specific to the BOC/CMRS joint marketing situation that would be in accord with both Section 601(d) and Section 702 of the 1996 Act.

(d) Section 251(c)(5); Network Information Disclosure

74. Discussion. In our regulation of cellular service up to this point, we have required no affirmative disclosure of network information outside of the application process. Specifically, we required cellular wireline carriers applying for a cellular system in an area where it also provided landline service to set forth in its application exactly how its system would interconnect with the landline network. This information has to be "of sufficient specificity to enable a potential competitor to design its system to connect with the landline network in exactly the same fashion if the competitor so chooses."[127] These requirements did not create any continuing requirement for network information disclosure after licenses have been issued. Cellular carriers were arguably subject to requirements created in the *Computer II* proceeding, where the Commission applied "to all carriers owning basic transmission facilities the requirement that information relating to network design be released to all interested parties on the same terms and conditions, insofar as such information affects either intercarrier interconnection or the manner in which interconnected CPE operates."[128] This "all-carrier rule" was amplified in the CPE and enhanced services contexts, where the

[127] *See Cellular Reconsideration Order*, 89 FCC 2d at 81.

[128] Amendment of Section 64.702 of the Commission's Rules and Regulations (Second Computer Inquiry), 84 FCC 2d 58, 82-83 (1980).

Commission has fashioned both structural and nonstructural safeguards for AT&T and the BOCs regarding the disclosure of carrier network information.[129]

75. The new interconnection provisions of the 1996 Act make it a duty of incumbent local exchange carriers "to provide reasonable public notice of changes to the network necessary for the transmission and routing of services using that local exchange carrier's facilities or networks , as well as any other changes that would affect the interoperability of those facilities and networks."[130] In the Notice of Proposed Rulemaking we adopted to initiate implementation of the new interconnection provisions, we tentatively concluded that:

> (1) 'information necessary for transmission and routing' should be defined as any information in the LEC's possession that affects interconnectors performance or ability to provide services; (2) ' services' should include both telecommunications services and information services as defined in sections 3(46) and 3(20), respectively, of the 1934 Act, as amended; and (3) 'interoperability' should be defined as the ability of two or more facilities, or networks, to be connected, to exchange information, and to use the information that has been exchanged.[131]

In addition, we tentatively concluded that "incumbent LECs should be required to disclose all information relating to network design and technical standards, and information concerning changes to the network that affect interconnection."[132] We also sought comment as to how and when the public notice and disclosure of network changes should be provided.[133]

76. In light of the statutory provision regarding public notice by incumbent LECs of network technical changes and our efforts toward comprehensive implementation of that provision in a manner that will include CMRS interconnection to incumbent LECs' networks, we tentatively conclude that no specific Part 22 rule pertaining to network information disclosure by the BOCs is necessary or appropriate. We seek comment on this tentative conclusion. Commenters supporting a specific Part 22 rule should provide information about particular technical or regulatory issues to be addressed by such a rule.

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[129] Furnishing of Customer Premises Equipment and Enhanced Services by the Bell Operating Companies and the Independent Telephone Companies, 2 FCC Rcd 143, 150-51 (1987); *Computer III Phase I Order*, 104 FCC 2d at 1080-86; Furnishing of Customer Premises Equipment and Enhanced Services by American Telephone and Telegraph Co., 102 FCC 2d 655, 686-88 (1985) (*AT&T CPE Order*); Computer and Business Equipment Manufacturers Ass'n, 93 FCC 2d 1226 (1983).

[130] *See* Section 251(c)(5), 47 U.S.C. § 251(c)(5).

[131] *Local Competition Notice* at para. 189.

[132] *Id.* at para. 190.

[133] *Id.* at paras. 191-92.

F. Sunset/Elimination of Section 22.903

77. Current FCC Requirement/Approach of 1996 Act. Section 22.903 and its predecessor, Section 22.901, were established without "sunset" provisions, or the requirement that the Commission periodically review the continued need for the restrictions contained therein. In contrast, the general approach of the 1996 Act to BOC-provided competitive services is initial entry pursuant to establishment of separate subsidiary corporations, through which the competitive service must be provided for a period of years. In the case of BOC entry into interLATA services, a competitive checklist must be met prior to BOC entry into that competitive market, and such entry must be through a structurally separate corporation. This structural separation continues for 3 years after the BOC receives in-region interLATA authorization, unless extended by order of this Commission.

78. With respect to other competitive services, the Act imposes sunset provisions of varying lengths. For example, Section 272(f) provides that the separate affiliate requirements with respect to the manufacturing activities or the interLATA telecommunications services of a Bell operating company, with the exception of the request fulfillment obligations in subsection (e), shall cease to apply 3 years after the date the BOC is authorized to provide interLATA telecommunications service under Section 271(d), unless extended by Commission rule or order. For interLATA information services, the separate affiliate requirements, with the exception of the request fulfillment obligations in subsection (e), shall cease to apply 4 years after the date of enactment of the 1996 Act, unless extended by Commission rule or order. In contrast, for BOC electronic publishing services under Section 274, the separate affiliate requirement terminates pursuant to subsection (g) 4 years after the date of enactment, with no express provision for extension by Commission rule or order.

79. Option 1: sunset of Section 22.903. We seek ultimately to eliminate any regulatory asymmetry between BOC provision of cellular services, on the one hand, and BOC provision of other CMRS as well as LEC provision of any CMRS, on the other. Yet, the competitive safeguards contained in Section 22.903, as modified through the proposals we have made above, may continue to serve the public interest during the present crucial phase of entry of new wireless competitors into the CMRS markets. Further, the realization of the fundamental regulatory reforms contained in the 1996 Act, including the opening of the LEC network for purposes of local exchange competition pursuant to Section 251, would reduce the need for these safeguards in the not too distant future, and would provide a convenient milepost to mark a transition period. We therefore seek comment on the addition of a sunset provision to Section 22.903, similar to those contained in the 1996 Act for BOC provision of other competitive services. Upon the sunset of the Section 22.903 requirements for each BOC's cellular operations, we propose that such service would be governed by the uniform set of competitive safeguards we propose below in Section VI for all in-region LEC CMRS.

80. If we adopt the transitional approach, we propose to sunset the effectiveness of the Section 22.903 requirements for a particular BOC in tandem with that BOC's receipt of authorization pursuant to Section 271(d) to provide interLATA service originating in any in-region State. The interconnection provisions of the Act, Section 251 and 252, are designed to

promote facilities-based local exchange competition, as reflected in their inclusion in the access and interconnection competitive checklist contained in Section 271(c)(2)(B). In addition to the Section 251 and 252 interconnection requirements, the competitive checklist requires BOCs to provide, *inter alia*, further unbundling of local loops, switching and transport; nondiscriminatory access to 911 and E911 services; directory assistance, and operator call completion services; and nondiscriminatory access to databases and associated signaling necessary for call routing and completing. The effective implementation of these requirements should provide potential CMRS competitors with sufficient protection from interconnection discrimination and monopoly leveraging such that we may safely relax the degree of separation required for BOC cellular operations. We believe that effectively conditioning relief from Section 22.903 upon each BOC's meeting a "competitive checklist" may be a viable approach to assure that, from the regulator's and the competitor's standpoint, a sufficiently "level playing field" is in place such that structural safeguards may safely be eliminated. Moreover, this approach to sunsetting Section 22.903 would provide the BOCs with an added incentive to meet the requirements of the competitive checklist. We seek comment on this formulation of an approach to sunsetting Section 22.903.

81. We also seek comment on alternative sunset dates. Parties advocating a different sunset should provide information supporting their recommendations. Parties proposing that we use a sunset date and\or competitive checklist different than that contained in Section 271(c)(2)(B) and (d) of the 1996 Act should detail why their proposed factors are relevant to the question of BOC cellular safeguards. Parties may also suggest alterations to the list for purposes of setting a sunset date for our Section 22.903 requirements. Finally, we note that, pursuant to Section 271(c)(1)(B), BOCs may be able to meet the requirements of the 1996 Act if, after 10 months from the date of enactment, no facilities-based provider, as described in subparagraph (A), has requested the access and interconnection arrangements described therein (referencing one or more binding agreements approved under Section 252), but the State has approved a statement of generally available terms that satisfies the competitive checklist of subsection (c)(2)(B). Thus, BOC entry in some areas could potentially occur without a single facilities-based competitor actually obtaining interconnection arrangements consistent with Sections 251 and 252 of the 1996 Act, as long as the BOC is generally offering access and interconnection in a manner that meets the requirements of the competitive checklist. We seek comment on the effect of this aspect of Section 271 on the proposal to tie sunset of Section 22.903 to BOC entry into in-region interLATA markets.

82. Option 2: immediate elimination of Section 22.903. We seek comment on whether we should forgo the transition period we describe above, where a streamlined Section 22.903 would be in effect for BOC cellular operations until a designated sunset, in favor of immediate elimination of Section 22.903 and its replacement by the uniform set of safeguards we propose below in Section VI. This approach would advance our goal of regulatory symmetry more expeditiously,[134] and would remove relatively intrusive requirements that may

[134] In the *Second CMRS Report and Order*, we found that Congress, in amending Section 332 of the Communications Act, "saw the need for a new approach to the classification of mobile services to ensure that similar services would be subject to consistent regulatory classification." 9 FCC Rcd at 1418. In implementing

not be necessary in a more competitive environment. Such an approach would enable the BOCs to realize some degree of efficiencies through integration with landline management and operations, akin to those already available to their largest competitors, AT&T and GTE. Other factors must also be considered, however, primarily the potential effect of such action on evolving competition in both the wireless and the local exchange markets. Although mindful of the *Cincinnati Bell* court's observation that "the structural separation requirements will prevent the Bell Companies from competing with Personal Communications Services providers on a level playing field,"[135] we must first determine whether the playing field will indeed be level at the time Section 22.903 is eliminated. In so doing, we must seriously consider the mandate in Section 332 to consider whether changes in our regulations will promote competition in commercial mobile services.[136] We are concerned about whether transitional structural separation for BOC provision of cellular service, which is more restrictive than any rules applying to other cellular providers or any provision of PCS, will promote or inhibit the development of competition. We therefore seek comment on this aspect of our two alternative safeguards proposals, and whether immediate elimination of Section 22.903 in favor of uniform LEC CMRS safeguards will promote competition and the public interest more effectively than the sunset approach we have outlined above.

83. A significant difference in these two approaches involves the requirement under Section 22.903, that would continue under Option 1 on an in-region basis, that the BOC cellular affiliate remain an independently managed and operating company, with separate officers and personnel. Option 2 would permit integrated management and shared personnel for BOC incumbent local exchange and BOC incumbent wireline cellular operations. Another significant difference is that Option 1 would entail the retention under Section 22.903(c) of the requirement that any research or development performed by BOCs for separate corporations, either separately or jointly, be undertaken on a compensatory basis. Option 2 would eliminate this specific rule, and apply Part 64 cost allocation requirements as those rules apply to any operations involving both regulated and nonregulated aspects. We seek comment on the relative costs and benefits for the public and the BOCs if the independent operation and joint research requirements were eliminated before the BOCs meet the requirements of the competitive checklist in Section 271. Parties should focus specifically on how the relative costs and benefits of independent versus integrated management and personnel bear upon the competitive equity issues discussed above.

G. BOC Provision of Incidental InterLATA CMRS

84. The 1996 Act permits the BOCs to immediately engage, without establishing separate affiliates, in specified in-region interLATA services that the Act defines as

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these amendments, we thus sought to "establish a symmetrical regulatory structure that will promote competition in the mobile services marketplace." *Id.*

[135] *Cincinnati Bell*, 69 F.3d at 768.

[136] 47 U.S.C. § 332(c)(1)(C).

"incidental." Questions have arisen as to whether this authorization bears upon the question of the retention or elimination of Section 22.903. Section 271 defines "incidental interLATA services" as the interLATA provision by a Bell operating company or its affiliate, *inter alia*, "of commercial mobile services in accordance with section 332(c) of this Act and with the regulations prescribed by the Commission pursuant to paragraph (8) of such section."[137] Paragraph 8 of Section 332(c) states that "a person engaged in the provision of commercial mobile services, insofar as such person is so engaged, shall not be required to provide equal access to common carriers for the provision of telephone toll services," but permits the Commission to order unblocked access to the toll carrier of the subscribers' choice, upon appropriate findings. Finally, Section 271(h) states that the provisions of subsection (g) are to be narrowly construed, and that the "Commission shall ensure that the provision of services authorized under subsection (g) by a Bell operating company or its affiliate will not adversely affect telephone exchange service ratepayers or competition in any telecommunications market."

85. In addition, Section 272, which establishes separate affiliate and nondiscrimination safeguards for BOC provision of, *inter alia*, in-region interLATA telecommunications services, contains a specific exception in subsection (a)(2)(B)(i) for incidental interLATA services described in paragraphs (1), (2), (3), (5) and (6) of section 271 (g). Section 272(f)(3), in turn, specifically preserves "the authority of this Commission, under any other section of the Act to prescribe safeguards consistent with the public interest, convenience and necessity."[138] Thus Section 271(g)(3) authorizes immediate market entry by BOCs for the provision of in-region, "incidental" interLATA services, which are defined as the provision of CMRS on a non-"1+"equal access basis.

86. We do not believe that the authorization contained in Sections 271(g)(3) and 272(a)(2)(B)(i) for immediate BOC provision of in-region, incidental interLATA service, defined as commercial mobile radio service, limits our authority to retain our current BOC cellular separate affiliate rules, or to prescribe alternative rules, should we determine that such rules constitute an appropriate competitive safeguard.[139] We note, in this regard, that Section 271(f)(3) preserves our authority to prescribe safeguards consistent with the public interest, convenience and necessity. We seek comment on this analysis.[140]

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[137] 47 U.S.C. § 271.

[138] *See* 47 U.S.C. § 272(a)(2)(B)(i) and (f)(3).

[139] 47 U.S.C. §§ 271(g)(3) and 272(a)(2)(B)(i). We express no opinion here as to the scope of the exception created by Section 271(g)(3), as it is not necessary for purposes of our discussion of the provision's effect on our cellular structural separation requirement.

[140] 47 U.S.C. § 271(f)(3).

V. SYMMETRY OF CELLULAR SAFEGUARDS

87. One of the principal criticisms of our cellular structural separation requirement is that it applies only to the BOCs, but not to other large LECs with similar characteristics, particularly GTE. This lack of regulatory symmetry was a concern of the court in the *Cincinnati Bell* decision, and presents the Commission with a complex problem in this period of transition to more competitive landline and wireless markets. We believe that this is an appropriate time to reexamine the basis for excluding LECs other than the BOCs from the scope of the rule.[141]

88. We note that in 1994, we extended the BOC open network architecture (ONA) and non-discrimination safeguards to GTE, in recognition, *inter alia*, of the fact that GTE's merger with Contel Corporation had significantly expanded the scope of GTE's operations and increased the benefits that GTE would bring to its customers by conforming to the *Computer III* BOC ONA and nondiscrimination requirements.[142] On the other hand, Congress, in the 1996 Act, did not treat the BOCs and GTE in an equivalent manner with respect to provision of in-region interLATA services.[143]

89. Discussion. The lack of regulatory symmetry between BOC-provided cellular service and LEC-provided cellular service under Section 22.903 presents a difficult problem in this period of transition to more competitive landline and wireless markets. Rather than distinguish between BOCs and other LECs, it would arguably be more consistent to apply Section 22.903 to GTE, which is similar in size to the BOCs, or to all LECs above a particular size, e.g., all Tier 1 LECs. We have used the Tier 1 demarcation for analogous

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[141] In the *Cellular Reconsideration Order*, 89 FCC 2d at 79, we found that the costs to independent and rural LECs of establishing structurally separate cellular subsidiaries outweighed any possible public benefit. We further found that this was not true in the case of the AT&T LECs, in large part because the vast size of AT&T placed it in a better position to afford such costs of incorporation and lost efficiencies of scope.

[142] Application of Open Network Architecture and Nondiscrimination Safeguards to GTE Corporation, CC Docket No. 92-256, *Report and Order*, 9 FCC Rcd 4922 (1994). Although the Notice in CC Docket No. 92-256 had proposed subjecting GTE only to the ONA requirements, the Order required GTE to comply with all the nondiscrimination safeguards applicable to the BOCs. GTE was required to address how it would comply with the nondiscrimination safeguards in its ONA Plan. These safeguards consist of Customer Proprietary Network Information (CPNI) rules, network information disclosure rules, and nondiscrimination reporting requirements. The Order observed that as a Tier 1 LEC, GTE is already fully subject to the same cost accounting safeguards adopted in the *BOC Safeguards Order*. *Id.* at 4941-42.

[143] Although the BOCs are released from the interLATA prohibition of the AT&T Consent Decree pursuant to Section 601(a)(1), their entry into in-region interLATA service markets pursuant to Section 271 is heavily conditioned, as described above, and included the requirement that they establish separate affiliates pursuant to Section 272. GTE, on the other hand, is released from the constraints of the GTE Consent Decree pursuant to Section 601(a)(2), without any additional conditions, such as establishment of separate affiliates or meeting a competitive checklist, placed upon GTE's entry into in-region interLATA, or any other services. *See* Section 601(a)(1) and (2).

purposes in determining which LECs would be subject to expanded interconnection rules[144] or required to comply with certain cost accounting rules, including the required filing of Cost Allocation Manuals.[145] Nevertheless, regulatory consistency or "symmetry" is only one among many of the considerations we must take into account when evaluating whether to impose structural separation on non-BOC LECs.

90. Based upon the record before us, the rationale for imposing structural separation on the BOCs' cellular service would appear to apply to all Tier 1 LECs. Yet, if we adopt the proposal to sunset Section 22.903 in tandem with BOC entry into in-region interLATA services, and to replace its provisions with the streamlined safeguards we here propose for in-region LEC PCS, we do not believe that the relative benefits of imposing Section 22.903 on any additional Tier 1 LECs for a transition period followed by a sunset would outweigh the costs of such requirements. Adoption of the alternative proposal to eliminate Section 22.903 immediately would of course moot this issue in its entirety. We do no therefore propose to apply Section 22.903 to any additional LECs at this time. We seek comment on this approach.

91. We also propose to require all the Tier 1 LECs to implement the same service safeguards for their in-region cellular service that we propose for in-region PCS and other CMRS in Section VI below. We seek comment on the costs to the Tier 1 LECs of establishing nonstructurally separate affiliates as described in Section VI.

92. Finally, we do not believe it appropriate to impose either a streamlined Section 22.903 or the proposed nonstructural competitive safeguards on any non-Tier 1 independent and rural LECs because, on balance, we believe that the cost and potential disruption of requiring non-Tier 1 LECs to establish new separate affiliates for the provision of cellular service would likely be significant, both in terms of the direct costs of incorporation and lost efficiencies of joint operations, facilities, and staff. These costs are obviously different than the going-forward costs of retaining a structurally separate corporate entity, discussed above. We therefore seek comment on the nature and extent of such costs, and ask that commenters be specific in their quantification of both direct costs of separate incorporation, and of lost economies of scope. We seek comment on our tentative conclusion that such costs likely outweigh the benefits of imposing a limited separate affiliate requirement.

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[144] *See. e.g.*, Expanded Interconnection with Local Telephone Facilities, CC Docket No. 91-141, Memorandum Opinion and Order, 9 FCC Rcd 5154 (1994) (*Virtual Collocation Order*) (requiring Tier 1 LECs, other than participants in National Exchange Carrier Association (NECA) pools, to permit third parties to interconnect their transmission facilities to those of the LECs); Section 64.1401(a), *et seq.*, 47 C.F.R. §§ 64.1401(a), *et seq.* (characterizing carriers subject to expanded interconnection obligation as every LEC classified as a "Class A company under § 32.11 of this chapter and that is not a National Exchange Carrier Association interstate tariff participant, as provided in part 69, subpart G of this chapter").

[145] As noted earlier, we here use the term "Tier 1" LEC as a short-hand reference to those carriers with over $100 million in revenues from regulated telecommunications operations that are subject to the CAM filing requirements under Section 64.903.

VI. SAFEGUARDS FOR PROVISION OF CMRS BY LECS

93. In this section, we address the issue of safeguards for LEC-provided PCS and other CMRS. While our current rules require the BOCs to comply with Section 22.903 structural safeguards in the provision of cellular service, we determined in the *Broadband PCS Order* that we would require implementation of nonstructural safeguards to protect against discrimination and cross-subsidization in the provision of PCS by both BOCs and other LECs. In the *CMRS Second Report and Order*, we extended this decision to apply accounting safeguards to all LEC-provided CMRS. We deferred consideration of additional safeguards issues -- including the asymmetry between our cellular and PCS rules -- to a subsequent proceeding. We return to these issues in this proceeding because we believe that developing clear and consistent safeguards is essential to ensuring that LEC provision of CMRS does not impair competition in the wireless market by other CMRS providers. In order to address the concerns raised by the *Cincinnati Bell* court, to ensure that our rules treat similar services in a consistent manner, and to respond to the changes in the 1996 Act relating to joint marketing, CPNI, and network disclosure, we believe that further examination of the question of competitive safeguards for LEC-provided CMRS is appropriate.

A. Present Competitive Safeguard Alternatives

94. Structural and Nonstructural Safeguards. As we discussed in Sections II and III, the BOC cellular structural separation requirement was, in essence, an adaptation of the Commission's *Computer II* structural separation rules for AT&T system's provision of enhanced services. *Computer II* structural safeguards were designed to offer the maximum amount of separation between regulated and unregulated BOC offerings in situations where the competitive concerns were found to outweigh lost operating efficiencies. In contrast, the *Broadband PCS Order*, relied, in large part, on the *Computer III* proceeding, in which those structural separation requirements for BOC provision of enhanced services were replaced with a set of nonstructural safeguards, that were to be phased-in in stages.[146]

95. The *Computer III* nonstructural safeguards featured implementation of "open network architecture" or "ONA," designed to ensure nondiscriminatory access to network facilities and functions for all enhanced service providers (ESPs). ONA was to provide all enhanced service providers equal access to the components of the BOCs' telephone network, as well as the ability to select network service elements not used by the BOCs in providing their own enhanced services. As a first step in implementing *Computer III*, the Commission permitted the BOCs, pending full structural relief, to offer individual enhanced services on an integrated basis (*i.e.*, directly by the operating company, rather than through a separate affiliate) following approval of service-specific comparably efficient interconnection (CEI)

[146] *Computer III* Phase I Order, 104 FCC 2d at 1063-70.

plans.[147] The other nondiscrimination safeguards of *Computer III* include: accounting safeguards; timely disclosure to competing ESPs of network information, including technical interfaces; access to and use of CPNI; and quarterly reporting to help ensure that BOC provision of basic services to competing ESPs was nondiscriminatory in terms of quality, installation, and maintenance. With the full implementation of ONA, *Computer III* envisioned that the BOCs would be permitted to provide integrated enhanced services without prior Commission approval of service- specific CEI plans.[148]

96. Allowing BOCs to provide enhanced services pursuant to non-structural safeguards was considered a means to achieve several important public interest goals, including bringing enhanced services more quickly and effectively to the consumer market by permitting the BOCs to realize fully their vast potential. This would permit the BOCs to use their extensive, geographically dispersed facilities and the associated management and operational resources, to provide such services throughout the country. In particular, it was designed to permit BOCs to use existing marketing contacts with virtually every household within their regions to market enhanced services to consumers inexpensively, to use the same personnel to repair and install the services and equipment necessary to provide basic and enhanced services, and to use their expertise to engage in research and development of enhanced services.[149]

97. Competitive Carrier. In the *Competitive Carrier* proceeding, the Commission established yet another approach to the question of the degree of separation appropriate for certain LEC-provided common carrier services.[150] We distinguished between carriers with

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[147] In their CEI plans, BOCs were required to describe: (1) the enhanced service or services to be offered, (2) how the underlying basic services would be made available for use by competing enhanced service providers (ESPs), and (3) how the BOC would comply with the other nonstructural safeguards *Computer III* imposed.

[148] *Computer III* Phase I Order, 104 FCC 2d at 1064. Following a remand from the United States Court of Appeals for the Ninth Circuit, the Commission in 1991 issued the *BOC Safeguards Order*, which further strengthened the *Computer III* nonstructural safeguards through increased cost accounting regulation. *BOC Safeguards Order,* 6 FCC Rcd at 7578-97. Following a series of court challenges, *California v. FCC*, 39 F.3d 919 (9th Cir. 1994)(*California III*), the question of the adequacy of the Commission's nonstructural safeguards to prevent BOC anti-competitive behavior is once again pending before the Commission. *Computer III* Further Remand Proceedings: Bell Operating Company Provision of Enhanced Services, CC Docket No. 95-20, Notice of Proposed Rulemaking, 10 FCC Rcd 8360 (1995) (*Computer III* Further Remand NPRM).

[149] *BOC Safeguards Order*, 6 FCC Rcd at 7575.

[150] 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,*

market power (dominant carriers) and those without market power (non-dominant carriers), and gradually relaxed regulation of non-dominant carriers on the grounds that non-dominant carriers lacked the incentive and ability to engage in conduct that might be anticompetitive or otherwise inconsistent with the public interest.[151]

98. In its *Competitive Carrier Fifth Report and Order,* the Commission clarified that an "affiliate" of an independent LEC for purposes of qualifying for regulation as a non-dominant carrier is "a carrier that is owned (in whole or part) or controlled by, or under common ownership (in whole or part) or control with, an exchange telephone company."[152] The Commission went on to explain that in order to qualify for non-dominant status, the affiliate must: (1) maintain separate books of account; (2) not jointly own transmission or switching facilities with the exchange telephone company; and (3) obtain any exchange telephone company services at tariffed rates and conditions. The Commission specified 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 bottleneck facilities. The Commission concluded that the specific separation requirements would not impose excessive burdens on independent LECs, and noted that those requirements were less stringent than those established in *Computer II.*[153]

99. As we noted earlier, in response to the 1996 Act's Section 271(b) authorization for the BOCs to begin immediately to provide interLATA services originating outside of their in-region areas, we adopted, as an interim measure, non-dominant carrier regulation for BOC provision of interstate, interexchange services originating outside of their in-region states if those services were provided through an affiliate that complied with our *Competitive Carrier* rules. In requiring that the non-dominant interexchange affiliate be a separate legal entity, we stated: "[i]n no other sense do we require 'structural separation.'"[154] By specifically permitting the sharing of personnel and other resources and assets, and banning only joint ownership of transmission and switching facilities, we found that application of the

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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).

[151] *First Report and Order,* 85 FCC 2d at 20-21. In its *First Report and Order,* the Commission classified local exchange carriers ("LECs") and AT&T as dominant carriers and concluded that these dominant carriers should be subject to the "full panoply" of then-existing Title II regulation. *Id.* at 22-24. In its *Fourth Report and Order,* the Commission considered how it should regulate the provision of interstate, interexchange services by independent LECs. The Commission determined that interexchange carriers affiliated with independent LECs would be regulated as non-dominant carriers. *Fourth Report and Order,* 95 FCC 2d at 575-79.

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

[153] *Id.* at 1198-99.

[154] *See* Bell Operating Company Provision of Out-of-Region, Interstate, Interexchange Services, *Report and Order,* CC Docket No. 96-21, FCC No. 96-288 (released July 1, 1996) (*BOC Out-of-Region Order*) at para. 22.

Competitive Carrier rules would avoid excessive burdens and would not impede the BOCs' ability to realize efficiencies through the use of joint resources.[155]

B. Nonstructural Safeguards in PacTel PCS Plan

100. On July 10, 1995, Pacific Bell, Nevada Bell, Pacific Bell Mobile Services and Pacific Telesis (PacTel), filed a "Plan of Nonstructural Safeguards Against Cross-Subsidy and Discrimination" (PacTel Plan).[156] On February 27, 1996, the Wireless Telecommunications Bureau approved the PacTel Plan as in compliance with existing nonstructural safeguards for LEC-provided PCS, and authorized PacTel to commence operations, subject to any compliance actions PacTel needs to ensure that its Plan is in compliance with all aspects of the 1996 Act.[157] The Bureau noted that the Plan was filed prior to passage of the 1996 Act, and that the Commission would shortly institute this rulemaking, and that if, as a result of the rulemaking, the LEC PCS rules or policies change, then PacTel will have to modify its Plan and operations accordingly. The *PacTel Plan Order* dismissed the arguments of opponents to the PacTel Plan that the existing safeguard rules and policies are inadequate, or that the Commission should adopt additional safeguards, as issues that properly belong in the context of a rulemaking. The proceeding before the Bureau was thus properly limited to a determination of whether the Plan complies with existing rules, not with the adequacy of such rules.[158] In response to objections by BellSouth that PacTel was not required to file a plan, the Bureau observed that PacTel relied on the Commission's statements regarding safeguards as evidence that the Commission fully considered the implications of LECs providing PCS in-region.[159]

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[155] *Id.* Although we found the *Competitive Carrier* separation requirements a useful model upon which to base, on an interim basis, oversight of BOC provision of out-of-region interstate interexchange services, we also restated our intention to consider, in a separate proceeding, modifications or elimination of these separation requirements. *See id.* at para. 32. We previously released a Notice initiating, *inter alia*, this inquiry in the context of determining appropriate nondominant treatment for LEC provision of certain interstate, interexchange services. *See* Policy and Rules Concerning the Interstate, Interexchange Marketplace, CC Docket No. 96-61, *Notice of Proposed Rulemaking*, FCC 96-123, released March 25, 1996, at paras. 61-62.

[156] The Wireless Telecommunications Bureau established a pleading cycle in response to PacTel's Plan. On August 16, 1995, AirTouch Communications, Inc. (AirTouch); Cox Enterprises, Inc. (Cox); MCI Telecommunications Corporation (MCI); Nextel Communications (Nextel); and Sprint Telecommunications Venture (STV) filed comments on PacTel's Plan. On September 12, 1995, BellSouth Telecommunications, Inc. (BellSouth) and PacTel filed reply comments.

[157] *See PacTel Plan Order.*

[158] *PacTel Plan Order* at paras. 7-11.

[159] *Id.* at para. 10.

1. Summary of PacTel's Plan

101. PacTel's Plan as proposed consisted of five principal parts: (1) establishment of a non-structurally separate affiliate for corporate purposes only; (2) reliance on existing Part 32 and Part 64 accounting safeguards, as incorporated into its LECs' cost accounting manuals (CAMs); (3) compliance with established interconnection obligations; (4) voluntary compliance with the Commission's *Computer III* CPNI rules; and (5) voluntary compliance with the Commission's *Computer III* network disclosure rules.[160]

102. Separate Affiliate. PacTel stated that it would provide PCS through a wholly-owned subsidiary of Pacific Bell, Pacific Bell Mobile Services (PBMS). PacTel explained that Pacific Bell, Nevada Bell and PTMS are subsidiaries of Pacific Telesis Group, and PTMS is the PCS licensee.[161] PTMS has entered into a letter agreement with PBMS whereby PBMS will design, construct, manage, operate and market services for PTMS in California and Nevada. PTMS will retain control and supervision over the licensed system. PBMS is a subsidiary of Pacific Bell for corporate purposes only, not a structurally separate subsidiary, as that term has been defined by the Commission.[162] PacTel explained that it chose to provide PCS services through a separate subsidiary, rather than as a fully integrated corporate division, for three reasons: (1) since PCS is a competitive service with associated risks, a separate subsidiary will permit a different compensation system that reflects the risk in the business; (2) a separate subsidiary will provide a more discrete measurement of operating results; and (3) it provides the advantage of a single purpose entity that can still take advantage of many of the economies of scope described by the Commission, such as joint marketing and collocation.[163]

103. Cost Accounting/Affiliate Transactions. PacTel explained that having a separate affiliate makes it easier to track PCS costs and to keep these costs separated from regulated costs, because it limits joint and common costs between PCS and regulated telephone service.[164] According to PacTel, its telephone operating companies have already revised their CAMs to describe the services they will provide the PCS subsidiaries.[165] Consistent with the

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[160] *Id.* at para. 3.

[161] PTMS was established to hold the PCS licenses to, *inter alia*, protect Pacific Bell's credit rating from any adverse impacts flowing from entry into a new competitive service. PacTel Plan at 3-4. In the A and B block auction, PTMS obtained PCS licenses for the Los Angeles and San Francisco MTAs.

[162] PacTel Plan at 3-4 & n.9. The Plan provides that Nevada Bell may do marketing in Nevada.

[163] *Id.* at 4-6.

[164] *Id.* at 4-6.

[165] On December 31, 1994, and June 30, 1995, Pacific Bell and Nevada Bell filed revisions to their CAMs which included changes to the affiliate transactions involving Pacific Bell Mobile Services. The Commission invited public comment on the two sets of changes of these, and other LECs subject to the CAM filing