two or more points suitable for a user's transmission needs.[120] The common carrier offering of basic services is regulated under Title II of the Communications Act.[121] In contrast, the Commission defined enhanced services as:

> services, offered over common carrier transmission facilities used in interstate communications, which employ computer processing applications that act on the format, content, code, protocol or similar aspects of the subscriber's transmitted information; provide the subscriber additional, different, or restructured information; or involve subscriber interaction with stored information.[122]

Enhanced services are not regulated under Title II of the Communications Act.[123]

39. The 1996 Act does not utilize the Commission's basic/enhanced terminology, but instead refers to "telecommunications services" and "information services." The 1996 Act defines "telecommunications" as:

> the transmission, between or among points specified by the user, of information of the user's choosing, without change in the form or content of the information as sent and received.[124]

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[120] *Computer II Final Decision*, 77 FCC 2d at 419-20, ¶ 95.

[121] *Computer II Final Decision*, 77 FCC Rcd at 428, ¶ 114.

[122] 47 C.F.R. § 64.702(a).

[123] *Id. See also Computer II Final Decision*, 77 FCC 2d at 428-30, ¶¶ 114-18. In *Computer II*, the Commission determined that, while we have jurisdiction over enhanced services under the general provisions of Title I, it would not serve the public interest to subject ESPs to traditional common carriage regulation under Title II because, among other things, the enhanced services market was "truly competitive." *Id.*, 77 FCC 2d at 430, 432-33 ¶¶ 119, 124, 128. Examples of services the Commission has treated as enhanced include voice mail, E-Mail, fax store-and-forward, interactive voice response, protocol processing, gateway, and audiotext information services. *See Bell Operating Companies Joint Petition for Waiver of Computer II Rules*, Order, 10 FCC Rcd 13,758, 13,770-13,774, App. A (Com. Car. Bur. 1995) (*BOC CEI Plan Approval Order*).

[124] 47 U.S.C. § 153(43).

"Telecommunications service" is defined as:

> the offering of telecommunications for a fee directly to the public, or to such classes of users as to be effectively available directly to the public, regardless of facilities used.[125]

The 1996 Act defines "information service" as:

> the offering of a capability for generating, acquiring, storing, transforming, processing, retrieving, utilizing, or making available information via telecommunications, and includes electronic publishing, but does not include any use of any such capability for the management, control, or operation of a telecommunications system or the management of a telecommunications service.[126]

40. We concluded in the *Non-Accounting Safeguards Order* that, although the text of the Commission's definition of "enhanced services" differs from the 1996 Act's definition of "information services," the two terms should be interpreted to extend to the same functions.[127] We found no basis to conclude that, by using the term "information services," Congress intended a significant departure from the Commission's usage of "enhanced services."[128] We further explained that interpreting "information services" to include all "enhanced services" provides a measure of regulatory stability for telecommunications carriers and ISPs by preserving the definitional scheme under which the Commission exempted certain services from traditional common carriage regulation.[129]

41. Consistent with our conclusion in the *Non-Accounting Safeguards Order* that "enhanced services" fall within the statutory definition of "information services," we seek comment in this Further Notice on whether the Commission's definition of "basic service" and the 1996 Act's definition of "telecommunications service" should be interpreted to extend to

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[125] 47 U.S.C. § 153(46). According to the Joint Explanatory Statement, the definitions of "telecommunications" and "telecommunications service" were derived from the Senate Bill with amendments. Joint Explanatory Statement at 116. The Joint Explanatory Statement indicates that the definition of "telecommunications service" was intended to include commercial mobile service (CMS), competitive access service, and alternative local telecommunications services to the extent they are offered to the public or such classes of users as to be effectively available to the public. Joint Explanatory Statement at 114.

[126] 47 U.S.C. § 153(20). This definition is based on the definition of "information service" used in the MFJ. *See* Joint Explanatory Statement at 115-16.

[127] *Non-Accounting Safeguards Order*, 11 FCC Rcd at 21955-56, ¶ 102.

[128] *Id.*

[129] *Id.*

the same functions, even though the two definitions differ.[130] We ask parties to address whether there is any basis to conclude that, by using the term "telecommunications services," Congress intended a significant departure from the Commission's usage of "basic services." As noted in the *Non-Accounting Safeguards Order*, we believe the public interest is served by maintaining the regulatory stability of the definitional scheme under which the Commission exempted certain services from traditional common carriage regulation. To the extent parties believe that "telecommunications services" differ from "basic services" in any regard, they should identify the distinctions that should be drawn between the two categories, describe any overlap between the two categories, and delineate the particular services that would come within one category and not the other.

42. In light of our conclusion in the *Non-Accounting Safeguards Order* that the statutory term "information services" includes all services the Commission has previously considered to be "enhanced," and our decision in this proceeding to seek comment on whether the statutory term "telecommunications services" includes all services the Commission has previously considered to be "basic services," we seek comment on whether the Commission hereafter should conform its terminology to that used in the 1996 Act. We ask commenters to discuss whether the Commission's rules, which previously distinguished between basic and enhanced services, should now distinguish between telecommunications and information services. For example, we ask whether the Commission's *Computer II* decision should now be interpreted to require facilities-based common carriers that provide information services to unbundle their telecommunications services and offer such services to other ISPs under the same tariffed terms and conditions under which they provide such services to their own information services operations.[131]

B. Cost-Benefit Analysis of Structural Safeguards

1. Background

43. The Commission's goals in addressing BOC provision of information services have been both to promote innovation in the provision of information services and to prevent access discrimination and improper cost allocation. Because the BOCs control the local exchange network and the provision of basic services, in the absence of regulatory safeguards they may have the incentive and ability to engage in anticompetitive behavior against ISPs that must obtain basic network services from the BOCs in order to provide their information

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[130] *See also* the discussion of the Universal Service Report in ¶ 8.

[131] *See Computer II Final Decision*, 77 FCC 2d at 475. We note that we have issued a Notice of Inquiry seeking comment on the treatment of Internet access and other information services that use the public switched network. *Usage of the Public Switched Network by Information Service and Internet Access Providers*, CC Docket No. 96-263, Notice of Inquiry, 11 FCC Rcd 21354 (1996) (*Information Service and Internet Access NOI*). We intend in that proceeding to review the status of ISPs in a more comprehensive manner.

service offerings. For example, BOCs may discriminate against competing ISPs by denying them access to services and facilities or by providing ISPs with access to services and facilities that is inferior to that provided to the BOCs' own information services operations. BOCs also may allocate costs improperly by shifting costs they incur in providing information services, which are not regulated under Title II of the Act, to their basic services.

44. Under rate-of-return regulation, which allows carriers to set rates based on the cost of providing a service, the BOCs may have had an incentive to shift costs incurred in providing information services to their basic service customers. In 1990, the Commission replaced rate-of-return regulation with price cap regulation of the BOCs and certain other LECs to discourage improper cost allocation, among other things.[132] Recently, the Commission revised its price caps regime to eliminate the sharing mechanism, which required price cap carriers to "share" with their access customers half or all their earnings above certain levels in the form of lower rates.[133] This revision substantially reduces the BOCs' incentive to misallocate costs.[134]

45. Since the adoption of *Computer I* in 1971, the Commission has employed various regulatory tools, including structural separation, to prevent access discrimination and cost misallocation, first by AT&T and then, after divestiture, by the BOCs, in providing information services. In *Computer I*, we imposed a "maximum separation policy" on the provision of "data processing" services by common carriers other than AT&T and its Bell System subsidiaries.[135] We continued to impose structural separation on the provision of

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[132] The Commission required the BOCs and GTE to be subject to price cap regulation and permitted other LECs to elect price cap regulation. *Policy and Rules Concerning Rates for Dominant Carriers*, CC Docket No. 87-313, Second Report and Order, 5 FCC Rcd 6786, 6818-19, ¶¶ 257-265 (1990). Currently, fourteen incumbent LECs are subject to price cap regulation.

[133] *See Price Cap Performance Review for Local Exchange Carriers*, CC Docket No. 94-1, and *Access Charge Reform*, CC Docket No. 96-262, Fourth Report and Order in CC Docket No. 94-1 and Second Report and Order in CC Docket No. 96-262, 12 FCC Rcd 16642, 16699-703, ¶¶ 147-155 (1997) (*Price Caps Fourth Report and Order*).

[134] The price caps regime, however, still retains a rate-of-return aspect in the low-end adjustment mechanism. The low-end adjustment mechanism permits a LEC with a rate-of-return of less than 10.25 percent to increase its price cap index to a level that would enable it to earn 10.25 percent. Furthermore, periodic performance reviews to update the X-factor could replicate the effects of rate-of-return regulation, if based on particular carriers' interstate earnings rather than industry-wide productivity growth. We stated in the *Price Caps Fourth Report and Order*, however, that in our next performance review we plan to focus on ensuring that we do not replicate rate-of-return effects. *Price Caps Fourth Report and Order*, 12 FCC Rcd 16714, ¶ 180.

[135] Under "maximum separation," we required that the separate entity maintain its own books of account, have separate officers and separate operating personnel, and utilize computer equipment and facilities separate from those of the carrier in providing unregulated services. Moreover, a carrier subject to the separation requirement was prohibited from engaging in the sale or promotion of the separate entity's services and from

enhanced services by AT&T and its Bell System subsidiaries in *Computer II*,[136] until we replaced structural separation with a system of nonstructural safeguards in 1986, in *Computer III*.

46. The Commission has long recognized both the benefits as well as the costs of structural separation as a regulatory tool.[137] The Commission noted in *Computer II* that a structural separation requirement reduces firms' ability to engage in anticompetitive activity without detection because the extent of joint and common costs between affiliated firms is reduced, transactions must take place across corporate boundaries, and the rates, terms, and conditions on which services will be available to all potential purchasers must be made publicly available.[138] Structural separation thus is useful as an enforcement tool and as a deterrent, because firms are less likely to engage in anticompetitive activity the more easily it

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making available any computer capacity or computer system component, used in the provision of its communications service, to others for the provision of unregulated services. *Regulatory and Policy Problems Presented by the Interdependence of Computer and Communication Services and Facilities* (*Computer I*), 28 FCC 2d 291, 302-304, ¶¶ 38-34 (1970) (*Tentative Decision*); 28 FCC 2d 267 (1971) (*Final Decision*), *aff'd in part sub. nom. GTE Service Corp. v. FCC*, 474 F.2d 724 (2d Cir. 1973), *decision on remand*, 40 FCC 2d 293 (1973). We did not establish requirements for AT&T and its subsidiaries based on our assumption that they were precluded from offering any type of data processing services by the terms of an antitrust consent decree then in effect. *See United States v. Western Electric Co.*, 13 Rad. Reg. (P&F) 2143, 1956 Trade Cas. (CCH) 71,134 (D.N.J. 1956).

[136] Under the rules adopted in the *Computer II Final Decision*, the AT&T separate subsidiary was prohibited from providing basic services or owning any network or local distribution transmission facilities, while its basic services affiliates were prohibited from offering enhanced services or customer premises equipment (CPE). Those rules also strictly limited the interactions of the separate subsidiary with its basic service affiliates. We required the separate subsidiary to obtain all transmission facilities necessary for providing enhanced services under tariff. We required it to elect separate officers; maintain separate books of account; employ separate operating, installation, and maintenance personnel; and perform its own marketing and advertising. We further required it to deal with any affiliated manufacturing entity only on an arms-length basis and to utilize separate computer facilities in providing enhanced services. Moreover, the separate subsidiary was required either to develop its own software or to contract with non-affiliates for such software, except that it was permitted to obtain generic software embedded within equipment that its affiliate sold off-the-shelf to any interested purchaser. We also decided to require AT&T's basic service affiliates to disclose network design and other network information that affected the interconnection or interoperation of customer premises equipment (CPE) or enhanced services. *Computer II Final Decision*, 77 FCC 2d at 475-86, ¶¶ 233-60; *see also Computer III Phase I Order*, 104 FCC 2d 958 at 969-971, ¶¶ 14-15. These requirements were extended to the BOCs in 1984. *See Policy and Rules Concerning the Furnishing of Customer Premises Equipment, Enhanced Services and Cellular Communications Equipment by the Bell Operating Companies*, CC Docket 83-115, Report and Order, 95 FCC 2d 1117, 1120, ¶ 3 (1984) (*BOC Separation Order*). While GTE also was initially subject to the *Computer II* structural separation requirements, the Commission subsequently relieved GTE of those rules. *Computer II Reconsideration Order*, 84 FCC 2d at 72-73, ¶ 66.

[137] *See Computer II Final Decision*, 77 FCC 2d at 461-63, ¶¶ 201-07.

[138] *Id.* at 462, ¶ 205.

can be detected. As for costs, the Commission recognized that structural separation increases firms' transaction and production costs,[139] but did not agree with arguments presented at the time that structural separation reduces innovation.[140]

47. The Commission similarly weighed the benefits and costs of structural separation in *Computer III* when, with the passage of time and the accumulation of experience, it replaced the *Computer II* structural separation requirements with a system of nonstructural safeguards. The Commission concluded in *Computer III* that the benefits of structural separation are not significantly greater than the benefits of nonstructural safeguards in preventing anticompetitive practices by the BOCs, and that structural separation imposes greater costs on the public and the BOCs than nonstructural safeguards.[141] The Commission also found that the benefits of structural separation had decreased since the adoption of the *BOC Separation Order*, due to technological and market developments that diminished the BOCs' ability to misallocate costs and engage in access discrimination.[142] Further, the Commission found, based on its experience, that the introduction of new information services by the BOCs was slowed or prevented altogether by structural separation, thus denying the public the benefits of innovation.[143] The Commission also found that structural separation imposed direct costs on the BOCs resulting from duplication of facilities and personnel, limitations on joint marketing, and deprivation of economies of scope.[144] The Ninth Circuit upheld the Commission's analysis of the costs of structural separation in *California I* and *California III*.[145]

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[139] *Id.* at 461, ¶¶ 202-03.

[140] *Id.* at 464-66, ¶¶ 211-14.

[141] *Computer III Phase I Order*, 104 FCC 2d at 1010-12, ¶¶ 96, 98.

[142] Specifically, the Commission found that the BOCs' ability to engage in access discrimination was hindered by implementation of the CEI and ONA requirements, development of the T1 standards committee, and growth of bypass and other alternatives to local service. *Computer III Phase I Order*, 104 FCC 2d at 1011, ¶ 97. The Commission also found that the BOCs' ability to misallocate costs was diminished by the availability of bypass and other new technologies, and political and regulatory pressures to minimize rural, residential, and small business local exchange rates. *Id.* at 1010-11, ¶¶ 95-96. As noted in ¶ 44 *supra*, because the Commission's recent *Price Caps Fourth Report and Order* eliminates the sharing mechanism, the BOCs' incentive to misallocate costs is further reduced. *See Price Caps Fourth Report and Order* at ¶¶ 147-155.

[143] *Computer III Phase I Order*, 104 FCC 2d at 1007, ¶ 89.

[144] *Computer III Phase I Order*, 104 FCC 2d at 1008-09, ¶ 91.

[145] The *California I* court stated that the record "suffice[d] to support" our finding that "separation has discouraged innovation in developing and marketing new enhanced services technologies, has prevented the BOCs from providing customers with efficient packages of basic and enhanced services, and has generally created inefficiencies by forcing the BOCs to maintain duplicate organizations and facilities." *California I*,

2. Effect of the 1996 Act and Other Factors

48. In the *Computer III Further Remand Notice*, the Commission sought comment on how various factors, including reports of anticompetitive behavior by the BOCs and the increase in the number of BOC information service offerings since the elimination of structural separation, affected the Commission's cost-benefit analysis of structural separation in *Computer III*.[146] The 1996 Act was enacted after the Commission issued the *Computer III Further Remand Notice*, and raises additional issues that may affect this cost-benefit analysis. As discussed in more detail below, we tentatively conclude that the Act's overall pro-competitive, de-regulatory framework, as well as our public interest analysis, support the continued application of the Commission's nonstructural safeguards regime to the provision by the BOCs of intraLATA information services.[147] We also tentatively conclude that allowing the BOCs to offer intraLATA information services subject to nonstructural safeguards serves as an appropriate balance of the need to provide incentives to the BOCs for the continued development of innovative new technologies and information services that will benefit the public with the need to protect competing ISPs against the potential for anticompetitive behavior by the BOCs. We thus propose to allow the BOCs to continue to provide intraLATA information services on an integrated basis, subject to the Commission's *Computer III* and ONA requirements as modified or amended by this proceeding, or on a structurally separate basis. If a BOC chooses to provide intraLATA information services on a structurally separate basis, we seek comment on whether we should permit the BOC to choose between a *Computer II* and an Act-mandated affiliate under section 272 or section 274, or whether we should mandate one of these types of affiliates.

a. Section 251 and Local Competition

49. Competition in the local exchange and exchange access markets is the best safeguard against anticompetitive behavior. BOCs are unable to engage successfully in discrimination and cost misallocation to the extent that competing ISPs have alternate sources

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905 F.2d at 1231. The *California III* court stated that "[p]etitioners have not raised any new claims with regard to the [Commission's] analysis of the costs of structural separation which would require us to reconsider our conclusion in *California I*." *California III*, 39 F.3d at 925.

[146] *Computer III Further Remand Notice*, 10 FCC Rcd at 8384-87, ¶¶ 36-40.

[147] In our previous *Computer III* orders, we have not made a regulatory distinction between interLATA and intraLATA information services, since the BOCs were prevented under the MFJ from providing any interLATA services. *See supra* note 16. Under the 1996 Act, BOC provision of interLATA information services (except for electronic publishing and alarm monitoring services) is subject to the separation and nondiscrimination requirements in section 272. *See* 47 U.S.C. § 272(a)(2)(C). We thus confine our tentative conclusion to the application of the Commission's nonstructural safeguards regime to BOC provision of intraLATA information services. We discuss separately the legal and regulatory issues regarding BOC provision of electronic publishing and alarm monitoring services *infra* at ¶¶ 71-74.

of access to basic services. Stated differently, when other telecommunications carriers, such as interexchange carriers (IXCs) or cable service providers, compete with the BOCs in providing basic services to ISPs, the BOCs are less able to engage successfully in discrimination and cost misallocation because they risk losing business from their ISP customers for basic services to these competing telecommunications carriers.[148]

50. As discussed above, the 1996 Act affirmatively promotes local competition. Sections 251 and 253, among other sections, are intended to eliminate entry barriers and foster competition in the local exchange and exchange access markets.[149] Indeed, the market for local exchange and exchange access services has begun to respond to some degree to the pro-competitive mandates of the 1996 Act. Some ISPs, for example, currently are obtaining basic services that underlie their information services from competing providers of telecommunications services that have entered into interconnection agreements with the BOCs pursuant to section 251.[150]

51. We recognize that the BOCs remain the dominant providers of local exchange and exchange access services in their in-region states,[151] and thus continue to have the ability and incentive to engage in anticompetitive behavior against competing ISPs. On the other hand, the movement toward local exchange and exchange access competition should, over time, decrease and eventually eliminate the need for regulation of the BOCs to ensure that they do not engage in access discrimination or cost misallocation of their basic service offerings.[152] The Commission has previously concluded that the nonstructural safeguards established in *Computer III* could combat such anticompetitive behavior as effectively as structural separation requirements, but in a less costly way.[153] We thus tentatively conclude that the de-regulatory, pro-competitive provisions of the 1996 Act, and the framework the 1996 Act set up for promoting local competition, are consistent with, and provide additional

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[148] We note that, even when the BOCs face competition from alternate providers of basic services, they may still be able to charge unreasonable rates for terminating access. The rules we adopted in our recently released *Access Reform Report and Order* address this issue. *See Access Reform Report and Order*, *supra* note 48, 12 FCC Rcd at 16135-42, ¶¶ 349-366.

[149] *See* discussion *supra* ¶¶ 18-19.

[150] *See, e.g., Third CLEC To Fan Flames of ISDN Competition*, ISDN News, *supra* note 101.

[151] The BOCs currently account for approximately 99.1 percent of the local service revenues in those markets. Industry Analysis Division, *Telecommunications Industry Revenue: TRS Worksheet Data* (Com. Car. Bur. Dec. 1996); *see also Non-Accounting Safeguards Order*, 11 FCC Rcd at 21912, ¶ 10.

[152] *See* discussion *supra* ¶¶ 29-36.

[153] *Computer III Phase I Order*, 104 FCC Rcd at 1011, ¶ 97. As noted above, we examine in this Further Notice the continued effectiveness of these nonstructural safeguards.

support for, the continued application of the Commission's current nonstructural safeguards regime for BOC provision of intraLATA information services. We seek comment on this tentative conclusion.

b. Structural Separation and the 1996 Act

52. In the *Computer III Further Remand Notice*, we sought comment on the issue of whether some form of structural separation should be reimposed for the provision of information services by the BOCs, and we discussed briefly the costs and benefits that the Commission previously identified in granting structural relief to the BOCs. In this section, we seek comment on the extent to which the Act-mandated separation requirements may affect this cost-benefit analysis.

53. As noted above, the 1996 Act permits the BOCs to enter markets from which they were previously restricted, allowing the BOCs to develop and market innovative new technologies and information services. In doing so, Congress in certain cases imposed structural separation requirements on the BOCs. Section 272, for example, allows the BOCs to provide certain interLATA information services as well as in-region, interLATA telecommunications services, and to engage in manufacturing activities, only through a structurally separate affiliate. Section 274 imposes structural separation requirements on BOC provision of intraLATA and interLATA electronic publishing services. Congress did not, however, mandate separation requirements for BOC provision of other information services.[154]

54. In the *Non-Accounting Safeguards Order* we recognized that section 272 on its face does not require the BOCs to offer intraLATA information services through a separate affiliate, and deferred to this proceeding the question of whether the Commission should exercise its general rulemaking authority to do so.[155] We find it significant that Congress limited the separate affiliate requirement in section 272 to BOC provision of most interLATA information services, interLATA telecommunications services, and manufacturing, and in section 274 to BOC provision of electronic publishing services.[156] We therefore tentatively conclude that Congress' decision to impose structural separation requirements in sections 272

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[154] *See, e.g.*, 47 U.S.C. §§ 260, 275 (governing the provision of telemessaging and alarm monitoring services, respectively). While some parties asked the Commission to impose separation requirements on the provision of intraLATA telemessaging services pursuant to our general regulatory authority, we declined to do so. *See Telemessaging and Electronic Publishing Order*, 12 FCC Rcd at 5457, ¶ 227. We also note that section 276 requires the Commission to prescribe a set of nonstructural safeguards for BOC provision of payphone service at least "equal to those adopted in the [*Computer III*] proceeding." 47 U.S.C. § 276(b)(1)(C). *See infra* ¶¶ 76-77 for a discussion of the nonstructural safeguards applicable to BOC provision of payphone service.

[155] *See Non-Accounting Safeguards Order*, 11 FCC Rcd at 21971, ¶ 135.

[156] *See* 47 U.S.C. § 272.

and 274, while relevant to our cost-benefit analysis, does not in itself warrant a return to structural separation for BOC provision of intraLATA information services not subject to those sections. We seek comment on this tentative conclusion.

55. Congress's decision to mandate structural separation only for certain information services does not necessarily foreclose the Commission from mandating or allowing structural separation for other information services. We recognize that, for example, the statutory separate affiliate requirements may reduce the cost of returning to a structural separation regime for BOC provision of intraLATA information services, given that the BOCs already are required to establish at least one structurally separate affiliate in order to provide the services covered by sections 272 and 274.[157] Some BOCs may find it more efficient to provide all of their information services through a statutorily-mandated affiliate. In addition, it may be in the public interest for the Commission to prescribe a uniform set of regulations for BOC provision of both intraLATA and interLATA information services, by requiring, for example, that BOCs provide all information services through an affiliate that complies with the statute. This approach would eliminate the need to distinguish between intraLATA and interLATA information services for purposes of regulation and, consequently, lower compliance and enforcement costs.

56. On the other hand, mandatory structural separation would entail increased transaction and production costs for the BOCs, as discussed above.[158] In addition, in the *Computer III Further Remand Notice* we noted that all of the BOCs currently are offering some information services on an integrated basis pursuant to CEI plans approved by the Commission.[159] Thus, our cost-benefit analysis should take into account the costs today of returning to structural separation. These would include the personnel, operational, and other changes the BOCs would have to undergo in order to reinstate a regime of structural separation, and the service disruptions, lower service quality, reduced innovation, and higher user rates that may result.[160] We must also consider the effect on the public of the potential

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[157] We permitted the BOCs in the *Telemessaging and Electronic Publishing Order* to provide section 272 services and electronic publishing services through the same affiliate, so long as that affiliate meets the requirements of both sections 272 and 274 for each service. *Telemessaging and Electronic Publishing Order*, 12 FCC Rcd at 5407, ¶ 110.

[158] *See supra* at ¶¶ 46-47 and note 136.

[159] *Computer III Further Remand Notice*, 10 FCC Rcd at 8386-87, ¶ 40.

[160] As discussed in the *Computer III Further Remand Notice*, the BOCs have indicated that they would have to "relocate hundreds of pieces of [information] services equipment, transfer or hire hundreds of dedicated [information] services personnel and replace integrated sales personnel with a dedicated direct sales force." *Computer III Further Remand Notice*, 10 FCC Rcd at 8386, 87, ¶ 40 (citing Joint Contingency Petition for Interim Waiver of the *Computer II* Rules at Exhibit B (Nov. 14, 1994) (*Interim Waiver Petition*)). In 1991, US West and Pacific Bell estimated that the one-time costs of converting from integrated to structurally separated

delay in the development of new technologies and information services by the BOCs that may result. In addition, once the separation requirements under sections 272 and 274 sunset,[161] structural separation for intraLATA information services based on the existence of the statutorily-mandated affiliates would have to be reexamined.

57. We also recognize the benefits of a flexible, regulatory framework that would allow the BOCs, consistent with the public interest, to structure their operations as they see fit in order to maximize efficiencies and thus provide greater benefits to consumers. We note that, under our current rules, a BOC may provide an intraLATA information service either on an integrated basis pursuant to an approved CEI plan or on a structurally separated basis pursuant to the Commission's *Computer II* rules.[162] SBC has argued that the BOCs continue to need this type of flexibility to provide intraLATA information services either on an integrated basis, subject to appropriate safeguards, or through a separate affiliate, because the most appropriate form of regulation varies service-by-service, depending on the relative significance of cost considerations and other factors.[163] Although the Commission may need to devote more resources to administer and enforce multiple regulatory regimes, this approach would allow the BOCs to structure their intraLATA information service offerings more in accordance with their business needs. In addition, such an approach may minimize the risk of service disruptions, since the BOCs would not have to change the manner in which they are providing their current intraLATA information service offerings.[164]

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provision of voice mail service alone would be as high as $10-$15 million. *Id.* (citing *BOC Safeguards Order*, 6 FCC Rcd at 7621, ¶ 104). The BOCs also estimated that converting to structural separation would result in price increases for information services between 30 and 80 percent. *Id.*

[161] The structural separation requirements for interLATA information services under section 272 and those for electronic publishing under section 274 expire on February 8, 2000, although section 272 authorizes the Commission to extend the four-year period for interLATA information services by rule or order. 47 U.S.C. §§ 272(f)(2), 274(g)(2).

[162] While BOCs can also provide intraLATA information services through a section 272 or 274 affiliate, we have deferred to this proceeding the issue of whether doing so would relieve the BOCs of the obligation to file a CEI plan. *See* ¶¶ 66-72 *infra*.

[163] *See* Letter from Todd F. Silbergeld, SBC Communications Inc., to William F. Caton, Acting Secretary, FCC, April 25, 1997; Letter from Robert J. Gryzmala, Southwestern Bell Telephone, to William F. Caton, Acting Secretary, FCC, June 21, 1996.

[164] As noted above, the BOCs previously have indicated that reimposition of structural separation likely would require them to relocate hundreds of pieces of equipment to provide information services, transfer or hire hundreds of dedicated information services personnel, and replace integrated sales personnel with a dedicated direct sales force. *Computer III Further Remand Notice*, 10 FCC Rcd at 8386-87, ¶ 40 (*citing Interim Waiver Petition* at Exhibit B).

58. In addition to the factors cited by the Commission in the *Computer III Phase I Order*,[165] more recent events may affect the analysis of the relative costs and benefits of structural and nonstructural safeguards. In particular, we earlier discussed how our *Price Caps Fourth Report and Order* eliminates the sharing mechanism from the price caps regime, thereby reducing the BOCs' incentive to misallocate costs.[166] We also described previously how the local competition provisions of the 1996 Act provide for alternate sources of access to basic services, thereby diminishing the BOCs' ability to engage in anticompetitive behavior against competing ISPs.[167]

59. In light of this analysis, we continue to believe it is preferable, as a matter of public interest, to continue with the Commission's nonstructural safeguards regime rather than to reimpose structural separation, notwithstanding the affiliate requirements of sections 272 and 274 of the Act. We thus tentatively conclude that the BOCs should continue to be able to choose whether to provide intraLATA information services either on an integrated basis, subject to the Commission's *Computer III* and ONA requirements as modified or amended by this proceeding, or pursuant to a separate affiliate. We seek comment on this tentative conclusion. In addition, if a BOC chooses to provide intraLATA information services through a separate affiliate, we seek comment on whether we should permit the BOC to choose between a *Computer II* and an Act-mandated affiliate, or whether we should mandate one of these types of affiliates. Finally, we seek comment on how the recent *SBC v. FCC* decision in the United States District Court for the Northern District of Texas affects this analysis.[168]

C. Comparably Efficient Interconnection (CEI) Plans

1. Proposed Elimination of Current Requirements

60. In the *Interim Waiver Order* adopted in response to the *California III* decision, the Bureau allowed the BOCs to continue to provide existing enhanced services on an integrated basis, provided that they filed CEI plans for those services.[169] In addition, the

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[165] *See supra* ¶ 47.

[166] *See supra* ¶ 44.

[167] *See supra* ¶¶ 49-51.

[168] *See supra* note 18.

[169] *Interim Waiver Order*, 10 FCC Rcd 1724 (1995). A CEI plan details how a BOC proposes to comply with the nine CEI "equal access" parameters with respect to the provision of a specific enhanced service. These parameters include: 1) interface functionality; 2) unbundling of basic services; 3) resale; 4) technical characteristics; 5) installation, maintenance, and repair; 6) end user access; 7) CEI availability as of the date the BOC offers its own enhanced service to the public; 8) minimization of transport costs; and 9) availability to all interested ISPs. *See Computer III Phase I Order*, 104 FCC 2d at 1039-1042, ¶¶ 154-166.

Bureau required the BOCs to file CEI plans for new enhanced services they propose to offer, and to obtain the Bureau's approval for these plans before beginning to provide service.[170] We concluded that the partial vacation of the *BOC Safeguards Order* in *California III* reinstated the service-specific CEI plan regime, augmented by implementation of ONA, until the Commission concluded its remand proceedings.[171] BOCs were also required to comply with the requirements established in their approved ONA plans, because we had previously determined that ONA requirements are independent of the removal of structural separation requirements.[172]

61. In this Further Notice, we tentatively conclude that we should eliminate the requirement that BOCs file CEI plans and obtain Bureau approval for those plans prior to providing new information services. We note that CEI plans were always intended to be an interim measure, designed to bridge the gap between the Commission's decision to lift structural separation in the *Computer III Phase I Order* and the implementation of ONA. While CEI plans have been effective as interim safeguards,[173] we tentatively conclude that they are not necessary to protect against access discrimination once the BOCs are providing information services pursuant to approved ONA plans, which they have been for several years.[174] ONA provides ISPs an even greater level of protection against access discrimination than CEI. Under ONA, not only must the BOCs offer network services to competing ISPs in

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[170] *Interim Waiver Order*, 10 FCC Rcd at 1730, ¶ 30.c.

[171] *Interim Waiver Order*, 10 FCC Rcd at 1728, ¶ 20. Since issuing the *Interim Waiver Order*, the Bureau has approved CEI plans and amendments for a number of preexisting BOC enhanced services offerings. *See Bell Operating Companies Joint Petition for Waiver of Computer II Rules*, Order, 10 FCC Rcd 13,758 (Com. Car. Bur. 1995). The Bureau has also approved CEI plans for a number of new BOC enhanced service offerings. *See, e.g., Ameritech's Offer of Comparably Efficient Interconnection to Providers of Message Delivery Service*, 11 FCC Rcd 5590 (Com. Car. Bur. 1996); *NYNEX Telephone Companies Offer of Comparably Efficient Interconnection to Providers of Enhanced Services*, 11 FCC Rcd 2419 (Com. Car. Bur. 1996); *Southwestern Bell Telephone Companies Offer of Comparably Efficient Interconnection to Providers of Enhanced Services*, 11 FCC Rcd 7041 (Com. Car. Bur. 1996); *Bell Atlantic Telephone Companies Offer of Comparably Efficient Interconnection to Providers of Internet Access Services*, Order, 11 FCC Rcd 6919 (Com. Car. Bur. 1996), *recon. pending*; *Southwestern Bell Telephone Companies Comparably Efficient Interconnection Plans for Security Services*, 11 FCC Rcd 10938 (Com. Car. Bur. 1997).

[172] *Interim Waiver Order*, 10 FCC Rcd at 1728, ¶ 22, citing *Computer III Remand Proceedings*, 5 FCC Rcd 7719 (1990) (*ONA Remand Order*).

[173] The *California III* court acknowledged that, as an interim measure until ONA was implemented, CEI plans "ensured that enhanced service competitors were provided with interconnections to the BOCs' own networks that were substantially equivalent to the interconnections that the BOCs provided for their own enhanced services." *California III*, 39 F.3d at 927.

[174] *See Computer III Further Remand Proceedings*, 10 FCC Rcd at 8374, ¶ 19. The BOCs currently make available to competing ISPs over 150 ONA network services.

compliance with the nine CEI "equal access" parameters, but the BOCs must also unbundle and tariff key network service elements beyond those they use to provide their own enhanced services offerings.[175] BOCs are also subject to ONA amendment requirements that constitute an additional safeguard against access discrimination following the lifting of structural separation.[176]

62. Further, under the 1996 Act, the BOCs are now subject to additional statutory requirements that will help prevent access discrimination, including the section 251 unbundling requirements and the network information disclosure requirements of section 251(c)(5).[177] These statutory requirements all serve as further protections against access discrimination, both by requiring the BOCs to open the local exchange market to competition, and by ensuring that the BOCs publicly disclose on a timely basis information about changes in their basic network services.

63. Given the protections afforded by ONA and the 1996 Act, we believe that the substantial administrative costs associated with BOC preparation, and agency review, of CEI plans outweigh their utility as an additional safeguard against access discrimination. Moreover, the time and effort involved in the preparation and review of the CEI plans may delay the introduction of new information services by the BOCs, without commensurate regulatory benefits. Such a result is contrary to one of the Commission's original purposes in adopting a nonstructural safeguards regime, which was to promote and speed introduction of new information services, benefiting the public by giving them access to innovative new technologies.[178]

64. For the reasons outlined above, we tentatively conclude that we should eliminate the requirement that BOCs file CEI plans and obtain Bureau approval for those plans prior to providing new information services. We believe the significant burden imposed by these requirements on the BOCs and the Commission outweighs their possible incremental

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[175] *Computer III Phase I Order*, 104 FCC 2d at 1019-20, ¶ 113; *see also Computer III Further Remand Proceedings*, 10 FCC Rcd at 8373, ¶ 18.

[176] If a BOC seeks to offer an enhanced service that uses a new basic underlying service or otherwise uses different arrangements for basic underlying services than those included in its approved ONA plan, the BOC must amend its ONA plan at least 90 days before it proposes to offer the enhanced service, and must obtain Commission approval of the amendment before it can use the new basic service for its own enhanced services. *Computer III Phase I Order*, 104 FCC 2d at 1068, ¶¶ 221-222; *BOC ONA Further Amendment Order*, 6 FCC Rcd at 7654, ¶ 13. We further discuss the ONA amendment process, and seek comment on whether this process has been effective, in Part IV.D.1.

[177] *See infra* ¶ 121 for a discussion of the section 251(c)(5) network information disclosure requirements.

[178] *See generally Computer III Phase I Order*, 104 FCC 2d at 1007-1011, ¶¶ 88-97.

benefit as additional safeguards against access discrimination.[179] In this light, we tentatively conclude that lifting the CEI plan requirement will further our statutory obligation to review and eliminate regulations that are "no longer necessary in the public interest."[180] We seek comment on this tentative conclusion and our supporting analysis. Parties who disagree with this tentative conclusion should address whether there are more streamlined procedures that could be adopted as an alternative to the current CEI filing requirements.

65. We recognize that, as part of our effort to reexamine our nonstructural safeguards regime, we seek comment in this Further Notice on whether we should modify or amend certain ONA requirements.[181] Because we base our tentative conclusion that we should eliminate the CEI-plan filing requirement in part on the adequacy of ONA, we ask that parties comment on how any of the modifications the Commission proposes in Part IV.D., or proposed by commenters in response to our questions, may affect this tentative conclusion. We also seek comment on whether the requirements that the 1996 Act imposes on the BOCs, such as those relating to section 251 unbundling and network information disclosure, are sufficient in themselves to provide a basis for eliminating CEI plans.

2. Treatment of Services Provided Through 272/274 Affiliates

a. Section 272

66. In the *Non-Accounting Safeguards Order*, we noted that section 272 of the Act imposes specific separate affiliate and nondiscrimination requirements on BOC provision of "interLATA information services," but does not address BOC provision of intraLATA information services.[182] We concluded that, pending the conclusion of the *Computer III Further Remand* proceeding, BOCs may continue to provide intraLATA information services on an integrated basis, in compliance with the Commission's nonstructural safeguards established in *Computer III* and ONA.[183]

67. The *Non-Accounting Safeguards Order* also raised the related issue of whether a BOC that provides all information services (both intraLATA and interLATA) through a

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[179] *See, e.g., Ameritech's Comparably Efficient Interconnection Plan for Electronic Vaulting Service*, CCBPol 97-03, Order, DA 97-2715 (rel. Dec. 31, 1997) (evaluating in detail and approving CEI plan to which no party had filed objections).

[180] *See* 47 U.S.C. § 161 (requiring the Commission periodically to review and eliminate unnecessary regulations).

[181] *See infra* Part IV.D.

[182] *Non-Accounting Safeguards Order*, 11 FCC Rcd at 21969-70, ¶ 132.

[183] *Id.* at 21969-71, ¶¶ 132, 134.

section 272 separate affiliate satisfies the Commission's *Computer II* separate subsidiary requirements, and therefore does not have to file a CEI plan for those services.[184] We noted that the record in the *Non-Accounting Safeguards Order* was insufficient to make this determination, and that we would examine this issue in the *Computer III Further Remand* proceeding.

68. If we do not adopt our tentative conclusion in this proceeding to eliminate the CEI plan filing requirement for the BOCs,[185] we tentatively conclude that the BOCs should not have to file CEI plans for information services that are offered through section 272 separate affiliates, notwithstanding that section 272's requirements are not identical to the Commission's *Computer II* requirements (all other applicable *Computer III* and ONA safeguards, however, as amended or modified by this proceeding, would continue to apply). We note that, to the extent certain or all BOCs no longer have to provide interLATA services through a section 272 affiliate as a result of the *SBC v. FCC* decision by the United States District Court for the Northern District of Texas, then this tentative conclusion would not apply.[186]

69. We reach our tentative conclusion for several reasons. First, we believe that the concerns underlying the Commission's *Computer II* requirements regarding access discrimination and cost misallocation are sufficiently addressed by the accounting and non-accounting requirements set forth in section 272 and the Commission's orders implementing this section.[187] Second, after a BOC receives authority under section 271 to provide interLATA services through a section 272 affiliate, the BOC in many cases may want to provide a seamless information service to customers that would combine both the inter- and intraLATA components of such service. For the Commission to require that the BOC also receive approval under a CEI plan for the intraLATA component of such service is, in our view, unnecessary, and likely to delay the provision of integrated services that would be beneficial to consumers. We seek comment on this tentative conclusion and supporting analysis.

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[184] *Id.* at 21972, ¶ 137.

[185] *See supra* Part IV.C.1.

[186] *See supra* note 18.

[187] *See, e.g., Non-Accounting Safeguards Order*, 11 FCC Rcd at 21976-96, ¶¶ 146-91 (structural separation requirements), 21997-22017, ¶¶ 194-236 (nondiscrimination safeguards), 22036-47, ¶¶ 272-92 (joint marketing restrictions); *Implementation of the Telecommunications Act of 1996: Accounting Safeguards Under the Telecommunications Act of 1996*, CC Docket No. 96-150, Report and Order, 11 FCC Rcd 17539 at 17617-18, ¶¶ 167-70 (accounting requirements) (1996) (*Accounting Safeguards Order*).

70. We also noted in the *Non-Accounting Safeguards Order* that other issues raised regarding the interplay between the 1996 Act and the Commission's *Computer III/ONA* regime would be addressed in the *Computer III Further Remand* proceeding.[188] These included whether: (1) the Commission should harmonize its regulatory treatment of intraLATA information services provided by the BOCs with the section 272 requirements imposed by Congress on interLATA information services; (2) the 1996 Act's CPNI, network disclosure, nondiscrimination, and accounting provisions supersede various of the Commission's *Computer III* nonstructural safeguards; and (3) section 251's interconnection and unbundling requirements render the Commission's *Computer III* and *ONA* requirements unnecessary. These issues are either being addressed in this Further Notice or have been covered in other proceedings.[189]

b. Section 274

71. In the *Telemessaging and Electronic Publishing Order*, we concluded that the Commission's *Computer II*, *Computer III*, and ONA requirements continue to govern the BOCs' provision of intraLATA electronic publishing services.[190] We found, however, that the record was insufficient to determine whether BOC provision of electronic publishing through a section 274 affiliate satisfied all the relevant requirements of *Computer II*, such that the BOC would not have to file a CEI plan for that service.[191] We noted that we would consider that issue, as well as other issues raised regarding the revision or elimination of the *Computer III/ONA* requirements, in the *Computer III Further Remand* proceeding.

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[188] *Non-Accounting Safeguards Order*, 11 FCC Rcd at 21970-71, ¶¶ 133, 135.

[189] *See supra* ¶¶ 52-59 for a discussion of whether the Commission should harmonize its regulatory treatment of intraLATA information services with section 272. *See infra* ¶¶ 117-126 for a discussion of the 1996 Act's network disclosure and CPNI requirements. We previously concluded that the 1996 Act's nondiscrimination requirements are consistent with *Computer III* and apply in addition to the Commission's *Computer III* requirements. *See, e.g., Telemessaging and Electronic Publishing Order*, 12 FCC Rcd at 5446, 5455, ¶¶ 199-200, 221; *Alarm Monitoring Order*, 12 FCC Rcd at 3848-49, ¶ 55. We also have already concluded that our existing accounting safeguards, with some modifications, effectively prevent BOCs from cross-subsidizing their unregulated information services with the BOCs' regulated local exchange service under the 1996 Act. *See generally Accounting Safeguards Order*, 11 FCC Rcd 17539. *See infra* ¶¶ 92-96 for a discussion of section 251 unbundling vis-a-vis ONA.

[190] *Telemessaging and Electronic Publishing Order*, 12 FCC Rcd at 5446, ¶ 200. We also found that section 274, which establishes specific structural separation and nondiscrimination requirements for BOC provision of electronic publishing, applies to the provision of both intraLATA and interLATA electronic publishing. *Id.* at 5383, ¶ 50. BOCs that want to provide interLATA electronic publishing, however, must first obtain section 271 authorization to do so. *See* 47 U.S.C. § 271; *Non-Accounting Safeguards Order*, 11 FCC Rcd at 21908-09, ¶ 3.

[191] *Telemessaging and Electronic Publishing Order*, 12 FCC Rcd at 5446, ¶ 200.

72. If we do not adopt our tentative conclusion in this proceeding to eliminate the CEI plan filing requirement for the BOCs, we tentatively conclude, as we do above for information services that are provided through a section 272 affiliate, that BOCs should not have to file CEI plans for electronic publishing services or other information services provided through their section 274 affiliate (as noted above, however, all other applicable *Computer III* and ONA safeguards, as amended or modified by this proceeding, would continue to apply). As noted above, to the extent certain or all BOCs no longer are subject to section 274 for their provision of electronic publishing as a result of the *SBC v. FCC* decision by the United States District Court for the Northern District of Texas, then this tentative conclusion would not apply.[192]

73. Again, we reach our tentative conclusion for several reasons. First, we believe the section 274 separation and nondiscrimination requirements, and the Commission's rules implementing those requirements, are sufficient to address concerns regarding access discrimination and misallocation of costs in general. Second, given that Congress set forth detailed rules in section 274 for the specific provision of electronic publishing services, we do not believe the Commission should continue to require the BOCs to file, and the Commission to approve, CEI plans before the BOCs may provide such services. We seek comment on this tentative conclusion and supporting analysis.

3. Treatment of Telemessaging and Alarm Monitoring Services

74. In the *Telemessaging and Electronic Publishing Order* and the *Alarm Monitoring Order*, respectively, we concluded that the Commission's *Computer II*, *Computer III*, and ONA requirements continue to govern the BOCs' provision of intraLATA telemessaging services[193] and alarm monitoring services.[194] Because neither section 260 nor

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[192] *See supra* note 18.

[193] *Telemessaging and Electronic Publishing Order*, 12 FCC Rcd at 5455, ¶ 221. We also noted that BOC provision of interLATA telemessaging service is subject to the requirements of section 272 in addition to the requirements of section 260. *Id.* at 5450, ¶ 210.

[194] *See Alarm Monitoring Order*, 12 FCC Rcd at 3848-49, ¶ 55. We also found that section 275 applies to the provision by the BOCs of both intraLATA and interLATA alarm monitoring services. *Id.* at 3831-32, ¶ 16. Section 275(a)(1), however, generally prevents the BOCs from engaging in the provision of alarm monitoring service until February 8, 2001. *See* 47 U.S.C. § 275. Because Ameritech is the only BOC that was authorized to provide alarm monitoring services as of November 30, 1995, we found that Ameritech is the only BOC that qualifies for "grandfathered" treatment under section 275(a)(2). *See id.* § 275(a)(2); *Alarm Monitoring Order*, 12 FCC Rcd at 3839, ¶ 33. Ameritech provides intraLATA alarm monitoring pursuant to an approved CEI plan, *see Bell Operating Companies Joint Petition for Waiver of Computer II Rules*, 10 FCC Rcd 13758, 13769-70, ¶¶ 72-75 (Com. Car. Bur. 1995) (approving Ameritech's CEI plan for "SecurityLink" service), and interLATA alarm monitoring service pursuant to an MFJ waiver. *See United States v. Western Electric Co.*, No. 82-0192, slip op. (D.D.C. Sept. 8, 1995).

section 275 imposes separation requirements for the provision of intraLATA telemessaging services or alarm monitoring services, respectively, BOCs may provide those services, subject both to other restrictions in those sections, as applicable,[195] as well as the Commission's current nonstructural safeguards regime, as modified by the proposals that we may adopt in this proceeding.

4. Related Issues

75. If we adopt our tentative conclusion to eliminate the CEI plan filing requirement for the BOCs, we seek comment on whether we should dismiss all CEI matters pending at that time (including pending CEI plans, pending CEI plan amendments, and requests for CEI waivers), on the condition that the BOCs must comply with any new or modified rules that may be established as a result of this Further Notice.[196] We also seek comment on whether we should require a BOC with CEI approval to continue to offer service under the CEI requirements. To the extent that parties involved in pending CEI matters raise issues other than those directly related to the CEI requirements (*e.g.*, whether the service for which the BOC is seeking CEI-plan approval is a true information service, as opposed to a telecommunications service that should be offered under tariff), we seek comment on how and in what forum those issues should be addressed.

76. We note that section 276 directs the Commission to prescribe a set of nonstructural safeguards for BOC provision of payphone service, which must include, at a minimum, the "nonstructural safeguards equal to those adopted in" the *Computer III* proceeding.[197] In implementing section 276, the Commission required the BOCs, among other

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[195] *See* discussion of *SBC v. FCC*, *supra* note 18.

[196] Pending CEI-related matters include, for example: *Bell Atlantic Telephone Companies Offer of Comparably Efficient Interconnection to Providers of Internet Access Services,* Order, 11 FCC Rcd 6919 (Com. Car. Bur. 1996), *recon. pending*; *Pleading Cycle Established for Comments on the Amendment to Bell Atlantic's Plan to Offer Comparably Efficient Interconnection to Providers of Enhanced Internet Access Services in the NYNEX Region States,* Public Notice, CCBPol 96-09, DA 97-1039 (rel. May 16, 1997); *Pleading Cycle Established for Comments on SWBT's Plan to Provide Comparably Efficient Interconnection Internet Support Services,* Public Notice, CCBPol 97-05, DA 97-1132 (rel. May 29, 1997); *Bell Operating Companies' Joint Petition for Waiver of Computer II Rules,* Order, 10 FCC Rcd 13758 n.6 (Ameritech's Plan to Provide Comparably Efficient Interconnection to Providers of Fast Packet Data Services and Internet Access Services Pending).

[197] 47 U.S.C. § 276.

things, to file CEI plans describing how they would comply with various nonstructural safeguards.[198] The Bureau approved the BOCs' CEI plans to provide payphone service on April 15, 1997.[199]

77. We seek comment on whether the changes that may be made to the Commission's *Computer III* and ONA rules as a result of this Further Notice should also apply to the nonstructural safeguards regime established in the *Payphone Order* proceeding for BOC provision of payphone service. For example, to the extent that we adopt our tentative conclusion to eliminate the CEI plan filing requirement, should we also relieve the BOCs from the requirement of filing amendments to their CEI plans for payphone service? How does this comport with the statutory requirement in section 276? We seek comment on these issues.

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[198] *Implementation of the Pay Telephone Reclassification and Compensation Provisions of the Telecommunications Act of 1996*, CC Docket No. 96-128, Report and Order, 11 FCC Rcd 20541 at 20640-41, ¶ 199 (*Payphone Order*) (subsequent citations omitted). BOC provision of payphone service is also subject, among other things, to certain accounting safeguards. *See Accounting Safeguards Order*, 11 FCC Rcd at 17582, 17652-17655, ¶¶ 100, 251-258.

[199] *See Ameritech's Plan to Provide Comparably Efficient Interconnection to Providers of Pay Telephone Services; Implementation of the Pay Telephone Reclassification and Compensation Provisions of the Telecommunications Act of 1996*, CC Docket No. 96-128, Order, DA 97-790 (rel. April 15, 1997) (CCB); *Bell Atlantic Telephone Companies' Comparably Efficient Interconnection Plan for the Provision of the Basic Payphone Services; Implementation of the Pay Telephone Reclassification and Compensation Provisions of the Telecommunications Act of 1996*, CC Docket No. 96-128, Order, DA 97-791 (rel. April 15, 1997) (CCB); *BellSouth Corporation's Offer of Comparably Efficient Interconnection to Payphone Service Providers; Implementation of the Pay Telephone Reclassification and Compensation Provisions of the Telecommunications Act of 1996*, CC Docket No. 96-128, Order, DA 97-792 (rel. April 15, 1997) (CCB); *The NYNEX Telephone Companies' Offer of Comparably Efficient Interconnection to Payphone Service Providers; Implementation of the Pay Telephone Reclassification and Compensation Provisions of the Telecommunications Act of 1996*, CC Docket No. 96-128, Order, DA 97-793 (rel. April 15, 1997) (CCB); *Pacific Bell and Nevada Bell Comparably Efficient Interconnection Plan for the Provision of Basic Telephone Service; Implementation of the Pay Telephone Reclassification and Compensation Provisions of the Telecommunications Act of 1996*, CC Docket No. 96-128, Order, DA 97-794 (rel. April 15, 1997) (CCB); *Southwestern Bell Telephone Company's Comparably Efficient Interconnection Plan for the Provision of Basic Payphone Services; Implementation of the Pay Telephone Reclassification and Compensation Provisions of the Telecommunications Act of 1996*, CC Docket No. 96-128, Order, DA 97-795 (rel. April 15, 1997) (CCB); *U S WEST's Comparably Efficient Interconnection Plan for Payphone Services; Implementation of the Pay Telephone Reclassification and Compensation Provisions of the Telecommunications Act of 1996*, CC Docket No. 96-128, Order, DA 97-796 (rel. April 15, 1997) (CCB) (collectively, *BOC CEI Payphone Orders*).

D. ONA and Other Nonstructural Safeguards

1. ONA Unbundling Requirements

a. Introduction

78. The Commission's ONA unbundling requirements serve both to safeguard against access discrimination and to promote competition and market efficiency in the information services industry. As described above, the Commission conditioned the permanent elimination of the *Computer II* structural separation requirements imposed on the BOCs upon the evolutionary implementation of ONA and other nonstructural safeguards. The ONA requirements, however, have a significance independent of whether they provide the basis for lifting structural separation. In 1990, during the course of the remand proceedings in response to *California I*, the Commission required the BOCs to implement ONA regardless of whether ONA provided the basis for elimination of structural separation. As discussed below, the Commission stated that "[a] major goal of ONA is to increase opportunities for ESPs to use the BOCs' regulated networks in highly efficient ways, enabling ESPs to expand their markets for their present services and develop new offerings as well, all to the benefit of consumers."[200] It was for this reason that the Commission applied the ONA requirements to GTE in 1994.[201]

79. ONA is the overall design of a carrier's basic network services to permit all users of the basic network, including the information services operations of the carrier and its competitors, to interconnect to specific basic network functions and interfaces on an unbundled and "equal access" basis.[202] The BOCs and GTE through ONA must unbundle key components of their basic services and make them available under tariff, regardless of whether their information services operations utilize the unbundled components. Such unbundling ensures that competitors of the carrier's information services operations can develop information services that utilize the carrier's network on an economical and efficient basis.

b. ONA Unbundling Requirements

80. In the *Computer III Phase I Order* we declined to adopt any specific network architecture proposals for ONA and instead specified certain standards that carriers' ONA plans must meet.[203] The unbundling standard for the BOCs required that: (1) the BOCs'

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[200] *ONA Remand Order*, 5 FCC Rcd at 7720, ¶¶ 7, 11.

[201] *See GTE ONA Order*, 9 FCC Rcd at 4924, 4932-36, ¶¶ 3, 16-24.

[202] *Computer III Phase I Order*, 104 FCC 2d at 1019, ¶ 113.

[203] *Computer III Phase I Order*, 104 FCC 2d at 1064, ¶ 213.

enhanced services operations obtain unbundled network services pursuant to tariffed terms, conditions, and rates available to all ISPs; (2) BOCs provide an initial set of basic service functions that could be commonly used in the provision of information services to the extent technologically feasible; (3) ISPs participate in developing the initial set of network services; (4) BOCs select the set of network services based on the expected market demand for such elements, their utility as perceived by information service competitors, and the technical and costing feasibility of such unbundling; and (5) BOCs comply with CEI requirements in providing basic network services to affiliated and unaffiliated ISPs.[204] In the *BOC ONA Order* that reviewed the initial BOC ONA plans for compliance with the Commission's requirements, the Commission generally approved the use of the "common ONA model" that described unbundled services BOCs would provide to competing ISPs.[205] Under the common ONA model, ISPs obtain access to various unbundled ONA services, termed Basic Service Elements (BSEs), through access links described as Basic Service Arrangements (BSAs).[206] BSEs are used by ISPs to configure their information services. Other ONA elements include Complementary Network Services (CNSs), which are optional unbundled basic service features (such as stutter dial tone) that an end user may obtain from carriers in order to obtain access to or receive information services, and Ancillary Network Services (ANSs), which are non-Title II services, such as billing and collection, that may be useful to ISPs.[207]

81. The BOCs and GTE are also subject to the ONA amendment requirement. Under this requirement, if a subject carrier itself seeks to offer an information service that uses a new BSE or otherwise uses different configurations of underlying basic services than those included in its approved ONA plan, the carrier must amend its ONA plan at least ninety days before it proposes to offer that information service.[208] The Commission must approve the amendment before the subject carrier can use the new basic service for its own information services.[209]

82. In addition to the ONA services that BOCs and GTE currently provide, there are mechanisms to help ISPs obtain the new ONA services they require to provide information services. As described below, when an ISP identifies a new network functionality

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[204] *Computer III Phase I Order*, 104 FCC 2d at 1064-66, ¶¶ 214-218. These requirements were originally applied only to the BOCs and were later extended to GTE. *See GTE ONA Order*, 9 FCC Rcd at 4937, ¶ 26.

[205] *BOC ONA Order*, 4 FCC Rcd at 13, ¶ 5.

[206] *See supra* notes 78 and 79.

[207] *See supra* notes 80 and 81. *See also BOC ONA Amendment Order*, 5 FCC Rcd at 3104, ¶ 4.

[208] *Computer III Phase I Order*, 104 FCC 2d at 1068, ¶ 221; *BOC ONA Further Amendment Order*, 6 FCC Rcd at 7654, ¶ 13.

[209] *Id.*

that it wants to use to provide an information service, it can request the service directly from the BOC or GTE through a 120-day process specified in our rules, or it can request that the Network Interconnection Interoperability Forum (NIIF)[210] sponsored by the Alliance for Telecommunications Industry Solutions (ATIS)[211] consider the technical feasibility of the service.

83. Under the Commission's 120-day request process, an ISP that requests a new ONA basic service from the BOC or GTE must receive a response within 120 days regarding whether the BOC or GTE will provide the service.[212] The BOC or GTE must give specific reasons if it will not offer the service. The BOC or GTE's evaluation of the ISP request is to be based on the ONA selection criteria set forth in the original *Phase I Order*: (1) market area demand; (2) utility to ISPs as perceived by the ISPs themselves; (3) feasibility of offering the service based on its cost; and (4) technical feasibility of offering the service.[213] If an ISP objects to the BOC or GTE's response, it may seek redress from the Commission by filing a petition for declaratory ruling.[214]

84. Additionally, ISPs can ask the NIIF for technical assistance in developing and requesting new network services.[215] Upon request, the NIIF will establish a task force composed of representatives from different industry sectors to evaluate the technical feasibility of the service, and through a consensus process, make recommendations on how the service can be implemented. ISPs can then take the information to a specific BOC or GTE and request the service under the 120-day process using the NIIF result to show that the request is technically feasible.

85. As part of the Commission's 1998 biennial review of regulations, we seek comment on whether ONA has been and continues to be an effective means of providing ISPs with access to the BOC/GTE unbundled network services they need to structure efficiently

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[210] We originally directed ISPs to seek such assistance from the IILC. As of January 1, 1997, the NIIF assumed the functions of the IILC. *See supra* note 87.

[211] ATIS is a private sector industry forum that promotes the resolution of national and international issues involving telecommunications standards and the development of operational guidelines.

[212] *BOC ONA Order*, 4 FCC Rcd at 205-08, ¶¶ 390-397; *BOC ONA Further Amendment Order*, 6 FCC Rcd at 7654-56.

[213] *Computer III Phase I Order*, 104 FCC 2d at 1065, ¶ 217.

[214] *BOC ONA Further Amendment Order*, 6 FCC Rcd at 7677-78, Appendix B.

[215] *BOC ONA Order*, 4 FCC Rcd at 33-34, ¶¶ 52-54.

and innovatively their information service offerings. To the extent that commenters assert that ONA is effective or ineffective, we request that they cite to specific instances to support their claims.

86. In addition, we seek comment on whether the "common ONA model" through which ISPs gain access to BSEs, BSAs, CNSs, and ANSs is adequate to provide ISPs with the network functionalities they need. If not, what specific changes to the ONA unbundling framework should be made? Some parties have argued that the common ONA model forces ISPs to purchase unnecessary services or functionalities that are embedded within the BSEs, BSAs, CNSs, and ANSs. We seek comment on this argument. In addressing these issues, commenters should take note of our separate inquiry below regarding the impact of section 251 and its separate unbundling regime.[216]

87. We further seek comment on whether ISPs make use of the ONA framework to acquire unbundled network services or whether they use other means to obtain such services in order to provide their information service offerings. Commenters that have used means other than ONA to acquire or provide unbundled network services should identify those means, state why ONA was not used, and discuss why the alternative approach was more effective and efficient.

88. In addition, we seek comment on whether the ONA 120-day request process established to help ISPs obtain new ONA services has been effective. We seek comment, from ISPs in particular, regarding whether they have made use of the 120-day request process, and the results from using that process. If ISPs have not used the 120-day request process, we request that they explain why they have not done so. We further request that parties comment, with specificity, on what, if anything, we should do to streamline the 120-day request process to make it more useful. In the alternative, we seek comment on whether the 120-day request process should be eliminated, in light of the fact that the issues that must be resolved between the carrier and the requesting ISP are technical and operational in nature, and may be most appropriately addressed in an industry forum, such as the NIIF. We also seek comment on whether the ONA amendment process has been effective.

89. We further seek comment regarding the role of the NIIF in helping ISPs obtain basic services from the BOCs and GTE. We seek comment, from ISPs in particular, regarding whether they have requested assistance from the NIIF in determining the technical feasibility of offering particular network functionalities as new basic services, and if so, the results obtained. If ISPs have not done so, we request that they tell us why not. We further

[216] *See infra* ¶¶ 92-96.

seek comment on whether we should continue to request that the NIIF perform the function of facilitating ISP ONA requests or whether some other forum or industry group would be more appropriate.[217]

90. Finally, we seek comment on whether and how the development of new information services, including, for example, Internet services, should affect our analysis of the effectiveness of the Commission's current ONA rules for ISPs. As we noted in the *Information Service and Internet Access NOI*, many of the Commission's existing rules have been designed for traditional circuit-switched voice networks rather than the emerging packet-switched data networks.[218] While the *Information Service and Internet Access NOI* sought comment, in general, on identifying ways in which the Commission could facilitate the development of high-bandwidth data networks while preserving efficient incentives for investment and innovation in the underlying voice network,[219] we seek comment in this Further Notice specifically on whether and how the Commission should modify the *Computer III* and ONA rules in light of these technological developments.

91. Specifically, we seek comment on how the Commission's *Computer III* or ONA rules may impact the BOCs' incentive to invest in and deploy data network switching technology. For example, the Commission's existing ONA rules require the BOCs to unbundle and separately tariff all basic services. We have interpreted this rule to require a BOC to unbundle and separately tariff a basic service used in the provision of an information service provided by the BOC affiliate, even where the basic service is solely located in, and owned by, the BOC affiliate, not the BOC. This situation may arise, for example, when a frame relay switch[220] is located in, and owned by, the BOC affiliate rather than the BOC. We seek comment on the appropriate treatment of these types of services.

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[217] We note that questions relating to the effectiveness of the new NIIF to address ONA issues on behalf of ISPs have been raised by the Association of Telemessaging Services International, Inc. (ATSI). *See* Letter from Herta Tucker, Executive Vice President, ATSI, to Reed Hundt, Chairman, FCC (March 31, 1997).

[218] *Information Service and Internet Access NOI*, 11 FCC Rcd at 21491, ¶ 311.

[219] *Id.*

[220] Frame relay is a high-speed packet-switching technology used to transport digital data between, among other things, geographically dispersed local area networks. The Commission has determined that frame relay service is a basic service. Under our rules, therefore, all common carriers owning transmission facilities used to provide basic frame relay service, or an enhanced service in conjunction with an underlying basic frame relay service, must file tariffs for the basic frame relay service. *See Independent Data Communications Manufacturers Association, Inc. Petition for Declaratory Ruling that AT&T's Interspan Frame Relay Service Is a Basic Service*, Memorandum Opinion and Order, 10 FCC Rcd 13717, 13718, ¶¶ 1, 6 (1995).