requiring incumbent LECs to provide all network elements for which it is technically feasible to provide access."[87] In considering whether to refrain from requiring the unbundling of a particular network element, the Commission is to weigh the standards set out in section 251(d)(2), as well as any other standards the Commission considers consistent with the objectives of the 1996 Act.[88]

51. So as to "promote efficient, rapid, and widespread new entry,"[89] the Commission identified a minimum list of seven network elements that incumbent LECs must make available to new entrants.[90] The Commission did not identify DSLAMs or packet switches as network elements that incumbent LECs must unbundle. It emphasized, however, that its list was a minimum one, because an exhaustive list would not accommodate changes in technology or differing local conditions.[91] Further, the Commission noted that it might identify "additional, or perhaps different" unbundling requirements in the future.[92]

**b. Discussion**

**(1) Loops**

52. We grant the ALTS request for a declaratory ruling that incumbent LECs are required, pursuant to section 251(c)(3) of the Act, to provide unbundled loops capable of transporting high speed digital signals.[93] ALTS asserts that competitive LECs are having extreme difficulty obtaining the digital loops needed to provide advanced services.[94] We agree with ALTS that, if we are to promote the deployment of advanced telecommunications

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[87] *Local Competition Order*, 11 FCC Rcd at 15641, ¶ 279.

[88] 47 U.S.C. § 251(d).

[89] *Local Competition Order*, 11 FCC Rcd at 15624, ¶ 241.

[90] *Id.* at 15683, ¶ 366.

[91] *Id.* at 15624-25, ¶ 243.

[92] *Id.* at 15626, ¶ 246.

[93] ALTS Petition at 13; *see also,* e.spire Comments (CC Docket No. 98-78) at 5, LCI Reply Comments (CC Docket No. 98-78) at 6-7, MCI Comments (CC Docket No. 98-78) at 2-3, NEXTLINK Comments (CC Docket No. 98-78) at 5, 8-9, WorldCom Comments (CC Docket No. 98-78) at 11, NAS Comments (CC Docket No. 98-78) at 2.

[94] ALTS Petition at 3.

capability to all Americans, competitive LECs must be able to obtain access to incumbent LEC xDSL-capable loops on an unbundled and nondiscriminatory basis.[95]

53. In the *Local Competition Order*, the Commission identified the local loop as a network element that incumbent LECs must unbundle "at any technically feasible point."[96] It defined the local loop to include "two-wire and four-wire loops that are conditioned to transmit the digital signals needed to provide services such as ISDN, ADSL, HDSL, and DS1-level signals."[97] To the extent technically feasible, incumbent LECs must "take affirmative steps to condition existing loop facilities to enable requesting carriers to provide services not currently provided over such facilities."[98] For example, if a carrier requests an unbundled loop for the provision of ADSL service, and specifies that it requires a loop free of loading coils, bridged taps, and other electronic impediments, the incumbent must condition the loop to those specifications, subject only to considerations of technical feasibility. The incumbent may not deny such a request on the ground that it does not itself offer advanced services over the loop, or that other advanced services that the competitive LEC does not intend to offer could be provided over the loop. As the Commission stated in the *Local Competition Order*, "section 251(c)(3) does not limit the types of telecommunications services that competitors may provide over unbundled elements to those offered by the incumbent LEC."[99]

54. The incumbent LECs' obligation to provide requesting carriers with fully functional conditioned loops extends to loops provisioned through remote concentration devices such as digital loop carriers (DLC). The Commission concluded in the *Local Competition Order* that it was "technically feasible" to unbundle loops that pass through an integrated DLC or similar remote concentration devices, and required incumbent LECs to unbundle such loops for competitive LECs.[100]

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[95] *See, e.g.*, NEXTLINK Comments (CC Docket No. 98-78) at 5 (Commission should clarify that for essential network elements (including the unbundled loop), incumbent LECs have a continuing obligation to provide nondiscriminatory access to such facilities for the provision of any telecommunications service); NAS Comments (CC Docket No. 98-78) at 2 (Commission should reaffirm that incumbent LECs must offer xDSL-capable loops as unbundled network elements); TCG Comments (CC Docket No. 98-78) at 4-6 (the ability of an xDSL loop to carry high speed data is an "embedded feature" functionally inseparable from the physical xDSL-conditioned copper loop, which is expressly an unbundled network element under the *Local Competition Order*); TRA Comments (CC Docket No. 98-78) at 7 (competitive LECs must have unbundled access to the network elements necessary to provide advanced telecommunications services).

[96] *Local Competition Order*, 11 FCC Rcd at 15690, ¶ 379.

[97] *Id.* at 15691, ¶ 380.

[98] *Id.* at 15692, ¶ 382. The requesting carrier bears the cost of such conditioning. *Id.*

[99] *Id.* at 15691-92, ¶ 381.

[100] *Id.* at 15692, ¶ 383.

55. To the extent that a competitive LEC cannot obtain nondiscriminatory access to an xDSL-capable loop, or any other loop capabilities to which it is entitled by virtue of section 251(c)(3) and the *Local Competition Order*, the competitive LEC can pursue remedies before the Commission and the appropriate state commissions. We note that the Commission has recently adopted an expedited complaint process to resolve these types of competitive issues in an accelerated fashion.[101]

56. Under our existing rules, incumbent LECs are also required to provide competing carriers with nondiscriminatory access to the operations support systems (OSS) functions for pre-ordering, ordering, and provisioning loops.[102] If new entrants are to have a meaningful opportunity to compete, they must be able to determine during the pre-ordering process as quickly and efficiently as can the incumbent, whether or not a loop is capable of supporting xDSL-based services.[103] An incumbent LEC does not meet the nondiscrimination requirement if it has the capability electronically to identify xDSL-capable loops, either on an individual basis or for an entire central office, while competing providers are relegated to a slower and more cumbersome process to obtain that information. In the NPRM below, we seek comment on whether we should adopt any additional rules to ensure that competing providers have nondiscriminatory access to the loop information they need to provide advanced services.[104]

### (2) Other Network Elements

57. We further grant ALTS' petition to the extent that ALTS requests a declaratory ruling that advanced services are telecommunications services, and that the facilities and equipment used to provide advanced services are network elements subject to the obligations in section 251(c).[105] Given our conclusion above that advanced services offered by incumbent

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[101] *Implementation of the Telecommunications Act of 1996 - Amendment of Rules Governing Procedures to be Followed When Formal Complaints are Filed Against Common Carriers*, CC Docket No. 96-238, Second Report and Order, (rel. July 14, 1998).

[102] *Local Competition Order*, 11 FCC Rcd at 15766, ¶ 523.

[103] *See id.* at 15763-64, ¶ 518. The Commission's rules define pre-ordering and ordering collectively as "the exchange of information between telecommunications carriers about current or proposed customer products and services or unbundled network elements or some combination thereof." 47 C.F.R. § 51.5. Pre-ordering generally includes those activities that a carrier undertakes to gather and confirm the information necessary to formulate an accurate order for a customer.

[104] *See infra* ¶¶ 157-72.

[105] ALTS petition at 14-17; NTIA July 17 *Ex Parte* at n.34.

LECs are telecommunications services, all equipment and facilities used in the provision of advanced services are "network elements" as defined by section 153(29).[106]

58. We seek comment in the NPRM below on the specific unbundling obligations that would apply to the network elements used to provide advanced services.[107] We note, for example, that the section 251(c)(3) unbundling requirement is subject to the question of technical feasibility. We seek comment in the NPRM on whether the Commission should weigh any criteria under section 251(d)(2) other than those expressly listed in that provision to determine the extent to which network elements used to provide advanced services should be unbundled.[108]

### 5. Resale Obligations Under Section 251(c)(4)

#### (a) Background

59. Section 251(c)(4) requires incumbent LECs to offer for resale at wholesale rates "any telecommunications service that the carrier provides at retail to subscribers who are not telecommunications carriers."[109] The Commission held in the *Local Competition Order* that this obligation extends to *all* telecommunications services, not merely voice services, that an incumbent LEC provides to subscribers who are not telecommunications carriers.[110] The Commission concluded that an incumbent LEC must establish a wholesale rate for every retail service that: (1) meets the statutory definition of a "telecommunications service," and (2) is provided at retail to subscribers who are not telecommunications carriers.[111] The Commission concluded, however, that exchange access services are generally offered to telecommunications carriers rather than retail subscribers, and thus were not subject to the provisions of section 251(c)(4).[112]

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[106] The term "network element" is defined in the Act as "a facility or equipment used in the provision of a telecommunications service. Such term also includes features, functions and capabilities that are provided by means of such facility or equipment . . . ." 47 U.S.C. § 153(29).

[107] *See infra* ¶ 82.

[108] *See infra* ¶ 83. We also note that, pursuant to section 251(f)(2) of the Act, incumbent LECs "with fewer than two percent of the nation's subscriber lines installed in the aggregate nationwide" may petition state commissions for suspension or modification of the requirements in section 251(c). 47 U.S.C. § 251(f)(2).

[109] 47 U.S.C. § 251(c)(4).

[110] *Local Competition Order*, 11 FCC Rcd at 15934-36, ¶¶ 871-77; *see also, e.g.*, AT&T Reply Comments (CC Docket Nos. 98-11, 98-26, 98-32) at 11.

[111] *Local Competition Order*, 11 FCC Rcd at 15934, ¶ 871.

[112] *Id.* at 15934, ¶ 873.

### (b) Discussion

60. Given our determination above that advanced services offered by incumbent LECs are telecommunications services, by the plain terms of the Act, incumbent LECs have the obligation to offer for resale, pursuant to section 251(c)(4), all advanced services that they generally provide to subscribers who are not telecommunications carriers. The Commission in the *Local Competition Order* similarly emphasized that the resale obligation extends to *all* such telecommunications services, including advanced services.[113]

61. To the extent that advanced services are local exchange services, they are subject to the resale provisions of section 251(c)(4). In the *Local Competition Order*, however, the Commission concluded that exchange access services are not subject to the provisions of section 251(c)(4) because "[t]he vast majority of purchasers of interstate access services are telecommunications carriers, not end users."[114] To the extent that advanced services are exchange access services, we believe that advanced services are fundamentally different from the exchange access services that the Commission referenced in the *Local Competition Order* and concluded were not subject to section 251(c)(4).[115] We expect that advanced services will be offered predominantly to residential or business users or to Internet service providers. None of these purchasers are telecommunications carriers.[116] We examine this issue further and propose specific requirements in the NPRM below.[117]

## 6. Collocation

### a. Background

62. In order to provide advanced services, new entrants may need to collocate equipment on the incumbent LEC's premises for interconnection and access to network elements.[118] Congress recognized competing providers' need for collocation in section 251(c)(6) of the Act, which requires incumbent LECs to provide "for the physical collocation

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[113] *Id.* at 15930, 15931, 15934, ¶¶ 863, 865-66, 871; *see, e.g.,* AT&T Reply Comments (CC Docket Nos. 98-11, 98-26, 98-32) at 11.

[114] *Local Competition Order*, 11 FCC Rcd at 15934, ¶ 873.

[115] In the Order, we do not decide whether or to what extent advanced services are "exchange access" services rather than local exchange services. *See supra* ¶ 40.

[116] *See Report to Congress on Universal Service*, at ¶¶ 73-82 (concluding that Internet service providers are not telecommunications carriers).

[117] *See infra* ¶ 85.

[118] *See, e.g.,* Covad Comments (CC Docket Nos. 98-11, 98-26, 98-32) at 13; DSL Access Telecommunications Alliance Comments (CC Docket Nos. 98-11, 98-26, 98-32) at 7-8.

of equipment necessary for interconnection or access to unbundled network elements at the premises of the local exchange carrier, except that the carrier may provide for virtual collocation if the local exchange carrier demonstrates to the State commission that physical collocation is not practical for technical reasons or because of space limitations."[119] In the *Local Competition Order*, the Commission implemented specific minimum requirements to implement the collocation requirements of section 251(c)(6).[120] The Commission adopted rules for, among other things, space allocation and exhaustion, types of equipment that could be collocated, and LEC premises where parties could collocate equipment.[121]

63. ALTS asserts that excessive rates and unreasonably burdensome terms and conditions for collocation are blocking competitive entry into data service markets.[122] As a result, ALTS requests that we initiate proceedings to help ensure implementation of section 251 and 252 of the Act with respect to deployment of advanced services. Among other requests, ALTS asks us to exercise our authority under section 251(c)(6) of the Act and establish additional rules governing collocation arrangements.[123]

**b. Discussion**

64. We conclude that the availability of cost efficient collocation arrangements is essential for the deployment of advanced services by facilities-based competing providers. Given incumbent LECs' statutory duty to provide physical collocation on just, reasonable, and nondiscriminatory rates, terms, and conditions,[124] we believe that incumbent LECs have a statutory obligation to offer cost efficient and flexible collocation arrangements. In addition, we expect that incumbent LECs will fulfill their statutory collocation duty by taking steps to offer collocation arrangements that permit new entrants to provide advanced services using equipment that the new entrant provides.[125] Such steps include offering collocation to competing providers in a manner that reduces unnecessary costs and delays for the competing

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[119] 47 U.S.C. § 251(c)(6).

[120] *Local Competition Order*, 11 FCC Rcd at 15782-15811, ¶¶ 555-617.

[121] *Id.*

[122] ALTS Petition at 2-3; *see also* Intermedia Comments (CC Docket No. 98-78) at 5 (the costs, delays, and restrictions associated with collocation are an impediment to the growth of facilities-based competition in local and advanced services markets).

[123] ALTS Petition at 2-3.

[124] 47 U.S.C. § 251(c)(6).

[125] Several of the petitioners acknowledge this obligation to allow competitors to collocate the equipment necessary to provide advanced services. *See* SBC Petition at 20-21; U S WEST Comments (CC Docket No. 98-78) at 31-34; Bell Atlantic Reply (CC Docket Nos. 98-11, 98-26, 98-32) at 26-27.

providers and that optimizes the amount of space available for collocation. We conclude that measures that optimize the available collocation space and that reduce costs and delays for competing providers are consistent with an incumbent LEC's obligation under both the statute and our rules. In addition, we agree with ALTS that we should build upon our current physical and virtual collocation requirements adopted in the *Expanded Interconnection*[126] and *Local Competition*[127] proceedings to ensure that our rules promote, to the greatest extent possible, the rapid deployment of advanced telecommunications capability to all Americans. We, therefore, propose specific additional physical and virtual collocation requirements in the NPRM below.[128]

### B. Forbearance and LATA Boundary Modifications

#### 1. Background

65. As discussed above, sections 251(c)(3) and (4) require incumbent LECs to provide nondiscriminatory access to unbundled network elements and to offer for resale, at wholesale rates, any telecommunications service the carrier provides at retail.[129] Section 271(b)(1) provides that a BOC or BOC affiliate "may provide interLATA services originating in any of its in-region States" only "if the Commission approves the application of such company for such State under [section 271(d)(3)]."[130] Under section 271(d)(3), the

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[126] *Expanded Interconnection with Local Telephone Company Facilities*, First Report and Order, 7 FCC Rcd 7369 (1992) (*Special Access Order*), *vacated in part and remanded, Bell Atlantic Telephone Cos. v. FCC*, 24 F.3d 1441 (D.C. Cir. 1994) (*Bell Atlantic v. FCC*); First Reconsideration, 8 FCC Rcd 127 (1993); *vacated in part and remanded, Bell Atlantic v. FCC*, 24 F.3d 1441; Second Reconsideration, 8 FCC Rcd 7341 (1993); Second Report and Order, 8 FCC Rcd 7374 (1993) (*Switched Transport Order*), *vacated in part and remanded, Bell Atlantic v. FCC*, 24 F.3d 1441; Remand Order, 9 FCC Rcd 5154 (1994) (*Virtual Collocation Order*), *remanded, Pacific Bell v. FCC*, 81 F.3d 1147 (D.C. Cir. 1996), *further recon. pending* (collectively referred to as *Expanded Interconnection*).

[127] *Local Competition Order*, 11 FCC Rcd at 15782-15811, ¶¶ 555-617.

[128] *See infra* ¶¶ 118-150.

[129] *See* 47 U.S.C. §§ 251(c)(3), (4).

[130] 47 U.S.C. § 271(b)(1). Section 3(25) of that Act defines local access and transport area (LATA) as:

> [A] contiguous geographic area --
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> (A) established before the date of enactment of the Telecommunications Act of 1996 by a Bell operating company such that no exchange area includes points within more than 1 metropolitan statistical area, consolidated metropolitan statistical area, or State, except as expressly permitted under the AT&T Consent Decree; or
>
> (B) established or modified by a Bell operating company after such date of enactment and approved by the Commission.

Commission may grant a BOC authorization to originate in-region, interLATA services only if it finds that the BOC has met the competitive checklist set forth in section 271(c)(2)(B) and other statutory requirements.[131]

66. Section 706(a) of the 1996 Act instructs the Commission and each state commission to "encourage the deployment on a reasonable and timely basis of advanced telecommunications capability to all Americans . . . by utilizing, in a manner consistent with the public interest, convenience, and necessity, price cap regulation, *regulatory forbearance*, measures that promote competition in the local telecommunications market, or other regulating methods that remove barriers to infrastructure investment."[132]

67. Section 10 of the Communications Act requires the Commission to forbear from applying any regulation or any provision of the Communications Act to telecommunications carriers or telecommunications services, or classes thereof, if the Commission determines that certain conditions are satisfied.[133] Section 10(d) specifies, however, that "[e]xcept as provided in section 251(f), the Commission may not forbear from applying the requirements of section 251(c) or 271 under [section 10(a)] until it determines that those requirements have been fully implemented."[134]

68. In their petitions, Ameritech, U S WEST, Bell Atlantic, and SBC seek regulatory relief from the application of section 251 and/or section 271 through Commission forbearance from applying those sections or through LATA boundary changes.[135] Recognizing

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47 U.S.C. § 153(25).

[131] 47 U.S.C. § 271(d)(3).

[132] 47 U.S.C. § 157 note (emphasis added).

[133] 47 U.S.C. § 160.

[134] 47 U.S.C. § 160(d).

[135] We note that each petitioner seeks slightly different relief. Ameritech requests that the Commission provide section 271 relief either by exercising forbearance authority with respect to advanced data services or by establishing a single, global "data LATA" for packet switched services. *See* Ameritech Petition at 2-3 & 12-14. Ameritech notes that if the Commission grants section 271 relief through forbearance, it should likewise forbear from applying section 272 requirements. *Id.* at 3 n.4. Bell Atlantic seeks regulatory relief from the requirements of section 271 through, among other things, forbearance pursuant to section 706, and relief from LATA boundaries, with "one large access area." *See* Bell Atlantic Petition at 10-12. U S WEST and SBC argue that the Commission should forbear from applying the unbundling requirements of section 251(c)(3) and the resale requirements of section 251(c)(4) to non-circuit-switched data services and facilities and to the provision of ADSL, respectively. *See* U S WEST Petition at 44-45; SBC Petition at 25-28. U S WEST requests, in addition, that the Commission permit it to carry data across current LATA boundaries either by lifting the ban on such carriage in section 271 or by redefining LATA boundaries. *See* U S WEST Petition at 42-44. SBC does not seek relief from section 271, either through forbearance or modification of LATA boundaries. SBC, however,

that the Commission may not forbear from application of sections 251(c) and 271 under section 10(a) until the requirements in those sections have been fully implemented, petitioners seek forbearance pursuant to section 706(a). Petitioners contend that section 706(a) constitutes an independent grant of forbearance authority that encompasses the ability to forbear from sections 251(c) and 271. Ameritech, Bell Atlantic, and U S WEST seek regulatory relief not only to provide xDSL-based services to end users, but also to obtain freedom to become Internet backbone providers.[136] Ameritech and U S WEST, notwithstanding their request here for LATA boundary changes, argue that this relief would not affect their compliance with section 271 for voice services.[137]

### 2. Discussion

#### a. Forbearance

69. After reviewing the language of section 706(a), its legislative history, the broader statutory scheme, and Congress' policy objectives, we agree with numerous commenters that section 706(a) does not constitute an independent grant of forbearance authority or of authority to employ other regulating methods.[138] Rather, we conclude that

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requests forbearance from dominant carrier regulation for provision of ADSL as well as from the obligations of section 252(i). *See* SBC Petition at 28-34.

[136] *See* Ameritech Petition at 9 (stating that section 271 bars Ameritech from providing Internet backbone services); Bell Atlantic Petition at 4 (stating that Commission relief "would enable Bell Atlantic to proceed with current plans to build a regional backbone network"); U S WEST Petition at 42 (urging that the Commission "carry out its mandate [under section 706] by allowing U S WEST to enter and compete in th[e] market for [I]nternet backbone services").

[137] Ameritech argues that its proposal would not undermine the objectives of section 271 and 10(d). Ameritech asserts that it "remains committed to meeting the requirements of section 271 . . . so that it can satisfy its customers' demands for integrated packages that include circuit-switched, voice-grade, long distance services." Ameritech Reply Comments (CC Docket No. 98-32) at 10. U S WEST asserts that the LATA boundary relief proposed by Ameritech would not affect LATA boundaries and associated restrictions applicable to two-way voice telephone service. U S WEST asserts further that it "has made a firm commitment that it will not use . . . relief [for the provision of advanced data services] to evade restrictions on the provision of voice services." U S WEST Reply Comments (CC Docket No. 98-26) at 21-22.

[138] *See, e.g.*, ACSI Comments (CC Docket Nos. 98-11, 98-26, 98-32) at 5; AT&T Comments (CC Docket No. 98-11) at 5-6; Cablevision Lightpath Comments (CC Docket Nos. 98-11, 98-26, 98-32) at 8; CIX Comments (CC Docket No. 98-11) at 24-26; CompTel Comments (CC Docket Nos. 98-11, 98-26, 98-32) at 10-12; CPI Comments (CC Docket Nos. 98-11, 98-26, 98-32) at 21; Electric Lightwave Comments (CC Docket Nos. 98-11, 98-26, 98-32) at 31; Excel Comments (CC Docket Nos. 98-11, 98-26, 98-32) at 4-5; Focal Communications Comments (CC Docket Nos. 98-11, 98-26, 98-32) at 5-6; ITAA Comments (CC Docket No. 98-11) at 5; LCI Comments (CC Docket Nos. 98-11, 98-26, 98-32) at 18; Level 3 Communications Comments (CC Docket Nos. 98-11, 98-26, 98-32) at 8; MCI Comments (CC Docket No. 98-32) at 24-25; TRA Comments (CC Docket Nos. 98-11, 98-26, 98-32) at 5-6; WorldCom Comments (CC Docket Nos. 98-11, 98-26, 98-32) at 10-11, 28-29; XCOM Comments (CC Docket Nos. 98-11, 98-26, 98-32) at 4-5, 11-14; NTIA July 17 *Ex Parte* at 5-7. *But see,*

section 706(a) directs the Commission to use the authority granted in other provisions, including the forbearance authority under section 10(a), to encourage the deployment of advanced services.

70. To determine whether section 706(a) constitutes an independent grant of forbearance authority, we look first to the text of the statute. We recognize that the language of section 706 directs the Commission to encourage the deployment of advanced services "by utilizing . . . regulatory forbearance . . . ."[139] It is not clear from the text of section 706(a), however, whether Congress intended that provision to constitute an independent grant of forbearance authority, or, alternatively, a directive that the Commission use forbearance authority granted elsewhere, in encouraging the deployment of advanced services.[140]

71. Because the language of section 706(a) does not make clear whether section 706(a) constitutes an independent grant of forbearance authority, we look to the broader statutory scheme, its legislative history, and the underlying policy objectives to resolve the ambiguity. We examine the structure of the 1996 Act as a whole. As the courts have recognized, "[t]he literal language of a provision taken out of context cannot provide conclusive proof of congressional intent, any more than a word can have meaning without context to illuminate its use."[141] Rather, when we are "charged with understanding the relationship between two different provisions within the same statute, we must analyze the language of each to make sense of the whole."[142]

72. As stated above, section 10(d) expressly forbids the Commission from forbearing from the requirements of sections 251(c) and 271 "until it determines that those requirements have been fully implemented."[143] There is no language in section 10 that carves out an exclusion from this prohibition for actions taken pursuant to section 706.

73. If section 706(a) were an independent grant of authority, as the BOCs argue,[144] then it would allow us to forbear from applying sections 251(c) and 271 regardless of whether

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*e.g.*, Ameritech Petition at 14; Bell Atlantic Petition at 10-11; SBC Petition at 5-6; U S WEST Petition at 37-40.

[139] 47 U.S.C. § 157 note.

[140] *Compare Chevron v. National Resources Defence Council*, 467 U.S. 837, 842-43 (1984).

[141] *See Bell Atlantic Tel. Cos. v. FCC*, 131 F.3d 1044, 1047 (D.C. Cir. 1997) (construing section 272(e)(4) of the Act).

[142] *Id.*

[143] 47 U.S.C. § 157 note.

[144] *See, e.g.*, Bell Atlantic Reply (CC Docket Nos. 98-11, 98-26, 98-32) at 4-9; SBC Reply (RM 9244) at 1-9; U S WEST Reply (CC Docket No. 98-26) at 8.

either section were fully implemented. Sections 251(c) and 271 are cornerstones of the framework Congress established in the 1996 Act to open local markets to competition.[145] The central importance of these provisions is reflected in the fact that they are the only two provisions that Congress carved out in limiting the Commission's otherwise broad forbearance authority under section 10. We find it unreasonable to conclude that Congress would have intended that section 706 allow the Commission to eviscerate those forbearance exclusions after having expressly singled out sections 251(c) and 271 for different treatment in section 10.[146]

74. We are not persuaded by Bell Atlantic's argument that a conclusion that section 706(a) confers no independent authority would make that section redundant.[147] On the contrary, we conclude that section 706(a) gives this Commission an affirmative obligation to encourage the deployment of advanced services, relying on our authority established elsewhere in the Act. Our actions and proposals in this Order and NPRM make clear that this obligation has substance.

75. Furthermore, we find nothing in the legislative history of section 706 to indicate that Congress gave us independent authority in section 706(a) to forbear from provisions of the Act. Section 706 was adopted contemporaneously with the forbearance authority in section 10, with section 706 contained in section 304 of the Senate version of the Communications Act of 1996, and the forbearance authority that was later included in section 10 contained in section 303 of that bill.[148] Thus, when enacting section 706, Congress was well aware of the explicit exclusions of our forbearance authority in section 10(d). Congress presumably would have stated explicitly that those exclusions would not apply to forbearance under section 706 had it so intended. We are not persuaded by Ameritech's argument that the statement in the Senate Commerce Committee's Report that section 706 is intended as a "fail-safe" indicates that Congress provided independent forbearance authority in section 706(a).[149]

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[145] *See, e.g.*, ALTS Comments (CC Docket Nos. 98-11, 98-26, 98-32) at 1; MCI Comments (CC Docket No. 98-32) at 13; TRA Comments (CC Docket Nos. 98-11, 98-26, 98-32) at 7; Level 3 Communications Reply (CC Docket Nos. 98-11, 98-26, 98-32) at 5; NTIA July 17 *Ex Parte* at 6.

[146] *See, e.g.*, ALTS Comments (CC Docket Nos. 98-11, 98-26, 98-32) at 3 (arguing that "[t]he only way the Telecommunications Act can be interpreted as a whole is [to] make the meaning of 'forbearance' in section 706 consistent with the . . . limitation of the same term as used in section 10"); MCI Comments (CC Docket No. 98-11) at 21-22 (stating that it is hard to imagine that Congress intended section 706 to override the specific limitations on forbearance in section 10).

[147] Bell Atlantic Reply (CC Docket Nos. 98-11, 98-26, 98-32) at 5.

[148] 141 Cong. Rec. H9954, H9970-71 (Oct. 12, 1995) (text of S. 652 as read in Senate); S. 652, 104th Cong., 1st Sess. 150-53 (1995) (S. 652 as passed by the Senate).

[149] Ameritech Reply (CC Docket No. 98-32) at 4, *citing* S. Rep. No. 104-23, 104th Cong., 1st Sess. 115 (1995) (*1995 Senate Report*).

The Senate Commerce Committee's Report makes clear that section 706 "ensures that advanced telecommunications capability is promptly deployed by requiring the [Commission] to initiate and complete regular inquiries," and then take immediate action if it determines that such capability is not being deployed to all Americans.[150] The Report does not clarify, however, whether section 706 is an independent grant of regulatory authority or directs the Commission to use regulatory measures granted in other provisions of the Act.[151]

76. Moreover, as a matter of policy, we believe that interpreting section 706, not as an independent grant of authority, but rather, as a direction to the Commission to use the forbearance authority granted elsewhere in the Act, will further Congress' objective of opening all telecommunications markets to competition, including the market for advanced services.[152] As discussed above, because of the central importance of the requirements in sections 251(c) and 271 to opening local markets to competition, we consider these sections to be cornerstones of the framework Congress established in the 1996 Act. We find that this conclusion that section 706 does not provide the statutory authority to forbear from sections 251(c) and 271 will better promote Congress' objectives in the Act.

77. For the foregoing reasons, we conclude that, in light of the statutory language, the framework of the 1996 Act, its legislative history, and Congress' policy objectives, the most logical statutory interpretation is that section 706 does not constitute an independent grant of authority. Rather, the better interpretation of section 706 is that it directs us to use, among other authority, our forbearance authority under section 10(a) to encourage the deployment of advanced services. Under section 10(d), we may not use that authority to forbear from applying the requirements of section 251(c) and 271 prior to their full implementation. Petitioners do not suggest that either section 251(c) or section 271 has been fully implemented, and we have no record on which to determine that either has been fully implemented. We, therefore, deny the BOC requests that we forbear from applying the requirements of sections 251(c) and 271. We seek comment in the NPRM below on whether

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[150] *1995 Senate Report, supra,* at 114.

[151] *Id.* at 113-15. Bell Atlantic also points to a floor statement that it claims supports its view that section 706 grants independent forbearance authority. Bell Atlantic Reply (CC Docket Nos. 98-11, 98-26, 98-32) at 7 (*citing* 141 Cong. Rec. S699-90 (daily ed. Feb. 1, 1996). As with the statement in the Senate Commerce Committee Report, this statement does not indicate whether section 706(a) gives the Commission independent forbearance authority or whether it directs the Commission to use regulatory measures granted elsewhere in the Act to achieve the objectives stated in section 706. Even if that statement were interpreted to indicate that section 706 gives the Commission independent forbearance authority, we conclude that statements of an individual member of Congress does not overcome the other evidence discussed in this section that indicates Congress' intention that the Commission not forbear from sections 251(c) and 271 until those sections are fully implemented. *See Bath Iron Works Corp. v. Office of Workers Compensation Programs*, 506 U.S. 153, 166 (1993); *Pappas v. Buck Consultants, Inc.*, 923 F.2d 531, 536-37 (7th Cir. 1991).

[152] *See Joint Explanatory Statement, supra* at 1, 113.

there are avenues other than forbearance that might allow us to lessen the obligations of these sections in appropriate circumstances.[153]

78. Ameritech also requests forbearance pursuant to section 706 from application of section 272's requirements if we grant its request to forbear from applying section 271's requirements. Because we deny that request for section 271 forbearance, we also deny Ameritech's request for section 272 forbearance.

79. In addition, SBC requests forbearance, under section 10: (1) from the dominant treatment of ADSL service to the extent that treatment results in the imposition of tariff filing requirements and other obligations under the Act and under parts 61 and 69 of the Commission's rules; and (2) from the obligations of section 252(i).[154] Section 10(a) requires us to forbear from the application of a statutory provision or regulation if we determine that specific criteria are met.[155] We conclude, on the record before us, that SBC has not demonstrated that the relief it requests pursuant to section 10 meets these criteria. In particular, to the extent that advanced services are offered by an incumbent LEC, we find, on the record before us, that it is consistent with the public interest to subject such incumbents to full incumbent LEC regulation.[156] We therefore deny SBC's requests for forbearance under section 10. We note, however, that, in the NPRM below, we address the regulatory status of an advanced services affiliate that competes without any unfair advantages derived from its affiliation with the incumbent. In particular, we tentatively conclude below that such an affiliate, to the extent it provides interstate exchange access services, should, under existing Commission precedent, be presumed to be nondominant and should not be required to file tariffs for its provision of any interstate services that are exchange access.[157]

### b. LATA Boundary Modifications

80. As an alternative to forbearance from enforcing section 271, Ameritech, Bell Atlantic and U S WEST request that the Commission permit them to change LATA boundaries pursuant to section 3(25) of the Communications Act in order to create a large-

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[153] *See infra* ¶¶ 178-196.

[154] SBC Petition at 5-6.

[155] 47 U.S.C.§ 160(a).

[156] 47 U.S.C. § 160(a)(3); *see generally* AT&T Comments (CC Docket No. 98-11) at 17; CIEA Comments (CC Docket No. 98-11) at 17-18; Hyperion Comments (CC Docket No. 98-11) at 10; Sprint Comments (CC Docket No. 98-11) at 5.

[157] *See infra* ¶ 48.

scale "LATA" for packet-switched services.[158] We decline to grant petitioners' requests for large-scale changes in LATA boundaries.

81. Although section 3(25)(B) of the Act permits a BOC to modify LATA boundaries upon Commission approval, we conclude that petitioners' requests for large-scale changes in LATA boundaries amount to more than requests for "modified" LATAs as that term is used in section 3(25)(B).[159] In *MCI v. AT&T*,[160] the Supreme Court held that the Commission's authority to "modify" portions of the Communications Act means "moderate change" and not "basic and fundamental changes in the scheme created by [the section at issue]"[161] We conclude that such large-scale changes in LATA boundaries for packet-switched services as proposed by petitioners would effectively eliminate LATA boundaries for such services.[162]

82. Such far-reaching and unprecedented relief could effectively eviscerate section 271 and circumvent the procompetitive incentives for opening the local market to competition that Congress sought to achieve in enacting section 271 of the Act.[163] We conclude,

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[158] 47 U.S.C. § 3(25). *See supra* n.135, for a description of the individual petitioners' requests.

[159] 47 U.S.C. § 3(25)(B); *see, e.g.*, AT&T Comments (CC Docket No. 98-11) at 12; ITA Comments (CC Docket No. 98-11) at 6-7.

[160] *MCI Telecommunications Corp. v. AT&T*, 512 U.S. 218 (1994) (*MCI v. AT&T*).

[161] *Id.* at 225, 228 (holding that the Commission's decision to forbear from statutory tariff filing requirements exceeded the Commission's authority to modify section 203(a) of the 1934 Act); *see also* AT&T Comments (CC Docket No. 98-11) at 11-12; CIEA Comments (CC Docket No. 98-11) at 26-27; ITAA Comments (CC Docket No. 98-11) at 6-7. Section 3(25)(B) appears to have been crafted to give the Commission the same authority that the district court exercised in adjusting LATA boundaries under the AT&T Consent Decree. *See, e.g, Western Electric Co. v. United States*, 578 F. Supp. 643 (D.C.C. 1983) (modifying LATA boundaries for mobile radio services in selected areas).

[162] The United States Court of Appeals for the District of Columbia Circuit has held that the ability of the Commission to modify a requirement does not permit the Commission to adopt a "wholesale abandonment or elimination of a requirement." *MCI Telecommunications v. FCC*, 765 F.2d 1186, 1192 (D.C. Cir. 1985); *see also AT&T v. FCC*, 978 F.2d 727, 736 (D.C. Cir. 1992), *cert. denied* 509 U.S. 913 (1993); ITAA Comments (CC Docket No. 98-11) at 7; MCI Comments (CC Docket No. 98-11) at 28-29; TCG Comments (CC Docket Nos. 98-11, 98-26, 98-32) at 5-9 (changing LATA boundaries as the BOCs propose would thwart Congress' objectives in section 271 and therefore are beyond the Commission's authority); WorldCom Comments (CC Docket Nos. 98-11, 98-26, 98-32) at 29 (section 3(25) at most allows modification, not elimination, of existing LATA boundaries).

[163] *See, e.g.*, Cablevision Lightpath Comments (CC Docket No. 98-11) at 9; CIEA Comments (CC Docket No. 98-32) at 24-25; CTA Comments (CC Docket Nos. 98-11, 98-26, 98-32) at 14-15; LCI Comments (CC Docket Nos. 98-11, 98-26, 98-32) at 19-20; Level 3 Comments (CC Docket Nos. 98-11, 98-26, 98-32) at 8; MCI Comments (CC Docket No. 98-11) at 29-30; Transwire Comments (CC Docket No. 98-32) at 16; WorldCom Comments ((CC Docket Nos. 98-11, 98-26, 98-32) at 29.

therefore, that the requests for large-scale changes in LATA boundaries, such as Ameritech's request for a global, "data LATA," are functionally no different than petitioners' requests that we forbear from applying section 271 to their provision of these services. It would exalt form over substance if we were to grant the requested large-scale changes in LATA boundaries. In the NPRM below, we seek comment on whether the Commission should, in certain circumstances, modify LATA boundaries to provide targeted relief.[164]

## VI. NOTICE OF PROPOSED RULEMAKING

### A. Introduction

83. In this NPRM, we propose an optional alternative pathway for incumbent LECs that would allow separate affiliates to provide advanced services free from incumbent LEC regulation. In particular, if an incumbent LEC chooses to offer advanced services through an affiliate that is truly separate from the incumbent, that affiliate would not be deemed an incumbent LEC and therefore would not be subject to incumbent LEC regulation, including the obligations under section 251(c). On the other hand, if the advanced services affiliate derives an unfair advantage from its relationship with the incumbent, that affiliate should be viewed as stepping into the shoes of the incumbent LEC and would be subject to all the requirements that Congress established for incumbent LECs. We propose in this NPRM specific structural separation and nondiscrimination requirements that we would require be in place in order for an affiliate to be deemed a non-incumbent LEC, and thus not subject to section 251(c). We also offer guidance on various factors that the Commission should consider in determining when an advanced services affiliate would be an "assign" of the incumbent LEC, and, therefore, subject to the obligations of section 251(c).

84. In this NPRM, we also propose additional rule changes that would apply whether or not incumbent LECs choose to establish a separate affiliate to provide advanced services.[165] We propose rules to ensure that all entities seeking to offer advanced services have adequate access to collocation and loops, which is critical to promote competition in the marketplace for advanced services. We then seek comment on ways to modify the section 251(c) unbundling requirements, once companies are in compliance with the rule changes we propose regarding collocation and access to loops. Finally, we seek comment on measures that would provide BOCs with targeted interLATA relief to ensure that all consumers, even those in rural areas, are able to reap the benefits of advanced telecommunications capability.

### B. Provision of Advanced Services through a Separate Affiliate

[164] *See infra* ¶¶ 192-196.

[165] As noted above, we recognize that the corporate holding company may be the entity that would establish the affiliate, rather than the incumbent LEC per se. *See supra* n.17.

85. A number of parties have raised the question of whether incumbent LECs may provide advanced services through separate affiliates that would not be subject to incumbent LEC regulation. For example, APT suggests in its petition that the Commission explore the possibility of requiring incumbent LECs to form separate subsidiaries, which would not be subject to rate regulation because of their lack of market power.[166] Ameritech asks that the Commission clarify that a BOC "data affiliate" that complies with the separation requirements in the *Competitive Carrier Fifth Report and Order*, as modified by the *LEC Classification Order*,[167] should be deemed a non-incumbent LEC, and thus not subject to section 251(c) obligations, and nondominant in its provision of interstate advanced services.[168] SBC has requested that the Commission "confirm that an affiliate of an incumbent LEC that satisfies applicable structural separation requirements is not itself an incumbent LEC for purpose of section 251(c)."[169] Rhythms Net suggests that incumbent LEC separate affiliates can be "a meaningful tool in assuring parity of treatment if the separate subsidiary is required to be a [competitive LEC] that functions like any other [competitive LEC] . . . ."[170] The Commission also explored the separate affiliate issue with many industry representatives during an en banc hearing on bandwidth issues.[171]

86. We are committed to ensuring that an optional alternative pathway is available for incumbent LECs that are willing to offer advanced services on the same footing as any of their competitors. As described more fully below, we believe that, if advanced services are offered by an affiliate that is truly separate from the incumbent LEC (an "advanced services affiliate"), that affiliate should not be deemed an incumbent LEC and, therefore, should not be

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[166] APT Petition at 17.

[167] *Competitive Carrier Fifth Report and Order*, 98 F.C.C. 2d 1191; *Regulatory Treatment of LEC Provision of Interexchange Services Originating in the LEC's Local Exchange Area and Policy and Rules Concerning the Interstate, Interexchange Market Place*, CC Docket No. 96-149, Second Report and Order, CC Docket No. 96-61, Third Report and Order, 12 FCC Rcd 15756, 15802 (*LEC Classification Order*), Order on Reconsideration, 12 FCC Rcd 8730 (1997); Order, 13 FCC Rcd 6427 (Comm. Car. Bur. 1998), *further recon. pending*. Hereafter, we will refer to these requirements as the *Competitive Carrier Fifth Report and Order* requirements.

[168] Ameritech Petition at 22-27.

[169] *See* SBC Comments (CC Docket No. 98-11, 98-26, 98-32) at 4.

[170] Letter from Jeffrey Blumenfeld, Rhythms Net, to Kathryn C. Brown, Chief, Common Carrier Bureau, Federal Communications Commission, CC Docket Nos. 98-11, 98-26, 98-32, 98-91, at 1 (filed July 24, 1998) (Rhythms Net July 24 *Ex Parte*).

[171] *See, e.g.*, Statement of Chuck McMinn, Chairman of the Board, Covad Communications Company, before the Federal Communications Commission, En Banc Hearing on Bandwidth, July 9, 1998, at 2 (stating that, "if [incumbent LECs] wish to provide DSL services in-region, they should be required to provide these services through a separate entity . . . [that] would have to obtain the inputs essential to provide DSL service in exactly the same manner as Covad or any other competitor.").

subject to the incumbent LEC regime established by Congress in section 251(c). In addition, we tentatively conclude below that such an advanced services affiliate, to the extent it provides interstate exchange access services, should, under existing Commission precedent, be presumed to be nondominant (and, therefore, not be subject to price cap regulation or rate of return regulation for its provision of such services). We also tentatively conclude below that such an affiliate, as a non-incumbent, also should not be required to file tariffs for its provision of any interstate services that are exchange access. We emphasize that we are not proposing that incumbent LECs be required to establish affiliates to provide advanced services. Any incumbent LEC is free to provide advanced services on an integrated basis, but, in those circumstances, is subject to section 251(c) requirements. Simply put, each incumbent LEC seeking to provide advanced services must make a business decision as to whether it wishes to provide such services free of section 251(c) requirements.

87. In this NPRM we lay out a framework that will guide incumbent LECs that choose to pursue this alternative. The proposals in this NPRM are based on the underlying assumption that, to be free of incumbent LEC regulation, an advanced services affiliate must function just like any other competitive LEC and not derive unfair advantages from the incumbent LEC.

88. We recognize that many states have significant practical experience in dealing with LEC affiliates in a variety of contexts. We therefore welcome input from the states on each of the issues raised below regarding provision of advanced services through a separate affiliate.

### 1. Background

89. The obligations set out in section 251(c) of the Act are imposed only on incumbent LECs.[172] In the *Non-Accounting Safeguards Order*, the Commission concluded that a BOC affiliate that satisfies appropriate structural separation requirements is not deemed an incumbent LEC for purposes of section 251 merely because it is engaged in local exchange activities.[173] Consistent with the reasoning in the Non-Accounting Safeguards Order, a determination as to whether a carrier is an incumbent LEC is not based on the nature of the service the carrier provides. Rather, in order to be deemed an incumbent LEC, a carrier must meet the definition in section 251(h).

90. Section 251(h)(1), in turn, defines an incumbent LEC as either a member of NECA as of the date of the enactment of the 1996 Act, or a "successor or assign" of such a member.[174] When applying the definition in section 251(h)(1)(B)(i) to separate affiliates in

[172] 47 U.S.C. § 251(c).

[173] *See Non-Accounting Safeguards Order*, 11 FCC Rcd at 22055, ¶ 312.

[174] 47 U.S.C. § 251(h)(1).

the *Non-Accounting Safeguards Order*, the Commission concluded that "[n]o BOC affiliate was a member of NECA when the 1996 Act was enacted."[175] The Commission determined that an affiliate can, however, be a "successor or assign" of a BOC. The Commission concluded that, if a BOC transfers to its affiliate ownership of any network elements that must be provided on an unbundled basis pursuant to section 251(c)(3), the affiliate would be deemed an assign of the BOC under section 3(4) of the Act with respect to those network elements.[176]

91. In addition, we note that the Commission, under section 251(h)(2), may, by rule, treat as an incumbent a LEC (or a class or category of LECs) that occupies a position in the market for telephone exchange service within an area that is comparable to the position occupied by the incumbent LEC, and such carrier has substantially replaced an incumbent LEC.[177] The Commission stated in the *Local Competition Order* that it "will not impose incumbent LEC obligations on non-incumbent LECs absent a clear and convincing showing that the LEC occupies a position in the telephone exchange market comparable to the position held by an incumbent LEC, has substantially replaced an incumbent LEC, and that such treatment would serve the public interest, convenience, and necessity and the purposes of section 251."[178] In the *Non-Accounting Safeguards Order*, the Commission determined that a BOC affiliate is not "comparable" to an incumbent LEC under section 251(h)(2) merely because it is engaged in local exchange activities.[179]

### 2. Advanced Services Affiliates

92. Building upon the reasoning in this existing precedent, we believe that an advanced services affiliate of an incumbent LEC that (1) satisfies adequate structural separation requirements (*i.e,* is "truly" separate); and (2) acquires, on its own, facilities used

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[175] *Non-Accounting Safeguards Order*, 11 FCC Rcd at 22055-22056, ¶ 312.

[176] *See id.*, 11 FCC Rcd at 22054, ¶ 309; *see also* 47 C.F.R. § 53.207.

[177] 47 U.S.C. § 251(h)(2); *Non-Accounting Safeguards Order*, 11 FCC Rcd at 22060, ¶ 321.

[178] *Local Competition Order*, 11 FCC Rcd at 16110, ¶ 1248, *citing* 47 U.S.C. § 251(h)(2). The Commission recently adopted a rule treating Guam Telephone Authority (GTA) as an incumbent LEC for purposes of section 251. *See Treatment of Guam Telephone Authority and Similarly Situated Carriers as Incumbent Local Exchange Carriers under Section 251(h)(2) of the Communications Act*, CC Docket No. 97-134, Report and Order, FCC 98-163 (rel. Jul. 20, 1998). The Competitive Telecommunications Association recently filed a petition asking the Commission to issue a declaratory ruling determining that certain affiliates of incumbent LECs should be treated as "successors or assigns" of the incumbent LECs. CompTel asks, in the alternative, that the Commission initiate a rulemaking under section 251(h)(2). *See Commission Seeks Comment on Petition Regarding Regulatory Treatment of Affiliates of ILECs*, CC Docket No. 98-39, Public Notice, 13 FCC Rcd 6669 (1998). We do not address CompTel's petition in this proceeding, although we seek comment on certain issues raised by CompTel as they relate to the provision of advanced services by an affiliate.

[179] *Non-Accounting Safeguards Order*, 11 FCC Rcd at 22055-22056, ¶ 312.

to provide advanced services (or leases such facilities from an unaffiliated entity) is generally not an incumbent LEC, and, therefore, is not subject to section 251(c) obligations with respect to those facilities. We also note that, although we believe an advanced services affiliate that is structured in accordance with rules we adopt in this proceeding would not be an incumbent LEC, the affiliate would remain subject to the general duties of telecommunications carriers in section 251(a)[180] and the obligations of all local exchange carriers in section 251(b).[181] Thus, for example, under section 251(a)(1), such an affiliate must "interconnect directly or indirectly with the facilities and equipment of other telecommunications carriers."[182]

93. In describing what we believe is an alternative pathway by which a truly separate affiliate of an incumbent LEC may provide advanced services free from the obligations of section 251(c), we emphasize that we are not proposing to forbear from section 251(c) requirements. Rather, we are setting forth proposals on the circumstances under which an affiliate is not deemed an incumbent LEC in the first place.

94. Certain competitive LECs argue that, regardless of how a separate affiliate is structured, new entrants should be able to obtain unbundled access to all such facilities used by the affiliate to provide advanced services.[183] We believe that such an interpretation violates section 251 of the Act. Under section 251(c), obligations to unbundle and to offer

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[180] 47 U.S.C. § 251(a).

[181] Section 251(b) imposes on each local exchange carrier the following duties:

> OBLIGATIONS OF ALL LOCAL EXCHANGE CARRIERS.--Each local exchange carrier has the following duties: (1) RESALE.--The duty not to prohibit, and not to impose unreasonable or discriminatory conditions or limitations on, the resale of its telecommunications services. (2) NUMBER PORTABILITY.--The duty to provide, to the extent technically feasible, number portability in accordance with requirements prescribed by the Commission. (3) DIALING PARITY.--The duty to provide dialing parity to competing providers of telephone exchange service and telephone toll service, and the duty to permit all such providers to have nondiscriminatory access to telephone numbers, operator services, directory assistance, and directory listing, with no unreasonable dialing delays. (4) ACCESS TO RIGHTS-OF-WAY.--The duty to afford access to the poles, ducts, conduits, and rights-of-way of such carrier to competing providers of telecommunications services on rates, terms, and conditions that are consistent with section 224. (5) RECIPROCAL COMPENSATION.--The duty to establish reciprocal compensation arrangements for the transport and termination of telecommunications.

47 U.S.C. § 251 (b).

[182] 47 U.S.C. § 251(a)(1). Moreover, we note that in the *Local Competition Order*, the Commission stated that "unlike section 251(c), which applies to incumbent LECs, section 251(a) interconnection applies to all telecommunications carriers including those with no market power." *Local Competition Order*, 11 FCC Rcd at 15991, ¶ 997.

[183] *See, e.g.*, LCI Comments (CC Docket No. 98-78) at 3-4.

resale at wholesale rates apply only to incumbent LECs, as defined in section 251(h). Accordingly, to the extent that an entity is not an "incumbent LEC" within the meaning of section 251(h), that entity will not be subject to the obligations, under section 251(c), to unbundle and to offer resale at wholesale rates.[184] We believe that it would be contrary to congressional intent to impose these obligations under section 251(c) upon entities that do not fall within the definition of an incumbent LEC. We seek comment on this statutory analysis and on our belief that a truly separate affiliate of an incumbent LEC may provide advanced services free from the obligations of section 251(c).

#### a. Circumstances Under Which an Advanced Services Affiliate Would Not Be an Incumbent LEC

95. Separation Requirements for Non-Incumbent LEC Status. We now explore the circumstances under which an advanced services affiliate would not qualify as an "incumbent LEC" under the definition set forth by Congress in section 251(h), and thus would not be subject to section 251(c) obligations. In particular, we explore what structural separation requirements for advanced services affiliates are sufficient for those affiliates to be deemed non-incumbent LECs.

96. We believe that, if an incumbent LEC wishes to establish an advanced services affiliate that would not be deemed an incumbent LEC, it should comply with the following structural separation and nondiscrimination requirements.

- First, the incumbent must "operate independently" from its affiliate.[185] In particular, the incumbent and affiliate may not jointly own switching facilities or the land and buildings on which such facilities are located.[186] In addition, the incumbent may not perform operating, installation, or maintenance functions for the affiliate.[187]

- Second, transactions must be on an arm's length basis, reduced to writing, and made available for public inspection.[188] We propose that the affiliate be required to provide a detailed written description of any asset or service transferred and the terms and conditions of the transaction on the Internet,

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[184] *See Non-Accounting Safeguards Order*, 11 FCC Rcd at 22055, ¶ 312.

[185] *See id.* at 21914, ¶ 15.

[186] *Id.*

[187] *See id.* at 21981, ¶ 158.

[188] *See id.* at 21992, ¶ 181.

through the company's home page, within ten days of the transaction.[189] This would provide a readily accessible mechanism for new entrants to ensure they are receiving treatment equivalent to that provided to the incumbent LEC's advanced services affiliate. All transactions between the incumbent and its affiliate also must comply with the affiliate transactions rules, as modified in the *Accounting Safeguards* proceeding.[190] We believe that these affiliate transactions rules are, in the context of transfers from incumbent LECs to their advanced services affiliates, sufficient to discourage, and facilitate detection of, improper cost allocations in order to prevent incumbent LECs from imposing the costs of their competitive ventures on telephone ratepayers.

-- Third, the incumbent and affiliate must maintain separate books, records, and accounts.

-- Fourth, the incumbent and advanced services affiliate must have separate officers, directors, and employees.

-- Fifth, the affiliate must not obtain credit under any arrangement that would permit a creditor, upon default, to have recourse to the assets of the incumbent.

-- Sixth, the incumbent LEC, in dealing with its advanced services affiliate may not discriminate in favor of its affiliate in the provision of any goods, services, facilities or information or in the establishment of standards.[191]

-- Seventh, an advanced services affiliate must interconnect with the incumbent LEC pursuant to tariff or pursuant to an interconnection agreement, and whatever network elements, facilities, interfaces and systems are provided by the incumbent LEC to the affiliate must also be made available to unaffiliated entities.[192]

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[189] *See Implementation of the Telecommunications Act of 1996: Accounting Safeguards Under the Telecommunications Act of 1996*, CC Docket No. 96-150, 11 FCC Rcd 17539, 17593 (1996) (*Accounting Safeguards Order)*. We note that below we seek comment on the extent to which certain transfers of assets or services may be made without resulting in the affiliate's being considered an incumbent LEC. *See, infra*, subpart 2(b).

[190] *See id.*, 11 FCC Rcd at 17686, ¶ 108.

[191] 47 U.S.C. § 272(c)(1).

[192] *See* Letter from Jim Earl, Covad Communications, to Rebecca Dorch, Office of Engineering Technology, and Marcelino Ford-Livene, Office of Plans and Policy, Federal Communications Commission, CC Docket Nos. 98-11, 98-26, 98-32, 98-78, 98-91 (filed July 20, 1998) (arguing that an incumbent LEC's affiliate providing advanced services must use an existing interconnection agreement rather than one that is unique to the affiliate) (July 20 Covad *Ex Parte*); NTIA July 17 *Ex Parte* at 11 (stating that an incumbent LEC's

We seek comment on our proposal.

97. To the extent commenters disagree with our reasoning, we invite them to propose specific modifications to the framework set forth above, and to describe with particularity why such modifications should be adopted. In particular, commenters should address how any proposed modification addresses concerns that incumbent LECs could improperly discriminate against competing providers, for instance, by using control over key facilities and services, in order to gain a competitive advantage for their advanced services affiliates.[193] Commenters also should address how any proposed modification addresses concerns about cost misallocation.

98. We seek comment on whether the same separation requirements should apply to all advanced services affiliates for them to be deemed not incumbent LECs, regardless of the size of the associated incumbent LECs. We note, for example, that section 251(f) provides exemptions from section 251(c) obligations for certain rural telephone companies and allows a local exchange carrier with fewer than 2 percent of the Nation's subscriber lines to petition a state Commission for suspension or modification of application of a particular requirement.[194] We also note that, to the extent a BOC is authorized to provide advanced services on an interLATA basis pursuant to section 271, it will be required to offer these services through an affiliate that complies with the requirements of section 272. We seek comment on whether, as a practical matter, a BOC would choose to establish two separate affiliates to provide advanced services -- one to provide such services on an interLATA basis and another to provide such services on an intraLATA basis -- if we were to adopt separation requirements less stringent than those in section 272 for advanced services affiliates.

99. We seek comment on whether any separation and other safeguards should sunset after a certain period of time or change in conditions. For example, with respect to the BOCs, we seek comment on whether the safeguards necessary to be deemed a non-incumbent LEC in the provision of advanced services should sunset at the same time that the statutorily-mandated section 272 requirements sunset with respect to the BOCs' provision of in-region interLATA services.[195] We seek comment on what other periods may be appropriate.

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affiliate providing DSL would have to negotiate an interconnection agreement in order to secure unbundled DSL-compatible loops and collocation space on the same terms and conditions as are made available to other DSL providers).

[193] *See, e.g.*, MCI Comments (CC Docket No. 98-11, 98-26, 98-32) at 39; CIX Comments (CC Docket No. 98-78) at 4-5.

[194] *See* 47 U.S.C. § 251(f).

[195] Section 272(f)(1) provides that the provisions of section 272 (other than subsection (e)) "shall cease to apply with respect to . . . the interLATA telecommunications services of a Bell operating company 3 years after the date such Bell operating company or any Bell operating company affiliate is authorized to provide interLATA telecommunications services under section 271(d), unless the Commission extends such 3-year period by rule or

100. Non-Dominant Status. We also tentatively conclude that an advanced services affiliate, to the extent it provides interstate exchange access services,[196] should, under existing Commission precedent, be presumed to be nondominant.[197] Therefore, such affiliate would not be subject to price cap regulation or rate of return regulation for its provision of such services.[198] We tentatively conclude that such an affiliate, as a non-incumbent, also should

order." 47 U.S.C. § 272(f)(1).

[196] We conclude in the Order above that advanced services offered by incumbent LECs are "telephone exchange service" or "exchange access." *See supra* ¶ 40. As previously noted, the question of whether, or to what extent, specific xDSL-based services offered by incumbent LECs are "telephone exchange service" as opposed to "exchange access" has been raised in other pending proceedings, and the Commission will continue to address this question on a case-by-case basis. *See supra* ¶ 40 and n.69.

[197] *See* 47 C.F.R. §§ 61.3(o), 61.3(u) (defining a dominant carrier as one that possesses market power, and a non-dominant carrier as a carrier not found to be dominant); *Hyperion Telecommunications Inc., Petition Requesting Forbearance, Time Warner Communications Petition for Forbearance, Complete Detariffing for Competitive Access Providers and Competitive Local Exchange Carriers*, CCB/CPD No. 96-3, CCB/CPD No. 96-7, CC Docket No. 97-146, Memorandum Opinion and Order, 12 FCC Rcd 8596, 8608, n.71 (1997) (*Hyperion/Time Warner MO&O*) ("our policy since the *Competitive Carrier Proceeding* has consistently been that a carrier is nondominant unless the Commission makes or has made a finding that it is dominant") and ¶¶ 23-24 (finding no demonstration that non-incumbent LEC providers of interstate exchange access services possess market power); *Access Charge Reform, Price Cap Performance Review for Local Exchange Carriers, Transport Rate Structure and Pricing, End User Common Line Charges*, CC Docket Nos. 96-262, 94-1, 91-213, 95-72, First Report and Order, 12 FCC Rcd 15982, 16140-16141, ¶¶ 360-63 (1997) (determining that non-incumbent LECs should be treated as nondominant in their provision of terminating access); *Local Competition Order*, 11 FCC Rcd at 15981, ¶ 976 (stating that non-incumbent LECs definitionally lack the market power possessed by incumbent LECs).

[198] *See Policy and Rules Concerning the Interstate, Interexchange Marketplace, Implementation of Section 254(g) of the Communications Act of 1934, as amended*, CC Docket No. 96-61, Second Report and Order, 11 FCC Rcd 20730, 20746 n.29 (1996), *stayed on other grounds pending review sub nom, MCI Telecommunications Corp. v. FCC*, Case No. 96-1459 (D.C. Cir., Feb. 19, 1997), Order on Reconsideration, 12 FCC Rcd 15014 (1997); *Policy and Rules Concerning Rates for Competitive Common Carrier Services and Facilities Authorizations Therefor*, CC Docket No. 79-252, First Report and Order, 85 FCC 2d 1, 33-35, ¶¶ 97-101 (1980). *See also Policy and Rules Concerning Rates for Dominant Carriers*, CC Docket No. 87-313, Second Report and Order, 5 FCC Rcd 6786, 6818-19, ¶¶ 262-65 (1990), Erratum, 5 FCC Rcd 7664 (Com. Car. Bur. 1990); *modified on recon.*, 6 FCC Rcd 2637 (1991); *aff'd sub nom. National Rural Telecom Ass'n v. FCC*, 988 F. 2d 174 (D.C. Cir. 1993). U S WEST, while maintaining that a separate affiliate is not necessary to qualify for nondominant status, agrees with Ameritech that an affiliate complying with the requirements in the *Competitive Carrier Fifth Report and Order* should be classified as nondominant. *See* U S WEST Comments (CC Docket Nos. 98-11, 98-32) at 8-9. *But see* CompTel Comments (CC Docket Nos. 98-11, 98-26, 98-32) at 16-17 (stating that grant of nondominant status to BOCs providing advanced services is inappropriate because new entrants are dependent upon BOC provisioning of local loops and other essential facilities, providing a powerful vehicle for BOCs to exercise market power in data services).

not be required to file tariffs for its provision of any interstate services that are exchange access.[199] We seek comment on these tentative conclusions.

101. Miscellaneous Issues. We seek comment on whether an advanced services affiliate should be limited in its ability either to resell telecommunications services offered by the incumbent LEC or to purchase unbundled network elements from the incumbent LEC. We also seek comment on whether a virtual collocation arrangement is more practical or attractive to an incumbent's affiliate than to other competitive LECs, and, therefore, creates an unfair competitive advantage for an advanced services affiliate vis-a-vis other entrants. If so, are there ways to make virtual collocation arrangements more equal?

102. We also note that some incumbent LECs have formed their own information services providers. Are advanced services affiliates likely to favor such affiliated information services providers, and, if so, in what ways? We also seek comment on whether competing information services providers (such as, for example, Internet services providers) will have the ability to offer service to customers of the advanced services affiliate.[200] Could the advanced services affiliate and the incumbent LEC act in concert to engage in a price squeeze on unaffiliated information service providers? Parties arguing that the incentive and ability for affiliates to favor affiliated information services providers should suggest means by which the Commission could address these concerns.[201]

103. Finally, commenters should compare any anticompetitive concerns they have with the operation of an advanced services affiliate to similar concerns they may have with the offering of such services on an integrated basis by the incumbent.

#### b. Transfers from an Incumbent LEC to an Advanced Services Affiliate

104. In order not to be subject to the requirements of section 251(c), the advanced services affiliate must not be a successor or assign of the incumbent LEC. A determination

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[199] *See Hyperion/Time Warner MO&O*, 12 FCC Rcd at 8596, ¶ 1 (granting petitions seeking permissive detariffing for provision of interstate exchange access services by providers other than incumbent LECs).

[200] *See, e.g.*, Letter from George Vradenburg III, Senior Vice President and General Counsel, America Online, to Kathryn C. Brown, Chief, Common Carrier Bureau, Federal Communications Commission, CC Docket Nos. 98-11, 98-32, 98-78, 98-91, at 3 (filed July 30, 1998) (expressing concern that a data services affiliate that is not a successor or assign "would be free to afford preferential treatment to the affiliated ISP, whose operations could even be integrated into the data services affiliate"); *but see Computer II Final Decision*, 77 FCC 2d at 475, ¶ 231; 47 C.F.R. § 64.702(a).

[201] *See generally*, NTIA July 17 *Ex Parte* at 17-19.

as to whether an affiliate is a successor or assign is ultimately fact-based.[202] In order to provide clarity and regulatory certainty, we make certain proposals below regarding when we would view an affiliate as a successor or assign. We seek to establish principles to guide the conduct of firms that choose to avail themselves of this pathway. We seek comment on how particular transactions between incumbents and their advanced services affiliates should affect the regulatory status of the affiliates. Commenters should consider whether, in a particular situation, the affiliate would be functioning like any other competitive LEC, or more like an assign of the incumbent.[203]

105. Transfers of Facilities. Under existing Commission precedent, if a BOC transfers to an affiliated entity ownership of any network elements that must be provided on an unbundled basis pursuant to section 251(c)(3), such an entity would be deemed to be an assign of the BOC under section 3(4) of the Act with respect to those network elements.[204] We seek comment on whether the converse is true: should an affiliate not be deemed an assign of the incumbent LEC if the affiliate acquires facilities on its own, and not by transfer from the incumbent LEC?

106. In the Order above, we state that network elements used to provide advanced services must be unbundled pursuant to section 251(c)(3), subject to considerations of technical feasibility.[205] We seek comment on the extent to which incumbent LECs already have purchased facilities used to provide advanced services, including, but not limited to DSLAMs and packet switches. We tentatively conclude that, subject to any *de minimis* exception as discussed below, a wholesale transfer of such facilities would make an affiliate the assign of the incumbent LEC.[206]

107. Moreover, we tentatively conclude that any transfer of local loops from an incumbent LEC to an advanced services affiliate would make that affiliate an assign of the

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[202] *See, e.g., Howard Johnson Co, v. Detroit Local Joint Executive Board*, 417 U.S. 249, n.9 (1974) (stating that determinations about successorship must be based on "the facts of each case and the particular legal obligation which is at issue" and that "there is and can be no single definition of 'successor' which is applicable in every legal context.").

[203] *See State of Connecticut, Department of Public Utility Control Investigation of the Southern New England Telephone Company Affiliate Matters Associated with the Implementation of Public Act 94-83*, Decision at 37 (June 25, 1997) (determining that SNET America, Inc., is not an assign of the SNET Telco under section 251(h)(1) merely because the latter planned to transfer to the former rights to provide retail services).

[204] *See Non-Accounting Safeguards Order*, 11 FCC Rcd at 22054, ¶ 309; 47 C.F.R. § 53.207.

[205] *See supra* ¶ 58.

[206] We note that, to the extent facilities used to provide advanced services remain in the incumbent LEC, such facilities must be unbundled pursuant to section 251(c)(3) where technically feasible. *See supra* ¶ 58.