DOCKET FILE COPY ORIGINAL

FCC MAIL SECTION

JUL 16 11 21 AM '99

DISPATCHED BY

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of	)	
Regulatory Treatment of LEC Provision of Interexchange Services Originating in the LEC's Local Exchange Area	)	CC Docket No. 96-149
and	)	
Policy and Rules Concerning the Interstate, Interexchange Marketplace;	)	CC Docket No. 96-61
Leaco Rural Telephone Cooperative, Inc. Petition for Waiver	)	CC Docket No. 96-149 CC Docket No. 96-61

SECOND ORDER ON RECONSIDERATION AND MEMORANDUM OPINION AND ORDER

Adopted: May 18, 1999 **Released:** June 30, 1999

By the Commission: Commissioners Furchtgott-Roth and Powell concurring in part, dissenting in part and issuing separate statements.

TABLE OF CONTENTS

Paragraph

I. INTRODUCTION 1

II. BACKGROUND 3

III. DISCUSSION 9
- A. Regulatory Treatment of Independent LECs 9
- B. Clarification of the Term "Interexchange" 29
- C. Streamlined Waiver Process 32

D. Sunset of Separation Requirements for Independent LECs 34
E. Classification of BOC InterLATA Affiliates 35
F. Market Definition 39

IV. LEACO RURAL TELEPHONE COOPERATIVE, INC. PETITION FOR WAIVER 40

V. SUPPLEMENTAL FINAL REGULATORY FLEXIBILITY ANALYSIS 43

VI. ORDERING CLAUSES 52

APPENDIX A - Final Rules
APPENDIX B - List of Parties

I. INTRODUCTION

1. Following the passage of the Telecommunications Act of 1996,[1] the Commission initiated a rulemaking to consider, among other things, whether it should alter the regulatory classification of the Bell Operating Companies (BOCs) and independent local exchange carriers (LECs) for the provision of interstate, long distance services.[2] In the *LEC*

[1] Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56 (1996 Act), *codified at* 47 U.S.C. §§ 151 *et seq*. Hereinafter, all citations to the 1996 Act will be to the 1996 Act as it is codified in the United States Code. The 1996 Act amended the Communications Act of 1934 (Communications Act).

[2] *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, Notice of Proposed Rulemaking, 11 FCC Rcd 7141 (1996) (*Interexchange NPRM*). *See also Implementation of the Non-Accounting Safeguards of Sections 271 and 272 of the Communications Act of 1934, as amended; and Regulatory Treatment of LEC Provision of Interexchange Services Originating in the LEC's Local Exchange Area*, CC Docket No. 96-149, Notice of Proposed Rulemaking, 11 FCC Rcd 18877 (1996) (*Non-Accounting Safeguards NPRM*). Our use of the term "long distance services" refers to interstate, domestic or international, interLATA services provided by the BOC interLATA affiliates, and interstate, domestic or international, interexchange services provided by independent LECs, respectively. *See infra* ¶¶ 29-31. We also define, for purposes of this proceeding, the terms "in-region state," "interLATA service," and "LATA" as those terms are defined in 47 U.S.C. §§ 271(i)(1), 153(21), and 153(25), respectively, of the Communications Act, as amended. *See LEC Classification Order*, 12 FCC Rcd at 15758, ¶ 2 n.4; *Bell Operating Company Provision of Out-of-Region Interstate, Interexchange Services*, CC Docket No. 96-21, Report and Order, 11 FCC Rcd 18564, 18565, ¶ 1 n.3 (1996) (*Interim BOC Out-of-Region Order*). The Commission examined separately its regulation of U.S. international services in *International Competitive Carrier Policies*, CC Docket No. 85-107, Report and Order, 102 FCC 2d 812 (1985), *recon. denied*, 60 Rad. Reg. 2d 1435 (1986).

Classification Order,[3] which was released on April 18, 1997, the Commission addressed these, as well as other issues. In the *LEC Classification Order on Reconsideration*, which was released on June 27, 1997, the Commission, on its own motion, made minor modifications to correct and clarify portions of the *LEC Classification Order*.[4] Following the release of the *LEC Classification Order*, petitioners sought reconsideration of a number of the Commission's conclusions in that order. In the *LEC Classification Partial Stay Order*, which was released on March 24, 1998, the Common Carrier Bureau stayed the deadline for compliance with certain rules in the *LEC Classification Order* until 60 days after release of this order on reconsideration.[5]

2. In this second order on reconsideration, we modify our conclusion in the *LEC Classification Order* and allow independent LECs that provide in-region, long distance services solely on a resale basis to do so through a separate corporate division rather than a separate legal entity.[6] The record indicates that this group includes most of the small and mid-sized LECs that currently provide in-region, long distance services.[7] We also clarify the meaning of the term "interexchange" to avoid any possibility of unnecessary application of the Commission's separate affiliate requirements. In addition, we affirm our decision relaxing regulation of the BOCs' section 272 interLATA affiliates, i.e., by classifying these affiliates as non-dominant for in-region, long distance services. We also address several other miscellaneous issues raised in the reconsideration petitions. Consistent with the *LEC Classification Partial Stay Order* and the relief we grant in this order on reconsideration, any independent LEC that was providing long distance services on an integrated basis through the

---

[3] *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 Nos. 96-149, 96-61, Second Report in CC Docket No. 96-149 and Third Report and Order in CC Docket No. 96-61, 12 FCC Rcd 15756, 15802 (*LEC Classification Order*), Order on Reconsideration, 12 FCC Rcd 8730 (1997) (*LEC Classification Order on Reconsideration*), Order, 13 FCC Rcd 6427 (1998) (*LEC Classification Partial Stay Order*), *further recon. pending*.

[4] *LEC Classification Order on Reconsideration*, 12 FCC Rcd 8730 (1997).

[5] *LEC Classification Partial Stay Order*, 13 FCC Rcd 6427 (1998).

[6] The BOCs' and independent LECs' provision of out-of-region, interstate, domestic, long distance services is not subject to separation requirements. *See infra* ¶ 8.

[7] According to an NTCA survey answered by nearly 3/4 of its members, 139 of the 156 NTCA independent LEC members that provide in region, interstate, long distance services, do so solely on a resale basis. Letter from R. Scott Reiter, Senior Industry Specialist, National Telephone Cooperative Association, to Magalie Roman Salas, Secretary, Federal Communications Commission, Attachment (filed Jan. 16, 1998) (NTCA Jan. 16 *ex parte* letter).

use or control of its own facilities must form a separate affiliate to provide such services within 60 days of the release of this order on reconsideration.[8] Finally, we act on the Leaco Rural Telephone Cooperative, Inc. (Leaco) Petition for Waiver of the *LEC Classification Order* requirements.

II. BACKGROUND

3. Under Title II of the Communications Act, the Commission traditionally has applied a variety of regulations to carriers in order to protect customers against unjust, unreasonable, and discriminatory rates. In the *Competitive Carrier Proceeding*, which was conducted between 1979 and 1985, the Commission under its broad rulemaking authority[9] examined how these regulations should be revised to accommodate and promote increasing competition in telecommunications markets.[10] The Commission found that these regulations, which had applied to all carriers under Title II, were unnecessary for carriers that were subject to competition and therefore lacked sufficient market power to engage in anticompetitive activity.[11] The Commission, moreover, determined that such regulations even were harmful to competition and consumers because they impaired market efficiency and burdened carriers with administrative costs.[12] The Commission therefore sought to distinguish carriers for

[8] *LEC Classification Partial Stay Order*, 13 FCC Rcd 6427 (1998).

[9] *See, e.g.*, 47 U.S.C. § 154(i).

[10] *Policy and Rules Concerning Rates for Competitive Common Carrier Services and Facilities Authorizations Therefor*, CC Docket No. 79-252, Notice of Inquiry and Proposed Rulemaking, 77 FCC 2d 308 (1979); First Report and Order, 85 FCC 2d 1 (1980) (*Competitive Carrier First Report and Order*); Further Notice of Proposed Rulemaking, 84 FCC 2d 445 (1981); Second Further Notice of Proposed Rulemaking, FCC 82-187, 47 Fed. Reg. 17,308 (1982); Second Report and Order, 91 FCC 2d 59 (1982) (*Competitive Carrier Second Report and Order*); Order on Reconsideration, 93 FCC 2d 54 (1983); Third Further Notice of Proposed Rulemaking, 48 Fed. Reg. 28,292 (1983); Third Report and Order, 48 Fed. Reg. 46,791 (1983); Fourth Report and Order, 95 FCC 2d 554 (1983) (*Competitive Carrier Fourth Report and Order*), *vacated, AT&T v. FCC*, 978 F.2d 727 (D.C. Cir. 1992), *cert. denied, MCI Telecommunications Corp. v. AT&T*, 509 U.S. 913, 113 S.Ct. 3020 (1993); *Competitive Carrier Fifth Report and Order*, 98 FCC 2d 1191 (1984); Sixth Report and Order, 99 FCC 2d 1020 (1985), *vacated, MCI Telecommunications Corp. v. FCC*, 765 F.2d 1186 (D.C. Cir. 1985), *affirmed*, MCI v. AT&T, 512 U.S. 218, 114 S.Ct. 2223 (1994) (*Competitive Carrier Sixth Report and Order*) (collectively referred to as the *Competitive Carrier Proceeding*).

[11] *See, e.g., Competitive Carrier First Report and Order*, 85 FCC 2d 1.

[12] *See, e.g., Competitive Carrier First Report and Order*, 85 FCC 2d 1.

which the costs of traditional tariff filing and facilities authorization regulations clearly exceeded the benefits.[13]

4. Accordingly, the Commission established a regulatory framework to distinguish between carriers that the Commission determined have market power, which are classified as dominant, and those that do not have market power, which are classified as non-dominant.[14] It also defined "market power" alternatively as "the ability to raise prices by restricting output" and as "the ability to raise and maintain price above the competitive level without driving away so many customers as to make the increase unprofitable."[15] The Commission recognized that in order to assess whether a carrier possesses market power, the relevant product and geographic markets first must be defined.[16] The Commission relaxed its tariff filing and facilities authorization requirements for non-dominant domestic carriers and focused its regulatory efforts on constraining the ability of dominant carriers to exercise market power.[17]

5. In the *Competitive Carrier Fourth Report and Order*, the Commission determined that interexchange carriers affiliated with independent LECs should be regulated as non-dominant interexchange carriers.[18] In the *Competitive Carrier Fifth Report and Order*, the Commission clarified that an "affiliate" of an independent LEC is "a carrier that is owned (in whole or in part) or controlled by, or under common ownership (in whole or in part) or

---

[13] *See, e.g., Competitive Carrier First Report and Order*, 85 FCC 2d 1.

[14] *Competitive Carrier First Report and Order*, 85 FCC 2d 1; *Competitive Carrier Fourth Report and Order*, 95 FCC 2d 554; *Competitive Carrier Fifth Report and Order*, 98 FCC 2d 1191. *See also* 47 C.F.R. §§ 63.1(o), (u).

[15] *Competitive Carrier Fourth Report and Order*, 95 FCC 2d at 558, ¶¶ 7-8 (*citing, inter alia*, A. Areeda & D. Turner, Antitrust Law 322 (1978) and W. M. Landes & R. A. Posner, *Market Power in Antitrust Cases*, 94 Harv. L. Rev. 937 (1981)). The *1992 Merger Guidelines* similarly define market power as "the ability profitably to maintain prices above competitive levels for a significant period of time." 1992 Department of Justice/Federal Trade Commission Merger Guidelines, 4 Trade Reg. Rep. (CCH) ¶ 13,104 at 20,570 (*1992 Merger Guidelines*).

[16] *Competitive Carrier Fourth Report and Order*, 95 FCC 2d at 562, ¶ 13.

[17] *Competitive Carrier Fourth Report and Order*, 95 FCC 2d at 575-80, ¶¶ 31-38; *Competitive Carrier Fifth Report and Order*, 98 FCC 2d at 1195-1200, ¶¶ 6-11; *Competitive Carrier Sixth Report and Order*, 99 FCC 2d at 1028 n.29, ¶ 12.

[18] *Competitive Carrier Fourth Report and Order*, 95 FCC 2d at 575-579, ¶¶ 31-37.

control with, an exchange telephone company."[19] The Commission further clarified that, in order to qualify for non-dominant treatment, the affiliate providing interstate, interexchange services must: (1) maintain separate books of account; (2) not jointly own transmission or switching facilities with its affiliated exchange telephone company; and (3) acquire any services from its affiliated exchange telephone company at tariffed rates, terms, and conditions.[20] The Commission noted that "[a]n affiliate qualifying for non-dominant treatment is not necessarily structurally separated from an exchange telephone company in the sense ordered in the *Second Computer Inquiry* . . . ."[21] The Commission added that any interstate, interexchange services offered directly by an independent LEC (rather than through a separate affiliate) or through an affiliate that did not satisfy the specified conditions would be subject to dominant carrier regulation.[22]

6. In the *Competitive Carrier Fifth Report and Order*, the Commission also addressed the possible entry of the BOCs into interstate, interLATA services in the future:

> The BOCs currently are barred by the [MFJ] from providing interLATA services . . . . If this bar is lifted in the future, we would regulate the BOCs' interstate, interLATA services as dominant until we determined what degree of separation, if any, would be necessary for the BOCs or their affiliates to qualify for nondominant regulation.[23]

7. The 1996 Act became law on February 8, 1996. The intent of the 1996 Act is "to provide for a pro-competitive, de-regulatory national policy framework designed to accelerate rapidly private sector deployment of advanced telecommunications and information technologies and services to all Americans by opening all telecommunications markets to

---

[19] *Competitive Carrier Fifth Report and Order*, 98 FCC 2d at 1198, ¶ 9.

[20] *Competitive Carrier Fifth Report and Order*, 98 FCC 2d at 1198, ¶ 9.

[21] *Competitive Carrier Fifth Report and Order*, 98 FCC 2d at 1198, ¶ 9. The Commission's affiliate transactions rules also were applied to the LEC and its interexchange affiliate. *See Separation of Costs of Regulated Telephone Service from Costs of Nonregulated Activities*, CC Docket No. 86-111, Report and Order, 2 FCC Rcd 1298 (1987), *recon.*, 2 FCC Rcd 6283 (1987), *further recon.*, 3 FCC Rcd 6701 (1988), *aff'd sub nom. Southwestern Bell Corp. v. FCC*, 896 F.2d 1378 (D.C. Cir. 1990); 47 C.F.R. Parts 32 and 64.

[22] *Competitive Carrier Fifth Report and Order*, 98 FCC 2d at 1198, ¶ 9.

[23] *Competitive Carrier Fifth Report and Order*, 98 FCC 2d at 1198-99, n.23 (citing *United States v. Western Electric Co.*, 552 F.Supp. 131 (D.D.C. 1982) (subsequent history omitted)).

competition."[24] Under the 1996 Act, a BOC is permitted to provide interLATA services originating in an in-region state only if it demonstrates to the Commission that it has satisfied the market-opening requirements of section 271 and that it will provide these services through an affiliate that complies with the structural separation and nondiscrimination requirements in section 272.

8. In the *LEC Classification Order*, the Commission modified its regulatory treatment of the provision of domestic, interstate, interexchange, and international services by the BOCs and independent LECs. As a preliminary matter, the Commission revised its product and geographic market definitions in accordance with the *1992 Merger Guidelines*.[25] The Commission also determined that dominant carrier regulation should be imposed on BOC interLATA affiliates only if they have the type of market power that gives them the ability profitably to raise and sustain prices of in-region, interstate, domestic, interLATA services above competitive levels by restricting output. That is because dominant carrier regulation does not sufficiently help to prevent other types of harmful anticompetitive activity such as cost misallocation, access discrimination, and attempts to engage in a price squeeze, that a BOC can engage in by virtue of its control of bottleneck facilities.[26] The Commission next determined that, in light of the separation and other requirements of sections 271 and 272 of the Act, and other existing Commission rules, the BOC interLATA affiliates lacked such ability and therefore should be classified as non-dominant. Similarly, the Commission found that independent LECs should be classified as nondominant because they do not have the ability profitably to raise and sustain prices of in-region, interstate, domestic, interexchange services by restricting output, but that such LECs should be required to provide these services subject to the *Competitive Carrier Fifth Report and Order* separation requirements in order to prevent and detect cost misallocation, access discrimination, and price squeeze.[27] The Commission required any independent LEC that was providing interexchange service on an integrated basis subject to dominant carrier regulation to comply with the *Fifth Report and*

[24] *See* Joint Statement of Managers, S. Conf. Rep. No. 104-230, 104th Cong., 2d Sess. Preamble (1996) (Joint Explanatory Statement); *see also* 47 U.S.C. § 706(a) (encouraging the deployment of advanced telecommunications capability to all Americans).

[25] *LEC Classification Order*, 12 FCC Rcd at 15768-801, ¶¶ 16-80.

[26] *LEC Classification Order*, 12 FCC Rcd at 15762-63, 15847, 15854-55, ¶¶ 6, 156, 170-71.

[27] *LEC Classification Order*, 12 FCC Rcd at 15763, 15847-57, ¶¶ 7, 156-75. The Commission adopted the same regulatory treatment of the BOC interLATA affiliates' and independent LECs' provision of in-region, international services, as it adopted for their provision of in-region, interstate, domestic, interLATA and in-region, interstate, domestic, interexchange services, respectively. *Id.* at 15763-64, 15838-40, 15862-65, ¶¶ 8, 138-42, 188-92.

Order requirements by April 18, 1998, one year from the date of release of the *LEC Classification Order*.[28] On March 24, 1998, the Common Carrier Bureau stayed the April 18, 1998 deadline in order to resolve, prior to the deadline for compliance, the issues addressed in this order on reconsideration.[29]

III. DISCUSSION

A. Regulatory Treatment of Independent LECs

1. Introduction

9. On reconsideration, we conclude that independent LECs that provide in-region, long distance services solely on a resale basis should be permitted to provide such services through a separate corporate division, rather than a separate corporate affiliate, subject to the remaining *Fifth Report and Order* requirements, as modified by the *LEC Classification Order*. As discussed below, we now determine that such independent LECs have less incentive and ability to engage in anticompetitive conduct and would face additional, unintended burdens if required to provide long distance service through a separate corporate affiliate. Affirming the conclusion in the *LEC Classification Order*, we decline to exempt rural and mid-sized independent LECs from the separate affiliate requirement based purely on their size or status as rural carriers. Additionally, we decline to exempt all independent LECs from the *Fifth Report and Order* separation requirements as requested by a number of independent LECs. In doing so, as discussed below, we affirm the conclusion in the *LEC Classification Order* that independent LECs that provide in-region, long distance services through their own long distance facilities have greater incentive to engage in anticompetitive conduct and, in general, do not face additional burdens in complying with the separate affiliate requirement.

2. Background

[28] *See LEC Classification Order on Reconsideration* at ¶ 2; *LEC Classification Order*, 12 FCC Rcd at 15856, ¶ 173. While the Commission required, as clarified in the *Interim BOC Out-of-Region Order*, that the long distance affiliate be a "separate legal entity," it declined to require the more stringent level of "structural separation" imposed in section 272 for the BOCs' provision of in-region, interLATA services. *See Fifth Report and Order*, 98 FCC 2d at 1195, 1198 n.23. *See also Bell Operating Company Provision of Out-of-Region Interstate, Interexchange Services*, CC Docket No. 96-21, Report and Order, 11 FCC Rcd 18564, 18575-76 (1996) (*Interim BOC Out-of-Region Order*), *recon. pending*.

[29] *LEC Classification Partial Stay Order*, DA 98-556 (rel. Mar. 24, 1998) (staying the April 18, 1998 deadline for compliance until 60 days after the release of this order on reconsideration).

10. In the *LEC Classification Order*, the Commission required all incumbent independent LECs that provide in-region, interstate, long distance services and in-region, international services, to do so through a separate long distance affiliate that satisfies the *Competitive Carrier Fifth Report and Order* requirements.[30] The Commission determined that an independent LEC's control of local bottleneck facilities gives it the ability and incentive, in providing in-region, long distance services, to engage in cost misallocation, unlawful discrimination, or a price squeeze.[31] Cost misallocation is a concern because it "may allow the independent LEC to recover costs incurred by its affiliate in providing in-region, interexchange services from subscribers to the independent LEC's local exchange and exchange access services."[32] Such action can distort price signals in those markets and may give the affiliate an unfair advantage over its competitors.[33] An independent LEC also potentially could discriminate against its interexchange affiliate's competitors by providing them with poorer quality interconnection or unnecessarily delay a competitors' request to connect to the independent LEC's network, thus impairing competition.[34] An independent LEC's ability to exert a price squeeze is a concern because it may unfairly permit an independent LEC to gain additional market share.[35]

11. The Commission further determined that the *Competitive Carrier Fifth Report and Order* separation requirements are necessary to help prevent and detect anticompetitive conduct. The Commission found that the separate books of account requirement is necessary to trace and document improper allocations of costs or assets between a LEC and its long

---

[30] *LEC Classification Order*, 12 FCC Rcd at 15861-64, ¶¶ 184-192; *see supra* ¶ 5.

[31] *LEC Classification Order*, 12 FCC Rcd at 15850, 15852, 15862-63, ¶¶ 163, 167, 188.

[32] *LEC Classification Order*, 12 FCC Rcd at 15848-49, ¶ 159.

[33] *LEC Classification Order*, 12 FCC Rcd at 15848-49, ¶ 159.

[34] *LEC Classification Order*, 12 FCC Rcd at 15849, ¶ 160.

[35] *LEC Classification Order*, 12 FCC Rcd at 15849, ¶ 161. Specifically, absent appropriate regulation, an independent LEC potentially could raise the price of access to all interexchange carriers. This would cause competing in-region carriers either to raise their retail rates to maintain the same profit margins or to attempt to maintain their market share by not raising their prices to reflect the increase in access charges, thereby reducing their profit margins. If the competing in-region, interexchange providers raised their prices to recover the increased access charges, the independent LEC could seek to expand its market share by not matching the price increase. The independent LEC also could set its in-region, interexchange prices at or below its access prices. The independent LEC's in-region competitors then would be faced with the choice of reducing their retail rates, and thereby reducing their profit margins, or maintaining their retail rates at the higher price and risk losing market share. *Id.*

distance affiliate, as well as discriminatory conduct.[36] The Commission also found that the prohibition on jointly-owned facilities will reduce the risk of improper cost allocations of common facilities between the independent LEC and its long distance affiliate.[37] The prohibition on jointly owned facilities also helps to deter any discrimination in access to the LEC's transmission and switching facilities by requiring the affiliates to follow the same procedures as competing interexchange carriers to obtain access to those facilities.[38] The Commission also found that the requirement that services be taken at tariffed rates, or on the same basis as requesting carriers that have negotiated interconnection agreements pursuant to section 251, helps to prevent a LEC from discriminating in favor of its long distance affiliate, and reduces the risk of a price squeeze to the extent that an affiliate's long distance prices are required to exceed their costs for tariffed services.[39]

12. Declining to exempt "rural" or "mid-sized" independent LECs from the separation requirements, the Commission concluded that the size or rural status of an independent LEC does not affect its ability and incentive to engage in anticompetitive behavior, and that rural or mid-sized LECs would not be adversely affected by compliance with the *Fifth Report and Order* separation requirements.[40] Although the Commission required the long distance affiliate to be a "separate legal entity," it declined to require the more stringent level of "structural separation" imposed by section 272 for the BOCs' provision of in-region, interLATA services.[41] The Commission found that the level of

---

[36] *LEC Classification Order*, 12 FCC Rcd at 15850, ¶ 163.

[37] *LEC Classification Order*, 12 FCC Rcd at 15850, ¶ 163.

[38] *LEC Classification Order*, 12 FCC Rcd at 15850, ¶ 163.

[39] *LEC Classification Order*, 12 FCC Rcd at 15850, ¶ 163.

[40] *LEC Classification Order*, 12 FCC Rcd at 15850, 15860, ¶ 163, 183. We use the term "rural LEC" to refer to a LEC that qualifies as a "rural telephone company" under the 1996 Act. Under the 1996 Act, a LEC can qualify as a "rural telephone company" based on its small size or its location in a rural geographic area. In addition, we use the term "mid-sized LEC" to refer to an independent LEC with fewer than 2 percent of the nation's subscriber lines that does not fall within the Act's definition of "rural telephone company." Section 3(37) of the Act defines the term "rural telephone company." 47 U.S.C. § 153(37). Section 251(f)(2) allows independent LECs with fewer than 2 percent of the nation's subscriber lines to petition a state commission for suspension or modification of the requirements of section 251(b) and (c). *See* 47 U.S.C. § 251(b), (c), (f)(2).

[41] *See LEC Classification Order*, 12 FCC Rcd at 15851, 15854, ¶¶ 165, 170; *see also Fifth Report and Order*, 98 FCC 2d at 1195, 1198 n.23. For example, the "separate legal entity" required by the *LEC Classification Order* "may be staffed by personnel of its affiliated exchange companies, housed in existing offices of its affiliated exchange companies, and use its affiliated exchange companies' marketing and other services."

separation imposed by the *Fifth Report and Order* requirements would "address cost shifting and discrimination, but [did] not appear to be overly burdensome."[42]

3. Discussion

13. ATU, GTE and USTA request that the Commission reconsider its decision to impose the *Fifth Report and Order* separation requirements, including the separate affiliate requirement, on all independent LECs.[43] Alternatively, in their petitions for reconsideration, ALLTEL, ITTA, and NTCA ask the Commission to exempt rural and mid-sized independent LECs from the *Fifth Report and Order* requirements, including the separate affiliate requirement.[44] In addition, several petitioners argue that independent LECs that provide in-region, interstate, long distance services solely on a resale basis should be granted relief from the *Fifth Report and Order* requirements because these requirements impose substantial unnecessary costs on such independent LECs and result in fewer regulatory benefits than for independent LECs that provide facilities-based long distance services.[45] Several parties oppose reconsideration of these issues.[46] Specifically, AT&T, GCI, and MCI argue in opposition that the Commission should affirm its finding in the *LEC Classification Order* that all independent LECs have the ability and incentive to engage in anticompetitive activity by virtue of their bottleneck control over the local exchange and exchange access markets.[47]

a. Application of the *Fifth Report and Order* Requirements to All Independent LECs

---

Interim BOC Out-of-Region Order, 11 FCC Rcd at 18575-76, ¶ 22. *See also LEC Classification Order*, 12 FCC Rcd at 15851, ¶ 165 (declining to require "actual 'structural separation.'").

[42] *LEC Classification Order*, 12 FCC Rcd at 15851, ¶ 165 (*citing Interim BOC Out-of-Region Order*, 11 FCC Rcd at 18575-76, ¶ 22).

[43] ATU Petition at 1; USTA Petition at 1; GTE Reply at 2-4.

[44] ALLTEL Petition at 2-3; ITTA Comments at 2; NTCA Petition at 2; ALLTEL Reply at 1-2. Note that ALLTEL confines its arguments to mid-sized independent LECs and NTCA seeks relief only from the separate affiliate requirement.

[45] *See* ALLTEL Petition at 7; NTCA Petition at 4; USTA Petition at 5; *see also* ITTA Comments at 3, 10-11; ATU Reply at 4; NTCA Reply at 4-5.

[46] AT&T, GCI, MCI and TRA oppose reconsideration.

[47] *See* AT&T Opposition at 2, 6-7; GCI Opposition at 2-4; MCI Opposition at 10; *see also* TRA Comments at 2.

14. Petitioners seeking relief from the *Fifth Report and Order* requirements for all independent LECs, or alternatively for rural and mid-sized independent LECs, raise a number of arguments that the Commission previously rejected in the *LEC Classification Order*. Various petitioners argue that independent LECs lack the ability and incentive to engage in cost misallocation, unlawful discrimination, or a price squeeze against rival interexchange carriers.[48] Petitioners argue, for instance, that the elimination of barriers to entry in the 1996 Act, the presence of multiple, large, long distance competitors, or the lack of allegations of anticompetitive behavior by independent LECs in the record of this proceeding, demonstrate that independent LECs lack the ability and incentive to engage in anticompetitive conduct against rival interexchange carriers.[49] The Commission was not persuaded by such arguments at the time of the decision in the *LEC Classification Order*.[50] As described above, in that order the Commission found that independent LECs can engage in such activity and cause substantial harm to consumers and competition, by virtue of their control of bottleneck facilities.[51] Therefore, we reject petitioners' arguments for the same reasons stated in that order.[52] We find, instead, as the Commission stated in the *LEC Classification Order*, that only the emergence of competition in the local exchange and exchange access markets will eliminate independent LECs' ability and incentive to engage in anticompetitive activity.[53]

15. Some petitioners argue that all independent LECs should be free from the *Fifth Report and Order* requirements because the Communications Act does not give the Commission authority to impose separation requirements for the provision of services other than those provided by the BOCs listed in section 272(a) of the Act.[54] USTA asserts that this viewpoint is confirmed by a letter from several Members of Congress to the Commission, asserting that the separate affiliate requirement for independent LECs contravenes

---

[48] ATU Petition at 2-4; USTA Petition at 5-7. *See also* ALLTEL Petition at 8-10; ITTA Comments at 9-10; NTCA Petition at 4-7; ALLTEL Reply at 5; NTCA Reply at 4-5.

[49] USTA Petition at 12-13; ALLTEL Reply at 6.

[50] *LEC Classification Order*, 12 FCC Rcd at 15847-57, ¶¶ 158-175.

[51] *See supra* ¶ 10.

[52] *LEC Classification Order*, 12 FCC Rcd at 15847-57, ¶¶ 158-175.

[53] *LEC Classification Order*, 12 FCC Rcd at 15866, ¶ 196 (the Commission intends to commence a proceeding three years after the adoption of the *LEC Classification Order* to determine whether the emergence of competition in the local exchange and exchange access marketplace justifies removal of the *Fifth Report and Order* requirements).

[54] 47 U.S.C. § 272(a). *See* ATU Petition at 3-4; ITTA Comments at 6; USTA Petition at 2-3.

Congressional intent.[55] We acknowledge that the existence of section 272 is not wholly irrelevant to our assessment of what safeguards must be imposed on incumbent independent LECs to discourage anticompetitive behavior. Nevertheless, we conclude, consistent with the Commission's findings in the *LEC Classification Order*, that the imposition by Congress of separate affiliate requirements on the BOCs' provision of in-region, long distance services does not foreclose the Commission's consideration, under its broad rulemaking authority,[56] of whether, and which, separation requirements may be appropriate for independent LECs.[57] Moreover, section 601(c)(1) of the 1996 Act provides that the Commission is not to presume that Congress intended to supersede any of its regulations unless expressly so provided,[58] and section 272(f)(3) states that the Commission maintains authority to impose safeguards under other sections of the Act.[59] We also agree with MCI that the letter from certain Members of Congress cited by petitioners does not constitute persuasive legislative history in support of its position, given that the letter was generated after passage of the Act.[60] Consequently, we conclude here, consistent with the Commission's past decisions, that we have the authority to impose separate affiliate requirements for services and carriers other than those listed in section 272.[61]

16. Finally, we reject USTA's argument that the separate legal entity requirement

---

[55] USTA Petition at 2-3. *See* Letter from Representatives Tauzin, Oxley, Boucher, *et al.*, to the Honorable Reed E. Hundt, Chairman, Federal Communications Commission (Jun. 25, 1997) at 1-2.

[56] *See, e.g.*, 47 U.S.C. §§ 154(i), 201; *see also AT&T Corp. v. Iowa Utilities Board*, 119 S.Ct. 721 (1999) (holding that the Commission has general jurisdiction under section 201(b) of the Communications Act to implement the 1996 Act's local competition provisions).

[57] *LEC Classification Order*, 12 FCC Rcd at 15852-53, ¶ 168. *See also* AT&T Opposition at 6; MCI Opposition at 4-5; TRA Opposition at 7.

[58] MCI Opposition at 5. *See also LEC Classification Order*, 12 FCC Rcd at 15852-53, ¶ 168.

[59] 47 U.S.C. § 272(f)(3).

[60] MCI Opposition at 4-5. *See MCI v. AT&T, et al.*, 512 U.S. 218, 228 (1994) (finding that the most relevant time for determining a statute's meaning is when the statute became law).

[61] *See Interim BOC Out-of-Region Order*, 11 FCC Rcd 18564 (1996) (Commission concludes that Congress' failure to specify structural safeguards does not imply that Commission lacks authority to impose *Fifth Report and Order* safeguards on BOC out-of-region services). *See also LEC Classification Order*, 12 FCC Rcd at 15852-53, ¶ 168; *Amendment of the Commission's Rules To Establish Competitive Service Safeguards for Local Exchange Carrier Provision of Commercial Mobile Radio Services; Implementation of Section 601(d) of the Telecommunications Act of 1996*, WT Docket No. 96-162, Report and Order, 12 FCC Rcd 15668, 15697-99, ¶ 47 (1997).

in the *LEC Classification Order* is an unwarranted departure from previous Commission policy and was not proposed in the *Non-Accounting Safeguards NPRM* that precipitated the *LEC Classification Order*.[62] In fact, the separate legal entity requirement is not an "unwarranted departure" from previous Commission policy, but merely a clarification, made in the *Interim BOC Out-of-Region Order*, that the *Fifth Report and Order* prohibition on joint ownership[63] only made sense in tandem with a separate legal entity requirement.[64] To the extent that the separate legal entity requirement arguably constitutes a new requirement, the *Non-Accounting Safeguards NPRM* provided adequate notice in seeking comment on whether the *Fifth Report and Order* requirements were sufficient.[65]

17. We also decline to exempt rural and mid-sized independent LECs from the *Fifth Report and Order* requirements. We reject the arguments of ALLTEL, ITTA, and NTCA that rural and mid-sized independent LECs have less incentive and ability than larger LECs to engage in cost misallocation, unlawful discrimination, or a price squeeze against rival interexchange carriers,[66] for the same reasons given in the *LEC Classification Order*.[67] We find that these petitioners raise no new arguments on reconsideration that the Commission did not already consider and reject in the *LEC Classification Order* proceeding. In addition, we are not persuaded by ALLTEL's unsupported assertion that the potential for competition in the local exchange market has reduced the actual ability of small LECs to leverage their

---

[62] USTA Petition at 14-15.

[63] *See supra* ¶ 5 for a description of the *Fifth Report and Order* requirements.

[64] *LEC Classification Order*, 12 FCC Rcd at 15851, ¶ 165.

[65] *Non-Accounting Safeguards NPRM* at ¶ 158 (seeking comment on "whether the existing *Competitive Carrier* [*Fifth Report and Order*] requirements are sufficient safeguards to apply to independent LECs to address any potential competitive concerns. Commenters proposing to modify or add to these requirements should address the extent to which there is a possibility of improperly allocating costs or other discriminatory or anticompetitive conduct, and if so, specifically how the proposed modification or addition would mitigate such conduct").

[66] ALLTEL Petition at 7-10; ITTA Comments at 9-11; NTCA Petition at 5-7; ALLTEL Reply at 2, 8-9; NTCA Reply at 2-4. We note that ALLTEL and ITTA ask for exemption from the *Fifth Report and Order* requirements for carriers with less than two percent of the nation's access lines in the provision of in-region, interstate, interexchange service. NTCA asks for exemption for carriers that qualify as "rural telephone compan[ies]" under section 3(37) of the Communications Act, 47 U.S.C. § 153(37). *See* ALLTEL Petition at 2-3; ITTA Comments at 2; NTCA Petition at 2; ALLTEL Reply at 1-2.

[67] *LEC Classification Order*, 12 FCC Rcd at 15859-60, ¶¶ 180-183.

monopoly power in an anticompetitive manner.[68] As the Commission concluded in the *LEC Classification Order*, we believe that an independent LEC's control of long distance facilities, not its size or status as a rural carrier, provides a greater incentive to engage in cost misallocation and anticompetitive conduct such as access discrimination.[69] Therefore, we decline to grant relief to rural and mid-sized independent LECs based purely on their size or status as a rural carrier.

18. We recognize that evidence in the current record indicates that the *Fifth Report and Order* requirements may have a disparate impact on rural and mid-sized independent LECs.[70] For example, a number of petitioners present evidence suggesting that the costs of compliance with the separate legal entity requirement may be more burdensome for a smaller independent LEC due to legal and administrative expenses associated with creating and maintaining a separate legal entity to provide long distance services.[71] Although we decline to grant relief to rural and mid-sized independent LECs based purely on their size or status as rural carriers, we believe that the limited exemption we grant in this order from the separate legal entity requirement, as discussed below, should sufficiently address the most significant concerns expressed in the record by such LECs.[72]

b. Relief from the Separate Legal Entity Requirement for Independent LECs Providing In-Region, Long Distance Services Solely on a Resale Basis

19. For purposes of this order, we define "independent LEC resellers" as independent LECs that provide in-region, long distance services using no interexchange switching or transmission facilities or capability of the LEC's own. Our definition of independent LEC resellers excludes from relief independent LECs that use their own switching or transmission facilities or capability, whether owned by the LEC or leased from an IXC or other entity, to provide in-region, interstate, interexchange services. That is because we believe such LECs would be able to engage in anticompetitive behavior against competing IXCs by providing superior interexchange switching or transmission services to

---

[68] ALLTEL Reply at 10, *referencing* affidavit of Daniel Spulber at 32-33.

[69] *LEC Classification Order*, 12 FCC Rcd at 15860, ¶ 183.

[70] NTCA Petition at 7-8.

[71] NTCA Petition at 7-8 (contending that "the small size of rural telephone companies . . . exacerbates the costs and dislocations inherent in separate entity requirements").

[72] *See infra* Section III.A.3.b.

their own interexchange operations.[73] Our definition includes both independent LECs that purchase for resale from an interexchange carrier end-to-end interexchange services, including originating and terminating access services, and independent LECs that purchase for resale from an interexchange carrier only interexchange transport services because the independent LEC, in either case, would not use its own switching or transmission facilities or capability to provide interexchange services.[74] Our definition of independent LEC resellers excludes carriers that use either switching or transmission facilities or capability and therefore is more narrow in scope than the Commission's definition of "resellers of basic service" in the *Competitive Carrier Second Report and Order*. In that order, the Commission defined "resellers of basic service" as "those carriers who do not own any *transmission facilities* but rather obtain basic communication services from underlying carriers for resale purposes."[75] We decline to adopt the *Competitive Carrier Second Report and Order* definition of resellers for purposes of this order, because we believe that it would result in granting relief to carriers that, because they use their own switching facilities or capability to provide interexchange services, have a substantial ability and incentive to engage in anticompetitive behavior against other IXCs.

20. In contrast to the lack of new evidence submitted by parties seeking relief from the *Fifth Report and Order* requirements for all independent LECs or all rural and mid-sized independent LECs, various petitioners present new evidence that indicates that compliance with the separate legal entity requirement would impose additional burdens on independent LECs that provide in-region, long distance services solely on a resale basis, i.e., "independent LEC resellers." Notably, the issue of the application of this requirement, particularly to resellers, was not specifically raised by commenters in the record the Commission considered before issuing the *LEC Classification Order*. Based on that record, the Commission found that nearly all independent LECs that provided long distance services did so through a *Competitive Carrier Fifth Report and Order* separate affiliate and that only three independent LECs provided long distance services on an integrated basis subject to dominant carrier regulation.[76] As a result, the Commission concluded that its decision in the *LEC Classification Order* would require few independent LECs to change the manner in which

[73] *See infra* ¶ 22 for our analysis of an independent LEC reseller's diminished ability to engage in anticompetitive activity.

[74] *See, e.g.*, MCI Opposition at 10.

[75] *Competitive Carrier Second Report and Order*, 91 FCC 2d 59 at 61-62, ¶ 5 (1982) (emphasis added).

[76] *LEC Classification Order*, 12 FCC Rcd at 15856, ¶ 173.

they were providing in-region, long distance services.[77]

21. In the *LEC Classification Order*, the Commission sought to balance carefully its objective of addressing the potential for anticompetitive conduct by independent LECs against the possible burdens those regulations might impose on these carriers.[78] The Commission also recognized that complying with the separation requirements generally is more burdensome for carriers that are already providing long distance services on an integrated basis than for carriers that have not yet begun providing such services.[79] On reconsideration, USTA and NTCA present new evidence indicating that many of their members have been providing long distance services through a separate division, rather than a separate legal entity.[80] In particular, NTCA asserts that its members had previously believed that the *Fifth Report and Order* allowed independent LECs to provide long distance services through a separate division, particularly if they provide such services on a resale basis.[81] The new evidence submitted in this record indicates that the *LEC Classification Order* would require a significant number of independent LECs to alter substantially their existing long distance operations. For instance, NTCA states that the separate legal entity requirement would impose additional legal, accounting, and administrative costs, and additional complications regarding compensation, benefits, and personnel recruitment, on independent LECs that currently provide long distance services through a separate corporate division.[82] We therefore conclude that this new evidence shifts the balance of the Commission's analysis.

22. We conclude that independent LECs that provide long distance services solely on a resale basis can be exempted from the separate legal entity requirement, and instead be required to provide these services through a separate corporate division, without substantially harming our ability to address potential anticompetitive conduct. The reason is that independent LECs that provide long distance services solely on a resale basis are less likely to engage in anticompetitive activity such as access discrimination and cost misallocation than facilities-based independent LEC providers of such services, even though, as discussed below,

---

[77] *See LEC Classification Order*, 12 FCC Rcd at 15856, ¶ 173.

[78] *LEC Classification Order*, 12 FCC Rcd at 15854, ¶ 170; *see Interim BOC Out-of-Region Order*, 11 FCC Rcd at 18575-76, ¶ 22; *Competitive Carrier Fifth Report and Order*, 98 FCC 2d at 1198-99, ¶ 9.

[79] *LEC Classification Order*, 12 FCC Rcd at 15856, ¶ 173.

[80] NTCA Petition at 4-5; NTCA Reply at 3-4; USTA Reply at 9 n.15.

[81] *See* NTCA Petition at 4-6; NTCA Reply at 3-5.

[82] NTCA Petition at 7-8; NTCA Reply at 6.

they retain the ability to engage in some anticompetitive activity.[83] For example, we believe that independent LEC long distance resellers are unlikely to provide "poorer quality interconnection or [impose] unnecessary delays"[84] when connecting the underlying interexchange carrier to the independent LEC's network because such discrimination would harm the ability of both the underlying interexchange carrier and the LEC to provide interstate, long distance services.[85] Moreover, independent LEC resellers may have less incentive to discriminate among competing interexchange carriers because they may be uncertain whether such discrimination would just push customers to other interexchange carriers as opposed to their own long distance services. We also agree with ALLTEL that independent LEC resellers are less likely to attempt to allocate costs improperly than LECs that provide facilities-based long distance services.[86] This is because, as we have noted in other proceedings, the wholesale rates of resold long distance services are more readily visible to auditors than the underlying transmission costs of a facilities-based carrier, for which the Commission and carriers do not have precise information.[87]

23. Finally, we believe that our modification of the separate legal entity requirement for independent LECs that provide long distance service solely on a resale basis will facilitate entry of more independent LECs into the long distance market. We believe that resale is an essential facilitator of competition in the long distance industry because it allows independent LECs and other providers to enter the market immediately, and to add their own facilities when it becomes efficient to do so. NTCA asserts that, in many rural areas, the local independent LEC is the sole provider of interexchange service, typically through resale, in competition with the large interexchange carriers.[88]

24. MCI asserts that independent LEC resellers may fail to impute properly the cost of access in their long distance rates, or may have their local exchange and access operations

---

[83] *See infra* ¶ 24.

[84] *LEC Classification Order*, 12 FCC Rcd at 15849, ¶ 160.

[85] ALLTEL Petition at 7-9; ITTA Comments at 8; USTA Petition at 5; *see* NTCA Petition at 4.

[86] ALLTEL Petition at 10; *see* NTCA Reply at 4.

[87] *See Rules and Policies on Foreign Participation in the U.S. Telecommunications Market; Market Entry and Regulation of Foreign-Affiliated Entities*, IB Docket Nos. 97-142 and 95-22, Report and Order and Order on Reconsideration, FCC 97-398, ¶ 204 (rel. Nov. 26, 1997) (*Foreign Participation Order*); *see also* ALLTEL Petition at 10.

[88] *See* NTCA Petition at 5-6; NTCA Reply at 2-3.

perform functions for their interexchange operations, such as marketing, that are not fully reimbursed.[89] Although we agree with AT&T and MCI that independent LEC resellers of the type described above will retain some incentive and ability to engage in anticompetitive conduct,[90] in light of our findings above,[91] we do not find these contentions to be a persuasive basis for retaining what the record now indicates is a burdensome separate legal entity requirement for such LECs. We are satisfied that the concerns raised by these commenters are sufficiently addressed by our continued imposition of the remaining *Fifth Report and Order* requirements on these independent LEC resellers.[92] In addition, other existing safeguards, such as the nondiscrimination provisions of section 251 of the Act and the *Local Competition Order*[93] and *Equal Access Order*,[94] and the Commission's authority to impose forfeitures and other sanctions and to grant damages and injunctive relief pursuant to sections 4(i), 503, and 206-209 of the Act, will help prevent anticompetitive conduct by independent LEC resellers.[95]

25. Consequently, we agree with commenters that assert that independent LECs that

---

[89] MCI Opposition at 9-11; MCI Reply at 3.

[90] *See* AT&T Opposition at 3, 7; MCI Opposition at 9-11; MCI Reply at 3; *see also* GCI Opposition at 2-4; TRA Comments at 4-8.

[91] *See supra* ¶ 22.

[92] *See infra* ¶ 25.

[93] *See* 47 U.S.C. § 251; *see also Implementation of the Local Competition Provisions in the Telecommunications Act of 1996,* CC Docket No. 96-98, First Report and Order, 11 FCC Rcd 15499, 15808, ¶ 611 (1996) (*Local Competition Order*), *aff'd in part and vacated in part sub nom. Competitive Telecommunications Ass'n v. FCC*, 117 F.3d 1068 (8th Cir. 1997); *vacated in part on reh'g, Iowa Utilities Bd. v. FCC*, 120 F.3d 753, *further vacated in part sub nom. California Public Utilities Comm'n v. FCC*, 124 F.3d 934, *writ of mandamus issued sub nom. Iowa Utilities Bd. v. FCC*, No. 96-3321 (8th Cir. Jan. 22, 1998), *petition for cert. granted*, Nos. 97-826, 97-829, 97-830, 97-831, 97-1075, 97-1087, 97-1099, and 97-1141 (U.S. Jan. 26, 1998) (collectively, *Iowa Utils. Bd.*), Order on Reconsideration, 11 FCC Rcd 13042 (1996), Second Order on Reconsideration, 11 FCC Rcd 19738 (1996), Third Order on Reconsideration and Further Notice of Proposed Rulemaking, FCC 97-295 (rel. Aug. 18, 1997), *further recon. pending.*

[94] *MTS and WATS Market Structure Phase III: Establishment of Physical Connections and Through Routes Among Carriers; Establishment of Physical Connections by Carriers with Non-Carrier Communications Facilities; Planning Among Carriers for Provision of Interconnected Services, and in Connection with National Defense and Emergency Communications Services; and Regulations for and in Connection with the Foregoing*, CC Docket No. 78-72, Report and Order, 100 FCC 2d 860 (1985) (*Equal Access Order*).

[95] *See, e.g.*, ALLTEL Petition at 9; ITTA Comments at 9; NTCA Petition at 6; USTA Petition at 4, 10.

provide in-region, interstate, long distance services on a resale basis through a separate corporate division, rather than a separate legal entity, should still be subject to the remaining *Fifth Report and Order* requirements set forth in section 64.1903(a) of the Commission's rules.[96] Independent LECs that resell long distance service through a separate division must therefore continue to keep separate books of account, and obtain services at tariffed rates or on the same basis as requesting carriers that have negotiated interconnection agreements pursuant to section 251.[97] The *Fifth Report and Order* prohibition on jointly owned transmission and switching facilities is not applicable to such LECs because, by definition, they do not own such facilities.[98]

26. In maintaining the requirement for separate books of account, we adhere to the principles articulated in the *Interim BOC Out-of-Region Order* concerning the separate books of account requirement for a separate legal entity.[99] Specifically, although the separate division must maintain its own books of account, it need not maintain these books of account in accordance with the Commission's Part 32 Uniform System of Accounts rules. The requirement that independent LECs that resell long distance service through a separate division must maintain separate books of account supersedes section 32.23(c) of the Commission's rules, which sets forth the accounting requirements for nonregulated activities involving the common or joint use of assets and resources by carriers in their provision of regulated and nonregulated products and services.[100] To help ensure that the regulated operations of the independent LEC do not improperly subsidize its interexchange operations, we require that all transactions between the regulated telephone operations and the long distance division comply with the Commission's affiliate transactions rules.[101] As the

---

[96] Anchorage Petition at 1-2; NTCA Petition at 4; Anchorage Reply at 4-5; NTCA Reply at 4-5; USTA Reply at 8; *see* ALLTEL Petition at 10; USTA Petition at 15.

[97] Anchorage Petition at 1-2; NTCA Petition at 4; Anchorage Reply at 4-5; NTCA Reply at 4-5; USTA Reply at 8; *see* ALLTEL Petition at 10; USTA Petition at 15.

[98] NTCA Petition at 4.

[99] In the *Interim BOC Out-of-Region Order*, the Commission clarified that the *Competitive Carrier Fifth Report and Order* separate books of account requirement "refers to the fact that, as a separate legal entity, the affiliate must maintain its own books of account as a matter of course." *Interim BOC Out-of-Region Order*, 11 FCC Rcd at 18576-77, ¶ 23. The Commission stated that its Part 32 Uniform System of Accounts, however, "is not required to be kept by [such] affiliates." *Id.* at 18576, ¶ 23 n.62.

[100] Other than the limited purposes described in section 64.1903, section 32.23(c) shall remain in full force and effect.

[101] *See* 47 C.F.R. § 32.27.

Commission recognized in the *LEC Classification Order*, the separate books of account requirement is necessary to enable the Commission, should the need arise, to document transactions between a LEC's local exchange and its long distance operations, and to determine whether an incumbent LEC has engaged in discriminatory conduct.[102] The requirement that services be obtained under tariff or on the same basis as section 251 negotiated interconnection agreements makes it more difficult for LECs to discriminate in favor of its long distance operations and "reduces somewhat the risk of a price squeeze" to the extent that the reseller LECs' long distance prices "must exceed their costs for tariffed services."[103]

27. We believe that the exemption from the separate affiliate requirement of the *Fifth Report and Order* granted to reseller independent LECs should provide relief to many rural and mid-sized independent LECs. Rural and mid-sized independent LECs that own no interexchange facilities will not be required to establish and maintain a separate affiliate to provide in-region, long distance services on a resale basis. Instead, these carriers may provide such services through a separate division of the local exchange company.[104] The current record suggests that most rural LECs and many mid-sized LECs will qualify for this exemption.[105] Additionally, we note that any rural or mid-sized independent LECs that do not qualify for the reseller exemption may petition the Commission for waiver of the separate legal entity requirement, as well as the other *Fifth Report and Order* requirements.[106]

28. We also believe that the relief granted to independent LEC long distance resellers should address specific concerns expressed in the record regarding the adverse impact of the *Fifth Report and Order* separate legal entity requirement on independent LECs that are organized as cooperative telephone companies. An unintended consequence of the separate legal entity requirement is that such independent LECs may lose their status as exempt from Federal income taxes, resulting in additional costs to members and deterring such LECs from

---

[102] *LEC Classification Order*, 12 FCC Rcd at 15850, 15853-54, ¶¶ 163, 169.

[103] *LEC Classification Order*, 12 FCC Rcd at 15850, ¶ 163.

[104] *See supra* ¶ 13.

[105] According to an NTCA survey answered by nearly 3/4 of its members, 139 of the 156 NTCA independent LEC members that provide in region, interstate, long distance services, do so solely on a resale basis. NTCA Jan. 16 *ex parte* letter.

[106] 47 C.F.R. § 1.3. Pursuant to our existing general waiver process, the Commission may exercise its discretion to waive any provision of its rules or orders if good cause is shown. *See infra* note 126; *see also LEC Classification Order*, 12 FCC Rcd at 15860, ¶ 183 n.518.

providing long distance services.[107] Section 501 of the Internal Revenue Code exempts "mutual or cooperative telephone companies" from Federal income taxation as long as "85 percent or more of the [cooperative's] income consists of amounts collected from members for the sole purpose of meeting losses and expenses."[108] No party disputes NTCA's contention that revenues received by an independent LEC's long distance affiliate by virtue of the affiliate's status as a profit-making "separate legal entity"[109] are considered non-member income and accordingly may deprive the LEC of tax-exempt status under section 501(c)(12)(A).[110] We believe that most independent LECs that are organized as cooperatives will fall within the scope of the relief that we grant today to resellers.[111] We note again,

---

[107] *See* NTCA Petition at 8; NTCA Reply at 6; Petition for Waiver of Leaco Rural Telephone Cooperative, Inc., CC Docket Nos. 96-149 and 96-61, at 5 (filed Aug. 15, 1997) (estimating that elimination of its tax-exempt status would result in additional annual costs of $38,000, or $16 per member); *see also* NTCA Dec. 18 *ex parte* letter.

[108] 26 U.S.C. §§ 501(a), 501(c)(12)(A).

[109] According to NTCA, if a telephone cooperative LEC establishes a separate legal entity to provide in-region, long distance services, this entity would be treated as a for-profit entity which would likely result in the cooperative's violating the statutory requirement that 85 percent or more of the cooperative's income consist of amounts collected from members for the sole purpose of meeting losses and expenses. On the other hand, a separate corporate division established by a telephone cooperative LEC to provide in-region, long distance services, likely would be treated as part of the cooperative, and not as a for-profit entity. *See* Letter from David Cosson, Vice President, Legal & Industry, National Telephone Cooperative Association (filed Dec. 18, 1997) (NTCA Dec. 18 *ex parte* letter); Letter from David Cosson, Kraskin, Lesse & Cosson, L.L.P. (filed Jan. 11, 1999); NTCA Petition at 8; NTCA Reply at 6; *see also* 26 U.S.C. §§ 501(a), 501(c)(12)(A).

[110] *See* Petition for Waiver of Leaco Rural Telephone Cooperative, Inc., CC Docket Nos. 96-149 and 96-61, at 5 (filed Aug. 15, 1997) (estimating that elimination of its tax-exempt status would result in additional annual costs of $38,000, or $16 per member); *see also* NTCA Dec. 18 *ex parte* letter.

[111] According to an NTCA survey of nearly 3/4 of its members, 198 of 363 total respondents fall within the definition of "mutual or cooperative telephone company" in section 501(c)(12)(A) of the Internal Revenue Code. Moreover, of the 97 of such cooperatives that currently are providing in-region, interstate, long distance services, 87 of these companies do so on a resale basis. NTCA Jan. 16 *ex parte* letter. According to this survey, 139 of the 156 NTCA independent LEC members that provide in-region, interstate, long distance services, do so on a resale basis. *Id.*

We note that we continue to require independent LECs that are facilities-based providers of interstate, interexchange services to comply with the *Fifth Report and Order* separation requirements, including the separate legal entity requirement, and therefore such LECs that are organized as cooperatives likely would no longer qualify for tax-exempt status under section 501(c)(12)(A), as discussed above. As a general matter we encourage facilities-based provision of interstate, long distance services by independent LECs, including LECs organized as cooperatives. We nonetheless believe that we should require all facilities-based independent LECs to comply

however, that independent LECs, including telephone cooperatives, that do not qualify for the relief we grant today to resellers may seek a waiver of the *Fifth Report and Order* separate affiliate requirement.[112]

B. Clarification of the Term "Interexchange"

29. As noted previously, the *LEC Classification Order* applies separate affiliate requirements to an independent LEC's provision of in-region, interstate, domestic, interexchange services. GTE requests that the Commission clarify the meaning of the term "interexchange" as it is used in the *LEC Classification Order*.[113] In particular, GTE asks that the Commission clarify that the term "interexchange" as applied to an independent LEC has equivalent meaning to "interLATA" as applied to a BOC.[114] GTE asserts that, while the *LEC Classification Order* clearly requires independent LECs to provide in-region, interstate, toll services between exchange areas through a separate affiliate, the Commission should clarify that independent LECs are allowed to provide in-region, interstate, toll services between local exchanges *within an exchange area* on an integrated basis.[115] GTE contends that, absent clarification, the term "interexchange" could be incorrectly interpreted to refer to services provided between the various smaller "local telephone exchanges" that make up an independent LEC's "exchange area." GTE is concerned that such an incorrect interpretation would make the Commission's separate affiliate requirements applicable to the small amount of in-region, interstate services that GTE provides between local telephone exchanges within the GTE exchange area.[116] No other parties oppose or even address these issues raised by

---

with the *Fifth Report and Order* requirements. We find that the benefits of full application of the *Fifth Report and Order* requirements to facilities-based independent LECs organized as cooperatives, i.e., increased deterrence of anticompetitive activity such as cost misallocation, access discrimination, and attempts to initiate a price squeeze, outweigh the regulatory burdens, i.e., the additional costs associated with forming a separate legal entity and loss of tax-exempt status.

[112] *See* ¶¶ 32-33 *infra*.

[113] GTE Petition at 1-2; GTE Reply at 1-2.

[114] GTE Petition at 2, 14; GTE Reply at 1-2. According to GTE, the "exchange areas," or LATAs, established by the AT&T and GTE Consent Decrees included a number of local exchanges, or local calling areas. *See United States v. Western Elec. Co.*, 569 F. Supp. 990, 993 n.9 (D.D.C. 1983).

[115] GTE Petition at 10-12.

[116] GTE Petition at 12, 13. GTE asserts that it derives only 0.2% of its revenues from such services, and that if required to provide such services on separate basis, it would be forced to cease providing the services altogether. *Id.* at 12. Other independent LECs also provide such services. *See e.g.*, Cincinnati Bell Telephone

GTE.

30. To ensure that the *LEC Classification Order* is interpreted properly, we clarify that our use of the term "interexchange" in the *LEC Classification Order* does not refer to services between local telephone exchanges within the independent LEC's exchange area, but instead refers to services between a point located in an independent LEC's exchange area and a point located outside such area.[117] The separate affiliate requirements only apply to independent LECs in the provision of in-region, interstate, "interexchange" services (i.e., services between an independent LEC's exchange area and a point located outside such area). We therefore clarify that an independent LEC that provides in-region, interstate services between local telephone exchanges within its exchange area may do so on an integrated basis.[118]

31. USTA requests more generally that the Commission clarify that the terms "interexchange" and "interLATA" are not used interchangeably in the *LEC Classification Order*.[119] Although we believe that the terminology in the *LEC Classification Order* is consistent with the 1996 Act and the *Competitive Carrier Proceeding*, we grant USTA's request and clarify that use of the term "interLATA" in the *LEC Classification Order* refers to telecommunications provided by a BOC between a point located in a BOC LATA and a point

Co., Interstate, IntraLATA Message Telecommunications Service, Tariff FCC No. 40, effective July 1, 1995; Sprint Local Telephone Companies, Interstate, IntraLATA Message Telecommunications Service, Tariff FCC No. 1, eff. Mar. 20, 1997.

[117] *See* 47 U.S.C. § 153(47) (defining local telephone exchange service as "service within a telephone exchange, or within a connected system of telephone exchanges within the same exchange area . . . .").

[118] We note that, although we clarify that GTE and other similarly situated independent LECs are not subject to the *LEC Classification Order* separate affiliate requirements in the provision of in-region, interstate services between local telephone exchanges within an independent LEC's exchange area, such LECs will continue to be subject to dominant carrier regulation for these services. Dominant regulation of these services is consistent with the *LEC Classification Order*. The *LEC Classification Order* classified independent LECs in the provision of in-region, interstate, interexchange services as non-dominant after finding that, subject to the *Fifth Report and Order* separation requirements, they would not possess market power sufficient to raise prices by restricting their own output of these services. The *LEC Classification Order* did not make this finding, or even address this issue, for GTE and other similarly situated independent LECs in the provision of in-region, interstate services between local telephone exchanges within an independent LEC's exchange area.

[119] USTA Petition at 16.

located outside such area,[120] and that use of the term "interexchange" in the *LEC Classification Order* refers to telecommunications provided by an independent LEC between a point located in an independent LEC exchange area and a point located outside such area.[121]

C. Streamlined Waiver Process

32. The Commission determined in the *LEC Classification Order* that, under special circumstances, an independent LEC could petition for a waiver of one or more of the *Fifth Report and Order* requirements pursuant to section 1.3 of the Commission's rules.[122] The Commission noted that such an independent LEC would face a heavy burden in demonstrating the need for such a waiver.[123] ATU requests that the Commission adopt a streamlined procedure for waiving the *Fifth Report and Order* requirements, in order to accommodate the different rates at which local competition will develop throughout the nation and to relieve individual independent LECs from unnecessary regulations that will impede their ability to compete effectively while providing no significant protections to ratepayers.[124] GCI and MCI oppose ATU's proposal, and argue that the current waiver procedures set forth in the Commission's rules are adequate to meet the needs of independent LECs.[125]

33. We decline to adopt ATU's proposal. We find that the existing general waiver process set forth in section 1.3 of our rules is an adequate means for independent LECs to seek relief from one or more of the *Fifth Report and Order* requirements.[126] We note that the

---

[120] 47 U.S.C. § 153(21) (defining interLATA service as "telecommunications between a point located in a local access and transport area and a point located outside such area.").

[121] 47 U.S.C. § 153(47) (defining "telephone exchange service" as "service within a telephone exchange, or within a connected system of telephone exchanges within the same exchange area . . . .").

[122] *LEC Classification Order*, 12 FCC Rcd at 15856, ¶ 173; *see id.* at 15860, ¶ 183 n.518.

[123] *LEC Classification Order* at 15860, ¶ 183 n.518.

[124] ATU Petition at 7.

[125] GCI Opposition at 5; MCI Opposition at 18-19.

[126] Section 1.3 of the Commission's rules provides that:

> The provisions of [Chapter I--Federal Communications Commission] may be suspended, revoked, amended, or waived for good cause shown, in whole or in part, at any time by the Commission, subject to the provisions of the Administrative Procedure Act and the provisions of this chapter. Any provision of the rules may be waived by the Commission on its own motion or on petition if good cause therefor

action we take above in exempting reseller independent LECs from the separate legal entity requirement will likely result in fewer potential waiver applicants. Such LECs would have been among those LECs best able to qualify for a waiver because of their lessened ability to engage in anticompetitive activity.[127] We also note that our decision to rely on our existing waiver provisions rather than to adopt a special waiver process is consistent with recent Commission precedent in other contexts.[128]

D. Sunset of Separation Requirements for Independent LECs

34. In the *LEC Classification Order*, the Commission stated its intention to commence a proceeding three years from the date that the *LEC Classification Order* was adopted to determine whether the development of competition in the local exchange and exchange access markets justifies removal of the *Fifth Report and Order* requirements applied to independent LECs, but declined to adopt an automatic sunset provision for those requirements.[129] Parties on reconsideration raise no new arguments or new facts that the Commission did not fully consider in the *LEC Classification Order*.[130] We therefore reject ATU's and ALLTEL's petitions for a sunset provision for independent LECs.

---

is shown.

47 C.F.R. § 1.3. A showing of good cause requires the petitioner to demonstrate that special circumstances warrant deviation from the rules or order, *and* to show how such a deviation would serve the public interest. *See Northeast Cellular Telephone Co. v. FCC*, 897 F.2d 1164, 1166 (D.C. Cir. 1990); *WAIT Radio v. FCC*, 418 F.2d 1153, 1157 (D.C. Cir. 1969). The petitioner must clearly demonstrate that the general rule is not in the public interest when applied to its particular case and that granting the waiver will not undermine the public policy served by the rule. *See WAIT Radio*, 418 F.2d at 1157. Where a waiver is found to be in the public interest, it is generally expected that the waiver will not be so broad as to eviscerate the rule. Rather, the request must be tailored to the specific contours of the special circumstances. *See id.* at 1158.

[127] *See* ¶ 22 *supra*.

[128] *See, e.g., Local Competition First Report and Order*, 11 FCC Rcd at 15534, ¶ 66 (declining to adopt a special waiver process by which states may seek waivers of the Commission's rules implementing section 251 of the Act); *Amendment of Part 73, Subpart G, of the Commission's Rules Regarding the Emergency Broadcast System*, FO Dockets 91-301, 91-171, Second Report and Order, 13 FCC Rcd 6353 (1997) (declining to adopt a special policy by which small cable systems may seek waivers from the requirements of the Emergency Alert System).

[129] *LEC Classification Order*, 12 FCC Rcd at 15865-66, ¶¶ 193-96.

[130] *Compare* ALLTEL Petition at 12 *and* ATU Petition at 4-5 (favoring a sunset provision) *with* GCI Opposition at 4-5 *and* MCI Opposition at 17-18 *and* TRA Opposition at 8-9 (opposing a sunset provision).

E. Classification of BOC InterLATA Affiliates

35. In the *LEC Classification Order*, the Commission concluded that BOC interLATA affiliates should be classified as non-dominant in the provision of in-region, long distance services.[131] RCN and Hyperion request that the Commission reconsider this decision, reclassify the BOC interLATA affiliates as dominant, and continue to classify a BOC interLATA affiliate as dominant until it demonstrates that it should be classified as non-dominant.[132] Bell Atlantic, SBC, and USTA oppose this request.[133] On reconsideration, we affirm our decision to classify the BOC interLATA affiliates as non-dominant in the provision of in-region, long distance services because the BOC interLATA affiliates will not, in light of the statutory and regulatory safeguards discussed in the *LEC Classification Order,* have the ability, upon entry or soon thereafter, to raise the price of in-region, long distance services by restricting their own output of those services.[134] We find that RCN and Hyperion present no new evidence to persuade us to reverse the Commission's conclusion that dominant carrier regulation is designed to prevent a carrier from raising prices by restricting its own output of services.

36. RCN and Hyperion argue that the Commission should classify a BOC interLATA affiliate as non-dominant only after a thorough examination of the impact that an individual BOC interLATA affiliate's entry will have in its own in-region market.[135] RCN and Hyperion suggest that the Commission's analysis in the *LEC Classification Order* was not sufficiently tailored to take into account facts specific to each individual BOC interLATA affiliate's market.[136] RCN and Hyperion also argue that the BOC interLATA affiliate should bear the burden of proof in demonstrating that it does not have market power in the provision of in-region, interLATA services.[137]

---

[131] *LEC Classification Order*, 12 FCC Rcd at 15804, 15834-35, 15838-39, ¶¶ 85, 133, 139.

[132] RCN and Hyperion Petition at 5.

[133] Bell Atlantic Opposition at 1-3; SBC Opposition at 2-5; USTA Opposition at 2-8.

[134] *LEC Classification Order*, 12 FCC Rcd at 15802, 15825-26, 15834-35, ¶ 82, 119, 133; *see* 47 U.S.C. §§ 271, 272.

[135] RCN and Hyperion Petition at 2-5.

[136] RCN and Hyperion Petition at 2-5.

[137] RCN and Hyperion Petition at 7-8.

37. We reject these arguments and affirm the Commission's finding in the *LEC Classification Order* that the BOC interLATA affiliates should be classified as non-dominant in the provision of these services, because they will not, in light of the statutory and regulatory safeguards discussed in the order, have the ability to raise prices by restricting their own output upon entry into their in-region long distance market, or soon thereafter.[138] We agree with Bell Atlantic that a region-by-region determination of market power, with the burden on the BOC interLATA affiliate to prove non-dominance, would hinder additional competition in the long distance market and impose unnecessary costs on the Commission and consumers.[139] As noted in the *LEC Classification Order*, the Commission has long recognized that regulations associated with dominant carrier classification can dampen competition when applied to a competitive industry.[140] As a result, we believe that dominant carrier regulation should be imposed only where the regulatory benefits outweigh the burdens. We affirm our finding in the *LEC Classification Order* that the burdens of dominant carrier regulation outweigh the benefits in this instance.[141] We emphasize that the classification of the BOC interLATA affiliates as non-dominant applies only to BOC interLATA affiliates that have satisfied the requirements of sections 271 and 272 and the other regulatory requirements relied upon in the *LEC Classification Order*.

38. We also reject RCN and Hyperion's argument that in evaluating whether to classify BOC interLATA affiliates as dominant, we should consider the impact of the affiliate's entry on small interexchange carriers and competitive LECs.[142] Petitioners have presented no new evidence to persuade us to reverse the finding in the *LEC Classification Order* that the question of whether a carrier should be regulated as dominant depends solely upon whether the carrier has the ability to raise prices by restricting its own output of

---

[138] *LEC Classification Order*, 12 FCC Rcd at 15834-35, ¶ 133.

[139] Bell Atlantic Opposition at 3-4; *see* USTA Opposition at 5 (contending that because all the BOCs will begin offering in-region, interLATA services with a market share of zero, the Commission should regulate the BOC affiliates as non-dominant).

[140] *LEC Classification Order*, 12 FCC Rcd at 15806-08, ¶¶ 88-90 (stating that, "[f]or example, advance notice periods for tariff filings can stifle price competition and marketing innovation when applied to a competitive industry"). *See Competitive Carrier First Report and Order*, 85 FCC 2d at 34-44, ¶¶ 99-129; *AT&T Reclassification Order*, 11 FCC Rcd at 3288, ¶ 27.

[141] *LEC Classification Order*, 12 FCC Rcd at 15804-09, ¶¶ 85-92. We note, as we did in the *LEC Classification Order*, that we retain the ability to impose some or all of the dominant carrier regulations on one or more of the BOC interLATA affiliates if this proves necessary in the future. *Id.* at 15834-35, ¶ 133.

[142] RCN and Hyperion Petition at 3.

services.[143] We agree with SBC that our goal in classifying carriers as dominant or non-dominant is to "protect *competition* in the relevant market, not particular *competitors.*"[144]

F. Market Definition

39. On reconsideration, RCN and Hyperion request that we clarify that the revised product and geographic market definitions adopted by the Commission in the *LEC Classification Order* reflect the approach of the *1992 Merger Guidelines.*[145] No other party specifically responds to RCN and Hyperion's petition.[146] As we noted in the *LEC Classification Order*, the Commission's revised product and market definitions are consistent with the approach taken in the *1992 Merger Guidelines.*[147] Specifically, the Commission revised its product and geographic market definitions to be based "solely on demand substitutability considerations" and concluded that "supply substitutability should not be used to define relevant markets, but rather should be used to determine which providers are currently serving, or potentially could be serving, a relevant market only after that market has been identified."[148]

IV. LEACO RURAL TELEPHONE COOPERATIVE, INC. PETITION FOR WAIVER

---

[143] *LEC Classification Order*, 12 FCC Rcd at 15804, ¶ 85.

[144] SBC Opposition at 5.

[145] RCN and Hyperion Petition at 10-11.

[146] *But see* SBC Opposition at 2 (arguing that the Commission should reject RCN and Hyperion's petition "in its entirety").

[147] *See LEC Classification Order*, 12 FCC Rcd at 15761-62, ¶ 5.

[148] *LEC Classification Order*, 12 FCC Rcd at 15774-75, ¶ 27 (*citing* the *1992 Merger Guidelines* at p. 20,572); *see LEC Classification Order*, 12 FCC Rcd at 15782, 15792-95, ¶¶ 41, 64-69. As the Commission noted in the *LEC Classification Order*, supply substitutability identifies all productive capacity that can be used to produce a particular good, whether it is currently being used to produce that good or to produce some other, even unrelated, good. For example, if a factory that is producing desks could be converted quickly and inexpensively to the production of wheelbarrows, then the owner of that factory should be considered a potential producer of wheelbarrows. That does not mean, however, that desks and wheelbarrows are in the same relevant product market. Demand substitutability identifies all of the products or services that consumers view as substitutes for each other, in response to changes in price. For example, if, in response to a price increase for orange juice, consumers instead purchase apple juice, then apple juice would be considered a demand substitute for orange juice.

40. The relief we grant to reseller independent LECs moots, in part, the petition for waiver of the *Competitive Carrier Fifth Report and Order* separation requirements filed by Leaco.[149] Under the *Fifth Report and Order* requirements, Leaco would be required to provide in-region, interstate, domestic, long distance services and in-region, international services through a separate affiliate that is a separate legal entity, and such affiliate must: (1) maintain separate books of account; (2) not jointly own transmission or switching facilities; and (3) acquire any services at tariffed rates, terms, and conditions.[150] Leaco asserts that, as a small, rural, telephone cooperative that provides in-region, long distance service solely on a resale basis, the costs of establishing a separate legal entity in order to enter the in-region, long distance market will constitute an undue burden because Leaco's ability to engage in anticompetitive behavior is constrained by existing regulations and its status as a reseller.[151] In this regard, Leaco claims that it will incur a one-time cost of $42,000 during the first year of entry, and annual costs of nearly $21,000 per year, in order to establish and maintain a separate legal entity to provide in-region, long distance services in accordance with the requirements set forth in the *LEC Classification Order*.[152] Moreover, as a "mutual or cooperative telephone company" within the meaning of section 501(c)(3) of the Internal Revenue Code, Leaco claims that loss of its tax-exempt status would impose costs of $38,000 annually.[153] Leaco estimates that the total costs will amount to over $33 per member the first year, and $25 per member each succeeding year. Leaco asserts that these costs constitute an undue burden because the *Fifth Report and Order* requirements are not necessary to prevent Leaco from engaging in anticompetitive conduct, given the existence of the Commission's Part 64 rules and New Mexico Commission regulation of local exchange and exchange access services.[154] Leaco also asserts that, as a reseller independent LEC, "any favorable access treatment afforded to Leaco's underlying facilities-based carrier would have to be made available to all other interexchange carriers."[155]

---

[149] Leaco Rural Telephone Cooperative, Inc. Petition for Waiver (filed Aug. 15, 1997) ("Leaco Petition" or "Petition").

[150] *See supra* ¶ 5.

[151] Leaco Petition at 3-5.

[152] Leaco Petition at 3-4.

[153] Leaco Petition at 4-5.

[154] Leaco Petition at 6.

[155] Leaco Petition at 6.

41. We find that the relief we grant generally to independent LECs that provide in-region, long distance services solely on a resale basis, renders moot part of Leaco's request for relief and resolves many of the concerns raised in its petition. As a result of our action today, if Leaco provides interexchange service on a resale basis, Leaco may provide such services through a separate corporate division rather than a separate legal entity. Our action should eliminate all of the costs that Leaco stated it would incur with the loss of its Federal tax-exempt status, and at least some of the costs to establish and maintain an affiliate that is a separate legal entity.[156] Our action also addresses Leaco's claim that its status as a reseller independent LEC diminishes its ability to engage in anticompetitive conduct.[157]

42. As for the remainder of Leaco's petition, we decline to waive the remaining *Fifth Report and Order* requirements because we find that Leaco has failed to show special circumstances necessary to meet the good cause standard for a waiver.[158] Under the remaining requirements, Leaco and its separate corporate division must maintain separate books of account and acquire any services at tariffed rates, terms, and conditions. We concluded in our order on reconsideration above that independent LECs that resell long distance services through a separate division must continue to keep separate books of account and obtain services at tariffed rates or on the same basis as requesting carriers that have negotiated interconnection agreements pursuant to section 251 of the Act.[159] We found that these requirements are necessary to aid in the prevention and detection of anticompetitive conduct, and that compliance costs would not constitute an undue burden.[160] Leaco has not shown that unique facts and circumstances distinguish its situation from that of other independent LECs that resell long distance services. Specifically, Leaco has cited no costs or burdens that it would incur in complying with the remaining *Fifth Report and Order* requirements, that we did not take into consideration in our cost-benefit analysis. Simply stated, Leaco seeks relief from the normal, contemplated functioning of the rules set forth above in our order on reconsideration. Leaco's request thus fails to meet the requirement of special circumstances set forth in section 1.3 of the Commission's rules, and we deny the remainder of Leaco's

---

[156] *See, e.g.*, Leaco Petition at Attachment, Pro Forma Expense Analysis (listing non-recurring cost of $3,000 for "Legal and Incorporation Cost," and annually recurring cost of $1,000 for "Building Lease"). The relief we grant should reduce or eliminate these costs.

[157] *See supra* ¶¶ 9, 22.

[158] *See* 47 C.F.R. § 1.3.

[159] The *Fifth Report and Order* prohibition on jointly owned transmission and switching facilities is not applicable to such LECs because, by definition, they do not own such facilities. *See supra* ¶ 25.

[160] *See supra* ¶¶ 24-28.

petition for waiver.

V. SUPPLEMENTAL FINAL REGULATORY FLEXIBILITY ANALYSIS

43. As required by the Regulatory Flexibility Act (RFA),[161] the Commission issued a Final Regulatory Flexibility Analysis (FRFA) in the *LEC Classification Order*, in which it certified that the rules adopted in that order would not have a significant impact on a substantial number of small entities. None of the petitions for reconsideration filed in this proceeding specifically addresses, or seeks reconsideration of, that FRFA. This present Supplemental FRFA addresses the potential effect on small entities of the rules we adopt in this order. This Supplemental FRFA incorporates and adds to our FRFA in the *LEC Classification Order*.[162]

44. *Need for and Objectives of this Report and Order and the Regulations Adopted Herein.* The need for and objectives of the rules adopted in this order on reconsideration are the same as those discussed in the *LEC Classification Order's* FRFA.[163] In general, the regulations adopted in the *LEC Classification Order* are intended to promote increased competition in the interexchange market. In this order on reconsideration, we clarify the *LEC Classification Order* and grant or deny petitions filed for reconsideration in order to further the same needs and objectives.[164]

45. *Description and Estimates of the Number of Small Entities Affected by this Report and Order.* In this FRFA, we consider the impact of this order on two categories of entities, "small incumbent LECs" and "small non-incumbent LECs." Consistent with our prior practice, we shall continue to exclude small incumbent LECs from the definition of a small entity for the purpose of this FRFA. Accordingly, our use of the terms "small entities" and "small businesses" does not encompass "small incumbent LECs." We use the term "small incumbent LECs" to refer to any incumbent LECs[165] that arguably might be defined by SBA

---

[161] *See* 5 U.S.C. § 604. The RFA, 5 U.S.C. § 601 *et seq.*, has been amended by the Contract With America Advancement Act of 1996, Pub. L. No. 104-121, 110 Stat. 847 (1996) (CWAAA). Title II of the CWAAA is the Small Business Regulatory Enforcement Fairness Act of 1996 (SBREFA).

[162] *LEC Classification Order*, 12 FCC Rcd at 15878-86, ¶¶ 214-234.

[163] *LEC Classification Order*, 12 FCC Rcd at 15879, ¶¶ 215-216.

[164] *LEC Classification Order*, 12 FCC Rcd at 15879, ¶¶ 215-216.

[165] For purposes of this order we adopt the definition of "incumbent LEC" in section 251(h) of the Act. *See* 47 U.S.C. § 251(h).

as "small business concerns."[166] We include "small non-incumbent LECs" in our analysis, even though we believe that we are not required to do so.[167]

46. The RFA defines a "small business" to be the same as a "small business concern" under the Small Business Act, 15 U.S.C. § 632, unless the Commission has developed one or more definitions that are appropriate to its activities.[168] Under the Small Business Act, a "small business concern" is one that: (1) is independently owned and operated; (2) is not dominant in its field of operation; and (3) meets any additional criteria established by the SBA.[169] SBA has defined a small business for Standard Industrial Classification (SIC) category 4813 (Telephone Communications, Except Radiotelephone) to be a small entity when it has fewer than 1,500 employees.[170]

47. *Incumbent LECs.* SBA has not developed a definition of small incumbent LECs. The closest applicable definition under SBA rules is for telephone communications companies other than radiotelephone (wireless) companies. The most reliable source of information regarding the number of LECs nationwide of which we are aware appears to be the data that we collect annually in connection with the Telecommunications Relay Service (TRS). According to our most recent data, 1,376 companies reported that they were engaged in the provision of local exchange services.[171] Although it seems certain that some of these carriers are not independently owned and operated, or have more than 1,500 employees, we are unable at this time to estimate with greater precision the number of LECs that would qualify as small business concerns under SBA's definition. Consequently, we estimate that there are fewer than 1,376 small incumbent LECs that may be affected by the decisions and

---

[166] *See* 13 C.F.R. § 121.201 (SIC 4813).

[167] *See Mid-Tex Electric Cooperative, Inc. v. FERC*, 773 F.2d 327, 340-343 (D.C. Cir. 1985) (holding that "an agency may properly certify that no regulatory flexibility analysis is necessary when it determines that the rule will not have a significant economic impact on a substantial number of small entities that are subject to the requirements of the rule," and rejecting SBA's argument that the RFA is intended to apply to all rules that affect small entities, whether the small entities are directly regulated or not).

[168] *See* 5 U.S.C. § 601(3) (incorporating by reference the definition of "small business concern" in 15 U.S.C. § 632).

[169] 15 U.S.C. § 632.

[170] 13 C.F.R. § 121.201.

[171] Federal Communications Commission, CCB, Industry Analysis Division, *Carrier Locator: Interstate Service Providers*, Fig. 1 (Types of Interstate Service Providers) (Nov. 1997) (*Interstate Service Providers Report*).

regulations adopted in this order on reconsideration.

48. *Non-Incumbent LECs.* SBA has not developed a definition of small non-incumbent LECs. For purposes of this order, we define the category of "small non-incumbent LECs" to include small entities providing local exchange services that do not fall within the statutory definition in section 251(h), including potential LECs, LECs which have entered the market since the 1996 Act was passed, and LECs that were not members of the exchange carrier association pursuant to section 69.601(b) of the Commission's regulations.[172] We believe it is impracticable to estimate the number of small entities in this category.[173] We believe it is impossible to estimate the number of entities which may enter the local exchange market in the near future. Nonetheless, we will estimate the number of small entities in a subgroup of the category of "small non-incumbent LECs." According to our most recent data, 119 companies identify themselves in the category "Competitive Access Providers (CAPs) & Competitive LECs (CLECs)."[174] A CLEC is a provider of local exchange services which does not fall within the definition of "incumbent LEC" in section 251(h). Although it seems certain that some of the carriers in this category are CAPs,[175] are not independently owned and operated, or have more than 1,500 employees, we are unable at this time to estimate with greater precision the number of non-incumbent LECs that would qualify as small business concerns under SBA's definition.

49. *Summary Analysis of the Projected Reporting, Recordkeeping, and Other Compliance Requirements.* In this order on reconsideration, we conclude that independent LECs that are in-region, long distance resellers are permitted to provide such services through a separate division rather than a separate legal entity, subject to the *Fifth Report and Order* requirements, as modified by the *LEC Classification Order.* No party to this proceeding suggests that permitting independent LECs to provide long distance resale through a separate division would affect small entities or small incumbent LECs. We determine that compliance with the separate division requirement, rather than a separate legal entity requirement, may require small incumbent LECs to use accounting, economic, technical, legal, and clerical skills.

---

[172] 47 U.S.C. § 251(h).

[173] *See* 5 U.S.C. § 607.

[174] *TRS Worksheet.*

[175] While the Commission has not prescribed a definition for the term "CAP," this term generally is not used to refer to companies that provide local exchange services.

50. *Steps Taken To Minimize Economic Impact on Small Entities and Small Incumbent LECs, and Alternatives Considered.* We believe that the modification of the separate legal entity requirement will facilitate entry of independent LECs into the long distance market. We believe that resale is an essential facilitator of competition in the long distance industry because it allows independent LECs, some of which may be small entities, and other providers to enter the market immediately, and add their own facilities when it becomes efficient to do so. The modification of the separate legal entity requirement for independent LEC long distance resellers seems likely to benefit independent LECs, some of which may be small entities, by helping to reduce the cost of entry and of providing service. We reject alternatives to exempt all independent LECs, or small and rural independent LECs, from the separate legal entity requirement, for the reasons stated in Section III of this order on reconsideration.

51. *Report to Congress.* The Commission shall send a copy of this FRFA, along with this order on reconsideration, in a report to Congress pursuant to the SBREFA, 5 U.S.C. § 801(a)(1)(A). A copy of this analysis will also be provided to the Chief Counsel for Advocacy of the Small Business Administration, and will be published in the Federal Register.

VI. ORDERING CLAUSES

52. Accordingly, IT IS ORDERED that pursuant to sections 1, 2, 4, 201, 202, 220, 251, 271, 272 and 303(r) of the Communications Act of 1934, as amended, 47 U.S.C. §§ 151, 152, 154, 201, 202, 220, 251, 271, 272, and 303(r), the ORDER ON RECONSIDERATION is hereby ADOPTED, and the requirements contained herein shall be effective 30 days after publication of a summary thereof in the Federal Register. The amendment to the Uniform System of Accounts for Telecommunications Companies, Part 32 of the Commission's rules, shall be effective six months after publication in the Federal Register, although affected parties may elect to implement these changes upon adoption. The collection of information contained herein is contingent upon approval by the Office of Management and Budget.

53. IT IS FURTHER ORDERED that Part 64, Subpart Q of the Commission's rules, 47 C.F.R. § 64Q, is AMENDED as set forth in Appendix B hereto.

54. IT IS FURTHER ORDERED that the petitions for reconsideration are GRANTED in part, as described herein, and otherwise are DENIED.

55. IT IS FURTHER ORDERED that the Leaco Rural Telephone Cooperative, Inc. Petition for Waiver is RENDERED MOOT in part, as described herein, and the remainder is DENIED.

56. IT IS FURTHER ORDERED that the Commission's Office of Public Affairs, Reference Operations Division, shall send a copy of this order on reconsideration, including the Final Regulatory Flexibility Analysis, to the Chief Counsel for Advocacy of the Small Business Administration.

FEDERAL COMMUNICATIONS COMMISSION

Magalie Roman Salas WZC
Magalie Roman Salas
Secretary

APPENDIX A

Corrected Version -- Part 64, Subpart T of Title 47 of the Code of Federal Regulations

PART 64 -- MISCELLANEOUS RULES RELATING TO COMMON CARRIERS

Subpart T -- Separate Affiliate Requirements For Incumbent Independent Local Exchange Carriers That Provide In-Region, Interstate Domestic Interexchange Services Or In-Region International Interexchange Services

Sec.
64.1901 **Basis and purpose.**
64.1902 **Terms and definitions.**
64.1903 **Obligations of all incumbent independent local exchange carriers.**

Subpart T -- Separate Affiliate Requirements For Incumbent Independent Local Exchange Carriers That Provide In-Region, Interstate Domestic Interexchange Services Or In-Region International Interexchange Services

§ 64.1901 Basis and purpose.

(a) *Basis*. These rules are issued pursuant to the Communications Act of 1934, as amended.

(b) *Purpose*. The purpose of these rules is to regulate the provision of in-region, interstate, domestic, interexchange services and in-region international interexchange services by incumbent independent local exchange carriers.

§ 64.1902 Terms and definitions.

Terms used in this part have the following meanings:

Books of Account. Books of account refer to the financial accounting system a company uses to record, in monetary terms, the basic transactions of a company. These books of account reflect the company's assets, liabilities, and equity, and the revenues and expenses from operations. Each company has its own separate books of account.

Incumbent Independent Local Exchange Carrier (Incumbent Independent LEC). The term incumbent independent local exchange carrier means, with respect to an area, the

independent local exchange carrier that:

(1) On February 8, 1996, provided telephone exchange service in such area; and

(2) (i) On February 8, 1996, was deemed to be a member of the exchange carrier association pursuant to § 69.601(b) of this title; or

(ii) Is a person or entity that, on or after February 8, 1996, became a successor or assign of a member described in paragraph (2)(i) of this section.

The Commission may also, by rule, treat an independent local exchange carrier as an incumbent independent local exchange carrier pursuant to section 251(h)(2) of the Communications Act of 1934, as amended.

Independent Local Exchange Carrier (Independent LEC). Independent local exchange carriers are local exchange carriers, including GTE, other than the BOCs.

Independent Local Exchange Carrier Affiliate (Independent LEC Affiliate). An independent local exchange carrier affiliate is a carrier that is owned (in whole or in part) or controlled by, or under common ownership (in whole or in part) or control with, an independent local exchange carrier.

In-Region Service. In-region service means telecommunications service originating in an independent local exchange carrier's local service areas or 800 service, private line service, or their equivalents that:

(1) Terminate in the independent LEC's local exchange areas; and

(2) Allow the called party to determine the interexchange carrier, even if the service originates outside the independent LEC's local exchange areas.

Local Exchange Carrier. The term local exchange carrier means any person that is engaged in the provision of telephone exchange service or exchange access. Such term does not include a person insofar as such person is engaged in the provision of a commercial mobile service under section 332(c), except to the extent that the Commission finds that such service should be included in the definition of that term.

§ 64.1903 Obligations of all incumbent independent local exchange carriers.

(a) Except as provided in paragraph (c) of this section, an incumbent independent LEC providing in-region, interstate, interexchange services or in-region international interexchange services shall provide such services through an affiliate that satisfies the following requirements:

(1) The affiliate shall maintain separate books of account from its affiliated

exchange companies. Nothing in this section requires the affiliate to maintain separate books of account that comply with Part 32 of this title;

(2) The affiliate shall not jointly own transmission or switching facilities with its affiliated exchange companies. Nothing in this section prohibits an affiliate from sharing personnel or other resources or assets with an affiliated exchange company; and

(3) The affiliate shall acquire any services from its affiliated exchange companies for which the affiliated exchange companies are required to file a tariff at tariffed rates, terms, and conditions. Nothing in this section shall prohibit the affiliate from acquiring any unbundled network elements or exchange services for the provision of a telecommunications service from its affiliated exchange companies, subject to the same terms and conditions as provided in an agreement approved under section 252 of the Communications Act of 1934, as amended.

(b) Except as provided in subparagraph (1) of this paragraph, the affiliate required in paragraph (a) of this section shall be a separate legal entity from its affiliated exchange companies. The affiliate may be staffed by personnel of its affiliated exchange companies, housed in existing offices of its affiliated exchange companies, and use its affiliated exchange companies' marketing and other services, subject to paragraph (a)(3) of this section.

(1) For an incumbent independent LEC that provides in-region, interstate domestic interexchange services or in-region international interexchange services using no interexchange switching or transmission facilities or capability of the LEC's own (i.e., "independent LEC reseller,") the affiliate required in paragraph (a) of this section may be a separate corporate division of such incumbent independent LEC. All other provisions of this Subpart applicable to an independent LEC affiliate shall continue to apply, as applicable, to such separate corporate division.

(c) An incumbent independent LEC that is providing in-region, interstate, domestic interexchange services or in-region international interexchange services prior to April 18, 1997, but is not providing such services through an affiliate that satisfies paragraph (a) of this section as of April 18, 1997, shall comply with the requirements of this section no later than August 30, 1999.

APPENDIX B
LIST OF PARTIES

List of Petitioners

ALLTEL Communications, Inc. (ALLTEL)
Anchorage Telephone Utility (ATU)
GTE
National Telephone Cooperative Association (NTCA)
RCN Telecom Services, Inc., and Hyperion Telecommunications, Inc. (RCN and Hyperion)
United States Telephone Association (USTA)

List of Parties Filing Oppositions and Comments

AT&T Corp. (AT&T)
Bell Atlantic Long Distance Carriers (Bell Atlantic)
General Communication, Inc. (GCI)
Independent Telephone and Telecommunications Alliance (ITTA)
MCI Telecommunications Corp. (MCI)
SBC Communications Inc. (SBC)
Telecommunications Resellers Association (TRA)
USTA

List of Parties Filing Reply Oppositions and Comments

ALLTEL
ATU
GTE
MCI
NTCA
RCN and Hyperion
USTA

CONSOLIDATED SEPARATE STATEMENT OF COMMISSIONER HAROLD FURCHTGOTT-ROTH

Re: Petition for Forbearance of the Independent Telephone & Telecommunications Alliance: Regulatory Treatment of LEC Provision of Interexchange Services Originating in the LEC's Local Exchange Area

I support these items to the extent that they provide the relief requested by the Independent Telephone & Telecommunications Alliances (ITTA) petition. I object, however, to the extent that the regulatory relief requested is denied or some lesser regulatory relief is provided. Moreover, I question the overall approach that the Commission has taken to this forbearance petition.

I start with the presumption that the ITTA petition has been "deemed granted" in full because of the Commission's failure either (i) to deny the petition within one year after receiving it, or (ii) to make an explicit finding that a 90 day extension was necessary to meet the statutory requirements. Section 10 of the Communications Act is very clear: "The Commission may extend the initial one-year period by an additional 90 days if the Commission finds that an extension is necessary to meet the requirements of subsection (a)." The statute is thus specific that it is the "Commission" which must grant any extension and must do so upon a finding that the extension is necessary to meet the purposes of section 10(a). I do not believe that the bureau, acting on its own motion and without even prior consultation with the "Commission," can act to extend this statutory time-frame. I do not believe that the 90 day extension can be effectively used by the bureau without even briefing the Commission on the merits of the underlying petition, determining whether or not there are any new or novel questions of fact, law or policy, and receiving some signal from a majority of the "Commission" that an extension of time is warranted under these particular circumstances.

In addition, I disagree with several aspects of the approach that the Commission has taken to this forbearance petition. In several instances, the Commission determines that ITTA has not met the criteria for forbearance to the extent that the petition requests relief beyond that which is granted in a contemporaneous rulemaking proceeding. *See e.g.*, Petition for Forbearance of the Independent Telephone & Telecommunications Alliance, Third Memorandum Opinion and Order in AAD File No. 98-43, at para. 10 (denying relief to the extent that petition "extends beyond the relief granted in the *LEC Classification Second Order on Reconsideration*.") *See also*, Petition for Forbearance of the Independent Telephone & Telecommunications Alliance, Sixth Memorandum Opinion and Order in AAD File No. 98-43, at para. 2 ("Although we do not grant forbearance from our rules regarding applications for special permission at this time, we are considering whether, and how, we should modify some of our rules that necessitate applications for special permission as part of our ongoing biennial review rulemaking and expect to make a final decision on the basis of that more complete record in the near future."). I am troubled that the Commission has decided to provide some lesser form of regulatory relief than that which was requested -- doing so in a separate rulemaking where the Commission has more discretion -- and then has used that proceeding as part of the justification for denying full regulatory forbearance

as requested. In other words, the Commission has determined that the simplest method of dealing with these petitions is to deny the forbearance relief at issue while at the same time providing lesser relief in a separate rulemaking proceeding. But that is not the process the statute requires. Moreover, under such an approach, the Commission is able to avoid the difficult question of why, when considering the same facts, particular regulatory relief is appropriate and other regulatory relief would contravene the statute. Such distinctions would frequently be difficult to justify as the forbearance criteria focus on general standards -- e.g. "protection of consumers," or "in the public interest." I object to the Commission's attempt to avoid the objective rigor of the section 10 forbearance test by providing regulatory relief in separate proceedings where the Commission has more discretion.

In addition, this approach lends itself to eliminating one set of requirements and at the same time adopting new -- albeit lesser -- regulatory restrictions that would not be justified under section 10 alone. *See e.g.*, Biennial Regulatory review of Accounting and Cost Allocation Requirements, Petition for Forbearance of the Independent Telephone & Telecommunications Alliance, Fourth Memorandum Opinion and Order in AAD File No. 98-43, at par. 25 (reinterpreting ITTA petition as not asking to forbear from Class A accounting altogether but "[e]ssentially . . . asking us to change our rules, not to forbear from applying the current rules."). While section 10 provides that the Commission may be able to forbear "in whole or in part" from a particular provision or regulation, *see* section 10(c), it does not provide the Commission with any authority to *adopt* new regulations or to *impose* separate conditions in the context of a forbearance petition. Section 10's primary emphasis is on deregulation, and I will not support this provision, or any of the proceedings required by a section 10 petition, being used as an opportunity to authorize new regulatory restrictions or conditions. I fear that this type of expansive reading of the Commission's authority under the Act's forbearance provisions will lead the Commission astray from its clear statutory duties and limitations.

Finally, as I have stated previously, I am concerned that the Commission is placing too high a burden on the parties requesting forbearance relief. I believe that the Section 10 forbearance scheme requires the Commission to justify continued regulation in light of the competitive conditions in the marketplace. The Commission cannot meet their statutory obligations by simply shifting the burden to petitioners to justify forbearance.

SEPARATE STATEMENT OF COMMISSIONER MICHAEL K. POWELL

Re: Petition for Forbearance of the Independent Telephone and Telecommunications Alliance (AAD File No. 98-43), *and related proceedings* (CC Docket No. 97-11, CC Docket No. 98-81, CC Docket No. 96-150, CC Docket No. 98-117, WT Docket No. 96-162, CC Docket No. 96-149, CC Docket No. 96-61)

I am pleased to join my colleagues in granting some of the regulatory relief requested in the forbearance petition filed by the Independent Telephone and Telecommunications Alliance (ITTA) on behalf of mid-sized local exchange carriers. Although I concur in the results of most of these items (especially where regulatory relief is granted), I am, however, compelled to dissent in part to three of the decisions, and I continue to be concerned about the Commission's handling and analysis of forbearance requests under section 10 of the Communications Act.

In these various items (some concern other ongoing rulemaking proceedings), we address nine regulatory requirements from which ITTA, on behalf of mid-sized LECs, requested forbearance. We adopted seven different Orders in response to the petition (and other petitions or notices). In looking at these Orders as a package and individually, while some relief is granted, I continue to be concerned that, where forbearance is denied, these petitions are not being treated in a manner fully consistent with the intent and spirit of section 10 of the Act. While I concur with the outcome of most of these items -- since I believe we are reaching the correct result -- I do continue to question (along lines similar to those I have expressed elsewhere) our means and methods for handling forbearance petitions.

I must respectfully dissent, however, from the continued application of separate affiliate requirements for the provision of in-region interexchange services and commercial mobile radio services (CMRS) by mid-sized LECs. My reasons are twofold. First, I continue to be uneasy with the degree to which reliance on this and similar regulatory devices is based on speculation about anticompetitive behavior. I fully understand that any analysis about potentially harmful future conduct entails some assessment of likely conduct. Historically, the agency has stewarded the basic principle of nondiscrimination, resulting in regulatory protections against cost misallocation and anticompetitive behavior flowing from control of a "bottleneck" facility. Our precedents, such as separate affiliate requirements, were rightly premised on the existence of a true monopolist (sanctioned by the state) and the associated risks. In that environment, not only did the incumbent have monopoly power, there was no prospect of competition nor any watchful present or future competitors. These safeguards were designed to protect consumers from the potential ill effects of such accumulated power.

I believe, however, that much has changed. The movement toward a competitive environment means that we must take into fuller consideration the necessity, viability, and the potentially distorting competitive consequences of old familiar regulatory devices. Thus, to the extent we must speculate about potential harm (to competition and consumers) we must, too, factor in more fully the potential disciplining effects of both real competition and potential competition. I see a continued tendency to invoke the ancient mantra "to protect against discriminatory this or that" as glib justification for continued regulatory constraints. I believe we must work harder and press more heavily on the traditional rationales. I do not believe we did so in this case. Moreover, to do so will take time and resources, which we do not have when forbearance petitions are presented for deliberation with only a second or two left on the statutory shot-clock, as was the case here.

My second concern rests with the extent that the Commission expresses a tendency to justify certain regulatory restrictions in the name of promoting or advancing competition. That alone, of course, may be worthy, but we are not free to do so in a manner that involves intermediate judgements that differ from those reached by Congress. Let me explain more fully.

Prior to the 1996 Act, I believe both Judge Greene and the FCC did seek to create limited competitive markets out of the monopoly provider's control and, concomitantly, impose safeguards designed to keep the monopolist from thwarting fledgling competitors as well as ensuring that core regulatory goals were not compromised by such competitive forays. These competitive excursions were limited and usually merely incremental voyages into competitive service markets. But, we must be reminded that the fundamental paradigm remained regulation and central control over the most prized services. The key point is that Judge Greene and the Commission had a fairly wide birth to develop the conditions of their market-opening efforts.

The 1996 Act, however, altered the paradigm and structured the basic terms of competition. Competitive services were to become the rule, and regulated services the limited exceptions. By its act, Congress crafted a comprehensive competitive model, designed specifically to supplant the MFJ. In weaving this fabric, Congress made a number of significant judgements. The one most relevant here is that it concluded that, rather than restrict the ILECs to regulated wholesale service, it allowed ILECs to compete at the retail level as well. This judgement may prove unwise or unworkable, but it is the one that Congress chose.

Congress was not oblivious to the challenges or perils of allowing the ILECs to compete, however, in long distance and other services while they still controlled many of the necessary facilities and inputs that other competitors would need. It addressed this problem by crafting an access and interconnection regime (sections 251 and 252) that placed unique duties and obligations on ILECs. In addition, Congress recognized that different classes of LECs required different levels of safeguards and incentives. Bell

Operating Companies (BOCs), and they alone, are subject to sections 271 and 272. ILECs have more duties and obligations than CLECs, and so on. Thus, whether one likes it or not, *Congress* substantially addressed the dangers of "bottleneck control" and discriminatory incentives in the Act.

As a consequence, I believe, the Commission is not as free (as it perhaps was prior to the Act) to steward a transition to a competition regime different than that of the one chosen by Congress. Specifically, as it relates to the question of separate affiliates, we must be careful not to impose regulatory requirements that in practical effect amount to wholesale/retail separations, where Congress intended none. (I note that in contrast to the carriers petitioning here, BOCs are expressly subject to separate affiliates for some services). For this reason, I am uncomfortable with the analysis proffered to support continued separate affiliate requirements. We cite "bottlenecks" and "incentives" in what subtly (though perhaps unintentionally) seems to me a preference for wholesale separation in a competitive market. By way of illustration, the Orders often speak of the importance of separate affiliates to ensure that they obtain facilities on an "arm's length basis" and to ensure that all competing in-region providers and other carriers have the same access (*i.e.*, wholesale).

Though Congress made judgements about the competitive ground-rules, it did not endeavor to sweep through our regulations and apply those judgments to each and every structural requirement on the books. Instead, it directed us to search out such rules and apply the new paradigm. To do so, it gave the Commission the twin engines of the biennial review and forbearance. This is one reason I believe that section 10 is important in evaluating the continued validity of separate affiliate requirements, not otherwise mandated by law, where competitive conditions and/or other regulatory or enforcement mechanisms are already in place.

I believe that the petition before us raised substantial questions with regard to the need for structural separation in light of present conditions. Accordingly, I believe that in response to ITTA's forbearance petition, we should have examined more carefully alternative methods of enforcing core ILEC responsibilities to see if there wasn't a more rational, limited approach. For example, we should have explored including a sunset of the structural separation requirement for in-region interexchange services like that available to BOCs in section 272 and treating mid-sized LECs more like rural carriers under the CMRS separate affiliate requirement.

For these reasons, I respectfully dissent in part from these particular decisions.