FCC MAIL SECTION

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

In the Matter of	)	
	)	
Petition of U S WEST Communications, Inc. for a Declaratory Ruling Regarding the Provision of National Directory Assistance	)	CC Docket No. 97-172
	)	
Petition of U S WEST Communications, Inc. for Forbearance	)	
	)	
The Use of N11 Codes and Other Abbreviated Dialing Arrangements	)	CC Docket No. 92-105

MEMORANDUM OPINION AND ORDER

Adopted: June 9, 1999 **Released: September 27, 1999**

By the Commission: Commissioner Furchtgott-Roth approving in part, concurring in part, dissenting in part, and issuing a statement; Commissioner Powell concurring in the result.

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I. INTRODUCTION

1. In a Petition for Declaratory Ruling,[1] U S WEST asks the Commission to rule that nothing in the Communications Act of 1934 (the Act), as amended by the Telecommunications Act of 1996 (the 1996 Act), or the Commission's rules, prohibits it from: (1) providing nonlocal directory assistance service to its in-region subscribers; and (2) using the 411 or 1-411 dialing code for the provision of nonlocal telephone numbers. In a Petition for Forbearance,[2] U S WEST maintains that, if the Commission finds that its provision of nonlocal directory assistance service is subject to the separate affiliate requirements of section 272, it should forbear from imposing those requirements pursuant to section 10 of the Act.

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[1] Petition of U S WEST Communications, Inc. for a Declaratory Ruling Regarding the Provision of National Directory Assistance (filed July 17, 1997) (U S WEST Petition for Declaratory Ruling). There are two complaints pending in the Enforcement Division with respect to the provision of nonlocal directory assistance service by BOCs. *See* MCI Telecommunications Corp. v. U S WEST Communications, Inc., File No. E-97-40 (filed July 22, 1997); MCI Telecommunications Corp. v. Illinois Bell Telephone Co., Indiana Bell Telephone Co., Michigan Bell Telephone Co., Ohio Bell Telephone Company, Wisconsin Bell, Inc., File No. E-97-19 (filed Apr. 11, 1997).

[2] On March 11, 1998, U S WEST filed a pleading styled as "Further Submission in Support of Petition for Declaratory Ruling" that sought forbearance from the separate affiliate requirements of section 272. U S WEST requested that such submission be treated as a formal petition for forbearance under section 10 of the Act. U S WEST Forbearance Petition at 1 n.1. On March 19, 1998, the Common Carrier Bureau announced it would treat the filing as a forbearance petition. *See* Public Notice, *Commission Seeks Comment on U S WEST Petition for Forbearance*, DA 98-532 (rel. Mar. 19, 1998). On March 8, 1999, pursuant to section 10(c) of the Act, the Common Carrier Bureau extended until June 9, 1999, the date on which U S WEST's Forbearance Petition shall be deemed granted in the absence of a Commission decision that the petition fails to meet the standards for forbearance under section 10(a) of the Act. *See* Petition of U S WEST Communications, Inc. for Forbearance, Order, CC Docket No. 97-172, DA 99-468 (rel. Mar. 8, 1999).

2. In this Order, we conclude that U S WEST's provision of nonlocal directory assistance service to its in-region subscribers constitutes the provision of in-region, interLATA service, as defined in section 271(a) of the Act. Because we find, however, that the regionwide component of U S WEST's nonlocal directory assistance service falls within the scope of the exception provided in section 271(g)(4), we conclude that U S WEST may continue to provide this service without obtaining authorization from the Commission to provide in-region, interLATA service under section 271(d). We conclude that the nationwide component of U S WEST's nonlocal directory assistance service, on the other hand, is unlawful as currently configured. Thus, U S WEST must cease providing nationwide directory assistance until the service is reconfigured to comply with section 271(g)(4). We note that, if U S WEST was providing nationwide directory assistance service in compliance with section 271(g)(4), the service would fall within the scope of the forbearance granted in this Order.

3. We further conclude in this Order that, although the incidental interLATA services described in section 271(g)(4) must normally be provided through a separate affiliate,[3] in accordance with section 10, we forbear, in part, from applying the requirements of section 272 to U S WEST's provision of regionwide directory assistance. We allow U S WEST to provide the regionwide component of its nonlocal directory assistance service on an integrated basis, but we require U S WEST to make available to unaffiliated entities all of the in-region telephone numbers it uses to provide regionwide directory assistance service at the same rates, terms, and conditions it imputes to itself pursuant to section 272(c)(1) and our authority under sections 4(i), 10, and 303(r).

4. Finally, we reject Ameritech's contention that in footnote 170 of the *N11 Order* the Commission implied that the adjunct-to-basic category is limited to services, functions, and information that are local in nature and scope.[4] At the same time, however, we issue a declaratory ruling concluding that the adjunct-to-basic category includes nonlocal directory assistance.

II. BACKGROUND

A. U S WEST's Nonlocal Directory Assistance Service

5. There are two types of directory assistance service available to customers throughout the United States: local directory assistance service and nonlocal directory assistance service. Directory assistance service is considered "local" whenever a customer

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

[4] Ameritech Petition for Clarification (filed Mar. 28, 1997); *see also The Use of N11 Codes and Other Abbreviated Dialing Arrangements*, CC Docket No. 92-105, First Report and Order and Further Notice of Proposed Rulemaking, 12 FCC Rcd. 5572 (1997) (*N11 Order*) (considering, *inter alia*, the use of the 411 dialing code to access LEC directory assistance services).

requests the telephone number of a subscriber located within his or her LATA or area code. Local directory assistance typically is provided by a customer's local exchange carrier (LEC). Under the Modified Final Judgment (MFJ), the BOCs were permitted to use their Official Services Networks (OSN), which cross LATA boundaries, for the provision of local directory assistance service to their own local exchange customers.[5] Currently, most customers dial 411, 1-411, or 555-1212 to access their LEC's local directory assistance service.

6. Directory assistance service is considered "nonlocal" whenever a customer requests the telephone number of a subscriber located outside his or her home LATA or area code. BOCs were prohibited under the MFJ from providing nonlocal directory assistance service.[6] In view of this restriction, nonlocal directory assistance service has traditionally been provided by interexchange carriers. To access nonlocal directory assistance, most customers dial 1-NPA-555-1212. Thus, in order to use this service, customers must know the area code of the customer or entity they wish to call. When a customer does not know the area code, they often first dial the number for local directory assistance service to obtain such information from the local directory assistance operator. Customers using nonlocal directory assistance service typically can obtain up to two directory listings from the same area code per call. In order to obtain a listing from a different area code, the customer has to dial the number for directory assistance service in that area.

7. In April 1997, U S WEST began offering what it terms "National Directory Assistance" service to customers throughout its region.[7] This service permits U S WEST to offer both local and nonlocal directory assistance service from a single telephone number.[8] By dialing the number for local directory assistance, which is usually 411 or 1-411 in the U S WEST region, customers can obtain the telephone number of a subscriber located anywhere in the United States. U S WEST states that, because of the rural nature of its territory, it is more economical to provide both local and nonlocal directory assistance service from centralized locations.[9] Thus, a caller seeking a telephone number (local or nonlocal) will frequently obtain that number from an operator in a different LATA, or in a different state. The operator, in turn, will typically obtain the number from a centralized database in yet another LATA.[10]

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[5] *See United States v. Western Elec. Co.*, 569 F. Supp. 1057, 1097-1100 (D.D.C. 1983).

[6] *See, e.g., United States v. Western Elec. Co.*, Civ. Action No. 82-0192, slip. op. at 4-5 (D.D.C. Oct. 30, 1984) (declining to permit U S WEST to provide directory assistance service where the number sought was outside the NPA of the caller).

[7] U S WEST Petition for Declaratory Ruling at 3; U S WEST Forbearance Petition at 5.

[8] U S WEST Forbearance Petition at 5.

[9] U S WEST Petition for Declaratory Ruling at 3.

[10] *Id.*

8. U S WEST explains that calls to 411 or 1-411 are routed in the following manner in its network. When a customer dials 411 or 1-411, the local central office switch will route the call to an operator services switch,[11] which adds the Automatic Directory Assistance Services (ADAS) platform to the call. The ADAS system will deliver a script requesting the city, state, and listing desired.[12] If the requested number is local, the call is routed to an operator with access to local directory listing information.[13] U S WEST states that it uses its OSN or leased common carrier lines to connect end-users to local directory assistance operators and to connect local directory assistance operators to its local directory assistance databases.[14]

9. If the requested number is nonlocal, the call is routed to an operator that handles nonlocal directory listing requests.[15] The nonlocal request could be for either: (1) a telephone number in U S WEST's region; or (2) a telephone number outside U S WEST's region. If the request is for a telephone number within U S WEST's region, it will be retrieved from U S WEST's Regional Directory Assistance database, which is located in Portland, Oregon.[16] If the request is for a telephone number outside U S WEST's region, it will be retrieved from the Quest411 database, which is located in Chicago, Illinois and owned by Nortel.[17] After identifying the telephone number matching the customer's request, the nonlocal directory assistance operator will either quote the number verbally or cause the number to be automatically quoted by the audio response system. U S WEST states that it uses its OSN or leased common carrier lines to connect end users to nonlocal directory assistance operators and to connect nonlocal directory assistance operators to the Regional Directory Assistance system located in Portland, Oregon. Nortel, however, furnishes the interLATA transmission whenever it is necessary to obtain telephone numbers from the Nortel-owned Quest411 database located in Chicago, Illinois.

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[11] Letter from Melissa Newman, Executive Director -- Federal Regulatory, U S WEST, to Michelle Carey, Audrey Wright, FCC (dated Feb. 1, 1999) (U S WEST Feb. 1, 1999 *Ex Parte*).

[12] *Id.*

[13] U S WEST Forbearance Petition at 5-6.

[14] U S WEST Feb. 1, 1999 *Ex Parte*.

[15] U S WEST Forbearance Petition at 6. U S WEST states that its nonlocal directory assistance service operator centers are located in Colorado Springs, Colo., Sioux Falls, S.D., Waterloo, Iowa, and Duluth, Minn.

[16] U S WEST Feb. 1, 1999 *Ex Parte*.

[17] *Id.*

10. U S WEST claims that its provision of nonlocal directory assistance service prompted a competitive response from AT&T and MCI.[18] According to U S WEST, shortly after it began offering nonlocal directory assistance service, AT&T and MCI began advertising their own nonlocal directory assistance services whereby callers can use one telephone number to obtain directory listings from anywhere in the United States.[19] AT&T's "00" INFO service permits AT&T customers to obtain telephone numbers from anywhere in the United States by dialing "00."[20] According to AT&T, its "00" INFO service:

> makes it easier for callers to use directory assistance. They no longer need to remember multiple numbers for directory assistance. And they don't need to know the area code. Customers need only dial one simple number to reach an AT&T information assistant who will help them find telephone listings anywhere in the United States.[21]

Similarly, by dialing "10-10-9000," customers can obtain telephone listings from across the country.[22] U S WEST submits that, if it is forced to withdraw from the nonlocal directory assistance market, either because its nonlocal directory assistance service is found to violate section 271, or because of the costs associated with complying with section 272, competing providers of nonlocal directory assistance service, such as AT&T and MCI, could discontinue their nonlocal directory assistance services or return to charging noncompetitive rates.[23]

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[18] U S WEST Forbearance Petition at 7-8.

[19] AT&T introduced its "00 INFO" nationwide directory assistance service in September 1997. Press Release, *AT&T Starts Trial of New Directory Service* (rel. Sept. 22, 1997) (AT&T Sept. 22, 1997 Press Release), Attach. A to U S WEST Forbearance Petition. MCI introduced its "10-10-9000" nationwide directory assistance service in all fifty states in October 1998. *See* Attachment to *Ex Parte* Letter from G. Michael Crumling, Executive Director -- Federal Regulatory, U S WEST, to Magalie Roman Salas, Secretary, FCC (dated Nov. 4, 1998) (U S WEST Nov. 4, 1998 *Ex Parte*).

[20] AT&T Sept. 22, 1997 Press Release.

[21] Press Release, *AT&T Extends "00" INFO Directory Assistance Service Trial to 23 States, and To All AT&T Calling Card Customers* (rel. Oct. 22, 1997), Attach. B to U S WEST Forbearance Petition.

[22] *See* Attachment to U S WEST Nov. 4, 1998 *Ex Parte*.

[23] U S WEST Forbearance Petition at 26.

B. Statutory Framework

1. Sections 271 and 272

11. Sections 271 and 272 establish a comprehensive framework governing BOC provision of "interLATA service."[24] Pursuant to section 271, neither a BOC nor a BOC affiliate may provide in-region, interLATA service prior to receiving section 271(d) authorization from the Commission.[25] There are two exceptions to this requirement in the statute: section 271(f) and section 271(b)(3). The first exception, section 271(f), provides, in relevant part, that section 271(a) shall not:

> [P]rohibit a [BOC] or affiliate from engaging, at any time after the date of enactment of the [1996 Act], in any activity to the extent authorized by, and subject to the terms and conditions contained in, an order entered by the United States District Court for the District of Columbia pursuant to section VII or VIII(C) of the AT&T Consent Decree if such order was entered on or before such date of enactment, to the extent such order is not reversed or vacated on appeal.[26]

12. The second exception, section 271(b)(3), authorizes the BOCs to engage in the provision of the "incidental interLATA services" described in section 271(g) immediately after the date of enactment of the 1996 Act.[27] One such service is defined in section 271(g)(4) as "the interLATA provision by a [BOC] or its affiliate . . . of a service that permits a customer that is located in one LATA to retrieve stored information from, or file information for storage in, information storage facilities of such company that are located in another LATA."[28] There are two limitations to our interpretation of section 271(g)(4). First,

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[24] *See* 47 U.S.C. §§ 271-72; *see also Implementation of the Non-Accounting Safeguards of Sections 271 and 272 of the Communications Act of 1934, as amended*, CC Docket No. 96-149, First Report and Order and Further Notice of Proposed Rulemaking, 11 FCC Rcd. 21905 (1996) (*Non-Accounting Safeguards Order*), *petition for review pending sub nom. SBC Communications v. FCC*, No. 97-1118 (filed D.C. Cir. Mar. 6, 1997) (held in abeyance May 7, 1997), Order on Reconsideration, 12 FCC Rcd 2297 (1997) (*Order on Reconsideration)*, Second Order on Reconsideration, 12 FCC Rcd 8653 (1997), *aff'd sub nom. Bell Atlantic Tel. Cos. v. FCC*, 131 F.3d 1044 (D.C. Cir. 1997), *recon. pending*. In the *Non-Accounting Safeguards Order*, the Commission determined that the statutory definition of interLATA service encompassed interLATA telecommunications services and interLATA information services. *Non-Accounting Safeguards Order*, 11 FCC Rcd. at 21932, para. 55.

[25] 47 U.S.C. § 271(b)(1).

[26] *Id.* § 271(f).

[27] *Id.* § 271(b)(3).

[28] *Id.* § 271(g)(4). Section 272(a)(2)(B)(i) directs that a BOC provide such data retrieval and storage services only through a separate affiliate.

that provision must be "narrowly construed."[29] Second, we must ensure that the services authorized under that provision "will not adversely affect telephone exchange ratepayers or competition in any telecommunications market."[30] BOCs are required to provide the services authorized under section 271(g)(4) through a separate affiliate.[31]

2. Section 10

13. The 1996 Act requires the Commission to forbear from applying any regulation or any provision of the Act to telecommunications carriers or telecommunications services, or classes thereof, if the Commission determines that the three conditions set forth in section 10 are satisfied. In particular, section 10 provides that:

> [T]he Commission shall forbear from applying any regulation or any provision of this Act to a telecommunications carrier or telecommunications service, or class of telecommunications carriers or telecommunications services, in any or some of its or their geographic markets, if the Commission determines that --
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> (1) enforcement of such regulation or provision is not necessary to ensure that the charges, practices, classifications or regulations by, for, or in connection with that telecommunications carrier or telecommunications service are just and reasonable and are not unjustly or unreasonably discriminatory;
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> (2) enforcement of such regulation or provision is not necessary for the protection of consumers; and
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> (3) forbearance from applying such provision or regulation is consistent with the public interest.[32]

With regard to the public interest determination required by section 10(a)(3), section 10(b) states that, "[i]f the Commission determines that such forbearance will promote competition among providers of telecommunications services, that determination may be the basis for a Commission finding that forbearance is in the public interest."[33] Section 10(d) specifies, however, that "[e]xcept as provided in section 251(f), the Commission may not forbear from

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[29] *Id.* § 271(h).

[30] *Id.*

[31] *Id.* § 272(a)(2)(B).

[32] *Id.* § 160(a).

[33] *Id.* § 160(b).

applying the requirements of section 251(c) or 271 under [section 10(a)] until it determines that those requirements have been fully implemented."[34]

C. The Petitions

1. U S WEST's Petition for Declaratory Ruling

14. In its Petition for Declaratory Ruling, U S WEST maintains that there is no basis for distinguishing between its provision of local directory assistance and nonlocal directory assistance service. In particular, U S WEST submits that the only difference between local and nonlocal directory assistance service is the range of numbers available to the calling customer.[35] Otherwise, U S WEST contends, the two services are configured in exactly the same manner. According to U S WEST, nothing in the Act or the Commission's rules seeks to regulate or limit the range of telephone numbers customers can obtain by dialing 411 or 1-411.[36] U S WEST further maintains that its provision of nonlocal directory assistance is not subject to the requirements of sections 271 and 272 because nonlocal directory assistance service is not an "interLATA service," as that term is defined in the Act.[37] U S WEST contends, for example, that, in order to be characterized as an "interLATA service," the customer must specify the points of transmission. U S WEST maintains, however, that with nonlocal directory assistance service the customer does not specify the points of transmission and is indifferent to the configuration of the network supporting the call. U S WEST further contends that, even if nonlocal directory assistance is an interLATA service, the service is, nonetheless, permitted under section 271(f).[38] Specifically, U S WEST asserts that the centralized provision of directory assistance services was permitted under the MFJ as official communication services between a BOC and its customers and, therefore, is permitted under section 271(f) of the Act as a previously authorized activity. U S WEST, therefore, seeks a declaratory ruling that the Act does not prohibit it from providing nonlocal directory assistance service to its customers.[39] In addition, U S WEST seeks a ruling that the *N11 Order* does not prevent it from using abbreviated dialing codes, such as 411 or 1-411, to provide nonlocal telephone numbers.[40]

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[34] *Id.* § 160(d).

[35] U S WEST Declaratory Ruling Petition at 4.

[36] *Id.* at 3-4.

[37] *Id.* at 6-7.

[38] *Id.* at 13-14.

[39] *Id.* at 15-16.

[40] *Id.* at 14-15.

2. U S WEST's Petition for Forbearance

15. In its Petition for Forbearance, U S WEST argues that, "if [nonlocal directory assistance] is an interLATA service at all, it plainly qualifies as an 'incidental interLATA service' under section 271(g)(4)" because the service allows customers to retrieve telephone numbers from a central database that is located outside their home LATA.[41] Because section 271(b)(3) authorized the BOCs to provide the incidental interLATA services described in section 271(g) immediately after the date of enactment of the 1996 Act, U S WEST contends that it may continue to provide nonlocal directory assistance service without obtaining authorization from the Commission. Although the incidental interLATA services described in section 271(g)(4) are subject to the separate affiliate requirements of section 272, U S WEST submits that section 10 requires the Commission to forbear from applying section 272 to its provision of nonlocal directory assistance service. U S WEST further claims that "any decision to prohibit or require a separate affiliate for [nonlocal directory assistance service] would raise serious First Amendment concerns."[42] In support of this latter claim, U S WEST states that, "[b]ecause [its] provision of [nonlocal directory assistance service] is indistinguishable from its provision of local directory assistance except as to the content of the information provided (nonlocal versus local numbers), any regulation of [nonlocal directory assistance service] would be content-based."[43]

16. With regard to the first forbearance criterion, U S WEST submits that it faces powerful competition in the nonlocal directory assistance market from interexchange carriers, such as AT&T and MCI, as well as Internet service providers and providers of payphone and cellular service.[44] According to U S WEST, "[m]arket forces . . . supply ample assurance that [it] will not charge unreasonable rates" for nonlocal directory assistance service.[45] Moreover, U S WEST contends that it will make the 411 or 1-411 dialing code available to any

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[41] U S WEST Forbearance Petition at 16. Section 271(g)(4) permits the interLATA provision by a BOC "of a service that permits a customer that is located in one LATA to retrieve stored information from, or file information for storage in, information storage facilities of such company that are located in another LATA." 47 U.S.C. § 271(g)(4). U S WEST compares its provision of nonlocal directory assistance service to the provision of reverse directory assistance service. Reverse directory assistance service provides a user with a customer's name, address, or both, upon the input of that customer's telephone number into a computer. *See Bell Operating Companies Petitions for Forbearance from the Application of Section 272 of the Communications Act of 1934, as amended, to Certain Activities*, CC Docket. No. 96-149, Memorandum Opinion and Order, 13 FCC Rcd. 2627, 2653, para. 52 (Com. Car. Bur. 1998), *petition for recon. pending* (*E911 Forbearance Order*). In the *E911 Forbearance Order*, the Common Carrier Bureau found that reverse directory assistance services are incidental interLATA services, as defined in section 271(g)(4). *Id.* at 2660-61, para. 68.

[42] U S WEST Forbearance Petition at 2.

[43] *Id.* at 2-3.

[44] *Id.* at 18-20.

[45] *Id.* at 18-19.

competitive LEC that either purchases switching from U S WEST or resells U S WEST's local exchange service.[46] With regard to the second forbearance criterion, U S WEST states that application of section 272 would force it to choose between substantially increasing the cost of providing nonlocal directory assistance service or not providing it at all. According to U S WEST, "[n]either result would benefit consumers."[47] U S WEST further submits that "competition provides the most effective means of protecting the interests of consumers."[48] With regard to the third forbearance criterion, U S WEST maintains that forbearance with respect to its provision of nonlocal directory assistance service is consistent with the public interest because: (1) customers would be able to dial a single, easy-to-remember number to obtain telephone numbers from anywhere in the country, without having to know the area code of the customer or entity they wish to call; (2) the market for nonlocal directory assistance service is likely to become increasingly competitive; and (3) forbearance would promote competition.[49]

3. Ameritech's Petition for Clarification

17. In its Petition for Clarification, Ameritech contends that, in footnote 170 of the *N11 Order*, the Commission "mischaracterized" the definition of adjunct to basic service by stating:

> [B]y 'traditional' directory assistance we refer to operator provision of local telephone numbers. The Commission has determined that traditional directory assistance services are 'adjunct' to basic services and are regulated pursuant to Title II of the Communications Act.[50]

Ameritech seeks clarification that, notwithstanding language in the *N11 Order*, the Commission did not intend to redefine the "adjunct to basic" category by limiting it to services, functions, and information that are "local" in nature.[51] Rather, relying on previous rulings by the Commission, Ameritech submits that the classification of services as basic or

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[46] *Id.* at 23. U S WEST acknowledges, however, that "[s]trict enforcement of section 272 might force [it] to abandon the easy 1-411 dialing format." *Id.* at 24. U S WEST notes, for example, that its practice of routing all of its subscribers' 1-411 calls to its own affiliate could, arguably, violate section 272(c)(1), which prohibits a BOC from discriminating in favor of its section 272 affiliate. *Id.*

[47] *Id.* at 25 (citing *E911 Forbearance Order*, 13 FCC Rcd. at 2669-70, para. 90).

[48] *Id.* at 26.

[49] *Id.* at 27-29 (citing *E911 Forbearance Order*, 13 FCC Rcd. at 2671-72, paras. 95-97).

[50] Ameritech Petition for Clarification at 11-12 (citing *N11 Order*, 12 FCC Rcd. at 5600-01, para. 48 n.170).

[51] *Id.* at 2, 14.

enhanced depends upon the purpose served by the service and its relationship to basic telephone service.[52] Ameritech then asserts that, because the purpose served by directory assistance service -- local and nonlocal -- is to facilitate the placement of a telephone call, nonlocal directory assistance service is properly classified as adjunct-to-basic.[53]

III. DISCUSSION

A. U S WEST's Nonlocal Directory Assistance Service is an InterLATA Service

18. We conclude that U S WEST's provision of nonlocal directory assistance service constitutes the provision of in-region, interLATA service. U S WEST concedes that its provision of nonlocal directory assistance involves interLATA transmission in at least two ways: (1) it uses its OSN or leased common carrier lines, which cross LATA boundaries, to transport end-user calls to the appropriate operator; and (2) it uses its OSN or leased common carrier lines to retrieve directory listing information from the appropriate database.[54] The Act defines an interLATA service as "telecommunications between a point located in a [LATA] and a point located outside such area."[55] Telecommunications, in turn, is defined as "the transmission, between or among points specified by the user, of information of the user's choosing, without change in the form or content of the information as sent and received."[56] We find that U S WEST's provision of nonlocal directory assistance falls squarely within the definition of "interLATA service" in view of the interLATA transmissions that occur as a result of U S WEST's centralized provision of the service.

19. In reaching this conclusion, we reject U S WEST's contention that nonlocal directory assistance service does not fall within the definition of an interLATA service because end users do not specify the points of transmission. Rather, we agree with AT&T and MCI that, in order to satisfy the "points specified by the user" prong of the interLATA service definition, a directory assistance customer need only dial 411.[57] By dialing 411, for instance, the directory assistance customer specifies that the call be directed to the directory assistance operator. The fact that the end user has no knowledge of where the operator

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[52] *Id.* at 10.

[53] *Id.* at 13-14.

[54] U S WEST Petition for Declaratory Ruling at 3-4. We note that a search request for an out-of-region telephone number is forwarded to the Nortel-owned Quest411 database via a Nortel-leased common carrier line. The data retrieved will be returned to the Portland database via the same line. *See* U S WEST Feb. 1 *Ex Parte.*

[55] 47 U.S.C. § 153(21).

[56] *Id.* § 153(43).

[57] *See* AT&T Reply Comments (Declaratory Ruling) at 4; MCI Reply Comments (Declaratory Ruling) at 6-7.

service center is located does not alter our finding that the directory assistance customer has placed an interLATA call. We note, for example, that customers frequently place interLATA calls without knowing where the recipient of the call is located, such as when a call is placed to an 800 telephone number.

20. Although we find that U S WEST's provision of nonlocal directory assistance service constitutes the provision of in-region, interLATA service, the Act permits the BOCs to provide such service without obtaining authorization from the Commission in two instances: (1) if the service is previously authorized within the meaning of section 271(f); or (2) if the service is an incidental interLATA service, as defined in section 271(g).

B. Section 271(f)

21. We reject U S WEST's contention that its provision of nonlocal directory assistance service is a previously authorized activity within the meaning of section 271(f). While U S WEST's Declaratory Ruling Petition suggests that the Commission should engage in a detailed analysis to determine whether nonlocal directory assistance service *would have been authorized* under the MFJ, the explicit terms of section 271(f) prohibit such an analysis. In particular, the section 271(f) exception extends only to those services that were, in fact, authorized by the MFJ court at the time of the enactment of the 1996 Act. Because there is no order specifically authorizing the BOCs to provide their in-region customers with nonlocal telephone numbers, section 271(f) prohibits a finding by the Commission that U S WEST's provision of nonlocal directory assistance service is previously authorized. In fact, we find, under the MFJ, BOCs were allowed to provide only local directory assistance service to their own in-region subscribers.[58] Any activity beyond this would have required a waiver of the MFJ's line-of-business restrictions. We note that the MFJ court declined to authorize U S WEST's provision of directory assistance service in cases where the telephone number sought was outside the NPA of the caller.[59] Such service could only be provided by an interexchange carrier.[60]

22. Although U S WEST claims, in the alternative, that the MFJ court's authorization of OSNs, which cross LATA boundaries, permits the BOCs to provide all directory assistance services, including nonlocal directory assistance service on a centralized,

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[58] *See United States v. Western Elec. Co.*, Civ. Action No. 82-0192, slip op. at 6 n.9 (D.D.C. Feb. 6, 1984) (ruling that Bell Atlantic's request to provide directory assistance service to the customers of independent telephone companies was properly viewed as one for a waiver of section II(D)(1) of the decree because such service did not fall within the "official services" exception); *see also United States v. Western Elec. Co.*, Civ. Action No. 82-0192, slip. op. at 4-5 (D.D.C. Oct. 30, 1984) (declining to permit U S WEST to provide directory assistance service where the number sought was outside the NPA of the caller).

[59] *United States v. Western Elec. Co., Inc.*, Civ. Action No. 82-0192, slip. op. at 3 (D.D.C Oct. 30, 1984).

[60] *Id.*

interLATA basis, we do not find that MFJ precedent supports this conclusion. Rather, we agree with MCI that the official service exception extended only to those services that related to the BOCs' *local* exchange operations.[61] Because the telephone numbers available through U S WEST's nonlocal directory assistance service are national in scope and, in most cases, obtained for the purpose of completing a long distance, rather than local, telephone call, we do not find that the service falls within the scope of the official services exception. Indeed, in view of the MFJ court's prohibition on activities that would place the BOCs in competition with interexchange carriers, we find that nonlocal directory assistance service would have been prohibited on the basis that each request for a nonlocal telephone number that is handled by U S WEST displaces a telephone call that would have otherwise been handled by an interexchange carrier.[62]

C. Section 271(g)(4)

23. We conclude that section 271(g)(4) authorizes U S WEST's provision of the regionwide component of its nonlocal directory assistance service, but does not authorize U S WEST's provision of the nationwide component of its nonlocal directory assistance service, as that service is currently structured by U S WEST.[63] As previously noted, section 271(g)(4) authorizes "the interLATA provision by a [BOC] or its affiliate . . . of a service that permits a customer that is located in one LATA to retrieve information from, or file information for storage in, information storage facilities of such company that are located in another LATA."[64] As an initial matter, we conclude that section 271(g)(4), by its express terms, authorizes BOC provision of the capability for customers to access only the BOC's *own* centralized information storage facilities. Indeed, we find that this construction of the statute is apparent from Congress' use of the term "such company" in setting forth the types of services authorized by section 271(g)(4). Thus, section 271(g)(4) permits a BOC to offer the incidental interLATA services described therein only when it uses its own facilities. Such a construction of section 271(g)(4) is consistent with Congress' directive that the provisions of section 271(g) are to be narrowly construed.[65]

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[61] *See* MCI Comments (Declaratory Ruling) at 8-10; *see also United States v. Western Elec. Co.*, 569 F. Supp. 1057, 1097 (D.D.C. 1983).

[62] *See United States v. Western Elec. Co.*, 627 F. Supp. 1090, 1100 (D.D.C. 1986) (concluding that the BOCs are excluded from the provision of interexchange services "in order to prevent them from becoming competitors of the interexchange carriers").

[63] We consider U S WEST to be providing "regionwide" directory assistance whenever a telephone number is retrieved from its Regional Directory Assistance Service system located in Portland. We find that U S WEST is engaged in the provision of "nationwide" directory assistance when it retrieves a telephone number from the Nortel-owned Quest411 database.

[64] 47 U.S.C. § 271(g)(4).

[65] *See id.* § 271(h).

24. According to U S WEST's own statement describing its provision of nationwide directory assistance service, U S WEST uses a "*Nortel owned* Quest411 system" located in Chicago, Illinois to provision nationwide directory assistance service (*i.e.*, when a U S WEST customer requests the telephone number of a subscriber located outside U S WEST's region).[66] In contrast, U S WEST uses its own directory assistance database located in Portland, Oregon to provision regionwide directory assistance service (*i.e.*, when a customer requests the telephone number of another subscriber in U S WEST's region). We cannot reasonably interpret section 271(g)(4) as extending to BOC provision of the capability for customers to access a database that is not the BOC's own information storage facility. We thus conclude that U S WEST's provision of the nationwide component of its nonlocal directory assistance service does not fall within the scope of section 271(g)(4).[67] We emphasize that our determination that U S WEST's nationwide directory assistance service does not satisfy the requirements of section 271(g)(4) is limited to the facts presented in the instant proceeding.

25. In finding that U S WEST's regionwide directory assistance service is an incidental interLATA service as defined in section 271(g)(4), we reject MCI's and Sprint's contention that section 271(g)(4) is limited to services that enable customers to retrieve stored information without the intervention of an operator.[68] Indeed, we find that neither the terms of section 271(g)(4) nor the legislative history specifies, or limits in any way, the means by which customers must retrieve information from the BOC's centralized information storage facilities.[69] We, therefore, conclude that it is reasonable to include operator-assisted services within the scope of section 271(g)(4), provided that the operator acts at the customer's behest and retrieves only that information specified by the customer from the BOC's centralized facilities. Given the fact that the sole purpose of U S WEST's directory assistance operators' interaction with the information stored in U S WEST's centralized databases is to retrieve directory listing information on behalf of the directory assistance customer, we conclude that

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[66] U S WEST Feb. 1, 1999 *Ex Parte* (emphasis added); *see also* U S WEST Forbearance Petition at 5.

[67] If U S WEST, rather than Nortel, owned the information storage facility containing the out-of-region directory listings, our conclusion may be different. The facts of this case, however, require that we reach the conclusion herein.

[68] 47 U.S.C. § 271(h). *See* MCI Comments (Forbearance) at 16-17; Sprint Reply Comments (Forbearance) at 4-5. According to MCI, section 271(g)(4) is limited to those services that involve "the electronic retrieval of information stored in a central computer." MCI Comments (Forbearance) at 16. MCI states that, in view of section 271(h)'s directive that the provisions of section 271(g) are to be narrowly construed, the scope of services permitted under section 271(g)(4) should not be expanded to include services that utilize intervening operators, as in the case of U S WEST's nonlocal directory assistance service. *Id.* at 16-17. Sprint states that "the intervention of live operators in U S WEST's [nonlocal directory assistance] service . . . makes the plain language of section 271(g)(4) unambiguously inapplicable." Sprint Reply Comments (Forbearance) at 6. According to Sprint, "[i]n light of the FCC's obligation to narrowly construe [the provisions of section 271(g)], the language of [section 271(g)(4)] cannot be extended and thus the 'incidental' exception is simply unavailable to U S WEST." *Id.* at 6.

[69] S. Conf. Rep. No. 104-230, at 144-50 (1996) (Conference Report).

U S WEST's provision of regionwide directory assistance service is functionally the same as the data storage and retrieval services described in section 271(g)(4).[70] We, therefore, disagree with MCI and Sprint that including U S WEST's provision of regionwide directory assistance service in section 271(g)(4) is the type of broad construction forbidden by section 271(h). Moreover, in view of our finding that U S WEST's provision of regionwide directory assistance service will promote competition in the interLATA directory assistance services market,[71] we conclude that the directive in section 271(h) that the services authorized in section 271(g) "will not adversely affect telephone exchange ratepayers or competition in any telecommunications market" is fulfilled.[72]

26. We disagree with AT&T that the "plain meaning of the term 'incidental interLATA services' requires that such services be incidental . . . to a service which the BOC is *permitted* to offer."[73] Contrary to this contention, we find nothing in the language of section 271(g) that requires a service to be otherwise expressly "permitted" before it may fall within this section. Rather, the paragraphs in section 271(g) spell out what services fall within the purview of the term "incidental interLATA service" and nowhere is there a limitation that a service described therein must be authorized by another provision of law. The interpretation that AT&T proffers, far from being the "plain meaning," would instead require that we read section 271(g)(4) as though it contained a limitation that is neither "plain" from the text, nor reasonably implied. Our reading of section 271(g)(4), in contrast, is consistent with the legislative history accompanying the final version of section 271(g)(4). The Conference Report states that section 271(g) "sets out the 'incidental' interLATA activities that the BOCs *are permitted* to provide upon the date of enactment" of the 1996 Act.[74] Thus, Congress indicated that, with the enactment of section 271(g), BOCs may start to offer any service described in this section. Accordingly, we reject AT&T's argument that

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[70] *See E911 Forbearance Order*, 13 FCC Rcd. at 2660, para. 68 (concluding that section 271(g)(4) authorizes BOC provision of a service that enables subscribers to use their personal computers to obtain directory and reverse directory information (*i.e.*, names and addresses) from the BOC's centralized directory assistance databases).

[71] *See* forbearance discussion, *infra,* part III.D.

[72] In addition, we note that our accounting safeguards, discussed, *infra*, at paragraph 37, adequately protect ratepayers from the adverse effects proscribed by section 271(h). *See Implementation of the Telecommunications Act of 1996: Accounting Safeguards Under the Telecommunications Act of 1996,* CC Docket No. 96-150, Report and Order, 12 FCC Rcd. 17539, 17567-73, paras. 61-76 (1996) (concluding that the accounting safeguards prevent the adverse effects proscribed by section 271(h)) (*Accounting Safeguards Order*).

[73] AT&T Comments (Forbearance) at 10.

[74] Conference Report at 149-50 (emphasis added).

there must be an independent grant of authority for the underlying service elsewhere before a particular incidental interLATA service may fall within the section 271(g) exceptions.[75]

27. Moreover, the incidental interLATA service exception in section 271(g) is independent of the "Exception for Previously Authorized Activities" in section 271(f). It appears, however, that AT&T is reading into section 271(g) a requirement that any service authorized therein also must have been permitted under the MFJ and hence constitute a "permitted" service. We also reject AT&T's contention that including nonlocal directory assistance service within the scope of section 271(g)(4) would be contrary to Commission precedent.[76] AT&T has ignored that in a subsequent order the Commission clarified that BOCs may provide any interLATA service designated as an incidental interLATA service under section 271(g) prior to obtaining section 271 authorization.[77] We, therefore, find that Commission precedent supports our determination that section 271(g) is an independent grant of authority for the BOCs to offer any of the incidental interLATA services described therein. We disagree with AT&T that such a construction of the statute would permit BOCs to offer interLATA services "without limitation" prior to receiving section 271 authority.[78] Indeed, as noted above, one limitation on the incidental interLATA services offered pursuant to section 271(g)(4) is that a BOC must own the information storage facilities.

D. Forbearance from Section 272

28. We have previously determined that U S WEST's provision of the regionwide component of its nonlocal directory assistance service is an incidental interLATA service, as defined in section 271(g)(4). As noted above, section 272(a)(2)(B)(i) requires the incidental interLATA services described in section 271(g)(4) to be provided through a separate affiliate. Notwithstanding this requirement, the 1996 Act requires the Commission to forbear from applying any regulation or provision of the Act to telecommunications carriers or

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[75] We note, however, that section 271(g) does not authorize BOC provision of a service that is otherwise *prohibited* by the Act. For example, although section 271(g)(1)(D) authorizes the interLATA provision by a BOC or its affiliate of alarm monitoring services, such authorization extends only to a BOC that is authorized to provide such services pursuant to section 275(a).

[76] AT&T Comments (Forbearance) at 11 (citing *Non-Accounting Safeguards Order* at 11 FCC Rcd. at 21967-68, para. 127). In the *Non-Accounting Safeguards Order*, the Commission stated:

> If a BOC's provision of an Internet or Internet access service (or for that matter, any information service) incorporates a bundled, in-region, interLATA transmission component provided by the BOC over its own facilities or through resale, that service may only be provided through a section 272 affiliate, after the BOC has received in-region interLATA authority under section 271.

Id.

[77] *Order on Reconsideration,* 12 FCC Rcd at 2299, para. 3.

[78] AT&T Comments (Forbearance) at 11.

telecommunications services, or classes thereof, if the Commission determines that certain conditions are satisfied. In this section, we consider whether section 10 permits us to forbear from applying the separate affiliate requirements of section 272 to U S WEST's provision of the regionwide component of its nonlocal directory assistance service. We note that, if U S WEST was providing the nationwide component of its nonlocal directory assistance service in compliance with section 271(g)(4), the forbearance analysis set forth herein would apply to its provision of that service as well.

1. Background

29. The fundamental objective of the 1996 Act is to bring consumers the full benefits of competition.[79] Section 272 seeks to further this objective by imposing on BOCs certain structural, transactional, and nondiscrimination requirements that are designed to prevent improper cost allocation between a BOC and its affiliate and discrimination by a BOC in favor of its affiliate after section 271 authority has been granted.[80] Section 10 states, however, that we must forbear from enforcing section 272 if we find that: (1) such requirements are not necessary to ensure that the charges, practices, classifications, and regulations with respect to the service or activity at issue are just and reasonable, and not unjustly or unreasonably nondiscriminatory; (2) such requirements are not necessary to protect consumers; and (3) forbearance is consistent with the public interest.[81] With regard to this latter criterion, section 10(b) states that, if we find that forbearance will promote competitive market conditions, then such finding may serve as a basis that forbearance is in the public interest.[82] We conclude that section 272, read in conjunction with section 10, means that, if we find that the objectives set forth in section 10 may be satisfied by means other than enforcing section 272, then such a finding is persuasive evidence that enforcement of the separate affiliate requirements of section 272 is not necessary. Moreover, as section 10(b) directs, if we find that forbearance from section 272 will enhance competition in the market in which the BOC seeks to enter, then such a finding may serve as a basis that forbearance is in the public interest.

2. Application of Forbearance Criteria

30. For the reasons set forth below, we forbear, in part, from section 272. We allow U S WEST to provide the regionwide component of its nonlocal directory assistance service on an integrated basis, but require it to provide to unaffiliated entities all of the in-

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[79] *See Non-Accounting Safeguards Order,* 11 FCC Rcd. at 21911, para. 7.

[80] *Id.* at 21911-12, para. 9.

[81] 47 U.S.C. §§ 160(a)-(c).

[82] *Id.* § 160(b).

region directory listing information it uses to provide regionwide directory assistance at the same rates, terms, and conditions it imputes to itself.

a. Section 10(a)(1)

31. We consider first whether enforcement of section 272 is necessary to ensure that the charges, practices, classifications, and regulations with respect to U S WEST's provision of the regionwide component of its nonlocal directory assistance service are just and reasonable, and not unjustly or unreasonably nondiscriminatory. We find that competition is the most effective means of ensuring that the charges, practices, classifications, and regulations with respect to U S WEST's provision of regionwide directory assistance service are just and reasonable, and not unjustly or unreasonably discriminatory. As discussed more fully below, we conclude that retention of the nondiscrimination requirements found in section 272(c)(1) should ensure that competition in the nonlocal directory assistance services market will not erode over time. In reaching this conclusion, we reject arguments that U S WEST's use of the 411 or 1-411 dialing code for the provision of nonlocal telephone numbers will impede competition in the nonlocal directory assistance services market such that the requirements of section 10(a)(1) are not met. Given these findings, we conclude that enforcement of section 272, in its entirety, is not necessary to ensure that the charges, practices, classifications, and regulations with respect to U S WEST's provision of regionwide directory assistance service are just and reasonable, and not unjustly or unreasonably discriminatory.

32. Commenters opposing forbearance raise two primary objections to U S WEST's provision of nonlocal directory assistance. First, they assert that U S WEST refuses to provide unaffiliated entities with nondiscriminatory access to all of the directory listing information it uses to provide nonlocal directory assistance service at the same rates, terms, and conditions it charges or imposes on itself.[83] Second, these commenters maintain that U S WEST has not provided nondiscriminatory access to the 411 or 1-411 dialing code to competing providers of nonlocal directory assistance service.[84] According to these commenters, U S WEST exercises bottleneck control over the telephone numbers of the subscribers in its region and virtually exclusive access to the 411 and 1-411 dialing codes as a result of being the dominant provider of local exchange and exchange access services for many years.[85] These commenters, therefore, assert that U S WEST's provision of nonlocal

[83] AT&T Comments (Forbearance) at 16-17; MCI Comments (Forbearance) at 22-23; Letter from Lonn L. Beedy, Metro One Telecommunications, to Michelle Carey, FCC (dated Aug. 14, 1998) (Metro One Aug. 14, 1998 *Ex Parte*) at 1-2; Letter from Gerard J. Waldron, INFONXX, to Magalie Salas Roman, Secretary, FCC (dated May 20, 1999) (INFONXX May 20, 1999 *Ex Parte*) at 2-3.

[84] AT&T Comments (Forbearance) at 13-16; MCI Comments (Forbearance) at 21-22

[85] AT&T Comments (Forbearance) at 15-16; MCI Comments (Forbearance) at 24; INFONXX May 20, 1999 *Ex Parte* at 4.

directory assistance will give it an unfair competitive advantage in the nonlocal directory services market unless: (1) U S WEST provides unaffiliated entities with access to all the directory listing information it uses to provide nonlocal directory assistance service at the same rates, terms, and conditions it charges or imposes on itself; and (2) U S WEST is prohibited from using familiar dialing sequences, such as 411 and 1-411, for the provision of nonlocal directory assistance service.[86]

33. *Access to Telephone Numbers.* U S WEST is a new entrant in the market for nonlocal directory assistance service that faces competition from AT&T and MCI as well as from Internet service providers, providers of payphone and cellular telephone services, and independent directory assistance service providers, such as Metro One and INFONXX.[87] More importantly, U S WEST does not exercise monopoly power over the components used to provide the telephone numbers of customers *outside* its region. Rather, like competing providers of nonlocal directory assistance, U S WEST must obtain the telephone numbers of subscribers outside its region from non-affiliated entities that compile national listings or other LECs.[88] Given that U S WEST does not exercise monopoly power with respect to obtaining the telephone numbers of subscribers outside its region, we find no reason to require U S WEST to provide these numbers to unaffiliated providers of nonlocal directory assistance service.

34. We are not persuaded, however, that U S WEST's current practices with respect to the telephone numbers of subscribers *inside* its region are sufficient to ensure that competition in the nonlocal directory assistance market will continue to grow. Indeed, the record indicates that U S WEST refuses to provide unaffiliated entities with access to all of the telephone numbers it uses to provide nonlocal directory assistance service, such as the telephone numbers of the customers of independent LECs and competitive LECs.[89] The record further reveals that U S WEST does not provide unaffiliated entities with access to the

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[86] AT&T Comments (Forbearance) at 17; MCI Comments (Forbearance) at 24-25; Metro One Aug. 14, 1998 *Ex Parte* at 4; INFONXX May 20, 1999 *Ex Parte* at 3-5.

[87] AT&T and MCI currently offer nonlocal directory assistance in all fifty states. AT&T's nationwide directory assistance service, termed "00 INFO," permits AT&T customers to obtain telephone numbers from anywhere in the United States by dialing "00." MCI's service enables customers to obtain national directory listings by dialing "10-10-9000." Metro One provides enhanced directory assistance service, including nationwide directory assistance service, for several national and regional cellular and PCS telephone companies. Metro One Aug. 14, 1998 *Ex Parte* at 2. INFONXX is an independent directory assistance service provider that has been providing directory assistance service since 1992. INFONXX May 20, 1999 *Ex Parte* at 2. Its customer base includes retail customers and cellular carriers. According to INFONXX, it was the first company to challenge an incumbent provider of directory assistance service. *Id.*

[88] U S WEST Forbearance Petition at 5-6.

[89] MCI Comments (Forbearance) at 22-23; Metro One Aug. 14, 1998 *Ex Parte* at 3; INFONXX May 20, 1999 *Ex Parte* at 2-3.

in-region telephone numbers it uses to provide nonlocal directory assistance at the same rates, terms, and conditions it imputes to itself.[90] We note that, if U S WEST was providing regionwide directory assistance service pursuant to the requirements of section 272, then, under section 272(c)(1), the foregoing practices would be deemed discriminatory.[91] We must consider, however, whether, if we were to forbear from section 272, these practices would be unjustly or unreasonably discriminatory within the meaning of section 10(a)(1). We conclude that they would be.

35. The competitive advantages U S WEST enjoys with respect to the provision of directory assistance service throughout its region stem from its dominant position in the local exchange and exchange access markets. Specifically, because of its dominance in these markets, U S WEST's directory assistance databases include the telephone numbers of U S WEST customers as well as the telephone numbers of the customers of independent LECs and competitive LECs operating in U S WEST's region.[92] Consequently, U S WEST has access to a more complete, accurate, and reliable database than its competitors. This, in turn, gives U S WEST a competitive advantage in the provision of directory assistance service throughout its region. Moreover, although U S WEST maintains that its nonlocal directory assistance service is subject to competition from various sources, U S WEST has not shown that any of these alternative sources of nonlocal directory assistance service offer directory listing information that is as up-to-date as the information provided by U S WEST. Finally, based on the record before us, we find that the rates U S WEST charges unaffiliated entities for obtaining directory listing information have the potential to adversely affect competition in the nonlocal directory assistance service market.[93] Given that U S WEST's competitive

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[90] Metro One Aug. 14, 1998 *Ex Parte* at 2; INFONXX May 20, 1999 *Ex Parte* at 4-5.

[91] Section 272(c)(1) provides that a BOC "may not discriminate between [its section 272 affiliate] and any other entity in the provision or procurement of goods, services, facilities, and information . . .." 47 U.S.C. § 272(c)(1).

[92] *See* AT&T Comments (Forbearance) at 16; MCI Comments (Forbearance) at 24; INFONXX May 20, 1999 *Ex Parte* at 4; *see also E911 Forbearance Order*, 13 FCC Rcd. at 2664-66, paras. 78-82. In the *E911 Forbearance Order*, the Common Carrier Bureau (Bureau) concluded that BellSouth's practice of not providing unaffiliated entities with all of the subscriber listings that BellSouth uses to provide reverse directory service would be deemed unjustly or unreasonably discriminatory within the meaning of section 10(a)(1). In reaching this conclusion, the Bureau noted that BellSouth obtained directory listings from other LECs for use in its directory assistance databases "solely because of [BellSouth's] dominant position in the provision of local exchange services throughout its region." *Id.* at 2665-66, para. 81. According to the Bureau, for example, "[b]ecause BellSouth has the vast majority of access lines within its region, it is to the advantage of independent LECs and competitive LECs to have the listings of their customers included in BellSouth's directory listing databases so that callers throughout the region using BellSouth's lines can obtain the telephone numbers of non-BellSouth customers." *Id.*

[93] *See, e.g.*, MetroOne Aug. 14, 1998 *Ex Parte* at 2-3 (stating that the prices ILECs charge for directory listing information create significant adverse competitive consequences for competing directory assistance service providers).

advantages in the provision of regionwide directory assistance service stem from its local exchange and exchange access monopolies, we find that any discrimination between U S WEST and unaffiliated entities with respect to in-region telephone numbers would be unjust and unreasonable within the meaning of section 10(a)(1).

36. Although we acknowledge that any competitor, even dominant firms such as U S WEST, should be able to develop some competitive advantages, unless competing directory assistance service providers can compete on a level playing field, we would have no assurance that U S WEST's charges, practices, classifications, and regulations with respect to nonlocal directory assistance service would be just and reasonable, and not unjustly or unreasonably discriminatory within the meaning of section 10(a)(1). We, therefore, conclude that the first criterion for forbearance is met only if we impose requirements that will ensure that competition in the market for nonlocal directory assistance will not be eroded over time. Based on the record before us, we find that retention of the nondiscrimination requirements found in section 272(c)(1) should ensure that the competitive advantages U S WEST enjoys with respect to the provision of directory assistance service throughout its region will not undermine competition in the market for nonlocal directory assistance service.

37. In particular, we conclude that U S WEST must make available to unaffiliated entities all of the in-region directory listing information it uses to provide regionwide directory assistance service at the same rates, terms, and conditions it imputes to itself.[94] Thus, to the extent U S WEST charges unaffiliated entities for the in-region directory information it uses to provide nonlocal directory assistance on an integrated basis, it must impute to itself the same charges.[95] Within sixty days of the release of this Order, U S WEST shall make any changes to its cost allocation manuals to reflect this accounting.[96] Moreover, if U S WEST uses the directory listing information of the customers of independent and competitive LECs operating in its region in its provision of nonlocal directory assistance, it must make such information available to unaffiliated entities. In

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[94] *See Non-Accounting Safeguards Order*, 12 FCC Rcd. at 22000-01, para. 202.

[95] Consistent with the *Accounting Safeguards Order*, U S WEST must treat its provision of nonlocal directory assistance as a nonregulated activity, and shall segregate the costs of providing this incidental interLATA service on an integrated basis in accordance with our Part 64 cost allocation rules. In the *Accounting Safeguards Order*, we established that incidental interLATA services shall be treated like nonregulated activities solely for federal accounting purposes. *See Accounting Safeguards Order*, 11 FCC Rcd. at 17572-73, para. 75; *see also* Implementation of Section 254(k) of the Communications Act of 1934, as amended, Order, 12 FCC Rcd 6415 (1997). U S WEST shall record any charges it imputes for its nonlocal directory services in its revenue accounts. *Accounting Safeguards Order*, 11 FCC Rcd. at 17576-77, para. 86. U S WEST shall account for any imputed charges by debiting its nonregulated operating revenue accounts and crediting its regulated revenue accounts by the amounts of the imputed charges. 47 C.F.R. § 32.5280(b).

[96] *See* 47 C.F.R. § 64.903. U S WEST shall ensure that its independent auditor examines this treatment, and the accuracy of the imputed charges, during its annual review of the U S WEST cost allocation manual. *Id.* § 64.904.

addition, U S WEST must update and maintain the directory listing information it provides to unaffiliated entities in the same manner it updates and maintains the directory listing information it uses in the provision of nonlocal directory assistance service. Absent such nondiscriminatory access to the in-region telephone numbers U S WEST uses to provide regionwide directory assistance service, we find that U S WEST's charges, practices, classifications, and regulations with respect to this service would be unjust and unreasonable, and unjustly or unreasonably discriminatory within the meaning of section 10(a)(1).

38. Although we retain the nondiscrimination requirements of section 272(c)(1), we decline to apply the requirements of section 272 in their entirety. Indeed, we find that the structural separation and other requirements of section 272 are broader than necessary to address the competitive advantages U S WEST derives from its monopoly control over the in-region telephone numbers. As discussed below, requiring U S WEST to provide regionwide directory assistance service through a separate affiliate would prevent U S WEST from realizing economies of scale and scope comparable to those available to providers that need not provide nonlocal directory assistance service on a structurally separated basis.[97] Moreover, we find that retention of the nondiscrimination requirements of section 272(c)(1) is sufficient to ensure that U S WEST's provision of regionwide directory assistance service would satisfy the requirements of section 10(a)(1). In reaching this conclusion, we note that section 10(c) permits us to grant or deny a petition for forbearance "in whole or in part." Although it is less than clear whether the requirements of section 272(c)(1) apply in the absence of a separate affiliate, we find that a reasonable interpretation of section 272 is that the nondiscrimination and structural separation requirements set forth therein coexist independently. In other words, for purposes of our forbearance analysis, the nondiscrimination requirements of section 272(c)(1) constitute statutory obligations that may be enforced separate and apart from the structural separation requirements of section 272. Were we to consider the section 272 nondiscrimination obligations as part and parcel of the structural separation requirements, we would be precluded from partially forbearing from section 272. In contrast to the dissent, we find it inappropriate to apply section 272 in its entirety for the sole purpose of ensuring that U S WEST complies with the nondiscrimination requirements set forth in section 272(c)(1) -- particularly where, as here, we find that the nondiscrimination requirements are sufficient to prevent U S WEST from gaining an unfair competitive advantage in the nonlocal directory assistance service market.

39. In reaching this conclusion, we note that, in the *E911 Forbearance Order*, the Bureau observed that, because "section 272(c)(1) literally applies only to BOC discrimination between a separate affiliate and unaffiliated entities," a decision to forbear from section 272 would relieve a BOC of its obligation to comply with the nondiscrimination requirements set forth in section 272(c)(1).[98] Although, for the reasons set forth above, we disagree that

[97] *See infra* paragraph 49.

[98] *E911 Forbearance Order*, 13 FCC Rcd. at 2667, para. 83.

interpretation of section 272, we agree with the Bureau's imposition of nondiscrimination requirements as a condition to forbearance pursuant to sections 4(i) and 10.[99] Like the Bureau, therefore, we rely upon our authority under sections 10, 4(i), and 303(r) to impose conditions, as an alternative basis for the nondiscrimination requirements applied in this Order.[100]

40. In retaining these nondiscrimination requirements, we recognize that section 272 contains a more stringent nondiscrimination standard than the one set forth in section 10(a)(1).[101] In this case, therefore, in order to determine whether enforcement of section 272(c)(1) is necessary, we must determine whether a flat prohibition on discrimination is appropriate. We find that it is. As noted above, in the absence of a requirement that U S WEST provide in-region telephone numbers to unaffiliated entities at the same rates, terms, and conditions it imputes to itself, the potential for U S WEST to use its monopoly position to gain an unfair competitive advantage in the nonlocal directory assistance market is substantial. Thus, in these circumstances, we find that any discrimination between U S WEST and unaffiliated entities with respect to in-region telephone numbers would be unjust and unreasonable. A forbearance analysis limited in the manner suggested by the dissent would ignore provisions of the Act that, like section 272, impose a stricter nondiscrimination requirement than the one set forth in section 10(a)(1). Thus, we find that the more reasonable interpretation of section 10 is that our forbearance analysis must include consideration of the standards set forth in the provision of the Act from which forbearance is sought.

41. By requiring U S WEST to provide nondiscriminatory access to the in-region telephone numbers it uses to provide nonlocal directory assistance service, we ensure that competing providers of nonlocal directory assistance service can obtain access to all of the in-region directory listing information U S WEST uses in the provision of nonlocal directory assistance service, and thereby obtain the most accurate and reliable directory listings possible. With access to a more complete and accurate directory listing database, at rates, terms, conditions equal to those U S WEST imputes to itself, alternative providers of nonlocal directory assistance should be able to compete more effectively against U S WEST. We emphasize that our decision requiring nondiscriminatory access to the in-region telephone numbers U S WEST uses to provide nonlocal directory assistance service does not prejudge

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[99] *Id.* at 2673, para. 100.

[100] *See E911 Forbearance Order*, 13 FCC Rcd. at 2667, para. 83. Section 4(i) provides that "[t]he Commission may perform any and all acts, make such rules and regulations, and issue such orders, not inconsistent with this Act, as may be necessary in the execution of its functions." 47 U.S.C. § 154(i). Section 303(r) provides that the Commission may "[m]ake . . . rules and regulations and prescribe such restrictions and conditions, not inconsistent with law, as may be necessary to carry out the provisions of [the Act] . . .." *Id.* § 303(r); *see also infra* paragraph 53.

[101] Indeed, while section 272(c)(1) contains a flat prohibition on discrimination by a BOC in favor of an affiliate, section 10(a)(1) requires the Commission to determine whether forbearance will result in charges, practices, classifications, and regulations that are *unjustly or unreasonably* discriminatory.

the question of whether directory assistance and directory listings are subject to the unbundling requirements of section 251(c)(3).[102]

42. *Access to the 411 or 1-411 Code.* U S WEST asserts that it will provide access to the 411 or 1-411 dialing code to competing providers of nonlocal directory assistance service that also provide local exchange service in the U S WEST region. U S WEST states, however, that it is currently unable to provide access to the 411 or 1-411 dialing code to competing providers of nonlocal directory assistance service that do not also offer local exchange service in U S WEST's region. According to U S WEST, such access is infeasible because "there is no reasonable way to give a customer dialing '1-411' a choice among multiple directory assistance providers."[103] Rather, U S WEST submits that, for the simple 1-411 dialing option to function properly, a customer's local exchange provider must be able to route that customer's 1-411 request automatically to a specific directory assistance provider.[104] We note that, if U S WEST was offering regionwide directory assistance service through a separate affiliate, its practice of refusing to provide access to the 411 or 1-411 dialing code to unaffiliated providers of nonlocal directory assistance service that do not also offer local exchange service would, arguably, violate section 272(c)(1)'s nondiscrimination requirements. We must decide, however, whether, if U S WEST is permitted to offer regionwide directory assistance service on an integrated basis, this practice would be unjustly or unreasonably discriminatory within the meaning of section 10(a)(1), or would result in charges, practices, classifications or regulations that are not just and reasonable.

43. We reject commenters' claims that U S WEST's use of the 411 or 1-411 code for the provision of nonlocal telephone numbers constitutes unjust or unreasonable discrimination within the meaning of section 10(a)(1). First, U S WEST does not have "exclusive" use of the 411 dialing code as some commenters have argued. Rather, any competitive LEC that wins the local customer will also be able to use this same nationally-recognized telephone number for the provision of both local and nonlocal directory assistance

[102] *See In the Matters of Implementation of the Local Competition Provisions in the Telecommunications Act of 1996, Interconnection Between Local Exchange Carriers and Commercial Mobile Radio Service Providers,* CC Docket Nos. 96-98, 95-185, Second Further Notice of Proposed Rulemaking (rel. Apr. 16, 1999) (seeking comment on which specific network elements the Commission should require incumbent LECs to unbundle under section 251(b)(3)).

[103] U S WEST Forbearance Petition at 24. U S WEST acknowledges that, in theory, it may be possible to permit access to multiple directory assistance service providers by having customers pre-select their directory assistance service provider just as they do their long distance carriers. U S WEST states, however, that the per-customer revenues from directory assistance are too small to justify the substantial costs of implementing such a system. *Id.* at n.32.

[104] *Id.* at 24.

service.[105] Because U S WEST, like other incumbent LECs, is required by the 1996 Act to open its local markets to competition, its dominant use of the 411 code diminishes as the local market becomes increasingly competitive. Second, although U S WEST's use of the 411 or 1-411 dialing code may give it an advantage in the nonlocal directory assistance service market with respect to interexchange carriers that provide only long distance service, we note that there is an overwhelming trend toward carriers offering long distance service as part of an integrated package containing local exchange service, *i.e.,* "one-stop shopping." Thus, we expect that, over time, the number of "pure" interexchange carriers in the market will decrease and thereby reduce any competitive advantage U S WEST enjoys with respect to using the 411 or 1-411 code for the provision of nonlocal directory assistance service. Third, we note that AT&T and MCI do not appear to have been deterred from providing nonlocal directory assistance service using an alternative access code given U S WEST's use of the 411 dialing code.

44. Although U S WEST will retain its advantageous use of the 411 dialing code until its local markets are open to competition, we do not find it necessary to prohibit its use of the code until this time. Rather, we find that, on balance, the pro-consumer benefits of permitting U S WEST to use the 411 or 1-411 dialing during this time outweigh any potential competitive advantage that may accrue to U S WEST. Moreover, we find that prohibiting U S WEST from using the 411 dialing code for nonlocal directory assistance service for a finite period of time, and then reinstating its use of such code after section 271 authority has been granted, would not only be unduly disruptive to U S WEST's provision of directory assistance service, but would likely cause significant customer confusion.

45. Given the foregoing findings, we conclude that enforcement of section 272, in its entirety, is not necessary to ensure that the charges, practices, classifications, and regulations with respect to U S WEST's provision of nonlocal directory assistance are just and reasonable, and not unjustly or unreasonably discriminatory. We, therefore, conclude that the first forbearance criterion is met.

b. Section 10(a)(2)

46. We consider next whether enforcement of section 272 is necessary for the protection of consumers. As described above, the fundamental objective of the 1996 Act is to

[105] We do not reach the issue of whether U S WEST's practice of limiting access to the 411 or 1-411 code to competitive LECs complies with the terms of section 251(b)(3). AT&T and MCI assert that, pursuant to section 251(b)(3), U S WEST must make the 411 or 1-411 dialing code available to carriers that offer telephone exchange service *or* telephone toll service, such as interexchange carriers. AT&T Comments (Forbearance) at 14; MCI Comments (Forbearance) at 21-22. We note that the Commission's current rules implementing section 251(b)(3) do not address this issue. Moreover, we do not, in the instant proceeding, have a sufficient record upon which to determine whether, assuming such access is required under section 251(b)(3), it is even technically feasible for local exchange carriers to provide such access. We find, therefore, that these issues are more appropriately addressed in the context of a rulemaking proceeding.

bring consumers of telecommunications services in all markets the full benefits of competition. Section 272 seeks to further this objective by imposing on BOCs requirements that are designed to prohibit them from engaging in anticompetitive discrimination and cost-shifting once they obtain authority to enter the in-region, interLATA market. The question before us is whether enforcement of section 272 is necessary to prevent U S WEST from engaging in conduct that would impede competition in the market for nonlocal directory assistance service, and thereby harm consumers. Based on the present record, we conclude that it is not.

47. As noted above, we do not find that application of the section 272 safeguards is the only manner in which fair competition in the nonlocal directory assistance market may be achieved. Indeed, in our discussion of the first forbearance criterion, we determine that U S WEST must make available to unaffiliated entities all of the in-region directory listing information it uses to provide regionwide directory assistance service at the same rates, terms, and conditions it imputes to itself. As noted above, imposition of nondiscrimination requirements with respect to in-region telephone numbers should promote the development of a fully competitive market for nonlocal directory assistance services by ensuring that no one competitor will have an undue advantage in the nonlocal directory services market. This should stimulate the entry of new providers of nonlocal directory assistance. The introduction of additional competitors in the nonlocal directory services market will, in turn, encourage the providers of these services to compete on the basis of price and quality, which will ultimately benefit consumers. In view of this finding, we conclude that enforcement of section 272 is not necessary to protect consumers.

c. Sections 10(a)(3) and 10(b)

48. Finally, we consider whether forbearance is in the public interest. In making this determination, we consider several factors, including benefits to consumers and whether forbearance will promote competitive market conditions. We conclude that allowing U S WEST to provide regionwide directory assistance service on an integrated basis will benefit consumers because they will be able to obtain a convenient, competitively-priced service. We further conclude that forbearance from the structural separation requirements of section 272 with respect to U S WEST's provision of nonlocal directory assistance service will enhance competition among competing providers of nonlocal directory assistance service. In view of these findings, we conclude that forbearance from section 272 with respect to U S WEST's provision of this service is consistent with the public interest.

49. We conclude that permitting U S WEST to provide nonlocal directory assistance service on an integrated basis will allow U S WEST to be a more effective competitor in the nonlocal directory services market. Conversely, if U S WEST was required to provide nonlocal directory assistance through a separate affiliate, while continuing to provide local directory assistance on an integrated basis, the section 272 safeguards would pose significant adverse competitive consequences for U S WEST, without positive benefits for consumers. Indeed, U S WEST argues that the increased costs associated with complying with section

272 would force it to choose between charging higher rates for the service or not providing it at all.[106]

50. We agree with the RBOC Coalition[107] that the advent of AT&T's "00" and MCI's "10-10-9000" nonlocal directory assistance services demonstrates the benefits of allowing U S WEST to remain an effective competitor in the nonlocal directory services market.[108] For example, forbearance from section 272 will allow U S WEST to continue providing nonlocal directory assistance at competitive rates. We note that, according to U S WEST, it charges $0.85 for two listings from anywhere in the United States, while AT&T and MCI charge $0.95 and $0.99, respectively, for each listing from a different area code.[109] Consumers, therefore, will benefit from the lower costs that will result from this increased competition in the nonlocal directory assistance services market.

51. We also find that customers will benefit from the convenience of using the 411 or 1-411 dialing code for the provision of regionwide directory assistance service. As noted above, customers using the nonlocal directory assistance traditionally offered via 1-NPA-555-1212 typically must dial two different telephone numbers whenever they wish to obtain the telephone numbers of customers located in different LATAs or area codes. For example, before U S WEST entered the nonlocal directory assistance market, if a U S WEST customer located in Phoenix, Arizona wished to obtain two telephone numbers, one of another subscriber located in Phoenix, where the area code is 606, and the other of a subscriber located in Chicago, Illinois, where the area code is 312, they had to place two directory

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[106] U S WEST Forbearance Petition at 21-22.

[107] On October 8, 1997, representatives from U S WEST, Ameritech, BellSouth, Bell Atlantic, and SBC, met with staff from the Common Carrier Bureau to discuss the provision of nonlocal directory assistance service by the BOCs. These representatives referred to themselves as the "RBOC Coalition." *See Ex Parte* Letter from G. Michael Crumling, Executive Director -- Federal Regulatory, U S WEST, to William F. Caton, Secretary, FCC (dated Oct. 8, 1997) (RBOC Coalition Oct. 8, 1997 *Ex Parte*).

[108] *See* RBOC Coalition Oct. 8, 1997 *Ex Parte*. We note that AT&T contends that it did not begin offering its "00 INFO" service in response to U S WEST's provision of nationwide directory assistance. Rather, according to AT&T, it began providing nationwide directory assistance via 800-CALL-INFO in 1994, and began offering nationwide directory assistance via 900-555-1212 in 1995. AT&T states that the introduction of its "00 INFO" service in September 1997 was not a competitive response to U S WEST's nonlocal directory assistance offering, "but reflected AT&T's ongoing efforts to improve its longstanding national [directory assistance] offering." AT&T Comments (Forbearance) at 19. AT&T submits that it will continue to offer nationwide directory assistance service regardless of whether U S WEST continues offering its own nonlocal directory assistance service. *Id.* Although we agree with AT&T that the foregoing facts demonstrate that AT&T's "00 INFO" service was not necessarily a competitive response to U S WEST's provision of nonlocal directory assistance service, we find it significant that AT&T began advertising for a "new directory assistance service" shortly after U S WEST began offering nonlocal directory assistance service. *See* AT&T Sept. 22, 1997 Press Release, Attach. A to U S WEST Forbearance Petition.

[109] *See* Attachment to U S WEST Nov. 4, 1998 *Ex Parte*.

assistance service calls: one to 1-411, and another to 1-312-555-1212. In contrast, the nonlocal directory assistance service offered by U S WEST enables customers to obtain both such telephone numbers by placing one directory assistance service call to 411 or 1-411. We find, therefore, that the benefits to consumers of being able to dial 411 or 1-411 dialing code to obtain both local and nonlocal telephone numbers are substantial. Indeed, as noted by U S WEST:

> [C]ustomers have flocked to U S WEST's [nonlocal directory assistance] service. In the first month of operation, Colorado consumers alone made thousands of calls to obtain nonlocal numbers. Since then, the number of calls from Colorado customers had risen substantially. . . . All told, [nonlocal directory assistance] now receives tens of thousands of calls per day, and U S WEST expects the service to grow substantially over the next three years.[110]

52. We concur with AT&T that section 272 is designed to ensure that BOCs will not be able to use the advantages derived from being a dominant provider of local exchange and exchange access services to gain an unfair competitive advantage in the nonlocal directory assistance services market.[111] As discussed above, however, the nondiscrimination safeguards required in this Order should accomplish that purpose. Moreover, these nondiscrimination requirements should ensure that the market for nonlocal directory services will become increasingly competitive in U S WEST's region. Indeed, although some entities do not appear to have been deterred from providing nonlocal directory assistance service in U S WEST's region, such entities should be able to compete more effectively against U S WEST because they will be able to obtain more accurate and reliable directory listing information at the same rates, terms, and conditions U S WEST imputes to itself.[112]

53. In evaluating whether forbearance is consistent with the public interest, we take into account the competitive harms caused by U S WEST's monopoly control over the in-region telephone numbers. As described above, because of U S WEST's dominance in the local market, it has the ability to charge rates for directory listing information that may make it difficult for competing providers of nonlocal directory assistance service to succeed in the

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[110] U S WEST Forbearance Petition at 6-7.

[111] *See* AT&T Comments (Forbearance) at 18 (stating that section 272 seeks to prevent BOCs from, among other things, leveraging their monopoly over local exchange services into interLATA markets).

[112] *See* INFONXX May 20, 1999 *Ex Parte* at 3-4 (stating that requiring U S WEST to provide all competitive providers of directory assistance service with access to all of the information it uses to provide nonlocal directory assistance service would help to promote fair competition in the market for competitive directory assistance services); *see also* Metro One Aug. 14, 1998 *Ex Parte* at 3 (stating that, in order to compete effectively against incumbent LECs, it must be able to acquire directory assistance data at a cost that is consistent with the costs the incumbent LECs incur in producing directory assistance data for their own directory assistance operations).

market and, at the same time, give U S WEST a competitive advantage.[113] Given this, we find that imposition of nondiscrimination requirements similar to those found in section 272(c)(1) is in the public interest. In reaching this conclusion, we note that U S WEST has not persuaded us that anything less than a flat prohibition on discrimination would facilitate competition in the market for nonlocal directory assistance services, and, therefore, be in the public interest. Therefore, in the alternative, we impose nondiscrimination requirements similar to those found in section 272(c)(1) using our authority under section 10, together with sections 4(i) and 303(r).[114] We find that these nondiscrimination requirements are necessary to fulfill the directive in section 10(a)(3) that any grant of forbearance be consistent with the public interest.

54. We emphasize that our decision to forbear in the instant proceeding is limited exclusively to U S WEST's provision of regionwide directory assistance service. Whether enforcement of section 272 is in the public interest is highly dependent upon the particular service or activity at issue. We note, for example, that forbearance from section 272 with regard to in-region, interLATA service poses a greater competitive concern than a decision to forbear in the case of nonlocal directory assistance. Specifically, in contrast to the provision of in-region, interLATA services, where competing providers need interconnection to the BOC's network and access to the BOC's facilities, the only component of directory assistance services over which the BOC exercises monopoly control is the in-region directory assistance database. As we conclude herein, as long as competing providers of nonlocal directory assistance service can obtain nondiscriminatory access to the BOC's in-region directory assistance database, such entities should be able to compete effectively against the BOC in the directory assistance services market.

55. In contrast, in the case of in-region, interLATA service, the Commission has found that BOC entry into the in-region, interLATA market raises issues for competition and

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[113] *See supra* paragraph 35; *see also* MetroOne Aug. 1, 1998 *Ex Parte* at 2.

[114] Courts have acknowledged that the Commission may properly take action under section 4(i) even if such action is not expressly authorized by the Act, as long as the action is not expressly prohibited by the Act and is necessary to the effective performance of the Commission functions. *See, e.g., Mobile Communications Corp. v. FCC*, 77 F.3d 1399 (D.C. Cir. 1996), *cert. denied*, 519 U.S. 823 (1996); *New England Tel. & Tel. Co. v. FCC*, 826 F.2d 1101, 1107 (D.C. Cir. 1987)), *cert. denied*, 490 U.S. 1039 (1989); *North American Tel. Ass'n v. FCC*, 772 P.2d 1282, 1293 (7th Cir. 1985); *Nader v. FCC*, 520 F.2d 182, 204 (D.C. Cir. 1975) (reference to Commission's "broad powers under section 4(i)"). In *Mobile Communications Corp. of Ameritech v. FCC*, the court held that the Commission had authority under section 4(i) to require a pioneer's preference holder to pay for a narrowband personal communications service (PCS) license, despite the fact that the Act did not explicitly authorize such action by the Commission. According to the court, the payment requirement would be "necessary in the execution of [the Commission's] functions" under section 4(i) so long as the Commission found it was necessary to fulfill the statutory directive to grant a license only where the grant would serve the public, interest, convenience and necessity. *Mobile Communications Corp. v. FCC*, 77 F.3d at 1406.

consumers, even after a BOC has satisfied the requirements of section 271(d)(3).[115] Indeed, Congress itself has made clear, through enactment of the separate affiliate and nondiscrimination requirements of section 272, that there are competitive dangers arising from the BOCs' monopoly position and control of bottleneck facilities that may linger after a BOC has satisfied the requirements of section 271. Thus, while a BOC may have satisfied section 271, that compliance alone does not ensure that its local market will remain open to competition. Instead, even after a section 271 petition has been granted, a BOC retains the incentive and ability, through control of local exchange and exchange access facilities and services, to engage in anticompetitive cost-shifting and discrimination, which is what section 272 seeks to prevent.[116]

56. On the basis of the foregoing, we conclude that forbearance from section 272 is in the public interest. Because we also conclude that the first and second criteria for forbearance are met, we shall forbear from enforcing section 272, in part, and impose nondiscrimination requirements pursuant to section 272(c)(1) and our authority under sections 4(i), 10, and 303(r).

E. U S WEST's First Amendment Concerns

57. We reject U S WEST's contention that any restriction or prohibition on its provision of nonlocal directory assistance service violates the First Amendment. As an initial matter, we question whether the provision of a telephone number constitutes "speech" entitled to First Amendment protection. As the Supreme Court has stated, "[I]t is the obligation of the person desiring to engage in assertedly expressive conduct to demonstrate that the First

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[115] *Non-Accounting Safeguards Order*, 11 FCC Rcd. at 21911-12, para. 10. In the *Non-Accounting Safeguards Order*, the Commission noted that, if a BOC is regulated under certain types of regulation, such as rate-of-return regulation, a price caps structure with sharing, a price caps scheme that adjusts the X-factor periodically based on changes in industry productivity, or if any revenues it is allowed to recover are based on costs recorded in its regulated books of account, it may have an incentive to allocate improperly to its regulated core business costs that would be properly attributable to its competitive ventures. *Id.* The Commission further found that a BOC may have an incentive to discriminate in providing exchange access service and facilities that its affiliate's rivals need compete in the interLATA services market. The Commission found, for example, that:

> [A] BOC may have an incentive to degrade services and facilities furnished to its affiliate's rivals, in order to deprive those rivals of efficiencies that its affiliate enjoys. Moreover, to the extent carriers offer both local and interLATA services as a bundled offering, a BOC that discriminates against the rivals of its affiliates could entrench its position in local markets by making these rivals' offerings less attractive.

Id. at 21912, para. 11. Finally, the Commission found that, if a BOC charges other firms prices for inputs that are higher than the prices charged, or effectively charged, to the BOC's section 272 affiliate, then the BOC could create a "price squeeze." *Id.* at 21912-13, para. 12.

[116] *Id.* at 21911-13, paras. 10-12.

Amendment even applies."[117] U S WEST has not met its burden of demonstrating that the provision of a telephone number is expressive speech.[118] To the extent that U S WEST's provision of telephone numbers could be construed as speech for First Amendment purposes, thus requiring any restriction placed on U S WEST's provision of directory assistance service to be content-neutral,[119] we note that our decision to prohibit U S WEST from providing the nationwide component of its nonlocal directory assistance service is not based on the content of the speech involved. Rather, we conclude that U S WEST's provision of nationwide directory assistance service is prohibited under the Act based on our application of section 271(g)(4). As described above, U S WEST's provision of nationwide directory assistance service is unlawful under this section because, in providing such service, U S WEST uses a database that is owned by Nortel. Thus, the service is restricted not because of the content of the communications between U S WEST and its customers, but rather because of the manner in which it is presently configured.[120] As noted, if U S WEST, rather than Nortel, owned the facility containing the out-of-region directory listings, our conclusion that U S WEST's provision of nationwide directory assistance is unlawful may have been different. Given these findings, we disagree with U S WEST that any prohibition on its provision of nonlocal directory assistance service would be an attempt "to regulate the speech of U S WEST's operators based on its content."[121]

58. Moreover, we do not find that imposing nondiscrimination requirements on U S WEST's provision of the regionwide component of its nonlocal directory assistance service is an impermissible content-based restriction. As we explained, we decline to forbear from section 272(c)(1) with respect to U S WEST's provision of the telephone numbers within its region in view of U S WEST's dominance in the local exchange and exchange access markets. Specifically, we conclude that, unless we required U S WEST to provide unaffiliated entities with access to all of the in-region directory listing information it uses to provide nonlocal directory assistance service, it would have an unfair competitive advantage

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[117] *Clark v. Community for Creative Non-Violence*, 468 U.S. 288, 293 n.5 (1984).

[118] *See Non-Accounting Safeguards Order*, 11 FCC Rcd. at 21947, para. 87 (ruling that, because a BOC neither provides, nor exercises editorial discretion over, the content of the information associated with certain information services, its provision of those services does not constitute speech subject to First Amendment projections); *see also PGMedia, Inc. v. Network Solutions, Inc.*, No. 97 CIV.1946 RPP (S.D.N.Y. 1999) (comparing Internet addresses to telephone numbers, and then concluding that such addresses are not constitutionally protected speech).

[119] *See R.A.V. v. St. Paul*, 505 U.S. 377, 382 (1992).

[120] *See BellSouth Corp. v. FCC*, 144 F.3d 58, 69 (D.C. Cir. 1998) (citing *Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989) ("Government regulation of expressive activity is content neutral so long as it is justified without reference to the content of the regulated speech."); *Turner Broadcasting System, Inc. v. FCC*, 512 U.S. 622, 643 (1994) ("[L]aws that confer benefits or impose burdens on speech without reference to the ideas or views expressed are in most instances content-neutral.").

[121] U S WEST Forbearance Petition at 30.

in the provision of nonlocal directory assistance service throughout its region. Our imposition of nondiscrimination requirements, therefore, is not based on the content of the information involved, but rather on our determination that, in the absence of such requirements, U S WEST's provision of nonlocal directory assistance service would impede competition in the nonlocal directory assistance service market.

59. In any event, even if this Order were incidentally to reach U S WEST's commercial speech, there is no First Amendment violation here. The D.C. Circuit has recently upheld, against a First Amendment challenge, section 274 of the Act, which imposes structural separation requirements on BOCs' electronic publishing activities on the ground that section 274 "'advances important governmental interests unrelated to the suppression of free speech and does not burden substantially more speech than necessary to further those interests.'"[122] Certainly Congress's interest in managing an orderly transition to competition in the local markets is an important one. Section 272, like section 274, advances that goal by discouraging discrimination and cross-subsidization by the BOCs. As the court concluded in *BellSouth*, this is not only an important interest, but it is one "'unrelated to the suppression of free speech.'"[123] Indeed, by preventing anticompetitive behavior, we believe that section 272 (like section 274) will result in "the enhancement of speech."[124] Thus, we find no First Amendment violation here.

F. Declaratory Ruling on Ameritech's Petition for Clarification

60. We disagree with Ameritech[125] that the Commission implied in footnote 170 of the *N11 Order* that the adjunct-to-basic category is limited to services, functions, and information that are local in nature and scope. Rather, the Commission merely concluded that "traditional directory assistance services," which it defined as operator provision of local

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[122] *BellSouth Corp.*, 144 F.3d at 69-70 (quoting *Turner Broadcasting System, Inc. v. Federal Communications Comm'n*, 520 U.S. 180, 189 (1997)) (concluding that the structural separation requirements set forth in section 274 further an important governmental interest of promoting competition by discouraging discrimination and cross-subsidization, and are unrelated to the suppression of free speech).

[123] *Id.* at 70.

[124] *Id.*

[125] BellSouth and U S WEST filed petitions in support of Ameritech's proposal and no party opposed it. Although AT&T filed comments in the proceeding, it states that it "does not oppose Ameritech's request that the Commission permit LECs to offer directory assistance . . . services via 411 that include nonlocal telephone numbers." AT&T Comments on Ameritech's Petition for Clarification at 5. AT&T maintains, however, that if the Commission permits incumbent LECs to use the 411 code for the provision of nonlocal telephone numbers, it should require such incumbent LECs to provide nondiscriminatory access to the 411 code to competitive LECs. AT&T submits that "[i]f [incumbent LECs] are permitted to offer [nonlocal directory assistance service] via what the Commission itself called 'nationally-recognized numbers for directory assistance,' they will gain an even greater -- and even more starkly anticompetitive advantage over [competing carriers] than if these numbers are used only to offer local [directory assistance]." *Id.*

telephone numbers, are adjunct-to-basic.[126] Such language has no bearing on the Commission's prior rulings concerning the classification of services as either adjunct-to-basic or enhanced. We, therefore, reject Ameritech's contention that it is necessary to strike footnote 170 of the *N11 Order*.

61. Although we find that the Commission's *N11 Order* did not imply that the adjunct-to-basic category is limited to local services, we find in this declaratory ruling that the adjunct-to-basic category is not limited to such services. As the Commission has previously determined, the relevant inquiry in distinguishing an adjunct-to-basic service from a technologically similar enhanced service is the purpose served by the service and its relationship to basic telephone service.[127] Because the purpose served by directory assistance, whether inclusive of national listings or not, is to facilitate the use of the basic network,[128] we find that nonlocal directory assistance service is properly classified as adjunct-to-basic.[129] We reach this conclusion despite the fact that nonlocal directory assistance service is not local in nature and scope.[130] Indeed, we note that certain adjunct-to-basic services, such as call forwarding, speed dialing, and directory assistance relying on a central computer, often

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[126] *See N11 Order*, 12 FCC Rcd. at 5600-01, para. 48. n.170.

[127] *See In the Matter of North American Telecommunications Association Petition for Declaratory Ruling Under Section 64.702 of the Commission's Rules Regarding the Integration of Centrex, Enhanced Services, and Customer Premises Equipment*, ENF 84-2, Memorandum Opinion and Order, 101 FCC 2d 349 (1985) (*NATA/Centrex Order*), at 358-361, paras. 22-28.

[128] *See id.* at 360, para. 26 (concluding that "[a]n offering of access to a database for the purpose of obtaining telephone numbers may be offered as an adjunct-to-basic telephone service; an offering of access to a database for most other purposes is the offering of an enhanced service").

[129] We note that Metro One is the only commenter that asserts that nonlocal directory assistance is an enhanced service. Metro One Aug. 14, 1998 *Ex Parte* at 1, 4. Other commenters, including MCI, agree that U S WEST's nationwide directory assistance service is an adjunct-to-basic offering. *See* MCI Comments (Declaratory Ruling) at 6.

[130] We thus agree with Ameritech's line of reasoning:

> Classifying a particular service based upon its 'local' nature would lead to other absurd results. For example, BOCs offering speed dialing as adjunct-to-basic could no longer permit end-user customers to store telephone numbers outside of an end-user's local calling area. Similarly, call forwarding service could be classified as either enhanced or adjunct-to-basic, depending upon whether the 'forward-to' numbers entered by a particular end-user customer were within the end users local calling area. The regulatory treatment of calling party name and other caller ID-based services would change based upon whether the telephone number of the calling party was 'local' to that of end-user subscriber.

See Ameritech Clarification Petition at 14.

involve the provision to the customer of information that is interLATA in nature and scope.[131] Nevertheless, each of these services is classified as adjunct-to-basic, on the basis that they facilitate the use of the basic network and do not materially change the nature of the underlying telephone call.[132]

62. The Act does not contain any restrictions on the use of the 411 code by any telecommunications carrier. The only limitation on the use of the 411 code enunciated by the Commission is that a LEC may not itself offer enhanced services using the 411 dialing code unless that LEC offers access to the code on a reasonable, nondiscriminatory basis to competing enhanced service providers.[133] Because nonlocal directory assistance service is an adjunct-to-basic service, we find that the restrictions enunciated by the Commission in the *N11 Order* on the provision of enhanced services via the 411 dialing code are not applicable to the provision of nonlocal directory assistance service by any telecommunications carrier. AT&T states that, notwithstanding the classification of nonlocal directory assistance service as adjunct-to-basic, we should prohibit incumbent LECs, such as U S WEST, from using the 411 dialing code for nonlocal directory assistance service until they are able to provide nondiscriminatory access to such code to competing providers of nonlocal directory assistance service.[134] As stated above, however, we decline to place restrictions on U S WEST's use of the 411 or 1-411 dialing code for the provision of nonlocal directory assistance service.[135] Moreover, similar to the views expressed by the Commission in the *N11 Order*, we find that the continued use of abbreviated dialing codes, such as 411 and 1-411, to access both local and nonlocal directory assistance service is "justified by the public convenience and necessity."[136]

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[131] For example, although caller ID often identifies to a called party the telephone number of a calling party that resides in a distant LATA, such service is classified as adjunct-to-basic. *See Non-Accounting Safeguards Order*, 11 FCC Rcd. at 21958, para. 107 n.245 (identifying caller ID as an adjunct-to-basic service); *see also Rules and Policies Regarding Calling Number Identification Service--Caller ID*, CC Docket No. 91-281, Report and Order and Further Notice of Proposed Rulemaking, 9 FCC Rcd. 1764 (1994); 47 C.F.R. § 64.1601(a) (requiring common carriers using Signaling System 7 to transmit the calling party's telephone number associated with an interstate call to interconnecting carriers).

[132] *See NATA/Centrex Order* at paras. 24-27.

[133] *See N11 Order*, 12 FCC Rcd. at 5600, para. 47.

[134] AT&T Comments (Ameritech Petition for Clarification) at 5.

[135] *See supra* paragraphs 42-45.

[136] *See N11 Order*, 12 FCC Rcd. at 5600, para. 47.

IV. CONCLUSION

63. For the reasons set forth above, we conclude that U S WEST's provision of nonlocal directory assistance service to its in-region subscribers constitutes the provision of in-region, interLATA service. We conclude, however, that U S WEST may continue providing the regionwide component of its nonlocal directory assistance service because that service falls within the scope of section 271(g)(4). The nationwide component of U S WEST's nonlocal directory assistance service, on the other hand, is unlawful as currently configured. Although U S WEST must cease providing nationwide directory assistance until the service is reconfigured to comply with section 271(g)(4), we note that, if U S WEST was providing nationwide directory assistance service in compliance with the Act, the service would fall within the scope of the forbearance granted in this Order.

64. We further conclude in this Order that, as long as U S WEST complies with the nondiscrimination requirements set forth above with respect to providing unaffiliated entities with access to all of the in-region directory listing information it uses to provide regionwide directory assistance service, the statutory criteria for forbearance set forth in section 10 are met for us to forbear, in part, from the requirements of section 272. Thus, we allow U S WEST to provide the regionwide component of its nonlocal directory assistance service on an integrated basis, subject to these nondiscrimination requirements.

65. Finally, we reject Ameritech's contention that in footnote 170 of the *N11 Order* the Commission implied that the adjunct-to-basic category is limited to services, functions, and information that are local in nature and scope. At the same time, however, we declare that the adjunct-to-basic category includes nonlocal directory assistance.

V. ORDERING CLAUSES

66. Accordingly, IT IS ORDERED, pursuant to section 1.2 of the Commission's rules, 47 C.F.R. § 1.2, that U S WEST's Petition for Declaratory Ruling is GRANTED to the extent set forth herein, and is otherwise DENIED.

67. IT IS FURTHER ORDERED, pursuant to sections 4(i), 10, 272, 303(r), 47 U.S.C. §§ 154(i), 160, 272, and 303(r) of the Communications Act of 1934, as amended, that U S WEST's petition for forbearance with respect to the regionwide component of its nonlocal directory assistance service is GRANTED to the extent set forth herein, and is otherwise DENIED.

68. IT IS FURTHER ORDERED that Ameritech's Petition for Clarification is DENIED and, pursuant to 1.2 of the Commission's rules, 47 U.S.C. § 1.2, a declaratory ruling is adopted.

FEDERAL COMMUNICATIONS COMMISSION

Magalie Roman Salas

Magalie Roman Salas
Secretary

SEPARATE STATEMENT OF COMMISSIONER HAROLD FURCHTGOTT-ROTH DISSENTING IN PART

Re: In the Matter of Petition of US WEST Communications, Inc. for a Declaratory Ruling regarding the Provision of National Directory Assistance; The Use of N11 Codes and Other Abbreviated Dialing Arrangements; (CC Docket Nos. 97-172; 92-105).

I support many aspects of this Order, but write separately to express several reservations. Specifically, I object to the majority's decision to forbear from section 272's separate affiliate requirement, but to impose the burdensome nondiscriminatory access restrictions on a unified entity as a condition of that forbearance.[1] I believe it would have been more consistent with the Commission's statutory mandate to refuse to forbear at all than to forbear and impose new conditions.

The majority expressly states that "if [it] finds that the objectives set forth in section 10 may be satisfied by means other than enforcing section 272, then such a finding is persuasive evidence that enforcement of the separate affiliate requirements of section 272 is not necessary." *Supra* at par. 29. As an initial matter, it is not apparent from this conclusion that the majority would place *any* limits on what "other means" they would be willing to impose to meet the objectives set forth in section 10. This cannot be what Congress intended in enacting section 10. In this particular circumstance, it appears that the Commission adopts "means other than enforcing section 272" through its "imposition of nondiscrimination requirements as a condition to forbearance." *Supra* at par. 39. The majority states that, "[it] find[s] that *imposition* of nondiscrimination requirements similar to those found in section 272(c)(1) is in the public interest" and therefore that imposition of these requirements is "necessary to fulfill the directive in section 10(a)(3)." *Supra.* at par. 53 (emphasis added). I disagree with this threshold observation. 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 authority to use "other means" without limit, such as to *adopt* new regulations or *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 also disagree with the majority to the extent that they claim to be forbearing in part from section 272. The majority expressly states that they are merely "retain[ing] the

[1] I also have reservations about the majority's conclusion that the provision of telephone numbers does not constitute speech entitled to First Amendment protection. *Supra* at par. 57. I agree, however, that the restriction on national directory assistance is based not on the substance of the message but the location of the database at issue under section 271(g)(4). Because I object to the imposition of the nondiscrimination requirement, I do not reach the issue of whether it constitutes a separate First Amendment violation.

nondiscrimination requirements of section 272(c)(1)," *supra* at par. 38, while at the same time forbearing from the structural separation requirements of section 272. The majority specifically concludes that the Commission has the authority to "retain" this requirement under section 10(c), which "permits [the Commission] to grant or deny a petition for forbearance in whole or in part." *Id.* According to the express terms of the statute, however, the nondiscrimination safeguards of section 272(c)(1) only apply to a Bell operating company "in its dealings with its affiliate." Section 272(c). Indeed, the majority even acknowledge that "it is less than clear whether the requirements of section 272(c)(1) apply in the absence of a separate affiliate." *Supra* at par. 38. To the contrary. On its face, the statute is clear that section 272(c)(1) *does not* apply except where there is a separate affiliate providing the service involved. By its own terms, the section 272(c) safeguards cannot apply in the absence of an affiliate. Since the majority forbears from the section 272 requirement that the service be provided through a separate affiliate, the majority cannot "retain" a section 272(c) limitation. Rather than merely "retaining" a requirement, therefore, the majority in fact is "imposing" a more stringent requirement as part of its section 10 analysis.

Indeed, my reading of the statute to conclude that section 272's restrictions cannot apply in the absence of a separate affiliate is consistent with the Common Carrier Bureau's previous interpretation. In the *E911 Forbearance Order*, the Bureau concluded that

> Because section 272(c)(1) literally applies only to BOC discrimination between a separate affiliate and unaffiliated entities, a decision permitting the BOCs to provide E911 services on an integrated basis would relieve those carriers of their obligations to provide unaffiliated entities with the listing information described above.

E911 Forbearance Order, CC Docket No. 96-149, at par. 33 (CCB 1998). Because the section 272(c)(1) restrictions could not be applied without a section 272 separate affiliate, the forbearance from the section 272 separate affiliate requirement in that instance was conditioned "on each BOC's making available to unaffiliated entities all listing information . . . at the same rates terms and conditions, if any, it charges or imposes on its own E911 services." *Id.* at par. 34. Put simply, in contrast to the majority's opinion today, the Bureau determined that section 272(c)(1)'s restrictions could not apply absent an affiliate and so it adopted a wholly separate nondiscrimination condition. *See also id.* at par. 83 ("Because section 272(c)(1) literally applies only to BOC discrimination between a separate affiliate and unaffiliated entities, a decision permitting BellSouth to provide its reverse directory assistance services on an integrated basis would relieve that carrier of its obligations to provide unaffiliated entities all listing information that it uses to provide interLATA reverse directory services.").

The majority now states that it "disagree[s] with [the Bureau's] interpretation of section 272, [but it] agree[s] with the Bureau's imposition of nondiscrimination requirements as a condition to forbearance." *Supra.* at par. 39. Although it originally provided no

explanation for this reversal of the agency's position, the majority now attempts to provide some rationalization.[2] It *now* explains that

> for purposes of our forbearance analysis, the nondiscrimination requirements of section 272(c)(1) constitute statutory obligations that may be enforced separate and apart from the structural separation requirements of section 272. Were we to consider the section 272 nondiscrimination obligations as part and parcel of structural separation requirements, we would be precluded from partially forbearing from section 272.

Supra. at par. 38. The majority also recognizes that "it is less than clear whether the requirements of section 272(c)(1) apply in the absence of a separate affiliate." *Id.* In fact, it is clear that it does not. The majority seems to say that it must interpret section 272 in a manner inconsistent with its plain language, because otherwise it would not be able to forbear in part pursuant to section 10. But convenience is not a permissible basis for interpreting a statute in a manner that contradicts its plain meaning. It would have been more consistent with the Commission's statutory mandate to refuse to forbear at all than to contort the statute in such a manner. Whereas no explanation for a change in the agency's position would have entitled the Commission to *little* deference, an explanation based on an statutory interpretation that is contrary to the law is entitled to *no* deference.

Moreover, it appears the Bureau was acting independently in making this earlier legal interpretation as it does not cite any prior Commission-level order in support of its interpretation. Neither does the majority refer to any prior Commission-level conclusions on this legal issue. Thus, this inconsistency is the result, at least in part, of the Bureau's attempt to deal with a new and novel legal and policy issue without direction from the Commission. As I have stated on several recent occasions, the Bureau does "not have authority to act on any applications or requests which present novel questions of fact, law or policy which cannot be resolved under outstanding precedents and guidelines." 47 CFR 0.291(a)(2). The Commission's rules expressly limit the general grants of delegated authority to the bureaus to "matters which are *minor* or *routine* or settled in nature." 47 CFR 0.5(c). I only wish that, aside from conveniently "concurring with the Bureau's result," the majority would expressly acknowledge that this situation is as an example of the potential inconsistencies that develop when the Bureau, at the Chairman's direction, moves forward on novel questions of law and

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[2] In an earlier draft of this order, the majority provided no explanation for its new interpretation of section 272. I pointed out that, as such, its decision would be, at best, entitled to little deference, and at worst, arbitrary. The Supreme Court has clearly stated that "[a]n agency interpretation of a relevant provision which conflicts with the agency's earlier interpretations is 'entitled to considerably less deference' than a consistently held agency view." *INS v. Cardoza-Fonseca*, 480 U.S. 421, 446 n.30, 107 S.Ct. 1207, 94 L.Ed.2d 434 (1987) (quoting *Watt v. Alaska*, 451 U.S. 259, 273, 101 S.Ct. 1673, 68 L.Ed.2d 80 (1981). The D.C. Circuit has noted that, given the Court's subsequent dicta in *Smiley v. Citibank, N.A.*, 517 U.S. 735, 742, 116 S.Ct. 1730, 135 L.Ed.2d 25 (1996), an agency's reversal of its earlier position does not itself defeat *Chevron* deference, but would require the agency to provide a reasoned explanation for the changed interpretation. *Amax Land Co. v. Quarterman*, 1999 WL 498546 at 8 (decided July 16, 1999). The majority's failure to explain the reversal of the agency's position would, therefore, have defeated any deference to this position.

policy. While on this narrow legal issue I actually agree with the Bureau's previous interpretation, it is my concern for just such conflicting opinions that has prompted my recent statements regarding delegated authority.[3]

The majority concludes that "we rely upon our authority under sections 10, 4(i), and 303(r) to impose conditions, as an alternative basis for the nondiscrimination requirements applied in this Order." *Supra* at par. 39. First, neither section 4(i) or section 303(r) provide separate authority to impose such a condition. Indeed, both provisions are merely "necessary and proper" type provisions that empower the Commission to take actions necessary to effectuate the other provisions of the Communications Act. *See* 47 U.S.C. section 4(i) ("[t]he Commission may perform any and all acts, make such rules and regulations, and issue such orders, not inconsistent with this Act, as may be necessary in the execution of its functions"); 47 U.S.C. section 303(r) ("Commission shall . . . prescribe such . . . conditions, not inconsistent with law, as may be necessary to carry out the provisions of this Act"). Neither section 4(i) nor 303(r) provide the Commission with general rulemaking authority independent of any other provision and thus these sections cannot provide a wholly independent statutory basis for imposing new conditions.

The majority maintains that action under section 4(i) is necessary to fulfill the "public interest" requirement in section 10(a)(3). *Supra.* at par. 53, n. 114. For the majority, section 4(i), coupled with the "public interest" requirement, gives the Commission *carte blanche* to impose any new regulations or conditions it sees fit, without regard to whether these conditions are consistent with specific terms of the Act. Thus in the present matter, the Commission, according to the majority, is permitted to employ a more stringent standard than the one specifically adopted by Congress in enacting section 10. The Commission thereby uses a generalized provision to trump a specific Congressional decision.

It is exactly this type of unchecked abuse of the "public interest" requirement that has led me to call for the adoption of determinate, binding standards to channel the Commission's discretion under the Act's "public interest" provisions.[4] In a recent decision, the D.C. Circuit made clear that an agency's failure to adopt "intelligible principles" for implementing its statutory mandate could effect an unconstitutional delegation of legislative power.[5] To my mind, the Commission's use of the "public interest" standard is arguably the kind of

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[3] *See, e.g.,* Separate Statement of Commissioner Harold Furchtgott-Roth, Application of AirTouch Communications, Inc., Transferor and Vodafone Group, PLC, Transferee for consent to Transfer Control of Licenses and Authorizations, June 21, 1999.

[4] *See, e.g.,* Testimony of Federal Communications Commissioner Harold W. Furchtgott-Roth Before the U.S. House of Representatives Committee on the Judiciary, Subcommittee on Commercial and Administrative Law Oversight Hearing, Tuesday, May 25, 1999

[5] American Trucking Ass'n v. EPA, 175 F.3d 1027, 1033 (D.C. Cir. 1999).

"free-wheeling authority [that] might well violate the nondelegation doctrine."[6] I fear that this type of expansive reading of the Commission's authority under the Act's general necessary and proper provisions, in the absence of some binding standard, has lead this Commission astray from its clear statutory duties and limitations.

Moreover, section 10 does not provide authority to *impose* conditions. In this instance, for example, I am especially troubled that the "condition" placed on the granting of the forbearance petition is the result of a higher burden of proof than section 10 would otherwise require. The majority concludes that "retention of the nondiscrimination requirements of section 272(c)(1) is sufficient to ensure that US WEST's provision of regionwide directory assistance service would satisfy the requirements of section 10(a)(1)." *Supra* at par. 38. The majority, however, proves too much. To satisfy section 10(a)(1) the Commission does not need to require complete nondiscrimination. To the contrary, forbearance under section 10 requires only that the charges and practices be "just and reasonable and are not unjustly or unreasonably discriminatory." Section 10(a)(1).

"Not unreasonably discriminatory" is not the same as complete nondiscrimination. Is it necessary to require that directory information be offered "at rates, terms and conditions equal to those US WEST imputes to itself" to satisfy the "not unreasonably discriminatory" standard? The majority *responds* to this criticism by conveniently making a "finding" that "any discrimination between U S WEST and unaffiliated entities with respect to in-region telephone numbers would be unjust and unreasonable." *Supra.* at par. 35. The only apparent factual basis for this finding lies in the majority's conclusion that "in the absence of a requirement that U S WEST provide in-region telephone numbers to unaffiliated entities at the same rates, terms, and conditions it imputes to itself, the potential for U S WEST to use its monopoly position to gain an unfair competitive advantage in the nonlocal directory assistance market is substantial." The facts here, however, belie such a conclusion. US WEST is currently offering such a service, and according to the majority, is violating these nondiscrimination requirements. *Supra.* at par. 34. And yet competition is still flourishing. *Supra.* at par. 33, n. 87. The majority's conclusion fails to reconcile the current reality of a competitive market for nonlocal directory assistance and their so-called "finding." In truth, the majority makes no "finding" at all, but only a capricious, self-serving conclusion that the conditions they propose are necessary. I object to their attempts to declare their legal theory a "finding" when it is inconsistent with their own facts.

The majority also finds that "based on the record before us, we find that the rates US WEST charges unaffiliated entities for obtaining directory listing information have the potential to adversely affect competition in the nonlocal directory assistance market." *Supra.* at par. 35. I fail to understand how this finding supports the conclusion that *any* discrimination would be unjust and unreasonable. In effect, the majority concludes that no difference in price could ever be just or reasonable, not even if it were based on actual

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[6] *International Union, UAW v. OSHA*, 938 F.3d 1310, 1317 (D.C. Cir. 1991).

differences in cost incurred. I disagree. The majority fails to explain why it would be "unreasonably discriminatory" for US WEST to charge a single cent more than the cost it imputes to itself. Discriminatory? Perhaps. But "unreasonably" so? Instead of making such a finding, the majority explains that with the nondiscrimination requirement "alternative providers of nonlocal directory assistance should be able to compete more effectively against US WEST." *Supra* at par 41. While true, that is not the relevant question. The relevant question is whether any difference in price or availability would be unjustly or unreasonably discriminatory.

Similarly, the majority fails to explain why it would be "unreasonably discriminatory" for US WEST to honor the requests of any independent and competitive LECs that do not want their information provided to unaffiliated entities without their express permission. Again, that might be discriminatory, but is it "unreasonably" so? Moreover, why must US WEST act as a clearinghouse for information in this context when the Commission has not found, and it is not clear that a majority of the Commission would find, that section 222 requires US WEST or any other carrier to act as a clearinghouse for this information? I do not think that requiring carriers to act as a clearinghouse is appropriate in either context.

Instead of addressing these issues, the majority merely declares that the "application of these requirements in the instant proceeding is consistent with the purpose of section 272(c)(1)." *Supra* at par. 36. That may be, but it is not the purpose of section 272(c)(1) that is the relevant standard; rather it is the "not unreasonably discriminatory" standard of section 10(a)(1) that should be used to determine whether or not the criteria for forbearance have been met. To the extent that conditions are necessary for forbearance to be justified, those conditions may go no further than to ensure that forbearance will not result in unjust or unreasonable discrimination. Beyond stating conclusions that are inconsistent with the facts as we know them today, the majority fails to address (i) what minimum conditions were necessary to avoid unjust or unreasonable discrimination, or (ii) why complete nondiscrimination was actually necessary under these facts to meet the unreasonable discrimination standard.

Concluding that any difference in cost is inherently discriminatory results in a much higher burden for petitioners seeking regulatory relief under section 10, and I am concerned about the precedent of the majority's determination here on other section 10 petitions. I fear that the Commission may be establishing a standard for whether or not a charge or practice is "just and reasonable" that will preclude any charge or practice that differs from what a company imputes to itself. But that is clearly a higher burden than the statute requires. A company could charge others a higher price than that which it imputes to itself and that charge could still be "just and reasonable."

The majority states that "the more reasonable interpretation of section 10 is that our forbearance analysis must include consideration of the standards set forth in the provision of

the Act from which forbearance is sought." *Supra.* at par. 40.[7] I find no basis in section 10 for this "interpretation." Rather than use the standard clearly established by Congress in section 10, the majority appears willing to rely instead on its own "wisdom" to establish a wholly different standard. I cannot support this willingness to expand the plain language of the statute. The majority's interpretation essentially reads out the standard established by Congress in section 10.

The majority now assumes that the nondiscrimination standard in section 10 will only be met if the nondiscrimination standard of section 272 is met. Essentially, the majority is willing to apply the two standards as if they were synonymous. The Commission, however, has previously determined that section 272's nondiscrimination standard is not synonymous with the "unjust and unreasonable" standard used in other provisions of the Act. In the *Non-Accounting Safeguards Order*, the Commission explicitly compared the nondiscrimination standard of section 272(c)(1) with the unjust and unreasonable standard in sections 201-202 and concluded that the two standards were not the same. "[B]ecause the text of the section 272(c)(1) nondiscrimination bar differs from the section 202(a) prohibition, . . . Congress did not intend section 272's prohibition against discrimination . . . to be synonymous with the 'unjust and unreasonable' discrimination language used in [section 202(a)]." *Non-Accounting Safeguards Order*, 11 FCC Rcd 21905, at par. 197 (1996). The majority should at least address how their interpretation of the standard under section 272(c)(1) and section 10's unjust and unreasonable language compares to the Commission's prior determination when comparing section 272(c)(1)'s requirements to the unjust and unreasonable language found in section 202(a).

In conclusion, I believe that the Commission has acted in an arbitrary and capricious manner in adopting a strict nondiscrimination requirement to meet a lesser "just and reasonable" standard. It is especially arbitrary since the Commission has elsewhere expressly determined that these two standards are not the same. The Commission should be required to make an explicit factual finding, beyond a mere self-justifying, conclusory statement, that such a requirement was the only option available that could ensure that access was provided at "just and reasonable" rates.

The majority should not be able to impose such a requirement without explaining why less burdensome options -- such as requiring US WEST to provide the directory information at just and reasonable rates and enforcing that requirement through the section 201-202 complaint process -- would be insufficient to meet the threshold requirements of section 10. If the Commission can impose a condition under its general "necessary and proper" provisions -- a position which I dispute -- and if such a condition is necessary for the forbearance relief requested, then such a condition must also be related to the actual forbearance standard articulated in section 10 -- e.g. prohibiting actions that are "unjustly and unreasonably

[7] It is unclear whether the majority would find invalid its previous forbearance analyses to the extent they did not include this consideration.

discriminatory." Conditions that go beyond such limitations by prohibiting actions that are "reasonably discriminatory" are not necessary to fulfill the statutory mandate of section 10. As such, these conditions are not required to meet the section 10 forbearance test and are inherently arbitrary. In other words, I believe that the majority's selection of this nondiscrimination condition was insufficiently related to the forbearance criteria at issue to qualify as reasoned decision-making.

APPENDIX

U S WEST's Petition for Declaratory Ruling

Petition
U S WEST Communications, Inc. (U S WEST) - July 17, 1997

Comments
AT&T Corp. (AT&T) - filed Sept. 2, 1997
Bell Atlantic - filed Sept. 2, 1997
BellSouth Corporation (BellSouth) - filed Sept. 2, 1997
MCI Telecommunications Corp. (MCI) - filed Sept. 3, 1997 (Erratum)
Roseville Telephone Company (Roseville) - filed Sept. 2, 1997
Southwestern Bell Telephone Company (SWBT), Pacific Bell Telephone Company (Pacific), and Nevada Bell Telephone Company (Nevada) - filed Sept. 2, 1997

Reply Comments
Ameritech Corp. (Ameritech) - filed Sept. 17, 1997
AT&T - filed Sept. 17, 1997
BellSouth - filed Sept. 17, 1997
MCI - filed Sept. 17, 1997
SWBT, Pacific, and Nevada - filed Sept. 17, 1997
U S WEST - filed Sept. 17, 1997

U S WEST's Petition for Forbearance

Petition
U S WEST - filed March 11, 1998

Comments
Ameritech - filed Apr. 9, 1998
AT&T - filed Apr. 9, 1998
MCI - filed Apr. 9, 1998
SBC Communications, Inc. (SBC) - filed Apr. 9, 1998

Reply Comments
AT&T - filed Apr. 23, 1998
Bell Atlantic - filed Apr. 23, 1998
MCI - filed Apr. 23, 1998
SBC Communications, Inc. (SBC) - filed Apr. 23, 1998
Sprint Communications Co., L.P. (Sprint) - filed Apr. 23, 1998
U S WEST - filed Apr. 23, 1998

Ameritech's Petition for Clarification

Petition
Ameritech Corp. (Ameritech) - filed Mar. 28, 1997

Comments
AT&T - filed Apr. 23, 1997
BellSouth - Apr. 23, 1997
U S WEST - Apr. 23, 1997

Reply Comments
None