

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

In the Matter of)	
)	
Section 272(f)(1) Sunset of the BOC Separate)	WC Docket No. 02-112
Affiliate and Related Requirements)	

NOTICE OF PROPOSED RULEMAKING

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By the Commission:

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I. INTRODUCTION

1. In this Notice of Proposed Rulemaking (Notice), we initiate an inquiry regarding the sunset of the statutory requirements under section 272 imposed on Bell Operating Companies (BOCs) when they provide in-region, interLATA services.¹ Section 272 of the Act requires BOCs to provide in-region, interLATA telecommunications services through separate corporate affiliates, subject to certain safeguards.² Section 272(f)(1) provides that the provisions of the section, with one exception, expire three years after a BOC or any BOC affiliate is authorized under section 271 to provide in-region interLATA services, “unless the Commission extends such 3-year period by rule or order.”³ In this Notice, we seek to develop a full record so that we may properly assess, as contemplated by the statute: (1) whether the structural safeguards established in section 272 should be extended by the Commission, despite the three-year sunset provision in the statute; and (2) whether any alternative safeguards should be put in place in states where the statutory requirements have sunset. We invite interested parties to comment on whether, and, if so, under what conditions, the structural and nondiscrimination safeguards established in section 272 should be extended by the Commission either generally or with respect to specific states.

II. BACKGROUND

2. Section 272 of the Act requires that the BOCs initially provide in-region, interLATA service through a separate corporate affiliate and comply with certain nondiscrimination requirements set forth in the statute.⁴ A BOC must demonstrate that it will provide in-region, interLATA service in compliance with the requirements of section 272 as part of the section 271 application process.⁵ In addition, section 272(d) requires that a BOC obtain and pay for a biennial joint federal/state audit after section 271 approval to determine whether it has complied with section 272.

3. The Commission adopted rules to implement the statutory requirements of section

¹ 47 U.S.C. § 272(f)(1). The Notice seeks comment on issues relating to BOC provision of both domestic interstate and international interexchange services. It is not intended to address the classification of BOCs as “dominant” on specific routes in their provision of U.S.-international services under section 63.10 of the Commission’s rules. This Notice does not address separate affiliate and related requirements for BOC manufacturing, although the sunset in section 272(f)(1) affects both manufacturing and long distance.

² 47 U.S.C. § 272(a)(2).

³ 47 U.S.C. § 272(f)(1). As more fully discussed below, the statute specifies that the requirements of section 272(e) do not sunset. Section 272(f)(3) preserves the Commission’s authority to prescribe safeguards under other sections of the Act. 47 U.S.C. § 272(f)(3).

⁴ 47 U.S.C. § 272.

⁵ 47 U.S.C. § 271(d)(3)(B).

272 in the *Accounting Safeguards Order* and the *Non-Accounting Safeguards Order*.⁶ In the *Non-Accounting Safeguards Order*, the Commission found that the BOCs have market power in the provision of local exchange and exchange access services within their service areas.⁷ The Commission stated that as long as the BOCs retain market power in the provision of these services, they will have an incentive and ability to discriminate against their long distance competitors, and engage in other anti-competitive conduct. In particular, the Commission found the BOCs to be dominant carriers with an incentive to discriminate in providing exchange access services and facilities that their interexchange competitors need to compete in the interLATA telecommunications services markets. For example, the Commission noted that BOCs may have an incentive to degrade services and facilities furnished to their interexchange competitors. Additionally, the Commission noted that a BOC could attempt to charge competitors prices for inputs that are higher than the prices charged to the BOC's section 272 affiliate, thereby creating a price squeeze.⁸

4. Under section 272 and our implementing rules, a BOC and its section 272 affiliate may not jointly own transmission and switching equipment.⁹ The BOC may not perform any operating, installation, or maintenance functions for facilities owned or leased by the section 272 affiliate, and the section 272 affiliate may not perform any such functions on BOC facilities.¹⁰ The separate 272 affiliate must maintain separate books of account and have separate officers and directors.¹¹ The separate 272 affiliate may not obtain credit under arrangements that would permit the creditor to look to the assets of the BOC.¹² The section 272 affiliate must conduct all transactions with the BOC on an arm's length basis, pursuant to the Commission's affiliate transaction rules,¹³ with any such transactions reduced to writing and available for public

⁶ See *Implementation of the Accounting Safeguards Under the Telecommunications Act of 1996*, CC Docket No. 96-150, Report and Order, 11 FCC Rcd 17539 (1996) (*Accounting Safeguards Order*), Order on Reconsideration, 14 FCC Rcd 11396 (1999); Second Order On Reconsideration, 15 FCC Rcd 1161 (2000); *Implementation of the Non-Accounting Safeguards of Section 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*); First Order on Reconsideration, 12 FCC Rcd 2297 (1997) (*First Order on Reconsideration*), Second Order on Reconsideration, 12 FCC Rcd 8653 (1997) (*Second Order on Reconsideration*), *aff'd sub nom. Bell Atlantic Telephone Companies v. FCC*, 131 F. 3d 1044 (D.C. Cir. 1997), Third Order on Reconsideration, FCC 99-242 (rel. Oct. 1, 1999) (*Third Order on Reconsideration*).

⁷ *Non-Accounting Safeguards Order*, 11 FCC Rcd at 21911-12, para. 10.

⁸ *Id.* at 21911-13, paras. 10-12.

⁹ 47 C.F.R. § 53.203(a)(1).

¹⁰ 47 C.F.R. § 53.203(a)(2)-(3).

¹¹ 47 C.F.R. § 53.203(b)-(c).

¹² 47 C.F.R. § 53.203(d).

¹³ 47 C.F.R. § 32.27. Under the affiliate transaction rules, transactions are to be valued at publicly available rates – specifically, a tariffed rate, a rate in a publicly filed agreement or statement of generally available terms, or a qualifying prevailing price valuation – if possible. If there is no such publicly available rate, transfers from the (continued....)

inspection.¹⁴ Specifically, the separate affiliate must post on the Internet within ten days of a transaction a detailed written description of the asset or service and the terms and conditions of the transaction.¹⁵

5. Section 272 (c) and (e) impose nondiscrimination safeguards on the BOC.¹⁶ Section 272(d) requires a biennial audit post-entry to ensure compliance with the structural and transactional requirements of section 272.¹⁷

6. Section 272(f)(1) provides that the provisions of the section, except for section 272(e), expire three years after a BOC or any BOC affiliate is authorized under section 271 to provide in-region, interLATA services, “unless the Commission extends such 3-year period by rule or order.”¹⁸

7. Section 271 approval is provided on a state-by-state basis. As such, the sunset dates for each BOC will vary depending upon when each state receives section 271 approval. Verizon’s New York section 272 requirements will sunset in December of 2002, and SBC’s Texas section 272 requirements will sunset in June of 2003, unless the Commission acts to extend them.¹⁹

III. DISCUSSION

8. In enacting section 272, Congress recognized that BOCs may attempt to

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BOC to the affiliate are booked at fair market value or net book cost, whichever is higher. Transfers from the affiliate to the BOC are recorded at fair market value or net book cost, whichever is lower. The BOC may use any reasonable method to determine fair market value; an independent appraisal is not required.

¹⁴ 47 C.F.R. § 53.203(e).

¹⁵ *Accounting Safeguards Order*, 11 FCC Rcd at 17593-94, para. 122.

¹⁶ 47 U.S.C. § 272(c) and (e). Section 272(c) requires a BOC to provide unaffiliated entities the same goods, services, facilities, and information that it provides to its section 272 affiliate at the same rates, terms, and conditions. Section 272(e) includes a number of specific nondiscrimination requirements, including: the obligation to fulfill requests from unaffiliated entities for telephone exchange service and exchange access within a period no longer than the period in which it provides such telephone exchange service and exchange access to itself or its own affiliate; the requirement that BOCs not provide facilities, services, or information concerning the provision of access to its affiliates, unless made available to other providers on the same terms, and conditions; and the requirement that BOCs charge their affiliates the same amount for access that is charged to unaffiliated interexchange carriers, or impute an amount for access, not less than that charged to unaffiliated interexchange carriers.

¹⁷ 47 U.S.C. § 272(d). *Accounting Safeguards Order*, 11 FCC Rcd at 17623-32, paras. 184-205.

¹⁸ 47 U.S.C. § 272(f)(1).

¹⁹ The sunset dates for the remaining approved states include: Kansas/Oklahoma in January 2004; Massachusetts in April 2004; Connecticut in July 2004; Pennsylvania in September 2004; Arkansas/Missouri in November 2004; Rhode Island in February 2005; Vermont in April 2005; and Georgia/Louisiana in May 2005.

discriminate and misallocate costs upon receiving section 271 approval. Nevertheless, Congress made the judgment that the BOCs should be subject to the structural and nondiscrimination

safeguards in section 272 only temporarily after entry into the long distance market. Specifically, Congress determined that upon completion of a three-year period, such safeguards would cease to exist unless the Commission extends the three-year period by rule or order.²⁰

9. In this Notice, we invite interested parties to comment on the sunset provisions of section 272. We ask whether, and, if so, under what conditions, the structural and nondiscrimination safeguards established in section 272 should be extended by the Commission either generally or with respect to specific states, despite the three-year sunset in the statute. To the extent we conclude the costs of continued application of these statutory requirements outweigh the benefits, we seek comment on what, if any, alternative safeguards should apply to BOC provisioning of in-region, interLATA, interexchange services in states where the statutory requirements have sunset.

A. Procedural Framework for Evaluating Sunset

10. Pursuant to the statute, the requirements of section 272 (except for subsection (e)) sunset three years after section 271 authorization unless extended by rule or order. The threshold question for the Commission is how it should evaluate whether these requirements of section 272 -- specifically, the separate affiliate requirement, the nondiscrimination safeguards, and the biennial audit -- should sunset after three years or, alternatively, be extended. In particular, we seek comment on whether we should adopt a rule of general applicability or should proceed by examining each state on a case-by-case basis. If we were to proceed on a case-by-case basis, what would be the nature of the proceeding? How far in advance of the sunset date should we commence the proceeding?

11. Whether we proceed by rulemaking or an order, we seek comment here on what information we should consider in evaluating whether the statutory requirements should sunset after three years. Specifically, we seek comment below on marketplace developments, but ask more generally what factors we should consider in undertaking this inquiry.

B. Marketplace Developments

12. In order to better assess the statutory sunset, we seek comment on the nature of the marketplace three years post-entry. We recognize that the market opening requirements of the 1996 Act are designed to bring the benefits of competition to consumers in all markets. In enacting 272, Congress recognized that the local exchange market would not be fully

²⁰ 47 U.S.C. § 272(f)(1). As more fully discussed below, the statute specifies that the requirements of section 272(e) do not sunset. In addition, section 272(f)(3) preserves the Commission's authority to prescribe safeguards under other sections of the Act. 47 U.S.C. § 272(f)(3).

competitive upon its opening. At the same time, Congress clearly contemplated that competitors would be entering the local market, and thereby would provide alternative sources of local exchange and originating access services. To the extent such alternatives exist in the marketplace, the BOCs should be constrained in their ability to discriminate against competing providers of interexchange service. How should these and other developments inform our consideration? Have circumstances changed in three years to support the sunset of statutory requirements? Has competition continued to develop in states where section 271 applications have been granted and, if so, on which geographic areas or types of customers has that competition been focused? What significance should the Commission place on such evidence in determining how to address the section 272 sunset?

13. The Commission to date has approved thirteen section 271 applications. We ask the BOCs to identify their section 272 affiliates; describe the services provided by each; and discuss why they have chosen to establish multiple affiliates. We ask interested parties to comment on the direct and indirect costs of continued application of the statutory requirements beyond three years. Would continued application of the statutory safeguards affect competition in the interexchange marketplace?

14. The purpose of the separate affiliate and nondiscrimination requirements in section 272 is to lessen the ability of a BOC to discriminate and/or misallocate costs to the advantage of its own operations, and to make it easier to detect any such behavior. In evaluating alternatives, how should we take into account the unique statutory treatment of the BOCs and their size?

15. To the extent commenters recommend that the Commission consider BOCs' actual behavior in terms of cost misallocation or other discrimination, what evidence is there of such behavior and on what evidence should the Commission rely? For example, have there been complaints at either the federal or state level of such behavior, and, if so, do the data show that complaints have increased or decreased? Should the Commission take into account whether complaints have increased or decreased, or rely only on final regulatory or judicial findings of discrimination? Is there evidence that BOCs' wholesale performance has deteriorated or improved since grant of a section 271 application and should the Commission rely on allegations that a BOC has ceased to meet the conditions of its section 271 approval or Commission findings that such backsliding has occurred? Should the Commission rely on BOCs' performance under the state-approved performance plans? Commenters are encouraged to provide data on both what they assert is evidence of discrimination or cost misallocation and to explain why reliance on such evidence is appropriate.

16. The first section 272 biennial audits have been performed by independent auditors both for Verizon and SBC.²¹ We note that the purpose of the audit under section 272 is to determine whether the BOCs are abiding by the separate affiliate and nondiscrimination

²¹ See *Accounting Safeguards Under the Telecommunications Act of 1996: Section 272(d) Biennial Audit Procedure*, CC Docket No. 96-150, Memorandum Opinion and Order, FCC 02-01 (rel. Jan. 10, 2002), recon. denied, FCC 02-111 (rel. April 11, 2002).

requirements.²² We ask that parties address whether factual findings contained in audit reports should in any way inform the sunset decision, and if so, how? For example, if audits were to reveal no patterns of discriminatory behavior, would that weigh in favor of permitting section 272 to sunset? Alternatively, if audits were to provide us with evidence of clear patterns of BOC discriminatory behavior, might that weigh in favor of continuing the separate affiliate requirements, either generally or with respect to that BOC?

C. Alternatives

17. In evaluating how to proceed under section 272(f)(1), there are a range of options before the Commission. As discussed more fully below, those options include, but are not limited to: (1) allow the statutory requirements to sunset three years after section 271 authorization; (2) extend the statutory requirements for a defined period of time for all BOCs; (3) allow the statutory requirements to sunset after three years, but adopt less stringent structural separation requirements; (4) allow the statutory separate affiliate requirements to sunset, but retain the statutory biennial audit requirements; or (5) allow the statutory requirements to sunset after three years, but adopt some form of nonstructural safeguards, such as reporting requirements. We seek comment on the costs and benefits of each of these alternatives, and invite commenters to suggest other alternatives. We ask commenters to address how our cost-benefit analysis for each alternative should take into account the fact that the BOC will still be required to use a separate affiliate in states where the sunset date has not yet occurred. Additionally, we seek comment on a BOC-specific approach, whereby discriminatory behavior may lead to targeted retention of requirements in specific states. Finally, we ask commenters to address how other proceedings currently underway, such as our *Incumbent LEC Broadband Notice* proceeding, should inform our analysis here.²³

18. *Allow everything to sunset.* The statute provides that these requirements will sunset in three years, absent further action. We seek comment on this sunset alternative. In particular, we seek comment on the sufficiency of such a framework. Do we have sufficient tools under our pre-existing rules to address any residual concerns about cost misallocation and discrimination by the BOCs?²⁴

²² The audits, which are conducted by independent auditors, do not provide an opinion on BOC compliance or noncompliance, but merely provide factual findings for the Commission to evaluate. The Commission determines whether those findings constitute violations of section 272.

²³ *Review of Regulatory Requirements for Incumbent LEC Broadband Services; SBC Petition for Expedited Ruling That it is Non-Dominant in its Provision of Advanced Services and for Forbearance From Dominant Carrier Regulation of These Services*, CC Docket No. 01-337, Notice of Proposed Rulemaking, 16 FCC Rcd 22745 (2001) (*Incumbent LEC Broadband Notice*).

²⁴ The BOCs are currently subject to certain reporting requirements under the Commission's Automated Reporting Management Information System (ARMIS). See 47 C.F.R. § 43.21. In addition, the BOCs are required to file on an annual basis a cost allocation manual describing how they allocate costs between regulated and non-regulated activities, 47 C.F.R. §§ 43.21(d) and 64.901-64.903, and are required to have that cost allocation manual (continued....)

19. We note, under our current rules, the second biennial audit results for a particular state will not be available until after the three year statutory period has passed.²⁵ Should we permit the statutory requirements to sunset in a particular state prior to the completion of the second biennial audit?

20. Furthermore, we seek comment on the interrelationship between the sunset provision and section 272(e) of the Act. Section 272(e) states that a BOC affiliate subject to section 251(c) “shall fulfill any requests from an unaffiliated entity for telephone exchange services and exchange access within a period no longer than the period in which it provides such telephone exchange service and exchange access to itself or to its affiliates.”²⁶ We note that in the *Non-Accounting Safeguards Order*, the Commission reconciled the apparent conflict between sections 272(e) and 272(f).²⁷ The Commission recognized on the one hand, that both sections 272(e)(2) and (e)(4) could be interpreted as subject to the sunset provision because they depend on the existence of a separate affiliate. On the other hand, the Commission found that section 272(f) specifically exempts section 272(e) from the sunset requirements. The Commission held that section 272(e)(2) and (e)(4) “can be applied to a BOC after sunset only if that BOC retains a separate affiliate.”²⁸ In particular, it held that if the BOC does not maintain a separate affiliate, subsections (e)(2) and (e)(4) cannot be applied “because there will be no frame of reference for

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audited by an independent auditor every two years, 47 C.F.R. § 64.904. See also 47 C.F.R. §§ 32.23(c) and 32.5280.

²⁵ 47 C.F.R. § 53.209. The first biennial audit for New York was submitted to the Commission in June 2001. The second one will not be due until June 2003, after the statutory sunset date.

²⁶ 47 U.S.C. § 272(e)(1). Section 272(e) applies to a BOC or a BOC affiliate subject to section 251(c). An affiliate subject to section 251(c) is an incumbent LEC as defined in section 251(h).

²⁷ Section 272(e)(1) requires a BOC and an affiliate subject to section 251(c) to fulfill the requests of unaffiliated entities for telephone exchange service and exchange access within a period no longer than the period in which it fulfills its own or its affiliate’s requests. Section 272(e)(2) states that a BOC and BOC affiliate subject to section 251(c) shall not provide any facilities, services, or information concerning its provision of exchange access to a 272(a) affiliate, unless such facilities, services or information are made available to other providers of interLATA services in the market on the same terms and conditions. Section 272(e)(3) provides that a BOC or BOC affiliate subject to section 251(c) shall charge the 272(a) affiliate or impute to itself, an amount for access to its telephone exchange service and exchange access service that is no less than the amount charged to an unaffiliated interexchange carrier for such service. Section 272(e)(4) states that a BOC and BOC affiliate subject to section 251(c) may provide interLATA or intraLATA facilities or services to its interLATA affiliate if such services or facilities are made available to all carriers at the same rate and on the same terms and conditions, so long as the costs are appropriately allocated.

²⁸ *Non-Accounting Safeguards Order*, 11 FCC Rcd at 22035, para. 270.

the BOC's conduct."²⁹ Should the Commission reconsider this conclusion? If so, as a practical matter, how would these requirements be applied in the absence of a separate affiliate? Would continued application of these nondiscriminatory requirements, or ones similar to these, be sufficient to constrain potential anti-competitive behavior by a BOC in the absence of a separate affiliate?

21. *Extend statutory requirements by rule for defined period of time.* In evaluating whether to extend the statutory requirements, we are particularly interested in the costs, on an ongoing basis, of continued application of the section 272 requirements. How should we take into account the fact that a number of BOCs have chosen to establish multiple section 272 affiliates? We ask parties to address the efficiency loss and other possible business costs associated with the prohibition of joint ownership of facilities. We further ask parties to identify any other administrative, regulatory or economic costs associated with use of a separate affiliate. What are the costs and benefits of requiring the BOCs to post all transactions on the Internet?

22. What would be an appropriate time period, should we decide to extend the statutory requirements – three more years or something shorter? For example, should we consider extending the statutory requirements long enough to receive the results of the second biennial audit for a particular state? We note that maintaining a separate affiliate creates a more transparent record of transactions between the BOC and its affiliate, thereby facilitating detection of discriminatory behavior. Would extending these requirements assist in protecting interexchange competition and consumer choice?

23. *Sunset statutory requirements but adopt less stringent separation requirements.* What conditions would warrant adoption of alternative, less stringent structural separation requirements? If we were to conclude that some less burdensome set of structural safeguards should be put in place, what would such a more limited set of alternative safeguards be? Should we require BOCs to establish a separate subsidiary that follows the provisions established in the *Competitive Carrier Fifth Report and Order*?³⁰

24. *Allow separate affiliate to sunset after three years, but retain non-discrimination requirements and/or biennial audit.* As noted above, sections 272(e)(1) and (e)(3) continue to exist even if the other requirements of section 272 have sunset. In that vein, we ask for comment on how we should ensure compliance with those provisions, and whether there may be a need for

²⁹ *Id.*

³⁰ *Policy and Rules Concerning Rates for Competitive Common Carrier Services and Facilities Authorizations Thereof*, CC Docket No. 79-252, *Competitive Carrier Fifth Report and Order*, 98 FCC 2d 1191 (1984) (*Competitive Carrier Fifth Report and Order*). The *Competitive Carrier Fifth Report and Order* identified three separation requirements with which independent LECs must comply in order for their interexchange operations to qualify for non-dominant treatment. Those requirements were that the affiliate providing domestic, interstate, intexchange services: maintain separate books of accounts; not jointly own transmission or switching facilities with the LEC; and acquire any services from its affiliated exchange companies at tariffed rates, terms, and conditions.

some form of biennial audit on these discrete requirements even after the other section 272 requirements have sunset.

25. *Adopt nonstructural safeguards such as reporting requirements.* We seek comment on whether the Commission should replace the separate corporate affiliate requirements with nonstructural safeguards. Specifically, we ask that parties comment on what, if any, requirements or mechanisms may be established as a form of nonstructural safeguard in order to facilitate the detection of discrimination against competing interexchange carriers and cost misallocation. For example, we seek comment on whether we should impose reporting and/or other nonstructural safeguard requirements on BOCs. What effect, if any, would these safeguards have on preventing cost misallocation, price and non-price discrimination, or a price squeeze? We note that section 272(e)(3), which does not sunset, requires the BOCs to impute an amount for access no less than that charged to interexchange competitors. Do we need to adopt any rules to implement this imputation requirement?

26. We also note that the Commission recently released two Notices addressing national performance measurements and standards, including the *Special Access Measurements and Standards* proceeding.³¹ We ask that parties comment on whether adoption of measures considered in the *Special Access* proceeding would provide an adequate safeguard, should the section 272 requirements sunset. To what extent, if any, would these performance measurements, if adopted, serve as an effective mechanism in identifying BOC discriminatory behavior?

D. Other Issues

27. We seek comment on what enforcement tools would be available to us, should the statutory requirements sunset. Congress established section 271(d) as a mechanism to facilitate the enforcement of all the section 271 requirements, including section 272 requirements. Should the Commission decide to allow the statutory requirements to sunset, would section 271(d) be available to address instances of potential discrimination or cost misallocation? We note that the statutory sunset does not affect the Commission's authority to impose forfeitures and other sanctions and to grant damages and injunctive relief pursuant to sections 4(i), 503, and 206-209 of the Act.³²

28. If we were to adopt less intrusive safeguards in lieu of the statutory requirements, should we adopt mechanisms for modifying or removing these safeguards in the future? We seek comment on two alternatives. First, we seek comment on whether BOCs should petition for relief from any safeguards adopted, based on a specific showing, e.g., that their market power

³¹ *Performance Measurements and Standards for Unbundled Network Elements and Interconnection, et al.*, CC Docket No. 01-318, Notice of Proposed Rulemaking, FCC 01-331 (rel. Nov. 19, 2001) (*UNE Measurements and Standards Notice*); *Performance Measurements and Standards for Interstate Special Access Services, et al.*, CC Docket No. 01-321, Notice of Proposed Rulemaking, FCC 01-339 (rel. Nov. 19, 2001) (*Special Access Measurements and Standards Notice*).

³² 47 U.S.C. §§ 4(i), 503, and 206-209.

over the local exchange and exchange access market has eroded. Second, we seek comment on whether to set a defined time period for revisiting any safeguards adopted, in order to determine the necessity for and cost effectiveness of maintaining such safeguards.

IV. PROCEDURAL MATTERS

A. Ex Parte Presentations

29. This matter shall be treated as a “permit-but-disclose” proceeding in accordance with the Commission’s *ex parte* rules.³³ Persons making oral *ex parte* presentations are reminded that memoranda summarizing the presentations must contain summaries of the substance of the presentations and not merely a listing of the subjects discussed. More than a one or two sentence description of the views and arguments presented is generally required.³⁴ Other requirements pertaining to oral and written presentations are set forth in section 1.1206(b) of the Commission’s rules.

B. Initial Regulatory Flexibility Certification

30. The Regulatory Flexibility Act of 1980, as amended (RFA),³⁵ requires that an initial regulatory flexibility analysis be prepared for notice-and-comment rule making proceedings, unless the agency certifies that “the rule will not, if promulgated, have a significant economic impact on a substantial number of small entities.”³⁶ The RFA generally defines the term “small entity” as having the same meaning as the terms “small business,” “small organization,” and “small governmental jurisdiction.”³⁷ In addition, the term “small business” has the same meaning as the term “small business concern” under the Small Business Act.³⁸ A

³³ 47 C.F.R. § 1.1200 *et seq.*

³⁴ *See* 47 C.F.R. § 1.1206(b)(2).

³⁵ *See* 5 U.S.C. § 603. The RFA, *see* 5 U.S.C. §§ 601-612, has been amended by the Small Business Regulatory Enforcement Fairness Act of 1996 (SBREFA). Pub. L. No. 104-121, Title II, 110 Stat. 857 (1996).

³⁶ 5 U.S.C. § 605(b).

³⁷ 5 U.S.C. § 601(6).

³⁸ 5 U.S.C. § 601(3) (incorporating by reference the definition of “small-business concern” in the Small Business Act, 15 U.S.C. § 632). Pursuant to 5 U.S.C. § 601(3), the statutory definition of a small business applies “unless an agency, after consultation with the Office of Advocacy of the Small Business Administration and after opportunity for public comment, establishes one or more definitions of such term which are appropriate to the activities of the agency and publishes such definition(s) in the Federal Register.”

“small business concern” is one which: (1) is independently owned and operated; (2) is not dominant in its field of operation; and (3) satisfies any additional criteria established by the Small Business Administration (SBA).³⁹

31. In the context of this Regulatory Flexibility analysis, SBA regulations define small telecommunications entities in SIC code 4813 (Telephone Companies Except Radio Telephone) as entities with fewer than 1,500 employees.⁴⁰

32. This NPRM initiates an inquiry concerning the sunset of the statutory requirements under section 272 that apply to the BOCs when they provide in-region, interLATA services. In particular, this NPRM seeks to develop a full record so that the Commission may properly assess, as contemplated by the statute: (1) whether the structural safeguards and nondiscrimination requirements applied to the BOCs by section 272 should be extended by the Commission, despite the three-year sunset provision in the statute; and (2) whether any alternative safeguards should be put in place for the BOCs in states where the statutory requirements have sunset.

33. The issues under consideration in this proceeding directly affect only the BOCs and their affiliates, which do not qualify as small entities under the RFA.⁴¹ In particular, none of the BOCs is a small entity because each BOC is an affiliate of a Regional Holding Company (RHC), and all of the BOCs or their RHCs have more than 1,500 employees.⁴² Insofar as this proceeding applies to other BOC or RHC affiliates, those affiliates are controlled by the BOCs or by the RHC. Accordingly, they are not “independently owned and operated” entities for purposes of the RFA.

34. Therefore, we certify that the proposals in this NPRM, if adopted, will not have a significant economic impact on a substantial number of small entities. The Commission will send a copy of the NPRM, including a copy of this Initial Regulatory Flexibility Certification, to the Chief Counsel for Advocacy of the Small Business Administration.⁴³ This Initial

³⁹ 15 U.S.C. § 632.

⁴⁰ See generally, 13 C.F.R. § 121.201, NAICS Code 513310, Wired Telecommunications Carriers.

⁴¹ 47 C.F.R. § 64.601 *et seq.*; *Carrier Locator: Interstate Service Providers*, FCC Common Carrier Bureau, Industry Analysis Division (rel. Feb. 2002) (*Carrier Locator*). See para. 30, *supra* (A small business concern is one that is independently owned and operated).

⁴² *Id.*

⁴³ 5 U.S.C. § 605(b).

Certification will also be published in the Federal Register.⁴⁴

C. Initial Paperwork Reduction Act of 1995 Analysis

35. This NPRM may modify an information collection. As part of our continuing effort to reduce paperwork burdens, we invite the general public and the Office of Management and Budget (OMB) to take this opportunity to comment on the possible changes in information collections contained in this NPRM, as required by the Paperwork Reduction Act of 1995, Pub. L. No. 104-13. Public and agency comments are due at the same time as other comments on this NPRM; OMB comments are due 60 days from date of publication of this NPRM in the Federal Register. Comments should address: (1) whether the possible changes in the collections of information are necessary for the proper performance of the functions of the Commission, including whether the information will have practical utility; (2) the accuracy of the Commission's existing burden estimates for the current requirements related to section 272; (3) ways to enhance the quality, utility, and clarity of the any information collected; and (4) ways to minimize the burden of any collection of information on the respondents, including the use of automated collection techniques or other forms of information technology.

D. Comment Filing Procedures

36. Pursuant to sections 1.415 and 1.419 of the Commission's rules, 47 C.F.R. §§ 1.415 and 1.419, interested parties may file comments not later than 30 days after publication of this Notice in the Federal Register and may file reply comments not later than 21 days after the date for filing comments. Comments may be filed using the Commission's Electronic Comment Filing System (ECFS) or by filing paper copies. See Electronic Filing of Documents in Rulemaking Proceedings, 63 Fed. Reg. 24121 (1998). Comments filed through the ECFS can be sent as an electronic file via the Internet to <<http://www.fcc.gov/e-file/ecfs.html>>. Generally, only one copy of an electronic submission must be filed. If multiple docket or rulemaking numbers appear in the caption of this proceeding, however, commenters must transmit one electronic copy of the comments to each docket or rulemaking number referenced in the caption. In completing the transmittal screen, commenters should include their full name, U.S. Postal Service mailing address, and the applicable docket or rulemaking number. Parties may also submit an electronic comment by Internet e-mail. To get filing instructions for e-mail comments, commenters should send an e-mail to ecfs@fcc.gov, and should include the following words in the body of the message, "get form <your e-mail address>." A sample form and directions will be sent in reply. Parties who choose to file by paper must file an original and five copies of each filing. If more than one docket or rulemaking number appear in the caption of this proceeding, commenters must submit two additional copies for each additional docket or rulemaking number. Filings can be sent by hand or messenger delivery, by commercial overnight courier, or by first-class or overnight U.S. Postal Service mail (although we continue to experience delays in receiving U.S. Postal Service mail). The Commission's contractor, Vistrionix, Inc., will receive hand-delivered or messenger-delivered paper filings for the Commission's Secretary at 236 Massachusetts Avenue, N.E., Suite 110, Washington, D.C.

⁴⁴ 5 U.S.C. § 605(b).

20002. The filing hours at this location are 8:00 a.m. to 7:00 p.m. All hand deliveries must be held together with rubber bands or fasteners. Any envelopes must be disposed of before entering the building. Commercial overnight mail (other than U.S. Postal Service Express Mail and Priority Mail) must be sent to 9300 East Hampton Drive, Capitol Heights, MD 20743. U.S. Postal Service first-class mail, Express Mail, and Priority Mail should be addressed to 445 12th Street, S.W., Washington, D.C. 20554. All filings must be addressed to the Commission's Secretary, Office of the Secretary, Federal Communications Commission.

37. Written comments by the public on the possible changes to information collections are due not later than 30 days after publication of this Notice in the Federal Register. Written comments must be submitted by the Office of Management and Budget (OMB) on the possible changes in information collections not later than 60 days after publication of this Notice in the Federal Register. In addition to filing comments with the Secretary, a copy of any comments on the possible changes to information collection(s) contained herein should be submitted to Judy Boley, Federal Communications Commission, Room 1-C804, 445 12th Street, S.W., Washington, D.C. 20554, or via the Internet to jboley@fcc.gov and to Jeanette Thornton, OMB Desk Officer, Room 10236 NEOB, 725 17th Street, N.W., Washington, D.C. 20503 or via the Internet to JThornto@omb.eop.gov.

V. ORDERING CLAUSES

38. Accordingly, IT IS ORDERED that, pursuant to the authority contained in sections 1, 2, 4(i)-4(j), 201, 202, 205, 251, 271, 272, and 303(r) of the Communications Act of 1934, as amended, 47 U.S.C. §§ 151, 152, 154(i)-4(j), 201, 202, 205, 251, 271, 272, and 303(r), this Notice of Proposed Rulemaking IS ADOPTED.

39. IT IS FURTHER ORDERED that the Commission's Consumer and Governmental Affairs Bureau, Reference Information Center, SHALL SEND a copy of this NPRM, including the Initial Regulatory Flexibility Certification, to the Chief Counsel for Advocacy of the Small Business Administration.

FEDERAL COMMUNICATIONS COMMISSION

Marlene H. Dortch
Secretary