

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

In the Matter of)	
)	
)	
<i>Computer III</i> Further Remand Proceedings:)	CC Docket No. 95-20
Bell Operating Company)	
Provision of Enhanced Services)	
)	
1998 Biennial Regulatory Review --)	CC Docket No. 98-10
Review of <i>Computer III</i> and ONA)	
Safeguards and Requirements)	

FURTHER NOTICE OF PROPOSED RULEMAKING

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By the Commission: Commissioner Furchtgott-Roth issuing a separate statement.

TABLE OF CONTENTS

	<u>Paragraph</u>
I. INTRODUCTION	1
II. BACKGROUND	9
A. Overview of <i>Computer III</i> /ONA and Related Court Decisions	9
B. Overview of the 1996 Act	17
1. Opening the Local Exchange Market	18
2. BOC Provision of Information Services	20
III. CALIFORNIA III REMAND	24
A. Background	24
B. Subsequent Events May Have Alleviated the Ninth Circuit's <i>California III</i> Concerns	29
IV. EFFECT OF THE 1996 ACT	37

A.	Basic/Enhanced Distinction	38
B.	Cost-Benefit Analysis of Structural Safeguards	43
1.	Background	43
2.	Effect of the 1996 Act and Other Factors	48
a.	Section 251 and Local Competition	49
b.	Structural Separation and the 1996 Act	52
C.	Comparably Efficient Interconnection (CEI) Plans	60
1.	Proposed Elimination of Current Requirements	60
2.	Treatment of Services Provided Through 272/274 Affiliates	66
a.	Section 272	66
b.	Section 274	71
3.	Treatment of Telemessaging and Alarm Monitoring Services	74
4.	Related Issues	75
D.	ONA and Other Nonstructural Safeguards	78
1.	ONA Unbundling Requirements	78
a.	Introduction	78
b.	ONA Unbundling Requirements	80
c.	Effect of the 1996 Act	92
2.	ONA and Nondiscrimination Reporting Requirements	99
a.	Introduction	99
b.	Annual ONA Reports	103
c.	Semi-Annual ONA Reports	108
d.	Nondiscrimination Reports	112
3.	Other Nonstructural Safeguards	117
a.	Network Information Disclosure Rules	117
b.	Customer Proprietary Network Information (CPNI)	124
V.	JURISDICTIONAL ISSUES	130
VI.	PROCEDURAL MATTERS	133
A.	Ex Parte Presentations	133
B.	Initial Paperwork Reduction Act Analysis	134
C.	Initial Regulatory Flexibility Certification	135
D.	Comment Filing Procedures	137
VII.	ORDERING CLAUSES	141

I. INTRODUCTION

1. In the Commission's *Computer III*¹ and *Open Network Architecture* (ONA)² proceedings, the Commission sought to establish appropriate safeguards for the provision by the Bell Operating Companies (BOCs) of "enhanced" services.³ Examples of enhanced services include, among other things, voice mail, electronic mail, electronic store-and-forward, fax store-and-forward, data processing, and gateways to online databases. Underlying this effort, as well as our reexamination of the *Computer III* and ONA rules in this Further Notice of Proposed Rulemaking (Further Notice), are three complementary goals. First, we seek to enable consumers and communities across the country to take advantage of innovative "enhanced" or "information" services⁴ offered by both the BOCs and other information service providers (ISPs). Second, we seek to ensure the continued competitiveness of the already robust information services market. Finally, we seek to establish safeguards for BOC provision of enhanced or information services that make common sense in light of current technological, market, and legal conditions.

¹ *Amendment of Section 64.702 of the Commission's Rules and Regulations (Computer III)*, Report and Order, CC Docket No. 85-229, Phase I, 104 FCC 2d 958 (1986) (*Phase I Order*), recon., 2 FCC Rcd 3035 (1987) (*Phase I Recon. Order*), further recon., 3 FCC Rcd 1135 (1988) (*Phase I Further Recon. Order*), second further recon., 4 FCC Rcd 5927 (1989) (*Phase I Second Further Recon.*), *Phase I Order and Phase I Recon. Order*, vacated, *California v. FCC*, 905 F.2d 1217 (9th Cir. 1990) (*California I*); Phase II, 2 FCC Rcd 3072 (1987) (*Phase II Order*), recon., 3 FCC Rcd 1150 (1988) (*Phase II Recon. Order*), further recon., 4 FCC Rcd 5927 (1989) (*Phase II Further Recon. Order*), *Phase II Order vacated, California I*, 905 F.2d 1217 (9th Cir. 1990); *Computer III Remand Proceedings*, 5 FCC Rcd 7719 (1990) (*ONA Remand Order*), recon., 7 FCC Rcd 909 (1992), *pets. for review denied, California v. FCC*, 4 F.3d 1505 (9th Cir. 1993) (*California II*); *Computer III Remand Proceedings: Bell Operating Company Safeguards and Tier 1 Local Exchange Company Safeguards*, 6 FCC Rcd 7571 (1991) (*BOC Safeguards Order*), recon. dismissed in part, Order, CC Docket Nos. 90-623 and 92-256, 11 FCC Rcd 12513 (1996); *BOC Safeguards Order vacated in part and remanded, California v. FCC*, 39 F.3d 919 (9th Cir. 1994) (*California III*), cert. denied, 115 S.Ct. 1427 (1995) (referred to collectively as the *Computer III* proceeding).

² *Filing and Review of Open Network Architecture Plans*, 4 FCC Rcd 1 (1988) (*BOC ONA Order*), recon., 5 FCC Rcd 3084 (1990) (*BOC ONA Reconsideration Order*); 5 FCC Rcd 3103 (1990) (*BOC ONA Amendment Order*), erratum, 5 FCC Rcd 4045 (1990), *pets. for review denied, California v. FCC*, 4 F.3d 1505 (9th Cir. 1993), recon., 8 FCC Rcd 97 (1993) (*BOC ONA Amendment Reconsideration Order*); 6 FCC Rcd 7646 (1991) (*BOC ONA Further Amendment Order*); 8 FCC Rcd 2606 (1993) (*BOC ONA Second Further Amendment Order*), *pet. for review denied, California v. FCC*, 4 F.3d 1505 (9th Cir. 1993).

³ Basic services, such as "plain old telephone service" (POTS), are regulated as tariffed services under Title II of the Communications Act. Enhanced services use the existing telephone network to deliver services that provide more than a basic transmission offering. *Bell Operating Companies' Joint Petition for Waiver of Computer II Rules*, Memorandum Opinion & Order, 10 FCC Rcd 1724 n.3 (1995) (*Interim Waiver Order*); 47 C.F.R. § 64.702(a). The terms "enhanced service" and "basic service" are defined and discussed more fully *infra* at ¶ 38.

⁴ The terms "enhanced services" and "information services" are used interchangeably in this Further Notice. See *infra* note 17.

2. Under *Computer III* and ONA, the BOCs are permitted to provide enhanced services on an "integrated" basis (*i.e.*, through the regulated telephone company), subject to certain "nonstructural safeguards," as described more fully below.⁵ These rules replaced those previously established in *Computer II*, which required AT&T (and subsequently the BOCs) to offer enhanced services through structurally separate subsidiaries.⁶ On February 21, 1995, the Commission released a Notice of Proposed Rulemaking (*Computer III Further Remand Notice*)⁷ following a remand from the United States Court of Appeals for the Ninth Circuit (*California III*).⁸ The *Computer III Further Remand Notice* sought comment on both the remand issue in *California III* relating to the replacement of structural separation requirements for BOC provision of enhanced services with nonstructural safeguards,⁹ as well as the effectiveness of the Commission's *Computer III* and ONA nonstructural rules in general.¹⁰

⁵ See *infra* Part II.A. The Commission initially applied the *Computer III* and ONA rules to both AT&T and the BOCs. *Computer III Phase I Order*, 104 FCC 2d 958 (1986). In subsequent orders, the Commission first modified, and then relieved, AT&T of most *Computer III* and ONA requirements. See, *e.g.*, *Computer III Phase I Reconsideration Order*, 2 FCC 3035 (1987); *Competition in the Interstate Interexchange Marketplace*, Report and Order, 6 FCC Rcd 5880 (1991); *Competition in the Interstate Interexchange Marketplace*, Memorandum Opinion and Order on Reconsideration, 10 FCC Rcd 4562 (1995). AT&T was never subject to the annual and biannual ONA reporting requirements the Commission imposed on the BOCs in the *BOC ONA Further Amendment Order*, 6 FCC Rcd 7646 (1991). AT&T remains subject, however, to a modified ONA plan that the Commission approved in 1988 and for which AT&T must submit an annual affidavit. *AT&T ONA Order*, 4 FCC Rcd 2449 (1988); see discussion *infra* at ¶ 116. AT&T also is subject to the Commission's customer proprietary network information (CPNI) and network information disclosure rules. See discussion *infra* ¶¶ 117-126. In 1994, the Commission extended to GTE the Commission's requirements regarding ONA unbundling, ONA reporting, CPNI, and network information disclosure, among other things. *Application of Open Network Architecture and Nondiscrimination Safeguards to GTE Corporation*, CC Docket No. 92-256, 9 FCC Rcd 4922 (1994) (*GTE ONA Order*). The Commission has not applied the *Computer III/ONA* requirements to any other local exchange carriers (LECs). Our discussion of the *Computer III* and ONA requirements in this Further Notice are intended to cover their application with respect to AT&T and GTE to the extent applicable.

⁶ *Amendment of Section 64.702 of the Commission's Rules and Regulations (Computer II)*, 77 FCC 2d 384 (1980) (*Final Decision*), *recon.*, 84 FCC 2d 50 (1980) (*Reconsideration Order*), *further recon.*, 88 FCC 2d 512 (1981) (*Further Reconsideration Order*), *affirmed sub nom. Computer and Communications Industry Ass'n v. FCC*, 693 F.2d 198 (D.C. Cir. 1982), *cert. denied*, 461 U.S. 938 (1983).

⁷ *Computer III Further Remand Proceedings: Bell Operating Company Provision of Enhanced Services*, CC Docket No. 95-20, Notice of Proposed Rulemaking, 10 FCC Rcd 8360 (1995) (*Computer III Further Remand Notice*).

⁸ *California v. FCC*, 39 F. 3d 919 (9th Cir. 1994) (*California III*).

⁹ See *infra* Part III.A.

¹⁰ *Computer III Further Remand Notice*, 10 FCC Rcd at 8362, ¶ 2.

3. Since the adoption of the *Computer III Further Remand Notice*, significant changes have occurred in the telecommunications industry that affect our analysis of the issues raised in this proceeding. Most importantly, on February 8, 1996, Congress passed the Telecommunications Act of 1996 (1996 Act)¹¹ to establish "a pro-competitive, de-regulatory national policy framework" in order to make available to all Americans "advanced telecommunications and information technologies and services by opening all telecommunications markets to competition."¹² As the Supreme Court recently noted, the 1996 Act "was an unusually important legislative enactment" that changed the landscape of telecommunications regulation.¹³

4. The 1996 Act significantly alters the legal and regulatory framework governing the local exchange marketplace. Among other things, the 1996 Act opens local exchange markets to competition by imposing new interconnection, unbundling, and resale obligations on all incumbent local exchange carriers (LECs), including the BOCs.¹⁴ In addition, the 1996 Act allows the BOCs, under certain conditions,¹⁵ to enter markets from which they previously were restricted,¹⁶

¹¹ Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56, codified at 47 U.S.C. §§ 151 et seq. Hereinafter, all citations to the 1996 Act will be to the 1996 Act as it is codified in the United States Code. The 1996 Act amended the Communications Act of 1934. We will refer to the Communications Act of 1934, as amended, as the "Communications Act" or the "Act."

¹² Joint Statement of Managers, S. Conf. Rep. No. 104-230, 104th Cong., 2d Sess. 1 (1996) (Joint Explanatory Statement).

¹³ *Reno v. ACLU*, 117 S.Ct. 2329 (1997).

¹⁴ See 47 U.S.C. § 251; see also *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, CC Docket No. 96-98, First Report and Order, 11 FCC Rcd 15499, 15808, ¶ 611 (1996) (*Local Competition Order*), *aff'd in part and vacated in part sub nom. Competitive Telecommunications Ass'n v. FCC*, 117 F.3d 1068 (8th Cir. 1997); *vacated in part on reh'g, Iowa Utilities Bd. v. FCC*, 120 F.3d 753, *further vacated in part sub nom. California Public Utilities Comm'n v. FCC*, 124 F.3d 934, *writ of mandamus issued sub nom. Iowa Utilities Bd. v. FCC*, No. 96-3321 (8th Cir. Jan. 22, 1998), *petition for cert. granted*, Nos. 97-826, 97-829, 97-830, 97-831, 97-1075, 97-1087, 97-1099, and 97-1141 (U.S. Jan. 26, 1998) (collectively, *Iowa Utils. Bd.*), Order on Reconsideration, 11 FCC Rcd 13042 (1996), Second Order on Reconsideration, 11 FCC Rcd 19738 (1996), Third Order on Reconsideration and Further Notice of Proposed Rulemaking, FCC 97-295 (rel. Aug. 18, 1997), *further recons. pending*.

¹⁵ See 47 U.S.C. §§ 271, 272.

¹⁶ Prior to the 1996 Act, the BOCs and their affiliates effectively were precluded under the Modification of Final Judgment (MFJ) from providing information services across local access and transport area (LATA) boundaries, as those terms were defined in the MFJ. See *United States v. Western Elec. Co.*, 552 F. Supp. 131 (D.D.C. 1982) (subsequent history omitted). While the MFJ, as originally entered, prohibited the BOCs from providing information services, that restriction was subsequently narrowed, and then eliminated entirely in 1991. *United States v. Western Elec. Co.*, 714 F. Supp. 1 (D.D.C. 1988); *United States v. Western Elec. Co.*, 767 F. Supp. 308 (D.D.C. 1991) (subsequent history omitted). The MFJ still prohibited the BOCs from providing services across LATA boundaries; thus the BOCs could provide information services only between points located

including the interLATA telecommunications and interLATA information services markets.¹⁷ In some cases, the 1996 Act requires a BOC to offer services in these markets through a separate affiliate.¹⁸ In addition, the 1996 Act incorporates new terminology and definitions that differ from those the Commission had been using.¹⁹

5. In light of the 1996 Act and ensuing changes in telecommunications technologies and markets, we believe it is necessary not only to respond to the issues remanded by the Ninth Circuit, but also to reexamine the Commission's nonstructural safeguards regime governing the provision of information services by the BOCs. Congress recognized, in passing the 1996 Act, that competition will not immediately supplant monopolies and therefore imposed a series of safeguards to prevent the BOCs from using their existing market power to engage in improper cost allocation and discrimination in their provision of interLATA information services, among other things. These statutory safeguards seek to address many of the same anticompetitive concerns as, but do not explicitly displace, the safeguards established by the Commission in the *Computer II*, *Computer III*, and ONA proceedings. We therefore issue this Further Notice to address issues raised by the interplay between the safeguards and terminology established in the 1996 Act and the *Computer III* regime. These 1996 Act-related issues were not raised in the *Computer III Further Remand Notice*. We therefore ask interested parties to respond to the

in the same LATA. Pursuant to section 601 of the 1996 Act, *see* 47 U.S.C. § 152 nt, the Act supplants the restrictions and obligations imposed by the MFJ.

¹⁷ The terms "local access and transport area" or "LATA," "information service," and "telecommunications service" are defined in the Act. *See* 47 U.S.C. §§ 153(25), (20), (46). In the *Non-Accounting Safeguards Order*, we concluded that all the services the Commission has previously considered to be "enhanced services" are "information services" as defined in the Act. *See 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, 21955, ¶ 102 (1996) (*Non-Accounting Safeguards Order*) (subsequent citations omitted). We seek comment in this proceeding on whether those services previously considered to be "basic services" fall within the definition of "telecommunications services" as defined in the Act. *See infra* ¶ 41. We also seek comment on whether the Commission should conform its terminology to that used in the Act. *See infra* ¶ 42. Thus, all providers that previously were considered to be enhanced service providers (ESPs) would now be deemed information service providers (ISPs). For historical consistency, however, we use the terms "enhanced service" and "basic service" in this Further Notice as necessary when discussing certain notices, orders, and decisions that used those terms prior to the 1996 Act.

¹⁸ *See infra* ¶¶ 20-23. We note that on December 31, 1997, the United States District Court for the Northern District of Texas held that sections 271-275 of the Act are a bill of attainder and thus are unconstitutional as to SBC Corporation and U S WEST. *SBC Communications, Inc. v. Federal Communications Comm'n*, No. 7:97-CV-163-X, 1997 WL 800662 (N.D. Tex. Dec. 31, 1997) (*SBC v. FCC*) (ruling subsequently extended to Bell Atlantic), *request for stay pending*. In general, the analysis in this Further Notice assumes the continued applicability of these provisions to the Bell companies. At appropriate places in this Further Notice, however, we ask commenters to assess the impact of *SBC v. FCC* on our analysis.

¹⁹ *See* discussion of "telecommunications service" and "information service" *infra* at Part IV.A.

issues raised in this Further Notice and, to the extent that parties want any arguments made in response to the *Computer III Further Remand Notice* to be made a part of the record for this Further Notice, we ask them to restate those arguments in their comments.

6. We note, in addition, that Congress required the Commission to conduct a biennial review of regulations that apply to operations or activities of any provider of telecommunications service and to repeal or modify any regulation it determines to be "no longer necessary in the public interest."²⁰ Accordingly, the Commission has begun a comprehensive 1998 biennial review of telecommunications and other regulations to promote "meaningful deregulation and streamlining where competition or other considerations warrant such action."²¹ In this Further Notice, therefore, we seek comment on whether certain of the Commission's current *Computer III* and ONA rules are "no longer necessary in the public interest." To the extent parties identify additional *Computer III* and ONA rules they believe warrant review under the Act, we invite those comments as well.

7. Consistent with the 1996 Act, in this Further Notice we seek to strike a reasonable balance between our goal of reducing and eliminating regulatory requirements when appropriate as competition supplants the need for such requirements to protect consumers and competition, and our recognition that, until full competition is realized, certain safeguards may still be necessary. We want to encourage the BOCs to provide new technologies and innovative information services that will benefit the public, as well as ensure that the BOCs will make their networks available for the use of competitive providers of such services. We therefore seek comment in this Further Notice on, among other things, the following tentative conclusions:

- notwithstanding the 1996 Act's adoption of separate affiliate requirements for BOC provision of certain information services (most notably, interLATA information services), the Act's overall pro-competitive, de-regulatory framework, as well as our public interest analysis, support the continued application of the Commission's nonstructural safeguards regime to BOC provision of intraLATA information services [¶¶ 43-59];
- given the protections established by the 1996 Act and our ONA rules, we should eliminate the requirement that BOCs file Comparably Efficient Interconnection (CEI) plans and obtain Common Carrier Bureau (Bureau) approval for those plans prior to providing new intraLATA information services [¶¶ 60-65];

²⁰ 47 U.S.C. § 161(a)(2).

²¹ See *1998 Biennial Review of FCC Regulations Begun Early*, FCC News Release (rel. Nov. 18, 1997).

- at a minimum, we should eliminate the CEI-plan requirement for BOC intraLATA information services provided through an Act-mandated affiliate under section 272 or 274 [¶¶ 66-72]; and
- the Commission's network information disclosure rules established pursuant to section 251(c)(5) should supersede certain, but not all, of the Commission's previous network information disclosure rules established in *Computer II* and *Computer III* [¶ 122].

We also generally seek comment on, among other things, the following issues:

- whether enactment and implementation of the 1996 Act, as well as other developments, should alleviate the Ninth Circuit's concern about the level of unbundling mandated by ONA [¶¶ 29-36];
- whether the Commission's definition of the term "basic service" and the 1996 Act's definition of "telecommunications service" should be interpreted to extend to the same functions [¶¶ 38-42];
- whether the Commission's current ONA requirements have been effective in providing ISPs with access to the basic services that ISPs need to provide their own information service offerings [¶¶ 85-90];
- whether the Commission, under its general rulemaking authority, should extend to ISPs some or all section 251-type unbundling rights, which the Commission previously concluded was not required by section 251 of the Act [¶¶ 94-96]; and
- how the Commission's current ONA reporting requirements should be streamlined and modified [¶¶ 99-116].

8. As set forth in the 1998 appropriations legislation for the Departments of Commerce, Justice, and State, the Commission is required to undertake a review of its implementation of the provisions of the 1996 Act relating to universal service, and to submit its review to Congress no later than April 10, 1998.²² The Commission must review, among other things, the Commission's interpretations of the definitions of "information service" and "telecommunications service" in the 1996 Act, and the impact of those interpretations on the current and future provision of universal service to consumers, including consumers in high cost

²² See Pub. L. 105-119, § 623, 111 Stat. 2440 (1997) (Universal Service Report); see also *Common Carrier Bureau Seeks Comment for Report to Congress on Universal Service Under the Telecommunications Act of 1996*, Public Notice, CC Docket No. 96-45 (Report to Congress), DA 98-2 (rel. Jan. 5, 1998).

and rural areas.²³ We recognize that there is a some overlap between the inquiry in this Further Notice about the relationship between the Commission's definition of the term "basic service" and the 1996 Act's definition of "telecommunications service," and the issues to be addressed in the Commission's report to Congress. Furthermore, we recognize that other aspects of this Further Notice also may be affected by the analysis in the Universal Service Report. We note that the inquiry in this Further Notice is primarily focused on the rules and terminology the Commission should be using in the context of its *Computer II* and *Computer III* requirements. We also note that the order in this proceeding will be issued after the Universal Service Report is submitted to Congress, and will thus take into account any conclusions made in that report.

II. BACKGROUND

A. Overview of *Computer III*/ONA and Related Court Decisions

9. We discussed in detail the factual history of *Computer III*/ONA in the *Computer III Further Remand Notice*.²⁴ One of the Commission's main objectives in the *Computer III* and ONA proceedings has been to permit the BOCs to compete in unregulated enhanced services markets while preventing the BOCs from using their local exchange market power to engage in improper cost allocation and unlawful discrimination against ESPs. The concern has been that BOCs may have an incentive to use their existing market power in local exchange services to obtain an anticompetitive advantage in these other markets by improperly allocating to their regulated core businesses costs that would be properly attributable to their competitive ventures, and by discriminating against rival, unaffiliated ESPs in the provision of basic network services in favor of their own enhanced services operations. In *Computer II*, the Commission addressed these concerns by requiring the then-integrated Bell System to establish fully structurally separate affiliates in order to provide enhanced services.²⁵ Following the divestiture of AT&T in 1984,²⁶ the Commission extended the structural separation requirements of *Computer II* to the BOCs.²⁷

²³ *Id.*

²⁴ *Computer III Further Remand Notice*, 10 FCC Rcd at 8362-8369, ¶¶ 3-10.

²⁵ *Computer II Final Decision*, 77 FCC 2d 384, 475-486, ¶¶ 233-60.

²⁶ *United States v. AT&T*, 552 F. Supp. 131 (D.D.C. 1982), *affirmed sub nom. Maryland v. United States*, 460 U.S. 1001 (1983).

²⁷ *Policy and Rules Concerning the Furnishing of Customer Premises Equipment, Enhanced Services and Cellular Communications Equipment by the Bell Operating Companies*, CC Docket No 83-115, Report and Order, 95 FCC 2d 1117, 1120, ¶ 3 (1984) (*BOC Separation Order*), *affirmed sub nom. Illinois Bell Telephone Co. v. FCC*, 740 F.2d 465 (7th Cir. 1984), *affirmed on recon.*, FCC 84-252, 49 Fed. Reg. 26056 (1984) (*BOC Separation Reconsideration Order*), *affirmed sub nom. North American Telecommunications Ass'n v. FCC*, 772 F.2d 1282 (7th Cir. 1985). See *infra* note 136 for a discussion of the *Computer II* structural separation requirements.

10. In *Computer III*, after reexamining the telecommunications marketplace and the effects of structural separation during the six years since *Computer II*, the Commission determined that the benefits of structural separation were outweighed by the costs, and that nonstructural safeguards could protect competing ESPs from improper cost allocation and discrimination by the BOCs while avoiding the inefficiencies associated with structural separation.²⁸ The Commission concluded that the advent of more flexible, competition-oriented regulation would permit the BOCs to provide enhanced services integrated with their basic network facilities.²⁹ Towards this end, the Commission adopted a two-phase system of nonstructural safeguards that permitted the BOCs to provide enhanced services on an integrated basis. The first phase required the BOCs to obtain Commission approval of a service-specific CEI plan in order to offer a new enhanced service.³⁰ In these plans, the BOCs were required to explain how they would offer to ESPs all the underlying basic services the BOCs used to provide their own enhanced service offerings, subject to a series of "equal access" parameters.³¹ Thus, the CEI phase of nonstructural safeguards imposed obligations on the BOCs only to the extent they offered specific enhanced services. The Commission indicated that such a CEI requirement could promote the efficiencies of competition in enhanced services markets by permitting the BOCs to participate in such markets provided they open their networks to competitors.³²

11. During the second phase of implementing *Computer III*, the Commission required the BOCs to develop and implement ONA plans. The ONA phase was intended to broaden a BOC's unbundling obligations beyond those required in the first phase. ONA plans explain how a BOC will unbundle and make available to unaffiliated ESPs network services in addition to those the BOC uses to provide its own enhanced services offerings.³³ These ONA plans were required to comply with a defined set of criteria in order for the BOC to obtain structural relief on a going-

²⁸ *Computer III Phase I Order*, 104 FCC 2d at 964-965, ¶¶ 3-6.

²⁹ *Computer III Phase I Order*, 104 FCC 2d at 963.

³⁰ The Commission initially imposed these CEI requirements on AT&T as well. In subsequent orders, the Commission first modified, and then relieved, AT&T of these requirements. The Commission has never imposed CEI requirements on GTE or any other independent LEC. *See supra* note 5.

³¹ *See Computer III Phase I Order*, 104 FCC 2d at 1035-1042, ¶¶ 147-166. As described in note 169 *infra*, the nine CEI parameters are: 1) interface functionality; 2) unbundling of basic services; 3) resale; 4) technical characteristics; 5) installation, maintenance, and repair; 6) end user access; 7) CEI availability as of the date the BOC offers its own enhanced service to the public; 8) minimization of transport costs; and 9) availability to all interested ISPs.

³² *Computer III Phase I Order*, 104 FCC 2d at 963, ¶ 2.

³³ *Computer III Phase I Order*, 104 FCC 2d at 1063-1068, ¶¶ 210-225.

forward basis.³⁴ This means that a BOC would not need to obtain approval of CEI plans prior to offering specific enhanced services on an integrated basis. The Commission also required the BOCs to comply with various other nonstructural safeguards in the form of rules related to network disclosure, customer proprietary network information (CPNI), and quality, installation, and maintenance reporting.³⁵ All of these nonstructural safeguards were designed to promote the efficiency of the telecommunications network, in part by permitting the technical integration of basic and enhanced services and in part by preserving competition in the enhanced services market through the control of potential anticompetitive behavior by the BOCs.³⁶

12. In 1990, the Court of Appeals for the Ninth Circuit vacated three orders in the *Computer III* proceeding, finding that the Commission had not adequately justified the decision to rely on (nonstructural) cost accounting safeguards as protection against cross-subsidization of enhanced services by the BOCs.³⁷ In response to this remand, the Commission adopted the *BOC Safeguards Order*, which strengthened the cost accounting safeguards, and reaffirmed the Commission's conclusion that nonstructural safeguards should govern BOC participation in the enhanced services industry, rather than structural separation requirements.³⁸

13. During the period from 1988 to 1992, the Commission approved the BOCs' ONA plans, which described the basic services that the BOCs would provide to unaffiliated and affiliated ESPs and the terms on which these services would be provided.³⁹ During the two-year period from 1992 to 1993, the Bureau approved the lifting of structural separation for individual

³⁴ *Computer III Phase I Order*, 104 FCC 2d at 1064, 1067-68, ¶¶ 213, 220-21. The unbundling standard for the BOCs required that: (1) the BOCs' enhanced services operation obtain unbundled network services pursuant to tariffed terms, conditions, and rates available to all ESPs; (2) BOCs provide an initial set of basic service functions that could be commonly used in the provision of enhanced services to the extent technologically feasible; (3) ESPs participate in developing the initial set of network services; (4) BOCs select the set of network services based on the expected market demand for such services, their utility as perceived by enhanced service competitors, and the technical and costing feasibility of such unbundling; and (5) BOCs comply with CEI requirements in providing basic network services to affiliated and unaffiliated ESPs. *Id.*, 104 FCC 2d at 1064-66, ¶¶ 214-218.

³⁵ *Computer III Phase I Order*, 104 FCC 2d at 1080-1086, 1089-1091, ¶¶ 246-255, 260-265; *Computer III Phase II Order*, 2 FCC Rcd at 3084-3086, ¶¶ 88-98.

³⁶ *Computer III Phase I Order*, 104 FCC 2d at 1063, ¶ 210.

³⁷ *California I*, 905 F.2d at 1232-1239 (vacating the *Computer III Phase I Order*, *Phase I Recon. Order*, and *Phase II Order*).

³⁸ *See BOC Safeguards Order*, 6 FCC Rcd at 7578-7588, 7617-25, ¶¶ 14-41, 98-109.

³⁹ *See supra* note 2 for a full citation of the ONA proceedings.

BOCs upon their showing that their initial ONA plans complied with the requirements of the *BOC Safeguards Order*,⁴⁰ and these decisions were later affirmed by the Commission.⁴¹

14. After *California I* and the Commission's response in the *BOC Safeguards Order*, the Ninth Circuit in *California II* upheld the Commission's orders approving BOC ONA plans.⁴² In *California II*, the court concluded that the Commission had scaled back its vision of ONA since *Computer III* by approving BOC ONA plans before "fundamental unbundling" had been achieved.⁴³ The court also concluded that the issue of whether implementation of ONA plans justified the lifting of structural separation, as the Commission had determined, was not properly before it.⁴⁴

15. In *California III*, the Court of Appeals for the Ninth Circuit partially vacated the Commission's *BOC Safeguards Order*.⁴⁵ The *California III* court found that, in granting full structural relief based on the BOC ONA plans, the Commission had not adequately explained its apparent "retreat" from requiring "fundamental unbundling" of BOC networks as a component of ONA and a condition for lifting structural separation.⁴⁶ The court was therefore concerned that ONA unbundling, as implemented, failed to prevent the BOCs from engaging in discrimination against competing ESPs in providing access to basic services.⁴⁷ The court did find, however, that the Commission had adequately responded to its concerns regarding cost-misallocation by strengthening its cost accounting rules and introducing a system of "price cap" regulation;⁴⁸ the

⁴⁰ See *Computer III Further Remand Notice*, 10 FCC Rcd at 8366 n.22, for a string citation of the referenced orders.

⁴¹ *Petition for Removal of the Structural Separation Requirements and Waiver of Certain State Tariffing Requirements*, 9 FCC Rcd 3053 (1994) (*Structural Relief Order*), joint motion for remand granted in light of *California I*, *MCI v. FCC*, No. 94-1597 (D.C. Cir. May 10, 1995).

⁴² *California v. FCC*, 4 F.3d 1505.

⁴³ *Id.* at 1511-13.

⁴⁴ The Court pointed out that the petition for review before it covered four Commission ONA orders, but not the specific Commission order lifting structural separation. *Id.* at 1513.

⁴⁵ *California III*, 39 F.3d at 930.

⁴⁶ *Id.* at 929-930.

⁴⁷ *Id.*

⁴⁸ Price cap regulation focuses primarily on the prices that an incumbent LEC may charge and the revenues it may generate from interstate access services. Price cap regulation encourages incumbent LECs to improve their efficiency by harnessing profit-making incentives to reduce costs, invest efficiently in new plant and facilities, and develop and deploy innovative service offerings, while setting price ceilings at reasonable levels. Thus, price caps

court indicated its belief that these strengthened safeguards would significantly reduce the BOCs' incentive and ability to misallocate costs.⁴⁹ The court also upheld the scope of federal preemption adopted in the *BOC Safeguards Order*.⁵⁰

16. In response to *California III*, the Bureau issued the *Interim Waiver Order*, which reinstated the requirement that BOCs must file CEI plans, and obtain Commission approval of those plans, to continue to provide specific enhanced services on an integrated basis.⁵¹ Also in response, the Commission issued the *Computer III Further Remand Notice*, which sought comment on the *California III* court's remand question regarding the sufficiency of ONA unbundling as a condition of lifting structural separation, and on the general issue of whether relying on nonstructural safeguards serves the public interest.⁵²

B. Overview of the 1996 Act

17. Since the *California III* remand and the Commission's release of the *Computer III Further Remand Notice*, the 1996 Act became law and the Commission has conducted a number of proceedings to implement its provisions. These developments give us a fresh perspective from which to evaluate the Commission's current regulatory framework for the provision of information services. In this section, we describe some of the major provisions of the 1996 Act, and in later sections we examine how those provisions may affect our current rules.

1. Opening the Local Exchange Market

18. Various provisions of the 1996 Act are intended to open local exchange markets to competition. Section 251(c) of the Act requires, among other things, incumbent LECs, including the BOCs and GTE, to provide to requesting telecommunications carriers interconnection and access to unbundled network elements at rates, terms, and conditions that are just, reasonable,

act as a transitional regulatory scheme until the advent of actual competition makes price cap regulation unnecessary. *Access Charge Reform*, CC Docket No. 96-262, *Price Cap Performance Review for Local Exchange Carriers*, CC Docket No. 94-1, *Transport Rate Structure and Pricing*, CC Docket No. 91-213, *End User Common Line Charges*, CC Docket No. 95-72, First Report and Order, 12 FCC Rcd 15982, 15993-94, ¶ 26 (1997) (*Access Reform Report and Order*).

⁴⁹ *California III*, 39 F.3d at 926.

⁵⁰ *California III*, 39 F.3d at 931-933. See *infra* ¶ 131 for a discussion of the scope of federal preemption adopted in the *BOC Safeguards Order*.

⁵¹ *Interim Waiver Order*, 10 FCC Rcd 1724. See *infra* ¶ 60 for a more complete discussion of the *Interim Waiver Order*.

⁵² *Computer III Further Remand Notice*, 10 FCC Rcd at 8362, ¶ 2.

and nondiscriminatory, and to offer telecommunications services for resale.⁵³ Section 253(a) bars state and local governments from imposing certain legal requirements that prohibit or have the effect of prohibiting the ability of any entity to provide any telecommunications service, and section 253(d) authorizes the Commission to preempt such legal requirements to the extent necessary to correct inconsistency with the Act.⁵⁴ As a result, telecommunications carriers may now enter the local exchange market, and compete with the incumbent LEC, through access to unbundled network elements, resale, or through construction of network facilities.

19. In implementing section 251 of the Act, the Commission prescribed certain minimum points of interconnection necessary to permit competing carriers to choose the most efficient points at which to interconnect with the incumbent LEC's network. The Commission also adopted a minimum list of unbundled network elements (UNEs) that incumbent LECs must make available to new entrants, upon request.⁵⁵ In Parts III and IV below, we discuss and seek comment on the potential impact of these unbundling requirements in more detail, both with respect to the issue in *California III* regarding the Commission's justification of ONA unbundling as a condition of lifting structural separation, as well as our overall reexamination of the Commission's current nonstructural safeguards framework.

2. BOC Provision of Information Services

20. The 1996 Act conditions the BOCs' entry into the market for many in-region interLATA services, among other things, on their compliance with the separate affiliate, accounting, and nondiscrimination requirements set forth in section 272.⁵⁶ In the *Non-Accounting Safeguards Order*, we noted that these safeguards are designed to prohibit anticompetitive discrimination and improper cost allocation while still permitting the BOCs to enter markets for certain interLATA telecommunications and information services, in the absence of full competition in the local exchange marketplace.⁵⁷ We also concluded in the *Non-Accounting Safeguards Order* that the Commission's *Computer II*, *Computer III*, and ONA requirements are

⁵³ See 47 U.S.C. § 251(c).

⁵⁴ 47 U.S.C. § 253(a), (d).

⁵⁵ We note that states have the authority to adopt additional interconnection points or unbundled network elements in accordance with section 251 of the Act. *Local Competition Order*, 11 FCC Rcd at 15567, ¶ 136.

⁵⁶ An "in-region interLATA service" is interLATA service that originates in any of a BOC's in-region states, which are the states in which the BOC or any of its affiliates was authorized to provide wireline telephone exchange service pursuant to the reorganization plan approved under the AT&T Consent Decree, as in effect on February 7, 1996. 47 U.S.C. §§ 153(21), 271(i)(1); see also 47 C.F.R. § 53.3.

⁵⁷ *Non-Accounting Safeguards Order*, 11 FCC Rcd at 21911, ¶ 9.

consistent with section 272 of the Act, and continue to govern the BOCs' provision of intraLATA information services, since section 272 only addresses BOC provision of interLATA services.⁵⁸

21. Sections 260, 274, and 275 of the Act set forth specific requirements governing the provision of telemessaging, electronic publishing, and alarm monitoring services, respectively, by the BOCs and, in certain cases, by incumbent LECs. Section 260 delineates the conditions under which incumbent LECs, including the BOCs, may offer telemessaging services. We affirmed our conclusion in the *Non-Accounting Safeguards Order* that, since telemessaging service is an "information service," BOCs that offer interLATA telemessaging services are subject to the separation requirements of section 272.⁵⁹ We further concluded that the *Computer III/ONA* requirements are consistent with the requirements of section 260(a)(2), and, therefore, BOCs may offer intraLATA telemessaging services on an integrated basis subject to both *Computer III/ONA* and the requirements in section 260.⁶⁰

22. Section 274 permits the BOCs to provide electronic publishing services, whether interLATA or intraLATA,⁶¹ only through a "separated affiliate" or an "electronic publishing joint venture" that meets certain separation, nondiscrimination, and joint marketing requirements in that section.⁶² The Commission found that there was no inconsistency between the nondiscrimination requirements of *Computer III/ONA* and section 274(d).⁶³ We therefore found that the *Computer III/ONA* requirements continue to govern the BOCs' provision of intraLATA electronic publishing.⁶⁴ We also noted that the nondiscrimination requirements of section 274(d) apply to the BOCs' provision of both intraLATA and interLATA electronic publishing.⁶⁵

⁵⁸ *Non-Accounting Safeguards Order*, 11 FCC Rcd at 21969, ¶ 132.

⁵⁹ *Implementation of the Telecommunications Act of 1996: Telemessaging, Electronic Publishing, and Alarm Monitoring Services*, CC Docket No. 96-152, First Report and Order and Further Notice of Proposed Rulemaking, 12 FCC Rcd 5361, 5455, ¶ 210 (1997) (*Telemessaging and Electronic Publishing Order*), citing *Non-Accounting Safeguards Order*, 11 FCC Rcd at 21975-76, ¶ 145.

⁶⁰ *Telemessaging and Electronic Publishing Order*, 12 FCC Rcd at 5455, ¶ 221.

⁶¹ We concluded that section 274 applies to a BOC's provision of both intraLATA and interLATA electronic publishing services, since, in contrast to section 272, Congress did not distinguish between such services in section 274. *Telemessaging and Electronic Publishing Order*, 12 FCC Rcd at 5383, ¶ 50.

⁶² See 47 U.S.C. § 274. Electronic publishing services are excluded from section 272's separation and other requirements for BOC provision of interLATA information services. See 47 U.S.C. § 272(a)(2)(C).

⁶³ *Telemessaging and Electronic Publishing Order*, 12 FCC Rcd at 5446, ¶ 199.

⁶⁴ *Telemessaging and Electronic Publishing Order*, 12 FCC Rcd at 5446, ¶ 200.

⁶⁵ *Id.*

23. Section 275 of the Act prohibits the BOCs from providing alarm monitoring services until February 8, 2001, although BOCs that were providing alarm monitoring services as of November 30, 1995 are grandfathered. Section 275 of the Act does not impose any separation requirements on the provision of alarm monitoring services.⁶⁶ We concluded in the *Alarm Monitoring Order* that the *Computer III*/ONA requirements are consistent with the requirements of section 275(b)(1), and therefore continue to govern the BOCs' provision of alarm monitoring service.⁶⁷ We discuss the potential impact of the Act's new requirements for BOC provision of certain information services on our cost-benefit analysis of structural versus nonstructural safeguards in more detail in Part IV.B below.

III. CALIFORNIA III REMAND

A. Background

24. As noted above, in *California III*,⁶⁸ the Ninth Circuit reviewed the *BOC Safeguards Order*,⁶⁹ in which the Commission reaffirmed its earlier determination to remove structural separation requirements imposed on a BOC's provision of enhanced services, based on a BOC's compliance with ONA requirements and other nonstructural safeguards. The court found that, in the *BOC Safeguards Order*, and in the orders implementing ONA, the Commission had "changed its requirements for, or definition of, ONA so that ONA no longer contemplates fundamental unbundling."⁷⁰ Because, in the Ninth Circuit's view, the Commission had not

⁶⁶ Alarm monitoring services are excluded from section 272's separation and other requirements for BOC provision of interLATA information services. See 47 U.S.C. § 272(a)(2)(C).

⁶⁷ *Implementation of the Telecommunications Act of 1996: Telemessaging, Electronic Publishing, and Alarm Monitoring Services*, CC Docket No. 96-152, Second Report and Order, 12 FCC Rcd 3824, 3848-49, ¶ 55 (1997), *recons. pending (Alarm Monitoring Order)*; see also *Enforcement of Section 275(a)(2) of the Communications Act of 1934, as amended by the Telecommunications Act of 1996, Against Ameritech Corporation*, CCBPol 96-17, Memorandum Opinion and Order, 12 FCC Rcd 3855 (1997), *vacated and remanded sub nom. Alarm Industry Communications Committee v. Federal Communications Commission and United States of America*, No. 97-1218, 1997 WL 791658 (D.C. Cir. Dec. 30, 1997).

⁶⁸ *California v. FCC*, 39 F.3d 919 (9th Cir. 1994).

⁶⁹ *BOC Safeguards Order*, 6 FCC Rcd 7571 (1991).

⁷⁰ *California III*, 39 F.3d at 923, 930. While the court did not provide a specific definition of the phrase "fundamental unbundling," the *California III* decision relied upon and reaffirmed the court's *California II* determination that:

[I]n *Computer III*, the FCC adopted general standards for ONA which the BOCs needed to satisfy as a precondition for lifting structural separation and which, when met, would eliminate the need for CEI plans. . . . The plans actually submitted pursuant to *Computer III*, however, did not meet those standards. The FCC recognized in the orders that the technology it thought in *Computer*

adequately explained why this perceived shift did not undermine its decision to rely on the ONA safeguards to grant full structural relief, the court remanded the proceeding to the Commission.⁷¹

25. In the *Computer III Phase I Order*, the Commission declined to adopt any specific network architecture proposals or specific unbundling requirements, but instead set forth general standards for ONA.⁷² BOCs were required to file initial ONA plans presenting a set of "unbundled basic service functions that could be commonly used in the provision of enhanced services to the extent technologically feasible."⁷³ The Commission stated that, by adopting general requirements rather than mandating a particular architecture for implementing ONA, it wished to encourage development of efficient interconnection arrangements.⁷⁴ The Commission also noted that inefficiencies might result from "unnecessarily unbundled or splintered services."⁷⁵

26. The *Computer III Phase I Order* required the BOCs to meet a defined set of unbundling criteria in order for structural separation to be lifted.⁷⁶ In the *BOC ONA Order*, the Commission generally approved the "common ONA model" proposed by the BOCs.⁷⁷ The common ONA model was based on the existing architecture of the BOC local exchange networks, and consisted of unbundled services categorized as basic service arrangements

III would soon permit open access and serve as a prerequisite to structural separation [sic] was not available; yet it approved the plans. This was a change in policy.

California II, 4 F.3d at 1512.

⁷¹ *California III*, 39 F.3d at 930.

⁷² *Computer III Phase I Order*, 104 FCC 2d at 1064, ¶ 213.

⁷³ *Computer III Phase I Order*, 104 FCC 2d at 1065, ¶ 216.

⁷⁴ *Computer III Phase I Order*, 104 FCC 2d at 1064, ¶ 213.

⁷⁵ *Id.* at 1065, ¶ 217.

⁷⁶ *Computer III Phase I Order* at 1064, 1067-68, ¶¶ 213, 220-21. As noted above, the unbundling standard for the BOCs required that: (1) the BOCs' enhanced services operation obtain unbundled network services pursuant to tariffed terms, conditions, and rates available to all ESPs; (2) BOCs provide an initial set of basic service functions that could be commonly used in the provision of enhanced services to the extent technologically feasible; (3) ESPs participate in developing the initial set of network services; (4) BOCs select the set of network services based on the expected market demand for such elements, their utility as perceived by enhanced service competitors, and the technical and costing feasibility of such unbundling; and (5) BOCs comply with CEI requirements in providing basic network services to affiliated and unaffiliated ESPs.

⁷⁷ *BOC ONA Order*, 4 FCC Rcd at 13, 41-42, ¶¶ 8, 69. The "common ONA model" is further discussed *infra* at Part IV.D.1.

(BSAs),⁷⁸ basic service elements (BSEs),⁷⁹ complementary network services (CNSs),⁸⁰ and ancillary network services (ANSs).⁸¹

27. In the *BOC ONA* proceeding, certain commenters criticized the common ONA model.⁸² The commenters argued that the BOCs had avoided the *Computer III Phase I Order* unbundling requirements by failing to "disaggregate communications facilities and services on an element-by-element basis."⁸³ They urged the Commission to adopt a more "fundamental" concept of unbundling in the ONA context, by requiring the BOCs to unbundle facilities such as loops, as well as switching functions, inter-office transmission, and signalling.⁸⁴ Specifically, they claimed that BSAs could be further unbundled; *e.g.*, trunks could be unbundled from the circuit-switched, trunk-side BSA, so that ESPs could connect their own trunks to BOC switches.⁸⁵

⁷⁸ BSAs are the fundamental tariffed switching and transport services that allow an ESP to communicate with its customers through the BOC network. Under the common ONA model, an ESP and its customers must obtain some form of BSA in order to obtain access to the network functionalities that an ESP needs to offer its specific services. Examples of BSAs include line-side and trunk-side circuit-switched service, line-side and trunk-side packet switched service, and various grades of local private line service. *BOC ONA Order*, 4 FCC Rcd at 36, ¶ 56. BSAs must be included in a BOC's interstate access tariff, as well as tariffed at the state level. *Id.* at 116, 143-4, ¶¶ 226, 276.

⁷⁹ BSEs are optional unbundled features (such as calling number identification) that an ESP may require or find useful in configuring an enhanced service. *BOC ONA Order*, 4 FCC Rcd at 36, ¶ 57. BSEs must be tariffed at the federal and state levels. *Id.* at 145, ¶ 279.

⁸⁰ CNSs are optional unbundled features (such as stutter dial tone) that end-users may obtain from carriers in order to obtain access to or receive an enhanced service. *BOC ONA Order*, 4 FCC Rcd at 36, ¶ 57. CNSs must be tariffed at the state level, but need not be tariffed at the federal level. *Id.* at 47, ¶ 83.

⁸¹ ANSs are non-regulated services, such as billing and collection, that may prove useful to ESPs. *BOC ONA Order*, 4 FCC Rcd at 36, 57-58, ¶¶ 57, 106.

⁸² *BOC ONA Order*, 4 FCC Rcd at 37-41, ¶¶ 59-68. In general, these arguments were set forth in a report by Hatfield Associates, Inc., sponsored by Telenet, CompuServe, Dun & Bradstreet, CBEMA, and IDCMA. *See id.* n.112.

⁸³ *BOC ONA Order*, 4 FCC Rcd at 37, ¶ 59.

⁸⁴ *BOC ONA Order*, 4 FCC Rcd at 37, ¶ 60. The commenters characterized the unbundling achieved under the common ONA model as "a set of merely software-defined switching features." *Id.* at 37, 39, ¶ 60, 63.

⁸⁵ *BOC ONA Order*, 4 FCC Rcd at 37, ¶ 59. Other commenters, such as the American Petroleum Institute (API) and the Association of Data Communications Users (ADCU) also characterized BSAs as highly packaged, end-to-end services in which switching, signalling, and transmission functions are not disaggregated. *Id.* at 38-39, ¶ 62. MCI asserted that access, switching, and transport functions are all physically segregable, and should not be bundled in the form of BSAs. *Id.* at 39, ¶ 63.

28. In the *BOC ONA Order*, the Commission rejected arguments that ONA, as set forth in the *Computer III Phase I Order*, required unbundling more "fundamental" than that set forth in the "common ONA model" proposed by the BOCs.⁸⁶ The Commission indicated that the *Computer III Phase I Order* anticipated that the BOCs would unbundle network services, not facilities, and determined that the ONA services developed by the BOCs under the common ONA model were consistent with the examples of service unbundling set forth in the *Computer III Phase I Order*.⁸⁷ The Ninth Circuit, however, agreed with the view that the Commission's approval of the BOC ONA plans, and subsequent lifting of structural separation, was a retreat from a "requirement" of "fundamental unbundling."⁸⁸

B. Subsequent Events May Have Alleviated the Ninth Circuit's *California III* Concerns

29. In this section, we seek comment on whether the enactment and implementation of the 1996 Act, as well as other developments, should alleviate the Ninth Circuit's underlying concern about the level of unbundling mandated by ONA. Section 251 of the Act requires incumbent LECs, including the BOCs and GTE, to provide to requesting telecommunications carriers interconnection and access to unbundled network elements⁸⁹ at rates, terms, and

⁸⁶ *BOC ONA Order*, 4 FCC Rcd at 13, 41, ¶¶ 8, 69. Instead, the Commission found that the common ONA model, which achieves BSE unbundling through the mechanism of software changes in end-office switches, "recognize[d] the realities" of then-current network architecture, and thus was "more likely to bring new features to ESPs at a faster rate, with less investment, than would a radical reconfiguration to a more modularized architecture." *BOC ONA Order* 4 FCC Rcd at 42, ¶ 70. The Commission, specifically rejecting any argument that BSAs should be further unbundled, found that requiring such further unbundling could cause technical and operational difficulties. *Id.* at 42, ¶ 71.

⁸⁷ *BOC ONA Order*, 4 FCC Rcd at 41, ¶ 69, citing *Computer III Phase I Order*, 104 FCC 2d at 1019-20, 1040, ¶¶ 113, 158, n.215. While rejecting the arguments of the parties that advocated further, or more "fundamental," unbundling, the Commission recognized that such unbundling, in the long run, might have pro-competitive effects as technology and regulatory policies evolve, and requested that the Information Industry Liaison Committee (IILC) investigate the technical and operational problems associated with such unbundling, in order to lay the groundwork for future policymaking. *BOC ONA Order*, 4 FCC Rcd at 43, ¶ 72. The IILC was established in 1987 by the Exchange Carriers Standards Association (ECSA) to serve as an inter-industry forum for discussion and voluntary resolution of industry-wide concerns about the provision of ONA services and related matters. *BOC ONA Order*, 4 FCC Rcd at 31, ¶ 49. In 1994, the ECSA changed its name to the Alliance for Telecommunications Industry Solutions (ATIS). Effective January 1, 1997, the IILC was sunset as an ATIS-sponsored committee. Under a reorganizational plan approved by the ATIS board, all open issues and work programs underway at that time were transferred from the IILC to the Network Interconnection/ Interoperability Forum (NIIF). See also *infra* ¶¶ 82-84 for further discussion of NIIF functions.

⁸⁸ See *California III*, 39 F.3d at 923, 930.

⁸⁹ The statute defines "network element" as:

conditions that are just, reasonable, and nondiscriminatory, and to offer telecommunications services for resale.⁹⁰ Section 251 also requires incumbent LECs to provide for physical collocation at the LEC's premises of equipment necessary for interconnection or access to unbundled network elements, under certain conditions.⁹¹

30. In its regulations implementing these statutory provisions, the Commission identified a minimum list of network elements that incumbent LECs are required to unbundle, including local loops, network interface devices (NIDs), local and tandem switching capabilities, interoffice transmission facilities (often referred to as trunks), signalling networks and call-related databases, operations support systems (OSS) facilities, and operator services and directory assistance.⁹² Additional unbundling requirements may be specified during voluntary negotiations between carriers, by state commissions during arbitration proceedings, or by the Commission as long as such requirements are consistent with the 1996 Act and the Commission's regulations.⁹³ We note that the 1996 Act creates particular incentives for the BOCs to unbundle and make available the elements of their local exchange networks. For example, section 271 provides that a BOC may gain entry into the interLATA market in a particular state by demonstrating, *inter alia*,

a facility or equipment used in the provision of a telecommunications service. Such term also includes features, functions, and capabilities that are provided by means of such facility or equipment, including subscriber numbers, databases, signaling systems, and information sufficient for billing and collection or used in the transmission, routing, or other provision of a telecommunications service.

47 U.S.C. § 153(29).

⁹⁰ See 47 U.S.C. §§ 251(c)(2)-(4). The Commission implemented the local competition provisions of sections 251 and 252 in the *Local Competition Order*, *supra* note 14. Certain portions of the Commission's rules, most notably the pricing rules and certain unbundling rules, were vacated by the United States Court of Appeals for the Eighth Circuit in the *Iowa Utilities Board* decision. See *Iowa Utilities Board*, 120 F.3d at 792-800, 807-818.

⁹¹ 47 U.S.C. § 251(c)(6). The Eighth Circuit upheld the Commission's rules implementing the collocation requirement. See *Iowa Utilities Board*, 120 F.3d at 817.

⁹² *Local Competition Order*, 11 FCC Rcd at 15683-15775, ¶¶ 366-541; see also 47 C.F.R. § 51.319. The Eighth Circuit upheld the Commission's determination that OSS, operator services and directory services, and vertical switching features (such as caller ID, call forwarding, and call waiting) qualify as network elements that are subject to the unbundling requirements of the Act. *Iowa Utilities Board*, 120 F.3d at 807-810.

⁹³ *Local Competition Order*, 11 FCC Rcd at 15625-26, 15631-32, ¶¶ 244, 246, 259. The FCC and the state commissions also have authority to require "more granular" unbundling of the specific network elements identified by the *Local Competition Order*. *Id.*, 11 FCC Rcd at 15631-32, ¶ 259.

that it has entered into access and interconnection agreements with competing telephone exchange service providers that satisfy the "competitive checklist" set forth in section 271(c)(2)(B).⁹⁴

31. In our view, the unbundling requirements imposed by section 251 and our implementing regulations (hereinafter referred to as "section 251 unbundling") are essentially equivalent to the "fundamental unbundling" requirements proposed by certain commenters, and rejected by the Commission as premature, in the *BOC ONA Order*. These commenters asked the Commission to require the BOCs to unbundle network elements such as loops, switching functions, inter-office transmission, and signalling.⁹⁵ As noted above, section 251(c)(3) and the Commission's implementing regulations require those elements, and others, to be unbundled by the BOCs, and by other incumbent LECs that are subject to the requirements of section 251(c). In addition, the type and level of unbundling under section 251 is different and more extensive than that required under ONA.⁹⁶ This may be because one of Congress's primary goals in enacting section 251 -- to bring competition to the largely monopolistic local exchange market -- is more far-reaching than the Commission's goal for ONA, which has been to preserve competition and promote network efficiency in the developing, but highly competitive, information services market.⁹⁷

32. We recognize that, according to the terms of section 251, only "requesting telecommunications carriers" are directly accorded rights to interconnect and to obtain access to unbundled network elements.⁹⁸ In that regard, the section 251 unbundling requirements do not

⁹⁴ See 47 U.S.C. § 271(c). The "competitive checklist" itself contains specific unbundling requirements, including nondiscriminatory access to network elements (47 U.S.C. § 271(c)(2)(B)(ii)), unbundled local loop transmission (47 U.S.C. § 271(c)(2)(B)(iv)), unbundled local transport (47 U.S.C. § 271(c)(2)(B)(v)), unbundled local switching (47 U.S.C. § 271(c)(2)(B)(vi)), as well as nondiscriminatory access to databases and associated signaling necessary for call routing and completion (47 U.S.C. § 271(c)(2)(B)(x)). *But see* discussion of *SBC v. FCC*, *supra* note 18.

⁹⁵ *BOC ONA Order*, 4 FCC Rcd at 37, ¶ 60.

⁹⁶ See *infra* ¶ 93.

⁹⁷ See, e.g., *Computer II Final Decision*, 77 FCC 2d at 433, ¶ 128; *Computer III Phase I Order*, 104 FCC 2d at 1010, ¶ 95.

⁹⁸ See 47 U.S.C. § 251(c)(2), (c)(3). The Commission determined that entities that provide both telecommunications services and information services are classified as telecommunications carriers for the purposes of section 251, and are subject to the general interconnection obligations of section 251(a), to the extent that they are acting as telecommunications carriers. *Local Competition Order*, 11 FCC Rcd at 15990, ¶ 995. The Commission further concluded that telecommunications carriers that have obtained interconnection or access to unbundled network elements under section 251 in order to provide telecommunications services, may offer information services through the same arrangement, so long as they are offering telecommunications services through the same arrangement as well. *Id.* See *infra* ¶¶ 92-96 for a more complete discussion of section 251 unbundling vis-a-vis ONA. See also ¶ 8 for a discussion of the Universal Service Report.

provide access and interconnection rights to the identical class of entities as does the ONA regime, since these rights do not extend to entities that provide solely information services ("pure ISPs"). We also recognize that the development of competition in the local exchange market has not occurred as rapidly as some expected since the enactment of the 1996 Act.⁹⁹

33. We believe, however, that section 251 is intended to bring about competition in the local exchange market that, ultimately, will result in increased variety in service offerings and lower service prices, to the benefit of all end-users, including ISPs. Moreover, because local telecommunications services are important inputs to the information services ISPs provide, ISPs are uniquely positioned to benefit from an increasingly competitive local exchange market. There is evidence, for example, that carriers that have direct rights under section 251 will compete with the incumbent LECs to provide pure ISPs with the basic network services that ISPs need to create their own information service offerings, either by obtaining unbundled network elements for the provision of telecommunications services¹⁰⁰ or through the resale of such services.¹⁰¹ As a result, incumbent LECs have an incentive to provide an increased variety of telecommunications services to pure ISPs at lower prices in response to the market presence of such competitors. Pure ISPs also could enter into partnering or teaming arrangements with carriers that have direct rights under section 251.¹⁰² In addition, ISPs can obtain certification as telecommunications service providers in order to receive direct benefits under section 251.¹⁰³ We also note that many ISPs that currently provide both telecommunications services and information services will have the benefit of both section 251 unbundling as well as ONA.¹⁰⁴

34. For all these reasons, the fact that section 251's access and interconnection rights apply by their terms only to a "requesting telecommunications carrier" does not, in our view,

⁹⁹ *Common Carrier Bureau Seeks Recommendations on Commission Actions Critical to the Promotion of Efficient Local Exchange Competition*, Public Notice, CCBPol 97-9, DA 97-1519 (rel. Jul. 18, 1997).

¹⁰⁰ The *Local Competition Order* states that incumbent LECs could not restrict the services that competitors could provide using unbundled network elements. *Local Competition Order*, 11 FCC Rcd at 15634, 15646, ¶¶ 264, 292.

¹⁰¹ See, e.g., *Third CLEC To Fan Flames of ISDN Competition*, ISDN News, Jan. 28, 1997 (discussing Intermedia Communications' plans to resell parts of the Bell networks to Internet service providers).

¹⁰² See, e.g., *Internet Service Provider Outlines Regional ADSL Rollout*, Communications Today, June 17, 1997 (discussing plans of ioNet, an ISP, to partner with competitive local service providers to offer asymmetric digital subscriber line (ADSL) services).

¹⁰³ See, e.g., *Networking Business Concentric Plans IPO*, Communications Week, July 21, 1997 (discussing plans of Concentric Network Corp. to register as a competitive local exchange carrier in several states, which is described in the article as "a growing trend with ISPs").

¹⁰⁴ See *supra* note 98.

change our conviction that the 1996 Act, as well as other factors, should alleviate the court's underlying concern in *California III* that the level of unbundling required under ONA does not provide sufficient protection against access discrimination. We seek comment on this analysis. In light of several recent court decisions bearing on these issues, we also ask commenters to address how the opinions of the Eighth Circuit Court of Appeals, including the decision regarding the recombination of unbundled network elements, as well as the decision of the United States District Court for the Northern District of Texas concerning the constitutionality of sections 271 through 275 of the Act, affect our analysis.¹⁰⁵

35. In addition to the changes engendered by the 1996 Act, there have been other regulatory and market-based developments that, we believe, also should alleviate the court's underlying concern about whether the level of unbundling mandated by ONA provides sufficient protection against access discrimination. For example, the Commission's *Expanded Interconnection*¹⁰⁶ proceeding requires Class A LECs,¹⁰⁷ including the BOCs and GTE, to allow all interested parties to provide competitive interstate special access, transport, and tandem switched transport by interconnecting their transmission facilities with the LECs' networks.¹⁰⁸ Competing ISPs that utilize transmission facilities thus may provide certain transport functions as part of their enhanced services independent of the *Computer III* framework. These additional interconnection requirements, together with section 251 unbundling and the Commission's current ONA requirements, further help to protect ISPs against access discrimination by the BOCs. We seek comment on this analysis.

36. In addition, the level of competition within the information services market, which the Commission termed "truly competitive" as early as 1980,¹⁰⁹ has continued to increase markedly as new competitive ISPs have entered the market. The phenomenal growth of the Internet over the past several years illustrates how robustly competitive one sector of the

¹⁰⁵ See *supra* notes 14, 18.

¹⁰⁶ *Expanded Interconnection with Local Telephone Company Facilities*, Report and Order and Notice of Proposed Rulemaking, 7 FCC Rcd 7369 (1992) (*Special Access Interconnection Order*), *recon.*, 8 FCC Rcd 127 (1992), *further recon.*, 8 FCC Rcd 7341 (1993), *vacated in part and remanded sub nom. Bell Atlantic Telephone Cos. v. FCC*, 24 F.3d 1441 (D.C. Cir. 1994) (subsequent citations omitted).

¹⁰⁷ Class A LECs are companies having annual revenues from regulated telecommunications operations that equal or exceed the indexed revenue threshold (which is currently approximately \$107 million). See 47 C.F.R. § 32.11(a)(1).

¹⁰⁸ See 47 C.F.R. §§ 64.1401, 64.1402. The *Local Competition Order* concluded that section 251 of the Act does not supersede the Commission's *Expanded Interconnection* rules, because the two sets of requirements are not coextensive. See *Local Competition Order*, 11 FCC Rcd at 15808, ¶ 611.

¹⁰⁹ See *Computer II Final Decision*, 77 FCC 2d at 433, ¶ 128. See also *Computer III Phase I Order*, 104 FCC 2d at 1010, ¶ 95 (concluding that the enhanced services market is "extremely competitive").

information services market has become.¹¹⁰ Recent surveys suggest that there are some 3,000 Internet access providers in the United States;¹¹¹ these providers range from small start-up operations, to large providers such as IBM and AT&T, to consumer online services such as America Online. We believe that other sectors of the information services market have also continued to grow, as we observed in the *Computer III Further Remand Notice*.¹¹² The presence of well-established participants in the information services market, such as EDS, MCI, AT&T, Viacom, Times-Mirror, General Electric, and IBM, may make it more difficult for BOCs to engage in access discrimination.¹¹³ For example, the *California I* court indicated that "the emergence of powerful competitors such as IBM, which have the resources and expertise to monitor the quality of access to the network, reduces the BOCs' ability to discriminate in providing access to their competitors."¹¹⁴ We seek comment on whether the sustained growth of competition within the information services market, including the continued participation of large information service competitors, serves to diminish further the threat of access discrimination and, consequently, the court's concern about whether the level of unbundling mandated by ONA is sufficient.¹¹⁵

IV. EFFECT OF THE 1996 ACT

37. As detailed in the background section, the Commission issued the *Computer III Phase I Order* more than ten years ago, shortly after divestiture, and before the BOCs had obtained authorization from the MFJ court to begin to provide information services.¹¹⁶ Similarly, the implementation of ONA primarily took place between 1988 and 1992. Our objective is now, as it was then, to promote efficiency and increased service offerings while controlling anticompetitive behavior by the BOCs. We therefore reevaluate below the continuing need for

¹¹⁰ As of January 1997, there were over 16 million host computers on the Internet, more than ten times as many as there were in January 1992. See Kevin Werbach, FCC Office of Plans and Policy, Working Paper 29, *Digital Tornado: The Internet and Telecommunications Policy*, 21-22 (March 1997) (*Digital Tornado*), citing *Network Wizards Internet Domain Survey* (Jan. 1997). One recent study estimated the number of U.S. subscribers to Internet services at 47 million. See *id.*, citing *Internet IT Informer* (Feb. 19, 1997).

¹¹¹ See *Digital Tornado* at 22, citing *Boardwatch Directory of Internet Service Providers* (Fall 1996).

¹¹² *Computer III Further Remand Notice*, 10 FCC Rcd at 8382, ¶ 32.

¹¹³ See *Computer III Further Remand Notice*, 10 FCC Rcd at 8382, ¶ 33 & n.81.

¹¹⁴ *California I*, 905 F.2d at 1233.

¹¹⁵ See also *infra* ¶¶ 90-91 where we seek comment on whether and how the development of new information services, including Internet services, which rely on emerging packet-switched networks, should affect the Commission's *Computer III* and ONA rules.

¹¹⁶ See *supra* note 16.

these safeguards, in light of the 1996 Act and the significant technological and market changes that have taken place since the *Computer III* nonstructural safeguards were first proposed. This reevaluation is also part of the Commission's 1998 biennial review of regulations as required by the 1996 Act.¹¹⁷

A. Basic/Enhanced Distinction

38. In the *Computer II* proceeding, the Commission adopted a regulatory scheme that distinguished between the common carrier offering of basic transmission services and the offering of enhanced services.¹¹⁸ The Commission defined a "basic transmission service" as the common carrier offering of "pure transmission capability" for the movement of information "over a communications path that is virtually transparent in terms of its interaction with customer-supplied information."¹¹⁹ The Commission further stated that a basic transmission service should be limited to the offering of transmission capacity between two or more points suitable for a user's transmission needs.¹²⁰ The common carrier offering of basic services is regulated under Title II of the Communications Act.¹²¹ In contrast, the Commission defined enhanced services as:

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

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

¹¹⁷ See *supra* ¶ 6; 47 U.S.C. § 161.

¹¹⁸ *Computer II Final Decision*, 77 FCC 2d at 387, ¶ 5.

¹¹⁹ See *Computer II Final Decision*, 77 FCC 2d at 419-20, ¶¶ 93, 96.

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

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

¹²² 47 C.F.R. § 64.702(a).

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

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

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

"Telecommunications service" is defined as:

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

The 1996 Act defines "information service" as:

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

40. We concluded in the *Non-Accounting Safeguards Order* that, although the text of the Commission's definition of "enhanced services" differs from the 1996 Act's definition of "information services," the two terms should be interpreted to extend to the same functions.¹²⁷ We found no basis to conclude that, by using the term "information services," Congress intended a significant departure from the Commission's usage of "enhanced services."¹²⁸ We further

13,770-13,774, App. A (Com. Car. Bur. 1995) (*BOC CEI Plan Approval Order*).

¹²⁴ 47 U.S.C. § 153(43).

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

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

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

¹²⁸ *Id.*

explained that interpreting "information services" to include all "enhanced services" provides a measure of regulatory stability for telecommunications carriers and ISPs by preserving the definitional scheme under which the Commission exempted certain services from traditional common carriage regulation.¹²⁹

41. Consistent with our conclusion in the *Non-Accounting Safeguards Order* that "enhanced services" fall within the statutory definition of "information services," we seek comment in this Further Notice on whether the Commission's definition of "basic service" and the 1996 Act's definition of "telecommunications service" should be interpreted to extend to the same functions, even though the two definitions differ.¹³⁰ We ask parties to address whether there is any basis to conclude that, by using the term "telecommunications services," Congress intended a significant departure from the Commission's usage of "basic services." As noted in the *Non-Accounting Safeguards Order*, we believe the public interest is served by maintaining the regulatory stability of the definitional scheme under which the Commission exempted certain services from traditional common carriage regulation. To the extent parties believe that "telecommunications services" differ from "basic services" in any regard, they should identify the distinctions that should be drawn between the two categories, describe any overlap between the two categories, and delineate the particular services that would come within one category and not the other.

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

¹²⁹ *Id.*

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

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

B. Cost-Benefit Analysis of Structural Safeguards

1. Background

43. The Commission's goals in addressing BOC provision of information services have been both to promote innovation in the provision of information services and to prevent access discrimination and improper cost allocation. Because the BOCs control the local exchange network and the provision of basic services, in the absence of regulatory safeguards they may have the incentive and ability to engage in anticompetitive behavior against ISPs that must obtain basic network services from the BOCs in order to provide their information service offerings. For example, BOCs may discriminate against competing ISPs by denying them access to services and facilities or by providing ISPs with access to services and facilities that is inferior to that provided to the BOCs' own information services operations. BOCs also may allocate costs improperly by shifting costs they incur in providing information services, which are not regulated under Title II of the Act, to their basic services.

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

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

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

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

45. Since the adoption of *Computer I* in 1971, the Commission has employed various regulatory tools, including structural separation, to prevent access discrimination and cost misallocation, first by AT&T and then, after divestiture, by the BOCs, in providing information services. In *Computer I*, we imposed a "maximum separation policy" on the provision of "data processing" services by common carriers other than AT&T and its Bell System subsidiaries.¹³⁵ We continued to impose structural separation on the provision of enhanced services by AT&T and its Bell System subsidiaries in *Computer II*,¹³⁶ until we replaced structural separation with a system of nonstructural safeguards in 1986, in *Computer III*.

46. The Commission has long recognized both the benefits as well as the costs of structural separation as a regulatory tool.¹³⁷ The Commission noted in *Computer II* that a

¹³⁵ Under "maximum separation," we required that the separate entity maintain its own books of account, have separate officers and separate operating personnel, and utilize computer equipment and facilities separate from those of the carrier in providing unregulated services. Moreover, a carrier subject to the separation requirement was prohibited from engaging in the sale or promotion of the separate entity's services and from making available any computer capacity or computer system component, used in the provision of its communications service, to others for the provision of unregulated services. *Regulatory and Policy Problems Presented by the Interdependence of Computer and Communication Services and Facilities (Computer I)*, 28 FCC 2d 291, 302-304, ¶¶ 38-34 (1970) (*Tentative Decision*); 28 FCC 2d 267 (1971) (*Final Decision*), *aff'd in part sub. nom. GTE Service Corp. v. FCC*, 474 F.2d 724 (2d Cir. 1973), *decision on remand*, 40 FCC 2d 293 (1973). We did not establish requirements for AT&T and its subsidiaries based on our assumption that they were precluded from offering any type of data processing services by the terms of an antitrust consent decree then in effect. *See United States v. Western Electric Co.*, 13 Rad. Reg. (P&F) 2143, 1956 Trade Cas. (CCH) 71,134 (D.N.J. 1956).

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

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

structural separation requirement reduces firms' ability to engage in anticompetitive activity without detection because the extent of joint and common costs between affiliated firms is reduced, transactions must take place across corporate boundaries, and the rates, terms, and conditions on which services will be available to all potential purchasers must be made publicly available.¹³⁸ Structural separation thus is useful as an enforcement tool and as a deterrent, because firms are less likely to engage in anticompetitive activity the more easily it can be detected. As for costs, the Commission recognized that structural separation increases firms' transaction and production costs,¹³⁹ but did not agree with arguments presented at the time that structural separation reduces innovation.¹⁴⁰

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

¹³⁸ *Id.* at 462, ¶ 205.

¹³⁹ *Id.* at 461, ¶¶ 202-03.

¹⁴⁰ *Id.* at 464-66, ¶¶ 211-14.

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

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

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

facilities and personnel, limitations on joint marketing, and deprivation of economies of scope.¹⁴⁴ The Ninth Circuit upheld the Commission's analysis of the costs of structural separation in *California I* and *California III*.¹⁴⁵

2. Effect of the 1996 Act and Other Factors

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

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

¹⁴⁵ The *California I* court stated that the record "suffice[d] to support" our finding that "separation has discouraged innovation in developing and marketing new enhanced services technologies, has prevented the BOCs from providing customers with efficient packages of basic and enhanced services, and has generally created inefficiencies by forcing the BOCs to maintain duplicate organizations and facilities." *California I*, 905 F.2d at 1231. The *California III* court stated that "[p]etitioners have not raised any new claims with regard to the [Commission's] analysis of the costs of structural separation which would require us to reconsider our conclusion in *California I*." *California III*, 39 F.3d at 925.

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

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

permit the BOC to choose between a *Computer II* and an Act-mandated affiliate under section 272 or section 274, or whether we should mandate one of these types of affiliates.

a. Section 251 and Local Competition

49. Competition in the local exchange and exchange access markets is the best safeguard against anticompetitive behavior. BOCs are unable to engage successfully in discrimination and cost misallocation to the extent that competing ISPs have alternate sources of access to basic services. Stated differently, when other telecommunications carriers, such as interexchange carriers (IXCs) or cable service providers, compete with the BOCs in providing basic services to ISPs, the BOCs are less able to engage successfully in discrimination and cost misallocation because they risk losing business from their ISP customers for basic services to these competing telecommunications carriers.¹⁴⁸

50. As discussed above, the 1996 Act affirmatively promotes local competition. Sections 251 and 253, among other sections, are intended to eliminate entry barriers and foster competition in the local exchange and exchange access markets.¹⁴⁹ Indeed, the market for local exchange and exchange access services has begun to respond to some degree to the pro-competitive mandates of the 1996 Act. Some ISPs, for example, currently are obtaining basic services that underlie their information services from competing providers of telecommunications services that have entered into interconnection agreements with the BOCs pursuant to section 251.¹⁵⁰

51. We recognize that the BOCs remain the dominant providers of local exchange and exchange access services in their in-region states,¹⁵¹ and thus continue to have the ability and incentive to engage in anticompetitive behavior against competing ISPs. On the other hand, the movement toward local exchange and exchange access competition should, over time, decrease and eventually eliminate the need for regulation of the BOCs to ensure that they do not engage in

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

¹⁴⁹ See discussion *supra* ¶¶ 18-19.

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

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

access discrimination or cost misallocation of their basic service offerings.¹⁵² The Commission has previously concluded that the nonstructural safeguards established in *Computer III* could combat such anticompetitive behavior as effectively as structural separation requirements, but in a less costly way.¹⁵³ We thus tentatively conclude that the de-regulatory, pro-competitive provisions of the 1996 Act, and the framework the 1996 Act set up for promoting local competition, are consistent with, and provide additional support for, the continued application of the Commission's current nonstructural safeguards regime for BOC provision of intraLATA information services. We seek comment on this tentative conclusion.

b. Structural Separation and the 1996 Act

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

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

54. In the *Non-Accounting Safeguards Order* we recognized that section 272 on its face does not require the BOCs to offer intraLATA information services through a separate

¹⁵² See discussion *supra* ¶¶ 29-36.

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

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

affiliate, and deferred to this proceeding the question of whether the Commission should exercise its general rulemaking authority to do so.¹⁵⁵ We find it significant that Congress limited the separate affiliate requirement in section 272 to BOC provision of most interLATA information services, interLATA telecommunications services, and manufacturing, and in section 274 to BOC provision of electronic publishing services.¹⁵⁶ We therefore tentatively conclude that Congress' decision to impose structural separation requirements in sections 272 and 274, while relevant to our cost-benefit analysis, does not in itself warrant a return to structural separation for BOC provision of intraLATA information services not subject to those sections. We seek comment on this tentative conclusion.

55. Congress's decision to mandate structural separation only for certain information services does not necessarily foreclose the Commission from mandating or allowing structural separation for other information services. We recognize that, for example, the statutory separate affiliate requirements may reduce the cost of returning to a structural separation regime for BOC provision of intraLATA information services, given that the BOCs already are required to establish at least one structurally separate affiliate in order to provide the services covered by sections 272 and 274.¹⁵⁷ Some BOCs may find it more efficient to provide all of their information services through a statutorily-mandated affiliate. In addition, it may be in the public interest for the Commission to prescribe a uniform set of regulations for BOC provision of both intraLATA and interLATA information services, by requiring, for example, that BOCs provide all information services through an affiliate that complies with the statute. This approach would eliminate the need to distinguish between intraLATA and interLATA information services for purposes of regulation and, consequently, lower compliance and enforcement costs.

56. On the other hand, mandatory structural separation would entail increased transaction and production costs for the BOCs, as discussed above.¹⁵⁸ In addition, in the *Computer III Further Remand Notice* we noted that all of the BOCs currently are offering some information services on an integrated basis pursuant to CEI plans approved by the Commission.¹⁵⁹ Thus, our cost-benefit analysis should take into account the costs today of returning to structural separation. These would include the personnel, operational, and other changes the BOCs would

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

¹⁵⁶ See 47 U.S.C. § 272.

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

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

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

have to undergo in order to reinstate a regime of structural separation, and the service disruptions, lower service quality, reduced innovation, and higher user rates that may result.¹⁶⁰ We must also consider the effect on the public of the potential delay in the development of new technologies and information services by the BOCs that may result. In addition, once the separation requirements under sections 272 and 274 sunset,¹⁶¹ structural separation for intraLATA information services based on the existence of the statutorily-mandated affiliates would have to be reexamined.

57. We also recognize the benefits of a flexible, regulatory framework that would allow the BOCs, consistent with the public interest, to structure their operations as they see fit in order to maximize efficiencies and thus provide greater benefits to consumers. We note that, under our current rules, a BOC may provide an intraLATA information service either on an integrated basis pursuant to an approved CEI plan or on a structurally separated basis pursuant to the Commission's *Computer II* rules.¹⁶² SBC has argued that the BOCs continue to need this type of flexibility to provide intraLATA information services either on an integrated basis, subject to appropriate safeguards, or through a separate affiliate, because the most appropriate form of regulation varies service-by-service, depending on the relative significance of cost considerations and other factors.¹⁶³ Although the Commission may need to devote more resources to administer and enforce multiple regulatory regimes, this approach would allow the BOCs to structure their intraLATA information service offerings more in accordance with their business needs. In addition, such an approach may minimize the risk of service disruptions, since the BOCs would

¹⁶⁰ As discussed in the *Computer III Further Remand Notice*, the BOCs have indicated that they would have to "relocate hundreds of pieces of [information] services equipment, transfer or hire hundreds of dedicated [information] services personnel and replace integrated sales personnel with a dedicated direct sales force." *Computer III Further Remand Notice*, 10 FCC Rcd at 8386, 87, ¶ 40 (citing Joint Contingency Petition for Interim Waiver of the *Computer II* Rules at Exhibit B (Nov. 14, 1994) (*Interim Waiver Petition*)). In 1991, US West and Pacific Bell estimated that the one-time costs of converting from integrated to structurally separated provision of voice mail service alone would be as high as \$10-\$15 million. *Id.* (citing *BOC Safeguards Order*, 6 FCC Rcd at 7621, ¶ 104). The BOCs also estimated that converting to structural separation would result in price increases for information services between 30 and 80 percent. *Id.*

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

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

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

not have to change the manner in which they are providing their current intraLATA information service offerings.¹⁶⁴

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

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

C. Comparably Efficient Interconnection (CEI) Plans

1. Proposed Elimination of Current Requirements

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

¹⁶⁵ See *supra* ¶ 47.

¹⁶⁶ See *supra* ¶ 44.

¹⁶⁷ See *supra* ¶¶ 49-51.

¹⁶⁸ See *supra* note 18.

60. In the *Interim Waiver Order* adopted in response to the *California III* decision, the Bureau allowed the BOCs to continue to provide existing enhanced services on an integrated basis, provided that they filed CEI plans for those services.¹⁶⁹ In addition, the Bureau required the BOCs to file CEI plans for new enhanced services they propose to offer, and to obtain the Bureau's approval for these plans before beginning to provide service.¹⁷⁰ We concluded that the partial vacation of the *BOC Safeguards Order in California III* reinstated the service-specific CEI plan regime, augmented by implementation of ONA, until the Commission concluded its remand proceedings.¹⁷¹ BOCs were also required to comply with the requirements established in their approved ONA plans, because we had previously determined that ONA requirements are independent of the removal of structural separation requirements.¹⁷²

61. In this Further Notice, we tentatively conclude that we should eliminate the requirement that BOCs file CEI plans and obtain Bureau approval for those plans prior to providing new information services. We note that CEI plans were always intended to be an interim measure, designed to bridge the gap between the Commission's decision to lift structural separation in the *Computer III Phase I Order* and the implementation of ONA. While CEI plans have been effective as interim safeguards,¹⁷³ we tentatively conclude that they are not necessary to

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

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

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

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

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

protect against access discrimination once the BOCs are providing information services pursuant to approved ONA plans, which they have been for several years.¹⁷⁴ ONA provides ISPs an even greater level of protection against access discrimination than CEI. Under ONA, not only must the BOCs offer network services to competing ISPs in compliance with the nine CEI "equal access" parameters, but the BOCs must also unbundle and tariff key network service elements beyond those they use to provide their own enhanced services offerings.¹⁷⁵ BOCs are also subject to ONA amendment requirements that constitute an additional safeguard against access discrimination following the lifting of structural separation.¹⁷⁶

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

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

California III, 39 F.3d at 927.

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

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

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

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

safeguards regime, which was to promote and speed introduction of new information services, benefiting the public by giving them access to innovative new technologies.¹⁷⁸

64. For the reasons outlined above, we tentatively conclude that we should eliminate the requirement that BOCs file CEI plans and obtain Bureau approval for those plans prior to providing new information services. We believe the significant burden imposed by these requirements on the BOCs and the Commission outweighs their possible incremental benefit as additional safeguards against access discrimination.¹⁷⁹ In this light, we tentatively conclude that lifting the CEI plan requirement will further our statutory obligation to review and eliminate regulations that are "no longer necessary in the public interest."¹⁸⁰ We seek comment on this tentative conclusion and our supporting analysis. Parties who disagree with this tentative conclusion should address whether there are more streamlined procedures that could be adopted as an alternative to the current CEI filing requirements.

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

2. Treatment of Services Provided Through 272/274 Affiliates

a. Section 272

66. In the *Non-Accounting Safeguards Order*, we noted that section 272 of the Act imposes specific separate affiliate and nondiscrimination requirements on BOC provision of "interLATA information services," but does not address BOC provision of intraLATA

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

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

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

¹⁸¹ See *infra* Part IV.D.

information services.¹⁸² We concluded that, pending the conclusion of the *Computer III Further Remand* proceeding, BOCs may continue to provide intraLATA information services on an integrated basis, in compliance with the Commission's nonstructural safeguards established in *Computer III* and ONA.¹⁸³

67. The *Non-Accounting Safeguards Order* also raised the related issue of whether a BOC that provides all information services (both intraLATA and interLATA) through a section 272 separate affiliate satisfies the Commission's *Computer II* separate subsidiary requirements, and therefore does not have to file a CEI plan for those services.¹⁸⁴ We noted that the record in the *Non-Accounting Safeguards Order* was insufficient to make this determination, and that we would examine this issue in the *Computer III Further Remand* proceeding.

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

69. We reach our tentative conclusion for several reasons. First, we believe that the concerns underlying the Commission's *Computer II* requirements regarding access discrimination and cost misallocation are sufficiently addressed by the accounting and non-accounting requirements set forth in section 272 and the Commission's orders implementing this section.¹⁸⁷ Second, after a BOC receives authority under section 271 to provide interLATA services through a section 272 affiliate, the BOC in many cases may want to provide a seamless information service

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

¹⁸³ *Id.* at 21969-71, ¶¶ 132, 134.

¹⁸⁴ *Id.* at 21972, ¶ 137.

¹⁸⁵ *See supra* Part IV.C.1.

¹⁸⁶ *See supra* note 18.

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

to customers that would combine both the inter- and intraLATA components of such service. For the Commission to require that the BOC also receive approval under a CEI plan for the intraLATA component of such service is, in our view, unnecessary, and likely to delay the provision of integrated services that would be beneficial to consumers. We seek comment on this tentative conclusion and supporting analysis.

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

b. Section 274

71. In the *Telemessaging and Electronic Publishing Order*, we concluded that the Commission's *Computer II*, *Computer III*, and *ONA* requirements continue to govern the BOCs' provision of intraLATA electronic publishing services.¹⁹⁰ We found, however, that the record was insufficient to determine whether BOC provision of electronic publishing through a section 274 affiliate satisfied all the relevant requirements of *Computer II*, such that the BOC would not have

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

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

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

to file a CEI plan for that service.¹⁹¹ We noted that we would consider that issue, as well as other issues raised regarding the revision or elimination of the *Computer III/ONA* requirements, in the *Computer III Further Remand* proceeding.

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

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

3. Treatment of Telemessaging and Alarm Monitoring Services

74. In the *Telemessaging and Electronic Publishing Order* and the *Alarm Monitoring Order*, respectively, we concluded that the Commission's *Computer II*, *Computer III*, and ONA requirements continue to govern the BOCs' provision of intraLATA telemessaging services¹⁹³ and alarm monitoring services.¹⁹⁴ Because neither section 260 nor section 275 imposes separation

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

¹⁹² *See supra* note 18.

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

¹⁹⁴ *See Alarm Monitoring Order*, 12 FCC Rcd at 3848-49, ¶ 55. We also found that section 275 applies to the provision by the BOCs of both intraLATA and interLATA alarm monitoring services. *Id.* at 3831-32, ¶ 16. Section 275(a)(1), however, generally prevents the BOCs from engaging in the provision of alarm monitoring service until February 8, 2001. *See* 47 U.S.C. § 275. Because Ameritech is the only BOC that was authorized to provide alarm monitoring services as of November 30, 1995, we found that Ameritech is the only BOC that

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

4. Related Issues

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

76. We note that section 276 directs the Commission to prescribe a set of nonstructural safeguards for BOC provision of payphone service, which must include, at a minimum, the "nonstructural safeguards equal to those adopted in" the *Computer III*

qualifies for "grandfathered" treatment under section 275(a)(2). *See id.* § 275(a)(2); *Alarm Monitoring Order*, 12 FCC Rcd at 3839, ¶ 33. Ameritech provides intraLATA alarm monitoring pursuant to an approved CEI plan, *see Bell Operating Companies Joint Petition for Waiver of Computer II Rules*, 10 FCC Rcd 13758, 13769-70, ¶¶ 72-75 (Com. Car. Bur. 1995) (approving Ameritech's CEI plan for "SecurityLink" service), and interLATA alarm monitoring service pursuant to an MFJ waiver. *See United States v. Western Electric Co.*, No. 82-0192, slip op. (D.D.C. Sept. 8, 1995).

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

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

proceeding.¹⁹⁷ In implementing section 276, the Commission required the BOCs, among other things, to file CEI plans describing how they would comply with various nonstructural safeguards.¹⁹⁸ The Bureau approved the BOCs' CEI plans to provide payphone service on April 15, 1997.¹⁹⁹

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

¹⁹⁷ 47 U.S.C. § 276.

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

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

D. ONA and Other Nonstructural Safeguards

1. ONA Unbundling Requirements

a. Introduction

78. The Commission's ONA unbundling requirements serve both to safeguard against access discrimination and to promote competition and market efficiency in the information services industry. As described above, the Commission conditioned the permanent elimination of the *Computer II* structural separation requirements imposed on the BOCs upon the evolutionary implementation of ONA and other nonstructural safeguards. The ONA requirements, however, have a significance independent of whether they provide the basis for lifting structural separation. In 1990, during the course of the remand proceedings in response to *California I*, the Commission required the BOCs to implement ONA regardless of whether ONA provided the basis for elimination of structural separation. As discussed below, the Commission stated that "[a] major goal of ONA is to increase opportunities for ESPs to use the BOCs' regulated networks in highly efficient ways, enabling ESPs to expand their markets for their present services and develop new offerings as well, all to the benefit of consumers."²⁰⁰ It was for this reason that the Commission applied the ONA requirements to GTE in 1994.²⁰¹

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

b. ONA Unbundling Requirements

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

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

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

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

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

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

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

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

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

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

²⁰⁶ *See supra* notes 78 and 79.

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

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

²⁰⁹ *Id.*

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

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

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

85. As part of the Commission's 1998 biennial review of regulations, we seek comment on whether ONA has been and continues to be an effective means of providing ISPs with access to the BOC/GTE unbundled network services they need to structure efficiently and innovatively their information service offerings. To the extent that commenters assert that ONA is effective or ineffective, we request that they cite to specific instances to support their claims.

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

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

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

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

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

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

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

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

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

89. We further seek comment regarding the role of the NIIF in helping ISPs obtain basic services from the BOCs and GTE. We seek comment, from ISPs in particular, regarding whether they have requested assistance from the NIIF in determining the technical feasibility of offering particular network functionalities as new basic services, and if so, the results obtained. If ISPs have not done so, we request that they tell us why not. We further seek comment on whether we should continue to request that the NIIF perform the function of facilitating ISP ONA requests or whether some other forum or industry group would be more appropriate.²¹⁷

²¹⁶ See *infra* ¶¶ 92-96.

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

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

91. Specifically, we seek comment on how the Commission's *Computer III* or ONA rules may impact the BOCs' incentive to invest in and deploy data network switching technology. For example, the Commission's existing ONA rules require the BOCs to unbundle and separately tariff all basic services. We have interpreted this rule to require a BOC to unbundle and separately tariff a basic service used in the provision of an information service provided by the BOC affiliate, even where the basic service is solely located in, and owned by, the BOC affiliate, not the BOC. This situation may arise, for example, when a frame relay switch²²⁰ is located in, and owned by, the BOC affiliate rather than the BOC. We seek comment on the appropriate treatment of these types of services.

c. Effect of the 1996 Act

(1) Section 251 Unbundling

92. Section 251 of the Act requires incumbent LECs, including the BOCs and GTE, to provide to requesting telecommunications carriers interconnection and access to unbundled network elements at rates, terms, and conditions that are just, reasonable, and nondiscriminatory,

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

²¹⁹ *Id.*

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

and to offer telecommunications services for resale.²²¹ The Act defines "telecommunications carrier" as "any provider of telecommunications services, except that such term does not include aggregators of telecommunications services (as defined in section 226)."²²² As we concluded in the *Local Competition Order*, the term "telecommunications carrier" does not include ISPs that do not also provide domestic or international telecommunications.²²³ Thus, as discussed above, companies that provide both information and telecommunications services are able to request interconnection, access to unbundled network elements, and resale under section 251, but companies that only provide information services ("pure ISPs") are not accorded such rights under section 251.²²⁴

93. Despite this limitation, there are several ways that pure ISPs may be able to obtain benefits from section 251, as discussed in Part III.B above.²²⁵ We recognize, however, that section 251 provides a level of unbundling that pure ISPs do not receive under the Commission's current ONA framework.²²⁶ Unbundling under section 251 includes the physical facilities of the network, together with the features, functions, and capabilities associated with those facilities.²²⁷ Section 251 also requires incumbent LECs to provide for the collocation at the LEC's premises of equipment necessary for interconnection or access to unbundled network elements, under certain conditions. Unbundling under ONA, in contrast, emphasizes the unbundling of basic services, not the substitution of underlying facilities in a carrier's network.²²⁸ ONA unbundling also does not mandate interconnection on carriers' premises of facilities owned by others.²²⁹ These differences may be due to the different policy goals that the two regimes were designed to serve.²³⁰

²²¹ See 47 U.S.C. § 251(c).

²²² 47 U.S.C. § 153(44); see also *id.* § 153(46) for the definition of "telecommunications service."

²²³ *Local Competition Order*, 11 FCC Rcd at 15990, ¶ 995. Conversely, a company that provides both telecommunications and information services must be classified as a telecommunications carrier to the extent that it is acting as a telecommunications carrier (*i.e.*, to the extent that it is providing telecommunications services). *Id.* at 15888, 15990, ¶¶ 992, 995. See also 47 U.S.C. § 153(44).

²²⁴ *Local Competition Order*, 11 FCC Rcd at 15988-15990, ¶¶ 992-95; see *supra* ¶ 32.

²²⁵ See discussion *supra* ¶ 33 .

²²⁶ See *supra* ¶¶ 29-32.

²²⁷ *Local Competition Order*, 11 FCC Rcd at 15631, ¶ 258.

²²⁸ *BOC ONA Order*, 4 FCC Rcd at 41, ¶ 69.

²²⁹ *Id.*

²³⁰ See *supra* ¶ 31.

94. As seen above, section 251 unbundling raises a number of issues relating to the Commission's ONA framework. In the *Non-Accounting Safeguards Order*, for example, some parties stated that section 251's interconnection and unbundling requirements render the Commission's *Computer III* and ONA requirements unnecessary.²³¹ A related issue is whether the Commission, pursuant to our general rulemaking authority, should extend section 251-type unbundling to "pure ISPs."

95. In this Further Notice, we seek comment on whether section 251, as currently applied, obviates the need for ONA. We ask commenters to analyze this issue with respect to both pure ISPs as well as ISPs that are also telecommunications carriers. For example, is ONA unbundling still necessary for ISPs that are also telecommunications carriers for whom section 251 unbundling is available? As for pure ISPs, does the fact that they can obtain the benefits of section 251 by becoming telecommunications carriers, or by partnering with or obtaining basic services from competitive telecommunications providers, render ONA unnecessary? Commenters should address whether ONA should still be available for pure ISPs or other ISPs in areas where there may not be sufficient competition in the local exchange market.

96. We also seek comment on whether it is in the public interest for the Commission to extend section 251-type unbundling to pure ISPs.²³² Put differently, we seek comment regarding whether, pursuant to our general rulemaking authority contained in section 201-205 of the Act, and as exercised in the *Computer III*, *ONA*, and *Expanded Interconnection* proceedings, we can and should extend some or all rights accorded by section 251 to requesting telecommunications carriers to pure ISPs. Commenters who contend that it is in the public interest to extend section 251-type unbundling should address why it is necessary to do so, given the alternative options pure ISPs have to obtain the benefits of section 251 unbundling, as well as the unbundling rights ISPs currently enjoy under the Commission's existing ONA regime. Commenters should also address whether the extension of section 251-type unbundling to pure ISPs would be inconsistent with section 251, which by its terms applies only to telecommunications carriers. Similarly, commenters should address whether section 251-type unbundling is appropriate for pure ISPs, given the different purposes section 251 and ONA serve, and the different approaches to unbundling they encompass. Furthermore, commenters that argue that we should extend the section 251 unbundling framework to pure ISPs should explain what such a framework would include. For example, commenters should address, among other things, whether extending section 251-type unbundling rights to pure ISPs necessarily requires the extension to pure ISPs of

²³¹ See, e.g., *Non-Accounting Safeguards Order*, 11 FCC Rcd at 21968, 21970, ¶¶ 129, 133 (noting NYNEX and Bell Atlantic comments).

²³² We note that related issues have been raised in the *Information Services and Internet Access NOI*, 11 FCC Rcd at 21490-93, ¶¶ 311-18, and may be addressed in that proceeding as well. See also ¶ 8 for a discussion of the Universal Service Report.

any obligations under section 251 or other Title II provisions. Commenters should also address whether extending section 251-type unbundling to pure ISPs obviates the need for ONA.²³³

(2) InterLATA Information Services

97. As discussed above, we tentatively conclude in this Further Notice that the Commission's nonstructural safeguard regime should continue to apply to BOC provision of intraLATA information services.²³⁴ Prior to the enactment of the 1996 Act, however, we did not distinguish between intraLATA and interLATA information services, and we did not explicitly apply our *Computer III* and ONA rules to BOC provision of interLATA information services since the BOCs were prevented under the MFJ from providing interLATA services.²³⁵ Section 272 of the 1996 Act, however, does distinguish between intraLATA and interLATA information services by imposing separation and nondiscrimination requirements on BOC provision of interLATA information services.²³⁶ We seek comment, therefore, on whether the Commission's ONA requirements, as modified or amended by this proceeding, should be interpreted as encompassing BOC provision of interLATA information services. We also seek comment on whether it would be inconsistent with section 272 for the Commission to apply ONA requirements to BOC provision of interLATA information services.

98. In addressing this issue, we ask that commenters take note of the following policy considerations. As noted above, the Commission required the BOCs to implement ONA regardless of whether ONA provided the basis for elimination of structural separation.²³⁷ We stated that ONA serves the public interest, not only by serving as a critical nonstructural safeguard against anticompetitive behavior by the BOCs, but also by promoting the efficient use of the network by ISPs, to the benefit of consumers.²³⁸ On the other hand, section 272 already sets forth the statutory requirements for BOC provision of interLATA information services and,

²³³ We do not address the issue of pricing of elements or services in this Further Notice. Those issues may be addressed in the proceeding on information services and Internet usage. *See Information Service and Internet Access NOI*, 11 FCC Rcd 21354. In addition, in the *Access Reform Report and Order*, we concluded that "ISPs should not be subject to interstate access charges." *Access Reform Report and Order*, *supra* note 148. We are not reexamining that decision here.

²³⁴ *See supra* ¶¶ 48, 59; *see also Non-Accounting Safeguards Order* 11 FCC Rcd at 21969-70, ¶ 132; *Telemessaging and Electronic Publishing Order*, 12 FCC Rcd at 5446, 5455, ¶¶ 200, 221.

²³⁵ *See supra* note 147.

²³⁶ *See* 47 U.S.C. § 272.

²³⁷ *See ONA Remand Order*, 5 FCC Rcd at 7720, ¶¶ 7, 11.

²³⁸ *Id.* It is for this reason that we applied the ONA requirements to GTE as well. *See GTE ONA Order*, 9 FCC Rcd at 4924, 4932-33, ¶¶ 3, 16-18.

therefore, including such services within the Commission's ONA framework may be unnecessary to protect the public interest. Moreover, as discussed above, section 251 unbundling may obviate ONA in some or all respects, including its application to BOC provision of interLATA information services. We also seek comment, to the extent commenters believe that ONA should encompass BOC provision of interLATA information services, on how the Commission's current ONA requirements, including ONA reporting requirements,²³⁹ may need to be changed or supplemented, if at all, to take account of such services.

2. ONA and Nondiscrimination Reporting Requirements

a. Introduction

99. In this section of the Notice, we examine the various reporting requirements imposed on the BOCs and GTE by the *Computer III* and *ONA* regimes. These reporting requirements were originally intended as a safeguard, in that the BOCs and GTE must disclose information that would allow detection of patterns of access discrimination. In addition, certain reporting requirements were intended to promote competition, by providing interested parties (including ISPs and equipment manufacturers) with information about service introduction and deployment by the subject carriers, which may assist such parties in structuring their own operations.

100. We recognize, however, that a number of years have passed since certain of these reporting requirements were imposed, and that some of the information we require to be disclosed may no longer be useful, relevant, or related to either the safeguard or competition promotion functions identified above. Thus, as part of the Commission's 1998 biennial review of regulations, we intend in this proceeding to reexamine each of the reporting obligations imposed on the BOCs and GTE by the *Computer III* and *ONA* regimes, to determine whether any of these requirements should be eliminated or modified, consistent with the 1996 Act.²⁴⁰ We also seek comment on what, if any, different or additional reporting requirements should be imposed to safeguard against anticompetitive behavior by the BOCs and GTE and to promote competition in the provision of information services. In particular, we also seek comment on methods to facilitate access to and use of this information by unaffiliated entities, including small entities.

101. We set forth below the ONA reporting requirements and make specific inquiries regarding each requirement. The following are general inquiries that apply to all ONA reporting requirements. We ask parties to respond to both the specific and general inquiries in their comments on each ONA reporting requirement.

²³⁹ See discussion *infra* ¶¶ 99-116.

²⁴⁰ See *supra* ¶ 6; 47 U.S.C. § 161.

- a. Is the information reported necessary to or helpful in monitoring the compliance of the subject carriers with their unbundling and nondiscrimination obligations? If not, why not? Would other types of information be more useful for compliance monitoring or enforcement purposes?
- b. Is this requirement duplicative? In other words, does the Commission currently require other reports that disclose the same or substantially similar information, or serve the same purposes? If so, how should the Commission streamline these requirements?
- c. Do industry groups, such as ATIS and/or NIIF, collect and compile information that is duplicative of that required by the Commission? If so, is that information readily available to interested parties?
- d. Should we continue to require the subject carriers to file this report with the Commission both on paper and on disk, or should we adopt streamlined filing proposals similar to those set forth in the Further Notice of Proposed Rulemaking in the *Non-Accounting Safeguards* proceeding?²⁴¹ Specifically, should we require either:
- i) a certification process whereby the subject carrier must maintain the required information in a standardized format, and file with the Commission an annual affidavit stating: (1) the information is so maintained; (2) the information will be updated in compliance with our rules; (3) the information will be maintained accurately; and (4) how the public will be able to access the information; or
 - ii) electronic posting whereby the subject carriers must make the required information available on the Internet (for example, by posting it on their website) or through another similar electronic mechanism?
- e. If we continue to maintain a paper filing requirement, is the information presented in a clear, comprehensible format? If not, what modifications to the format would improve clarity and accessibility?
- f. If we continue to maintain a paper filing requirement, should we alter the frequency with which we require this report to be filed? If so, what alteration should be made, and what is the basis for that alteration? In the alternative, if we impose a certification process or electronic posting requirement, how often should subject carriers be required to update the information they must maintain? How must the subject carriers maintain historical data, and for what length of time?

²⁴¹ See, e.g., *Non-Accounting Safeguards Order*, 11 FCC Rcd at 22079-86, ¶¶ 362-382.

102. In conjunction with our inquiries elsewhere in this item, we seek to examine, and, if possible, clarify the relationship between the ONA reporting requirements and the other obligations imposed on the subject carriers by ONA. For example we seek comment above on whether we should modify or eliminate the ONA unbundling requirements.²⁴² To the extent that parties argue that we should do so, we request that they comment upon the effect that such action would have on the reporting obligations of the subject carriers. It seems that if the subject carriers were no longer required to unbundle and tariff ONA services, much of the information we currently require to be disclosed in the annual and semi-annual ONA reports would cease to exist. Does this mean that all such reporting requirements should be eliminated? Are there other meaningful reporting requirements that should be imposed instead?

b. Annual ONA Reports

103. The BOCs and GTE are required to file annual ONA reports that include information on: 1) annual projected deployment schedules for ONA service, by type of service (BSA, BSE, CNS), in terms of percentage of access lines served system-wide and by market area;²⁴³ 2) disposition of new ONA service requests from ISPs; 3) disposition of ONA service requests that have previously been designated for further evaluation; 4) disposition of ONA service requests that were previously deemed technically infeasible; 5) information on Signaling System 7 (SS7), Integrated Services Digital Network (ISDN), and Intelligent Network (IN) projected development in terms of percentage of access lines served system-wide and on a market area basis;²⁴⁴ 6) new ONA services available through SS7, ISDN, and IN; 7) progress in the IILC (now NIIF) on continuing activities implementing service-specific and long-term uniformity issues; 8) progress in providing billing information including Billing Name and Address (BNA), line-side Calling Number Identification (CNI), or possible CNI alternatives, and call detail services to ISPs;²⁴⁵ 9) progress in developing and implementing Operation Support Systems (OSS) services and ESP access to those services; 10) progress on the uniform provision of OSS services; and 11) a list of BSEs used in the provision of BOC/GTE's own enhanced services.²⁴⁶ In addition,

²⁴² See *supra* Part IV.D.1.

²⁴³ This information must cover the upcoming three years, and must refer to generic *ONA Services User Guide* names for the services covered, as well as the carrier's own trade name for the service. *BOC ONA Further Amendment Order*, 6 FCC Rcd at 7653, ¶ 9, n.22.

²⁴⁴ SS7 data must be reported by TR 317 and TR 394; ISDN data by Basic Rate Interface (BRI) and Primary Rate Interface (PRI); and IN data by release number or other designation type. *BOC ONA Further Amendment Order*, 6 FCC Rcd at 7660, ¶ 29, n.44.

²⁴⁵ Call detail services allow a telephone system to collect, record, and organize information about telephone calls so the system can be used for a variety of business purposes.

²⁴⁶ *BOC ONA Further Amendment Order*, 6 FCC Rcd at 7677-78 App. B; *GTE ONA Order*, 9 FCC Rcd at 4940-41, ¶¶ 33-35.

the BOCs are required to report annually on the unbundling of new technologies arising from their own initiative, in response to requests by ISPs, or resulting from requirements imposed by the Commission.²⁴⁷

104. We believe that certain aspects of the annual reporting requirements may be outdated and should be streamlined. We seek comment, for example, on whether we should continue to require the subject carriers to continue to report on projected deployment of ONA services (item 1 above), particularly as this information does not appear to change appreciably from year to year. Should we instead require the subject carriers to make a one-time filing of a 5-year deployment schedule at the time a new ONA service is introduced? In addition, should we require the subject carriers to continue to report on the disposition of ONA service requests from ISPs (items 2,3, and 4 above), despite evidence that the frequency of such requests has declined appreciably since the initial implementation of ONA?

105. We seek comment on whether we should continue to require the subject carriers to report on deployment of SS7 (items 5 and 6), which has become available in most service areas. We further seek comment on whether we should continue to require the subject carriers to report on the availability and deployment of ISDN, IN, and AIN services (items 5 and 6). In addition, we seek comment regarding whether the requirement that the BOCs report on "new ONA services available through SS7, ISDN, and IN, and plans to provide these services" (item 6)²⁴⁸ overlaps so significantly with the requirement that they report on the unbundling of new technologies²⁴⁹ that one of these requirements should be eliminated.

106. In addition, we seek comment on whether, and to what extent, we should alter the requirement that carriers report on progress in industry forums regarding uniformity issues. Currently, subject carriers are required to report on progress in the IILC on continuing activities implementing service-specific and long-term uniformity issues (item 7). As a preliminary matter, we note that the functions that used to be performed by the IILC were transferred, as of January 1, 1997, to the NIIF.²⁵⁰ We tentatively conclude that, at a minimum, the ONA reporting requirement should be updated to reflect this change. We believe that the BOCs have agreed to provide to the NIIF periodic updates regarding issues that have been resolved. We seek comment on the nature of such updates to the NIIF, including specifically what information the BOCs provide. We further seek comment regarding whether the information from such updates is comprehensive enough, and sufficiently accessible to interested parties, to allow us to eliminate

²⁴⁷ *BOC ONA Second Further Amendment Order*, 8 FCC Rcd at 2608, ¶ 10.

²⁴⁸ *BOC ONA Further Amendment Order*, 6 FCC Rcd at 7677-78, App. B.

²⁴⁹ *BOC ONA Second Further Amendment Order*, 8 FCC Rcd at 2608, ¶ 10.

²⁵⁰ *See supra* note 87.

the ONA reporting requirement covering progress of matters in the NIIF. In the alternative, we seek comment regarding whether there are other sources of information produced by or for ATIS or the NIIF that may reasonably substitute for this ONA reporting requirement.

107. We seek comment on whether we should continue to require the subject carriers to report on progress in providing billing information and call detail services to ISPs (item 8). We seek comment on whether we should continue to require the subject carriers to report on progress in developing, implementing, and providing access to Operation Support Systems (OSS) services (items 9 and 10). We believe it is important for such information to continue to be publicly available. We recognize, however, that such information may be more appropriately provided pursuant to other statutory provisions. For example, we issued a Public Notice on June 10, 1997, asking for comment on LCI's petition for expedited rulemaking to establish reporting requirements, performance, and technical standards for OSS in the context of section 251 of the Act.²⁵¹ We seek comment on the appropriate forum for collecting information about OSS and whether continued reporting under *Computer III* is necessary in light of other pending Commission proceedings. We further seek comment on what, if any, changes we should make to the ONA OSS reporting requirements, to better reflect the obligations with respect to OSS imposed on carriers in the *Local Competition Order*.²⁵²

c. Semi-Annual ONA Reports

108. In addition to the annual ONA reports discussed above, the BOCs and GTE are required to file semi-annual ONA reports.²⁵³ These semi-annual reports include: (1) a consolidated nationwide matrix of ONA services and state and federal ONA tariffs;²⁵⁴ (2) computer disks and printouts of data regarding state and federal tariffs; (3) a printed copy and a diskette copy of the *ONA Services User Guide*;²⁵⁵ (4) updated information on 118 categories of

²⁵¹ *Comments Requested on Petition for Expedited Rulemaking to Establish Reporting Requirements and Performance and Technical Standards for Operation Support Systems*, Public Notice, RM 9101, DA 97-1211 (rel. June 10, 1997) (*LCI OSS Petition*).

²⁵² *See Local Competition Order*, 11 FCC Rcd at 15763-15768, ¶¶ 516-528.

²⁵³ *BOC ONA Further Amendment Order*, 6 FCC Rcd at 7678, App. B; *GTE ONA Order*, 9 FCC Rcd at 4940-41, ¶¶ 33-35.

²⁵⁴ Currently, the BOCs prepare a consolidated, nationwide matrix of their ONA services and the federal and state tariffing status of each. GTE prepares and files a matrix, following the format established by Bellcore, showing its own ONA services and their federal and state tariffing status.

²⁵⁵ The *ONA Services User Guides* filed by the BOCs contain three parts: 1) a generic Services Description section (this information is identical for all the BOCs; it is supplied both on paper and on diskette); 2) a BOC-specific Tariff Reference section listing the BOC's ONA tariffs on a state-by-state basis (supplied on paper and on diskette); and 3) Wire Center Deployment information (supplied on diskette only). GTE also files all three types of

network capabilities requested by ISPs and how such requests were addressed, with details and matrices;²⁵⁶ and 5) updated information on BOC responses to the requests and matrices.

109. Considerable portions of the semi-annual reports filed by the BOCs appear to be redundant, as each of the BOCs files identical information. This generic information includes the ONA service matrix and the Services Description section of the *ONA Services User Guide*, as well as information on the 118 network capabilities originally requested by ISPs, and how the BOCs collectively have responded to these requests. Bell Communications Research, Inc. (Bellcore) originated and, until its spin-off earlier this year, prepared these portions of the BOCs' semi-annual reports; currently, an organization called the National Telecommunications Alliance (NTA) has assumed this responsibility. We see no benefit to continuing to require each of the BOCs separately to file the generic portions of the semi-annual report, particularly as there appear to be few changes in this information from year to year. Thus, we tentatively conclude that the BOCs should be permitted to make one consolidated filing (or posting) for all generic information they currently submit in their semi-annual reports. We seek comment on this tentative conclusion. We further seek comment on whether we should allow GTE to join in this consolidated filing or posting (to the extent that this arrangement would be mutually agreeable to the parties) with respect to the information it files that overlaps with that filed by the BOCs.

110. In addition, we seek comment on the frequency with which we require the subject carriers to file the information contained in the semi-annual ONA reports. In particular, we inquire as to whether we should reduce the filing frequency, and restructure the semi-annual reports to become part of the annual ONA reports filed by the subject carriers. A reduction in filing frequency would decrease the burden imposed on the subject carriers, without, we believe, significantly affecting the quality or utility of the information supplied, much of which is either generic or rather static in nature, or is available through other means (for example, in the state and federal tariffs filed by the subject carriers).

111. We also seek comment regarding whether certain information required in the semi-annual reports overlaps with the information required in the annual reports. For example, in the annual ONA reports, the Commission requires the BOCs and GTE to supply information on the disposition of several categories of ONA requests,²⁵⁷ whereas in the semi-annual reports, the Commission requires the BOCs and GTE to supply information regarding how they have

information, including: 1) a Services Description section that follows the format established by the BOCs (on paper and on diskette); 2) GTE's own Tariff Reference section (on paper and on diskette); and 3) Wire Center Deployment information (supplied on diskette only).

²⁵⁶ See *BOC ONA Order*, 4 FCC Rcd at 25-27, ¶¶ 31-36.

²⁵⁷ *BOC ONA Further Amendment Order*, 6 FCC Rcd at 7677-78, App. B.

responded to ISP requests for the existing 118 categories of network capabilities.²⁵⁸ These separate requirements seem to elicit similar, if not identical, information. To the extent there is overlap, we seek comment regarding whether these requirements may be simplified and consolidated, or, in the alternative, whether either or both sets should be eliminated entirely. We also seek comment on other, similar, overlaps among the ONA reporting requirements, and what we should do to eliminate the burdens or inefficiencies associated with them.

d. Nondiscrimination Reports

112. The BOCs and GTE are also required to establish procedures to ensure that they do not discriminate in their provision of ONA services, including the installation, maintenance, and quality of such services, to unaffiliated ISPs and their customers.²⁵⁹ For example, they must establish and publish standard intervals for routine installation orders based on type and quantity of services ordered, and follow these intervals in assigning due dates for installation, which are applicable to orders placed by competing service providers as well as orders placed by their own information services operations.²⁶⁰ In addition, they must standardize their maintenance procedures where possible, by assigning repair dates based on nondiscriminatory criteria (e.g., available work force and severity of problem), and handling trouble reports on a first-come, first-served basis.²⁶¹

113. In order to demonstrate compliance with the nondiscrimination requirements outlined above, the BOCs and GTE must file quarterly nondiscrimination reports comparing the timeliness of their installation and maintenance of ONA services for their own information services operations versus the information services operations of their competitors.²⁶² If a BOC

²⁵⁸ *BOC ONA Further Amendment Order*, 6 FCC Rcd at 7678, App. B; *GTE ONA Order*, 9 FCC Rcd at 4940-41, ¶¶ 33-35. The semiannual reports include a filing of a matrix of BOC and GTE ONA services and state and federal tariffs; data regarding state and federal tariffs; the *ONA Services Users Guide*; and other updated information in the areas of ISP requests, BOC and GTE responses, and services offered. *Id.*

²⁵⁹ *Computer III Phase II Order*, 2 FCC Rcd at 3084, ¶¶ 88-89.

²⁶⁰ *BOC ONA Order*, 4 FCC Rcd at 242, ¶ 467. The installation process is tracked by mechanized systems, which must assign available facilities and equipment in a nondiscriminatory manner, without regard to the identity of the customer ordering the service. *Id.* at 243, 244, ¶¶ 468, 472.

²⁶¹ *BOC ONA Order*, 4 FCC Rcd at 243, ¶ 470.

²⁶² *Computer III Phase II Order*, 2 FCC Rcd at 3086, ¶ 98. BOCs were also required to file other, similar quarterly installation and maintenance reports regarding their provision of services to affiliated and unaffiliated CPE vendors. See *Furnishing of Customer Premises Equipment by the Bell Operating Telephone Companies and the Independent Telephone Companies*, CC Docket No. 86-79, Report and Order, 2 FCC Rcd 143, 155, ¶ 84 (1987) (*BOC CPE Relief Order*), modified on recon. 3 FCC Rcd 22 (1987) (*BOC CPE Relief Reconsideration Order*). These filing requirements were recently eliminated by the Bureau. See *Revision of Filing Requirements*,

or GTE demonstrates in its ONA plan that it lacks the ability to discriminate with respect to installation and maintenance services, and files an annual affidavit to that effect, it may modify its quarterly report to compare installation and maintenance services provided to its own information services operations with services provided to a sampling of all customers.²⁶³ In their quarterly reports, the BOCs and GTE must include information on total orders, due dates missed, and average intervals for a set of service categories specified by the Commission,²⁶⁴ following a format specified by the Commission.²⁶⁵

114. We tentatively conclude that the nondiscrimination obligations for provisioning and performing maintenance activities established by *Computer III* continue to apply to the BOCs and GTE. We seek comment, however, on whether the current quarterly installation and

CC Docket No. 96-23, 11 FCC Rcd 16326 (Com. Car. Bur. 1996) (*Revision of Filing Requirements Order*).

²⁶³ *Computer III Phase II Reconsideration Order*, 3 FCC Rcd at 1161, ¶ 84. In addition, the *Computer III Phase II Order* originally imposed a requirement to report on the quality and reliability of ONA services BOCs provided to their own enhanced services operations versus their enhanced services competitors. *Computer III Phase II Order*, 2 FCC Rcd at 3086, ¶ 98. This requirement was replaced with an annual affidavit, signed by the officer principally responsible for installation procedures, attesting that the BOC had followed installation procedures described in the BOC's ONA plan, and that the BOC had not, in fact, discriminated in the quality of services it had provided. *Computer III Phase II Reconsideration*, 3 FCC Rcd at 1160, ¶ 76.

²⁶⁴ *BOC ONA Reconsideration Order*, 5 FCC Rcd at 3093-94, ¶¶ 77-80, and App. B. The specified service categories include: (1) Circuit Switched Line: Business Line, PBX, Centrex, WATS, Mobile, Feature Group A, Foreign Exchange; (2) Circuit Switched Trunk: Feature Group B, Feature Group D, DID (Line and Trunk); (3) Packet Switched Services (X.25 and X.75): Packet DDD Access Line, Packet Synchronous Access Line, Packet Asynchronous Access Line; (4) Dedicated Metallic: Protection Alarm, Protection Relaying, Control Circuit; (5) Dedicated Telegraph Grade: Telegraph Grade 75 Baud, Telegraph 150 Baud; (6) Dedicated Voice Grade: Voice Non-Switched Line, Voice Switched Line, Voice Switched Trunk, Voice and Tone-Radio Land Line, Data Low Speed, Basic Data and Voice, Voice and Data-PSN Access Tie Trunk, Voice and Data-SSN Access, Voice and Data-SSN-Intermachine Trunk, Data Extension-Voice Grade Data, Protection Relay Voice Grade, Telephoto and Facsimile; (7) Dedicated Program Audio: Program Audio 200-3500 HZ, Program Audio 100-5000 HZ, Program Audio 50-8000 HZ, Program Audio 50-15000 HZ; (8) Dedicated Video: TV Channel-One Way 15kHz Audio, TV Channel-One Way 5 kHz Audio; (9) Dedicated Digital: Digital Voice Circuit, Digital Data-2.4kb/s, Digital Data-4.8kb/s, Digital Data-9.6kb/s, Digital Data-56kb/s; (10) Dedicated High Capacity Digital: 1.544 MBPS BSA; (11) Dedicated High Capacity Digital (Greater than 1.544 MBPS): Dedicated Digital-3.152 MBPS, Dedicated Digital-6.312 MBPS, Dedicated Digital-44.736 MBPS, Dedicated Digital-45 MBPS or Higher; (12) Dedicated Alert Transport; (13) Dedicated Derived Channel; (14) Dedicated Network Access Link (DNAL).

²⁶⁵ *Id.* at 3093-94, ¶¶ 77-80, and App. B. For installation reports, the Commission requires the BOCs and GTE to report separately for their own affiliated enhanced services operations and for all other customers, whether ISPs or other carriers, and to include information, for each specified service category, on: (1) total orders; (2) due dates missed; (3) percentage of due dates missed; and (4) average interval. The BOCs and GTE are also required to report maintenance activities separately for their own affiliated enhanced services operations and for all other customers. For maintenance activities with due dates, carriers are required to report: (1) total orders; (2) due dates missed; (3) percentage of due dates missed; and (4) average interval. For maintenance activities without due dates, carriers are required to report only total orders and average interval.

maintenance reports are an appropriate and effective mechanism for monitoring the BOCs' and GTE's compliance with these nondiscrimination obligations. Are there ways in which the quarterly reports, and the accompanying annual affidavits, may be simplified, clarified, or otherwise made more useful to the Commission and the interested public? Along these lines, we note that the Commission issued a Further Notice of Proposed Rulemaking in conjunction with its *Non-Accounting Safeguards Order*, seeking comment on what types of reporting requirements are necessary to implement the specific nondiscrimination requirement set forth in section 272(e)(1) of the Communications Act.²⁶⁶ While we acknowledge that the nondiscrimination obligations imposed on the BOCs by section 272(e)(1) differ from those imposed by *Computer III*, we seek comment regarding whether the information required to demonstrate compliance with both sets of nondiscrimination requirements is sufficiently similar that we should harmonize the ONA nondiscrimination reporting requirements with the reporting requirements adopted in response to the Further Notice of Proposed Rulemaking in the *Non-Accounting Safeguards* proceeding. We also seek comment on whether we should harmonize the ONA nondiscrimination reporting requirements with reporting requirements being considered in other proceedings, such as in the *LCI OSS Petition*.²⁶⁷

115. We note that, like the BOCs, AT&T was originally required to file quarterly nondiscrimination reports on the provision of installation and maintenance services to unaffiliated providers of enhanced services.²⁶⁸ The Commission modified and reduced these reporting requirements in 1991 and in 1993.²⁶⁹ In 1996, the Bureau eliminated the requirement that AT&T file quarterly installation and maintenance nondiscrimination reports, as well as the requirement

²⁶⁶ *Non-Accounting Safeguards Order*, 11 FCC Rcd at 22079-86, ¶¶ 362-382. Section 272(e)(1) states that BOCs "shall fulfill any requests from an unaffiliated entity 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 to its affiliates." 47 U.S.C. § 272(e)(1).

²⁶⁷ See *supra* ¶ 107 and note 251.

²⁶⁸ See *Computer III Phase I Order*, 104 FCC 2d at 1055-56, ¶ 192; *Computer III Phase II Order*, 2 FCC Rcd at 3086, ¶¶ 98-101; *Computer III Phase II Reconsideration Order*, 3 FCC Rcd at 1159, ¶¶ 66. Like the BOCs, AT&T was also required to file similar quarterly installation and maintenance reports regarding provision of services to affiliated and unaffiliated CPE vendors. See *Furnishing of Customer Premises Equipment and Enhanced Services by American Telephone and Telegraph Co.*, 102 FCC 2d 655, 690-91, ¶¶ 59-60 (1985) (*AT&T Structural Relief Order*), modified in part on reconsideration, 104 FCC 2d 739 (1986) (*AT&T Structural Relief Reconsideration Order*).

²⁶⁹ See *Competition in the Interstate Interexchange Marketplace*, CC Docket No. 90-132, Report and Order, 6 FCC Rcd 5880, 5909 (1991) (*First Interexchange Competition Order*) (eliminating nondiscrimination reporting for AT&T network services subject to maximum streamlined regulation, including Basket 3 services and services not subject to price cap regulation); *Competition in the Interstate Interexchange Marketplace*, CC Docket No. 90-132, Second Report and Order, 8 FCC Rcd 3668 (1993) (*800 Streamlining Order*) (designating AT&T's 800 services as subject to streamlined treatment). Following these modifications, only AT&T's analog private line services remained subject to nondiscrimination reporting requirements.

that AT&T file an annual affidavit²⁷⁰ that its quarterly reports are true and that it has not discriminated in providing installation and maintenance services.²⁷¹

116. The Bureau declined to eliminate the requirement that AT&T file a second affidavit,²⁷² which affirms that AT&T has followed the installation procedures in its ONA plan²⁷³ and has not discriminated in the quality of network services provided to competing enhanced service providers, deferring that determination to the instant proceeding.²⁷⁴ We tentatively conclude that we should no longer require AT&T to file this second affidavit because the level of competition in the interexchange services market is an effective check on AT&T's ability to discriminate in the quality of network services provided to competing ISPs.²⁷⁵ This tentative conclusion is consistent with our previous finding that the competitive nature of the interexchange market provides an important assurance that access to those services will be open to ISPs, and that much of the information of greatest use to ISPs is controlled by LECs such as the BOCs, and not by interexchange carriers.²⁷⁶ We also find that this tentative conclusion comports with our statutory obligation to eliminate regulations that are no longer necessary due to "meaningful economic competition" between providers of such service.²⁷⁷ We seek comment on this tentative conclusion.

3. Other Nonstructural Safeguards

²⁷⁰ See *Computer III Phase II Reconsideration Order*, 3 FCC Rcd at 1161, ¶ 80, n.148.

²⁷¹ See *Revision of Filing Requirements Order*, 11 FCC Rcd at 16332, ¶ 12.

²⁷² See *Computer III Phase II Reconsideration Order*, 3 FCC Rcd at 1159, ¶ 66.

²⁷³ As noted above, AT&T was required to file a modified ONA plan that the Commission approved in 1988, but has not been subject to other ONA reporting requirements. See *supra* note 5.

²⁷⁴ See *Revision of Filing Requirements Order*, 11 FCC Rcd at 16332, ¶ 12.

²⁷⁵ The Commission has determined that the interexchange telecommunications market is substantially competitive. See, e.g., *Policy and Rules Concerning the Interstate, Interexchange Marketplace*, CC Docket No. 96-61, Second Report & Order, 11 FCC Rcd 20730, 20741-43, ¶¶ 21-22 (1996) (*Tariff Forbearance Order*), stay granted, *MCI Telecommunications Corp. v. FCC*, No. 96-1459 (D.C. Cir. filed Feb. 13, 1997); *Motion of AT&T to be Reclassified as a Non-Dominant Carrier*, Order, 11 FCC Rcd 3271, 3278-3279, 3288, ¶¶ 9, 26 (1995) (*AT&T Nondominance Order*), recon. pending; *Competition in the Interstate Interexchange Marketplace*, CC Docket No. 90-132, Report & Order, 6 FCC Rcd 5880, 5887, ¶ 36 (1991) (*First Interexchange Competition Order*). We also note, from a regulatory parity perspective, that no other interexchange carriers are required to file service quality affidavits similar to that required of AT&T.

²⁷⁶ *AT&T ONA Order*, 4 FCC Rcd at 2450, ¶ 4.

²⁷⁷ 47 U.S.C. § 161(a)(2).

a. Network Information Disclosure Rules

117. The Commission's network information disclosure rules seek to prevent anticompetitive behavior by ensuring that ISPs and other interested parties can obtain timely access to information affecting the interconnection of information services to the BOCs', AT&T's, and other carriers' networks. Prior to the 1996 Act, the rules set forth in the Commission's *Computer II* and *Computer III* proceedings governed the disclosure of network information.²⁷⁸ Section 251(c)(5) of the Act requires incumbent LECs to "provide reasonable public notice of changes in the information necessary for the transmission and routing of services using that local exchange carrier's facilities or networks, as well as of any other changes that would affect the interoperability of those facilities or networks."²⁷⁹ The Commission recently adopted network information disclosure requirements to implement section 251(c)(5) in the *Local Competition Second Report and Order*.²⁸⁰ Although we discussed our preexisting network information disclosure requirements in conjunction with the requirements of section 251(c)(5) in the *Local Competition Second Report and Order*, we did not address in that proceeding whether our *Computer II* and *Computer III* network information disclosure requirements should continue to apply independently of our section 251(c)(5) network information disclosure requirements.²⁸¹ We address that issue in this proceeding as part of our 1998 biennial review of regulations, in an effort to eliminate unnecessary and possibly conflicting requirements.

²⁷⁸ The *Computer II* network information disclosure rules are set forth in section 64.702(d)(2) of the Commission's rules and in the *Computer II* proceeding. See 47 C.F.R. § 64.702(d)(2); see, e.g., *Computer II Final Decision*, 77 FCC 2d 384 at 480, ¶ 246; *Computer II Reconsideration Order*, 84 FCC 2d 50 at 82-83, ¶ 95; and *Computer and Business Equipment Manufacturers Association Petition for Declaratory Ruling Regarding Section 64.702(d)(2) of the Commission's Rules and the Policies of the Second Computer Inquiry*, ENF-82-5, Report and Order, FCC 83-182, 93 FCC 2d 1226 (1983) (*Computer II Disclosure Order*). The *Computer III* network information disclosure rules are set forth in the *Computer III Phase I Order* and *Computer III Phase II Order* and other *Computer III* orders. See, e.g., *Computer III Phase I Order*, 104 FCC 2d 958 at 1080-1086, ¶¶ 246-255; *Computer III Phase II Order*, 2 FCC Rcd 3072 at 3086-3093, ¶¶ 102-140. GTE was made subject to the *Computer III* network information disclosure rules in the ONA proceeding. See *Application of Open Network Architecture and Nondiscrimination Safeguards to GTE Corporation*, CC Docket No. 92-256, Report and Order, FCC 94-58, 9 FCC Rcd 4922, 4947-4948, ¶¶ 50-53 (1994) (*GTE ONA Order*).

²⁷⁹ 47 U.S.C. § 251(c)(5). An incumbent LEC is defined in section 251(h).

²⁸⁰ See 47 C.F.R. §§ 51.325-51.335; *Implementation of the Local Competition Provisions of the Telecommunications Act of 1996*, CC Docket No. 96-98, *Interconnection Between Local Exchange Carriers and Commercial Mobile Radio Service Providers*, CC Docket No. 95-185, *Area Code Relief Plan for Dallas and Houston, Ordered by the Public Utility Commission of Texas*, NSD File No. 96-8, *Administration of the North American Numbering Plan*, CC Docket No. 92-237, *Proposed 708 Relief Plan and 630 Numbering Plan Area Code by Ameritech-Illinois*, IAD File No. 94-102, Second Report and Order and Memorandum Opinion and Order, 11 FCC Rcd 19392 (1996) (*Local Competition Second Report and Order*), recon. pending.

²⁸¹ See, e.g., *Local Competition Second Report and Order*, 11 FCC Rcd at 19472, 19476, 19486, 19490, 19491, ¶¶ 173 n.383, 183 n.403, 205, 214, 216 n.486.

118. The rules established pursuant to section 251(c)(5) in some respects appear to duplicate and even exceed the rules established under *Computer II* and *Computer III*, while in other respects they do not. For example, section 251(c)(5) of the Act, and the Commission's rules implementing that section, only apply to incumbent LECs,²⁸² while some of the *Computer II* network information disclosure requirements apply more broadly to "all carriers owning basic transmission facilities."²⁸³ We seek comment, therefore, on the extent to which the Commission should retain its network information disclosure rules established in the Commission's *Computer II* and *Computer III* proceedings in light of the disclosure requirements stemming from section 251(c)(5) of the 1996 Act. As a starting point, we set forth in the following paragraphs a general description of the current network disclosure requirements under *Computer II*, *Computer III*, and section 251(c)(5), and then we ask parties to comment on whether, and why, specific requirements should be retained or eliminated. The following descriptions are not intended to be an exhaustive list of every feature of the Commission's current network disclosure requirements. These descriptions are intended, rather, to serve as a basis for comparison by parties commenting in this proceeding.

119. *Computer II* Network Disclosure Obligations.

a. *Application of the Network Disclosure Obligations.* The *Computer II* network information disclosure rules consist of two requirements: (1) a disclosure obligation which depends on the existence of a *Computer II* separate subsidiary;²⁸⁴ and (2) a disclosure obligation that applies independent of whether the carrier has a *Computer II* separate subsidiary. The Commission initially imposed both requirements on AT&T in the *Computer II Final Decision*.²⁸⁵ The Commission extended disclosure requirement (2) in the *Computer II Reconsideration Order* to "all carriers owning basic transmission facilities" (hereinafter the "all-carrier" rule).²⁸⁶ After divestiture, the Commission extended disclosure requirement (1) to the BOCs insofar as they are providing information services in accordance with the structural separation requirements of *Computer II*.²⁸⁷

²⁸² See 47 U.S.C. § 251(h) for a definition of "incumbent LEC."

²⁸³ *Computer II Reconsideration Order*, 84 FCC 2d at 82, ¶ 95.

²⁸⁴ See 47 C.F.R. § 64.702(d)(2).

²⁸⁵ We initially imposed the *Computer II* structural separation and other requirements, including the network information disclosure rules, on AT&T and GTE in the *Computer II Final Decision*. We later lifted those requirements from GTE in the *Computer II Reconsideration Order*. *Computer II Reconsideration Order*, 84 FCC 2d at 72-73, ¶ 66.

²⁸⁶ *Computer II Reconsideration Order*, 84 FCC 2d at 82-83, ¶ 95.

²⁸⁷ See *Policy and Rules Concerning the Furnishing of Customer Premises Equipment, Enhanced Services and Cellular Communications Equipment by the Bell Operating Companies*, CC Docket 83-115, Report and Order,

b. *Events Triggering the Public Notice Requirement.* The *Computer II* "all-carrier" rule is triggered by implementation of "change[s] . . . to the telecommunications network that would affect either intercarrier interconnection or the manner in which interconnected CPE must operate" ²⁸⁸ The *Computer II* separate affiliate disclosure obligation is triggered by any of three events: (1) the BOC communicates the relevant network information directly to its *Computer II* separate affiliate; (2) such information is used by the BOC or a third party to develop services or products which reasonably can be expected to be marketed by the *Computer II* separate affiliate; or (3) the BOC engages in joint research and development with its *Computer II* separate affiliate, leading to the design or manufacture of any product that either affects the network interface or relies on a not-yet implemented interface. ²⁸⁹

c. *Timing of Public Notice.* Under *Computer II*, the disclosure obligation of the "all-carrier" rule must be met "in a timely manner and on a reasonable basis." ²⁹⁰ The *Computer II* separate affiliate network disclosure obligation requires that disclosure be made to information service competitors of the *Computer II* affiliate "at the same time" disclosure is made directly to the *Computer II* separate affiliate as described in item (1) above. ²⁹¹ If the disclosure requirement is triggered by the events described in items (2) and (3) above, then disclosure must be made at the "make/buy" point, i.e., when the BOC or an affiliated company decides, in reliance on previously undisclosed information, to produce itself or to procure from a non-affiliated company any product, whether it be hardware or software, the design of which either affects the network interface or relies on the network interface. ²⁹²

d. *Types of Information To Be Disclosed.* The *Computer II* "all-carrier" rule encompasses "all information relating to network design . . . , insofar as such information

95 FCC 2d 1117 (1984) (*BOC Separation Order*), *aff'd sub nom. Illinois Bell Telephone Co. v. FCC*, 740 F.2d 465 (7th Cir. 1984), *aff'd on reconsideration*, FCC 84-252, 49 Fed. Reg. 26056 (1984) (*BOC Separation Reconsideration*), *aff'd sub nom. North American Telecommunications Association v. FCC*, 772 F.2d 1282 (7th Cir. 1985).

²⁸⁸ *Computer II Reconsideration Order*, 84 FCC 2d at 81-822, ¶ 92.

²⁸⁹ *See Computer II Disclosure Order*, 93 FCC 2d at 1245, ¶ 60; *see also Computer III Phase I Order*, 104 FCC 2d at 971, ¶ 15.

²⁹⁰ *Computer II Disclosure Order*, 93 FCC 2d at 1228, ¶ 6; *see also Computer II Reconsideration Order*, 84 FCC 2d at 82-83, ¶¶ 93, 95.

²⁹¹ *Computer II Final Decision*, 77 FCC 2d at 480, ¶ 246; *Computer II Disclosure Order*, 93 FCC 2d at 1245, ¶ 60.

²⁹² *See Computer II Disclosure Order*, 93 FCC 2d at 1245, ¶ 60.

affects . . . intercarrier interconnection"293 For the separate affiliate network disclosure requirement, the information required to be disclosed consists of, "at a minimum, . . . any network information which is necessary to enable all [information] service . . . vendors to gain access to and utilize and to interact effectively with [the BOCs'] network services or capabilities, to the same extent that [the BOCs' *Computer II* separate affiliate] is able to use and interact with those network services or capabilities."²⁹⁴ This requirement includes information concerning "network design, technical standards, interfaces, or generally, the manner in which interconnected . . . enhanced services will interoperate with [any of the BOCs'] network."²⁹⁵ In addition to technical information, the information required includes marketing information, such as "commitments of the carrier with respect to the timing of introduction, pricing, and geographic availability of new network services or capabilities."²⁹⁶

e. *How Public Notice Should Be Provided.* Under *Computer II*, carriers subject to the "all-carrier" rule must disclose in their tariffs or tariff support material either the relevant network information or a statement indicating where such information can be obtained, that will allow competitors to use network facilities in the same manner as the subject carrier.²⁹⁷ The separate affiliate network disclosure obligation requires that the BOCs "file with the Commission, within seven calendar days of the date the disclosure obligation arises, a notice apprising the public that the disclosure has taken place and indicating in summary form the nature of the information which has been disclosed [to its *Computer II* separate affiliate], the identity of any source documents and where interested parties can obtain additional details."²⁹⁸ Moreover, when a BOC "files a tariff for a new or changed network service where there has been a prior disclosure to or for the benefit of

²⁹³ *Computer II Reconsideration Order*, 84 FCC 2d at 82-83, ¶ 95; see *Computer II Disclosure Order*, 93 FCC 2d at 1228, 1238, ¶¶ 6, 38.

²⁹⁴ *Computer II Disclosure Order*, 93 FCC 2d at 1237, ¶ 34.

²⁹⁵ *Id.* at 1238, ¶ 36. The information required includes, but is not limited to, "(a) circuit quality (transmission speeds, error rates, bandwidths, equalization characteristics, attenuation, transmission delays, quantization effects, non-linearities etc.); (b) performance specifications for switched systems (connection times, queuing delays, blocking probabilities, etc.); and (c) network protocols (message formats, requirements for synchronizing bits, error detection and correction procedures, signalling procedures, etc.)." *Id.*

²⁹⁶ *Id.* at 1238, ¶ 37.

²⁹⁷ See *Computer II Disclosure Order*, 93 FCC 2d at 1246, ¶ 63.

²⁹⁸ *Id.* at ¶ 64.

[the *Computer II* separate affiliate], the tariff support materials must list any disclosure notices previously filed with the Commission that are relevant to the tariffed offering."²⁹⁹

120. *Computer III* Network Disclosure Obligations.

a. *Application of the Network Disclosure Obligations.* The *Computer III* network information disclosure rules initially were imposed on AT&T and the BOCs in the *Phase I Order* and *Phase II Order*.³⁰⁰ The Commission later extended the *Computer III* network information disclosure rules and other nondiscrimination safeguards to GTE in the *GTE ONA Order*.³⁰¹

b. *Events Triggering the Public Notice Requirement.* The *Computer III* public notice requirement is triggered at the "make/buy" point; that is, when AT&T, any of the BOCs, or GTE "makes a decision to manufacture itself or to procure from an unaffiliated entity, any product the design of which affects or relies on the network interface."³⁰²

c. *Timing of Public Notice.* AT&T, the BOCs, and GTE must disclose the relevant information concerning planned network changes at two points in time. First, they must disclose the relevant technical information at the "make/buy" point. They are permitted, however, to condition this "make/buy" disclosure on the recipient's signing of a nondisclosure agreement, upon which the relevant technical information must be disclosed within 30 days. Second, they must make public disclosure of the relevant technical information a minimum of twelve months before implementation of the change; however, if the planned change can be implemented between six and twelve months following the "make/buy" point, then public notice is permitted at the "make/buy" point, but at a minimum of six months before implementation.³⁰³

d. *Types of Information To Be Disclosed.* Under *Computer III*, the range of information encompassed by the network information disclosure requirements is adopted

²⁹⁹ *Id.*

³⁰⁰ *See Computer III Phase I Order*, 104 FCC 2d 958 (1986); *Computer III Phase II Order*, 2 FCC Rcd 3072 (1987).

³⁰¹ *See GTE ONA Order*, 9 FCC Rcd 4922 (1994).

³⁰² *Computer III Phase I Order*, 104 FCC 2d at 1084, ¶ 252; *see Computer III Phase II Order*, 2 FCC Rcd at 3087, ¶¶ 108, 109.

³⁰³ *See Computer III Phase II Order*, 2 FCC Rcd at 3091-3093, ¶¶ 134-140; *Computer III Phase II Reconsideration Order*, 3 FCC Rcd at 1164-1165, ¶ 116.

from, and identical to, the *Computer II* requirements.³⁰⁴ Specifically, at the "make/buy" point, AT&T, the BOCs, and GTE must disclose that a network change or network service is under development.³⁰⁵ The notice itself need not contain the full range of relevant network information, but it must describe the proposed network service with sufficient detail to convey what the new service is and what its capabilities are.³⁰⁶ The notice must also indicate that technical information required for the development of compatible information services will be provided to any entity involved in the provision of information services and may indicate that such information will be made available only to such entities willing to enter into a nondisclosure agreement.³⁰⁷ Once an entity has entered into a nondisclosure agreement, AT&T, the BOCs, or GTE must provide the full range of relevant information.³⁰⁸

e. *How Public Notice Should Be Provided.* Under the *Computer III* rules, public notice is made through direct mailings, trade associations, or other reasonable means.³⁰⁹

121. Section 251(c)(5) Network Disclosure Obligations.

a. *Application of the Network Disclosure Obligations.* These rules apply to all incumbent LECs, as the term is defined in section 251(h) of the Act.³¹⁰

b. *Events Triggering the Public Notice Requirement.* The incumbent LEC makes a decision to implement a network change that either: (1) affects "competing service providers' performance or ability to provide service; or (2) otherwise affects the ability of the incumbent LEC's and a competing service provider's facilities or network to connect, to exchange information, or to use the information exchanged."³¹¹ Examples of network changes that would trigger the section 251(c)(5) public disclosure obligations include, but are not limited to, changes that affect (1) transmission, (2) signalling standards, (3) call

³⁰⁴ See *Computer III Phase I Order*, 104 FCC 2d at 1085, ¶ 253 n.298.

³⁰⁵ See *Computer III Phase I Order*, 104 FCC 2d at 1084, ¶ 253.

³⁰⁶ *Id.*

³⁰⁷ *Id.*

³⁰⁸ See *supra* note 304. The full range of network information that must be disclosed is defined in the *Computer II Disclosure Order*, 93 FCC 2d at 1236-1238, ¶¶ 31-38, and is summarized in ¶ 119 *supra*.

³⁰⁹ *Computer III Phase I Order*, 104 FCC Rcd at 1084, 1086, ¶¶ 253, 255.

³¹⁰ See 47 U.S.C. § 251(h).

³¹¹ *Local Competition Second Report and Order*, 11 FCC Rcd at 19476, ¶ 182; see also 47 C.F.R. § 51.325.

routing, (4) network configuration, (5) logical elements, (6) electronic interfaces, (7) data elements, and (8) transactions that support ordering, provisioning, maintenance, and billing.³¹²

c. *Timing of Public Notice.* Incumbent LECs must disclose planned network changes at the "make/buy" point,³¹³ but at least twelve months before implementation of the change.³¹⁴ If the planned change can be implemented within twelve months of the "make/buy" point, then public notice must be given at the "make/buy" point, but at least six months before implementation.³¹⁵ If the planned changes can be implemented within six months of the make/buy point, then the public notice may be provided less than six months before implementation, if additional requirements set forth in section 51.333 of the Commission's rules are met.³¹⁶

d. *Types of Information To Be Disclosed.* Under the Commission's regulations, incumbent LECs are required to disclose, at a minimum, "complete information about network design, technical standards and planned changes to the network."³¹⁷ Public notice of planned network changes, at a minimum, shall consist of: (1) the carrier's name and address; (2) the name and telephone number of a contact person who can supply additional information regarding the planned changes; (3) the implementation date of the planned changes; (4) the location(s) at which the changes will occur; (5) a description of the type of changes planned (including, but not limited to, references to technical specifications, protocols, and standards regarding transmission, signalling, routing, and facility assignment as well as references to technical standards that would be applicable to any new technologies or equipment, or that may otherwise affect interconnection); and (6) a description of the reasonably foreseeable impact of the planned changes.³¹⁸

³¹² *Local Competition Second Report and Order*, 11 FCC Rcd at 19476, ¶ 182.

³¹³ 47 C.F.R. § 51.331; *Local Competition Second Report and Order*, 11 FCC Rcd at 19491, ¶ 216. The meaning of the "make/buy" point relevant to section 251(c)(5) is adopted from the *Computer II* and *Computer III* proceedings. See *Local Competition Second Report and Order*, 11 FCC Rcd at 19491, ¶ 216 n.486.

³¹⁴ 47 C.F.R. § 51.331(a); *Local Competition Second Report and Order*, 11 FCC Rcd at 19490, ¶ 214. The timing requirements for public notice under section 251(c)(5) are adopted, with modifications, from the timing requirements for public notice under *Computer III*. *Local Competition Second Report and Order*, 11 FCC Rcd at 19490, ¶ 214.

³¹⁵ 47 C.F.R. § 51.331(a)(1); *Local Competition Second Report and Order*, 11 FCC Rcd at 19490, ¶ 214.

³¹⁶ 47 C.F.R. § 51.331(a)(2); *Local Competition Second Report and Order*, 11 FCC Rcd at 19490-91, ¶ 215.

³¹⁷ *Local Competition Second Report and Order*, 11 FCC Rcd at 19479, ¶ 188.

³¹⁸ 47 C.F.R. § 51.327; *Local Competition Second Report and Order*, 11 FCC Rcd at 19479, ¶ 188.

e. *How Public Notice Should Be Provided.* Network disclosure may be made either: (1) by filing public notice with the Commission in accordance with section 51.329 of the Commission's rules; or (2) providing public notice through industry fora, industry publications, or on the incumbent LEC's own publicly accessible Internet sites, as well as a certification filed with the Commission in accordance with section 51.329 of the Commission's rules.³¹⁹

122. We tentatively conclude that the Commission's rules established pursuant to section 251(c)(5) for incumbent LECs should supersede the Commission's previous network information disclosure rules established in *Computer III*. We also tentatively conclude that the Commission's network disclosure rules established in *Computer II* should continue to apply -- specifically, the *Computer II* separate affiliate disclosure rule should continue to apply to any BOC that operates a *Computer II* subsidiary, and the all-carrier rule should continue to apply to all carriers owning basic transmission facilities. We reach our tentative conclusion regarding the *Computer III* network disclosure rules since, in our view, the 1996 Act disclosure rules for incumbent LECs are as comprehensive, if not more so, than the Commission's *Computer III* disclosure rules. Parties who disagree with this view should explain why all or some aspects of the Commission's *Computer III* disclosure rules are still needed for incumbent LECs in light of the rules established pursuant to section 251(c)(5) of the Act.

123. We recognize, however, that some BOCs may still be providing certain intraLATA information services through a *Computer II* subsidiary, rather than on an integrated basis under the Commission's *Computer III* rules. We tentatively conclude, therefore, that the *Computer II* separate subsidiary disclosure rule should continue to apply in such cases because, for instance, it encompasses marketing information which is not included within the scope of information to be disclosed under section 251(c)(5) and it requires disclosure under a more stringent timetable than that required under section 251(c)(5).³²⁰ We also tentatively conclude that the all-carrier rule should continue to apply to all carriers owning basic transmission facilities, since it is broader in certain respects than section 251(c)(5). First, it applies to all carriers, whereas section 251(c)(5) just applies to incumbent LECs. In addition, the all-carrier rule requires, among other things, the disclosure of network changes that affect end users' CPE, whereas our rules interpreting section

³¹⁹ 47 C.F.R. § 51.329; *Local Competition Second Report and Order*, 11 FCC Rcd at 19483, ¶ 198.

³²⁰ This marketing information includes, for instance, "information which relates to commitments of the [BOC] with respect to the timing of introduction, pricing, and geographic availability of new network services or capabilities." See *supra* ¶ 119; *Computer II Disclosure Order*, 93 FCC 2d at 1238, ¶ 37. Disclosure under the *Computer II* separate affiliate network disclosure requirement must be made to information service competitors at the same time such information is directly disclosed to the BOC's separate affiliate or, in the case of BOC disclosures to third parties for the benefit of the BOC's separate affiliate, disclosure must take place at a "make/buy point" that is more strict than the "make/buy" point which governs disclosure under section 251(c)(5). See *supra* ¶¶ 119, 121; *Computer II Final Decision*, 77 FCC 2d at 480, ¶ 246; *Computer II Disclosure Order*, 93 FCC 2d at 1245, ¶ 60.

251(c)(5) only require the disclosure of information that affects "competing service providers." We seek comment on these tentative conclusions and analyses.

b. Customer Proprietary Network Information (CPNI)

124. The Commission first established its CPNI rules in the *Computer II Final Decision* in 1980 to encourage AT&T, the BOCs, and GTE to develop and market efficient, integrated combinations of information and basic services without the marketing restrictions imposed by structural separation, while protecting the competitive interests of information service competitors.³²¹ While the CPNI rules are an integral part of the Commission's current nonstructural regulatory framework for the provision of information services by AT&T, the BOCs, and GTE, we defer consideration of all CPNI issues relating to our *Computer II* and *Computer III* rules to our *CPNI* rulemaking proceeding.

125. Section 702 of the 1996 Act, which added a new section 222 to the Communications Act of 1934, as amended, sets forth requirements for use of CPNI by telecommunications carriers, including the BOCs. Although the requirements of section 222 were effective upon enactment of the 1996 Act, we issued a *CPNI Notice* on May 17, 1996, which sought comment on, among other things, what regulations we should adopt to implement section 222.³²² We stated in the *CPNI Notice* that the CPNI requirements the Commission previously established in the *Computer II* and *Computer III* proceedings remain in effect pending the outcome of the rulemaking, to the extent they do not conflict with section 222. The *CPNI* proceeding will address whether these pre-existing requirements should be retained, eliminated, extended, or modified in light of the Act.

126. Under the *Computer II* structural separation requirements, AT&T, the BOCs, and GTE were prohibited from jointly marketing their basic services with the enhanced services provided through their separate affiliate. Under the *Computer III* nonstructural safeguards regime, AT&T, the BOCs, and GTE were permitted to engage in joint marketing of basic and enhanced services subject to restrictions on their use of CPNI.³²³ In the *BOC Safeguards Order*,

³²¹ See *Computer II Final Decision*, 77 FCC 2d at 481, ¶ 249.

³²² *Implementation of the Telecommunications Act of 1996: Telecommunications Carriers' Use of Customer Proprietary Network Information and Other Customer Information*, CC Docket No. 96-115, Notice of Proposed Rulemaking, 11 FCC Rcd 12513 at 12515, ¶ 3 (1996) (*CPNI Notice*).

³²³ Specifically, in the *Computer III Phase I Order* we applied to the BOCs on an interim basis, pending adoption of final CPNI rules for the BOCs, the same CPNI restrictions that we imposed on AT&T in the *Computer II AT&T Structural Relief Order*. *Computer III Phase I Order*, 104 FCC 2d at 1089-91, ¶¶ 261-265. We adopted final CPNI rules for BOC provision of information services in the *Computer III Phase II Order*, and reaffirmed these rules in the *Computer III Phase II Reconsideration Order*. *Computer III Phase II Order*, 2 FCC Rcd at 3093-98, ¶¶ 141-76; *Computer III Phase II Reconsideration Order*, 3 FCC Rcd at 1161-64, ¶¶ 85-114.

the Commission strengthened the CPNI rules by requiring that, for customers with more than twenty lines, BOC personnel involved in marketing enhanced services obtain written authorization from the customer before gaining access to its CPNI.³²⁴

127. On March 6, 1992, the Association of Telemessaging Services International, Inc. (ATSI) filed a petition for reconsideration³²⁵ of the *BOC Safeguards Order* in CC Docket No. 90-623, the *Computer III Remand* proceeding. ATSI asked the Commission to modify the *BOC Safeguards Order* by: (1) prohibiting joint marketing of basic and information services; (2) extending the prior authorization requirement for CPNI to all users, regardless of size; and (3) ensuring that users who restrict access to their CPNI continue to receive nondiscriminatory treatment and an adequate level of service.³²⁶ On May 17, 1996, the Commission issued an order dismissing issues (2) and (3) as moot because of the passage of the Telecommunications Act of 1996 and our commencement of a new proceeding to address the obligations of telecommunications carriers with respect to CPNI in light of the new statute.³²⁷ The order also noted that issue (1) remained to be addressed by the Commission.³²⁸ ATSI filed a motion to withdraw its petition for reconsideration in CC Docket No. 90-623³²⁹ and to incorporate its petition into the Commission's *Computer III Further Remand* proceeding in CC Docket No. 95-20, as well as other proceedings, on December 10, 1996.³³⁰ On May 14, 1997, the Common Carrier Bureau partially granted the *ATSI Motion* by agreeing to address in this proceeding

³²⁴ *Computer III BOC Safeguards Order*, 6 FCC Rcd at 7609, ¶ 84.

³²⁵ Petition for Reconsideration of the Association of Telemessaging Services International, Inc., CC Docket No. 90-623, filed Mar. 6, 1992 (*ATSI Petition*).

³²⁶ *ATSI Petition* at 1.

³²⁷ See *Computer III Remand Proceedings: Bell Operating Company Safeguards and Tier 1 Local Exchange Company Safeguards*, CC Docket No. 90-623, and *Rules Governing Telephone Companies' Use of Customer Proprietary Network Information*, CC Docket Nos. 90-623, 92-256; Order, 11 FCC Rcd 16617 (1996).

³²⁸ *Id.* at 16619-20, ¶ 7.

³²⁹ Motion to Withdraw Petition for Reconsideration in *Computer III Remand Proceedings* and To Incorporate the Same in *Computer III Further Remand Proceedings* and Other Proceedings, CC Docket Nos. 90-623, 95-20, 96-149, and 96-152, filed Dec. 10, 1996 (*ATSI Motion*).

³³⁰ ATSI also requested that its petition be incorporated into CC Docket Nos. 96-149 and 96-152, the *Non-Accounting Safeguards* proceeding and the *Telemessaging, Electronic Publishing, and Alarm Monitoring* proceeding, respectively. We denied ATSI's motion to the extent it requested the Commission to incorporate the joint marketing question into the *Non-Accounting Safeguards* proceeding and the *Telemessaging, Electronic Publishing, and Alarm Monitoring Services* proceeding. See *Computer III Remand Proceedings: Bell Operating Company Safeguards and Tier 1 Local Exchange Company Safeguards*, CC Docket No. 90-623, and *Computer III Further Remand Proceedings: Bell Operating Company Provision of Enhanced Services*, CC Docket No. 95-20, Order, 12 FCC Rcd 5899 (1997) (*ATSI Order*).

whether joint marketing of basic services and information services by the BOCs should be prohibited.³³¹

128. We therefore seek comment on the issue raised in the *ATSI Petition*: whether, to the extent the Commission continues to allow the BOCs to provide information services subject to a nonstructural safeguards regime, the BOCs should be prohibited from jointly marketing basic services and information services when these services are provided on an intraLATA basis. To the extent parties support the view that the term "telecommunications service" in the Act encompasses the same set of services as the term "basic service" did under the Commission's previous rules,³³² parties should discuss the issue raised in the ATSI petition in terms of whether joint marketing should be allowed between telecommunications services and information services. As noted in the *ATSI Order*, we do not address this question with respect to interLATA information services, since under section 272 of the Act BOCs must provide interLATA information services pursuant to a section 272 affiliate and subject to the joint marketing provisions in that section. Also, under section 274, BOCs providing electronic publishing, whether on an interLATA or intraLATA basis, must do so pursuant to a section 274 affiliate and subject to the joint marketing rules in that section.

129. In its petition, ATSI argues that joint marketing of basic services and information services harms consumers and diminishes overall competition in the information services market. ATSI alleges that the BOCs have abused the Commission's joint marketing rules by: (1) routing calls to subscribers of competing voice messaging providers to the BOC's own voice messaging service instead; (2) soliciting customers of competing voice messaging providers who contact the BOCs to request other BOC services; (3) providing customers with misleading and disparaging information about the voice messaging services offered by competing providers; and (4) engaging in other unfair practices.³³³ ATSI therefore requests that the Commission prohibit the BOCs from using the same personnel and facilities to market basic services and information services. We seek comment on these issues. We also seek comment on the costs and operational efficiencies or inefficiencies of allowing the BOCs to provide intraLATA information services on an integrated basis, but requiring different personnel and facilities to market basic services and information services.

V. JURISDICTIONAL ISSUES

130. Our authority, pursuant to section 2(a) of the Communications Act, to establish, enforce, modify, or eliminate a regime of safeguards for the provision of information services by

³³¹ See *ATSI Order*, 12 FCC Rcd at 5902.

³³² See discussion *supra* at ¶ 41.

³³³ *ATSI Petition* at 3-6.

the BOCs and GTE is well settled.³³⁴ In addition, the scope of our authority to preempt inconsistent regulation on the part of the states has been established by the Commission in the previous *Computer III* orders and has been affirmed on appeal.

131. In the *Computer III Phase I Order*, the Commission preempted: (1) all state structural separation requirements applicable to the provision of enhanced services by AT&T and the BOCs; and (2) all state nonstructural safeguards applicable to AT&T and the BOCs that were inconsistent with federal safeguards.³³⁵ The *California I* court vacated these preemption actions, on the ground that the Commission had not adequately justified imposing them.³³⁶ In response to the *California I* remand, the Commission narrowed the scope of federal preemption to cover only: (1) state requirements for structural separation of facilities and personnel used to provide the intrastate portion of jurisdictionally mixed enhanced services;³³⁷ (2) state CPNI rules requiring prior authorization that is not required by federal regulation; and (3) state network disclosure rules that require initial disclosure at a time different than the federal rules.³³⁸ The Commission reasoned that such state requirements would thwart or impede the nonstructural safeguards pursuant to which the BOCs may provide interstate enhanced services, and the federal goals such safeguards were intended to achieve.³³⁹ The *California III* court upheld the Commission's narrowly tailored preemption, stating that the Commission had met its burden of demonstrating that it was preempting only state regulations that would negate valid federal regulatory goals.³⁴⁰

132. Thus, we believe that the proposals we make in the current Further Notice, and the options upon which we seek comment, fall within the scope of our authority previously established in the context of this proceeding, as outlined above. To the extent that our proposals go beyond our recognized preemption authority, we ask that commenters identify those proposals and comment on our authority to adopt them.

³³⁴ See *Computer III Phase I Order*, 104 FCC 2d at 1124, ¶ 342 (citing *Computer II Final Decision*, 77 FCC 2d at 432, 486-487, ¶¶ 124, 261-264). See also *California II*, 4 F.3d at 1514-1516 (holding that it is within the FCC's jurisdictional authority to require the federal tariffing of ONA services that are technically compatible with interstate service).

³³⁵ *Computer III Phase I Order*, 104 FCC 2d at 1127-28, ¶ 348.

³³⁶ *California I*, 905 F.2d at 1239-1245.

³³⁷ *BOC Safeguards Order*, 6 FCC Rcd at 7631, ¶ 121. The Commission noted that many cases have recognized the impracticality of separate provision of interstate and intrastate basic communications and cited, among other cases, *Louisiana Public Service Comm'n v. FCC*, 476 U.S. 355, 375 n.4 (1986).

³³⁸ *BOC Safeguards Order*, 6 FCC Rcd at 7631, ¶ 121.

³³⁹ *Id.*

³⁴⁰ *California III*, 39 F.3d at 933.

VI. PROCEDURAL MATTERS

A. Ex Parte Presentations

133. This matter shall be treated as a "permit-but-disclose" proceeding in accordance with the Commission's revised *ex parte* rules, which became effective June 2, 1997. *See Amendment of 47 C.F.R. § 1.1200 et seq. Concerning Ex Parte Presentations in Commission Proceedings*, GC Docket No. 95-21, Report and Order, 12 FCC Rcd 7348, 7356-57, ¶ 27 (citing 47 C.F.R. § 1.1204(b)(1)) (1997). 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. *See* 47 C.F.R. § 1.1206(b)(2), as revised. Other rules pertaining to oral and written presentations are set forth in Section 1.1206(b) as well.

B. Initial Paperwork Reduction Act Analysis

134. This Further Notice contains either a proposed or modified information collection. As part of its 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 information collections contained in this Further Notice, 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 Further Notice; OMB comments are due 60 days from the date of publication of this Further Notice in the Federal Register. Comments should address: (a) whether the proposed collection of information is necessary for the proper performance of the functions of the Commission, including whether the information shall have practical utility; (b) the accuracy of the Commission's burden estimates; (c) ways to enhance the quality, utility, and clarity of the information collected; and (d) ways to minimize the burden of the collection of information on the respondents, including the use of automated collection techniques or other forms of information technology.

C. Initial Regulatory Flexibility Certification

135. The Regulatory Flexibility Act (RFA)³⁴¹ requires that an initial regulatory flexibility analysis be prepared for notice-and-comment rulemaking proceedings, unless the agency certifies that "the rule will not, if promulgated, have a significant economic impact on a substantial number

³⁴¹ The RFA, *see* 5 U.S.C. § 601 *et. seq.*, has been amended by the Contract With America Advancement Act of 1996, Pub. L. No. 104-121, 110 Stat. 847 (1996) (CWAAA). Title II of the CWAAA is the Small Business Regulatory Enforcement Fairness Act of 1996 (SBREFA).

of small entities."³⁴² The RFA generally defines "small entity" as having the same meaning as the terms "small business," "small organization," and "small governmental jurisdiction."³⁴³ In addition, the term "small business" has the same meaning as the term "small business concern" under the Small Business Act.³⁴⁴ A 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).³⁴⁵

136. This Further Notice pertains to the Bell Operating Companies (BOCs), each of which is an affiliate of a Regional Holding Company (RHC), as well as to GTE and AT&T. Neither the Commission nor SBA has developed a definition of "small entity" specifically applicable to the BOCs, GTE, or AT&T. The closest definition under SBA rules is that for establishments providing "Telephone Communications, Except Radiotelephone," which is Standard Industrial Classification (SIC) code 4813. Under this definition, a small entity is one employing no more than 1,500 persons.³⁴⁶ We note that each BOC is dominant in its field of operation and all of the BOCs as well as GTE and AT&T have more than 1,500 employees. We therefore certify that this Further Notice will not have a significant economic impact on a substantial number of small entities. The Commission's Office of Public Affairs, Reference Operations Division, will send a copy of this Further Notice, including this certification, to the Chief Counsel for Advocacy of the Small Business Administration.³⁴⁷ A copy will also be published in the Federal Register.

D. Comment Filing Procedures

137. Pursuant to applicable procedures set forth in Sections 1.415 and 1.419 of the Commission's rules, 47 C.F.R. §§ 1.415, 1.419, interested parties may file comments on or before March 27, 1998, and reply comments on or before April 23, 1998. To file formally in this proceeding, you must file an original and six copies of all comments, reply comments, and supporting comments. If you want each Commissioner to receive a personal copy of your

³⁴² 5 U.S.C. § 605(b).

³⁴³ *Id.* § 601(6).

³⁴⁴ *Id.* § 601(3) (incorporating by reference the definition of "small business concern" in 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."

³⁴⁵ Small Business Act, 15 U.S.C. § 632.

³⁴⁶ 13 C.F.R. § 121.201, SIC code 4813.

³⁴⁷ 5 U.S.C. § 605(b).

comments, you must file an original and eleven copies. Comments and reply comments should be sent to Office of the Secretary, Federal Communications Commission, 1919 M Street, N.W., Room 222, Washington, D.C., 20554, with a copy to Janice Myles of the Common Carrier Bureau, 1919 M Street, N.W., Room 544, Washington, D.C., 20554. Parties should also file one copy of any documents filed in this docket with the Commission's copy contractor, International Transcription Services, Inc., 1231 20th Street, N.W., Washington, D.C., 20036. Comments and reply comments will be available for public inspection during regular business hours in the FCC Reference Center, 1919 M Street, N.W., Room 239, Washington, D.C., 20554.

138. Comments and reply comments must include a short and concise summary of the substantive arguments raised in the pleading. Comments and reply comments must also comply with section 1.49 and all other applicable sections of the Commission's rules.³⁴⁸ We also direct all interested parties to include the name of the filing party and the date of the filing on each page of their comments and reply comments. All parties are encouraged to utilize a table of contents, regardless of the length of their submission.

139. Parties are also asked to submit comments and reply comments on diskette. Such diskette submissions would be in addition to and not a substitute for the formal filing requirements addressed above. Parties submitting diskettes should submit them to Janice Myles of the Common Carrier Bureau, 1919 M Street, N.W., Room 544, Washington, D.C., 20554. Such a submission should be on a 3.5 inch diskette formatted in an IBM compatible form using MS DOS 5.0 and WordPerfect 5.1 software. The diskette should be submitted in "read only" mode. The diskette should be clearly labeled with the party's name, proceeding, type of pleading (comment or reply comments) and date of submission. The diskette should be accompanied by a cover letter.

140. You may also file informal comments or an exact copy of your formal comments electronically via the Internet at <<http://www.fcc.gov/e-file/>> or via e-mail <computer3@comments.fcc.gov>. Only one copy of electronically-filed comments must be submitted. You must put the docket number of this proceeding in the subject line if you are using e-mail (CC Docket No. 95-20), or in the body of the text if by Internet. You must note whether an electronic submission is an exact copy of formal comments on the subject line. You also must include your full name and Postal Service mailing address in your submission.

VII. ORDERING CLAUSES

141. Accordingly, IT IS ORDERED that, pursuant to Sections 1, 2, 4, 10, 11, 201-205, 251, 271, 272, and 274-276, of the Communications Act of 1934, as amended, 47 U.S.C. §§

³⁴⁸ See 47 C.F.R. § 1.49. However, we require here that a summary be included with all comments and reply comments, regardless of length. This summary may be paginated separately from the rest of the pleading (e.g., as "i, ii").

151, 152, 154, 160, 161, 201-205, 251, 271, 272, and 274-276, a FURTHER NOTICE OF PROPOSED RULEMAKING IS ADOPTED.

142. IT IS FURTHER ORDERED that the Commission's Office of Public Affairs, Reference Operations Division, SHALL SEND a copy of this FURTHER NOTICE OF PROPOSED RULEMAKING, including the Initial Regulatory Flexibility Certification, to the Chief Counsel for Advocacy of the Small Business Administration, in accordance with the Regulatory Flexibility Act, *see* 5 U.S.C. § 605(b).

FEDERAL COMMUNICATIONS COMMISSION

Magalie Roman Salas
Secretary

Separate Statement of Commissioner Harold W. Furchtgott-Roth***Computer III* Further Remand Proceedings: Bell Operating Company Provision of Enhanced Services
and
1998 Biennial Regulatory Review -- Review of *Computer III* and ONA Safeguards and Requirements**

Further Notice of Proposed Rulemaking

I support adoption of this Further Notice of Proposed Rulemaking. I question, however, whether the FCC is prepared to meet its statutory obligation to review all of its regulations in 1998.

Contrary to the captioning of this Further NPRM (and at least one other item that the staff has presented to the Commission for decision), we may be neglecting the express directives of a terse but important provision of the Telecommunications Act of 1996. In this provision, codified as Section 11 of the Communications Act, Congress directed the FCC to conduct, beginning in 1998, a biennial review of "*all* regulations issued under [the Act] in effect at the time of the review that apply to the operations or activities of any provider of telecommunications service" and determine whether any of these regulations are "no longer necessary in the public interest as the result of meaningful economic competition between providers of such service." 47 U.S.C. Section 161 (emphasis added). Section 11 also requires that the FCC "repeal or modify any regulation it determines to be no longer necessary in the public interest."

Clearly, Section 11 has two components: a policy against unnecessary regulations and a procedure to find and remove all such regulations every two years. In this Further NPRM, the Commission fully addresses only the policy component of Section 11.

Although the Commission thus appears to have fulfilled its duty to implement the policy of Section 11 in the context of this particular proceeding, I am concerned that -- because of this item's caption and the many references to Section 11 throughout the text -- we may be leaving the misimpression that we also are addressing the procedural requirements of Section 11. To my knowledge, the FCC has no plans to review affirmatively *all* regulations that apply to the operations or activities of any provider of telecommunications service and to make specific findings as to their continued necessity in light of current market conditions. Indeed, the comprehensive and systematic review of all FCC regulations required under Section 11 certainly would take many months to complete, yet we have not published a specific schedule to ensure completion of this task in 1998.

Nor has the Commission issued general principles to guide our "public interest" analysis and decision making process across the wide range of FCC regulations. I believe that, in addition to the direction given us within the law, the public interest determinations we eventually make

pursuant to Section 11 should be made based on a straightforward analysis: regulations are in the public interest only if their benefits significantly outweigh their costs. We have not yet adopted any such guidance.

It is unfortunate that this public discussion of our responsibilities under Section 11 has first surfaced in the context of a seemingly unrelated action in the decade-old *Computer III* proceedings. In my view, however, we should not let this or any other such limited Commission analysis and decision making (or even the sum of such limited actions) be mistaken for complete compliance with Section 11 as envisioned by Congress.

* * * * *