PART 52—[AMENDED]

1. The authority citation for part 52 continues to read as follows:

Authority: 42 U.S.C. 7401–7671q.

Subpart F—California

2. Section 52.220 is amended by adding paragraphs (c)(196)(i)(D), (c)(202)(i)(F), (c)(245) and adding and reserving paragraph (c)(244) to read as follows:

§ 52.220 Identification of plan.

* * * * *

(c) * * *

(196) * * *

(i) * * *

(D) Yolo-Solano Air Quality Management District.

(*1*) Rule 3.2, adopted on August 25, 1993; and rules 3.14 and 3.15, adopted on September 22, 1993.

* * * * *

(202) * * *

(i) * * *

(F) Yolo-Solano Air Quality Management District.

(*1*) Rule 3.1, adopted on February 23, 1994.

* * * * *

(244) [Reserved]

* * * * *

(245) New and amended regulations for the following APCDs were submitted on March 26, 1997, by the Governor's designee.

(i) Incorporation by reference.

(A) Yolo-Solano Air Quality Management District.

(*1*) Rule 3.4, adopted on December 11, 1996.

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[FR Doc. 97–17599 Filed 7–3–97; 8:45 am]

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FEDERAL COMMUNICATIONS COMMISSION

47 CFR Chapter I

[CC Docket No. 96–149; FCC 97–222]

Implementation of the Non-Accounting Safeguards of Sections 271 and 272 of the Communications Act of 1934, as Amended

AGENCY: Federal Communications Commission.

ACTION: Final rule.

SUMMARY: The Second Order on Reconsideration (Order) released June 24, 1997 examines the proper interpretation of section 272(e)(4) of the Communications Act of 1934, as amended by the Telecommunications Act of 1996 (the Act). The Order concludes that the Commission's original interpretation—that section 272(e)(4) imposes requirements on Bell Operating Company (BOC) provision of interLATA services that the BOCs are otherwise authorized to provide—is the only one that resolves an apparent conflict with section 272(a) in a way that squares with the considered policy choice Congress made in imposing a separate affiliate requirement for BOC provision of in-region interLATA services.

EFFECTIVE DATE: August 6, 1997.

FOR FURTHER INFORMATION CONTACT: Lisa Choi, Attorney, Common Carrier Bureau, Policy and Program Planning Division, (202) 418–1580.

SUPPLEMENTARY INFORMATION: This is a summary of the Commission's Order adopted June 20, 1997, and released June 24, 1997. The full text of this Order is available for inspection and copying during normal business hours in the FCC Reference Center, 1919 M St., N.W., Room 239, Washington, D.C. The complete text also may be obtained through the World Wide Web, at http://www.fcc.gov/Bureaus/Common Carrier/Orders/fcc97–222.wp, or may be purchased from the Commission's copy contractor, International Transcription Service, Inc., (202) 857–3800, 2100 M St., N.W., Suite 140, Washington, D.C. 20037.

Regulatory Flexibility Certification

The changes adopted in this Order do not affect our certification in the *First Report and Order* (62 FR 2927 (January 21, 1997)).

Synopsis of Order on Reconsideration

I. Introduction and Summary

1. In the *Non-Accounting Safeguards First Report and Order,* released on December 24, 1996, the Commission implemented the non-accounting safeguards provisions of the Communications Act of 1934, as amended by the Telecommunications Act of 1996 (Communications Act). These provisions generally prescribe the manner in which the Bell Operating Companies (BOCs) may enter certain new markets, including the in-region interLATA services market. In this *Second Order on Reconsideration,* we examine in greater depth the proper interpretation of one of these provisions, section 272(e)(4).

2. The BOCs' interpretation—that section 272(e)(4) is an affirmative grant of authority allowing a BOC to provide directly (*i.e.,* not through a separate affiliate) in-region interLATA services on a wholesale basis—presents an apparent conflict with section 272(a), which, in relevant part, *prohibits* a BOC from doing precisely this. Such conflict is only heightened by the requirement in section 272(b)(1) that a BOC and its separate affiliate must ''operate independently,'' which, as explained below, presupposes that the BOC may not provide any in-region interLATA services directly.

3. Confronting this apparent conflict, we conclude that our original interpretation—that section 272(e)(4) imposes requirements on BOC provision of interLATA services that the BOCs are otherwise authorized to provide—is the only one that resolves the conflict in a way that squares with the considered policy choice Congress made in imposing a separate affiliate requirement for BOC provision of in-region interLATA services. In the past, where courts and agencies have chosen to impose separate affiliate requirements on the BOCs for competitive services requiring local BOC facilities as an input, the defining feature of such requirements has always been a prohibition on providing such services on an end-to-end physically integrated basis, and for an obvious reason. It is precisely the provision of such services on an end-to-end physically integrated basis that gives rise to the concerns that separate affiliate requirements are intended to address. Our original interpretation of section 272(e)(4) preserves this essential prohibition, while the BOCs' interpretation, under which section 272(e)(4) is a grant of authority, eviscerates it. Our interpretation is bolstered by our view that it is exceedingly unlikely that Congress would have tucked away a fundamental grant of authority in section 272(e), which imposes obligations on the BOCs in response to requests from unaffiliated carriers. The thrust of section 272 is likewise to limit, not expand, BOC authority.

II. Statutory Framework

4. BOC entry into the in-region interLATA services market is governed by sections 271 and 272 of the Communications Act. Section 271(a) states that neither a BOC nor an affiliate ''may provide interLATA services except as provided in this section.'' Section 271(b) grants immediate authorization to a BOC or its affiliate to provide interLATA services originating outside of the BOC's in-region states (''out-of-region'' interLATA services) and to provide six specified ''incidental'' interLATA services. Section 271(f) explains that the prohibition in section 271(a) does not apply to any activities ''previously

authorized'' by the court that administered the AT&T Consent Decree.

5. With respect to interLATA services originating within a BOC's in-region states (''in-region'' interLATA services), 271(b) does not authorize immediate entry. Specifically, section 271(b)(1) states that a BOC or its affiliate may provide in-region interLATA services originating in a particular state if, and only if, the Commission formally approves the provision of such services pursuant to section 271(d)(3). Section 271(d)(3) approval for a particular state is generally designed to ensure that the BOC has taken sufficient steps to open its local exchange network in that state to competition. As explained in the *Non-Accounting Safeguards First Report and Order,* Congress recognized that section 271(d)(3) approval might be granted in a particular state before the local exchange market in that state became fully competitive. Congress thus enacted section 272 to respond to the concerns about anticompetitive discrimination and cost-shifting that arise when a BOC enters the interLATA services market in an in-region state in which the local exchange market is not yet fully competitive. As reflected in the title of section 272 (''Separate Affiliate; Safeguards''), Congress chose to respond to these concerns through the structural requirement of a separate affiliate. Thus, section 272(a)(1) provides that ''[a] Bell operating company (including any affiliate) * * * may not provide any service described in [section 272(a)(2)] unless it provides that service through one or more [separate] affiliates'' that operate independently of the BOC.

6. Section 272(a)(2) lists three kinds of services for which a separate affiliate is required: (a) Manufacturing services, (b) ''[o]rigination of interLATA telecommunications services'' other than out-of-region services, previously authorized services, and all but one of the six incidental services, and (c) ''[i]nterLATA information services'' other than electronic publishing services and alarm monitoring services. Thus, section 272(a)(2) requires a separate affiliate for the origination of all but three kinds of interLATA telecommunications services (out-of-region services, previously authorized services, and most incidental services) and all but two kinds of interLATA information services (electronic publishing services and alarm monitoring services).

7. As a general matter, the other provisions in section 272 define more precisely how structurally separate the BOC and its section 272 interLATA affiliate must be, and the terms of any relationship between the two. With regards to structural separation, the most significant provisions in section 272 are section 272(b)(1), which requires the separate affiliate to ''operate independently from the [BOC],'' section 272(b)(2), which requires it to keep ''separate'' books of account, and section 272(b)(3), which requires it to have ''separate officers, directors, and employees.'' With regard to the relationship between the BOC and its structurally separate affiliate, the most significant provisions are section 272(b)(5), which requires that any dealings between the two be conducted ''on an arm's length basis,'' ''reduced to writing,'' and made ''available for public inspection,'' and section 272(c)(1), which provides that in such dealings, a BOC ''may not discriminate between [the BOC] or affiliate and any other entity in the provision or procurement of goods, services, facilities, and information, or in the establishment of standards.''

8. Section 272(e), which is entitled ''Fulfillment of Certain Requests,'' contains four provisions, three of which impose particularized non-discrimination requirements pertaining to direct BOC provision of telephone exchange service and exchange access. Specifically, section 272(e)(1) states that a BOC ''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''; section 272(e)(2) states that a BOC ''shall not provide any facilities, services, or information concerning its provision of exchange access to [an] affiliate * * * unless such facilities, services, or information are made available to other providers of interLATA services in that market on the same terms and conditions''; and section 272(e)(3) states that a BOC ''shall charge the affiliate * * *, or impute to itself (if using the access for its provision of its own services), an amount for access to its telephone exchange service and exchange access that is no less than the amount charged to any unaffiliated interexchange carriers for such service.'' The fourth subsection, section 272(e)(4), is the subject of this order. As the Joint Explanatory Statement describes them, these provisions are ''[a]dditional requirements for the provision of interLATA services'' that are ''intended to reduce litigation by establishing in advance the standard to which a BOC entity that provides telephone exchange service or exchange access service must comply in providing interconnection to an unaffiliated entity.''

9. The final provision in the statutory framework governing BOC entry that bears mention is section 272(f), which provides, among other things, for the sunset of the separate affiliate requirement in section 272(a). With respect to ''interLATA telecommunications services'' in particular, 272(f) provides for sunset three years after grant of section 271(d)(3) approval, unless the Commission extends the three-year period by rule or order. For interLATA information services, the sunset period is four years after enactment of the Telecommunications Act of 1996 unless extended by rule or order.

10. In the *Non-Accounting Safeguards First Report and Order,* we implemented these and other provisions of section 272. In so doing, we explained that the structural and nondiscrimination requirements taken together were intended by Congress to effectuate the goal of preventing anticompetitive abuses by BOCs that control essential local facilities and seek to enter competitive markets that require these facilities as an input. More generally, we explained that:

> [o]ur task is to implement section 272 in a manner that ensures that the fundamental goal of the 1996 Act is attained—to open all telecommunications markets to robust competition—but at the same time does not impose requirements on the BOCs that will unfairly handicap them in their ability to compete. The rules and policies adopted in this order seek to preserve the carefully crafted statutory balance to the extent possible until facilities-based alternatives to the local exchange and exchange access services of the BOCs make those safeguards no longer necessary.

11. Of particular significance in the present context is the Commission's implementation of the ''operate independently'' requirement in section 272(b)(1). As discussed below, the Commission's implementation of the ''operate independently'' requirement is significant because while not in dispute in the instant proceeding, the fundamental policy issue that implementation addressed—the degree of permissible physical integration between the BOC's local network and the separate affiliate's interLATA network where the affiliate chooses to have such a network—overlaps considerably with the fundamental policy issue raised by the BOCs' proposed reading of section 272(e)(4), namely whether the BOC may own and operate an interLATA network within the local operating company itself and

thus provide interLATA services on a wholly integrated basis.

12. In the *Non-Accounting Safeguards First Report and Order,* we concluded that the ''operate independently'' requirement entails four important restrictions: (1) No joint BOC-affiliate ownership of switching and transmission facilities, (2) no joint ownership of the land and buildings on which such facilities are located, (3) no provision of operation, installation, or maintenance services by the BOC (or non-section 272 affiliate) with regards to the section 272 affiliate's facilities, and (4) no provision by the section 272 affiliate of operation, installation, or maintenance services with respect to the BOC's facilities. We determined that these restrictions are necessary to prevent the ''substantial integration'' of the BOC's local network and the affiliate's interLATA network where the affiliate chooses to have such a network. Such integration, we concluded, is the antithesis of genuine independent operation, for it creates the very dangers of discrimination and improper cost allocation that section 272 was designed to prevent. With respect to the possibility of discrimination, we explained that the non-discrimination requirements in sections 272(b)(5) and 272(c)(1) and elsewhere ''would offer little protection if a BOC and its section 272 affiliate were permitted to own transmission and switching facilities jointly.'' For example, ''[t]o the extent that a section 272 affiliate jointly owned transmission and switching facilities with a BOC, the affiliate would not have to contract with the BOC to obtain such facilities, thereby precluding a comparison of the terms of transactions between a BOC and a section 272 affiliate with the terms of transactions between a BOC and a competitor of the section 272 affiliate.'' Together, then, ''the prohibition on joint ownership * * * and the nondiscrimination requirements should ensure that competitors can obtain access to transmission and switching facilities equivalent to that which section 272 affiliates receive.'' With respect to the possibility of improper cost allocation, we explained that, ''[b]ecause the costs of wired telephone networks and network premises are largely fixed and largely shared among local, access, and other services, sharing of switching and transmission facilities may provide a significant opportunity for improper allocation of costs between the BOC and its section 272 affiliate.'' The specific concern with improper cost allocation in this context is that an undue proportion of these shared costs will be allocated to a BOC's local operations, which has two negative effects. First, assuming that the BOC is subject to a regulatory regime that links the local rates it can charge to its costs and that the local market is not fully competitive, such overallocation of costs would allow the BOC to overcharge its local ratepayers by providing local service at a high price that overestimates the true costs of that service. Second, an overallocation of costs to the BOC's local operations means an underallocation of costs to the affiliate's long-distance operations, which would allow the affiliate to undercut inefficiently its interexchange competitors by providing a long-distance service at a low price that underestimates the true costs of that service.

III. Background and Positions of the Parties

13. Section 272(e)(4) states that a BOC ''may provide any interLATA or intraLATA facilities or services to its interLATA affiliate if such services or facilities are made available to all carriers at the same rates and on the same terms and conditions, and so long as the costs are appropriately allocated.'' In the *Non-Accounting Safeguards First Report and Order,* the Commission rejected arguments that section 272(e)(4) is an affirmative grant of authority for BOCs to provide directly interLATA services on a wholesale basis, including in-region services. Rather, the Commission read section 272(e)(4) as a limitation of authority, that is, as imposing a non-discrimination and cost-allocation requirement on the provision of any interLATA or intraLATA facilities or services *that the BOC is otherwise authorized to provide.*

14. On February 11, 1997, Bell Atlantic and PacTel sought summary reversal of the Commission's interpretation of section 272(e)(4) in the United States Court of Appeals for the District of Columbia Circuit. The Commission responded, among other things, that some of the statutory arguments that these BOCs advanced before the court had not been clearly presented to the Commission, and thus that the Commission should have an opportunity, prior to judicial review, to reconsider on an expedited basis its interpretation in light of these arguments. On March 31, 1997, the court granted the Commission's request, and noted its expectation that the Commission would complete its reconsideration within 90 days (which is the timeframe the Commission had suggested). On April 3, 1997, the Common Carrier Bureau issued a Public Notice seeking comment on certain specific questions relating to section 272(e)(4). The pleading cycle closed on April 24, 1997.

15. Bell Atlantic, NYNEX, SBC (which, after the merger, includes PacTel), and BellSouth (hereinafter ''the BOCs'') filed joint comments and reply comments that largely track the arguments made by Bell Atlantic and PacTel in their pleadings before the Court of Appeals. The BOCs focus principally on what they regard as the plain language of section 272(e)(4). As noted above, section 272(e)(4) states in relevant part that a BOC ''may provide any interLATA * * * services to its interLATA affiliate if such services * * * are made available to all carriers * * * on the same [rates,] terms and conditions, and so long as the costs are appropriately allocated.'' In the BOCs' view, the phrase ''may provide'' is the language of a grant of authority. They also emphasize that what Congress decided the BOCs ''may provide'' is not just some interLATA services, but ''any'' such services.

16. The BOCs do recognize certain limits on this purported grant of authority. First, the BOCs effectively recognize that the grant of authority is limited to wholesale interLATA services, presumably because the only entities to which section 272(e)(4) contemplates the BOC providing interLATA services are ''its interLATA affiliate'' and ''all carriers''—not end-users—and because reading section 272(e)(4) as a grant of authority to provide *retail* interLATA services would render section 272's separate affiliate requirement for interLATA services utterly meaningless. They also recognize that any grant of authority in section 272(e)(4) is conditioned on the satisfaction of the non-discrimination and cost-allocation requirements plainly set forth in that provision. Lastly, given that section 271(b) requires section 271(d)(3) approval before a BOC may provide in-region ''interLATA services,'' a phrase that the BOCs agree includes wholesale as well as retail services, the BOCs concede that the section 271(d)(3) approval requirement must still be met before they may provide wholesale interLATA services to their affiliates and other carriers pursuant to section 272(e)(4). Nonetheless, in the BOCs' view, the ''may provide'' language in section 272(e)(4) compels the conclusion that that section is fundamentally a grant of authority to the BOCs to directly offer in-region interLATA services, whatever the limits on that grant.

17.To bolster their plain language argument, the BOCs further contend that

reading section 272(e)(4) as a grant of authority benefits long-distance consumers. The BOCs generally claim that, if permitted by the statute, they intend to design, build, and operate new facilities-based interLATA networks, as well as maintain existing ones such as their Official Services Networks. After they receive section 271(d)(3) approval to provide in-region interLATA services, the BOCs assert that they would use the authority granted by section 272(e)(4) to sell interLATA services that can be provided over these networks, on a wholesale basis, to their affiliates (as well as other carriers). The BOCs argue that placing the design, construction, and operation of their interLATA networks in the local operating companies in this way benefits long-distance consumers because the BOCs are able to achieve considerable efficiencies that in turn lead to lower long-distance rates. A Bell Atlantic affidavit submitted by the BOCs explains the source of these potential efficiencies:

> Bell Atlantic intends to place the construction, ownership and operation of its long-distance network in its operating telephone companies. * * * [T]he reason is simple. The telephone companies currently provide local exchange, exchange access, and short-haul (or 'intraLATA') long distance service. As a result, they already own some facilities, equipment and related support systems that can be used to provide both local and long-distance service. They also employ a skilled workforce that is trained in the construction, operation, installation and maintenance of telephone facilities and equipment, and that is capable of managing local and long distance facilities alike. Placing the construction and operation of long distance facilities (whether new or existing) in the operating telephone companies will allow us to make the most efficient use of these existing resources.

18. Ten parties, including the largest interexchange carriers, a trade association representing long-distance resellers, and two state commissions, filed comments and/or reply comments opposing the view that section 272(e)(4) is an affirmative grant of authority. These parties focus primarily on what they regard as the plain language of 272(a) and the flat prohibition they say it contains on direct BOC provision of all but a small, clearly specified subset of in-region interLATA services (e.g., five of the six incidental services) prior to the sunset of the separate affiliate requirement. Specifically, they focus on the phrases ''interLATA telecommunications services'' and ''interLATA information services'' in section 272(a)(2) and argue that both phrases plainly apply to wholesale as well as retail services—just as the more general phrase ''interLATA services'' in section 271 applies to both. Parties opposing the BOCs also focus on the clearly specified subset of interLATA services that are exempted from the separate affiliate requirement in section 272(a)—''out-of-region'' services, ''incidental'' services, ''previously authorized'' services, ''electronic publishing,'' and ''alarm monitoring''—and observe that ''wholesale'' services are not among them. They find it significant as well that the MFJ, which the section 271/272 framework replaces in relevant part, imposed an outright bar on BOC provision of interLATA services and in so doing, did not distinguish between retail and wholesale services. In light of the flat prohibition in section 272(a), the opponents of the BOCs conclude, the only sensible way to read section 272(e)(4) is solely as a nondiscrimination and cost-allocation requirement that limits the manner in which BOCs may provide interLATA services that they are otherwise authorized to provide, such as the interLATA services that fall into the subset of exceptions in section 272(a) and, when the separate affiliate requirements sunset, other interLATA services as well.

19. The opponents of the BOCs also dispute the claim that reading section 272(e)(4) as a grant of authority benefits consumers. Most broadly, they assert that the BOCs' vision of an '' 'integrated supplier' of local and long-distance services * * * is wholly disengaged from * * * [and] at war with'' the separate affiliate requirement in section 272. Section 272, they explain, was Congress' response to the traditional concerns for discrimination and improper cost allocation that arise precisely when a dominant carrier providing local exchange and exchange access services seeks to provide long-distance service on a physically integrated basis. More specifically, they emphasize that section 272 reflects Congress' fundamental decision to impose a *structural,* as opposed to a non-structural, solution in response to these concerns in the short-term.

20. Lastly, the opponents of the BOCs argue that, in a world in which section 272(e)(4) is a grant of authority, it would be extremely difficult to enforce the non-discrimination requirement. The Telecommunications Resellers Association (TRA), for example, complains that non-facilities-based interLATA resellers, who are the would-be rivals of the BOCs' interLATA affiliates, ''know all too well from their experience * * * that even the slightest preference or discrimination can be highly consequential in a fast-paced competitive market.'' Moreover, according to TRA, ''[g]iven the comprehensive interaction between a non-facilities-based resale carrier and its network service provider, the opportunities for preference or discrimination abound.'' TRA explains that resellers need equal treatment not only with respect to the general rates, terms, and conditions of service but also with respect to ''myriad operational support systems such as order provisioning, trouble resolution and billing.'' Along similar lines, facilities-based interLATA service providers such as AT&T and MCI complain that the BOCs will be able to ''customize'' the networks they build and the services they provide to be responsive to the needs of their interLATA affiliates. The principal point of such arguments appears to be that the difficulty of enforcing the non-discrimination requirement if we were to conclude that section 272(e)(4) is a grant of authority is one more reason to question whether Congress intended section 272(e)(4) to be such a grant of authority.

21. In response, the BOCs claim that any conflict between section 272(a) and section 272(e)(4) is ''wholly imaginary'' because section 272(a) merely establishes ''a general rule'' providing that the BOCs must provide certain services ''through'' an affiliate. The subsections that follow 272(a) then ''detail the conduct that Congress understood to be consistent with the general rule.'' Section 272(e)(4), they say, is one such provision. The BOCs claim the conflict is wholly imaginary also because one of the principal activities for which section 272(a) requires a separate affiliate is the ''[o]rigination of interLATA telecommunications services,'' and, in the BOCs'' view, the term ''origination'' describes a *retail* interLATA service. They argue that, ''[w]hen a BOC provides interLATA services to its affiliate under [section 272(e)(4)] * * *, it is not 'originating' interLATA services. Rather, it is the affiliate that 'originates' such services when its retail customers place interLATA calls.''

22. Alternatively, the BOCs claim that, even assuming there were a conflict between section 272(a) and section 272(e)(4), ''[u]nder well-established canons of statutory interpretation, the specific authorization contained in section 272(e)(4) would take precedence over the general language of section 272(a).''

23. In response to the argument that the BOCs' notion of an integrated supplier is ''at war with'' section 272, the BOCs contend that the separate affiliate requirement in section 272 was

not designed to prevent a BOC from providing interLATA service on a physically integrated basis; rather it was designed ''to make entirely transparent the dealings between an operating company and its interLATA affiliate.'' As for the traditional concerns about discrimination and improper cost allocation that arise where a BOC provides integrated service, the BOCs contend that any such concerns that Congress may have had in enacting section 272 exist only where the BOC has incentives to engage in discrimination and cost shifting. According to the BOCs, the wholesale provision of interLATA services pursuant to section 272(e)(4) does not create such incentives because of the requirement that any wholesale interLATA services the BOC provides to its affiliate must be made available to any other carrier on the same rates, terms, and conditions. The BOCs assert that this requirement effectively eliminates any incentives to engage in discrimination or improper cost allocation because, according to the BOCs, any advantage the BOC would gain from engaging in such conduct could not be captured by the affiliate alone. Rather, the advantages would necessarily be offered to all carriers.

IV. Discussion

24. As an initial matter, we agree with the BOCs to this extent: the phrase ''may provide'' in section 272(e)(4), *if viewed in isolation*, could reasonably be read as a grant of authority. Thus, standing alone without reference to any other statutory provision, section 272(e)(4) could reasonably be read to allow a BOC to provide directly any interLATA services, including in-region services, to its affiliate so long as it does so in conformity with the non-discrimination and cost allocation requirements in that provision.

25. But section 272(e)(4) cannot be viewed in isolation; it must be read in conjunction with other provisions to which it is integrally related. And a thorough analysis of sections 271 and 272 confirms our view that section 272(e)(4) is not an independent grant of authority for the BOCs to provide wholesale interLATA services on an unseparated basis. We conclude first that section 272(a), in relevant part, *prohibits* the BOCs from doing precisely what the BOCs claim section 272(e)(4) authorizes them to do. Specifically, section 272(a) prohibits the BOCs, after obtaining section 271(d)(3) approval and until sunset of section 272's requirements, from providing directly most in-region interLATA services, including wholesale services, except through a separate affiliate. We thus confront an apparent conflict between section 272(a) and section 272(e)(4). In so doing, we further conclude that the only plausible construction of either provision that reconciles the apparent conflict and serves the core purposes for which Congress imposed a separate affiliate requirement is a construction of section 272(e)(4) according to which it is a non-discrimination requirement—a requirement that is similar in function, not surprisingly, to the non-discrimination requirements that appear in sections 272(e)(1), 272(e)(2), and 272(e)(3). The BOCs' reading of section 272(e)(4), by contrast, fails to serve such purposes and further, requires us to believe that Congress intended to tuck away a fundamental grant of authority in section 272(e). In these respects and others, our analysis indicates that the interpretation proffered by the BOCs is unpersuasive.

26. We find unconvincing the reasons advanced by the BOCs in support of their claim that the separate affiliate requirement in section 272(a) can reasonably be read to refer only to retail services. As summarized above, the BOCs first seek to justify this reading of the statute on the ground that section 272(a) establishes a ''general'' rule and that that general rule is necessarily read to refer only to retail services because that is the reading that makes the general rule consistent with the apparent grant of authority in section 272(e)(4) to provide wholesale services. There is nothing ''general,'' however, about the separate affiliate requirement in section 272(a) with respect to the interLATA services that are covered by that requirement. In particular, section 272(a)(1) states that a BOC may not provide ''any service *described in [section 272(a)(2)]*'' unless it provides ''*that* service'' through an affiliate. Section 272(a)(2) then specifies precisely ''[t]he services for which a separate affiliate is required,'' namely, manufacturing activities, the origination of interLATA telecommunications services (with three exceptions), and interLATA information services (with two exceptions). Thus, the scope of section 272(a)'s separate affiliate requirement appears plainly to be fleshed out by section 272(a)(2), not by *subsequent* provisions in section 272 such as section 272(e)(4).

27. This last point also serves as a complete response to the BOCs' persistent emphasis on the word ''through'' in section 272(a)(1). In the BOCs'' view, section 272(a)(1) does not categorically prohibit a BOC from providing directly the services listed in section 272(a)(2); rather, section 272(a)(1) says that the BOC may not provide such services unless ''it,'' the BOC, provides such services ''through'' an affiliate. And, in the BOCs'' view, ''one of the most natural ways'' for a BOC to provide such services ''through'' an affiliate is to provide them to an affiliate, on a wholesale basis, and then to have the affiliate resell the services on a retail basis. As an initial matter and as explained in more detail below, in the context of past separate affiliate requirements that have been imposed on the BOCs for the provision of competitive services that require local BOC facilities as an input, there is nothing ''natural'' about the BOCs' proposed wholesale/retail framework, which would allow the BOCs to provide interLATA services on a fully integrated basis. Such requirements, where a court or agency has chosen to impose them, have never allowed such integration of local BOC facilities and the extra facilities necessary to provide the competitive service at issue. In any event, whether ''natural'' or not, providing integrated interLATA services ''through'' a BOC affiliate by providing such services *to* the affiliate cannot be squared with the language of section 272(a)(2). As demonstrated above, section 272(a)(2) includes the exclusive list of services that a BOC must provide ''through'' an affiliate. That list includes ''interLATA telecommunications services'' and ''interLATA information services,'' which—as demonstrated immediately below—plainly include wholesale as well as retail services. Thus, it is clear that section 272(a) requires the BOCs to provide wholesale interLATA services ''through'' an affiliate, just as it requires them to provide retail interLATA services ''through'' an affiliate.

28. The BOCs' other basis for reading section 272(a) to refer only to retail services rests on the use of the term ''[o]rigination'' in the phrase ''[o]rigination of interLATA telecommunications services'' in section 272(a)(2). As explained above, the BOCs assert that, ''[w]hen a BOC provides interLATA services to its affiliate under [section 272(e)(4)], * * * it is not 'originating' interLATA services. * * * [I]t is the affiliate that 'originates' such services when its retail customers place interLATA calls.'' Significantly, however, the BOCs do not offer any dictionary definition of ''origination,'' nor a definition drawn from any other authoritative source, that supports their particular understanding of the term. Rather, they argue that the term ''origination'' derives its meaning from the context of section 272. Although we

agree that the term must be understood in its proper context, the difficulty with the BOCs' position is that they simply *assert,* without explanation, that the proper context is ''the specific activity of providing interLATA services to . . . customers,'' *i.e.,* providing retail interLATA services. In contrast, sections 271 and 272 indicate that Congress was almost certainly using the term ''origination'' in section 272(a)(2) in a geographical sense.

29. Specifically, it is far more likely that, by requiring a separate affiliate for ''[o]rigination of interLATA telecommunications services,'' Congress simply meant to clarify that a separate affiliate is required for certain interLATA telecommunications services *as judged by the point of origination of such services.* Such a clarification might have been considered helpful in light of the fact that, as noted above, one of the exceptions to the separate affiliate requirement for ''[o]rigination of interLATA telecommunications services'' is for ''out-of-region'' services, that is, services for which the point of origination is outside a BOC's in-region states. This out-of-region versus in-region distinction is one of the fundamental distinctions in section 271; section 271 permits immediate entry for the former, but requires section 272(d)(3) approval for the latter. It is therefore only natural that Congress would have wanted to maintain—and did maintain—that same distinction in the separate affiliate requirement in section 272. Further, this view of ''origination'' in section 272(a)(2) appears to be consistent with the *absence* of that term with respect to ''interLATA information services.'' Because Congress failed to include an ''out-of-region'' services exception with respect to interLATA information services, a separate affiliate is required for such services regardless of their point of origination.

30. The legislative history supports our view that the term ''origination'' was meant merely as a helpful clarification. It appears that the term ''origination'' was not part of either the Senate or the House version of section 272(a), but was added during the reconciliation conference. For example, the Senate version of section 272(a), which was the template for the final version, stated, ''The services for which a separate subsidiary is required * * * are: (A) Information services * * * (B) Manufacturing services * * * (C) InterLATA services.* * *'' Thus, both houses of Congress passed versions of section 272(a) in which the separate affiliate requirement, even the BOCs would have to agree, clearly applied to both retail and wholesale interLATA services. The explanation in the Joint Explanatory Statement of the Senate version of section 272 confirms this. It describes the services for which a separate affiliate is required as including ''interLATA telecommunications services,'' without the term ''origination'' preceding it and without any indication of a wholesale/retail distinction. Thus, to accept the BOCs' argument, one would have to conclude that the addition of the term ''origination'' during the conference reflected Congress' decision to reject the broad consensus that had been reached on the scope of the separate affiliate requirement and to cut back on it significantly by limiting the requirement to retail service offerings that originate within the BOC's service territory. If this were the case, one would expect, at a minimum, some discussion of such a decision in the legislative history, but we have found no such discussion, and the parties have not pointed to any. The Joint Explanatory Statement, for example, is silent on the issue. Rather, the explanation in the Joint Explanatory Statement of the final version of section 272 simply states, ''The conference agreement adopts the Senate provisions with several modifications,'' and then goes on to discuss the major changes that occurred, without mentioning the addition of ''origination.''

31. Moreover, equating the ''origination'' of a service with the retail provision of that service appears to lead to unlikely results in two respects. First, as just noted, the term ''origination'' does not precede the other main category of interLATA service for which a separate affiliate is required, namely, interLATA information services. Under the BOCs' reading of the statute, then, in-region wholesale interLATA information services would still generally require a separate affiliate, while in-region wholesale interLATA telecommunications services would not. Yet Congress treated these two kinds of in-region interLATA services identically for section 271 purposes, requiring section 271(d)(3) approval for both. The BOCs have not advanced any plausible rationale for why Congress would have treated them fundamentally differently for section 272 purposes.

32. Second, equating the ''origination'' of a service with the retail provision of that service also appears to lead to unlikely results because of the interplay between sections 271(a) and 271(b). Section 271(a) bars BOC provision of ''interLATA services''—which, as noted above, the BOCs agree include wholesale services—''except as provided in this section.'' Section 271(b) then authorizes, on various timetables, ''interLATA services originating in any of [a BOC's] in-region States,'' ''interLATA services originating outside its in-region States,'' and certain ''incidental interLATA services * * * originating in any State.'' If the term ''origination'' in section 272(a)(2) refers only to the provision of retail interLATA services, then the references to ''originating'' in section 271(b) would also appear to refer to retail interLATA services. Consequently, under the BOCs' reading of the statute, section 271(a) bars a BOC from providing wholesale interLATA services, but no provision of section 271(b) authorizes the BOCs to provide these services, including out-of-region and incidental wholesale services. Thus, we conclude that a carrier ''originat[es]'' an in-region interLATA service in a particular state when it provides in-region interLATA service regardless of whether it provides that service on a wholesale or a retail basis.

33. We note that, during the proceeding that resulted in the *Non-Accounting Safeguards First Report and Order,* certain of the BOCs advanced a different argument as to why the language of section 272(a) does not cover wholesale services: that the phrase ''telecommunications services'' itself—statutorily defined as ''the offering of telecommunications for a fee directly to the public, * * * regardless of the facilities used''—covers only retail services. Proponents of this interpretation contended that wholesale telecommunication services are not offered directly to ''the public,'' but only to other carriers. In the *Non-Accounting Safeguards First Report and Order,* the Commission addressed this argument at length and rejected it primarily on the ground that it could find no basis in the statute, legislative history, or FCC precedent for finding the reference to ''the public'' in the statutory definition to be intended to exclude wholesale telecommunications services. Rather, the Commission concluded that the phrase ''the public'' was meant only to exclude private carriage services, as opposed to common carrier services. While the BOCs have not pressed this particular argument before the court or before the Commission on reconsideration, Omnipoint has pressed a variant of it in response to the Bureau's request for comments on the scope of section 272(e)(4).

34. In providing wireless service, Omnipoint explains that it often needs transport services that cross LATA boundaries and that it could deliver a more efficient wireless service if it

could use the BOCs' interLATA transport facilities, such as the existing transport facilities that are part of the BOCs' Official Services Networks, rather than build its own interLATA transport facilities or lease the interLATA transport facilities of existing interLATA service providers (facilities which Omnipoint says are inconveniently located for its purposes). Its principal legal argument is that our conclusion in the *Non-Accounting Safeguards First Report and Order* that the phrase ''telecommunications services'' covers all wholesale (as well as retail) telecommunication services was ''overly broad'' and that it should be construed to exclude at least one kind of wholesale arrangement, carrier-to-carrier leasing of high-capacity private lines. We find no basis in the statutory definition of ''telecommunications services,'' however, for concluding that this kind of wholesale arrangement, as opposed to all other kinds, falls outside that definition.

35. In providing wireless service, Omnipoint explains that it often needs transport services that cross LATA boundaries and that it could deliver a more efficient wireless service if it could use the BOCs' interLATA transport facilities, such as the existing transport facilities that are part of the BOCs' Official Services Networks, rather than build its own interLATA transport facilities or lease the interLATA transport facilities of existing interLATA service providers (facilities which Omnipoint says are inconveniently located for its purposes). Its principal legal argument is that our conclusion in the *Non-Accounting Safeguards First Report and Order* that the phrase ''telecommunications services'' covers all wholesale (as well as retail) telecommunication services was ''overly broad'' and that it should be construed to exclude at least one kind of wholesale arrangement, carrier-to-carrier leasing of high-capacity private lines. We find no basis in the statutory definition of ''telecommunications services,'' however, for concluding that this kind of wholesale arrangement, as opposed to all other kinds, falls outside that definition.

36. US WEST, like the other BOCs, does not dispute that the statutory definition of ''telecommunications services'' applies to wholesale telecommunications services. It merely observes that the statutory definition does not cover *all* telecommunications-like services—most significantly, it does not include private carriage services—and that the BOCs should be able to provide directly any service that falls outside that definition. With the important reminders that (1) wholesale telecommunications services are one kind of telecommunications-like services that, as just noted, does *not* fall outside that definition, and (2) the separate affiliate requirement also applies to in-region interLATA information services, we have no objection to this observation. In this regard, however, we note our serious doubts whether there is any interLATA service that a BOC might seek to provide to its affiliate that could be properly characterized as a private carriage service, given that the BOC would be under a legal obligation pursuant to sections 272(c)(1) and 272(e)(4) to make such service available to any other entity—a hallmark of a common carrier service.

37. Firmly bolstering our view that nothing in section 272(a)(2) suggests a wholesale/retail distinction—not ''origination,'' not ''telecommunication services,'' and not any other term or phrase—is the fact that section 251(c)(4) demonstrates that, when Congress means to create an important wholesale/retail distinction, it does so clearly, a point we emphasized in the *Non-Accounting Safeguards First Report and Order.* Section 251(c)(4) imposes a duty on incumbent local exchange carriers to offer for resale at wholesale rates ''any telecommunications service that the carrier provides at retail to subscribers who are not telecommunications carriers.'' Moreover, section 272(a)(2) sets out quite specifically the three kinds of services for which a separate affiliate is required and the exceptions to each kind of service. Congress' attention to detail in this respect makes the lack of any straightforward textual indication of a wholesale/retail distinction in section 272 all the more telling. In sum, we reject the BOCs' assertion that section 272(a) prohibits a BOC from offering directly to customers only retail interLATA services originating in-region.

38. We think that section 272(b)(1), which requires the separate affiliate to ''operate independently'' of the BOC, provides independent support for the fact that Congress did not intend the BOCs to provide in-region interLATA services, on a wholesale basis, to their affiliates and other carriers. To allow the BOCs to provide such services would be to allow them to place the design, construction, and operation of their interLATA facilities in their local operating companies and thus to provide their wholesale in-region interLATA services over a uniquely integrated local-interLATA network. As explained above, however, we concluded in the *Non-Accounting Safeguards First Report and Order* that section 272(b)(1) was principally designed to prevent substantial integration of the local operating company's local network facilities and the separate affiliate's long-distance network facilities (assuming the affiliate chooses to be a facilities-based provider rather than a reseller). And such a conclusion plainly presupposes that Congress did not intend that local and interLATA facilities could be integrated within the local operating company itself. For what purpose could Congress have had in prohibiting physical integration of the local operating company's local facilities and the affiliate's interLATA facilities if complete physical integration of local and interLATA networks within the local operating company itself would be permitted regardless?

39. Having concluded that section 272(a), reinforced by section 272(b)(1), prohibits in relevant part precisely what the BOCs claim section 272(e)(4) authorizes, we now address the BOCs' alternative arguments regarding the proper interpretation of section 272(e)(4). As summarized above, the BOCs contend that, even assuming *arguendo* we were to find an apparent conflict between sections 272(a) and 272(e)(4), under the well-established canon of construction, the more specific provision overrides the more general provision. Even assuming *arguendo* that this canon were applicable, however, it is far from clear that section 272(e)(4) should be considered the more specific provision and section 272(a) the more general. While there are certain respects in which section 272(e)(4) is the more specific provision, there are also certain respects in which section 272(e)(4) is the more general. For example, one could reasonably view section 272(e)(4) as the more general provision because that section, under the BOCs' reading of it, constitutes a broad grant of authority to provide directly, on a wholesale basis, any interLATA services, any interLATA facilities, any intraLATA services, and any intraLATA facilities, whereas section 272(a) is a circumscribed limitation on that broad grant that requires that, out of the entire universe of interLATA or intraLATA facilities or services that a BOC is purportedly authorized to provide directly, certain such services—specifically, manufacturing activities, interLATA telecommunications services (with three exceptions), and interLATA information services (with two

exceptions)—be provided through a separate affiliate.

40. It is also far from clear why, if we were to conclude that section 272(e)(4) overrides section 272(a), we would not have to conclude that it also overrides section 271(a), thus permitting the BOCs to provide any wholesale interLATA services immediately, before section 271(d)(3) approval—a result, as mentioned above, the BOCs disavow. In this regard, the BOCs' attempt to distinguish section 271(a) and section 272(a) is unpersuasive. Specifically, they argue that section 271(a) does not give way to section 272(e)(4) because section 271(a) states that a BOC may not provide interLATA services ''except as provided in this section,'' and section 272(e)(4) is not ''in this section.'' Yet, as explained above, we think the text of section 272(a) directs equally clearly that the services for which a separate affiliate is required, along with any exceptions, are to be found in section 272(a)(2) and only that provision, not in subsequent provisions of section 272 such as section 272(e)(4).

41. In any event, we find that the canon the BOCs seek to invoke is not applicable in this instance, at least not in the way in which the BOCs have described it. The canon that ''the specific governs the general'' only applies where the conflict between the statutory provisions is inescapable, that is, where there is no *plausible* construction of either provision that allows the conflict to be reconciled. This is for good reason, for the application of the canon where there is no such construction presupposes that Congress has contradicted itself—a position that should be adopted only as a last resort. Thus, we are obliged to determine whether there is a plausible construction of either section 272(a) or 272(e)(4) that allows us to reconcile the apparent conflict, making sense of both provisions and serving the purposes of the statute to the greatest extent possible.

42. We are doubtful that there is any plausible construction of section 272(a) that would allow us to reconcile the apparent conflict and adopt the BOCs' reading of section 272(e)(4). As discussed at length above, the BOCs' characterization of section 272(a) as a ''general'' rule, to be given content by the subsequent subsections of section 272, cannot be sustained in light of that rule's clear directive to look specifically to the list of services in section 272(a)(2). Moreover, the BOCs' interpretation of ''origination'' as referring to the provision of interLATA services to retail customers who place interLATA calls does not appear to have any basis in the common usage of that term and appears to lead to unlikely results. The only other possible construction would be to add to the list of exceptions in section 272(a)(2) a ''wholesale services'' exception. While there may be situations where it is defensible to read an exception into a statute in order to reconcile an otherwise irreconcilable statutory conflict, that seems inappropriate where, as here, Congress explicitly focused on the issue of exceptions and prescribed a specific list. Buttressing this point is the fact that the Senate version of section 272 would have expressly authorized the Commission to grant exceptions to the separate affiliate requirement, but that provision was dropped by the conferees.

43. By contrast, we conclude that there is a plausible construction of section 272(e)(4) that reconciles the apparent conflict with section 272(a) and does so in a way that is uniquely consistent with the specific policy choice that Congress made in enacting the separate affiliate requirement. Specifically, as we previously concluded in the *Non-Accounting Safeguards First Report and Order*, we construe section 272(e)(4) to mean that the BOC may provide any interLATA or intraLATA facilities or services *it is otherwise authorized to provide* to its interLATA affiliate if such services or facilities are made available to all carriers at the same rates and on the same terms and conditions, and so long as the costs are appropriately allocated. Thus, in our view, section 272(e)(4) is not a grant of authority; it merely prescribes the manner by which BOCs may provide interLATA and intraLATA facilities and services to their affiliates.

44. We believe this construction of section 272(e)(4) does not have any of the defects alleged by the BOCs that might render the construction implausible. First, our reading gives effect to all of the statute's existing terms, including the key terms ''may provide'' and ''any'' on which the BOCs rely; our interpretation just does not read these terms as effectuating a grant of authority.

45. Second, our interpretation does not render section 272(e)(4) meaningless or redundant. Far from it, the provision serves precisely the same function as the other three provisions in section 272(e). As explained above, section 272(c)(1) imposes a general non-discrimination requirement on the BOCs in their dealings with affiliates. In order ''to reduce litigation,'' however, Congress, in section 272(e), set forth more particularized non-discrimination requirements tailored to specific contexts. Section 272(e)(1), for example, sets forth a non-discrimination requirement with respect to the time in which a BOC fulfills requests for local exchange or exchange access service. Similarly, section 272(e)(4) sets forth a non-discrimination requirement with respect to the provision of interLATA or intraLATA facilities and services that a BOC is otherwise authorized to provide—services such as out-of-region services, five of the six incidental services, previously authorized activities, and perhaps most importantly, all other interLATA services as the separate affiliate requirements expire.

46. In light of the similar function that section 272(e)(4), under our reading, serves in relation to the other three provisions of section 272(e), our reading also draws support from the well-established canon of construction that statutory provisions are to be construed in light of the company they keep. Our interpretation of section 272(e)(4) is also consistent with the overriding focus of section 272 generally. As both the text of section 272 and the descriptions of the provision in the legislative history make clear, section 272 primarily establishes structural separation requirements and other safeguards applicable to the BOCs' provision of interLATA and other services that the BOCs are elsewhere authorized to provide (in section 271, for the most part). In contrast, the BOCs' proposed reading of section 272(e)(4) as a grant of authority is flatly inconsistent with the thrust of section 272(e) in particular and section 272 in general. It seems unlikely enough that Congress would have placed a fundamental grant of authority to the BOCs in section 272, the thrust of which, as just noted, is to prescribe the manner in which the BOCs may enter certain new markets; but it seems utterly implausible that Congress would have placed such a grant in section 272(e) as the fourth subsection of a provision entitled ''Fulfillment of Certain Requests,'' following three other subsections that all impose restrictions on the BOCs.

47. We recognize that our preferred interpretation of section 272(e)(4) does not give this provision the great significance the BOCs' interpretation does. We think this fact weighs in favor of our interpretation, however, because judging from the legislative history, Congress did not appear to regard section 272(e)(4) as a particularly significant provision, just as it did not appear to attach great significance to the addition of the term ''origination'' in section 272(a). Specifically, section 272(e)(4) was introduced as part of a

lengthy managers' amendment to the Senate version of section 272. Significantly, the amendment as a whole was described merely as ''mak[ing] certain technical corrections.'' Moreover, at no point during the discussion of the managers' amendment was there any specific discussion of section 272(e)(4) or its impact. Nor does there appear to have been any such discussion of this provision at any later point in the legislative history. The absence of any discussion on the measure would seem highly unlikely, however, if section 272(e)(4) were really intended to be a fundamental grant of authority as the BOCs claim.

48. Finally, and most importantly, we think our interpretation is not only a plausible construction of the text, but also the only construction that can be squared with the considered policy choice Congress made in imposing a separate affiliate requirement for in-region interLATA services. For many years, until the passage of the Telecommunications Act of 1996, a well-known regulatory debate took place—in the federal courts, in the Department of Justice, in the Commission, and among industry groups, antitrust law experts, and economists—regarding the wisdom of allowing the BOCs, as regulated entities that control the bottleneck facilities of the local network, to provide services in potentially competitive markets that require these bottleneck facilities as an essential input of such services. Examples of such services include interLATA services, which are provided by connecting a BOC's local bottleneck facilities to interLATA facilities, enhanced services, which are provided by connecting the BOC's local facilities to computer facilities, and wireless services, which are provided by connecting the BOC's local facilities to wireless facilities. Certain parties in this debate emphasized the anti-competitive dangers that arise if the BOC is permitted to provide such services on a physically integrated basis. That is, they emphasized the dangers that arise if the BOC is allowed to place the design, construction, and operation of the non-local facilities at issue—such as interLATA facilities in the case of interLATA services, computer facilities in the case of enhanced services, or wireless facilities in the case of wireless services—in the local operating company. For example, with respect to interLATA services, these parties were concerned that a BOC, if permitted to provide such services on an integrated basis, would have the ability and incentive to arrange more efficiently designed, higher quality connection between its local network and its interLATA facilities than between its local network and rivals' interLATA facilities. They were also concerned that a BOC might take the common costs of the facilities (and employees) that are jointly used to provide both local and interLATA service and allocate, on its books of account, an undue proportion of such costs to its local operations. As suggested above, such improper cost allocation would allow the BOCs to overcharge local service ratepayers while at the same time inefficiently undercut their interexchange competitors. On the other side of the debate, the BOCs emphasized the significant integrative efficiencies that result from being able to have the same facilities (and employees) that are used in the design, construction, and operation of their local networks used in the design, construction, and operation of their interLATA networks. And they also disputed that service on a physically integrated basis raises the anti-competitive dangers described above. The MFJ bar on the provision of interLATA services, which preceded the section 271/272 framework, clearly reflected a judgment that the dangers were serious and outweighed any benefits.

49. There was a related well-known debate during these years over the wisdom of requiring the BOCs, in the event they were to be permitted to provide competitive services that require the BOCs' local facilities as an input for such services, to do so through a separate affiliate. For certain such services such as wireless services, the Commission decided, precisely because of the anti-competitive dangers described above, that a separate affiliate would generally be required. With respect to the provision of interLATA services on a non-dominant basis by local exchange carriers other than the BOCs (which were not covered by the MFJ), the Commission decided the same. For other services such as enhanced services, the Commission originally determined that a separate affiliate would be required, but subsequently decided that non-structural safeguards would suffice. The particulars of these decisions is not the point here, however. Rather, the key point is that, as reflected in these and other similar court and agency decisions, both sides in these separate affiliate debates, as well as the decisionmakers who resolved them at various points, shared a common assumption about what was fundamentally at stake in such debates, namely, whether the BOCs could provide the competitive service at issue on an end-to-end, physically integrated basis. Thus, for example, in the many years of debate over the wisdom of a separate affiliate requirement for enhanced services, it was uniformly assumed that what was at issue was the BOCs' right to place the design, construction, and operation of the computer facilities necessary to furnish enhanced services—the computer hardware, the databases, etc.—in the local operating company and thus to provide such services on an end-to-end, physically integrated basis.

50. In any event, in enacting sections 271 and 272 of the Telecommunications Act of 1996, Congress ended the debate with respect to interLATA services and decided the issue legislatively. With respect to in-region interLATA services in particular, the section 271/272 framework permits the BOCs to provide such services once they obtain section 271(d)(3) approval, but they have to do so, at least initially, through a separate affiliate. And as noted above, we are not at liberty to depart from that decision during the period in which the statutory separate affiliate requirements are in effect.

51. The BOCs respond that Congress' decision to impose a separate affiliate requirement did not necessarily include the decision to preclude a BOC from providing in-region interLATA service on a physically integrated basis, that is, from placing the design, construction, and operation of interLATA network facilities in the local network operating company. Rather, in their view, the separate affiliate requirement is designed merely ''to make entirely transparent the [wholesale] dealings between an operating company and its interLATA affiliate,'' and is entirely agnostic on whether the service ultimately being provided by the BOC to the affiliate and being sold by the affiliate to end users is a uniquely integrated one. Yet, as discussed above, a bar on the integration of a BOC's local facilities and the additional BOC facilities necessary to provide competitive services such as interLATA services has always been understood by courts and agencies, and the lawyers and economists arguing before them, as the *sine qua non* of a separate affiliate requirement, and we presume that Congress chose to impose a separate affiliate requirement in section 272 with that long-held common understanding in mind. And we presume this for good reason. Again as explained above, the concerns for discrimination and improper cost allocation that have

always been understood as the justification for the imposition of a separate affiliate requirement are most present where interLATA services are being provided on an integrated basis.

52. Indeed, were we to conclude that the BOCs were permitted to provide interLATA services on an integrated basis, it is hard to understand why Congress would choose to require that a separate affiliate ''operate independently'' of the BOC, or more importantly, why it would choose to require a separate affiliate at all. To be sure, as the BOCs explain, a separate affiliate also forces the dealings between the operating company and interLATA affiliate to be ''entirely transparent.'' But the only dealings that would take place between the operating company and the separate affiliate under the BOCs' vision of an integrated supplier are the typical dealings that take place between a facilities-based interLATA service provider and a reseller, that is, dealings related to the pricing, ordering, and billing of the facilities-based provider's interLATA services. And the possibility of discrimination in the wholesale pricing, ordering, and billing of interLATA services, by itself, has never been thought to justify, so far as we are aware, the imposition of a separate affiliate requirement in an analogous context. It is not surprising, then, that we are also not aware of a separate affiliate requirement in any analogous context, statutory or regulatory, past or present, in which a BOC or similarly regulated entity has been permitted to provide facilities-based integrated service to the separate affiliate, so long as it does not also sell the service to end users.

53. The BOCs also argue that, even assuming that Congress, in enacting section 272, was generally concerned with the risks of discrimination and improper cost allocation that arise with the provision of facilities-based integrated service, such risks are insubstantial in light of the non-discrimination requirement in section 272(e)(4) (even under their reading of it as a grant of authority) that bars a BOC from advantaging its interLATA affiliate. They observe that Congress viewed the risk of discrimination and improper cost allocation as problematic only where the BOCs possess not only the ability to engage in such conduct, but also the *incentive.* In this case, the BOCs argue, the non-discrimination requirement in section 272(e)(4) removes any ''conceivable incentive'' they might otherwise have to engage in prohibited conduct in the provision of wholesale interLATA services.

54. As an initial matter, we do not think that the presence of a non-discrimination requirement would remove a BOC's incentive to advantage its affiliate, given, among other things, the numerous practical difficulties in enforcing such a requirement. But even assuming *arguendo* that it would diminish the BOC's incentive to some extent, the BOCs' argument here cannot withstand scrutiny. As explained above, in a world in which section 272(e)(4) is a grant of authority, the affiliate would be acting as a reseller that purchases finished wholesale interLATA services from a facilities-based interLATA service provider, i.e., the BOC. Thus, the only incentive the presence of a non-discrimination requirement would diminish is the incentive of the local operating company to discriminate in the pricing, ordering, and billing of wholesale interLATA services in favor of the affiliate. Any benefits of this kind of unlawful conduct could not be captured entirely by the affiliate but would have to be shared. But the non-discrimination requirement certainly would not diminish the local operating company's more serious incentive to discriminate in the internal design, construction, and operation of interLATA networks in favor of itself (concern for which, as just explained, has always been the primary justification for separate affiliate requirements in this area) and at the expense of its rival facilities-based interLATA service providers. Any benefits of this kind of unlawful conduct could be captured entirely by the local operating company when it sells finished wholesale interLATA services to its affiliate and other resellers. In this regard, we find it significant that the BOCs claim that '' 'there is no possibility that a BOC could *use* its supply of wholesale interLATA services to its affiliate to impede competition in the retail market.' '' They make no similar claim about the possibility that a BOC could impede competition in the way it *creates* that supply. Thus, because it is clear that, with respect to the design, construction, and operation of interLATA networks, the BOCs have the ability *and* incentive to engage in the very core prohibited conduct that Congress was concerned about when it made its policy choice to require separate affiliates, that choice is controlling.

55. Finally, our conclusion that section 272(e)(4) is not a grant of authority serves as a complete response to the BOCs' arguments regarding use of their in-region, interLATA Official Services Networks. In the *Non-Accounting Safeguards First Report and Order,* we noted that a BOC is permitted to ''transfer ownership'' of its Official Services Network to its affiliate (so long it did so in a way that gave other carriers an equivalent opportunity to obtain ownership). We did not offer any discussion of the issue, however, because there was no indication in the record before us that transferring ownership of these Networks to affiliates was something that the BOCs seek to do. As a Bell Atlantic affidavit filed in response to our expedited reconsideration of section 272(e)(4) notes, these networks are ''currently used in the operation of the local telephone network'' and thus their ownership ''realistically cannot be transferred.'' Rather, the BOCs seek to maintain ownership of their interLATA Official Services Networks and lease excess capacity on the networks to their affiliates. The leasing of capacity on an in-region interLATA network is plainly an in-region interLATA service, however. And, as we conclude in this *Second Order on Reconsideration,* because section 272(e)(4) is not a grant of authority, a BOC may not directly provide in-region interLATA services until the separate affiliate requirement is removed.

V. Conclusion

56. For the reasons stated, we find that the most sensible interpretation of section 272(e)(4) is that it is a non-discrimination and cost allocation requirement that applies to interLATA services that the BOC is otherwise authorized to provide; it is not an affirmative grant of authority to provide integrated interLATA services on a wholesale basis. In so finding, we emphasize that Congress did not ignore, nor have we, the integrative efficiencies that may result when the same people and facilities of a BOC that provide local service provide interLATA service as well. Indeed, by providing for the sunset of the separate affiliate requirement within three years of BOC entry (for telecommunications services) unless the Commission acts otherwise, Congress envisioned that there may well come a point when the benefits of such efficiencies come to outweigh any risk of anti-competitive harm due to discrimination and improper cost allocation such that consumers are better off. In this respect, the BOCs' emphasis on these benefits is not misguided; it is merely premature.

VI. Ordering Clauses

57. Accordingly, it is Ordered that, pursuant to sections 1–4, 201–205, 214,

251, 252, 271, 272, and 303(r) of the Communications Act of 1934, as amended, 47 U.S.C. §§ 151–154, 201–205, 214, 251, 252, 271, 272, and 303(r), the Second Order on Reconsideration in CC Docket No. 96–149 is Adopted.

Federal Communications Commission.

William F. Caton,

Acting Secretary.

[FR Doc. 97–17647 Filed 7–3–97; 8:45 am]

BILLING CODE 6712–01–P

FEDERAL COMMUNICATIONS COMMISSION

47 CFR Part 73

[MM Docket No. 97–38; RM–8971]

Radio Broadcasting Services; Weston, ID

AGENCY: Federal Communications Commission.

ACTION: Final rule.

SUMMARY: This document allots Channel 240A to Weston, Idaho, as that community's first local aural transmission service in respone to a petition filed by West Wind Broadcasting. See 62 FR 5788, February 7, 1997. Coordinates used for Channel 240A at Weston are 42–02–18 and 111–58–48. With this action, the proceeding is terminated.

DATES: Effective August 4, 1997. The window period for filing applications for Channel 240A at Weston, Idaho, will open on August 4, 1997, and close on September 4, 1997.

FOR FURTHER INFORMATION CONTACT: Nancy Joyner, Mass Media Bureau, (202) 418–2180. Questions related to the window application filing process for Channel 240A at Weston, Idaho, should be addressed to the Audio Services Division, (202) 418–2700.

SUPPLEMENTARY INFORMATION: This is a synopsis of the Commission's Report and Order, MM Docket No. 97–38, adopted June 11, 1997, and released June 20, 1997. The full text of this Commission decision is available for inspection and copying during normal business hours in the FCC's Reference Center (Room 239), 1919 M Street, NW., Washington, DC. The complete text of this decision may also be purchased from the Commission's copy contractors, International Transcription Service, Inc., 2100 M Street, NW., Suite 140, Washington, DC 20037, (202) 857–3800.

List of Subjects in 47 CFR Part 73

Radio broadcasting.

Part 73 of Title 47 of the Code of Federal Regulations is amended as follows:

PART 73—[AMENDED]

1. The authority citation for Part 73 continues to read as follows:

Authority: Secs. 303, 48 Stat., as amended, 1082; 47 U.S.C. 154, as amended.

§ 73.202 [Amended]

2. Section 73.202(b), the Table of FM Allotments under Idaho, is amended by adding Weston, Channel 240A.

Federal Communications Commission.

John A. Karousos,

Chief, Allocations Branch, Policy and Rules Division, Mass Media Bureau.

[FR Doc. 97–17567 Filed 7–3–97; 8:45 am]

BILLING CODE 6712–01–P

FEDERAL COMMUNICATIONS COMMISSION

47 CFR Part 73

[MM Docket No. 97–62; RM–9008]

Radio Broadcasting Services; Orofino, ID

AGENCY: Federal Communications Commission.

ACTION: Final rule.

SUMMARY: This document allots Channel 253A to Orofino, Idaho, as that community's second local FM transmission service in response to a petition filed by Topaz Enterprises, Inc. *See* 62 FR 7982, February 21, 1997. Coordinates used for Channel 253A at Orofino are 46–28–48 and 116–15–00. As Orofino is located within 320 kilometers (199 miles) of the Canadian border, concurrence of the Canadian government in this proposal was obtained. With this action, the proceeding is terminated.

DATES: Effective August 4, 1997. The window period for filing applications for Channel 253A at Orofino, Idaho, will open on August 4, 1997, and close on September 4, 1997.

FOR FURTHER INFORMATION CONTACT: Nancy Joyner, Mass Media Bureau, 202) 418–2180. Questions related to the window application filing process for Channel 253A at Orofino, Idaho, should be addressed to the Audio Services Division, (202) 418–2700.

SUPPLEMENTARY INFORMATION: This is a synopsis of the Commission's Report and Order, MM Docket No. 97–62, adopted June 11, 1997, and released June 20, 1997. The full text of this Commission decision is available for inspection and copying during normal business hours in the FCC's Reference Center (Room 239), 1919 M Street, NW., Washington, DC. The complete text of this decision may also be purchased from the Commission's copy contractors, International Transcription Service, Inc., 2100 M Street, NW., Suite 140, Washington, DC 20037, (202) 857–3800.

List of Subjects in 47 CFR Part 73

Radio broadcasting.

Part 73 of Title 47 of the Code of Federal Regulations is amended as follows:

PART 73—[AMENDED]

1. The authority citation for Part 73 continues to read as follows:

Authority: Secs. 303, 48 Stat., as amended, 1082; 47 U.S.C. 154, as amended.

§ 73.202 [Amended]

2. Section 73.202(b), the Table of FM Allotments under Idaho, is amended by adding Channel 253A at Orofino.

Federal Communications Commission.

John A. Karousos,

Chief, Allocations Branch, Policy and Rules Division, Mass Media Bureau.

[FR Doc. 97–17569 Filed 7–3–97; 8:45 am]

BILLING CODE 6712–01–P

FEDERAL COMMUNICATIONS COMMISSION

47 CFR Part 73

[MM Docket No. 97–36; RM–8991]

Radio Broadcasting Services; Mendota, CA

AGENCY: Federal Communications Commission.

ACTION: Final rule.

SUMMARY: This document allots Channel 263A to Mendota, California, as that community's first local aural transmission service in response to a petition filed by Mendota Broadcasting Company. *See* 62 FR 5790, February 7, 1997. Coordinates used for Channel 263A at Mendota are 36–45–12 and 120–22–54. With this action, the proceeding is terminated.

DATES: Effective August 4, 1997. The window period for filing applications for Channel 263A at Mendota, California, will open on August 4, 1997, and close on September 4, 1997.

FOR FURTHER INFORMATION CONTACT: Nancy Joyner, Mass Media Bureau, (202) 418–2180. Questions related to the window application filing process for Channel 263A at Mendota, California,