ORAL ARGUMENT SCHEDULED FOR APRIL 7, 2004

BRIEF FOR RESPONDENTS

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

03–1035

AT&T CORP.,

Petitioner,

v.

FEDERAL COMMUNICATIONS COMMISSION
AND UNITED STATES OF AMERICA,

Respondents.

ON PETITION FOR REVIEW OF AN ORDER OF THE
FEDERAL COMMUNICATIONS COMMISSION

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CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

1. Parties.

Except for the United States, which is a statutory respondent, all parties, intervenors, and amici appearing before the agency and in this Court are listed in the Brief for AT&T Corp.

2. Rulings under review.

AT&T Corp. cites no order of the Federal Communications Commission that addresses the issue it raises in its petition for review. AT&T references the following two documents released by the Commission:

> *Section 272 Sunsets for Verizon in New York State by Operation of Law on December 23, 2002 Pursuant to Section 272(f)(1)*, Public Notice, 17 FCC Rcd 26864 (2002) (J.A. 1–5).
>
> *Section 272(f)(1) Sunset of the BOC Separate Affiliate and Related Requirements*, Memorandum Opinion and Order, 17 FCC Rcd 26869 (2002) (J.A. 6–20).

3. Related cases.

This case has not previously been before this Court. The issues presented in this case are similar to those presented in *AT&T Corp. v. Federal Communications Commission et al.*, No. 03–1258 (D.C. Cir.), which is being held in abeyance pending the Court's decision in this case.

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GLOSSARY

1996 Act *or* Act	Telecommunications Act of 1996.
APA	Administrative Procedure Act.
BOC	Bell operating company.
EPA	Environmental Protection Agency.
LATA	Local access and transport area.
LEC	Local exchange carrier.
MFJ	Modified Final Judgment.
NPDES	National Pollution Discharge Elimination System.

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QUESTION PRESENTED

After receiving the Federal Communications Commission's approval to provide long distance services in a state, Bell operating companies are required by statute to provide those services through a separate affiliate that meets certain requirements. Congress specified that most of those statutory requirements sunset by operation of law after three years, "unless the Commission extends such 3-year period by rule or order." 47 U.S.C. § 272(f)(1). Congress did not, however, direct the Commission to conduct any proceeding or to take any action concerning the statutory sunset date, nor did it prescribe any standards regarding the agency's discretionary authority to extend the effectiveness of the statutory requirements. As Congress provided, those requirements expired in New York by operation of law. Is the Commission's decision not to disturb the statutory sunset date in New York committed to its discretion under 5 U.S.C. § 701(a)(2)?

JURISDICTION

AT&T Corp. challenges the sunset of the statutory requirement that Verizon provide long distance services in New York through a separate affiliate. 47 U.S.C. § 272. That sunset occurred automatically by operation of 47 U.S.C. § 272(f)(1). Contrary to AT&T's portrayal, the Commission did not "rule[]" that the statutory separate affiliate requirement "should no longer apply," and the Commission's Public Notice advising that Section 272's requirements expired by operation of law is not a Commission order "terminat[ing] the safeguards applicable to Verizon in New York" or "conclud[ing] a portion of a rulemaking proceeding." *See* AT&T Br. 1, 2. The only agency "decision" at issue in this case is the Commission's decision not to exercise its discretion to disturb the sunset date that Congress established in the statute. As explained below (pp. 20–49), that decision is "committed to agency discretion by law." 5 U.S.C. § 701(a)(2). AT&T's petition for review should, therefore, be dismissed for lack of jurisdiction. *Baltimore Gas & Elec. Co. v. FERC*, 252 F.3d 456, 457 (D.C. Cir. 2001).

STATUTORY PROVISIONS

Pertinent statutory provisions are reproduced in the appendix to this brief.

COUNTERSTATEMENT

1. The Bell operating companies (BOCs) are incumbent local exchange carriers (LECs) that were owned by petitioner AT&T until 1984. *See United States v. American Tel. & Tel. Co.*, 552 F. Supp. 131, 139 (D.D.C. 1982) (*AT&T I)*, *aff'd sub nom. Maryland v. United States*, 460 U.S. 1001 (1983). Like virtually all incumbent LECs operating before 1996, the BOCs held state-issued franchises that granted them a monopoly over the local telephone networks in their service areas. *See AT&T Corp. v. Iowa Utils. Bd.*, 525 U.S. 366, 371 (1999). Because of this monopoly, a party—such as a long distance carrier—that wanted to connect calls to and from a BOC's customer required access to the BOC's network. *AT&T I*, 552 F. Supp. at 223. And since the BOCs provided local telephone service to most of the nation's population, access to their networks was particularly important to a long distance carrier's ability to compete. *Id.; see also Policy and Rules Concerning Rates for Competitive Common Carrier Services and Facilities Authorizations Therefor*, First Report and Order, 85 FCC 2d 1, 23 ¶ 62 (1980) (*Competitive Carrier First Report and Order*) (noting that the Bell

System controlled "access to over 80% of the nation's telephones" and that "many of AT&T's competitors must have access to this network if they are to succeed").

Although AT&T also controlled the vast majority of the nation's long distance services for much of the twentieth century (*AT&T I*, 552 F. Supp. at 222), it did not enjoy a monopoly franchise in the long distance market. Rather, as alleged in an antitrust suit brought by the United States Department of Justice, AT&T had, in response to the increasing competition that had developed in the long distance market, illegally maintained its dominance in that market (and in other markets) by using its control of the BOCs to impede its competitors' access to the BOCs' local telephone networks. *Id.* at 223. In addition, AT&T allegedly engaged in improper cross-subsidization of its long distance services. *Id.* Through these activities, the government alleged, AT&T had harmed competition in the long distance market. *Id.* at 139, 160–61.

In 1982, AT&T entered into a consent decree to settle the antitrust suit. Under the terms of the consent decree—known as the Modification of Final Judgment or MFJ—AT&T agreed to divest the BOCs to end its control of the local telephone network and, consequently, its ability to use the local network to disadvantage its long distance competitors. *Id.* at 140–41. To ensure that the newly divested BOCs would not use the same strategy that AT&T had allegedly used to harm competition in the long distance market, the MFJ prohibited the BOCs from providing telecommunications services across the boundaries of "local access and transport areas," or LATAs. *See United States v. Western Elec. Co.*, 569 F. Supp. 990, 993–94 (D.D.C. 1983); *see also* 47 U.S.C. § 153(25) (defining LATA). This restriction on "interLATA" service effectively prohibited the BOCs from providing long distance services across LATA boundaries, thereby diminishing their economic incentive to engage in anticompetitive practices. *AT&T I*, 552 F. Supp. at 165.

2. While the MFJ was being negotiated and implemented, the Federal Communications Commission was conducting its *Competitive Carrier* proceeding to address the emergence of competition in the long distance market. In a series of decisions, the Commission classified telecommunications carriers as dominant or nondominant based on their ability to exercise market power and tailored its regulatory requirements accordingly. *Competitive Carrier First Report and Order*, 85 FCC 2d at 10 ¶ 25. The Commission applies the "full panoply" of regulatory safeguards to dominant carriers, while nondominant carriers receive streamlined regulatory treatment. *Id.* at 6 ¶ 16, 23 ¶ 63. For example, dominant carriers must file tariffs on one to 120 days' notice, with supporting information, including, in some cases, detailed cost data. 47 C.F.R. §§ 61.38, 61.58. Nondominant carriers, in contrast, may negotiate individualized service agreements and offer rates and services

tailored to their customers' particular needs. *See Policy and Rules Concerning the Interstate, Interexchange Marketplace*, Second Report and Order, 11 FCC Rcd 20730 (1996), *aff'd*, *MCI WorldCom, Inc. v. FCC*, 209 F.3d 760 (D.C. Cir. 2000).

The Commission classified AT&T as dominant in the long distance market from 1980 (*see Competitive Carrier First Report and Order*, 85 FCC 2d at 23 ¶ 63) until 1995, when the Commission found that competition had developed to the point that AT&T no longer possessed market power. *See Motion of AT&T Corp. to be Reclassified as a Non-Dominant Carrier*, Order, 11 FCC Rcd 3271, 3307–09 ¶¶ 67–73 (1995). The Commission initially classified incumbent LECs (including the BOCs) as dominant in all services provided within their local service areas. *Competitive Carrier First Report and Order*, 85 FCC 2d at 23–24 ¶¶ 62, 65 & n.61. Although non-BOC incumbent LECs (often called independent LECs) had a very small share of the long distance market, the Commission expressed concern that their "control of essential facilities" to which long distance carriers "must have access" (*id.* at 24 ¶ 65) would give them the ability and incentive to shift the costs of providing long distance services to their rate-regulated local service and to engage in other anticompetitive practices.[1] The

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[1] *See Policy and Rules Concerning Rates for Competitive Common Carrier Services and Facilities Authorizations Therefor*, Fifth Report and Order, 98 FCC 2d 1191, 1195–96 ¶ 7 (1984) (*Competitive Carrier Fifth Report and Order*).

Commission accordingly regulated independent LECs that provided long distance services as dominant in the long distance market. *Competitive Carrier Fifth Report and Order*, 98 FCC 2d at 1195–96 ¶ 7, 1198–99 ¶ 9.

The Commission treated long distance carriers *affiliated with* independent LECs differently. The Commission observed that independent LECs providing long distance services through separate affiliates "increased competition" and benefited consumers "through lower-priced services and new offerings." *Id.* at 1197 ¶ 8. The Commission accordingly regulated the long distance services provided by those affiliates as nondominant if they met certain separation conditions designed to protect against "cost-shifting and anticompetitive conduct." *Id.* at 1198 ¶ 9. Specifically, the Commission required that the long distance affiliate have separate books of account and separate transmission and switching facilities from its LEC affiliate, and obtain any services from the LEC through the LEC's tariff. *Id.*

The Commission did not address in the *Competitive Carrier* proceeding whether compliance with these separation requirements would be sufficient to qualify a BOC's long distance affiliate for nondominant treatment because the MFJ's restrictions on interLATA services applied to BOC affiliates. *See AT&T I*, 552 F. Supp. at 227. The Commission simply decided that "[i]f this bar is lifted in the future, we would regulate the BOCs' interstate, interLATA services as dominant until we determined what degree of separation, if any, would be necessary for the BOCs or their affiliates to qualify for nondominant regulation." *Competitive Carrier Fifth Report and Order*, 98 FCC 2d at 1198 n.23.

3. That bar was lifted when Congress enacted the Telecommunications Act of 1996 (the 1996 Act), Pub. L. No. 104–104, 110 Stat. 56. The 1996 Act seeks to "promote competition" and "reduce regulation" by "opening all telecommunications markets to competition." *Id.*; H.R. Conf. Rep. No. 104–458, at 1 (1996). It ends the monopoly franchises of incumbent LECs (47 U.S.C. § 253) and requires them to open their local telephone networks to new entrants, *see* 47 U.S.C. §§ 251, 252. Under the 1996 Act, new entrants can access the local network by obtaining the incumbent's retail services at wholesale rates and reselling those services to end users, by leasing various elements of the incumbent's network on an unbundled basis, and by interconnecting their own equipment to the incumbent's network. *See AT&T Corp. v. FCC*, 220 F.3d 607, 611 (D.C. Cir. 2000) (*AT&T II*). "Through any of these three routes," the 1996 Act affords new entrants the ability to "offer local phone service in competition" with the incumbent LEC. *Id.*

The 1996 Act also eliminates the MFJ's restrictions on the BOCs' ability to provide long distance services. *Id.* at 611–12 (citing 1996 Act, § 601(a)(1), 110 Stat. at 143). The 1996 Act, however, imposes certain conditions on the BOCs "[t]o encourage [them] to open their markets to competition as quickly as possible." *Id.* at 612. Before a BOC may provide interLATA services originating in a state served by one of its incumbent local exchanges, it must obtain authorization from the Commission (47 U.S.C. § 271(b)(1)) by demonstrating that it provides competitors access and interconnection to its local network consistent with the 14-point "competitive checklist" specified in 47 U.S.C. § 271(c)(2)(B), and that the authorization would be consistent with the public interest. *See* 47 U.S.C. § 271(d)(3)(A), (C). In addition, the BOC must show that the authorization "will be carried out in accordance with the requirements of section 272." 47 U.S.C. § 271(d)(3)(B).

Section 272 establishes various structural, nondiscrimination, and enforcement mechanisms to "check [the BOCs'] incentive to leverage their bottleneck assets into market power over other telecommunications services." *Association of Communications Enters. v. FCC*, 235 F.3d 662, 667 (D.C. Cir. 2001). Section 272 requires that a BOC offer any long distance services authorized by the Commission through a separate affiliate that operates independently from the BOC, that maintains separate books, records, and accounts; and that has separate officers, directors, and employees. 47 U.S.C. § 272(a), (b)(1)–(3). The affiliate cannot have a credit arrangement that allows recourse to the BOC's assets, and its transactions with the BOC must be on an arm's length basis, reduced to writing, and available for public inspection. 47 U.S.C. § 272(b)(4), (5). A BOC may not discriminate in favor of its long distance affiliate "in the provision or procurement of goods, services, facilities, and information, or in the establishment of standards"; or in the provision of "telephone exchange service," "exchange access," or "interLATA or intraLATA facilities or services." 47 U.S.C. § 272(c)(1), (e). A BOC and its affiliate also may not engage in certain types of joint marketing activities. 47 U.S.C. § 272(g). Transactions between a BOC and its affiliate must be recorded in accordance with Commission-approved accounting rules, and a BOC must obtain an independent audit biennially to determine whether it has complied with the requirements of Section 272. 47 U.S.C. § 272(c)(2), (d).

In Section 272(f), Congress provided for the automatic sunset of most of these requirements. With respect to a BOC's long distance affiliate, Congress specified that, except for subsection (e), Section 272 "shall cease to apply" three years after the BOC receives authority to provide interLATA services in a state, "unless the Commission extends such 3-year period by rule or order." 47 U.S.C. § 272(f)(1). As the Commission observed a few months after the 1996 Act was passed, Congress did not "specify the standard that the Commission should apply when deciding whether to extend the separate affiliate requirements beyond the sunset date."[2] Rather, Congress gave the

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[2] *Implementation of the Non-Accounting Safeguards of Sections 271 and 272 of the Communications Act of 1934, as amended*, Notice of Proposed Rulemaking, 11 FCC Rcd 18877, 18885 n.28 (1996) (*Non-Accounting Safeguards NPRM*).

Commission broad discretion, and it did not compel the Commission to take any action and did not provide any guidance in the statutory language concerning the Commission's exercise of that discretion.

After a statutory sunset date passes for a state, Section 272 no longer requires a BOC to provide long distance services in that state through a separate affiliate or to comply with most of Section 272's structural and nondiscrimination provisions. The BOC, however, remains subject to the nondiscrimination provisions in Section 272(e), as well as to the general statutory prohibition against unreasonable discrimination (47 U.S.C. § 202) and to the obligation to provide equal access and nondiscriminatory interconnection to long distance carriers, 47 U.S.C. § 251(g). In addition, Congress expressly provided that the sunset provision did not "limit the authority of the Commission under any other section of this Act to prescribe safeguards consistent with the public interest, convenience, and necessity." 47 U.S.C. § 272(f)(3). Congress thus preserved the Commission's authority to require a BOC to comply with regulatory "safeguards" even after Section 272 "cease[s] to apply." This includes safeguards in effect when a sunset occurs for a state, as well as additional safeguards that the Commission might adopt in the future.

4. With the MFJ's restrictions on the BOCs lifted, the Commission partially addressed the question that it had previously reserved: "what degree of separation, if any, would be necessary for the

BOCs or their affiliates [providing long distance services] to qualify for nondominant regulation." *Competitive Carrier Fifth Report and Order,* 98 FCC 2d at 1198 n.23. In its 1997 *LEC Classification Order*, the Commission decided to regulate BOC affiliates that complied with Section 272's safeguards as nondominant, "given that section 272 contains numerous safeguards designed to prevent the BOCs from engaging in improper cost allocation, discrimination, and other anticompetitive conduct."[3] The Commission observed that Section 272(f)(1) "provides that the BOC safeguards set out in section 272 * * * shall sunset three years after the date that the BOC affiliate is authorized to provide interLATA telecommunications services unless the Commission extends such three-year period by rule or order." 12 FCC Rcd at 15835 n.391. But the Commission declined to predict "how competition will develop" or "what accounting and non-accounting safeguards, if any, will be needed at that time." *Id.* The Commission concluded instead that it would determine what "safeguards, if any, are necessary and appropriate upon expiration of those section 272 safeguards subject to sunset" and whether the BOCs or their affiliates "should be classified as dominant or nondominant" in the long distance market. *Id.*

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[3] *Regulatory Treatment of LEC Provision of Interexchange Services Originating in the LEC's Local Exchange Area*, Second Report and Order, 12 FCC Rcd 15756, 15835 ¶ 134 (1997) (*LEC Classification Order*).

The Commission also reexamined the separation requirements for long distance affiliates of independent LECs seeking to qualify for nondominant treatment. In the *LEC Classification Order*, the Commission determined that those separation requirements should be mandatory for independent LECs, rather than merely a condition for nondominant treatment. *Id.* at 15856 ¶ 173.

5. On December 22, 1999, Verizon became the first BOC to receive Commission approval to provide long distance services.[4] In granting its approval, the Commission found that Verizon had taken the "statutorily required steps to open its local exchange and exchange access markets [in New York] to competition." *New York 271 Order*, 15 FCC Rcd at 3955 ¶ 1. AT&T claimed numerous deficiencies in the Commission's decision on judicial review, but this Court rejected those challenges. *AT&T II*, 220 F.3d at 610. In affirming, the Court gave "special deference" to the Commission's decision, noting that the agency must make its decision "in the context of rapid technological and competitive change." *Id.* at 617.

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[4] *See Application by Bell Atlantic New York for Authorization under Section 271 of the Communications Act to Provide In-Region, InterLATA Service in the State of New York*, Memorandum Opinion and Order, 15 FCC Rcd 3953 (1999) (*New York 271 Order*), *aff'd*, *AT&T II*, 220 F.3d at 607.

6. On May 16, 2002, the Commission initiated "an inquiry regarding the sunset of the statutory requirements under section 272."[5] In the *Section 272 Sunset NPRM*, the Commission solicited views from interested parties concerning "(1) whether the structural safeguards established in section 272 should be extended by the Commission, despite the three-year sunset provision in the statute; and (2) whether any alternative safeguards should be put in place in states where the statutory requirements have sunset." 17 FCC Rcd at 9917 ¶ 1 (J.A. 22).

The Commission asked a series of questions in the *Section 272 Sunset NPRM*, but proposed no specific course of action and reached no tentative conclusions. The Commission observed that Congress enacted Section 272 because the "BOCs may attempt to discriminate and misallocate costs" after receiving authority to provide long distance services, but that "Congress made the judgment that the BOCs should be subject to the structural and nondiscrimination safeguards in section 272 only temporarily." *Id.* at 9919–20 ¶ 8 (J.A. 24–25). The Commission requested comment on "marketplace developments," but also asked "more generally what factors" it should consider in its inquiry. *Id.* at 9920 ¶ 11 (J.A. 25). The Commission listed a non-exhaustive set of regulatory options that included allowing the sunset to

[5] *Section 272(f)(1) Sunset of the BOC Separate Affiliate and Related Requirements*, Notice of Proposed Rulemaking, 17 FCC Rcd 9916, 9917 ¶ 1 (2002) (J.A. 22) (*Section 272 Sunset NPRM*).

occur, extending the sunset period, replacing the statutory requirements with other separation requirements, and adopting nonstructural safeguards. *See id.* at 9922–25 ¶¶ 17–26 (J.A. 27–30).

Although the scope of the *Section 272 Sunset NPRM* is broad, it does not expressly address an issue that the Commission had deferred in the *LEC Classification Order*: whether to regulate BOCs that provide long distance services outside of a Section 272 affiliate as dominant or nondominant. On May 19, 2003, the Commission released the *Section 272 Sunset FNPRM* in the same docket to address that issue.[6] The *Section 272 Sunset FNPRM* considers "the continued need for dominant carrier regulation" of BOCs and independent LECs providing long distance services on an integrated basis. 18 FCC Rcd at 10915 ¶ 2 (J.A. 400–01). It inquires about the appropriate service and geographic markets in which BOCs and independent LECs participate and their ability to exercise market power in those markets. *Id.* at 10920–32 ¶¶ 10–34 (J.A. 406–18). It also asks whether dominant carrier regulation "is necessary to prevent potential improper allocation of costs, discrimination against competitors, or price squeezes"; or, alternatively, whether "less burdensome or more effective regulatory

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[6] *Section 272(f)(1) Sunset of the BOC Separate Affiliate and Related Requirements*, Further Notice of Proposed Rulemaking, 18 FCC Rcd 10914 (2003) (J.A. 400–32) (*Section 272 Sunset FNPRM*).

means" are available to protect against these harms. *Id.* at 10932 ¶ 35 (J.A. 418).

7. On December 23, 2002, Verizon reached the automatic sunset date under Section 272(f)(1) with respect to its long distance operations in New York. The Commission released a Public Notice on that date observing that "[t]he provisions of section 272 (other than section 272(e)) * * * sunset for Verizon's operations in New York by operation of law."[7]

The Commission also released a Memorandum Opinion and Order on that date to address an issue of statutory interpretation regarding the scope of the Section 272 sunset provision.[8] The BOCs had argued that the sunset takes effect in every state served by a BOC (or an affiliate of a BOC) three years after the date the BOC first receives interLATA authorization in any state. 17 FCC Rcd at 26872 ¶ 5 (J.A. 9). In the *Section 272 Sunset Scope Order*, the Commission rejected the BOCs' interpretation and agreed with AT&T and other long distance carriers that Section 272 sunsets on a "state-by-state" basis. *Id.* at 26876 ¶ 13 (J.A. 13); *see also id.* at 26872 ¶ 5 (J.A. 9). In addition, the

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[7] *Section 272 Sunsets for Verizon in New York State by Operation of Law on December 23, 2002 Pursuant to Section 272(f)(1)*, Public Notice, 17 FCC Rcd 26864, 26864 (2002) (J.A. 1) (*December 23 Public Notice).*

[8] *Section 272(f)(1) Sunset of the BOC Separate Affiliate and Related Requirements*, Memorandum Opinion and Order, 17 FCC Rcd 26869 (2002) (J.A. 6–20) (*Section 272 Sunset Scope Order*).

Commission confirmed that, under Commission precedent, "Verizon will be deemed nondominant" in long distance services "only insofar as that service is provided through an affiliate that complies with section 272 and our implementing rules." *Id.* at 26870 n.8 (J.A. 7); *see also id.* at 26870 n.5 (J.A. 7).

Over the dissent of two commissioners, the Commission did not address any other issue in the *December 23 Public Notice* or the *Section 272 Sunset Scope Order*.

SUMMARY OF ARGUMENT

In Section 272(f)(1), Congress made manifest its intent that Section 272's requirements should apply to a BOC's long distance operations only for a limited time, and Congress specifically defined that time to be three years from the date the BOC receives authority to provide long distance services in a state. And while Congress granted the Commission discretion to alter that period, Congress provided no meaningful standards in the statute to guide the Commission's exercise of discretion, nor has the Commission voluntarily established a binding policy limiting its discretion under Section 272(f)(1). In these circumstances, the Commission's decision not to disturb Section 272's sunset date in New York is "committed to agency discretion by law." 5 U.S.C. § 701(a)(2). AT&T's petition for review must, therefore, be dismissed for lack of jurisdiction.

1. In Section 272(f)(1), Congress provided blanket authorization to the Commission to "extend[] [the] 3-year [sunset] period by rule or order." As the plain language of the statute shows, Congress remained utterly silent regarding the circumstances in which the Commission should exercise its discretion. Congress neither provided a standard for the Commission to apply, nor did it instruct the Commission to conduct a proceeding of any kind before the statutory sunset takes effect in a state. By drafting the statute in such broad terms, Congress indicated its intent to commit the decision whether to act to the agency's absolute and unfettered discretion.

The statutory structure reinforces this view. In Section 272, Congress established the set of safeguards that, in its judgment, should apply to a BOC when it first receives authority to provide long distance services. But Congress also made the judgment that the statutory safeguards should be temporary. Thus, in Section 272(f)(1), Congress directed that those safeguards "shall cease to apply" automatically, without any need for the Commission to take any action or make any findings to authorize the sunset to take place. But Congress also understood that Section 272 should not expire without some check on the potential misuse of market power by a BOC. Thus, while Congress gave the Commission absolute discretion in deciding whether to take action to prevent the sunset from taking effect, Congress expressly preserved the Commission's broad regulatory authority to prescribe safeguards "consistent with the public interest" after the sunset date. 47 U.S.C. § 272(f)(3).

Indeed, several statutory and regulatory safeguards remain in place after the sunset of Section 272 in a state. Various statutory provisions prohibit a BOC from engaging in unreasonable discrimination, and dominant carrier regulation continues to apply to any long distance services that a BOC provides outside of a separate affiliate that complies with Section 272's safeguards. The Commission also has initiated several rulemaking proceedings to consider whether different or additional safeguards, if any, should be imposed on the BOCs after the sunset of Section 272. These proceedings are on-going and provide AT&T with an opportunity to comment on the adequacy of existing safeguards and to propose any additional safeguards that it believes may be appropriate. With these avenues for recourse available to AT&T, there is no particular need for judicial review whenever the statutory sunset of Section 272 takes effect in a state.

2. The Commission has not established a binding policy limiting its exercise of discretion under Section 272(f)(1). Although AT&T attempts to fashion such a policy from isolated words and phrases combed from various Commission decisions and presented out of context, its attempt fails because the Commission has never endeavored to issue a policy concerning the Section 272(f)(1) sunset provision. For example, AT&T relies heavily on a phrase taken from the background

section of a Commission rulemaking order that promulgated rules to implement various provisions of Section 272—even though that order did not issue any rules governing the sunset provision in Section 272(f)(1). And AT&T cites Commission decisions that refer to Section 272's safeguards as "important," but those decisions do not discuss—and often do not even cite—Section 272(f)(1). The Commission's precedents provide no assistance to AT&T.

Nor does the *Section 272 Sunset NPRM* evince a binding standard for deciding whether to disturb the statutory sunset date. The *NPRM* raises general questions about the Commission's exercise of discretion under Section 272(f)(1) and about possible alternative safeguards that would protect against any potential cost-shifting and anticompetitive practices after Section 272 sunsets in a state. It does not, however, promise—or even propose—any specific course of action, and it does not commit to making a decision before the statutory sunset takes effect in a state. In short, nothing the Commission has done has limited its discretion in such a way as to enable meaningful judicial review of AT&T's challenge to the statutory sunset of Section 272 in New York. AT&T's petition for review must, therefore, be dismissed.

ARGUMENT

The Commission's decision not to disturb Section 272's sunset date in New York is unreviewable because it is committed to agency discretion.

In the 1996 Act, Congress made the judgment that the BOCs should be allowed to provide long distance services after they had shown that their local markets were open to competition. Congress also made the judgment that, after receiving authority to provide long distance services, the BOCs should provide those services through a separate affiliate that complies with the structural and nondiscrimination safeguards that Congress established in Section 272. But Congress also made the judgment that those statutory safeguards should not be permanent, and, to that end, Congress wrote into Section 272 an automatic expiration date: Section 272 "shall cease to apply" three years after a BOC receives interLATA authority in a state, "unless the Commission extends such 3-year period by rule or order." 47 U.S.C. § 272(f)(1).

It is that last clause that is at issue in this case. AT&T complains that the Commission did not intervene to change Congress's determination that Section 272's requirements should expire in New York after three years. But, as the Commission has long recognized, "[t]he statute does not specify the standard that the Commission should apply when deciding whether to extend the separate affiliate requirements beyond the sunset date." *Non-Accounting Safeguards*

NPRM, 11 FCC Rcd at 18885 n.28. Congress did not direct the Commission to conduct any proceedings or to take any action under Section 272(f)(1), and it did not describe any circumstances that might warrant extension of the statute's requirements. Congress thus established a statutory regime that terminates Section 272's requirements by default on a date certain, and left to the Commission's absolute discretion the decision whether to intervene in the operation of the statute.

Although the Administrative Procedure Act (APA) sets forth the procedures by which an aggrieved party may seek judicial review of agency action (including a failure to act) (*see Heckler v. Chaney*, 470 U.S. 821, 828 (1985); 5 U.S.C. § 701 *et seq.*), the APA also provides that no judicial review is available when the action being challenged is "committed to agency discretion by law." 5 U.S.C. § 701(a)(2); *Lincoln v. Vigil*, 508 U.S. 182, 190–91 (1993); *Drake v. FAA*, 291 F.3d 59, 70 (D.C. Cir. 2002). This exception to judicial review applies where "the statute is drawn so that a court would have no meaningful standard against which to judge the agency's exercise of discretion." *Chaney*, 740 U.S. at 830. "In such a case, the statute ('law') can be taken to have 'committed' the decisionmaking to the agency's judgment absolutely." *Id.*

This case presents one of those "rare instances where 'statutes are drawn in such broad terms that in a given case there is no law to apply.'" *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 410 (1971) (quoting S. Rep. No. 79–752, at 26 (1945)). Here, neither Congress nor the Commission has put forth "substantive legal criteria against which an agency's conduct can be seriously evaluated." *Drake*, 291 F.3d at 70; *see also Padula v. Webster*, 822 F.2d 97, 100 (D.C. Cir. 1987). Without any "judicially manageable standards," courts have "no legal norms" to apply on review and "no concrete limitations to impose on the agency's exercise of discretion." *Drake*, 291 F.3d at 70. Because neither the 1996 Act nor the Commission's precedents provides a "concrete limitation" on the agency's "virtually unfettered discretion" not to disturb Congress's determination that Section 272 should expire after three years, "meaningful judicial review is impossible," and AT&T's petition for review must be dismissed. *Id.* at 70–71.

a. Congress specified no judicially manageable standards for evaluating the Commission's decision not to disturb the automatic sunset of Section 272's requirements in New York.

When Congress does not "statutorily restrict[] what can be done," it creates "a clear inference * * * that it does not intend to impose legally binding restrictions" on the agency. *Vigil*, 508 U.S. at 192. Deciding whether Congress has "statutorily restricted what can be done" (*id.*) requires a "careful examination of the statute on which the claim of agency illegality is based." *Webster v. Doe*, 486 U.S. 592, 600 (1988). This examination considers "the language and structure of the statute" and "the nature of the administrative action at issue." *Drake*, 291 F.3d at 70; *see also Webster*, 486 U.S. at 600–01. It is not enough that the agency is generally charged with pursuing broad statutory objectives; judicial review is unavailable where the statute "is utterly silent on the manner in which the Commission is to proceed" on the specific matter at hand. *Baltimore Gas & Elec. Co. v. FERC*, 252 F.3d 456, 461 (D.C. Cir. 2001).

i. The text of Section 272(f)(1) is "utterly silent on the manner in which the Commission is to proceed" in deciding whether to alter the sunset schedule that Congress established. Section 272(f)(1) provides that Section 272's requirements "shall cease to apply" after three years "unless the Commission extends such 3-year period by rule or order." On its face, the statute contains no standard to guide the Commission's actions, or its decision whether to act at all. Nor does it direct the agency to conduct proceedings of any kind. It simply authorizes the Commission to extend Section 272's requirements without providing any direction to the agency as to the circumstances in which it should exercise that discretion.

This Court has held that, when statutes are written "in such broad terms," there is "no law to apply," and courts are without jurisdiction to review the agency's decision. *District of Columbia v. Schramm*, 631 F.2d 854, 861 (D.C. Cir. 1980) (quoting *Overton Park*, 401 U.S. at 410). *Schramm* arose under the National Pollution Discharge Elimination System (NPDES) instituted under the Clean

Water Act. 631 F.2d at 856–57. The NPDES requires "[a]nyone wishing to discharge effluents into a waterway" to obtain a permit. *Id.* at 857. The Clean Water Act grants the Environmental Protection Agency (EPA) the authority to issue NPDES permits, but provides that a state may assume responsibility for issuing permits if it establishes an EPA-approved program that meets certain requirements. *Id.* "No permit shall issue," however, if the EPA "objects in writing" to a state-issued permit. 33 U.S.C. § 1342(d)(2).

In *Schramm*, the District of Columbia argued that the EPA should have vetoed an NPDES permit issued by Maryland because, according to the District, the permit and the permitting process violated the Clean Water Act. 631 F.2d at 857–59. The Court concluded that the District's challenge was unreviewable. Although the Court noted that it had authority to "review [EPA] vetoes of state NPDES decisions," it concluded, after examining "the legislative scheme, the policies of the Clean Water Act, and the case law," that it did not have jurisdiction to review a decision "not to veto." *Id.* at 859–60. In reaching its decision, the Court approvingly quoted the Second Circuit's conclusion that the Clean Water Act did not "provide any clear direction to the [EPA] as to when [it] should or should not reject any particular State permit" and that "the option to take no action, even when a permit does not conform [to the Clean Water Act], is committed to the [EPA's] almost unfettered discretion." *Id.* at 861 n.12 (quoting *Mianus River Preservation Comm.*

v. Administrator, Envt'l Protection Agency, 541 F.2d 899, 909 n.24 (2d Cir. 1976)).

The Commission's discretion under Section 272(f)(1) not to "extend such 3-year" sunset period is as devoid of meaningful judicial standards as the EPA's decision "not to veto" a state-issued permit. Because Section 272(f)(1) does not "provide any clear direction" to the Commission, the agency retains the "option to take no action" when deciding whether a BOC should be required to adhere to Section 272's requirements beyond the three-year period prescribed by Congress. 631 F.2d at 861 n.12. And, as in *Schramm*, a decision not to act is unreviewable, because nothing in the language of Section 272(f)(1) provides a meaningful standard for evaluating the Commission's decision to let Section 272 expire by operation of law for Verizon's long distance operations in New York. *See also Southern Ry. Co. v. Seaboard Allied Milling Corp.*, 442 U.S. 444, 455 (1979) ("on the face of the statute there is simply 'no law to apply' in determining if the decision is correct") (quoting *Overton Park*, 401 U.S. at 410).

ii. The statutory framework reinforces the absence of standards in the text. Section 272 represents Congress's judgment as to the types of safeguards that should apply to a BOC for three years after it receives authority to provide long distance services. But Congress also "made the judgment" that Section 272 should apply "only temporarily," and that, "upon completion of a three-year period, such safeguards would cease to exist" unless extended by the Commission. *Section 272 Sunset NPRM*, 17 FCC Rcd at 9920 ¶ 8. Congress thus used the term "Sunset" in the heading of Section 272(f) to indicate that it expected Section 272 to terminate automatically.[9] And in providing that Section 272 "shall cease to apply" after three years, Congress omitted any condition precedent, such as a Commission finding that the sunset be in the public interest. *Compare* 47 U.S.C. §§ 273(d)(6) (requiring Commission finding before sunset can occur); 549(e) (same). This was no accidental oversight; in the Senate's version of Section 272, the Commission was required to find that "an exception from compliance" with the statutory requirements be "necessary for the public interest." S. 652, 104th Cong., sec. 102, § 252(h) (1995). Congress expressly rejected that framework in favor of the automatic sunset provision in Section 272. *See* H.R. Conf. Rep. No. 104–458, at 152.

AT&T argues, however, that Section 272(f)(1) does not "express[] the view" that "Section 272 requirements *should* be terminated at the end of three years," but contemplates that the Commission would "assess market conditions" at that time and determine whether those requirements "protect the public interest." AT&T Br. 9. But when Congress wanted the Commission to undertake that sort of inquiry, it

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[9] *See* Black's Law Dictionary 1450 (7th ed. 1999) (defining "sunset law" as "[a] statute under which a governmental agency or program automatically terminates at the end of a fixed period unless it is formally renewed").

said so in express terms.[10] By adopting an entirely different structure in Section 272, Congress indicated that it did not intend to impose a similar duty under Section 272(f)(1). *See NextWave Personal Communications, Inc. v. FCC*, 254 F.3d 130, 152–53 (D.C. Cir. 2001) (express provisions in Bankruptcy Code that accommodate regulatory policies indicated that no implied regulatory accommodation existed in the provision at issue), *aff'd*, 537 U.S. 293 (2003); *see also Barnhart v. Sigmon Coal Co., Inc.*, 534 U.S. 438, 452 (2002); *Russello v. United States*, 464 U.S. 16, 23 (1983).

AT&T nevertheless argues that Section 272 has the "clear" statutory purpose of preventing a BOC "from leveraging its market power in local service to gain anti-competitive advantage in the market for long distance" and that, therefore, Congress must have expected the Commission to extend Section 272 as long as the BOC retains local market power. AT&T Br. 30, 33. This argument falters when examined in light of the statutory framework. Although Congress established that

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[10] *See* 47 U.S.C. § 161 (requiring the Commission to review its telecommunications regulations every two years, determine whether they remain "necessary in the public interest as a result of meaningful economic competition," and "repeal or modify" regulations that are "no longer necessary in the public interest"); 1996 Act, § 202(h), 110 Stat. at 111–12 (virtually identical requirement regarding the Commission's media ownership rules); 47 U.S.C. § 548(c)(5) (restriction on exclusive programming contracts sunsets "unless the Commission finds, in a proceeding conducted during the last year" before the sunset date that the restriction "continues to be necessary to preserve and protect competition and diversity in the distribution of video programming").

Section 272 would sunset automatically, Congress expressly preserved "the authority of the Commission under any other section of this Act to prescribe safeguards consistent with the public interest." 47 U.S.C. § 272(f)(3). Congress, therefore, must have understood that a BOC may have market power in a state when Section 272 expires because, in the absence of market power, no "safeguards" would be necessary to protect against cost-shifting and anticompetitive conduct by the BOCs.[11] Under AT&T's market power test, however, Section 272(f)(3) is a dead letter: The Commission would never need to exercise the regulatory authority that Section 272(f)(3) preserves because a BOC with market power would always remain subject to Section 272's requirements. Because courts are reluctant to adopt an interpretation of a statute "that would effectively nullify" one of its provisions,[12] AT&T cannot, by invoking the "clear" purpose of Section 272, establish its preferred market power test

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[11] *See*, *e.g.*, *Association of Communications Enters.*, 235 F.3d at 668 (in the absence of market power, "it is not apparent why a separate affiliate would be necessary—or even useful. It could be thought that the affiliate structure is a *non sequitur* if an [incumbent LEC] cannot use its local loop monopoly to leverage its position in the advanced service market."); *see also LEC Classification Order*, 12 FCC Rcd at 15877–78 ¶¶ 211, 213 (eliminating separate affiliate requirement because incumbent LECs did not have market power in long distance services originating outside of their local service areas).

[12] *Southern Ry. Co.*, 442 U.S. at 456 (holding unreviewable an agency's decision to allow a tariff to go into effect without investigation because that would "render obsolete" the statute's more detailed complaint filing procedures); *see also Carter v. United States*, 530 U.S. 255, 262 (2000); *Walters v. Metropolitan Educ. Enters.*, 519 U.S. 202, 208–09 (1997).

as the standard governing the Commission's exercise of discretion under Section 272(f)(1). *See Bell Atlantic Tel. Cos. v. FCC*, 131 F.3d 1044, 1050 (D.C. Cir. 1997) (describing the "policy purpose" of Section 272 as "preventing the BOCs from entering the interLATA origination market except through affiliates *until the sunset of § 272(a)(2)*") (emphasis added).

iii. The absence of any "judicially meaningful standard" limiting the Commission's discretion under Section 272(f)(1) comports with the "nature of the administrative action" involved in this case. *Drake*, 291 F.3d at 70. Here, the "scope of the administrative decision" is "extremely limited." *Southern Ry. Co.*, 442 U.S. at 454. As the Commission has recognized, several statutory safeguards are "available to prevent discriminatory behavior by the BOCs" after Section 272 sunsets.[13] For example, Section 272(e), which prohibits a BOC from engaging in various types of discriminatory practices, remains in effect after the statutory sunset date. 47 U.S.C. § 272(f)(1). The BOCs also must continue to provide "equal access and nondiscriminatory interconnection" to long distance carriers—an MFJ requirement that

[13] *Implementation of the Non-Accounting Safeguards of Sections 271 and 272 of the Communications Act of 1934, as amended*, First Report and Order and Further Notice of Proposed Rulemaking, 11 FCC Rcd 21905, 22036 ¶ 271 (1996) (*Non-Accounting Safeguards Order*); *see also Request for Extension of the Sunset Date of the Structural, Nondiscrimination, and Other Behavorial Safeguards Governing Bell Operating Company Provision of In-Region, InterLATA Information Services*, Order, 15 FCC Rcd 3267, 3268 ¶ 3 & n.6 (2000).

Congress carried over into the 1996 Act—until the Commission supercedes that requirement by regulation.[14] And, like all carriers, the BOCs are subject to the general prohibition against unreasonable discrimination in 47 U.S.C. § 202.

These statutory safeguards are supported by regulatory safeguards that are currently in place to address concerns about cost-shifting and discriminatory conduct by the BOCs. Since the *Competitive Carrier* proceeding, the primary regulatory safeguard has been dominant carrier regulation of long distance services that are provided by a BOC on an integrated basis. To obtain nondominant treatment under the *LEC Classification Order*—which a BOC has an incentive to do since AT&T and most other long distance competitors are regulated as nondominant—a BOC must continue to offer long distance services through an affiliate that complies with Section 272's safeguards, even after the Section 272(f)(1) sunset date. Thus, to the extent Verizon in New York elects to provide long distance services on an integrated basis—or even through a separate affiliate that meets the less-stringent requirements imposed on independent LECs—it is subject to dominant carrier regulation of its long distance services. *See Section 272 Sunset Scope Order*, 17 FCC Rcd at 26870 nn.5, 8 (J.A. 7).

[14] *See* 47 U.S.C. § 251(g); *see generally Notice of Inquiry Concerning a Review of the Equal Access and Nondiscrimination Obligations Applicable to Local Exchange Carriers*, Notice of Inquiry, 17 FCC Rcd 4015 (2002).

AT&T may consider these existing safeguards inadequate to protect its interests. But AT&T continues to have the opportunity to present its concerns to the Commission. Because of the MFJ's restrictions and Section 272, the Commission has never before had to examine carefully the types of regulatory safeguards, if any, that it should adopt under its own regulatory authority to protect against cost-shifting and anticompetitive conduct by the BOCs. The Commission has undertaken that inquiry and—as contemplated by Section 272(f)(3)—has issued several rulemaking notices to examine the full "range of options" available to it to address those concerns. *Section 272 Sunset NPRM*, 17 FCC Rcd at 9922 ¶ 17 (J.A. 27). The breadth of these rulemaking notices demonstrates that, contrary to AT&T's contention, the Commission has not "abdicate[d]" its statutory responsibilities. AT&T Br. 4.

In the *Section 272 Sunset NPRM*, the Commission initiated a broad inquiry into "whether any alternative safeguards should be put in place in states where the statutory requirements have sunset." *Id.* at 9917 ¶ 1 (J.A. 22); *see also id.* at 9920 ¶ 9 (J.A. 25). The Commission laid out a non-exhaustive set of options and "invite[d] commenters to suggest other alternatives." *Id.* at 9922 ¶ 17 (J.A. 27). The Commission observed that, even after the sunset takes effect, its existing regulations require the BOCs to submit reports on their "revenues, expenses, and investment" and "service quality" (47 C.F.R. § 43.21(e)–(g)), to file with the Commission a manual detailing how they allocate their costs between regulated and nonregulated operations (47 C.F.R. §§ 43.21(d), 64.901–.903), and to have that manual audited every two years (47 C.F.R. § 64.904). 17 FCC Rcd at 9922 n.24 (J.A. 27). The Commission asked whether these and other "pre-existing rules" are "sufficient tools" to address "concerns about cost misallocation and discrimination by the BOCs." *Id.* at 9922 ¶ 18 (J.A. 27). The Commission also asked whether it should require a biennial audit to ensure compliance with the nondiscrimination provisions of Section 272(e), which does not sunset (*id.* at 9924–25 ¶ 24 (J.A. 29–30)), and whether it should require the BOCs to comply with the "less stringent structural separation requirements" that are currently imposed on independent LECs providing long distance services, *id.* at 9924 ¶ 23 (J.A. 29).

The Commission is also considering possible "nonstructural safeguards" to "facilitate the detection of discrimination" and "cost misallocation." *Id.* at 9925 ¶ 25 (J.A. 30). The Commission has initiated two separate rulemaking proceedings to consider performance standards to evaluate whether incumbent LECs are providing competitors and new entrants with "just, reasonable, and nondiscriminatory" access and interconnection to their local networks.[15] The *Special Access NPRM*

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[15] *Performance Measurements and Standards for Interstate Special Access Services*, Notice of Proposed Rulemaking, 16 FCC Rcd 20896, 20898 ¶ 1 (2001) (*Special Access NPRM*); *Performance Measurements and Standards for Unbundled Network Elements and Interconnection*,

examines various performance standards on the set of services (known as special access services) that LECs provide to long distance carriers to connect those carriers with their customers (16 FCC Rcd at 20897 ¶ 1, 20905–06 ¶ 16), while the *Network Elements NPRM* considers how to evaluate the ability of new entrants in the local telephone market to obtain network elements from the incumbent LEC, 16 FCC Rcd at 20642–43 ¶ 1. The Commission is considering whether adoption of these performance standards would "serve as an effective mechanism in identifying BOC discriminatory behavior" after Section 272 sunsets. *Section 272 Sunset NPRM*, 17 FCC Rcd at 9925 ¶ 26 (J.A. 30).

In connection with these areas of inquiry, the Commission is also reexamining the "continued need for dominant carrier regulation" of a BOC's long distance services provided outside of a Section 272 affiliate. *Section 272 Sunset FNPRM*, 18 FCC Rcd at 10915 ¶ 2 (J.A. 400–01). The Commission has traditionally relied on dominant carrier regulation to check the "opportunity and incentive [of a carrier with market power] to subsidize the rates for its more competitive services with the revenues obtained from its monopoly or near-monopoly services." *Competitive Carrier First Report and Order*, 85 FCC 2d at 6 ¶ 15. The requirement that dominant carriers provide service through tariff, coupled with regulation of the dominant carrier's rates, can help "to

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Notice of Proposed Rulemaking, 16 FCC Rcd 20641, 20643 ¶ 2 (2001) (*Network Elements NPRM*).

detect and prevent predatory pricing" and deter "anticompetitive conduct by limiting the profit" that a BOC can earn from discriminatory behavior. *LEC Classification Order*, 12 FCC Rcd at 15805–06 ¶ 87. Although some aspects of dominant carrier regulation are "not designed to address the potential problems associated with BOC entry into competitive markets," the Commission is examining whether "specific aspects of dominant carrier regulation * * * are necessary to constrain BOCs from engaging in certain types of anticompetitive behavior." *Section 272 Sunset FNPRM*, 18 FCC Rcd at 10934–35 ¶¶ 38–39 (J.A. 419–20).

These on-going rulemaking proceedings are significant here because they show that there is no "need for judicial supervision" of the Commission's decision not to alter the statutory sunset date. *See Investment Co. Inst. v. FDIC*, 728 F.2d 518, 526 (D.C. Cir. 1984) (quoting *Natural Resources Defense Council, Inc. v. SEC*, 606 F.2d 1031, 1043 (D.C. Cir. 1979)). The Commission retains broad discretion to adopt any number of structural and nonstructural rules to protect against cost-shifting and discriminatory practices by the BOCs and to supplement or replace those safeguards currently in effect. *See*, *e.g.*, *Computer & Communications Indus. Ass'n v. FCC*, 693 F.2d 198, 205, 219 (D.C. Cir. 1982) (upholding the Commission's broad discretion to determine the most appropriate separation requirements to impose on dominant carriers). And having filed comments in these open proceedings, AT&T

may obtain judicial review if it is aggrieved by the results. *See Southern Ry. Co.*, 442 U.S. at 454, 456 (observing that party seeking review had alternative statutory mechanisms to obtain review). Given the statutory and regulatory safeguards that are currently in place and the "alternative form[s] of relief" that the on-going rulemaking proceedings make available to AT&T, no particular "need" exists for judicial supervision of the Commission's exercise of discretion in leaving undisturbed the Section 272(f)(1) sunset date. *Investment Co. Inst.*, 728 F.2d at 526.

iv. At bottom, AT&T's view is that—despite what Congress plainly said—it would not have wanted Section 272's safeguards to expire in any state merely through the passage of time. But, as this Court has observed, the 1996 Act is a "compromise" between those who wanted "the local and long-distance markets * * * open to all competitors immediately" and others who wanted the BOCs to "wait until actual competition was introduced in their local markets before providing interLATA service." *SBC Communications, Inc. v. FCC*, 138 F.3d 410, 413 (D.C. Cir. 1998). In crafting the legislative compromise, Congress rationally decided that a prescribed set of safeguards should apply to a BOC when it first enters the long distance market in a state, but that, after three years, the statutory safeguards should give way to traditional forms of regulation, in which the Commission applies its expert judgment in determining what types of safeguards would be "consistent with the public interest." 47 U.S.C. § 272(f)(3). And while Congress authorized the Commission to alter the date on which that transition would occur, it remained "utterly silent" about the circumstances in which the Commission should act. *Baltimore Gas & Elec. Co.*, 252 F.3d at 461. The "clear inference" is that Congress did "not intend to impose legally binding restrictions," but committed to "the agency's judgment absolutely" whether to disturb the compromise that Congress had developed. *Vigil*, 508 U.S. at 191, 192 (cross-reference and internal punctuation omitted). The Commission's decision not to act to alter the sunset schedule that Congress established falls squarely within its discretion.

b. The Commission has not established a binding standard limiting its discretion under Section 272(f)(1).

In the absence of "law to apply" in the statute, AT&T may obtain judicial review under this Court's precedents only if the Commission has voluntarily adopted "binding policies that limit its discretion" such that a court can engage in meaningful judicial review. *Padula v. Webster*, 822 F.2d at 101.[16] Under *Padula*, an agency pronouncement may supply a limiting standard where the agency intends to create a "binding norm." *Id.* To determine an agency's intent, courts examine language, context, and any available extrinsic evidence. *Id.* (quoting *Doe v.*

[16] The Supreme Court has not endorsed this view. *See Chaney*, 470 U.S. at 836.

Hampton, 566 F.2d 265, 281–82 (D.C. Cir. 1980)). Pronouncements that are "merely prospective" or that "impose no significant restraints on the agency's discretion are not regarded as binding norms" and will not provide a basis for judicial review. *Id.*; *see also Safe Energy Coalition of Mich. v. United States Nuclear Regulatory Comm'n*, 866 F.2d 1473, 1478–80 (D.C. Cir. 1989).

AT&T does not contend that the Commission has issued any regulations that limit its exercise of discretion under Section 272(f)(1). Nor does AT&T identify any Commission decision that undertakes a substantive discussion of Section 272(f)(1). AT&T's entire argument rests on repeated references to isolated words and phrases in various Commission decisions that, in AT&T's view, adopt a policy to maintain Section 272 in effect based on whether a BOC has "market dominance" and "whether any significant facilities-based competitors to [the BOC] had emerged." AT&T Br. 32. This argument cannot withstand even a cursory review of the authorities on which AT&T relies.

i. AT&T attempts to find a standard limiting the Commission's discretion in the *Non-Accounting Safeguards Order*. AT&T Br. 23, 24, 31. According to AT&T, that order provides that Section 272's safeguards will be extended until "facilities-based alternatives to the local exchange and exchange access services of the BOCs make those safeguards no longer necessary." AT&T Br. 23, 24 (quoting *Non-*

Accounting Safeguards Order, 11 FCC Rcd at 21913 ¶ 13). That phrase cannot carry the weight that AT&T puts on it.

The Commission adopted the *Non-Accounting Safeguards Order* to promulgate rules implementing the structural and nondiscrimination provisions of Section 272. 11 FCC Rcd at 21910 ¶ 6. In that context, the Commission stated: "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." *Id.* at 21913 ¶ 13. On its face, this single sentence is merely aspirational and does not reflect an intent to establish a "binding policy" on when Section 272 should sunset.[17]

The context verifies this view. The sentence appears in the background section of the order—not in the substantive portion of the decision—and does not even cite Section 272(f)(1). The sentence certainly does not "arise in the course of discussing the agency's discretion." *Chaney*, 470 U.S. at 836. Indeed, although the *Non-Accounting Safeguards Order* occupies 192 pages in the FCC Record—and although the Commission had expressly observed in the underlying

[17] *Safe Energy Coalition*, 866 F.2d at 1478 (regulation that did not define the extent of the agency's regulatory authority did not bind agency's discretion); *see also Chaney*, 470 U.S. at 836 ("vague language" in policy statement that agency is "obligated" to take enforcement action is not binding because it "did not arise in the course of discussing the agency's discretion").

notice of proposed rulemaking that "[t]he statute does not specify the standard that the Commission should apply when deciding whether to extend the separate affiliate requirements beyond the sunset date"[18]—the Commission never attempted to develop a standard for exercising its discretion to alter the Section 272(f)(1) sunset date established by Congress. It merely remarked that a "number of safeguards will be available to prevent discriminatory behavior by BOCs after the separate affiliate requirements of section 272 cease to apply." *Non-Accounting Safeguards Order*, 11 FCC Rcd at 22036 ¶ 271. The *Non-Accounting Safeguards Order* thus "impose[s] no significant restraints on the agency's discretion" and provides no "binding norms" that can provide a basis for judicial review. *Padula*, 822 F.2d at 101.

ii. AT&T also attempts to locate a binding standard in the Commission's statements in various proceedings that Section 272 is "of crucial importance" and is the "principal guarantee" in the 1996 Act against improper cost-shifting and discrimination by the BOCs. AT&T Br. 24–25. AT&T, however, cannot make the requisite showing that the agency intended these descriptive phrases to limit its discretion under Section 272(f)(1). None of the statements cited by AT&T addresses the statutory sunset of Section 272's requirements or in any way involved the Commission's discretion under Section 272(f)(1).

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[18] *Non-Accounting Safeguards NPRM*, 11 FCC Rcd at 18885 n.28.

The Commission first described Section 272 as "crucial[ly] importan[t]" in 1997 when it denied a request by Ameritech to provide interLATA services in Michigan.[19] The Commission did not once in that decision cite the sunset provision in Section 272(f)(1). Subsequent Commission orders granting interLATA authority often refer back to the description in the Ameritech decision, but they also do not mention Section 272(f)(1)'s sunset provision.[20] Similarly, in describing Section 272 as the "principal guarantee" against improper cost-shifting and discriminatory practices, the Commission did not cite, much less discuss, Section 272(f)(1).[21] It defies reason to suggest that the Commission, in making these statements without even mentioning Section 272(f)(1), intended to create a standard for deciding whether it would exercise its discretion under that sunset provision.

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[19] *Application of Ameritech Michigan Pursuant to Section 271 of the Communications Act of 1934, as amended, to Provide In-Region, InterLATA Services in Michigan*, Memorandum Opinion and Order, 12 FCC Rcd 20543, 20725 ¶ 346 (1997).

[20] *See* AT&T Br. 24 n.46 (citing *Texas 271 Order*, 15 FCC Rcd 18354, 18549 ¶ 395 (2000); *New York 271 Order*, 15 FCC Rcd at 4153 ¶ 402; *Minnesota 271 Order*, 18 FCC Rcd 13323, 13357 ¶ 62 (2003); *New Mexico-Oregon-South Dakota 271 Order*, 18 FCC Rcd 7325, 7390 ¶ 112 (2003); *Qwest 9-State 271 Order*, 17 FCC Rcd 26303, 26515 ¶ 380 (2002)).

[21] *Application by SBC Communications, Inc., Pacific Bell Telephone Company, and Southwestern Bell Communications Services, Inc., for Authorization to Provide In-Region, InterLATA Services in California*, Memorandum Opinion and Order, 17 FCC Rcd 25650, 25745 ¶ 173 (2002).

The other Commission decisions cited by AT&T are even less helpful to its cause. *See* AT&T Br. 24 n.46. The *Verizon 272 NAL* cites Section 272(f)(1) only once to note that the sunset had taken effect for Verizon's operations in New York;[22] it does not attempt to establish a standard governing the exercise of discretion under Section 272(f)(1). In the *LEC Classification Order*, the Commission relied on Section 272 in deciding to regulate the BOCs' long distance affiliates as nondominant, but it expressly left open the question of what "safeguards, if any, are necessary and appropriate upon expiration of section 272's requirements subject to sunset." 12 FCC Rcd at 15835 n.391. The two merger orders cited by AT&T are also unenlightening on this issue.[23] Even though the merger orders required the merging BOCs to provide "advanced services" through a separate affiliate—and even though those orders expressly provided for the sunset of that requirement—the merger orders do not once cite Section 272(f)(1). *See Bell Atlantic-GTE Merger Order*, 15 FCC Rcd at 14153 ¶ 265; *SBC-Ameritech Merger Order*, 14 FCC Rcd at 14861 ¶ 367. Thus, the merger orders—like the other precedents cited by AT&T—reveal no Commission intent to establish a standard for exercising discretion under Section 272(f)(1).

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[22] *Verizon Tele. Cos., Inc.*, Notice of Apparent Liability for Forfeiture, 18 FCC Rcd 18796, 18798 ¶ 4 n.12 (2003).

[23] *GTE Corporation*, Memorandum Opinion and Order, 15 FCC Rcd 14032 (2000) (*Bell Atlantic-GTE Merger Order*); *Ameritech Corp.*, Memorandum Opinion and Order, 14 FCC Rcd 14712 (1999) (*SBC-Ameritech Merger Order*).

AT&T nevertheless argues that the Commission, having recognized Section 272 as "crucial[ly] importan[t]," could not allow it to sunset because that would result in an unexplained departure from prior agency precedent. AT&T Br. 29–33. But, as AT&T recognizes (*see id.*), the requirement that an agency explain policy changes is an element of "arbitrary" and "capricious" review under 5 U.S.C. § 706(2)(A). *See*, *e.g.*, *Motor Vehicle Manufs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 41–42 (1983). The Court does not reach that inquiry when the decision at issue is committed to agency discretion (*see Drake*, 291 F.3d at 69–72), especially where the decision is a "refusal to take action," rather than "an affirmative act of approval."[24] In any event, the argument that the Commission departed from precedent is unsustainable. Section 272's "importance" when a BOC first obtains interLATA authority has no bearing on whether, after three years, the statutory safeguards should give way to any regulatory safeguards that the Commission determines to be "consistent with the public interest." 47 U.S.C. § 272(f)(3). AT&T's attempt to find a "clear departure" from precedent fails. *See* AT&T Br. 30.

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[24] *Transportation Intelligence, Inc. v. FCC*, 336 F.3d 1058, 1063 (D.C. Cir. 2003) (citing *Chaney*, 470 U.S. at 831); *see also ICC v. Brotherhood of Locomotive Engs.*, 482 U.S. 270, 278 (1987) (holding that an agency's decision on reconsideration affirming its earlier decision is reviewable, but that its refusal to reopen a proceeding is not reviewable when the only issue on reconsideration is a claim of material error); *Southern Ry. Co.*, 442 U.S. at 452; *Schering Corp. v. Heckler*, 779 F.2d 683, 685 (D.C. Cir. 1985); *Kixmiller v. SEC*, 492 F.2d 641, 644 (D.C. Cir. 1974).

iii. Having never established a standard for exercising discretion under Section 272(f)(1), the Commission could not have "employed a standard for sunsetting" in the *Section 272 Sunset NPRM*, as AT&T contends. AT&T Br. 31.[25] While AT&T observes that the *NPRM* asks about "the nature of the marketplace" and whether "alternative sources of local exchange and originating access services" constrain the BOCs' ability to engage in cost-shifting and discriminatory practices (AT&T Br. 14, 23, 24–25, 28, 31), AT&T cites no portion of the *NPRM* establishing that these avenues of inquiry—which are relevant to the Commission's adoption of safeguards under its own regulatory authority—would determine whether the Commission would alter the statutory sunset date. That is because the *NPRM* expressly raises the "threshold question" of "how it should evaluate" whether Section 272 "should sunset after three years or, alternatively, be extended." *Section 272 Sunset NPRM*, 17 FCC Rcd at 9920 ¶ 10 (J.A. 25).

To that end, the *NPRM* asks "whether, and if so, under what conditions," Section 272 "should be extended by the Commission * * * despite the three-year sunset in the statute." *Id.* at 9920 ¶ 9 (J.A. 25). And while the Commission sought comment on "marketplace developments," it also "ask[ed] more generally what factors [it] should

[25] AT&T stitches together phrases from three separate paragraphs of the *Section 272 Sunset NPRM* in an attempt to fabricate support for its claim. *See* AT&T Br. 31.

consider in undertaking this inquiry." *Id.* at 9920 ¶ 11 (J.A. 25). These questions would have been unnecessary had the Commission already established a standard constraining the exercise of its discretion under Section 272(f)(1). The Commission did not bind itself in any way merely by asking such general questions, and the agency proposed no specific course of action and reached no tentative conclusions in the *Section 272 Sunset NPRM*. Simply put, the Commission did not establish a binding norm limiting the discretion that Congress granted it in Section 272(f)(1).

Nor was the Commission required to issue an order or take any action with regard to the New York sunset because it initiated the general *Section 272 Sunset* inquiry. The Commission did not commit to complete that inquiry before the sunset date in any state or to issue an order each time the sunset takes effect in a state. And Section 272(f)(1) places no such requirements on the agency. Contrary to AT&T's apparent position, the Commission did not burden itself with duties that Congress chose not to impose on the agency.

AT&T emphasizes the unremarkable proposition that an agency must provide reasons for terminating an on-going proceeding. *See* AT&T Br. 26–29 (citing *Williams Nat. Gas Co. v. FERC*, 872 F.2d 438 (D.C. Cir. 1989), *Competitive Enters. Inst. v. National Highway Traffic Safety Admin.*, 956 F.2d 321 (D.C. Cir. 1992), and *MCI Telecomm. Corp. v. FCC*, 917 F.2d 30 (D.C. Cir. 1990)). In those cases, however, the agency issued an order terminating a rulemaking proceeding, thus providing a basis for judicial review. *See Williams Nat. Gas Co.*, 872 F.2d at 443; *Competitive Enters. Inst.*, 956 F.2d at 323; *MCI Telecom. Corp.*, 917 F.2d at 34. In contrast, the *Section 272 Sunset* proceeding is on-going (as exemplified by the subsequent issuance of the *Section 272 Sunset FNPRM*), and the Commission is "continu[ing] to review" whether to exercise its regulatory authority to adopt safeguards, and, if so, what those safeguards should be. *See Section 272 Sunset Scope Order*, 17 FCC Rcd at 26869 ¶ 1 (J.A. 6–7).

Equally important, the cases cited by AT&T involve situations in which the underlying agency action was subject to judicial review.[26] That is not the situation under Section 272(f)(1). And, even assuming

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[26] *See Williams Nat. Gas Co.*, 872 F.2d at 445–46 (termination of rulemaking proceeding despite agency's tentative conclusion that existing regulatory regime violated "statutory requirement[s]"); *MCI Telecomm. Corp.*, 917 F.2d at 34 (failure to address whether services were "like" services under 47 U.S.C. § 202); *Competitive Enters. Inst.*, 956 F.2d at 323 (termination of proceeding where "the agency does not dispute that there is 'law to apply'"); *see also Camp v. Pitts*, 411 U.S. 138, 140 (1973) ("Unquestionably, the Comptroller's action [denying application for a new bank] is subject to judicial review"); *Public Citizen v. FAA*, 988 F.2d 186, 196–97 (D.C. Cir. 1993) (review of the agency's findings that a statutory requirement had been met); *Reeve Aleutian Airways, Inc. v. United States*, 889 F.2d 1139, 1144 (D.C. Cir. 1989) (review of suspension of carrier from program); *Action for Children's Tele. v. FCC*, 821 F.2d 741, 745 (D.C. Cir. 1987) (repeal of guidelines relating to children's television); *Independent U.S. Tanker Owners Comm. v. Dole*, 809 F.2d 847, 851–52 (D.C. Cir. 1987) (review of an agency's explanation for a rule); *Celecom Communications, Inc. v. FCC*, 789 F.2d 67, 70–71 (D.C. Cir. 1986) (review of grant of cellular license).

arguendo that an agency somehow through its actions can convert an otherwise unreviewable action into a reviewable one, nothing the Commission did in initiating the *Section 272 Sunset* proceeding provides a warrant to transform a decision that Congress committed to the Commission's absolute discretion into one for which judicial review is available. *See District No. 1, Pacific Coast Dist. v. Maritime Admin.*, 215 F.3d 37, 43 (D.C. Cir. 2000) ("In the absence of any statutory or self-imposed limitation, we have no jurisdiction to review under the APA an agency's procedural decision regarding how best to make a substantive decision committed by law to the agency's discretion").

Neither the Commission's release of the *December 23 Public Notice* nor the release of the *Section 272 Sunset Scope Order*—the documents that AT&T cites as the relevant "rulings under review" (AT&T Br. ii)—alters the analysis. The *December 23 Public Notice* simply provides notice that "[t]he provisions of section 272 (other than section 272(e)) * * * sunset for Verizon's operations in New York by operation of law as provided in section 272(f)(1)." *December 23 Public Notice*, 17 FCC Rcd at 26864 (J.A. 1). It does not "rule[]" that "Section 272 safeguards should no longer apply in New York" (AT&T Br. 2); it merely informs the public that they do not apply as a consequence of Congress's determination that Section 272 requirements expire after three years. And although the *Section 272 Sunset Scope Order* does rule on a legal issue—the scope of the Section 272 sunset—it resolves that issue in favor of AT&T.[27] The *Section 272 Sunset Scope Order* does not address the Commission's exercise of discretion under Section 272(f)(1)—much less establish a binding norm limiting that discretion. Therefore, neither it nor the *December 23 Public Notice* supplies the meaningful standard necessary to support the Court's jurisdiction to entertain AT&T's petition for review.

CONCLUSION

For the foregoing reasons, the Court should dismiss AT&T's petition for review.

[27] Because AT&T prevailed below and is not aggrieved, it lacks standing to challenge the *Section 272 Sunset Scope Order*. *Ezzell Trucking, Inc. v. Federal Motor Carrier Safety Admin.*, 309 F.3d 24, 25–26 (D.C. Cir. 2003); *see also Mathias v. WorldCom Technologies, Inc.*, 535 U.S. 682, 684 (2002) (per curiam) ("As a general rule, a party may not appeal from a favorable judgment simply to obtain review of findings it deems erroneous").

Respectfully submitted,

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October 20, 2003

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

AT&T CORP., PETITIONER, v. FEDERAL COMMUNICATIONS COMMISSION AND UNITED STATES OF AMERICA, RESPONDENTS.	))))))))))))	03–1035

Certificate of Compliance

As required by Fed. R. App. P. 32(a)(7), I hereby certify that the accompanying "Brief for Respondents" in the captioned case contains 11465 words.

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October 20, 2003

STATUTORY APPENDIX

Contents:

1. Section 701(a) of Title 5, United States Code, provides as follows:

> This chapter applies, according to the provisions thereof, except to the extent that—
>
> * * * * *
>
> (2) agency action is committed to agency discretion by law.

2. Section 272 of the Communications Act of 1934 (47 U.S.C. § 272) provides as follows:[*]

> (a) SEPARATE AFFILIATE REQUIRED FOR COMPETITIVE ACTIVITIES.—
>
> (1) IN GENERAL.—A Bell operating company (including any affiliate) which is a local exchange carrier that is subject to the requirements of section 251(c) may not provide any service described in paragraph (2) unless it provides that service through one or more affiliates that—
>
> (A) are separate from any operating company entity that is subject to the requirements of section 251(c); and
>
> (B) meet the requirements of subsection (b).
>
> (2) SERVICES FOR WHICH A SEPARATE AFFILIATE IS REQUIRED.—The services for which a separate affiliate is required by paragraph (1) are:
>
> (A) Manufacturing activities (as defined in section 273(h)).
>
> (B) Origination of interLATA telecommunications services, other than—

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[*] The provisions of the Communications Act of 1934 that are reproduced here differ slightly from the text of Title 47, United States Code, because of changes made when those provisions were codified. Title 47 has not yet been enacted into positive law. *See* 1 U.S.C. § 204(a).

(i) incidental interLATA services described in paragraphs (1), (2), (3), (5), and (6) of section 271(g);

(ii) out-of-region services described in section 271(b)(2); or

(iii) previously authorized activities described in section 271(f).

(C) InterLATA information services, other than electronic publishing (as defined in section 274(h)) and alarm monitoring services (as defined in section 275(e)).

(b) STRUCTURAL AND TRANSACTIONAL REQUIREMENTS.—The separate affiliate required by this section—

(1) shall operate independently from the Bell operating company;

(2) shall maintain books, records, and accounts in the manner prescribed by the Commission which shall be separate from the books, records, and accounts maintained by the Bell operating company of which it is an affiliate;

(3) shall have separate officers, directors, and employees from the Bell operating company of which it is an affiliate;

(4) may not obtain credit under any arrangement that would permit a creditor, upon default, to have recourse to the assets of the Bell operating company; and

(5) shall conduct all transactions with the Bell operating company of which it is an affiliate on an arm's length basis with any such transactions reduced to writing and available for public inspection.

(c) NONDISCRIMINATION SAFEGUARDS.—In its dealings with its affiliate described in subsection (a), a Bell operating company—

(1) may not discriminate between that company or affiliate and any other entity in the provision or procurement of

goods, services, facilities, and information, or in the establishment of standards; and

(2) shall account for all transactions with an affiliate described in subsection (a) in accordance with accounting principles designated or approved by the Commission.

(d) BIENNIAL AUDIT.—

(1) GENERAL REQUIREMENT.—A company required to operate a separate affiliate under this section shall obtain and pay for a joint Federal/State audit every 2 years conducted by an independent auditor to determine whether such company has complied with this section and the regulations promulgated under this section, and particularly whether such company has complied with the separate accounting requirements under subsection (b).

(2) RESULTS SUBMITTED TO COMMISSION; STATE COMMISSIONS.—The auditor described in paragraph (1) shall submit the results of the audit to the Commission and to the State commission of each State in which the company audited provides service, which shall make such results available for public inspection. Any party may submit comments on the final audit report.

(3) ACCESS TO DOCUMENTS.—For purposes of conducting audits and reviews under this subsection—

(A) the independent auditor, the Commission, and the State commission shall have access to the financial accounts and records of each company and of its affiliates necessary to verify transactions conducted with that company that are relevant to the specific activities permitted under this section and that are necessary for the regulation of rates;

(B) the Commission and the State commission shall have access to the working papers and supporting materials of any auditor who performs an audit under this section; and

(C) the State commission shall implement appropriate procedures to ensure the protection of any proprietary information submitted to it under this section.

(e) FULFILLMENT OF CERTAIN REQUESTS.—A Bell operating company and an affiliate that is subject to the requirements of section 251(c)—

(1) 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;

(2) shall not provide any facilities, services, or information concerning its provision of exchange access to the affiliate described in subsection (a) unless such facilities, services, or information are made available to other providers of interLATA services in that market on the same terms and conditions;

(3) shall charge the affiliate described in subsection (a), 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; and

(4) 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.

(f) SUNSET.—

(1) MANUFACTURING AND LONG DISTANCE.—The provisions of this section (other than subsection (e)) shall cease to apply with respect to the manufacturing activities or the interLATA telecommunications services of a Bell operating company 3 years after the date such Bell operating company or any Bell operating company affiliate is authorized to provide interLATA telecommunications services under section 271(d), unless the Commission extends such 3-year period by rule or order.

(2) INTERLATA INFORMATION SERVICES.—The provisions of this section (other than subsection (e)) shall cease to apply with respect to the interLATA information services of a Bell operating company 4 years after the date of enactment of the Telecommunications Act of 1996, unless the Commission extends such 4-year period by rule or order.

(3) PRESERVATION OF EXISTING AUTHORITY.—Nothing in this subsection shall be construed to limit the authority of the Commission under any other section of this Act to prescribe safeguards consistent with the public interest, convenience, and necessity.

(g) JOINT MARKETING.—

(1) AFFILIATE SALES OF TELEPHONE EXCHANGE SERVICES.—A Bell operating company affiliate required by this section may not market or sell telephone exchange services provided by the Bell operating company unless that company permits other entities offering the same or similar service to market and sell its telephone exchange services.

(2) BELL OPERATING COMPANY SALES OF AFFILIATE SERVICES.—A Bell operating company may not market or sell interLATA service provided by an affiliate required by this section within any of its in-region States until such company is authorized to provide interLATA services in such State under section 271(d).

(3) RULE OF CONSTRUCTION.—The joint marketing and sale of services permitted under this subsection shall not be considered to violate the nondiscrimination provisions of subsection (c).

(h) TRANSITION.—With respect to any activity in which a Bell operating company is engaged on the date of enactment of the Telecommunications Act of 1996, such company shall have one year from such date of enactment to comply with the requirements of this section.