[FR Doc. 04–6929 Filed 3–29–04; 8:45 am]
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FEDERAL COMMUNICATIONS COMMISSION

47 CFR Part 53

[WC Docket No. 03–228; FCC 04–54]

Section 272(b)(1)'s ''Operate Independently'' Requirement for Section 272 Affiliates

AGENCY: Federal Communications Commission.

ACTION: Final rule.

SUMMARY: This document adopts rules eliminating the Commission's Operating, Installation, and Maintenance (OI&M) sharing prohibition. The Commission finds that, in light of the other existing section 272 non-structural requirements, eliminating the OI&M sharing prohibition would neither materially increase Bell operating companies' (BOCs) abilities or incentives to misallocate costs or discriminate against unaffiliated rivals, nor would it diminish the ability of the Commission to monitor and enforce compliance with the Act. The Commission finds that there is sufficient evidence to show that the OI&M sharing prohibition has increased the section 272 affiliates' operating costs, and that the elimination of the OI&M sharing prohibition would likely result in substantial cost savings to the affiliates and enable the affiliates to compete more effectively in the interexchange market. Therefore, the Commission concludes that the OI&M sharing prohibition poses significant adverse consequences that outweigh any potential benefits of enforcing structural separation of OI&M services, given the protections afforded to consumers and competitors by section 272's other non-structural safeguards.

DATES: Effective March 30, 2004.

FOR FURTHER INFORMATION CONTACT: Christi Shewman, Attorney-Advisor, Wireline Competition Bureau, at (202)418–1686 or via the Internet at *christi.shewman@fcc.gov*.

SUPPLEMENTARY INFORMATION: This is a summary of the Commission's Report and Order (R&O) in WC Docket No. 03–228, FCC 04–54, adopted March 11, 2004 and released March 17, 2004. The complete text of this R&O is available for inspection and copying during normal business hours in the FCC Reference Information Center, Portals II, 445 12th Street, SW., Room CY–A257, Washington, DC 20554. This document may also be purchased from the Commission's duplicating contractor, Qualex International, Portals II, 445 12th Street, SW., Room CY–B402, Washington, DC 20554, telephone 202–863–2893, facsimile 202–863–2898, or via e-mail *qualexint@aol.com*. It is also available on the Commission's Web site at *http://www.fcc.gov*.

Synopsis of the Report and Order

1. *Background.* Sections 271 and 272 of the Communications Act, as amended, establish a comprehensive framework governing BOC provision of ''interLATA service.'' Pursuant to section 271, neither a BOC nor a BOC affiliate may provide in-region, interLATA service prior to receiving section 271(d) authorization from the Commission. Section 272 requires BOCs, once authorized to provide in-region, interLATA services in a state under section 271, to provide those services through a separate affiliate until the section 272 separate affiliate requirement sunsets for that particular state. In addition, section 272 imposes structural and transactional requirements on section 272 separate affiliates, including the requirement to ''operate independently'' from the BOC.

2. Section 272(b)(1) directs that the separate affiliate required pursuant to section 272(a) ''shall operate independently from the [BOC].'' In 1996, the Commission adopted rules to implement the ''operate independently'' requirement that prohibit a BOC and its section 272 affiliate from (1) jointly owning switching and transmission facilities or the land and buildings on which such facilities are located; and (2) providing OI&M services associated with each other's facilities. The Commission's rules prohibit a section 272 affiliate from performing OI&M functions associated with the BOC's facilities. Likewise, they bar a BOC or any BOC affiliate, other than the section 272 affiliate itself, from performing OI&M functions associated with the facilities that its section 272 affiliate owns or leases from a provider other than the BOC with which it is affiliated. On November 3, 2003, the Commission adopted the *Notice of Proposed Rulemaking* (68 FR 65665, November 21, 2003) in this proceeding to seek comment on whether it should modify or eliminate the rules adopted to implement section 272(b)(1)'s ''operate independently'' requirement, including the OI&M sharing prohibition.

3. *''Operate Independently.''* In this Order, the Commission rejects arguments that it must retain both the OI&M sharing prohibition and the joint facilities ownership restriction in order to give meaning to section 272(b)(1)'s ''operate independently'' language. The Commission reaffirms the conclusion of the previous Commission that section 272(b)(1) is ambiguous. An agency is free to modify its interpretation of an ambiguous statutory provision when other reasonable interpretations may exist, provided that it acknowledges its change of course and provides a rational basis for its shift in policy. In fact, a reexamination of rules is particularly appropriate where, as here, the Commission has gained more experience over time and new ways of achieving regulatory goals have developed. In the instant situation, the Commission has chosen to reexamine the rules adopted to implement section 272(b)(1) in light of its eight years of experience in implementing the 1996 Act (including applicable cost allocation and nondiscrimination rules), its additional experience with monitoring section 272 affiliates, and, more generally, the growth of competition in all telecommunications markets. Thus, the Commission concludes that it should eliminate the OI&M sharing prohibition but retain the joint facilities ownership restriction under section 272(b)(1), consistent with its obligation to implement the statutory directive that the section 272 affiliate and the BOC ''operate independently.''

4. *Operating, Installation, and Maintenance Services.* The Commission finds that the OI&M prohibition is an overbroad means of preventing anti-competitive conduct and poses significant costs that outweigh any potential benefits. Because the prohibition on OI&M sharing is not directly compelled by section 272(b)(1), the Commission eliminates sections 53.203(a)(2) through (a)(3) of its rules. The Commission concludes that the remaining section 272 requirements, together with its other non-structural safeguards, will continue to serve as effective protections against anticompetitive conduct by BOCs following elimination of the OI&M sharing prohibition. In the context of OI&M functions, the Commission concludes that the existing non-structural safeguards are well-tailored and sufficient to provide effective and efficient protections against cost misallocation and discrimination by BOCs. Based on the record in this proceeding, the Commission does not expect that eliminating the OI&M sharing prohibition will materially increase BOCs' abilities or incentives to misallocate costs or discriminate against unaffiliated rivals in price or performance. Nor will eliminating the

prohibition diminish the ability of the Commission to monitor and enforce compliance with the Act in light of non-structural safeguards. Following elimination of the OI&M sharing prohibition, the Commission will be able to effectively monitor the performance of BOC provision of OI&M functions through application of (1) the other section 272 requirements and (2) the Commission's affiliate transactions and cost allocation rules.

5. *Costs of the OI&M Sharing Prohibition.* The Commission finds that there is sufficient evidence in the record to show that the OI&M sharing prohibition has increased the section 272 affiliates' operating costs, and that the elimination of the OI&M sharing prohibition will likely result in substantial cost savings to the affiliates and enable the affiliates to compete more effectively in the interexchange market. It recognizes that, at the time the OI&M sharing prohibition was adopted, the Commission acknowledged that structural separation may sacrifice economies of scale and scope. The Commission, nonetheless, concluded that the benefits of the OI&M sharing prohibition outweighed these costs. It now finds, however, that, when the historical and projected costs of the OI&M sharing prohibition against protections afforded by our structural and non-structural safeguards are considered, the costs of the rule exceed the likely benefits of maintaining the rule. Moreover, the Commission finds that the likely savings to the section 272 affiliates by elimination of the rule, in conjunction with the BOCs' adherence to our structural and non-structural rules, including the cost allocation rules, supports a finding for the elimination of the OI&M sharing prohibition at this time. The Commission further finds that the evidence supports BOCs' claims that the OI&M sharing prohibition imposes inefficiencies that prevent BOCs from competing more effectively in the interexchange market.

6. *Joint Facilities Ownership.* The joint facilities ownership restriction was adopted concurrently with the OI&M sharing prohibition to implement the ''operate independently'' requirement of section 272(b)(1). The joint facilities ownership restriction, codified in section 53.203(a)(1) of the Commission's rules, provides that ''[a] section 272 affiliate and the BOC of which it is an affiliate shall not jointly own transmission and switching facilities or the land and buildings where those facilities are located.'' In adopting this restriction, the Commission believed that joint ownership of facilities could facilitate cost misallocation and discrimination. Based on the record presented in this proceeding, the Commission continues to believe that, unlike the OI&M sharing prohibition, the costs of maintaining separate ownership of facilities does not outweigh the benefits the rule provides against cost misallocation and discrimination. In making this determination, the Commission is mindful that the record support for eliminating the joint facilities ownership restriction is much more limited and inconclusive than the record that has been presented on the OI&M sharing prohibition. Therefore, the Commission retains the joint facilities ownership restriction to ensure that BOCs and their affiliates continue to operate independently.

Final Regulatory Flexibility Certification

7. The Regulatory Flexibility Act of 1980, as amended (RFA), requires that an initial regulatory flexibility analysis be prepared for notice-and-comment rulemaking proceedings, unless the agency certifies that ''the rule will not, if promulgated, have a significant economic impact on a substantial number of small entities.'' The RFA generally defines the term ''small entity'' as having the same meaning as the terms ''small business,'' ''small organization,'' and ''small governmental jurisdiction.'' In addition, the term ''small business'' has the same meaning as the term ''small business concern'' under the Small Business Act. A ''small business concern'' is one which: (1) is independently owned and operated; (2) is not dominant in its field of operation; and (3) satisfies any additional criteria established by the Small Business Administration (SBA).

8. In the Notice, the Commission sought comment generally on whether we should modify or eliminate the rules adopted to implement the ''operate independently'' requirement of section 272(b)(1) of the Act. Specifically, it sought comment on whether the OI&M sharing prohibition is an overbroad means of preventing cost misallocation or discrimination by BOCs against unaffiliated rivals. The Commission also sought comment on whether the prohibition against joint ownership by BOCs and their section 272 affiliates of switching and transmission facilities, or the land and buildings on which such facilities are located, should be modified or eliminated.

9. The Order eliminates the OI&M sharing prohibition, under sections 53.203(a)(2) through (a)(3) of the Commission's rules, because the Commission finds that it is an overbroad means of preventing cost misallocation or discrimination by BOCs against unaffiliated rivals. Further, the Order retains the prohibition against joint ownership by BOCs and their section 272 affiliates of switching and transmission facilities, or the land and buildings on which such facilities are located, under section 53.203(a)(1) of the Commission's rules.

10. The rules adopted in this Order apply only to BOCs and their section 272 affiliates. Neither the Commission nor the SBA has developed a small business size standard specifically applicable to providers of incumbent local exchange service and interexchange services. The closest applicable size standard under the SBA rules is for Wired Telecommunications Carriers. This provides that such a carrier is small entity if it employs no more than 1,500 employees. None of the four BOCs that would be affected by amendment of these rules meets this standard. The Commission next turns to whether any of the section 272 affiliates may be deemed a small entity. Under SBA regulation 121.103(a)(4), ''SBA counts the * * * employees of the concern whose size is at issue and those of all its domestic and foreign affiliates * * * in determining the concern's size.'' In that regard, it is noted that, although section 272 affiliates operate independently from their affiliated BOCs, many are 50 percent or more owned by their respective BOCs, and thus would not qualify as small entities under the applicable SBA regulation. Moreover, even if the section 272 affiliates were not ''affiliates'' of BOCs, as defined by SBA, as many are, the Commission estimates that fewer than fifteen section 272 affiliates would fall below the size threshold of 1,500 employees. Particularly in light of the fact that Commission data indicate that a total of 261 companies have reported that their primary telecommunications service activity is the provision of interexchange services, the fifteen section 272 affiliates that may be small entities do not constitute a ''substantial number.'' Because the rule amendments directly affect only BOCs and section 272 affiliates, based on the foregoing, we conclude that a substantial number of small entities will not be affected by the rules.

11. Therefore, the Commission certifies that the requirements of the Order will not have a significant economic impact on a substantial number of small entities. The Commission will send a copy of the Order, including a copy of this Final Regulatory Flexibility Certification, in a

report to Congress pursuant to the Congressional Review Act. In addition, the Order and this final certification will be sent to the Chief Counsel for Advocacy of the SBA, and will be published in the **Federal Register**.

Final Paperwork Reduction Act Analysis

12. This Report and Order does not contain information collection(s) subject to the Paperwork Reduction Act of 1995 (PRA), Pub. L. 104–13.

Ordering Clauses

13. Pursuant to sections 2, 4(i)–(j), 272, and 303(r) of the Communications Act of 1934, as amended, 47 U.S.C. 152, 154(i)–(j), 272, 303(r), the Report and Order *is adopted*.

14. Pursuant to sections 1.103(a) and 1.427(b) of the Commission's rules, 47 CFR 1.103(a), 1.427(b), that this Report and Order and Memorandum Opinion and Order *shall be effective* upon publication of the Report and Order in the **Federal Register**.

15. The Commission's Consumer and Governmental Affairs Bureau, Reference Information Center, *shall send* a copy of this Order, including the Final Regulatory Flexibility Certification, to the Chief Counsel for Advocacy of the Small Business Administration.

List of Subjects in 47 CFR Part 53

Telecommunications, Special Provisions concerning Bell operating companies.

Federal Communications Commission.

Marlene H. Dortch,

Secretary.

Final Rules

■ For the reasons discussed in the preamble, the Federal Communications Commission amends 47 CFR part 53 as follows:

PART 53—SPECIAL PROVISIONS CONCERNING BELL OPERATING COMPANIES

■ 1. The authority citation for part 53 continues to read as follows:

Authority: Sections 1–5, 7, 201–05, 218, 251, 253, 271–75, 48 Stat. 1070, as amended, 1077; 47 U.S.C. 151–55, 157, 201–05, 218, 251, 253, 271–75, unless otherwise noted.

■ 2. In § 53.203, revise paragraph (a)(1) to read as follows:

§ 53.203 Structural and transactional requirements.

(a) * * * (1) A section 272 affiliate and the BOC of which it is an affiliate shall not jointly own transmission and switching facilities or the land and buildings where those facilities are located.

* * * * *

[FR Doc. 04–6946 Filed 3–29–04; 8:45 am]

BILLING CODE 6712–01–P

FEDERAL COMMUNICATIONS COMMISSION

47 CFR Part 73

[DA 04–655, MM Docket No. 01–54, RM–9918]

Digital Television Broadcast Service; Nampa, ID

AGENCY: Federal Communications Commission.

ACTION: Final rule.

SUMMARY: The Commission, at the request of Idaho Independent Television, Inc., substitutes DTV channel 13c for DTV channel 44 at Nampa, Idaho. *See* 66 FR 12752, February 28, 2001. DTV channel 13c can be allotted to Nampa, Idaho, in compliance with the principle community coverage requirements of § 73.625(a) at reference coordinates 43–45–18 N. and 116–05–52 W. with a power of 17, HAAT of 829 meters and with a DTV service population of 391 thousand. With this action, this proceeding is terminated.

DATES: Effective May 3, 2004.

FOR FURTHER INFORMATION CONTACT: Pam Blumenthal, Media Bureau, (202) 418–1600.

SUPPLEMENTARY INFORMATION: This is a synopsis of the Commission's Report and Order, MM Docket No. 01–54, adopted March 9, 2004, and released March 19, 2004. The full text of this document is available for public inspection and copying during regular business hours in the FCC Reference Information Center, Portals II, 445 12th Street, SW., Room CY–A257, Washington, DC. This document may also be purchased from the Commission's duplicating contractor, Qualex International, Portals II, 445 12th Street, SW., CY–B402, Washington, DC 20554, telephone 202–863–2893, facsimile 202–863–2898, or via e-mail *qualexint@aol.com.*

List of Subjects in 47 CFR Part 73

Digital television broadcasting, Television.

■ 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: 47 U.S.C. 154, 303, 334 and 336.

§ 73.622 [Amended]

■ 2. Section 73.622(b), the Table of Digital Television Allotments under Idaho, is amended by removing DTV channel 44 and adding DTV channel 13c at Nampa.

Federal Communications Commission.

Barbara A. Kreisman,

Chief, Video Division, Media Bureau.

[FR Doc. 04–7103 Filed 3–29–04; 8:45 am]

BILLING CODE 6712–01–P

FEDERAL COMMUNICATIONS COMMISSION

47 CFR Part 73

[DA 04–676; MB Docket No. 03–163; RM–10734]

Radio Broadcasting Services; Fortuna Foothills and Wellton, AZ

AGENCY: Federal Communications Commission.

ACTION: Final rule; denial of petition for reconsideration.

SUMMARY: This document denies a Petition for Reconsideration filed by Dana J. Puopolo directed at the *Report and Order* in this proceeding, which dismissed the Petition for Rulemaking requesting the allotment of Channel 240A to Fortuna Foothills, and substituting Channel 248A for vacant Channel 240A at Wellton, Arizona to accommodate the allotment at Fortuna Foothills. *See* 68 FR 61788, published October 30, 2003. With this action, the proceeding is terminated.

FOR FURTHER INFORMATION CONTACT: Rolanda F. Smith, Media Bureau, (202) 418–2180.

SUPPLEMENTARY INFORMATION: This is a synopsis of the Commission's *Memorandum Opinion and Order,* adopted March 12, 2004, and released March 15, 2004. The full text of this decision is available for inspection and copying during normal business hours in the FCC Reference Information Center at Portals II, CY–A257, 445 12th Street, SW., Washington, DC. The complete text of this decision may also be purchased from the Commission's copy contractor, Qualex International, Portals II, 445 12th Street, SW., Room CY–B402, Washington, DC 20554, telephone (202) 863–2893, facsimile (202) 863–2898, or via e-mail *qualexint@aol.com.*