

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

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In the Matter of)
)
Computer III Further Remand)
Proceedings: Bell Operating)
Company Provision of Enhanced)
Services)

CC Docket No. 95-20

NOTICE OF PROPOSED RULEMAKING

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By the Commission:

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I. INTRODUCTION

1. In the Computer III proceeding, the Commission adopted major changes to the rules governing the Bell Operating Companies' (BOCs') participation in the enhanced services market.¹ In particular, the Commission determined that the requirement that the BOCs offer enhanced services through structurally separate subsidiaries should be replaced with a set of nonstructural safeguards.² Following a remand from the United States Court of

¹ "Enhanced services" use the telephone network to deliver services that provide more than a basic voice transmission offering. They are contrasted with "basic services," such as "plain old telephone service" (POTS), which are regulated as tariffed services under Title II of the Communications Act. See 47 C.F.R. § 64.702(a); infra para. 3.

² Under the structural separation requirements, BOCs were required to establish separate subsidiary companies, hire separate personnel, and use separate computer equipment and other facilities for their enhanced services. After Computer III, BOCs are still permitted to offer their enhanced services through subsidiary

Appeals for the Ninth Circuit, the Commission in 1991 issued the BOC Safeguards Order, which adopted additional nonstructural safeguards and articulated the requirements for removing all structural separation requirements. On October 18, 1994, the Ninth Circuit decided California v. FCC³ (California III), which remanded the BOC Safeguards Order. The California III decision held that we had not sufficiently explained our conclusion that totally removing structural separation requirements was in the public interest, given that our Open Network Architecture (ONA) requirements no longer called for "fundamental unbundling" of the BOC networks.

2. In response to the Ninth Circuit's concerns, we review the various nonstructural safeguards against BOC access discrimination⁴ that are currently in place. The issue remanded by the court is whether we should totally lift structural separation requirements, as applied to BOC provision of enhanced services, given the current state of network unbundling under ONA.⁵ We also solicit comments, broadly, on whether structural separation should be reimposed for some or all BOC enhanced services.⁶

II. BACKGROUND

3. In 1980, the Commission issued Computer II, which adopted a regulatory scheme with two categories of communications

companies, but those subsidiaries are able to share personnel, facilities, and marketing resources with the parent companies.

³ 39 F.3d 919 (9th Cir. 1994).

⁴ "Access discrimination" occurs when BOCs provide competing enhanced service providers (ESPs) with access to network services inferior to that provided to the BOCs' own enhanced services, or when BOCs otherwise refuse, as a means of exercising market power, to provide network services desired by ESPs.

⁵ As used herein, totally lifting structural separation requirements, or "full structural relief," means removing the requirement that BOCs receive approval of service-specific Comparably Efficient Interconnection (CEI) plans prior to offering any new enhanced service. Under full structural relief, BOCs are permitted to offer all enhanced services on a structurally integrated basis, so long as they comply with ONA requirements. A detailed description of the two stages of Computer III structural relief and the various ONA requirements is provided in Sections (IV) (B) (1) - (2), below.

⁶ For a further discussion of the scope of the remand proceedings, see infra Section III.

services: basic and enhanced. Basic services, such as "plain old telephone service" (POTS), are regulated as tariffed services under Title II of the Communications Act. Enhanced services use the existing telephone network to deliver services other than basic transmission, such as voice mail, E-Mail, voice store-and-forward, fax store-and-forward, data processing, and gateways to on-line databases.

4. In Computer II, the Commission concluded that enhanced services should not be regulated under Title II of the Communications Act.⁷ The Commission established rules to govern the provision of enhanced services, including a requirement that the then-integrated Bell System establish separate subsidiaries for the provision of enhanced services.⁸ Following the divestiture of AT&T in 1984,⁹ the Commission extended the structural separation requirements of Computer II to the BOCs.¹⁰

5. In Computer III, the Commission reexamined the state of the telecommunications marketplace and the effects of structural separation during the six years since Computer II, and determined

⁷ Amendment of Section 64.702 of the Commission's Rules and Regulations (Computer II), 77 FCC 2d 384, 428-40, paras. 114-18 (1980) (Final Decision), recon., 84 FCC 2d 50 (1981) (Reconsideration Order), further recon., 88 FCC 2d 512 (1981) (Further Reconsideration Order), affirmed sub nom. Computer and Communications Industry Ass'n v. FCC, 693 F.2d 198 (D.C. Cir. 1982), cert. denied, 461 U.S. 938 (1983).

⁸ Final Decision, 77 FCC 2d at 475-86, paras. 233-60; Reconsideration Order, 84 FCC 2d at 75-86, paras. 72-105; 47 C.F.R. § 64.702.

⁹ United States v. AT&T, 552 F. Supp. 131 (D.D.C. 1982), affirmed sub nom. Maryland v. United States, 460 U.S. 1001 (1983).

¹⁰ Policy and Rules Concerning the Furnishing of Customer Premises Equipment, Enhanced Services and Cellular Communications Equipment by the Bell Operating Companies, CC Docket No 83-115, Report and Order, 95 FCC 2d 1117, 1120, para. 3 (1984) (BOC Separation Order), affirmed sub nom. Illinois Bell Telephone Co. v. FCC, 740 F.2d 465 (7th Cir. 1984), affirmed on recon., FCC 84-252, 49 Fed. Reg. 26056 (1984) (BOC Separation Reconsideration Order), affirmed sub nom. North American Telecommunications Ass'n v. FCC, 772 F.2d 1282 (7th Cir. 1985).

that structural separation was no longer in the public interest.¹¹ The Commission concluded that nonstructural safeguards could protect competing enhanced service providers (ESPs) from anticompetitive activity by the BOCs while avoiding the inefficiencies associated with structural separation. The Commission therefore permitted the BOCs to provide enhanced services on an integrated basis with their basic service pursuant to Comparably Efficient Interconnection (CEI) requirements.¹² In the first stage of implementing Computer III, BOCs had to obtain, prior to offering any new enhanced services, FCC approval of service-specific CEI plans. In these plans, the BOCs were required to explain how they would offer to ESPs all the underlying basic services the BOCs used for their own enhanced services. BOCs were obligated under CEI to offer these services to ESPs subject to a series of "equal access" parameters, including requirements that the services be offered at the same tariffed rates the BOCs themselves paid, and that the services offered to ESPs have the same technical characteristics and interface functionality as the services used by the BOCs.¹³ The approved "CEI plans" did not require, however, that BOCs provide other network services that ESPs might find useful if the BOCs themselves did not use those network services. During the second stage of implementing Computer III, the BOCs were required to develop and implement ONA plans that detailed all network services they would provide to competitive

¹¹ Amendment of Section 64.702 of the Commission's Rules and Regulations, (Computer III), CC Docket No. 85-229, Phase I, 104 FCC 2d 958 (1986) (Phase I Order), recon., 2 FCC Rcd 3035 (1987) (Phase I Reconsideration Order), further recon., 3 FCC Rcd 1135 (1988) (Phase I Further Reconsideration Order), second further recon., 4 FCC Rcd 5927 (1989) (Phase I Second Further Reconsideration), Phase I Order and Phase I Reconsideration Order vacated, California v. FCC, 905 F.2d 1217 (9th Cir. 1990); Phase II, 2 FCC Rcd 3072 (1987) (Phase II Order), recon., 3 FCC Rcd 1150 (1988) (Phase II Reconsideration Order), further recon., 4 FCC Rcd 5927 (1988) (Phase II Further Reconsideration Order), Phase II Order vacated, California v. FCC, 905 F.2d 1217; Computer III Remand Proceedings, 5 FCC Rcd 7719 (1990) (ONA Remand Order), recon., 7 FCC Rcd 909 (1992), pets. for review denied, California v. FCC, 4 F.3d 1505 (9th Cir. 1993); Computer III Remand Proceedings: Bell Operating Company Safeguards and Tier 1 Local Exchange Company Safeguards, 6 FCC Rcd 7571 (1991) (BOC Safeguards Order); BOC Safeguards Order vacated in part, California v. FCC, 39 F.3d 919.

¹² These CEI requirements, and the plans BOCs have filed to show compliance with them, are described in Section IV(B)(1), below.

¹³ See Phase I Order, 104 FCC 2d at 1036, para. 147.

ESPs and described how they would comply with certain nonstructural safeguards. The Commission required the BOCs to comply with various other nondiscrimination safeguards, including requirements regarding network disclosure, customer proprietary network information (CPNI) rules, and quality, installation, and maintenance reporting requirements.¹⁴

6. In 1990, the Court of Appeals for the Ninth Circuit in California I vacated three orders in the Computer III proceeding.¹⁵ The court concluded that the Commission had not adequately justified the decision to rely on cost accounting safeguards as protection against cross-subsidization of enhanced services by the BOCs.¹⁶ In order to avoid disruption in service while it conducted remand proceedings, the Commission granted an interim waiver to allow the BOCs to continue providing enhanced services pursuant to previously-approved CEI plans pending completion of the rulemaking proceeding that culminated in the BOC Safeguards Order.¹⁷ In that order, the Commission reevaluated the costs and benefits of lifting structural separation, and concluded that, with strengthened cost accounting requirements, the removal of structural separation requirements served the public interest.¹⁸ The Commission determined that its experience in the decade since the Computer II Final Decision demonstrated that structural separation inhibited the deployment of enhanced services, and that the safeguards it adopted in the BOC Safeguards Order would ensure a fair competitive environment.

7. Among the nonstructural safeguards required in Computer III was ONA, which requires BOCs to unbundle elements of their networks and allow ESPs to purchase specific services that are useful for their enhanced services. ONA goes beyond the CEI requirements of the Computer III Phase I Order, which mandated that BOCs provide competitive ESPs with "equal access" interconnections to basic network services at the same tariffed rates that the BOCs

¹⁴ See infra § (IV) (B) (3).

¹⁵ California v. FCC, 905 F.2d 1217.

¹⁶ Id. at 1232-39.

¹⁷ Bell Operating Companies' Joint Petition for Waiver of Computer II Rules, 5 FCC Rcd 4714 (1990). See also Computer III Remand Proceedings: Bell Operating Company Safeguards and Tier 1 Local Exchange Company Safeguards, Notice of Proposed Rulemaking, CC Docket No. 90-623, 6 FCC Rcd 174, 183-84, paras. 56-66 (1990).

¹⁸ BOC Safeguards Order, 6 FCC Rcd at 7617-25, paras. 90-109.

themselves paid.¹⁹ The Commission announced in the Phase I Order that it was prepared to lift Computer II structural separation and service-specific CEI filing requirements after the BOCs submitted ONA plans that met a defined set of criteria.²⁰ During the period from 1988 to 1992, the Commission, after requiring multiple rounds of amendments, approved BOC ONA plans that described the unbundled basic services each BOC proposed to provide as ONA services and the terms under which they would be offered.²¹ During the two-year period from 1992 to 1993, the Common Carrier Bureau approved the lifting of structural separation for individual BOCs upon their showing that their initial ONA plans complied with the requirements of the BOC Safeguards Order,²² and these decisions were later

¹⁹ Phase I Order, 104 FCC 2d at 1034-66, paras. 142-218.

²⁰ Id. at 1064, 1067-68, paras. 213, 220-21. The unbundling standard for the BOCs required that: (1) BOCs obtain unbundled network services pursuant to tariffed terms, conditions, and rates available to all ESPs; (2) BOCs provide an initial set of basic service functions that could be commonly used in the provision of enhanced services to the extent technologically feasible; (3) ESPs participate in developing the initial set of network services; (4) BOCs select the set of network services based on the expected market demand for such elements, their utility as perceived by enhanced service competitors, and the technical and costing feasibility of such unbundling; and (5) BOCs comply with CEI requirements in providing basic network services to affiliated and unaffiliated ESPs.

²¹ Filing and Review of Open Network Architecture Plans, 4 FCC Rcd 1 (1988) (BOC ONA Order), recon., 5 FCC Rcd 3084 (1990) (BOC ONA Reconsideration Order); 5 FCC Rcd 3103 (1990) (BOC ONA Amendment Order), erratum, 5 FCC Rcd 4045, pets. for review denied, California v. FCC, 4 F.3d 1505 (9th Cir. 1993), recon., 8 FCC Rcd 97 (1993) (BOC ONA Amendment Reconsideration Order); 6 FCC Rcd 7646 (1991) (BOC ONA Further Amendment Order); 8 FCC Rcd 2606 (1993) (BOC ONA Second Further Amendment Order), pet. for review denied, California v. FCC, 4 F.3d 1505 (9th Cir. 1993). In April 1994, the Commission decided to apply the Computer III and ONA requirements to GTE Corporation. Application of Open Network Architecture and Nondiscrimination Safeguards to GTE Corporation, CC Docket No. 92-256, 9 FCC Rcd 4922 (1994).

²² For each of the BOCs, the Bureau either determined that all the services described in the ONA plans were being offered, or granted waivers for services the BOCs were not offering, usually because of lack of demand. See Bell Atlantic's Notice and Petition for Removal of the Structural Separation Requirement and Waiver of Certain State Tariffing Requirements, CC Docket Nos. 90-623 and

affirmed by the Commission.²³ Pending approval of the BOC ONA plans and removal of structural separations requirements, BOCs could provide individual enhanced services on an integrated basis only after receiving approval of service-specific CBI plans.²⁴

8. After California I, and after the issuance of the BOC Safeguards Order on remand, the Ninth Circuit in California II upheld the orders approving BOC ONA plans.²⁵ The California II court concluded that the Commission had scaled back its vision of ONA since Computer III, but that the issue of whether the lifting of structural separation was still justified was not properly before it.²⁶

88-2, Phase I, 7 FCC Rcd 3877 (1992) (Bell Atlantic Order); Southwestern Bell Telephone Company Notice and Petition for Removal of the Structural Separation Requirement and Waiver of Certain State Tariffing Requirements, CC Docket Nos. 90-623 and 88-2, Phase I, 7 FCC Rcd 7294 (1992) (SWBT Order); US West Notice and Petition for Removal of the Structural Separation Requirement and Waiver of Certain State Tariffing Requirements, CC Docket Nos. 90-623, and 88-2, Phase I, 7 FCC Rcd 3639 (1992) (US West Order); Ameritech Operating Companies Notice and Petition for Removal of the Structural Separation Requirement, CC Docket Nos. 90-623 and 88-2, Phase I, 7 FCC Rcd 4104 (1992) (Ameritech Order); New York Telephone Company and New England Telephone Company Notice and Petition for Removal of the Structural Separation Requirement and Waiver of Certain State Tariffing Requirements, CC Docket Nos. 90-623 and 88-2, Phase I, 7 FCC Rcd 8633 (1992) (NYNEX Order); Pacific Bell and Nevada Bell Notice and Petition for Removal of the Structural Separation Requirement and Waiver of Certain State Tariffing Requirements, CC Docket Nos. 90-623 and 88-2, Phase I, 8 FCC Rcd 3982 (1993) (Pacific Order); BellSouth Corporation Notice and Petition for Removal of the Structural Separation Requirement and Waiver of Certain State Tariffing Requirements, CC Docket Nos. 90-623 and 88-2, Phase I, 8 FCC Rcd 4864 (1993) (BellSouth Order).

²³ Petition for Removal of the Structural Separation Requirements and Waiver of Certain State Tariffing Requirements, 9 FCC Rcd 3053 (1994) (Structural Relief Order), petition for review pending sub nom. MCI v. FCC, No. 94-1597 (D.C. Cir. filed August 29, 1994).

²⁴ Phase I Order, 104 FCC 2d at 1059, para. 201.

²⁵ California v. FCC, 4 F.3d 1505.

²⁶ Id. at 1511-13.

9. In California III, the Court of Appeals for the Ninth Circuit partially vacated the BOC Safeguards Order.²⁷ The court held that the Commission had "responded to our concerns" expressed in California I about improper cross-subsidization, and that the Commission had "demonstrated that the BOCs' incentive and ability to cross-subsidize will be significantly reduced" under the Commission's regime of nonstructural safeguards.²⁸ The decision also upheld the preemption elements of the BOC Safeguards Order.²⁹ As discussed in greater detail below, however, the court observed that the BOC Safeguards Order permitted the BOCs to move beyond the CEI plan regime to a framework of full structural integration based on the approved BOC ONA plans. The court reaffirmed the conclusion of California II that the Commission had retreated from its commitment to require "fundamental unbundling" of BOC networks as a component of ONA, and noted that the issue of how this policy shift affected structural relief was now squarely before it. The court observed that parties had argued that ONA, as implemented, failed to prevent BOCs from engaging in access discrimination against competing ESPs.³⁰ As the Commission had not explained why its shift away from "fundamental unbundling" did not undermine the decision to rely on ONA safeguards under full structural relief, the California III court concluded that the Commission's cost benefit analysis was flawed. California III therefore vacated the Commission's decision in the BOC Safeguards Order to move from a service-specific CEI plan regime to full structural relief.

10. On November 14, 1994, the BOCs filed a joint petition (Interim Waiver Petition) requesting an interim waiver to permit them to continue offering enhanced services pursuant to their approved ONA plans.³¹ The BOCs also requested an interim waiver to continue unseparated research and development, and to offer on an integrated basis new enhanced services associated with video dialtone. On January 11, 1995, the Common Carrier Bureau

²⁷ California v. FCC, 39 F.3d 919.

²⁸ Id. at 926.

²⁹ Id. at 931-33.

³⁰ Id. at 929-30. For a definition of "access discrimination," see supra note 4.

³¹ Joint Contingency Petition for Interim Waiver of the Computer II Rules (Nov. 14, 1994) (Interim Waiver Petition)

granted the BOCs a limited interim waiver (Interim Waiver Order).³² The Bureau concluded that, because California III generally returned our regulation of BOC enhanced services to a CEI plan regime, waivers would only be necessary for new enhanced services or market trials, and for those existing services and market trials that were not covered by previously-approved CEI plans. The Interim Waiver Order allows the BOCs to continue to offer existing enhanced services pursuant to their ONA plans, so long as they file CEI plans within sixty days. BOCs are also permitted to offer new enhanced services after filing and receiving FCC approval of service-specific CEI plans. The Bureau declined to treat video-dialtone-related enhanced services differently from other new enhanced services. The Interim Waiver Order specifies similar requirements for BOCs to continue existing market trials, and to begin new market trials for enhanced services.

III. ISSUES ON REMAND

11. The partial vacation of the BOC Safeguards Order generally reinstates the Computer III service-by-service CEI plan regime. BOCs also must still comply with the requirements of their approved ONA plans, as ONA requirements are independent of structural relief.³³ The California III court acknowledged that as an interim measure until ONA was implemented, CEI plans "ensured that enhanced service competitors were provided with interconnections to the BOCs' own networks that were substantially equivalent to the interconnections that the BOCs provided for their own enhanced services."³⁴ California III focused, however, on the decision to move from the CEI plan regime to full structural relief under ONA, and specifically on the risk of access discrimination under the current level of BOC network unbundling.

12. The California III court found the BOC Safeguards Order arbitrary and capricious insofar as it completely lifted structural separation requirements without explaining how an ONA regime without "fundamental unbundling" would provide an adequate safeguard against access discrimination by the BOCs. The court stated that "the FCC never explains why it now authorizes lifting structural separation when it recognizes that its assumptions in Computer III regarding ONA have not proven correct, and that

³² Bell Operating Companies' Joint Petition for Waiver of Computer II Rules, Memorandum Opinion and Order, DA 95-36 (Common Carrier Bureau, January 11, 1995) (Interim Waiver Order).

³³ ONA Remand Order, 5 FCC Rcd 7719 (1990).

³⁴ California III, 39 F.3d at 927.

fundamental unbundling is not attainable at this time."³⁵ California III thus requires us to reexamine the public interest benefits and the risk of access discrimination that result from totally lifting structural separation requirements, given the current level of network unbundling. Accordingly, we are here seeking comment on whether the nonstructural access discrimination safeguards spelled out below -- including the current level of ONA network unbundling -- provide sufficient protection, given the benefits of integrated BOC provision of enhanced services, to lift the service-specific CBI plan filing requirements, as contemplated in Computer III and the BOC Safeguards Order.

13. Beyond the specific issues we are required to address by the California III remand, several parties have raised broader questions about whether our decision to rely on nonstructural safeguards serves the public interest. We therefore solicit comment on whether structural separation should be reimposed for some or all BOC enhanced services. Parties are asked to provide evidence as to whether the current Computer III regime of nonstructural safeguards or a Computer II-like framework of structural separation with the possibility of waivers permitting the BOCs to offer specific enhanced services on an integrated basis better serves the public interest. We also seek comment on whether such waivers, if granted, should be conditioned upon compliance with specific safeguards, and which safeguards would be appropriate.

IV. DISCUSSION

14. In response to the California III decision, we review the various nonstructural safeguards that govern BOC provision of enhanced services, including the network unbundling currently required under ONA. We describe how these safeguards were designed to protect against access discrimination by the BOCs, and we solicit comment on their effectiveness. We then consider the broader question of the costs and benefits of relying on nonstructural safeguards as opposed to structural separation for BOC enhanced services, and we ask parties to comment as to what they believe would be the most effective regulatory framework.

³⁵ Id. at 930.

A. The Evolutionary ONA Model³⁶

15. The concept of ONA has evolved since the initial stages of the Computer III proceeding. In the Computer III Phase I Order we declined to adopt any specific network architecture proposals and instead specified certain standards that carriers' ONA plans must meet.³⁷ We required BOCs to file initial ONA plans presenting a set of "unbundled basic service functions that could be commonly used in the provision of enhanced services to the extent technologically feasible."³⁸ We stated that by adopting general requirements we wished to encourage the most efficient interconnection arrangements possible consistent with our regulatory goals.³⁹ We noted that although we wanted the BOCs to provide unbundled service elements, we were well aware of inefficiencies that might result from "unnecessarily unbundled or splintered services,"⁴⁰ and we acknowledged that this unbundling could only occur to the degree it was "technologically feasible." In the Computer III Phase I Reconsideration Order, we discussed the fact that ONA would be an evolutionary process and that we would allow structural relief for the BOCs once they implemented the initial ONA services in their ONA plans and implemented other nonstructural safeguards.⁴¹ In the BOC ONA Order that reviewed the initial BOC ONA plans for compliance with the Computer III Phase I Order requirements, the Commission generally approved the use of the "common ONA model" that described unbundled services BOCs would

³⁶ In describing the evolution of our ONA requirements as a background for this discussion, we do not challenge the Ninth Circuit's holding that our orders implementing ONA "constituted a retreat from the original premise of Computer III." California III, 39 F.3d at 928. Although we do not agree with that holding, our premise in this remand proceeding is that we have departed from the ONA requirements that the Ninth Circuit perceived in California II. We intend in this proceeding to conduct the cost-benefit analysis that the California III court required. See California III, 39 F.3d at 930, 933.

³⁷ Phase I Order, 104 FCC 2d at 1064, para. 213. See supra note 20 for a list of the specific standards that the Commission established.

³⁸ Phase I Order, 104 FCC 2d at 1065, para. 216.

³⁹ Id.

⁴⁰ Id. at 1065, para. 217.

⁴¹ Phase I Reconsideration Order, 2 FCC Rcd at 3055, para. 143.

provide to competing ESPs.⁴² At that time, we concluded that we would not require "the kind of fundamental unbundling that would allow ESPs to connect their own trunks or loops to BOC switching facilities."⁴³

16. After the BOCs filed their initial ONA plans, the Commission received extensive public comment on the sufficiency of the underlying ONA model used by the BOCs.⁴⁴ The Commission adopted additional safeguards, and required the BOCs to amend their initial ONA plans in four rulemaking proceedings between 1988 and 1991, before deciding to lift structural separation.⁴⁵ At the end of this process, the Commission approved the initial BOC ONA plans.

B. Access Discrimination Safeguards Under the Approved Open Network Architecture Plans

17. As described in the orders approving the BOC ONA plans, ONA exists to promote a fair competitive marketplace for the provision of enhanced services. ONA incorporates and subsumes CEI "equal access" requirements, mandates further unbundling of network service elements after the lifting of structural separation, and provides for several other safeguards. We now review the safeguards implemented within the current ONA framework in order to detect and deter discriminatory conduct by the BOCs. We ask parties to comment on whether these safeguards are adequate to serve their intended purpose. In their comments, parties are

⁴² BOC ONA Order, 4 FCC Rcd at 13, para. 18. Under the common ONA model, ESPs obtain access to various unbundled ONA services, termed Basic Service Elements (BSEs), through access links described as Basic Serving Arrangements (BSAs). Other ONA elements include Complementary Network Services (CNSs), which are unbundled basic service features that an end user may obtain from BOCs in order to receive or use enhanced services, and Ancillary Network Services (ANSs), which are non-Title II services, such as billing and collection, that may be useful to ESPs. See BOC ONA Amendment Order, 5 FCC Rcd at 3104.

⁴³ BOC ONA Order, 4 FCC Rcd at 13, para. 18. BOCs are now required to allow third parties, including ESPs, to interconnect their trunks to BOC switches as a result of the Commission's Expanded Interconnection proceeding. See infra para. 30.

⁴⁴ BOC ONA Order, 4 FCC Rcd at 35-42, paras. 56-72.

⁴⁵ See supra note 21; BOC ONA Order, 4 FCC Rcd 1 (1988); BOC ONA Reconsideration Order, 5 FCC Rcd 3084 (1990); BOC ONA Amendment Order, 5 FCC Rcd 3103 (1990); BOC ONA Further Amendment Order, 6 FCC Rcd 7646 (1991).

encouraged to address their actual experience under these rules.

1. Comparably Efficient Interconnection

18. Since Computer III, the BOCs have been permitted to provide particular enhanced services on an integrated basis pursuant to approved service-specific CEI plans.⁴⁶ BOC CEI plans detailed how the BOCs proposed to define and comply with the CEI "equal access" parameters for specific enhanced services. Those CEI parameters include: interface functionality; unbundling of basic services; resale; technical characteristics; installation and maintenance reporting; end user access; availability as of the date the BOC offers its own enhanced services to the public; minimization of transport costs; and availability to all interested ESPs. Under CEI, the BOCs must offer ESPs interconnection to their networks at the same tariffed rates that the BOCs themselves pay.⁴⁷ CEI also requires the BOCs to provide ESPs with access to all network service elements that the BOCs need to offer their own enhanced services.⁴⁸ CEI therefore is intended to prevent the BOCs from providing competing ESPs network connections inferior to those that the BOCs themselves rely on.⁴⁹ After the implementation of ONA and the removal of structural separation requirements, the BOCs still have to offer network services to competing ESPs on a CEI "equal access" basis even though they are no longer obligated to file CEI plans for each new enhanced service they wish to offer. In the Computer III Phase I Order, the Commission determined that the equal access standard of CEI "will increase the public welfare

⁴⁶ In Computer III, the Commission stated that the "basic service functions utilized by a carrier-provided enhanced service [must] be available to others on an unbundled basis, with technical specifications, functional capabilities, and other quality and operational characteristics, such as installation and maintenance times, equal to those provided to the carrier's enhanced services." Phase I Order, 104 FCC Rcd at 1036, para. 147. The Commission also indicated that it did not expect exact equality in access offered to ESPs under CEI, but that variations in each of the CEI parameters of the basic services offered to competing enhanced services providers should be no greater than those of the basic services used by the carrier in conjunction with its enhanced services offering. Id. at 1036, para. 147 & n.210.

⁴⁷ Id. at 1065-66, paras. 147, 214.

⁴⁸ Id. at 1064, paras. 214-15.

⁴⁹ Id. at 1034-58, paras. 142-200.

by maximizing the availability of enhanced services to the public."⁵⁰ The Commission also concluded that CEI would deter access discrimination by the BOCs.

2. Network Unbundling Under ONA

a. Network Services Available to ESPs

19. In Computer III, the Commission required the BOCs, through their ONA plans, to provide network services to competing ESPs based on selection criteria that reflect, among other things, the variation in BOC equipment, cost, and services requested by ESPs in the BOCs' geographic service area. According to BOC ONA reports, ESPs can now select from the over 150 ONA network services provided by one or more BOCs to fashion specific enhanced services to provide to customers. These services are available to competing ESPs through nondiscriminatory intrastate and interstate tariffs. For example, in providing a voice messaging service, US West uses thirteen separate ONA services.⁵¹ US West makes all of these network services available to ESPs on a CEI "equal access" basis. BOCs report that in providing BOC enhanced services they currently use few of the Basic Service Elements (BSEs) that they offer to ESPs.⁵²

20. In addition to the ONA services that BOCs currently provide, there are ONA mechanisms to help ESPs obtain new ONA services they require to provide enhanced services. When an ESP identifies a new BSE that would be useful to it for providing an enhanced service, it can (1) request the service directly from a BOC through a 120-day process our rules established, or (2) it can request that the Information Industry Liaison Committee (IILC) consider the technical feasibility of the service.

21. Under the 120-day service request process, an ESP may request a new ONA basic service and must receive a response from the BOC within 120 days regarding whether the BOC will provide

⁵⁰ Id. at 1037, para. 149.

⁵¹ The services used by US West are: Uniform Call Distribution; Hunting; Call Transfer; Message Delivery Service; Closed User Group (Packet); Market Expansion Line; Flow Control Parameters (Packet); Logical Channel (Packet); Logical Channel Layout (Packet); Multiple Network Address (Packet); DID Call Transfer; Call Forwarding Variable; and Call Forwarding Busy Line. See US West 1994 ONA Annual Report (April 15, 1994).

⁵² See generally 1994 BOC ONA Annual Reports.

the service.⁵³ The BOC must give specific reasons if it will not offer the service. The BOC evaluation is to be based on the ONA selection criteria set forth in the original Computer III Phase I Order: (1) market area demand; (2) utility to ESPs as perceived by the ESPs themselves; (3) costing feasibility; and (4) technical feasibility.⁵⁴ If an ESP finds the BOC response unsatisfactory, it may seek redress from the Commission by filing a petition for declaratory ruling.⁵⁵ To date, we have not received any such petitions.

22. ESPs can also ask the IILC for technical assistance in developing and requesting new network services.⁵⁶ Upon request from an ESP or carrier for a new unbundled network capability, the IILC establishes a task force composed of BOC, ESP, interexchange carrier (IXC), and customer premises equipment (CPE) manufacturer representatives to analyze and make recommendations on how the service might be provided. The task force evaluates the technical feasibility of the service and through a consensus process makes recommendations on how the service may be implemented. ESPs can then take the information to a specific BOC and request the service under the 120-day process. The IILC has been operating since 1988 and has reviewed a number of such requests, leading to a number of new BOC services.⁵⁷

b. New Network Unbundling Since the BOC Safeguards Order

23. Since Commission approval of the BOC ONA plans in 1991, BOCs have continued to offer new ONA services as technology develops and as ESPs identify new basic services needed to provide enhanced services. In their 1994 BOC Annual Reports on ONA implementation, the BOCs reported a number of services available

⁵³ BOC ONA Order, 4 FCC Rcd at 205-06, para. 397; BOC ONA Amendment Order, 5 FCC Rcd at 3117, para. 124; BOC ONA Further Amendment Order, 6 FCC Rcd at 7654-56, paras. 14-19.

⁵⁴ Phase I Order, 104 FCC 2d at 1065, para. 217.

⁵⁵ BOC ONA Further Amendment Order, 6 FCC Rcd at 7677-78, Appendix B.

⁵⁶ BOC ONA Order, 4 FCC Rcd at 32-33, paras. 52-54.

⁵⁷ Among the services for which requests were brought to the IILC and which were later implemented by the BOCs are services related to the delivery of calling number identification and a service that allows visual indicators that a party has messages waiting.

through new technologies that were not developed when their ONA plans were originally approved. These new technologies include Common Channel Signaling (CCS), Integrated Services Digital Network (ISDN), and Intelligent Networks (IN).

24. CCS is a network architecture under which call setup and billing data are transmitted using the Signalling System 7 (SS7) protocol through separate network facilities from those that transmit the actual communications between the calling party and the called party. SS7 enables ESPs to use such features to provide enhanced services as automatic recall, automatic call back, customer originated trace, distinctive ringing, selective call rejection, selective call acceptance, and caller ID. ISDN enables one digital communications network to handle simultaneous voice, data, and video transmissions. ISDN deployment will facilitate connectivity between Local Area Networks (LANs), as well as on-line data interfaces for on-line business transactions, work-at-home, and desktop conferencing.⁵⁸ Intelligent Network (IN) technology permits separation of service logic programs, databases, or both from traditional end office switches.⁵⁹ BellSouth reports efforts to implement several intelligent network applications that enable ESPs to develop customized end user services. Such services would allow ESPs to route customer calls, and to create new services for their customers by reconfiguring BOC AIN capabilities. For example, BellSouth anticipates that ESPs will use workstations to access BellSouth's Service Management System through a remote access network to develop new network services.⁶⁰

⁵⁸ Pacific Bell 1994 ONA Annual Report (April 15, 1994). New network services available through ISDN include ISDN Multiline Hunt Group, Hold Capability, Automatic Call Back and Call Forwarding, User-to-User Signaling with Call Control, Flexible Calling for Managing Multiple Calls and X.25 Supplementary Services. *Id.* at 8.

⁵⁹ IN uses the capabilities of decentralized logic modules (such as Service Control Points (SCPs)) to interact with the conventional digital, stored program-controlled switch. The logic modules are placed at separate network computers that communicate with the service hardware and software through the SS7 network. Advanced Intelligent Network (AIN) is the Bellcore version of one type of IN. The Commission has initiated a proceeding to consider issues related to IN implementation. See Intelligent Networks, CC Docket No. 91-346, Notice of Proposed Rulemaking, 8 FCC Rcd 6813 (1993). For a fuller discussion of IN, see infra para. 31.

⁶⁰ BellSouth 1994 ONA Annual Report (April 15, 1994).

c. ONA Amendment Requirements

25. In the Computer III Phase I Order and the BOC ONA Amendment Order, the Commission developed the ONA amendment process as an additional safeguard against access discrimination following the lifting of structural separation. Under this requirement, if a BOC itself seeks to offer an enhanced service that uses a new BSE or otherwise uses different arrangements for underlying basic services than those included in its approved ONA plan, the BOC must amend its ONA plan at least ninety days before it proposes to offer that enhanced service.⁶¹ The BOC must obtain approval of the amendment before it can use the new basic service for its own enhanced services.⁶²

26. The ONA amendment requirement provides a continuing opportunity after structural relief for the Commission and the public to identify potential access discrimination by the BOCs. For new ONA services that a BOC uses to provide enhanced services, the ONA amendment process enables the Commission and the public to identify discrimination before the services are approved. The ninety-day window gives competing ESPs notice so that they have an opportunity to develop new offerings on a competitive basis, and allows the Commission -- and the public -- to review the proposed amendment.⁶³ The amendment process also provides an opportunity to monitor BOC compliance with CEI safeguards, as the BOCs must demonstrate that each new BSE is available on a nondiscriminatory basis to competing ESPs. In these ways, the ONA amendment requirement is intended to make it more difficult for BOCs to engage in access discrimination.

d. Annual and Semi-Annual Reporting Requirements

27. The 1991 BOC ONA Further Amendment Order required the BOCs to file annual and semi-annual ONA reports.⁶⁴ By enabling ESPs and the Commission to monitor implementation of ONA by the BOCs, these reports are designed to serve as a further safeguard against access discrimination. These filings report: (1) projected deployment schedules for existing ONA services; (2) new ONA service requests from ESPs and ONA service requests that were

⁶¹ Phase I Order, 104 FCC 2d at 1068, paras. 221-22; BOC ONA Further Amendment Order, 6 FCC Rcd at 7654, para. 13.

⁶² Id.

⁶³ Id.

⁶⁴ BOC ONA Further Amendment Order, 5 FCC Rcd at 7649-50, para. 4.

previously deemed technically infeasible; (3) information on SS7, ISDN, and IN projected deployment; (4) new ONA services available through SS7, ISDN, and IN; (5) progress on the implementation of service-specific and long-term uniformity issues; (6) billing information and Operation Support Systems (OSS) services; (7) and a list of BSEs used for the BOCs' own enhanced services. The Commission also required the BOCs to report semi-annually those ONA services tariffed in state and federal jurisdictions. The semi-annual reporting requirements include: the filing of a matrix of BOC ONA services and state and federal tariffs; data regarding state and federal tariffs; and the ONA Services User Guide that provides information on ONA services.

3. Other Nondiscrimination Safeguards in Computer III and the BOC Safeguards Order

28. The Computer III Phase I Order and the BOC Safeguards Order describe a set of additional rules intended to safeguard against access discrimination, including Customer Proprietary Network Information rules, network information disclosure rules, and nondiscrimination reporting requirements.⁶⁵ The CPNI rules balance efficiency goals with competitive equity and privacy considerations, and seek to prevent the BOCs from unreasonably using their access to information about customer usage patterns for competitive advantage.⁶⁶ Network information disclosure rules are designed to ensure that independent ESPs receive timely access to technical information related to new or modified network services affecting the interconnection of enhanced services to the BOC networks.⁶⁷ The nondiscrimination reporting requirements compare the quality of basic services provided to the BOCs' own enhanced services with those provided to the BOCs' ESP

⁶⁵ California III expressly upheld the CPNI rules in the face of a challenge, and did not criticize the effectiveness of any of the other safeguards. 39 F.3d at 931.

⁶⁶ BOC ONA Order, 4 FCC Rcd at 223, para. 430; BOC ONA Amendment Order, 5 FCC Rcd at 3119, para. 137; BOC Safeguards Order, 6 FCC Rcd at 7605-14, paras. 75-89.

⁶⁷ Under our network information disclosure rules, a BOC must disclose the relevant network information to an ESP at the "make/buy point" (subject to the ESP's execution of a nondisclosure agreement) and to the public at a point six to twelve months before introduction of the new or modified network service. Phase II Order, 2 FCC Rcd at 3087-88, paras. 107-12; see Phase I Order, 104 FCC 2d at 1080-86, paras. 246-55.

competitors.⁶⁶

29. There is evidence to suggest that these safeguards have been effective. For example, the Commission determined in the BOC Safeguards Order that BOC nondiscrimination reports over a three-year period showed that discrimination against competing ESPs had not taken place.⁶⁶ Nondiscrimination reports in the three years since that order have similarly not shown any access discrimination by BOCs. The nondiscrimination safeguards described in the BOC Safeguards Order provide the Commission and competing ESPs with data to monitor whether BOCs have engaged in access discrimination. Moreover, no formal complaints have been filed at the FCC by ESPs alleging BOC access discrimination since the Computer III Phase I Order.

C. Other Nondiscrimination Safeguards

1. Other Unbundling Proceedings

30. Since Computer III, the Commission has made further progress towards unbundling of BOC network facilities through the Expanded Interconnection proceeding.⁷⁰ The Commission's Expanded

⁶⁶ Under our nondiscrimination reporting requirements, each BOC must: (1) demonstrate that its procedures and systems for providing services preclude discrimination in installation and maintenance, and quality of ONA services; (2) file annual affidavits attesting that it has not discriminated in the quality of installation and maintenance of ONA services provided to its ESP competitors; and (3) file quarterly reports comparing the timeliness of its installation and maintenance of basic services for its own enhanced services operations with that for all customers. See Phase I Order, 104 FCC 2d at 1055-56, para. 192, 1066, para. 218; Phase II Reconsideration Order, 3 FCC Rcd at 1160, paras. 76-77; BOC ONA Order, 4 FCC Rcd at 235, paras. 451-52.

⁶⁸ BOC Safeguards Order, 6 FCC Rcd at 7602, para. 67.

⁷⁰ Expanded Interconnection with Local Telephone Company Facilities, Report and Order and Notice of Proposed Rulemaking, 7 FCC Rcd 7369 (1992) (Special Access Interconnection Order), recon., 8 FCC Rcd 127 (1992), further recon., 8 FCC Rcd 7341 (1993), vacated in part and remanded sub nom. Bell Atlantic Telephone Cos. v. FCC, 24 F.3d 1441 (D.C. Cir. 1994); Expanded Interconnection with Local Telephone Company Facilities, Second Report and Order and Third Notice of Proposed Rulemaking, 8 FCC Rcd 7374 (1993) (Switched Transport Expanded Interconnection Order), pat. for review pending sub nom. Bell Atlantic v. FCC, No. 93-1743 (D.C. Cir., filed Nov. 12, 1993); Expanded Interconnection with Local

Interconnection orders have required the BOCs and other Tier 1 Local Exchange Carriers (LECs) to allow third parties to provide competitive interstate special access, transport, and tandem switched transport by interconnecting with the BOC networks. As a result of the Expanded Interconnection orders, the BOCs have unbundled switching and transport elements of their networks, and must permit third parties to virtually collocate their equipment at BOC end offices.⁷¹ To the extent that competing ESPs find it useful to provide transport functions as part of their enhanced services, they can now do so independent of the Computer III framework. We solicit comment on whether expanded interconnection achieves some of the goals understood as "fundamental unbundling" at the time of the Computer III proceeding.⁷²

31. The Commission is also moving towards greater unbundling of network service elements in its Intelligent Networks proceeding. As discussed above, several BOCs have begun to test intelligent network services. With intelligent networks, some of the intelligence currently located in software housed in every switch is placed instead in fewer, centralized databases. Intelligent networks facilitate the rapid creation of new services, because software modifications are made only to the centralized database, rather than to each individual switch. In 1993, in the

Telephone Company Facilities, Transport Phase II, Third Report and Order, 9 FCC Rcd 2718 (1994) (Tandem Signalling Interconnection Order); see also Expanded Interconnection with Local Telephone Company Facilities, Memorandum Opinion and Order, FCC 94-190, 9 FCC Rcd 5154 (1994), appeal docketed sub nom. Southwestern Bell Telephone Co. v. FCC, No. 94-1547 (D.C. Cir. Aug. 10, 1994).

⁷¹ Expanded interconnection does not require that BOCs permit physical collocation of enhanced services or customer premises equipment. Special Access Interconnection Order, 7 FCC Rcd at 7413-14, paras. 93-94; Switched Transport Interconnection Order, 8 FCC Rcd at 7412-13, para. 63. The Commission determined in Computer III that such collocation was not necessary to prevent access discrimination in the provision of enhanced services. Computer III, 104 FCC 2d at 1037-38, paras. 151-53. Moreover, the United States Court of Appeals for the District of Columbia Circuit held last year that the Commission did not have statutory authority to mandate physical collocation, and that such a requirement raised significant constitutional questions. See Bell Atlantic v. FCC, 24 F.3d 1441, 1447 (D.C. Cir. 1994).

⁷² See supra para. 15 & n. 43.

Intelligent Networks proceeding,⁷³ the Commission proposed to require that Tier 1 LECs, including the BOCs, implement intelligent networks that offer third parties mediated access⁷⁴ to AIN functions. The Commission proposed to pursue serial implementation of mediated access at the LEC service management system,⁷⁵ then at the service control point,⁷⁶ and then at the switch. As technology develops, we anticipate that BOCs will continue to unbundle their networks and make new services available to competing ESPs. We solicit comment on the degree to which the unbundling contemplated in the Intelligent Networks proceeding would provide further protection against access discrimination.

2. The Effects of Market Forces

32. Market forces, in both the enhanced services and basic service markets, comprise another possible check on successful access discrimination by the BOCs against competing ESPs. The enhanced services marketplace has traditionally been, and appears to remain, competitive in character. As early as 1980, in the Computer II Final Decision, the Commission found that the enhanced services market was competitive.⁷⁷ In Computer III, the Commission concluded that the enhanced services market continued to

⁷³ Intelligent Networks, CC Docket No. 91-346, Notice of Proposed Rulemaking, 8 FCC Rcd 6813 (1993) (Intelligent Networks NPRM); see also Intelligent Networks, Notice of Inquiry, 6 FCC Rcd 7256, 7256-57, paras. 4-7 (1991) (Intelligent Networks NOI).

⁷⁴ "Mediated access" allows a party other than a Local Exchange Carrier (LEC) to gain access to a LEC network for limited purposes, but prevents that party from engaging in activities that might compromise network reliability. See Intelligent Networks NPRM, 8 FCC Rcd at 6813, para. 4.

⁷⁵ Access to the service management system would allow third parties to select various parameters for the creation of new services. See id. at 6816-17, paras. 25-33. For instance, a customer could access the network to direct that all calls be sent to one location during certain hours and to another location during other hours. See id. at 6817, para. 28.

⁷⁶ Access to the service control point would allow third parties to make modifications to the centralized database that provides call handling information in response to network queries. See id. at 6818-19, paras. 34-47.

⁷⁷ Final Decision, 77 FCC 2d at 433, para. 128.

be "extremely competitive."⁷⁸ In 1993, parties supporting the petitioners in California III acknowledged that there is now "a vibrant mass market for information [enhanced] services," that the voice mail market is competitive, and that most of the recent increase in subscribers for enhanced videotext services derived from the development of competitive ESP gateways.⁷⁹ The provision of enhanced services has also continued to be characterized by high rates of growth.⁸⁰

33. The existence of well-established competing ESPs⁸¹ appears to make it more difficult for BOCs successfully to engage in access discrimination. As the California I court stated, the Commission could reasonably conclude that large competitors like IBM could be relied on to monitor the quality of access to the network, reducing the ability of the BOCs to discriminate.⁸² If the

⁷⁸ Phase I Order, 104 FCC 2d at 1010, para. 95.

⁷⁹ Joint Brief of Petitioner-Intervenors at 15, 35-36.

⁸⁰ For example, nearly 100 newspapers, including Newsday and the Los Angeles Times, are now available electronically through competitive gateways such as America Online and Prodigy. See, e.g., Amy Harmon, Times Mirror Co. Launches On-Line Interactive Services, Los Angeles Times, October 27, 1994, at D1; Hanna Liebman, Newspapers Hit the Highway, Mediaweek, April 25, 1994, at 16. Numerous alliances between content providers and non-BOC ESPs have been announced in the past year alone. See, e.g., Los Angeles Times and Newsday/New York Go Online, Business Wire, Oct. 26, 1994; EDS, IT Network Form Cable Alliance, Dallas Morning News, Sept. 28, 1994, at 11D; Viacom Unit, American Online in Education Deal, Reuters, August 16, 1994; Mark Berniker, ABC Online: From Soaps to News, Broadcasting and Cable, July 11, 1994, at 32.

⁸¹ Companies such as EDS, MCI, Viacom, Times Mirror, General Electric, and IBM are active participants in the enhanced services industry. See supra note 80; infra note 98. Large non-BOC corporations are well-established in the marketplace. For example, the U.S. market for value-added network services such as packet transmission and on-line databases was valued in 1993 at \$3.4 billion, with the top six firms -- including BT Tymnet, SprintNet, INFONET, GE Information Services, IBM Information Network, and CompuServe -- controlling nearly half of the revenues. See U.S. Industrial Outlook 1994 at 29-7 (U.S. Government Printing Office).

⁸² California I, 905 F.2d at 1233. The court also noted that the record supported the proposition that large competitors can bypass the local exchange network by using microwave or cable systems to link computers and their customers' terminals. Id.

BOCs do not provide services, ESPs may find alternative ways to provide those services that bypass the BOC local exchange networks entirely, or may move their distribution facilities out of the BOC's service area.³³ The continuing vibrancy of the enhanced service market also appears to suggest that provision by the BOCs of enhanced services pursuant to nonstructural safeguards has not proved seriously detrimental to competition.

34. We seek comment on the effect of market forces on the ability of BOCs to engage in access discrimination to the detriment of competition in the enhanced services market. We are particularly interested in whether and to what degree, as a result of competitive pressures, the threat of BOC access discrimination has diminished since the initial Computer III orders.

D. Costs and Benefits of Lifting Structural Separation

35. In this further notice we solicit comment on two issues related to the merits of structural separation. First, we seek comment regarding the issue raised by the court in California III. The court's remand presents the issue of whether the ONA framework, as implemented by the BOCs, provides sufficient public interest benefits and regulatory safeguards against access discrimination to justify replacing the current service-specific CEI plan regime for BOC enhanced services with full structural relief. In remanding this issue to the Commission, the court cited, for example, findings by the Georgia Public Service Commission that BellSouth had engaged in access discrimination in connection with its MemoryCall service.³⁴ The court also cited concerns raised by parties about the level of unbundling of network services included in approved BOC ONA plans and the absence of a fundamental unbundling requirement.³⁵ We have discussed above the existing access discrimination safeguards within the ONA framework and the current status of the implementation of those safeguards by the BOCs. We seek comments from parties regarding whether these access discrimination safeguards are adequate to support our moving from a CEI plan regime to one without any structural separation requirements. We also solicit comment on whether any increased risk of access discrimination should lead us to retain the CEI plan filing requirement, or whether a certain amount of increased risk is justified in return for the potential benefits of full structural relief.

³³ See United States v. Western Electric, 993 F.2d 1572, 1578-79 (1993).

³⁴ California III, 39 F.3d at 929.

³⁵ Id. at 929-30.

36. Second, we seek comment on the broader issue of whether some form of structural separation should be reimposed for the provision of enhanced services by the BOCs. In response to California III, some parties have argued that the Commission should take a fresh look at whether the benefits of allowing the BOCs to offer enhanced services, or at least some enhanced services, on an integrated basis outweigh the costs in terms of the potentially greater risk of anticompetitive actions by the BOCs.⁸⁶ Other parties urge the Commission to affirm its earlier decisions granting full structural relief, because nonstructural safeguards are adequate to deter and detect discrimination by the BOCs and have led to the provision of many new enhanced services by the BOCs.⁸⁷ We discuss below briefly certain costs and benefits we have previously identified in granting structural relief to the BOCs.

37. The Commission has previously determined that structural separation hurts consumers by creating inefficiencies and slowing or preventing the development of enhanced services,⁸⁸ and this finding was upheld by the Ninth Circuit in both California I and California III.⁸⁹ In the Computer III proceeding, the Commission found that separation requirements "hinder the introduction of enhanced services that could benefit the public by being widely available through the BOCs' local exchanges."⁹⁰ In the first Computer III remand proceedings, the BOCs provided specific examples of new services that were delayed or abandoned as a result of the reimposition of structural separation requirements after California I.⁹¹ The lifting of structural separation has

⁸⁶ See, e.g., Letter from Richard E. Wiley, Wiley, Rein & Fielding, to Reed E. Hundt, Chairman, FCC, November 30, 1994.

⁸⁷ See, e.g., Letter from Richard D. McCormick, US West to Reed Hundt, Chairman, FCC, November 29, 1994; Ex Parte Statement from Fred Konrad, Ameritech to William Caton, Secretary, FCC, December 2, 1994; Ex Parte from Alan F. Ciamporcerro, Pacific Telesis to William Caton, Acting Secretary, FCC, November 30, 1994.

⁸⁸ See, e.g., Phase I Order, 104 FCC 2d at 1008, paras. 89-94; BOC Safeguards Order, 6 FCC Rcd at 47-48, paras. 100-01.

⁸⁹ California III, 39 F.3d at 925; California I, 905 F.2d at 1232.

⁹⁰ Phase I Order at 1007, para. 89.

⁹¹ BOC Safeguards Order, 6 FCC Rcd at 7618-19, para. 101 & n.196. For instance, US West stated that it has foregone deployment of its proposed fax store-and-forward service after the