

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

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FEDERAL COMMUNICATIONS COMMISSION  
OFFICE OF SECRETARY

In the Matter of )

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

CC Docket No. 95-20

COMMENTS OF BELL ATLANTIC

The Bell Atlantic Telephone  
Companies

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**Table of Contents**

I. Introduction and Summary . . . . . 1

II. The Enhanced Service Marketplace Has Thrived Since the  
Commission Granted Structural Relief . . . . . 4

A. Voice Messaging . . . . . 7

B. On-line Services . . . . . 10

C. Value-Added Services . . . . . 11

D. Video Services . . . . . 12

III. A Return To Structural Separation Will Curtail New Mass-  
Marketed Enhanced Services and Limit the Benefits To  
Consumers From Existing Services . . . . . 15

IV. "Fundamental Unbundling" Has Already Occurred . . . . . 20

V. The Commission Should Modify Several Nonstructural  
Safeguards That Create Customer Confusion and Inconvenience,  
Raise Prices, and Prevent Rapid Deployment of New,  
Innovative Technology . . . . . 25

A. CPNI . . . . . 25

B. Network Disclosure . . . . . 29

C. Cost Allocations . . . . . 32

D. New ONA Services . . . . . 32

VI. The Commission Should Remove Protocol Processing From the  
Definition of Enhanced Services . . . . . 33

VII. Conclusion . . . . . 36

Attachment A Hausman and Tardiff, *Benefits and Costs of  
Vertical Integration of Basic and Enhanced  
Telecommunications Services*

Attachment B Declaration of Robert N. Garner

Attachment C CPNI

Attachment D Evolution of the Data Communications Market

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I. Introduction and Summary.

The Commission has repeatedly found that providing enhanced services on a structurally integrated basis strongly promotes the public interest. By contrast, structural separation affirmatively harm consumers by increasing enhanced service prices and preventing services that consumers want from even reaching the market. The Commission should not here reverse a decade of consistent policy decisions.

Structural relief has, without question, successfully served the public interest. In the time since the Bell operating companies ("BOCs") were authorized to offer enhanced services on an unseparated basis, the marketplace for enhanced services has thrived and continues to grow at a double-digit pace. This is true both of enhanced services generally, and of the particular business segments the BOCs have entered. At the same time, the

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<sup>1</sup> The Bell Atlantic telephone companies ("Bell Atlantic") are Bell Atlantic-Delaware, Inc.; Bell Atlantic-Maryland, Inc.; Bell Atlantic-New Jersey, Inc.; Bell Atlantic-Pennsylvania, Inc.; Bell Atlantic-Virginia, Inc.; Bell Atlantic-Washington, D.C., Inc.; and Bell Atlantic-West Virginia, Inc.

BOCs for the first time have been able to offer new types of mass market services such as voice messaging that consumers value. In fact, customers have flocked to these offerings, including nearly one and one-quarter million in the case of Bell Atlantic alone. Yet, the BOCs have only a small share of the business segments they have entered, and increased competition has produced lower prices for consumers.

Only one conclusion can be drawn from this experience. The Commission's non-structural safeguards work. New services are available, marketplace growth continues unabated, and competition has thrived. Under these circumstances, additional regulatory restrictions are unnecessary and, by imposing added costs on consumers, would be counterproductive.

In particular, the Commission should reject calls to roll back the clock to the failed policy of structural separation under Computer II. No enhanced services were offered by AT&T or the BOCs under structural separation, either before or after divestiture. The delay this caused in the introduction of voice messaging service alone produced a consumer welfare loss of nearly \$6 billion. A return to structural separation would only increase this figure by ensuring that the public again is deprived of new mass-marketed enhanced services that the BOCs could provide. And for existing services, the added costs of structural separation will boost prices by 25 percent or more. When coupled with the inability to provide "one-stop shopping,"

this price hike will largely wipe out future demand and deny many consumers the services they value.

Also, with respect to the one issue that was remanded by the Ninth Circuit, the Commission should reject calls for a more "fundamental unbundling" of BOC networks. As the Commission has repeatedly found, "fundamental unbundling" of the existing hardware-defined network not only would be extremely expensive -- it would require major network redesign, even if technically feasible -- but it also would disrupt service to existing customers. Nor would a complete rebuilding of the network produce any benefit. Experience shows that any legitimate needs of enhanced service providers ("ESPs") are being fully met through existing procedures.

Rather than pander to the interests of competitors who would use this proceeding to obtain an artificial competitive advantage, the Commission instead should take this opportunity to modify its existing non-structural requirements in the respects identified below to remove unnecessary burdens that cause customer confusion and deny consumers the benefits of true competition. The result will be to reduce customer inconvenience and annoyance, promote fair competition and the rapid deployment of new technologies and services, and eliminate distinctions between services which have no place in current technology.

In particular, the Commission should (1) simplify its customer proprietary network information ("CPNI") requirements, (2) shorten the network disclosure period, (3) expedite BOC

enhanced service use of additional basic services, (4) revise the cost allocation rules to reflect the unregulated marketplace, and (5) eliminate protocol conversion from the definition of enhanced services.<sup>2</sup>

II. The Enhanced Service Marketplace Has Thrived Since the Commission Granted Structural Relief.

As long ago as 1986, the Commission lifted structural separation requirements for AT&T and the BOCs based on its recognition that the "inefficiencies and other costs to the public associated with structural separation significantly outweigh the corresponding benefits."<sup>3</sup> Five and one-half years later, the Commission reaffirmed its conclusion based on a *de novo* review, and held that non-structural safeguards would allow the BOCs to provide enhanced services more efficiently while also protecting competition.<sup>4</sup>

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<sup>2</sup> In order to expedite its decision reaffirming structural relief, the Commission may wish to bifurcate this proceeding and address these needed modifications to the nonstructural safeguards in a separate phase.

<sup>3</sup> *Amendment of section 64.702 of the Commission's Rules and regulations (Third Computer Inquiry), Report and Order*, 104 F.C.C.2d 958 at ¶ 46 (1986) ("R&O").

<sup>4</sup> *Computer III Remand Proceedings: Bell Operating Company Safeguards and Tier 1 Local Exchange Company Safeguards*, 6 FCC Rcd 7571 at ¶ 98 (1991) ("Remand Order") ("[P]ermitting the BOCs to participate in the enhanced services industry pursuant to [nonstructural] safeguards . . . will permit the BOCs to use their resources more efficiently to provide enhanced services, resulting in the wider availability of enhanced services to the public, while effectively ensuring that BOC participation in enhanced services does not adversely affect basic service rates or harm ESPs due to BOC anticompetitive conduct.").

The intervening years have borne out all of these findings. As the Commission points out, the number of BOC enhanced service customers has risen from 160,000 in 1990 to more than five million today.<sup>5</sup> With the removal of additional legal and regulatory constraints, similar growth rates for other enhanced services can be expected in the future.<sup>6</sup>

As the Commission also recognizes, the marketplace for enhanced services is thriving.<sup>7</sup> In fact, the Department of Commerce estimates that information services generally accounted for \$135.9 billion in revenues in 1994, and "is among the fastest growing sectors of the economy."<sup>8</sup> This is equally true of the individual segments of the information services business examined by Commerce, all of which use telephone lines as well as other

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<sup>5</sup> **Notice of Proposed Rulemaking**, at ¶ 37 (rel. Feb. 21, 1995) ("Notice").

<sup>6</sup> Voice messaging is the predominant BOC enhanced service today, because other enhanced services remain hamstrung by the AT&T divestiture decree's prohibition on providing interLATA services. This prohibition bars the BOCs from providing enhanced services on an economically efficient basis. As a result, it has made some other BOC services, such as electronic mail, electronic data interchange, and videotext gateways, non-competitive with similar services offered by other providers who are not similarly constrained.

<sup>7</sup> The Commission pointed out that the U.S. market for value-added data services alone (e.g., packet transmission and on-line databases) was \$3.4 billion in 1993. Notice at n.81.

<sup>8</sup> United States Department of Commerce, **U.S. Industrial Outlook 1994**, at 25-1 ("Commerce Report").

distribution media in various ways and amounts.<sup>9</sup> And while the BOCs have been able to introduce new competition and deliver services that consumers value, they by no stretch of the imagination have dominated the business. On the contrary, their role is dwarfed by some of the largest and most sophisticated businesses in the country, the likes of which include GE, AT&T, MCI, IBM, Sears, TCI, Time Warner, American Airlines, EDS, and Microsoft.

In short, if BOC entry had undermined enhanced service competition, output would be expected to fall and prices to increase as the BOCs dominated the business. But despite the dire predictions of enhanced service competitors, the opposite has happened. The marketplace for enhanced services has continued to grow rapidly, prices have dropped, and large, well-funded non-BOC firms have entered the market or increased their presence.<sup>10</sup>

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<sup>9</sup> Specifically, revenues from electronic information services were estimated at over \$15 billion in 1994 and are growing at approximately 15% annually; this segment includes on-line, research, financial management and marketing services. **See** Commerce Report at 25-1, 25-2. Revenues from data processing and network services reached over \$50 billion in 1994 and are growing at over 14% annually; this segment includes services such as credit card authorizations, data entry, payroll processing, electronic mail, and electronic data interchange services. **Id.** at 25-1, 25-3. Revenues from computer professional services reached \$65 billion in 1994 and are growing at approximately 9% annually; this segment includes systems integration and software and consulting services. **Id.** at 25-4, 25-5.

<sup>10</sup> **Id.** **See also** Hausman and Tardiff, *Benefits and Costs of Vertical Integration of Basic and Enhanced Telecommunications Services* at 7-9 (April 6, 1995) ("Hausman and Tardiff"). This study appears in Attachment A.

Significantly, this is equally true in the segments of the enhanced services businesses that the BOCs have entered or are entering, including voice messaging, on-line services, value-added services, and video services.

A. **Voice Messaging:** The voice messaging business includes both electronic voice messaging services and competing customer premises equipment ("CPE"). In total, voice messaging constitutes a \$3 billion business and is growing at a double-digit rate, as shown below. The BOCs have become significant players in this marketplace, especially among residential customers, but they are merely one part of a large, highly competitive, and growing marketplace marked by increasing demand and rapidly falling prices. In fact, no BOC has achieved a share of this business of more than about 3 percent.<sup>11</sup>

Far from harming competition, BOCs' unseparated provision of voice messaging services has created a whole new market niche which unaffiliated competitors can freely enter. As Frost and Sullivan recently found, "[t]he RHCs and the independent LECs have developed the residential end-user market, which previously had little interest in or knowledge of voice messaging.... End-users are now convinced of the advantages of

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<sup>11</sup> Hausman and Tardiff at 10. Several BOCs have achieved a 6 percent share of the voice messaging services business, but that share drops to 3 percent when voice messaging equipment is also considered, as it should be.

voice messaging or call answering over traditional answering machine devices."<sup>12</sup>

This new consumer interest in voice messaging services has accelerated the rate of growth of the overall voice messaging services industry.<sup>13</sup> From \$1.1 billion in 1990, the industry grew to \$1.54 billion in 1994, and the rate of growth increased from 8.4% in 1991 to 12.4% in 1994.<sup>14</sup> Frost and Sullivan further estimates a compound growth rate exceeding 15% for the next three years, with the rate leveling off by 2000, when the total revenues are expected to exceed \$3 billion.<sup>15</sup>

The increased competition provided by BOC entry has not only spurred overall industry growth, but it has also resulted in lower prices to the benefit of consumers. In 1990, customers of live and automated voice messaging services in the United States each paid an average of \$30 per month for this service.<sup>16</sup> By

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<sup>12</sup> Frost and Sullivan, *U.S. Voice Messaging Services Markets* at 1-4 (1994) ("Frost and Sullivan"). Of Bell Atlantic's 1 1/4 million voice messaging customers, just over one million are residential consumers.

<sup>13</sup> Voice messaging services consist of both automated telephone answering and voice mail services, with processors centrally located, and "live" operator answering services. As the term is used here, they do not include premises-based answering machines or more sophisticated voice messaging equipment.

<sup>14</sup> Frost and Sullivan at 3-3.

<sup>15</sup> *Id.*

<sup>16</sup> *Id.* at 3-10.

1993, the monthly fee had dropped nearly by half to \$15.13 and is expected to decline by another 1/3 to \$10.25 by 2000.<sup>17</sup>

The voice messaging business is by no means dominated by a few players. In 1993, there were more than 4000 voice messaging service providers.<sup>18</sup> Among these are such well-financed companies as AT&T, MCI, McCaw Cellular, Dial-Com, Octel, Voice-Tel, and Sprint.<sup>19</sup> There is no sign that the number of non-BOC participants is declining, even as the BOCs' subscribership grows.

Competing with the \$1.5 billion voice messaging services business is a robust voice messaging CPE business of nearly like size. Voice messaging CPE can provide many of the same features as automated voice messaging services through equipment located on the customer's premises and is a direct substitute for automated voice messaging services of the type the BOCs offer.<sup>20</sup> On the consumer side, this equipment consists of answering machines, while business voice messaging equipment ranges from simple answering machines to sophisticated voice mail systems.

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<sup>17</sup> *Id.* at 3-11.

<sup>18</sup> *Id.* at 3-21.

<sup>19</sup> *Id.* at 3-22 to 3-23.

<sup>20</sup> Voice messaging CPE cannot answer a line if the destination telephone is off-hook. Voice messaging services can answer under such circumstances if used with the Call Forwarding Busy complementary network service.

BOC entry into voice messaging services has not harmed sales of competing CPE any more than it has hindered sales of competing voice messaging services. According to the North American Telecommunications Association ("NATA"), even with BOC participation since 1988, revenues for voice messaging CPE rose from \$150 million in 1985 to an estimated \$1.322 billion in 1995.<sup>21</sup> Moreover, the Electronic Industries Association estimates that more than half of all residential subscribers in the United States, or more than 125 million people, currently own answering machines.<sup>22</sup> Among the key manufacturers of residential and business voice messaging equipment are Octel, AT&T, Northern Telecom, VMX, and ROLM.

**B. On-line Services.** Within the electronic information service segment of the business, the three largest on-line information services, CompuServe (owned by H&R Block), America Online, and Prodigy (a partnership of Sears and IBM), have over 5.3 million subscribers.<sup>23</sup> On-line subscribership is growing rapidly, and will continue to do so as new providers such as Microsoft enter the business and as more on-line services provide "user-friendly" access to the Internet.<sup>24</sup> In fact, 30 million

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<sup>21</sup> 1993-1994 NATA Telecommunications Market Review and Forecast at 171.

<sup>22</sup> M. Mills, *Montgomery to Get Phone Message Service*, Washington Post, March 17, 1995, at F1, F8 (citing study).

<sup>23</sup> P.H. Lewis, *Prodigy Sees Quick Growth from Internet Web Service*, New York Times, Jan. 31, 1995, at D3.

<sup>24</sup> *Id.*

customers already have Internet access today,<sup>25</sup> and that number is growing at the rate of 10% per month to an estimated 200 million by decade's end.<sup>26</sup>

The consumer market, however, which is a likely area of growth in on-line services, is still under-represented among Internet users,<sup>27</sup> and this fact will likely spur additional on-line service subscribership over the coming years. Several of the BOCs, including Bell Atlantic, entered this business several years ago, but the AT&T consent decree's prohibition on providing interLATA service made the service uneconomic.<sup>28</sup> Once the interLATA restrictions are lifted, BOCs may re-enter this burgeoning segment of the business. But with large, well-financed incumbents already established, BOC entry would only add to customer choice, not inhibit an already competitive marketplace.

**C. Value-Added Services:** The BOCs have been permitted to provide data services with protocol conversion on an

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<sup>25</sup> P.H. Lewis, *Trying to Find Gold With the Internet*, New York Times, Jan. 3, 1995, at C15.

<sup>26</sup> R.E. Yates, *Shining Time for Spyglass; Deal with Microsoft Lights Up Emerging Software Innovator*, Chicago Tribune, Jan. 22, 1995, at C1.

<sup>27</sup> *Id.*

<sup>28</sup> This was true both because the cost of placing a processor in each LATA was prohibitive, and because those restrictions made it cumbersome and expensive for ESPs to connect to the gateway.

unseparated basis since 1986.<sup>29</sup> BOC entry has certainly not hindered the growth of value-added services, which are generally packet data services with or without protocol conversion.<sup>30</sup> From \$500 million in 1989, the providers of these services have seen revenues skyrocket to \$3.4 billion in 1993.<sup>31</sup> The value-added marketplace is dominated by several large companies, including British Telecom's Tymnet, SprintNet, IBM Information Network, and GE Information Services.<sup>32</sup>

D. **Video Services:** The BOCs also are attempting to enter the video services business following a series of court decisions allowing them to offer programming over their networks. But as new entrants in the video programming and distribution business, telephone companies will enter the market in direct competition with a variety of established incumbents. These include not only the entrenched cable TV incumbents and their

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<sup>29</sup> See, e.g., *The Bell Atlantic Telephone Companies, Petition for Waiver of Section 64.702 of the Commission's Rules (Computer II) to Provide Certain Types of Protocol Conversion, Memorandum Opinion and Order*, AAD 5-1296, 60 R.R.2d (P&F) 327 (rel. May 19, 1986).

<sup>30</sup> Commerce Report at 29-7. Protocol conversion allows disparate customer premises terminals to send and receive data. Without such conversion, each terminal would be unable to understand the data the other is sending.

<sup>31</sup> *Id.*; United States Department of Commerce, U.S. Industrial Outlook 1990, at 31-4.

<sup>32</sup> Commerce Report at 29-7.

vertically integrated programming affiliates,<sup>33</sup> but also the universally available and phenomenally successful direct broadcast satellite providers.<sup>34</sup> It also includes the multi-billion dollar video sales and rental industry,<sup>35</sup> and the established broadcast industry which is still the principal source of video services for many consumers.<sup>36</sup>

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<sup>33</sup> Total cable TV revenues for 1994 were estimated by the Commerce Department at over \$28 billion. Commerce Report at 31-6. According to cable industry figures, cable TV is now available to over 96 percent of the homes in the country and actually serves over 60 percent. National Cable Television Assoc., Cable Television Developments at 1-A (Fall 1994) ("NCTA Factbook"). At last count, 12 of the top 15 cable programming channels were owned by cable companies and cable companies owned interests in 57 of the 107 channels overall. **Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming**, 9 FCC Rcd 7442 at App. G, Tables 3, 4, 8 (1994).

<sup>34</sup> See C. McConnell, *DBS Business Flying High, Broadcasting & Cable*, Jan. 9, 1995, at 55 (reporting on explosive growth of DBS in the second half of 1994 with Direct TV growing to 350,000 subscribers and Primestar growing to 250,000 subscribers); *Digital TV: Advantage, Hughes, Business Week*, Mar. 13, 1995 (reporting that DirectTV has grown to nearly half a million subscribers, and shipped 700,000 satellite dishes and decoder systems); M.L. Kubowski, Dillon, Read & Co., Ind. Rep. No. 1539833, *Cox Communications, Inc. - Company Report* at 21 (Dec. 28, 1994) (Primestar DBS service growing "like wildfire" and projected to reach up to a million subscribers by the end of 1995).

<sup>35</sup> The Department of Commerce estimates that revenues from video sales and rentals is now between \$12 and \$17 billion annually, and ownership of video cassette recorders is approaching saturation and exceeds 80 percent of U.S. homes. Commerce Report at 31-4.

<sup>36</sup> Some 30 percent or more of U.S. homes still receive video service over the air from local broadcasters, which at present is a \$ 27.1 billion industry. See NCTA Factbook at 1-A (Fall 1994); and see Broadcast & Cable Facts, Feb. 22, 1995 (Television Bureau report on total television broadcast revenues for 1994).

In addition to the overwhelming evidence showing that the enhanced service industry has thrived since the BOCs were allowed to enter on an unseparated basis, the record also demonstrates that the BOCs have not engaged in anticompetitive conduct. As the Commission acknowledges, there have been no formal FCC complaints from any of the many litigious participants in the enhanced service field.<sup>37</sup> In addition, despite the unsupported claims of a spokesman for the enhanced service industry that there were numerous state complaints,<sup>38</sup> Bell Atlantic's experience does not bear that out. A survey of the seven Bell Atlantic jurisdictions shows but a single complaint over the past three years.<sup>39</sup>

As they have in the past, proponents of structural separation no doubt will concoct a laundry list of alleged misbehavior, and speculate about nefarious acts the BOCs might one day commit to handicap their ability to compete.<sup>40</sup> As shown

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<sup>37</sup> Notice at ¶ 29.

<sup>38</sup> Statement of Randolph J. May at *ex parte* industry workshop before the Federal Communications Commission, Jan. 30, 1995.

<sup>39</sup> This was an allegation in Pennsylvania that a service representative tried to sell a Bell Atlantic voice messaging service to one customer of an unaffiliated answering service. After investigation, Bell Atlantic provided the personnel in that business office with additional training and there have been no further complaints.

<sup>40</sup> Even the Association of Telemessaging Services International, which urges a return to structural separation, was able to garner only a small handful of incidents among all the BOCs and GTE during a three-year period 1992 through 1994 (only two in the Bell Atlantic region). These few mistakes, even if  
(continued...)

above, however, the record proves just the opposite. Unseparated BOC entry has uniformly increased overall demand, broadened the range of available services, and lowered prices.

Moreover, this experience merely confirms other relevant marketplace experience. For example, GTE has long been allowed to offer enhanced services and until recently was not subject even to non-structural safeguards. Yet GTE never dominated the market or engaged in anticompetitive conduct.<sup>41</sup> Likewise, the BOCs have provided other unregulated services, including CPE. But as in the case of enhanced services, unaffiliated CPE vendors have thrived, while the BOCs have met with only modest success in the CPE business.<sup>42</sup>

III. A Return To Structural Separation Will Curtail New Mass-Marketed Enhanced Services and Limit the Benefits To Consumers From Existing Services.

Not only does the Commission have a clear track record proving that non-structural safeguards work, it also has a record that shows that structural separation imposes enormous costs -- including depriving the public of new enhanced services. From

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<sup>40</sup> (...continued)  
they were all valid, hardly constitute a pattern of abuse that would warrant a return to structural separation.

<sup>41</sup> **United States v. Western Elec. Co.**, 993 F.2d 1572, 1579 (D.C. Cir.) (citing Reply Affidavit of Franklin M. Fisher at ¶¶ 53-63), **cert. denied**, 114 S. Ct. 487 (1993).

<sup>42</sup> **See** Reply Affidavit of Franklin M. Fisher at ¶¶ 33-44, **United States v. Western Elec. Co.**, No. 82-0192 (D.D.C. dated Jan. 9, 1991); Reply Affidavit of Dennis W. Carlton and George J. Stigler at ¶¶ 66-67, **United States v. Western Elec. Co.**, No. 82-0192 (D.D.C. dated Jan. 10, 1991).

the time the Computer II rules became effective until today, it appears that not one enhanced service has been offered by any carrier to consumers or small business customers on a fully structurally separated basis.

Voice messaging provides a good example of the magnitude of the cost of these constraints to consumer welfare. In 1981, AT&T, which was subject to structural separation for provision of enhanced services under the Computer II Decision,<sup>43</sup> asked for a waiver to offer a voice messaging service to consumers (which AT&T called Custom Calling II) on an unseparated basis. Despite a showing that the service would be uneconomic if offered on structurally separated basis, the Commission denied AT&T's request.<sup>44</sup> The upshot was that initiation of a mass-marketed residential voice messaging service had to await BOC decree and structural relief nearly a decade later. As Professor Hausman and Dr. Tardiff explain in their attached report, the consumer welfare loss that resulted from this delay has been calculated as nearly \$6 billion.<sup>45</sup>

Now that mass-marketed voice messaging services are being widely offered, the public would suffer greatly if the Commission reimposed structural separation. Bell Atlantic's

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<sup>43</sup> **Second Computer Inquiry, Final Decision**, 77 F.C.C.2d 384 (1980) ("Computer II Decision").

<sup>44</sup> **American Telephone and Telegraph Petition for Waiver of Section 64.702 of the Commission's Rules and Regulations, Memorandum Opinion and Order**, 88 F.C.C.2d 1 (1981). **See also** Hausman and Tardiff at 12-13.

<sup>45</sup> Hausman and Tardiff at 14-15.

voice messaging processors are generally located in Bell Atlantic central offices. These processors were installed and are maintained by Bell Atlantic telephone company installation and maintenance personnel pursuant to the Joint Cost Rules.<sup>46</sup> If the Commission were to impose structural separation for these services, Bell Atlantic would need to hire a separate installation force, or retain contractors, to move every one of these processors to separately-secured space. In order to minimize disruption to customers' services, this move would have to be undertaken gradually, and would consume a one-year period. Even then, each of Bell Atlantic's more than one million voice messaging customers would be removed from service for at least one day and could expect additional service disruptions as the new architecture is put into service.<sup>47</sup>

The one-time cost of the relocation of Bell Atlantic's entire voice messaging network would be at least \$15 million and could go higher. These costs would be borne by the subscribers to voice messaging.<sup>48</sup>

On a continuing basis, structural separation would eliminate the economies of scope and one-stop shopping that the Commission has found are very much in the public interest.<sup>49</sup>

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<sup>46</sup> 47 C.F.R. §§ 64.901-64.904.

<sup>47</sup> **See** Attachment B, Declaration of Robert N. Garner.

<sup>48</sup> If the Commission were to impose a shorter transition period than one year, the cost would be substantially higher, and the disruption to the service greater. **See id.**

<sup>49</sup> Remand Order at ¶¶ 100-109.

The increased operating costs of residential and small business voice messaging services on a structurally-separated basis, with a separate sales force, separate installation and maintenance personnel and separate office space, would force a price increase of about 25%. This would mean higher prices for any customers who retained the service, and would effectively deny other consumers a service they value by making it uneconomic.

In addition, the cost to consumers is more than just increased price. As shown in the attached Declaration of Robert N. Garner, one of the most significant costs of structural separation to consumers results from the inability to provide customers with "one-stop shopping" through telephone company business offices.<sup>50</sup> Consumers view Bell Atlantic's voice messaging service as one of many available optional telephone company services -- they do not understand the "basic" and "enhanced" service distinctions reflected in the Commission's rules. Even with increased advertising, many subscribers will simply not subscribe to a voice messaging service if they must call a different sales channel for information, for installation, and for maintenance. In fact, Bell Atlantic projects that, despite the popularity of its voice message service, without the ability to sell voice messaging through its business offices, new sales would decline by at least 80% in each future year. As a result, reimposing structural separation would mean that, by the end of the decade, subscribership to Bell Atlantic's voice

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<sup>50</sup> **See** Attachment B.

messaging service would be more than one million customers less than under existing rules.

Moreover, the BOCs face increasingly robust local exchange and intraLATA toll competition from large, well-financed companies, including cable companies, interexchange carriers, competitive access providers, wireless carriers, and private systems. No public interest benefit is served by saddling the BOCs with more stringent structural or non-structural conditions than their direct competitors, such as the cable companies. On the contrary, imposing artificial regulatory handicaps on the BOCs will serve only to deny consumers the benefits of true competition, and add to the other costs imposed by structural separation.

As for new services, the Commission should not attempt to draw any regulatory distinction among existing or future classes of enhanced services, just as it has uniformly treated enhanced video services no differently from other enhanced services.<sup>51</sup> The dynamics of the industry guarantee that any distinctions the Commission attempts to make today will be

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<sup>51</sup> **Telephone Company-Cable Television Cross-Ownership Rules, Sections 63.54-63.58**, 7 FCC Rcd 5781 at ¶¶ 92-93 (1992) (applying both nonregulated service safeguards and Open Network Architecture requirements on BOC provision of enhanced video services.) **See also Memorandum Opinion and Order on Reconsideration and Third Notice of Proposed Rulemaking**, 10 FCC Rcd 244 at ¶ 230 (1994); **Bell Operating Companies' Joint Petition for Waiver of Computer II Rules, Memorandum Opinion and Order**, DA 95-36 at ¶ 31 (rel. Jan. 11, 1995).

unworkable in the coming years.<sup>52</sup> The experience with voice messaging shows that it is uneconomic to maintain a separate sales force for mass marketed services. The BOCs are unlikely to invest in developing many new consumer and small business enhanced services if they cannot market them through existing telephone company sales channels. Accordingly, a return to structural separation will deprive the public of new enhanced mass-marketed services from the BOCs. And if the BOCs do not offer these services, the lesson of the voice messaging experience teaches that nobody will.

#### IV. "Fundamental Unbundling" Has Already Occurred.

As the experience outlined above conclusively shows, the Commission's existing non-structural safeguards have proven to be more than adequate to protect against any potential anticompetitive conduct. Nor is this surprising given the extensive body of rules already in place.

Both the Ninth and D.C. Circuit Courts of Appeal have recognized that the Commission's existing rules provide abundant protection against cross-subsidy.<sup>53</sup> For example, the price cap rules effectively blunt any incentive created by rate of return regulation to engage in cross-subsidy by breaking the direct link

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<sup>52</sup> The waiver process can be used to deal with unique situations requiring special treatment.

<sup>53</sup> The modifications to these rules proposed below retain this protection but remove unnecessary burdens and customer confusion.

between costs and revenues, while the cost accounting rules eliminate any conceivable ability to do so.<sup>54</sup> Moreover, while the D.C. Circuit has recognized that the BOCs would be unable to discriminate against enhanced service competitors even in the absence of regulatory safeguards,<sup>55</sup> the Commission's extensive body of existing rules are more than adequate to make doubly sure that they do not.<sup>56</sup>

The one issue the Ninth Circuit requires the Commission to address on remand is whether the benefits of structural relief under the existing ONA rules outweigh the cost of "fundamental unbundling."<sup>57</sup> The Commission should examine this issue in the

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<sup>54</sup> *People of the State of California v. FCC*, 39 F.3d 919, 926 (9th Cir. 1994) ("[W]ith the implementation of these measures, the FCC ... has demonstrated that the BOCs' incentive and ability to cross-subsidize will be significantly reduced."), **cert. denied**, 63 U.S.L.W. 3540, **and cert. denied**, 63 U.S.L.W. 3564 (April 3, 1995); *United States v. Western Elec. Co.*, 993 F.2d 1572, 1580 (D.C. Cir.) (price cap regulation "reduces any BOC's ability to shift costs from unregulated to regulated activities, because the increase in costs for regulated activity does not automatically cause an increase in the legal rate ceiling"), **cert. denied**, 114 S. Ct. 487 (1993).

<sup>55</sup> 993 F.2d at 1579-80 ("The affidavits in the record offer persuasive evidence that, despite their local monopoly power, the BOCs will be unable to discriminate against competing information service providers.").

<sup>56</sup> These include detailed cost allocation rules, ARMIS reporting, nondiscrimination reports, CPNI rules, prior network disclosure requirements, separate tariffing of ONA services and prior approval of new services, annual reports of BOC enhanced service use of basic services, ESP request procedures for new ONA services, and the panoply of comparably efficient interconnection requirements.

<sup>57</sup> **See** Notice at ¶ 12.

context of its specific Computer III requirements and the court's language.

Specifically, in the Report and Order, the Commission required carriers to provide:

unbundled basic service "building blocks" (Basic Service Elements) to others on a tariffed basis. Such unbundling is essential to give competing enhanced service providers an opportunity to design offerings that utilize network services in a flexible and economical manner. In essence, competitors will pay only for those Basic Service Elements that they use in providing enhanced services.<sup>58</sup>

On appeal, the court interpreted this language to require a degree of unbundling "that would permit the enhanced service providers to construct their own innovative services as easily as the BOCs. The FCC specified that all basic network capabilities that would be useful in enhanced service applications,... would be subject to the unbundling requirement."<sup>59</sup> Accordingly, the court defined "fundamental unbundling" in terms of unbundled services that ESPs have asked for in order to develop and offer their enhanced services.

While the court noted that installation and maintenance reporting alone did not serve this purpose, it did not have the benefit of the Commission's experience with the service request process under the ONA rules. These rules allow ESPs to request basic network services for use in providing enhanced services,

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<sup>58</sup> R&O at ¶ 214.

<sup>59</sup> ***People of the State of California v. FCC***, 39 F.3d at 927 (emphasis added) (citation omitted).

and require the BOCs to respond within 120 days.<sup>60</sup> The rules also impose annual reporting requirements to monitor responses. In the nearly nine years since the first Computer III decision, the ESPs have requested, and the BOCs have provided, the specific services and features requested by ESPs that met the Commission's criteria for such requests of market demand, utility for the enhanced service, and technical and costing feasibility.<sup>61</sup> This experience shows that the BOCs already have unbundled their networks to the extent necessary to meet the Commission's initial requirement, even as the court read it. They already are offering the unbundled network services that the ESPs have requested for use in enhanced service applications.

In fact, the Commission has found that the BOCs' networks are significantly more unbundled than they were at the time of the 1991 order that is now on remand.<sup>62</sup> New access services, such as long term transport restructure and virtual collocation, provide additional unbundled choices to ESPs as well as to interexchange carriers.<sup>63</sup> New technologies and services, such as common channel signalling, integrated services digital networks ("ISDN"), and intelligent networks, have provided ESPs with an increasingly wide array of services and features, and

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<sup>60</sup> ***Filing and Review of Open Network Architecture Plans, Memorandum Opinion and Order***, 4 FCC Rcd 1 at ¶ 397 (1988) ("ONA Order").

<sup>61</sup> ***Id.*** at ¶ 396.

<sup>62</sup> Notice at ¶¶ 23-24.

<sup>63</sup> ***See id.*** at ¶ 30.