

As in the case of discrimination and other anticompetitive conduct, much of the cost shifting that occurs in connection with the provision of BOC enhanced services relates to the intrastate aspects of the affected enhanced services. To the extent that BOC enhanced services are offered on an intrastate basis, the cost shifting and misallocation opportunities that are presented thereby will largely affect intrastate costs. At the same time, this Commission, which has removed the protection of structural separation, cannot provide any other regulatory protection against intrastate cross-subsidies.

One of the more egregious examples of such intrastate cross-subsidies was uncovered by a California PUC audit, which found that state ratepayers had subsidized Pacific Bell's development of its voice messaging and other enhanced services. Pacific Bell entered into a settlement of these issues with the CPUC requiring it to refund \$57 million to customers and to reduce its rates by \$19.1 million.^{26/} In a related proceeding addressing Pacific Bell's application to transfer its enhanced services to a separate subsidiary, the CPUC required that ratepayers also be credited with the increase in value of the enhanced services assets in the form of an additional one-time rate reduction.^{27/}

^{26/} Application of Pacific Bell, a corporation, for authority to increase certain intrastate rates and charges applicable to telephone services furnished within the State of California, Application 85-01-034, Decision 92-07-076 (CPUC July 22, 1992).

^{27/} Pacific Bell Transfer.

There have also been a series of federal and state audits that have uncovered a variety of cross subsidies and overcharges:

- Pacific Bell has continued to fund its enhanced services, as well as other competitive ventures, with ratepayer revenues. The CPUC permitted Pacific Telesis Group to spin off its wireless service operations to an independent company only on condition that Pacific's ratepayers be reimbursed \$7.9 million for their funding of development costs.^{78/} Similar problems were revealed in a CPUC audit released last summer and in an audit of BellSouth released at the same time.^{79/} Previously, audit teams conducting combined FCC/state joint audits of the BOCs had complained that most of the BOCs had stalled the progress of the audits through slow responses to data requests and cited, in particular, BellSouth's "consistent pattern of obstructionist behavior."^{80/}
- A Common Carrier Bureau audit, released in October 1993, of the affiliate transactions between BellSouth's operating companies and a nonregulated subsidiary revealed overcharges by the affiliate of \$25.7 million, resulting in overcharges to interstate ratepayers of \$6 million.^{81/}
- A Common Carrier Bureau audit of transactions between the GTE Telephone Operating Companies (GTOCs) and two nonregulated affiliates revealed overcharges of the GTOCs by the affiliates, which were passed on by the GTOCs to their ratepayers. The GTOCs entered into a Consent Decree requiring a common line rate reduction of

^{78/} Interim Opinion, Investigation on the Commission's own motion into the Pacific Telesis Group's "spin-off" proposal, I. 93-02-028, Decision 93-11-011 (CPUC Nov. 3, 1993), mod. on other grounds, Decision 94-03-036 (CPUC March 9, 1994).

^{79/} Bell Audits Find Common Problems, NARUC Told, Telecommunications Reports, August 1, 1994, at 13.

^{80/} Joint Audits of SW Bell, Ameritech, Pacific Telesis Near End; Controversies Continue to Stall BellSouth, NYNEX Reviews, Telecommunications Reports, April 4, 1994, at 7-8.

^{81/} See BellSouth Affiliate Transaction Audit: Summary of Audit Findings and attached BellSouth Statement, BellSouth Corporation, BellSouth Telecommunications, Inc., AAD 93-127 (Nov. 8, 1993).

\$49.5 million.^{82/}

- A joint five-state/FCC audit of Southwestern Bell affiliate transactions and cost allocations among Southwestern Bell's operating company and its affiliates revealed overcharges by the affiliates totalling \$93.7 million for the period 1989-92, which have burdened Southwestern Bell's intra- and interstate ratepayers.^{83/}

MCI believes, as it did at the time of the Computer III Remand proceeding, that cost allocation rules are inherently ineffective, no matter how many bells and whistles are added to the process. As MCI explained in its Comments in that docket, such rules cannot work because: there is no accurate method for developing an allocator for jointly used resources; LEC control over allocation formulae and the internal data used to populate the formulae result in the distorted apportionment of costs; and BOCs will continue to overproject their regulated use of joint investment and expenses, rendering any forward-based allocation incorrect.^{84/} Cost accounting rules also do not work because

^{82/} Consent Decree Order, The GTE Telephone Operating Companies, AAD 94-35 (released April 8, 1994).

^{83/} Five States Regulatory Commissions and Federal Communications Commission Joint Audit Team, Review of Affiliate Transactions at Southwestern Bell Telephone Company (May 1994).

^{84/} The lack of any real control over such projections is epitomized by the Commission's laughably limp warning to the LECs in the Video Dialtone Order that it "would not anticipate accepting a 0% allocation of overhead" to video dialtone service in applying the new services test. Memorandum Opinion and Order on Reconsideration and Third Further Notice of Proposed Rulemaking, Telephone Company - Cable Television Cross-Ownership Rules, Sections 63.54-63.58 and Amendments of Parts 32, 36, 61, 64 and 69 of the Commission's Rules to Establish and Implement Regulatory Procedures for Video Dialtone Service, CC Docket No. 87-266, FCC 94-269 (released Nov. 7, 1994) at ¶ 220.

there is no effective deterrent to violations. If and when a violation happens to be uncovered by an audit years later, the competitive and ratepayer injuries have long since occurred, and, after a refund is ordered, the BOC is no worse off than if it had never violated the rules. The relevant portion of MCI's prior Comments explaining these points in more detail is attached hereto as Exhibit D.

In the Computer III Remand Order, 6 FCC Rcd at 7596-97, ¶¶ 55-56, as well as in other proceedings addressing cost allocation rules in various contexts,^{85/} the Commission has presented price cap regulation as the magic bullet that will suppress the incentives to cross-subsidize to the point where such activities, at least at the interstate level, can be adequately controlled by means of cost allocation rules. As the recent audit findings indicate, however, that has not turned out to be the case. One must assume that the post-price cap cost shifting revealed by these audits was motivated, rather than purely random behavior. It follows that there is still a healthy drive to cross-subsidize among the BOCs even after the advent of price cap regulation. As MCI and other parties have explained for years, the sharing obligation and other rate-of-return aspects of price cap regulation create more than a sufficient incentive to continue cross subsidizing. Moreover, price cap regulation of interstate rates cannot have any impact on intrastate cross-subsidies, which

^{85/} Id. at ¶¶ 166-67.

are probably more significant for most ESPs.

Because the BOCs' incentives to inflate regulated costs continue, price cap regulation has not been the panacea for interstate cross subsidization that was once envisioned. The Commission therefore cannot rely on price cap regulation to supplement its cost separation rules. Moreover, the latter cannot be relied upon to substitute for structural separation, for the reasons explained in MCI's previous Comments and as evidenced by the recent audit findings.^{86/} Not only do those audits demonstrate that this Commission's system of price cap regulation has not diminished the BOCs' incentives to cross-subsidize at the interstate level (and could not have any impact on intrastate cross-subsidies), but they also demonstrate the BOCs' undiminished ability to do so.

All objective analyses concur that even with price cap regulation, the Commission's cost allocation oversight burden has grown, and "the staff resources allocated to this function have declined rather than increased ... [and] the number of FCC auditors remains inadequate to provide a positive assurance that

^{86/} It is also no answer that the audits themselves prove the effectiveness of the cost accounting rules. All of these audits have taken place long after the fact, after the damage has been done to competition and to ratepayers. Structural separation operates before the fact, preventing the injury altogether.

ratepayers are protected from cross-subsidization."^{87/} As the House Judiciary Committee noted:

Some have asserted that the current regulatory scheme limits the potential for anticompetitive conduct because of regulations such as price caps, automated reporting, non-discrimination reports, and State safeguards. To a large extent, the value of regulatory oversight depends upon enforcement resources which, as noted above, do not presently exist. The regulatory problem is exacerbated with regard to the RBOCs because they dominate entire geographic regions and overlap Federal and State regulatory jurisdictions. See, e.g., National Ass'n. of Regulatory Util. Comm'rs. *Some RBOCs Are Not Cooperating With the NARUC's Joint State/Federal Audit Efforts* (NARUC Summer Meeting, July 28, 1992) (detailing difficulties in coordinating overlapping State and Federal audits of the RBOCs.) In addition, it is widely understood that regulations are incapable of preventing anticompetitive conduct by monopoly utilities because of the inherent difficulty for regulators to second-guess a utility's subjective engineering and procurement judgment. See, e.g., 3 Phillip Areeda & Donald Turner, *Antitrust Laws* § 726, p. 219 (1978), ("the integrated utility can always argue that its product, though more expensive, is 'better'").^{88/}

Given the evident weaknesses of cost allocation rules as a safeguard against cross-subsidies, after so many years of tinkering by the Commission, it would be irrational to eliminate the structural separation requirement. That rule eliminates most of the problems of cross-subsidization by eliminating most joint and common costs and the opportunities for arbitrary misallocation of those costs. Structural separation also

^{87/} U.S. General Accounting Office, Telecommunications - FCC's Oversight Efforts to Control Cross-Subsidization, GAO/RCED-93-34, at 12 (Feb. 1993).

^{88/} Antitrust and Communications Report at 59 n.246.

highlights transactions between affiliates, thereby inhibiting cost shifting. Structural separation also provides state commissions with a powerful tool to control intrastate cross-subsidies, an especially difficult task when dealing with multi-state RBOCs. Given the Commission's chronically inadequate auditing and enforcement resources, the largely self-enforcing structural separation requirement is the only realistic safeguard against cross-subsidies.

CONCLUSION

It is clear that the case for eliminating structural separation is far weaker now than it was at the time of the Computer III Remand proceeding, just as it was far weaker then than it had been at the time of the original Computer III proceeding. ONA has now been held twice -- in California II and California III -- to constitute a significant retreat from the Commission's original promise of a fundamental unbundling, and thus an opening up, of the BOC network. As the Hatfield Report explains, the advanced technologies that were supposed to facilitate such unbundling are instead being used by the BOCs to tighten their grip on the local exchange bottleneck and close off access to competitive service providers. The paralysis of ONA leaves CEI and the other antidiscrimination rules as the main safeguard against access discrimination and other forms of anticompetitive conduct, and CEI has proven to be woefully inadequate to prevent such conduct in actual practice. The

results of recent audits similarly demonstrate that cross-subsidization continues unabated by price cap regulation or the accounting rules. Problems of discrimination and cross-subsidization are especially rampant at the intrastate level, which is unaffected by this Commission's nonstructural regulations.

Meanwhile, the supposed benefits from the elimination of structural separation are proving to be thinner as time passes. Even after several years of integrated BOC enhanced services, voice messaging service appears to be the only one in which they have made substantial headway. More importantly, there still has been no showing, after all this time, that structural integration made any difference or that other providers could not have met the same demand for the same services at comparable rates while the BOCs were under a structural separation regime. The BOCs no longer claim any economies from unseparated services arising from technical integration with the network or that are unique to them, nor do they claim that they are providing unique services. With the claimed benefits reduced to such modest levels and the safeguards so diminished, the continuing BOC abuses drive any

reasonable cost-benefit analysis away from structural relief.
Structural separation must be maintained.

Respectfully submitted,

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Dated: April 10, 1995

EXHIBIT A

**b. The FCC Completely Ignored Evidence
Demonstrating the Ineffectiveness of ONA
and Other Nondiscrimination Requirements**

The FCC studiously avoided any consideration at all of some of the most significant, relevant evidence bearing on the inadequacy of ONA and the nondiscrimination requirements. First, the FCC completely overlooked, for the third time, a substantial body of evidence originally introduced by MCI, and ignored by the FCC, in the ONA Proceeding demonstrating the ineffectiveness of ONA in combatting access discrimination. MCI introduced the same evidence in the ONA Remand Proceeding, where it was ignored again, and, most recently, in the proceeding below. This evidence consisted of over one hundred pages of deposition extracts containing admissions by BellSouth employees that:

- the same BellSouth personnel who determine which enhanced services BellSouth will provide are also responsible for approving or rejecting new ONA service requests from competing ESPs, and
- ESPs' requests for network service features are subject to a screening procedure that BellSouth's own enhanced service operations avoid when they request new network features.²⁷

The testimony also contained admissions that:

- ONA will not make available to ESPs any new services that would not otherwise have been made available in the absence of ONA;

²⁷ See MCI Comments at 80-81 (J.A. 1742-43). The relevant pages of the deposition testimony are attached to and cited in MCI's Petition for Reconsideration in the ONA Proceeding, a copy of which was also submitted, with the deposition extracts, under cover of an ex parte letter from Frank W. Krogh, MCI, to Donna R. Searcy, Secretary, FCC (Mar. 15, 1991) in the Structural Remand Proceeding [hereinafter MCI Mar. 15 ex parte letter] (J.A. 1992-94). The cited pages of the deposition testimony appear in the Joint Appendix under the name of each deponent, in alphabetical order (J.A. 2542-2675).

- No objective criteria are used to set the price of intrastate basic services offered to ESPs, and intrastate prices will not be based on costs;
- The ONA regime cannot be "self-enforcing" in controlling discrimination, as was promised, because ESPs have no meaningful participation in the process of how or why ONA service requests are approved or rejected.^{63/}

In the ONA Proceeding itself, the FCC excused its refusal to consider this evidence on the grounds that "[t]hese arguments raise issues decided in the Computer III proceeding and are inappropriately raised in seeking reconsideration of the BOC ONA Order."^{64/} Now, of course, that excuse is gone. The proceeding below was conducted for the very purpose of reconsidering the structural separation issues remanded by this Court in vacating the Computer III orders.^{65/} Whatever issues were "decided" in Computer III were thus open for de novo review in the proceeding below.^{66/} The failure to consider this significant evidence undermining its position on such a crucial issue, for the third time, renders the Order arbitrary and capricious.^{67/}

The second category of discrimination-related evidence

^{63/} See MCI ONA Recon. Pet. at 5-7, 11, 13-25 (J.A. 452-54, 458, 460-72); MCI ONA Recon. Reply at 4-9 (J.A. 476-81). MCI also pointed out that the situation was probably the same for the other BOCs. MCI ONA Recon. Pet. at 16 n.30 (J.A. 463).

^{64/} ONA Reconsideration Order, 5 FCC Rcd at 3098 n.36 (J.A. 541).

^{65/} NPRM, 6 FCC Rcd at 174-75 (J.A. 915-17).

^{66/} The vacating of the Computer III orders deprived them of any binding effect, thus "clear[ing] the path for future relitigation of the issues." United States v. Munsingwear, Inc., 340 U.S. 36, 40 (1950).

^{67/} Office of Communication of the United Church of Christ v. FCC, 779 F.2d 702, 714 (D.C. Cir. 1985). See also, e.g., City of Brookings Mun. Tel. Co. v. FCC, 822 F.2d 1153, 1171 (D.C. Cir. 1987).

ignored by the FCC consists of the many examples of different types of BOC access discrimination and other anticompetitive conduct submitted below. MCI introduced sworn testimony from the U.S. District Court proceeding reviewing the MFJ restrictions demonstrating the BOCs' practices of raising ESPs' costs unreasonably and withholding necessary interconnection features.^{68/} The Association of Teleessaging Services International Inc. ("ATSI") described numerous examples of access discrimination by BOCs against competitive VMS providers, including unequal interconnections.^{69/} The process of requesting and actually receiving new ONA features is more akin to tooth extraction than the cooperative process envisioned in Computer III.^{70/}

Moreover, in July 1991, the U.S. District Court overseeing the MFJ, in reviewing the remaining portion of the ban on BOC information services, confirmed the ineffectiveness of ONA in preventing access discrimination.^{71/} As it found, "ONA is still developing and evolving, and its success in enabling competitors

^{68/} MCI Comments at 26-30 (J.A. 1688-92); sworn statements attached as Exhibits in Support of MCI's Opposition to Motion for Removal of the Information Services Restriction in the Modification of Final Judgment, MFJ Proceeding (Oct. 17, 1990) [hereinafter MCI MFJ Exhibits], attached to MCI Mar. 15 ex parte letter (J.A. 2050-2440).

^{69/} ATSI Comments at 10-22 (J.A. 1375-87). See also Iowa Network Services Comments at 16-26 (J.A. 1633-43); AccessPlus Communications Comments at 8-20 (J.A. 980-92); Ex parte letter from Marc S. O'Krent, President, The Telephone Connection of Los Angeles, Inc., to Donna Searcy, Secretary, FCC (Nov. 11, 1991) [hereinafter O'Krent letter] (J.A. 3117-21).

^{70/} One VMS provider describes, in two chronologies totaling 93 pages, the Kafkaesque nightmare of trying to obtain useful ONA services from the BOCs. AccessPlus Communications Comments at 18-20 and Att. A and B (J.A. 990-1085).

^{71/} United States v. Western Electric Co., 767 F.Supp. 308 (D.D.C.), appeal docketed, No. 91-5263 (D.C. Cir. Aug. 30, 1991).

in the information services market to obtain the features they need is entirely unproven.^{72/} Moreover,

[a]s for those ONA rules that have been in place over the last several years, they have already provided some indication of their lack of effectiveness: they have not prevented the Regional Companies from discriminating against their competitors in the few markets in which such discrimination was at all feasible.^{73/}

The District Court found, based on much of the same sworn testimony introduced by MCI in the record below,^{74/} that the BOCs "have... managed to engage in [anticompetitive] conduct" in those information service markets which they have entered, such as VMS.^{75/}

Although the District Court's opinion was submitted in the record below in an ex parte filing,^{76/} the FCC ignored it. The FCC's "see-no-evil, hear-no-evil, speak-no-evil" approach to the pivotal issue in its cost-benefit analysis is totally "antithetical to reasoned decisionmaking." International Ladies Garment Workers' Union v. Donovan, 722 F.2d 795, 815-17 (D.C. Cir. 1983) (failure to consider alternative approach), cert. denied, 469

^{72/} Id. at 319.

^{73/} Id. at 319 n.55 (emphasis added). Among other examples of discriminatory conduct, the court cited the access discrimination that was the basis for the Ga. MemoryCall Order. Id. at 320 n.57.

^{74/} Compare id. at 320-23 with MCI Comments at 26-28 (J.A. 1688-90) and MCI MFJ Exhibits attached to MCI Mar. 15 ex parte letter (J.A. 2050-2440). Notwithstanding these findings, the District Court removed the information services restriction, "albeit with considerable reluctance," Western Electric Co., 767 F. Supp. at 327, based on an unusual technical legal standard set down by the Court of Appeals for review of the MFJ restrictions.

^{75/} 767 F. Supp. at 323.

^{76/} Ex parte Filing of Telephone Answering Services of the Mountain States (Aug. 27, 1991) (J.A. 3010-57).

U.S. 820 (1984).

Except for the Ga. MemoryCall Order, the FCC never addressed or even acknowledged this vast record of recent BOC access discrimination, nor did it ever suggest any reason to regard actual experience since the ONA Orders as irrelevant. In fact, it found that "[o]ur experience with ONA since that time [the California I decision] serves to reaffirm this conclusion [that ONA is effective]." 6 FCC Rcd at 7599 (J.A. 3161). It was arbitrary for the FCC to base its finding that ONA is effective on its "experience" under ONA, while ignoring the most significant, relevant evidence of the nature of that experience.

The FCC's discussion of the Ga. MemoryCall Order drives home the unreasonableness of the FCC's decision, since it concedes the discriminatory nature of BellSouth's conduct.^{III} There is no explanation of how that discriminatory "experience... serves to - reaffirm" the effectiveness of ONA.

The FCC does suggest that ONA was not fully in place during the time period relevant to the Ga. MemoryCall Order and that there is thus no reason to believe that ONA is not effective.^{IV} If ONA was not fully in place, however, it was irrational for the FCC to base its decision on its "experience with ONA since" California I, because if ONA was not in place, there has been no "experience with ONA." That is precisely the type of "self-

^{III} Order, 6 FCC Rcd at 7623 n.211 (J.A. 3185).

^{IV} Id.

contradiction" that marks an agency order as arbitrary and capricious.^{79/}

The FCC's ONA regime is irrelevant for another reason as well. Most VMS providers, such as those involved in the proceeding resulting in the Ga. MemoryCall Order, are local in nature (whether or not they are capable of terminating interstate calls), and use intrastate BOC access services, including intrastate ONA services.^{80/} The FCC's ONA rules and the BOCs' federal ONA tariffs, filed pursuant thereto, are therefore irrelevant to the problems of access discrimination faced by many ESPs at the state level.^{81/}

The FCC has held, in the ONA Proceeding, that since "our jurisdiction over intrastate tariffed services is limited, ... we scrutinize BOC state tariffing proposals to ensure only that they do not undermine fundamental ONA objectives."^{82/} Under that loose standard, the FCC's approval of the BOCs' proposed intrastate ONA tariffs in the ONA plans^{83/} is meaningless. For example, although BellSouth had tariffed one of the ONA services

^{79/} See American Tel. & Tel. Co. v. FCC, 836 F.2d 1386, 1391 (D.C. Cir. 1988).

^{80/} See, e.g., BellSouth Reply Comments at 2, 9-11, BellSouth's Petition for Emergency Relief and Declaratory Ruling, DA 91-757 (Aug. 6, 1991) [hereinafter BellSouth Emergency Pet.], att. to ex parte letter from Gary J. Dennis, Bell South, to Donna Searcy, Secretary, FCC (Oct. 8, 1991) (acknowledging widespread use of intrastate ONA services by VMS providers) (J.A. 3096-99).

^{81/} MCI discussed this gap in the FCC's proposed system of nonstructural "safeguards" in its Comments at 42-45 (J.A. 1704-07).

^{82/} BOC ONA Order, 4 FCC Rcd at 148 (J.A. 432A).

^{83/} See BOC ONA Amendment Order, 5 FCC Rcd at 3112-13 (J.A. 551-52); BOC Further Amendment Order, 6 FCC Rcd at 7664 (J.A. 573).

needed by VMS competitors of its MemoryCall service in Georgia, that service was not actually usable by most VMS providers in most BellSouth local exchange central offices in Georgia because it was not compatible with the central office equipment. BellSouth's MemoryCall service, however, was designed around that technical incompatibility so that it could use that ONA service in every central office, giving it a tremendous advantage.^{4/}

There is, accordingly, nothing in the record to indicate that VMS providers generally will soon have access to the features they need under the BOCs' state ONA tariffs, and thus nothing to indicate any significant change from the discriminatory access found in the Ga. MemoryCall Order. Without such access, there is no support for the FCC's decision to eliminate structural separation.

B. The FCC Ignored or Trivialized Substantial Evidence That Its Cost Accounting Safeguards Would Be Inadequate to Prevent or Even Detect Cross-Subsidization by the BOCs

Prior to Computer III, the FCC consistently had rejected accounting separation as a viable regulatory mechanism to protect

^{4/} Cox Enterprises Comments at 17-22, BellSouth Emergency Pet. (July 23, 1991), attached to ex parte letter from J.G. Harrington to Peggy Reitzel, FCC (July 23, 1991) (J.A. 2993-98); Ga. MemoryCall Order at 27-30 (J.A. 2940-43). Moreover, BellSouth defended its failure to upgrade its switches to allow such compatibility for other VMS providers as being perfectly consistent with the FCC's ONA unbundling criteria. BellSouth Reply Comments at 22-27, BellSouth Emergency Pet. (J.A. 3102-07). Similarly, the Telephone Connection of Los Angeles pointed out, just one month before the release of the Order below, that a tariffed Pacific Bell ONA service required for the provision of competitive services by VMS providers was not available in many Pacific Bell central offices, rendering it useless for VMS providers. O'Krent letter at 3-4 (J.A. 3119-20).

interstate ONA services at this time."^{21/} If ESPs cannot use ONA services for whatever reason, ONA obviously will not be a safeguard against discrimination. The Order below failed to consider this shortcoming.

3. The Order Below Failed to Address Adequately the Voluminous Evidence on the Issue of Discrimination

MCI/NAA's initial brief demonstrated that the Order failed adequately to consider sworn testimony that the BOCs were not planning to implement meaningful ONA as well as voluminous evidence of widespread, chronic access discrimination against ESPs, focusing especially on the Ga. MemoryCall Order. In its brief, the FCC brushes aside this evidence as "anecdotal" and suggests that it was too insignificant to be considered. FCC Br. at 61-62.

The FCC has thus once again failed to consider significant evidence consisting of sworn deposition testimony containing admissions by BellSouth employees that they considered ONA to be little more than "overdone" "media hype"^{22/} that would not result in new network services or reduce access discrimination. MCI/NAA Br. at 32-33. Given the Ga. MemoryCall Order's findings, two

^{21/} MCI/NAA Br. at 31 n.60 (quoting Creation of Access Charge Subelements for Open Network Architecture, 8 FCC Rcd 3114, 3116 (1993)).

^{22/} Deposition of Randall Corn at 47, In re: An Investigation into the Statewide Offering of Access to the Local Network for the Purpose of Providing Information Services, Docket No. 880423-TP (Fla. PSC Jan. 23, 1989) (J.A. 2549). Those deposition extracts were submitted under cover of an ex parte letter from Frank W. Krogh, MCI, to Donna R. Searcy, Secretary, FCC (Mar. 15, 1991) (J.A. 1992-94). Those deposition pages are cited in MCI's Petition for Reconsideration of the BOC ONA Order (filed Feb. 24, 1989) (J.A. 443-72) and are arranged by deponent, in alphabetical order, in the Joint Appendix (J.A. 2542-2675).

years later, of access discrimination by BellSouth, the unheeded warning as to the ineffectiveness of ONA provided by this testimony was obviously quite significant. The FCC's continued, unexplained silence concerning this crucial, prophetic evidence is baffling.

MCI and NAA also cited other evidence of widespread discrimination in the record (much of which was not in the record of the MFJ Proceeding).³⁰ The FCC argues that although the Order did not address the evidence presented as to discrimination, it somehow responded to "the commenters' main objections to its antidiscrimination safeguards." FCC Br. at 61. FCC counsel then attributes to the Commission the implicit finding that "the opponents' anecdotal allegations [were] unpersuasive with respect to the policy issue at hand, in light of the record as a whole and the Commission's own experience in this area." Id. at 62.

One basic problem with that statement, of course, is that the Order did not say that. Instead, it was silent on the discrimination evidence. Counsel's post hoc rationales for the agency's decision are irrelevant.³¹ Another problem is that the FCC cannot make hundreds of pages of record material concerning multiple examples of access discrimination magically disappear by

³⁰ MCI/NAA Br. at 34-38. See, e.g., ex parte letter from Marc S. O'Krent, President, The Telephone Connection of Los Angeles, Inc., to Donna R. Searcy, Secretary, FCC (Nov. 11, 1991) (J.A. 3117-21), discussed in MCI/NAA Br. at 34 n.69.

³¹ Burlington Truck Lines, Inc. v. United States, 371 U.S. 156, 168-69 (1962); SEC v. Chenery Corp., 332 U.S. 194, 196-97 (1947).

labelling it "anecdotal."^{32/} The FCC has not explained why evidence of widespread actual discrimination, including occurrences that it concedes would violate the ONA rules,^{33/} is irrelevant to the effectiveness of supposed antidiscrimination "safeguards."^{34/}

With respect to the one incident of access discrimination discussed in the Order below -- the Ga. MemoryCall Order -- the FCC argues that the abuses found in that proceeding do not impugn the effectiveness of ONA because ONA was not fully in effect at the time of the discriminatory conduct and such conduct would violate the ONA rules when the latter do become effective. The FCC notes that during the relevant period, BellSouth was operating under a service-specific Comparably Efficient Interconnection (CEI) plan.^{35/}

These excuses, however, fail to address a crucial problem discussed in MCI/NAA's brief -- namely that ONA, whenever it is

^{32/} See record material cited in MCI/NAA Br. at 32-38 & nn.62-63, 68-70, 84 and Joint Brief of Petitioner - Intervenor at 33 & n.110, 35 & n.115 (filed May 19, 1993) [hereinafter MCI/NAA Intervenor's Br.]. See also NCTA Reply Comments at 10-12 (J.A. 2843-45).

^{33/} See Order, 6 FCC Rcd at 7623 n.211 (J.A. 3185).

^{34/} The FCC's citation of American Mining Congress v. United States EPA, 965 F.2d 759 (9th Cir. 1992) in this connection (FCC Br. at 61) is mystifying, since, in that case, the comments to which the agency had not responded were not "significant" because they were irrelevant. American Mining Congress, 965 F.2d at 771. Here, the FCC still has not explained why evidence of rampant access discrimination is irrelevant to the issue of access discrimination.

^{35/} FCC Br. at 59-61. The FCC's brief (as well as footnote 211 of the Order below, 6 FCC Rcd at 7623 (J.A. 3185)) thus undercut the BOC Intervenor's contention that the conduct found in the Ga. MemoryCall Order would not have violated the FCC's ONA rules. BOC Intervenor's Br. at 29-32.

fully effective, will never be of much use to the type of local voice mail service (VMS) provider that was subjected to the discriminatory conduct found in the Ga. MemoryCall Order. This is because such VMS providers typically use intrastate services regulated by state commissions, over which the FCC has "limited" control, if any.^{36/} Thus, there is no reason to expect that, even once the FCC's ONA regime is fully effective, it will have any impact on the intrastate discriminatory access problems found in the Ga. MemoryCall Order and discussed elsewhere in the record. At the same time, as discussed above, interstate ONA services are too expensive. VMS providers and other ESPs are therefore left with no useful access safeguards to protect them against discrimination.^{37/} The FCC's brief is silent on this crucial point.^{38/}

^{36/} MCI/NAA Br. at 37-38 (citing BOC ONA Order, 4 FCC Rcd at 148).

^{37/} The FCC also mentions the absence of discrimination complaints at the FCC as further evidence supporting its reliance on ONA. FCC Br. at 62. It is not surprising that there would be no access discrimination complaints filed at the FCC by VMS providers or other small ESPs. As the Ga. MemoryCall Order demonstrates, the discrimination these ESPs experience typically occurs in intrastate access services tariffed at the state level, and, therefore, they are more likely to pursue remedies at the state level. See MCI Comments at 42 (J.A. 1704).

^{38/} The FCC has an especially heavy burden to explain how its ONA and other antidiscrimination rules could possibly protect local VMS providers using intrastate access services in light of the FCC's preemption of any state attempt to impose structural separation requirements for jurisdictionally "mixed" BOC enhanced services. See Order, 6 FCC Rcd at 7630-36 (J.A. 3192-98). It would be irrational for the FCC to impose a regulatory scheme on the states that provides no protection against discrimination at the intrastate level while depriving the states of a major antidiscrimination tool favored by most of the state commissions submitting comments below. See MCI/NAA Intervenors' Br. at 36-37. As in NARUC v. FCC, 533 F.2d 601, 616 (D.C. Cir. 1976)

(continued...)

4. The Order is Doomed by its Internal Inconsistencies

In its haste to avoid any blame for the conduct found in the Ga. MemoryCall Order, the FCC created several fatal inconsistencies within the Order below. The FCC's excuse that ONA and the other nondiscrimination regulations were not yet fully in effect at the time of the conduct found in the Ga. MemoryCall Order undermines its assertion that "[o]ur experience with ONA since... [California I] serves to reaffirm this conclusion [that ONA is effective]."^{39/} If ONA was not fully effective, there could not have been any "experience with ONA" that could "serve[] to reaffirm" any such conclusion.^{40/} Thus, "[t]he FCC's argument contains two obviously contradictory positions.... It does not matter which is the true position of the FCC; either way... [there is no] reasoned basis for the rule."^{41/}

^{39/}(...continued)

(voiding preemption of state regulation while expressing concern that preemption, combined with lack of federal regulation, disadvantages some participants in market vis-a-vis others), "the Commission not only intends to preempt state regulation... but intends to issue no regulations of its own to govern these [intrastate] activities." The only control exercised by the FCC over intrastate ONA tariffs is the loose criterion that BOC state ONA tariffs "do not undermine fundamental ONA objectives." BOC ONA Order, 4 FCC Rcd at 148 (J.A. 432A).

^{39/} 6 FCC Rcd at 7599 (J.A. 3161); FCC Br. at 62.

^{40/} Nothing material happened in the development of ONA between the release date of the Ga. MemoryCall Order -- June 4, 1991 -- and the Order below -- December 20, 1991. If ONA was not fully effective before the release of the Ga. MemoryCall Order, it was not fully effective prior to release of the Order below.

^{41/} ALLTEL Corp. v. FCC, 838 F.2d 551, 559 (D.C. Cir. 1988). The FCC's comment about its "experience with ONA" is also rebutted by FCC Commissioner Duggan's Separate Statement

(continued...)

Again, in paragraph 63 of the Order (J.A. 3162), the FCC concludes that "the BOCs are generally meeting the basic service needs of the enhanced services industry," referring to the BOCs' ONA tariffs and plans to deploy additional ONA services. Whatever the FCC means by the phrase "the BOCs are generally meeting the basic service needs of the enhanced services industry," it apparently does not include the provision of sufficiently unbundled network features to prevent the BOCs from discriminating against ESPs, as shown by the Ga. MemoryCall Order. Moreover, if, as the FCC stated in its discussion of the Ga. MemoryCall Order, ONA was not fully effective, it is not clear how the BOCs were already "meeting the basic service needs of" ESPs as of the date of the Order below.

In its brief, the FCC backs away from its previous reliance on ONA, now arguing that "ONA is simply a part... of a larger package of antidiscrimination safeguards." FCC Br. at 56. The FCC brief argues that "regardless of the pace of ONA development, CEI equal access requirements... have continued in the interim to provide an adequate check on discrimination," id. at 59, and lauds CEI as the "primary safeguard" and the "core protection against access discrimination." Id. at 63. The FCC concludes that it was therefore reasonable for the Order to rely on the whole package -- an allegedly stronger set of safeguards than was

⁴¹(...continued)
concerning the Order, in which he points out that "we do not yet have experience with federally tariffed ONA services." 6 FCC Rcd at 7645 (J.A. 3207).

approved in California I -- as an "effective alternative to structural separation."^{42/}

The hole in that argument is that CEI and all of the other nondiscrimination safeguards were fully in effect during the period of the discriminatory conduct identified in the Ga. MemoryCall Order and elsewhere in the record, and thus are demonstrably ineffective. Indeed, BellSouth provided its MemoryCall service under a CEI plan^{43/} that the FCC had found to comply with all of the CEI parameters, including equal access and price parity for ESPs and BellSouth's own VMS.^{44/} The BellSouth CEI plan also complied with all of the FCC's other antidiscrimination requirements, including customer proprietary network information (CPNI), nondiscrimination reporting and network information disclosure.^{45/} Moreover, in approving the BellSouth CEI plan, the FCC's Common Carrier Bureau explicitly "prohibit[ed] BellSouth from using CPNI to identify particular customers of existing VMS competitors for 'targeted' marketing efforts."^{46/} Two and one-half years later, the Ga. MemoryCall Order found that BellSouth was doing exactly that. Curiously, in attempting to address this problem again by its "unhooking"

^{42/} FCC Br. at 63 (quoting Order, 6 FCC Rcd at 7576).

^{43/} Order, 6 FCC Rcd at 7623 n.211 (J.A. 3185).

^{44/} BellSouth Plan for Comparably Efficient Interconnection for Voice Messaging Services, 3 FCC Rcd 7284, 7285-90 (CCB 1988) (Addendum, Tab 4).

^{45/} Id. at 7291-94.

^{46/} Id. at 7293.

prohibition in the Order below,^{47/} the FCC treats it as if it were a new issue that was only first brought to the FCC's attention by the Ga. MemoryCall Order.^{48/} Thus, the Ga. MemoryCall Order and other discriminatory conduct reflected in the record show that although "ONA is simply a part... of a larger package," the other elements in the package are clearly worthless.

Although the Ga. MemoryCall Order provides compelling reason to question the effectiveness of the FCC's purported nondiscrimination "safeguards," the Order fails to address, much less explain, how those "safeguards" can prevent such discrimination in the future. The FCC cannot "simply ignore comments that challenge its assumptions;" it "must come forward with some explanation that its view is based on some reasonable analysis." ALLTEL, 838 F.2d at 558. The FCC's failure to do so is arbitrary and capricious.

5. The Recent Court of Appeals Decision in the MFJ Proceeding Does Not Support the Order

As noted above, the FCC's post hoc reliance on the recent opinion by the Court of Appeals for the D.C. Circuit in the MFJ Proceeding is irrelevant in this case. That decision addressed whether an antitrust consent decree should be modified to allow the BOCs to offer information services, not the regulatory regime under which they could offer such services pursuant to the Communications Act.

^{47/} Order, 6 FCC Rcd at 7613-14, 7623 n.211 (J.A. 3175-76, 3185).

^{48/} Id. at 7613-14 & n.168 (J.A. 3175-76).