

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

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NYNEX REPLY COMMENTS

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SUMMARY

NYNEX responds here to parties' contentions on the two central issues raised in this proceeding: first, as remanded by the Ninth Circuit, whether the Commission's nonstructural safeguards, including the current level of network unbundling, provide sufficient protection against access discrimination to justify full structural relief, *i.e.*, lifting the service-specific CEI plan filing requirements; and second, as a "fresh look" initiated by the Commission, whether some form of structural separation should be reimposed for the provision of enhanced services by the BOCs.

In Point II below, with respect to the remand issue, we demonstrate that the commentors opposing full structural relief for BOC provision of enhanced services are long on rhetoric and short on facts. They fail to show that the Commission's ONA framework, including comprehensive nonstructural safeguards and network unbundling, does not effectively preclude access discrimination. Those parties' purported examples and predictions of access discrimination are unsubstantiated. It bears emphasis that no party identifies any specific unbundled network service which is needed to provide enhanced services and meets the Commission's ONA criteria, but which the BOCs have failed to provide.

Furthermore, no commentor effectively disputes that the enhanced services market has flourished under the ONA/nonstructural safeguards regime; exchange services competition and bypass have increased significantly; and fundamental unbundling has substantially been achieved. These factors and resulting consumer benefits provide compelling reasons for full structural relief.

(ii)

In Point III below, regarding a “fresh look” at the structural separation issue, NYNEX shows there is no basis for the Commission to take a giant step backwards by reimposing structural separation. Many of the parties supporting a reimposition of structural separation are competitors of the BOCs and apparently seek to hamstring the BOCs’ enhanced service offerings to promote their own private interests. But the Commission has made it clear that it will adopt regulatory policies to promote competition and not protect individual competitors from such competition. These commentators have failed to demonstrate any additional public interest benefits from structural separation to offset the substantial negative impact on the development of a competitive enhanced services market which would be caused by the additional burdens and costs of structural separation.

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NYNEX REPLY COMMENTS

The NYNEX Telephone Companies ("NYNEX")¹ submit these Reply Comments to parties' comments filed April 7, 1995, in response to the Commission's Notice of Proposed Rule Making ("NPRM") in the above-captioned matter.

I. INTRODUCTION AND OVERVIEW

NYNEX responds here to parties' contentions on the two central issues raised in this proceeding: first, as remanded by the Ninth Circuit,² whether the Commission's nonstructural safeguards, including the current level of network unbundling, provide sufficient protection against access discrimination to justify full structural relief, *i.e.*, lifting the service-specific CEI plan filing requirements; and second, as a "fresh look" initiated by the Commission, whether some form of structural separation should be reimposed for the provision of enhanced services by the BOCs.

In Point II below, with respect to the remand issue, we demonstrate that the commentators opposing full structural relief for BOC provision of enhanced services are

¹ The NYNEX Telephone Companies are New York Telephone Company and New England Telephone and Telegraph Company.

² California v. FCC, 39 F.3d 919 (1994) ("California III").

long on rhetoric and short on facts. They fail to show that the Commission's ONA framework, including comprehensive nonstructural safeguards and network unbundling, does not effectively preclude access discrimination. Those parties' purported examples and predictions of access discrimination are unsubstantiated. It bears emphasis that no party identifies any specific unbundled network service which is needed to provide enhanced services and meets the Commission's ONA criteria, but which the BOCs have failed to provide.

Furthermore, no commentor effectively disputes that the enhanced services market has flourished under the ONA/nonstructural safeguards regime; exchange services competition and bypass have increased significantly; and fundamental unbundling has substantially been achieved. These factors and resulting consumer benefits provide compelling reasons for full structural relief.

In Point III below, regarding a "fresh look" at the structural separation issue, NYNEX shows there is no basis for the Commission to retreat from its procompetitive policies by reimposing structural separation. Many of the parties supporting a reimposition of structural separation are competitors of the BOCs and apparently seek to hamstring the BOCs' enhanced service offerings to promote their own private interests. But the Commission has made it clear that it will adopt regulatory policies to promote competition and not protect individual competitors from such competition. These commentors have failed to demonstrate any additional public interest benefits from structural separation to offset the substantial negative impact on the development of a competitive enhanced services market which would be caused by the additional burdens and costs of structural separation.

II. PARTIES OPPOSING FULL STRUCTURAL RELIEF DO NOT EFFECTIVELY DISPUTE THAT THE COMMISSION'S ONA/NONSTRUCTURAL SAFEGUARDS FRAMEWORK PREVENTS ACCESS DISCRIMINATION

A. Regulatory Safeguards And Allegations Regarding Access Discrimination

The BOCs have been providing integrated enhanced services for nine years.

Those who oppose full structural relief are unable to provide any actual evidence showing that the BOCs have engaged in access discrimination during that period. Instead, these parties speculate as to how the BOCs might engage in access discrimination should they desire to do so.³ But raw speculation does not justify withholding full structural relief.

The record shows that the existing regulatory framework has produced a vibrant enhanced services marketplace, the provision by the BOCs of an array of enhanced services to the mass market, and no indication that competitors and, more importantly, consumers, have been harmed as a result of BOC participation in the market on an integrated basis.⁴

1. Effectiveness Of CEI/ONA In General

ITAA criticizes the efficacy of the Commission's various nonstructural safeguards.⁵ In particular, ITAA states that the Commission's CEI and ONA requirements do not prevent access discrimination or ensure that ESPs receive the

³ See, e.g., Ad Hoc, ATSI, Compuserve, ITAA, MCI.

⁴ We refute herein allegations of NYNEX access discrimination. We believe the alleged instances of access discrimination by other BOCs are also baseless, and leave that demonstration to the respective BOCs. For example, a number of parties attempt to make much of the Georgia MemoryCall decision (Docket No. 4000-U, Ga. PSC, June 4, 1991). See ATSI, Compuserve, MCI, Prodigy. However, as explained by BellSouth, that decision merely reflected regulatory policy differences between the Georgia PSC and the FCC. Moreover, BellSouth obtained preemptive relief from the FCC (FCC 92-18, Feb. 14, 1992), which was upheld by the Eleventh Circuit. Georgia PSC v. FCC, No. 92-8257, 1993 U.S. App. LEXIS 24458 (Sept. 22, 1993) (*per curiam*).

⁵ ITAA 20.

network services they need to provide enhanced services.⁶ ITAA asserts that under CEI the ESPs are only entitled to choose the network “building blocks” that BOCs use for their own enhanced services.⁷ Similarly, Hatfield⁸ criticizes BOC efforts to meet ESP requests pursuant to the CEI/ONA regime. These parties’ assertions are simply without merit.

The ONA process subsumes and strengthens CEI requirements to ensure that: BOCs accommodate ESP service requests meeting the Commission’s ONA criteria whether or not the BOCs will use such services in their own enhanced service operations; and that the deployment of those requested services is not limited to where they may be utilized by the BOC itself. Furthermore, neither ITAA nor any other party identifies a single ESP service request which meets the ONA criteria but has been denied by BOCs.⁹ NYNEX has made a strong and effective effort to satisfy ESP needs and has satisfied all ESP requests that met the FCC ONA criteria. Indeed, we have promptly responded to these requests even though we have no need for the services in our own provision of enhanced services: NYNEX utilizes only 20 of the 87 services associated with the 72 requests it has satisfied.

Contrary to the baseless rhetoric, ESPs have access to the same services available to BOC enhanced service operations,¹⁰ and have the added ability to secure services not

⁶ ITAA 20-22; see also Ad Hoc 17, NAA 11.

⁷ ITAA 21.

⁸ Hatfield Associates, Inc., Report submitted in support of the comments of Compuserve, ITAA and MCI.

⁹ See NPRM at ¶ 39.

¹⁰ Indeed, the BOCs’ enhanced service operations obtain network services under the same tariff rates and terms as unaffiliated ESPs.

used by BOCs. Access discrimination under the ONA/CEI framework has simply not been shown.

2. **Opposing Parties' Claimed Examples And Predictions Of Access Discrimination**

As noted in the NPRM (§ 29), no formal complaints have been filed at the Commission by ESPs alleging BOC access discrimination. Nevertheless, Compuserve states there were 19 informal complaints filed with the Commission, classified either as Computer III or ONA-related, since 1991.¹¹ However, Compuserve indicates it was able to track down only 6 of those informal complaints,¹² and Compuserve does not provide any details on them. Compuserve does not show that any of the 19 referenced informal complaints document access discrimination against ESPs or any harm to consumers or competitors. Other parties similarly fail to offer such documentation, and merely offer limp excuses why access discrimination complaints may not have been filed.¹³

Compuserve points to two complaints filed with the NY PSC alleging particular NYNEX service difficulties with respect to installation or repair of a T-1 link, measured business line and private line. Compuserve wrongly states that these complaints demonstrate how a BOC operating on an integrated basis could discriminate against ESPs.¹⁴ But, there was no discrimination by NYNEX or any evidence that any service problem hampered the provision of an enhanced service in competition with NYNEX.

¹¹ Compuserve 38.

¹² *Id.*

¹³ See, e.g., ITAA, Prodigy.

¹⁴ Compuserve 40-41.

Indeed, Compuserve readily concedes that the difficulties it alleges “may not have resulted from any anticompetitive motive by NYNEX.”¹⁵

Furthermore, ITAA alleges that BOCs conspire to target and degrade the network services received by competing ESPs.¹⁶ ITAA also asserts that the BOCs have impeded competition by denying timely access to basic service.¹⁷ ITAA is wrong and provides no evidence to support its conjectures.¹⁸

The opportunities for discriminatory interconnection in the enhanced services market are minimal. Of those enhanced services that use the telephone exchange, most flow through the network indistinguishably from an ordinary telephone call. The network is too large, well-established and stable to be altered or manipulated to undermine competing enhanced services that are mingled imperceptibly in the flow of telecommunications. Furthermore, the D.C. Circuit noted “considerable evidence” that “competing information service providers [can] bypass the BOCs’ local-exchange network,” and are therefore impervious to discrimination in interconnection.¹⁹ This trend has accelerated.²⁰

¹⁵ *Id.* at 41. In the real world of NYNEX’s highly competitive telecommunications market, the negative impact of poor service results would far outweigh any hypothetical benefit to a NYNEX ESP.

¹⁶ *Id.* at 5-10. ITAA alleges an access discrimination episode involving The Boston Phoenix, a New England newspaper. ITAA 49-50, citing Boston Phoenix, Inc. v. NYNEX Corp., No. 95-0059 (Mass. Dist. Ct. Feb. 3, 1995); this case is currently in Massachusetts state court. ITAA’s allegation is without basis. ITAA cites a preliminary injunction against NYNEX, but ignores the fact that the court nowhere discusses any allegation that NYNEX was trying to disadvantage a potential competitor in any market.

¹⁷ ITAA 22.

¹⁸ The D.C. Circuit has observed that speculation unsupported by evidence that the BOCs might injure competition by illegal collusion would not be a basis for retaining a line-of-business restriction. U.S. v. Western Electric Co., 900 F.2d 283, 296, cert. denied, 498 U.S. 911 (1990).

¹⁹ U.S. v. Western Electric Co., *supra*, 900 F.2d at 308.

²⁰ See NYNEX 16-18, 29-30.

The courts have noted the inability of BOCs to engage in access discrimination and not be detected. As the D.C. Circuit concluded in the Information Services Appeal, there is “persuasive evidence that, despite their local monopoly power, the BOCs will be unable to discriminate against competing information service providers.”²¹ Given the Commission’s detailed ONA reporting requirements and the sophistication of ESPs, attempts to discriminate by BOCs would not go undetected. As the D.C. Circuit observed:

information services giants operating throughout the country, such as IBM, AT&T and GE, will notice any discrepancies in treatment by the various BOCs and will have the capacity and incentive to bring anticompetitive conduct to the attention of regulatory agencies.²²

MCI alleges NYNEX New York committed an anticompetitive abuse by failing to assign central office codes to Teleport and MFS for use in offering competitive local exchange service.²³ MCI is in error. Contrary to MCI’s suggestion, upon receipt of Teleport’s and MFS’s central office code requests, NYNEX New York was fully responsive and acted in accordance with ICCF guidelines for code assignment. One of those guidelines provides that “the applicant must be licensed or certified to operate in the area, if required, and must demonstrate that all applicable regulatory authority required to provide the service for which the central office code is required has been obtained.” In

²¹ U.S. v. Western Electric Co., 993 F.2d 1572, 1579-80 (D.C. Cir.), cert. denied, 114 S. Ct. 487 (1993).

²² U.S. v. Western Electric Co., *supra*, 993 F.2d at 1580. To similar effect, the D.C. Circuit characterized as “far-fetched” any concern that if the RBOCs were permitted to provide telecommunications products, the RBOCs would coerce customers by providing inferior local exchange access to interexchange carriers which refuse to purchase their equipment from an RBOC. U.S. v. Western Electric Co., 907 F.2d 1205, 1210 (1990).

²³ MCI 33.

response to NYNEX New York's request, the NY PSC issued clarification in this area²⁴ and NYNEX New York thereafter issued confirmations granting the Teleport and MFS code requests.²⁵

Finally, Compuserve cites a previous filing by ACC Corporation with the U.S. Department of Justice as evidencing BOC access discrimination.²⁶ Compuserve is wrong, and the matter did not involve network services furnished to ESPs. In the referenced filing, ACC Corporation claimed NYNEX unduly delayed establishing an interface for the provision of directory assistance and printed directory services that NYNEX New York had offered to provide to ACC's customers. To the contrary, NYNEX timely and repeatedly furnished contact and format information for listings to ACC. NYNEX provided such information to all competitive local exchange carriers ("CLECs") that expressed an interest in NYNEX providing directory services on their behalf. NYNEX New York worked with all the CLECs to provide interconnection arrangements, including those related to directory listings and directory assistance, satisfactory to the parties.²⁷

²⁴ See Case 92-C-0665, NY PSC Order issued October 4, 1993.

²⁵ MCI also makes the unfounded allegation that the NY PSC had to intervene to instruct NYNEX New York to provide intraLATA access (presubscription) to MCI. MCI 33-34. Here again, MCI raises an issue unrelated to any access discrimination against ESPs. MCI is also wrong on the facts. MCI ignores the fact that the NY PSC initially required NYNEX New York to make intraLATA presubscription available to interexchange carriers at their expense. The NY PSC then withdrew that requirement and directed the parties to negotiate the details of implementation of intraLATA presubscription. See Case 28425, NY PSC Opinion 94-11. NYNEX New York thereafter collaborated with the PSC Staff and other parties to develop a plan under which NYNEX New York agreed to implement intraLATA presubscription at its own expense, beginning in August 1995, with completion by September 1996. That plan is very favorable to MCI.

²⁶ Compuserve 46.

²⁷ The California Cable Television Association ("CCTA") mistakenly claims there is documentation of NYNEX New England anticompetitive behavior with respect to pole attachments and the provision of conduit space. CCTA 12. CCTA merely reiterates claims made by New England Cable Television Association ("NECTA") in Comments filed previously with the Commission in CC Docket No. 87-266. NYNEX fully refuted those claims in its Reply Comments in that docket filed on January 17, 1995. Rather than repeating that pleading, we incorporate it by reference herein.

3. CPNI Rules

CCTA maintains that the Commission's CPNI rules improperly discriminate against ESPs not affiliated with telephone companies.²⁸ CCTA's contention is without merit. In the BOC Safeguards Order,²⁹ the Commission strengthened its CPNI nonstructural safeguard by requiring that, for customers with more than 20 lines, BOC personnel involved in marketing enhanced services must obtain written authorization from the customer before obtaining the customer's CPNI. The Ninth Circuit in California III upheld the CPNI rules over an attack by MCI:

In adopting the new CPNI rules, the FCC balanced the competing interests of competitive equity, customer privacy, and the need for efficiency in the development of mass market enhanced services. We conclude that the FCC's balancing of these interests was not arbitrary and capricious.³⁰

No basis has been provided for revisiting the CPNI rules in this proceeding.

4. Effectiveness Of The IILC

Several parties criticize the effectiveness of the IILC as an industry mechanism to address ONA items of interest to ESPs.³¹ In this regard, Geonet cites two IILC issues which Geonet sponsored: # 044 - Advanced Intelligent Network ("AIN") Access by Non-LEC Resource Element, and # 055 - Information regarding ISDN and

²⁸ CCTA 14-15; see also ATSI.

²⁹ 6 FCC Rcd. 7571, ¶ 84 (1991).

³⁰ 39 F.3d at 931.

³¹ See ATSI, Geonet, MCI, Prodigy.

possible inclusion of such information in the ONA Services User Guide. Geonet's criticisms are not well-founded.³²

NYNEX publicly discloses new technology plans and resulting services when plans are firm enough that specific technologies, interfaces, times and locations are known; and NYNEX fully complies with network information disclosure requirements. In this regard, unaffiliated ESPs are treated at least as well as other customers and NYNEX's affiliated ESPs.³³

In the context of IILC, it is not improper for a participating company to oppose the introduction of an issue if it believes the subject matter is not appropriate to the organization's charter and purpose. Such was the case with NYNEX and the two issues cited by Geonet. In each issue, contrary to the intended IILC process, Geonet concentrated on requesting particular technology information rather than sharing the underlying service needs driving Geonet's requests. As a result, NYNEX was not able to

³² MCI's attempt to discredit the effectiveness of the standards bodies also misses the mark. See MCI Exhibit B. The Commission on many occasions has relied on and recognized the valuable contributions these bodies have made. See, e.g., NPRM at ¶¶ 20-22. MCI purports to demonstrate RBOC control of standards bodies based on numbers reflecting RBOC participation. See, e.g., MCI Exhibit B at 9. MCI's approach is facile and wrong. MCI ignores the fact that nothing precludes non-RBOCs from participating or taking a leadership role in these groups. In its familiar litigious manner, MCI simply tries to discredit the efforts of the standards bodies in MCI's continued quest to secure regulatory mandates rather than industry agreement. Perhaps MCI's resources could better be focused on contributing technical expertise to constructive industry problem-solving.

³³ ITAA asserts there is evidence the BOCs have not complied with network disclosure obligations. As purported support, ITAA cites prior FCC Orders pertaining to NYNEX Enterprise Service. ITAA 33 & n. 67. ITAA is incorrect. The cited Remand Order rescinded a prior Staff waiver of the CPE unbundling rules. That waiver had permitted NYNEX to include multiplexing in the regulated service. The Commission held that if NYNEX continued to offer the service, then the multiplexing function would have to be unbundled and detariffed; in that event network information disclosure would be required. Importantly, NYNEX made this network information disclosure in anticipation of and in advance of the Remand Order, and thus at all times NYNEX was in compliance with this safeguard. Furthermore, as demonstrated by Bell Atlantic (p. 31), the Commission should modify its network disclosure rules to reduce the six-month lead time requirement, which is too long given advances in technology and market conditions.

fully meet Geonet's request for information nor to fully investigate alternative solutions.³⁴

For its part, ATSI claims to know of "one instance in which the proprietor of a voice message business repeatedly requested the IILC to establish an ONA service element for a new network capability that, when ultimately implemented by the BOC serving that voice messaging system's service area, was not deployed in the telephone company offices serving his system."³⁵ Notably, ATSI never identifies the carrier involved in the matter, the service element requested or the circumstances under which the service was allegedly not deployed. Thus, ATSI provides no evidence of access discrimination.³⁶

B. Network Unbundling

ITAA is wrong in asserting that the Commission has abandoned "fundamental unbundling."³⁷ As an evolutionary process in its various procompetitive proceedings, the Commission has effectively achieved "fundamental unbundling" of BOC network functionalities. Further, ESPs can completely bypass NYNEX's network because competitive alternatives to NYNEX's network services now exist. These factors have

³⁴ With respect to the issue # 044, NYNEX was unable to define its AIN plans for Geonet because those plans, especially regarding the interconnection of third parties' resource elements, are not yet sufficiently firm and specific for public disclosure. As for issue # 055, the ONA Services User Guide is for services, not technologies. Many other mechanisms for the dissemination of technology deployment information are available to meet Geonet's needs, e.g. NYNEX ONA Reports and Bellcore's special reports on ISDN availability. The Commission should not countenance the attempts of a few participants to use the standards bodies in self-serving ways outside the intended scope of those bodies.

³⁵ ATSI 6.

³⁶ ATSI does acknowledge IILC was able to successfully address technical feasibility and uniformity issues to the point that the service was implemented, thus illustrating that the IILC is effective.

³⁷ ITAA 23. See also Ad Hoc, MCI.

provided an additional check on any potential BOC access discrimination against competing ESPs.

ITAA claims five core network elements have not yet been unbundled, and that this is a failing of the ONA model.³⁸ ITAA fails to provide any factual information why these network elements are needed to provide enhanced services, and there is no basis to infer they would be needed. In any case, absent the request that involves physical collocation (which BOCs are not required to offer)³⁹ and ITAA's fifth listed request (direct access to remote line concentration equipment), the other requested network items are available from NYNEX. That fifth item, currently the subject of an MFS rulemaking petition before the FCC (RM 8614), is not an ESP request meeting ONA criteria. Furthermore, ITAA apparently misunderstands the ONA model as mandating particular tariff rates and structures, which it does not; the ONA model essentially entails a technical representation.

Hatfield maintains that the introduction of new technologies such as AIN and SS7 create more opportunities for BOCs to engage in access discrimination.⁴⁰ Hatfield is mistaken. Hatfield provides no evidence to substantiate its argument, but merely speculates as to a multitude of ways BOCs may discriminate, and asserts that the potential for discrimination would be minimized under structural separation. Hatfield ignores the fact that even if a BOC, despite the grave risks, wanted to discriminate in the provision of network services, it could still do so under a separate subsidiary arrangement as the BOC would still be aware of the identities of the affiliated and unaffiliated ESPs.

³⁸ ITAA 26-27.

³⁹ See NPRM at n. 71.

⁴⁰ Hatfield 22-29.

As its prime example of hypothetical discrimination based upon new technological platforms, Hatfield suggests that BOCs will withhold signaling information from competitive access providers ("CAPs") so those CAPs will not be able to provide the interoffice portion of switched access connections.⁴¹ Hatfield's suggestion is bogus.⁴² NYNEX and the other BOCs have tariffs in effect which allow competitors to provide the tandem functions in an access environment. Among other things, NYNEX's tariff enable customers to receive CIC and OZZ information so that those customers can complete calls to other "network nodes," the functionality Hatfield wrongly says BOCs have refused to supply.

Further, Hatfield contends that: the complicated signaling involved in SS7 and ISDN can be manipulated by BOCs to bring about access discrimination; and these technologies are too difficult for the Commission to understand and monitor to prevent discrimination.⁴³ Hatfield's contentions are unsupported and mistaken. The signaling for SS7 and ISDN is implemented based upon industry standards. Hatfield seriously underrates the Commission's wherewithal to understand and monitor the industry. In past reports filed with the Commission, in contradiction to its present filing, Hatfield outlined the benefits that new technologies such as SS7 and AIN could bestow on all market participants. Now, however, Hatfield has reversed position in a meritless effort to

⁴¹ Hatfield 23-24.

⁴² Clearly, Hatfield's conjecture does not directly relate to issues associated with ONA services for ESPs. Furthermore, Hatfield fails to acknowledge that ESPs will likely not adopt access as a vehicle to obtain ONA services because of those ESPs' desire to maintain special treatment afforded them by the ESP exemption. See Amendments of Part 69 Relating to ESPs, CC Docket No. 87-215, Order released April 27, 1988 at n. 53.

⁴³ Hatfield 26-28.

demonstrate the “ills” of these new technologies and their “potential” to provide the BOCs with new opportunities to discriminate.

C. Market Forces

No commenting party detracts from our showing that market forces, including the development of a dynamic enhanced services marketplace, also provide substantial protection against any BOC anticompetitive conduct. Several parties argue that exchange services competition does not protect against access discrimination, as the BOCs have not opened their networks to competition.⁴⁴ This argument is not true and not supported by the record. NYNEX has already opened its network to local access competitors as evidenced by the recent agreements cited in our initial Comments (pp. 17-18).⁴⁵ These competitors are well-established, sophisticated businesses that offer a wide range of services not encumbered by many of the regulatory constraints on the BOCs.⁴⁶ These businesses can offer one-stop shopping including long distance services that the MFJ bars the BOCs from providing. It is noteworthy that the Commission recently recognized the growing intensity of competition in granting NYNEX a waiver with respect to its Universal Service Preservation Plan.⁴⁷

In order to stay competitive and attract and keep mass market customers, NYNEX will be required to develop and deploy network services that attract ESPs to our network.

⁴⁴ See AT&T, ITAA, MCI.

⁴⁵ In addition, NYNEX recently signed historic interconnection agreements with MFS and Teleport which will foster further competition for local telecommunications services in Massachusetts.

⁴⁶ See Bell Atlantic 3-4 (proposing that FCC streamline BOC regulatory requirements).

⁴⁷ FCC 95-185, Memorandum Opinion And Order released May 4, 1995.

Otherwise these ESPs will offer their services over a competitor's network. It is in NYNEX's best interest to meet the needs of all our customers, including ESPs.

Finally, no party disputes the fact that the enhanced services market is vibrant and continues to flourish with robust competition.

III. NO PARTY JUSTIFIES A RETREAT TO STRUCTURAL SEPARATION

A. Benefits Of Integration

The parties advocating that structural separation be reimposed⁴⁸ have not effectively refuted the fact that the Commission's ONA framework of nonstructural safeguards has led to a flourishing enhanced services marketplace with substantial consumer benefits. Ad Hoc and Hatfield wrongly assert there is no causal link between the FCC's procompetitive policies and the vibrant enhanced services market; these parties simply do not substantiate their claim. Ad Hoc speculates that MFJ information services relief and "natural growth" of the market account for growth in BOC enhanced services.⁴⁹ But the MFJ relief is just one factor,⁵⁰ and the "natural growth" in consumer demand referred to by Ad Hoc has been substantially stimulated and satisfied by the BOCs' joint marketing directed at developing mass markets.

Ad Hoc also argues that with today's network architecture (SS7 and AIN), BOC enhanced services will be provisioned on a decentralized basis such that there is little benefit from integration.⁵¹ This argument is flawed. Even if Ad Hoc's visionary network

⁴⁸ E.g., Ad Hoc, ATSI, AT&T, CCTA, Compuserve, Hatfield, ITAA, NCTA.

⁴⁹ Ad Hoc 11.

⁵⁰ The MFJ interexchange restriction has significantly limited BOC participation in the enhanced services market.

⁵¹ Ad Hoc 8.

widely existed today, which it does not, Ad Hoc's decentralization assumption is unsubstantiated. Further, structural separation would still be confusing and inefficient to customers (e.g., from loss of joint marketing), and the benefits of integration would still be denied to the public.⁵²

A number of commentators maintain that any benefits from BOC integration are minimal and/or merely represent anticompetitive leveraging of the telephone business into the enhanced services market.⁵³ These parties are mistaken. Many of these parties compete with the BOCs in the enhanced services market and, increasingly, in the local exchange market. These parties stand to benefit by denying the BOCs the ability to compete on an integrated basis. Moreover, these parties overlook that the Commission's Computer III policies have fostered widely available enhanced services at affordable prices from a broad range of competitors. The BOCs are using integrated facilities, personnel, marketing, and support systems to bring enhanced services such as voice messaging to markets not served previously, i.e., to small business, residence and rural users. Indeed, the Ninth Circuit upheld the Commission's determination that the inability of BOCs to develop the voice mail market had been a substantial cost of structural separation.⁵⁴ Bringing enhanced services to the mass market is an expensive and difficult process, entailing a great deal of customer education and interaction.⁵⁵ If structural

⁵² Ad Hoc concedes there may be circumstances in which BOC integrated provision of enhanced services creates efficiencies. Ad Hoc 22.

⁵³ See, e.g., Ad Hoc, CCTA, Compuserve, ITAA, MCI, NCTA.

⁵⁴ California III, 33 F.3d at 925.

⁵⁵ The Commission must also consider the potential impact of cutting the mass market out of the information age. In contrast to the BOCs, the opponents of BOC structural relief, such as Compuserve, have generally not focused their enhanced service offerings on the mass market. For example, Compuserve in previous Comments submitted to the Commission has described its FRAME-Net service, an enhanced service, as a "private carrier" offering "tailored to individual customer

separation were reimposed, the BOCs to a significant degree would be unable to provide enhanced services at prices customers are willing to pay.

ITAA states that no major U.S. ESP is an integrated carrier, and on this basis questions the benefits of integration.⁵⁶ ITAA does not recognize integrated carriers such as AT&T and MCI⁵⁷ which participate in the enhanced services market. In any case, ITAA's statement just highlights the fact that the ESP marketplace is so robust that the BOCs are just one of many competitors lacking dominant market share. If the FCC's nonstructural safeguards were as ineffectual as some commentators contend, one might expect the BOCs to dominate that market.

B. Protection Against Cross-Subsidy

Several parties favoring a return to structural separation attack the Commission's nonstructural cost accounting safeguards as being ineffectual to preclude BOC cross-subsidy of enhanced services.⁵⁸ These parties' contentions are without merit; they present no new arguments not already properly disposed of by the Commission and courts. It bears emphasis that the Commission and courts have already concluded that the Commission's cost accounting safeguards, together with price cap regulation, are effective to deter and detect cross-subsidy.⁵⁹

needs" and not held out indifferently to the public. Matter Of Petition For Declaratory Ruling Relative To AT&T Frame Relay Service, Comments of Compuserve filed January 23, 1995, pp. 11-12.

⁵⁶ ITAA 59.

⁵⁷ See MCI Exhibit B at 4.

⁵⁸ E.g., Ad Hoc, Compuserve, ITAA, MCI.

⁵⁹ See NYNEX 10-12.

MCI asserts that these safeguards against cross-subsidy cannot be considered a settled issue, since California III faulted the Commission's cost-benefit balance.⁶⁰ MCI is incorrect. California III has remanded a narrow issue requiring the Commission to explain how an ONA regime without "fundamental unbundling" would provide adequate safeguards against access discrimination by the BOCs. California III has not remanded any cross-subsidy issue to the Commission. Indeed, the Ninth Circuit concluded:

On remand, the FCC has taken specific affirmative steps designed to deter and detect cross-subsidization by introducing price caps as well as further strengthening its cost accounting rules. We conclude that with the implementation of these measures, the FCC has responded to our concerns....⁶¹

MCI admits that its criticisms of the Commission's cost accounting safeguards reiterate MCI's comments in CC Docket No. 90-623.⁶² While MCI suggests the Commission ignored its prior comments, the BOC Safeguards Order fully addressed and rejected MCI's arguments. MCI provides no basis for reaching a different result here.

Thus, for example, MCI tries to make much of its belief that the Commission cannot provide regulatory protection against intrastate cross-subsidy.⁶³ But the Commission appropriately rejected this argument before.⁶⁴ MCI overlooks the fact that Part 64 is applied before jurisdictional separations, so that the total company, fully allocated costs of enhanced services are clearly identified, segregated from regulated

⁶⁰ MCI 24 n. 45.

⁶¹ California III, 39 F.3d at 926.

⁶² See MCI 30, 44-45.

⁶³ MCI 42.

⁶⁴ See BOC Safeguards Order at ¶ 48 & n. 86.

revenue requirements and made available for intrastate regulatory treatment. MCI also disregards the various states' use and reinforcement of FCC cost accounting safeguards to preclude cross-subsidy.

Hatfield reiterates its well-worn arguments that the Commission's cross-subsidy and accounting rules are obsolete and ineffective.⁶⁵ These arguments are the same as presented in a Hatfield Report included in CFA's and NCTA's Joint Petition for Rulemaking filed April 8, 1993 (RM-8221). Those arguments were rejected in the Commission's Video Dialtone Reconsideration Order,⁶⁶ and similarly in the BOC Safeguards Order⁶⁷ and court decisions referenced earlier.⁶⁸

Further, several parties contend that the Commission's cross-subsidy accounting controls are ineffective since they operate after-the-fact.⁶⁹ This contention is without merit. It is contrary to the Commission's previous findings that its rules adequately deter against cross-subsidy, and provide for effective enforcement where cross-subsidy might be attempted. Among other things, effective protection against cross-subsidy is secured by the Commission's advance approval process with respect to cost allocation manuals. If any aspect of the cost accounting safeguards could operate after the fact, one must

⁶⁵ Hatfield 41-47.

⁶⁶ Telephone Company-Cable Television Cross-Ownership Rules, CC Docket No. 87-266, 10 FCC Rcd. 244 (1994). See also NYNEX Comments filed May 21, 1993, opposing the CFA/NCTA Joint Petition.

⁶⁷ 6 FCC Rcd. 7571 (1991).

⁶⁸ CCTA states (at p. 15) that the California III decision was not in the context of video services, but that is beside the point. The Commission has made clear that its nonstructural safeguards were designed "to accommodate new enhanced service offerings in an increasingly competitive environment" and have never been intended to be product-specific nor limited to existing products. Video Dialtone Reconsideration Order at ¶ 180.

⁶⁹ Ad Hoc, Compuserve, ITAA, MCI.

consider the Commission's joint network plant cost allocation rules which entail retrospective penalty provisions structured to benefit telephone ratepayers.

A number of parties also question the FCC's wherewithal to enforce its cross-subsidy safeguards.⁷⁰ The Commission rejected this argument in the BOC Safeguards Order (§ 54), as well as in its recent Interim Waiver⁷¹ and Video Dialtone Reconsideration Order. The Commission now has nearly 8 years of experience enforcing its cost accounting safeguards, and no basis is offered by the commentors to doubt the Commission's continued capacity to effectively regulate in this area.

As purported illustrations of NYNEX cross-subsidy, the opposing commentors can only reference the old Materiel Enterprises Company ("MECO") audit⁷² and cite the Commission's pending orders to show cause relative to NECA audits.⁷³ These parties' arguments are unavailing. These matters do not involve any allegations of cross-subsidy of enhanced services. In the MECO audit, the Commission did not determine that NYNEX engaged in any violation of its rules, and the Commission previously found that the MECO episode supports the efficacy of its rules.⁷⁴ Similarly, the NECA show cause orders, while unjustified and unconcluded,⁷⁵ demonstrate the Commission's close scrutiny of the telephone companies' books of account.

⁷⁰ E.g., Comuserve, Hatfield, ITAA, MCI.

⁷¹ BOCs' Joint Petition For Waiver Of Computer II Rules, DA 95-36, Order released January 11, 1995.

⁷² ITAA 46-47.

⁷³ Ad Hoc 14-15, Comuserve 27-30.

⁷⁴ BOC Safeguards Order at § 54.

⁷⁵ See NYNEX response filed May 2, 1995.

Finally, several parties repeat the argument that the Commission's cost accounting rules are inadequate because they do not take account of certain benefits that may be conferred upon BOC enhanced services by virtue of the BOCs' integrated operations.⁷⁶ This argument is wrong. To the extent the BOCs' enhanced service operations receive a tangible or cost-based service or benefit from the regulated side (e.g., training services), those nonregulated operations must bear the tariff rate, prevailing market price or fully allocated cost.⁷⁷ Moreover, the FCC's cost accounting safeguards go beyond protecting against economic cross-subsidy. Those safeguards assure that BOC enhanced service operations bear not only their incremental costs but an additional non-economic cost allocation to specifically benefit telephone ratepayers.

C. Costs Of Structural Separation

MCI asserts that the FCC is in "deep denial" as to the holding of California III, and that the status quo for purposes of the Commission's cost-benefit analysis is complete structural separation under Computer II.⁷⁸ On this basis, MCI contends that the Commission must ignore any costs of transitioning to a structural separation regime.⁷⁹ This argument is devoid of merit. As MCI acknowledges,⁸⁰ its argument as to the scope of California III reiterates the position MCI has presented in its comments on ITAA's petition for reconsideration of the Interim Waiver. We refuted that petition in our joint

⁷⁶ See ATSI, Compuserve.

⁷⁷ See 47 C.F.R. Sections 32.27, 64.901; BOC Safeguards Order at n. 91. The Commission previously rejected arguments that its cost accounting rules must reflect "intangible benefits" to nonregulated activities. Separation Of Costs, 2 FCC Rcd. 1298, ¶ 41, Reconsideration Order, 2 FCC Rcd. 6283, n. 204 (1987).

⁷⁸ MCI 4-5.

⁷⁹ MCI 10. See also Hatfield, ITAA, NAA, Prodigy.

⁸⁰ See MCI 5.