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BEFORE THE

Federal Communications Commission

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF SECRETARY

WASHINGTON, D.C. 20554

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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REPLY COMMENTS OF COMPUSERVE INCORPORATED

Randolph J. May
Brian T. Ashby
SUTHERLAND, ASBILL & BRENNAN
1275 Pennsylvania Avenue, N.W.
Washington, D.C. 20004-2404
(202) 383-0100

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Its Attorneys

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SUMMARY

Along with approximately 25 other entities, CompuServe -- one of the nation's leading providers of online services -- filed comments in this proceeding on April 7, 1995. With the notable exception of the BOCs, almost all the commentators agree with CompuServe that the BOCs should be required to provide enhanced services through structurally separate subsidiaries. The BOCs, on the other hand, make the same arguments in their comments that they have been making since the inception of this proceeding. Altogether, the comments demonstrate that, when compared to the Commission's nonstructural safeguards regime, structural separation is a far more effective, less regulatorily-intrusive, and less resource-intensive way to prevent the BOCs from cross-subsidizing their enhanced service offerings with revenues from their local exchange operations and discriminating against their enhanced service competitors in the provision of access to the local exchange.

As an initial matter, many of the BOCs contend that the Commission should focus on the narrow issue they claim is presented by California III -- whether structural relief is warranted absent the fundamental unbundling originally promised under ONA -- and not consider the broader issue of whether its decision to allow BOC provision of enhanced services through nonstructural safeguards serves the public interest. The Commission should reject these arguments. The Ninth Circuit questioned the efficacy of the Commission's entire nonstructural safeguards regime, not just ONA, in California III. Thus, adoption of the narrow focus advocated by the BOCs would ignore the import of the Ninth Circuit's decision and would invite further litigation.

Another argument made by the BOCs in their comments is that the Commission's nonstructural safeguards have been effective at preventing cross-subsidization and access discrimination. However, even though the BOCs fail for the most part even to acknowledge evidence of anticompetitive abuses, the record established by the comments and at earlier stages of this proceeding documents examples of cross-subsidization and access discrimination. For instance, the comments discuss the BOC audits released by the Commission earlier this year that uncovered irregularities and apparent violations of agency accounting and reporting requirements. Apart from highlighting the cross-subsidization that can take place under nonstructural safeguards, the audits also show the extent to which the Commission is dependent on the BOCs to supply the information needed to determine compliance with the safeguards. Moreover, the comments also reveal a widespread pattern of BOC discrimination in the voice-mail market. As a result of the MFJ's interexchange restriction, the voice-mail market is the only enhanced services market in which the BOCs currently are

participating on a large scale. The evidence of abuses in the voice-mail market is relevant to predictions concerning likely BOC conduct when and if they begin providing other enhanced services.

The BOCs also argue in their comments that the Commission's nonstructural safeguards have brought benefits to the public, and that a return to structural separation would impose enormous costs on consumers. According to the BOCs, the benefits that have inured from the Commission's decision to abandon structural separation include a thriving enhanced services market, the introduction of new enhanced services, the wider availability of existing enhanced services, and lower prices for some enhanced services. These claimed benefits are largely illusory. For one thing, they are traceable in large part to exploitation by the BOCs of their local exchange dominance to promote their own enhanced services. Moreover, BOC attempts to link recent salutary developments in the enhanced services market to their integrated provision of enhanced services are misleading because BOC participation in the enhanced services market to date has been limited almost exclusively to the provision of voice-mail services. In short, there is no evidence to support the claims of the BOCs that their integrated provision of enhanced services has resulted in lower prices for those services, wider availability of particular services, or the introduction of new services.

BOC contentions regarding the costs to them of establishing separate subsidiaries lack merit. First, the costs to the BOCs of establishing separate subsidiaries should not be considered by the Commission. The BOCs took a calculated risk when they integrated their enhanced services while the lawfulness of the Commission's nonstructural safeguards was being appealed, and in the event structural safeguards again are required, any costs incurred by the BOCs as a result of their informed decision should be absorbed by them. Also, the costs of structural separation outlined by the BOCs are costs all other providers of enhanced services must bear.

The BOCs also make a number of sweeping claims about the effectiveness of ONA in their comments. For the most part, these claims do not reflect reality. As demonstrated in the report, ONA: A Promise Not Realized -- Reprise, the Commission has retreated significantly from the amount of unbundling it initially indicated would be required before granting full structural relief. In fact, the report shows that nothing close to fundamental unbundling of the local exchange network has been achieved. Thus, ONA clearly is not the self-enforcing barrier against BOC access discrimination that the Commission originally envisioned.

Finally, even though the Commission's nonstructural safeguards are inadequate to protect the BOCs' enhanced service competitors, Bell Atlantic proposes that the Commission modify its nonstructural safeguards in ways that would weaken them significantly. As discussed herein, Bell Atlantic's proposals, in addition to being unwise from the standpoint of public policy, are outside the scope of this proceeding and should be rejected summarily.

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REPLY COMMENTS OF COMPUERVE INCORPORATED

CompuServe Incorporated ("CompuServe"), by its undersigned attorneys, hereby submits these reply comments in response to the Notice of Proposed Rulemaking ("NPRM") released by the Federal Communications Commission ("Commission") on February 21, 1995 in the above-captioned proceeding.^{1/} As explained below, a careful, open-minded analysis of the initial comments shows that the Commission should require the Bell Operating Companies ("BOCs") to provide enhanced services through structurally separate subsidiaries.^{2/}

^{1/} FCC 95-48 (released February 21, 1995). The date for filing reply comments was extended to May 19, 1995. Computer III Further Remand Proceedings: Bell Operating Company Provision of Enhanced Services, DA 95-908 (released April 25, 1995).

^{2/} The conclusions reached in these reply comments are bolstered by a report -- entitled The Benefits of Structural Separation: Reply -- that is being submitted jointly to the Commission under separate cover by CompuServe, the Information Technology Association of America ("ITAA"), and MCI. The Benefits of Structural Separation: Reply, Hatfield Associates, Inc. (filed May 19, 1995). The contents of that report are incorporated by reference into these reply comments.

I. BACKGROUND

On April 7, 1995, approximately 25 entities submitted comments in response to the NPRM. In addition to CompuServe, these entities include other enhanced service providers ("ESPs"), the BOCs, interexchange carriers, state regulatory agencies, and telecommunications trade associations. The record established by these comments reveals that almost all of the commentors -- with the notable exception of those filed by the BOCs -- agree with CompuServe that the BOCs should be required to provide enhanced services through structurally separate subsidiaries. These comments generally indicate that ESPs are dependent on the BOCs' local exchange facilities for distribution of their services, and demonstrate that this dependence gives the BOCs an incentive and the ability to cross-subsidize their enhanced service operations with revenues from their monopoly local exchange services and to engage in access discrimination against their enhanced service competitors. In this regard, these comments are replete with examples of BOC anticompetitive conduct. Because structural separation is a far less costly, more effective, and less regulatorily-intrusive way than nonstructural safeguards to prevent the BOCs from engaging in cross-subsidization and access discrimination, these comments conclude that the costs of providing the BOCs with structural relief outweigh the benefits, if any, which have resulted from the Commission's decision to abandon structural separation.

The BOCs' comments, on the other hand, blithely assert that the Commission's nonstructural safeguards regime has proven effective at preventing anticompetitive abuses, and attempt to link recent growth in the enhanced services industry to their integrated provision of enhanced services. In so doing, however, they fail for the most part even to acknowledge the large body of evidence, including numerous audits released by the Commission in March, that shows that the BOCs have used their dominant position in the local exchange to disadvantage their enhanced service competitors. Bell Atlantic even goes so far as to argue that many of the Commission's existing nonstructural safeguards are unnecessary and/or overly burdensome and proposes modifications to those safeguards designed to weaken them significantly.^{3/}

The record established by the comments, as well as the record compiled at earlier stages of this proceeding, demonstrates that the benefits commonly attributed to integrated BOC provision of enhanced services are largely illusory and that the costs to the public and the BOCs' enhanced service competitors are substantial. Accordingly, for the reasons discussed herein and in its initial comments, CompuServe urges the Commission to require that the BOCs provide enhanced services through structurally separate subsidiaries.

^{3/} Bell Atlantic Comments at 25-36.

II. DISCUSSION

The Commission issued the NPRM in response to the most recent judicial remand of its decision to replace structural separation with nonstructural safeguards.^{4/} Based on its earlier finding that Open Network Architecture ("ONA") -- as ultimately approved by the Commission -- no longer requires that the BOCs fundamentally unbundle their local exchange networks, the United States Court of Appeals for the Ninth Circuit ("Ninth Circuit") found in California III that the cost/benefit analysis underlying the Commission's decision to abandon structural

^{4/} CompuServe Comments at 5-11. Based on its findings in the Computer II proceeding, the Commission required the BOCs to provide enhanced services through structurally separate subsidiaries. Amendment of Section 64.702 of the Commission's Rules and Regulations, 77 F.C.C.2d 384 (1980) ("Computer II Order"), recon., 84 F.C.C.2d 50 (1981), ("Computer II Reconsideration Order"), further recon., 88 F.C.C.2d 512 (1981), aff'd sub nom. Computer and Communications Indus. Ass'n. v. FCC, 693 F.2d 198 (D.C. Cir. 1982), cert. denied, 461 U.S. 938 (1983), aff'd on second further recon., 56 RR2d 301 (1984). However, the Commission changed course in the Computer III proceeding and allowed the BOCs to provide enhanced services pursuant to nonstructural safeguards. Amendment of Section 64.702 of the Commission's Rules and Regulations, 104 F.C.C.2d 958 (1986) ("Computer III Phase I Order"), recon., 2 FCC Rcd 3035 (1987) ("Computer III Phase I Reconsideration Order"), further recon., 3 FCC Rcd 1135 (1988), second further recon., 4 FCC Rcd 5927 (1989), Computer III Phase I Order and Computer III Phase I Reconsideration Order vacated sub nom. California v. FCC, 905 F.2d 1217 (9th Cir. 1990); 2 FCC Rcd 3072 (1987) ("Computer III Phase II Order"), recon., 3 FCC Rcd 1150 (1988), further recon., 4 FCC Rcd 5927 (1989), Computer III Phase II Order vacated sub nom. California v. FCC, 905 F.2d 1217 (9th Cir. 1990); Computer III Remand Proceedings: Bell Operating Company Safeguards and Tier 1 Local Exchange Company Safeguards, 6 FCC Rcd 7571 (1991), vacated in part and remanded sub nom., California v. FCC, 39 F.3d 919 (9th Cir. 1994) ("California III").

separation was flawed. The court, therefore, vacated and remanded that portion of the Commission's decision.^{5/}

According to the Commission, California III returns the BOCs to the nonstructural safeguards regime, known as Comparably Efficient Interconnection ("CEI"), in effect prior to ONA.^{6/} For this reason, the Commission requested comment in the NPRM on whether its nonstructural safeguards -- absent the fundamental unbundling ONA originally was supposed to offer -- provide the BOCs' enhanced service competitors and the public with sufficient protection to warrant replacing CEI with ONA.^{7/} Moreover, even though beyond the scope of the issues that the Commission claims it is required to address under California III, the agency also seeks comment on "broader questions about whether our decision to rely on nonstructural safeguards serves the public interest."^{8/}

A. The Commission Appropriately Requested Comment On The Broad Issue Of Whether Abandonment Of Structural Separation For BOC Provision Of Enhanced Services Has Served The Public Interest And Therefore Should Ignore The BOCs' Suggestions That A More Minimalist Approach To The California III Decision Be Adopted

In their comments, a number of the BOCs contend that the Commission should focus on the narrow issue arguably presented by California III -- whether structural relief is warranted absent

^{5/} California III, 39 F.3d at 929-30.

^{6/} NPRM at 9.

^{7/} Id. at 11.

^{8/} Id.

fundamental unbundling -- and not consider the broader issue of whether the abandonment of structural separation serves the public interest.^{9/} In urging the Commission to focus only on this narrow issue, the BOCs accept the Commission's assertion that California III returns the BOCs to a CEI regime.^{10/}

The Commission should reject the BOCs' arguments concerning the scope of this remand proceeding. The adoption of such a minimalist approach to California III simply would invite another remand from the Ninth Circuit. While it is true that the Ninth Circuit's findings in California III focused on the Commission's retreat from its original conception of ONA, it also is true that those findings call into question the efficacy of the Commission's entire nonstructural safeguards regime.^{11/} For this reason, if the Commission were to do as many of the BOCs argue -- not revisit its decision to abandon structural separation -- it would ignore the import of the Ninth Circuit's decision and, in effect, render judicial review meaningless.

Relatedly, BOC contentions that California III returns them to a CEI regime are not surprising because it tilts the cost/benefit analysis which the Commission is required to conduct under California III in their favor by presupposing that

^{9/} See, e.g., BellSouth Comments at 3.

^{10/} See, e.g., Southwestern Bell Comments at 5.

^{11/} California III, 39 F.3d at 930 (The Ninth Circuit found that, without the fundamental unbundling originally promised by ONA, the Commission's nonstructural safeguards, including CEI, "are not adequate to prevent access discrimination.").

integration in the form of CEI is the starting point for the cost/benefit analysis. However, the Ninth Circuit's findings regarding the ineffectiveness of CEI and other nondiscrimination safeguards -- without fully implemented ONA -- demonstrate that the Commission's interpretation of California III is wrong. As explained in CompuServe's comments, the Ninth Circuit's remand did not return the BOCs to a CEI regime, but rather, vacated and remanded the Commission's nonstructural safeguards regime, including both ONA and CEI, in toto.^{12/} For this reason, California III returns the BOCs to a structural separation regime, and the starting point for the required cost/benefit analysis should be that the BOCs may be afforded structural relief only if the benefits of doing so outweigh the costs. In other words, the issue presented by California III is not whether the BOCs should be required to provide enhanced services pursuant to ONA or CEI, but whether the BOCs should be accorded any relief from structural separation whatsoever.^{13/}

B. The Record Established At This And Earlier Stages Of The Computer III Proceeding Demonstrates That The Costs Of Requiring The BOCs To Provide Enhanced Services Through Structurally Separate Subsidiaries Are De Minimis And That The Costs Clearly Are Outweighed By The Benefits Of Structural Separation

CompuServe believes that the record established by the comments, as well as the record compiled at earlier stages of

^{12/} CompuServe Comments at 12-15; see also MCI Comments at 5; ITAA Comments at 15-18; Prodigy Comments at 2-3.

^{13/} Id. at 15.

this proceeding, demonstrates that, at least until effective competition develops in the local exchange,^{14/} the benefits of structural separation far outweigh the costs. For one thing, structural separation is superior to nonstructural safeguards because it would make cross-subsidization and access discrimination harder to effectuate and easier to detect and rectify.^{15/} Structural separation also has the advantage of being less regulatorily-intrusive and resource-intensive than nonstructural safeguards.^{16/}

Notwithstanding the foregoing, the BOCs argue that nonstructural safeguards have proven effective in protecting their enhanced service competitors,^{17/} and that a return to structural separation would prove costly and deprive the public of many benefits.^{18/} These arguments, though, cannot withstand analysis. Recent experience with nonstructural safeguards

^{14/} It is worth noting that a number of the BOCs argue they no longer have a local exchange monopoly and that, therefore, they no longer have an incentive or the ability to engage in cross-subsidization or access discrimination. See, e.g., NYNEX Comments at 29-31. As CompuServe explained in its comments, however, it is indisputable that the BOCs still have a near total monopoly in the local exchange market. CompuServe Comments at 16-19; see also AT&T Comments at 2; Association of Telemessaging Services International Comments at 2. Therefore, the arguments of the BOCs regarding the degree of competition present in the local exchange market cannot be taken seriously.

^{15/} CompuServe Comments at 20-22; see also ITAA Comments at 12-13.

^{16/} Id. at 21.

^{17/} See, e.g., Pacific and Nevada Bell Comments at 1-6.

^{18/} See, e.g., Southwestern Bell Comments at 30-41.

demonstrates that they are woefully inadequate to protect the BOCs' competitors and the public from being injured by anticompetitive conduct. Moreover, the costs that the BOCs claim would result from imposition of structural separation, much like the benefits that they claim have inured from their integrated provision of enhanced services, are largely illusory.

1. Even Though The Record Established In This Proceeding Is Replete With Examples Of BOC Discrimination And Cross-Subsidization, The BOCs Blithely Claim That There Is No Evidence That They Have Engaged In Anticompetitive Activity

The record established in the comments is replete with examples of BOC cross-subsidization and access discrimination. This evidence consists of decisions rendered by various courts and state regulatory agencies, audits of the BOCs' enhanced services and other unregulated operations, informal complaints filed against the BOCs by ESPs at both the federal and state level, reports prepared by telecommunications industry experts, and anecdotal data from a wide variety of sources. The following is a sampling of this evidence:

- The most commonly discussed example of BOC access discrimination is the Georgia Public Service Commission's ("GPSC's") decision regarding Southern Bell's provision of MemoryCall voice-mail service.^{19/} In the MemoryCall Order, the GPSC determined that BellSouth used its dominant

^{19/} ITAA Comments at 48-49, citing, Investigation Into Southern Bell Telephone and Telegraph Company's Provision of MemoryCall(sm) Service, Docket No. 4000-U (released May 21, 1991) ("MemoryCall Order").

position in the local exchange to disadvantage competitors in the voice-mail market.^{20/}

- The Association of Telemessaging International's ("ATSI's") comments reference numerous instances in which existing customers of voice-mail providers have been solicited by their local BOC when requesting a voice-mail related service from the BOC.^{21/} Moreover, in a recent ex parte submission, ATSI presented evidence that the BOCs frequently fail to provide facilities and services needed by their voice-mail competitors, and maintain and repair those facilities and services on a timely basis, and that this often has a deleterious impact on the relationship between the BOCs' competitors and their customers.^{22/}
- CompuServe's comments describe two complaints recently filed by it with the New York Department of Public Service involving various access service problems encountered in its dealings with NYNEX.^{23/} The complaints, among other things, describe situations in which CompuServe's telephone lines have been disconnected by NYNEX without authorization and where the installation of access facilities has been delayed for over a month without explanation.^{24/}
- In an order initiating a rulemaking to address local exchange access issues, the California Public Utilities Commission ("CPUC") found that BOC provision of enhanced services subject only to nonstructural safeguards may have stifled growth in the enhanced services industry and,

^{20/} MemoryCall Order, Docket No. 4000-U at 2. The GPSC also indicated that it suspected the MemoryCall service had been "cross-subsidized or predatorily priced." Docket No. 4000-U at 41.

^{21/} ATSI Comments at 8-9. As the Commission is aware, this practice is known as "unhooking" and supposedly is prohibited. See CompuServe Comments at 40, n. 89.

^{22/} See Letter from Robert Butler to William Caton Concerning the Computer III Remand Proceeding (filed December 13, 1994).

^{23/} CompuServe Comments at 40-41.

^{24/} Letter from Vicki Rutkowski to Peter Sperano Concerning NYNEX Service Problems (filed March 8, 1995); Letter from Vicki Rutkowski to Peter Sperano Concerning NYNEX Service Problems (filed February 2, 1995).

thereby, harmed the public.^{25/} The CPUC noted that "[t]he participation of dominant carriers in potentially competitive markets can have a chilling effect on the emergence of competition if the competitive safeguards are perceived by competitors (regardless of what regulators themselves think) to be ineffective."^{26/}

- In its comments, CompuServe described a number of informal complaints filed with the Maryland Public Service Commission ("MPSC") within the past two years that contain allegations of an anticompetitive nature against Bell Atlantic.^{27/} This unscientific sampling of complaints demonstrates the myriad ways in which a BOC, if it were so inclined, could use its dominant position in the local exchange to injure its competitors. Moreover, it shows that, if similar reviews were to be conducted at other state regulatory agencies, additional evidence of alleged BOC misconduct likely would be discovered.^{28/}
- Despite Ameritech's hype for its Customer First Plan and its purported willingness to face competition, MCI's comments indicate that it filed a complaint against Ameritech with the Illinois Commerce Commission on November 22, 1994 after unsuccessfully trying to obtain interconnections that would have enabled it to provide competitive local exchange services in Illinois.^{29/} Ironically, MCI explains that, in response to MCI's efforts to provide competitive local exchange services in Illinois, Ameritech has taken the

^{25/} MCI Comments at 18-19, citing, Investigation on the Commission's Own Motion Into Open Access and Network Architecture Development of Dominant Carrier Networks, I. 93-04-002 (released April 13, 1993) ("CPUC Order").

^{26/} CPUC Order, I. 93-04-002 at 15.

^{27/} CompuServe Comments at 41-46.

^{28/} CompuServe does not have the resources necessary to conduct an exhaustive review of the complaints filed in all 50 states. Indeed, even if the necessary resources were available, a comprehensive, meaningful review of state complaints would be extremely difficult to conduct. The reason for this is that many states, including New York, Pennsylvania, and Virginia, prohibit public access to informal complaints or limit access to those complaints unless the complainant has given prior consent to public review.

^{29/} MCI Comments at 35-36, citing, Complaint and Petition Requesting Expedited Relief of MCI Telecommunications Corporation, No. 94-0438 (filed November 22, 1994).

position that MCI should be required to market such services separately from its interexchange services.^{30/}

- CompuServe's comments describe the audits released in March by the Commission in which the agency identified numerous instances of apparent cross-subsidization and other violations involving each of the BOCs.^{31/} These apparent violations, among other things, involve the Commission's jurisdictional separations regulations, misclassification of revenue, widespread documentation problems, and clerical errors. Taken together, the Commission found that the BOCs' apparent violations benefited them to the detriment of their customers, and noted that its ability to enforce its accounting and reporting requirements is "impaired if we cannot rely upon the information the carriers are required to submit about the costs of their operations and their allocations of those costs . . ."^{32/}
- Similar cost-shifting was found in a federal-state joint audit of transactions between Southwestern Bell and its affiliates. This audit revealed, among other things, that Southwestern Bell's records are not adequate to support the charges Southwestern Bell's parent billed it for management services.^{33/}

^{30/} Id.

^{31/} CompuServe Comments at 27-31, citing, The Ameritech Operating Companies, FCC 95-72 (released March 3, 1995); The Bell Atlantic Telephone Operating Companies, FCC 95-73 (released March 3, 1995); The BellSouth Telephone Operating Companies, FCC 95-74 (released March 3, 1995); The NYNEX Telephone Operating Companies, FCC 95-75 (released March 3, 1995); Pacific Bell, FCC 95-76 (released March 3, 1995); Southwestern Bell Telephone Company, FCC 95-77 (released March 3, 1995); US West Communications, Inc., FCC 95-78 (released March 3, 1995) ("US West Audit").

^{32/} See, e.g., US West Audit, FCC 95-78 at 2.

^{33/} Newspaper Association of America Comments at 10 ("NAA Comments"), citing, Southwestern Bell Telephone Company, FCC 95-31 (released March 3, 1995). Despite the Commission's findings, Southwestern Bell claimed that, when marketing unregulated services on an integrated basis, "[a]ppropriate costs are captured based upon the amount of time a service representative spends on that product." Southwestern Bell Comments at 39.

- Another recently concluded audit conducted at the request of the Commission revealed that GTE cross-subsidized its enhanced service offerings between 1988 and 1990.^{34/}
- ITAA's comments make reference to a Commission audit, for the period from 1987 to 1989, of transactions between NYNEX and one of its unregulated, but less than fully separate, subsidiaries.^{35/} The subsidiary, the NYNEX Material Enterprise Company ("MECO"), purchased telecommunications products and services and then resold those products and services to NYNEX's regulated operations. The Commission's audit revealed that "MECO overcharged its regulated affiliates on sales of products and services, and that the regulated telephone companies, in turn, passed on the excessive costs to the ratepayers."^{36/}

When viewed in the aggregate, this sampling of evidence clearly demonstrates that the Commission's nonstructural safeguards regime does not serve effectively to protect the BOCs' enhanced service competitors or the public.

Because the evidence of BOC abuses is substantial, one would have thought that the comments filed by the BOCs would have attempted to refute the evidence or, at the very least, explain their actions. However, with the exception of the discussion of the MemoryCall Order in BellSouth's comments,^{37/} the BOCs fail

^{34/} ITAA Comments at 44-45, citing, The GTE Telephone Operating Companies, 9 FCC Rcd 2594 (1994). Despite the Commission's findings, Bell Atlantic claimed in its comments that, even though GTE has been providing enhanced services for many years, GTE has never "engaged in anticompetitive conduct." Bell Atlantic Comments at 15; see also US West Comments at 19-20.

^{35/} ITAA Comments at 46-47, citing, New York Telephone Co. and New England Telephone Co.: Apparent Violations of the Commission's Rules and Policies Governing Transactions With Affiliates, 5 FCC Rcd 866 (1990) ("MECO Order").

^{36/} MECO Order, 5 FCC Rcd at 868.

^{37/} BellSouth Comments at 32-50. In fact, BellSouth attempts at great length to "explain away" the findings of access
(continued...)

even to acknowledge the existence of this evidence. Rather, the BOCs refer to the Commission's statement in the NPRM that no formal complaints have been filed by ESPs at the federal level which allege anticompetitive behavior on the part of the BOCs and assert that this proves the Commission's nonstructural safeguards regime is effective at preventing cross-subsidization and access discrimination.^{38/}

As CompuServe explained in its comments, however, there are a variety of reasons, such as resource and time constraints and the historical delay of the Commission in resolving formal complaints, that explain the dearth of formal complaints filed

^{37/} (...continued)

discrimination made by the GPSC in the MemoryCall Order. Generally, BellSouth claims that the GPSC's decision is based on the unsubstantiated fears of Southern Bell's voice-mail competitors and that Southern Bell complied with "all known requirements for its service introduction and even went beyond them." BellSouth Comments at 50. Even if BellSouth's claims are true, it does not prove that Southern Bell did not engage in access discrimination, but merely serves to underscore the inadequacy of the Commission's nonstructural safeguards. After all, notwithstanding Southern Bell's alleged compliance with "all known requirements," the GPSC indicated in the MemoryCall Order that "the evidence in this case [demonstrates that Southern Bell] has actually used its monopoly position to deter competition in the [voice-mail] market." MemoryCall Order, Docket No. 4000-U at 2. Likewise, the Ninth Circuit in California III observed that the MemoryCall Order demonstrates that the BOCs have the "ability to exploit their monopoly control over the local networks to frustrate regulator's attempts to prevent anticompetitive behavior." California III, 39 F.3d at 929.

^{38/} See, e.g., Southwestern Bell Comments at 9-10; see also Bell Atlantic Comments at 14; Ameritech Comments at 11-12; NYNEX Comments at 13-14.

with the Commission.^{39/} Moreover, the record compiled in this proceeding is replete with evidence of complaints concerning BOC anticompetitive conduct. Indeed, as the BOCs note in their comments, the only enhanced service currently being provided by them on a significant scale is voice-mail service,^{40/} and BOC voice-mail service has been the subject of many complaints.^{41/} For this reason, the widespread evidence of BOC anticompetitive abuse in connection with their provision of voice-mail services is relevant to predictions concerning how the BOCs are likely to conduct themselves if and when they begin providing other enhanced services on a significant scale. Thus, because ample evidence of BOC cross-subsidization and access discrimination exists, it would be incorrect for the Commission to consider only formal complaints filed with it when evaluating the relative costs and benefits of structural and nonstructural safeguards.

2. The Benefits That The BOCs Claim Have Resulted From Their Integrated Provision Of Enhanced Services Are Illusory

In their comments, the BOCs claim that their integrated provision of enhanced services, although to date limited almost

^{39/} CompuServe Comments at 4. As noted by the Internet eXchange Association ("IXA"), the dearth of formal complaints, if anything, shows that there is a problem with the Commission's formal complaint process. See IXA Comments at 9.

^{40/} See, e.g., Southwestern Bell Comments at 8, see also Bell Atlantic Comments at 5, n. 6; Pacific and Nevada Bell Comments at 15.

^{41/} See CompuServe Comments at 47-49; see also ATSI Comments at 8-9.

exclusively to voice-mail services, has brought innumerable benefits to the public. According to the BOCs, these benefits include a vigorously competitive and thriving enhanced services industry,^{42/} the introduction of new enhanced services,^{43/} the wider availability of existing services,^{44/} lower prices for voice-mail services,^{45/} and the likelihood that these benefits will continue to accrue only if they are allowed to continue providing integrated enhanced services.^{46/} These claims are supported by a number of different studies and affidavits prepared on behalf of the BOCs by various consultants.^{47/}

The benefits of integrated BOC provision of enhanced services are illusory. First, as explained in CompuServe's comments, the benefits identified by the BOCs are due in large part to the BOCs use of their local exchange monopolies to promote their own enhanced services by means of

^{42/} See, e.g., US West Comments at 22.

^{43/} See, e.g., BellSouth Comments at 56.

^{44/} See, e.g., US West Comments at 14.

^{45/} See, e.g., Bell Atlantic Comments at 8-9.

^{46/} See, e.g., BellSouth Comments at 57.

^{47/} See J. Hausman and T. Tardiff, Benefits and Costs of Vertical Integration of Basic and Enhanced Telecommunications Services (dated April 1995) ("Hausman/Tardiff Study"); The Benefits of RBOC Participation in the Enhanced Services Market, Booz, Allen & Hamilton, Inc. (dated April 1995); The Economics of Structural Separation from the Perspective of Economic Efficiency, RRC, Inc. (April 1995); Affidavit of David Teece (dated April 6, 1995) ("Teece Affidavit"); Affidavit of William Neil, Jr. (dated April 6, 1995).

cross-subsidization and discrimination.^{48/} The BOCs admit as much in their comments when they indicate that one of the principal benefits of integration is the ability to market enhanced services directly to their captive local exchange customers.^{49/} Indeed, the Teece Affidavit indicates that integration allows the BOCs "to offer their enhanced services directly to their basic-service customer base."^{50/} Because the BOCs' enhanced service competitors do not have a body of captive local exchange customers to whom they can market their services, integration provides the BOCs with an unfair competitive advantage.

Relatedly, it is worth noting that many of the benefits identified by the BOCs have no connection whatsoever to their integrated provision of enhanced services. For instance, much is made in the BOCs' comments about the explosive growth enjoyed by the enhanced services industry in recent years. The implication is that this growth is at least partly attributable to the Commission's decision to abandon structural separation.^{51/} By

^{48/} CompuServe Comments at 23-25.

^{49/} See, e.g., BellSouth Comments at 57-58 ("[T]he ubiquitous nature of the BOCs' sales channels and marketing operations provides a legitimate asset that should be used to make enhanced services as widely available as possible."); see also US West Comments at 17; NYNEX Comments at 24-24.

^{50/} Teece Affidavit at 11.

^{51/} See, e.g., NYNEX Comments at 22 (The Commission's nonstructural safeguards regime "can certainly claim to have played some part in the extraordinary salutary development of the enhanced services market during the period of RBOC integrated operations.").

their own admission, however, the BOCs' entry into the enhanced services market has been limited almost exclusively to the provision of voice-mail services, even though the enhanced services growth documented by the BOCs has not been limited to voice-mail services.^{52/} In fact, the BOCs indicate that this growth has been widespread and includes many segments of the enhanced services industry, such as online services, where the BOCs have not begun competing on a large scale.^{53/} It, therefore, is difficult to take seriously the claim of the BOCs that the Commission's decision to abandon structural separation has been responsible, even in part, for recent growth in the enhanced services market.

A number of other specious claims are made by the BOCs concerning the benefits of integration. For example, the BOCs rely on the Hausman/Tardiff Study to take credit for decreases in the cost of voice-mail services since they began offering those services on a large scale in 1990.^{54/} The problem with this argument is that the prices for other enhanced services -- services which the BOCs admit they are not and have not provided in any significant way -- also have dropped

^{52/} See, e.g., Bell Atlantic Comments at 5-13.

^{53/} Id. at 10-13.

^{54/} Hausman/Tardiff Study at 9 (The price for voice-mail services dropped 50 percent between 1990 and 1993.).

significantly since that time.^{55/} Also, the Hausman/Tardiff Study uses the recent growth in the voice-mail market to imply that similar benefits will result if the BOCs enter into the market for other enhanced services on an integrated basis.^{56/} The problem with this argument is that the BOCs are comparing apples and oranges when they use data from the voice-mail market to extrapolate the impact of their entry into other enhanced service markets. There is no evidence that enhanced services not currently offered by non-BOC ESPs would become available if the BOCs were to begin providing enhanced services other than voice-mail on a large scale basis, or that enhanced services currently offered by non-BOCs ESPs would be made more widely available if the BOCs were to begin providing enhanced services other than voice-mail. Independent ESPs are today responding to the competitive marketplace to provide the services consumers want.

The Hausman/Tardiff Study also contains other misleading information. For instance, it indicates that certain highly desired enhanced services -- referred to as "distance learning and medical services" -- are not now being offered because the BOCs currently are "deterred or prohibited" from providing those

^{55/} The price of CompuServe's services has dropped steadily during this same period. The charge for 2400 baud access in 1987 was \$12.50 per hour. Today, a CompuServe subscriber receives unlimited access to over 100 basic services for \$9.95 per month, with access to thousands of extended services for only \$4.80 per hour at 14.4 kbps.

^{56/} Hausman/Tardiff Study at 10-20.