

services.^{57/} No effort, however, is made to define "distance learning and medical services." In any event, CompuServe, among other independent ESPs, currently provides a host of services that are "distance learning and medical services."^{58/} It, therefore, is not clear why the Hausman/Tardiff Study tries to suggest that these types of services are not currently being provided.

3. The Costs That The BOCs Claim Would Be Imposed Upon Them And The Public If They Are Required To Provide Enhanced Services Through Structurally Separate Subsidiaries Are Illusory

Much like the benefits identified by the BOCs, the costs identified by the BOCs of returning to a structural separation regime also are illusory. According to the BOCs, these costs include those associated with the establishment of separate subsidiaries,^{59/} the confusion and disruption to consumers that would attend implementation of structural separation,^{60/} and the

^{57/} Id. at 17. According to the Hausman/Tardiff Study, if these services currently were being offered, economic welfare would increase by \$40 billion annually.

^{58/} By way of example, on CompuServe, the public has access to a wealth of educational materials, including numerous encyclopedias, thousands of reference databases and other home-study resources, and hundreds of medical databases and forums. Moreover, there are frequent interactive forums, often conducted on a real-time basis, concerning various educational issues and issues relating to medical services. Indeed, there are online forums devoted specifically to most major diseases, with each forum having its own library of materials, online conferences, and interactive discussions.

^{59/} See, e.g., US West Comments at 12-13.

^{60/} See, e.g., Southwestern Bell Comments at 32.

economic losses that would result from their failure to provide integrated enhanced services.^{61/}

For one thing, as explained in CompuServe's comments, the extent to which requiring the BOCs to provide enhanced services through structurally separate subsidiaries would impose transition costs on the BOCs should not be considered by the Commission when evaluating the relative costs and benefits of structural and nonstructural safeguards.^{62/} The reason for this is that the BOCs knowingly took a calculated risk by integrating their enhanced services while the lawfulness of the Commission's nonstructural safeguards regime was under judicial review, and in the event structural separation again is required, any costs incurred by the BOCs as a result of their calculated risk should be absorbed by them.^{63/}

^{61/} See, e.g., Ameritech Comments at 14-15.

^{62/} CompuServe Comments at 25-26; see also Prodigy Comments at 2-3; NAA Comments at 9; MCI Comments at 10.

^{63/} In the event that the Commission determines that imposition of structural separation for certain BOC enhanced services would cause widespread customer disruption or deprive the public of reasonably priced service in certain areas, the Commission has the flexibility to grant waivers of its structural separation requirements on a case-by-case basis. See MCI's Opposition to Joint Contingent Petition for Interim Waiver of the Computer II Rules at 6-9 (filed November 21, 1994). Because so much of the BOCs' case for imposition of a nonstructural safeguards regime rests on their provision of voice-mail services, the BOCs may be able to present a case for a waiver of the structural separation requirements with regard to voice-mail services that they would not be able to present with regard to online data services. Most of the BOCs' present enhanced services customers are voice-mail customers, so obviously implementation of a structural separation requirement for data services would not cause customer confusion and disruption like the BOCs claim would occur with respect to
(continued...)

With regard to the economic losses identified by the BOCs, the Hausman/Tardiff Study claims that a return to structural separation would entail large economic costs in the form of enhanced services that the BOCs may not offer to the public.^{64/} According to the BOCs, these unidentified services may be discontinued, or never brought to the market, because structural separation allegedly would render those services uneconomic by depriving the BOCs of the ability to, among other things, employ joint marketing.^{65/}

All ESPs other than the BOCs are required to operate on a separated basis, and almost all, including CompuServe, have done so successfully. Yet the BOCs claim they cannot efficiently provide enhanced services on a separated basis. Why should the BOCs be treated any differently than other ESPs? Why is it that the BOCs cannot efficiently operate in the same manner as other ESPs? Neither the Hausman/Tardiff Study nor the BOCs' comments provides answers to these questions. Indeed, once all the BOCs' verbiage is parsed, it becomes clear that the reason for this is that the claimed costs of structural separation are the costs to

^{63/} (...continued)
implementation of separate subsidiaries to provide voice-mail services.

^{64/} Hausman/Tardiff Study at 10-20.

^{65/} See, e.g., Bell Atlantic Comments at 17-20; see also NYNEX Comments at 29 ("Structural separation could make [voice-mail] and other enhanced services so costly as to make it uneconomic for NYNEX to continue to offer them on any wide-scale basis, if at all.").

the BOCs of foregoing the opportunity to exploit their dominant position in the local exchange.

C. Despite the Contrary Claims Of The BOCs, The Commission's Decision To Retreat From Its Original Conception Of Open Network Architecture Has Rendered Open Network Architecture Largely Unusable To Most Enhanced Service Providers And Has Enabled The BOCs To Discriminate Against Their Enhanced Service Competitors

The BOCs make a number of sweeping claims about the effectiveness of ONA and the extent to which they have unbundled their local exchange networks.^{66/} For the most part, these claims do not reflect reality.

First, there seems to be some confusion on the part of the BOCs concerning the unbundling requirements that underlie ONA. A number of the BOCs claim that fundamental unbundling was never intended by the Commission,^{67/} while others argue that fundamental unbundling already has been achieved.^{68/} While the BOCs may be confused about whether the Commission's original conception of ONA envisioned fundamental unbundling and whether fundamental unbundling has been achieved, there can be no doubt that fundamental unbundling was an integral part of the Commission's original conception of ONA. A report prepared on behalf of MCI, CompuServe, and ITAA -- submitted under separate cover with the initial comments -- shows that the Commission has

^{66/} See, e.g., BellSouth Comments at 20-32.

^{67/} Id. at 4.

^{68/} See, e.g., NYNEX Comments at 14-18.

retreated significantly from the amount of unbundling it initially indicated would be required before granting full structural relief.^{69/} The Ninth Circuit came to the same conclusion in California III.^{70/}

More importantly, the record established in this proceeding shows that nothing close to fundamental unbundling of the local exchange network has been achieved. The inadequacy of ONA, as well as the Commission's other nonstructural safeguards, to perform any meaningful role is demonstrated by the Hatfield Study.^{71/} This study details the lack of development of ONA in recent years and the resistance of the BOCs to the type of unbundling necessary for the satisfactory development of enhanced services.^{72/} In addition, an affidavit attached to MCI's

^{69/} See ONA: A Promise Not Realized -- Reprise, Hatfield Associates, Inc. at 9-10 (filed April 1995) ("Hatfield Study").

^{70/} California III, 39 F.3d at 928 ("[B]ecause the ONA plans as approved did not accomplish fundamental unbundling, the FCC's approval of these plans constituted a change from its position that complete ONA was a prerequisite to the elimination of structural separation.").

^{71/} Hatfield Study at 9-17. The BOCs claim that ESPs are receiving the ONA services they want and that ONA serves as a "self-enforcing" barrier to discrimination. See, e.g., Pacific and Nevada Bell Comments at 55; see also Bell Atlantic Comments at 23; BellSouth Comments at 23. However, the other comments filed in this proceeding -- many filed by the very parties the BOCs claim are being well-served by ONA -- paint a very different picture. See, e.g., NAA Comments at 13-14; see also LDDS Comments at 8-10. In this vein, the Hatfield Study demonstrates that ONA as implemented by the Commission is of limited use to ESPs and is not an effective safeguard against discrimination. Id. at 9-17.

^{72/} The Hatfield Study, as well as many of the comments, note that Ameritech's Customer First Plan shows that greater

(continued...)

comments explains in detail how the BOCs can control enhanced service development through dominance of industry standards and forum processes, and how the BOCs use those standards and forums to discriminate against their enhanced service competitors.^{73/}

D. Bell Atlantic's Proposal To Weaken Existing Nonstructural Safeguards And Remove Protocol Processing From The Enhanced Services Definition Should Be Rejected Summarily

Bell Atlantic's comments propose a number of modifications to the Commission's existing nonstructural safeguards that are designed to weaken them significantly.^{74/} Specifically, Bell Atlantic asks that: (1) the existing regulations governing customer proprietary network information ("CPNI") be modified to allow BOC enhanced service personnel access to the CPNI of all customers that do not affirmatively restrict access to that information;^{75/} (2) the current requirement that the BOCs disclose new network interface specifications at least six months

^{72/} (...continued)

unbundling of the local exchange network is possible, but that the BOCs only seem willing to agree to this level of unbundling if they can get something, such as authority to enter the interexchange market, in return for the unbundling. Id. at 35; see also Information Industry Association Comments at 3-4.

^{73/} Affidavit of Peter Guggina (dated April 3, 1995) ("Guggina Affidavit").

^{74/} The comments of Ameritech and Pacific and Nevada Bell also suggest that the Commission consider making modifications to its nonstructural safeguards regime, but unlike Bell Atlantic, do not propose any specific modifications to those safeguards. Ameritech Comments at 4; Pacific and Nevada Bell Comments at 70.

^{75/} Bell Atlantic Comments at 25-29.

prior to offering services that use the new interface be reduced to one month and eliminated in the case of customer-specified network equipment;^{76/} (3) the present requirement that a portion of joint and common costs be allocated to unregulated operations be modified so that more costs can be allocated to regulated operations;^{77/} (4) the ONA regulations be amended to reduce and/or eliminate the requirement that the BOCs amend their ONA plans at least 90 days before they use a new basic service in connection with their enhanced services;^{78/} and (5) the Commission's long-standing definition of enhanced services be amended so as to classify protocol processing as a basic, regulated service.^{79/}

Because the record established by the comments demonstrates that the Commission's nonstructural safeguards are inadequate to prevent the BOCs from engaging in cross-subsidization and access discrimination, Bell Atlantic's proposals to further weaken those safeguards should be rejected summarily by the Commission. The relief requested by Bell Atlantic clearly is outside the scope of this proceeding.

Bell Atlantic's proposed modifications to the Commission's CPNI regulations should be rejected because, even without the proposed modifications, those regulations provide the BOCs with a

^{76/} Id. at 29-31.

^{77/} Id. at 32.

^{78/} Id. at 32-33.

^{79/} Id. at 33-36. See 47 C.F.R. § 64.702(a) (1995).

sizeable competitive advantage over their enhanced service competitors. As explained by CompuServe in the comments it filed last year in response to the Commission's public notice on CPNI issues, existing CPNI regulations provide the BOCs with virtually unfettered access to the CPNI of their customers with fewer than 20 lines, but require the BOCs' enhanced service competitors to obtain the affirmative written authorization of customers any time they wish to access the same CPNI.^{80/} Bell Atlantic's proposed modification, by providing the BOCs with unfettered access to all CPNI, simply would compound the existing inequities of the Commission's CPNI regulations.

Likewise, the proposed modifications to the Commission's network disclosure, cost allocation, and ONA plan amendment regulations should not be modified as proposed by Bell Atlantic. The proposal to reduce significantly, and in some cases eliminate, the network disclosure requirement for new network interface specifications would increase the existing ability of the BOCs, described in the Guggina Affidavit, to control enhanced services development through dominance of the enhanced services industry standards and forum process.^{81/} Obviously, the shorter the notice provided to the BOCs' competitors of new interface specifications, the more likely it is that the BOCs will gain a "head start" over those competitors in the provision of services

^{80/} Additional Comments Sought on Rules Governing Telephone Companies' Use of Customer Proprietary Network Information, 9 FCC Rcd 1685 (1994).

^{81/} See Guggina Affidavit at 4-9.

utilizing the new interface specifications. Moreover, given the above-described infirmities inherent in the Commission's cost allocation and ONA plan amendment regulations, grant of the modifications to those regulations proposed by Bell Atlantic would be sheer folly. Modifying existing cost allocation regulations so as to allow the "market to drive prices toward incremental cost" would effectively eliminate the need for the BOCs to allocate their costs, and modifying the ONA plan amendment regulations as proposed would further limit the usefulness of ONA to the BOCs' enhanced service competitors.

Finally, Bell Atlantic's proposal to remove protocol processing from the enhanced services definition also should be rejected. The Commission initially classified protocol processing as an enhanced service in the Computer II proceeding,^{82/} and has upheld that classification many times since then after extensive review.^{83/} For instance, during the Computer III proceeding, the Commission weighed the pros and cons of three alternate regulatory classifications for protocol processing, but ultimately decided to maintain the classification

^{82/} Computer II Order, 77 F.C.C.2d at 422.

^{83/} See Computer II Reconsideration Order, 84 F.C.C.2d at 60-61; see also Communications Protocols Under Section 64.702 of the Commission's Rules and Regulations, 95 F.C.C.2d 584, 596 (1983); Petitions For Waiver of Section 64.702 of the Commission's Rules and Regulations to Provide Certain Types of Protocol Conversion Within Their Basic Telephone Networks, 1984 FCC LEXIS 1636, 5-6 (1984); Petitions for Waiver of Section 64.702 of the Commission's Rules (Computer II), 100 F.C.C.2d 1057, 1058 (1985); Computer III Phase II Order, 2 FCC Rcd at 3078-3082.

of protocol processing as an enhanced service.^{84/} The Commission concluded that "[t]he extensive record established in this proceeding, when viewed as a whole, supports the conclusion we initially reached in Computer II that protocol processing services should not be treated as regulated, basic offerings."^{85/} Because the Commission has considered modifying its enhanced services definition in the general manner proposed by Bell Atlantic on a number of occasions and has decided -- based upon the review of extensive records -- against making such a modification each time, there is no reason for the Commission to reopen this issue again.

III. CONCLUSION

For all of the foregoing reasons, as well as those presented in its earlier comments and in the pleadings submitted by it at earlier stages of the Computer III proceeding, CompuServe again urges the Commission to require the BOCs to provide enhanced services through fully separate subsidiaries. A requirement for separate subsidiaries would not only avoid the likelihood of still another judicial remand, but, more fundamentally, it would comport with the public interest and the development of a sound communications policy for the continued rapid growth of the National Information Infrastructure. And, a separate subsidiary

^{84/} Computer III Phase II Order, 2 FCC Rcd at 3080.

^{85/} 2 FCC Rcd at 3078.

requirement would accomplish these objectives in a much less regulatorily-intrusive manner than the present resource-intensive nonstructural safeguards regime.

Respectfully submitted,
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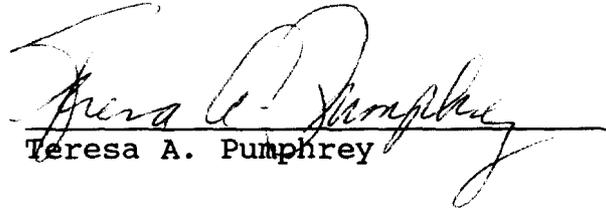
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