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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

To: The Commission

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REPLY COMMENTS OF COX ENTERPRISES, INC.

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SUMMARY

Two key factors should lead the Commission to conclude that it is vital to restore structural separation for Bell Operating Company ("BOC") enhanced services operations. First, the BOCs control facilities essential to the operations of independent enhanced services providers. Second, the BOCs abuse their control of these essential facilities, to the detriment of competition and the proper development of the enhanced services marketplace. These factors also support imposition of separate subsidiaries any time a BOC enters a competitive market that depends on monopoly telephone facilities.

There can be no doubt that the BOCs have bottleneck control over facilities essential to enhanced services providers. Whenever an enhanced services provider needs telephone services, the only meaningful choice is to go to the local BOC. Moreover, even under the most favorable regulatory and economic conditions, the BOC stranglehold on access to enhanced services customers will remain for the foreseeable future.

The record also shows that the BOCs consistently abuse their control of essential facilities. These abuses include refusals to provide necessary services to enhanced services providers, cross-subsidization, use of customer proprietary network information to "unhook" customers of enhanced services providers and a host of other anticompetitive practices. BOCs have abused their monopolies in every region of the country, across a wide range of services, and new abuses continue to occur. Structural separation is necessary because it makes it harder to engage in these abuses and easier for regulators to detect them. Without structural separation, BOCs' abuses of their market power are sure to continue.

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REPLY COMMENTS OF COX ENTERPRISES, INC.

Cox Enterprises, Inc. ("Cox"), by its attorneys, hereby submits its reply comments in the above-referenced proceeding.^{1/} Cox submits these comments, in large part, to respond to the unfounded assertions of the Bell Operating Companies (the "BOCs") that the nonstructural "safeguards" adopted in the original *Computer III* order have been sufficient to prevent competitive abuse. An accurate review of the results of the *Computer III* regime shows precisely the opposite: BOCs continually discriminate against independent enhanced services providers, refuse to provide necessary services and otherwise abuse their monopoly market position. Thus, because BOCs have both the means and the will to act anticompetitively, the Commission should reinstitute structural separation of BOC basic and enhanced service operations. The Commission also should recognize that structural separation is necessary any time a BOC enters a competitive business.

I. Introduction

Cox is a major diversified media company with significant interests in television, radio, cable television, newspapers and telecommunications. Cox is among the

^{1/} *Computer III* Further Remand Proceedings, *Notice of Proposed Rulemaking*, CC Docket No. 95-20, rel. Feb. 21, 1995 (the "Notice").

leaders in the newspaper industry in electronic publishing, and operates electronic publishing ventures in Florida, Georgia and Texas. Most recently, Cox became one of the founding partners in the New Century Network which will make newspaper services widely available online in the near future. Cox also is a leader in the development of new communications technologies and was awarded a pioneer's preference for its innovative use of cable television infrastructure in the provision of personal communications services.^{2/}

Since the Commission's original *Computer III* decision, Cox has gained substantial experience in dealing with BOC responses to the needs of enhanced services providers. Cox has sought to obtain basic services necessary to the provision of its enhanced services from BOCs. Cox has participated in the industry forum process described in detail in MCI's comments.^{3/} Cox also has participated actively in various state proceedings in Georgia, including the MemoryCall case and the Georgia state ONA proceeding. Thus, Cox has extensive knowledge of BOC behavior under nonstructural safeguards.

Based on this experience, Cox has concluded that nonstructural separation of BOC enhanced service operations is insufficient to prevent anticompetitive behavior. As described in more detail below, there are two key factors that lead to this conclusion. First, the BOCs control facilities that are essential to the operations of enhanced services providers; indeed, enhanced services providers cannot exist without the BOC networks. Second, and notwithstanding BOC protests to the contrary, BOCs abuse their control of essential facilities

^{2/} Amendment of the Commission's Rules to Establish New Personal Communications Services, *Third Report and Order*, 9 FCC Rcd 1337, 1345 (1994); *see also* Review of the Pioneer's Preference Rules, *Memorandum Opinion and Order on Remand*, 9 FCC Rcd 4055 (1994).

^{3/} Comments of MCI at Exhibit B.

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In the
UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

UNITED STATES OF AMERICA)
)
 Plaintiff,)
)
 v.) Civil No. 82-0192 (HHG)
)
 WESTERN ELECTRIC COMPANY, INC.)
 and AMERICAN TELEPHONE AND)
 TELEGRAPH COMPANY,)
)
 Defendants.)

**COMMENTS OF COX ENTERPRISES, INC. ON THE MOTION OF BELL
ATLANTIC, BELL SOUTH, NYNEX AND SOUTHWESTERN
BELL TO VACATE THE DECREE**

Cox Enterprises, Inc. ("Cox"), by its attorneys, respectfully submits its comments in opposition to the above-referenced request to vacate the Modification of Final Judgment.^{1/} These comments demonstrate that the Bell Operating Companies ("BOCs") consistently use their local exchange monopoly to disadvantage competitors and captive telephone ratepayers. Existing federal and state regulation have been inadequate to prevent such abuses. Consequently, until the BOCs are subject to effective local exchange competition, the Decree should remain in effect.

^{1/} United States v. Western Electric Co., 552 F.Supp. 131 (D.D.C. 1982) (the "Decree" or the "MFJ"), aff'd sub nom., Maryland v. United States, 460 U.S. 1001 (1983).

I. INTRODUCTION

The primary purpose underlying the Decree was to prevent the anti-competitive practices of the Bell System so that competition could develop in telecommunications markets. Today, competition exists in virtually all areas of the communications marketplace except for one: the local exchange market. The Decree was premised on the assumption that local exchange was a "natural" monopoly and that competition was not possible. Accordingly, to prevent the BOCs from leveraging their local exchange monopoly into competitive markets, the Decree provides that the BOCs may not participate in the closely-related markets for interexchange services and equipment manufacturing.

In the above-referenced motion (the "Motion to Vacate"), four of the seven BOCs argue that the Decree no longer is necessary to prevent anti-competitive behavior and that the public interest is not served by preventing BOCs from participating in the two forbidden markets. The facts do not bear out these claims. Time and again audits of the BOCs uncover continuing and substantial misconduct. As the Court of Appeals for the Ninth Circuit observed only weeks ago:

[T]he BOCs have the incentive to discriminate and the ability to exploit their monopoly control over the local networks to frustrate regulators' attempts to prevent anti-competitive behavior.^{2/}

^{2/} People of the State of California v. FCC, Case No. 92-70083, slip op. at 12766 (9th Cir. Oct. 18, 1994)

These comments demonstrate that the BOCs have both the incentive and the ability to cross-subsidize competitive services with revenues from regulated services and to use their bottleneck control over local exchange facilities to the detriment of their competitors. These abuses have occurred under existing regulation and federal and state regulators have not demonstrated that they are equipped or would be able to prevent similar abuses in the interexchange and equipment markets.

The ultimate solution to anti-competitive behavior by the BOCs is establishing full and fair competition in the local exchange market. Although the potential for such competition exists in the future, the local exchange market is not by any stretch of the imagination competitive today. Until local exchange competition develops, the Court must retain the Decree restrictions on BOC entry into interexchange and equipment manufacturing markets.

II. THE BELL OPERATING COMPANIES POSSESS A MONOPOLY IN THE LOCAL EXCHANGE MARKET

The Motion to Vacate is premised on the theory that the decree no longer is necessary because the local exchange market is not a "natural" monopoly. Motion at 55.

While the Motion to Vacate demonstrates the potential for competition at some point in the future,^{3/} it utterly fails to demonstrate the presence of competition today. Due to legal,

^{3/} "[C]able systems are emerging as competitors to LECs." Motion to Vacate at 58; "Electric companies are testing new uses for the fiber optic networks that link their customers, and a few currently provide telephone services." Id. at 58 n.29; "Wireless service may soon compete directly with wireline calling." Id. at 59; "Looking only slightly to the future, these cable-CAP network are ideally suited to connect PCS radio transceivers and to tie PCS networks to interexchange carriers." Id. at 61 (emphasis added).

technological and economic barriers, the BOC monopoly in the local exchange is as strong as it was ten years ago. Accordingly, the Decree remains necessary to assure that the BOCs do not leverage their monopoly into other markets.

A. Legal Barriers to Entry

In the Motion to Vacate, the BOCs go to considerable lengths in attempting to convince this Court that they soon will be overwhelmed by competition. Noticeably absent from this rhetorical barrage is any mention of the fact that it is unlawful to provide competitive local exchange service in over 40 states. For example, the Code of Virginia states:

No certificate shall be granted to an applicant proposing to furnish local exchange telephone service in the territory of another certificate holder unless and until it shall be proved to the satisfaction of the [Corporation] Commission that the service rendered by such certificate holder in such territory is inadequate to the requirements of the public necessity and convenience.

Va. Code § 56-265.4:4.

No other companies in this country are permitted to operate with such a significant amount of revenue protected by law from competition. While several states are making strides towards encouraging forms of local competition, the picture of robust local competition painted by the BOCs is plainly contradicted by the facts of regulatory, technical and economic restrictions on competitive local exchange endeavors.

The general prohibition on local exchange competition that exists in most states affects competition in interstate markets as well. Until a competitive access provider

to stymie competition in enhanced services. BOCs discriminate against independent enhanced services providers, cross-subsidize their enhanced service operations and engage in other anticompetitive behavior. Structural separation is essential to reduce the ability of BOCs to engage in such abuses, to the ultimate benefit of consumers and competition.

If BOCs lacked either control of essential facilities, or a demonstrated propensity to abuse that control, then structural separation would not be required.^{4/} As shown below and in the comments of many other parties to this proceeding, the BOCs plainly meet these criteria. The BOCs also have shown a pattern of abuse in every market where they face competition. Thus, the Commission should retain the structural separation requirements adopted in the *Computer II* proceeding and should apply the same requirements to BOC entry into any competitive business.^{5/}

II. The Bell Operating Companies Maintain Control of Essential Facilities for the Operation of Enhanced Services Providers.

The first key factor in determining whether the Commission should require structural separation of BOC enhanced service operations is the BOC control of essential

^{4/} For instance, under these criteria, structural separation is not warranted for the entry of cable operators into telephony. Cable operators do not control facilities that are essential for another party to enter the telephony market. Therefore, they do not have the ability to engage in anticompetitive practices that BOCs routinely use against independent enhanced services providers.

^{5/} Amendment of Section 64.702 of the Commission's Rules and Regulations (Second Computer Inquiry), *Final Decision*, 77 F.C.C.2d 384 (1980) ("*Computer II Order*"), *recon.* 84 F.C.C.2d 50 (1981), *further recon.*, 88 F.C.C.2d 512 (1981), *affirmed sub nom. Computer and Communications Industry Ass'n v. FCC*, 693 F.2d 198 (D.C. Cir. 1982), *cert. denied*, 461 U.S. 938 (1983).

facilities. BOCs not only control these facilities now, but will continue to do so for the foreseeable future.

BOC control of essential facilities for providing enhanced services is obvious; it is impossible to provide telephone-based enhanced services in a BOC's operating territory without using the BOC's local exchange services. This means that an enhanced services provider must use BOC facilities to reach the overwhelming majority of the potential customers in the United States.

The BOCs claim they are not bottlenecks; indeed, this is a significant element of their ongoing nationwide campaign for deregulation. This claim is untrue. The BOCs are the only ubiquitous providers of local telecommunications services. When an enhanced services provider needs to purchase telephone services necessary to offer enhanced services, the only place to go, in BOC territory, is the local BOC. Because local telephone services are absolutely vital to enhanced services providers, it is evident that BOCs have bottleneck control of an essential facility.

Moreover, BOC facilities are, today, the only possible way to reach residential customers. For all intents and purposes, they also are the only way to reach business customers.^{6/} This dependence on BOC facilities to reach enhanced services customers is a significant factor in the enhanced services marketplace.

^{6/} While competitive access providers ("CAPs") have made some inroads in the market for business services, CAPs typically provide high-end, high-capacity services. These services are of little use to mass-market enhanced services providers such as newspapers. The CAP share of the market for POTS or POTS-like services is strikingly small, even in urban centers.

The eventual advent of local competition will not quickly eliminate the BOC bottleneck. The growth of competitive local exchange services will be slow, and those services will not be anywhere near ubiquitous for many years. Until the time that BOCs have ubiquitous local exchange competitors, enhanced services providers still will have to depend on the BOCs for the local exchange services necessary to provide enhanced services.

Once competition becomes ubiquitous, the BOCs will continue to control access to BOC customers. This is important because even the most optimistic scenarios for local competition concede that incumbent carriers will retain the largest share of the local exchange market for many years after all regulatory barriers to local competition are lifted. So long as BOCs remain dominant in the local exchange market, they will have the power that comes with their control over the access to their residential and business customers. Thus, even under the most optimistic assumptions about the regulatory and business environment, the existing BOC bottleneck control of essential facilities will continue for the foreseeable future.

III. The Bell Operating Companies Have Demonstrated that They Abuse Their Monopoly Over Essential Facilities.

By itself, the BOC monopoly over essential facilities would require careful Commission scrutiny because of the risks inherent in any bottleneck monopoly. The actions of the BOCs since the Commission originally lifted its structural separation requirement, however, demonstrate that mere scrutiny is not enough. The BOCs consistently engage in a pattern of anticompetitive behavior that is not restrained by nonstructural safeguards.

Because the BOCs both have the power to act anticompetitively and use that power to the

detriment of the enhanced services marketplace, the Commission should reinstitute the structural separation requirements first adopted in the *Computer II* proceeding.^{7/}

The BOCs argue that structural separation is unnecessary because they have not abused their market power. *See, e.g.*, Comments of US West at 19; Comments of BellSouth at 13-31. The record shows that this assertion is false. Since the elimination of the structural separation requirement, the BOCs have, almost without exception, engaged in anticompetitive behavior. This behavior continues today.

One of the best-documented examples of BOC abuse is the MemoryCall case, in which Cox participated. While BellSouth and others have attempted to minimize the importance of MemoryCall, even to the point of denying that there were any findings of anticompetitive abuse, it is a prime example of the kind of behavior that persists under nonstructural safeguards.^{8/}

MemoryCall is a voice messaging service offered by BellSouth in Georgia and elsewhere. The MemoryCall proceeding arose when BellSouth first began offering this service in Georgia. As described in more detail in Cox's comments on the BOC motion to vacate the MFJ (the "Cox MFJ Comments"), attached as Exhibit 1, when the Georgia Public Service Commission investigated MemoryCall, it discovered a host of anticompetitive abuses. These abuses included BellSouth's refusal to offer services useful to other voice mail providers, discriminatory provisioning of other services, tariff terms that favored BellSouth

^{7/} See *Computer II Order*, 77 F.C.C.2d at 457-90.

^{8/} See Comments of BellSouth at 32-51.

over unaffiliated voice messaging providers, and cross-subsidization.^{9/} The most egregious practice was BellSouth's effort to switch independent voice messaging provider customers to MemoryCall when those customers called to request services required to use voice messaging, a practice known as "unhooking." *Id.* at 34. These abuses were found by the Georgia Commission following an extensive proceeding that included detailed testimony, discovery and briefing by all parties. Indeed, the MemoryCall proceeding spawned a series of regulatory proceedings, all aimed at policing BellSouth's abuses in the enhanced services market, that continue to this day.

MemoryCall provided a virtual catalog of the ways that a BOC could abuse its market power. By refusing to provide services requested by independent voice messaging providers, BellSouth prevented them from gaining market share while it prepared to enter the market.^{10/} BellSouth then adopted an advantageous architecture for its voice messaging service that was technically unavailable to other providers because of the configuration of the BellSouth network. BellSouth's tariff terms for call forwarding services gave MemoryCall a significant marketplace advantage.^{11/} BellSouth's apparent cross-subsidy of MemoryCall

^{9/} Investigation Into Southern Bell Telephone and Telegraph Company's Provision of MemoryCall Service, *Order of the Commission*, Georgia Docket No. 4000-U (1991). A copy of the Georgia MemoryCall order is included in Exhibit 1.

^{10/} Not coincidentally, BellSouth first began offering the most crucial service, Call Forwarding-Variable, at the same time it entered the voice messaging market. Call Forwarding-Variable is necessary for any voice messaging system to function efficiently.

^{11/} The tariff did not permit an independent voice messaging provider to order call forwarding for a customer unless the voice messaging provider was willing to bear the risk of non-payment. BellSouth's MemoryCall operation did not bear this risk because MemoryCall was integrated into BellSouth's basic services operations and customers therefore ordered call forwarding directly from BellSouth from the same customer service representative and at the same time they ordered MemoryCall.

gave it a significant price advantage over independent voice messaging providers. Finally, BellSouth's active abuse of its position as the monopoly provider of basic telephone services by engaging in unhooking meant that BellSouth was able to take customers away from independent voice messaging providers even after the independent providers had made a sale. In effect, BellSouth's use of unhooking meant that the independent providers simply were finding customers for BellSouth.

Georgia was not the only jurisdiction to find abuses in MemoryCall.

BellSouth's unhooking first was discovered in Florida. BellSouth promised not to engage in that practice again, a promise it broke in Georgia. This Commission also specifically described unhooking as unlawful, and cited the Georgia Commission's MemoryCall order in support of that conclusion, in the *Computer III Remand Order*.^{12/} Thus, BOC suggestions that there never were any findings of abuse in the MemoryCall case are utterly false. See Comments of BellSouth at 32-51.

While MemoryCall is a paradigm of BOC abuses, it is not the only example. In Georgia, where Cox has the most experience, there has been repeated evidence that BellSouth abuses its monopoly power to benefit its enhanced services. These abuses are described in detail in the Cox MFJ Comments, attached as Exhibit 1. For instance, the Georgia Commission is now completing a proceeding to consider the results of an audit of BellSouth that found millions of dollars of cross-subsidies between BellSouth's regulated and unregulated services. Similarly, review of BellSouth's Georgia state open network architecture plan showed that BellSouth had priced the few services it unbundled so that the

^{12/} Computer III Remand Proceedings, *Report and Order*, 6 FCC Rcd 7571, 7613-4 (1991).

services BellSouth would use had significantly lower margins than the services that only competitors would use.^{13/} What is most significant about these abuses is that they are not isolated. Rather, they are a pattern that repeats itself across a wide range of services and through the entire time since the Commission first eliminated the structural separation requirement.

The pattern also repeats itself from BOC to BOC. For instance, Cox's experience in seeking "N11" service from the BOCs speaks volumes about BOC unwillingness to permit, let alone facilitate, the development of enhanced services. Although Cox has requested N11 service from four different BOCs — Ameritech, BellSouth, Southwestern Bell and U S West — only BellSouth has been willing to provide the service, and then only because of significant pressure brought to bear by the Commission. The other BOCs, even after two years of service by BellSouth in Florida, Georgia and elsewhere, still refuse to provide N11 service. This refusal is particularly remarkable because, by all accounts, N11 service has been highly successful, far exceeding BellSouth's own projections for call volume and the number of subscribers. Any service that benefitted only the BOC and had comparable success, such as caller ID, would be widely duplicated and made available nearly ubiquitously. N11 service, which benefits enhanced services providers, has

^{13/} Abuses such as this would be made more difficult by structural separation because it would be harder for a BOC's regulated monopoly operations to coordinate their pricing arrangements with personnel in a separate subsidiary.

not.^{14/} This is significant evidence that the BOCs continue to use their control of essential facilities to handicap independent enhanced services providers. *See also* Exhibit 1 at 14-30.

Moreover, the BOCs use every mechanism at their disposal to block the progress of enhanced services providers. For example, and as documented at length by MCI, the telephone industry forum process provides an ideal mechanism for the BOCs to obstruct enhanced services providers' efforts to obtain new services they need. *See* Comments of MCI at Exhibit B. Cox's experience is consistent with MCI's. Cox's efforts to obtain a new local abbreviated dialing service, which began nearly three years ago, have yet to reach fruition because of the delays caused by the industry forum process.^{15/} It took more than two years to take the issue through a single industry forum, and then consideration by a second forum was required. This second forum has yet to complete its review and, it appears, is far from certain to support a service that is desirable to Cox and other enhanced services providers. The delays in the consideration of abbreviated dialing are all the more remarkable because several of the BOCs have insisted that abbreviated dialing, rather than N11 service, is the proper response to Cox's need for an inexpensive local pay-per-call service.^{16/}

^{14/} The BOC failure to offer N11 service is particularly telling because the Commission formally stated that there are no legal or regulatory impediments to offering N11 service and because the Industry Numbering Committee has rejected other proposed uses for N11 numbers, including using them for access to telecommunications relay service.

^{15/} Abbreviated dialing would provide a local pay-per-call service as an alternative to N11 service. *See* N11 Codes and Other Abbreviated Dialing Arrangements, *Notice of Proposed Rulemaking*, 7 FCC Rcd 3004 (1992).

^{16/} *See* Comments of GTE, IAD File No. 94-101, filed August 19, 1994, at 6-7.

BOCs also have demonstrated a pattern of abuse in other areas where they have monopoly control over essential facilities. The most obvious example is cellular interconnection, where the BOCs have imposed interconnection rate structures that are strikingly different from those they use for interconnection with other LECs. Cellular carriers pay rates far in excess of costs, not just for BOC termination of calls from cellular phones, but also for the privilege of terminating calls from the BOC landline networks to their own cellular systems. Despite the Commission's efforts to restrain such unreasonable BOC behavior, these sorts of arrangements continue to be the norm.^{17/} BOC interconnection practices directly affect the prices that cellular carriers can charge, and have made it effectively impossible for cellular carriers to compete with landline telephony, even in areas where such competition would make sense. The BOCs could not engage in this behavior unless they had control of essential facilities for the provision of cellular service. Thus, as with enhanced services, BOCs have market power and abuse it. Most recently, the Commission found that BOC tariffs implementing its virtual collocation requirements were unlawful because the rates under those tariffs discriminated against interconnectors.^{18/} As in enhanced services and cellular telephony, the BOCs have control over essential facilities for interconnection. Consistent with their actions in other markets, the BOCs abused their control over those facilities, in this case by setting the prices for access to those essential

^{17/} See, e.g., *The Need to Promote Competition and Efficient Use of Spectrum for Radio Common Carrier Services*, 2 FCC Rcd 2915 (1987) (stating requirement that LECs offer reasonable terms for interconnection). Recently, some BOCs have indicated that they intend to impose similar interconnection rate structures on PCS providers.

^{18/} *Local Exchange Carriers' Rates, Terms, and Conditions for Expanded Interconnection Through Virtual Collocation for Special Access and Switched Transport, Report and Order*, CC Docket No. 94-97, Phase I (rel. May 11, 1995).

facilities at discriminatory levels. *Id.* at ¶ 65-72. This conduct reinforces the BOCs' propensity to abuse their market power.

New abuses continue to emerge in other areas where BOCs are trying to compete with service providers, demonstrating that BOCs will continue to use their bottleneck unless the Commission takes decisive action. Most recently, Pacific Bell has begun a direct mail marketing campaign targeting telephone subscribers who use other carriers for intraLATA toll service in California. Pacific has chosen the customers targeted for this campaign based on its internal records of which customers are using other carriers.^{19/} Using this information to target its marketing efforts is a plain abuse of those customers' CPNI, and has obvious anticompetitive implications. Again, Pacific Bell, like the other BOCs, has access to this information only because it is the sole provider of local telephone service, with control over essential facilities that both its subscribers and competing interexchange carriers must use. With separate subsidiaries in place, this kind of abuse would be harder to accomplish and easier to identify. This is precisely the kind of abuse that cannot be addressed by nonstructural safeguards and can best be addressed by structural separation.^{20/}

^{19/} The California Public Utilities Commission has authorized intraLATA toll competition, but defaults all traffic to the local exchange carrier unless a customer affirmatively dials the carrier identification code for another carrier. Thus, Pacific Bell can target customers by determining which ones dialed calls using another carrier's carrier identification code. Moreover, this is the only way that Pacific Bell can identify specific subscribers who are using other carriers for intraLATA toll calls.

^{20/} This also demonstrates that the best "bright line" test for whether a service should be subject to structural separation is whether the service is a competitive service. Enhanced services are an example of competitive services, but there are many others. *See Comments of Cox Enterprises, Inc.*, CC Docket No. 94-1, filed April 17, 1995; *Petition of Cox*

The ultimate BOC rejoinder to these facts is to assert that none of these concerns are serious because the Commission has not been flooded with complaints about BOC behavior. *See, e.g.*, Comments of NYNEX at 3. In fact, Cox has complained about BOC actions, most notably in the MemoryCall case. Moreover, most of the scrutiny of BOC behavior has occurred at the state level, in such proceedings as the Georgia Commission's cross-subsidy proceeding, or through state audits of BOC behavior. This Commission does not normally involve itself in such state proceedings.

In addition, enhanced services providers do not expect complaints to the Commission to be effective. In the MemoryCall case, Cox and others reported BellSouth's blatant rules violations which had been confirmed in an adjudicatory proceeding before a competent regulatory authority, the Georgia Public Service Commission. Nevertheless, the Commission imposed no sanctions on BellSouth.^{20/} The absence of enforcement action on MemoryCall was all the more discouraging to enhanced services providers because the Commission specifically found that BellSouth had engaged in unhooking, a prohibited behavior, and still did not impose even a forfeiture. The inevitable effect of this laissez-faire attitude towards enforcement of the requirements of the *Computer III* rules was to discourage enhanced services providers from bringing their concerns to the Commission. Regardless of

^{20/} (...continued)

Enterprises, Inc. to Deny or to Condition License Grant, File No. 00002-CW-L-95, filed May 12, 1995.

^{21/} Cox specifically requested sanctions, including forfeitures and voiding BellSouth's Comparably Efficient Interconnection Plan for voice messaging services. *See* Comments of Cox Enterprises, BellSouth Corporation Petition for Emergency Relief and Declaratory Ruling Preempting Actions of the Georgia Public Service Commission, CC Docket No. 91-757, filed July 22, 1991.

the merits of any case, small, often financially strapped enhanced services providers are not likely to spend the money and time necessary to prosecute a complaint if there is little likelihood of success.

Given the failures of nonstructural safeguards, and the risks that are part and parcel of BOC involvement in enhanced services, the only proper course for the Commission to follow at this time is to reintroduce the *Computer II* regime of structural separation. Structural separation is not a cure-all, but it greatly limits the potential for BOC misbehavior. If the BOC is required to regard its enhanced services operations (and other competitive businesses) from arms' length, it is less likely to imagine that it can get away with discrimination or other anticompetitive behavior.

Structural separation also effectively eliminates abuses (such as unhooking) that depend directly on using a BOC's status as the monopoly carrier. If the same personnel are not used to market both competitive and monopoly services, it becomes much more difficult to use information obtained as a result of being the monopoly provider to gain a competitive advantage. In the case of MemoryCall, unhooking simply would not have occurred if the person selling call forwarding was not simultaneously selling voice messaging.

Consequently, structural separation is a vital element of any regime to protect against the anticompetitive behavior of the BOCs in the enhanced services marketplace. As the pattern of BOC abuses in other areas shows, structural separation also should be applied to other BOC forays into competitive businesses.

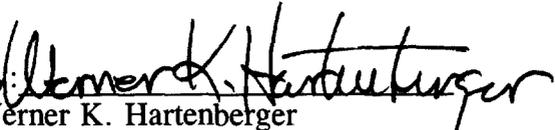
IV. Conclusion

The record shows that nonstructural separation has not worked. The BOCs have the opportunity to engage in anticompetitive behavior because they control essential facilities, and will continue to do so for the foreseeable future. The BOCs not only have the opportunity to act anticompetitively, but have done so from the time nonstructural safeguards first replaced structural separation. In light of the BOCs' abuse of their market power, the Commission should reinstitute the regime of structural separation. Without it, independent enhanced services providers across the country will continue to suffer from anticompetitive BOC behavior. to the detriment of the public interest.

For all these reasons, Cox respectfully requests that the Commission adopt rules that are consistent with the positions taken herein.

Respectfully submitted,

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May 19, 1995

EXHIBIT 1

In the
UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

UNITED STATES OF AMERICA)

Plaintiff,)

v.)

Civil No. 82-0192 (HHG)

WESTERN ELECTRIC COMPANY, INC.)
and AMERICAN TELEPHONE AND)
TELEGRAPH COMPANY,)

Defendants.)

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November 16, 1994