

assets held by the existing, regulated monopoly line of business."

Id. It was reasoned that

as long as a Regional Holding Company is engaged in both monopoly and competitive activities, it will have the incentive as well as the ability to "milk" the rate-of-return regulated monopoly affiliate to subsidize its competitive ventures and thereby to undersell its rivals in the markets where there is competition.

Id.

The antitrust court analyzed the specific forms that cross-subsidy might take, explaining that

[o]ne such practice would be the misallocation of common costs. To the extent that a Regional Holding Company used the same facilities, equipment, and personnel to serve both its regulated and its unregulated activities, it would have the ability to overallocate the costs assigned to the former in order to maximize the amount that would be passed onto the ratepayers (who have no choice but to pay). Not only would this improper assignment of costs burden the ratepayers; it would also enable the company profitably to charge less for its competitive products and services than do its rivals who enjoy no such subsidy.

Id., footnote omitted. One BOC proposal to be allowed to engage in the office equipment business was found to be particularly instructive of the cross subsidy problem.

Nynex's proposal for an office equipment venture illustrates this problem. Under that company's proposal, over 75 percent of the employees of its Business Information Systems Company (BISC) subsidiary will be located in a sales division that will also serve as the sales agent for its telephone exchange services. Under this arrangement, Nynex could easily manipulate the common costs of the BISC and Operating Companies so that the ratepayers would subsidize the office equipment business.

Id., f.n. 12. Other potential cross-subsidy abuses were noted.

A Regional Holding Company could also subsidize its competitive ventures by transferring assets from its regulated affiliates to its unregulated affiliates at less than their cost or below their market value. Such a practice would not only adversely affect the ratepayers who ultimately fund the research and development costs of the transferred assets, but it would, once again, impede fair and effective competition in the competitive market: this cross subsidization would give the company's unregulated enterprise an obvious and improper advantage over its competitors. Conversely, a regulated affiliate could "purchase" assets from the unregulated affiliate at a price above their market value and pass on the extra costs to the ratepayers.

Id., p. 854, footnotes omitted.

The antitrust court recognized the special potential for cross-subsidy abuse where a BOC is developing regulated assets in anticipation of their use in competitive markets.

An affiliate which develops an asset in its regulated market in anticipation of its potential use in the competitive market would have the incentive to add features or capabilities beyond those required for the provision of local telephone service in order to enhance the asset's market value. As a result, the ratepayers would subsidize the unregulated businesses by paying for "extras" which benefit only those businesses. Indeed, the ratepayers might bear the entire risk of researching and developing these assets because a Regional Holding Company would transfer from its regulated to its unregulated affiliate only those projects which turn out to be successful. Conversely, if the unregulated affiliate developed an asset and sold it to the Operating Company at the full cost of development, a cross subsidy would occur if the asset possessed features or capabilities beyond those required for the provision of the local service.

Id., f.n. 15.

(c) Exploitation of Marketing Advantages Stemming from the Local Exchange Monopoly

The BOCs have a unique position because they are the contact point for the telephone public. This position provides special opportunities for anticompetitive behavior, in the view of the antitrust court.

In addition to cross subsidization, a Regional Holding Company could impede competition in markets unrelated to telecommunications by exploiting the marketing advantages stemming from its local exchange monopoly. The company would have a unique advantage over its competitors if, for example, it "bundled" its regulated monopoly services with its competitive products or services, or if it advertised, and in fact provided to its customers in the competitive market, more timely telecommunications service, preferential access, or both.

Id., p. 854 The antitrust court believed that "[s]uch practices are especially likely to occur if the regulated and unregulated services are marketed by a single sales staff." Id., f.n. 17.

(3) Separate Subsidiary Requirement

Based on these and other analyses, the antitrust court imposed a separate subsidiary requirement, holding that

. . . [i]t is generally agreed that if the Regional Holding Companies conducted competitive activities through separate subsidiaries, intracompany transactions would become more apparent and thus cross subsidization and other anticompetitive conduct could more easily be prevented or rectified. . . . Accordingly, while, as a general matter, the Court is not eager to require the establishment of separate subsidiaries, that measure is warranted in this situation, and it will be required.

Id., pp. 870-71, footnote omitted.

In summary, the antitrust court concluded that the MFJ Decree was entered

to eliminate anticompetitive conditions in the telecommunications industry. . . . Under the decree, the Regional Holding Companies play an essential role--they are to provide efficient, economical, and, if possible, technologically advanced local telephone service. Their role is not to provide a source of ratepayer funds, credit, and other assets to finance competitive ventures, nor were they meant to be vast conglomerates in which telephone service is relegated to a subordinate place. . . .

The decree contemplates that AT&T, as a company now engaged in competitive business, could enter various new fields as it sees fit; it did not contemplate such entry for the Regional Holding Companies except on a limited and slowly-evolving basis. The reason is simple: these companies, unlike AT&T, retain what is in law and in reality a monopoly over a critical aspect of the nation's telephone service.

. . . [T]here is the overriding principle that the Court is obligated under the decree to make certain that the Regional Holding Companies do not impede competition in the non-telecommunications markets they seek to enter. . . .

The decree assumes, as does the Court, that the Regional Holding Companies may diversify on a significant scale only as they demonstrate . . . the improbability of their involvement in anticompetitive conduct based upon their monopoly status.

Id., pp. 874-875.

b. Western Electric (1987)

In 1987 the BOCs once again asked for waivers of all three line of business restrictions. In Western Electric (1987), the

antitrust court reexamined the opportunity and incentive of the BOCs to use their monopoly control over the local telephone network to defeat competition. The BOCs advanced their new request on the grounds that they no longer had monopoly control of the local telephone network, that there is no longer a Bell System because there are seven Regional Companies, and that, unlike at the time the MFJ Decree was entered, federal regulation is now sufficient to prevent anticompetitive abuses.

The antitrust court examined each of these contentions and found each wanting. The antitrust court concluded that the BOCs continued the same incentive and ability to use their monopoly control of the local service network to defeat competition as they had at the time of divestiture.⁶

⁶See, Western Electric (1987), pp. 565-566, wherein with respect to the BOCs continued opportunity and incentive for monopoly abuse in the information services market, the antitrust court concluded

there has been no change whatever in this respect since 1984, and no demonstration that now, unlike then, there is no substantial possibility that the Regional Companies could not, and indeed would not, use their monopoly power to impede competition in the information services market.

That the ability for abuse exists as does the incentive, of that there can be no doubt. As stated above, information services are fragile, and because of their fragility, time-sensitivity, and their negative reaction to even small degradations in transmission quality and speed, they are most easily subject to destruction by those who control their transmission. Among the more obvious means of anticompetitive action in this regard are increases in the rates for those switched and private line services upon which Regional

The antitrust court did carve out one area for waiver: Information services transmission. It did so based on a cost/benefit analysis, as follows.

After considering the subject in some detail and with great care, the Court has become convinced, first, that, if the authority of the Regional Companies is carefully limited, the risk of anticompetitive action by these companies, while not insignificant, is, on balance, outweighed by other considerations; second, that the broad scale and the reasonable cost criteria necessary for a successful [information services transmission] system can be met only by permitting the Regional Companies to provide the necessary infrastructure components for efficient videotex services on an integrated basis; and third, that it is probable that a well-run, adequately publicized system could perform a useful service, and that it might attract a sufficient number of subscribers, so that it could operate on an economically sound basis.

For the reasons stated, the Court will exempt from the information services restriction the transmission of information generated by others

Western Electric (1987), pp. 591 and 597 (bracketed material supplied). The antitrust court invited those BOCs interested to

Company competitors depend while lower rates are maintained for Regional Company network services; manipulation of the quality of access lines; impairment of the speed, quality, and efficiency of dedicated private lines used by competitors; development of new information services to take advantage of planned, but not yet publicly known, changes in the underlying network; and use for Regional Company benefit of the knowledge of the design, nature, geographic coverage, and traffic patterns of competitive information service providers.

submit specific proposals for entry into the information services transmission business.

c. VMS Waiver Order

In March, 1988, the antitrust court granted a waiver to the BOCs under Section VIII(C) of the MFJ Decree, thereby permitting them "to engage in voice storage and retrieval services, including voice messaging . . . services." VMS Waiver Order, p. 23.⁷

Over opposition from VMS competitors, the antitrust court granted the waiver based on a public policy cost/benefit analysis.⁸ The antitrust court concluded that a large VMS market exists that will not be effectively developed absent proper BOC participation.

⁷The VMS Waiver Order distinguishes between information services content and information services transmission. The VMS Waiver Order denied the BOCs' request for waiver of the line of business restriction on information services content. Authority to offer services like MemoryCallSM is covered by the waiver granted by the antitrust court to engage in information services transmission.

As earlier noted in f.n. 3 herein, a portion of the VMS Waiver Order was overturned on appeal. See, United States v. Western Electric Company, Inc., 900 F.2d 283, 305 (D.C. Cir. 1990) (" . . . the district court erred in applying section VIII(C) to the uncontested motion to remove the line-of-business restriction on information services. And because we are unable to say that the district court would have reached the same result had it applied the proper legal standard, we are constrained to remand the case for further consideration of the BOCs' motion to remove the information services ban in its entirety.") The portion overturned is the District Court's denial of the waiver request for information services content. It appears to the Commission that the waiver for information services transmission has remained (or will remain) intact.

⁸Those in opposition to the waiver argued principally two propositions: (1) Due to BOC monopoly of local switching services, "a competitive market for the delivery of [VMS] services to consumers is likely to develop only if the [BOCs] remain prohibited from providing them" and (2) the BOCs failed to show under Section VIII(C) of the MFJ Decree that there is a lack of competitive harm. VMS Waiver Order, pp. 18, 20, bracketed material supplied.

Recognizing the potential for BOC anti-competitive activity in the VMS market, the antitrust court nonetheless concluded that BOC entry into the VMS market was warranted.⁹

The antitrust court did not simply turn the BOCs loose in the information services arena to behave as they desire. In the context of granting waivers to enter the information services transmission arena, the antitrust court noted that

" . . . Regional Company behavior in the information services field will be closely monitored. Should it become apparent that the flexibility granted herein is being abused,

⁹Although finding the cost/benefit calculation a close call, the antitrust court concluded its cost/benefit analysis as follows:

In the Court's opinion, several factors tip the balance in favor of Regional Company entry.

First. In view of the fact that the core violations that were the subject of proof at the AT&T trial did not involve this market at all, there is less reason to believe that Regional Company involvement in this industry will lead to anti-competitive behavior than would, for example, its involvement in long distance, provision of information content, or manufacture of telecommunications products.

Second. Due to the subtle competitive pressure exerted on this market by the presence of service bureaus, answering services, and particularly home answering machines, the ability to control prices and otherwise to operate monopolistically will be substantially diluted.

Third. In view of the largely inconclusive and speculative nature of the competitive considerations, other public policy factors should also be considered. In this context, the public interest heavily tips the balance in favor of the requests of the Regional Companies.

The likelihood is that truly ubiquitous access to these services will not be had by the residential and small business consumer in the absence of Regional Company involvement. . . .

VMS Waiver Order, pp. 21-22, some material omitted.

that local bottlenecks are being used to discriminate against competitors in the information services market, or that the information services are being subsidized by funds contributed by the ratepayers, the Court will take appropriate enforcement action. In fact, if the behavior of a particular Regional Company proves particularly egregious, the Court will not hesitate to rescind that violator's authority to engage in information transmission services altogether."

VMS Waiver Order, p. 18, footnote omitted.

B. Federal Communications Commission Findings

The Federal Communications Commission (FCC) has rendered several post-divestiture decisions regarding the conditions under which it shall allow the BOCs to offer interstate enhanced services. By necessity, each of those decisions addresses the opportunity and incentive of the BOCs to behave anticompetitively, principally from the point of view of preventing discriminatory access to the local system and impermissible cross-subsidy. The relevant portion of these decisions are briefly discussed herein as a partial basis for the Commission's finding in this case that SBT has both the opportunity and incentive to behave anticompetitively in the ES market if its presence therein is uncontrolled.¹⁰

¹⁰The Commission takes notice of the following decisions rendered by the FCC, plus one Federal Appeals Court decision relating thereto.

1. Policy and Rules Concerning the Furnishing of Customer Premises Equipment, Enhanced Services and Cellular Communications Equipment by the Bell Operating Companies, CC Docket 83-115, Report and Order, 95 FCC 2d 1117 (1984), referred to hereafter as "BOC Separation Order," and FCC 84-252, 49 Fed.Reg. 26056 (1984), referred to hereafter as the "BOC Separation Reconsideration Order."

1. BOC Separation Order

Prior to divestiture, but after the entry of the MFJ and MFJ Decree, the FCC undertook to determine "whether the separate subsidiary requirements [previously adopted by the FCC for application to AT&T] are applicable to the [divested] Bell Operating Companies (BOCs) after they are divested by [AT&T] pursuant to the . . . (MFJ)."¹¹ The FCC ordered a separate subsidiary requirement for the BOC provision of enhanced services, stating

We have determined in this proceeding that structural separation should be imposed on the divested BOCs in their offering of . . . enhanced services We have found that the benefits, and the ability to detect and prevent improper cost-shifting and other anticompetitive practices, outweigh the costs imposed on the BOCs in forming and operating through separate organizations.

BOC Separation Order, p. 23 (some material omitted).¹²

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2. FCC 86-252, CC Docket No. 85-229, Report and Order, June 19, 1986, which is the FCC Order in Computer Inquiry III, referred to hereafter as "CI-III."
 3. People of the State of California v. Federal Communications Commission, 905 F.2d 1217 (9th Cir. 1990), referred to hereafter as "California v. FCC."

¹¹BOC Separation Order, pp. 1-2, (bracketed material supplied).

¹²In its BOC Separation Reconsideration Order, at p. 7, the FCC made a fuller description of the rationale it had adopted in its BOC Separation Order.

The order was based upon our findings that in light of current circumstances, a modified structural separation is necessary to ensure that BOC provision of . . . enhanced services does not lead to unreasonable rates for regulated services or diminished competition

The modified structural separation requirement for BOC provision of enhanced services adopted by the FCC prohibited, among other things, joint billing and joint marketing. The FCC found that these type of joint activities posed far too great an opportunity for anticompetitive behavior by the BOCs that might hinder competition in the ES market.¹³ Part of the rationale for

in the provision of . . . enhanced services. Absent modified structural separation it would be more difficult to control the regionals' ability to cross-subsidize competitive offerings or to discriminate in the interconnection of competitors' offerings. The benefit to consumers of controlling such potential conduct outweigh the cost of separation. We do recognize the possible inefficiencies inherent in structural separation. Structural separation may reduce possible economies of scale and scope. Public services might be provided more cheaply on an unseparated basis. However, until we have had the opportunity to measure the effect of structural separation on the regionals' provision of . . . enhanced services, structural separation is valuable to maximize the benefits and minimize the harms of the regionals' participation in these activities while we acquire experience which will enable us to adjust the structure under which this participation may be most beneficial.

¹³The FCC specifically found that

Joint operations may allow the BOCs to prosper for reasons other than (1) that they provide a price and quality combination for unregulated products and services that is more attractive than what other suppliers provide, or (2) that they have lower costs. The BOCs could employ their monopoly position in network services to promote their own . . . enhanced services. Those activities involve a danger of anticompetitive practices (e.g., delayed service connection for subscribers purchasing a rival's CPE) and cost shifting (e.g., over-allocation toward monopoly services of a sales

a prohibition of joint billing is potential abuse of CPNI.¹⁴ The FCC also concluded that the potential abuses from joint marketing could only be adequately controlled by the imposition of some structural separation requirement.¹⁵

representative marketing both monopoly services and CPE).

BOC Separation Order, p. 15.

¹⁴Specifically, the FCC noted that

the customer data which is needed properly to compute and send bills include sensitive customer proprietary information which should not be accessed by personnel providing unregulated products and services.

BOC Separation Order, p. 17.

¹⁵See, BOC Separation Order, p. 18, wherein the FCC states

The BOCs . . . argue that there should be no prohibition of joint marketing, subject to appropriate accounting controls. The BOCs argue that, due to their diminished market power after divestiture, they should not be constrained with the joint marketing prohibition. They argue that customers should be able to obtain at one time both network services and CPE. We must reject these arguments The BOCs have failed to identify convincing reasons why accounting controls effectively can be employed to segregate competitive and regulated costs. As stated previously, reliance on accounting systems alone to allocate common costs is often unsatisfactory. By requiring the total separation of marketing forces, including advertising costs in the case of unregulated products and services, we can more effectively ensure that ratepayers do not bear costs which should be born by the competitive sector.

2. Computer Inquiry III and the Ninth Circuit Reversal Thereof

In the BOC Separation Order, the FCC rejected the argument that divestiture had reduced the need for structural separation. In CI-III, the FCC completely reversed its course and relieved the BOCs of structural separation requirements. Whereas in the BOC Separation Order the FCC had concluded that structural separation was a necessity,¹⁶ in CI-III the FCC reasoned that divestiture and increased competition in the enhanced services market had changed the cost/benefit of structural separation. In the FCC's new view, structural separation no longer could be viewed as the principal safeguard against monopoly abuse. The FCC therefore adopted new regulations permitting the BOCs to integrate their basic and enhanced services upon implementation of a plan of non-structural safeguards to be approved by the FCC.

In place of its former structural separation policy, the FCC substituted two non-structural safeguards. One safeguard is the development of cost allocation methods to minimize the ability of

¹⁶The BOC Separation Order, 95 FCC 2d at 1135-1136, states as follows:

Anticompetitive conduct directed against enhanced service providers can be controlled by structural separation in a manner that may not be effective with accounting separation alone. If a BOCs separate entity is required to obtain access to the network in the same fashion as would a competing supplier, the provision of inferior access to a BOC rival would be much easier to detect. In addition, the design of the network to favor the BOC's own enhanced services would be easier to detect since separate structure could help to reveal any illegal information transfers.

the BOCs to shift costs from their unregulated to regulated activities. The second safeguard is the adoption of regulations designed to prevent the BOCs from using their monopoly control of the local telephone network to discriminate against competing providers of enhanced services. This latter control embraces an open network architecture ("ONA") policy, a requirement that each BOC notify its competitors in the enhanced services industry of changes in the network that would effect the provision of enhanced services on a timely basis, and a requirement that each BOC provide its competitors with information about customer use of the telephone network.

In California v. FCC, the Ninth Circuit overturned the FCC's Order in CI-III, finding that the record before the FCC supplied an inadequate factual basis upon which the FCC could rationally find that the individual costs and benefits of structural separation had been materially affected by changed circumstances since the BOC Separation Order. In essence, the California v. FCC Court invalidated the FCC's new cost/benefit analysis because the record revealed no basis for concluding that risks to ratepayers and competitors from improper cross-subsidy activity was in any way lessened by events in the telecommunications world since the FCC issued its BOC Separation Order.¹⁷

¹⁷See, California v. FCC, pp. 1237-1238, wherein the Court concludes:

. . . [T]he . . . purported "changes" in the telecommunications market identified by the FCC lend no support to its conclusion that the risk of cross-subsidization by the BOCs has

C. The Evidence Presented in this Case

The Commission has conducted its own hearing regarding SBT's provision of MemoryCall[®] service.¹⁸ The evidence presented to the Commission in this docket demonstrates SBT's clear opportunity and incentive to behave anticompetitively in the VMS market with respect to network access, marketing practices and pricing (including cross-subsidy matters). The record shows actual

decreased. . . . [A]s we have already pointed out, the Commission's consistent position before *Computer III* has always been that monitoring and enforcement problems make cost-accounting regulations an ineffective tool in detecting cost-shifting. Should the BOCs be free to integrate their basic and enhanced operations, nothing in the record suggests that the FCC (or state regulators) will have any less difficulty than before in determining whether costs have been misallocated. Indeed, the only justification the Commission has offered for its heavy reliance on cost-accounting regulations in *Computer III* is that the risk of cost-shifting has been reduced by the four so-called "market changes." Because, as we have discussed, the record fails to show that these purported market changes have demonstrably reduced either cost-shifting opportunities or incentives, the Commission's justification for its new policy change lacks record support. In sum, the Commission has failed to explain satisfactorily how changed circumstances justify its substitution of nonstructural for structural safeguards to protect telephone ratepayers and enhanced services competitors from cross-subsidization.

¹⁸Prior to the hearing conducted in this Docket, SBT's request to provide MemoryCall[®] service on a trial basis was the subject of Docket No. 3896-U. As part of its record in this case, the Commission incorporates its record from Docket No. 3896-U. That record consists principally of prefiled testimony and exhibits of several parties, the transcript of the hearings conducted in that case, the transcript of relevant administrative sessions and the Commission's Orders entered in that case.

anticompetitive behavior with respect to discriminatory access to the local network and marketing practices. Serious issues of actual cross-subsidy and predatory pricing are at least raised by the record. They must be pursued to their conclusion before the Commission can definitely conclude whether there is actual anticompetitive behavior in the area of predatory pricing and cross-subsidy.

1. Discriminatory Access to the Local Network Through Monopoly Control of the Local Network Bottleneck

The record in this case demonstrates at least three significant issues of discriminatory, anti-competitive behavior by SBT in the VMS market regarding access to the local network. In the Commission's view, the evidence on each issue shows at a minimum that SBT has both the opportunity and incentive to use its monopoly control of the local network to defeat competition in the VMS market through its influence on whether, how and when competitors can access the local network. Further, the evidence shows that SBT has not hesitated to take advantage of this opportunity, has used its monopoly control over the local network to gain an anticompetitive advantage in its offering of MemoryCallSM service and will continue to do so if left unchecked by the Commission.

First, SBT's trial offer of MemoryCallSM was undertaken in a manner that, due to technical barriers, meant that competitors to MemoryCallSM could not use the local network, except to provide a service significantly inferior to MemoryCallSM. See, Testimony of

Burgess, Transcript, p. 180, l. 2 to p. 182, l. 3 and Section III.C.1.a below. Second, SBT refuses to allow MemoryCallSM competitors to co-locate their VMS equipment in SBT's central offices, thereby perpetuating a distinction in product quality and price that disadvantages competitors to MemoryCallSM. See, Testimony of Burgess, Transcript, p. 71 and Section III.C.1.b below. Third, the evidence suggests the possibility that SBT has manipulated development of the local network, especially the timing of unbundling certain network features necessary for MemoryCallSM to be offered at all, in order to maximize its competitive advantage with respect to its initial offering of MemoryCallSM. See, Section III.C.1.c below.

a. Technical Barrier Due to 1AESS Switches

The voice messaging services offered in competition to MemoryCallSM work on Direct Inward Dial (DID) architecture. See, Testimony of Burgess, Transcript, p. 180, l. 8-10. MemoryCallSM is designed on a more advanced architecture that avoids the technical barrier. See, Testimony of Saner, Transcript, p. 287, l. 2 to l. 8, wherein it is noted that SBT's MemoryCallSM service, because of its special access to SBT engineering, recognized the 1AESS switch technical barrier and designed both the network and its service to avoid the 1AESS switch technical barrier. The functional difference is critical, because in an area served by a 1AESS switch that has not been upgraded, the voice message services that can be offered in competition to MemoryCallSM are grossly inferior in quality and availability. See, Testimony of Burgess, Transcript at

p. 68, l. 6 to p. 71, l. 2; Testimony of Dunn, Transcript, p. 340; Testimony of Saner, Transcript, p. 283, l. 10 to p. 286, l. 25. See also, Testimony of public witness H. Colby, a MemoryCallSM competitor, Transcript, p. 40, l. 3-to p. 42, l. 3.

SBT asked that its trial of MemoryCallSM take place in the Atlanta area. As it turns out, at the time of the trial, 48 central offices in Georgia had LAESS switches, not upgraded. Thirty-three (33) of them were located in the Atlanta area. However, the vast majority, perhaps as much as 98%, of the TAS Bureaus offering services in competition to MemoryCallSM are located in the Atlanta area. See, Testimony of Burgess, Transcript, pp. 69-70. Stated another way, as of March, 1991, almost a year after the trial of MemoryCallSM started, 29 out of 39 of the central offices where MemoryCallSM is being offered were LAESS switch central offices. See, Testimony of Saner, Transcript, p. 285, l. 1 to l. 14. The result was that, given the location chosen to trial offer MemoryCallSM, during the trial period MemoryCallSM was competing against voice message services that, because of technical network barriers, were grossly inferior.

Only when the LAESS switch problem was brought to the Commission's attention by the TAS Bureaus did SBT begin a program to upgrade the Atlanta area switches. However, at best, SBT expects that program to be completed (for all but one central office) in mid-June, 1991. See, Testimony of Burgess, Transcript, p. 184, l. 4 to l. 17, wherein SBT suggests through its cross-examination question, but Burgess cannot and does not confirm, that

the conversions will be complete by this date; but see also, Testimony of Saner, Transcript, p. 288, l. 15 to p. 289, l. 4, noting that SBT has informed him that the central office update will not be completed until June, 1992, and further noting that the current schedule for updating is not being met. The remaining central office location will not be upgraded until October, 1991 at the earliest. Thus, for at least the first 15 months of SBT's initial entry into the VMS market with MemoryCall[®], the technical barriers of the network created an insurmountable advantage in SBT's favor regarding the quality of the voice messaging services available as competition to MemoryCall[®]. Absent the technical barrier due to the LAESS switch, the voice messaging services competing with MemoryCall[®] compare much more favorably with respect to quality and availability of the voice mail service.

b. Co-Location

SBT places its voice mail equipment (including hardware) within its central offices, thereby enabling SBT to provide a higher quality voice mail service. This action also reduces SBT's overall cost of providing MemoryCall[®] because it eliminates the need for a local transport link to provide the service. See, Testimony of Burgess, Transcript, p. 71, l. 4 to l. 23; p. 185, l. 13 to l. 23.

At present, TAS Bureaus must place their voice mail equipment on their business premises. This reduces the quality of voice mail and necessitates paying SBT for a local transport link to the central office serving their customer. Id.

The TAS Bureaus have requested the opportunity to locate their voice mail equipment within SBT's central offices, that is, they have requested the opportunity to co-locate their voice mail equipment. See, Testimony of Burgess, Transcript, p. 184, l. 24 to p. 185, l. 7.

SBT has received and denied such requests. Id. Since the time SBT began offering MemoryCallSM, it has been their policy not to co-locate other providers' equipment in their central offices. If SBT granted such requests, however, the voice mail quality distinction would be eliminated and TAS Bureaus would not incur the extra cost of a local transport link. Id.

SBT concedes that co-location is an advantage derived from its monopoly position. See, Testimony of Daniel, Transcript, p. 503. SBT also acknowledges that it refuses to allow co-location. Id., p. 502.

c. Timing of Unbundling Call Forwarding Features

The evidence in this Docket indicates that the network features necessary for the TAS Bureaus to offer their VMS options on a basis competitive in quality and availability to SBT's current offering of MemoryCallSM service, has existed since at least the early 1980s.¹⁹ The record is also clear that SBT chose not to

¹⁹See, Testimony of Saner, Transcript, p. 262, l. 13 to p. 263, l. 20, which establishes the following:

[SBT] would like you to believe, the Commission, that they are the only ones that can provide voice messaging to the mass market and that is simply not the case. The market which they have referred to is being unserved -- has been unserved because of the refusal to

unbundle the features and offer them on the network on an unbundled basis until SBT was prepared to offer MemoryCallSM service. See, Testimony of Daniel, Transcript, pp. 529 and 535. See also,

offer call forwarding no answer and call forwarding busy line in the past. As far back as 1982, our industry has asked for these features. In 1985, I began a petition with Southern Bell asking for these features myself. What's more alarming than anything is these features have been available since 1982, almost nine years and they're being offered today because MemoryCallSM is getting into the business, but they're not being offered on an equal access basis.

Without call forwarding no answer and call forwarding busy line, the residential market, and to a certain extent the small business market, which is what they're referring to as the unserved market out there, has been unmarketable. Residential users must have an automatic means of forwarding their calls when they're on the phone or out of the office or out of their home. They will not use call forwarding variable each time they have to go out to the store, go out in the yard or they want to walk their dog. They simply do not have the discipline and they should not have to have that discipline. These special calling features should have been available nine years ago.

Had this voice messaging industry today had those features, there would have been at least 89 voice messaging companies in Atlanta offering residential answering services. The price the residential marketplace would have been charged would have been market driven by the competition and the price would have been fair. There would not have been a pent-up demand and the unserved market would have been served a long time ago.

See also, Testimony of Saner, Transcript, p. 276, l. 10 to l. 19, indicating that at the outset of its business Message World was very successful in attracting residential customers for its voice mail service, but could not keep them because at that time (around 1986) SBT had not made Call Forwarding - Don't Answer and Call Forwarding - Busy Line available to the VMS market.

Testimony of Saner, Transcript, p. 283, l. 10 to p. 284, l. 17 and p. 316 to p. 317, l. 22.

The Commission finds this evidence disturbing enough because of its indication that SBT may have improperly impeded development of the VMS market for almost a decade. The evidence is even more disturbing, however, because of what it may well signal with respect to SBT's purported commitment to a proper Open Network Architecture program.²⁰

²⁰Cox Enterprises, Inc. raises this important point in its post-hearing brief, p. 12, f.n. 5, as follows:

Under the concept of Open Network Architecture ("ONA"), new features, such as CF-NA and CF-BL, should be made available on a cost basis to whoever needs them as soon as they are technically feasible. As the FCC explains:

We consider Open Network Architecture to be the overall design of a carrier's basic network facilities and services to permit all uses of the basic network, including the enhanced service operations of the carrier and its competitors, to interconnect to specific basic network functions and interfaces on an unbundled and "equal access" basis. A carrier providing enhanced services through Open Network Architecture must unbundle key components of its basic services and offer them to the public under tariff, regardless of whether its enhanced services utilize the unbundled components.

- Third Computer Inquiry, Report and Order, 104 F.C.C.2d 958, 1019 (1986) ("Computer III") (emphasis added).

The FCC felt so strongly about ONA that it stated: "We consider the development of Open Network Architecture the focal point of this proceeding. We conclude that the

In summary, the Commission finds that the record in this case demonstrates not only that SBT has the opportunity and incentive to use its monopoly control of the local bottleneck to discriminate against competitors regarding access to the local network, it has in fact done so with respect to access to the local network by competitors of MemoryCallSM service.

2. Marketing Abuses and Other Unfair Use of Monopoly Position

The record in this case shows that SBT engaged in at least the following marketing and other promotional practices with respect to MemoryCallSM during the trial period.

1. SBT actively sold MemoryCallSM to TAS Bureau customers who called SBT to order call forwarding and other custom calling features in preparation for signing on with a TAS Bureau.
2. SBT's marketing included repair service attendants selling MemoryCallSM to TAS Bureau customers.
3. SBT bills for MemoryCallSM by using its monopoly billing system.

implementation . . . of Open Network Architecture plans, approved by this Commission, is a precondition for complete elimination of the structural rules for these carriers." Computer III, 104 F.C.C.2d at 1020.

As this proceeding has made clear, Southern Bell has a view of ONA all its own. According to Southern Bell, Southern Bell should make new services available only when it plans to offer an enhanced service that can use them. Daniel at 533 ("ONA says when we use those services ourselves, we are required to make them available"). This is nothing less than an acknowledgement by Southern Bell that it views its own outside business ventures as its primary franchise motivation, not the service demands of its captive telephone ratepayers.

4. SBT uses its monopoly billing system to promote the sale the MemoryCall[®] with bill stuffers.
5. SBT refuses to allow its VMS competitors to use its monopoly billing system to either bill VMS or promote VMS.
6. SBT uses its Customer Proprietary Network Information (CPNI) to identify prospective MemoryCall[®] subscribers, while TAS Bureaus are denied real time equal access to SBT's CPNI.

See, Testimony of Burgess, Transcript, pp. 66-67, listing the marketing practices noted above and also describing the cross-subsidy concerns raised by these practices. See also, Testimony of P. Williford, public witness and competitor of MemoryCall[®], Transcript, p. 38, l. 11-23; Testimony of Saner, Transcript, p. 291, l. 21 to p. 296, l. 25, establishing points 1, 2, 3, 4, 5 and 6 above, plus other marketing and operational practices of questionable fairness. These practices are not denied by SBT. See, Testimony of Daniel, Transcript, pp. 538-41, 546-47, 555.

In the Commission's view, these practices constitute marketing and other promotional activities that unfairly trade on SBT's monopoly position to the immediate and irreparable detriment of a competitive VMS market.²¹ Indeed, SBT admits the validity of the concerns raised by the Staff of the Commission (See, Testimony of Daniel, Transcript, pp. 444-45) and generally concedes the validity of the Commission's concerns to protect independent competitors and

²¹To the extent that it is not self-evident that SBT's practices threaten the development of a competitive VMS market, See, Testimony of A. Carson, a public witness and competitor of MemoryCall[®], testifying that from October, 1990 (when SBT began its concerted marketing push for MemoryCall[®]) her business lost approximately \$100,000.00 in annual gross revenues, the majority attributable to MemoryCall[®].

fair competition in the VMS market (See, Comments of SBT, Transcript, p. 7, l. 9 to l. 12). Of particular concern to the Commission is the fact that SBT had earlier encountered many of the same problems in Florida when it introduced MemoryCallSM service, yet apparently SBT took no steps to curb such practices here until the Commission instigated its investigation into SBT's trial offer of MemoryCallSM in Georgia.²²

Under the most favorable construction of SBT's evidence on these points, SBT raises two "defenses" to its actions. First, SBT claims to have corrected those abuses that deserve correction. Second, SBT asserts that certain marketing advantages it enjoys are properly retained by it because they merely represent "economies of scale" of which SBT should be allowed to take advantage.

Neither the evidence nor sound regulatory policy supports either of these two defenses. Rather, the Commission finds, as suggested by its Staff, that SBT's practices "raise questions regarding whether SBT and [its VMS competitors] are operating on anything like an equal footing," thereby raising "issues of fundamental fairness and competitive equality." See, Testimony of Burgess, Transcript, p. 67, bracketed material supplied.

MemoryCallSM enjoys a favored status because of its connection to SBT's monopoly control of the local exchange network. A business or residential customer must initially contact SBT to

²²See, Testimony of Daniel, pp. 548-49, wherein SBT admits that despite similar problems associated with SBT's earlier Florida offering of MemoryCallSM, no prior preventative steps were taken to avoid such practices here, and where SBT acknowledges that this behavior was an error on SBT's part.