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Before the
FEDERAL COMMUNICATIONS COMMISSION
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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

In the Matter of	
Computer III Further Remand Proceedings: Bell Operating Company Provision of Enhanced Services	CC Docket No. 95-20
1998 Biennial Regulatory Review -- Review of Computer III and ONA Safeguards and Requirements	CC Docket No. 98-10

Comments of the Information Technology Association of America

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SUMMARY

In the Notice, the Commission has requested comment on four issues of concern to ITAA: (1) the effect of the Telecommunications Act on the Commission's "basic/enhanced dichotomy"; (2) the appropriate safeguards to prevent the BOCs from discriminating against non-affiliated ISPs; (3) the continued need for the Commission's Open Network Architecture ("ONA") regime; and (4) the desirability of granting ISPs "Section 251-type rights."

The Basic/Enhanced Dichotomy. The Commission's basic/enhanced dichotomy, adopted in Computer II, has fostered a robust, competitive information services industry. There is no evidence, in either the text or legislative history of the Telecommunications Act, that Congress intended to shift the boundary between regulated basic services and non-regulated enhanced services. To the contrary, the evidence indicates that -- while the Act uses the terms "telecommunications" and "information" services -- Congress intended to codify the Commission's regulatory dichotomy. The Commission, moreover, has already determined that Congress intended all enhanced services to be included in the statutory term information service. Because there is no overlap between information services and telecommunications services, the Commission should find that only services previously regulated as basic are included in the term telecommunications service. In particular, the Commission should not treat protocol conversion, which has long been treated as an non-regulated enhanced service, as basic telecommunications.

Safeguards. The Commission's request for comment on whether to "reimpose" structural separation on BOC provision of intra-LATA information services reflects a misreading of the Ninth Circuit's decision in California III. In California III, the court found that the Commission had failed to justify its reliance on nonstructural safeguards to prevent BOC access discrimination. The court therefore vacated this portion of the Commission's Computer III

Remand Order. The effect of this decision was to return the Commission to the Computer II structural separation regime. The relevant question, therefore, is whether current conditions justify the Commission's tentative decision to lift structural separation for BOC intra-LATA information services.

Current market conditions do not justify lifting structural separation. While the Telecommunications Act has the potential to foster local competition in the future, ISPs remain almost totally dependent on the BOCs for the transport services they need to deliver services to their customers today. The BOCs, therefore, retain the ability to discriminate against non-affiliated ISPs. Until local competition has taken root, the Commission should require the BOCs to provide all information services -- both inter-LATA and intra-LATA -- through a structurally separate affiliate that complies with the requirements of Section 272 of the Act. As Congress recognized in the Telecommunications Act, structural separation is the most effective, and least intrusive, means of preventing anticompetitive conduct by the BOCs. If the Commission does decide to permit the BOCs to provide information services on an integrated basis, however, it should retain the CEI requirement.

ONA. ONA is a failure. Because ONA offers too few features at too high a price, it has never been, is not now, and is unlikely ever to become an effective means of either deterring BOC discrimination or promoting innovative use of the local network. Consistent with Congress' direction that the Commission eliminate unnecessary regulatory requirements, the Commission should abolish ONA. The Commission also should replace the existing ONA reporting requirements with narrowly tailored reporting requirements that will provide useful information regarding BOC provisioning while avoiding unnecessary regulatory burdens.

Section 251 Rights. The Commission should not give ISPs "carrier-like" Section 251 rights. Rather, the best means to protect ISPs from anticompetitive abuse is to facilitate competition in the local data transport market. The Commission therefore should ensure that its rules promote a wide range of options that enable ISPs to obtain data traffic from their customers. This includes:

- Preserving ISPs' right to purchase State-tariffed circuit switched business lines from the incumbent LECs on the same terms as other business users.
- Ensuring that ILEC's provide xDSL transport service to their information services affiliate, and to non-affiliated ISPs, on a non-discriminatory basis.
- Facilitating entry by Competitive Local Exchange Carriers, which can provide end-to-end services between ISPs and their subscribers.
- Modifying the Expanded Interconnection rules to allow Data-oriented Competitive Access Providers (D-CAPs) to obtain aggregated data traffic, at cost-based prices, from the ILECs at the serving central office.
- Modifying the Expanded Interconnection rules to give ISPs the same rights as D-CAPs to obtain aggregate data traffic from ILECs for transport over the ISPs' packet networks.

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Comments of the Information Technology Association of America

The Information Technology Association of America ("ITAA") submits these comments in response to the Further Notice of Proposed Rulemaking ("Notice") issued by the Commission in the above-captioned proceeding.[1] In the Notice, the Commission has requested comment regarding four issues of concern to ITAA and its members: (1) the effect of the Telecommunications Act on the "basic/enhanced dichotomy" created by the Commission in Computer II; (2) the most appropriate safeguards to prevent the Bell Operating Companies ("BOCs") from discriminating against non-affiliated information service providers; (3) the continued need for the Commission's Open Network Architecture regime and its attendant

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1 See Computer III Further Remand Proceedings: Bell Operating Company Provision of Enhanced Services; 1998 Biennial Regulatory Review -- Review of Computer III and ONA Safeguards and Requirements, CC Docket Nos. 95-20, 98-10, FCC 98-8 (rel. Jan. 30, 1998) ("Notice").

reporting requirements; and (4) the desirability of granting Information Service Providers ("ISPs") "Section 251-type rights" to obtain Unbundled Network Elements ("UNEs") from the incumbent local exchange carriers ("ILECs")

As discussed below, ITAA believes that:

- Although the Telecommunications Act uses the terms "telecommunications" and "information services," rather than "basic" and "enhanced," Congress intended to codify the Commission's Computer II regulatory dichotomy. The Commission should incorporate the statutory terms in its Rules, while preserving the three descriptive clauses in Rule 64.702(a), which provide clarity as to the offerings that are not subject to common carrier regulation.

- Until effective local competition has taken root, the Commission should require that the BOCs provide all information services -- both inter-LATA and intra-LATA -- through a separate affiliate that complies with the requirements of Section 272 of the Communications Act.

- The Commission should eliminate ONA, which has proven to be a complete failure. The Commission also should replace the existing ONA reporting requirements with narrowly tailored reporting requirements that will provide useful information regarding BOC provisioning while avoiding unnecessary regulatory burdens.

- The Commission should not extend "Section 251-type rights" to ISPs. Instead, the Commission should modify its rules to promote competitive deployment of local data transport services by Incumbent Local Exchange Carriers ("ILECs"), Competitive Local Exchange Carriers ("CLECs"), Competitive Access Providers ("CAPS"), and ISPs themselves.

INTRODUCTION

ITAA is the principal trade association of the computer software and services industry. Together with its twenty affiliated regional technology councils, ITAA represents more than 11,000 companies located throughout the United States. ITAA's members provide the public with a wide variety of information products, software, and services. Among the most

significant of these are network-based enhanced services, which the Telecommunications Act refers to as information services.

ITAA represents a significant number of information service providers -- ranging from small locally based enterprises to major multinational corporations. ITAA has actively participated in each of the Commission's three Computer Inquiries, as well as other Commission proceedings that have addressed ONA, CEI, network disclosure, customer proprietary network information, and other competitive safeguards. Because ITAA's member companies remain dependent on the BOCs for the basic transport services they need to deliver information services to their customers, ITAA's members are vulnerable to BOC access discrimination. ITAA therefore continues to have a strong interest in the safeguards at issue in this proceeding and the maintenance of the Commission's pro-competitive policies with respect to information services.

I. THE COMMISSION SHOULD PRESERVE THE BASIC/ENHANCED DICHOTOMY ESTABLISHED IN COMPUTER II, WHILE ADOPTING THE TERMINOLOGY USED IN THE TELECOMMUNICATIONS ACT

In Computer II, the Commission established a "bright line" of demarcation between regulated basic services and non-regulated enhanced services. In the Telecommunications Act of 1996, however, Congress used the terms "telecommunications" and "information services," which were found in the Modification of Final Judgement ("MFJ"), rather than the terminology used in the Commission's Rules. The Notice asks whether the Commission's "definition of 'basic service' and the Telecommunications Act's definition of 'telecommunications service' should be interpreted to extend to the same functions."[2] The Commission should

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[2] Id. at ¶ 41.

-- and, indeed, must -- do so. In order to promote administrative certainty, the Commission should incorporate the statutory terms in its Rules, while preserving the three descriptive clauses in Rule 64.702(a), which provide clarity as to the offerings that are not subject to common carrier regulation.

A. Congress Codified the Commission's Regulatory Dichotomy in the Telecommunications Act of 1996

In the eighteen years since the Commission established the basic/enhanced dichotomy, it has been enormously successful. The dichotomy is clear-cut and easily applied, thereby promoting administrative efficiency and business certainty. At the same time, by limiting regulation to underlying transport services, the agency's regulatory regime has fostered a vibrant, robustly competitive, and growing information technology industry.

In adopting the Telecommunications Act, Congress plainly was aware of the Commission's Computer II regime. There is no evidence, either in the words of the statute or in the legislative history, that Congress intended to alter the regulatory dichotomy created by the Commission. To the contrary, the available evidence indicates that Congress intended to codify the Commission's long-standing regulatory regime.

The Telecommunications Act's definitions of both telecommunications and information services were taken, in all relevant respects, from the Modification of Final Judgement.[3] The definitions contained in the MFJ, in turn, were taken from an earlier Senate

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[3] Compare 47 U.S.C §§ 153(20) & 153(43) with United States v. AT&T, 552 F. Supp. 131, 229 (D.D.C. 1982) (Sections IV.J and IV.O of the MFJ). The House bill included definitions of both telecommunications and information services that were taken, almost verbatim, from "the definitions contained in the Modification of Final Judgement." H. Rpt. 104-204, 104th Cong. 1st Sess., 125. While Congress adopted the House (continued...)

bill,[4] which was introduced in order to codify the Commission's Computer II basic/enhanced dichotomy.[5] Significantly, throughout the period during which the MFJ was in effect, the FCC and the Bell Operating Companies repeatedly took the position that the MFJ's telecommunications/information services dichotomy tracked the FCC's basic/enhanced dichotomy.[6] Thus, there is every reason to conclude that Congress intended to enact into law the established regulatory boundary.[7]

The Commission, moreover, has already determined that Congress intended "all services the Commission has previously considered to be 'enhanced'" to be included in the "the

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[3](...continued)
definition of information services, the Act uses the Senate's definition of telecommunications. Although there are some differences in the definition of telecommunications in the two bills, the Senate bill does not fundamentally depart from the MFJ-based language adopted by the House. Compare H.R. 1555 § 501(a)(48) with S. 652 § 8(b).

[4] See S. 898 § 103(19), 97th Cong., 1st Sess. (1981).

[5] See S. Rep. No. 97-170, 97th Cong., 1st Sess., at 4 & 24 (1981).

[6] See, e.g., Amendment of Part 69 of the Commission's Rules Relating to Enhanced Service Providers, 3 FCC Rcd 2631, 2633 (1988) (Computer I and MFJ categories are "substantially equivalent"); Reply of Bell Operating Companies in Support of Their Motion for a Limited Waiver of the Interexchange Restriction to Permit Them to Provide Information Services Across LATA Boundaries (Feb. 2, 1994) (Information and enhanced service "are, as a general matter, the same."); see also U.S. Department of Justice, The Geodesic Network 6.1 n.1 (1987) ("The MFJ's lines roughly track the FCC's Computer II lines between 'basic' and 'enhanced' services.").

[7] The legislative history is silent as to why Congress chose to use the MFJ definitions, rather than those contained in the Commission's Rules. The most reasonable inference is that Congress did so for administrative simplicity, because a major purpose of the Telecommunications Act was to transfer enforcement of the MFJ restrictions to the Commission.

statutory term 'information service.'"[8] Because there is no overlap between information services and telecommunications services,[9] then only those services currently classified as basic services fall within the definition of the term telecommunications service.

ITAA is aware that, in the view of some observers, the phrase telecommunications is intended to encompass offerings -- such as protocol conversion -- that do not fall within the definition of a basic service.[10] Such an expansive reading of the definition of telecommunications could subject currently non-regulated information service providers to common carrier regulation. As the Commission has recognized, the "[e]xpansion of regulation to cover or threaten to cover . . . vendors that have not been regulated can not be sustained in the absence of an overriding statutory purpose."[11] There simply is no such purpose in the

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8 Implementation of the Non-Accounting Safeguards of Sections 271 and 272 of the Communications Act of 1934, 11 FCC Rcd 21905, 21955-56 (1996).

9 In adopting the term "telecommunications," the Congress accepted the Senate's definition of this word. See H.R. Conf. Rep. No. 458, 104th Cong., 2d Sess. 116 (1996). The report accompanying the Senate bill explains that the definition of the term telecommunications "excludes those services, such as interactive games or shopping services and other services involving interaction with stored information, that are defined as information services." S. Rep. No. 23, 104th Cong., 1st Sess. 17-18 (1995); see also Letter from Harris Miller, President, Information Technology Association of America, to William Kennard, Chairman, Federal Communications Commission, February 27, 1998, filed in Docket 96-45, at 3-6 ("ITAA Letter") (demonstrating that information services do not contain a "telecommunications component").

10 See, e.g., Letter from Senator Ted Stevens and Senator Conrad Burns to Hon. William Kennard, submitted in CC Docket No. 96-45, at 4-5 (Jan. 26, 1998).

11 Amendment of Section 64.702 of the Commission's Rules and Regulations (Second Computer Inquiry), 77 F.C.C.2d 384, 434 (1980) ("Computer II Final Order"), on recon., 84 F.C.C.2d 50, 53 (1980), further recon., 88 F.C.C.2d 512 (1981), aff'd sub nom. Computer & Communications Indus. Ass'n v. FCC, 693 F.2d 198, 205 n.18 (D.C. Cir. 1982), cert. denied, 461 U.S. 938 (1983).

Telecommunications Act.[12] To the contrary, Congress has declared that "[i]t is the policy of the United States . . . to preserve the vibrant and competitive free market that presently exists for the Internet and other interactive computer services, unfettered by Federal or State regulation."[13]

Consistent with this deregulatory intent, the Commission should not define the term telecommunications in a manner that could result in the regulation of currently non-regulated services. Instead, the Commission should find that the term telecommunications services includes only those service previously regulated as basic services under Title II of the Communications Act.

B. The Commission Should Adopt the Terminology Used in the Telecommunications Act, While Retaining the Descriptive Clauses Found in Section 64.702(a)

ITAA supports the proposal, advanced in the Notice, that the Commission "should conform its terminology to that used in the 1996 Act."[14] Thus, in place of the terms "basic" service and "enhanced" service, the Commission's Rules should use the terms telecommunications service and information service. At the same time, however, the Commission should retain the three descriptive clauses found in Section 64.702(a) of its Rules.

Under this approach, Section 64.702(a) would be revised to read:

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12 See ITAA Letter, supra n.9, at 4-6.

13 47 U.S.C. § 230(b).

14 Notice ¶ 42.

> Information services offer a capability for generating, acquiring, storing, transforming, processing, retrieving, utilizing, or making available information via telecommunications. For purposes of this subpart, a service will be deemed an information service if it is offered over common carrier transmission facilities used in interstate communications, and if it employs computer processing applications that: (1) act on the format, content, code, protocol or similar aspects of the subscriber's transmitted information; (2) provide the subscriber additional, different, or restructured information; or (3) involve subscriber interaction with stored information.

Retaining the three descriptive clauses contained in Section 64.702(a) will serve several important purposes. First, doing so will foreclose any possible argument that, by adopting the Act's terminology, the Commission has sought to shift the regulated/non-regulated boundary. Consequently, all services previously considered to be enhanced, including protocol conversion, will continue to be exempt from common carrier regulation. This will serve the Commission's stated goal of "provid[ing] . . . regulatory stability for telecommunications carriers and ISPs by preserving the definitional scheme" used prior to the Telecommunications Act.[15]

Second, retaining the descriptive clauses will make it easier to resolve questions regarding the regulatory status of new services that may be deployed in the future. While the terms "information service" and "enhanced service" refer to the identical category of offerings, the descriptive clauses found in Section 64.702(a) provide more specificity than the statutory definition. Consequently, retaining this language will provide useful guidance to carriers, ISPs, and their customers.

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[15] Id. at ¶ 40.

II. THE COMMISSION SHOULD PRESERVE STRUCTURAL SEPARATION AND EFFECTIVE NON-STRUCTURAL SAFEGUARDS

In the Notice, the Commission proposes to allow the BOCs to provide intra-LATA information services on an "integrated" basis, rather than through a structurally separate affiliate.[16] ITAA urges the Commission to abandon this proposal.

Like the Commission, ITAA believes that the safeguards that govern BOC provision of information services should "make common sense" in light of current "market and legal conditions."[17] However -- given that the BOCs continue to hold de facto monopolies in the provision of local exchange services, and that the U.S. Court of Appeals for the Ninth Circuit has twice found nonstructural safeguards to be inadequate to prevent BOC access discrimination -- ITAA believes the common sense approach is to require that all BOC information services (both inter-LATA and inter-LATA) be provided through a single separate affiliate that complies with the requirements of Section 272 of the Communications Act.

A. The Computer II Structural Separation Rules Remain in Effect

The Notice represents another in a long series of Commission efforts -- dating back to 1986 -- to eliminate the requirement, adopted in Computer II, that the BOCs provide all information services through a structurally separate affiliate. The Ninth Circuit has twice rejected the Commission's attempts to achieve this goal -- first in California I and then in California III. Despite this history, the Commission apparently assumes that the BOCs are currently free to provide intra-LATA information services on an "integrated" basis.

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16 Id. at ¶ 54.

17 Id. at ¶ 1.

Consequently, in the Notice the Commission has requested comment on whether it should "reimpose" some form of structural separation on the provision of intra-LATA information services by the BOCs.[18]

The Commission's inquiry is premised on a fundamental misreading of the effect of the Ninth Circuit's decision in California III. In that case, the court considered three issues: (1) the legality of the Commission's decision, in the Computer III Remand Order, to replace the structural safeguards of Computer II with nonstructural safeguards; (2) the legality of the Commission's revised rules governing the use of Customer Proprietary Network Information ("CPNI"); and (3) the legality of Commission's decision to preempt certain State regulations.[19] In its decision, the court held that:

> [T]he FCC has failed to explain or justify its change in policy regarding nonstructural safeguards against access discrimination. For this reason, . . . that portion of [the FCC's] order is arbitrary and capricious. We uphold those portions of the Order on Remand that implement CPNI rules and that preempt state regulations.

Thus, the only portions of the Computer III Remand Order that were not vacated were those dealing with CPNI and preemption. As was the case after California I, in which the court found that the Commission had not adequately justified its initial decision to lift standard separation, the effect of California III was to return the Commission to the Computer II structural separation regime.[20]

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18 Id. at ¶ 52.

19 California v. FCC, 39 F.3d 919, 930 (9th Cir. 1994) ("California III").

20 See Bell Operating Companies' Joint Petition for Waiver of Computer II Rules, 5 FCC Rcd 4714, 4714 (Com. Car. Bur. 1990) (recognizing that California I returned the Commission to the Computer II regime).

In light of the above, the question before the Commission is not whether the agency should "reimpose" structural separation. Rather, the relevant question is whether current regulatory and market conditions provides a basis that can justify the Commission's tentative decision to lift the structural separation requirement for BOC intra-LATA information services. As we now demonstrate, current conditions still do not support this action.

B. The Commission Should Not Lift the Structural Separation Requirements for Intra-LATA Information Services

1. The BOCs retain the ability to discriminate against unaffiliated ISPs

In light of the Ninth Circuit's decision, if the Commission is to lift the structural separation requirement applicable to BOC provision of intra-LATA information services, it must demonstrate that the BOCs no longer have the potential to discriminate against non-affiliated information service providers.[21] In the Notice, the Commission tentatively concludes that the local competition provisions contained in the Telecommunications Act will prevent the BOCs from engaging in access discrimination. Consequently, the Notice states, the Commission can lawfully permit the BOCs to provide intra-LATA information services free from structural separation. This analysis is not correct.

Contrary to the Commission's assumption, Congress' adoption of provisions that have the potential to foster local competition in the future does not provide a basis for lifting the

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[21] The Commission, in theory, could make this showing either by demonstrating it had enhanced the effectiveness of its non-structural safeguards or by demonstrating that the risk of BOC discrimination has decreased. The Commission has not attempted to make the first showing. To the contrary, the Commission is proposing to weaken the already inadequate non-structural safeguards by eliminating the Comparably Efficient Interconnection requirement. See Notice ¶¶ 60-65.

structural separation requirements today. At the present time, Information Service Providers remain almost totally dependent on the BOCs for the telecommunications transport services they need to deliver services to their customers.[22] Therefore, the BOCs retain the ability to discriminate against unaffiliated ISPs. They are likely to retain this ability for some time. As the Commission has found, carriers "with market power may retain the ability to engage in discriminatory behavior long after the entry of new competitors."[23]

There is no doubt that the BOCs also continue to have a strong incentive to discriminate against non-affiliated ISPs. Indeed, this incentive will only increase when these carriers are allowed to enter the in-region inter-LATA information services market. The BOCs, in fact, have already laid the foundation for increased discrimination against non-affiliated ISPs.

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22 In the Notice, the Commission suggests that the presence of large ISPs -- including several of ITAA's members -- in the information services market reduces the threat of access discrimination. See Notice ¶ 36. In other contexts, however, the Commission has recognized that the presence of large buyers in a market is entirely inadequate to restrain the ability of monopolists to engage in discrimination. Indeed, the Commission's regulatory regime for international services is premised on the agency's long-held belief that even the largest U.S. telecommunications carriers are vulnerable to discrimination in their dealings with foreign monopolists.

Just like these U.S. telecommunications carriers, large ISPs are vulnerable to discrimination in their dealings with the BOCs. The BOCs, like foreign monopolists, have the ability to discriminate against their customers by virtue of their "dual role as a provider of an . . . essential input and a competitor in the retail market using that input." International Settlement Rates, 12 FCC Rcd 19806, 19904-06 (1997); see Rules and Policies on Foreign Participation in the U.S. Telecommunications Market, IB Docket No. 97-142, FCC 97-398, at ¶ 254 (Nov. 26, 1997) (discussing "the risk that a U.S. carrier would be able to use its market power in an upstream market . . . (i.e., local exchange and exchange access services) to harm competition in the downstream market (e.g., enhanced services . . .)").

23 Rules and Policies on Foreign Participation in the U.S. Telecommunications Market, IB Docket No. 97-142, FCC 97-398, at ¶ 159 (rel. Nov. 26, 1997).

In several markets, the BOCs are bundling high-speed xDSL local transport services with their affiliated information services, thereby putting rival ISPs at a competitive disadvantage.[24]

2. Retaining structural separation will have significant pro-competitive benefits and few costs

Throughout the Third Computer Inquiry, the Commission has sought to bolster its efforts to eliminate structural separation by relying on a cost-benefit analysis. In both California I and California III, the Ninth Circuit found the Commission had failed to appropriately weigh all of the relevant factors. If the Commission again chooses to use cost-benefit analysis, it must not repeat this mistake.

Benefits of structural separation. The most significant benefit of structural separation is that it is the only regulatory method that has been proven to be effective at deterring (and facilitating discovery of) discrimination. For this reason, in adopting the Telecommunications Act, Congress provided that during the transition to a more competitive local exchange market the BOCs must provide inter-LATA information services through a structurally separate affiliate.[25]

To be sure, the statutory structural separation requirement applies only to BOC-provided inter-LATA information services. This reflects the fact that a significant purpose of the Telecommunications Act was to establish the rules governing BOC entry into inter-LATA

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[24] For example, ITAA understands that Ameritech does not make its ADSL service directly available to end-users. Rather, the carrier provides basic transport service to its non-regulated information service affiliates -- which combines this offering with ADSL equipment, and makes this transport service available only to customers that subscribe to its Internet access services.

[25] See 47 U.S.C. § 272.

markets. While the Act did not specifically address the appropriate regulatory regime for BOC participation in the intra-LATA information services market, the agency must give substantial deference to Congress' recognition of the substantial benefits of structural separation.

Requiring the BOCs to provide information services through a structurally separate affiliate has a second significant benefit: it will substantially reduce administrative costs. Structural separation is essentially self-enforcing. Once the FCC ensures that the BOC's comply with the applicable structural requirements, there will be little need for the Commission to oversee the day-to-day operations of the affiliate.

The approach proposed in the Notice, in contrast, would result in significant administrative costs. If the BOCs are allowed to provide intra-LATA information services on an integrated basis, while being required to provide inter-LATA information services through a Section 272 separate affiliate, they will almost certainly seek to "game the system" by attempting to structure many of their information services as intra-LATA offerings. As a result, the Commission will be required to expend scarce administrative resources "to distinguish between intraLATA and interLATA services for purposes of regulation."[26]

This situation has already occurred. Several of the BOCs have attempted to circumvent the Act's current prohibition on BOC provision of inter-LATA information services by structuring their Internet access offering to look like an intra-LATA service. This attempt, in turn, has given rise to several lengthy regulatory disputes that are pending before the

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[26] Notice ¶ 55.

Common Carrier Bureau.[27] The Commission can expect a significant increase in such disputes if it adopts the proposed approach.

The cost of structural separation. In seeking to determine the appropriate regulatory regime governing BOC provision of intra-LATA information services the Commission also must consider the costs of requiring the BOCs to provide information services through a separate affiliate. In the present case, these costs are extremely low.

In California III, the Commission persuasively argued that if the BOCs were required to comply with structural separation for one jurisdictional portion of their information services, consideration of economic and operational efficiency would almost certainly dictate that they offer all information services through the separate affiliate.[28] Consequently, because Section 272 requires the BOCs to provide inter-LATA information services on a structurally separate basis, the most economically and operationally efficient approach is for the BOCs to comply with the same requirements when they provide intra-LATA information services. Indeed, because many of the BOCs already are providing intra-LATA information services

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27 See generally Implementation of the Non-Accounting Safeguards of Sections 271 and 272 of the Communications Act, of 1934, as amended, 11 FCC Rcd 21905, 21966-68 ("Non-Accounting Safeguards Order") (describing opposition to the Bell Atlantic and Southwestern Bell CEI Plans regarding the provision of Internet access service).

28 California III, 39 F.3d at 932. In that case, the Commission successfully argued that it had the authority to preempt State regulations requiring the BOCs to provide intra-state information services through a separate affiliate because, as a practical matter, the existence of such regulations would cause the BOCs to provide inter-state information services through a separate affiliate, thereby impeding the agency's efforts to eliminate structural separation at the inter-state level. Presumably, what was true then is true today: if the BOCs are required to provide any significant portion of their information services through a separate affiliate, the most efficient approach will be for them to provide all of their information services through a separate affiliate.

through a Computer II separate affiliate, the cost of requiring the BOCs to modify the affiliate to comply with the requirements of Section 272 is likely to be minimal.

3. The Commission should revisit this issue in the year 2000

Congress has provided that, until February 8, 2000, the BOCs must provide inter-LATA information services through a separate affiliate. At that time, the Commission will need to decide whether to continue the separation requirement. The Commission's consideration of this issue will coincide with its second biennial regulatory review. ITAA urges the Commission to use that opportunity to revisit the need to apply the structural separation requirement to BOC provision of both inter-LATA and intra-LATA information services. If the Commission determines that local competition has developed to an extent that unaffiliated ISPs have meaningful alternate sources of local transport service, then it should consider modifying or even eliminating the structural separation requirements.

C. If the Commission Allows the BOCs to Provide Intra-LATA Information Service on an Integrated Basis, It Should Preserve the CEI Requirements

The Commission also has tentatively concluded that the BOCs should no longer be required to file Comparably Efficient Interconnection ("CEI") plans before they are allowed to provide information services on an integrated basis.[29] As demonstrated above, the Commission should not allow the BOCs to provide information services on an integrated basis. If the Commission decides to do so, however, it should retain the CEI requirement.

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[29] See Notice ¶ 61.

Although the Commission's CEI requirements have not been entirely effective in preventing BOC discrimination, they remain an appropriate safeguard. CEI is intended to provide ISPs with unbundled basic services that are relatively equal -- in terms of technical specifications, functional capabilities, quality, and operational capabilities -- to the services that the BOCs themselves use.[30] If the BOCs comply with the CEI requirements, ISPs are more likely to be able to provide the same information services, in the same manner as, the BOCs.

The maintenance of the Commission's CEI requirements will serve another important purpose. As the ongoing dispute over several BOC Internet Access Services demonstrates,[31] CEI filings provide the Commission with a means to determine whether information services offered by the BOCs on an integrated basis are, in fact, intra-LATA. Without these filings, the Commission will have no effective means to police BOC efforts to circumvent the entry and structural separation provisions of the Telecommunications Act by artificially structuring their inter-LATA information services as intra-LATA information services.[32]

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30 See Amendment of Section 64.702 of the Commission's Rules and Regulations (Third Computer Inquiry), 104 F.C.C.2d 958, 1036 (1986) ("Computer III Order") (subsequent history omitted).

31 See, supra, § II.B.2.

32 See 47 U.S.C. §§ 271, 272.

D. The Commission Should Maintain Effective Nonstructural Safeguards

Regardless of whether the Commission requires the BOCs to provide intra-LATA information services through a separate affiliate, it must retain effective behavioral safeguards. Two safeguards -- network disclosure and the joint marketing rules -- are especially important.

Network disclosure. The Commission has requested comment on its proposal to simplify the exiting web of network disclosure rules.[33] While ITAA believes that these rules provide an important safeguard against anticompetitive conduct by seeking to ensure that ISPs have timely access to information about network interfaces, the Association favors elimination of unnecessary or duplicative regulation. The Association therefore supports the Commission's tentative decision to eliminate the Computer III information disclosure rules in favor of the more comprehensive rules established pursuant to the Telecommunications Act.[34]

At the same time, ITAA supports the Commission's decision to retain the Computer II separate affiliate disclosure rules and the all-carrier disclosure rules. As explained in the Notice, the retention of these rules is necessary because they provide for the disclosure of important network information in situations not covered by the disclosure requirements established by the Commission pursuant to the Telecommunications Act.[35]

Joint marketing. The Commission also has inquired as to whether it should permit the BOCs to engage in the joint marketing of telecommunications services and

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[33] See Notice ¶ 123.

[34] See 47 U.S.C. § 251(c)(5).

[35] See Notice ¶ 122.

information services that are provided on an intra-LATA basis.[36] ITAA believes that the Commission should not do so.

Section 272 of the Telecommunications Act prohibits a BOC from jointly marketing inter-LATA information services with local exchange service unless the BOC allows other ISPs offering the same information services to sell the BOCs' local exchange telephone services.[37] This approach provides the BOCs with operational flexibility, while limiting their ability to obtain an unfair competitive advantage in the information services market. The Commission should conform its rules for the joint marketing of intra-LATA information services to the Act's requirements for inter-LATA services. Here, again, adoption of a single set of rules will promote administrative efficiency.

III. THE COMMISSION SHOULD ELIMINATE OPEN NETWORK ARCHITECTURE

As part of part of its biennial regulatory review, the Commission seeks comments regarding the continued need for its Open Network Architecture program. In particular, the agency has asked whether "ONA has been and continues to be an effective means of providing ISPs with access to the . . . unbundled network services they need to structure efficiently and innovatively their information services offerings."[38] The Commission has further inquired as to whether "ISPs make use of the ONA framework . . . to obtain . . . services [necessary] to

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36 See id. at ¶ 128.

37 See 47 U.S.C. § 272(g)(1).

38 Notice ¶ 85.