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April 23, 1998

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

Ms. Magalie Roman Salas
Secretary
Federal Communications Commission
1919 M Street, N.W.
Washington, D.C. 20554

Re: **CC Docket Nos. 95-20; 98-10**

Dear Ms. Salas:

Enclosed for filing in CC Docket No. 95-20 you will find an original and nine copies of Reply Comments of CompuServe Network Services, Inc. and also a computer diskette containing the reply comments in "read only" format. Please date stamp the "stamp and return" copy of the reply comments for return by the messenger.

Please do not hesitate to contact me if you have any questions.

Sincerely,

Randolph J. May

Randolph J. May

Enclosures

cc: Janice Myles, Common Carrier Bureau (w/encls.)

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BEFORE THE

Federal Communications Commission

WASHINGTON, D.C. 20554

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

In the Matter of	)	
	)	**CC Docket No. 95-20**
***Computer II* 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 No. 98-10**

REPLY COMMENTS OF COMPUSERVE NETWORK SERVICES, INC.

CompuServe Network Services, Inc. (sometimes hereinafter referred to as "CNS"), by its undersigned attorneys, hereby submits these reply comments in response to the Further Notice of Proposed Rulemaking (FNPM") released January 30, 1998, in the above-captioned proceeding.[1] In its initial comments, CompuServe Network Services, a wholly-owned subsidiary of WorldCom, Inc., demonstrated that the Commission should allow the Bell Operating Companies ("BOCs") to provide intraLATA information services only through a separate affiliate and should confirm that the definition of "telecommunications service" under the 1996 Act is equivalent to the Commission's existing definition of "basic service."

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[1] Computer III Further Remand Proceedings; Bell Operating Company Provision of Enhanced Services; Further Notice of Proposed Rulemaking; CC Docket Nos. 95-20 and 98-10, released January 30, 1998 ("FNPRM").

As CompuServe Network Services stated in its initial comments, it remains heavily dependent upon the BOCs for the access services which are necessary for it to reach its customers. In light of this present dependence, which subjects CNS and other non-BOC-affiliated ISPs to potential anticompetitive abuses in the form of cross-subsidization and access discrimination, CNS replies briefly to the arguments made by the BOCs.

I. THE BOCS SHOULD BE REQUIRED TO PROVIDE INTRALATA INFORMATION SERVICES THROUGH A SEPARATE AFFILIATE

In its very detailed and well-documented comments, MCI demonstrates persuasively that the Commission's positing of the cost/benefit analysis is backwards, in light of the two-time reversal by the Court of Appeals of the Commission's abandonment of structural safeguards. In other words, contrary to the Commission's assumption that the Ninth Circuit's California III decision allowed the Commission to sanction BOC provision of information services under a non-structural regime, due to the court's vacation of FCC's Computer III Remand Order, structural separation should be considered the status quo for purposes of evaluating the costs and benefits of requiring an intraLATA information services affiliate.[2/]

In any event, apart from the Commission's failure to acknowledge of the status quo in the FNPRM, it is clear that the benefits of requiring the BOCs to offer intraLATA

[2/] See Comments of MCI Telecommunications Corporation, March 27, 1998, at pages 13-22, for a comprehensive recitation of the administrative and judicial history of the Computer III Remand proceeding. Also see the Comments of the Information Technology Association, March 27, 1998, at 10 ("As was the case after California I, in which the court found that the Commission had not adequately justified its initial decision to lift structural separation, the effect of California III was to return the Commission to the Computer II structural separation regime.") In implementing the Ninth Circuit remand, the Commission ignored its own statement that "[t]he vacation of the Computer III orders generally returns the industry and the Commission to a Computer II regime." Computer III Remand Proceedings, 5 FCC Rcd 7719 (1990).

information services through a separate affiliate clearly outweigh whatever minimal costs would be incurred by such requirement. In it initial comments, CNS detailed the benefits of structural separation,[3] and those arguments will not be repeated here.

It is pertinent to point out, however, that in their comments the BOCs for the most part ignore the fact that Congress itself has found the benefits of structural separation to outweigh the costs. For example, BellSouth completely ignores the Congressional requirements, and argues instead that "[t]he Commission therefore should use this proceeding to confirm that the BOCs have the same opportunity as any other LEC to offer enhanced services on an integrated basis and subject to the same set of rules."[4] Bell Atlantic, shutting its eyes to what Congress did in the 1996 Act, states "a return to structural separation would cause serious public harm."

It is understandable that the BOCs wish to ignore the Congressional requirements for separate subsidiaries. First, it shows that, with regard to interLATA services, which is the type of services on which it was focusing, Congress thought the benefits of structural separation outweighed the claimed costs. Second, because Congress already has made that judgment, the costs of requiring that intraLATA services also be offered through a separate subsidiary are truly

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[3] Comments CNS, at 6-10. See Comments of Bell Atlantic, March 27, 1998, at 8.

[4] Comments of BellSouth Corporation, at 5. Much of BellSouth's comments, in effect, consists of an argument that the Commission should treat the BOCs no differently from other LECs. Of course, Congress disagreed. While there is one district court judge who has generally agreed with the thrust of BellSouth's argument as a matter of constitutional law, this court's view is by no means the law of the land.

minimized.[5] Whatever the cost/benefit analysis might be otherwise, Congress's requirement that a separate affiliate be established for interLATA transmissions shifts the balance definitively.

Indeed, the FCC itself has acknowledged that the balance shifts once structural separation is required for some services in one jurisdiction or another. In support of its action preempting state structural separation requirements in the Computer III Remand proceeding, the FCC determined that "it would not be economically feasible for the BOCs to offer the interstate portion of such [enhanced] services on an integrated basis while maintaining separate facilities and personnel for the intrastate portion."[6] Although the Commission there was referring to differential treatment of interstate versus intrastate services, certainly the analysis would be the same for interLATA and intraLATA services. In other words, taking the Commission at its word in the Computer III proceeding, now that Congress has required a separate affiliate for interLATA services, presumably it would not be "economically feasible" for the BOCs to offer intraLATA services on a different basis.

And there is another important dimension to the cost/benefit analysis as well, one that is partly but not solely economic. As CNS stated in its initial comments, "because of the nature of ISP calls where the same call session almost always involves at least some interLATA transmissions, it would seem very difficult, and certainly not cost-effective, for the BOCs to

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[5] CNS does not disagree with the contention of some of the BOCs that they should be permitted to offer intraLATA information services through the same separate affiliate through which they offer interLATA services if such affiliate meets all the Section 272 requirements. See, for example, the Comments of SBC Communications Inc., March 27, 1998, at 26. In fact, CNS stated in it initial comments that it does not object if intraLATA services are offered through the same affiliate used for interLATA services. Comments of CNS, at 11.

[6] California v. FCC, 39 F.3d 919, 932 (9th Cir. 1994).

differentiate between interLATA and intraLATA information services traffic."[7] Although the BOCs do not acknowledge this point in their initial comments in this proceeding, now that Congress has required utilization of a separate subsidiary, previously they have recognized the practical difficulty -- and, therefore, obvious costs -- of trying to distinguish between interLATA and interLATA transmissions. For example, in the Access Charge Reform proceeding, Southwestern Bell proclaimed: "It is almost impossible to determine, measure and bill on a jurisdictionally-specific basis traffic that terminates to ISPs and the Internet."[8] And the FCC quite rightly argued in the Access Charge Reform appeal that "[i]t may not be practical to determine whether a particular call . . . is interstate or intrastate, or even what percentage of calls is interstate or intrastate."[9] This statement simply reaffirms the Commission's determination in the Computer III Remand proceeding that not only was it not "economically feasible" for the BOCs to comply with different separation requirements in two jurisdictions (or LATAs), it was not "operationally feasible" as well.[10]

In light of the unanimity that it is practically impossible to distinguish between interLATA and intraLATA information services traffic, at least in any way that approaches cost-effectiveness, the Commission would be closing its eyes to reality and inviting future abuse if it

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[7] Comments of CNS, at 11.

[8] Comment of Southwestern Bell Telephone Company, CC Docket No. 96-263, March 24, 1997, at 12.

[9] Brief of the FCC, Southwestern Bell Telephone Co. v. FCC, Nos. 97-2618 and consolidated cases, 8th Cir., filed December 16, 1997, at 79.

[10] California III, 39 F.2d at 933.

allows the BOCs to offer intraLATA information services on an integrated basis. The temptation on behalf of the BOCs to misclassify traffic to avoid separation requirements would be tremendous, and, as pointed out above, it would be practically impossible to monitor compliance for enforcement purposes.

While the Commission may have believed that the cost/benefit analysis it undertook in the Computer III proceeding was rational -- although the Ninth Circuit and CompuServe disagreed -- the Commission now must acknowledge, if it is to engage in rational decisionmaking, that its previous cost/benefit analysis has been turned on its head. With the statutory requirement that a separate affiliate be established in any event, it is now clear that the benefits of requiring the BOCs to use a separate affiliate outweigh the costs.

II. THE 1996 ACT'S DEFINITION OF "TELECOMMUNICATIONS SERVICE" SHOULD BE DETERMINED TO BE EQUIVALENT TO THE COMMISSION'S DEFINITION OF "BASIC SERVICE"

Most commenters agreed with CNS that the Commission should consider "telecommunications services" as defined in the 1996 Act to be the equivalent of "basic services" as defined by the Commission in the Computer II regime. In the FNPRM, the Commission stated that "the public interest is served by maintaining the regulatory stability of the definitional scheme under which the Commission exempted certain services from traditional common carrier regulation."[11]

Ameritech's comments on this point are persuasive:

> Ameritech concurs with that conclusion [i.e. "enhanced services" and "information services" are equivalent], and believes that,

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[11] FNPRM, at para. 41.

> consistent with that holding, it is also in the public interest that the Commission's corresponding definition of a "basic service" be extended to the same functionality encompassed by the Act's definition of "telecommunications." Harmonizing these two parallel definitions will maintain stability across the industry by matching these two analogous definitional schemes which distinguish the regulatory treatment accorded to specific services. Unless the Commission makes clear that its exemption of "enhanced services" from common carrier regulation matches the Act's parallel treatment of "information services" as separate from "telecommunications," regulatory uncertainty will remain. There is simply no basis to conclude that Congress intended a departure from the Commission's traditional usage of its basic/enhanced dichotomy, and the Commission should add clarity and certainty to this area by so holding.[12]

Despite the prevailing view expressed in the initial comments, a couple of the BOCs suggest that the Commission should use this proceeding to reclassify protocol conversion as "basic" or "telecommunications." Bell Atlantic cites a letter from Senators Stevens and Burns in which they state their belief that certain protocol conversions should not convert what otherwise is a "telecommunications service" under the 1996 Act into an "information service."[13] U S West says that "[w]hen the enhanced status of protocol conversion was last debated, the stakes were quite different than they are now."[14] According to U S West, when a BOC or GTE offers a carrier service which supports multiple interfaces, "it should be permitted to do so without any CEI, waiver or other regulatory requirements, so long as it notifies the Commission

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[12] Comments of Ameritech, March 27, 1998, at 14-15. See also Comments of AT&T Corp., March 27, 1998, at 8-9.

[13] Comments of Bell Atlantic, March 27, 1998, at 20.

[14] Comments of U S West, Inc., March 27, 1998, at 17.

via public filing and makes the full service, including the protocol conversion, available on a common carrier basis."[15]

It is fitting for U S West to refer to the time when the status of protocol conversion was "last debated," because it calls to mind that very few issues in the history of telecommunications have been debated so many times and so thoroughly.[16] It is appropriate as well to focus on the second part of U S West's statement -- that "the stakes were quite different than they are now." CNS disagrees, because in a very fundamental sense the stakes are the same now: whether previously unregulated services will remain unregulated or instead be treated as regulated common carrier services. After a thorough review in the Computer III proceeding, the Commission concluded that retention of protocol processing as an enhanced service "is more likely to preserve the competitive conditions that now prevail in the protocol processing/packet switching services marketplace and also contribute to regulatory certainty" and also "prevents the possible reregulation of enhanced service providers such as VANS."[17] And, in the just-released Report to Congess on Universal Service, the Commission stated that "services offering a net protocol conversion appear to fall within the [information services definition] because they offer a capability for 'transforming [and] processing' information."[18]

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[15] Id.

[16] See Sections 64.702 of the Commission's Rules and Regulations (Third Computer Inquiry), Report and Order, 2 FCC Rcd 3072, 3074-82 (1987), and the proceedings cited therein.

[17] 2 FCC Rcd at 3080.

[18] Federal-State Joint Board on Universal Service, CC Docket No. 96-45 (Report to Congress), released April 10, 1998, at para. 51.

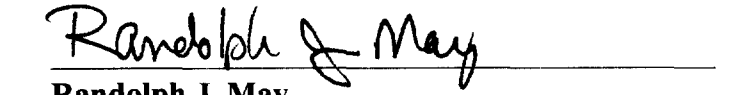
In light of the success of the deregulatory policies adopted by the Commission -- and now embedded into national policy by the 1996 Act -- to promote a competitive information services industry, it would be unwise for the Commission to take action now which could have the effect of regulating as common carriage heretofore unregulated services and also creating regulatory uncertainty. As Ameritech urges, there is no indication that Congress intended a departure from the Commission's traditional interpretations of basic and enhanced services. Congress was aware that the status of protocol conversion services had been reexamined by the Commission many times, and if it wanted to alter the deregulatory treatment of these services, surely it would have made its intent evident. Instead, it made clear its intent "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."[19]

III. CONCLUSION

CompuServe Network Services urges the Commission to take actions in this proceeding consistent with the views expressed herein and in CNS's initial comments.

Respectfully submitted,

COMPUSERVE NETWORK SERVICES, INC.



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April 23, 1998

Its Attorneys

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[19] 47 U.S.C. § 230(b)(2).

CERTIFICATE OF SERVICE

I, Teresa A. Pumphrey, do hereby certify that true and correct copies of the foregoing, "**Reply Comments of CompuServe Network Services, Inc.**" were served by hand or first-class U.S. mail, postage prepaid, this 23rd day of April, 1998, on the following:

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