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FEDERAL COMMUNICATIONS COMMISSION
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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

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

REPLY COMMENTS OF THE COMMERCIAL INTERNET EXCHANGE ASSOCIATION

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The Commercial Internet eXchange Association ("CIX"), by its attorneys, hereby replies to the comments filed in the above-captioned proceeding. CIX urges the Commission to update and bolster its competitive safeguards in this proceeding for a continued, vigorous Internet and information service industry.

Introduction and Summary

In its initial comments, CIX advocated the following three-point approach in this proceeding. *First*, ONA standards must be strengthened and made consistent with "fundamental unbundling," as already implemented pursuant to the Section 251 unbundling requirements of the 1996 Act. *Second*, the Commission should adopt rules that enable ISPs to collocate in a practical fashion as the RBOCs deploy xDSL and other telecommunications technologies, in order to promote competitively neutral access to new local access technologies. *Third*, on the issue of structural separations, the Commission should adopt a plan akin to the LCI "Fast Track" Model of structural separations: the RBOC's retail interests

in its inter/intraLATA information service business would be significantly divorced from its interests in selling local network services.

In reply, CIX believes that the record confirms that ISPs can improve data access solutions if enabled with effective rights that promote efficient and creative solutions. CIX endorses the comments of other parties (including ITAA, MCI, and AOL) proposing regulatory initiatives to improve on the current ONA regime. In the final analysis, the Commission's ONA policies should better provide independent ISPs with the tools to compete with BOC-affiliated ISPs as high bandwidth telecommunications services are deployed by the BOCs. ONA rules should be easily enforceable at the Commission, available ONA elements/ services (including price and location information) should be Web-posted and accurate, and requests for new elements/services should be expeditiously processed at the Commission. The Commission should also retain its CEI process because plan pre-approval safeguards anticompetitive harm to the information services market.

Discussion

I. The Commission Should Improve Access Rights/Process for ISPs

A number of commenters from the Internet community voiced common concerns over the current regulatory regime and offered useful ideas to improve the ONA process. For example, America Online urges the Commission to adopt a flexible unbundling approach, with BOCs providing "needed network functionality at non-discriminatory, reasonable and cost-based tariffed rates."[1] MCI recommends that the Commission enact an ONA regulatory mandate for "fundamental physical and logical unbundling of the local network," including

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1 Comments of America OnLine at 16. See also Comments of Helicon Online (ISPs should be able to purchase directly from ILECs the network elements they need provide direct data access to the ISP's customer).

unbundling of broadband packet-switched services.[2] Community Internet Systems notes that, for rural Nebraska, "extensive, mandated unbundling and access to the unbundled packages by 'pure ISPs' is necessary" because of the lack of local telecommunications competition.[3] The Retail Internet Service Providers request "'unswitched clean copper service' -- at nondiscriminatory, cost-based rates" to provide xDSL to their customers.[4] ITAA recommends that the Commission revise its Expanded Interconnection rules so that data competitive access providers ("D-CAPs") may obtain aggregated data traffic at the BOC's serving central offices, and to extend such D-CAP rights to ISPs.[5]

CIX endorses proposals to reform the Commission's policies, including ONA, Expanded Interconnection, and other efficiency-enhancing ISP access arrangements. The Commission's policies should promote access to the BOC network for competing providers, including ISPs, to offer innovative and efficient data access services.

As several commenters pointed out, it is also critically important for the Commission to improve the enforcement, review, and notification process of ONA or other rules promoting access by competing providers. Several commenters note the frustration that the information service community experience with the current lack of actual deployment and implementation of the initial ONA principles.[6] As some commenters point out, a key issue is the general abrogation of the ONA program to the BOCs themselves (with the adoption of

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2 Comments of MCI at 67-69. See also Comments of WorldCom at i (FCC's ONA policies "should be corrected by creating a cost-based, truly unbundled, and entirely federal access arrangement designed specifically for ESPs.").

3 Comments of Community Internet Systems, Inc. at 2; see also Comments of KWOM (FCC should provide ISPs with Section 251 unbundling rights).

4 Joint Comments of Retail Internet Service Providers at 2.

5 Comments of ITAA at 30-31.

6 Comments of ITAA at ii; Comments of Helicon Online at 1; Comments of WorldCom at 3-4.

their ONA common model) and to the NIIF (formerly the IILF) for further ONA implementation.[7] CIX agrees that an expedited process of Commission dispute resolution should be adopted, as well as a regulatory mandate for further unbundling of the local network "accomplished by a date certain, with intermediate checkpoints."[8] To realize the promise of ONA or other access arrangements for smaller ISPs, CIX also believes that a list of available network elements or access services (including available BOC offices, price, ordering instructions, average installation delays, maintenance procedures, etc.) should be readily available at both the FCC and the BOCs' WW web-sites.[9]

II. Effective Access Arrangements For ISPs Should Be a Continuing Policy Mandate

CIX observes that some Bell Companies argue that the 1996 Act somehow eradicates the legal or policy basis for the Commission's CEI and ONA obligations.[10] The Commission has already rejected these arguments: "[w]e conclude that the Computer II, Computer III, and ONA requirements are consistent with the 1996 Act, and continue to govern BOC provision of intraLATA information services. . . . We also reject NYNEX's claim that the section 251 interconnection and unbundling requirements render the Commission's Computer III an ONA requirements unnecessary."[11] Further, Section 251(g) of the Act explicitly provides the

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7 Comments of MCI at 49-50 ("IILC was essentially a blackhole from which nothing ever emerged, or if something did emerge, only years late . . .); Comments of AOL at 15.

8 Comments of MCI at 67.

9 See also Comments of AOL at 18 (FCC should adopt an access documentation and certification process).

10 Comments of BellSouth at 11-12 ("Congress has spoken and defined the degree of unbundling applicable to all ILECs," through Section 251 of the Act, and "the requirements of the 1996 Act fully address" the California III court's concern for ONA fundamental unbundling); Comments of Ameritech at 3 ("fundamental unbundling" concern of California III court "has been fully addressed" by the local competition provisions of the 1996 Act).

11 Implementation of the Non-Accounting Safeguards of Sections 271 and 272 of the Communications Act, as Amended, First Report and Order and Further Notice of Proposed

Commission with continuing authority after enactment of the 1996 Act to develop and enforce its policies for "equal access and nondiscriminatory interconnection restrictions and obligations . . ." for ISPs. 47 U.S.C. § 251(g).

Nor does the 1996 Act obviate the continuing need for strong Computer II, Computer III, and ONA obligations. These "rules are the only regulatory regime by which certain independent ISPs are guaranteed nondiscriminatory access"[12] to the BOC bottleneck services. The Commission has found that ONA also serves the public interest because it allows ISPs "to use the BOCs' regulated networks in highly efficient ways, enabling them to expand their markets for their present services, and develop new offerings as well, all to the benefit of consumers."[13]

Moreover, there is a continuing need and public interest for effective ISP access to unbundled elements, or other functional access arrangements. While Ameritech claims that ONA and CEI rights are "immaterial" because large ISPs are either telecommunications carriers or aligned with carriers and "industry trends also reflect the fact that newer ISPs are also aligning with newer [CLECs],"[14] CIX doubts that asserted "trend." According to one estimate, there are more than 6,300 ISPs in the U.S.;[15] no evidence suggests that a significant proportion (or even one percent) of those ISPs can somehow take advantage of the local competition provisions of the 1996 Act.[16] Thus, thousands of "pure ISPs" in the U.S. --

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Rulemaking, CC Dkt. No. 96-149, 11 FCC Rcd. 21905, 21969-70 (1996) ("Non-Accounting Safeguards Order").

12 Non-Accounting Safeguards Order, 11 FCC Rcd. at 21970-71.

13 In the Matter of Computer III Remand Proceedings, Report and Order, 5 FCC Rcd. 7719, 7720 (1990), aff'd, California v. FCC, 4 F.3d 1505 (9th Cir. 1993).

14 Comments of Ameritech at 6.

15 <www.thedirectory.org>.

16 The Retail Internet Service Providers also correctly suggests that even if a CLEC has entered a given local market, it may already have an arrangement with one ISP (or is offering

making up the vast ranks of the highly competitive Internet industry -- would benefit from effective ONA and access rights.

The record in this proceeding confirms that smaller ISPs, including ISPs serving rural communities with no CLEC alternatives, have a demonstrated need and a business plan to provide American consumers with better, high bandwidth Internet service.[17] The record also shows that these independent ISPs need more effective federal policies to deliver those services, including policies guaranteeing access to necessary elements of the BOCs' local network.

III. If BOCs are Permitted to Offer Integrated Information Services, CEI Plan Approval Process Should Be Retained

CIX agrees with other commenters[18] that the BOC CEI plan approval process should be retained as an essential competitive safeguard if the BOCs are permitted to offer integrated information services.[19]

The CEI plan approval process is a far better compliance and enforcement mechanism against access discrimination than simply an after-the-fact complaint process. The CEI plan pre-approval means that, if the BOC intends to use its monopoly position in the market to the disadvantage of independent ISPs, the Commission has a fulsome opportunity to prevent that harm before it occurs. By contrast, the ordinary FCC complaint process is retrospective in

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Internet service itself), and so would be unlikely to offer telecommunications service to any and all other ISPs in the area. Joint Comments of Retail ISPs at 12.

17 Comments of Helicon Online; Comments of Community Internet Systems, Inc.; Joint Comments of Retail ISPs; Comments of KWON.

18 Comments of America OnLine at 20; Comments of ITAA at 17.

19 As stated in its initial comments, CIX supports structural separations for BOC-affiliated information service offerings, and other commenters have offered a host of reasons further supporting that approach. See, e.g., Comments of MCI. Conceptually, CIX favors the LCI "Fast Track" proposal, to effectively separate the BOC's incentives to sell retail services from its wholesale services incentives. See also Comments of LCI at 12.

nature and is unlikely to make the injured parties, or the competitive market, truly whole after the fact. Once the BOC has exercised it monopoly power, to the detriment of many relatively small ISPs, an FCC adjudication would not likely bring the market back to its prior state of full competition. Moreover, as ITAA points out, CEI approval proceedings provide a means of ensuring that BOCs do not creatively enter the interLATA information services market in contravention of the Communications Act.[20] Because Section 271 of the Act is clearly intended to protect the competitive information services market, the CEI process is a convenient and effective checkpoint for the Commission to confirm whether a BOC's specific Internet access service offering is in compliance with the Act.

Moreover, CIX questions the BOCs' claims that the CEI process causes delay and actually impedes the introduction of new services to the American public. For example, Ameritech introduces a study[21] to support its assertion that "the availability of new innovative services may be not only delayed but also completely prevented by the existing CEI requirements."[22] However, the Ameritech Study analysis of the CEI process is based on some erroneous assumptions which undermine Ameritech's position.

Most significantly, the study assumes without discussion that the CEI regulatory safeguards have only one effect on innovation: to discourage or delay the introduction of new BOC services. The study neglects to consider (let alone investigate) the positive effects the

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20 Comments of ITAA at 17. Moreover, CIX objects to the Commission's proposed plan to approve all pending CEI plans. Further Notice of Proposed Rulemaking, at ¶ 75. In particular, CIX and other parties objected to Southwestern Bell's May 22, 1997 CEI Internet Support Services plan (CCBPol 97-05) because it contemplated SWBT's entry into interLATA services contrary to Section 271 of the Act. CIX submits that it is not in the public interest grant such a plan, and that the Commission must address the significant issues of compliance with the Communications Act raised by CIX and others.

21 James Prieger, "The Effects of Regulation on the Innovation and Introduction of New Telecommunications Services" (dated Mar. 2, 1998) ("Ameritech Study").

22 Ameritech Comments at 11.

CEI safeguards have had on innovation and the introduction of new information services generally, throughout the market. For example, the existence and enforcement of the BOCs' CEI "equal access" obligations[23] have likely had a very positive impact on the ability of other carriers and enhanced service providers to introduce and innovate during the periods that CEI has been in effect. CEI is an enforceable mandate ensuring that other "innovators" in the enhanced services market are not unreasonably denied access to the BOC's monopoly access services, and so it encourages investment and market entry by other "innovators."[24] Thus, the study does not comprehensively approach the effect of CEI on innovation and introduction of new services to the American consumer by RBOCs *and other providers.*

The Ameritech Study also assumes that the filing date of a BOC CEI plan is a reasonable proxy to measure the date when an innovative service was introduced to the American consumer. Id. at 5. This assumes that the world of innovators is made up only of BOCs, i.e., when an BOC submits a CEI plan, it is for a truly innovative service. This assumption is unwarranted, especially in the context of Internet access services, because it fails to consider whether a market for the service is already available to consumers at the time that the BOC plan is filed. For example, the study uses Bell Atlantic's March 8, 1996 Internet Access CEI plan as data of an innovative service offering to the American consumer.[25] In March, 1996, however, the American consumers in Bell Atlantic's region already had hundreds, if not thousands, of Internet access providers to choose from -- non-BOC Internet

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23 Computer III Inquiry, 104 F.C.C. 2d 958, 1038-42 (1986) (subsequent history omitted).

24 Conversely, the increase in the number of BOC services introduced during non-CEI years may be explained by the BOCs' increased ability to discriminate against independent ISPs.

25 Ameritech Study, Appendix 4 (at 1).

access providers had offered an array of Internet services in that market for years.[26] Because the Ameritech Study fails to focus on what, if any, BOC offerings are truly innovative, it teaches noting about whether the CEI process actually slows the delivery of innovative services to the American consumer.

Finally, the study asserts that the CEI plan approval process adds "almost 200 days" of delay to the introduction of the BOCs' services. Ameritech Study at 10. However, no evidence is presented to indicate that the BOCs would or could have initiated service on the day of CEI plan filing. Stated differently, since the BOCs are aware of the predicted delay (and even the statistical variance), they can and likely do avoid any actual delay by filing CEI plans in advance of commercial launch of the service. In addition, the study concludes that elimination of delay would add "to the benefit of consumers and companies alike." Id. However, as discussed above, the study does not even consider "the benefit of consumers" because it fails to look at the positive effects of the CEI safeguards, and the review process, for other "innovators" in the market.

Thus, Ameritech's assertion that "CEI . . . has been empirically demonstrated to have a chilling effect on innovation" is unproven.[27] Its study fails to show that consumers are in any way adversely affected by the Commission's regulation of RBOC-integrated information service offerings, nor does it show that RBOCs are subject to unwarranted delay under that process.

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26 Especially in the case of Internet access, the BOCs largely followed in after the market of independent providers had "pioneered" the way.

27 Ameritech Comments at 10.

Conclusion

CIX urges the Commission to revise its Computer III and ONA policies in a manner that better allows ISPS to bring more efficient local data access solutions to the American consumer.

Respectfully submitted,

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