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VIA HAND DELIVERY

Magalie Roman Salas, Esq.
Office of the Secretary
Federal Communications Commission
445 12th Street, SW, TW-A325
Washington, DC 20556

Re: CC Docket No: 96-149, Comments of BellSouth Corporation regarding the Request of CIX and ITAA to Extend the Sunset Date for § 272 Restrictions on interLATA Information Services

Dear Ms. Salas:

Herewith transmitted on behalf of BellSouth Corporation are one (1) original and seven (7) copies of Comments in the above captioned matter. Additional copies have been provided to persons specified in the Commission's Public Notice of December 9, 1999, establishing the pleading cycle in this matter, as indicated on the attached certificate of service.

An additional copy is also enclosed. Please date-stamp and return it in the self-addressed, stamped envelope provided. Thank you for your assistance in this matter.

Very truly yours,

Sean Lev

Enclosure

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OFFICE OF THE SECRETARY

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C.

In the Matter of	)	
Request for Extension of the Sunset Date Of the Structural, Non-Discrimination, and Other Behavioral Safeguards Governing Bell Operating Company Provision of In-Region, InterLATA Information Services	)	CC Docket No. 96-149

COMMENTS OF BELLSOUTH CORPORATION

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December 17, 1999

EXECUTIVE SUMMARY

BellSouth Corporation opposes the request to continue the structural separation and other section 272 requirements relating to the offering of in-region interLATA information services by Bell Operating Companies ("BOCs"). Granting that relief would advance no legitimate interest and would impose unnecessary and burdensome costs, leading to considerable consumer harm.

As an initial matter, the request relies on a misreading of the statute. In particular, the Requestors ignore a basic dichotomy in the statute. Congress tied the sunset date for restrictions relating to *equipment manufacturing and long distance* to conditions in local telecommunications markets (in particular, those restrictions lapse three years after a BOC achieves section 271 relief). By contrast, with regard to *interLATA information services*, Congress declined to link the sunsetting to local telecommunications markets in any way, instead allowing section 272's restrictions to expire after a fixed period of four years. Accordingly, contrary to the Requestors' argument, the appropriate inquiry focuses not on local telecommunications markets, but rather on whether the BOCs could somehow impede competition in the market to which the restrictions apply—the market for interLATA information services.

Once the inquiry is properly defined, it is clear that there is no reason to postpone the sunset date. The BOCs pose no realistic threat to competition in interLATA information services. The Commission has defined interLATA information services in this docket as containing two bundled components: an information content component and an interLATA transport component. The BOCs cannot harm competition with respect to either component. Competition in the content market is fierce and barriers to

entry are exceedingly low. In the interLATA transport market, BOC entry would bring needed competition against well-capitalized, vertically integrated incumbent oligopolists.

Finally, even if there were reason for concern about competition in interLATA information services, existing non-structural safeguards are, as the Commission has recognized since its 1986 *Computer III* decision, more than sufficient to protect competition, and they do so at substantially less cost than structural separation.

For all these reasons, the Commission should decline to postpone the expiration of section 272's requirements with respect to interLATA information services.

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Request for Extension of the Sunset Date Of the Structural, Non-Discrimination, and Other Behavioral Safeguards Governing Bell Operating Company Provision of In-Region, InterLATA Information Services	)	CC Docket No. 96-149

COMMENTS OF BELLSOUTH CORPORATION

BellSouth Corporation ("BellSouth") hereby opposes the request of the Commercial Internet eXchange ("CIX") and the Information Technology Association of America ("ITAA") (collectively, "Requestors") to postpone the sunset date of the structural separation requirement and other provisions of section 272 of the Communications Act of 1934, as amended (the "Act"), that apply to in-region interLATA information services provided by Bell Operating Companies ("BOCs").[1]

INTRODUCTION

Requestors' arguments for an extension of the sunset date for the section 272 restrictions applicable to interLATA information services are based on a misreading of the statute, and granting the request would advance no legitimate interests and would

[1] Requestors do not seek a postponement of the sunset date with respect to out-of-region interLATA information services. *See* Request, at 1 n.1 & 21 n.42.

impose needless and wasteful costs, to the detriment of consumers. Accordingly, the Commission should deny the request.

As an initial matter, Requestors' arguments are based on a fundamental legal mistake. Contrary to Requestors' central theory, it is plain from the text of the Act that Congress did not intend to tie the separate subsidiary requirement at issue here to the state of competition in local telecommunications markets (or to the Commission's granting section 271 relief to the BOCs). On the contrary, Congress included two very different sunset provisions in section 272(f) of the Act. The first, which governs manufacturing and long distance, is tied expressly to BOC receipt of authorization to provide services pursuant to section 271. The second, which governs information services, is for a fixed period of four years. It provides a window of opportunity in order further to guarantee the development of competition in the interLATA information services market, but it is not tied in any respect—directly or indirectly—to the status of competition in local telecommunications markets.

Although Requestors never distinguish between the two provisions, only the second one—the one that Congress specifically chose *not* to link to section 271 relief—is at issue in these proceedings. Accordingly, in evaluating the Request, the Commission's focus should not be, as Requestors would have it, on whether the Commission has determined that the BOCs pass muster under section 271. Rather, the focus should be on whether the BOCs could somehow impede competition in the market for interLATA information services.

Once the inquiry is properly defined, it is clear that there is no basis to extend the statutory separate subsidiary requirement. Simply put, the BOCs cannot impede (and

have not impeded) competition in any way in the interLATA information services market, as the Commission has defined it in this docket. The Commission has explained in this docket that an "'interLATA information service' refers to an information service that incorporates as a necessary, bundled element an interLATA telecommunications transmission component, provided to the customer for a single charge."[2] Thus, for purposes of these proceedings, the relevant market involves a single service containing two components: (1) information content and (2) interLATA transport.

Accordingly, in order to have an anticompetitive effect in the relevant market, a BOC would somehow have to leverage its alleged market power in local voice telephony not only into the adjacent market for interLATA transport but also further into the realm of information content. The BOCs have no ability to do either of those things. First, it is nonsensical to suggest that the BOCs can exert market power as to content. Anyone with a web page is a potential content competitor, and the BOCs' current offerings in that area are dwarfed by output from such behemoths as AOL, Microsoft and CNN. As for interLATA transport, that market is, if anything, too concentrated at present, and BOC entry would only increase competition against entrenched, vertically integrated players like MCI WorldCom, Sprint, and AT&T.

Indeed, the BOCs' experience in *intra*LATA information services, such as Internet access and voice mail, demonstrates that BOC participation has not harmed competition in any way: those markets have grown explosively even though the BOCs have been competing for years without being subject to the kind of structural separation

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[2] *Implementation of the Non-Accounting Safeguards of Sections 271 and 272 of the Communications Act of 1934, as Amended*, First Report and Order and Further Notice of

requirements Requestors advocate. The advent of broadband Internet connections via cable modems, fixed and mobile wireless connections, and satellite will make it even easier to bypass the local loop, thus shrinking any alleged BOC market power further. Additionally, the Internet uses an inherently open interface at every link, thereby ensuring a level competitive playing field on which no BOC could deny, or discriminate in providing, competitive access.

Finally, even if there were some reason for concern here, competition would be amply protected by the non-structural safeguards that would still apply to the BOCs. Indeed, allowing the relevant section 272 requirements to sunset on schedule would be fully consistent with the Commission's recognition in its *Computer III* proceedings that non-structural safeguards can be just as effective as—but significantly less costly and disruptive than—structural separation. There is no reason that the Commission should repudiate that understanding in this context.

For all these reasons, there is no need to postpone the sunset date of February 8, 2000. The CIX and ITAA are simply the latest in a long line of competitors seeking to hobble the BOCs with unnecessary regulation in order to protect their own narrow commercial interests. In the past, the Commission has had to deal with fears that BOCs might suppress competition when, for example, offering interLATA wireless service, selling customer premises equipment, or providing intraLATA information services. Consistently, these fears have proved unfounded. Requestors' prophecies of doom are even less credible than those that have been proven wrong in the past.

Proposed Rulemaking, 11 FCC Rcd 21905 ¶ 115 (1996) ("*Non-Accounting Safeguards Order*").

ARGUMENT

I. REQUESTORS' ATTEMPT TO TIE THE SUNSET PERIOD FOR INTERLATA INFORMATION SERVICES TO THE COMMISSION'S GRANTING OF SECTION 271 RELIEF CONTRADICTS CONGRESSIONAL INTENT AS REVEALED IN THE STRUCTURE AND TEXT OF THE STATUTE

Requestors' legal analysis is based on a mistaken premise. They argue repeatedly that the Commission, in determining whether to extend the separate subsidiary requirement for interLATA information services, should look to the status of local telecommunications markets (as reflected in the Commission's decisions regarding section 271 relief). That argument misreads the Act. While BellSouth firmly believes that local markets are open and that competition there is growing rapidly, section 272 makes plain that the status of the local telecommunications market is not relevant to the question presented here. Thus, the Commission should look at the market to which the separate subsidiary requirement would apply—the interLATA information services market—in making its determination.

Section 272 of the Act imposes stringent and burdensome requirements, including the conduct of business through a separate affiliate, on BOCs who compete in (1) manufacturing activities, (2) origination of interLATA telecommunications services (with certain exceptions not relevant here), and (3) interLATA information services other than electronic publishing and alarm monitoring services.[3] The section also provides two separate sunset provisions, only one of which is tied to competition in the markets for local telephony.

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[3] *See* 47 U.S.C. § 272(a)(2).

Section 272(f)(1), which governs BOC manufacturing activities and interLATA telecommunications services, provides that the structural separation requirement and related requirements of section 272

> shall cease to apply with respect to the manufacturing activities or the interLATA telecommunications services of a Bell operating company 3 years after the date such Bell operating company or any Bell operating company affiliate is authorized to provide interLATA telecommunications services under section 271(d) . . ., unless the Commission extends such 3-year period by rule or order.

47 U.S.C. § 272(f)(1). Thus, with respect to manufacturing and interLATA telecommunications services, Congress explicitly linked the lifting of the section 272 requirements to the status of local telecommunications markets, as reflected in authorization under section 271(d).

In stark contrast, section 272(f)(2), which governs interLATA information services and hence is the provision relevant here, does *not* tie the sunset provision to developments in local telecommunications markets. Instead, section 272(f)(2) provides that the section 272 requirements

> shall cease to apply with respect to the interLATA information services of a Bell operating company 4 years after February 8, 1996, unless the Commission extends such 4-year period by rule or order.

Id. § 272(f)(2).

Congress thus was not concerned that continuation of the BOCs' alleged market power in the local telecommunications market would create competitive problems in the interLATA information service market. Congress's judgment in that regard, moreover, was not novel. Shortly before the passage of the Telecommunications Act of 1996, the Department of Justice supported a waiver of restrictions in the AT&T Divestiture Decree that would have allowed BOCs to provide interLATA information services

notwithstanding what DOJ then thought to be the BOCs' continuing monopoly over local loops.[4] (The 1996 Act was passed before the court ruled on the waiver.)

In sum, Requestors' main legal argument—that Congress did not intend section 272's separate affiliate and other requirements to sunset until the BOCs received authorization to enter the long-distance market pursuant to section 271—gets things precisely backwards. Although Congress *did* intend to keep the section 272 requirements in place with respect to BOC manufacturing activities and interLATA *telecommunications* services until the section 271 criteria were met, Congress did *not* intend to condition the lifting of the section 272 requirements upon compliance with section 271 insofar as interLATA *information* services are concerned.

Congress wrote this difference in treatment into the text of the statute itself, and the Commission must interpret the statute in a way that gives meaning to all of its terms. Doing so here requires that the Commission look to the state of competition not in local telecommunications, but in interLATA information services. As BellSouth will now explain, it is clear beyond all doubt that the BOCs pose no threat to competition in that market.

II. THE ENORMOUS COMPETITION IN INTERLATA INFORMATION SERVICES ELIMINATES ANY POSSIBILITY OF DISCRIMINATION BY BELL OPERATING COMPANIES

As BellSouth noted at the outset, in this docket the Commission has defined interLATA information services as the offering of information content bundled with an interLATA transport component. There is no reason to believe that the BOCs have, or

[4] *See generally* Memorandum of the United States in Support of the Motion of the Bell Companies for a Waiver to Permit Them to Provide Information Services Across LATA Boundaries, *United States v. Western Elec. Co.*, No. 82-0192 (D.D.C. May 8, 1995).

could obtain, market power as to either of those components, much less as to the bundle. As for the content component, although Congress scarcely considered the Internet's impact when it passed the Telecommunications Act of 1996,[5] the Internet today accounts for the bulk of interLATA information traffic. There can be no dispute that the BOCs are minuscule players in the burgeoning Internet content business. As for the interLATA component, BOCs currently do not provide interLATA telecommunications and so do not participate in the integrated market for interLATA information services. If anything, BOC entry into those markets will spur competition by taking market share from the entrenched oligopolists. Indeed, the BOCs' experience even in offering *intra*LATA information services demonstrates that there is no danger that the BOCs' alleged dominance in local voice telephony could cause competitive harm in the realm of information services. In short, the notion that BOCs could use their alleged control over the local loop to dominate not only interLATA telecommunications but also Internet content is absurd.

A. The BOCs Lack Market Power with Respect to Content

No BOC is a major Internet content provider. According to PC Data Online, which ranks web sites by the number of unique users per month,[6] the largest web sites on the Internet have traffic volumes 10 to 20 times greater than even the largest BOC sites. Among the portals, Yahoo, the busiest site online, had close to 38 million unique users in November 1999; AOL.com had 32 million users; MSN.com had 29 million users; and

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[5] When the first commercial web browser appeared on the market in 1993, there were 1.3 million computers with an Internet address; by 1996, there were 9.4 million; in July 1999, there were over 56 million. *See* Robert H. Zakon, Hobbes' Internet Timeline v.4.2 (last modified Aug. 15, 1999) <http://www.isoc.org/guest/zakon/Internet/History/HIT.html>.

[6] *See generally* <www.pcdataonline.com>.

Lycos.com had 16 million users. AOL, Microsoft, and Lycos all had multiple sites listed in the top 20. The top e-commerce sites were Amazon.com (16th) and eBay.com (17th), which each had close to 14 million users. Many news and information sites, usually associated with traditional media, also came in far above the BOC sites. CNet.com was 18th with 13 million users, MSNBC.com was 36th with 7 million users, ESPN.com was 59th with 5 million users.

The BOC sites are tiny by comparison. For November 1999, the PC Data Online ranked BOC sites as follows:

Site	Ranking	Unique Users
BellSouth.net	241	1.9 million
Yellowpages.net (SBC/Ameritech)	273	1.7 million
GTE.net	361	1.4 million
BellSouth.com	375	1.3 million
At Hand (BellSouth/SBC/U S WEST)	411	1.2 million
USWEST.net	835	675,000
USWESTDEX.com	898	632,000
USWEST.com	1017	577,000
Ameritech.net	1177	510,000
PacBell.net	1318	459,000
BellAtlantic.net	1385	438,000
BellAtlantic.com	1556	389,000
SWBell.net	1564	387,000
BigYellow.com	1596	381,000

Not only do major internet content providers attract more users to their web sites, many of them also have market values in excess of, or at least comparable to, those of the BOCs. As of December 1999, BellSouth's market capitalization was $89 billion.[7] For the same date, Bell Atlantic and SBC, the larger of the BOCs, had capitalizations of $98 billion and $183 billion, respectively. This compares to market capitalizations of $484

[7] For market capitalizations, *see Quicken.com-Quote* <http://www.quicken.com/investments/quotes>.

billion for Microsoft, $205 billion for AOL, and $93 billion for Yahoo. Additional web properties are controlled by subsidiaries of companies that are similarly well capitalized. AT&T ($182 billion cap) controls Excite@Home, NBC Internet is owned by General Electric ($482 billion cap), and Disney ($58 billion cap) owns the Go Network. Even start-ups like Amazon ($36 billion cap) and eBay ($21 billion cap) have the financial wherewithal to stand up to competition.

Given the intense competition in the market for Internet content—and the very low barriers to entry, since virtually anyone can set up a web page—the prospect of the BOCs monopolizing content on the Internet is laughable. Perhaps it is for that reason that CIX and ITAA do not so much as attempt to address the "information" aspect of interLATA information services.

B. BOC Entry Can Only Benefit Competition in InterLATA Telecommunications

In order to have an anticompetitive effect in the integrated market for interLATA information services, BOCs would have to exercise market power not only with respect to the content component but also with respect to the interLATA telecommunications component. The largest players in interLATA telecommunications generally are AT&T, MCI WorldCom, and Sprint. MCI WorldCom and Sprint are the largest Internet backbone providers.

The Internet's backbone networks are operated by some 43 national providers.[8] A recent study by Boardwatch Magazine found that MCI WorldCom accounts for 33 percent of ISP connections.[9] Sprint holds a 10 percent share of the market, followed by Intermedia (8 percent), Cable & Wireless (which inherited the backbone MCI spun off when it merged with WorldCom; 6 percent), and Electric Lightwave (5 percent).[10] Other backbone providers form a distant second tier, and the only likely entrant into the top tier is AT&T, which recently paid some $5 billion for IBM's backbone network (thus further concentrating an already concentrated market).[11]

Given this concentrated market with substantial barriers to entry, the prospect of BOC entry into the Internet backbone business can only serve to increase competition. It is fanciful to suggest that the BOCs could, without an existing base of backbone customers and without economies of scope from an established interLATA voice network, exert market power against entrenched, vertically integrated competitors like MCI WorldCom and Sprint. The Request contains no evidence to the contrary and, in fact, makes hardly more than a passing reference to the "interLATA" aspect of interLATA information services.[12]

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[8] *See* Bill McCarthy, *Introduction to the Directory of Internet Service Providers*, Boardwatch Magazine's Directory of Internet Service Providers, at 4 (11th ed. 1999).

[9] *See id.* at 5.

[10] *See id.* at 4.

[11] AT&T News Release, *AT&T to Acquire IBM's Global Network Business for $5 Billion* (Dec. 8, 1998) <http://www.att.com/press/item/0,1354,507,00.html>.

[12] *See* Request, at 12.

C. The BOCs' Experience in IntraLATA Information Services Demonstrates That Their Participation Does Not Harm Competition

Perhaps the strangest aspect of CIX and ITAA's Request is the amount of space devoted to the argument that BOCs will harm competition in the markets for dial-up and broadband Internet access. *See* Request, at 8-12. These services are entirely *intra*LATA services, and the BOCs already can and do compete in offering them without being subject to the separate subsidiary and other requirements of section 272. Accordingly, these services are completely irrelevant to evaluating whether to postpone the sunset date for provisions relating to interLATA information services. Moreover, as discussed below, Requestors' suggestion that BOCs' allegedly dominant position with respect to local loops has somehow impaired competition in the markets for Internet access or other information services is empirically false.

(1) The BOCs Lack a Dominant Position in the Market for IntraLATA Information Services

There are more than 6,000 Internet Service Providers ("ISPs") in the United States serving tens of millions of customers, and although the BOCs have been providing Internet access for many years, none has come close to obtaining market power as an ISP. As of September 1999, the largest ISPs were AOL (19.6 million subscribers), MSN (1.8 million), AT&T WorldNet (1.5 million), EarthLink (1.4 million), MindSpring (1.2 million), and Prodigy (1.1 million).[13] EarthLink and MindSpring have since agreed to merge.[14] In addition, free ISPs have been gaining market share lately. NetZero, a free

[13] David Foust & Dean Rocks, *In a Squeeze at MindSpring*, Business Week, Sept. 20, 1999, at 139.

[14] EarthLink Press Release, *EarthLink and MindSpring Announce Strategic Merger* (Sept. 23, 1999) <http://www.earthlink.com/about/pr/mindspring.html>.

ISP, recently reported nearly 2 million registered users.[15] AltaVista launched its FreeAccess service in August 1999; two months later, the company reported 550,000 registered users.[16] One analyst expects free ISPs to serve more than 13 million households by 2003.[17] By contrast, as of May 1999, BellSouth.net provided service to 500,000 subscribers.[18] GTE has some 600,000 subscribers; Bell Atlantic has 160,000[19]; and SBC/Ameritech had some 625,000 (before a recent investment in Prodigy).[20] In such a competitive marketplace, any attempt by BOCs to raise prices or decrease quality would be not only ineffective, but suicidal. Another example of an intraLATA information service in which competition has blossomed with BOC participation is voice mail. The voice-messaging industry has grown at double-digit rates; monthly service fees have dropped significantly; and no BOC has ever achieved a considerable share of this market.

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[15] NetZero Press Release, *NetZero Reports First-Quarter Results* (Oct. 25, 1999) <http://www.netzero.net/company/19991025quarter.html>. The number of regular users, however, is fewer. *See Free ISPs Pile Up Subscribers, But Viability is Questioned*, Communications Daily, Dec. 1, 1999.

[16] Chris Yurko, *Alta Vista and dotNow Claim Record Sign-Ups; Is Ad-Supported Access Catching On?*, Network World, Oct. 12, 1999.

[17] *See* Patricia Fusco, *Jupiter: Free ISPs Won't Replace Dial-Up Access* (Dec. 7, 1999) <http://www.internetnews.com/isp-news/article/0,1087,8_255291,00.html>.

[18] BellSouth Press Release, *BellSouth.Net Internet Service Draws Half a Million Southeast Subscribers* (May 12, 1999) <http://www.bellsouthcorp.com/proactive/documents/render/26262.vtml>.

[19] Application for Transfer of Control, Exhibit A, at 17, *GTE Corp. ,Transferor, and Bell Atlantic Corp., Transferee, for Consent to Transfer of Control*, CC Dkt. No. 98-184 (FCC filed Oct. 2, 1998).

[20] Prodigy Press Release, *SBC, Prodigy join consumer, small business Internet operations*

(2) The Advent of Broadband Internet Access Makes BOCs Even Less Likely to Exercise Market Power in the Future

Facilities-based competition in the market for *broadband* Internet access means that BOCs have even less power in the broadband world than in traditional information services.[21] Local-loop DSL technology lags far behind cable modems in providing broadband Internet access. Approximately 1,276,000 residential customers were using high-speed Internet services as of the end of second quarter 1999. Fully 1 million of these users (roughly 78 percent) access the Internet over cable systems.[22] At the same time only 190,000 residential subscribers (15 percent) were using DSL services,[23] and only about 86,000 (7 percent) were using a satellite service.[24]

It should therefore come as no surprise that the BOCs are minor players at best in the broadband Internet access market. Cable ISP giants Road Runner and Excite@Home dominate the residential broadband market, with 430,000 subscribers (34 percent) and

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(Nov. 22, 1999) <http://www.prodigy.com/pcom/sbc/sbc_index.html>.

[21] The Commission has designated 200 kbps as the point at which "broadband" services begin. This, in the Commission's view, is the speed at which next-generation or "advanced" Internet services become possible. This speed "is enough to provide the most popular forms of broadband – to change Web pages as fast as one can flip through the pages of a book and to transmit full-motion video." *See Inquiry Concerning the Deployment of Advanced Telecommunications Capability to All Americans in a Reasonable and Timely Fashion, and Possible Steps to Accelerate Such Deployment Pursuant to Section 706 of the Telecommunications Act of 1996,* 14 FCC Rcd 2398, 2406, ¶ 20 (1999) ("*Advanced Services Report*").

[22] Cable Datacom News, *Cable Modem Market Stats & Projections* (last modified Nov. 9, 1999) <http://www.cabledatacomnews.com/cmic/cmic16.html>.

[23] XDSL.com, *Deployment and Projections* (last modified Nov. 5, 1999) <http://www.xdsl.com/content/ resources/deployment_info.asp>.

[24] Hughes Electronics Corp. Press Release, *Hughes Reports 32% Revenue Growth And Solid EBITDA Growth In Third Quarter* (October 13, 1999) <http://www.hughes.com/ earnings/99_earnings/99_qt3/99_qt3_release.html>; *see* Reinhardt Krause, *DirecTV Thinks AOL Its Channel To Gains*, Investor's Business Daily, Oct. 12, 1999, at A6.

500,000 subscribers (39 percent), respectively.[25] Yet the BOCs face strong competition even within the DSL sphere. As the Cable Services Bureau has recognized,

> a new type of CLEC has begun to focus on the high-speed Internet market. Covad Communications Company (Covad), Rhythms NetConnections Inc. (Rhythms NetConnections), and NorthPoint Communications Inc. (NorthPoint) all have raised billions of dollars in their initial public offerings. These companies intend to target DSL services to small and mid-sized businesses, as well as to residential customers.[26]

In terms of central offices, as if November 1999, the CLECs had 2,071 DSL-equipped offices, while the BOCs and other ILECs had only 1,157.[27]

Finally, contrary to Requestors' claims, promotions by BellSouth and other BOCs involving free installation and a free modem are not only irrelevant, they are entirely proper. In BellSouth's case, for instance, BellSouth provides its Complete Choice service to all customers at its tariffed rate, regardless of whether the customer also subscribes to the FastAccess Internet access service. CLECs are also free to resell the Complete Choice service in combination with their own Internet access services. Moreover, BellSouth charges itself and competing ISPs the same tariffed rates for the ADSL services used to provide high-speed Internet access. Because Internet access services are not common carrier offerings, however, BellSouth is under no obligation to provide such services to all customers on nondiscriminatory terms.

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[25] Cable Datacom News, *supra*, n. 22 (This source lists a figure of 800,000 subscribers in North America, including Canada. An inquiry to the editorial board revealed that of that published number, 500,000 are U.S. subscribers.).

[26] FCC Cable Servs. Bureau, *Broadband Today*, Staff Report to William E. Kennard, Chairman, FCC, on Industry Monitoring Sessions Convened by Cable Servs. Bureau, at 27 (Oct. 1999).

[27] XDSL.com, *supra*, n.23.

Nor are these practices out of step with other offers in the marketplace. For example, Flashcom, an ISP that resells transport in partnership with NorthPoint and Covad, also offers free installation and modem at the same monthly price offered by BellSouth and Bell Atlantic.[28] These discounted offerings are the fruits of healthy competition for subscribers, rather than some nefarious attempt to stifle that competition.

D. The Open TCP/IP Protocol Used on the Internet Necessarily Prevents Any Attempt to Leverage Supposed Power Over the Local Loop into InterLATA Telecommunications or Further into Information Content

In discussing why non-structural safeguards would perform as well as structural separation in preventing anticompetitive behavior by BOCs with respect to information services, the Commission in its *Computer III* order[29] said it was "most important[]" that "CEI and Open Network Architecture requirements are specifically designed to ensure that all enhanced services providers, including the BOCs unregulated operations, receive equal access to the BOCs basic facilities."[30] The Internet takes the notion of equal and open network access to a new level, making non-structural safeguards all the more effective. A recent working paper from the Commission's Office of Plans and Policy describes the situation well:

> The most important technical feature of the Internet is its openness, which allows any user to develop new applications and to communicate with virtually any other user. This openness is driven by the sharing of that common communications protocol: IP, the Internet protocol, developed by early Internet pioneers. No one owns the Internet protocol, no one licenses its use, and no one restricts access to

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[28] *See* Flashcom, *Pricing* <http://www.flashcom.com>; BellSouth, *FastAccess - Cost* <http://services.bellsouth.net/external/adsl/cost.html>; Bell Atlantic, *Infospeed DSL and BellAtlantic.net Pricing* <http://www.bellatlantic.com/infospeed/more_info/pricing.html>.

[29] *Amendment of Section 64.702 of the Commission's Rules and Regulations (Third Computer Inquiry)*, Report and Order, 104 FCC 2d 958 (1986) ("*Computer III*").

[30] *Id.*, 104 FCC 2d at 1011, ¶ 97.

> it. IP is available for all to use, and the explosion of Internet applications, from online commerce and medicine to educational and social tools, demonstrates the wide range of individuals and companies taking advantage of the openness of the Internet.[31]

This openness deprives BOCs or any other information service providers of the opportunity to monopolize the Internet, since every packet is discretely addressed and encoded, with *both* the address on the "envelope" *and* the content within completely under the control of the originating computer—not the network provider. TCP/IP encoding implies the ultimate in unbundling, unbundling right down to the level of the individual data packet. Any bottleneck that BOCs might be thought to control at the local level simply will not translate into control of a bottleneck on the Internet, not only because of the fierce competition in cyberspace but also because TCP/IP guarantees open access with a vengeance. Because BOCs pose no threat to competition in interLATA information services, there is no need to postpone the sunset date prescribed in section 272(f)(2).

III. EVEN ASSUMING THAT THERE WERE A THREAT OF COMPETITIVE HARM HERE, EXISTING COMMISSION SAFEGUARDS ARE MORE THAN SUFFICIENT TO ALLEVIATE ANY CONCERNS

Even if the Commission were to conclude that there is a competitive concern here, that would not justify the relief that Requestors seek. Rather, as the Commission has concluded in the past, non-structural safeguards protect competition more efficiently and at significantly lesser expense.

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[31] Jason Oxman, FCC Office of Plans and Policy, *The FCC and the Unregulation of the Internet*, OPP Working Paper No. 31, at 5 (July 1999).

Beginning with its 1986 *Computer III* order, the Commission has been moving away from reliance on structural separation requirements as a means of addressing alleged competitive threats. In the Commission's words:

> Structural separation imposes opportunity costs by discouraging the BOCs from designing innovative enhanced services that utilize the resources of the public switched network. Such innovation losses, resulting from the physical, technical, and organizational constraints imposed by the structural separation requirements, directly harm the public, which does not realize the benefits of new offerings.[32]

The Commission has also acknowledged that "structural separation imposes direct costs on the BOCs from duplication of facilities and personnel, the limitations on joint marketing, and the inability to take advantage of scope economies," with the result that "the BOCs are unable to organize their operations in the manner best suited to the markets and customers they serve."[33] Furthermore, the Commission has indicated that the benefits of structural separation were rather more limited than anticipated, in part because "[t]he availability of bypass and other new technologies places some limits on the BOCs' ability to shift costs from their unregulated services to their regulated offerings without reducing the demand for those offerings."[34]

For these reasons, the Commission has used non-structural safeguards to protect competition not only with respect to BOC provision of intraLATA information services but also with respect to BOC sales of customer premises equipment[35] and video

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[32] *Computer III*, 104 FCC 2d at 1007, ¶ 89.

[33] *Id.* at 1008, ¶ 91.

[34] *Id.* at 1010, ¶ 96.

[35] *See Furnishing of Customer Premises Equipment by the Bell Operating Telephone Companies and the Independent Telephone Companies*, Report and Order, 2 FCC Rcd 143 (1987), *on recon.*, 3 FCC Rcd 22 (1987), *aff'd*, *Illinois Bell Tel. Co. v. FCC*, 883 F.2d 104 (D.C. Cir. 1989).

services.[36] In 1993, the Commission concluded that the public interest would not be served by a structural separation requirement for PCS operations of LECs.[37] "Indeed," the Commission said, "by seriously limiting the ability of LECs to take advantage of their potential economies of scope, such requirements would jeopardize, if not eliminate, the public interest benefits we seek through LEC participation in PCS." Although a remand from the Sixth Circuit later prompted the Commission to reinstate some structural requirements for PCS operations, the degree of separation required is looser than that prescribed by section 272.[38]

The shift toward reliance on non-structural safeguards since *Computer III* represents a fundamental change in regulatory philosophy: rather than regulating access to or by corporate entities, the Commission now generally regulates access to or from telecommunications networks themselves. The Commission should reject Requestors' invitation to turn back the clock to the burdensome, inefficient, innovation-destroying regulation of corporate structures. The Commission should also disregard Requestors' nostalgic block quotes about the importance of structural separation from *Computer I* and *Computer II*,[39] which were the products of a different regulatory environment, a different industry structure, and an embryonic information services marketplace.

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[36] *Implementation of Section 302 of the Telecommunications Act of 1996 (Open Video Systems)*, Report and Order and Notice of Proposed Rulemaking, 11 FCC Rcd 14639 (1996).

[37] *Amendment of the Commission's Rules to Establish New Personal Communications Services*, Second Report and Order, 8 FCC Rcd 7700, 7751-52, ¶ 126 (1993).

[38] *See Amendment of the Commission's Rules to Establish Competitive Service Safeguards for Local Exchange Carrier Provision of Commercial Mobile Radio Services*, Report and Order, 12 FCC Rcd 15668, 15692-94, ¶¶ 37-40 (1997).

[39] *See* Request at 14-16.

In this regard, Requestors misleadingly state that the Ninth Circuit "has twice found that [*Computer III's*] regime is inadequate to prevent BOC anti-competitive abuse in the information (enhanced) services market."[40] In fact, the Court of Appeals never ruled on the adequacy of non-structural safeguards but instead twice remanded *Computer III* on procedural grounds.[41] The court expressly recognized that the balancing of costs and benefits "must be left to the discretion of the FCC."[42] Nothing has happened since *Computer III* to undermine the Commission's findings that "nonstructural requirements will perform as well as structural separation in combating the possibility of discrimination by the BOCs," and that "the discrimination potential inherent in the BOCs' control of the local exchange monopolies has eroded" over time.[43] On the contrary, a decade of experience has proved the Commission correct, and nowhere are those statements more true than with respect to interLATA information services, as demonstrated above.

Insofar as Requestors have managed to find remaining examples of structural separation requirements in telecommunications services, as in the SBC-Ameritech merger,[44] their reliance on those examples to support postponing the sunset date for interLATA information services is misplaced, for two reasons. First, Requestors are simply wrong when they say that "BOC entry into the advanced telecommunications services market raises the very same issues as BOC entry into the inter-LATA

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[40] Request at 18; *see also id.* at 19.

[41] *See California v. FCC*, 905 F.2d 1217 (9th Cir. 1990) ("*California I*"); *California v. FCC*, 39 F.3d 919 (9th Cir. 1994) ("*California III*").

[42] *California I*, 905 F.2d at 1231.

[43] *Computer III*, 104 FCC 2d at 1011, ¶ 97.

[44] *See* Request, at 16.

information services market."[45] As noted in Part I above, Congress has correctly recognized that telecommunications and information services markets are different in this regard, and it has accordingly created two separate sunset provisions in section 272(f). The Commission is bound to adhere to Congress's judgment on this point. And, as explained in detail in Part II above, whatever the facts are as to the intraLATA advanced services market, there is no prospect of BOCs exercising market power with respect to interLATA information services, as defined in this docket, and hence no justification for prolonging the separate subsidiary requirement. Second, the Commission's regulation of advanced telecommunications services like Digital Subscriber Line ("DSL") service—including such steps as line-sharing, unbundling requirements, and expanded collocation—already serves to reduce any supposed BOC market power, thus weakening rather than strengthening the case for additional structural separation of information services.

CONCLUSION

For the foregoing reasons, the Commission should decline to postpone the sunset date in 47 U.S.C. §272(f)(2) for the structural separation and other extraordinary BOC-specific requirements contained in section 272(b), (c), (d), and (g) of the Communications Act of 1934, as amended.

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[45] *Ibid.*

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CERTIFICATE OF SERVICE

I, Shannon K. Thrash, hereby certify that on this 17th day of December, 1999, copies of the foregoing Comments of BellSouth Corporation were served upon the following parties via hand-delivery or first class United States mail:

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