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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C.

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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, Inter-LATA Information Services	)	CC Docket No. 96-149

COMMENTS OF BELL ATLANTIC

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Region, Inter-LATA Information Services	)	

COMMENTS OF BELL ATLANTIC[1]

INTRODUCTION AND SUMMARY

In a filing that regurgitates the same failed arguments made in Computer Inquiry III over the past decade and a half, CIX and ITAA claim that the Commission should retain a separate affiliate requirement for interLATA information services. They are wrong. CIX and ITAA distort the provisions of the Act and the legislative history, ignore the Commission's unbroken line of contrary findings, and fail to show how existing non-structural safeguards, that have operated successfully for over a decade in the robust, rapidly-growing information services market, are inadequate.

Since 1987, the Bell companies have been permitted to provide intraLATA information services subject to the non-structural safeguards established in Computer

[1] The Bell Atlantic telephone companies ("Bell Atlantic") are Bell Atlantic-Delaware, Inc.; Bell Atlantic-Maryland, Inc.; Bell Atlantic-New Jersey, Inc.; Bell Atlantic-Pennsylvania, Inc.; Bell Atlantic-Virginia, Inc.; Bell Atlantic-Washington, D.C., Inc.; Bell Atlantic-West Virginia, Inc.; New York Telephone Company; and New England Telephone and Telegraph Company.

Inquiry III.[2] During that period – more than a decade – the information services business has experienced dramatic growth, falling prices, and thriving competition. The exact opposite would be true if the Chicken Little predictions of CIX/ITAA had any basis in reality. Moreover, the Commission has not received a single formal complaint that any Bell company has violated any of those safeguards or that any non-affiliated information service provider has been discriminated against. The Commission itself recognized that the Computer Inquiry III non-structural safeguards have been a success when it recently found it unnecessary to give prior approval to new Bell company information services in order to protect competition.[3]

Here, CIX/ITAA want the Commission to require the Bell companies to provide interLATA information services through a separate affiliate rather than pursuant to the non-structural safeguards under the successful Computer Inquiry III regime. But CIX/ITAA never even attempt to show that there are any differences between an inter and intraLATA information service that warrant scrapping the successful non-structural safeguards. In fact, there are no such differences.

CIX/ITAA concede that structural separation of *out-of-region* information services should sunset on February 8, 2000 – they ask that only the sunset for *in-region* be extended for two years. As shown below, they have no factual, legal, or policy

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[2] *See, e.g., Amendment of Section 64.702 of the Commission's Rules (Third Computer Inquiry),* 104 F.C.C.2d 958 (1986) ("Computer III Order").

[3] *Computer III Further Remand Proceedings: Bell Operating Company Provision of Enhanced Services, Report and Order*, 14 FCC Rcd 4289, ¶ 11 (1999) ("Further Remand Order") ("[C]ompliance with the Commission's CEI [non-structural] safeguards remains conducive to the operation of a fair and competitive market for information services").

support for delaying the in-region sunset date, and the Commission should flatly reject their request.

ARGUMENT

I. Sunset of Structural Separation For InterLATA Information Services In the Act Is Not Tied To Long Distance Relief.

CIX/ITAA claim that Congress did not intend that the separate affiliate requirement for interLATA information services should sunset before long distance relief is granted.[4] Request of the Commercial Internet eXchange Association and the Information Technology Association of America at 6 ("CIX/ITAA"). The problem with that allegation is that the plain language of the Act proves otherwise. While section 272(f)(1) ties sunset of the structural separation requirement for *telecommunications services* to grant of long distance relief, the sunset for *information services* under 272(f)(2) is four years *after enactment*. By enacting disparate sunset dates, Congress demonstrated its intent that the information services sunset should be independent of long distance relief. And nothing in the legislative history indicates otherwise.

CIX/ITAA disingenuously quote from the Senate report to support their distorted reading of Congressional intent – that Congress expected that the information services sunset date would not precede grant of long distance relief. CIX/ITAA at n.9. But they ignore the fact that the Senate bill would not have required any structural separation at all

[4] Bell Atlantic has shown that the Act does not require prior Commission approval before a Bell company may provide interLATA information services, because the section 271 restriction is limited to telecommunications services. *See, e.g.*, Bell Atlantic Comments, CC Docket No. 98-147 at 11 (filed Sept. 25, 1998). This issue is currently pending on appeal. *See Bell Atlantic v. FCC*, No. 99-1479 (D.C. Cir.).

for most interLATA information services. And in any event, the Conference Report makes clear that Congress *deleted* the very Senate sunset provision on which CIX/ITAA erroneously rely. *See* Conf. Rpt. 104-458, 104th Cong., 2d Sess. at 152. Moreover, under the House bill, which had a structural separation provision for information services, such separation would have ended eighteen months after enactment, with no provision allowing extension.

Accordingly, by providing different sunset dates – one tied to long distance relief and one based only on the date of enactment – Congress recognized that long distance relief could be delayed and that the sunset of structural separation for information services should not be postponed as a result.

II. The Commission Has Repeatedly Found That Non-Structural Safeguards Will Fully Guard Against Cross-Subsidies and Other Anticompetitive Practices.

The Commission, in an unbroken line of decisions, has found non-structural safeguards for Bell company provision of information services fully sufficient to protect competition. As long ago as 1987, the Commission found that the "inefficiencies and other costs to the public associated with structural separation significantly outweigh the corresponding benefits" and removed the structural separation requirements that had prevented the public from receiving new information services. Computer III Order at ¶ 46. After the benefit of five years of experience under this regime, the Commission reaffirmed its conclusion that permitting the Bell companies to provide information services subject to non-structural safeguards "result[] in the wider availability of enhanced services to the public, while

effectively ensuring that BOC participation in enhanced services does not adversely affect basic service rates or harm ESPs due to BOC anticompetitive conduct."[5]

Since enactment, the Commission has continued to recognize the benefits of allowing Bell companies to provide information services free of a separate affiliate requirement. In its proposal last year to retain (and modify) the Computer Inquiry III non-structural safeguards, the Commission found that, in the period since the Bell companies were allowed to provide information services on an unseparated basis, competition "has continued to increase markedly as new competitive ISPs have entered the market."[6] And just this year in the Further Remand Order, the Commission not only retained structural relief for information services, it modified the requirements to allow the Bell companies to bring new information services to the market on an unseparated basis without prior Commission approval. It found that that pre-approval requirement is "no longer necessary in the public interest as a result of meaningful competition." Further Remand Order at ¶ 6. While retaining non-structural safeguards to prevent harm to competition, the Commission allowed the Bell companies to offer new or revised information services simply by posting on the Internet how they intended to meet those safeguards. And, since they were first adopted in1987, not one complaint has been filed that any Bell company has failed to fully meet the Commission's non-structural requirements.

Faced with this unbroken line of Commission findings and Bell company adherence to the safeguards, CIX/ITAA stoop to quoting from ancient history to support their position

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[5] *Computer III Remand Proceedings,* 6 FCC Rcd 7571, ¶ 98 (1991).

[6] *Computer III Further Remand Proceedings: Bell Operating Company Provision of Enhanced Services, Further Notice of Proposed Rulemaking*, 13 FCC Rcd 6040, ¶ 36 (1998) ("Further Notice").

– Commission decisions from the 1970s and early 1980s that initially imposed structural separation and that have been long superseded by non-structural remedies. *See* CIX/ITAA at 14-15. They also disingenuously cite the two Ninth Circuit cases that addressed the Computer Inquiry III regime to support their claim that non-structural safeguards are inadequate. *See id.* at 18-19. While the first case reversed the initial Computer Inquiry III structure because the Commission had not shown that removing structural separation will fully protect against cross-subsidy and discrimination, *See California v. FCC*, 905 F.2d 1217 (9th Cir. 1990), the second appeal upheld most of the safeguards as effective to prevent anticompetitive abuses. In the second case, *California v. FCC*, 39 F.3d 919 (9th Cir. 1994), the court found that, with the measures the Commission implemented during the intervening period (price caps and cost accounting), "the BOCs' incentive and ability to cross-subsidize will be significantly reduced." *Id.* at 926. The *only* basis upon which the court reversed in 1994 was the failure of the Commission to implement "fundamental unbundling," which is not at issue here.

As a result, the Commission has uniformly held since 1987 that non-structural safeguards for Bell company provision of intraLATA information services will fully protect competition while allowing the Bell companies to give the public the benefit of new information services as soon as they can be brought to market.

III. Non-Structural Safeguards Will Effectively Protect Competition in the Inter-LATA Information Services Market.

These findings apply equally to interLATA information services, despite CIX/ITAA's claim to the contrary. CIX/ITAA at 13-20. First, they again attempt to support their claim by quoting language from the Commission's First and Second

Computer Inquiries on the benefits of structural separation, ignoring the fact that the Commission in the Third Computer Inquiry found structural separation unnecessary for the same services. *Id.* at 13-17.

Second, they collaterally attack the Computer Inquiry III non-structural safeguards as "inadequate" for interLATA information services. *Id.* at 17-20. They claim that Computer Inquiry III does not contain an "absolute prohibition" against discrimination in favor of the Bell company's own information services. *Id.* at 17. This is, of course, flatly wrong. Under the Computer Inquiry III regime, the information service provider must take all telecommunications services under tariff, at the same rate that is available to others, and the Bell company must comply with a series of other detailed comparably efficient interconnection requirements designed to ensure against discrimination. As shown above, the Commission has uniformly found those non-structural safeguards fully sufficient to prevent discrimination, and more than a decade of experience has proved it correct. In fact, the Commission has found them to be so effective and Bell company compliance so ubiquitous that it eliminated the advance approval requirement as unnecessary.

Third, CIX/ITAA attack the Commission's cost allocation mechanism, saying that it will be "exceedingly difficult" for the Commission to detect cross-subsidization if the Bell companies provided interLATA information services without structural separation. *Id.* at 20. But they never even attempt to show why detection of such subsidies will be any more difficult for interLATA information services market than for intraLATA information services, where, over more than ten years, the joint cost mechanism has proved effective.

IV. Competition In the Information Services Business Has Thrived, And the Bell Companies Are But Minor Players in the Internet Access Market.

During the period in which the Bell companies have been permitted to provide information services on an unseparated basis, competition has thrived, output has grown with increasing rapidity, and prices have fallen. By 1994, seven years after Computer Inquiry III, the information services industry already accounted for $135.9 billion in revenues, and the Commerce Department termed it "among the fastest growing sectors of the economy."[7] That rapid growth has continued unabated. Today, according to the Commerce Department, the United States is "the world's largest producer and consumer of information technology products and services."[8] Eight out of the top ten information services companies in the world are United States companies, and none is a Bell company.[9]

The only interLATA information service that CIX/ITAA specifically identify as carrying the potential for anticompetitive activity is Internet access, a service which Bell Atlantic already provides as an intraLATA service on a structurally integrated basis. *See* CIX/ITAA at 11-12. Currently, the customer must select the interLATA provider from a list of non-affiliated companies and must contract with that provider for its service. Once Bell Atlantic obtains long distance relief in a state, Bell Atlantic expects to offer the customer a packaged service that includes the interLATA transmission segment, just as

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[7] United States Department of Commerce, *U.S. Industrial Outlook 1994* at 25-1.

[8] United States Department of Commerce, DRI/McGraw-Hill, and Standard and Poor's, *U.S. Industry & Trade Outlook '99* at 26-1.

[9] *Id.* at 26-4.

does every one of the thousands of other Internet service providers in the market today that is not subject to section 271 and 272 restrictions.

Despite CIX/ITAA's entreaties, Bell Atlantic's Internet access can hardly be deemed to provide a serious competitive threat to their members. The country's growing Internet habit is currently being fed by some 5,100 Internet service providers, more than triple the number since the beginning of 1996.[10] These companies serve some 110 million Internet users,[11] a figure that is expected to grow to 165 million by 2002.[12] By 2005, the U.S. should be home to more than 207 million Internet subscribers.[13] According to one estimate, Internet service providers will account for $23.6 billion in revenues in 1999, up 68 percent from just a year ago.[14]

This massive growth has happened in the face of unseparated competition from several of the Bell companies. Yet, according to published reports, to date Bell Atlantic has been able to garner but 200,000 subscribers – less than two-tenths of one percent of

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[10] *See* Boardwatch Directory of Internet Service Providers (11th ed. 1999); J. Rickard, Boardwatch Directory of Internet Service Providers (Fall 1997). This figure is also substantially higher than the Commission's estimate of 3,000 Internet providers in the Fall of 1996. Further Notice at ¶ 36.

[11] K. Woo, *U.S. To Top 110 Million Net Users By Year End*, Newsbytes, Nov. 8, 1999; See also Nielsen/NetRatings, *Internet Usage Statistics for the Month of November 1999*, http://209.249.142.16/nnpm/owa/NRpublicreports.usagemonthly (118 million).

[12] K. Woo, *U.S. To Top 110 Million Net Users By Year End*, Newsbytes, Nov. 8, 1999.

[13] S. Machlis, *U.S. To Have 133M Internet Users Next Year*, Computerworld, July 7, 1999, http://www.idg.net/crd_internet_9-134419.html.

[14] M. Stone, *Ma & Pa ISP Market Booming*, Newsbytes, June 2, 1999 (based on a study by the Cahners In-Stat Group); *See also* F. Murphy, First Union Capital Markets, Company Report - CAIS Internet, Investext Rpt. No. 2879925, June 16, 1999 (IDC project[ed] total Internet Service Provider revenue in the United States to grow from $4.6 billion in 1997 to $19.3 billion in 2000).

the total market. By contrast, America Online has at least 19,000,000 subscribers, CompuServe 2,000,000, and AT&T WorldNet 1,800,000.[15] Even if Bell Atlantic were able to improve its share ten-fold in the coming years, the resulting two percent market share would hardly pose a competitive threat. It is no wonder that CIX/ITAA cannot articulate how the Bell companies could possibly impede competition in this dynamic market, because clearly they could not.

CIX/ITAA also claim that the emergence of broadband Internet access services somehow provides further support for extending the structural separation sunset. They ignore two critical facts, however. First, it is the cable television companies, not local exchange carriers, that are by far the largest purveyors of broadband services. With cable systems passing nearly all American homes, "[f]or many, perhaps most, American citizens, their first opportunity to obtain high bandwidth Internet access will be through cable systems."[16] The cable incumbents enjoy a nearly 80% share of the broadband market, and the Commission needs to allow the Bell companies to compete against this market dominance unencumbered by the restraints that do not apply to the cable

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[15] *See* Ranking Internet Service Providers by Size, http://www.jetcafe.org/~npc/isp/large.html.

[16] Petition to Deny of Consumers Union, Consumer Federation of America, and Office of Communication, Inc. of the United Church of Christ at 11, *Joint Application of AT&T Corp. and Tele-Communications, Inc. for Approval of Transfer of Control of Commission Licenses and Authorizations*, CS Docket No. 98-178 (filed Oct. 29, 1998).

companies.[17] As this Commission recognized nearly a year ago, "[t]he most popular offering of broadband to residential customers is via 'cable modems' offered by cable television companies within their cable service territories."[18] In fact, as of October 1999, cable modems were available in more than 100 local markets, including 25 of the 30 largest MSAs.[19] 21 million cable subscribers are served by upgraded cable systems that can provide broadband access, and is increasing rapidly – by four million in the past quarter alone.[20]

V. CIX/ITAA Have Not Shown That the Bell Companies Have Engaged in Anticompetitive Conduct.

With no factual or legal basis for their request, and unable to show how the Bell companies could impede competition, CIX/ITAA attempt to show that the Bell companies have engaged in anticompetitive acts that, they claim, show that they will harm competition

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[17] At the end of the third quarter of 1999, there were approximately 1,000,000 cable modem subscribers Cable Datacom News, *Cable Modem Market Stats & Projections*, Nov. 9, 1999, http://www.cabledatacomnews.com/cmic/cmic16.html. At the same time, there were about 190,000 residential digital subscriber line customers. XDSL.com, *Deployment and Projections - Updated 11/5/1999*, http://www.xdsl.com/content/ resources/deployment_info.asp. And there were about 86,000 satellite broadband subscribers. Hughes Electronics Press Release, *Hughes Reports 32% Revenue Growth And Solid EBITDA Growth In Third Quarter*, October 13, 1999. Cable's 1,000,000 figure is 78% of the total 1,276,000 subscriber market.

[18] *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, ¶ 54 (1999).

[19] *See* Cable Datacom News, *Commercial Cable Modem Launches in North America*, http://cabledatacomnews.com/cmic/cmic7.html.

[20] Eric Nee, *Is Excite@Home the AOL of Broadband?*, Fortune, Dec. 6, 1999 at 157.

if allowed to provide interLATA information services without structural separation. Here again, they have failed, because these alleged violations are, in fact, lawful. For example, in the only example involving Bell Atlantic, they allege that Bell Atlantic is unlawfully bundling digital subscriber line ("DSL") service with customer premises equipment ("CPE") by giving CPE discounts to customers of Bell Atlantic's DSL service. CIX/ITAA at 10. But they simply have their facts wrong. What they fail to point out is that the bundling involves two unregulated offerings -- Internet access, an information service, and a modem, which is CPE. Bell Atlantic's information service provider subscribes to Bell Atlantic's DSL service under tariff on the same basis as can any other ISP (as required under Computer Inquiry III). It then adds the Internet access component (browser and search functions) and resells the resulting information service to the public on an unregulated basis. Bell Atlantic also offers customers of this unregulated information service a price reduction on a DSL modem – an item of unregulated CPE. There is no order, rule, or policy that prohibits the Bell companies from bundling unregulated information services and unregulated CPE, which is exactly what is happening here.

VI. Removal of Structural Separation Will Further Information Service Competition.

Just as removal of structural separation in 1987 allowed the Bell companies to offer new intraLATA information services with no harm to competition, so removal of the separation requirement for interLATA information will enable them to compete against the large, well-funded incumbent providers of those services, such as America Online, MindSpring, and CompuServe, again without harming competition. And it will allow them to compete more effectively against the closed cable television systems. The Computer Inquiry III non-structural safeguards will fully prevent cross-subsidies and

anticompetitive conduct, just as it has for more than a decade in the intraLATA world. Denial of the CIX/ITAA's request will therefore help the public without harm to their members.

VII. Conclusion

Accordingly, CIX/ITAA's request should be denied and the structural separation requirement for interLATA information services should sunset as scheduled four years after enactment of the 1996 Act.

Respectfully submitted,

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December 17, 1999

CERTIFICATE OF SERVICE

I hereby certify that on this 17th day of December, 1999, copies of the foregoing "Comments of Bell Atlantic" were sent by first class mail, postage prepaid, to the parties on the attached list.

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