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

COMMENTS OF AT&T CORP.

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COMMENTS OF AT&T CORP.

Pursuant to the Commission's Public Notice,[1] AT&T Corp. ("AT&T") respectfully submits the following comments.

In its Public Notice, the Commission seeks comment on a number of related issues regarding the continued need for application of the Computer III safeguards (in conjunction with the possible imposition of structural separation requirements) to the Bell Operating Companies ("BOCs"). In particular, the Commission seeks comment on (1) "the continued application of the *Computer III* safeguards to BOC provision of enhanced services;" (2) "whether there is a way to make any safeguards that we adopt in this proceeding more self-enforcing;" and (3) whether "the Commission's unbundling requirements promulgated pursuant to section 251 of the 1996 Act" affect the level of unbundling that the Commission should impose under ONA. Public Notice, pp. 1-2.

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[1] Public Notice, Further Comment Requested to Update and Refresh Record On Computer III Requirements, CC Docket Nos. 95-20, 98-10, DA 01-620 (released March 7, 2001). *See* 66 Fed. Reg. 15064 ("Public Notice").

The answers to the Commission's inquiries are straight-forward. Despite the passage of the 1996 Act and the adoption of the Commission's regulations implementing the Act's local competition provisions, no significant change has taken place in the marketplace that would warrant any relaxation in the existing ONA requirements that apply to the BOCs. The regrettable reality is that – largely due to the BOCs' unrelenting opposition to full implementation of their section 251 obligations – the BOCs continue to exercise monopoly bottleneck control over local facilities and equipment, and remain able to exploit that control to thwart competition in the information services market. Indeed, far from providing cause for optimism, recent events, including the difficulties encountered by entities such as Northpoint, Rythms and Covad, who have sought to compete with the BOCs in the provision of the advanced telecommunications services that ISPs need to provide their information services to end users, vividly demonstrate that the existing nonstructural safeguards must be retained.

In addition to leaving the *Computer III* non-structural safeguards in place, the Commission should order structural separation between a BOC's wholesale and retail operations. It should now be clear that non-structural safeguards are inherently inadequate when faced with an incumbent enjoying market power. Instead, a structural approach, pursuant to which the BOC's retail affiliate would be required to purchase wholesale capacity from the BOC under the same terms and conditions that the BOC would be required to make available to third parties, is required. Imposition of structural separation would accomplish two important objectives. First, it would go some way towards limiting (although by no means eliminating) a BOC's ability to discriminate in favor of itself and against new entrants. Second, the existence of formal structural

separation, and the attendant requirement that the BOC deal with its affiliate in an arms-length and transparent manner, would further the Commission's objective of making the ONA safeguards more self-enforcing, as a BOC's violation of those obligations would be more easily observed.

Finally, the promulgation of the Commission's unbundling requirements pursuant to section 251 of the 1996 Act provides no basis for the Commission to relax the existing scope of the ONA unbundling obligations. As the Commission correctly recognized in its *1998 FNPRM*, the unbundling obligations under section 251 of the Act and the ONA unbundling requirements are fundamentally different in scope and accomplish fundamentally different purposes.[2] Section 251(c), and the Commission's implementing regulations, require incumbent LECs to unbundle their *facilities*, in order to enable new entrants to attempt to compete with the ILECs in the provision of telecommunications services. Over the long-term, section 251's unbundling obligations, in conjunction with the Act's other market-opening requirements, are designed to break the BOCs' long-standing bottleneck monopolies. By contrast, the ONA unbundling obligations require the BOCs to unbundle certain network *services* that the BOCs use to provide their enhanced services, and make those basic service components available to competing ISPs. The ONA unbundling requirements thus provide important protections to competing ISPs during the period – which unquestionably continues today – in which the BOCs continue to dominate the exchange service and exchange access markets and many

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[2] Further Notice of Proposed Rulemaking, *Computer III Further Remand Proceedings: Bell Operating Company Provision of Enhanced Services*, 13 FCC Rcd. 6040, 6090-91 (1998) ("*1998 FNPRM*").

of the key network services on which ISPs depend are effectively available only from the BOCs.

I. THERE IS NO JUSTIFICATION FOR THE ELIMINATION OF COMPUTER III'S NON-STRUCTURAL SAFEGUARDS.

In its *1998 FNPRM*, the Commission recognized that "the BOCs remain the dominant providers of local exchange and exchange access services in their in-region states, and thus continue to have the ability and incentive to engage in anticompetitive behavior against competing ISPs." *1998 FNPRM*, 13 FCC Rcd. at 6072 (¶ 51). Accordingly, the Commission "tentatively conclude[d]" in 1998 that "the framework the 1996 Act set up for promoting local competition" is "consistent with, and provide[s] additional support for, the continued application of the Commission's current nonstructural safeguards regime for BOC provision of [] information services." *Id.*, at 6072-73.

Nothing has changed in the three years since the Commission issued its 1998 Further Notice of Proposed Rulemaking that would justify a decision by the Commission now to alter course and to remove or relax existing non-structural safeguards. The reality is that the BOCs continue to be the dominant providers of exchange and exchange access services in their territories, and continue to exercise bottleneck monopoly control over the facilities and equipment in their in-region states. There is thus no basis for the Commission to conclude that the *Computer III* nonstructural safeguards are no longer necessary to curb the BOCs' actual and potential anticompetitive behavior against competing ISPs.

Indeed, events since the Commission issued the *1998 FNPRM* confirm that the retention of the nonstructural safeguards are, if anything, even more necessary today than they were then. In recent months, many of the new entrants who compete with the BOCs in the provision of DSL lines and high-speed transport to ISPs, such as Northpoint, Rythms and Covad, have either filed for bankruptcy or have made clear that they are in danger of imminently having to do so. These events reveal that whatever optimism may have existed in 1998 that the BOCs' bottlenecks were on the verge of being broken was ill-founded, and that – as AT&T predicted in its 1998 comments – retention of the nonstructural safeguards is as vitally important today as ever.

II. THE COMMISSION SHOULD ORDER THE STRUCTURAL SEPARATION OF THE BOCS INTO DISTINCT WHOLESALE AND RETAIL UNITS.

In addition to retaining the *Computer III* nonstructural safeguards, the Commission should order the structural separation of the BOCs into distinct wholesale and retail units. As discussed above, the various obligations imposed by section 251 and the Commission's implementing regulations have thus far failed to break the BOCs' monopolies. Structural separation along wholesale-retail lines, by contrast, represents an alternative approach to opening the local markets, one that would impose fewer enforcement burdens on the Commission.

To constrain the BOCs' ability to use their ubiquitous network facilities to favor their own retail operations and stifle competition, AT&T urges the Commission to order the structural separation of the BOCs into distinct wholesale and retail units. Through structural separation, the Commission should require that the BOCs' retail arms be reconstituted as corporate affiliates separate from their wholesale arm. Under this

approach, the BOCs would continue to own and maintain their networks, whereas their structurally separate retail affiliates would compete on an equal footing with ISPs, CLECs and DLECs for customers. Thus, for example, if a BOC's retail affiliate wished to offer its customers a bundle of local exchange service and Internet access, the retail affiliate would have to purchase the facilities or services with which it is going to provide those services from the BOC under the same terms and conditions as unaffiliated ISPs and CLECs would. Once implemented, therefore, this structural separation would place competing ISPs in the same position as the BOC retail affiliate in their ability both to offer customers a bundle of local exchange and Internet access services as well as in offering their customers a stand-alone information service.

In addition to preventing discrimination, this structural separation would provide "the minimum necessary level of transparency to police the price and nonprice discrimination concerns."[3] Structural separation would thus also assist the Commission in achieving its goal of making the nonstructural safeguards "more self enforcing," or at least more easily enforced. Because a BOC's retail affiliate would be required to obtain network services on an arms-length basis from the BOC, those transactions would create a benchmark that would make a violation of the BOC's ONA obligations less difficult to detect.

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[3]Memorandum Op. and Order, *Silver Star Telephone Company, Inc. Petition for Preemption and Declaratory Ruling*, 12 FCC Rcd. 15668, ¶ 61 (1997) ("*CMRS Structural Separation Order*").

III. THE COMMISSION'S SECTION 251 UNBUNDLING REGULATIONS PROVIDE NO BASIS FOR RELAXING THE SCOPE OF THE ONA UNBUNDLING OBLIGATIONS.

The Public Notice seeks comment "on the extent to which the Commission's unbundling requirements promulgated pursuant to section 251 of the 1996 Act" provides any basis for modifying "the level of unbundling required under ONA." Public Notice, p.2. They plainly do not.

As the Commission observed in its *1998 FNPRM*, the Commission's section 251 unbundling regulations and the ONA unbundling obligations differ significantly in both scope and purpose. "Unbundling under section 251 includes the physical facilities of the network," and is designed to make it possible for new entrants to purchase those facilities and compete with the ILECs in the provision of telecommunications services. *1998 FNPRM*, 13 FCC Rcd. at 6090-91 (¶ 93). "Unbundling under ONA, in contrast, emphasizes the unbundling of basic *services*, not the substitution of underlying facilities in a carrier's network." *Id.* (emphasis added).

Over time, the section 251 unbundling obligations (if strictly enforced), along with the Act's other market-opening requirements, *may* make it possible for new entrants to break the BOCs' stranglehold monopoly over their local exchanges. Until such time as the BOCs no longer enjoy their monopoly power, however, the ONA unbundling requirements remain vitally important. So long as the BOCs remain dominant within their territories, ISPs who wish to provide their information services in competition with the BOCs' own ISP affiliates will be dependent – among other things – on purchasing both DSL lines and transport from the BOCs in order to provide their bundled information offerings. Accordingly, unless the BOCs are required to sell those network

services to unaffiliated ISPs at rates and terms that mirror those that the BOC ISP affiliate itself incurs, the BOCs would be able to engage in precisely the types of anticompetitive discrimination that the ONA obligations were designed to prevent.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on this 16th day of April, 2001, I caused true and correct copies of the foregoing Comments of AT&T Corp. to be served by hand delivery on the following:

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