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

In the Matter of	)	
	)	
Computer III Further Remand Proceedings	)	CC Docket No. 95-20
Bell Operating Company Provision of	)	
Enhanced Services	)	
	)	CC Docket No. 98-10
1998 Biennial Regulatory Review—	)	
Review of Computer III ONA	)	
Safeguards and Requirements	)	
	)	

FURTHER COMMENTS OF SBC COMMUNICATIONS INC.

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FURTHER COMMENTS OF SBC COMMUNICATIONS INC.

SBC Communications Inc. (SBC) files these further comments in response to the Commission's March 7, 2001 Public Notice, which invited parties to "update and refresh" the record in these proceedings.[1] In its earlier comments filed in 1998, SBC demonstrated that competitive and other marketplace developments supported significant streamlining of the Commission's *Computer III* and Open Network Architecture (ONA) regulatory regime.[2] Given the continuing rapid growth of competition during the past two years, it is time for the Commission to discard the fifteen-year old *Computer III* regime altogether.

General Introductory Comments and Summary

The Commission's rules regulating the provisioning of information services by the Bell Operating Companies (BOCs) date back more than 30 years.[3] During that time period, the

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[1] *In the Matter of Computer III Further Remand Proceedings Bell Operating Company Provision of Enhanced Services*, CC Docket No. 95-20, *1998 Biennial Regulatory Review — Review of Computer III ONA Safeguards and Requirements*, CC Docket No. 98-10, *Public Notice*, DA 01-620 (rel. March 7, 2001).

[2] *See* Comments of SBC Communications Inc., March 27, 1998 and Reply Comments of SBC Communications Inc., April 23, 1998.

[3] In *Computer III Further Remand Proceeding: Bell Operating Company Provision of Enhanced Services; 1998 Biennial Regulatory Review — Review of Computer III ONA Safeguards and Requirements*, CC Docket 95-20, CC Docket 98-10, Further Notice of Proposed Rulemaking, 13 FCC Rcd 6040, <>n.3 (1998) (*Further Notice*), the Commission stated that it does not "distinguish between an 'Enhanced Service Provider' (ESP) and an 'Information Service Provider' (ISP)." Hence the term ISP will refer to an Enhanced Service Provider or an Information Service Provider, but not a Internet Service Provider per se. Additionally, as used in

Commission has consistently modified and streamlined its regulations to reflect developments in the competitive landscape. In the pre-divestiture *Computer II* proceeding, the Commission required AT&T to offer enhanced services through a separate affiliate in order to prevent AT&T from engaging in anti-competitive behavior. In 1986, the Commission reexamined its rules "in light of the continuing significant changes in the communications and computer services marketplaces " and determined that the costs of structural separation outweighed the benefits. Consistent with these findings, the Commission eliminated the structural separation requirement and permitted the BOCs to offer enhanced services on an integrated basis provided they comply with nonstructural safeguards (specifically, the *Computer III* and ONA rules).

It is now time — indeed past time — for the Commission to take the next deregulatory measures. Driven by technological innovation, the past 15 years have seen an explosion in the number and types of information services in the marketplace, the most notable example being Internet access and related services. The BOCs certainly have played a role in the evolution of the information services market, but they are by no means dominant in that market. For this reason alone, the *Computer III* regime, which was conceived and implemented to incubate competition in a fledging industry, is out-dated.

Equally important, though, is that the BOCs no longer maintain monopoly bottleneck control in the provision of local exchange services. Fueled by the Telecommunications Act of 1996, competition for local exchange services is growing rapidly. According to ALTS, CLECs accounted for 9.3% of all access lines by the end of 2000, and their market share was growing rapidly.[4]

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these comments, SBC intends for the term ISP to refer to competitive ISPs, as opposed to the BOCs or BOC-affiliated ISPs. Consistent with the Commission's adoption of a consistent definition of ESP and ISP, it makes sense for the Commission to clarify that the term "basic service" as used in its *Computer III* rules and the 1996 Act's definition of "telecommunication service" extend to the same function.

[4] The State of Local Competition 2001, The Association for Local Telecommunications Services, Feb. 2001, p. 11. The report also indicated that CLECs provided 6.7% of the total nationwide end user telephone lines as of June 30, 2000, which represented a 53% growth in market share in just six months.

The Commission noted these competitive developments in its 1998 biennial regulatory review of the *Computer III* and ONA requirements.[5] Recognizing the protections afforded by the ONA requirements and the 1996 Act, the Commission eliminated the requirement that BOCs obtain prior approval of their Comparably Efficient Interconnection (CEI) plans prior to providing new information services.[6] The Commission also eliminated the *Computer III* network disclosure requirements, because it found those requirements were effectively superceded by the disclosure rules adopted pursuant to the 1996 Act.[7]

Now it is time for the Commission to go further. More than two years have passed since the Commission reviewed its *Computer III* and ONA requirements, and competition in the telecommunications and information services markets has continued to grow at a rapid pace during that time. For example:

- The number of Internet users is currently estimated to be about 400 million and is doubling every one to two years.[8]
- The consumer market for broadband services, in particular, continues to expand rapidly.
- The BOCs are now dwarfed by their competitors in the provision of telecommunications services to the largest and most significant sector of the information services industry - Internet services. Cable operators, who were the first to enter the market, serve close to 75% of all residential and small business broadband subscribers,[9] and CLECs provide

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[5] *In the Matter of Computer III Further Remand Proceedings Bell Operating Company Provision of Enhanced Services*, CC Docket No. 95-20, *1998 Biennial Regulatory Review — Review of Computer III ONA Safeguards and Requirements*, CC Docket No. 98-10, *Report and Order*, FCC 99-36 (rel. March 10, 1999) (*1998 Biennial Regulatory Review Order*).

[6] *Id.* at 4296.

[7] *Id.*

[8] *See* "Wild Ride – The Internet is No Joyride These Days – Providers and Investors are Hanging on For Dear Life, *tele.com*, at 1 (Mar. 5, 2001).

[9] FCC, High Speed Services for Internet Access: Subscribership as of June 30, 2000 (rel. Oct. 2000)

dial-up services to Internet service providers accounting for sixty percent or more of all dial-up Internet traffic.[10]

- A recent Commission report on local competition shows that the number of unbundled access lines provided by ILECs doubled in the first half of 2000 from about 1.5 million to 3 million lines.[11]
- The Commission has approved the entry of SBC and Verizon into the in-region long distance markets in Texas, Kansas, Oklahoma and New York.

The Commission should take the opportunity in this proceeding to eliminate outdated *Computer III* and ONA requirements that are no longer necessary in today's regulatory and competitive environment. As discussed below, the existing combination of alternative legal options, as well as widespread and growing competition, will ensure that ISPs have nondiscriminatory access to basic transmission services in the absence of these burdensome regulations.[12] Moreover, reducing the regulation of BOC-provided enhanced services will eliminate at least a small part of the significant disparity that exists in the regulation of the BOC's DSL services compared to competing cable modem services.

Even if the Commission fails to eliminate the *Computer III* and ONA requirements, it should clarify that such requirements apply only to BOCs and not BOC separate affiliates. Consistent with Commission precedent, nonstructural safeguards should not be imposed where there is already structural separation. In any event, these separate affiliates are non-dominant in

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[10] *See, The State of Local Competition 2001*, The Association of Local Telecommunications Services, Feb. 2001, p. 12.

[11] *See In the Matter of Policy and Rules Concerning the Interstate, Interexchange Marketplace; Implementation of Section 254(g) of the Communications Act of 1934, as amended; 1998 Biennial Regulatory Review — Review of Customer Premises Equipment and Enhanced Services Unbundling Rules In the Interexchange, Exchange Access, And Local Exchange Markets*, CC Docket No. 96-61, CC Docket No. 98-183, *Report and Order*, FCC 01-98 (rel. March 30, 2001)(*CPE-Enhanced Services Bundling Order*).

[12] *In re Amendment of Sections 64.702 of the Commissions Rules and Regulations*, CC Docket 85-229, *Report and Order*, 104 F.C.C.2d 958, 962 (1986) (*Computer III*).

the market and should not be considered BOC successors and assigns for purposes of the *Computer III* and ONA requirements.

Under no circumstances should the Commission give ISPs all or some unbundling rights available under section 251 of the 1996 Act. The 1996 Act draws a clear distinction between information services and telecommunications services, and only telecommunications services providers are entitled to unbundled elements. Any attempt to extend unbundling rights to ISPs would result in an unlawful and unauthorized taking of BOC property. Finally, the Commission has no basis to revive the outdated mandatory structural separation requirements of *Computer II* that it abandoned more than 15 years ago.

II. Responses to Specific Issues

A. *Computer III* and ONA Requirements Are No Longer Necessary to Ensure That ISPs Have Nondiscriminatory Access to Basic Transmission Services

In seeking comment on its *Computer III* and ONA requirements, the Commission should address, as a threshold matter, whether those requirements should be retained at all. In light of the fundamental changes that have taken place in telecommunications markets over the past fifteen years, SBC submits that the *Computer III* regime is anachronistic and, indeed, the very type of regime that Congress intended the Commission to eliminate when it enacted the 1996 Act. The underlying premise of the *Computer III* and ONA requirements is that, without those requirements, ISPs would be unable to obtain on nondiscriminatory terms the transmission services they need to provide their information services. SBC does not believe that this premise was ever correct — even when the BOCs were virtual monopoly providers of local exchange services. After all, the primary business of the BOCs is to sell local exchange and exchange access services, and they make money when information service providers purchase those services for use in the provision of an information service.

Irrespective, however, of whether this premise was ever valid, today it no longer is. The explosive growth of intermodal and intramodal competition, particularly in Interner-related services — in recent years as a result of the 1996 Act has eliminated any bottleneck that

previously existed. Indeed, in the provision of transmission services for what is today the largest and most important information service – Internet access – the BOCs are dwarfed by their competitors. Accordingly, the Commission should eliminate burdensome *Computer III* and ONA requirements and rely on less intrusive regulation such as the section 208 enforcement process to address any market failures.

In particular, the ONA requirements that BOCs must provide Basic Service Elements (BSEs) and Basic Serving Arrangements (BSAs) to ISPs on nondiscriminatory terms and conditions are unnecessary. There is no evidence that the ONA requirements are necessary to ensure that the ISPs can obtain the basic transmission services they need to serve their customers. Indeed, as noted, the underlying assumption that, without these requirements, the BOCs would unreasonably withhold technically and financially viable services from the marketplace is speculative at best. For example, one of SBC's top corporate goals last year — a goal that SBC touted repeatedly and progress towards which was closely tracked by Wall Street— was to serve 1 million DSL customers by year's end. Given this goal, it was, and continues to be in SBC's interest, to do everything reasonably possible to address the needs of ISPs that wish to provide DSL-based Internet access services. Those Internet service providers do no need BSAs or BSEs; the market will address their needs.

But SBC's incentives are not limited to Internet-based information services. More than 15 years of experience have proven that ISPs have been successful in bringing new and innovative services into the market, and this success is not due to any ONA requirements applicable to basic transmission services.[13] The Commission should not retain a complex and redundant regulatory regime based on pure speculation that the BOCs *could* withhold a needed transmission service to retain an advantage in an ancillary information services market.

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[13] *See* Peter W. Huber *et al.*, FEDERAL TELECOMMUNICATIONS LAW § 5.4.1 at 433 (2nd Edition 1999), "In the end, the open network architecture was so much sound and fury signifying nothing. With few exceptions, the BOCs sold no BSAs or BSEs to the enhanced service providers. The enhanced service providers did not want or need them after all."

Irrespective of the *Computer III* and ONA requirements, basic transmission services have been and are now available to ISPs on a nondiscriminatory basis in the BOCs' state tariffs. ISPs can avail themselves of these tariffed services on the same terms and conditions as any other purchasers of such services.[14] It is important to note that state and federal statutes obligate the BOCs to provide their services on a non-discriminatory basis, ensuring that ISPs are protected from discriminatory treatment. Even in the absence of tariffs, the Commission recently confirmed that any carrier offering a package of telecommunications and enhanced services must comply with the safeguard to make available the underlying transmission capacity for the enhanced service.[15] Further section 253 of the Act prohibits states from erecting barriers to entry that would inhibit CLECs from offering the basic transmission services used by ISPs.[16] These various statutory and Commission requirements obviate the need for duplicative ONA requirements of BOC basic transmission services.

Moreover, the assumption of bottleneck facilities on which the *Computer III* and ONA requirements were founded is quickly eroding. Under the 1996 Act, interconnection, unbundled network elements and resale are all available options for CLECs competing with the BOCs. That means ISPs have the option of partnering with a CLEC or even becoming a CLEC themselves and taking advantage of the far more extensive unbundling requirements of the 1996 Act. In fact, hundreds of CLECs have been certified nationwide and these CLECs are offering telecommunications service over millions of access lines (either through self-provisioning or by

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[14] As with all other basic transmission services, ISPs presently have access to DSL services in parity with the BOCs' own enhanced service provider groups or affiliates. Therefore, the ONA framework is not necessary to allow ISPs to obtain access to DSL services and the market will function properly without duplicative ONA requirements.

[15] *CPE Enhanced Service Bundling Order* at ¶ 40.

[16] 47 U.S.C. § 253.

ordering unbundled network elements). As a result, the BOCs are just one potential source for basic transmission services used in the provisioning of information services. Neither the CLEC option nor the self-provisioning option was available at the time the ONA requirements were adopted.

The Commission also should eliminate other *Computer III* and ONA requirements that impose unnecessary burdens on the BOCs without serving a useful purpose. In its 1998 Comments, SBC demonstrated that the costly and burdensome requirement that BOCs file a CEI plan before providing each new information service should be eliminated. Although the Commission eliminated the requirement that BOCs obtain prior approval of their CEI plans in the *1998 Biennial Review Order*, BOCs are still required to devote time and resources preparing CEI plan filings. The Commission should not continue to impose burdensome up-front regulations on new information services when less onerous options are available. In this case, lifting the CEI plan requirement would have no effect on ISPs' access to basic transmission services because these services are available through tariffs and ISPs are adequately protected against discriminatory treatment by state and federal statutes.

Further, the Commission should eliminate the annual and semi-annual ONA reporting obligations.[17] These reports serve no purpose, but they require considerable time and resources on the part of the BOCs. Besides the fact that, as far as SBC can tell, no one makes any use of these reports, if there is a problem with the areas covered by the reports, ISPs are free to seek enforcement through the Commission's complaint processes.[18]

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[17] *See In the Matter of Filing and Review of Open Network Architecture Plans*, CC Docket 88-2 (Phase I), *Memorandum Opinion and Order*, 6 FCC Rcd 7646, Appendix B (1991)(*ONA MO&O*).

[18] *E.g.*, 47 U.S.C. §§ 201(b), 202(a). Commission Rules 1. 720 *et seq.* (47 C.F.R. §§ 1.720 *et seq.*).

In addition to the fact that ISPs have access to basic transmission services without the necessity of the CEI plans or ONA reports, SBC notes that these kinds of regulatory obligations are not applied fairly. Even though DSL service and cable modems are competing in the same marketplace, only DSL technology is burdened with *Computer III and ONA* regulation. This is true despite the fact that cable modems have the lion's share of the market.[19] Chairman Powell has acknowledged that the Commission must move to "some degree of *less* regulation" in the broadband market that is "not so technology centric."[20] He continued, adding: "We need these [regulations] *harmonized* . . . [o]therwise, we're penalizing a competitive technology simply because of its legacy."[21] The Commission's legacy *Computer III* and ONA requirements under review in this proceeding are a part of the disharmony recognized by Chairman Powell.

B. The Commission Does Not Have Authority to Extend to ISPs Some or All Unbundling Rights Under Section 251 of the 1996 Act

In the original *Further Notice*, as well as the March *Public Notice*, the Commission requests comments on extending section 251-type unbundling rights to ISPs pursuant to the Commission's "general rule making authority."[22] The Commission clearly lacks authority to provide unbundling rights to ISPs, and any rules to that effect would constitute an unlawful "taking" within the meaning of the Fifth Amendment.[23] Moreover, the provision of basic

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[19] Recently, Chairman Powell stressed that, under his leadership, the Commission would "place much greater emphasis on the importance of deregulation" and would "understand" that regulations in evolving markets "need to be removed or altered in a way that will provide better incentives, lower cost structures, *less distortion*, so that companies can actually take advantage of the marketplace." *Interview with FCC Chairman Michael Powell*, CNBC/Dow Jones Business Video (Feb. 9, 2001), available at http://www.telecomclick.com/newsarticle.asp. (Emphasis supplied.)

[20] *Cable Bureau Suggests Regulatory Forbearance for New Services*, Communications Daily, Feb. 23, 2001 (emphasis supplied).

[21] *Id.* (emphasis supplied).

[22] *Public Notice*, p. 2-3.

[23] U. S. Const. amend. V; *Iowa Util. Bd. v. FCC*, 219 F.3d 744, 753-54 (8th Cir. 2000), *cert. granted, in part*, ___ U.S. ___, 121 S.Ct. 877, 148 L.Ed.2d 788 (2001)(although the court declined to address the petitioners' unlawful "takings" argument, it was implied that unbundling constituted a taking for purposes of the Fifth Amendment).

transmission services to ISPs as inputs is completely different from the provision of unbundled network elements to carriers that are competing in the telecommunications services market. The Commission cannot confuse services and unbundled network elements by giving unbundling rights to ISPs.

Section 251(c) of the Act requires incumbent local exchange carriers (ILECs) to provide interconnection, access to unbundled network elements and telecommunications services for resale to "telecommunications carriers."[24] The Commission concluded that ISPs that do not also provide telecommunications services are not included within the term "telecommunications carrier."[25] In other words, the 1996 Act draws a clear distinction between telecommunications carriers and ISPs, and only telecommunications carriers have unbundling rights under section 251(c). As SBC explained in its comments filed in 1998, in drafting section 251, Congress could have given ISPs the same unbundling rights that it gave to telecommunications carriers, but it chose not to do so. The Commission cannot second-guess the wisdom of Congress's choice not to give ISPs unbundling rights. Indeed, the Commission could not extend unbundling rights to ISPs without effecting an unlawful taking of ILEC property. As the Commission has recognized, interconnection and unbundling under the 1996 Act require that ILECs turn over part of their networks for their competitors' exclusive use.[26] This results in a taking of ILEC property that implicates the Fifth Amendment and requires constitutionally adequate compensation. It is well established that where a utility is required to dedicate its property to public use, the government must provide the utility the full compensation due under the Constitution.[27]

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[24] 47 U.S.C. § 251(c).

[25] *In the Matter of Telecommunications Act of 1996: Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, CC Docket No. 96-98, *First Report and Order*, 11 FCC Rcd 15499, 15990 (¶ 995) (1996) (*Local Competition Order*). The Commission also noted that ILECs are required to negotiate interconnection agreements with a "requesting carrier or carriers not with end users or other entities." *Id.* at ¶ 875.

[26] *Local Competition Order* at ¶ 268.

[27] *See, e.g.*, *Duquesne Light Co. v. Barasch*, 488 U.S. 299, 307-08 (1982).

Courts have consistently held that without an express grant of authority from Congress to order a physical taking, the Commission is without general authority to do so. In *Bell Atlantic v. FCC*, for example, the D.C. Circuit vacated the Commission's attempt to require physical collocation of competitors' equipment pursuant to general authority under section 201(a) to order "physical connections" as necessary for the public interest.[28] As the court stated:

> The order of physical co-location, therefore, must fall unless any fair reading of § 201(a) would discern the requisite authority [to undertake a physical taking]. The Commission's power to order "physical connections," undoubtedly of broad scope, does not supply a clear warrant to grant third parties a license to exclusive physical occupation of a section of the LEC's central offices.[29]

In 1999, the Commission adopted new extensive physical collocation requirements under section 251(c)(6) of the Act, which provides explicit congressional authorization for physical collocation. Once again, the D.C. Circuit vacated portions of the Commission's rules on the grounds that the collocation requirement resulted in a taking and the rules required collocation in circumstances that were not provided for in the statute.[30] This time the court found that the Commission's expansive definition of the term "necessary" under section 251(c)(6) went too far and had "no support in the Act"[31] The court noted that the Commission's obligation to construe statutory language consistent with its ordinary and fair meaning was "particularly relevant" where a broader construction might result in an unnecessary taking of private property.[32] The same reasoning applies here. Because the Commission plainly lacks the statutory authority to extend section 251-type unbundling rights to ISPs, there is no question it would be effecting an unnecessary and unauthorized taking of ILEC property. Consequently, the Commission's

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[28] *Bell Atlantic v. FCC*, 24 F.3d 1441 (D.C. Cir. 1994).

[29] *Id.* at 1446.

[30] *GTE v. FCC*, 205 F.3d 416 (D.C. Cir. 2000).

[31] *Id.* at 424.

[32] *Id.* at 423.

"general rule making authority" cannot provide a basis on which to grant the ISPs section 251-type unbundling rights.

The constitutional taking issue should put the matter to rest. Nevertheless, SBC notes that there are also policy considerations why the Commission should not confuse the ONA regulatory scheme and unbundling rights under section 251. On the one hand, the purposes of the Commission's ONA scheme are more modest and are aimed at providing non-discriminatory access to transmission services that ISPs need as inputs for their information services. In this context, ISPs are obtaining telecommunications services in the same manner as other end user customers. Section 251, on the other hand, is intended to provide telecommunications carriers access to the ILECs' network and facilities in order to compete with ILECs in the provision of telecommunications services.[33] Nothing on the scale of section 251 unbundling is necessary to provide ISPs with non-discriminatory access to transmission services, and the Commission should not blur the lines between services provided to end users and unbundled elements provided to competing providers of telecommunications services. In any event, as previously discussed, ISPs can obtain the benefits of section 251 unbundling either directly — by becoming telecommunications carriers and self-provisioning transmission services — or indirectly — by partnering with or obtaining transmission services from CLECs.

C. The Commission Should Not Impose *Computer III* and ONA Requirements on BOC Affiliates

The Commission's *Computer III* and ONA requirements apply only to the BOCs (including GTE to some extent),[34] and thus should not apply to structurally separate BOC

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[33] As the Commission noted in the *1998 Biennial Review Order*, "Unbundling under ONA emphasizes the unbundling of basic services, not the substitution of underlying facilities in a carrier's network. Unbundling under section 251, in contrast, includes the physical facilities of the network, together with the features, functions, and capabilities associated with those facilities. *1998 Biennial Review Order*, 14 FCC at 4200 n.46.

[34] The Commission has relieved AT&T of the *Computer III* and *ONA* requirements, and it has never imposed CEI requirements on GTE or any other independent LECs. *See, e.g.*, *Computer III Phase I Reconsideration Order*, 2 FCC Rcd 3035 (1987); *Competition in the Interstate Interexchange Marketplace, Report and Order*, 6 FCC Rcd 5880 (1991).

affiliates. In the *1998 Biennial Regulatory Review Order*, the Commission held that the BOCs should not have to file CEI plans for any information services they offer through section 272 separate affiliates, notwithstanding that section 272's requirements are not identical to the Commission's *Computer II* requirements. The Commission concluded:

> [W]e agree with commenters that the requirements Congress set forth in sections 272 and 274 substantially reduce our concern regarding access discrimination. . . . Because we believe that structural separation protects against discriminatory interconnection *better than do nonstructural safeguards such as CEI*, we see no reason at this time to impose on the BOCs even the relatively light burden of posting CEI plans on the Internet for intraLATA information services they provide through a separate subsidiary. Accordingly, we will no longer require the BOCs to formulate CEI plans before initiating or altering any intraLATA information service offered through a 272 or 274 affiliate.[35]

This reasoning applies to any BOC affiliate that complies substantially with the section 272 structural separation requirements. As long as the structural separation requirements are in place, there is no risk of discrimination. Accordingly, these structurally separate BOC affiliates should not be saddled with legacy BOC regulations such as the *Computer III* and ONA requirements.

SBC recognizes that the D.C. Circuit recently held that SBC's advanced services affiliates are successors or assigns of the SBC operating companies for section 251 purposes. [36] That decision, though, in no way suggests that SBC's advanced services affiliates — or any other BOC affiliate for that matter — must necessarily be subject to *Computer III* or ONA requirements to the same extent as the BOC themselves. It is well established that the determination of whether an entity is a successor or assign must be made with in the context of

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[35] *Id.* ¶¶ 33-34 (emphasis added). While the Commission's analysis applied specifically to the filing of CEI plans, the burden of all *Computer III* and ONA requirements should be removed from BOC separate affiliates.

[36] *Association of Communications Enterprises v. FCC,* No. 99-1441 (D.C. Circuit, Jan. 9, 2001) (*Ascent v. FCC*).

the specific obligations at issue, and so it was in *Ascent v. FCC*.[37] In concluding that SBC's advanced services affiliates must comply with section 251, the court based its decision entirely on statutory interpretation issues specific to section 251. The court found, first, that the Merger Order was the legal and practical equivalent of forbearance, which is not available for the requirements of Section 251(c). That rationale, of course, is not applicable to the *Computer III* or ONA requirements because the Commission is free to forbear from applying those requirements. The Court found, further, that Congress had specified when an ILEC could avoid the 1996 Act's obligations by providing telecommunications services through a separate affiliate, and the Commission was bound by that specification. In contrast to section 251, the *Computer III* and ONA requirements are not statutory mandates, but rather creations of the Commission designed for companies operating in a monopoly environment. Therefore, *Ascent v. FCC* has no bearing on whether *Computer III* and ONA requirements apply to BOC affiliates.

Nor did *Ascent v. FCC* in any way impugn the Commission's conclusion in the *SBC/Ameritech Merger Order* that SBC's advanced services affiliates lack market power. Rather, as noted, that decision was decided on grounds that have nothing to do with market power. That being the case, SBC's advanced services affiliates clearly would not have any ability (let alone incentive) to discriminate against unaffiliated ISPs, or to deny them service or access to information necessary for interconnection.[38]

D. The Commission Has No Basis to Revive the Mandatory Structural Separation Requirements It Abandoned 15 Years Ago

The Commission's *Computer III* regime was established more than 10 years before the enactment of the 1996 Act and the revolutionary impact of the Internet. Now, with the continued growth of independent ISPs and the rapid emergence of CLECs that have access to the

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[37] *See, e.g., Howard Johnson Co., Inc. v. Detroit Local Joint Executive Bd.*, 417 U.S. 249, 264 (1974).

[38] A number of high speed transport services compete with DSL for Internet Service Providers. The website DSLReports lists more than a dozen technologies. *See* http://www.dslreports.com/alternatives.

unbundled local exchange network, any concerns raised by the Ninth Circuit Court of Appeals in its opinion in *California III* [39] as to the appropriateness of the non-structural safeguards governing BOC provision of information services have been eliminated. Given these market developments, the Commission has no basis to revive mandatory structural separation requirements it abandoned 15 years ago.

As the Commission fully realizes, the "essential thrust of *Computer II* [which provided for BOC structural separation] was to provide a mechanism whereby non-discriminatory access can be had to basic transmission services by all enhanced service providers [ISPs]."[40] The Commission's nonstructural safeguards are designed to provide the same protection mechanism without the burden of structural separation, which had real and unwanted costs to consumers and providers alike. Consequently, under the *Computer III* and ONA regime, "the BOCs acquire transmission capacity for their own enhanced services operations under the same tariffed terms and conditions as competitive enhanced service providers."[41] However, as discussed above, the *Computer III* and ONA framework is not necessary because BOCs are obligated under both federal and state statutes to provide these services in a non-discriminatory fashion — and they do. If anything, the Commission should be eliminating its nonstructural safeguards, not reviving mandatory structural separation.

Conclusion

During the past two years both the telecommunications and information services markets have continued to experience rapid growth in competition and a wave of innovation. In light of these marketplace developments, it is time for the Commission to reduce unnecessary regulation of BOC-provided information services and eliminate asymmetrical regulatory mandates that unfairly and irrationally burden the BOC's advanced services but do not apply to competing

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[39] 39 F.3d 919 (1994).

[40] *CPE-Enhanced Services Bundling Order*, ¶ 3.

[41] *Id.*, ¶ 5.

cable modem services. Specifically, the ONA requirements are not needed to ensure that ISPs have access to basic transmission services on nondiscriminatory terms and conditions – such access will be guaranteed both by the continuing growth of competition in the local exchange market and by the state and federal statutory prohibitions against discrimination. The Commission also should eliminate other unnecessary requirements such as the filing of CEI plans, including the obligation to post them, and the filing of the ONA annual and semi-annual reports.

At a minimum, the Commission should avoid expanding its regulation of information services in this proceeding. The Commission should not extend to ISPs some or all unbundling rights under section 251. Because the Commission lacks the authority to require interconnection and unbundling for ISPs, any rules to that effect would constitute an unauthorized and unlawful taking of BOC property. Further, such unbundling would be poor public policy, as it would blur the distinction between services provided to ISPs as inputs and unbundling requirements designed to promote competition in the telecommunications market.

The Commission also should not extend the *Computer III* and ONA requirements to BOC affiliates, including SBC's advanced services affiliates. As the Commission previously recognized, as long as affiliates are structurally separate there is no need to overlay nonstructural safeguards on them as well. Moreover, SBC's affiliates are non-dominant in the market and should not be deemed successors and assigns of their BOC parent for purposes of the *Computer III* and ONA requirements. Finally, the Commission should not revive outdated and burdensome mandatory structural separation requirements that it abandoned more than 15 years ago. The Commission should eliminate redundant and unnecessary regulations in this proceeding, not increase the regulatory burden on BOC-provided information services.

Respectfully submitted,

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April 16, 2001

CERTIFICATE OF SERVICE

I, Regina Ragucci, do hereby certify that on this 16th day of April 2001, Comments of SBC Communications Inc. in CC Docket No. 95-20 and 98-10, was served via hand delivery to the parties listed below.

Regina Ragucci

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