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FEDERAL COMMUNICATIONS COMMISSION
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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

In the Matter of:)
)
Computer III Further Remand)
Proceedings: Bell Operating Company)
Provision of Enhanced Services)
)
1998 Biennial Regulatory Review --)
Review of Computer III and ONA)
Safeguards and Requirements)

CC Docket No. 95-20

CC Docket No. 98-10

FURTHER COMMENTS OF WORLDCOM, INC.

I. Introduction

Seven years ago the Ninth Circuit Court of Appeals held that the Commission, in allowing the Bell Operating Companies (BOCs) to provide local and intraLATA information services jointly with their local telecommunications services, had failed rationally to weigh the regulatory and competitive costs and benefits of lifting the *Computer II* regime of structural separation under which the BOCs had previously operated.¹ The Court vacated the Commission's decision and remanded it back to the Commission for further proceedings. The Commission subsequently released the *Interim Waiver Order*, which allowed the BOCs to continue to provide intraLATA information services on a structurally integrated basis pending

¹ *California v. FCC*, 39 F.3d 919, 930 (1994).

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the outcome of the instant proceeding.² Now, more than six years later, the Commission has sought further comment on how the Commission should respond to the vacation and remand of *Computer III*.

Both WorldCom and MCI, which merged in the intervening years, have already provided comments on the legal and policy issues which the Commission must address here.³ WorldCom will not reiterate all of those arguments in these comments, though they remain unanswered by the Commission more than three years later. Nonetheless, the nonstructural “safeguards” established in *Computer III* have been vacated. As a legal matter, the Commission must conduct a cost-benefit analysis to determine whether the *Computer II* structural separation requirements should be eliminated.⁴ Unless the Commission finds that alternative methods of conduct-oriented regulation are at least as effective as structural separation in facilitating the development of competition and ensuring that ISPs obtain nondiscriminatory access to capabilities the BOCs use to provide competing information services, the Commission is legally obligated to retain the structural separation requirement. It should have been clear when the Commission previously sought comment that the Open Network Architecture (ONA) approach endorsed by *Computer III*

² *Bell Operating Companies' Joint Petition for Waiver of Computer II Rules*, DA 95-36 (rel. Jan. 11, 1995).

³ Comments of WorldCom, Inc. (filed March 27, 1998); Comments of MCI Telecommunications Corporation (filed March 27, 1998). WorldCom adopts and incorporates by reference both sets of comments.

⁴ *See, e.g.*, Comments of MCI Telecommunications Corporation at 4: “the issue presented now is whether the structural separation rules, having been revived by *California III*, should be eliminated. In other words, the Commission must determine whether the supposed economic and other benefits of eliminating structural separation outweigh the competitive and ratepayer risks in doing so.”

was insufficient to protect competitive information service providers (ISPs). In the years since, ONA has proven to be without value to ISPs.⁵ Even if it was not clear then, it is clear now that ONA is an idea whose time never came.

It is equally clear now that, as currently implemented and enforced, the 1996 Act cannot alleviate the Ninth Circuit's concerns about the inadequacies of *Computer III*. Although unbundled network elements (UNEs), like ONA, could in theory serve as building blocks for competitive information services, the BOCs have not in practice made UNEs available on a nondiscriminatory basis. Proper implementation of the 1996 Act would have spurred the successful entry of a series of facilities-based competitors for BOC broadband services. In today's marketplace, the single most important capability that ISPs need from local exchange carriers is the ability to provide information services over broadband connections.

In the wake of the 1996 Act, a new type of local competitor attempted to use that Act's unbundling requirements specifically to serve ISPs and their end user customers. So-called DLECs (data local exchange carriers) tried to enter the market with aggressive plans to provide high-bandwidth connections to end users and ISPs by collocating digital subscriber line (DSL) equipment in BOC central offices and ordering unbundled loops pursuant to section 251(c) of the Act. The BOCs responded with an array of anticompetitive strategies, including high prices for loops, loop conditioning, and loop makeup information, dysfunctional OSS, and discriminatory provisioning of collocation and UNEs. The BOCs assured the DLECs' competitive failure by

⁵ According to their most recent tariff review plans, the BOCs collectively projected revenues of less than \$25 million from ONA. Bell Atlantic North and South accounted for approximately 68% of that total. Pacific Bell and Southwestern Bell Telephone estimated demand for ONA services of \$0.

failing to provide conditioned loops in a timely fashion. NorthPoint is now bankrupt and its assets have been sold for pennies on the dollar. Rhythms' auditor has issued a warning on its ability to continue as a going concern. And Covad has had to significantly scale back its business plan.⁶

Meanwhile, the BOCs have established a strangle-hold on DSL to rival their traditional monopoly over local exchange services. According to the Commission's own report, ILECs (primarily the BOCs) provide service to approximately 93% of all ADSL subscribers.⁷ So sure are the BOCs of their grip on this critical input to information services, that the Chairman of SBC recently wrote to Congressman Billy Tauzin that a million consumers in Illinois "cannot now, and may never, have access to DSL service" if his company is not relieved of state unbundling regulations.⁸ SBC has also raised its DSL prices by 25%, surely a sign of monopoly power.⁹

The BOCs have also used volume discounts as a way to customize their DSL offerings so that they are useless to competitive ISPs. The Kentucky Public Service Commission was forced

⁶ For a discussion of the issues faced by NorthPoint, Rhythms, and Covad, *see, e.g.*, "DSL providers can't get a break," http://www.upside.com/Rex_Crum/3ac9e9aa30d_yahoo.html (April 4, 2001).

⁷ *Deployment of Advanced Telecommunications Capability: Second Report*, 15 FCC Rcd 20913 at ¶ 102 (2000). ADSL (asymmetric digital subscriber line) is the version of DSL used most often by residential end users.

⁸ Letter of March 14, 2001.

⁹ *See, e.g.*, "Regional Bells ringing up higher DSL rates," <http://www.zdnet.com/zdnn/stories/news/0,4586,2687148,00.html>.

to order BellSouth to change its pricing to give small ISPs an opportunity to compete.¹⁰

Since ONA has failed and the unbundling requirements of the 1996 Act, as currently implemented and enforced, have proven insufficient to nurture competition for broadband services, the Commission can only conclude that the structural separation requirements of *Computer II* are needed to help protect competitive ISPs from access discrimination.¹¹ There is no basis on which the Commission could find that the concerns of the Ninth Circuit Court of Appeals are adequately addressed either by ONA or by section 251(c)'s unbundling requirements. Structural separation is still an important safeguard to protect competitors from the abuse of BOC monopoly power in the local exchange over competition for information services.

II. ONA Is an Unmitigated Failure

The Commission had high hopes that ONA would protect competitive ISPs by giving them “unbundled” substitutes for Feature Group services. ISPs have found scant shelter under the ONA umbrella. ISPs have never found ONA to be useful.¹² The failure of ONA was predictable when the Ninth Circuit remanded *Computer III* to the Commission. Now that ONA's failure after seven years is plain for all to see, the Commission's structural safeguards must be restored.

¹⁰ *Iglou Internet Services, Inc. v. BellSouth Telecommunications, Inc.*, Case No. 99-484 (rel. Nov. 30, 2000).

¹¹ The Iglou case provides a stark example of the risks of allowing the BOCs to provide these services on a structurally integrated basis.

¹² As shown above, the BOCs do not receive significant revenues from their ONA offerings, *supra* footnote 5.

As WorldCom has previously explained, ONA was doomed to fail.¹³ The lack of fundamental unbundling combined with the excessive prices for ONA capabilities ensured that competitive ISPs would ignore ONA and make other arrangements that were second- or third-best alternatives. By and large, competitive ISPs have succeeded by purchasing business lines, often from competitive local exchange carriers (CLECs). While the use of CLEC-provided business lines has worked for competitive ISPs in a world of dial-up Internet connections, it will not suffice in the high-speed world that consumers are demanding and the Commission's policies should facilitate.

Because of the lack of open access to cable modem service, DSL constitutes the most promising option for competitive provision of widespread high-bandwidth connections to end users, but ISPs have not been able to use ONA to obtain nondiscriminatory access to DSL capabilities and thereby compete fairly with BOC-provided information services. BOC DSL service includes only limited ISP choices. It is likely that most BOC DSL customers also subscribe to BOC ISP service for the simple reason that the BOCs do not offer their customers robust choices.

This leveraging of power in local markets to limit competition in related markets is exactly the problem which ONA was intended to address. The complete failure of ONA and the virtual elimination of the DLEC market are signals that the Commission cannot afford to ignore. Unless the Commission moves quickly to re-establish BOC structural separation and strict enforcement of the Act's anti-discrimination mandate, competitive ISPs may be shut of

¹³ WorldCom Comments at 3.

providing service to customers with high-speed, DSL connections.

III. Section 251(c)'s Unbundling Requirements Have Not Produced DSL Competition

Competitive ISPs may have hoped that CLECs would take advantage of the unbundling requirements of section 251(c) of the Act to thwart the expansion of BOC monopoly power to high-bandwidth connections. It has become apparent that, as currently implemented and enforced,¹⁴ section 251(c) does not ensure a competitive market in high-speed connections. The companies that sought to compete in this market have failed, citing inordinately high conditioning charges and BOC provisioning inadequacies. The BOCs succeeded in making the entry of these competitors too costly and difficult. Section 251(c)'s unbundling requirements do not stand in the way of this new BOC monopoly.

After the passage of the 1996 Act, several companies were formed to provide DSL service using unbundled loops from the incumbents. The three most prominent of these "DLECs" were Covad Communications, Rhythms, and NorthPoint. Initially, investors saw these companies as harbingers of a broadband future. They were well-capitalized competitors founded by experienced professionals.

It soon became clear that the BOCs did not intend to make things easy for the DLECs. Anticompetitive pricing, provisioning, and operations support systems (OSS) all contributed to the precipitous decline in the share prices and fortunes of these companies. In addition to the well-known examples of NorthPoint, Rhythms, and Covad, other DSL providers, including Jato

¹⁴ The Commission's decision to excuse ILECs from providing unbundled access to packet switching has contributed to the inability of ISPs to compete on equal terms with BOC broadband information services.

and HarvardNet, have also proven unable to surmount anticompetitive BOC practices.

The DLECs were, perhaps, the best hope for the emergence of a competitive DSL market. Their implosion shows that the Act's unbundling requirements as currently implemented and enforced will not suffice to prevent the expansion of BOC monopoly power. As high-bandwidth connections become increasingly popular among consumers, the BOCs will continue to extend their DSL monopoly to the information services market. Neither ONA nor the 1996 Act has prevented it. The Commission must act now, while there is still time.

The Commission should restore the structural separation requirements of *Computer II*. Structural integration will facilitate the BOCs' ability to use their control of advanced service UNEs to impede competition in the information services market, and structural separation will facilitate enforcement of the antidiscrimination rules that are critical to the survival and success of ISPs seeking to compete against the BOCs. The Commission's recent decision to eliminate the bundling restriction adopted in *Computer II* raises the stakes.¹⁵ The BOCs can now offer a bundle of narrowband local voice, broadband local, long-distance, and Internet service, along with modems and software upgrades at a single price substantially below the cost of each product purchased separately. If competitors cannot get nondiscriminatory access to the capabilities that enable them to provide the same bundle, their ability to compete against the BOCs may be crippled, and effective competition will never emerge. As a result, failure to effectively enforce the nondiscrimination requirement would inflict even more serious harm on competition by

¹⁵ In the Matter of 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. 98-183, *Report and Order* (rel. March 30, 2001).

unaffiliated ISPs than it would have while the rules against bundling were still in effect. Especially as the Commission is allowing the BOCs greater flexibility to compete, the Commission cannot afford to repeal safeguards like structural separation that help to increase compliance with essential nondiscrimination requirements.

Moreover, the Commission should strengthen its unbundling rules under section 251(c) to require the BOCs to provide truly non-discriminatory access at cost-based rates to all network elements, information, and OSS that competitors need to succeed in the DSL market. The structural separation requirement should remain in place until the development of competition demonstrates that a BOC has fully complied with current and strengthened rules. Finally, the Commission should put into place rules to ensure that competitive ISPs have the equivalent of equal access to BOC DSL customers. ONA is plainly insufficient.

IV. Conclusion

The history of this remand proceeding illustrates well the dangers of Commission inaction and delay. Competitive information services are critical to the future of the national economy, yet the Commission has taken seven years to address this remand proceeding. During this period of time, the BOCs have operated under an “interim” waiver. They have cemented their position in the increasingly vital market for broadband services and set the stage for extending their dominance to information services. The Commission must find that ONA is insufficient to address the concerns of the Ninth Circuit Court of Appeals. The Commission should mandate the structural separation of BOC information services from the provision of BOC telecommunications services, and require that the BOCs provide competitive ISPs with the equal access to BOC DSL customers.

Respectfully submitted

WorldCom, Inc.

A handwritten signature in black ink, appearing to read "Henry G. Hultquist". The signature is written in a cursive style with a large, stylized initial "H".

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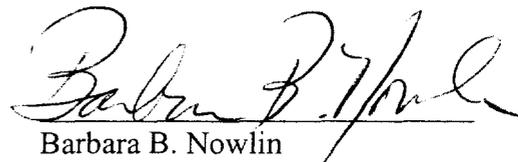
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