Before the
Federal Communications Commission
Washington, D. C. 20554

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

REPLY

BellSouth Corporation urges the Commission to reject arguments that it is necessary to re-impose *Computer II* structural safeguards, or any other structural separation requirements, on certain Bell operating company ("BOC") local exchange carrier ("LEC") operations.

I. THE COMMENTS DO NOT PROVIDE A BASIS TO REVERSE THE COMMISSION'S EFFORTS TO REDUCE REGULATION WHERE CONDITIONS WARRANT

The Commission is not required to take at face value the unsupported, general allegations of anti-competitive behavior leveled by Internet service provider ("ISP") Associations against BOCs.[1] The Commission specifically considered the impact of its recent decision to eliminate the *Computer II* customer premises equipment ("CPE") bundling restrictions on ISPs.[2] The

[1] *Morales v. Yeutter*, 952 F.2d 954, 958 (7th Cir. 1991) (agency not required to take comments at face value where comments were neither subject to cross-examination or any other method of verification).

[2] *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*

Commission concluded that "there is no significant economic impact on small ISPs and small competitive enhanced service providers" where the transmission service components of CPE bundles are separately available from incumbent LECs on a non-discriminatory basis.[3] Commenters have provided no persuasive evidence that the Commission should not reach the same conclusion in this proceeding. Indeed, conditions in the market for broadband services warrant further reduction in unnecessary regulation.

The Commission has yet to alter its requirement that common carriers owning common carriage transmission facilities and providing enhanced services unbundle "basic" from "enhanced" services and offer transmission capacity to other enhanced service providers under the same tariffed terms and conditions under which they provide basic services to their own enhanced service operations.[4] Despite replacing *Computer II* separate subsidiary requirements with less costly, but equally effective, non-structural safeguards in *Computer III*, the Commission has consistently affirmed and strengthened the requirement that BOCs acquire transmission capacity for their own enhanced services operations under the same tariffed terms and conditions as competitive enhanced service providers.[5] The Commission's two most recent actions streamlining or eliminating unnecessary non-structural safeguards have not altered this fundamental requirement. Non-affiliated ISPs are thus assured access to common carrier transmission components, as well as to the full range of the Commission's existing compliance and enforcement mechanisms, themselves recently modified to reflect the pro-competitive policies

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Unbundling Rules in the Interexchange, Exchange Access and Local Exchange Markets, CC Docket Nos. 96-61, 98-183, *Report and Order*, FCC 01-98 (rel. Mar. 30, 2001).

[3] *Id.* at ¶ 62.

[4] *Id.* at ¶ 4.

animating the 1996 Act.[6] Those comments that advocate structural separation under current market conditions, whether as an initial matter or as an enforcement mechanism, are a transparent effort to obtain federal regulations that distort the discipline of the market place by assuring the success of non-BOC enhanced service providers.

Two things are strikingly absent from the comments of ISPs and CLECs. First, there is no evidence of any specific complaints filed against BellSouth concerning its compliance with the Commission's comparatively efficient interconnection ("CEI") or open network architecture ("ONA") requirements.[7] Second, there is no acknowledgment that the broadband market is dominated by Title VI cable operators.[8] These entities provide bundled packages of enhanced services and telecommunications services and yet are under no current obligation to make available to competing enhanced service providers, as is BellSouth, the underlying transmission components of their enhanced service offerings.

II. INSTANCES OF BUSINESS DOWNTURNS IN THE TELECOMMUNICATIONS SECTOR SINCE 1996 DO NOT JUSTIFY REJECTION OF CONGRESS'S PREFERENCE FOR STRUCTURAL RELIEF

A number of comments attempt to lay the blame for the apparent business "failures" of at least two entities on the Commission's decision not to re-impose pre-1996 Act structural separation requirements on BOC enhanced services operations. These arguments are specious

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5 *Id.*

6 *In the Matter of Implementation of the Telecommunications Act of 1996, Amendment of Rules Governing Procedures to Be Followed When Formal Complaints Are Filed Against Common Carriers*, CC Docket No. 96-238, *Report and Order*, 12 FCC Rcd 22497 (1997); *Order on Reconsideration*, FCC 01-78 (rel. Mar. 7, 2001).

7 "Along with the vast expansion of competitive information services and underlying telecommunications offerings, the Commission has not received a single formal complaint of any former Bell Company's failure to meet ONA obligations." Verizon Comments at 7.

8 *Id.* at 2.

and must be rejected out of hand. There will be winners and there will be losers in any market place, and the factors that drive success are diverse indeed: a solid business plan, astute management, a skilled and diverse workforce, availability of capital, competitive pressures, legal and regulatory compliance, service quality, reliable inventory, marketing strategies, ethical behavior, good timing and luck, to name just a few.

What the commenters advocating a return to structural separation are really advocating are (1) a regulatory paradigm in which BOC LEC operations alone are encumbered by as much regulatory impedimenta as is possible to contrive, and (2) a regulatory presumption that any BOC business success, or non-BOC business failure, is evidence of anti-competitive conduct on the part of former Bell operating companies. In essence, non-BOC commenters seek regulatory insurance for business risk. In reality, however, the Commission's elimination of structural safeguards in *Computer III* and its continued streamlining of non-structural safeguards in light of the congressional bias in favor of limited structural separation as embodied in the 1996 Act have incubated a thriving and competitive market for enhanced services.[9]

While the mere filing of a complaint does not prove the existence of ONA or CEI violations, the Commission's formal complaint procedures, themselves recently streamlined in light of the pro-competitive intent of the 1996 Act, at a minimum provide that complaints of anticompetitive behavior present specific allegations of fact and corresponding legal conclusions, all conditioned on the Commission's good faith verification requirements. A lack of formal complaints against BOCs for damages caused by ONA or CEI non-compliance, whether resolved

[9] *Id*. at 4-6, citing to statistical evidence of revenue growth of information service industry during "era" of non-structural safeguards and specifically demonstrating competition and customer benefits in voice messaging services markets.

adversely to BOC interests or even simply pending, presents a stark contrast to the generalized, unverified allegations that a return to structural separation is warranted.[10]

The American ISP Association generally asserts that BellSouth has not sufficiently unbundled its ADSL product, complaining that an ISP member was unable to have access to ATM services separate from BellSouth's ADSL offering. This allegation, typically, lacks sufficient specificity as to time, place and identity of the ISP as to allow BellSouth to investigate it with particularity. It can nevertheless be dismissed out of hand. BellSouth made ATM available on a stand-alone, arms-length common carriage basis long before it ever offered ADSL, and both ATM and ADSL are available to all ISPs on an unbundled basis as basic service.

BellSouth's operational support systems are designed so that service orders placed by ISPs are fulfilled on a non-discriminatory basis. BellSouth's field forces are currently unable to ascertain the identity of an ISP prior to installation. As BellSouth rolled out its ADSL offering, it experienced errors in loop qualification and service installations across its region, and these impacted both affiliated and non-affiliated ISP operations alike. BellSouth began, and continues to implement, process improvements in order to resolve issues to better serve all of its ADSL customers. As with SBC, BellSouth has a business imperative to sell a large quantity of ADSL services this year, and it must succeed at delivering its product to non-affiliated ISPs in order to

[10] *See* Verizon Comments, *supra* n. 7. One commenter's suggestion that structural separation be imposed upon a BOC LEC as a "market enforcement mechanism" that is triggered only upon a BOC's non-compliance with non-structural safeguards stands as a concession both that competition is not harmed by non-structural safeguards, and that structural safeguards are viewed by non-BOC service providers as punitive regulatory impedimenta. The Commission has the ability to impose fines and forfeitures, not to mention award a complainant actual damages, in the event of a finding that a BOC has violated its rules, and thus redress any specific competitive harm that might flow from a specific violation of the Commission's non-structural safeguards.

meet its business objectives.[11] BellSouth has neither the business nor regulatory incentive to discriminate against non-affiliated ISPs in its provision of unbundled basis services, nor the operational capability to do so.

The Commission should disregard the unsubstantiated complaints concerning inadequate BOC notifications. Current Commission rules are adequate to assure that non-affiliated ISPs receive timely and adequate notification of network information necessary to offer their enhanced services. Specifically with regard to ADSL, BellSouth emails each of its ISP customers, non-affiliated and affiliated alike, with regular updates of DSLAM and Remote Terminal ("RT") location installation information. BellSouth provides both planned and actual-completed installation information to all customers. In particular, all of BellSouth's ISP customers were informed at the beginning of this year as to which BellSouth wire centers would be equipped with ADSL, and with the planned date of installation. Moreover, BellSouth's ADSL deployment information and installation schedules are made available to the public on a web site that is updated every one to two weeks for wire center (central office) DSLAM deployment information and monthly for RT deployment information.

There are some complaints about existing tiered pricing structures for ADSL services. Small ISPs complain that it is unfair that larger ISPs with purchasing power are able to obtain volume discounts for purchasing significant quantities of ADSL services. There is nothing inherently unfair about such a pricing mechanism, which is reflected every day in competitive markets. ADSL is a costly enhancement to existing narrowband legacy networks that involves significant large capital investments. There are non-affiliated ISPs that are larger than BellSouth's

[11] SBC Comments at 6.

own retail enhanced service operations and that have competitive alternatives to BellSouth-provided ADSL, including CLEC- provided services and arrangements with Title VI cable operators.[12] In order to obtain this business, a rational seller would price its basic services to attract and retain sufficient volume to build out an ADSL enhanced network on the scale and scope that only large, non-affiliated ISPs can justify. This is a classic example of competitive pressures within the market place operating to produce lower "wholesale" input prices for larger firms, and it is neither unreasonable nor unlawful for a common carrier to discriminate between large firms and smaller firms in terms of tiered, volume based pricing, particularly with regard to initial deployment and roll-out of a capital intensive, new advanced service.

It is understandable, of course, that smaller firms want the same (or lower) prices for their inputs as larger firms, even though they are unable to commit to the same volume and term purchase commitments. It is natural that smaller firms would want to leverage the negotiating strength of large, non-affiliated ISPs in order to obtain input costs that allow them to compete with the larger ISPs. These desires, however, do not transform BellSouth's historic pricing response to the market power of large, non-affiliated ISPs as unlawful or unreasonable. Further, the basic services inputs of BellSouth's enhanced service operation are obtained from BellSouth on the same terms and conditions as all similarly situated non-affiliated ISPs, assuring competitive neutrality. Nothing about these conditions warrant a return to structural separation.

Moreover, as American ISP and others note, smaller ISPs have been challenging pricing structures for ADSL before state commissions.[13] As an initial matter, state commissions do not

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[12] As Verizon notes, while affiliates of Bell operating companies are among the 5,000 ISPs operating in the United States today, none is listed among the 10 largest.

[13] Comments of American ISP at 14.

have jurisdiction over interstate rates, nor would any determination by such a commission affect the reasonableness of interstate ADSL rates and rate structures which have been fully reviewed by this Commission. Nevertheless, BellSouth has been and remains committed to addressing marketplace expectations and needs. Thus, in Kentucky, for example, BellSouth proposed an approach to modifying its interstate tariff that continues to meet BellSouth's need to recover its cost, while at the same time facilitating the success of its business imperatives, without protracted entanglement in regulatory proceedings. It is simply too early in the development and build-out of the ADSL market to leap to the conclusion that any type of additional federal regulatory measures are necessary to address the general allegations of dissatisfaction with regard to service pricing and availability.

In light of all this, it is disingenuous for commenters to argue that the failure of a competing firm in the telecommunications and information services marketplace, or a BOC affiliate's relative success using underlying BOC basic services obtained on an arms-length, non-discriminatory basis, demonstrate anti-competitive conduct that warrants a regression to pre- Act structural separation requirements. Where non-affiliated and affiliated BOC ISPs use the same underlying transport, service differentiation and success depend on a number of factors, including customer service, service quality, and the general drivers of success listed above. The Commission has done enough to ensure that the basic service inputs are available to all would- be market participants on a non-discriminatory basis. It is up to the participants, affiliated and non-affiliated alike, to succeed or fail in the market based on their own management of their businesses.

Finally, as contrary to the arguments raised by Low Tech Design, Inc., BellSouth's Privacy Director[14] and Internet Call Waiting [15] service are regulated offerings, provided pursuant to tariff. The technology that is used to provide these capabilities is based upon AIN 0.1, not AIN 0.2.

III. CABLE OPERATORS DOMINATE THE ISP MARKET

AT&T's call for complete structural separation is particularly outrageous in light of that company's dominance in the broadband market place. As demonstrated in the record of a concurrent proceeding, cable operators, of which AT&T is the undisputed giant, dominate nearly 75% of the broadband market, with DSL perhaps comprising less than a quarter of that market and competition rapidly developing from satellite and other wireless technologies.[16] Cable operators have no regulatory obligations concerning competitive access to their broadband platforms. Commenters' claims in this proceeding that BOC LECs' current (but diminishing) dominance in the market for local exchange service provided over legacy narrowband networks

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[14] Privacy Director service provides Caller ID subscribers with the ability to identify unavailable, unknown, blocked and private numbers. Privacy Director intercepts all unidentified calls before the subscriber's phone rings. If the call is from a private number, the caller will be asked to press 1 to deliver his/her calling information. If the call is unknown, the caller will be asked to state their name. Once the calling party is identified, Privacy Director rings the subscriber and announces the calling party's information. The subscriber has the option to accept the call, reject the call, or send a 'Do Not Solicit' message to a telemarketer. Neither the calling nor the called party are able to manipulate the calling party information.

[15] Internet Call Waiting Service utilizes AIN functionality to allow customers of Internet Access Providers to receive notification of incoming calls on their personal computer screen during an active Internet session. Customers have the option of answering the call by terminating the session, temporarily placing the call on hold, or by forwarding the call.

[16] *In the Matter of Inquiry Concerning High-Speed Access to the Internet Over Cable and Other Facilities*, GEN Docket No. 00-185, *Notice of Inquiry*, 15 FCC Rcd 19287 (2000); Comments of SBC Communications Inc. and BellSouth Corporation (filed Dec. 1, 2000); Reply Comments of SBC Communications Inc, and BellSouth Corporation (filed Jan. 10, 2001).

somehow constitute a "per se" dominance in the broadband or information services markets are simply not credible in this light.

BellSouth believes that the Commission should adopt a new regulatory paradigm for broadband Internet access that eliminates the anti-competitive effects of disparate regulatory treatment of broadband Internet service providers depending on their historical classifications as Title II common carriers or Title VI cable operators. Continuing to streamline its existing regulations for Title II common carriers is consistent both with the policies embodied in the 1996 Act, the course embarked upon by the Commission in the *Computer III* proceeding, and with a forward looking, market based regulatory paradigm for federal regulatory oversight of advanced services. Nothing in the further comments filed in this proceeding should divert the Commission from this course.

IV. CONCLUSION

The Commission should reject arguments that it is necessary to re-impose *Computer II* structural safeguards, or any other structural separation requirements, on certain BOC LEC operations, and continue to streamline and eliminate vestigial regulatory burdens.

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CERTIFICATE OF SERVICE

I do hereby certify that I have this 30th day of April 2001 served the following parties to this action with a copy of the foregoing **REPLY** by electronic filing and/or by placing a copy of the same in the United States Mail, addressed to the parties listed on the attached service list.

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