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**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554**

APR 30 2001

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

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)	

WORLDCOM REPLY TO FURTHER COMMENTS

Initial comments submitted pursuant to the Commission's Public Notice asking parties to update and refresh the record in the above-referenced matter separate into two groups. The Bell Operating Companies (BOCs) claim that they are bit players in the provision of broadband services and, as such, could not possibly discriminate against competitive information service providers (ISPs). A broad cross-section of ISPs, however, catalogue in detail the myriad ways in which the BOCs are using their local exchange monopoly to prevent effective competition for high-speed residential Internet services. Given the extent and apparent success of BOC discrimination, the Commission can answer the legal question presented here in only one way: non-structural safeguards are insufficient to prevent BOC access discrimination vis a vis competitive ISPs. The structural safeguards established in *Computer II* must be retained.

WorldCom strongly agrees with the Information Technology Association of America's characterization of the legal issue presented here:

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The question before the Commission, therefore, is whether current regulatory and market conditions provide a basis that can justify the Commission's tentative decision to *lift* the structural separation requirement for BOC information services. To do so, the Commission must find either that the risk of BOC anti-competitive conduct (specifically access discrimination) has decreased or that the effectiveness of the Commission's non-structural safeguards has increased.¹

Notwithstanding BOC arguments that the Commission should take this opportunity to eliminate all safeguards against BOC access discrimination, the record demonstrates that the current non-structural safeguards and market conditions create an environment in which BOC access discrimination is able to thrive.

Competitive ISPs of all sizes agree that the BOCs do not provide non-discriminatory access to DSL. As Earthlink, one of the country's largest ISPs, puts it: "the persistence of anticompetitive BOC pricing practices is a serious threat to genuine ISP competition."² Just a few examples suffice to show the many ways in which BOCs can use pricing to shut competitive ISPs out of DSL services. For example, the California ISP Association describes how in 1999, SBC's advanced services affiliate in California was able to sell a package of DSL and Internet service for \$39.95 per month, despite the fact that SBC's price for the DSL telecommunications service alone to competitive ISPs was \$39 per month.³ In our initial comments, WorldCom described how BellSouth used a discriminatory volume pricing scheme to disadvantage small,

¹ Comments of the Information Technology Association of America at 6 (emphasis in original).

² Comments of Earthlink, Inc. at 10.

³ Comments of the California ISP Association, Inc. at 16.

competitive ISPs.⁴

The record shows that BOC access discrimination is not limited to anticompetitive pricing schemes. By failing to provide functional operations support systems for ISPs, transparent installation, maintenance, and repair intervals and processes, and engaging in discriminatory marketing practices, the BOCs have succeeded in excluding competitive ISPs from DSL services.⁵ Indeed, the BOCs' success in selling information services to DSL customers is particularly remarkable in light of their comparable lack of success in dial-up services.⁶ It is quite likely that this disparity arises from the BOCs' ability to discriminate against competitive ISPs seeking DSL access to end users.

The fact that dial-up services are provided in an open-access environment prevents the BOCs from successfully discriminating against competitive ISPs. The experience with dial-up shows that if the BOCs are forced to compete on the merits in an open-access environment where it is as easy to use competing Internet service as BOC Internet service, the BOCs have nothing special to offer. They can be successful only if they are able to discriminate in providing access to their wireline plant. As WorldCom and other commenters pointed out, "the BOCs' emergence as the dominant providers of DSL reflects, to a significant extent, a deliberate effort during the

⁴ WorldCom Comments at 4-5, citing *IgLou Internet Services, Inc. v. BellSouth Telecommunications, Inc.*, Case No. 99-484 (KY PSC)(rel. Nov. 30, 2000).

⁵ See, e.g., Comments of Earthlink, Inc. at 13-18.

⁶ According to the California ISP Association, BOC ISPs control 75-85% of the DSL lines currently in service. (Comments of the California ISP Association, Inc. at 7, citing a recent study by the Association for Local Telecommunications Services.) BOC ISP control of dial-up lines has never approached a fraction of this.

last several years to thwart the development of a competitive market.”⁷ The BOCs’ ability to thwart the market entry of DSL-oriented CLECs means that ISPs must depend exclusively on the BOCs for DSL services. CLECs do not provide an answer to BOC access discrimination.

Rather than address ISP claims of actual discrimination, the BOCs simply suggest that, in theory, there can be no discrimination since “the BOCs no longer maintain monopoly bottleneck control in the provision of local exchange services.”⁸ To support this remarkable assertion, SBC cites a report by the Association for Local Telecommunications Services for the proposition that CLECs account for 9.3% of the country’s access lines.⁹ SBC does not bother to explain that many CLEC customers obtain service over lines that are actually owned by the BOCs. Nor does SBC bother to estimate the extent of competition for that sub-group of customers served by DSL, or explain the disparate treatment the BOCs provide to their own customers and to the CLECs.

In fact, the BOCs continue to exercise bottleneck control of last-mile facilities, particularly among the residential and small business customers for whom DSL is appropriate. Not a single ISP that filed comments claimed that it had any alternative to BOC-provided DSL. Indeed, the BOCs ability to engage in the discriminatory practices described at length in initial comments constitutes conclusive proof of their continued monopoly. Firms that faced real competition could not get away with such tactics.¹⁰

⁷ Comments of the Information Technology Association of America at 9; *see also* WorldCom Comments at 7.

⁸ Further Comments of SBC Communications Inc. at 2.

⁹ *Id.*

¹⁰ SBC’s recent 25% increase in DSL prices is further evidence of BOC monopoly power. *See, e.g.,* WorldCom Comments at 4 (citing news stories).

The BOCs also allege that they are not dominant providers of broadband services and, as such, could not engage in anticompetitive behavior against competitive ISPs.¹¹ Once again, their deeds belie their words. The fact that they are able to use pricing, OSS, provisioning, maintenance, repair, and anticompetitive marketing practices demonstrates conclusively that the BOCs face no effective competitive alternative. Denial of nondiscriminatory access by cable modem providers cannot justify legitimizing BOC discriminatory practices.

In fact, purchasers of broadband telecommunications services - whether they be retail consumers or ISPs - have no effective alternative to the BOCs, so discrimination runs rampant. Cable companies provide broadband services in some parts of the country, but cable modem services do not provide an effective competitive constraint on BOC DSL-based services even in those geographic areas. That is particularly true because, as the BOCs well know, cable companies have been permitted to engage in even more complete discrimination against competing ISPs by denying them open access to their broadband networks even in principle. The result has been a broadband duopoly that the BOCs have predictably been eager to maintain through anticompetitive pricing and interconnection practices.

As the D.C. Circuit recognized only last week, "The creation of a durable monopoly affords both the opportunity and incentive for both firms to coordinate to increase prices." *FTC v. H.J. Heinz Co.*, No. 00-5362 (D.C. Cir. April 27, 2001). As shown by basic economic theory and the Commission's experience with duopolies in the cellular context until the mid-1990s, a market with only two firms and high barriers to entry is likely to have higher prices, poorer

¹¹ See, e.g., Comments of Verizon at 15.

service, and less innovation than more competitive markets. At a minimum, the Commission ought to require the BOCs to make a compelling showing to overcome the presumption that consumers fare poorly in duopoly markets, and that nonstructural regulations proven useless in the past seven/eight years since the Commission terminated structural safeguards will somehow be an effective substitute for the competition that does not exist.

It is clear that non-structural safeguards are not working to prevent BOC access discrimination against competitive ISPs. At this juncture, the only conceivable way to address the *Computer III* remand is to reinstate structural separation. The Commission must also reaffirm its commitment to the enforcement of its non-discrimination rules. Otherwise the BOCs will continue to ignore those rules to advantage their own information services.

The Commission must find a way to ensure that competitive ISPs have equal access to DSL services. When enforced, structural separation will assist the Commission in identifying discriminatory conduct, but by itself will not ensure that competitive ISPs can obtain broadband data transport to end users on non-discriminatory rates, terms, and conditions. The Commission should propose specific rules to facilitate ISP access to broadband data transport services.¹² The Commission should also take forceful action to re-invigorate the provision of DSL services by CLECs.

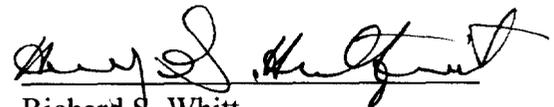
Finally, the Commission should reject self-serving BOC demands for additional deregulation. The Commission did not propose to reconsider in this proceeding whether the BOCs should provide nondiscriminatory access to competing ISPs. The nondiscrimination

¹² See, e.g., Comments of the Information Technology Association of America at 26, describing “data-oriented competitive access providers.”

principle is a given in this proceeding, and the only issue is whether BOC compliance with this requirement can be assured as effectively without structural separation. In the face of continuing BOC discrimination against the provision of competitive information services over DSL, additional deregulation would be an open invitation to anticompetitive conduct. Additional deregulation would constitute an inappropriate response to the remand of *Computer III*.

Respectfully submitted,

WorldCom, Inc.

A handwritten signature in black ink, appearing to read "Henry G. Hultquist", written over a horizontal line.

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April 30, 2001

Certificate of Service

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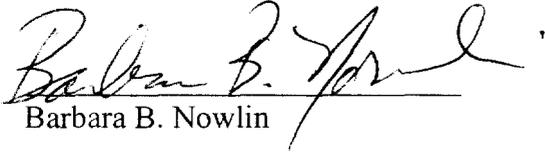
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