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August 11, 2003

Marlene Dortch
Secretary
Federal Communications Commission
The Portals
TW-A325
445 12th Street, S.W.
Washington, D.C. 20554

ERRATA

Re: Ex Parte Presentation, WC Docket Nos. 02-33, 98-10, 95-20; 01-337; CC Docket Nos. 02-52

Dear Ms. Dortch:

Enclosed please find a corrected version of BellSouth Corporation's ex parte, which was filed on July 10, 2003. The initial ex parte submission was missing Attachment "C" and Attachment "D." Additionally, after the July 10 ex parte was filed, undersigned counsel learned that BellSouth had amended its dispatch practices so as to eliminate dual dispatches in certain, but not all, instances, resulting in a cost savings of $2.5 million annually. The enclosed version updates the information based upon this change in dispatch practice and includes all attachments.

Naturally, if you have any questions or need additional information, please do not hesitate to contact me.

Very truly yours,

L. Barbee Ponder, IV

LBPIV:kjw
Attachment

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July 10, 2003

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Federal Communications Commission
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Washington, D.C. 20554

Re: Ex Parte Presentation, WC Docket Nos. 02-33, 98-10, 95-20; 01-337; CC Docket Nos. 02-52

Dear Ms. Dortch:

In this ex parte, BellSouth explains how the *Computer Inquiry* rules distort the deployment and operation of wireline broadband networks. The Commission began developing those rules in 1966 and they reflect the narrowband world where they started. Broadband networks and the services they provide make the *Computer Inquiry* distinction between basic and information services archaic. Protocol conversion and interaction with stored information are integral parts of broadband networks and services. The costs and inefficiencies of drawing these artificial regulatory lines in a broadband world are large and growing. And, because the costs and inefficiencies are imposed on only one set of broadband competitors, the rules have a particularly pernicious effect on competition, consumers and the development of broadband networks.

While it is not possible to simply quantify all of the costs ultimately borne by society that result from the application of the *Computer Inquiry* regulatory regime to broadband information services, this ex parte does quantify some of the annual operating costs of complying with the rules in the provision of broadband Internet access. These costs amount to approximately $45.8 million, or about $42.93 of annual cost per end user customer utilizing BellSouth's DSL network. Universal service contribution requirements on wireline broadband services imposes an additional annual cost of approximately $36 on each of these customers. The upshot is that BellSouth and the independent ISPs that use its network must attempt to compete with the dominant provider of broadband Internet access services, cable, while contending with no less than

$78.94 per customer per year (or $6.58 per customer per month) of regulatory costs that are not imposed on the dominant and *lower cost* provider.[1] These costs entirely outweigh any potential consumer benefit generated by the existing regulatory regime.[2]

Regulation is putting a heavy thumb on the scales here, reducing competition, skewing the deployment of broadband networks and harming all consumers, whether they use cable modem, or DSL provided by telephone companies or independent ISPs.

I. THE EXISTING REGULATORY REGIME IMPOSES SIGNIFICANT AND UNNECESSARY COSTS THAT HARM BROADBAND COMPETITION AND CONSUMERS.

This section discusses the specific costs that the existing regulations impose on the provision of broadband services over wireline networks.[3] These costs are ultimately paid by broadband customers through higher prices, reduced competition and less innovation. The costs of existing regulation greatly exceed any potential consumer benefit.

A. Regulation causes significant broadband network inefficiency.

The existing *Computer II/III* and Title II regulatory regimes require BellSouth to break out an underlying basic transmission component of integrated broadband information service offerings so that the basic transmission can be offered pursuant to tariff under Title II. In addition to establishing a wholly artificial regulatory demarcation between these two integrated parts of a broadband network, operating support systems

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[1] *See, e.g.*, Jane Black, *Saving the Bell's Broadband Bacon*, BusinessWeek Online, April 21, 2003, at http://www.businessweek.com/technology/content/apr2003/tc20030421_9461_tc024.htm ("CIBC cable analyst Alan Bezoza estimates that its operating margins on high-speed data run as great as 60% before interest, taxation, and amortization. By contrast, unfavorable economies of scale mean the Bell operating companies . . . continue to lose money on every DSL subscriber they sign up.").

[2] By letter dated June 5, 2003, BellSouth made an ex parte presentation concerning the Constitutional, legal and regulatory considerations for ensuring equal regulatory treatment for the equivalent and competing services provide by cable and telephone companies. Ex Parte Letter from Jonathan Banks, Counsel for BellSouth, to Marlene Dortch, Secretary, FCC (June 5, 2003) ("June 5 *ex parte*"). Therein, BellSouth explained that regulatory parity is necessary to ensure the long-term viability of the competitive broadband marketplace. The lopsided imposition of regulations, and the concomitant costs discussed herein, on nondominant wireline providers of such broadband services, threatens the continued viability of this competitive marketplace and thus the resulting consumer benefits.

[3] This section does not address a number of the other costs imposed on wireline broadband offerings by the current regulatory scheme. Among these costs are those occasioned by the difficulty of responding to requests for customized service offering. It is difficult to respond to such requests and meet competition because of the requirement that basic components must be broken out, OSS developed to provide nondiscriminatory access to those components and the tariffs drafted and filed. On prior occasions, BellSouth has been unable to meet customer needs for customized service offerings due to its inability to develop an acceptable product that could be provisioned in compliance with existing regulatory requirements.

(OSS) must be created to provide ISPs with nondiscriminatory access to the basic functions at the demarcation point, and ordering, repair and other functions associated with the underlying basic services.

Because protocol conversion and interaction with stored information are part and parcel of broadband offerings – the two parts are tightly integrated often in a single piece of equipment - the rules that require basic services to be broken out of broadband information service create significant costs and force significant network inefficiencies.[4] In addition, the *Computer Inquiry* rules force inefficient operating structures. By separating an integrated broadband offering into regulated and deregulated pieces, the *Computer Inquiry* rules effectively require separate network organizations to support the two pieces. This significantly raises operating costs and inhibits efficient customer service.

The first subsection that follows discusses the network design handicaps imposed by the *Computer Inquiry* rules. The costs of these handicaps are quite substantial but difficult to quantify. The rapid collapsing of basic transmission and computer hardware that performs information service-type functions means that these costs are rising rapidly. In fact, the whole notion of separating basic from enhanced services that underlies the *Computer Inquiry* rules is no longer tenable with today's increasingly converged broadband networks.

The second subsection discusses some of the increased operating costs required by the Computer Inquiry rules. Although these costs are less substantial than the network design costs, they still amount to approximately $45.8 million annually. That alone adds approximately $43 of regulatory cost per year for each DSL customer served over BellSouth's network.

1. Network Design Inefficiencies.

Existing regulations force BellSouth to use inefficient methods of transporting data to ISPs by forcing aggregated backhaul and access to use the same transport protocols. For example, BellSouth's tariffed DSL service is based upon ATM transmission. ATM transmission is very efficient at managing end-user connections, but does not scale well as an efficient ISP-customer interface. BellSouth's larger ISP customers often prefer a scalable interface such as Ethernet, packet over SONET, etc.

[4] This essential issue is ignored in the recent Earthlink streamlining proposal. Ex Parte letter from Donna Lampert on behalf of Earthlink, MCI and AOL, to Marlene Dortch, Secretary, FCC, Docket Nos. 02-33, 95-20, 98-10 (May 1, 2003). That proposal would require Bell companies to break apart every broadband information service and offer the underlying transmission services separately to ISPs, including transmission, components and lines, switching and routing, ordering and operations support systems, signaling and other network functions or features. This proposal would, if anything, make things worse. It would remedy none of the inefficiencies and cost handicaps identified in this letter.

Smaller ISPs prefer to integrate their DSL services into existing interfaces like Frame Relay.

Providing either a scalable solution, or integrating into existing customer interfaces, requires net protocol conversion from ATM to Ethernet, Frame Relay or some other transport protocol. This protocol conversion creates an information enhanced service offering that is subject to all of the complexities of the *Computer II/III* parity and nondiscriminatory obligations. Thus, even though several pieces of existing equipment can easily perform this function in the regulated portion of BellSouth's network, a regulatory demarcation must be created. As a result, BellSouth is forced to tariff the pure broadband transmission (without protocol conversion), which does not meet the current demands of independent ISPs such as EarthLink.

Further, in order for BellSouth to meet the ONA/CEI regulations that apply to its tariffing of these basic broadband transmission offerings, BellSouth must insist that vendors include customized functionality within their products or simply deploy duplicative facilities. Both of these outcomes are extremely inefficient consequences that further increase the costs that BellSouth incurs to provide, and end users must ultimately pay to receive, broadband service.

Thus, the effect of the current regulatory regime carries over into the market for the manufacture and sale of telecommunications equipment. In order to comply with existing requirements, BellSouth must perform extensive work with its equipment vendors to ensure that such equipment contains artificial network and accounting demarcs for its tariffed services. Specifically, in order to comply with the CEI requirements, the equipment utilized by BellSouth must create an artificial internal interface to allow alternative enhanced service providers access to the underlying tariffed services. Once this interface to the regulated service exists in the same hardware as the enhanced service offering, BellSouth must have a method for allocating the cost of the hardware between regulated and non-regulated books. BellSouth relies on its equipment manufacturers to develop measurements to allocate these costs consistent with the *Computer Inquiry* requirements.

In many instances, next-generation equipment does not provide demarcs for regulatory purposes, and vendors have no incentive to create such demarcs since all but four potential purchasers, BellSouth and the other former RBOCs, do not want or need these demarcs. Thus, BellSouth must negotiate the design of, and purchase at an increased cost, specially made next-generation equipment from manufacturers, while BellSouth's competitors are able to purchase instantaneously off the shelf the same functionality at a cheaper price. The only reason that BellSouth must engage in these costly exercises is to meet the regulatory demand for separating basic and enhanced services, not because of some demand of the marketplace.

In certain instances, BellSouth simply purchases duplicative equipment because it represents the least expensive alternative for compliance with the Commission's existing regulations. As an example, BellSouth has purchased duplicate equipment with common functionality to be deployed in both the non-regulated network (this non-regulated equipment was manufactured by Redback), while deploying similar functionality in the regulated network (this regulated equipment was manufactured by Nortel). This duplicate functionality is fully supportable by the equipment contained within either network, but BellSouth is currently hampered in using the full functionality of either deployment without developing a new Comparatively Efficient Interconnection ("CEI") plan, and reg/non-reg accounting for not only the physical equipment, but also for the equipment support personnel, Operating Support Systems and any internal software. Neither Nortel nor Redback manufacture their equipment to support the antiquated regulatory need for an internal artificial demarc, nor the requisite accounting outputs. There is little incentive for either manufacturer to develop such capability because it serves no market purpose.

An additional example is difficulty caused by the regulatory implications of the net protocol conversion contained within BellSouth's newly developed Regional Broadband Aggregation Network ("RBAN") product. BellSouth put together the RBAN offering at Earthlink's request. It is instructive regarding what is presently happening in the broadband marketplace and why the Commission's existing regulations are outdated and of no further benefit to the public. As BellSouth explained in its June 5 *ex parte*, EarthLink was not interested in purchasing the pure tariffed DSL transmission offering that BellSouth is obligated to provide under existing regulations, but rather was interested in purchasing a more efficient broadband information service arrangement that included regional traffic aggregation and protocol conversion. Attachment "A" is a diagram of the RBAN network architecture. BellSouth was required to make several changes to its tariff to support the development and competitive position of that product.[5] Even though no other company has approached BellSouth to create a similar broadband information service utilizing the basic transmission underlying the RBAN offering, BellSouth has had to modify its systems and tariffs to maintain compliance with *Computer II/III* nondiscriminatory requirements. The two-year delay in BellSouth's ability to develop RBAN was due in large part to the regulatory burden placed on BellSouth by the *Computer II/III* and Title II common carriage regulations as discussed in further detail below.

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[5] BellSouth had to make repeated minor changes to its tariffs and technical publications in order to develop RBAN. Because these changes were made to services in a non-revocable tariff, BellSouth would be required to support the tariff changes even if the planned RBAN offering did not succeed in the marketplace. Forcing regulated portions of a new enhanced service offering to be tariffed along with all of the associated long-term costs, reduces BellSouth's willingness to innovate and invest in future enhanced service offerings. In addition, these required tariff changes send signals to competitors that harm competition. *See, e.g.*, Order and Notice of Proposed Rulemaking, *Comsat Corp. Petition for Forbearance from Dominant Carrier Regulation and for Reclassification as a Non-Dominant Carrier*, 13 FCC Rcd 14083, 14118, ¶ 66 (1998).

Because RBAN utilizes tariffed, ATM-based DSL access, and hands customer traffic off to ISPs via an IP connection, a net protocol conversion takes place between the customer premises and the ISP's point-of-presence. This protocol conversion is by definition an enhanced service offering, and must take place in the non-regulated portion of BellSouth's network. For BellSouth's RBAN service, the protocol conversion occurs when the customer's traffic reaches the first router on BellSouth's Regional Internet Backbone (shown on Attachment "A" as "BRIB"), since this is the first opportunity for a piece of non-regulated equipment to perform this non-regulated function. It would be more efficient and less costly, however, for BellSouth to perform this protocol conversion earlier in the customer data flow. Specifically, it would be more efficient to perform the ATM to IP protocol conversion in either the Egress Broadband Gateway, or the Ingress Broadband Gateway (shown on Attachment "A" as EBG and IBG, respectively), or in the ATM switches used to transport the customer traffic from the IBG to the EBG within the LATA.

Eliminating the *Computer Inquiry* requirements would allow BellSouth to reduce costs by reducing duplicate functionality, and perform protocol conversion in the most cost effective location within the network. Thus, eliminating existing requirements will result in greater innovation and more cost effective services for both wholesale and retail customers.

Additionally, eliminating those requirements will allow BellSouth to invest in more powerful network hardware produced by vendors that often incorporate enhanced service offerings within their basic transport products. For example, basic transport, protocol conversion, and interaction with customer stored data once required costly dedicated equipment for each function. Modern equipment combines these functions into a single piece of hardware, yielding better performance, and enabling more innovative customer service arrangements. For instance, in many major metropolitan areas, including Atlanta, the functionality performed by the L2TP Network Server ("LNS"), EBG and IBG denoted on Attachment "A" could be performed by one piece of equipment.

Unfortunately, these combinations of enhanced and regulated functions into a single platform are very difficult for BellSouth to utilize given current regulatory requirements. Evolving its network by utilizing the most modern equipment available is critical to BellSouth when large customers, such as EarthLink, demand the efficiency and cost structure associated with these new capabilities. This evolution is also essential for BellSouth to compete more effectively with the cable modem alternative. If BellSouth is unable to innovate and meet these competitive challenges, customers (retail and wholesale) will ultimately migrate to their next best alternative.

2. *Infrastructure and Operational Inefficiencies.*

Further, the existing requirements impose significant increased costs on BellSouth's supporting infrastructure and operational systems. This creates the need for unnecessarily redundant support organizations, processes, and systems. For example, because of the existing nondiscrimination rules, BellSouth must maintain separate regulated and de-regulated technical support operations to support their respective regulated and non-regulated portions of a single service, as depicted in the "RBAN Maintenance and Trouble Reporting" diagram (Attachment "B"). If the regulations were removed, the regulated and deregulated help desk functions could be integrated, significantly reducing the time spent attempting to identify and resolve an end user customer's service problem. Not only must consumers ultimately pay the cost of these network inefficiencies, but they must also endure the frustration of not having their particular trouble resolved in the fastest, most efficient manner possible.[6]

BellSouth conservatively estimates that the increased annual cost of the redundant personnel centers needed for customer trouble handling processes alone is approximately $13.5 million annually. Further, dual dispatch processes are often required to correct customer reported problems as the true cause of the problems cannot always be determined via remote testing. Due to concerns with equal access requirements, technicians dispatched on a nonregulated customer trouble usually cannot correct network related problems without first going through the appropriate network ticketing process available to all enhanced service providers. This can create a second dispatch, sometimes one or more days later, and usually involving the same technician going to the same end-user location. Even where non-regulated dispatch and repair process have been modified to include maintenance and repair on the network or regulated portion of the underlying transport service, it continues to be necessary for BellSouth to provide access to the regulated dispatch process, leading to duplicated systems and support processes. Provisioning and Installation processes require similar separations. The estimated annual cost of the operational separation of these dispatch and repair processes is approximately $3.5 million. Once again, the end user customer ultimately pays the price for the dual dispatch processes, both in monetary terms as well as in terms of personal frustration and lost productivity.

Further, the creation of separate support organizations for the basic and information service parts of an otherwise integrated broadband information services leads to the creation of unnecessary system redundancy, including ticketing and troubleshooting systems, and causes additional estimated annual costs of $9.5 million.

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[6] BellSouth has attempted to develop improved broadband customer support processes over the past several years. These attempts have been frustrated by the complexity of the *Computer Inquiry* requirements, particularly the need to create OSS that provide demonstrably nondiscriminatory access for all ISPs to internal operations functions. Examples of these attempts include creating a customer care organization to support both the non-regulated and regulated portions of a service and integrating CPE and professional installation services with the tariffed service offering.

Dual systems and support structures are created to comply with the non-discrimination portion of the CEI rules. Specifically, access to equipment, services, systems, personnel, expertise, and information must be provided on a non-discriminatory basis to all ISPs, even though many do not request or use the information. Essentially, this creates artificial "CEI" interface requirements to all regulated workgroups, systems, databases, and equipment so that nondiscrimination can be explicitly guaranteed. The complexity of delivering RBAN with regulated and non-regulated workgroups and systems, and all of the interfaces that had to be developed are depicted in Attachment "B."

Still further, because alarm monitoring/surveillance must be separated for deregulated and regulated equipment and equipment manufacturers do not incorporate separate interfaces into their product offerings, different monitoring systems and alarm clearing processes must be utilized, causing BellSouth to incur approximately $2.0 million in additional annual cost to support these services. For an example of this mandated inefficiency, see the "RBAN Alarm and Surveillance & Customer Outage Notification Diagram" (Attachment "C"). Even though RBAN is a single service, the regulated and non-regulated portions of the network are monitored by separate regulated and non-regulated Network Operations Centers (NOCs). Both functions could easily be provided within the same workgroup, allowing both cost savings and an end-to-end service view during trouble isolation. These changes would lead to improved restoration times and increased customer satisfaction, but are not possible due to the existing *Computer Inquiry* rules.

B. The "two-mile rule" mandates additional unnecessary cost.

Still further, the "two-mile rule" established by the Commission in Computer III is yet another example of a mandate that has outlived its purpose. Under the two-mile rule, the Commission requires BOCs to impute a two-mile transport cost between the tariffed service demarc and the information service demarc to establish parity with independent ISPs. In an effort to jump-start the nascent enhanced service industry, the FCC, in the CI-III Order (CC Docket No. 85-229, released June 16, 1986), elected not to not make it mandatory that BOCs allow other enhanced service providers ("ESPs") to collocate, but did require the BOCs to provide other ESPs with interconnection facilities to minimize such transport costs. Subsequently, in the BOC ONA Order (Memorandum Opinion and Order released December 22, 1988 in CC Docket No. 88-2, Phase I), the FCC required the BOCs to offer a two-mile initial mileage band as part of a "price parity" program to satisfy the Commission's requirement that BOCs minimize ESP transmission costs. Paragraph 168 of the BOC ONA Order states the following: *"...we find that two miles is a reasonable minimum distance for price parity associated with a distance-sensitive banded tariff."*

This requirement is archaic given the fact that the information service provider industry is thriving, with many non-BOC participants providing a variety of services, including many services not provided by the BOC. Each participant has inherent cost

advantages and disadvantages. For example, while perhaps a company like BellSouth, in its provision of Internet access, may have an advantage with respect to having the ability to collocate, a company like AOL/Time-Warner has a significant advantage with respect to access to program content, while also having access to alternative transport facilities via their cable properties, and a company like MSN has a tremendous advantage in the acquisition and development of software, and has leveraged this advantage to broker partnerships with both IXC's and BOCs.

Furthermore, information service providers no longer are constrained to buy transmission facilities exclusively from the ILEC, but instead can purchase transport facilities from numerous other providers, such as IXCs or CLECs. And, finally, administrative tracking of these imputed costs is both expensive and unnecessarily raises BOC ESP costs, further disadvantaging BOC competitiveness vis-à-vis cable operators. The imputed cost for a two-mile DS-3 ATM transport circuit is approximately $2310 per month. This size circuit is used to transport up to 2000 customers when fully loaded, but average utilization of 1600 customers per circuit is more customary. Therefore, the imputed cost for the BOC ESP is approximately $1.44 per customer per month. This additional $1.44 is a cost borne exclusively by the BOC ESP, further reducing their ability to be competitive with the dominant broadband facility based provider, cable modem service.

II. THE IMPOSITION OF A UNIVERSAL SERVICE FUND CONTRIBUTION OBLIGATION ON DSL, BUT NOT CABLE MODEM, SERVICES FURTHER DISADVANTAGES DSL USERS INCLUDING INDEPENDENT ISPs.

In addition to absorbing all of the costs discussed above in attempting to offer broadband services to wholesale and retail customers at competitive prices, BellSouth *and the independent ISPs relying upon BellSouth's network* must also contend with the added disadvantage caused by the disparate assessment of universal service contributions on wireline, but not cable, broadband services. The current USF contribution method discriminates against providers of DSL services and their wholesale and retail customers.

Indeed, independent ISPs have an incentive to choose cable modem service as the underlying transport for their broadband services as a result of this added disparity. Even if BellSouth can manage to price its underlying transmission at the same rate as cable, the additional USF burden placed only on wireline broadband services will push the ISP to choose cable over DSL. Attachment "D" hereto provides an example of the significant impact on an ISP's potential profit margin caused by the USF contribution. As this example shows, a 9.1% USF contribution rate equates to an additional $3.00 per customer monthly charge, causing a 23% decrease in the ISP's operating cash flow. This decrease can be avoided by use of cable modem transmission, placing DSL transmission at an even greater competitive disadvantage. This disadvantage is growing as the USF contribution rate continues to increase.

BellSouth requests that the Commission remove wireline DSL revenues (wholesale and retail) from the USF contribution base on an interim basis, or unless and until a similar obligation is imposed evenhandedly on all competing services including cable modem service. DSL contributions represent a very small fraction of the overall USF contribution. Indeed, the estimated contribution from ILEC provided DSL services in 2002 was approximately $194 million, only 3% of the total USF contribution.[7] Thus, the effect of granting BellSouth's request on USF funding is minimal at best.

III. EARTHLINK FAILS TO SHOW THAT *COMPUTER INQUIRY* PROVIDES ANY REAL BENEFIT TO ISPs.

In its May 12 *ex parte*, the sole basis for EarthLink's claim that existing ONA regulations are "used" and "useful" are the BOCs' ONA Reports to the FCC.[8] Specifically, EarthLink cites BellSouth's April 15, 2001, 2002, and 2003 ONA report filings.[9] EarthLink does not, however, state that it has ever utilized any ILEC's formal ONA request process to receive any new ONA services. Indeed, BellSouth has never received any such request from EarthLink and none of the requests identified in BellSouth's ONA report filings are attributable to EarthLink.

The ONA request process is a prime example of why the *Computer Inquiry* rules are no longer necessary. The ONA requests that BellSouth receives do not come through any formal process, but are actually collected informally during the ordinary course of business. Typically, only the largest independent ISPs make these informal feature requests. Further, BellSouth has responded to these requests and would continue to respond to ISP requests for ONA services even in the absence of regulatory compulsion for all of the market-driven reasons discussed in BellSouth's June 5 *ex parte*. In many instances, BellSouth is already developing those ONA services that are informally requested by ISPs in an attempt to develop those products and services that BellSouth believes meet the largest market demands.

It has been BellSouth's experience that ISPs will not necessarily purchase those ONA services that BellSouth develops in response to their requests. For instance, several large ISPs demanded Multiple Virtual Circuit services which would provide an ability to configure more than one virtual or logical connection on a single physical connection. BellSouth tariffed this capability approximately one year ago, but has had no purchasers to date.

It is extremely telling that of all of the various ONA requirements imposed upon BellSouth by the *Computer Inquiry* regulations, EarthLink points to only one specific obligation that it claims *other* independent ISPs have utilized. Yet, even here, EarthLink

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[7] Worldwide DSL Services Forecast, 2003-2007, March 2003.
[8] *See* May 12 *ex parte*.
[9] *Id.* at 2.

is unable to quantify any produced benefit to justify the continuing costs of these regulations.

Regarding CEI regulations, EarthLink makes a vague reference to the "interface functionality" requirement. Because BellSouth must ensure that all ISPs have access to the same systems and processes, BellSouth is required to create functionality for ISPs such as EarthLink even though they have no intention of ever utilizing it. Indeed, there are several capabilities, services and features in BellSouth's Service Order Entry Gateway ("SOEG") that EarthLink has never utilized, even though these features are required by current CEI regulations. In effect, EarthLink is insisting that BellSouth continue to engage in multiple exercises in futility. Although EarthLink may claim that *other* ISPs find the ONA/CEI regulations "useful," other independent ISPs disagree. Indeed, the Information Technology Association of America ("ITAA"), a trade association with many ISP members, filed a recent ex parte presentation urging the Commission to "eliminate ineffective [Computer Inquiry] rules," specifically naming the Open Network Architecture and the CEI Plan regime as serving "no useful purpose."[10]

Further, EarthLink claims that the categories of cost identified by BellSouth and others – "overhead and administration; repair, maintenance and consumer service; OSS; equipment infrastructure, network and technical support costs" -- are not attributable to the *Computer Inquiry* regulations, but are the normal costs of engaging in a wholesale business.[11] Once again, EarthLink's claims miss the mark. While BellSouth may continue to incur costs associated with these categories of expense even if the *Computer Inquiry* obligations are removed, the fact is that the existing regulations dramatically *increase* the amount of such costs in these categories.

IV. THE COSTS CAUSED BY EXISTING REGULATIONS HARM ALL CONSUMERS OF COMPETITIVE BROADBAND SERVICES.

It is beyond dispute that regulatory mandates impose real costs on those companies having to comply. Indeed, the Commission has recognized the fact that costs incurred from the imposition of burdensome regulation can hamper, if not stifle, a company's incentive to invest, innovate and thereby promote the public welfare – "our policy and regulatory framework will work to foster investment and innovation in these networks by limiting regulatory uncertainty and unnecessary or unduly burdensome regulatory costs."[12]

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[10] *See* Ex Parte letter from Mark Uncapher, Senior Vice President and Counsel for ITAA, to Marlene Dortch, Secretary, FCC (May 23, 2003).

[11] *See* Ex Parte Letter from Mark J. O'Connor, Counsel for EarthLink, Inc. to Marlene Dortch, Secretary, FCC (May 12, 2003) ("May 12 *ex parte*") at 4-5.

[12] Notice of Proposed Rulemaking, *Appropriate Framework for Broadband Access to the Internet over Wireline Facilities; Universal Service Obligations of Broadband Providers; 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*, 17 FCC Rcd 3019, 3022, ¶ 5 (2002) ("*Wireline Broadband NPRM*").

In the context of mandated sharing of unbundled network elements, Justice Breyer has stated:

> Even the simplest kind of compelled sharing, say, requiring a railroad to share bridges, tunnels, or track, mean that someone must oversee the terms and conditions of that sharing. Moreover, a sharing requirement may diminish the original owner's incentive to keep up or to improve the property by depriving the owner of the fruits of value-creating investment, research, or labor. And as one moves beyond the sharing of readily separable and administrable physical facilities, say to the sharing of research facilities, firm management, or technical capacities, these problems can become more severe. One would not ordinarily believe it practical, for example, to require a railroad to share its locomotives, fuel, or workforce. Nor can one guarantee that firms will undertake the investment necessary to produce complex technical innovations knowing that any competitive advantage deriving from those innovations will be dissipated by the sharing requirement.

AT&T Corp. v. Iowa Utils Bd., 525 U.S. 366, 428-29 (1999) (Breyer, J. concurring in part). These same costs and disincentives exist where a company is required to "unbundle" the underlying transmission components of any information service that it chooses to provide and offer that transmission to its competitors on a nondiscriminatory basis as is currently required by the Commission's *Computer Inquiry* Rules.

Indeed, within the broadband marketplace, any action that BellSouth desires to undertake regarding its broadband services must be filtered continuously through the *Computer II/III* and Title II sieves to ensure compliance, a time consuming and costly exercise. These potential actions include any change to an existing broadband service, negotiating the rates, terms and conditions of a new broadband service offering with a potential customer (wholesale or retail), or deciding to undertake the development of a new and innovative broadband service offering. While its competitors, the dominant providers of broadband services, have the ability to tack quickly to take advantage of the ever-changing winds of the marketplace, BellSouth and other similarly situated companies must attempt to respond while dragging the regulatory anchor.[13]

EarthLink has claimed that the RBOCs have failed to present sufficient cause to justify deregulation. Specifically, EarthLink asserted that the ILECs provided "no

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[13] The Commission has held consistently that tariff regulation of non-dominant carriers is not only unnecessary to ensure just and reasonable rates, but is actually counterproductive since it can inhibit price competition, service innovation, entry into the market, and the ability of carriers to respond quickly to market trends. Memorandum Opinion and Order, *Tariff Filing Requirements for Nondominant Common Carriers*, 8 FCC Rcd 6752, 6752, ¶ 2 (1993).

specific facts that the deregulation advocated would yield any benefits to the public, such as price reductions or a wider array of services."[14] More recently however, EarthLink has publicly recognized that "compliance with regulations is not cost-free for the regulatee, and that decisionmakers should weigh the benefits and costs of regulation."[15] However, EarthLink mistakenly concludes that the "ISPs [who claim to find great value in *Computer Inquiry*]... ultimately pay the costs of the regulations".[16] Contrary to EarthLink's claims, retail broadband customers, not ISPs, must "ultimately pay" all costs associated with providing broadband Internet access services, including all costs caused by regulation. To the extent that retail customers do not pay all such costs, such unpaid costs (now, losses) must be absorbed by shareholders in the form of reduced stock prices. If such losses persist, a company may be forced to exit the market. Because numerous competitive alternatives are available to both broadband end-user customers and investors, lopsided regulation penalizes BellSouth through reduced revenue (from customers exercising their competitive choices) and through reduced share price (from investors exercising their alternatives).

Further, EarthLink's expressed magnanimity for paying these costs fails to recognize the financial reality of the marketplace. BellSouth attempts to recover the costs of providing broadband transmission through the sale of such transmission to various purchasers at the tariffed rate. But, BellSouth's ability to actually recover its costs given the very substantial regulatory handicap it labors under, is in no way assured given the continued dominance of cable providers.

In addition, existing *Computer Inquiry II/III* regulations require BellSouth to purchase broadband transmission from its own tariff at nondiscriminatory rates in order to provide retail broadband services such as BellSouth® FastAccess® ("FastAccess") to end user customers. BellSouth's retail broadband operations, and hence its end user customers, receive no benefit from either the *Computer II/III* or Title II regulations, yet because BellSouth is by far the largest purchaser of this tariffed transmission, BellSouth and its end user customers bear most of these regulatory costs. Thus, BellSouth's FastAccess customers are unjustly penalized for having to pay the costs of regulation that provide them with no benefit. Similarly, EarthLink's end user customers pay only a fraction of the overall costs of these regulations, yet as BellSouth has previously explained, EarthLink does not utilize the tariffed outputs (pure transmission) actually

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[14] Reply Comments of EarthLink, Inc., *Appropriate Framework for Broadband Access to the Internet Over Wireline Facilities*, CC Docket No. 02-33, et al., at 12 (FCC filed July 1, 2002) ("*EarthLink Reply Comments*"). *See also* Ex Parte Letter from Maura Colleton Corbett, Executive Director, BroadNet, the Broad Net Alliance, to Marlene Dortch, Secretary, FCC (May 22, 2003) at 2 ("[T]he ILECs have never produced any tangible evidence that continued adherence to these rules is in any way harmful to them, or to the development of broadband in general.").

[15] *See* May 12 *ex parte* at 3.

[16] *Id.* at 4. ("[N]o party even alleges in this proceeding that uncompensated regulatory costs are borne by the BOCs. Indeed, since the BOCs certainly do factor such costs into their DSL rates, it is the ISPs that ultimately pay the costs of the regulations and yet the record shows ISPs find great value in *Computer Inquiry*.").

generated by the existing regulatory regime.[17] Thus, EarthLink's endusers are also bearing the cost of needless regulation.[18]

Indeed, all current broadband customers, as well as those persons that would purchase such services at a cheaper price, are being adversely affected by the Commission's costly regulation of only one broadband technology – DSL. If the *Computer Inquiry* rules and their resulting costs were eliminated, BellSouth and similarly situated companies would have greater financial flexibility to lower prices for broadband services causing increased competitive pressure on all other competing technologies and providers to do the same. Not only are those end users of BellSouth's broadband services and network harmed by the existing regulatory regime, but so are independent ISPs and their customers.[19] Still further, those consumers that have not previously purchased broadband services but would do so at a lower price point are also being harmed by the regulatory status quo that is denying them all of the benefits of broadband.

Finally, the increased financial flexibility that would accrue to companies such as BellSouth from the elimination of the *Computer Inquiry* rules could also incite further investment in broadband upgrades and further deployment to bring broadband services to more consumers, especially those in the more rural areas of the nation, in order to better meet the Congressional goals expressed in Section 706 of the Telecommunications Act of 1996.

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[17] *See* June 5 ex parte, at 12-15.

[18] If EarthLink is suggesting that independent ISPs should bear the full cost of these existing regulations, given EarthLink's claim that they receive the full benefit, then EarthLink should clarify its position.

[19] Certainly, the Commission should not be considering expanding broadband regulation and further handicapping wireline providers from developing innovative ways to provide new services in competition with the dominant cable modem providers. However, a paragraph in a recent NPRM raised this prospect. The Commission should not take any position that would discourage DSL providers from using MMDS spectrum to further invigorate competition with cable modem providers. *See* Notice of Proposed Rulemaking and Memorandum Opinion and Order, *Amendment of Parts 1, 21, 73, 74 and 101 of the Commission's Rules to Facilitate the Provision of Fixed and Mobile Broadband Access, Educational and Other Advanced Services in the 2150-2162 and 2500-2690 MHz Bands*, WT Docket Nos. 03-66, 03-67, & 02-68, FCC 03-56, ¶¶ 119-129 (rel. Apr. 2, 2003) ("MMDS/ITFS NPRM") (FCC seeks comments regarding whether DSL providers should be prevented from owning or leasing MMDS/ITFS spectrum.).

V. CONCLUSION

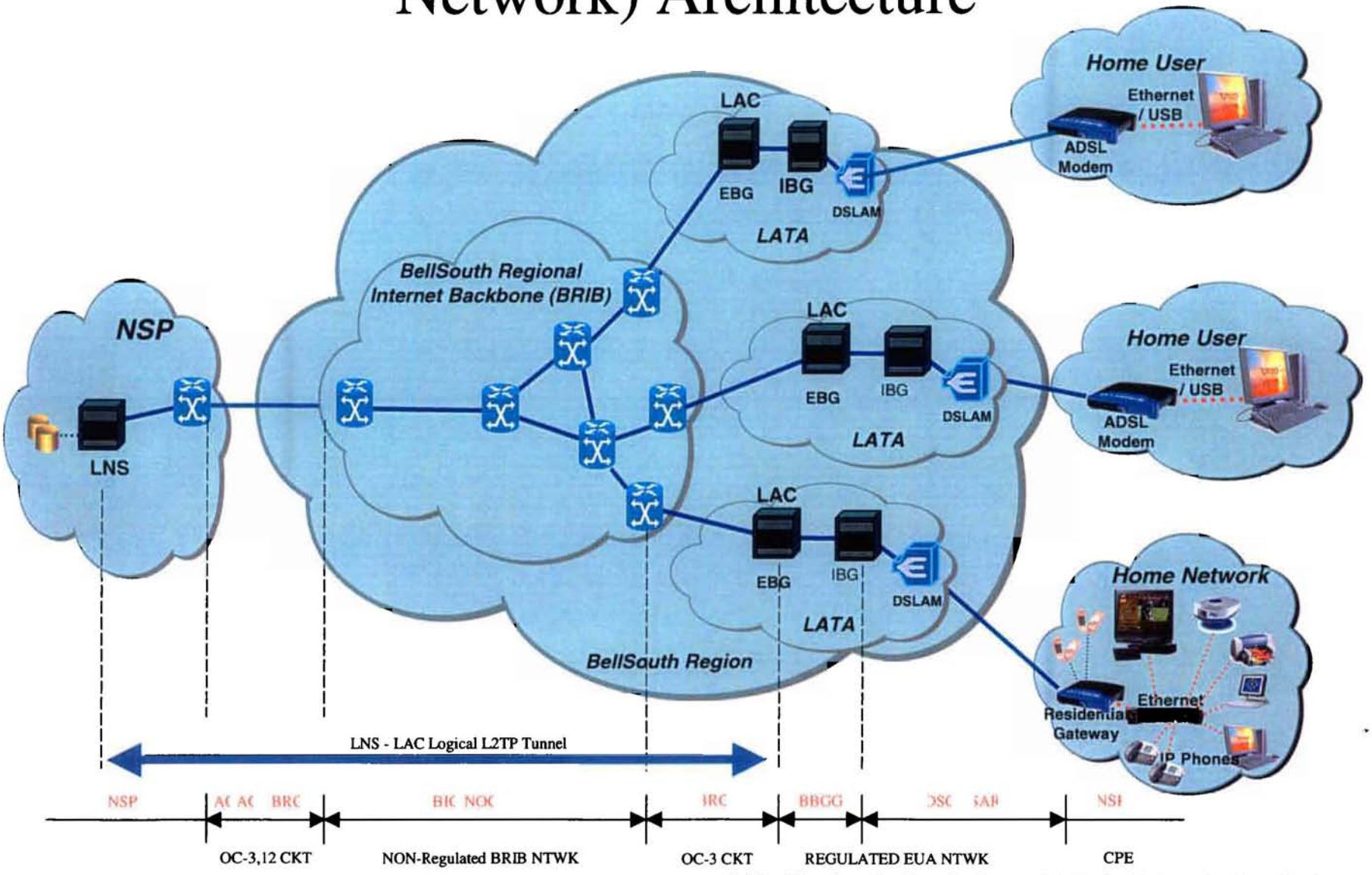
For all of the additional reasons expressed herein, the Commission must radically revamp its current approach to regulating broadband services in order to maintain a competitive market for broadband services and to provide a better climate for innovation and investment in broadband.

Very truly yours,

L. Barbee Ponder, IV

LBPIV:kjw
Attachments

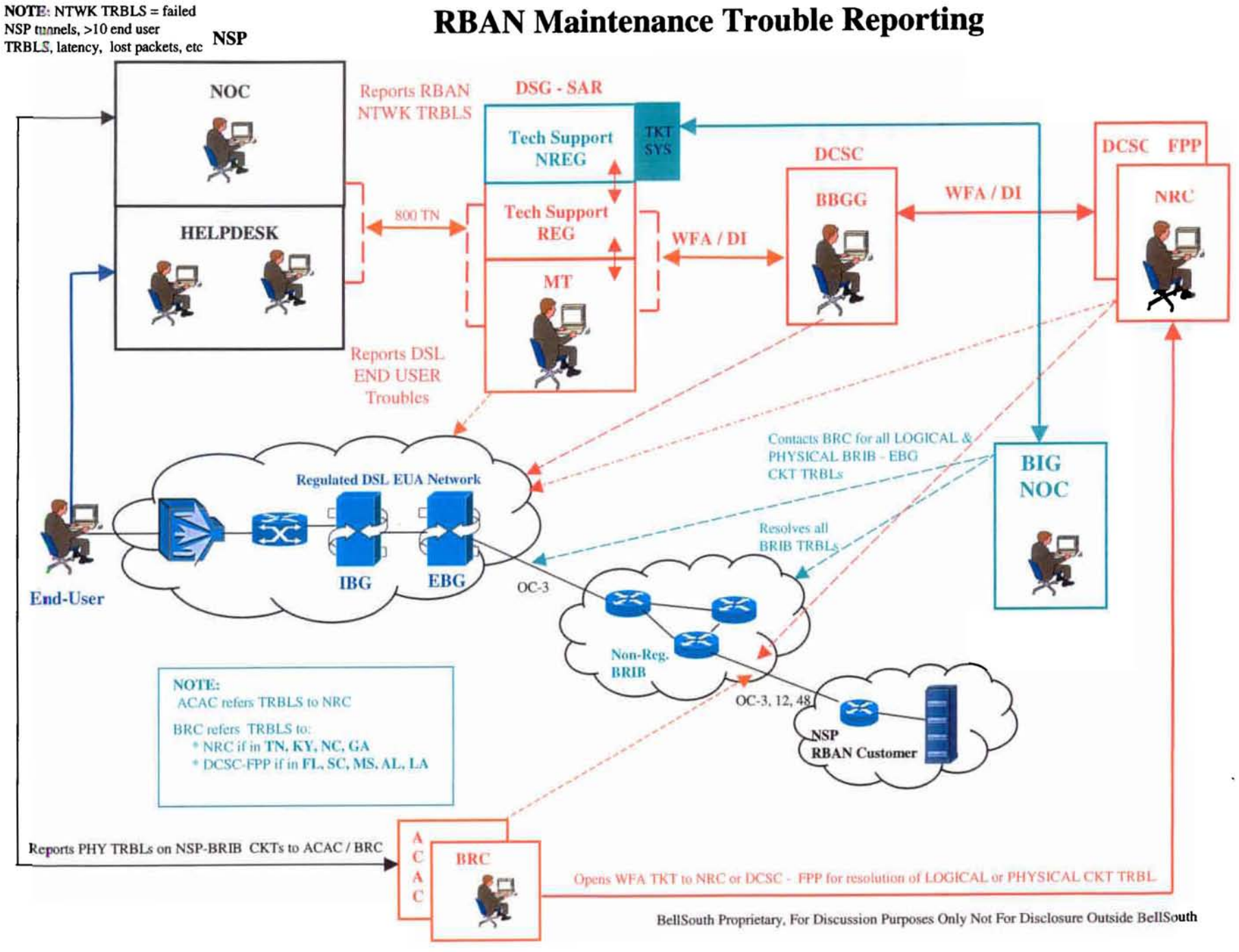
RBAN (Regional Broadband Access Network) Architecture



BellSouth Proprietary, For Discussion Purposes Only Not For Disclosure Outside BellSouth

ATTACHMENT "B"

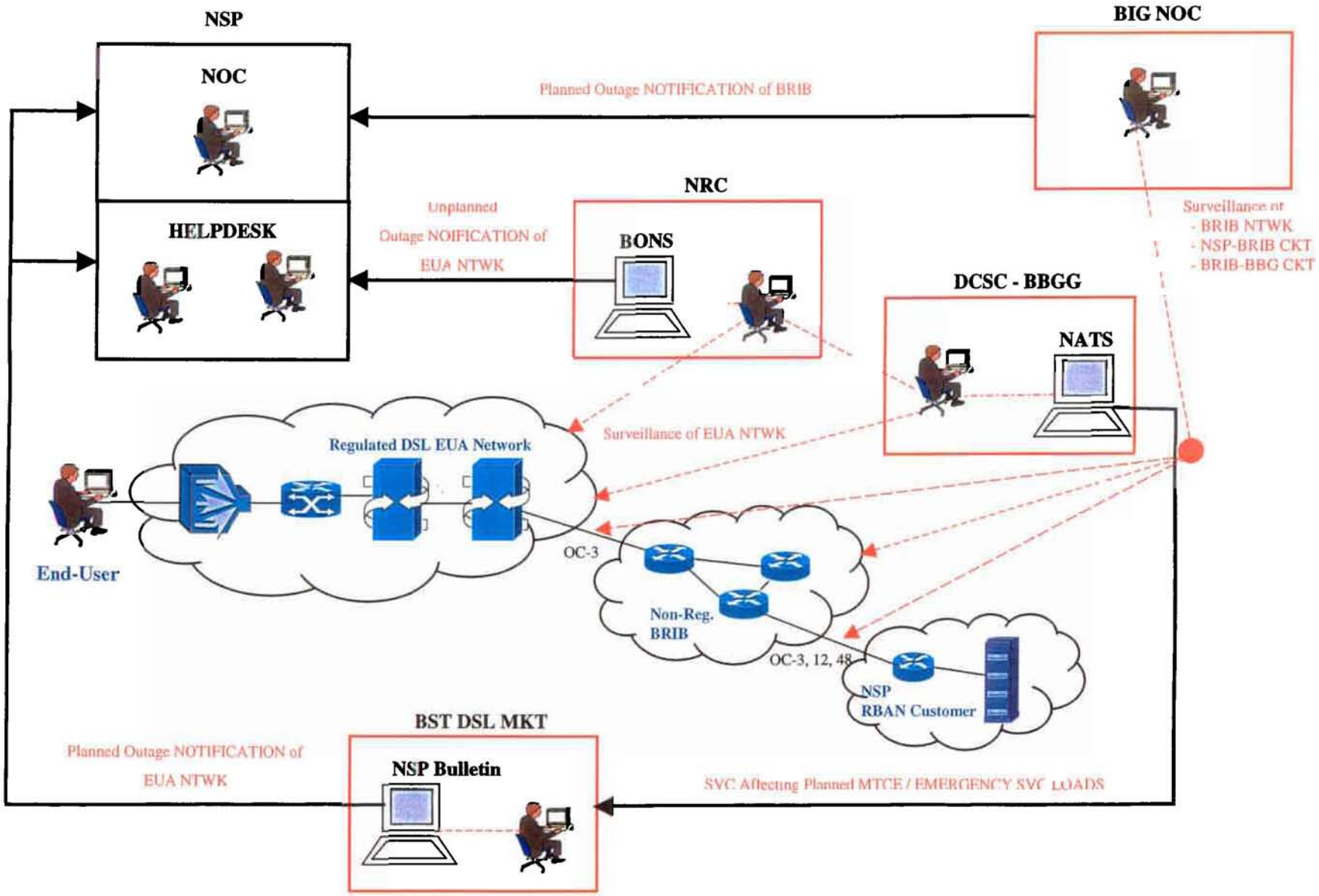
RBAN Maintenance Trouble Reporting



BellSouth Proprietary, For Discussion Purposes Only Not For Disclosure Outside BellSouth

ATTACHMENT "C"

RBAN Alarm Surveillance & Customer Outage Notification



BellSouth Proprietary, For Discussion Purposes Only Not For Disclosure Outside BellSouth

Example of Impact on ISPs

	Without USF contribution	With USF contribution
ISP purchases tariffed DSL service	$33 per month	$33 per month
ISP sells retail Internet service	$50 per month	$50 per month
USF contribution	$0	$3 (based on 9.1% contribution rate)
ISP margin	$17	$14 (represents a 23% decrease in operating cash flow for the ISP)