

July 18, 2003

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Ms. Marlene H. Dortch, Secretary
 Federal Communications Commission
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 Room TW-A325
 Washington, D.C. 20554

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Re *Ex Parte* Presentation
CC Docket Nos. 02-33, 95-20, and 98-10

Dear Ms. Dortch:

WorldCom, Inc. (d/b/a MCI), through counsel, would like to respond to a recent flurry of *ex parte* submissions by several of the Bell Operating Companies ("BOCs") urging the Commission to adopt the radical changes proposed in its Broadband Framework NPRM. What those *ex parte* submissions show is that even at this late date the incumbents can provide neither empirical evidence nor legal or policy justification for deregulating the nation's bottleneck telephone loop facilities as proposed in this NPRM. Therefore, for the reasons we have stated consistently throughout this proceeding, the Commission's proposed actions are not legally sustainable and, if adopted, would greatly disserve the public interest.

The recent BOC filings are notable both for the claims they make but fail to substantiate, and for the claims and record evidence they ignore. As to the latter, there are four critical related points that have been made repeatedly by MCI and others in this proceeding that the BOCs neither can nor do dispute.

First, this proceeding applies well beyond the category of services typically described under the rubric of "broadband." In fact, the Commission does not purport to define, delineate, refine, or limit the term "broadband." The statutory definitions the Commission proposes to construe do not describe broadband services at all. Instead, the Commission proposes radically to constrict the scope of the generic term "telecommunications services." By ruling that any time a telecommunications service is bundled with an information service, the resulting service is an information service, and the underlying transmission facility (no matter what it is) is no longer subject to any regulation, the Commission proposes to consign to the dustbin over a century of common carrier regulation. As we have stressed repeatedly, every single service offered by the incumbents, or any carrier, easily can be combined with an information service, such as voicemail, and by that stratagem cease to be a "telecommunications service." Nor would a rule limiting the ruling to facilities that can be used to carry "broadband" be meaningful. Virtually every loop in the Bells' networks is capable of carrying traffic at broadband speeds. In all of their *ex parte* filings, the Bells never dispute the breathtaking scope of the deregulatory regime they are promoting.

Second, by proposing broadly to deregulate *services* without regard to the characteristics of the *facilities* over which those services are provided, the NPRM effectively deregulates the last-mile bottleneck without even considering the policy arguments that led the Commission to

subject these facilities to regulation in the first place. As the BOCs' own dubious figures show, most homes can receive broadband communications services either over their phone lines or their cable lines, but not both, while only a minority of homes have a choice of two. Almost no homes have a third choice. And businesses overwhelmingly remain dependent upon bottleneck ILEC last mile facilities. MCI and others have submitted substantial economic evidence that carriers that control monopoly or duopoly bottleneck facilities have both the power and the incentive to exert market power over downstream markets that rely on the bottleneck(s). And we have described in detail the many ways the BOCs will exercise that market power to the detriment of consumers if the Broadband Framework NPRM's tentative conclusions are adopted. The BOCs do not deny the monopoly/duopoly characteristics of their loop facilities, and make no effort to address the large body of economic literature that uniformly concludes that it would be folly to deregulate such bottleneck facilities.

Third, about the only more or less settled feature of the Commission's proposed Title I jurisdiction over telephone services bundled with information services is that it allows the FCC broadly to preempt common carrier-type regulation by the states. Thus the *Broadband Framework* proposes not only a stealth deregulation of potentially all phone service, but also a stealth power grab by the FCC at the expense of the states. On this matter as well the BOCs are silent. As to the Commission's permissive "ancillary" authority under Title I to adopt a "Title II-lite" regime, MCI already has outlined some of the more obvious legal and policy infirmities with such a proposal.¹

Fourth, because so much of the regulatory structure of telephone service is triggered by its common carrier characteristics, this proposed deregulation will have extraordinary collateral national consequences that the BOCs continue to ignore. That is why the FBI, the GSA, the Department of Justice, and the Secretary of Defense each have expressed such grave concerns about the truly frightening scope of this proposed "Framework."

Because they have no cogent responses to these fundamental points, the BOCs have chosen to ignore any countervailing record evidence in this proceeding. If the Commission seeks to have its new rules upheld in federal appellate court, however, that strategy is not available to it.

Nor can the Commission rely on the recent BOC submissions, which amount to little more than sound bites. Their recent *ex partes* make the following points.

First, the BOCs argue that the *Computer Inquiry* rules were adopted for a narrowband world, and that the distinction between "basic" and "enhanced" services is now technologically

¹ *Ex Parte* letter from Mark Schneider to Marlene Dortch in CC Docket No. 02-33, January 7, 2003.

obsolete.² But the *Computer Inquiry* rules always have applied to services offered at “broadband” speeds – indeed the *Frame Relay Order* the BOCs particularly target applied the *Computer Inquiry* rules specifically to a broadband service. And while they claim it is no longer possible to separate transmission services from enhanced services, and that the current rules impede the development of services and technologies that inseparably provide both transmission and application (e.g., Verizon 7), the BOCs provide no support for this untrue assertion. The BOCs’ assertions to the contrary notwithstanding, the “very concept of protocol processing and interaction with stored information,” Verizon 6, was the very subject of the *Computer Inquiry* rules.

Indeed, in making this obsolescence point, the BOCs *ex partes* quickly lapse into incoherence. Thus Verizon asserts that “Broadband features are not discrete elements” but “different treatment options from an application server.” Verizon 9. But Verizon does not explain what it means by “broadband features” or “narrowband features,” or how the latter but not the former are provided by “discrete elements.” Nor does Verizon explain why an application server is not a “discrete element.” And, finally, no explanation is offered as to why the “discrete” nature of the equipment that provides information services has any relevance in any event. The pertinent question in this regard is whether the underlying common carriage transmission facilities that the *Computer Inquiry* rules recognize and make available are “discrete” from the information services which are carried by the transmission facilities. As to that, if anything, Internet-based applications are *more* separate and separable from the lines over which they are carried than “old” information services.

All that aside, Verizon goes on to insist that the FCC’s failure to acknowledge the way these “broadband features” operate is said to result in “loss of integration efficiencies.” *Id.* 11. This in turn is claimed to lead to service offerings that are “complex and confusing to the customer” because Verizon must adopt a “layered approach,” leading to “second guessing” and “uncertainties and delays.” *Id.* 12. Worse still, Verizon insists, this situation leads to “finger pointing,” and “complex coordination of 3rd party inputs,” and so still more “customer frustration – confusion.”

As best we can make out, all Verizon means to say is that customers prefer the simplicity of a vertically integrated monopoly service over the “confusion” occasioned by choice. This is not an argument about broadband at all, and it is certainly not a new argument. The incumbent phone companies have been trotting out this same horror story about pro-competitive regulation for over a century. Indeed, Verizon’s last words on this point evoke fragments of their advocacy over their entire monopoly history (though Verizon evidently lacks the stomach any longer to put its defense of monopoly into complete sentences) “Interoperability/Complex processing equipment/Finger pointing/Additional costs to disaggregated technology.” Verizon 12. If this is

² See, e.g., Verizon May 20, 2003, *Ex Parte* letter (“Verizon”) at 2

the best the BOCs can do when asked to show why their local bottleneck facilities and services should be deregulated, the Commission ought to think twice before embracing their agenda

Next, the incumbents argue that the *Computer Inquiry* rules “result in lost business opportunities”³ But here again, lack of specificity cloaks the truth: despite MCI’s repeated request for examples, the BOCs adamantly refuse to identify *what* opportunities they have lost, or even one instance of *how* tariffing “limits [their] ability to tailor offerings and business deals to meet customers’ specific needs.” Qwest 17

Finally, the BOCs argue that the relevant broadband *retail* markets are competitive, proving that the “ILECs do not control bottleneck facilities.” Verizon 3. This is deeply cynical advocacy. As the Bells well know, virtually all of the retail competition referenced in their *ex partes* relies upon BOC last mile facilities – the very facilities that they seek to free from carrier regulation. To the extent that there is any retail competition utilizing local telephone facilities, it is only *because* of the common carrier regulation of those last mile facilities. Radical deregulation inevitably will become the death knell to that competition. Thus, SBC trumpets that “Incumbent IXCs Dominate” Interstate ATM and Frame markets, but acknowledges only in passing that IXCs “may use ILEC Special Access circuit” to reach the end users.⁴ There is no “may” about it: The overwhelming majority of commercial office buildings – where frame relay and ATM customers are located – are served exclusively by BOC local fiber.⁵

The Bell’s data is misleading in another way as well. Ignoring FCC precedent, Qwest complains of its small share of a hypothetical “national” market for local frame relay and ATM services. By definition, however, the relevant geographic market for local services is the *local* market. Qwest 15-16. As the FCC has recognized, SBC’s local frame relay services are not substitutes for Qwest’s local frame relay service, because those carriers do not offer such service in Qwest’s region. If Qwest had calculated shares for the relevant local geographic markets, it would have revealed that each BOC has well over 90% share of both local frame and local ATM services in the markets it serves.⁶

³ Qwest May 23, 2003, *Ex Parte* Letter (“Qwest”) at 17

⁴ SBC May 29, 2003, *Ex Parte* Letter (“SBC”) at 14.

⁵ See Declaration of Peter Reynolds on behalf of WorldCom filed in CC Docket No. 01-338 (filed under protective order, April 4, 2002) at ¶¶ 5, 9, WorldCom Reply Comments in CC Docket No. 01-338 at 77 n 233 (competitive choices in less than 10% of locations)

⁶ Even if market share were calculated for each BOCs’ in-region service area, as SBC has advocated, the result would still show that each BOC has an overwhelming market share. See, e.g., SBC Reply Comments, CC Dkt. No. 01-337, at 18-19 (Apr. 22, 2002) (asking the Commission to treat each incumbent ILEC’s in-region service area as a discrete geographic market)

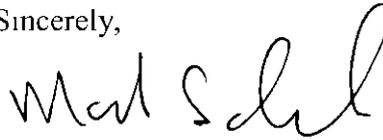
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The statistics Qwest provides to support its claim that it is not dominant in the provision of broadband services to the mass market are similarly misleading and meaningless Qwest 12. Although market share is one of the key elements of a dominance analysis, Qwest does not provide any data regarding its market share for mass market broadband services. Instead, Qwest provides penetration rates for cable and DSL, without any accompanying explanation of how or why a low penetration rate supports a finding of non-dominance.

For these reasons, and for the many more provided by virtually every non-BOC participant in this proceeding, the Commission should abandon this radical rulemaking, and most certainly should not adopt the tentative conclusions proposed in the NPRM.

Sincerely,

A handwritten signature in black ink that reads "Mark D. Schneider". The signature is written in a cursive, flowing style.

Mark D. Schneider
Counsel for WorldCom, Inc.

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