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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

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Federal Communications Commission
Office of Secretary

In the Matter of	)	
Computer III Further Remand Proceedings: Bell Operating Company Provision of Enhanced Services; 1998 Biennial Regulatory Review — Review of *Computer III* and ONA Safeguards and Requirements	)	CC Docket Nos. 95-20, 98-10

PETITION FOR DECLARATORY RULING OR WAIVER OF OSS SAME ACCESS REQUIREMENT

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August 11, 2004

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Before the
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I. INTRODUCTION AND SUMMARY

In its recently released *OI&M Order*,[1] the Commission specifically authorized Bell operating company ("BOC") affiliates to share operations, installation, and maintenance ("OI&M") functions. Such sharing, the Commission reasoned, "will likely result in substantial cost savings to [Bell company] affiliates and enable the affiliates to compete more effectively."[2] SBC Communications Inc. ("SBC") files this petition to ensure that the relief the Commission intended to provide in the *OI&M Order* is not thwarted by a decades-old ONA restriction that the Commission itself has effectively abandoned and that, SBC believes, was never applicable to its advanced services affiliate, Advanced Solutions, Inc. ("ASI"),[3] in the first place.

In order to take advantage of the efficiencies authorized by the *OI&M Order*, SBC plans to consolidate within ASI the OI&M functions for SBC's broadband services, including the

[1] *See* Report and Order and Memorandum Opinion and Order, *Section 272(b)(1)'s "Operate Independently" Requirement for Section 272 Affiliates*, 19 FCC Rcd 5102 (2004) ("*OI&M Order*").

[2] *Id.* ¶ 25.

[3] ASI includes SBC Advanced Solutions, Inc., as well as Ameritech Advanced Data Services — Wisconsin, Inc., Ameritech Advanced Data Services — Illinois, Inc., Ameritech Advanced Data Services — Ohio, Inc., Ameritech Advanced Data Services — Indiana, Inc., and Ameritech Advanced Data Services — Michigan, Inc.

advanced telecommunications services provided by ASI, SBC Telecom, Inc. ("SBCT"), and SBC Long Distance Services, Inc., ("SBC LD"), as well as the broadband information services provided by SBC Internet Services, Inc. ("SBC IS"). Under this planned consolidation, ASI personnel would have direct access to the back-office systems that support these various affiliates, and it would utilize that direct access to perform OI&M, customer care, and other services on behalf of each of them, including SBC IS.

An old Commission decision, however – one that, in SBC's view, never applied to ASI in the first place[4] – has placed a cloud of uncertainty as to whether SBC may take full advantage of

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[4] The *Computer III* requirement at issue here applies only to Bell operating companies. *See, e.g.*, Notice of Proposed Rulemaking, *Appropriate Framework for Broadband Access to the Internet over Wireline Facilities*, 17 FCC Rcd 3019, ¶ 41 & n.86 (2002). Under section 3(4) of the Communications Act, 47 U.S.C. § 153(4), ASI is not a BOC unless (1) it is a successor or assign of an SBC operating company, and (2) it provides telephone exchange service. ASI, in fact, meets neither of these criteria.

ASI is not a successor or assign of the SBC operating companies for purposes of *Computer III*. Although in *ASCENT v. FCC*, 235 F.3d 662 (D.C. Cir. 2001), the court held that ASI is a successor or assign of the SBC ILECs *for purposes of section 251*, it did not hold that ASI is a successor or assign of the SBC ILECs for any other purpose. To the contrary, its decision focused entirely on section 251 – a fact confirmed, not only by its reasoning, which derived primarily from the limits on the Commission's authority to forbear from applying section 251(c), but also by its amended ordering clause, which reads: "the vacatur applies only insofar as the Order authorizes exemption of advanced services provided through the Order's prescribed affiliate structure from the obligation imposed incumbent local exchange carriers by 47 U.S.C. § 251(c)."

Because the *ASCENT* court did not address whether ASI is a successor or assign of the SBC ILECs for any purpose other than section 251, its holding does not render ASI a successor or assign of the SBC BOCs for purposes of the *Computer III* rules. Indeed, the law is clear that a successor or assign determination can only be made with reference to specific legal obligations, not on a blanket basis, and that an entity can be a successor or assign for one purpose but not another. *See Howard Johnson Co. v. Detroit Local Joint Exec. Bd.*, 417 U.S. 29, n. 9 (1974)("[t]here is, and can be, no single definition of 'successor' which is applicable in every legal context. A new employer, in other words, may be a successor for some purposes and not for others."); *Local 32B-32J Service Employees International Union, AFL-CIO v. NLRB*, 982 F.2d 845, 849-50 (2d Cir. 1993).

Even if ASI is a successor or assign of the SBC BOCs for *Computer III* purposes, it is not itself a "BOC," as defined in the Act, because it does not provide telephone exchange service. Rather, its services all offer Internet connectivity and are thus properly classified as exchange access services. That being the case, ASI is not subject to the *Computer III* regime, irrespective of its status under *ASCENT*.

Although these arguments are sound, the Commission has yet to rule on them and so there is some level of uncertainty regarding ASI's status under the *Computer III* regime. The uncertainty is heightened by the fact that some entities have argued (incorrectly in ASI's view) that the *ASCENT* decision renders ASI a successor or assign of the SBC ILECs for all purposes. Moreover, the Commission's holding that "ISP-bound traffic does not originate and terminate within an exchange and, therefore, does not constitute telephone exchange service within the meaning of the Act," has been vacated and remanded by the D.C. Circuit. *Deployment of Wireline Services Offering Advanced Telecommunications Capability*, 15 FCC Rcd 385, ¶ 16 (1999), *vacated and remanded, WorldCom, Inc. v. FCC*, 246 F.3d 690 (D.C. Cir. 2001).

the OI&M decision. Specifically, in an Open Network Architecture ("ONA") order adopted fourteen years ago – prior to the time the Commission had occasion to consider the provision of OSS access pursuant to section 251 of the Act – the Commission held that BOCs must provide the "same access" to unaffiliated enhanced services providers ("ESPs") as is utilized by the BOC's affiliated enhanced services operation.[5] The Commission based this holding on the ground that, because BOCs had no track record of providing OSS access to competitors, there was no record basis upon which the Commission could make a finding that mediated access was "comparably efficient" to direct access.[6]

The Commission has since held in a series of section 271 decisions that mediated access can meet even the more stringent nondiscrimination requirement of section 251. These decisions cannot be squared with, and thus effectively overrule, the Commission's prior holding that the same access is required by the less strict nondiscrimination standard embodied in the Commission's *Computer III* rules.[7]

Nevertheless, because the Commission has not squarely and expressly repealed its *Computer III* same access rule, the status of that rule is not entirely clear. Given the lack of any dispositive ruling regarding ASI's status under the *Computer III* regime (*see* note 4, *supra)*, SBC

SBC would welcome a clarification by the Commission that ASI is not subject to the *Computer III* regime. It recognizes, however, that a determination of ASI's status under *Computer III* raises broader issues than this narrow petition and thus would likely take more time to resolve. In order to remove as quickly as possible any uncertainty regarding ASI's OSS access obligations, SBC files this petition. In filing this petition, SBC in no way concedes that ASI is subject to the *Computer III rules,* but rather emphasizes its firm belief that ASI is not subject to that regime.

[5] *See, e.g.*, Memorandum Opinion and Order, *Filing and Review of Open Network Architecture Plans*, 5 FCC Rcd 3103, ¶ 43 (1990) ("*BOC ONA Amendment Order*").

[6] *BOC ONA Amendment Order* ¶ 43; *see also* Memorandum Opinion and Order on Reconsideration, *Filing and Review of Open Network Architecture Plans*, 8 FCC Rcd 97, ¶ 4 (1993) ("*BOC ONA Amendment Reconsideration Order*").

[7] *See Jackson v. Stinnett,* 102 F.3d 132, 135-36 (5th Cir.1996) ("'Where provisions in the two acts are in irreconcilable conflict, the later act to the extent of the conflict constitutes an implied repeal of the earlier one.'") (quoting *Posadas v. National City Bank,* 296 U.S. 497, 503 (1936)).

thus faces some legal risk if it takes advantage of the OI&M sharing that the Commission authorized in the *OI&M Order*.

To eliminate this risk, SBC asks the Bureau for a declaratory ruling that "same access" is no longer required to achieve the comparable efficiency required under the *Computer III* regime. In the alternative, SBC seeks a waiver of any such requirement to permit ASI employees to access its back-office systems in performing OI&M, customer care, and other services for SBC IS without providing unaffiliated ISPs with direct access to those systems.[8]

This clarification or waiver would further the public interest by enabling ASI to perform OI&M on behalf of SBC IS and thereby tap into the efficiencies the Commission intended to make possible through such sharing. Moreover, it would provide such benefits without any countervailing cost. ASI will continue to provide unaffiliated ESPs the comparably efficient OSS access, through the same interfaces they enjoy today, and it will continue to work to improve those interfaces in the future. The Commission has recognized that mediated access provides *CLECs* a meaningful opportunity to compete and fully meets the strict nondiscrimination standard of section 251. No serious argument can be made that more is required under the *Computer III* regime. Indeed, given that the Commission has questioned whether *Computer III* requirements have any place *at all* in the broadband marketplace,[9] there is all the more reason for the Commission to issue the requested declaratory ruling or waiver so that SBC may avail itself of the OI&M efficiencies the Commission intended.

II. BACKGROUND

A. In its initial set of rules implementing section 272 of the Telecommunications Act of 1996 ("1996 Act"), the Commission prohibited sharing of OI&M between the BOC and its

[8] Although SBC's planned consolidation of OI&M functions involves ASI employees performing OI&M on behalf of SBC IS, the relief SBC seeks in this petition would remain in place in the event SBC elected no longer to provide advanced services through a separate affiliate.

[9] *See Wireline Broadband NPRM, supra.*

section 272 affiliates.[10] Although such a rule was not mandated by the language of section 272, the Commission concluded that it was warranted under section 272(b)(1)'s "operate independently" requirement, because it would facilitate the Commission's ability to monitor the performance of OI&M functions associated with exchange access, while at the same time enforcing the BOCs' obligations to refrain from cost misallocation and discrimination against competitors.[11] The Commission's rule prohibited sharing not only between the BOC itself and its 272 affiliate, but also between any BOC non-272 affiliate and the 272 affiliate, on the theory that such sharing could create a loophole in the basic sharing prohibition reflected in the rule.[12]

In the recently released *OI&M Order*, the Commission eliminated the OI&M sharing prohibition. Based on the intervening eight years of experience under the Commission's existing safeguards, as well as substantial developments in the marketplace, the Commission concluded that the prohibition, even if justified at the time of its promulgation, had now become an "overbroad means of preventing anti-competitive conduct and poses significant costs that outweigh potential benefits."[13] Specifically, the Commission held that "existing non-structural safeguards" are "well-tailored and sufficient to provide effective and efficient protections against cost misallocation and discrimination by BOCs" (the concerns the OI&M sharing prohibition was designed to combat in the first place).[14] Meanwhile, the Commission concluded that "the OI&M sharing prohibition has increased the section 272 affiliates' operating costs, and that the elimination of the OI&M sharing prohibition will likely result in substantial cost savings to the affiliates and enable the affiliates to compete more effectively in the interexchange market."[15]

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[10] *See* First Report and Order and Further Notice of Proposed Rulemaking, *Implementation of the Non-Accounting Safeguards of Sections 271 and 272 of the Communications Act of 1934, as amended*, 11 FCC Rcd 21905, ¶¶ 156-68 (1996), subsequent history omitted.

[11] *See id.*

[12] *See id.* ¶ 163.

[13] *OI&M Order* ¶ 16.

[14] *Id.* ¶ 18; *see id.* ¶¶ 19-22.

[15] *Id.* ¶ 25.

On balance, then, "the savings the BOCs will likely attain from the elimination of the OI&M sharing prohibition" — which savings are likely to be passed on to consumers — "will exceed any benefits from maintaining th[e] rule" prohibiting OI&M sharing, thus warranting elimination of the rule.[16] The Commission further noted that the elimination of the OI&M sharing prohibition would allow OI&M sharing among BOC affiliates. "Because the primary purpose" of the rule prohibiting such sharing among affiliates "was to ensure that the prohibition" as to OI&M sharing between the BOC and the long-distance affiliate "was not easily avoided and we now have lifted that prohibition in this Order, there is also no need to prohibit sharing of OI&M services between affiliates."[17]

B. In the wake of the *OI&M Order*, SBC's data affiliates have moved quickly to take advantage of the relief the Commission granted. Specifically, SBC is in the process of consolidating within ASI the OI&M functions that support the broadband services provided by ASI, SBC LD, and SBCT.

An obsolete *Computer III* decision that has been effectively repudiated, however, has created some uncertainty regarding SBC's ability to also consolidate within ASI the OI&M functions that support the enhanced services provided by SBC IS and thus to take full advantage of the efficiencies contemplated in the *OI&M Order*. In that decision, the Commission held that a BOC must make available to unaffiliated ESPs the *same* OSS access that the BOC provides to its own enhanced services operations.[18] At the same time, the Commission recognized that " 'direct access' to OSS functions" by unaffiliated ESPs "raises serious questions of network security and control, including the continued proprietary nature of network information regarding individual network customers," that makes such direct access infeasible.[19] As a result, if the

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[16] *Id.* ¶ 27 n.95; *see id* ¶¶ 27-28.

[17] *Id.* ¶ 17 n.53.

[18] *See BOC ONA Amendment Order* ¶ 43.

[19] *Id.*

ONA OSS same access requirement is construed to apply to ASI — such that ASI employees can perform OI&M services for SBC IS only if unaffiliated ESPs are granted direct access to ASI's OSSs — then the practical result is that ASI may *not* perform OI&M for SBC IS. And that result, in turn, would prevent SBC from realizing the full benefit of the efficiencies contemplated in the *OI&M Order*.

The lost efficiencies resulting from this prohibition, moreover, would be substantial. As explained in the attached affidavit of Richard Dietz, if ASI is unable to perform OI&M and other services for SBC IS, SBC will, in effect, be required to create overlapping systems to perform functions for SBC IS that ASI will already be performing for other affiliates. These functions include, among other things, ordering, customer care, provisioning and maintenance, and network management, for both DSL-based services and ATM and Frame Relay. SBC estimates that the cost of these overlapping systems would be approximately $36.9 million per year. In addition, SBC would incur significant opportunity costs that would be lost if SBC were forced to maintain this artificial and inefficient OI&M structure for SBC IS. Given that SBC IS competes in an already highly competitive Internet services market, the impact of these lost opportunity costs on its ability to compete cannot be minimized. As discussed below, these costs bring with them no discernible competitive benefits and are accordingly reason enough to grant the relief requested in this petition.

III. DISCUSSION

A. The Bureau Should Clarify that the OSS Same Access Requirement No Longer Applies or, in the Alternative, it Should Waive that Requirement in the Circumstances Presented Here

The issue presented by SBC in this petition is narrow in scope. SBC asks only that its enhanced services operations be permitted to share OI&M functions in the same manner as all of SBC's other affiliates without giving rise to an obligation to provide unaffiliated ESPs with direct access to SBC back-office systems. The Commission has effectively already so held by ruling that the strict section 251 nondiscrimination standard permits BOCs to provide CLECs with mediated access to OSS systems, where the BOC itself uses direct access. To eliminate

legal risk, SBC asks that the Bureau formalize this holding.[20] Alternatively, the Bureau should waive any requirement that would prohibit SBC's enhanced services operations from participating in the sharing of OI&M functions as described above without providing direct access to unaffiliated ISPs. The Bureau has authority to grant such relief,[21] where "good cause [is] shown and where the particular facts would make strict compliance inconsistent with the public interest."[22] Particularly in light of the narrow relief sought, SBC's waiver request clearly meets this standard.

1. As the Commission recognized in the *OI&M Order*, the costs of prohibiting OI&M sharing can be substantial,[23] and that is particularly so here. As noted above — and as explained in more detail in the declaration of Richard Dietz — if ASI is unable to perform OI&M on behalf of SBC IS, SBC IS will have to create a duplicate set of systems, and employ a duplicate set of personnel, to perform functions that ASI is already capable of performing. That means duplicate systems and personnel to handle (i) ordering, interconnection, circuit design, and inventory; (ii) customer care; (iii) provisioning, testing, and maintenance; and (iv) network monitoring. Those functions, moreover, must be performed for both the DSL services and the ATM and Frame Relay services that SBC IS purchases from ASI.

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[20] Sections 0.91(b) and 0.291 of the Commission's rules give the Bureau authority to issue the requested clarification or waiver pursuant to delegated authority. *See* 47 C.F.R. §§ 0.91(b), 0.291.

[21] *See* Memorandum Opinion and Order, *BOC Notices of Compliance with CEI Waiver Requirements for Market Trials of Enhanced Services*, DA 88-2058, CC Docket No. 88-616 (CCB Jan. 30, 1989) ("*Market Trials Waiver Order*"); Order, *US West Communications, Inc.'s Petition for Computer III Waiver*, 11 FCC Rcd 1195 (CCB 1995) (waiving applicability of CEI to US West's reverse search capability offered in connection with electronic white pages offering); Memorandum Opinion and Order, *Bell Operating Companies' Joint Petition for Waiver of Computer II Rules*, 10 FCC Rcd 1724 (CCB 1995) (waiving *Computer II* rules on an interim basis following Ninth Circuit's partial remand of *BOC Safeguards Order*); Memorandum Opinion and Order, *US West Notice and Petition for Removal of the Structural Separation Requirement and Request for Waiver of Certain State Tariffing Requirements*, 7 FCC Rcd 3639, ¶ 9 n.12 (CCB 1992) (waiving OSS same access requirement pending Commission decision on petitions for reconsideration of that requirement).

[22] *E.g.*, Declaratory Ruling and Notice of Proposed Rulemaking, *Inquiry Concerning High-Speed Access to the Internet Over Cable and Other Facilities*, 17 FCC Rcd 4798, ¶ 45 (2002) ("*Cable Modem Declaratory Ruling*"), *vacated in part, Brand X Internet Servs. v. FCC*, 345 F.3d 1120 (9th Cir. 2003), *pets. for cert. pending*; *see* 47 C.F.R. § 1.3; *Market Trials Waiver Order* ¶ 2; *WAIT Radio v. FCC*, 418 F.2d 1153, 1159 (D.C. Cir. 1969), *cert. denied*, 409 U.S. 1027 (1972).

[23] *See OI&M Order* ¶ 25.

SBC estimates that the inability to consolidate these functions within a single entity would result in approximately $36.9 million annually in additional operational costs. *See* Dietz Decl. ¶¶ 9-14. Those additional costs, moreover, would bring with them nothing in the way of added efficiency, but would instead impose on SBC, in addition to the already sizeable operational costs, a significant amount of lost opportunity cost. Specifically, the need to create duplicate systems would result in confusing and overlapping serving arrangements that would substantially hinder SBC's ability to provide customers with efficient, integrated solutions.

These added costs and forced inefficiencies would affect customers in all market segments, but would be felt most acutely in the enterprise segment of the market. *See id.* ¶¶ 4-5. Enterprise customers typically demand multiple services with sophisticated networks necessary to connect numerous employees at various locations. To meet these needs, an advanced services provider must provide a dedicated account team, custom engineering solutions, and a single point of contact — indeed, enterprise customers have come to expect nothing less from the marketplace. The inability to share OI&M, however, would substantially hinder SBC's ability to provide such integrated solutions. *See id.*

2. It is accordingly clear that the relief SBC seeks in this petition is necessary to avoid millions of dollars in costs, as well as operational inefficiencies that would substantially undermine its ability to compete. At the same time, those costs are wholly unnecessary, as this relief would have no material adverse affect on unaffiliated ESPs. Indeed, by its terms, the OSS "same access" requirement that ASI seeks relief from was itself *intended* to be temporary. The Commission adopted the requirement only because, at the time, BOCs did not yet have a track record of providing competing providers with OSS access and because, as a result, the then-current record "d[id] not permit [the Commission] to conclude that . . . indirect gateways . . . are comparably efficient to direct access."[24] In other words, the "same access" requirement was not

[24] *BOC ONA Amendment Order* ¶ 43; *see also* Memorandum Opinion and Order on Reconsideration, *Filing and Review of Open Network Architecture Plans*, 8 FCC Rcd 97, ¶ 4 (1993) ("*BOC ONA Amendment Reconsideration Order*").

an end in itself, but rather was a means that the Commission deemed necessary *at the time* — *i.e.*, 14 years ago — to ensure that unaffiliated ESPs enjoyed access to BOC systems that permitted them a meaningful opportunity to compete. In fact, by its own terms, the same access requirement merely constituted initial Commission guidance subject to further evaluation and review. Soon after the adoption of the same access requirement, the Commission's *Computer III* decision was vacated and remanded by the Ninth Circuit Court of Appeals, effectively placing any further modifications to the Commission's ONA rules on hold until the broader remand issues had been decided.[25]

Today is far different. For more than a decade, SBC has been providing unaffiliated ESPs with the OSS access they need to compete, through interfaces that ESPs have come to rely upon as an integral component of their business plans. Today, ASI provides these ESPs with a wealth of tools that allow them to perform OSS functions. Through the ASI Resource Center — a web-based repository of resources and links available to all unaffiliated ESPs — ESPs can perform, among other things, pre-ordering and ordering functions, as well as monitor the status of orders and perform trouble administration. *See* Dietz Decl. ¶ 6. The tools available to perform these functions include not only CPSOS —which is the pre-order and ordering interface that most ESPs use to support their ordering of DSL services, and that ESPs can access not only through the Internet but also directly, through electronic bonding — but also the Batch Ordering Tool, XML Pre-Ordering and Ordering Interfaces, ASI Magic, and others. *See id.* ¶ 7. In addition, for trouble administration purposes, ESPs have access to, among other things, the

[25] The Commission's *Computer III* decision, which imposed ONA in the first place, was vacated by the Ninth Circuit in *California v. FCC*, 905 F.2d 1217 (9th Cir. 1990) ("*California I*"), approximately a month after the *BOC ONA Amendment Order* put in place the same access requirement. On remand from *California I*, the Commission largely reinstated and strengthened the rules the court had vacated and it offered additional explanation to justify them. *See Computer III Order on Remand*, 6 FCC Rcd 7571 (1991). The Ninth Circuit, however, reversed the Commission and again remanded the ONA rules to the Commission. *See California v. FCC*, 39 F.3d 919, 927-30 (9th Cir. 1994). At that point, the Common Carrier Bureau issued the *Interim Waiver Order*, 10 FCC Rcd 1724 (1995), which waived the *Computer II* structural separation rules on an interim basis while the Commission opened a proceeding to implement the court's remand order, *see* Notice of Proposed Rulemaking, *Computer III Further Remand Proceeding*, 10 FCC Rcd 8360 (1995). Soon after, Congress passed the 1996 Act, and, since then, the remand proceeding has sat idle and, thus, the Commission has generally avoided addressing any other pending issues in that proceeding, notably including any issues where follow-up action was otherwise expected.

Electronic Bonding for Trouble Administration ("EBTA") interface, which allows for real-time trouble report administration and communication between the ESP and ASI. *See id.* Likewise, to track network status, ESPs can rely on a host of reports that track, among other things, service interruption events as well as anticipated network deployment. *See id.* These tools – along with the many others described in the attached declaration – allow ESPs to plan their business over the long-term, while managing it in the short-term.

Importantly, none of these tools will go away if the Bureau agrees with SBC's interpretation that the OSS access requirement no longer requires "same access" to OSS or, alternatively, waives such requirement. On the contrary, ASI is continuously looking for ways to improve the efficiency with which it provides access to its systems, and that will continue after the relief sought in this petition is granted. As a result, ESPs will not only continue to enjoy the same access to ASI's systems that they enjoy today, but also can look forward to potentially receiving even more robust access in the future.

Equally important to the track record SBC has established in providing OSS access to ESPs, the Bureau itself now has a wealth of experience of its own in reviewing the adequacy of OSS offerings. Unlike the situation fifteen years ago, when the Commission did not know whether mediated access to OSS systems could be comparably efficient to direct access, the Commission has now concluded, over and over again, that mediated access provides competitors with a meaningful opportunity to compete. Indeed, it has found in its review of BOC section 271 applications that mediated OSS access meets the strict nondiscrimination standard of section 251 – a standard that is more stringent than the *Computer III* standard of comparable efficiency.[26]

[26] The comparably efficient interconnection nondiscrimination standard was adopted pursuant to section 202 of the Communications Act of 1934, which prohibits "unjust and unreasonable" discrimination. By contrast, section 251(c) of the 1996 Act requires ILECs to provide "nondiscriminatory access to network elements on an unbundled basis at any technically feasible point on rates, terms, and conditions that are just, reasonable, and nondiscriminatory[.]" The Commission has held that "Congress did not intend that the term 'nondiscriminatory' in the 1996 Act be synonymous with 'unjust and unreasonable discrimination' used in the 1934 Act, but rather, intended a more stringent standard." First Report and Order, *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, 11 FCC Rcd 15499, ¶ 217 (1996). Accordingly, OSS access that meets the section 251(c) nondiscrimination standard must necessarily meet the comparably efficient standard adopted pursuant to section 202. The Commission has held, in its review of OSS access in section 271 applications that section 251 does not "require perfection[.]" Memorandum Opinion and Order, *Joint Application by BellSouth Corp., et al., for*

Thus the sole premise of the same access requirement – that the Commission was not in a position to determine whether mediated OSS access could be comparably efficient to direct access – has been abandoned by the Commission and no longer applies.

3. This analysis — and the propriety of relief that flows from it — is buttressed by the antiquated nature of the *Computer III* requirements generally. As noted above, the OSS "same access" requirement is by its terms obsolete in light of the Commission's subsequent decisions regarding mediated access. The same holds true for the *Computer III* requirements generally, as they are applied to broadband, in light of the robust competition in that marketplace.

As the Commission has stressed, "the core assumption underlying" *Computer III* "was that the telephone network is the primary, if not exclusive, means through which information service providers can obtain access to customers."[27] But, as the Commission has also stressed, that core assumption is now out-of-date: the "one-wire world for customer access appears to no longer be the norm in broadband services markets as the result of the development of intermodal competition among multiple platforms, including DSL, cable modem service, satellite broadband service, and terrestrial and mobile wireless services."[28]

Provision of In-Region, InterLATA Services In Georgia and Louisiana, 17 FCC Rcd 9018, ¶ 195 (2002); *see also* Memorandum Opinion and Order, *Application by Bell Atlantic New York for Authorization Under Section 271 of the Communications Act to Provide In-Region, InterLATA Service in New York*, 15 FCC Rcd 3953, ¶ 176 (1999) ("we do not hold Bell Atlantic to a standard of perfection"), *aff'd*, *AT&T Corp.*, 220 F.3d 607; Memorandum Opinion and Order, *Application of Ameritech Michigan To Provide In-Region, InterLATA Services in Michigan*, 12 FCC Rcd 20543, ¶ 203 (1997) ("Ameritech should not be held to a standard of perfection in demonstrating that its OSS functions are operationally ready"). Rather, that standard involves a review of "the totality of the circumstances" to determine whether, viewed in the aggregate, the OSS access provided is sufficient to provide an efficient competitor "a meaningful opportunity to compete." *New Jersey Order*, App. C, ¶ 31; *see also* Memorandum Opinion and Order, *Application by SBC Communications Inc., et al., Pursuant to Section 271 of the Telecommunications Act of 1996 To Provide In-Region, InterLATA Services in Texas*, 15 FCC Rcd 18354, ¶ 58 (2000) (checklist compliance generally is "based on the totality of the circumstances," and "an apparent disparity in performance for one measure, by itself, may not provide a basis for finding noncompliance with the checklist").

[27] *Wireline Broadband Notice* ¶ 36.

[28] Notice of Proposed Rulemaking, *Review of Regulatory Requirements for Incumbent LEC Broadband Telecommunications Services*, 16 FCC Rcd 22745, ¶ 5 (2001).

Indeed, the broadband marketplace in which ASI competes is robustly competitive. A recent study estimates that almost nine out of ten U.S. households have access to broadband,[29] while another concludes that only one in twenty have access to DSL but not cable modem.[30] Likewise, as to ATM and Frame Relay services, a recent analyst report shows that AT&T and the other large interexchange carriers — not the BOCs and their affiliates — serve the vast majority of the enterprise customers that purchase these services. According to this report, as of January 2004, AT&T, MCI, and Sprint together controlled 79 percent of the Frame Relay market and 60 percent of the ATM market.[31] In fact, the competitive providers themselves have repeatedly confirmed their dominance of the broadband marketplace.[32]

As a result of this intense competition, ASI has every incentive to facilitate the sale of DSL lines to ESPs, affiliated and unaffiliated alike, so as to stem the massive (and growing) share of the larger cable incumbents.[33] Likewise, ASI has every incentive to ensure widespread use of its ATM and Frame Relay services, or else risk losing additional business to the dominant

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[29] *See* Steve Rosenbush *et al.*, *Broadband: What's the Holdup?*, Business Week (Mar. 1, 2004), *available at* http://www.businessweek.com/magazine/content/04_09/b3872049.htm.

[30] *See* Jason Bazinet *et al.*, J.P. Morgan Securities Inc., *Industry Update*: *Broadband 2003: Deflation Looms and Market Shares Will Shift*, at 12, Figure 9 (Dec. 5, 2002).

[31] Michael Bowen & Erin Wermouth, Schwab Soundview Capital Markets, *AT&T Corp.* at 3 (Jan. 21, 2004). "ATM and frame relay services constitute the majority of telecom spending by businesses and nearly 85% of revenue opportunity within ATM and frame relay services is in long distance service offerings" that are provided primarily by AT&T, MCI, and Sprint. *Id.* at 2.

[32] AT&T's Chairman recently boasted that his company is the nation's "largest private line/frame relay/ATM provider," and he further stated that AT&T's network now "touches virtually all Fortune 1,000 companies." David Dorman, Chairman and CEO, AT&T, *Presentation Before Credit Suisse First Boston Media and Telecom Week* at 6 (Dec. 11, 2003). Time Warner Telecom recently stated that "[w]hile [RBOCs] have lot of fiber deployed, I don't know that they have more buildings connected than we do in all cases. In certain markets they may; in others they may not." Ed Gubbins, *A Conversation with Time Warner Telecom's Mike Rouleau*, Telephony Online (Oct. 29, 2003) (quoting Mike Rouleau, Time Warner Telecom senior vice president of business development) *available at* http://telephonyonline.com/ar/telecom_conversation_time_warner/index.htm. Royce Holland, the former CEO of Allegiance and founder of MFS, has stated that "[t]he large corporate enterprise market . . . is all but irrelevant in the debate over competition policy because *there are no bottleneck facilities*." *Allegiance CEO Urges Regulators to "Stay the Course" on Competition*, TR Daily (Dec. 4, 2003) (emphasis added; internal quotation marks omitted).

[33] *See Cable Modem Declaratory Ruling* ¶ 9 (recognizing that cable broadband Internet access is by far the "most widely subscribed to technology" with approximately 68% of the residential market).

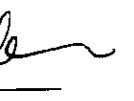
carriers in the marketplace. In short, the concerns of discrimination and cross-subsidization that animated *Computer III* in the first place are wholly out of place in broadband. Thus, just as in the *OI&M Order*, "the savings [ASI and SBC IS] will likely attain from" sharing OI&M — which are likely to be passed on to consumers, given that the services ASI provides are "substantially competitive" — "will exceed any benefits" from prohibiting OI&M sharing in this context.[34]

Largely as a result of the robust competition for broadband, the Commission has issued an NPRM calling into question whether *Computer III* can be justified at all any longer, and it has assembled an enormous record that overwhelmingly establishes that *Computer III* is no longer necessary in the broadband marketplace. At a minimum, the relief SBC requests here — a narrow ruling authorizing the sharing of OI&M with SBC IS as the Commission itself contemplated in the *OI&M Order* — is plainly warranted.

IV. CONCLUSION

The Bureau should issue a declaratory ruling that the OSS "same access" requirement has been repealed. Alternatively, the Commission should waive that requirement so that SBC's enhanced services operations can share OI&M and other services in the same manner as other SBC affiliates, without legal risk.

Respectfully submitted,



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August 11, 2004

[34] *OI&M Order* ¶¶ 27-28 & n.95.

Declaration

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

In the Matter of Computer III Further Remand Proceedings Bell Operating Company Provision of Enhanced Services; 1998 Biennial Regulatory Review – Review of Computer III and ONA Safeguards and Requirements	CC Docket Nos. 95-20, 98-10

DECLARATION OF RICHARD DIETZ

I, Richard Dietz, being of lawful age and duly sworn upon my oath, do hereby state as follows:

1. My name is Richard Dietz. I am President and CEO of SBC Data Services, Inc. My duties include supervision of SBC's data services and long distance affiliates, which include, among other entities, SBC's section 272 long distance affiliates (referred to here as SBC Long Distance, Inc. ("SBCLD"), SBC's advanced services affiliates (collectively referred to here as Advanced Services, Inc., ("ASI")), SBC's data equipment and customer network management affiliate (referred to here as "SBC DataComm"), and SBC's Internet access affiliates (referred to collectively here as SBC Internet Services ("SBCIS"). I have previously held positions in finance, corporate recruiting, information systems, strategic planning, regulatory, network operations, sales, customer services, network engineering and construction, and marketing for SBC Communications Inc. companies. I received a Bachelor of Science degree in engineering in 1968 from Case Western Reserve University in Cleveland, Ohio, and a master's degree in business administration from Washington University in St. Louis in 1974. In my current position, I have first-hand knowledge of the costs and burdens on SBC affiliates and on consumers resulting from the various non-structural safeguards and structural separation regulations imposed on these lines of business.

2. Among the Commission's Computer III requirements is a requirement for the BOC to provide unaffiliated enhanced service providers ("ESPs") access to certain operational support systems (OSS) that are utilized by the BOC's affiliated or integration enhanced service personnel. I understand that there is some uncertainty as to whether ASI is subject to this requirement, and if so, whether it must provide unaffiliated ISPs with the "same access" available to its own personnel for (a) order and entry status; (b) trouble reporting and status; (c) diagnostics, monitoring, testing and network reconfigurations; or (d) traffic data collection. The purpose of this declaration is to describe the specific costs and burdens imposed by any such requirement on SBC and its customers. In particular, I show how an ONA "same access" restriction would impair SBC's ability to provide effective customer

service, cause customer confusion and frustration, needlessly prolong service outages, diminish customer expectations of network reliability, and impose significant direct costs on SBC and ultimately consumers, all of which would constrain SBC's ability to provide the highest quality service at the best price, thereby reducing competition in the marketplace.

3. Application of a "same access" requirement to ASI would force separation and duplication of a number of critical functions and facilities between SBCIS and other SBC affiliates. Among other things, it would make it difficult for SBC to use common systems and personnel to monitor the operation of network facilities to ensure they are functioning properly and to identify malfunctions, outages, or capacity issues. It would also prevent SBC from integrating the systems, personnel and processes responsible for installing network facilities. In this regard, it would require separate organizations for the actual provisioning of network facilities. It also would impose forced separation on SBC's maintenance and repair activities, which could complicate and delay the process of diagnosing and repairing network problems. For example, when a customer who obtains Internet Access Service from SBCIS reports a service problem, the Internet Access personnel would not be able to test the customer's logical and physical circuit on an end-to-end basis using the operational support systems supporting the telecommunications network service because it would not be feasible to make that same systems access available to unaffiliated ISPs. Thus, if after testing its own facilities, the Internet Access technician determined that the problem was not in the Internet Access network, the Internet Access technician would have to attempt to determine, without the benefit of testing, the source of the problem and refer the trouble ticket to the telecommunications network personnel. If the Internet Access technician guessed wrong, another hand-off would be required. If there were problems in two different networks, multiple technicians would have to be dispatched. The bottom line is this is an inefficient business model.

4. Application of a "same access" requirement to ASI would affect all customers that requested combinations of enhanced services and advanced telecommunications services. However, the most significant impact would be on medium and large business customers. These customers generally require multiple services with sophisticated networks to connect numerous employees at different locations. Consequently, they demand specialized services from telecommunications carriers. They require dedicated account teams, custom engineering solutions to meet their business needs, and a single point of contact for customer service. Seamless end-to-end service and the efficient provisioning of the network are essential for these customers.

5. A "same access" requirement would prevent SBC from effectively and efficiently meeting these customers' service expectations. As a result, SBC would have to attempt to meet the multi-faceted requirements of its business customers through multiple separate operations that operate largely independently of one another. For example, in order to better serve medium and large business customers, SBC has created multiple customer support centers with separate OSSs to attempt to serve as single points of interface for the customer. To that end, the Internet Access operations has customer support centers that coordinate and facilitate the installation, monitoring, maintenance, and repair of enhanced services (e.g., Dedicated Internet Access, IP Virtual Private Networks). SBC has also established "Major Account Centers" to perform the same functions for customers whose needs are different

from those served by SBCIS. But while SBC can establish single points of contact that obviate the need for customers to make multiple phone calls, SBC would not be able to provide the follow-up functions necessary to serve its customers in an integrated, efficient and coordinated manner. Instead, because of the need to maintain separate OSSs for enhanced services and advanced services, SBC would have to create separate and duplicative organizations, to perform these functions in piece-parts through a series of hand-offs and iterative processes. This would result in increased costs, installation delays, maintenance and repair problems, and a reduction in the quality and reliability of SBC's service. These costs would be passed on to consumers. Many consumers who would otherwise consider SBC for their service needs would instead limit themselves to SBC's competitors, who do not operate under similar restrictions. As a result, the "same access" requirement would effectively reduce customer choice in the marketplace.

6. Relief through clarification or waiver of the "same access" requirement would enable SBC to avoid millions of dollars in unnecessary costs and operational inefficiencies. Moreover, it would do so without having any material adverse effect on unaffiliated ESPs. For 15 years, SBC has been providing unaffiliated ESPs with the OSS access they need to compete, through interfaces that ESPs have come to rely on as an integral component of their business plans. Unaffiliated ESPs doing business with ASI have access to the ASI Resource Center – providing a repository of information, tools, links to web-based graphical user interfaces ("GUI") and documents for primarily DSL and CPE products. The ASI Resource Center provides system applications and documents for pre-ordering and ordering functions, order status, trouble administration, network status, and system status. Screen shots demonstrating all the tools and capabilities the ASI Resource Center offers are attached to my declaration.

7. SBC ASI also offers several access tools to provide unaffiliated ESPs the ability to do certain pre-order, order, trouble reporting, diagnostic testing, and monitoring functions. Examples of some of the different OSS access tools or documents are provided below by function area.

   a. Pre-Ordering

      - *Batch Planning Tool* – a DSL marketing tool that allows the user to pre-qualify a large volume of potential customers in a geographic area.

      - *DSL Macros Spreadsheet Tool* – a DSL pre-qualification tool allowing the user to request DSL availability on up to 50,000 telephone numbers at one time.

      - *Extensible Markup Language (XML) Pre-Ordering Application Interface (API)*[1] – an interface that allows the user to pre-qualify customers for DSL, perform a variety of pre-ordering functions, and order DSL for customers.

[1] eXtensible Markup Language (XML) is a widely used standard that facilitates the structured interchange of data between computer applications over the World Wide Web. XML is similar to the language used for Web pages, the HyperText Markup Language (HTML). An XML solution allows computer programs to automatically extract data from an XML document. For example, one web server can talk to another web server to quickly swap data such as prices, inventory numbers, transaction numbers, order status information, and service or product availability.

- *SBC ASI DSL Green List* – a planning tool which provides ISPs with a list of telephone numbers and Central Office loop lengths that may have potential for utilizing SBC ASI's DSL Transport services within SBC ASI's thirteen State footprint.

b. Ordering

- *Batch Ordering* – a DSL ordering tool that provides the capability for users to submit large volumes of DSL orders.

- *XML Application Interface* – an interface which provides users with the transactions and interactions that enable them to perform DSL Ordering functions related to the DSL Transport service.

- *Complex Product Service Order System (CPSOS)* – a web-based tool with a graphical user interface that allows users to pre-qualify customers for DSL, perform a variety of pre-ordering functions, and submit DSL orders.

c. Trouble Administration

- *Electronic Bonding for Trouble Administration (EBTA)* – provides "Real Time" application trouble report administration and communication between SBC ASI and an ISP.

- *MAGIC–SBC Data Services* – allows the user to perform a variety of trouble administration and order status functions.

- *Closed Trouble Ticket Status Report* – allows each ISP to view information concerning completed trouble reports submitted to SBC ASI.

d. Statusing

- *Batch ADSL Ordering Tool Reports* – a reporting mechanism that accompanies the Batch Ordering Tool which allows the ISP to view and receive confirmation of ongoing status of all DSL orders.

- *XML Account Look Up Application Interface* – an interface which provides an XML solution that allows ISPs the ability to retrieve the "in service" DSL Transport records from backend ASI systems.

- *XML Order Status Application Interface* – an interface which provides XML users with the ability to retrieve order status on all pending and modified orders.

- *LeadFree* – Lead Free provides inventory and automatic assignment of virtual paths/virtual channels for DSL Transport service. In addition, DSL Transport completions and requests for provisioning of new ISPs are passed from Lead Free to CPSOS. ISPs are provided a graphical user interface to LeadFree in order to manage