

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

In the Matter of

Review of Wireline Competition Bureau Data
Practices

WC Docket No. 10-132

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

COMMENTS OF AT&T INC.

AT&T Inc., on its own behalf and on behalf of its wholly owned Bell operating company subsidiaries, (AT&T) files these comments in response to the Commission’s Notice of Proposed Rulemaking (*NPRM*), which seeks comments on the proposal to eliminate “the narrowband comparably efficient interconnection (CEI) and open network architecture (ONA) reporting requirements that currently apply to the Bell Operating Companies (BOCs).”¹

I. INTRODUCTION

The reporting requirements under consideration in the *NPRM* have their roots in the *Computer Inquiry* (CI) proceeding that was initiated in 1966; that is, 45 years ago.² Under *CI- I*, the Commission developed a policy of “maximum separation,”³ which had as its aim “to create a level playing field where telephone companies using their economic might could not unfairly

¹ *Review of Wireline Competition Bureau Data Practices; etc., Notice of Proposed Rulemaking*, WC Docket No. 10-132; CC Docket Nos. 95-20, 98-10, FCC 11-15 (rel. Feb. 8, 2011) (*NPRM*).

² *Regulatory & Policy Problems Presented by the Interdependence of Computer and Communication Services & Facilities, Notice of Inquiry*, 7 F.C.C. 2d 11 (1966).

³ *GTE Serv. Corp. v. FCC*, 474 F.2d 724, 729 (2d Cir. 1973) (“The Commission concluded that the best method of regulation was to avoid the extremes of an absolute prohibition of communication common carriers’ furnishing computer services, directly or indirectly, and the regulation of the data processing industry as such. The middle ground found by the Commission was based upon the concept of achieving ‘a maximum separation of activities’ which are subject to regulation from non-regulated activities involving data processing.’ 28 F.C.C. 2d at 269 (quoting the Tentative Decision, 28 F.C.C. 2d at 302).”) (Emphasis supplied).

enter the [enhanced service provider]⁴ market, and destroy its competitive and innovative nature.”⁵

Similarly, the aim of the later *CI-II* proceeding, which was begun in the 1970s, was to allow common carriers—more particularly AT&T Corp. (and later the BOCs) and GTE Corporation—to enter the newly emerging “enhanced services market” with sufficient structural safeguards to prevent feared anti-competitive behavior by telephone company monopolies, such as cross subsidization and discrimination.⁶ Back then, the Commission was ably struggling to balance the need to protect the independent enhanced services market from anti-competitive behavior and, at the same time, to unleash for consumers the benefits to be derived from AT&T Corp.’s innovation and investment in that market.

As this market continued to evolve and as the constraints of structural separation proved too costly and cumbersome, the Commission instigated the *CI-III* proceeding.⁷ With *CI-III*, the

⁴ For simplicity, throughout these comments, AT&T will refer to enhanced services or enhanced service providers (ESPs) in lieu of information services and ISPs.

⁵ Robert Cannon, *Where Internet Service Providers and Telephone Companies Compete: A Guide to the Computer Inquiries, Enhanced Service Providers and Information Service Provider*, 9 COMM.LAW CONSPECTUS 50, 53 (2001) (Cannon Article).

⁶ *Amendment of Section 64.702 of the Commission’s Rules and Regulations (Second Computer Inquiry)*, Final Decision, 77 F.C.C. 2d 384, 385-86 (1980). See Notice of Inquiry and Proposed Rulemaking (Notice), 61 F.C.C. 2d 103 (1976); and 47 C.F.R. § 64.702. The fear of *cross subsidization* has been addressed by price-cap regulation. See *California v. FCC*, 39 F.3d 919, 926-27 (9th Cir. 1994) (citing: *United States v. Western Elec. Co.*, 301 U.S. App. D.C. 268, 993 F.2d 1572 (D.C. Cir.), *cert. denied*, 114 S. Ct. 487 (1993): “The D.C. Circuit concluded that price cap regulation ‘reduces any BOC’s ability to shift costs from unregulated to regulated activities, because the increase in costs for the regulated activity does not automatically cause an increase in the legal rate ceiling.’”). As for *discrimination*, in addition to Section 202(a) remedies, which remain in place, the advent of competition in the local telecommunications market has made fear of it unjustified.

⁷ *Amendment of Sections 64.702 of the Commission’s Rules and Regulations (Third Computer Inquiry)*, Report and Order, 104 FCC 2d 958, para. 1 (1986) (*Phase I Order*) (“Motivating this reexamination was our tentative conclusion that, in order to fulfill our statutory obligation to ‘make available, so far as possible, to all the people of the United States rapid [and] efficient . . . communications service. . .,’ our existing rules and policies should be reworked in light of the continuing significant changes in the communications and computer services marketplaces. We expressed the view that those rules are outmoded in ways that have become evident with the passage of time and our accumulation of experience.”), modified on reconsideration, 2 FCC Rcd 3035 (1987) (*Phase I Reconsideration*), further reconsideration, 3 FCC Rcd 1135 (1988) (*Phase I Further Reconsideration*), second further reconsideration pending, appeals pending sub nom. California v. FCC, No. 87-7230 (9th Cir.) (pet. for rev. filed

Commission sought to achieve the goals of the *CI* line of dockets by employing *nonstructural* safeguards.⁸ It was within the *CI-III* proceeding that the ONA and CEI obligations—and the reporting requirements under consideration in this proceeding—were ultimately adopted.⁹

II. DISCUSSION

A. The Commission Should Eliminate All BOC CEI and ONA Reporting Requirements, Including the Requirement to Create, Post, and Maintain CEI Plans

While this abbreviated history reflects the big-picture evolution of the Commission’s approach on BOC involvement in the enhanced services market, it doesn’t spotlight the degree to which the technological, market, and regulatory circumstances underpinning that approach have changed. The *Interim Waiver Order*—the order providing the BOCs a limited waiver of the *CI-II* structural separation requirements—was adopted a year before the enactment of the Telecommunications Act of 1996, which revolutionized the telecommunications market in the United States.¹⁰ The world in which that Order was promulgated resembles not at all the world of today.¹¹ Indeed, many feel that the Telecommunications Act of 1996 alone was sufficient reason to dismantle the entire *Computer Inquiry* structure, which is a relic of era of telephone company monopolies and a computer industry still in its infancy. Regardless, the foundation for

May 28, 1987) and sub nom. Illinois Bell Telephone Co. v. FCC, No. 88-1364 (D.C. Cir.) (pet. for rev. filed May 16, 1988).

⁸ *Phase I Order*, 104 FCC 2d at 963, para. 2 (“We tentatively found that the costs of those requirements in lost innovation, inefficiency, and delay outweigh their benefits in preventing cross-subsidization and discrimination; and we proposed replacing such requirements with nonstructural safeguards.”).

⁹ *Id.* at 965, para. 6.

¹⁰ Bell Operating Companies’ Joint Petition for Waiver of Computer II Rules, Memorandum Opinion and Order, 10 FCC Rcd 1724 (Bur. 1995) (“To the extent that the California III decision might be regarded as returning regulation to the Computer II framework, we grant the BOCs limited waivers of the Computer II structural separation requirements, pending conclusion of remand proceedings.”).

¹¹ Appropriate Framework for Broadband Access to the Internet over Wireline Facilities; etc., Report and Order and Notice of Proposed Rulemaking, 20 FCC Rcd 14853, 14866 para. 21 (2005) (*Title I Order*) (“The Commission first examined the relationship between communications and computer processing in *Computer I*, a proceeding that began almost four decades ago in an era far different from today [i.e., 2005] in terms of the technological, marketplace, and regulatory environment for telecommunications carriers.”)

the CI rules and regulations—*i.e.*, the fear that BOCs would discriminate against unaffiliated ESPs and improperly support affiliated ESPs through cross-subsidization—arose at a time “when only a single platform capable of delivering [ESP] services was contemplated and only a single facilities-based provider of that platform was available to deliver them to any particular end user.”¹² That time has long passed.

If this were not enough it is also true that, regardless of whatever pressures may have existed in the past for BOCs to discriminate against non-affiliated ESPs, those pressures do not exist today. In fact, the opposite is true. In a competitive market the pressure is to sell to ESPs and to keep as much traffic as possible on the BOC network thereby maximizing utilization of the network in order to achieve economies of scale and scope. Consequently, the Commission’s proposal to discontinue the BOCs’ CEI and ONA reporting requirements is a welcome and rationale step forward that acknowledges, at least to a small degree, the new reality in which all of us—the Commission, the BOCs, those using and wishing to use the BOCs’ facilities, and the BOCs’ competitors—now find ourselves.

In the *NPRM*, the Commission concludes that it should “eliminate the remaining narrowband BOC-specific CEI and ONA reporting requirements.”¹³ These reporting requirements entail three general categories of reports: annual, semi-annual, and quarterly. The annual and semi-annual reports are enumerated in Appendix B to the *BOC ONA Further Amendment Order*.¹⁴ The quarterly report is described in the *BOC ONA Reconsideration Order*.¹⁵ As part of the Commission’s request for comments, it concedes that it “does not rely on

¹² *Id.*, at 14879, para. 47.

¹³ *NPRM*, at para. 8.

¹⁴ *Filing and Review of Open Network Architecture Plans, Memorandum Opinion and Order*, 6 FCC Rcd 7646, Appendix B (1991) (*BOC ONA Further Amendment Order*). See also Cannon Article, at 65.

¹⁵ *Filing and Review of Open Network Architecture Plans, Memorandum Opinion and Order*, 5 FCC Rcd 3084, 3093 paras. 73-80, Appendix B (1990) (*BOC ONA Reconsideration Order*).

any of these submissions in the course of its decision making.”¹⁶ Under the standard of the Paperwork Reduction Act—*i.e.*, that “the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information shall have practical utility”¹⁷—the Commission could not today sustain the burden needed to impose these information collection obligations. Plus, as the Commission notes in the *NPRM*, commenters and reply commenters in this docket have not previously argued in favor of retaining any of these reporting requirements.¹⁸ After all is said and done, these reporting requirements are all costs and no benefits. Eliminating them cannot happen soon enough.

It is unclear whether the Commission intended to include CEI plans within the scope of the *NPRM*. Since 1999, the Commission has required that BOCs “post all their . . . CEI plans and plan amendments on their Internet websites and notify the Common Carrier Bureau [now the Wireline Competition Bureau] at the time of the posting.”¹⁹ The stated purpose for requiring this posting is allegedly that “the existence of CEI plans helps the Commission enforce compliance with BOC interconnection obligations.”²⁰ In today’s world, this is unnecessary. As the Commission itself noted “the movement toward local exchange and exchange access competition should, over time, decrease and eventually eliminate the need for regulation of the BOCs to ensure that they do not discriminate against competitive ISPs in providing access to their basic service offerings.” AT&T submits that this time has come. Indeed, the time to eliminate this sort of regulation has long passed.

There is no evidence that CEI plans provide any useful information to anyone or that they are used in any manner. The information in CEI plans is not unique and is already publicly

¹⁶ *Id.*, at para. 9.

¹⁷ 44 U.S.C. § 3506(c)(2)(A)(i).

¹⁸ *NPRM*, at para. 8.

¹⁹ *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*, Order, 14 FCC Rcd 21628, 21630 para. 6 (1999).

²⁰ *Id.*

available. All of the telecommunications inputs used in conjunction with BOC-affiliated ESPs are either tariffed (at the state or federal level) or are they are sufficiently competitive to be de-regulated. Either way, the Commission's concerns in this area are pointless.

The Commission should discontinue requiring BOCs to create, post, maintain, amend, or otherwise publish CEI plans.

B. The Commission Should Also Eliminate the Remaining Narrowband Computer Inquiry Requirements on All Carriers

In his January 2011 Executive Order, President Obama directed that federal agencies submit a plan for the periodic review of existing regulations “to determine whether any such regulations should be modified, streamlined, expanded, *or repealed* so as to make the agency’s regulatory program more effective or less burdensome in achieving the regulatory objectives.”²¹ This directive has as its foundation the “general principles of regulation” cited within the Order—among which is the obligation to “take into account benefits and costs, both quantitative and qualitative.” AT&T submits that the benefits of the *Computer Inquiry* regime are minimal and the costs are excessive, and that the Commission should take this opportunity to eliminate this entire scheme in light of technological, economic, and regulatory developments.

The necessity of evaluating the worth of regulations is on-going. It does not stop the minute the regulations are adopted. When conditions change, regulators should reassess the continuing wisdom of their regulations. The conditions that gave birth to the *Computer Inquiry* regime have long since passed away. In technology, enhanced or information services have moved away from the narrowband, plain old telecommunications services and have turned instead to broadband services. In the marketplace, the local exchange market is wide open to competition, with most competitors not relying at all on the ILECs’ networks. And in regulation, the thrust and focus is on the future of communications, which involves IP broadband networks.

The concerns that gave rise to this docket in the 1960s were justified. Today, however, with the competition in the local exchange market, with price-cap regulation, and with multiple,

²¹ Exec. Order No. 13,563, 76 Fed. Reg. 3821 (2011) (emphasis supplied).

