

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

In the Matter of

Computer III Remand Proceedings

MEMORANDUM OPINION AND ORDER

Adopted: July 20, 1990;

Released: July 23, 1990

By the Chief, Common Carrier Bureau:

I. INTRODUCTION

1. In the *Computer III* proceeding,¹ the Commission adopted major changes in the rules governing the participation of the Bell Operating Companies (BOCs) in the enhanced services market. For instance, the Commission replaced the requirement that the BOCs offer enhanced services through separate subsidiaries with nonstructural safeguards designed to prevent discrimination against competing enhanced service providers and cross-subsidization of enhanced services by basic service offerings. In *People of California v. FCC*, the Court of Appeals for the Ninth Circuit recently decided to vacate the Commission's *Computer III* decisions and remand for further proceedings.² The *California* opinion concluded that the Commission had not sufficiently justified its decision to replace structural separation with nonstructural safeguards for BOC enhanced service operations. The Court also held that certain Commission preemption decisions were not justified.

2. In addition to the BOC structural relief and preemption decisions, the Commission made a number of other policy decisions in *Computer III*. For example, AT&T was permitted to offer enhanced services on an integrated basis subject to the filing and approval of Comparably Efficient Interconnection (CEI) plans. The Commission also reaffirmed its *Computer II* decision to treat Network Channel Terminating Equipment (NCTE) as Customer Premises Equipment (CPE), but concluded that carriers should be permitted to provide remote loopback testing on a regulated basis. The Commission limited the "multiplexer exception" to existing equipment currently provided under that exception, and to any updated or improved versions of such equipment. No petitioner sought review of the *Computer III* decisions that related to AT&T enhanced services, NCTE, or the multiplexer exception, and the Court did not discuss these matters. Because the Court decided to vacate the *Computer III* decisions without any limitation, however, the *Computer III* orders apparently will be vacated in their entirety.³ Thus, an interim waiver of the Commission's *Computer II* rules for AT&T and NCTE, effective on issuance of the Ninth Circuit's mandate, is necessary in order to maintain the status quo pending further Commission action.

II. DISCUSSION

3. Courts have upheld an agency's authority to adopt interim measures to prevent industry disruption after agency rules have been vacated if the agency takes steps to safeguard against the harms identified by the court. These measures may remain in effect while the agency conducts remand proceedings.⁴ We hereby grant an interim waiver of *Computer II*, effective upon issuance of the mandate, for AT&T's provision of enhanced services on an integrated basis, and for carriers to continue offering loopback testing under the terms and conditions specified in *Computer III* on a regulated basis, and to continue applying the *Computer III* changes to the multiplexer exception and waiver standard.⁵

A. AT & T

4. In the *Computer III* proceeding, the Commission replaced the requirement that AT&T offer enhanced services through separate subsidiaries with nonstructural safeguards, but safeguards that differed from those applicable to the BOCs. Because of the different competitive situation in the provision of interstate interexchange basic services, AT&T was not required to unbundle its basic services useful in the provision of enhanced services, as were the BOCs, and was permitted to offer enhanced services integrated or collocated with basic service facilities pursuant to service-specific CEI plans.⁶ Pursuant to *Computer III*, the Bureau has approved CEI plans permitting AT&T to offer the following services on an integrated basis: (1) Transaction Services; (2) Codec; (3) Subaccount Billing; (4) FTS 2000; (5) Enhanced Services Complex (voice); and (6) Protocol Processing. Three additional CEI-related items are pending before the Bureau: (1) Amendment to the Transaction Services CEI plan; (2) Enhanced Services Complex (data); and (3) Request for permanent waiver of the CEI requirements for 900 Dial-it service.

5. As previously noted, no one challenged the Commission's *Computer III* decisions concerning AT&T's provision of integrated enhanced services in any petition for review. The *California* opinion did not discuss those decisions. The entire focus of the Court's criticism of the *Computer III* decisions was the insufficiency of the Commission's explanation for its policy change between the *BOC Separation Order* and the initiation of *Computer III* regarding appropriate regulatory safeguards for BOC provision of enhanced services.⁷ In these circumstances, we conclude that exercise of our authority to take interim measures to permit AT&T to continue offering enhanced services on an integrated basis is in the public interest, and is consistent with the court's opinion in *California*.

6. Immediate reversion to the regulatory situation prior to *Computer III* in this area would be seriously disruptive. Reimposing structural separation on AT&T's provision of enhanced services currently provided through collocated facilities would require that a separate subsidiary be established, which would have to maintain its own books of account, hire separate officers and operating personnel, and utilize computer equipment and facilities separate from those used in the provision of regulated services.⁸ As a practical matter, it would be impossible for AT&T to begin providing these services on a separated basis the instant a mandate issues. Therefore, if AT&T were required to stop providing services on an integrated basis immediately after the mandate issues, customers would

lose service. We believe that a waiver of the *Computer II* rules for AT&T is necessary to prevent the disruption of service to customers.

7. In addition, we anticipate that the Commission will begin proceedings shortly proposing to reinstate structural relief for AT&T. It appears unnecessarily disruptive to compel AT&T to put its enhanced services operations in separate subsidiaries for a short period of time, when the Commission may decide to permit it to convert back to integrated operations.

8. For all these reasons, we grant AT&T a limited waiver, effective upon issuance of the mandate, to continue to offer the services for which CEI plans have been approved until the Commission issues a Notice of Proposed Rule Making proposing to readopt structural relief for AT&T's provision of enhanced services, at which time the Commission can consider whether to extend or modify this waiver. AT&T is free to add new customers to existing services, and to file new CEI plans. We will continue processing CEI plans and related petitions. We conclude that this procedure will preserve the status quo, avoid unnecessary disruption to AT&T and to customers, and generally serve the public interest.

B. NCTE

9. In *Computer III*, the Commission generally reaffirmed the decision it had made in *Computer II* to treat NCTE as CPE.⁹ The Commission, however, permitted carriers to provide, as part of a tariffed offering, equipment on customer premises to support functions necessary to perform loopback tests from the demarcation point. The Commission also limited the "multiplexer exception"¹⁰ to the provision of existing equipment provided under that exception, and to updated or improved versions of such equipment.¹¹ The Commission stated that it would entertain on a case-by-case basis requests for waivers to permit the offering of other NCTE functions on a regulated basis.¹² Upon issuance of the Ninth Circuit's mandate, some current carrier offerings may violate the *Computer II* rules.

10. No petitioner challenged the Commission's *Computer III* decisions regarding the regulatory treatment of NCTE. The *California* opinion did not discuss these decisions. Thus, we conclude that a waiver of the *Computer II* rules for carriers currently providing NCTE functionalities on a regulated basis under *Computer III* is consistent with the Court's opinion in *California*, and is necessary to prevent industry disruption. If the status of the NCTE functionalities currently provided as part of regulated offerings were to change from regulated to non-regulated, carriers would be required to amend their cost allocation manuals in order to reflect the new accounting treatment. In addition, carriers would have to refile tariffs to reflect the removal of the NCTE functionality. Making these changes to cost allocation manuals and tariffs would be time-consuming and expensive. Thus, it is clear that carriers could not comply immediately, and that classifying NCTE functionalities as non-regulated for accounting purposes would impose significant burdens on them.

11. In addition, we anticipate that the Commission will begin proceedings shortly proposing in part to reinstate the treatment of NCTE adopted in *Computer III*. We wish to avoid the industry disruption that would be caused by a requirement that carriers change the treatment of NCTE from regulated to non-regulated, and then change back to regulated.

12. We therefore grant carriers a waiver, effective on the issuance of the mandate, to continue offering loopback testing under the terms and conditions specified in *Computer III* on a regulated basis, and to continue applying the *Computer III* changes to the multiplexer exception and waiver standard. The waiver we grant in this order is effective upon issuance of the mandate and will be effective until the Commission issues its Notice of Proposed Rule Making on matters including NCTE.

III. ORDERING CLAUSES

13. Accordingly, IT IS ORDERED, pursuant to Sections 0.91 and 0.291 of the Commission's Rules, 47 C.F.R. §§ 0.91 and 0.291, that an interim waiver of *Computer II* is granted to the extent described herein, effective upon the issuance of the mandate in *People of California v. FCC*.¹³

FEDERAL COMMUNICATIONS COMMISSION

Richard M. Firestone
Chief, Common Carrier Bureau

FOOTNOTES

¹ Amendment of Sections 64.702 of the Commission's Rules and Regulations, CC Docket No. 85-229, Phase I, Report and Order, 104 FCC 2d 958 (1986) (*Phase I Order*), reconsideration, 2 FCC Rcd 3035 (1987) (*Phase I Reconsideration Order*), further reconsideration, 3 FCC Rcd 1135 (1988) (*Phase I Further Reconsideration*), second further reconsideration, 4 FCC Rcd 5927 (1989) (*Phase I Second Further Reconsideration*), *Phase I Order* and *Phase I Reconsideration Order vacated sub nom. California v. FCC*, No. 87-7230 (9th Cir. filed June 6, 1990), appeal pending sub nom. Illinois Bell Telephone Co. v. FCC, No. 88-1364 (D.C. Cir. pet. for rev. filed May 16, 1988); *Phase II Order*, CC Docket No. 85-229, Phase II, 2 FCC Rcd 3072 (1987), reconsideration, 3 FCC Rcd 1150 (1988) (*Phase II Reconsideration Order*), further reconsideration, 4 FCC Rcd 5927 (1989) (*Phase II Further Reconsideration*), *Phase II Order vacated sub nom. California v. FCC*, No. 87-7230 (9th Cir. filed June 6, 1990), appeal pending sub nom. *California v. FCC*, No. 88-7183 (9th Cir. filed May 13, 1988).

² *People of the State of California v. FCC*, No. 87-7230, slip. op. (9th Cir. June 6, 1990). The Commission decisions under review were the *Phase I Order*, the *Phase I Reconsideration*, and the *Phase II Order*.

³ The D.C. Circuit has held that when an agency replaces an existing rule with a new rule, and a court vacates all or part of the new rule, the effect is to reinstate the rules previously in force. *Action on Smoking and Health v. C.A.B.*, 713 F.2d 795 at 797 (D.C. Cir. 1983).

⁴ See *Mid-Tex Electric Cooperative Inc., v. Federal Energy Regulatory Commission*, 822 F.2d 1123 (D.C. Cir. 1987) (Court upholds agency adoption of interim measures; interim measures may remain in effect while agency conducts court-ordered remand proceedings); *American Gas Association v. F.E.R.C.*, 888 F.2d 136 (D.C. Cir. 1989) (Agency has authority to promulgate interim measures; Court holds specific measure invalid on

grounds that it did not sufficiently address Court's concerns on an interim basis and that two years had passed without agency issuing final order).

⁵ We find that seeking comment on this interim waiver would be contrary to the public interest since: (1) the interim waiver is of limited duration; (2) there will shortly be ongoing public proceedings to promulgate a permanent rule; (3) the *Computer III* orders were originally adopted after a lengthy comment period; and (4) AT&T relied on non-structural safeguards for its provision of enhanced services and carriers relied on *Computer III* decisions to offer loopback testing on a regulated basis during the period between its promulgation and the Ninth Circuit's opinion vacating *Computer III*. Cf. *Mid-Tex*, 822 F.2d at 1131-1133.

⁶ *Computer III Phase I Reconsideration* at ¶¶ 45-53. Before *Computer III*, AT&T was permitted to provide enhanced services using facilities not collocated with basic network facilities under the terms of the *AT&T Limited Waiver Order*, which treated such enhanced service facilities as CPE for regulatory purposes and used essentially the same nonstructural safeguards as applied to AT&T's integrated provision of basic services and CPE. Petition of AT&T for Limited and Temporary Waiver of 47 CFR Section 64.702 Regarding Its Provision of Unregulated Services Externally to the AT&T-C Network, *Memorandum Opinion and Order*, Mimeo No. 1147 (released November 27, 1985), appl. for rev. denied, 104 FCC 2d at 1043 n. 220. In *Computer III*, the Commission replaced those nonstructural safeguards with those adopted in *Computer III*. See *Computer III Phase I Reconsideration* at ¶ 53.

⁷ See *California*, slip op. at 5750-5769.

⁸ See *Computer II Final Decision*, 77 FCC 2d 384 at 475, para. 233.

⁹ The BOCs were authorized to provide NCTE pursuant to nonstructural safeguards in the BOC *CPE Structural Relief Order*. Furnishing of Customer Premises Equipment by the Bell Operating Companies, CC Docket No. 86-79, 2 FCC Rcd 143 (1987).

¹⁰ The multiplexer exception

permits carrier provision of multiplexers on customer premises as part of a regulated service in order to facilitate provision of tariffed basic service offerings of (a) two or more communications channels to a single customer, or (b) individual channels to two or more customers.

Phase II Order at para. 235.

¹¹ See *Phase II Reconsideration* at para. 138.

¹² *Phase II Order*, 2 FCC Rcd at 3105-06.

¹³ *People of the State of California v. FCC*, No. 87-7230, slip. op. (9th Cir. June 6, 1990).