

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

CC Docket No. 90-368

In the Matter of

Computer III Remand Proceedings

MEMORANDUM OPINION AND
ORDER ON RECONSIDERATION

Adopted: January 9, 1992; Released: January 24, 1992

By the Commission:

I. INTRODUCTION

1. On December 17, 1990, the Commission released a *Report and Order*¹ in this proceeding, which adopted three narrowly focused proposals to reinstate certain *Computer III* rules that the United States Court of Appeals for the Ninth Circuit had vacated in *California v. FCC*.² BellSouth Corporation (BellSouth) has filed a petition for partial reconsideration of the *Report and Order*, requesting that we expand the scope of this proceeding to revisit our long-standing classification of protocol processing as an enhanced service.³ We adhere to our conclusion not to reconsider our classification of protocol processing in this proceeding, and deny BellSouth's petition.

II. BACKGROUND

2. In the *Computer II* proceeding,⁴ the Commission established a regulatory distinction between enhanced services, which would be offered on a non-tariffed competitive basis, and basic services, which would be subject to Commission regulation under Title II of the Communica-

tions Act. Under the *Computer II* regime, AT&T and the BOCs generally were permitted to offer enhanced services only through structurally separate subsidiaries. The Commission concluded that protocol processing was an enhanced service.⁵

3. In the *Computer III* proceeding that followed, the Commission permitted AT&T and the BOCs to offer enhanced services integrated with their basic offerings, provided that those carriers complied with certain nonstructural safeguards designed to protect competing enhanced service providers from possible anticompetitive conduct. The Commission also sought comment on, and reaffirmed, the *Computer II* classification of protocol processing as enhanced.⁶

4. On review, the United States Court of Appeals for the Ninth Circuit in *California v. FCC* held that the Commission had not adequately justified the decision to replace structural separation with nonstructural safeguards for the BOCs' enhanced service operations.⁷ The Court also held that certain Commission preemption decisions had not been sufficiently justified.⁸ No party briefed the protocol processing classification issue, and the Court did not address that question.⁹ However, the Court vacated the *Computer III* orders under review, including the order reaffirming the status of protocol processing as enhanced, and remanded the case to the Commission for further proceedings consistent with the Court's opinion.¹⁰

III. THE REMAND PROCEEDING

5. Two months after *California v. FCC* was decided, the Commission initiated this remand proceeding with the release of the August 6, 1990, Notice of Proposed Rulemaking.¹¹ In the *Notice*, we stated that the effect of the Ninth Circuit's decision vacating the *Computer III* orders under review was, generally, to return the telecommunications industry and the Commission to a *Computer II* regime. We noted that in several instances the Court's vacation of the *Computer III* orders appeared to affect regulatory changes that had not been challenged in the appellate proceedings. Because the legal basis for such regulations did not appear to have been eroded by the Ninth Circuit's action, we determined that expeditious action was possible and warranted to resurrect three of

¹ *Computer III Remand Proceedings* (CC Docket No. 90-368), 5 FCC Rcd 7719 (1990) (*Report and Order*).

² *People of the State of California v. FCC*, 905 F.2d 1217 (9th Cir. 1990). The orders under review were: *Amendment of Sections 64.702 of the Commission's Rules and Regulations (Third Computer Inquiry)* (CC Docket No. 85-229), 104 FCC 2d 958 (1986) (*Phase I Order*), *recon.*, 2 FCC Rcd 3035 (1987) (*Phase I Reconsideration*), 2 FCC Rcd 3072 (1987) (*Phase II Order*).

³ Comments and/or replies regarding the BellSouth petition have been filed by ADAPSO, BT Tymnet, Inc., Compuserve Incorporated, Integrated Communications Systems, Inc., International Business Machines Corporation, the NYNEX Telephone Companies, US Sprint Communications Company Limited Partnership, and U S West Communications, Inc.

⁴ *Amendment of Section 64.702 of the Commission's Rules and Regulations (Computer II)*, 77 FCC 2d 384 (1980) (*Computer II Final Decision*), *modified on recon.*, 84 FCC 2d 50 (1981) (*Computer II Reconsideration*), *modified on further recon.*, 88 FCC 2d 512 (1981) (*Computer II Further Reconsideration*), *aff'd*, *Computer and Communications Industry Association v. FCC*, 693 F.2d 198 (D.C. Cir. 1982), *cert. denied*, 461 U.S. 938 (1983).

⁵ See *Computer II Final Decision*, 77 FCC 2d at 421-22;

Computer II Reconsideration, 84 FCC 2d at 60-61.

⁶ See *Amendment of Section 64.702 of the Commission's Rules and Regulations (Third Computer Inquiry)* (CC Docket No. 85-229), Notice of Proposed Rulemaking, 50 Fed. Reg. 33581, 33593-33599 (Aug. 20, 1985); Supplemental Notice of Proposed Rulemaking, 51 Fed. Reg. 24410 (Jul. 3, 1986). *Phase I Order*, 104 FCC Rcd at 1092-1109; *Phase II Order*, 2 FCC Rcd 3074-82; *Phase II Reconsideration*, 3 FCC Rcd at 1152-58.

⁷ *California v. FCC*, 905 F.2d at 1238-39.

⁸ *Id.*, 905 F.2d at 1239-45.

⁹ The *Phase II Reconsideration* is the subject of a separate pending judicial challenge in the Ninth Circuit. *BellSouth Corp. v. FCC*, Ninth Circuit No. 88-7290. Therefore, the parties that might have been inclined to brief the protocol processing issue apparently assumed that they could brief it in the subsequent review proceeding, *BellSouth v. FCC*. The Commission's motion to dismiss the BellSouth petition for review is pending before the Court.

¹⁰ *Id.*, 905 F.2d at 1246.

¹¹ *Computer III Remand Proceedings* (CC Docket No. 90-368), 5 FCC Rcd 5242 (1990) (*Notice*).

those *Computer III* regulatory changes. First, we proposed to reinstate Open Network Architecture (ONA) obligations on the Bell Operating Companies (BOCs). Second, we proposed to permit AT&T to provide collocated enhanced services on an integrated basis pursuant to *Computer III* nonstructural safeguards. Finally, we proposed to reinstate certain *Computer III* decisions regarding Network Channel Terminating Equipment.¹²

6. We explicitly excluded from this expedited rulemaking other issues raised by the Court's vacation of the three *Computer III* orders. Thus, we reserved for a separate rulemaking proceeding those *Computer III* rules that the Ninth Circuit had specifically addressed.¹³ As to the classification of protocol processing, the Commission found that no further action was needed. Specifically, we stated:

Because the classification of protocol processing in *Computer III* merely reaffirmed the Commission's earlier classification of those services, the effect of the vacation order is to restore protocol conversion services to the *Computer II* status, which also was enhanced. There is thus no need to propose further consideration of this classification issue in this notice.¹⁴

7. In the *Report and Order*, we adopted the three specific regulatory proposals set forth in the *Notice*.¹⁵ We also declined the suggestion, urged in comments filed by BellSouth and two other parties, that the Commission expand the scope of this proceeding to revisit the protocol processing issue.¹⁶ We reiterated our position, taken in the *Notice*, that it was unnecessary to "reexamine the classification of protocol processing in this proceeding because the Ninth Circuit's opinion, by vacating certain *Computer III* orders, had no effect on the classification of protocol processing."¹⁷

IV. THE PLEADINGS

8. BellSouth's petition for reconsideration of the *Report and Order* challenges the Commission's procedural decision "not to readdress the regulatory classification of protocol processing" in this proceeding.¹⁸ BellSouth argues that the Commission erred in concluding that the

California v. FCC decision vacating certain *Computer III* orders had no effect on the classification of protocol processing as enhanced.¹⁹ In fact, BellSouth had reopened the classification issue in the *Computer III* proceeding before reaffirming the existing classification on a new record, the Ninth Circuit's vacation of the pertinent *Computer III* orders does not merely reinstate the same *Computer II* classification. Rather, BellSouth claims the court decision leaves a regulatory void, which the Commission is now obligated to fill.²⁰

9. BellSouth asserts that by adhering to the identical *Computer II* classification without affirmatively revisiting the merits of the issue, the Commission impermissibly ignores the new evidence compiled in the intervening *Computer III* proceeding, the result of which was vacated.²¹ In BellSouth's view, the record of intervening technological, market, and regulatory changes developed in the *Computer III* proceeding, as well as unspecified subsequent developments, render the current classification contrary to the public interest.²²

10. Opponents of BellSouth's petition argue that the Commission reasonably exercised its inherent discretion to determine the scope of the rulemaking proceedings.²³ Those opponents vigorously dispute BellSouth's assertion that the Commission has declined to address the protocol processing classification, despite new evidence bringing into question the viability of the existing rule.²⁴ They note that the Commission revisited and reaffirmed the *Computer II* classification in the *Computer III* proceeding, and that the Commission addressed all of the "new" developments that BellSouth asserts in support of further proceedings here.²⁵ The opponents assert that because the *California v. FCC* decision did not address the *Computer III* analysis of protocol processing, there is no serious reason to question the continued application of *Computer II* rules that the Commission reaffirmed in the vacated

¹² See *Notice*, 5 FCC Rcd at 5242 (paras. 1 and 5 & n.15), 5243 (paras. 8-11).

¹³ See *Notice*, 5 FCC Rcd at 5242 (para. 6). That proceeding has been commenced. See *Computer III Remand Proceedings: Bell Operating Company Safeguards; and Tier 1 Local Exchange Company Safeguards* (CC Docket No. 90-623), Notice of Proposed Rulemaking, 6 FCC Rcd 174 (1990).

¹⁴ *Notice*, 5 FCC Rcd at 5242 n.17.

¹⁵ See *Report and Order*, 5 FCC Rcd at 7719 (para. 1).

¹⁶ See *Report and Order*, 5 FCC Rcd at 7722 (para. 24) & n.57.

¹⁷ See *Report and Order*, 5 FCC Rcd at 7722 (para. 24).

¹⁸ BellSouth Petition at 1. BellSouth's petition is very ambiguous with regard to whether its challenge is to the Commission's procedural decision to limit the scope of this proceeding, or to the merits of the classification itself. ADAPSO Opposition at 2-3. However, since we expressly did not seek comment on the classification issue in this proceeding, we could not, in any event, rule on the merits of that issue here. See 47 C.F.R. §§ 1.412(a), 1.413, 1.415 (requiring notice and opportunity for com-

ment prior to adoption of rules changes). We thus interpret the petition as presenting only a procedural challenge to the scope of this proceeding.

¹⁹ BellSouth Petition at 2-6.

²⁰ *Id.*

²¹ *Id.* at 3, citing *Geller v. FCC*, 610 F.2d 973 (D.C. Cir. 1979). See also BellSouth Reply at 7.

²² BellSouth Petition at 6-9; BellSouth Reply at 6-9. Three commenters agree generally with BellSouth's conclusion that the record in the vacated *Computer III* proceeding warrants revisiting the protocol processing issue, at least in some forum. See NYNEX Comments at 1-2; US West Comments at 1-2; ICS Reply at 1-3.

²³ See IBM Comments at 5-6; US Sprint Opposition at 6; BT Tymnet Opposition at 5-6.

²⁴ US Sprint Opposition at 7-9; BT Tymnet Opposition at 8-11; ADAPSO Opposition at 7-10; CompuServe Opposition at 4-7.

²⁵ BT Tymnet Opposition at 8-10; ADAPSO Opposition at

Computer III orders.²⁶ The opposing parties maintain that the Commission's classification of protocol processing as enhanced was and remains proper.²⁷

V. DISCUSSION

11. We are not required continually to reopen settled rules.²⁸ In fact, a presumption exists that "the policies committed to [the agency] by Congress... will be carried out best if the settled rule is adhered to."²⁹ BellSouth has not demonstrated that either the law or the facts have changed in a way that makes it necessary or desirable to reconsider our classification of protocol processing.

12. First, with regard to changes in the law, we believe the Ninth Circuit's vacation order in *California v. FCC* had no direct impact upon the Commission's existing classification of protocol processing as an enhanced service.³⁰ Under established law, the vacation of existing rules has the effect of automatically reinstating preexisting ones.³¹ Here, the Ninth Circuit opinion was simply silent with respect to our longstanding classification of protocol processing as enhanced. Thus, the *Computer II* classification, which we reaffirmed in *Computer III*, was not affected by *California v. FCC*.

13. Second, BellSouth provides no factual justification to support revisiting our protocol processing classification. BellSouth's primary contentions are that new evidence developed since *Computer II* shows: (1) that protocol processing is not a stand-alone service but rather plays a vital role in the integrated delivery of packet switching service; and (2) that the application of ONA pricing parity rules to protocol processing is not cost-effective for users of BOC-provided protocol processing services, particularly those associated with the provision of multiplexed interconnection arrangements.³² As BellSouth concedes,³³ the Commission addressed, in substance, both of these contentions in the course of retaining the current classification in the *Computer III* proceeding.³⁴ The decision in *California v. FCC* provides no indication that our analysis there was in error. Beyond the *Computer III* record, BellSouth notes only the possibility that it may present unspecified "additional 'new evidence'" based upon subsequent experience.³⁵

14. BellSouth has failed to show that either the legal or the factual underpinnings of the Commission's regulatory classification of protocol processing have eroded. In the

absence of such a showing, we decline to revisit in this proceeding our long-standing classification of protocol processing as an enhanced service.

VI. ORDERING CLAUSE

15. IT IS HEREBY ORDERED that pursuant to Sections 1, 4(i), 4(j), 201, 202, and 205 of the Communications Act of 1934, 47 U.S.C. §§ 151, 154(i), 154(j), 201, 202, 205, the Petition for Partial Reconsideration filed by BellSouth Corporation IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

8-10.

²⁶ See BT Tymnet Comments at 7-8; IBM Comments at 5 & n.8.

²⁷ BT Tymnet Opposition at 12-15; US Sprint Opposition at 7-9; IBM Comments at 2-4, 7-9; CompuServe Opposition at 6-7; ADAPSO Opposition at 10.

²⁸ See, e.g., *United Church of Christ v. FCC*, 911 F.2d 813, 818 (D.C. Cir. 1990); *NRDC v. Thomas*, 838 F.2d 1224, 1249 (D.C. Cir.), cert. denied, 488 U.S. 888 (1988).

²⁹ *Motor Vehicle Manufacturers Association v. State Farm Mutual*, 463 U.S. 29, 41-42 (1983), quoting *Atchison T. & S.F.R. Co. v. Wichita Bd. of Trade*, 412 U.S. 80-0, 807-08 (1973).

³⁰ See Notice, 5 FCC Rcd at 5242 n.16; *Report and Order*, 5 FCC Rcd at 7722 (para. 24).

³¹ See, e.g., *Action on Smoking and Health v. CAB*, 713 F.2d 795, 797 (D.C. Cir. 1983); *Abington Memorial Hospital v. Heckler*, 750 F.2d 242, 244 (3d Cir. 1984).

³² BellSouth Petition at 7-9; BellSouth Reply at 7-9.

³³ See BellSouth Reply at 7.

³⁴ In fact, by the time of the *Phase II Reconsideration* in *Computer III*, most of the "new evidence" Bell South alludes to had already been addressed. In the *Phase II Reconsideration*, which denied reconsideration of our decision in the *Phase II Order* to retain the existing protocol processing classification, we stated:

We agree with those parties who observe that many of the arguments of the petitioners are not new. Arguments such as those related to ... the unitary nature of protocol processing and communications, constraints on the introduction of new [e.g., digital] technology (such as ISDN and fast packet switching)... the effects of specific CEI/ONA requirements on competition... have been thoroughly considered in previous orders in this proceeding.

Phase II Reconsideration, 3 FCC Rcd at 1153-54.

³⁵ BellSouth Reply at 8.