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

In the Matter of	)	
	)	
	)	
Petition of Bell Atlantic for Relief from Barriers to Deployment of Advanced Telecommunications Services	)	CC Docket No. 98-11
	)	
Petition of US WEST for Relief from Barriers to Deployment of Advanced Telecommunications Services	)	CC Docket No. 98-26
	)	
Petition of Ameritech for Relief from Barriers to Deployment of Advanced Telecommunications Services	)	CC Docket No. 98-32
	)	

CONSOLIDATED OPPOSITION OF ACSI

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SUMMARY

Being unable or unwilling to comply with the core procompetitive provisions of the Act, Petitioners Bell Atlantic, U S West and Ameritech have asked the Commission to eliminate them as they apply to advanced telecommunications services. Specifically, the Petitions seek forbearance from Sections 251(c), 271 and 272 in this context. ACSI believes that the Commission has no statutory basis for granting these Petitions and should deny them accordingly.

The Commission's forbearance authority is set forth in Section 10, not Section 706, as the Petitioners claim. By its terms, in addition to the generally applicable standards for forbearance, Section 10 forbids the Commission to forbear from enforcing the requirements of Sections 251(c) and 271 before a petitioner has demonstrated that it has fully implemented those provisions. None of the Petitioners has attempted to make such a showing here. Ironically, with respect to data-service-related interconnection, unbundling, and resale, ACSI's experience shows that the Petitioners have not been burdened by Section 251; rather, they refuse to comply with it.

Although Section 10 does not proscribe the Commission's forbearance authority with respect to the separate affiliate requirements of Section 272, the Petitioners have not made the required tripartite showing under Section 10 that would allow the Commission to forbear from enforcing Section 272. Indeed, the Petitioners are unable to show (1) why Section 272's competitive safeguards are no longer necessary to ensure Petitioners' rates and practices related to *any* telecommunications service are just, reasonable, and nondiscriminatory, (2) how consumers would benefit *only* if the Petitioners were freed from such requirements, and (3) how such forbearance would be in the public interest.

Contrary to the Petitioners' contentions, Section 706 of the 1996 Act contains no independent source of forbearance authority that would permit the Commission to forbear from enforcing Sections 251(c), 271 or 272. In Section 706, Congress merely listed "regulatory forbearance" as one of the regulating methods by which the Commission can encourage investment in advanced telecommunications infrastructure – it did not alter, augment or otherwise supplement the Commission's authority to forbear as defined in Section 10. Thus, if the Commission were to determine that specific action was required by Section 706, it could use its Section 10 forbearance authority only to the extent consistent with the requirements of that section.

The Commission also must deny requests for a "global data LATA" or other data-service-specific LATA relief. As the Commission previously has recognized, such requests would require forbearance from Section 271 which Section 10 proscribes the Commission from granting.

Finally, the Commission also must deny requests made by the Petitioners for reconsideration of the Commission's interconnection, unbundling, and resale rules, as they apply to high speed packetized data services. ACSI believes that such action is necessary because the RBOC requests are unfounded, procedurally defective and, above all else, premature. ACSI's negotiating experience with each of the Petitioners demonstrates that, rather than relieve the Petitioners from the requirements of Section 251(c), the Commission should underscore that these requirements continue to apply in full force to data related interconnection, unbundling, and resale.

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CONSOLIDATED OPPOSITION OF ACSI

Pursuant to the Commission's March 16, 1998 Order in the above-captioned dockets, American Communications Services, Inc. ("ACSI"), by its attorneys, respectfully submits these comments in opposition to the above-captioned Petitions for "Relief from Barriers to Deployment of Advanced Telecommunications Services" pursuant to Section 706(a) of the Telecommunications Act of 1996 ("1996 Act"),[1] filed by Bell Atlantic Corporation ("Bell Atlantic"), U S West Communications, Inc. ("U S West") and Ameritech Corporation ("Ameritech") (collectively, the "Petitioners").

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[1] Pub L. 104-104, Title VII, § 706. *See* 47 U.S.C. § 157 nt.

I. INTRODUCTION

While different in their presentation, the three Petitions seek similar relief. Citing Section 706(a) of the 1996 Act, the Petitioners ask the Commission to remove what they believe are regulatory "barriers to deployment of advanced telecommunications services."[2] The "barriers" the RBOC Petitioners would have the Commission eliminate include some of the core procompetitive provisions of the 1996 Act. Namely, the Petitioners seek to eliminate Sections 251(c), 271, and 272 of the Communications Act of 1934, as amended (the "Act"), as they apply to high-speed packetized data and other advanced telecommunications services. Specifically, the Petitioners seek permission to:

- provide high-speed, broadband digital services without regard to LATA boundaries and the requirements of Section 271;[3]
- exclude such broadband digital services from otherwise applicable pricing and unbundling requirements of Section 251(c)(d);[4] and
- sell interLATA high speed, broadband services other than through a separate affiliate, as now is required by Section 272.[5]

ACSI submits, however, that the Petitions are little more than thinly veiled attempts to circumvent the central competitive provisions of the 1996 Act, including the intensely debated Section 271 approval process. Given U S West's claim that it currently complies with the

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2 *E.g., Bell Atlantic Petition* at 1-4; *U S West Petition* at 1-5; *Ameritech Petition* at 2-4.

3 *E.g., Bell Atlantic Petition* at 3; *U S West Petition* at 4; *Ameritech Petition* at 2-3.

4 *E.g., Bell Atlantic Petition* at 3-4; *U S West Petition* at 4. Ameritech seeks to reach the same end by a different means. Specifically, Ameritech seeks "clarification" that its affiliate that satisfies *its own* proposed separation requirements is not an incumbent LEC for purposes of Section 251(c)'s interconnection, unbundling, and resale requirements. *Ameritech Petition* at 3-4.

5 *Bell Atlantic Petition* at 4, 18; *Ameritech Petition* at 3, 14-27 (Ameritech seeks relaxed separations requirements).

requirements of Section 251,[6] and claims by Bell Atlantic and Ameritech that both already have satisfied Sections 251 and Section 271, the Petitioners' requests seem curious. If the Petitioners can in fact demonstrate compliance with the competitive checklist, Section 271 approvals would provide much of the relief sought by the Petitioners.[7]

However, none of the Petitioners has a Section 271 petition currently on file with the Commission.[8] Instead, the Petitioners seek to use extra-statutory procedure to seek absolution for their noncompliance with critical procompetitive provisions of the 1996 Act that currently restrain them from using their monopoly control over bottleneck facilities to dominate access to and transport of packet switched and other advanced telecommunications services. The Commission should be aware that some incumbent local exchange carriers ("ILECs") already are delaying negotiation of local data service interconnection arrangements, presumably in the hope that favorable action on the pending Section 706 Petitions will free them from the obligation to interconnect with competitors to exchange data traffic. In order to expand its own data service

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6 *U S West Petition,* at 36 n.15. ACSI believes that U S West's claim is nothing short of astounding. ACSI recently has filed complaints against U S West with both the Arizona Corporation Commission and the New Mexico State Corporation Commission because U S West, among other things, (1) has failed to cutover customers or port numbers to ACSI in a timely and proper manner, (2) has prevented ACSI from collocating state-of-the-art concentrator equipment (despite the fact that U S West itself uses the same equipment). *In the Matter of American Communications Services, Inc. v. U S West Communications, Inc.*, Arizona Corporation Commission Docket No. T-01051B-98-0144 (complaint filed March 17, 1998); *Complaint by American Communications Services, Inc. against U S West Communications, Inc.*, New Mexico State Corporation Commission Docket No. 98-150-TC (complaint filed March 17, 1998). ACSI also will shortly be amending its complaint in New Mexico because U S West has failed to provision interoffice trunks to ACSI in anything approaching a reasonable time frame, frustrating ACSI's attempts to provide competitive services.

7 Any attempt to create a new, parallel route to interLATA approval outside of the Section 271 process is flatly inconsistent with the Act.

8 Ameritech has had one Section 271 application denied by the Commission.

offerings, ACSI currently is attempting to negotiate interconnection of its local data network with most major ILECs, including each of the Petitioners. It also has sought to use unbundled network elements and resale products to complement its own data service offerings. However, the negotiations, to date, are proving difficult, as the ILECs have expressed varying views as to whether the Commission's interconnection, unbundling and resale rules extend to data services at all. Indeed, the Petitioners have displayed varying degrees of receptivity to NNI agreements and none have demonstrated any willingness to offer favorable agreements on an accelerated schedule.[9] The Petitioners also refuse to offer any resale discounts from the retail rates offered in their tariffs for end user advanced telecommunications services. Thus, instant Petitions can only be viewed as a continuation of the Petitioners' attempts to avoid meaningful data interconnection arrangements.

The Petitioners' efforts to void the interconnection, unbundling and resale requirements of the 1996 Act must be rebuked because the Petitioners seek forbearance from statutory provisions which the Commission has no authority to forbear from enforcing. Moreover, grant

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[9] *See, e.g., U S West Petition* at 45-46, wherein U S West contends that the obligations under Sections 251(c)(2)-(4) are limited to circuit-switched voice services. The Act, however, defines the subjects of these provisions "telephone exchange service" and "telecommunications services" in very broad terms. *See* 47 U.S.C. §§ 3(43) and 3(46). Two-way service or voice service is not a requisite element of either type of service. If Congress intended that ILECs only had to provide interconnection with, unbundling of, and resale of dial-up voice traffic routed through a circuit-switched network, it would have said so. However, the expansive definitions of "telephone exchange service" and "telecommunications service" in the Act reflect Congress's attempt to avoid restrictive interpretations. Moreover, including packet-switched data services within those definitions is sound because packet-switched facilities can be used to provide a plethora of services similar, from the customers perspective, to those offered over the circuit-switched network, including two-way voice.

of the relief requested would harm the public interest by undermining the development of competitive telecommunications markets and slowing deployment of advanced telecommunications services.

I. THE PETITIONERS HAVE NOT MADE THE MINIMUM SHOWING REQUIRED EVEN TO REQUEST FORBEARANCE TREATMENT

The Petitioners seek to have their broadband digital networks and services released from critical competitive safeguards incorporated into the 1996 Act. However, the relief sought – if even appropriate – is grossly premature at this time. The Petitioners have not even attempted to address the explicit statutory preconditions for forbearance from application of the requirements of Sections 251(c) and 271. Likewise, they have demonstrated no adequate justification for eliminating Section 272's safeguards.

A. The Petitioners Have Not Satisfied the Preconditions for Seeking Forbearance from the Requirements of Sections 251(c) and 271

Each Petitioner incorrectly cites Section 706 as the statutory basis for obtaining forbearance from regulation of their advanced digital networks and services. Simply put, Section does not constitute an independent grant of forbearance authority. While it is true that Section 706 requires the Commission to utilize alternative methods of regulation as required to encourage the deployment of advanced telecommunications capabilities, Congress merely listed "regulatory forbearance" as one of a list of "regulating methods" that the Commission may use to achieve that goal. Thus, Section 706 does not create forbearance authority, it simply authorizes the Commission to utilize the forbearance authority granted elsewhere as required to encourage the deployment of advanced telecommunications services.

The FCC's forbearance authority is explicitly defined in from Section 10 of the Act, which the Petitioners conveniently have chosen to ignore. Upon examination of the text of Section 10, the reasons for the Petitioners attempt at a statutory sleight-of-hand becomes evident. Namely, Section 10 expressly bars the Commission from granting much of the relief sought by the Petitioners by making forbearance from the requirements of Section 251(c) and 271 "off limits" until the RBOCs can demonstrate that both sections have been fully implemented. Specifically Section 10 states that:

> [e]xcept as provided in Section 251(f), the Commission may not forbear from applying the requirements of section 251(c) or 271 under subsection (a) of this section until it determines that those requirements have been fully implemented.[10]

Of course, this is a showing that the Petitioners currently are unable or unwilling to make. Indeed, none of the Petitioners have received FCC clearance under Section 271 for *any* of the 32 states where they serve as the ILEC. And none of them even have an application for approval under Section 271 pending at the FCC as of the date of this filing.

As importantly, even if they did file an appropriate application with the Commission, none of the Petitioners would be able to demonstrate implementation of Section 251(c) with respect to data services. ACSI has been attempting for months to negotiate interconnection arrangements with each of the Petitioners which would enable ACSI to achieve local interconnection sufficient to support the mutual exchange, transport and termination of local frame relay traffic. As of this date, none of the Petitioners has agreed to provide interconnection pursuant to Section 251 for the mutual exchange of such data traffic. While not refusing outright

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[10] 47 U.S.C. § 160(d). The limitation in Section 10(d) includes an exception for rural carriers per Section 10(f). As explained in detail below, inclusion of this exception

(continued...)

to negotiate, they uniformly have taken the position that data interconnection is beyond the scope of Section 251, and have offered only to establish network-to-network interfaces ("NNI's") at tariffed rates, and subject to tariffed restrictions.

Nevertheless, Petitioners – being unwilling or unable to demonstrate full implementation of Sections 251(c) and 271 and therefore unable to petition for forbearance from those provisions under Section 10 – now implore the Commission to find in the words "regulatory forbearance" in Section 706 a novel source of forbearance authority to support an end run around the provisions of Sections 251(c) and 271 and to short-circuit the explicit language of Section 10.[11] Such nefariously creative attempts at statutory construction should not be countenanced.

Apart from the fact that the language of Section 706(a) gives no support for the interpretation offered by the RBOC Petitioners, there is little reason to believe that Congress would establish the extremely high hurdle for forbearance from enforcing Sections 251(c) and 21 in Section 10 of the Act, and at the same time set forth the minimal standard Section 706(a) would support. Section 10 requires that three tests be met generally for forbearance each of which must be met. First, enforcement of the regulation or provision must be unnecessary to ensure rates and practices are just, reasonable, and nondiscriminatory. Second, enforcement of the regulation or provision must be unnecessary to protect consumers. Third, forbearance must be consistent with the public interest. As for Sections 251(c) and 271, the Act provides a fourth requirement: Sections 251(c) and 271 must be fully implemented.

(...continued)

precludes the prospect that additional exceptions may be available. None of the RBOC Petitions seeks to invoke the exception of Section 10(f).

[11] *Bell Atlantic Petition,* at 10; *U S West Petition,* at 36 n.15; and *Ameritech Petition,* at 14 n.23.

Contrast this high hurdle with the low one that Section 706(a) would represent, namely that forbearance from the subject regulation or provision would merely encourage deployment of advanced telecommunications service through means consistent with the public interest, convenience, and necessity. Surely it would *not* be consistent with the public interest to abandon the requirements of Section 10 in favor of a mere "encouragement" standard. Congress could not have intended such a result.

In addition, Congress could not have meant to give State commissions, too, new-found powers to forbear from enforcing any provision the 1996 Act simply because the State regulators believe forbearance would encourage investment in advanced services. If the Petitioners' interpretation of Section 706(a) were correct, State commissions would have forbearance authority coextensive with that of the FCC. Such jointly held and unlimited forbearance authority could easily result in the Act's undoing. State commissions, for example, under Petitioner's interpretation, could find that an interest in encouraging deployment of advanced telecommunications services excuses the need to ensure that arbitrated agreements satisfy the requirements of Section 251(c) and the Commission's implementing rules. Congress could not have intended such a result, as is evident from the difficult, multi-pronged test under Section 10(a) governing forbearance by the FCC.

Indeed, Congress regarded strict compliance with the Section 271 competitive checklist as significantly critical to expressly bar the Commission from waiving its requirements. Section 271(d)(4) provides that "[t]he *Commission may not*, by rule or otherwise, *limit* or extend the terms used in *the competitive checklist*" which RBOC Petitioners must meet before being granted

in-region interLATA authority.[12] By its terms, the competitive checklist, Section 271(c)(2)(B), requires compliance with (among other sections and rules):

- the interconnection requirements of and rules promulgated under Section 251(c)(2);[13]
- the unbundling requirements of and rules promulgated under Section 251(c)(3);[14] and
- the resale requirements of and rules promulgated under Section 251(c)(4).[15]

Section 271(d)(4) thus reflects a congressional judgment that RBOC compliance with Section 271 and related sections invoked in the competitive checklist (including Section 251(c)) is fundamental to the success of the Act. Congress' intent is reinforced by the limitation placed on the Commission's forbearance authority in Section 10 of the Act. Nothing in Section 706, including the listing of "regulatory forbearance" as one of the "regulatory methods" available to address a finding of a lack of timely deployment of advanced telecommunications infrastructure, indicates that Congress intended to undo the twice fortified requirements of Sections 251(c) and 271(c) in exchange for RBOC investment in advanced telecommunications infrastructure.

The Commission itself acknowledged its lack of discretion to waive Section 271 requirements in its recent decision in *Petition for Declaratory Ruling Regarding U S West Petitions to Consolidate LATAs in Minnesota and Arizona ("U S West LATA Order"),*[16]. In the *U S West LATA Order*, the Commission recognized that its ability to forbear from enforcing

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12 *Id.* § 271(d)(4) (emphasis added).

13 47 U.S.C. § 271(c)(2)(B)(i).

14 *Id.* § 271(c)(2)(B)(ii).

15 *Id.* § 271(c)(2)(B)(xiv).

16 12 FCC Rcd 4738 (1997).

Section 271 is limited by Section 10(d) and, on that basis, denied U S West's requests to consolidate LATAs.[17] Indeed, the Commission unequivocally recognized that "[t]he Act expressly prohibits the Commission from abstaining in any way from applying the requirements of Section 271 until those requirements have been *fully implemented*."[18] Thus, in keeping with its own well reasoned precedent, the Commission should reject the current RBOC requests for forbearance from Section 271.

B. Petitioners Have Failed to Demonstrate that Forbearance From Enforcement of Section 272's Requirements Satisfies Section 10 Conditions

Offering little in the way of support other than a not-very-compelling "Congress just got it wrong" argument, Ameritech and Bell Atlantic also request forbearance from or modification of the separate affiliate safeguards of Section 272 and the Commission's rules promulgated thereunder.[19] However, Congress determined that Section 272's safeguards would be necessary for three years *after* an RBOC gained Section 271 authority to provide the type of in-region interLATA long distance services the Petitioners seek permission to provide here. Since the Petitioners have made no case demonstrating full implementation of Section 271, their requests for forbearance from Section 272, as applied to in-region services, are fatally premature.

In any event, any request for forbearance from Section 272 (or any other statutory provision or rule other than Sections 251(c) and 271 and the rules promulgated thereunder) must satisfy the three-prong test set forth in Section 10(a) and (b). A brief review of the requirements

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17 *Id.* at ¶¶ 25-26.

18 *Id.* at ¶ 26 (emphasis added).

19 *See Ameritech Petition* at 14-22; *Bell Atlantic Petition* at 17-18 (Bell Atlantic speaks vaguely of a need for relief from separate affiliate restrictions).

of Sections 10(a) and (b) demonstrates that the Petitioners have not made even a *prima facie* case for Commission forbearance from application of Section 272 requirements.

The first part of the test is set forth in Section 10(a)(1) and provides that any petition for forbearance from a "regulation or provision" must demonstrate that:

> enforcement of such regulation or provision is not necessary to ensure that charges, practices, classifications, or regulations by, for or in connection with that telecommunications carrier or telecommunications service are just and reasonable or not unjustly or unreasonably discriminatory.

With respect to Section 272, Congress already has answered that question. Section 272 was enacted based on a congressional assessment that safeguards were necessary to ensure that RBOCs do not use the inherent competitive advantages that result from their control over bottleneck facilities to engage in precisely this sort of anticompetitive behavior in favor of its interexchange affiliates. Bell Atlantic's mere statement that the "[s]eparate affiliate restrictions that hamper the efficient development of an advanced network further lessen the attractiveness of broadband investments,"[20] and Ameritech's unsupported claim that Section 272 is inconsistent with Section 706,[21] cannot overcome this fundamental congressional judgment.

Ameritech also denies that its control over bottleneck facilities essential to the provisioning of long distance services poses any danger of anticompetitive conduct or cross-subsidization in this case because the proposed services are packet switched rather than circuit switched.[22] But Ameritech fails to articulate why packet-switched traffic is any less prone to anti-competitive conduct than circuit-switched traffic that passes through its bottleneck.

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20 *Bell Atlantic Petition* at 18.

21 *Ameritech Petition* at 14-15.

22 *Id.* at 17.

Moreover, Ameritech claims that "whatever control over so-called bottleneck local exchange facilities Ameritech may once have had has largely been dissipated."[23] This claim apparently is based on Ameritech's provisioning of nearly 70,000 unbundled loops and 500,000 resold lines for local exchange services (or, in other words, Ameritech's market share now may be closer to 99% than it is to 100%).[24] This hardly amounts to dissipation. Ameritech still provides local bottleneck facilities for all but a fraction of one percent of all customers in its service territory (even the resold lines described above are still provided over Ameritech's facilities).

Ameritech also appears to make the ridiculous claim that the significant advantages of brand recognition and incumbency that will give it a considerable competitive advantage when it is permitted to enter into competition with AT&T, MCI, Sprint and other providers in the traditional long distance business will not translate to the market for packet switched long distance services because it will have to compete with other service providers with strong brand recognition such as AOL and UUNET. Within its operating region, any RBOC is at least as well known as companies such as these – especially since each of the Petitioners already is provisioning broadband intraLATA data services.[25] Only an RBOC has had, until very recently, a customer relationship (at home and at work) with every single customer in an RBOC's service territory. Accordingly, given the Petitioners' current dominant market position, there is little doubt that Section 272 is still needed to ensure that the rates and practices of the RBOC Petitioners *vis-à-vis* their affiliates are just, reasonable and nondiscriminatory.

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23 *Id.* at 18.

24 *See id.*

25 *See, e.g., U S West Petition* at 7; *Ameritech Petition* at 6.

Moving to the second prong of the test for forbearance, Section 10(a)(2) requires that Petitioners demonstrate that "enforcement of such regulation or provision is not necessary for the protection of consumers." However, implicit in Section 272 is a congressional judgment that consumers will not ultimately benefit from RBOC efforts to capitalize on the advantages of incumbency and control over bottleneck facilities as they enter adjacent markets absent the separate affiliate requirements. Again, in response the Petitioners appear to have little else to offer other than "Congress just got it wrong".[26] Rather than discuss the protective benefits Congress sought to provide to consumers through enactment of Section 272's safeguards, Ameritech and Bell Atlantic merely state that it would be easier for them to do business without having to comply with Section 272's safeguards.[27] But they speak little of how consumers will benefit from the squeeze competitors – and ultimately consumers – will feel as a result of the Petitioners' unique ability to bundle these services with their own bottleneck facilities absent any separate subsidiary safeguards.

Section 10(a)(3), the third prong of the test, requires that "forbearance from applying such provision or regulation [be] consistent with the public interest." Section 10(b) adds that:

> In making the determination under subsection (a)(3), the Commission shall consider whether forbearance from enforcing the provision or regulation will promote competitive market conditions, including the extent to which such

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26 The Petitioners' general public interest/policy arguments are similarly not compelling. For example, U S West describes itself as the natural choice for bringing advanced telecommunications services to "rural America". *U S West Petition* at 6. However, it reveals no plan and makes no specific commitment to achieve this goal. Rather, its limited deployment plan for advanced telecommunications infrastructure appears to include only the largest *cities* across its region. *See, e.g., id.* at 24-25 (describing U S West's commitment to bring digital subscriber line services to more than forty cities in its fourteen state service territory and explaining that such services are "difficult to deploy in less densely populated areas").

27 *Bell Atlantic Petition* at 18; *Ameritech Petition* at 15.

forbearance will enhance competition among providers of telecommunications services.

Again, since Congress determined that Section 272's safeguards would be necessary for three years *after* an RBOC gained Section 271 interLATA long distance authority,[28] it is impossible to conceive that removal of the these safeguards *before* any of the Petitioners have satisfied Section 271 would serve the public interest or promote competitive market conditions. Petitioners' arguments that consumers will benefit from their being freed to bundle packet switched services with their traditional bottleneck services are not persuasive. In spite of the Petitioners' assertions, they *do* have the same "anticompetitive potential or unfair or special advantages entering the Internet and high-speed data market the Commission" as Congress had "thought Bell companies might have entering the regular long distance market."[29] Contrary to what the Petitioners contend, it is their control over local bottleneck facilities – and not their lack of investment in backbone facilities – which should remain the Commission's primary focus of concern.[30]

Petitioners' arguments that forbearance from Section 272 (or Sections 251(c) or 271 for that matter) will encourage more *RBOC* investment in advanced telecommunications infrastructure also are disingenuous.[31] Petitioners(s) already are investing heavily their

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28 Section 272(f)(1) provides that the provisions of Section 272 will sunset with regard to long distance services after three years, unless extended by a Commission rule or order.

29 *See Bell Atlantic Petition* at 20; *see also Ameritech Petition* at 18, 20-22 ("Even if Ameritech could, and did, discriminate, it could not be sure that it would benefit from the discrimination.").

30 In its Ameritech-Michigan Order, the Commission explicitly and correctly rejected similar RBOC attempts to shift the focus away from local competition and toward the long distance market.

31 *See, e.g., Bell Atlantic Petition* at 18; *Ameritech Petition* at 16; *also, see, e.g., U S West Petition* at 41-42.

broadband networks without regard to obtaining the concessions they seek in this proceeding. Bell Atlantic, for example, announced only last week that it intends to accelerate investment of *$1.5 billion* to expand and enhance its broadband digital network – *without any promise of forbearance.* Likewise, U S west proudly notes in its Petition that it already has deployed the third largest frame relay operation in the nation, including more than 350 frame relay switches again *without any forbearance treatment.*[32]

In sum, forbearance from Section 272 cannot be granted because the Petitioners have not demonstrated that (1) sufficient safeguards against anticompetitive behavior exist without it, (2) consumers would benefit from the extension into data and other packet switched services of RBOC dominance resulting from their control over bottleneck local facilities, and (3) grant of such a concession would promote competition or benefit the public interest in any other way. Indeed none of the concessions sought by the Petitioners' can be viewed as being consistent with the public interest. The Petitions should be denied on this basis as well.

II. THE COMMISSION CANNOT GRANT THE LATA-RELATED "RELIEF" REQUESTED WITHOUT UNLAWFULLY ABROGATING SECTION 271

As an "alternative" to forbearance, the Petitioners' request that the Commission create a "global data LATA" or modify (*i.e.*, eliminate) existing LATAs for the defined purpose of encouraging the speedier development of high-speed broadband and packet switched services.[33]

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32 *U S West Petition* at 7.

33 Ameritech asks the Commission to forbear from applying Section 271 with respect to "high-speed broadband services" by either (a) modifying the definition of LATA to establish a single global LATA for provisioning of non-circuit switched data services and facilities or (b) exercising its forbearance authority with respect to the application of Section 271 under Section 706 of the Act. *Ameritech Petition* at 2-3, 11-14. Bell Atlantic simply asks for permission to provide high-speed broadband services without regard to LATA boundaries. *Bell Atlantic Petition* at 3, 11-12. U S West requests

(continued...)

This, as the Commission already has recognized in its *U S West LATA Order*, is no alternative. The RBOC's LATA "relief" proposals unabashedly seek to scale back the RBOC Petitioners' longstanding interLATA restrictions.[34] Thus, grant of the Petitioners' requests would require impermissible forbearance from Section 271. The Commission rightly concluded in its *U S West LATA Order* that "[t]he Act expressly prohibits the Commission from abstaining in any way from applying the requirements of Section 271 until those requirements have been fully implemented."[35]

The Petitioners have offered no compelling reason why the Commission should stray from the path chosen by Congress. A clear path for removal of interLATA restrictions already exists. If the Petitioners want to free themselves of interLATA restrictions in the advanced services market – or in any other telecommunications market – they first need to demonstrate compliance with Section 271.

III. RBOC REQUESTS FOR RELIEF FROM UNBUNDLING AND RESALE REQUIREMENTS ARE BOTH PROCEDURALLY DEFECTIVE AND PREMATURE

Although the Commission statutorily is proscribed from forbearing from the Act's interconnection, unbundling and resale requirements, it may – through notice and comment rulemaking – reconsider its rules promulgated under Section 251(c). The Commission set its

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(...continued)

permission to build and operate packet- and cell- switched data networks across LATA boundaries and to carry interLATA traffic incident to its provision of xDSL services. *U S West Petition* at 1, 4, 42-44.

34 *Bell Atlantic Petition* at 12.

35 *U S West LATA Order* at ¶ 26.

basic unbundling and resale requirements in its first Local Competition Order.[36] Those requirements were affirmed by the United States Court of Appeals for the Eighth Circuit in *Iowa Utilities Bd. v. FCC,* 120 F.3d 753 (8th Cir. 1997), *cert. granted sub nom. AT&T Corp. v. Iowa Utilities Bd.* 118 S.Ct. 879 (1998). To the extent the Petitioners' current Petitions request forbearance from or modification of those requirements, those requests ought to be made either in a petition for *certiorari* or in a petition for reconsideration. The Petitioners cannot use Section 706 or trendy buzz words associated with advanced telecommunications services to circumvent these procedural requirements. To the extent the Petitioners' current petitions seek forbearance from unbundling requirements set by the State commissions, Petitioners should seek reconsideration by the various State commissions that have required further unbundling.

ACSI also submits that RBOC requests for relief from the Commission's unbundling and resale requirements with respect to data services are premature. If anything, the Act's requirements and the Commission's rules need to be underscored, rather than scaled back. As explained earlier herein, ACSI currently is attempting to negotiate interconnection, unbundled network elements and frame relay resale agreements with each of the Petitioners in order to provide data telecommunications services. However, this process is proving difficult, as many ILECs have questioned whether the Commission's interconnection, unbundling and resale rules extend to data services and facilities full, or at all.

Thus, ACSI believes that, if any action affecting the Commission's interconnection, unbundling and resale rules is appropriate herein, it should emphasize that the Commission's rules do apply to the interconnection of competitive data networks with the ILECs' data

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36 *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996,* 11 FCC Rcd 15499, ¶¶ 226-978 (1996).

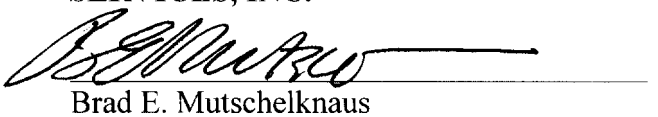
telecommunications networks, unbundling of network elements permitting access to the ILECs' data networks and the provision of competitive data telecommunications services, and the resale of all end user digital telecommunications services.

CONCLUSION

For all the foregoing reasons, the Commission should deny the above-captioned Petitions filed by Ameritech, Bell Atlantic and U S West. At most, the Commission should incorporate the record created herein into any Section 706(b) NOI that the Commission chooses to initiate.

Respectfully submitted,

AMERICAN COMMUNICATIONS SERVICES, INC.



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April 6, 1998