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

In the Matter of	)	
	)	
Petition of Bell Atlantic Corporation for Relief from Barriers to Deployment of Advanced Telecommunications Services	)	CC Docket No. 98-11
In the Matter of	)	
	)	
Petition of U S WEST Communications, Inc. for Relief from Barriers to Deployment of Advanced Telecommunications Services	)	CC Docket No. 98-26
In the Matter of	)	
	)	
Petition of Ameritech Corporation to Remove Barriers to Investment in Advanced Telecommunications Capability	)	CC Docket No. 98-32

OPPOSITION COMMENTS OF FOCAL COMMUNICATIONS CORPORATION, HYPERION TELECOMMUNICATIONS, INC. KMC TELECOM INC., AND MCLEODUSA INCORPORATED

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EXECUTIVE SUMMARY

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Petitioners' attempt to use Section 706 as a back door means to avoid the Section 271 prohibition, and to escape from their Section 251(c) and other obligations, is patently absurd. Section 706 of the 1996 Act directs the FCC to take certain actions to meet the goal of increasing the deployment of advanced telecommunications capability to all Americans. By its plain terms, however, Section 706 of the 1996 Act only authorizes the FCC to use existing regulatory tools, such as its forbearance authority or price cap regulation, to achieve those goals. Section 706 of the 1996 Act does not grant the FCC regulatory forbearance authority independent of that granted in Section 10. Since Section 10 prohibits the FCC from modifying the Petitioners' Section 251(c) or 271 duties before they are fully implemented, the FCC has no authority to grant the requested relief.

Even if the FCC were to determine that it had the authority to grant some or all of the requested relief, it should not do so because Petitioners have failed to meet the test of Section 706. The fact that Petitioners continue to resist implementation of the pro-competitive duties placed on them by the 1996 Act argues strongly against any relaxation of such duties. Granting

waivers of Petitioners' fundamental obligations under Sections 251, 271 and 272 of the 1996 Act is not, at this time, in the public interest and would significantly undermine key aspects of the Act. The FCC should summarily deny the Petitions.

The FCC has taken significant steps, in the context of its universal service proceeding, to further the goals of deploying advanced telecommunications services to schools, libraries and rural health care providers. The FCC has also taken steps, pursuant to its Internet Notice of Inquiry ("NOI"), to investigate the impact of the growth of the Internet on the public switched telephone network. As required by Section 706, the FCC should now take steps to initiate a NOI regarding the availability of advanced telecommunications services to all Americans. If advanced telecommunications capability is not being deployed to all Americans in a reasonable and timely fashion, the FCC can make such a determination and take action, pursuant to Section 706, using ***existing*** regulatory tools to remove barriers to infrastructure investment and promote competition. Moreover, given Section 706's emphasis on promoting competition, Section 706 presents an opportunity for the FCC to further the pro-competitive goals of the Act by imposing greater, not lesser, regulation on the BOCs.

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OPPOSITION COMMENTS OF FOCAL COMMUNICATIONS CORPORATION, HYPERION TELECOMMUNICATIONS, INC., KMC TELECOM INC., AND MCLEODUSA INCORPORATED

Focal Communications Corporation, Hyperion Telecommunications, Inc., KMC Telecom Inc., and McLeodUSA Incorporated, (together, the "Joint Commenters") pursuant to the Federal Communications Commission's ("FCC") Order, DA 98-513 (rel. March 16, 1998) issued in the above-captioned proceedings, respectfully submit the following comments in opposition to the Petitions of Bell Atlantic, Ameritech and US West (collectively, the "Petitioners").

INTRODUCTION

Joint Commenters provide facilities-based and resold local exchange services, including advanced telecommunications services, in competition with Petitioners. All four Joint Commenters have created, or are in the process of creating, state-of-the-art networks to serve their customers. As new entrants in the local exchange markets, however, Joint Commenters remain heavily reliant on the incumbent local exchange carriers ("ILECs"), including Petitioners, for facilities that go the "last mile" to reach customers' premises.

Focal Communications Corporation is a privately-owned Delaware corporation that provides, through its operating company affiliates (together, "Focal"), competitive local and long distance telecommunications services. Focal has obtained local certification or is otherwise authorized to provide local service in California, Illinois, Indiana, Maryland, Massachusetts, New York, and Pennsylvania, and has applications pending for local certification or other authorization in Delaware, the District of Columbia, Florida, New Jersey, Michigan, Virginia, and Washington.

Hyperion Telecommunications, Inc. ("Hyperion"), is a privately held Delaware corporation that, through affiliates and wholly owned subsidiaries, operates twenty-two (22) competitive local exchange networks in Arkansas, Florida, Kansas, Kentucky, Louisiana, Mississippi, New Jersey, New York, Pennsylvania, Tennessee, Vermont, and Virginia. These networks currently serve thirty-five cities with approximately 4,000 route miles of fiber optic cable. Hyperion is authorized to provide services in the territories served by Southwestern Bell, Bell Atlantic, and BellSouth.

KMC Telecom Inc. ("KMC") is authorized to provide competitive local and long distance services in 17 states, and Puerto Rico, and is operational in six states (Alabama, Florida, Georgia, Louisiana, Texas and Wisconsin). KMC has installed state-of-the-art networks in Huntsville, Alabama; Baton Rouge and Shreveport, Louisiana; Corpus Christi, Texas; and Madison, Wisconsin, and will soon build similar networks in Savannah and Augusta, Georgia; and Melbourne, Florida.

McLeodUSA Incorporated, through its operating subsidiaries (together, "McLeod"), is a provider of integrated telecommunications services to residential customers and small and medium-sized businesses in Colorado, Iowa, Illinois, Indiana, Minnesota, North Dakota, South Dakota, Wisconsin and Wyoming. McLeod offers "one-stop" integrated telecommunications services, including local, long distance, voice mail, paging and Internet access services, tailored to the customer's specific needs. McLeod is currently constructing fiber optic networks in five states to carry telecommunications services traffic on its own network.

The Joint Commenters strongly oppose the Petitioners' request for forbearance from and waivers of various statutory provisions and FCC regulations under the guise of Section 706. As explained in detail below, the FCC lacks statutory authority to grant the relief sought by Petitioners. Furthermore, even if the FCC had the authority to grant the requested relief, Petitioners have failed to meet the standards for such relief set forth in Section 706. Granting waivers of Petitioners' fundamental obligations under Sections 251, 271 and 272 of the Telecommunications Act of 1996 ("1996 Act") is not, at this time, in the public interest and would significantly undermine key aspects of the Act. The FCC should summarily deny the Petitions.

I. THE ACT DOES NOT AUTHORIZE THE FCC TO GRANT THE RELIEF REQUESTED BY PETITIONERS

Despite Petitioners' assertions to the contrary, the Communications Act of 1934, as amended by the Telecommunications Act of 1996 (the "Act"), does not grant the FCC the authority to grant the relief requested by Petitioners. Section 271 of the Act clearly states that "[n]either a Bell operating company, nor any affiliate of a Bell operating company, may provide interLATA services except as provided in this section." 47 U.S.C. §271(a). With limited exceptions for certain incidental services, Section 271 explicitly prohibits Bell Operating Companies ("BOCs") and BOC affiliates from providing interLATA services originating in any state in which the BOC is the ILEC unless and until the FCC determines that the BOC meets the requirements of Section 271, including the competitive checklist requirements of Section 271(c)(2)(B). 47 U.S.C. §271(c)(3)(A). None of the Petitioners argue that the in-region interLATA services it seeks to offer fall within the "incidental" exception of Section 271. To the contrary, each of the Petitioners admits that the Section 271 prohibition currently prevents them from offering the various in-region interLATA services each seeks to offer. Ameritech Petition at 9 (among other things, Section 271 bars Ameritech from providing Internet backbone services); Bell Atlantic Petition at 3 (relief from restrictions necessary to permit Bell Atlantic to provide high-speed broadband services without regard to present LATA boundaries); US West Petition at 43 (bar on interLATA data carriage prevents US West from building a data network that crosses LATA boundaries).

Petitioners' attempt to use Section 706 as a back door means to avoid the Section 271 prohibition, and to escape from their Section 251(c) and other obligations, is patently absurd.[1] Petitioners are correct in their assertion that Section 10 of the Act and Section 706 of the 1996 Act must be read together in context. However, their tortured interpretation of the two sections turns settled principles of statutory construction upside down. In Section 10, Congress granted the FCC the authority to forbear from applying any regulation or provision of the Act, with important exceptions, if certain conditions are met. The important exceptions are that the FCC may not forbear from applying the requirements of Section 251(c) or 271 until the FCC determines that those requirements have been fully implemented. 47 U.S.C. §160(d). Section 10 of the Act thus grants and defines the FCC's forbearance authority.

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[1] Specifically, Ameritech asks the FCC to:

- Modify the definition of a LATA to establish a single global LATA for provision of non-circuit switched data services and facilities or forbear from applying Section 271 to such services;
- Replace Section 272's separation requirements with the separation requirements established in the Fifth Report and Order of the Competitive Carrier Proceeding; and
- Clarify that an affiliate that satisfies the modified separation requirements is not an ILEC for purposes of section 251(c).

Ameritech Petition at 2-3. Bell Atlantic asks the FCC to permit Bell Atlantic to:

- Provide high-speed broadband services without regard to present LATA boundaries; and
- Develop high-speed broadband services that operate at speeds greater than ISDN, including all xDSL services, free from pricing, unbundling and separations restrictions.

Bell Atlantic Petition at 3-4. US West asks the FCC to:

- Allow US West to build and operate packet- and cell-switched data networks across LATA boundaries;
- Permit US West to carry interLATA data traffic incident to its provision of digital subscriber line services;
- Forbear from requiring US West to unbundle for its competitors the non-bottleneck elements used to provide these data services; and
- Forbear from requiring US West to make these competitive services available at a wholesale discount for resale.

US West Petition at ii.

Section 706 of the 1996 Act directs the FCC to take certain actions to meet the goal of increasing the deployment of advanced telecommunications capability to all Americans. By its plain terms, however, Section 706 only authorizes the FCC to use existing regulatory tools, such as its forbearance authority or price cap regulation, to achieve those goals. Section 706 does not grant the FCC regulatory forbearance authority independent of that granted in Section 10. The Joint Explanatory Statement of the Conference Committee explains that: "[m]easures to be used include: price cap regulation, regulatory forbearance, and other methods that remove barriers and provide the proper incentives for infrastructure investment." Joint Explanatory Statement of the Committee of Conference, 142 Cong. Rec. H1104 (daily ed., Jan. 31, 1996). In short, the FCC is directed to "take action" to meet the goal of deploying advanced telecommunications to all Americans by utilizing ***existing regulatory tools***, regulatory tools that are authorized and defined by separate statutory provisions. Therefore, the general reference to "regulatory forbearance" must be read in context with the specific provision creating and defining the FCC's forbearance authority. Well-settled principles of statutory construction provide that specific provisions govern provisions of general application.[2] Section 10 specifically defines the FCC's forbearance authority. Its limits cannot be read out of the Congressional directive to use such forbearance authority in implementing Section 706.

Section 271(c)(4) provides further and independent evidence of the FCC's lack of authority to modify the Section 271 prohibition. That Section provides:

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[2] *See, e.g., Aeron Marine Shipping Co. v. United States*, 695 F.2d 567 (D.C. Cir. 1982); *In re Brown*, 329 F. Supp. 422 (S.D. Iowa 1971) ("However inclusive the general language of the statute, it will not be held to apply or prevail over matters specifically dealt with in another part of the same enactment.")

> The [FCC] may not, ***by rule or otherwise***, limit or extend the terms used in the competitive checklist set forth in subsection (c)(2)(B).

47 U.S.C. §271(c)(4) (emphasis added). Petitioners do not even attempt to explain how the FCC can ignore this clear and unmistakable statutory directive that the FCC may not modify, by rule or otherwise (*i.e.*, regulatory forbearance), the Section 271 checklist requirements. Thus the absence of any reference to Section 271 in Section 706 is a fatal omission. Again, the specific statutory provision trumps the general one, and the FCC may not use Section 706 to ignore or override the clear Congressional directive prohibiting it from altering the Section 271 competitive checklist requirements.[3]

Congressional intent and the legislative history provide further support for the fact that the FCC's exercise of its forbearance authority under Section 706 is limited to that specific authority granted by Section 10. It is patently absurd to believe that Congress intended Section 706 to trump the core market-opening provisions of the 1996 Act. The 1996 Act embodies Congress' desire to "promote competition and reduce regulation in order to secure lower prices and higher quality services for American telecommunications consumers." Pub. L. No. 104-104, 110 Stat. 56 (1996). Consistent with this purpose, the 1996 Act provides a comprehensive plan for replacing local telephone monopolies with markets that provide competition and choice. Sections 251 and 271 are the centerpieces of Congress' comprehensive market-opening plan.

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[3] Petitioners' argument regarding the creation of one huge "data LATA" is equally unpersuasive and completely unsupportable. The FCC may not, by rule or otherwise (*i.e.*, modifying LATA boundaries under Section 3(25)(B)), modify the competitive checklist test BOCs must meet to gain in-region interLATA authority.

One of the most significant obstacles to the movement from a monopolistic market for local telecommunications services to a competitive market is the control by ILECs of the facilities necessary to provide such services. Even if the cost of duplicating these facilities were not an insurmountable barrier to market entry, potential competitors could not reasonably duplicate them at a pace that would adequately advance competition. Because such facilities were constructed under a regime of regulatory protection and at the expense of ratepayers, regulators appropriately can and have required that ILECs make the facilities available to others to open the market to competition.

In the context of local telecommunications services, these critical elements are the local exchange facilities, which are under the control of the ILECs. With monopoly control of local exchange facilities, the BOCs have the unique ability and the strong incentive to delay, impede and diminish the quality of access and interconnection made available to their competitors in an effort to protect their market positions. Section 251 of the Act therefore requires ILECs to take specific steps to make these bottleneck facilities available to CLECs and other competitors. Congress had limited ability to encourage expeditious compliance with these requirements, however, because most of the possible incentives and sanctions remain in the hands of state public utility commissions. Congress nonetheless had available what it believed was a promising means for encouraging compliance. Congress used the BOCs' desire for relief from the restrictions of the Modified Final Judgment ("MFJ"), prohibiting the BOCs from providing interLATA services, as an incentive to enlist the BOCs' cooperation.[4] Through Section 271 of

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[4] These restrictions were imposed because of the recognized bottleneck control of the local markets by the BOCs.

the Act, Congress transformed the MFJ interLATA restrictions into more limited statutory restrictions and established the competitive checklist by which the BOCs could demonstrate that they have opened their local exchange markets to competition. When the BOCs comply with the checklist, they may apply to the FCC to provide interLATA services originating in their regions.

The BOCs clearly understood the carrot and stick approach established by Sections 251 and 271. Jim Cullen, Vice Chairman, Bell Atlantic Corporation, testified before the House Commerce Committee's Subcommittee on Telecommunications and Finance that:

> "Bell Atlantic does favor and urge passage of the [telecommunications reform bill] with a more precise and specific checklist administered by the FCC ... [The telecommunications reform bill] establishes a reasonable process for [BOC] entry into the interLATA business, a competitive checklist administered by the FCC ..."

Hearing on H.R. 1555 Before the Subcommittee on Telecommunications and Finance of the House Committee on Commerce, 104th Cong. 32 (1995). In response to questioning, Mr. Cullen reiterated the point: "we need specific ground rules and agreements in a checklist to open the markets for competition." *Id.* at 124. Moreover, "[w]e are happy to meet every test, every checklist item." *Id.* at 126. Likewise, Richard Brown, Vice Chairman, Ameritech Corporation stated:

> Mr. Chairman, your bill ... would create a new structure for seeking relief from the current [MFJ] restrictions on our entry into long distance and manufacturing, an approach that mirrors the philosophy driving our Customers First proposal. It appropriately links local and long distance competition. We believe that if competitors are allowed to enter our local market that we should likewise be allowed to enter their long distance market. The checklist approach of [the bill] accomplishes this goal. Obviously, we at Ameritech think this makes a great deal of sense and commend you for taking this approach.

Id. at 140. Similarly, in a press release issued on the day the 1996 Act was signed into law, US West announced that "[w]e intend to be in the inter-LATA long distance business as soon as we

can meet the checklist requirements of the new legislation" and US West's Coleman estimated that US West would be able to "reach a reasonable resolution on the bill's checklist requirements in the majority of its states within 12-18 months."[5]

As demonstrated in detail below, granting the relief requested by Petitioners would undermine Congress' goal of opening the local exchange markets to competition because the data services Petitioners seek to offer are inextricably related to the underlying transmission component of such services, transmission components over which Petitioners still enjoy monopoly control. The time and effort Congress spent in crafting the extremely detailed market-opening provisions of the Act cannot and should not be deemed to be overridden so cavalierly by a general policy statement supporting the deployment of advanced telecommunications to all Americans. The FCC has taken significant steps, in the context of its universal service proceeding, to further the goals of deploying advanced telecommunications services to schools, libraries and rural health care providers.[6] The FCC has also taken steps, pursuant to its Internet Notice of Inquiry ("NOI"), to investigate the impact of the growth of the Internet on the public switched telephone network.[7] As required by Section 706, the FCC should now take steps to initiate a NOI regarding the availability of advanced telecommunications services to all

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[5] "US West Moves Quickly Following Passage of Telecommunications Legislation," US West Press Release (rel. Feb. 8, 1996) (available on US West's web site at <http://www.uswest.com/com/insideusw/news/020896.html>).

[6] *See, Joint Federal-State Board on Universal Service*, CC Docket No. 96-56, Report and Order, 12 FCC Rcd 8776, ¶¶587-600, 738-749 (1997).

[7] *See, Use of the Public Switched Network by Information Service and Internet Providers*, CC Docket No. 96-263, Notice of Inquiry, FCC 96-488 (rel. Dec. 24, 1996).

Americans. If, as Petitioners contend, advanced telecommunications capability is not being deployed to all Americans in a reasonable and timely fashion, the FCC can make such a determination and take action, pursuant to Section 706, using ***existing*** regulatory tools to remove barriers to infrastructure investment and promote competition. Moreover, given Section 706's emphasis on promoting competition, Section 706 presents an opportunity for the FCC to further the pro-competitive goals of the Act by imposing greater, not lesser, regulation on the BOCs.

II. EVEN IF THE FCC HAD THE AUTHORITY TO TAKE THE REQUESTED ACTIONS, PETITIONERS' REQUESTS MUST BE DENIED BECAUSE THEY HAVE FAILED TO SATISFY THE SPECIFIC TESTS SET FORTH IN SECTION 706

Even if the FCC were to determine that it has the authority to grant the relief requested by Petitioners, and the Joint Commenters emphasize again that the FCC has no such authority, the FCC cannot grant the requested relief on the basis of the evidence presented. Section 706(b) directs the FCC to initiate a NOI to determine whether advanced telecommunication capability is being deployed in a reasonably and timely fashion. The Congressional directive to "take immediate action" to remove barriers to infrastructure investment hinges upon a determination being made pursuant to this NOI. The FCC has not yet taken this important procedural step which is a prerequisite to any action. The importance of the NOI cannot be understated. Petitioners present a wholly one-sided view of the deployment of advanced telecommunications infrastructure. While some commenters may provide rebuttal evidence in response to Petitioners' request for relief, the nature of the procedural mechanism chosen by Petitioners, and their request for expedited consideration, necessarily limit the scope and breadth of the evidence that will be entered in the record in this proceeding. Only through a NOI will the FCC have the

opportunity to solicit and review evidence regarding the extent of advanced infrastructure deployment and investment, and the impediments to such deployment, including those created and or maintained by the BOCs.

Nor can the Petitioners succeed under Section 706(a). ***If*** Section 706(a) can be read to authorize FCC action independent of the NOI requirements set forth in 706(b), and Joint Commenters do not concede that is can be so read, any such action can only be taken after the four criteria of Section 706(a) have been met. First, the FCC must find that advanced telecommunications capability is not being deployed on a ***reasonable and timely basis*** to all Americans. Second, the FCC must find that a federal law or regulation acts as a barrier to investment in such advanced telecommunications infrastructure. Third, the FCC must identify existing statutory or regulatory authority granted independently of Section 706 that will permit the FCC to remove the federal law or regulation that acts as a barrier. Finally, the FCC can only remove the legal or regulatory barrier if its finds that such removal is consistent with the public interest, convenience, and necessity, which includes the Congressional interest in opening local markets to competition.

Even if the FCC were to set aside the question of whether it has the authority to modify the purported "regulatory barriers" of Sections 251, 271 and 272 (*i.e.*, criterion number three), Petitioners would still fail to meet the remaining three criteria. Bemoaning at length the congested state of the Internet, Petitioners do not even attempt to address the question of what constitutes a "reasonable and timely basis" for deployment of advanced telecommunications. Petitioners also virtually ignore the investments currently being made to upgrade existing advanced telecommunications capabilities by existing providers, including, for example, AT&T,

MCI, Sprint and WorldCom, as well as the billions of dollars of investments new entrants are making or have committed to make in totally new advanced telecommunications capabilities. Finally, Petitioners fail to explain how freeing them to invest in advanced telecommunications capabilities that cross LATA boundaries will further the goal of deploying advanced telecommunications to all Americans when Petitioners still maintain control of the bottleneck facilities necessary to bring such capabilities over the "last mile" to all Americans.

A. Petitioners Have Failed to Demonstrate that Deployment of Advanced Telecommunications Capability Fails the "Reasonable and Timely Basis" Test

Collectively, Petitioners submit pages upon pages of complaints regarding Internet congestion and the failure of existing providers to connect non-urban areas to the Internet via high speed links. According to a survey performed by Data Communications, however, at least 30 Internet Service Providers ("ISPs") offer nationwide service over a backbone of high-speed circuits ranging from 45 Mbps to 622 Mbps. Robin Bareiss, *ISP Backbones*, 26 Data Communications 12, 36 (Sept. 21, 1997). That same survey found that most providers have 50 percent or more spare bandwidth during peak traffic periods. *Id.* While public network access points ("NAPs") may be sources of congestion, Internet providers are increasingly relying on private peering arrangements that permit such providers to exchange traffic directly without going through NAPs, thus avoiding those potential bottlenecks. Other providers are alleviating

NAP congestion by building new NAPs.[8] Therefore, the greatest source of Internet congestion remains at the level of the local loop and the local exchange.

Numerous factors contribute to Internet congestion, including: flat-rated pricing to consumers for Internet services; congested public access points for traffic exchange; and the capacity limitations of the public switched telephone network. As US West itself admits, Petitioners already have incentives to invest in cell-switched and packet-switched networks in order to relieve the increased data traffic that is causing congestion on traditional circuit-switched voice networks. US West Petition at 26. *See also* Ameritech Petition at 7 (stating that Ameritech experienced 66 major network congestion problems attributable to Internet-related usage from 1995 to 1997) and Bell Atlantic White Paper at 50-51 (listing Bell Atlantic capital commitments to provide Internet access and broadband networks).

Joint Commenters take issue with the contention, implied but never explicitly stated, that additional advanced telecommunications capacity will not be deployed to all Americans on a ***reasonable and timely*** basis. The explosive growth of the Internet has contributed to the congestion experienced by Internet users. As Bell Atlantic noted in the White Paper attached to its Petition, "[t]he Internet serves an estimated 56 million U.S. subscribers today, double what it served a year ago." Bell Atlantic White Paper at 1 (footnote omitted). Fiber optic capacity cannot be added to the Internet backbone, or added to connect communities to that backbone, overnight. Nor is it a simple task to upgrade the speed at which the backbone networks operate.

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[8] For instance, plans are underway for a state-based NAP in Florida, where approximately 50% of the local Internet traffic is routed through the MAE-EAST NAP in Vienna, Virginia. *See*, Kenneth Cukier, "PSINet goes Against the Grain with Peering Offer," *CommunicationsWeek International*, No. 191, 33 (Sept. 22, 1997).

Given the explosive growth of the Internet, and the time it takes to upgrade both capacity and bandwidth, it would not be unreasonable for demand to outstrip supply. In short, Petitioners' diatribes represent a static, and even historical, view of the Internet backbone. One need only look to the flood of press releases and debt and securities offerings issued by new entrants to learn that numerous companies have incentives to invest, and are investing, in advanced telecommunications capabilities.

As ILECs, Petitioners' investments in new telecommunications technologies have been funded in large measure on the backs of local ratepayers. Local ratepayer funds, together with inflated access charges paid by interexchange carriers, have enabled the BOCs to amass huge amounts of capital and financial strength. The BOCs will always come out winners based on a simple comparison of the financial worth and available capital of the BOCs vis-a-vis the financial worth and available capital of new entrants. However, as history shows, permitting the largest competitors to exercise unfettered control over the telecommunications infrastructure will often result in less, not more, competition and innovation. Until the BOCs' local monopolies are open to competition, BOCs cannot and should not be permitted to enter the in-region interLATA market.

B. Even if the FCC Did Have the Authority to Waive the Requirements of Section 251(c) Or 271, Such Waiver Would Not Be In the Public Interest

The 1996 Act fundamentally changed telecommunications regulation by adopting a new regulatory regime to foster competition in the local telephone markets and to expand competition in the long distance markets. In order to open up the local exchange markets to competition, the Act imposes specific affirmative obligations upon ILECs, such as Petitioners, which have

operated without genuine competition in their service areas for most of their history. In order to incent ILECs to comply with the affirmative obligations set forth in Section 251, Congress substituted the interLATA entry test of Section 271 for the interLATA restrictions formerly imposed on the BOCs by the MFJ. The FCC has had several opportunities to test the interaction and application of these two important market-opening statutory provisions in the context of reviewing BOC Section 271 applications. To date, the FCC has denied each Section 271 application submitted by a BOC, including those submitted by Petitioner Ameritech on the grounds that the BOC does not meet the Section 271 checklist opening its local exchange market to competition.[9] Bell Atlantic and US West have not even applied to the FCC to receive Section 271 authority, implicitly admitting that they are not currently able to pass the Section 271 test.

The fact that no BOC has passed the Section 271 test is evidence of the monopoly control BOCs still maintain over bottleneck local exchange facilities. Petitioners' promises notwithstanding, not a single BOC has shown that it has sufficiently opened its markets to competition and satisfied its obligations to provide non-discriminatory access to its network to competitors. Given the history of telephone monopolies, the FCC cannot and should not assume that the BOCs' continued monopoly control over local loops, the last mile of facilities necessary to reach most customers, will have no impact on competitors of BOCs advanced

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[9] *See, e.g., Application of Ameritech Michigan Pursuant to Section 271 of the Communications Act of 1934, as amended, To Provide In-Region, InterLATA Services In Michigan*, CC Docket No. 97-137, Memorandum Opinion and Order (rel. Aug. 19, 1997) (denying application to provide in-region interLATA services); *Application of BellSouth Corporation, et al. Pursuant to Section 271 of the Communications Act of 1934, as amended, To Provide In-Region, InterLATA Services In Louisiana*, CC Docket No. 97-231, Memorandum Opinion and Order (rel. Feb. 4, 1998) (denying application to provide in-region interLATA services).

telecommunications services. Although US West and Ameritech acknowledge that they will be required to unbundle those basic elements of their network, *i.e.*, local loops, over which their proposed deregulated advanced services are supplied, Bell Atlantic does not even attempt to make such a distinction. *Compare* Bell Atlantic Petition at 3-4 with Ameritech Petition at 17-19, US West Petition at 48-49.[10] Presumably, Bell Atlantic seeks to avoid its Section 251 obligations for all components of its proposed "deregulated" advanced telecommunications services.

Nor can Petitioners be trusted to provide unbundled loops capable of supporting advanced services to their competitors on a non-discriminatory basis. Each of the Joint Commenters has suffered discriminatory access restrictions at the hands of at least one of the Petitioners. For instance, McLeod purchases access to ILECs' local switches in the form of a product generally know as "Centrex." Actions taken by US West have impeded McLeod's provision of local exchange service via Centrex. Specifically, US West has filed tariffs and other notices with state public utilities commissions announcing its intention to "grandfather" Centrex services (permitting existing customers to retain the service but prohibiting new customers from purchasing the service) or otherwise restrict the resale of Centrex. Although McLeod has successfully challenged US West's action as anticompetitive in several of the states in which

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[10] Ameritech and US West profess their intent to comply with their Section 251 interconnection, unbundling and resale obligations for basic network elements. Ameritech Petition at 18 (Ameritech "is not seeking ... to remove the section 251(c) unbundling and resale requirements from those local exchange facilities that may be used to provide both voice and data services"); US West Petition at 48 ("US WEST is not asking the [FCC] to remove the unbundling and resale discount requirements form the underlying 'bottleneck' facilities that may be used in voice and data services alike").

McLeod provides competitive local exchange service,[11] continuing regulatory battles such as these have delayed McLeod's ability to expand its service offerings to new customers. In fact, US West's newest version of its Centrex product, which is only now beginning to be offered, continues to include overt restrictions on the resale of the product.[12] It is also noteworthy that US West filed its first Section 271 petition with state regulators in Montana, a state where US West won the right to withdraw its Centrex offering.[13] In that petition, US West reportedly relies on competition from ***independent*** LECs, as opposed to CLECs, to justify its bid to provide in-region interLATA services.[14]

As the old saying goes, actions speak louder than words. Much like the existing "coincidental" parallel action on the 706 petitions, each of the Petitioners have fought, and continue to fight, their obligation to provide reciprocal compensation for local telecommunications traffic terminated to a CLEC customer that happens to be an ISP. As the FCC is aware, all three Petitioners have, at various times, denied CLECs compensation for such

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[11] *See, e.g., The Investigation and Suspension of Tariff Sheets Filed by US West Communications, Inc. with Advice Letter No. 2617, Regarding Tariffs for Interconnection, Local Termination, Unbundling and Resale of Services*, Docket No. 96S-331T, Commission Order, Decision No. C97-739, 89, 107 (Colo. PUC, July 16, 1997) (constraints placed upon the resale of Centrex Plus by US West do not conform to either federal or state law and would impede the emergence of competition).

[12] *See, Petition to Introduce Centrex Prime Service As a New Service*, Minnesota PUC Docket No. P421/EM-97-1661, Comments of the Minnesota Department of Public Service filed March 16, 1998, at 2.

[13] *Application of US West Communications, Inc. to Discontinue Centrex Plus Service*, Docket No. D96.2.15, Order No. 5905c (Mont. P.S.C., Feb. 25, 1997), *reconsideration denied*, Order on Motion for Reconsideration, Order No. 5905d (Mont. P.S.C., June 25, 1997).

[14] "US West began move to enter long distance," *Communications Daily*, 3 (March 31, 1998).

traffic, forcing the CLECs to turn to state public utilities commissions to receive reciprocal compensation owed and unpaid.[15]

Petitioner Ameritech has continued to use its monopoly market power to unilaterally withhold reciprocal compensation payments duly owed to competitors for local traffic despite clear and strongly worded state commission orders declaring otherwise. Specifically, the Illinois Commerce Commission has found that:

> Ameritech Illinois' "unilateral" remedy is so ill-tailored to its perceived problem that it lends substantial credence to the complainants' allegations that Ameritech Illinois' conduct is intentionally anticompetitive. Ameritech Illinois' local exchange competitors are obligated by law to terminate calls made by Ameritech Illinois' customers, they incur costs in order to do so, and they are entitled to be compensated for the use of their equipment and facilities. Significantly, the competitive local exchange carriers can hardly be considered the cause of any

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[15] *See, e.g. Consolidated Petitions of Brooks Fiber Communications of Michigan, Inc., TCG Detroit, MFS Intelenet of Michigan, Inc, and Brooks Fiber Communications of Michigan, Inc. against Michigan Bell Telephone Company, d/b/a Ameritech Michigan and Request for Immediate Relief,* Order, Case Nos. U-11178, U-11502, U-11522, U-11553 (Mich. P.S.C. Jan. 28, 1998), at 1, *appeal docketed sub nom Michigan Bell Telephone Company d/b/a Ameritech Michigan v. MFS Intelenet of Michigan et al.*, Case No. 5:98-CV-18 (W.D. Mich., Feb. 6, 1998). This decision is available on the Commission's web site at <http://ermisweb.cis.state.mi.us/mpsc/orders/com/U-11178b.txt>; *Petition of Cox Virginia Telcom, Inc. for Enforcement of interconnection agreement with Bell Atlantic-Virginia, Inc. and arbitration award for reciprocal compensation for the termination of local calls to Internet service providers*, Final Order, Case No. PUC970069 (Va. S.C.C. October 24, 1997) at 2; *Petition for Arbitration of an Interconnection Agreement Between MFS Communications Company, Inc. and US WEST Communications, Inc., Pursuant to 47 USC § 252,* Arbitrator's Report and Decision, Docket No. UT-960323 (Wash. Utils. and Transp. Comm. Nov. 8, 1996) at 26; *affirmed, US West Communications, Inc. v. MFS Intelenet, Inc.*, No. C97-222WD, Slip. op. at 8 (W.D. Wash., Jan. 7, 1998) (Washington Commission "did not act arbitrarily or capriciously in deciding not to change the current treatment of ESP call termination"), *appeal docketed*, No. 98-35146 (9th Cir.).

> additional unrecovered ***network*** costs which Ameritech Illinois believes arise from increased internet usage.[16]

Petitioners' vigorous attempts to avoid their Section 251 duties with respect to the fundamental obligation to provide reciprocal compensation for the use of facilities shows just how far the BOCs will go to discriminate against and disadvantage their competitors' provision of advanced telecommunications services. Granting the BOCs' Section 706 petitions would only further the BOCs' ability to engage in such discriminatory and anticompetitive practices.

Petitioner Bell Atlantic has recently taken other unilateral action against CLECs in contravention of the 1996 Act. Bell Atlantic recently re-interpreted the rules of Section 252(i) of the Act to modify an opt-in agreement requested by Focal in three Bell Atlantic markets. Under Bell Atlantic's interpretation of Section 252(i), it may unilaterally replace the negotiated rate schedule of the base agreement with one that provides more favorable pricing to Bell Atlantic.

Through the withdrawal or restriction of Centrex, the denial of reciprocal compensation, the unilateral interpretation of Section 252(i), and numerous other actions, Petitioners are attempting to deny revenue to competitors -- revenues that would be used to upgrade the competitors' networks and develop new technologies in competition with the BOCs. The fact that Petitioners continue to resist implementation of the pro-competitive duties placed on them by the 1996 Act argues strongly against any relaxation of such duties. Petitioners' efforts to twist the meaning of Section 706 to their favor, and escape their pro-competitive duties, must be swiftly rebuffed.

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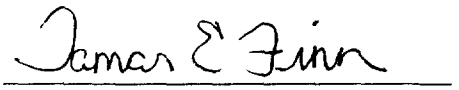
[16] *Complaint of WorldCom Technologies, Inc. Against Ameritech Illinois*, Order, Docket No. 97-0519, 14 (Ill. C.C. March 11, 1998) (emphasis in original).

CONCLUSION

The FCC has taken action, in its universal service proceeding, to encourage the development and deployment of advanced telecommunications services to all Americans. If the FCC determines that those actions are not sufficient, it should investigate further means of encouraging the deployment of advanced telecommunications capacity. However, the information superhighway should not be promoted to the detriment of the core principles of the 1996 Act. Abdicating the responsibility to utilize Sections 251 and 271 to open local telephone markets to competition is not in the public interest and will only serve to further consolidate the breadth of facilities subject to ILEC monopoly control. The FCC should deny the 706 Petitions and institute a Section 706 NOI.

Respectfully submitted,



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