HOGAN & HARTSON
L.L.P.

DAVID L. SIERADZKI
COUNSEL
DIRECT DIAL (202) 637-6462
INTERNET DSO@DC2.HHLAW.COM

DOCKET FILE COPY ORIGINAL

COLUMBIA SQUARE
555 THIRTEENTH STREET, NW
WASHINGTON, DC 20004-1109
TEL (202) 637-5600
FAX (202) 637-5910

April 6, 1998

Magalie Roman Salas
Secretary
Federal Communications Commission
1919 M St., N.W.
Washington, D.C. 20554

Re: Petitions of Bell Atlantic Corp., US West Communications, Inc., and Ameritech Corp.; CC Docket Nos. 98-11, 98-26, and 98-32

Dear Ms. Salas:

On behalf of LCI International Telecom Corp. ("LCI"), I am submitting for filing, pursuant to the procedural order in these proceedings, DA 98-513 (released Mar. 16, 1998), three originals, each with 12 copies, of LCI's consolidated comment on each of the three proceedings referred to above. If you have any questions, please contact me.

Respectfully submitted,

David Sieradzki

David L. Sieradzki
Counsel for LCI

Enclosures

cc: Attached service list

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

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

COMMENTS OF LCI INTERNATIONAL TELECOM CORP.

Anne K. Bingaman
Douglas W. Kinkoph
LCI INTERNATIONAL
TELECOM CORP.
8180 Greensboro Drive, Suite 800
McLean, VA 22102

Peter A. Rohrbach
Linda L. Oliver
David L. Sieradzki
HOGAN & HARTSON L.L.P.
Columbia Square
555 Thirteenth Street, NW
Washington, DC 20004

Its Attorneys

SUMMARY

The Commission should reject the RBOCs' latest effort to nullify key provisions of the 1996 Act. The petitions of Bell Atlantic, US West, and Ameritech run counter to the core goals of the 1996 Act. The 1996 Act seeks to promote competition in all parts of the telecommunications industry by opening the ubiquitous wireline local exchange network for use by all carriers. By contrast, the RBOCs' proposals would enable them to fence off from competitors the inevitable improvements to that network, many of which are already underway, and thus prevent consumers from enjoying the full benefits of competition and technological developments.

Contrary to the petitions, the RBOCs already have ample incentives to invest in and deploy technologically advanced facilities and services -- indeed, they are already doing so -- and they do not need extra regulatory give-aways as additional incentives. If the RBOCs want to fence off new technologies from their competitors, they may do so by electing to opt into the LCI "Fast Track" plan, which would allow an RBOC speedy interLATA entry, and deregulated treatment of its retail affiliate, in exchange for adopting a separated structure under which the RBOC's retail affiliate must interact with the RBOC's network company on the same basis as any other CLEC. Under the LCI proposal, the RBOC's retail affiliate would be free to invest in advanced network technologies, as long as it did so on the same arms'-length basis as any other CLEC.

The RBOC petitions also ignore the central role that Section 251(c) provisions play in the promotion of local competition. Congress did not envision a

world in which competitors would build duplicate local exchange networks and compete with the incumbents only in that way. Instead, Congress adopted a broad definition of network element, which encompasses all the "features, functions, and capabilities" of the local exchange network. Congress did not freeze that network in time. Nor is it accurate to pretend that there is a different network for data than for voice, or for narrowband and broadband, as the petitioners suggest. It is all one local exchange network. In many other ways, the RBOC petitions violate the Act.

The RBOCs, in effect, seek to fence the network off, forcing each competitor to separately invest in the equipment needed to obtain access to advanced network capabilities, such as xDSL. The prohibitive cost of a CLEC duplicating the ILECs' investment in xDSL, rather than obtaining it on a network element basis from the ILEC, is demonstrated by US West's own numbers.

Instead of adopting the anti-competitive RBOC proposals before it in these petitions, the Commission should adopt the LCI "Fast Track" plan, which not only would expedite Section 271 authorizations, but also would provide the RBOCs with the ability, if they choose to do so, to shield their investments in advanced network capabilities from their competitors, without harm to competition or to consumers. The LCI plan addresses the incentives for discriminatory self-dealing by the RBOCs both before and after interLATA entry, thus promoting local competition, speeding interLATA entry, and allowing the RBOC to create a deregulated CLEC affiliate without harm to competition.

TABLE OF CONTENTS

Page

I. THE RBOCS DO NOT NEED ADDITIONAL INCENTIVES TO INVEST IN AN UPGRADED NETWORK. 6

II. THE LCI "FAST TRACK" PLAN WOULD ENABLE RBOCS' RETAIL AFFILIATES TO DEPLOY NEW TECHNOLOGIES WITHOUT GIVING COMPETITORS ACCESS, AS LONG AS THEY USE THE UNDERLYING NETWORK IN THE SAME MANNER AS INDEPENDENT COMPETITORS. 9

III. THE COMMISSION SHOULD REJECT THE RBOCS' ATTEMPT TO DENY ACCESS TO THE LOCAL NETWORK AS IT EVOLVES. 12

IV. THE COMMISSION LACKS THE LEGAL AUTHORITY TO GRANT THE PETITIONS. 18

CONCLUSION 21

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FEDERAL COMMUNICATIONS COMMISSION
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	)	
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COMMENTS OF LCI INTERNATIONAL TELECOM CORP.

LCI International Telecom Corp. ("LCI"), by its counsel, submits these comments in opposition to the petitions filed by Bell Atlantic, US West, and Ameritech.

INTRODUCTION: SERVICE ADVANCES FOR *ALL* CARRIERS, NOT JUST RBOCs

These petitions open another front in the battle of the regional Bell operating companies (" RBOCs") to nullify key provisions of the Telecommunications Act of 1996 ("1996 Act"). LCI assumes that other parties will discuss the multiple ways that the relief requested in the petitions violates Sections 251-52 and 271-72 of the Act, 47 U.S.C. § § 251-52, 271-72. LCI briefly mentions

some of the primary legal problems below, but otherwise will leave it to others to discuss these matters.

LCI is concerned with a larger issue raised by the petitioning RBOCs: the ability of *all* carriers -- and not just the RBOCs -- to employ advanced telecommunications technology to create service innovations in the future. The petitions foreshadow a major competitive problem that will confront consumers and policymakers over the next decade. Put simply, RBOCs will have continuing incentives to limit compliance with Section 251(c) in ways that restrict the ability of competitive local exchange carriers ("CLECs") to provide new and advanced services.

This danger is hardly abstract. The Commission is well-aware that the RBOCs have fought the mandates of Section 251(c) at every turn. Consequently, local exchange and exchange access competition is virtually non-existent for residential consumers, or for business consumers outside a relatively few core city centers. RBOC discrimination against competitors who of necessity must rely on the BOC local exchange network is a problem that will continue well after Section 271 interLATA authority is granted. If anything, RBOC incentives to discriminate against their rivals will increase once the Section 271 carrot is no more.

To date RBOC discrimination has blocked the development of competition for *traditional* local exchange and exchange access services. However, the 1996 Act is written broadly to accommodate *advanced* services as well. The Act

correctly recognizes that the RBOCs, as owners of the nation's one ubiquitous wireline network, are gatekeepers able to control the development of local competition -- both today and as that competition evolves in the future -- by controlling the ability of other firms to make use of that network. 1/ The Act therefore required the RBOCs to provide non-discriminatory access to the local network in *all* its capacities.

In other words, the Act creates a non-discriminatory opportunity for *all* carriers to develop new services over the existing ILEC network. Congress correctly recognized that it was this very competition that was most likely to result in innovation.

The RBOC petitions here mark their first (but probably not their last) attempt to cut back the mandates of Section 251 so that they alone may enjoy a unique ability to take advantage of enhancements on the wireline network of today. The RBOCs try to support their anticompetitive advocacy with a net full of red herrings. They complain that they need additional incentives to invest. They paint artificial lines through their networks, trying to distinguish "voice" facilities from "data" or "old" facilities from "new" ones. They challenge the adequacy of the investments being made by their rivals.

These arguments are riddled with factual misstatements, but in any event they are irrelevant under the 1996 Act. Section 251(c)(3) -- and the Act's

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1/ For example, Section 251(c)(3) provides that requesting carriers can use network elements to provide any telecommunications services.

definition of "network element" in Section 153(29) -- were written in generic terms specifically to prevent the RBOCs and other incumbent local exchange carriers ("ILECs") from whittling away at their obligation to make elements of the local network available to other carriers. The Commission is precluded as a matter of law from drawing lines fencing off specific elements from ILEC competitors. Moreover, the Commission and the states would quickly find themselves in a regulatory morass if they tried to do so. Regulators already face a daunting task in preventing ILEC discrimination in the future regarding the price, terms and conditions for interconnection and unbundled network elements. This task would be complicated even further if regulators also faced disputes over, for example, whether a specific network feature, function, or capability should be available to others. 2/

LCI already has proposed a solution to the Telecom Act stalemate that is equally applicable here. Our "Fast Track" plan, filed on January 22, 1998, is sometimes viewed just as a way to expedite Section 271 authorizations. 3/ However, Fast Track is even more a plan to deal with the incentives for discriminatory self-dealing by the RBOC *both before and after* interLATA entry. It

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2/ The statutory definition of "network element" includes all "features, functions, and capabilities" of any "facility or equipment used in the provision of a telecommunications service." 47 U.S.C. § 153(29).

3/ *Petition Of LCI International Telecom Corp. For Declaratory Rulings: A "Fast Track" Plan to Expedite Residential Local Competition and Section 271 Entry Through Establishment Of Independent RBOC Wholesale and Retail Service Companies,* CC Docket No. 98-5 (filed January 22, 1998) (hereafter "LCI Petition" or "Fast Track petition"). *See* n. 8, *infra*, for a brief description of the proposal.

interposes structural safeguards as a substitute for much of the continuing day-to-day regulation of RBOC activities that otherwise will be required to prevent anticompetitive discrimination. Fast Track recognizes that RBOC discrimination incentives and conflicts of interest are so strong that only two choices are available. On the one hand, RBOCs can continue to integrate their retail and carrier's carrier activities, in which case both retail and wholesale operations will require detailed scrutiny on an on-going basis. Alternatively, retail and carrier's carrier operations can be structurally separated, with adequate safeguards to address the conflicts of interest that will remain. In that case much less RBOC regulation is required, and the RBOC's retail affiliate can be treated as a CLEC.

LCI's Fast Track plan is directly relevant to the issues raised in the petitions here. It establishes a structure in which a "NetCo" carrier's carrier company would have incentives to enhance the local wireline network for the benefit of *all* service providers, and not just its own affiliated retail operations.

At the same time, the plan also provides that a properly separated RBOC "ServeCo" retail entity would have all the rights of a CLEC to make proprietary network investments. Section 251(c) would not apply to the ServeCo entity. Thus, to the extent that the RBOC sought to compete with other retailing CLECs through advanced services, it would be free to do so -- on the same basis as any unaffiliated CLEC. Thus, if it were necessary for a CLEC to collocate and install equipment in every BOC central office in order to have the ability to provide xDSL service, then ServeCo would also have to collocate and install such equipment

in every central office to have that same ability. Of course, NetCo could also decide to install that equipment itself and make it available to all CLECs (including its own retail affiliate) on the same basis.

In short, the battle for the telecommunications future begins here. The RBOCs cleverly attempt to set up a false choice. They suggest that the Commission must excuse them from compliance with Section 251(c) and other provisions of the Act in order to secure new telecom services for the public. The truth is just the opposite. The Commission can best ensure advanced services by enforcing the Act so that competitive pressures from multiple carriers can drive progress.

The Commission should reject the RBOC petitions out of hand, in recognition of the unlawful discrimination they propose. The Commission also should remind the RBOCs that they will be regulated closely both before and after interLATA entry to ensure that all carriers have nondiscriminatory access to the local network. At the same time, the Commission should tell RBOCs who wish to make proprietary investment outside the scope of Section 251 that they may do so through retail affiliates separated pursuant to the Fast Track safeguards. The Commission can do so by granting the declaratory rulings requested in LCI's Fast Track petition, or by acting separately here.

I. THE RBOCS DO NOT NEED ADDITIONAL INCENTIVES TO INVEST IN AN UPGRADED NETWORK.

In their petitions, Bell Atlantic, US West, and Ameritech contend that the only way to create incentives for them to develop technologically advanced

networks is to permit them to fence off network improvements from competitors and to relieve them of regulatory requirements that are intended to protect the public from their exercise of market power as owners of the incumbent local exchange telephone network, upon which all their competitors rely to provide to compete in the provision of local exchange services. Under the RBOCs' plans, they would be free to: (1) offer new or advanced services without providing other carriers access to the underlying facilities needed to provide those services, contrary to the pro-competitive unbundling requirements of Section 251(c)(3); (2) deny competitors the ability to resell those services pursuant to Section 251(c)(4); (3) construct and use interLATA transmission facilities without first complying with the local market-opening requirements of Section 271, and (4) engage in these activities without the protections of the structural separation requirements of Section 272. 4/ In essence, these RBOCs are asking the Commission to allow the RBOCs to evade the critical local competition provisions of the Act by freezing the local exchange network in time, relegating competitors to use of an inferior network, depriving them of the ability to compete as the network evolves, and fencing off from consumers the chance to enjoy the benefits of competition in broadband-network-based services.

The RBOCs already have strong incentives to upgrade their networks. First, they have strong incentives to expand the scope of the services they can provide over those networks, and to cater to the rapidly growing demand for data transmission. Just as telephone networks have been converted to digital technology

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4/ 47 U.S.C. §§ 251(c)(3), 251(c)(4), 271, 272.

from analog because of its superior technical characteristics, efficiency, and capabilities, so too RBOCs will have incentives to deploy new technologies that expand the capacity of their existing networks. Second, RBOCs have incentives to expand the speed and capabilities of their networks to respond to customer demand for greater bandwidth and functionality, and to grow beyond their traditional POTS services. Third, as the petitioners themselves point out, the RBOCs are already investing in these technologies. They do not have to be bribed by the Commission to do it faster.

Bell Atlantic, US West, and Ameritech each recount in detail in their petitions their existing Internet-related business ventures, including the provision of Internet access service, high speed subscriber line technologies such as ISDN and xDSL, and even some of the switching and transmission facilities used in regional Internet backbone networks. 5/ There can be no question about the RBOCs' existing authority to offer basic intraLATA services such as upgraded subscriber lines, which are no different for regulatory and most other purposes than plain old subscriber lines, as well as their authority to offer information services such as Internet access (subject to Section 272 safeguards). And of course, once they satisfy the requirements of Section 271, the RBOCs will be allowed to offer interLATA telecommunications services such as interLATA Internet backbone facilities. 6/

5/ *See, e.g.*, Bell Atlantic Petition at 15-17; US West Petition at 6-8, 24-26, 35; Ameritech Petition at 30-31.

6/ There is no restriction today on their constructing such facilities within their LATAs as long as they do not cross LATA boundaries.

In fact, there is no reason to believe that, even if the Commission were to grant everything these petitioners requested, that the broadband-related investment would happen any faster. Presumably, they will invest in new technology if they believe they can garner sufficient revenue to cover the cost. The petitioners suggest that only if they can deny other carriers cost-based access to the network facilities will they be able to make enough money to justify the investment. This logic only makes sense if the RBOCs can preclude retail competitors by that step (as they can) and thereby overcharge their own retail customers. It would be just as likely that the petitioners would be able to recover their investment by maximizing the number of competitors using that upgraded technology, thus maximizing the actual use of that technology, and discouraging construction of competitive facilities.

In sum, it is far from obvious what additional incentives, if any, would be created by the regulatory give-aways the RBOCs seek here.

II. THE LCI "FAST TRACK" PLAN WOULD ENABLE RBOCS' RETAIL AFFILIATES TO DEPLOY NEW TECHNOLOGIES WITHOUT GIVING COMPETITORS ACCESS, AS LONG AS THEY USE THE UNDERLYING NETWORK IN THE SAME MANNER AS INDEPENDENT COMPETITORS.

If the RBOCs' real desire is to keep for themselves the fruits of their investment in network improvements, then they can accomplish that goal -- without sacrificing competition or consumer welfare -- by opting into the LCI "Fast Track"

plan for accelerated interLATA entry approval. 7/ The LCI proposal is designed to substantially reduce the RBOCs' incentives to thwart local competition and to give them incentives to provide what their competitors need to succeed, while speeding interLATA entry and deregulating the RBOCs' retail activities.

Under LCI's proposal, an RBOC can invest in new technology and shield the availability of that technology (and the associated retail services) from competitors by making that investment through a properly separated retail affiliate (ServeCo). Under the LCI plan, ServeCo would not be required to allow competitors access to ServeCo's facilities under Section 251(c)(3) and would not have to offer its retail services at an avoided-cost discount pursuant to Section 251(c)(4). Its retail

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7/ The LCI petition proposes a voluntary structural approach that a RBOC could elect to pursue, in exchange for faster interLATA entry and deregulation of its retail affiliate. Under this model, a RBOC's competitive retail operations would be located in an affiliate ("ServeCo") that would be structurally separated from the operator of the existing monopoly local network ("NetCo"). Both entities would be subject to structural requirements that ensure that they operate completely independently on a truly arms' length basis (*e.g.*, no shared facilities, functions, services, employees, or brand names; substantial public ownership of ServeCo; independent directors; and ServeCo management compensation based exclusively on ServeCo's performance). ServeCo would obtain network services from NetCo on precisely the same basis as its competitors, and most retail regulation of ServeCo would be eliminated. ServeCo would be regulated like any other Competitive Local Exchange Carrier ("CLEC"), without the restrictions and level of oversight that otherwise would be necessary. ServeCo would be free, for example, to install its own network facilities, which it would interconnect with NetCo's facilities in exactly the same way as other CLECs, and would not need to share with its competitors. This structure would give NetCo an incentive to sell network services in the manner that its customers -- both to its affiliate and independent competitors -- demand. We urge the Commission to consider the plan, and the record developed in response to the petition, as it considers the issues raised by the Section 706 petitions.

services, moreover, would be unregulated, thus addressing the RBOCs' concerns about the effect of price cap regulation of advanced offerings.

Unlike the RBOCs' proposals in these petitions, however, the NetCo/ServeCo structure preserves the pro-competitive goals of the Act. Because ServeCo must use the incumbent network facilities of a separate network affiliate ("NetCo") through exactly the same interconnection arrangements used by other competitive local exchange carriers ("CLECs"), ServeCo will not obtain an undue advantage over other CLECs. ServeCo would have to install xDSL facilities (for example, the "DSLAM") in exactly the same manner that other CLECs would do, including installing collocation cages, if necessary, and using the same interconnection mechanisms and the same operational support systems ("OSS"). ServeCo would have to be able to justify that separate investment, just as any other CLEC would have to do.

Although the RBOC would be free to invest in advanced network capabilities through ServeCo, it might instead choose to put that capability into the network, through NetCo, where it would be available to all CLECs. The NetCo affiliate might very well find it advantageous to deploy these technological advances itself, and sell the use of those facilities to both the ServeCo affiliate and independent CLECs, thereby maximizing the use of its investment and the revenues obtained from that investment. For example, if NetCo's carrier-customers, including ServeCo and independent CLECs, demanded it and if the economies of scale and scope justified it, NetCo might choose to deploy the DSLAMs

and other equipment necessary to upgrade POTS subscriber loops to xDSL loops. In that case, both ServeCo and CLECs would be able to make use of those network elements pursuant to Section 251(c)(3), using identical operational support systems ("OSS") and under the same types of interconnection agreements.

The point is that the Commission need not give in to threats that the RBOCs will not invest in new technologies. Instead, the Commission can offer the RBOCs an alternative -- the LCI structural approach. The Section 706 petitions offer one more compelling reason why the Commission should grant the LCI petition and adopt a set of declaratory rulings that would free the RBOCs not only to get into the interLATA business more quickly, but also to deregulate its retail offerings and shield new network investments, if it wishes to do so, from access by competitors.

III. THE COMMISSION SHOULD REJECT THE RBOCS' ATTEMPT TO DENY ACCESS TO THE LOCAL NETWORK AS IT EVOLVES.

The Commission should soundly reject the RBOCs' pleas that they be allowed to deny competing carriers access to their ubiquitous local exchange networks as those networks evolve and become more advanced. The Commission also should reject the RBOCs' request to exclude advanced retail services from the Section 251(c)(4) resale obligation. In the absence of a structural separation plan like LCI's Fast Track approach, a structurally integrated RBOC should not be allowed to fence off network improvements from access by all carriers that depend on the existing ubiquitous local wireline network.

It is essential to emphasize here what Congress envisioned when it threw open the local exchange market to competition. It did not envision a world in which competitors would build duplicate local exchange networks and compete with the incumbents only in that way. Rather, the Act recognized that the greatest degree of local competition would be achieved if the incumbents were required to allow competitors access to their networks, at cost. In this way, robust competition could occur at the *retail* level immediately. That retail competition, in turn, could provide the market presence and revenue stream to form the basis for the gradual construction of new local exchange facilities by competitors, with competitors continuing to use ILEC network elements wherever necessary.

The Section 251(c)(3) network element provisions are the heart of the Act's local competition provisions. No one would deny that Congress understood that few, if any, competitors would be able to duplicate the ubiquitous ILEC local exchange network, and that all competitors, to a greater or lesser degree, would need to use ILEC network elements in order to compete.

Unable to avoid this bedrock requirement, the RBOCs have attempted in these petitions to corrupt the network element obligation by painting the local exchange network as entirely different that the advanced local exchange network, as though they are two different networks. Networks are moving to higher and higher capacity, and to greater capabilities. This is no different than the transition that took place years ago, when networks moved from analog to digital technology (in fact, that evolution is still in progress, as ILECs convert to IDLC technology, for

example). The point is that the network is capable of supporting a broad range of services. All carriers, not just the incumbent, has the right to employ those network capabilities to create their own services. This is the whole point of the network element provisions of the Act.

The notion of creating a much more liberal regulatory regime for packet-switched networks and data services, while retaining the system envisioned by the 1996 Act for circuit-switched networks and voice services, is not sustainable. It is widely acknowledged that in many cases, the same facilities are used for both packet-switched and circuit-switched networks, and voice and data services, are converging. Data has long traveled over circuit-switched networks designed primarily for voice telephony; and increasingly, purveyors of "Internet telephony" are learning how to make voice calls traverse packet-switched networks. Not only is the radically divergent form of regulation that the RBOCs propose for data/packet-switching and voice/circuit-switching not sustainable, it is also contrary to the Commission's goal of technological neutrality. 8/

Networks may evolve, and new technology will continue to be used in those networks -- but what will not change is other carriers' utter reliance on the ILEC network, because it is the only ubiquitous local network, and is likely to continue to be so for many years to come.

8/ One may reasonably suspect that the RBOCs' true motivation in submitting these petitions is to set the stage for an ultimate argument to repeal the pro-competitive protections of the 1996 Act with respect to traditional voice telephony as well.

It is difficult today to draw lines based on network technology and will continue to be so as networks continue to evolve. If the FCC were to adopt the RBOCs' theory -- that some network functions can be denied to competitors -- then the FCC and the state commissions are destined to be embroiled in line-drawing battles, as the RBOCs continue to try to fence more and more of their network capability off from competitors. The LCI proposal, which allows the retail affiliate (ServeCo) free rein to invest in facilities and to deny them to competitors, while imposing the Act's Section 251(c) obligations only on NetCo, creates a bright line that is easy to police, yet gives the RBOC the freedom it claims it needs to invest in new technology that is unavailable to competitors. It also anticipates the regulatory issues that are likely to persist long after interLATA entry occurs -- of which the RBOC petitions are a good example.

The RBOCs also argue that the rates for UNEs (which they consider to be unreasonably low) effectively force them to bear all the risk associated with new facilities, but not garner the benefits of those risky investments. 9/ But this argument does not concern *whether* Section 251(c)(3) the Act should be implemented with respect to any given network element, but rather what the proper rate levels should be. Even under the now-vacated FCC pricing rules, so vilified (and misunderstood) by the RBOCs, it is clear that the Total Element Long-Run Incremental Cost ("TELRIC") methodology *requires* state commissions to allow

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9/ *See, e.g.*, Bell Atlantic Petition at 17 & Att. 2 at 15-16; US West Petition at 46-47; Ameritech Petition at 22-23.

ILECs to recover a *risk-adjusted* rate of return, particularly in connection with network elements that are risky to provision. 10/ In other words, if a particular network element involves unusual investment risks, the TELRIC-based rate would give the ILEC extra compensation for taking that risk. 11/

It is ironic that the RBOCs make such a passionate case for needing extra incentives to make the enormous investment and risk involved in investing in advanced technology. They totally ignore the plight of the CLECs, who today possess tiny shares of the local market. Even if they grow quickly, they cannot hope to have the volumes to justify the kind of network upgrades that the RBOCs are contemplating. US West's own statistics prove this out. US West argues that because it serves many less densely populated areas, and thus has lower volumes of customers per switch, that it needs special incentives to invest in xDSL technology to serve those customers. 12/ Clearly, if it is hard for US West to justify investing in adding xDSL for each switch (when it does not even need to collocate to do so!),

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10/ *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, 11 FCC Rcd 15499, 15849, 15850-51, 15854-56, ¶¶ 686, 691, 699-703 (1996), *vacated in pertinent part sub nom. Iowa Util. Bd. v. FCC*, 120 F.3d 753 (8th Cir. 1997).

11/ The RBOCs' argument that competitors would be able to pay unreasonably low rates for advanced network capabilities and services is even less plausible in the context of resale under Section 251(c)(4). The rate at which an ILEC must offer services for resale to CLECs is based on the ILEC's own retail price -- so if the ILEC has set a supra-competitive retail price for a risky new service, the price resellers will pay will be based on that higher retail price. What the RBOCs appear to wish to do is create a situation in which they alone will be able to offer broadband services -- hardly an environment conducive to competition or innovation.

12/ US West Petition at 25-26.

and when it has the entire local customer base over which to spread the cost of that technology, imagine how difficult it would be for each of US West's competitors to justify that investment:

> [D]eploying xDSL to a central office requires enormous capital investments: US West must install one or more DSLAMs in each central office, prepare the loops of each MegaBit Service subscriber, and cable the office to a network of ATM switching systems. 13/

US West also observes that

> The central office equipment used to provide MegaBit service is expensive: a basic, 128-user DSLAM costs approximately $73,000 installed (and several might be necessary), an installed ATM switching system costs approximately $350,000, and the DS-3 networking needed to connect the central office with other central offices can cost several hundred thousand dollars. . . . 14/

US West also correctly identifies residential and small business customers as the most vulnerable to being left out because of the relatively higher cost of serving them. 15/ With all this, it is genuinely puzzling why an RBOC would not conclude that the best way to recover this investment is to make it available to *all* carriers, thus maximizing volume.

In sum, if the RBOCs are allowed to deny competitors the ability to employ the "features, functions, and capabilities" of xDSL technology, or other new technologies (for this is the precedent for more to come), they would have the

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13/ US West Petition at 35.

14/ *Id.* at 31-32.

15/ *Id.* at 26.

opportunity to reinforce their existing dominance over the incumbent local exchange network. In this way, a RBOC could use its control over the xDSL-based technology to obtain dominance over other packet-based data transport markets. Their exclusive ability to offer broadband and other advanced services would give them leverage into the market for other services as well, since most services will be offered together as "full-service packages."

IV. THE COMMISSION LACKS THE LEGAL AUTHORITY TO GRANT THE PETITIONS.

LCI will not dwell on the many obvious legal infirmities of the petitions. We assume that other parties will focus on these issues. But it is clear that the Commission lacks the legal authority to grant the petitions.

First, Section 706 is not an independent grant of forbearance authority. Rather, it merely directs the Commission to use the forbearance authority that is specifically granted in Sections 10 and 332 in order to promote deployment of advanced services. This is clear from the context: for example, Section 706 also directs the Commission to use price caps toward the same end, even though the FCC's authority to adopt price cap regulation for interstate telecommunications service was well-settled when the 1996 Act was enacted. *National Rural Telecom Assn v. FCC*, 988 F.2d 174 (D.C. Cir. 1993).

Moreover, unlike the detailed standards governing the specific forbearance authority provided in Sections 10 and 332, Section 706 of the Act contains no substantive standards governing when forbearance would be required

or permitted. 16/ Congress clearly expressed its intent in Section 10(d) that the Commission may not forbear on enforcing Sections 251(c) and 271 until those sections are fully implemented. When it does consider whether to forbear from such key pro-competitive provisions, it must evaluate the state of the market at the time the request for forbearance is made, and make all the factual and policy determinations required by Section 10.

There also is no basis for the FCC to allow the RBOCs into the interLATA business before they have met the requirements of Section 271. Congress made it clear that regardless of the nature of the interLATA services, the RBOCs must meet certain requirements before being allowed to provide them. The fact that RBOCs cannot offer these services today reflects a considered and balanced policy choice that is at the heart of the 1996 Act: RBOC entry into interLATA markets should be contingent on full opening of local markets in order to give the RBOCs a powerful incentive to open their local networks to competitors. The wisdom of that choice applies with equal force to the interLATA services described in the petitions under consideration here. The construction of interLATA networks for data purposes is still construction of interLATA networks. Nor does Section 3(25) of the Act authorize the FCC to, in effect, repeal Section 271 as to certain classes of interLATA offerings by "redrawing" (that is, *erasing*) LATA boundaries. The Commission needs to hold tight to the carrot of interLATA entry if it is to see the benefits of the Act realized. If the RBOCs are anxious to be rid of the

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16/ 47 U.S.C. § § 160(a), 332, 157n.

interLATA entry restriction, they should elect to pursue the LCI "Fast Track" approach, discussed above.

Likewise, Section 251(c)(3) of the Act does not contemplate that the Commission will freeze the RBOC network in time, allowing the RBOCs to deny access to the network simply because it evolves with technological change. Instead, that section gives requesting access to all the "features, functions, and capabilities" of the network. 47 U.S.C.§ 153(29). Indeed, Congress understood that telecommunications networks are dynamic and fast-changing, and that many different technologies can be used to provide the same services. If Congress had intended to draw lines around services or network facilities or technologies, it would have done so. 17/

In sum, the RBOCs' proposed end run around the Act's statutory framework should not be countenanced.

17/ See, e.g. 47 U.S.C. § 271(c)(1)(a) (providing that local exchange services provided over Part 22 wireless networks did not count under Track A of Section 271).