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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 U S 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

COMMENTS OF APK NET, LTD., CYBER WARRIOR, INC., HELICON ONLINE, L.P., INFORAMP, INTERNET CONNECT COMPANY, MTP LLC DBA JAVANET, AND PROAXIS COMMUNICATIONS, INC.

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1. Introduction and Summary.

Section 706 of the Telecommunications Act of 1996 (the "1996 Telecom Act") authorizes the Commission to take various steps, including regulatory forbearance in some cases, to encourage the widespread deployment of advanced telecommunications capabilities throughout the nation. Three regional Bell Operating Companies ("RBOCs") have requested special regulatory relief under Section 706, supposedly to promote the deployment of advanced telecommunications and information services — specifically, high-bandwidth access to the Internet.[1]

[1] Petition of Bell Atlantic (filed January 26, 1998) ("Bell Atlantic Petition"); Petition for Relief [filed by U S WEST] (filed February 25, 1998) ("U S WEST Petition"); Petition of Ameritech Corporation (filed March 5, 1998) ("Ameritech Petition").

The retail Internet Service Providers ("ISPs") filing these comments[2] agree that the public interest would be served by rapid deployment of high-bandwidth Internet access to residential and small business customers on affordable terms.[3] We could not disagree more strongly, however, with the idea that the particular relief that the RBOCs seek will advance that goal.

With the development of xDSL technology, the ILECs' embedded twisted pair copper has been transformed from an obsolete "narrowband" medium into a state-of-the-art "broadband" medium essentially overnight. As a result, the single most important thing the Commission can do to promote the availability of advanced communications services, as called for by Section 706, is to establish a clear federal rule that retail ISPs and their customers can have non-discriminatory access to unswitched clean copper circuits suitable for use with xDSL equipment.[4] With such a rule in place, the burgeoning consumer demand for higher bandwidth access to the Internet will provide all the incentive that anyone needs to rapidly deploy such equipment.

Unfortunately — although the point seems to be obscured by careful rhetoric — what the petitioning RBOCs seek appears to be the right to discriminate

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[2] Some information regarding the commenting retail ISPs, who together serve more than 80,000 end users in areas ranging from Vermont to Florida to Illinois to Washington State, is included in Attachment A.

[3] Larger customers already can and do obtain high-bandwidth Internet access by purchasing T1 or higher-speed circuits directly from their local area networks (LANs) to an ISP. The public interest is served by this activity, which would be facilitated by cost-based T1 pricing — a beneficial side effect of the recommendations in these comments.

[4] The retail ISPs submitting these comments have recently explained that this obligation should be imposed on all ILECs under the terms of Sections 201 and 202 of the Communications Act of 1934. *See* Comments of Retail Internet Service Providers, In the Matter of *Computer III* Further Remand Proceedings: Bell Operating Company Provision of Enhanced Services; 1998 Biennial Regulatory Review — Review of *Computer III* and ONA Safeguards and Requirements (filed March 27. 1998) ("Retail ISP Computer III Further Remand Comments").

against retail ISPs, other businesses, and consumers in the provision of xDSL-based services.[5] Granting the RBOCs' requested relief, therefore, would not promote the widespread availability of broadband communications services. Instead, it would tend to perpetuate the ILECs' monopoly control of a critical bottleneck asset — existing copper facilities running to the nation's homes and businesses.

There are thousands of retail ISPs eager to supply xDSL-based high-bandwidth Internet access to their customers. While individual circumstances vary, as a group, their ability to offer such services is not constrained by their financial resources or those of their customers; it is not constrained by technology; and it is not constrained by any lack of entrepreneurial energy. To the contrary, their ability to offer such services is constrained almost exclusively by the unwillingness of many RBOCs to offer unswitched, clean copper circuits to retail ISPs and their customers at cost-based rates and on reasonable, non-discriminatory terms. ***This*** is the problem the Commission needs to solve.

The RBOCs claim that under Section 706, the Commission may ignore certain pro-competitive provisions of the 1996 Telecom Act to permit the RBOCs to (a) provide in-region interLATA Internet backbone services and (b) offer end-user xDSL-based Internet access services, free in various respects from the unbundling or resale obligations that would normally arise under Section 251(c).[6] Section 706, however, does not provide such authority because Section 706 itself directs the Commission to promote

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[5] The term "xDSL" refers to any of the various forms of Digital Subscriber Line ("DSL") technology. What these technologies have in common is the use of digital signal processing techniques to send very high rates of digital information over "plain old twisted pair" copper circuits. Also, the rate at which data can be sent increases as the length of the copper circuit decreases. To maximize bandwidth to the customer, therefore, it is necessary to locate the "upstream" end of the xDSL circuit as near to the customer as can practically be arranged.

[6] The different RBOC petitions take slightly different approaches to this issue. Each is separately addressed in the body of these comments.

competition. As a result, it would never be appropriate to rely on Section 706 to waive the key pro-competitive obligations embodied in Sections 251 and 271.

The relief the RBOCs seek is particularly inappropriate because, from the retail ISPs' perspective, the "problem" the RBOCs are seeking to solve is almost entirely of their own creation. The most simple and direct way to facilitate the deployment of advanced, high-bandwidth access to the Internet — and thus advance the goals of Section 706 — is to make it easy for new and existing retail ISPs to offer such a service. This would involve giving retail ISPs non-discriminatory access to unswitched, clean copper circuits to end user customers. The customer and the ISP could then attach appropriate xDSL equipment to these circuits and provide the customer with the maximum technically feasible bandwidth. Rather than make this process easy, however, in general the RBOCs have made it hard, whether by withdrawing pre-existing tariffs for "dry copper" alarm circuits or by refusing to allow retail ISPs sufficient effective "collocation" rights to make the service work.[7]

If promoting deployment of advanced services is important — and it is — the Commission should take the opportunity presented by the RBOCs' filings to direct all ILECs to offer a technically and economically non-discriminatory, cost-based, federally tariffed "unswitched clean copper circuit" service to end users, including ISPs. This carefully targeted, pro-competitive relief — unlike that sought by the RBOCs — would, consistent with Section 706 (and the rest of the Act) harness the forces of

[7] Retail ISPs as such do not need "collocation;" they need non-discriminatory access to unswitched, clean copper circuits. The technical characteristics of xDSL equipment, however, may create circumstances where the only way to meet a non-discrimination requirement is by means of collocation. *See* Retail ISP Computer III Remand Comments at 18-19.

competition to solve any problems that might now exist regarding retail access to high-bandwidth Internet connectivity.[8]

In this regard, it is totally beside the point that the RBOCs all seem willing to grudgingly allow competing local exchange carriers ("CLECs") to collocate and obtain access to unbundled copper loops. Retail ISPs as such are not carriers; they are businesses that (like many others) use local telecommunications services as an input to the production of their own offerings to consumers. With xDSL technology, both consumers and the retail ISPs who serve them need (and, under Section 201, are entitled to) a simple, basic local telecommunications service: unswitched copper circuits, offered at cost-based rates and on economically and technologically non-discriminatory terms. No legitimate purpose would be served by forcing ISPs to become carriers simply to try to pry out of the incumbent LECs ("ILECs") some version of this useful, simple, basic service. Instead, the ILECs should be required to provide this service under their fundamental obligation, embodied in Sections 201 and 202, to provide service on reasonable and non-discriminatory terms.

The retail ISPs filing these comments are more directly concerned with the RBOCs' behavior in local telecommunications markets than with their activities in interLATA markets. This concern controls our view of the RBOCs' proposed Section 271 relief. The purpose of Section 271 is to provide a "carrot" to the RBOCs: if they forswear their traditional monopolistic ways in local telecommunications markets, then the law permits them to enter in-region interLATA markets. As noted above, widespread deployment of high-bandwidth Internet access requires ***more*** effort to open up monopoly segments of the local telecommunications infrastructure than the RBOCs

[8] This simple arrangement would also go far towards eliminating Internet-related traffic on the RBOCs' circuit-switched networks. There is no basis, therefore, for Ameritech's claim that the problem of Internet traffic on local networks is "difficult to solve." *See* Ameritech Petition at 7. *See also* Bell Atlantic Petition at 16-17.

have generally been willing to undertake so far. For this reason, it would be senseless to do anything that would ***lower*** the incentives of the RBOCs to open up their local monopolies. Yet, that would be the inevitable effect of granting the Section 271 relief the RBOCs seek. Indeed, if offering normal interLATA voice telephony has not been enough of a "carrot" to motivate RBOCs to meet the requirements of Section 271, perhaps the prospect of offering in-region interLATA Internet backbone service will be. The Commission, therefore, should deny the RBOCs' requested interLATA relief as well.

2. Section 706 Precludes The Commission From Granting The "Local" Relief That The RBOCs Have Requested.

a. Any Relief Under Section 706 Must Affirmatively Promote Competition.

The RBOCs claim to have discovered a problem: congestion on the Internet backbone and a shortage of high-bandwidth end-user connections to the Internet.[9] The access of all Americans to the high-bandwidth services they deserve — and to which Section 706 is directed — is, supposedly, in jeopardy. If the RBOC petitions are to be credited, only the RBOCs' financial muscle and sophisticated networks can rescue the country from the shocking and inexplicable failure of market forces to meet this (seemingly obvious) consumer demand.[10]

The RBOCs propose a two-part solution to this problem: abrogate the interLATA restriction in Section 271 so that they may offer in-region Internet backbone service; and abrogate the unbundling, resale and non-discrimination requirements of

[9] *See, e.g.*, Bell Atlantic Petition at 12-17; Ameritech Petition at 5.

[10] *See* Bell Atlantic Petition, Attachment 2 ("White Paper") at 51-52.

Section 251.[11] Neither of these special regulatory preferences should be granted, because both are directly contrary to the language and purpose of Section 706.[12]

Both Section 706(a) and Section 706(b) are relevant to the matters now before the Commission. Section 706(a) provides that the Commission:

> shall encourage the deployment on a reasonable and timely basis of advanced telecommunications capability to all Americans ... by utilizing, ***in a manner consistent with the public interest, convenience and necessity***, price cap regulation, regulatory forbearance, ***measures that promote competition in the local telecommunications market,*** or other regulating methods that remove barriers to infrastructure investment.

Section 706(a), therefore, requires that any Commission action meet a traditional "public interest, convenience, and necessity" test, including, specifically, measures that promote competition in "the local telecommunications market." In this regard, it is clear that the "public interest" in telecommunications in general, and local telecommunications markets in particular, specifically includes the promotion and preservation of competition.[13]

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[11] *See* Bell Atlantic Petition at 3-4; Ameritech Petition at 2-3; U S WEST Petition at 1, 4-5.

[12] The RBOCs do not directly address the ways in which the relief they seek would also violate Sections 201 and 202, and so do not expressly seek forbearance from the application of those provisions. This is probably because the RBOCs do not want the Commission (or anyone else) to focus on the truly "basic" communications service that the RBOCs should be required to offer on non-discriminatory terms in connection with, and as a result of the development of, xDSL technology. *See infra. See also* Retail ISP Computer III Further Remand Comments.

[13] For example, the Commission has recently concluded that the "public interest" with regard to local telecommunications markets entails "promoting competition." *See* In the Matter of Southwestern Bell Telephone Company, Tariff F.C.C. No. 73, *Order Concluding*
(continued...)

Section 706(b) relates to the general inquiry the Commission must undertake to assess the availability of advanced telecommunications capability. This provision is even more direct in its mandate that any relief the Commission orders must be pro-competitive in nature. Section 706(b) provides that if an inquiry indicates that "advanced telecommunications capability" is not "being deployed to all Americans in a reasonable and timely fashion," the Commission:

> shall take immediate action to accelerate deployment of such capability by removing barriers to infrastructure investment ***and by promoting competition in the telecommunications market.***

These two provisions make clear that any measures the Commission takes to encourage the development of advanced, high-bandwidth services "to all Americans" pursuant to its authority under Section 706 ***must be measures that promote competition.***

This is hardly a radical or surprising conclusion. The overriding purpose of the Telecommunications Act of 1996, of which Section 706 is a part, is to promote competition in all telecommunications markets. As a result, however, it would be quite anomalous for the Commission to conclude that Section 706 could ***ever*** authorize forbearance from enforcing any aspect of Section 251 or Section 271, both of which are key pro-competitive provisions in the 1996 Act. This conclusion is even more clear in

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[13](...continued)
Investigation and Denying Application for Review, 12 FCC Rcd 19311 (1997) at ¶ 54. And, as the Commission recently stated in another context, the Communications Act "charges the Commission with 'regulating interstate and foreign commerce in communication by wire and radio so as to make available, so far as possible ... a rapid, efficient, Nation-wide, and world-wide wire and radio communication service with adequate facilities at reasonable charges . . . .' In carrying out that charge over more than 60 years, the Commission has long considered competition issues in applying the public interest standard." In the Matter of Rules and Policies on Foreign Participation in the U.S. Telecommunications Market; Market Entry and Regulation of Foreign-Affiliated Entities. *Report and Order and Order on Reconsideration,* 12 FCC Rcd 2389 (1997) at ¶ 355 (footnotes omitted).

this particular case, because the specific relief that the RBOCs have proposed is profoundly unfair, discriminatory and anticompetitive.

b. The RBOCs' Market Position Is Threatened By xDSL Technology.

As noted above, the RBOCs claim that there is a terrible problem in the market for high-bandwidth Internet access, and that extraordinary action by the Commission under Section 706 is needed to address it. Specifically, as part of the RBOCs' proposed rescue effort, they want to be permitted to offer consumers xDSL-based Internet access service.

But the fact is that today, ***right now,*** every RBOC in the country can offer high-bandwidth xDSL connections, to end users and to existing ISPs, including the RBOCs' own Internet access operations. No regulatory relief at all, much less extraordinary regulatory relief under Section 706, is needed to achieve this result.

Something is very wrong with this picture. If the RBOCs can already offer xDSL-based services, what do they want that they do not already have?

The answer appears to be that the RBOCs do not merely want to offer xDSL-based Internet access service. They also want to maintain control over how their xDSL offerings are used by third parties, in order to benefit their own position in the market. As a result, in their petitions, what they are asking the Commission to do is to establish a regulatory structure under which they can continue their traditional role as monopoly gatekeepers, directing as much of the revenue from high-bandwidth Internet access as possible into their coffers and away from those of competitors.

At bottom, therefore, the purpose of the pending Section 706 petitions is not to facilitate high-bandwidth access to the Internet. The purpose is to perpetuate and expand the scope of services over which the RBOCs exercise monopoly control.

To understand this situation, the Commission needs to remember the key technical advance represented by xDSL technology: all it needs to work is a relatively clean, short, unswitched copper communications path. Copper. Point-to-point. No switching. No multiplexing. No fiber optics. No SONET. No intelligent network. No SS7. Just clean, unswitched, basic copper telecommunications paths, with xDSL equipment on both ends.

For this reason, xDSL is the RBOCs' worst nightmare. It takes their visions of providing consumers with technically sophisticated, high-value communications services[14] (natural enough, for telecommunications companies) and dissolves them in the clear, cold light of technical progress. The key technical sophistication needed to make xDSL work is embedded in the equipment. Essentially all of the RBOCs' elaborate embedded networks are irrelevant to xDSL. As a result, — other than their raw and essentially unchallenged monopolistic control over the copper communications paths on poles and through conduits to end users — the RBOCs are irrelevant to xDSL as well.[15]

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[14] *E.g.*, Bell Atlantic states that it wants "to be the premier provider of network services in the industry." www.bell-atl.com./invest/fininfo/annual97/index.htm. U S WEST states that it "provides integrated communications solutions that meet customers' needs and improve their lives." www.uswest.com/inc/investorinfo/annuals/annual96/html/comindex.html.

[15] For this reason, Ameritech's claim (Ameritech Petition at 24) that new entrants are "no less able to construct ***new broadband facilities*** than is an incumbent LEC" is irrelevant. The issue at hand is not the "construction" of "new broadband facilities." The issue at hand is how to encourage the rapid deployment of xDSL equipment, which ***converts*** existing, (formerly) ***narrowband*** facilities — twisted pair copper — ***into*** "broadband facilities."

The RBOCs probably find this situation maddening. Did they really struggle for fifteen years after divestiture, investing billions of dollars along the way, to establish reputations and identities as high-value, sophisticated communications firms, just to be relegated to selling ***copper*** when the "information age" finally arrives? That, however, is the basic technical and economic reality of xDSL technology.[16]

For these reasons, the Commission must be highly skeptical of RBOC efforts to avoid providing clean, unswitched copper circuits to retail ISPs and other end users. "Plain vanilla" copper circuits are not glamorous, exciting, "high tech," or high-margin. They are, however, precisely what the RBOCs should be required to provide, at cost-based rates and on non-discriminatory terms and conditions, in order to promote the rapid and widespread deployment of high-bandwidth Internet access.

c. The RBOCs' "Local" Relief Would Impede, Not Promote, The Competitive Availability Of xDSL-Based Internet Access Service.

As noted above, the RBOCs are asking the Commission to establish a regulatory structure under which they can continue their traditional monopolistic role, both in connection with the offering of clean, unswitched copper transmission paths — which they do not want to do very much at all — and in their role as xDSL-based transport service providers, where they want to retain as much of the revenue from high-

[16] Because xDSL technology significantly lowers the cost of local transport facilities, the Commission should disregard Ameritech's vague references to "the already substantial costs of building and operating advanced data networks." Ameritech Petition at 16. Just like a circuit-switched voice network, a packet-switched data network fundamentally consists of transmission links and switching devices located at nodes where the links intersect. The key distinction here is that for data traffic, packet switching makes ***more efficient use*** of the links than circuit switching does. What xDSL technology does, in economic terms, is lower the cost of links, both in absolute terms and relative to switching functions. The natural economic result is a strong incentive for end users to demand increasing numbers of unswitched xDSL links in preference either to lower-bandwidth unswitched links or links that utilize circuit switching.

bandwidth Internet access as possible. Obviously, fundamental regulatory discretion prevents them from stating these objectives forthrightly. Instead, the different RBOCs approach this delicate issue in different ways.

Bell Atlantic's petition on this point is oblique to the point of being incomprehensible. It states that its xDSL Internet offering must be allowed to be exempt from normally applicable unbundling and resale obligations.[17] But it provides no discussion of the ease with which xDSL equipment can be used with "plain vanilla" copper transmission paths; no discussion of its willingness (or unwillingness) to offer a "plain vanilla" unswitched copper circuit service to retail ISPs; and no discussion of the competitive impact on retail ISPs of a bundled xDSL/Internet access service.

U S WEST takes a different approach. It recognizes that retail ISPs have an interest in high-bandwidth Internet access,[18] and touts its existing intraLATA packet-switched transport service as useful to retail ISPs. But the Commission should not be confused by what U S WEST says it ***will*** do into ignoring the crucial issue, which is whether, and under what terms, retail ISPs and their customers will be permitted to order clean, unswitched copper transmission paths at cost-based rates and on economically and technologically non-discriminatory terms compared to carrier-affiliated ISPs, including U S WEST's own ISP affiliate(s).

U S WEST states that it is not seeking to be exempt from providing competing ***carriers*** access to unbundled copper loops that those ***carriers*** can use to offer an xDSL service.[19] But for reasons the retail ISPs have explained elsewhere, the fact

[17] *See* Bell Atlantic Petition at 3-4, 21.

[18] U S WEST Petition at 51-52.

[19] *See* U S WEST Petition at 4.

that CLECs may be able to obtain unbundled loops is cold comfort to ISPs with customers served from central offices with only a few CLECs — or none at all.[20]

What retail ISPs and their customers need, however, is not an unbundled "element" of U S WEST's network. What retail ISPs and their customers need is access to the underlying basic telecommunications ***service*** upon which the effective use of xDSL CPE depends: clean, unswitched, point-to-point copper transmission paths of suitable length for the xDSL equipment to work. In this regard, U S WEST states that it is not seeking an exemption for applicable ONA requirements in connection with its xDSL-based Internet access service.[21] Indeed, U S WEST goes so far as to state that it will make "basic xDSL service" available to "all ISPs ... subject to [ONA] principles."[22]

While encouraging, this U S WEST statement seems to be directly at odds with its well-publicized recent efforts to ***withdraw*** its retail "dry copper" tariffs at the state level. In this regard, the proper application of ONA principles (and, indeed, the basic principles of "reasonable service" under Section 201 and non-discrimination under Section 202) to xDSL-based Internet access unequivocally requires that the RBOC offering such a service make clean, unswitched copper circuits available to retail ISPs

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[20] *See* Retail ISP Computer III Further Remand Comments at 12-13.

[21] U S WEST Petition at 51.

[22] *Id.* The retail ISPs filing these comments suspect that they and U S WEST would have substantial disagreements about what "Open Network Architecture principles" require in the context of xDSL. As noted elsewhere, the technical characteristics of xDSL equipment require that the "upstream" end of the xDSL circuit be as close to the customer as possible in order to maximize available bandwidth. In practice, this means that independent ISPs must be able to connect ***their*** xDSL equipment to the copper circuit reaching a particular end user no farther away from that end user than the ILEC's (or other carrier-affiliated) ISP would connect xDSL equipment. In many cases, that location may be the central office. *See* Retail ISP Computer III Remand Comments at 14-19. We invite U S WEST to clarify its views on these matters in its reply comments.

and end user customers.[23] If this indeed is U S WEST's intention, it should clarify that intention in its reply comments.

Ameritech, like U S WEST, seems to implicitly recognize that retail ISPs will be affected by an integrated RBOC xDSL-based Internet access offering.[24] Its proposal, however, is at bottom no better, and probably worse, than U S WEST's. Like U S WEST, Ameritech acknowledges that competing ***carriers*** would be able to access unbundled Ameritech loops in order to provide their own xDSL-based service.[25] Also like U S WEST, however, Ameritech seems utterly oblivious to the fact that what retail ISPs need is a simple, basic communications service — clean, unswitched, point-to-point copper circuits, at cost-based rates and on technically and economically non-discriminatory terms.

Ameritech does add an additional wrinkle to the discussion of this issue. Ameritech proposes to use its copper loops to offer both xDSL service and voice service on the same loop. Having chosen for its own purposes to pursue technology that integrates these two functions, Ameritech wants to be excused from having to unbundle them.[26] Presumably, a retail ISP seeking to provide xDSL-based Internet access to an end user in Ameritech's territory would either have to take on a customer's POTS needs along with Internet access needs — if ISPs could have access to such arrangements at all — or abandon the market to Ameritech's integrated offering.

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[23] *See* Retail ISP Computer III Further Remand Comments at 14-19.

[24] Ameritech makes various references in its Petition to "data service competitors." If Ameritech means something other than retail ISPs by this phrase, it should clarify its meaning in its reply comments.

[25] *See* Ameritech Petition at 18.

[26] Ameritech Petition at 23.

From the perspective of the retail ISPs filing these comments, therefore, the situation appears to be as follows. The RBOCs want to offer a high-bandwidth Internet access service, with the "Internet access" functions bundled with the xDSL-based transport between an end user and an end office (or nearby location). But while the RBOCs seem to grudgingly acknowledge that they must still provide unbundled copper loops to competing ***carriers***, they have failed to address the needs of ***existing retail ISPs*** to be able to compete with the RBOCs' Internet access offerings.

The result of granting relief of this sort is easy to see. If the only source of high-bandwidth Internet access service is from the RBOC itself (or, possibly, from another carrier), then the retail ISP business as it now exists will disappear. This will not occur because the RBOCs (or other carriers) are more efficient, more responsive to consumer needs, more technologically advanced, or more willing to invest. It will occur because retail ISPs will have been denied access to a simple, basic telecommunications service they need to compete — clean, unswitched copper circuits to their customers, with a circuit length no greater than the circuit lengths available to the RBOCs' own ISP operations. Thousands of aggressive, entrepreneurial, technically sophisticated firms will be destroyed.[27]

It is inconceivable that such a profoundly anticompetitive result is remotely consistent with Section 706. Most fundamentally, there is no basis to believe that accommodating the RBOCs' desires in this way will actually improve the degree to which high-bandwidth Internet access is available to "all Americans." To the contrary, existing retail ISPs are much more likely to aggressively pursue the promotion of high-

[27] From this perspective, Ameritech's blithe assertion (Ameritech Petition at 18) that "whatever control over so-called bottleneck facilities Ameritech may once have had has been largely dissipated" is — at least from the perspective of retail ISPs — totally untrue. There is ***no*** other source for copper circuits to end users — particularly residential and small business end users — than the ILEC.

bandwidth Internet access than are the RBOCs.[28] This is because Internet access is the retail ISPs' core business. Moreover Section 706 directs the Commission to take steps that are "consistent with the public interest." It cannot be consistent with the public interest to effectively destroy the current competitive market for Internet access by handing the entire business over to the RBOCs and perhaps a few others.

What the RBOCs appear to have forgotten in their carrier-centric approach is that retail ISPs are businesses which use local telecommunications services as an input to the services that they provide to their customers. As such, xDSL technology creates a demand by retail ISPs and their customers for access to a simple, basic telecommunications service — clean, unswitched copper circuits — which, when combined with xDSL customer premises equipment ("CPE"), allows retail ISPs to provide a vastly improved service to their customers.

In this regard, the RBOCs' argue that without special regulatory breaks they will lack "incentives" to deploy xDSL equipment.[29] This claim should be rejected. xDSL equipment is basically CPE: when connected to both ends of an underlying basic telecommunications service — a clean, unswitched copper circuit — it allows the parties on each end to communicate. In this respect, xDSL equipment is the regulatory equivalent of the analog modems that end users and ISPs use today to exchange data via the circuit-switched network. What is new and different — and extremely valuable — about xDSL equipment, as compared to analog modems, is (a) it is digital end-to-end, and (b) it permits much higher data communications rates if the unswitched copper circuit is clean enough and short enough.

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[28] *See* Letter from R. Annunziata to W. Kennard dated March 5, 1998 at 2 (noting relative lack of investment by RBOCs compared to other industry participants).

[29] *See* Bell Atlantic Petition at 15-15, 17; Ameritech Petition at 22-23.

Local exchange ***carriers*** as such (whether ILECs or CLECs) generally do not have, or need, "incentives" to deploy ***customer*** premises equipment. The incentive to deploy CPE — such as analog modems, or, now, xDSL equipment — is felt by end users and businesses who can take advantage of the new capabilities that CPE offers. In the case of xDSL equipment, all that Ameritech and the other ILECs need to do is ***get out of the way*** by providing simple, basic unswitched copper circuits at cost-based rates and on economically and technologically non-discriminatory terms. The consumer demand for high-bandwidth access to the Internet will then provide all the "incentive" that is needed to rapidly deploy xDSL technology.

3. Any Commission Action Under Section 706 Should Include A Requirement That ILECs, Including The Petitioning RBOCs, Must Offer Unswitched Clean Copper Circuits As A Federally-Tariffed End-User Service At Cost-Based Rates And On Reasonable And Non-Discriminatory Terms.

For reasons we have outlined elsewhere, the RBOCs have an obligation to offer unswitched clean copper circuits as a basic service to retail ISPs (and others in their capacity as end users) independent of Section 706.[30] This obligation arises from Section 201 of the Act, because, in light of the development of xDSL technology, a request for such services is "reasonable." Moreover, if the RBOC itself (including affiliates) makes use of xDSL technology, then Section 202's non-discrimination requirement obliges the RBOC to offer the service to unaffiliated third parties on non-discriminatory terms.[31]

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[30] *See* Retail ISP Computer III Further Remand Comments at 14-19. Probably the most important area of potential technical discrimination with xDSL technology is the length of the copper circuit offered to the non-affiliated third party. Non-affiliated third parties seeking to use xDSL technology to offer high-speed Internet access must be able to connect their xDSL equipment no further away from the customer than any carrier-affiliated ISP is permitted to connect. In practical terms, this means that retail ISPs are entitled to some form of effective collocation rights. *See id.* at 17-19.

[31] *Id.*

Here, however, the RBOCs have affirmatively claimed that there is a bandwidth shortage for consumer Internet access. and that the Commission should use its authority under Section 706 to remedy the problem. The retail ISPs agree that the public interest would be served by the Commission taking regulatory steps to promote the availability of high-bandwidth Internet access to all Americans. There is no reason, however, for the Commission to accept the RBOCs' invitation to engage in legally questionable efforts to water down or eliminate the key pro-competitive provisions of Section 251 and Section 271.

If the Commission wants to truly encourage the widespread and rapid deployment of high-bandwidth Internet access, all that the Commission needs to do is order ILECs to fulfill their obligations under Sections 201 and 202, and offer clean, unswitched point-to-point copper circuits to end users (including retail ISPs) at cost-based rates and on economically and technically non-discriminatory terms. This would fully unleash market forces to satisfy the explosion of demand for high-bandwidth Internet access. This would also eliminate the Hobson's choice that most retail ISPs and their customers face today: send Internet traffic through the low-bandwidth circuit-switched public network; or pay inflated T1 rates for direct connections between end users and retail ISPs.

In this regard, the retail ISPs filing these comments acknowledge that it is possible that the retail ISPs filing these comments have misunderstood the RBOCs' plans and proposals. Indeed, while none of the RBOCs directly states that it ***will*** provide unswitched, clean copper circuits to connect ISPs and end users, none of them outright denies it, either. It is therefore possible that the petitioning RBOCs are fully prepared to make clean, unswitched copper circuits available to retail ISPs at cost-based rates and on technologically and economically non-discriminatory terms.

In order to avoid misunderstanding, the retail ISPs filing these comments invite the petitioning RBOCs to clarify this matter in their reply comments. The retail ISPs are specifically concerned with being able to obtain access to clean, unswitched point-to-point copper circuits at cost-based rates and on economically and technologically non-discriminatory terms (compared to the use of such circuits by the RBOC's or other carrier-affiliated Internet access services). A commitment from the RBOCs that such services would be available would go far towards eliminating the retail ISPs' current concerns about the RBOCs' petitions as currently framed.

4. The Commission Should Be Extremely Cautious In Relaxing The Requirements Of Section 271 On The Basis Of Section 706.

The retail ISPs filing these comments are not long distance carriers (whether for voice or Internet traffic), and therefore do not have a direct business interest in whether the RBOCs are permitted into interLATA markets. Retail ISPs, however, are customers of the RBOCs in local telecommunications markets. As a result — and because of the linkage between local and interLATA markets established by Section 271 — retail ISPs do have an interest in the RBOCs' request for relief from Section 271 to be allowed to offer in-region Internet backbone service.

First, to the extent that a shortage of Internet backbone capacity exists, it would seem that the normal operation of market forces would lead providers with existing interLATA communications capacity to redeploy some of that capacity for Internet backbone use, and at the same time encourage new entrants to place additional capacity. The RBOCs have presented no evidence that these market forces are not operating properly or that any transitory backbone capacity shortages will not be

addressed promptly by these or other means. Their case for interLATA relief, therefore, seems to be quite weak on its face.[32]

Second, while the retail ISPs do not have a direct concern with RBOC activities in interLATA markets, they have profound concerns about RBOC activities in local telecommunications markets. One of the key purposes of Section 271 is to ensure that the RBOCs have fully opened up their monopoly local markets to competition before the RBOCs are allowed into interLATA markets. By conditioning interLATA relief on the opening up of local markets, Section 271 provides a strong and healthy incentive for the RBOCs to overcome their natural and (in pure financial terms) understandable aversion to surrendering their monopoly position.

To the extent that Internet backbone traffic represents an important and growing segment of the interLATA telecommunications market, the only logical conclusion is that allowing the RBOCs into the interLATA Internet backbone market without requiring compliance with Section 271 will reduce whatever incentive they now have to cooperate in opening up their local telecommunications monopolies to competition. It is hard to see, therefore, how allowing the RBOCs into the Internet backbone market could possibly be consistent either with the general pro-competitive purposes of the Telecommunications Act of 1996 or with the specific provisions of Section 706, discussed above, that require Commission actions under that section to ***promote*** competition in local (and other) telecommunications markets.

[32] The retail ISPs commenting here take no position at this time with regard to (a) the degree of concentration on the Internet backbone that will result if the MCI/WorldCom merger is finally consummated or (b) the degree to which a concentrated Internet backbone market might affect the retail delivery of Internet access service. *See* Bell Atlantic Petition at 22; *see id.*, Attachment 1 (Declaration of Prof. Thomas W. Hazlett), *passim*.

5. Conclusion.

For the reasons stated above, the Commission should not grant the relief sought in the RBOCs' Section 706 petitions, and should specifically and unequivocally reject any form of relief that would permit the RBOCs to provide their own (or other carrier-affiliated) ISP operations with access to unswitched copper circuits without requiring that other retail ISPs have technically and economically non-discriminatory access to this basic service. Otherwise, to paraphrase from an unhappy time in our Nation's history, the Commission will destroy the market for retail Internet access, supposedly in order to save it.

That said, now that the petitioning RBOCs have asked the Commission to take steps to encourage the deployment of advanced communications capabilities, the Commission should take steps that — unlike the relief requested by the RBOCs — will actually advance that goal. Specifically, on the basis of Sections 201 and 202 of the Communications Act of 1934, and on the basis of Section 706 of the Telecommunications Act of 1996, the Commission should direct the RBOCs (and all other ILECs) to offer a federally-tariffed, cost-based unswitched clean copper circuit service on technically and economically reasonable, non-discriminatory terms. This

simple step would do more than any almost other decision to encourage the availability of high-bandwidth Internet access to all Americans.

Respectfully submitted,

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Dated: April 6, 1998

Attachment A
Commenting Retail ISPs

1. **APK Net, Ltd.**

APK Net, Ltd. is Ohio's oldest commercial Internet service provider, founded in 1991. APK Net serves 5,500 customers in 10 counties in Northern Ohio, and provide services to a mix of residential, small business and institutional clients..

2. **Cyber Warrior, Inc.**

Cyber Warrior has been in business since 1994. The company currently serves approximately 1,000 customers, including more than 100 dedicated lines, by providing services such as Internet access, Web hosting and design, and local bulletin board service. Cyber Warrior currently employs about 35 people.

3. **Helicon On-Line, L.P.**

Helicon Online, L.P. was formed in march of 1996 and supplies Internet access to over 17,000 customers, primarily in rural Western Pennsylvania, rural Northeastern Vermont. The company provides dial up access via 33.6 analog modems and — wherever digital circuits are available — x2 56 and ISDN service. In many communities the company is the only local access number to the Internet.

4. **InfoRamp**

InfoRamp is a full service ISP with approximately 10,000 customers in Chicago, North central and Northeastern Illinois. About 90% of these customers are residential dial-up users. The company also provides web hosting for business clients and establishes dedicated point-to-point service arrangements. InfoRamp is part of a family of companies that includes Cellular Dynamics, the 19th largest cellular reseller (not agent) in the nation and Aces Group, a paging company. Altogether, the organization has over 30 employees, many of whom staff 7 retail stores and outlets in various rural areas. The company also works with a major retailer to operate a concession selling Internet, wireless and other communication services at 22 locations in Chicago and 35 locations in the surrounding suburban and rural areas. InfoRamp has been in business for 3 years.

5. **Internet Connect Company**

Internet Connect Company has been in business for approximately 3 years. Internet Connect serves the Florida area. The company currently has 30