continuing, and accelerating, challenges by the ILECs, in concert with their slow-roll approach to dealing with would-be new competitors, the ILECs have preserved their monopolies and thwarted would-be competitors.

Thus, despite initial hopes for successful implementation of the 1996 Act, the harsh reality is that RBOC challenges and intransigence have undercut much of the Act's effectiveness. In an environment where the RBOCs are resisting statutory and regulatory dictates, the last thing the Commission should do is aid the RBOCs in their endeavors by fashioning an artificial blanket exception to the critical pro-competitive provisions of the 1996 Act.

B. The RBOCs Are Ignoring Or Actively Resisting Many Section 251 and 252 Obligations

1. Failure to provide essential network facilities to CLECs

While lambasting the competitive market for not keeping up with unprecedented Internet demand, the RBOCs' own record in deploying local exchange facilities and services pursuant to signed interconnection agreements leaves a lot to be desired. One prime example is the RBOCs' failure to make the necessary capital investment to allow CLECs to actually compete in the marketplace. In a recent complaint filed in Rhode Island, Brooks Fiber, a WorldCom subsidiary, detailed the numerous and repeated ways that Bell Atlantic has breached its interconnection agreement with Brooks.[54] In particular, Brooks showed how Bell Atlantic

[54] Complaint of Brooks Fiber Communications of Rhode Island Against Bell Atlantic-Rhode Island for Insufficient and Unreasonable Service Quality, State of Rhode Island and Providence Plantations Public Utilities Commission, Docket No. 2665, filed December 4, 1997 ("Brooks Fiber Complaint").

was failing to install new incoming and outgoing interconnection trunk groups, and resolve network trouble reports, in a timely fashion.[55] Bell Atlantic's inability (or refusal) to manage its network to keep pace with Brooks' growth has led to call blockage rates of 50 to 60 percent, far higher than traffic patterns associated with Bell Atlantic's own interoffice trunk groups.

The RBOCs' failure to provide adequate facilities on a timely basis has an obvious detrimental impact on CLECs. In the case of Brooks, customers have terminated service largely because of network blockages. Moreover, these blockages contribute to the significant congestion experienced by ISPs and others at the RBOCs' local switches. Further, the RBOCs are not required to pay reciprocal compensation for calls that, for one reason or another, fail to terminate to a CLEC's network.

WorldCom faces many other instances where RBOC foot-dragging and outright refusal to provide facilities has severely hampered its ability to compete in the local exchange market. Among other things, the RBOCs' behavior demonstrates that they are not prioritizing the deployment of their resources in a way that promotes local competition.

2. Failure to pay reciprocal compensation to CLECs

The RBOCs also oppose paying reciprocal compensation to CLECs, as they agreed to do in their many interconnection agreements, for local traffic terminating to the CLEC's customer where that customer happens to be an information service provider ("ISP").[56]

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[55] Brooks Fiber Complaint at 13-14.

[56] See, e.g., BA/NYNEX 96-263 Comments at 9 (CLECs should not receive reciprocal compensation for local calls terminating to their ESP customers).

The RBOCs' wholly unsupported view -- that traffic to ISPs is interstate in nature, and therefore not subject to reciprocal compensation -- has been rejected in over a dozen different jurisdictions across the country.[57] Nonetheless, the RBOCs continue to fight such compensation requirements across their territories, and even now either refuse to pay any compensation to CLECs, or selectively pay only a fraction of what is owed. For the many critical months that CLECs were not paid, however, that many fewer network facilities could be financed and built, and fewer new customers served. That delay alone impedes competition.

3. Failure to meet Bell Atlantic/NYNEX merger conditions

Even where Bell Atlantic voluntarily agreed to abide by certain procompetitive conditions, as set forth in the FCC's order approving the Bell Atlantic-NYNEX merger, there is considerable evidence that Bell Atlantic already has reneged on its commitments. Both AT&T and MCI have separately filed detailed formal complaints accusing Bell Atlantic of a wide variety of actions (and inactions) contrary to the conditions it agreed to as part of its merger with NYNEX.[58] If these allegations are found to be true, Bell Atlantic currently is violating its own commitments to the FCC and the public.

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[57] See, e.g., State of New York Public Service Commission, Order Closing Proceeding, Case 97-C-1275, issued March 19, 1998 (local calls to ISPs are subject to payment of reciprocal compensation); Michigan Public Service Commission, Opinion and Order, Case Nos. U-11178 et al., issued January 28, 1998 (local calls to ISPs are subject to payment of reciprocal compensation).

[58] See Formal Complaint of MCI Communications Corp. v. Bell Atlantic Corp. (File No. E-98-12), filed December 22, 1997; Formal Complaint of AT&T Corp. v. Bell Atlantic Corp. (File No. E-98-05), filed November 5, 1997.

C. The RBOCs Are Ignoring Their Section 271 and 272 Obligations

While doing what they can to forestall viable local competition, the RBOCs are fighting a multi-front offensive against Sections 271 and 272 of the 1996 Act. Indeed, the filing of these petitions represents just another assault by the RBOCs on legislation they themselves lobbied for and actively supported a little over two years ago.

1. Attempting to eliminate Sections 271 and 272 completely

Bell Atlantic and US WEST are parties (with Ameritech denied party status) to SBC's challenge of the constitutionality of the 1996 Act itself. District Court Judge Joe Kendall issued a decision on December 31, 1997 striking down Sections 271 through 275 of the Act as an unconstitutional "bill of attainder" against the RBOCs.[59] While a stay pending appeal to the 5th Circuit is in place, the audacity of this latest RBOC assault on the Act should give every policymaker cause to question the RBOCs' commitment to the Act.

2. Providing interLATA Internet access services

The RBOCs also appear to be providing Internet access service in violation of the 1996 Act. Pending before the Commission since July 1996 is a petition for reconsideration filed by MFS Communications (now a wholly-owned subsidiary of WorldCom) challenging the Common Carrier Bureau's grant of a CEI plan for Bell Atlantic's Internet access service.[60]

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[59] SBC v. FCC, Civil No. 7-97-CV-163-X) (N.D. Texas Dec. 31, 1997).

[60] Petition for Reconsideration of MFS Communications Company, Inc. CCBPol 96-09, filed July 3, 1996 ("MFS Petition"); see Bell Atlantic Telephone Companies' Offer of Comparably Efficient Interconnection to Providers of Internet Access Services, Order, 11 FCC Rcd 6919 (CCB June 6, 1996).

MFS explained that, among other infirmities, Bell Atlantic's CEI plan violates Sections 271 and 272 of the 1996 Act by offering bundled, in-region interLATA information services without receiving Section 271 authorization. The FCC's Non-Accounting Safeguards Order subsequently validated MFS' reading of those provisions as prohibiting the RBOCs from providing interLATA Internet access service on a bundled basis, but indicated that the lawfulness of Bell Atlantic's Internet access service was better considered in Bell Atlantic's pending CEI proceeding.[61]

Almost twenty months after MFS' petition was filed, however, and despite five separate ex parte filings by WorldCom requesting Bureau action on the Bell Atlantic plan and a similar SBC proposal,[62] MFS' petition remains pending. Through anecdotal evidence, WorldCom understands that other RBOCs may be providing Internet access service in violation of the 1996 Act as well.[63] If the Commission ultimately enforces the Act by granting MFS' petition, Bell Atlantic and any other offending RBOCs will be required to cease their unlawful

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[61] Implementation of the Non-Accounting Safeguards of Sections 271 and 272 of the Communications Act of 1934, as amended, First Report and Order and Further Notice of Proposed Rulemaking, CC Docket No. 96-149, issued December 24, 1996, at para. 127.

[62] See Letter from David N. Porter, Vice President, Government Affairs, WorldCom, Inc., to Joseph Di Scipio, Common Carrier Bureau, FCC, CCBPol 96-09, filed June 23, 1997; Letter from David N. Porter, Vice President, Government Affairs, WorldCom, Inc., to William F. Caton, Acting Secretary, FCC, CCBPol 96-09, filed July 7, 1997; Letter from David N. Porter, Vice President, Government Affairs, WorldCom, Inc., to William F. Caton, Acting Secretary, FCC, CCBPol 96-09, filed August 21, 1997; Letter from David N. Porter, Vice President, Government Affairs, WorldCom, Inc., to William F. Caton, Acting Secretary, FCC, CCBPol 96-09, filed September 4, 1997; Letter from David N. Porter, Vice President, Government Affairs, WorldCom, Inc., to A. Richard Metzger, Acting Chief, Common Carrier Bureau, FCC, CCBPol 96-09, filed September 23, 1997.

[63] For example, the RBOCs' web sites include promotional materials that appear to offer interLATA Internet access services on a bundled basis. See www.uswest.com; www.ameritech.com; www.bellatlantic.com; www.sbc.com; www.bellsouth.com.

activities.[64]

In short, the Commission should not reward the RBOCs' for their continuing intransigence in doing what they are compelled by law and regulation to do.

V. THERE IS NO LEGAL AUTHORITY UNDER SECTION 706 TO SUPPORT THE RBOCs' PETITIONS

The flaws in the RBOCs' petitions run deeper still because they do not even meet the threshold standard of Section 706 of the 1996 Act.

Section 706 states that the FCC and state commissions:

> shall encourage the deployment on a reasonable and timely basis of advanced telecommunications capability to all Americans (including, in particular, elementary and secondary schools and classrooms) 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.[65]

Section 706(b) states that the FCC shall initiate by August 8, 1998, and complete within 180 days, "a notice of inquiry concerning the availability of advanced telecommunications capability to all Americans (including, in particular, elementary and secondary schools and classrooms)." The Commission is directed to determine "whether advanced telecommunications capability is being deployed to all Americans," and if not, "take immediate action to accelerate deployment of such capability by removing barriers to infrastructure investment and by promoting

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[64] Indeed, Bell Atlantic appears to acknowledge in its petition that Internet access service is "interLATA in nature." Bell Atlantic Petition at 12.

[65] 47 U.S.C. Section 157 nt.

competition in the telecommunications market."[66]

Stressing "the breadth and importance of the Commission's mandate under Section 706," Bell Atlantic reads Section 706 as granting the Commission "broad authority to use deregulatory tools."[67] Essentially, Bell Atlantic equates "regulating methods that remove barriers to infrastructure investment" with eliminating statutory and regulatory restrictions that Bell Atlantic claims inhibit its ability to invest in Internet backbone and packet-switching-based facilities and services.[68]

No one can doubt that one of Congress' many goals in the 1996 Act was to bring the benefits of advanced telecommunications services to all Americans. Nor can that entirely laudable goal be seriously questioned. How that goal is to be achieved, however, is another matter entirely. While the RBOCs apparently believe that Section 706 necessarily requires the Commission to immediately and unconditionally relieve the RBOCs of their obligations under the rest of the Act, WorldCom parses the language of Section 706 just a little differently.

First, context is critical. Bell Atlantic, for one, completely ignores the fact that, far from occupying a prominent position in the heart of the 1996 Act, Section 706 was placed by Congress in an obscure section entitled "Miscellaneous Provisions," located at the back end of the statute. In addition, Section 706 itself is not even a codified provision of the amended Communications Act. Instead, Congress directed that this provision be codified merely as a note to Section 157 of the Act. Congress' own treatment of Section 706 certainly does not mesh with

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[66] Id.

[67] Bell Atlantic Petition at 6.

[68] Bell Atlantic Petition at 10.

the RBOCs' grandiose claims about the supposed breadth and importance of that provision.

Second, Section 706 refers only to "advanced telecommunications capability," not to specific facilities or services. The RBOCs would have the provision apply to all packet-switched facilities and networks, and all services that use those facilities and networks, but the provision expressly is defined "without regard to any transmission media or technology." The RBOCs also fail to explain how a "capability" is the same as, or differs from, a service, facility, or technology. The Conference Report also speaks only of "capability," but then directs the Commission to assess the availability only of "equipment needed to deliver advanced broadband capability."[69] Again, the petitions do not address why the Commission's determination apparently is limited to equipment, not services.

Third, under Section 706(a), the FCC is only to "encourage" deployment. The use of this word, which means "to inspire" or "give support to,"[70] is in sharp contrast both to all the mandatory Title II requirements, and to the RBOCs' call for the FCC to actively micromanage deployment by eliminating those competitive and consumer safeguards.

A few other self-limiting aspects of Section 706 bear scrutiny. For example, the "encouragement" indicated in the provision by the Commission is not unfettered. Instead, it must be given for deployment on a "reasonable and timely" basis, not the unreasonable and premature basis requested by the RBOCs. Such encouragement also must be consistent with the "public interest, convenience and necessity" -- a classic FCC public interest test. Any proposal

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[69] Conference Report to Accompany S.652, Report 104-230, 104th Cong., 2d Sess., February 1, 1996, at 210 (emphasis added).

[70] Webster's II New Riverside University Dictionary, Houghton Mifflin Co. (1988).

that is not in the public interest -- even though it may be in a proposing entity's personal pecuniary interest -- cannot be adopted. Moreover, the provision twice mentions providing new services to schools in particular, even though the RBOCs' petitions have obvious commercial, non-educational aims.[71]

Section 706 also lists the various tools the Commission could use; these include "measures that promote competition in the local telecommunications market" and other "regulating measures."[72] The RBOCs cannot take issue with the simple fact that Congress expressed its desire in Section 706 (as well as elsewhere throughout the Act) for the FCC to actively promote local competition. Nor do the RBOCs mention that the Commission is to use "regulating measures," not deregulating measures.[73] In turn, these tools must be utilized to "remove barriers to infrastructure investment." Even though the RBOCs believe that this provision applies (naturally) only to them, the language never refers to any specific entity. One can reasonably infer, then, that Section 706 applies to all providers, not just the RBOCs. As a result, WorldCom would argue that strict enforcement of local competition provisions, rather than excusing the RBOCs from meeting their statutory obligations, will better remove the existing barriers to infrastructure investment by CLECs, CAPs, IXCs, ISPs, and others.

Further, as explained in Section II above, Section 706 is not independent of

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[71] Indeed, the letters from various universities included as attachments to Bell Atlantic's and Ameritech's petitions expressly limited their support to certain data facilities and services that the RBOCs would provide for educational purposes.

[72] 47 U.S.C. Section 157 nt.

[73] Moreover, despite Bell Atlantic's call for an end to price caps regulation of data services and facilities, the provision clearly states that the Commission is to "utiliz[e] ... price cap regulation," not eliminate it outright.

Section 10 of the 1996 Act, as Bell Atlantic claims. Among the "regulating measures" listed in Section 706(a) is "regulatory forbearance." However, Section 10(d) specifically excludes Sections 251(c) and 271 from the reach of forbearance.

The RBOCs point to other disparate provisions of the Communications Act as granting additional authority for the Commission to grant their petitions. These provisions, even taken together, fail to grant the Commission anything like the sweeping authority that the RBOCs claim. In particular, Bell Atlantic and Ameritech raise Section 3(25) of the Act, which defines the term "LATA" as described in the Modification of Final Judgment ("MFJ"), or as "established and modified" by an RBOC and "approved" by the FCC.[74] The petitioners argue that this provision allows the Commission to eliminate the interLATA restriction for data services.[75] In particular, Ameritech criticizes the "artificial construct" of LATA boundaries and urges the Commission not to "cling" to "this artificial, anachronistic legal construct"[76] The problem, of course, is that Congress did not agree that LATA boundaries have no usefulness, and retained this "construct" from the MFJ entirely intact. Further, Section 3(25) at most only allows modification, not elimination, of existing LATA boundaries, and Ameritech's call for the creation of "one, global LATA for packet-switched services" certainly exceeds any fair understanding of the concept of modification.

US WEST also claims (albeit in a footnote) that Section 157 of the amended Communications Act, entitled "New Technologies and Services," imposes a burden of persuasion

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[74] 47 U.S.C. Section 3(25).

[75] Bell Atlantic Petition at 12; Ameritech Petition at 12-14.

[76] Ameritech Petition at 12.

on persons seeking to oppose the deployment of new technology or services.[77] Again, US WEST misses the mark. Certainly WorldCom does not oppose any RBOC's deployment of new technology or services, as long as that deployment is exercised in a manner consistent with the legal requirements of the 1996 Act. Indeed, it is the RBOCs which must bear the burden of proving that the 1996 Act permits -- indeed, requires -- the "relief" they seek. WorldCom submits that the RBOCs have come nowhere near meeting that burden.

WorldCom suggests that another provision of the Act is more relevant than anything the RBOCs can muster. Section 230(b)(2) of the Act mandates as federal policy to "preserve the vibrant and competitive free market that presently exists for the Internet and other interactive computer services, unfettered by Federal or State regulation."[78] In WorldCom's view, the optimal way that the federal government can preserve (i.e., "keep safe," "protect from harm," "maintain unchanged")[79] the Internet and other information services is to promote local competition by fully enforcing the 1996 Act, and prevent the RBOCs from providing interLATA facilities and services unless and until they met the statutory obligations established by Congress.

In addition, if Congress truly had desired and intended to "deregulate" data services and facilities, as the RBOCs imply, it could have done so explicitly in the statute. Data services, especially the Internet, obviously were in great prominence in late 1995 and early 1996. Yet for purposes of Section 251 and 271, among other provisions, Congress showed absolutely no intention of treating data services any differently from voice services.

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[77] US WEST Petition at 37 n.16; see 47 U.S.C. Section 157.

[78] 47 U.S.C. Section 230(b)(2).

[79] Webster's II New Riverside University Dictionary, Houghton Mifflin Co. (1988).

Finally, Bell Atlantic claims that Section 706(b) requires that its petition be considered by August 8, 1998. However, this provision is a general direction to the FCC, not a specific measure for Bell Atlantic's advantage. Indeed, WorldCom would welcome a general proceeding to consider Section 706, which expressly requires that the FCC promote local telecommunications competition. In WorldCom's view, the petitions most certainly would defeat that mandate by effectively granting the RBOCs Section 271 approval for free, thereby removing any RBOC incentive to comply with the pro-competitive checklist requirements. In addition, Section 706(b) contemplates a two-step process: (1) a factual inquiry to determine whether advanced services are being deployed in a reasonable and timely fashion, and (2) if not, what steps the FCC could take. WorldCom believes that the Commission must be confronted with compelling and irrefutable evidence of imminent market failure before it can even consider the RBOCs' petitions. As will be shown below, no such evidence exists.

VI. THERE ARE NO COMPELLING FACTS TO SUPPORT THE PETITIONS

Initially, Section 706 -- to the extent it applies at all -- requires the FCC to make a factual determination first, and then decide whether any regulatory response is necessary. The RBOCs' petitions are putting the proverbial cart (regulatory relief) before the horse (well-documented evidence of actual market failure). Moreover, Bell Atlantic in particular wants to run roughshod over key provisions of the 1996 Act on the basis of one highly dubious premise: the Internet backbone is so congested that the RBOCs are needed to unclog it. This premise cannot support the weight of the three petitions.

A. The RBOCs Deliberately (And Mistakenly) Conflate Medium And Message

As explained in Section II, the RBOCs' petitions rest on a fundamental misunderstanding: namely, that transmission technology (in this case, packet-switching) is the same thing as the service that is being transmitted (in this case, advanced telecommunications services). While the one permits the other, they are not equivalent. By confusing the two, however, the RBOCs want to try to convince the Commission not to exercise any regulatory role over any services that are carried over packet-switched networks, including traditional voice services. In short, the medium is not the message.

The Commission made this point abundantly clear in its Universal Service Order.[80] There the Commission agreed with the Joint Board that "'packet-switched' services can qualify as interstate telecommunications...."[81] The Commission declined to include the term "packet-switched" in its list of examples of telecommunications services, however, because "that term describes how information is transmitted rather than defining a particular service that would be ordered by a customer."[82] In other words, because packet-switching is the medium by which various services are provided, it is nonsensical to try to categorize the medium without first knowing how it is actually being used.

The Act and FCC rules further undercut the RBOCs' views. For example, the Commission's definition of "enhanced services" involves "services offered over common carrier

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[80] Federal-State Joint Board on Universal Service, Report and Order, CC Docket No. 96-45, issued May 8, 1997 ("Universal Service Order").

[81] Universal Service Order at para. 780.

[82] Id.

transmission facilities."[83] Likewise, the Act's definition of "information service" is the "offering of a capability" for sending or receiving "information via telecommunications...."[84] The Act's definition of "advanced telecommunications capability" focuses on the capability itself "without regard to any transmission media or technology...."[85] In short, all these definitions hinge on their service-specific characterizations, not on the particular type of transmission technology used to deliver those services.[86] The Commission must not allow the RBOCs to get away with their requests for deregulation of their provision of a certain type of network, as well as all types of services, including traditional voice service, to be provided over that network.

B. The RBOCs Need No Further "Incentives" To Provide Advanced Data Services

The RBOCs' concerted focus on alleged "congestion" in the Internet backbone, and their perceived need for "incentives" to deploy advanced data services and facilities throughout their respective regions, is misplaced. While demand for bandwidth throughout the Internet is obvious, this is not a problem unique to the backbone. In any event, as will be explained below, huge new investments in long distance capacity and Internet backbone are already being made in the fiercely-competitive interLATA portion of the telecommunications market.

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[83] 47 C.F.R. Section 64.702(b).

[84] 47 U.S.C. Section 153(20).

[85] 47 U.S.C. Section 157 nt.

[86] See also Universal Service Order at paras. 788-789.

In fact, the larger issue appears to be congestion at the local level. Bell Atlantic stated as much in the Internet NOI proceeding, where they took the position that the Commission must concern itself, not with any aspect of the Internet backbone, but rather with congestion in the ILECs' central office switches and facilities, and interoffice trunk facilities.[87] Even in its petition, Bell Atlantic admits in an aside that the surprising growth of the Internet "has caused some traffic congestion in certain Bell Atlantic switches, especially those located near major ISP points of presence."[88] Ameritech's petition also acknowledges that increasing Internet usage brings "continued significant network congestion" on the existing circuit-switched networks.[89] As indicated above, this inability or unwillingness to deploy sufficient local facilities not only slows services to the RBOCs' own end user customers, it also has a significant negative impact on CLECs. To the extent that the RBOCs' own switches and interoffice facilities are actually part of the problem, rather than the solution, the RBOCs' resources would be better spent there, and not on building and operating interLATA backbone networks.

The three petitioners appear to suffer from the collective delusion that they are the only entities capable of providing advanced data services to the public.[90] This is not true, of course, but certainly could be the case should the RBOCs be successful in continuing to block the ability of other entities to compete in the local market. In fact, MFS and other competitors

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[87] BA/NYNEX 96-263 Comments at i, 1-6; BA/NYNEX 96-263 Reply at 7.

[88] Bell Atlantic White Paper at 15.

[89] Ameritech Petition at 6-7.

[90] Bell Atlantic Petition at 15-17; US WEST Petition at 6-8; Ameritech Petition at 30-33.

originally beat the RBOCs to the xDSL market,[91] showing that the RBOCs' monopoly on facilities is not entirely compatible with the timely deployment of new services.

The RBOCs' assurances about their ability to compete in the data market are less than convincing. For example, Bell Atlantic brags openly about its "ability to execute advanced telecommunications projects," its "unexcelled expertise in network design and construction," and its "proven track record in providing higher-speed data services to residential and lower density areas."[92] However, if the RBOCs' prime example of the successful deployment of advanced data services is ISDN, it is not a promising one. By all accounts, the RBOCs' rollout of ISDN has been incredibly slow, has proven quite expensive to consumers, and has achieved only minimal market penetration. In fact, one RBOC executive claims that recent agreements by the RBOCs concerning xDSL standards "should allow us to avoid many of the problems that slowed delivery of ISDN to market."[93] This dubious history is highlighted in a recent column in the "Personal Technology" section of The Wall Street Journal discussing how xDSL "isn't the first high-speed Internet connection [the ILECs] have promised us."[94] The columnist argues persuasively that the RBOCs "bungled" the deployment of ISDN, and that just setting up ISDN connections -- which "aren't cheap either" -- through Bell Atlantic is "not exactly a day at the

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[91] Press Release, "MFS and UUNET Announce Plan to Rollout New xDSL Services That Redefines Internet Access for Growing Businesses," December 9, 1996; see also "Uunet to Launch High-Speed DSL Services," Web Week, January 6, 1997 (with regard to xDSL, the RBOCs are "still trying to play catch-up" to the CLECs).

[92] Bell Atlantic Petition at 15.

[93] Ackerman March 13 Speech at 4.

[94] "Enjoying Speedy Link To the Internet, After a Slow Start," The Wall Street Journal, Walter S. Mossberg, February 12, 1998, at B1.

beach" because the process is "full of hassles and expenses few average users would readily endure." His cautionary note about the promise of xDSL is "I'll believe it when I see it."[95]

Further, as is also the case with xDSL, CLECs wishing to provision ISDN service to its end user customers are completely dependent on the RBOCs to deploy the needed facilities. There is evidence that Bell Atlantic for one, is ignoring this obligation. TCG recently filed a complaint in New York alleging that Bell Atlantic has refused to provide requested capacity, including interconnection trunks and tandem capacity, to provide 64 kbps clear channel ISDN service.[96] To the extent the RBOCs are allowed to get away with such discriminatory treatment of competing providers, the RBOCs' assertions about the lack of advanced data services will become self-fulfilling prophecy.

The RBOCs make repeated references throughout their petitions to their need for "incentives" to provide advanced data services and facilities; Ameritech in particular claims that current law "cramps," "stunts," "dampens," "saddles," and otherwise has a "chilling effect" and "drag" on the RBOCs' ability to incur capital investment.[97] One straightforward response, of course, is that the Act is the Act, no matter what its consequences for individual companies. In fact, far from representing an unfortunate side effect of the Act's structure, the RBOCs' perceptions about the Act's restrictions actually demonstrate that the Act is working as intended to incent the RBOCs to comply with their legal obligations.

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[95] Id.

[96] Complaint of Teleport Communications Group, Inc. Against New York Telephone Company for Failure to Provide 64 Clear Channel ISDN Service and Facilities, New York Public Service Commission, Case No. 97-C-1532, filed September 8, 1997.

[97] Ameritech Petition at 3, 9, 16.

The RBOCs claim that current law discourages their investment and innovation because the CLECs are able to take advantage of the RBOCs' hard work and innovation. Again, the RBOCs' argument is with Congress and the statute, not the Commission. Further, under current law, the CLECs hardly get a "free ride;" they must pay for each and every element and service they use. In addition, FCC rules requiring RBOC provision of unbundled network elements and services for resale have been in place now for over a year and a half, and no RBOC appears to be tottering on the edge of bankruptcy. US WEST itself implies that its current deployment of xDSL services will generate substantial revenues for the company.[98]

The simple fact is that nothing is preventing the RBOCs today from rolling out advanced data services such as xDSL. The single best example is US WEST, which is already busily deploying frame relay service, ATM switches, and xDSL throughout its region despite laboring under its "restrictions." In fact, US WEST boasts that it has announced "the most aggressive roll-out of [xDSL] of any carrier in the country."[99] Even though US WEST later laments the limitations imposed by the interLATA restriction, the fact remains that the restriction is not actually preventing US WEST from deploying its services.[100]

Further, xDSL is its own best reason for deployment. As a promising new data

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[98] US WEST Petition at 25-26.

[99] US WEST Petition at 7.

[100] Maybe one answer is that the RBOCs actually are hesitant to deploy xDSL before it is a proven winner in the marketplace. Bell Atlantic and NYNEX reported to the FCC in the Internet NOI proceeding that there were potentially significant technical and cost problems with deploying xDSL, including a limited number of locations compatible with certain types of existing copper loops. BA/NYNEX 96-263 Comments, Attachment E, at 2. If this proves true, perhaps the RBOCs' current claims about the great promise of xDSL are just part and parcel of their "Trojan horse" strategy.

access service, and the potential foundation of numerous other vertical services, xDSL should bring the RBOCs substantial new sources of revenues, and consequently profits. In addition, customers' usage of xDSL will take data traffic off the RBOCs' local networks, thereby greatly alleviating the RBOCs' major concerns about local switch congestion caused by increased data traffic. US WEST acknowledges that its "MegaBit" xDSL service will alleviate local congestion "by offloading data traffic to a separate packet-switched network before it encounters any circuit switch."[101] Aside from its other apparent virtues, then, xDSL "contribute[s] directly to the overall efficiency of the circuit-switched network."[102]

A far better question is why the RBOCs have not deployed facilities and services where current law allows such deployment. For example, why is Ameritech not building backbone capacity in Boston, and Bell Atlantic not providing high-speed digital access services in Chicago? The 1996 Act permits -- indeed, encourages -- the RBOCs to invest in out-of-region facilities and services. If the RBOCs' response is that the only incentive to provide these facilities and services is to do so within their regions, where their local exchange facilities are located, this only shows that the RBOCs' motivation to provide Internet facilities and services is solely derived from their control of local bottleneck facilities. Plainly, then, the RBOCs' desire to invest in the Internet and advanced services, and their desire to be the only provider of those services within the reach of their local monopolies, are completely intertwined.

Nonetheless, the backbone-incentive argument is a red herring. There are many new players in the market today actually providing xDSL services without also owning or

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[101] US WEST Petition at 26.

[102] Id.

providing Internet backbone services.[103] For example, Northpoint Communications and Covad Communications, both operating out of California, have made a successful business of providing only high-speed Internet access services such as xDSL.[104]

Further, despite Bell Atlantic's complaints about the substantial risks of deploying xDSL,[105] there is no real "risk" to Bell Atlantic. The RBOCs already enjoy a higher rate of return that any other single industry segment in America. While the petitions nowhere indicate how the RBOCs would raise the billions of dollars in capital they claim is needed in order to "save the Internet," it is highly likely that the money will come straight from the unwilling pockets of captive ratepayers, especially from bloated access charge revenues. Such funding sources entail little actual risk to the RBOCs, at least in comparison to the capital demands placed on competitive service providers in the open market.

C. Bell Atlantic's Claims About Alleged Backbone Congestion Are Untrue And Unsupported, And In Any Event Do Not Offer A Viable Rationale For Granting Any Of The Petitions

Perhaps the central factual argument raised by the RBOCs in support of their petitions is the supposed congestion of the Internet backbone. The bulk of Bell Atlantic's

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[103] See, e.g., "DSL show abuzz with new players; rollout woes seen," Lorie Wirbel, EETimes, March 16, 1998, at 1; "Local Connection -- Stepped-up competition brings a service bonanza and lower prices," Mary Thyfault, InformationWeek, January 19, 1998, at 1.

[104] Id.; Press Release, Northpoint Communications, Inc., "Concentric, Northpoint Launch High Speed DSL Internet Services Aimed at Small to Medium Size Business Market," March 23, 1998, at 1; Press Release, Covad Communications Co., "Covad Communications Extends Reach of its DSL Service Through Launch of ISP Partner Program," February 9, 1998, at 1.

[105] Bell Atlantic Petition at 17.

petition discusses the issue, while both US WEST and Ameritech allude to it as a primary reason to grant their respective petitions.[106] It is fair to say, then, that the RBOCs' petitions have no credible factual basis without their backbone congestion argument.

At the outset, it is apparent that any purported concerns about Internet congestion pale in comparison to more pressing public policy concerns about the serious lack of local exchange competition. FCC Commissioner Ness recently stated publicly that, although allegations about Internet backbone congestion have been raised by certain parties:

> I see greater urgency in the problem of congestion in the facilities connecting your home to the Internet. Here, I believe that the competition we are working so hard to promote will help.... I believe that the single most important thing we can do to promote bandwidth in the "last mile" to the home is to accelerate competition among multiple providers. The more the telcos worry about losing the bandwidth market to the cable companies, and vice versa, the sooner both will be knocking on your door to offer you the services you want. So I hope we can enlist your support in breaking open the local telephone and cable monopolies.[107]

WorldCom wholeheartedly agrees with Commissioner Ness that the solution to greater bandwidth to the home is more competition in the local market, not the extension of monopoly-based market power to the Internet. There is no compelling need for the RBOCs to insure adequate investment in the Internet; in fact, with major problems on the loop and switch side, the RBOCs should focus their resources on rolling out high-speed loop facilities and switching capacity to end users and CLECs.

On its face, Bell Atlantic's backbone congestion argument fails to hold water.

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[106] See US WEST Petition at 22; Ameritech Petition at 5.

[107] Ness February 9 Speech at 4.

First, even though Bell Atlantic claims that the Internet backbone is the single biggest congestion point, its own petition cites other significant congestion points in the Internet network. For example, Bell Atlantic (1) observes that most end users use relatively slow 28.8 or 33.6 kbps modems; (2) criticizes the fact that 4,000 competitive ISPs cannot meet ISDN speeds; (3) states that 19 million servers are no faster than 56 kbps; and (4) points to apparent congestion at the NAPs.[108] Indeed, Bell Atlantic observes that "[t]he speed of Internet service can thus be choked by the computer at the far end, just as it can be choked by a modem at the near end or the backbone in the middle."[109] Ameritech also indicates that the congestion is largely in its own circuit-switched network.[110] Other observers agree that the local networks, modems, servers, and NAPs must shoulder much of the blame for perceived congestion. A recent Boardwatch magazine article, for one, points the finger of blame largely at servers and individual web sites.[111] As the article indicates, the Internet is only as fast as its slowest link, and the quixotic quest for a "clear channel" is fruitless:

> ...the entire concept of clear channel capacity is alien to the packet-switched TCP/IP networking philosophy and technical operation. In other words, it doesn't work that way, and without total redesign from top to bottom, it cannot. There is no "clear channel" to the Internet....[112]

Remarking that the "roads" comprising the Internet "are basically in good shape," the

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[108] Bell Atlantic White Paper at 8; 17-18; 26; 25.

[109] Bell Atlantic White Paper at 26.

[110] Ameritech Petition at 6-8.

[111] Boardwatch Magazine, "Internet Architecture," Jack Rickard, at 11.

[112] Id. at 10.

Boardwatch article concludes that "the bottom line is that the Internet works to about the same degree the worst part of it works."[113] Bell Atlantic's petition essentially agrees with this analysis. Noting the five separate layers of the Internet, Bell Atlantic states that "[h]ow fast an Internet subscriber can connect, or whether (s)he can connect at all, is determined by the slowest or busiest link or layer in this chain."[114] In other words, increasing the Internet backbone speed a thousand fold would do nothing to increase the speed of the Internet from the perspective of the consumer. Of course, if this view is accurate, it directly undermines Bell Atlantic's claim that the Internet backbone alone is the true, tangible source of congestion on the Internet.[115]

Next, Bell Atlantic claims that "rather than racing to add critically needed capacity, the incumbent providers are racing to consolidate and focus on business customers."[116] WorldCom wonders if anybody at Bell Atlantic reads the newspapers. Bell Atlantic's petition presents a skewed snapshot of the backbone market, and all but ignores all the many existing and new backbone providers that are entering the market and expanding at lightning speed to offer service to countless ISPs serving residential retail end users. WorldCom recently provided the Commission with such a list, which Bell Atlantic conveniently

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[113] Id.

[114] Bell Atlantic White Paper at 7.

[115] Further, under the dubious rationale of the RBOCs' petitions, the answer to these myriad congestion problems would be to just let the RBOCs take over running every aspect of the entire Internet -- modems, servers, web sites, local access, NAPs, backbone, all of it. Because not even the RBOCs would presume such a course, one is left grasping for any remaining basis for the petitions.

[116] Bell Atlantic Petition at 13.

overlooks.[117]

In addition to more established entities like AT&T, GTE, Sprint, MCI, and WorldCom itself, newer names include Qwest, IXC Communications, Williams Companies, and Level 3 Communications, all of which pouring billions of dollars into deploying advanced, packet-switched networks nationwide. A host of regional carriers, such as Norlight Telecommunications, Minnesota Equal Access Network, and KIN Network, also operate their own backbones.[118] Indeed, one new provider, AGIS, which claims to be the nation's fourth largest backbone provider and carrier of Internet traffic, has introduced a product dubbed "Backbone-In-A-Box" which allows users to configure a customized, first-tier network at speeds up to 2.45 Gbps (OC-48), and choose from 200 connection POPs across the country.[119] As FCC Commissioner Ness recently remarked, the Internet backbone "is an area in which multiple providers are making massive investments to meet burgeoning demand."[120] She noted that "today every major player in the communications world is heavily invested in the Internet," and ticked off a list of players, including Qwest and Level 3, as "making multi-billion dollar investments in the deployment of new fiber capacity...."[121]

Given the tremendous importance that the RBOCs attach to their claims about Internet backbone congestion, it is surprising that the petitions provide such scanty support for

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[117] WorldCom/MCI Reply at 34-36, 72.

[118] WorldCom/MCI Reply at 36.

[119] "AGIS Creates Turn-Key Solution for Companies Who Want to Become An Internet Backbone," Business Wire via First!, March 11, 1998, File b0311132.900.

[120] Ness February 9 Speech.

[121] Ness February 9 Speech.

this proposition. Bell Atlantic alone cites a single "study," performed by a company called Keynote Systems, with support from Boardwatch magazine, claiming that the average backbone speed is 40 kbps.[122] No other record support is provided. Bell Atlantic does not even bother to attach a copy of the study. Without the actual words of the study in the record, Bell Atlantic's characterization of the study and its results is misleading.

After obtaining and reviewing on its own Keynote's public statements about the study, WorldCom has considerable doubts about its claimed findings. First, the study was conducted in May and June 1997, and again in August and September 1997. This particular period is widely considered to be the height of public concerns about supposed network congestion. Any review of traffic patterns from this particular period is likely to be skewed.

Second, Keynote may not qualify as a disinterested analyst. Keynote's web site indicates that it is in the business of selling diagnostic services to backbone providers. Certainly it is in Keynote's own financial interest to "discover" and then publicize major problems with the backbone.

Third, despite Bell Atlantic's claims, Keynote's study does not conclude that Internet backbone congestion is the cause of the purported average speed of 40 kbps. In fact, Keynote indicates in several places that more than one culprit is responsible. For example, in one press release, Keynote states that some of the congestion centers on the Network Access Points (NAPs") where backbone providers interconnect their networks.[123] In another statement

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[122] Bell Atlantic Petition at 22.

[123] Keynote/Boardwatch Internet Backbone Index, "Frequently Asked Questions," at 5. If the NAPs are in fact a major part of the "problem" -- which WorldCom does not concede -- there is no law or regulation that prevents the RBOCs from building as many NAPs as