Mintz, Levin, Cohn, Ferris, Glovsky and Popeo, P.C.
701 Pennsylvania Avenue, N.W.
Washington, D.C. 20004

One Financial Center
Boston, Massachusetts 02111
Telephone: 617/542-6000
Fax: 617/542-2241

Telephone: 202/434-7300
Fax: 202/434-7400
www.mintz.com

James J. Valentino
Internet Address
jvalentino@mintz.com

Direct Dial Number
202/434-7363

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April 6, 1998

HAND DELIVERY

Magalie Roman Salas
Secretary
Federal Communications Commission
1919 M Street, N.W.
Room 222
Washington, D.C. 20554

Re: CC Docket No. 98-26, In the Matter of Petition of US WEST for Relief from Barriers to Deployment of Advanced Telecommunications Services

Attached hereto by XCOM Technologies, Inc. ("XCOM"), please find twelve copies of its comments filed today in opposition to the Petition of Bell Atlantic for Relief from Barriers to Deployment of Advanced Telecommunications Service. Pursuant to Commission order dated March 16, 1998, XCOM respectfully requests that its comments be incorporated into the above-referenced proceeding.

Please do not hesitate to contact me with any questions regarding this submission.

Sincerely,

James J. Valentino

JJV:lmr
Enclosures

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

Petition of Bell Atlantic Corporation for Relief from Barriers to Deployment of Advanced Telecommunications Services	)))	**CC Docket No. 98-11**

COMMENTS OF XCOM TECHNOLOGIES, INC.

David F. Callan
President and Chief Executive Officer
XCOM TECHNOLOGIES, INC.
One Main Street
Cambridge, MA 02142
617/500-0000

Bartlett L. Thomas
James J. Valentino
MINTZ, LEVIN, COHN, FERRIS,
GLOVSKY AND POPEO, P.C.
701 Pennsylvania Avenue, N.W.
Suite 900
Washington, D.C. 20004-2608
202/434-7300

Dated: April 6, 1998

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

Petition of Bell Atlantic Corporation for Relief from Barriers to Deployment of Advanced Telecommunications Services	)))	**CC Docket No. 98-11**

COMMENTS OF XCOM TECHNOLOGIES, INC.

INTRODUCTION AND SUMMARY

XCOM Technologies, Inc. ("XCOM"), by its attorneys, and pursuant to the Public Notice and Order issued by the Federal Communications Commission ("FCC" or "Commission"),[1/] hereby submits its Comments in opposition to the Petition of Bell Atlantic for regulatory relief from "restrictions impeding its expansion and offering of high-speed [broadband] services, including Internet, 'Intranet' and 'Extranet' Services."[2/] XCOM is a facilities-based competitive local exchange carrier ("CLEC") providing local data and voice services to Internet Service Providers ("ISPs") and corporate customers on a regional basis.[3/] For the reasons specified

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[1/] Public Notice, Commission Seeks Comment on Bell Atlantic Petition for Relief from Barriers to Deployment of Advanced Telecommunications Service, CC Docket No. 98-11, DA 98-184 (rel. January 30, 1998). See also In the Matter of Petitions of Bell Atlantic, US WEST, and Ameritech for Relief from Barriers to Deployment of Advanced Telecommunications Services, CC Docket Nos., 98-11, 98-26, 98-32, Order at 2 (rel. March 16, 1998).

[2/] See Bell Atlantic Petition for Relief from Barriers to Deployment of Advanced Telecommunications Service, CC Docket No. 98-11, DA 98-184 (filed January 26, 1998) ("Bell Atlantic Petition").

[3/] Founded in 1996, XCOM offers virtual point of presence to Internet Service Providers and remote access solutions to corporate customers on a regional basis over a facilities-based network. XCOM's platform separates data traffic from normal voice traffic by utilizing existing features in the public switched telephone network ("PSTN") and proprietary software. XCOM currently serves Massachusetts, New Hampshire and Rhode Island and will shortly begin service

herein, XCOM respectfully requests that the Commission deny Bell Atlantic's Petition for regulatory relief from barriers to deployment of advanced telecommunications services.[4/]

In its Petition, Bell Atlantic states that section 706 of the Telecommunications Act of 1996 ("1996 Act")[5/] "requires" the Commission "to take steps, particularly deregulatory steps, to speed up the deployment of high-speed broadband services for all Americans."[6/] Relying on this provision, Bell Atlantic's Petition seeks forbearance relief from numerous statutory and regulatory provisions, including: in-region interLATA service restrictions set forth in section 271; the pricing and unbundled network element requirements in section 251; and the separate affiliate requirements in section 272 – all as applied to Bell Atlantic's "high speed" broadband services.[7/] Significantly, Bell Atlantic asks the Commission to allow it to provide such high-

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in the greater New York and Washington, DC metropolitan areas. XCOM has also received CLEC certification in New Jersey, Virginia, Delaware, and Maryland.

[4/] XCOM notes that Ameritech Corporation and US WEST Communications Inc. have recently filed petitions raising similar legal and policy issues. US WEST Petition for Relief from Barriers to Deployment of Advanced Telecommunications Service, CC Docket No. 98-26, DA 98-469 (filed Feb. 25, 1998); Ameritech Petition for Relief from Barriers to Deployment of Advanced Telecommunications Service, CC Docket No. 98-32, DA 98-470 (filed March 5, 1998). Accordingly, XCOM respectfully request that its comments be incorporated by reference into those proceedings. See In the Matter of Petitions of Bell Atlantic, US WEST, and Ameritech for Relief from Barriers to Deployment of Advanced Telecommunications Services, CC Docket Nos., 98-11, 98-26, 98-32, Order at 2 (rel. March 16, 1998).

[5/] Pub. L. No. 104-104, 110 Stat. 56 (Feb. 8, 1996).

[6/] Bell Atlantic Petition at 1.

[7/] See 47 U.S.C. § 271(c), 47 U.S.C. § 251(c). Bell Atlantic also seeks forbearance from: (1) the wholesale discount requirement in section 251(c)(4) of the Act which enables competitors to obtain telecommunications services at a discount for resale; (2) the Commission's price cap rules governing rates for new services, 47 C.F.R. § 61.39(d); and (3) jurisdictional separations rules, 47 C.F.R. § 36 et seq. See Bell Atlantic Petition at 3. While XCOM's believes that Bell Atlantic's Petition fails on other numerous legal and factual bases, the Petition can easily be dismissed on statutory forbearance grounds alone. Accordingly, XCOM's initial comments are

speed in-region interLATA services before Bell Atlantic has taken the necessary steps to open its local market to competition, as section 271 requires.[8/] In addition, Bell Atlantic claims that the Commission should forbear from the unbundling, resale, and access obligations set forth in Section 251(c) because "the access policy of Section 251(c)" is "concerned" with voice networks and is not appropriate for advanced data networks.[9/]

Bell Atlantic's Petition is nothing more than a back-door attempt to evade critical 1996 Act safeguards which were designed to ensure that the BOCs provide new entrants with nondiscriminatory access to essential local network components on a full and fair basis. Under section 271 of the 1996 Act, Bell Atlantic is prohibited from providing most interLATA services in-region until it demonstrates to both the states and the Commission that it has opened its local exchange markets to full competition.[10/] Under the local market-opening provisions of section 251(c), Congress obligates incumbent LECs to extend interconnection, access to unbundled network elements, resale, and collocation to all other telecommunications carriers.[11/] Congress and the Commission have both recognized that section 271 and section 251(c) provide the BOCs with the statutory framework necessary to foster the development of local competition. Bell

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largely focused on the significant legal questions raised by Bell Atlantic's request for forbearance from its section 271 and section 251(c) obligations, but reserves the right to address other factual and legal issues on reply.

[8/] 47 U.S.C. § 271(d)(3).

[9/] Bell Atlantic Petition at 21.

[10/] 47 U.S.C. § 271(b)(1), (d)(1)(3).

[11/] 47 U.S.C. § 271(c). The term network element, defined at 47 U.S.C. § 153(29), has been broadly defined to include "all of the facilities and equipment that are used in the overall commercial offering of telecommunications." See Iowa Utilities Board v. FCC, 120 F.3d 753, 808-09 (8th Cir. 1997).

Atlantic's attempt to avoid these statutory requirements must be denied because it would thwart the 1996 Act's core objective of promoting local exchange competition.

In essence, Bell Atlantic posits that a significant portion of the future of telecommunications market rests in packet data networks.[12/] If Bell Atlantic's theory is true, then it is critically important to apply section 251(c) and section 271 obligations in this context. Otherwise, under Bell Atlantic's own construct, the statutes fail to achieve the Act's core objectives to open telecommunications markets and to provide the BOCs with both obligations and incentives to promote local competition.

The core objectives to promote local competition incorporated in section 271 and section 251(c) are underscored by section 10 of the 1996 Act. That section specifies the Commission's forbearance authority with respect to telecommunications carriers.[13/] While Congress grants the FCC a significant amount of forbearance authority that may be exercised upon the demonstration of certain specified conditions, the language in section 10(d) clearly prohibits the FCC from forbearing with respect to "the requirements of section 251(c) or section 271."[14/] Thus, the plain language of section 10 of the 1996 Act expressly incorporates Congress's intention that the Commission may not grant a BOC authorization to originate most in-region, interLATA services unless the BOC first fulfills its section 251(c) obligation and meets the competition checklist set forth in section 271.

[12/] See infra n.38.

[13/] See 47 U.S.C. § 160.

[14/] See 47 U.S.C. § 160(d).

Moreover, Bell Atlantic's claim that the phrase "regulatory forbearance" within section 706 provides the Commission with a separate and independent means of authority which trumps the forbearance provision and corresponding prohibitions found in section 10 is erroneous.[15/] As set forth herein, Bell Atlantic's reading of section 706 is clearly at odds with the plain meaning of the forbearance statute, violates basic rules of statutory construction, and conflicts with the structure and premise of the 1996 Act that expressly prohibits the BOCs from entering the in-region interLATA service market until they have opened their local markets to competition.

As additional support for its Petition, Bell Atlantic erroneously claims that immediate relief from interLATA service restrictions and other prohibitions would enable Bell Atlantic to invest in advanced technologies, revitalize its "hobbled" Internet access service, and promote "sorely" needed deployment and competition in advanced telecommunications services. As discussed herein, each of Bell Atlantic's arguments is meritless. Bell Atlantic and other BOCs have already announced major initiatives to upgrade their networks to handle high-speed voice and data traffic. Every BOC has launched Internet access services in an aggressive fashion. There is been no evidence to support that the success or failure of BOC Internet access services is tied to the removing core section 271 obligations set forth in the 1996 Act. Finally, the current Internet backbone marketplace is deploying high-speed advanced technologies under timetables that are truly staggering. While Bell Atlantic is certainly capable of deploying broadband facilities now, there is no indication that granting it authority to provide interLATA high speed service in this fiercely competitive marketplace is necessary to create "universally high-quality

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[15/] See Bell Atlantic Petition at 10-11; see also Ex Parte Letter from Raymond Smith, Chairman and Chief Executive Office, Bell Atlantic, to The Honorable Susan Ness, Commissioner, FCC, at 1 (dated March 5, 1998) ("Bell Atlantic Ex Parte Letter").

Internet access" for all Americans, especially where Bell Atlantic has urged the Commission to remove substantial obligations to resell or unbundle such services.

ARGUMENT

I. THE COMMISSION DOES NOT HAVE THE STATUTORY AUTHORITY TO FORBEAR FROM APPLYING THE REQUIREMENTS OF SECTION 271 AND SECTION 251(c)

By enacting the 1996 Act, Congress sought to open all telecommunications markets to competition and, ultimately, to deregulate these markets.[16/] Congress, primarily through sections 251, 252, and 253 of the 1996 Act, sought to open local telecommunications markets to competitors not only by removing legislative and regulatory impediments to competition, but also by reducing inherent economic and operational advantages possessed by incumbent local exchange carriers ("ILECs") by virtue of their historical monopoly over the local telecommunications market.[17/]

Since passage of the 1996 Act, XCOM has successfully provided competitive local exchange services to ISPs and other business customers over an advanced, data-friendly platform it has deployed in several East Coast states and the District of Columbia. XCOM's platform separates data traffic from normal voice traffic by utilizing existing features in the PSTN, such as

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[16/] See Joint Statement of Managers, S.Conf. Rep. No. 104-230, 104th Cong., 2d Sess. 1 (1996) (Joint Explanatory Statement)(the purpose of the 1996 Act is to "provide for a pro-competitive, de-regulatory national policy framework designed to accelerate rapidly private sector deployment of advanced telecommunications and information technologies and services to all Americans by opening all telecommunications markets to competition."). See also Joint Explanatory Statement of the Committee of Conference, House of Representatives, 104th Cong. 2nd Sess., Conf. Rept. 104-458 at 113 (Jan. 31, 1996).

[17/] See In the Matter of Application of Ameritech Michigan Pursuant to Section 271 of the Communications Act, as amended, To Provide In-Region, InterLATA Services in Michigan, Memorandum Opinion and Order at ¶ 10-13 (rel. Aug, 19, 1997)("Ameritech 271 Order"); see also 47 U.S.C. §§ 251-253.

Signalling System No. 7 ("SS7"), and proprietary software developed by XCOM. While XCOM is a facilities-based CLEC, it is nevertheless dependent upon Bell Atlantic and other incumbent LECs for access to certain critical local functionalities, such as collocation and SS7. XCOM requires additional functionalities from LECs such as xDSL connectivity, trunking, numbering, and interconnection. Thus, despite a state-of-the-art platform designed to covert circuit switched network traffic to Internet protocol at the earliest possible point,[18/] XCOM's ability to deliver advanced network access to its customers is ultimately dependent upon 1996 Act safeguards designed to ensure that the BOCs provide new entrants with nondiscriminatory access to essential local network components in a full and fair manner.[19/]

The 1996 Act recognizes that the BOCs have little natural incentive to help new entrants such as XCOM gain a foothold in the local telecommunications marketplace.[20/] For this reason, section 271 requires BOCs to demonstrate that they have opened their local telecommunications markets to competition as a precondition to their entry into the interexchange business within

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[18/] Recently, XCOM announced deployment of its Enterprise Digital Switch 4500 (EDS 4500). The EDS 4500 is an open architecture switching platform of which a subset of its functionality can alleviate the tandem feeder system and end office switch congestion for data calls currently found on the PSTN. See PR Newswire, "XCOM Technologies, 'The Data Phone Company™,' Deploys SS7 Bypass Solution Utilizing Enterprise Digital Switch," December 9, 1997.

[19/] See Ameritech 271 Order at ¶ 14 ("[A] competitor's success in capturing local market share from the BOCs is dependent, to a significant degree, upon the BOCs' cooperation" in the nondiscriminatory provision of local network components.). See also In the Matter of Application by BellSouth Corporation, Pursuant to Section 271 of the Communications Act of 1934, as Amended, to Provide In-Region, InterLATA Services in Louisiana, FCC 98-17, Memorandum Opinion and Order, n.23 (rel. Feb. 4, 1998).

[20/] See Ameritech 271 Order at n.1.

their service areas.[21] By doing so, Congress intended that the prospect of providing in-region interLATA service would induce the BOCs to open their local exchange monopolies to facilities-based competitors in accordance with the competitive checklist embodied in section 271.

With regard to section 271, it is clear that both Congress and the Commission share the view that the 1996 Act prohibits the BOCs from entering in-region interexchange service until they have opened their local markets to competition. For example, in discussing the Senate version of section 271, which was adopted by the Conference Committee, Senator Kerrey noted that "[t]he way to overcome this ability of the RBOCs to thwart the open local markets is to give them a positive incentive to cooperate in the development of competition."[22] Likewise, Chairman Kennard recently stated:

> To achieve the ambitious goal of deregulating the telephone industry, Congress carefully crafted a plan of action: first ensure that the local telephone market is open to competition, then allow the Bell Companies to offer long distance service. Thus, the Bell Companies would have an incentive to open up their networks to competitors in order to receive long distance authority.[23]

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[21] Section 271(c) expressly provides that a BOC's entry into the in-region long distance market is contingent upon its provision of access and interconnection in accordance with a detailed competitive checklist to a facilities-based local exchange competitor that serves both business and residential subscribers. 47 U.S.C. § 271(c)(1),(2).

[22] See, e.g., 141 Cong. Rec. S8139 (daily ed. June 12, 1995) (statement of Sen. Kerrey). During House consideration of the Conference Report, Rep. Hastert stated that "[f]air competition means local telephone companies will not be able to provide long-distance service in the region where they have held a monopoly until several conditions have been met to break that monopoly." 142 Cong. Rec. H1152 (daily ed. Feb. 1, 1996) (statement of Rep. Hastert).

[23] See Statement of William E. Kennard, FCC Chairman, on the Telecommunications Act of 1996 – Moving Toward Competition Under Section 271 (March 4, 1998). During that same speech Chairman Kennard also strongly stated: "[t]wo truths are fundamental to the FCC's role in the 271 process Congress devised: we will not grant long distance authorization to companies that have not opened their markets; we will grant entry to those that have. The law requires that it cannot and will not be otherwise." Id. See also Statement of William E. Kennard, FCC Chairman, on Section 271 of the Telecommunications Act of 1996, Before the Subcommittee on

Thus, any premature BOC entry into the in-region interexchange business would thwart the 1996 Act's core objective of promoting local exchange competition by requiring the BOCs to provide access and interconnection to their bottleneck networks. As the Commission has recognized, the BOCs "have no economic incentive, independent of the incentives set forth in section 271 . . . to provide potential competitors with opportunities to interconnect and make use of the incumbent LEC's network services."[24/]

As with section 271, the market-opening provisions of section 251(c) is another key component of the 1996 Act. Section 251(c) of the 1996 Act obligates all incumbent LECs to extend interconnection, access to unbundled elements, resale, collocation, and the duties to negotiate to requesting telecommunications carriers.[25/] By mandating that incumbent LECs make available essential facilities and functions to other telecommunications carriers, Congress recognized that such access was necessary for the local exchange market to flourish.

The critical importance of the regulatory incentive incorporated in section 271 and incumbent LEC obligations set forth in section 251(c) is underscored by the 1996 Act's provisions regarding forbearance. In keeping with Congress's desire to open competition and deregulate telecommunications market, the 1996 Act requires that the Commission forbear from

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Communications of the Committee on Commerce, Science, and Transportation, United States Senate (March 25, 1998).

[24/] In the Matter of Implementation of the Local Competition Provisions in the Telecommunications Act of 1996, CC Docket No. 96-98 (rel. August 8, 1996) ("Local Competition Order") at ¶ 55, rev'd in part, Iowa Utilities v. FCC, 120 F.3d 753 (8th Cir. 1997). See also Ameritech 271 Order at ¶ 14.

[25/] 47 U.S.C. § 251(c).

applying "any regulation or provision of [the Act]" to a telecommunications carrier or service if the Commission determines that:

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

(2) enforcement of such regulation or provision is not necessary for the protection of consumers; and

(3) forbearance from applying such provision or regulation is inconsistent with the public interest.[26/]

While the FCC's forbearance is unquestionably broad, it is not absolute because it is affected by a substantial limitation in section 10(d) of the Act.[27/] That section specifies that "the Commission may not forbear from applying the requirements of section 251(c) or section 271 under subsection (a) of this section until it determines that those requirements have been fully implemented."[28/] By prohibiting the FCC from forbearing with respect to the application of section 251(c) and section 271, the 1996 Act's forbearance provision clearly incorporates Congress's intention that the Commission may not grant a BOC authorization to originate in-region, interLATA services unless the BOC first meets the competitive checklist set forth in section 271(c)(2)(B).[29/]

[26/] 47 U.S.C. § 160(a).

[27/] Notwithstanding the limitations set forth in section 10(d) of the Act, Bell Atlantic's Petition does not, and cannot, make this fundamental showing.

[28/] See 47 U.S.C. § 160(d).

[29/] Prior Commission approval of a BOC's application to provide in-region, interLATA service is not required where the BOC provides services that are either previously authorized within the meaning of section 271(f) of the Communications Act or incidental interLATA services as defined by section 271(g) of the 1996 Act. See In the Matters of Bell Operating Companies,

In its Petition, Bell Atlantic erroneously argues that the limitations on forbearance set forth in section 10(d) of the 1996 Act are not applicable in the context of its request for regulatory forbearance for broadband services.[30] As support for position, Bell Atlantic claims that section 706(a) of the 1996 Act grants the Commission broad authority to forbear from applying section 271 interLATA restrictions or the section 251(c) interconnection obligations.[31] Section 706(a) of the 1996 Act, codified as part of a note following 47 U.S.C. § 157, requires the Commission to encourage the deployment 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 methods that remove barriers to infrastructure investment.[32]

Specifically, Bell Atlantic maintains that the phrase "regulatory forbearance" within section 706 provides the Commission with a separate and independent means of authority which trumps the forbearance provisions and corresponding prohibitions found at section 10 of the 1996 Act.[33]

Bell Atlantic's position is clearly at odds with the language of the forbearance statute, which provides that the Commission shall forbear "from applying <u>any regulation or any provision of [Title 47]</u> to a telecommunications carrier" or service under certain specified

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<u>Petitions for Forbearance from the Application of Section 272 of the Communications Act or 1934, As Amended, to Certain Activities</u>, CC Docket No. 96-149, Memorandum Opinion and Order, at ¶ 2 (rel. Feb. 6, 1998).

[30] <u>See</u> Bell Atlantic Petition at 10-11.

[31] <u>Id.</u>

[32] 47 U.S.C. § 157, note.

[33] <u>See</u> Bell Atlantic Petition at 10-11.

conditions except that the Commission may not "forbear from applying the requirements of section 251(c) or section 271 of [Title 47] under subsection (a) of this section until it determines that those requirements have been fully implemented."[34/] Thus, with respect to telecommunications carriers, Congress expressly limited the Commission's authority to forbear from any provision of the Communications Act, including section 706, to the extent it involves forbearance from the requirements of section 251(c) or section 271. Nothing in the 1996 Act supports Bell Atlantic's bald assertion that section 706 allows Bell Atlantic or any other BOC to avoid critical section 271 and section 251(c) obligations. Congress easily could have written such an exception into the forbearance statute, particularly since it did so with respect to commercial mobile service.[35/]

Bell Atlantic's reading of section 10(a) and section 706 violate basic rules of statutory construction. If, as Bell Atlantic claims, section 706 provides a separate and independent forbearance authority for telecommunications carriers than that provided in section 10(a), it would have been unnecessary to identify separately the forbearance language regarding commercial mobile service. That language becomes superfluous under Bell Atlantic's reading of section 10(a), a result that conflicts with fundamental principles of statutory construction.[36/]

[34/] See 47 U.S.C. § 160(a),(d) (emphasis added).

[35/] See 47 U.S.C. § 160(a) ("Notwithstanding section 332(c)(1)(A) of this title ...,").

[36/] See Kungys v. United States, 485 U.S. 759, 778 (1998) (plurality opinion of Scalia, J.); South Carolina v. Catawba Indian Tribe, Inc., 476 U.S. 498, 510, n.22 (1986) (statutes should not be read so as to render other provisions superfluous); cf. Communications Corp. v. FCC, 128 F.3d 735, 739-40 (D.C. Cir. 1997)(finding that the FCC's interpretation of a "premise" in assessing end user line charges violated the principle of statutory interpretation that requires construction so that no provision is rendered superfluous or insignificant).

In addition, the statutory language prohibiting the Commission from forbearing from section 271 and portions of section 251 demonstrates that Congress specifically considered and delineated the circumstances under which the Commission's forbearance authority would be prohibited, and thereby militates against construing section 706 as authorizing an exception to the forbearance authority specified in section 10(a).[37] Finally, interpreting section 706 in this manner violates basic rules of statutory construction by conflicting with the structure and premise of the 1996 Act.[38] As Chairman Kennard recently noted, allowing BOCs into the interLATA services market before they open up their local markets to competition would effectively "turn the 1996 Act on its head."[39]

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[37] See United States v. Smith, 499 U.S. 160, 166-67 (1991)(statutes should not be interpreted to create exceptions in addition to those specified by Congress); Natural Resources Defense Council, Inc. v. Reilly, 976 F.2d 36, 41 (D.C. Cir. 1992)(recognizing the general rule that, where the statute lists explicit exceptions, others should not be implied); Transohio Savings Bank v. Director, Office of Thrift Supervision, 967 F. 2d 598, 615 (D.C. Cir. 1992)(same).

[38] See Eli Lilly & Co. v. Medtronic, Inc., 496 U.S. 661, 670 (1990); Gwaltney of Smithfield, Ltd. V. Chesapeake Bay Foundation, Inc., 484 U.S. 49, 59-60 (1987) (statutory language can be meaningful only if construed in a manner consistent with the structure and policy goals of the whole act); Pilon v. United States Dep't of Justice, 73 F.3d 1111, 1118-19 (D.C. Cir. 1996)(applying a framework of construction that considers the purposes behind the statute as a whole). See also National Wildlife Federation v. Gorsuch, 693 F.2d 156, 178-79 (D.C. Cir. 1982).

[39] See Kennard, "Moving Toward Competition," at 7. Bell Atlantic's lawyers imply that Bell Atlantic's immediate entry into the high-speed broadband marketplace would not impede its efforts to seek interLATA entry because the market for such service is quite small. See Bell Atlantic Petition at 20-21. Press reports, however, indicate that Bell Atlantic's business personnel view entry into the interLATA high-speed data market as significant, or more significant, than entry into the long distance voice market. Significantly, Bell Atlantic Chairman Ivan Seidenberg recently stated: "[W]hat about the opportunities that will open once Bell Atlantic can address the data market unfettered by long distance restrictions? As significant as the current opportunity is [nearly $2 billion with a 25 percent annual growth rate], it is only a small portion of the total data market once long distance and Internet backbone revenues are added." See Bell Atlantic Press Release, "Bell Atlantic Builds on Strength in Business Data

In summary, Bell Atlantic's proposed reading of section 10(a) and section 706 is nothing more than its latest back-door attempt to evade the Commission's section 271 requirements and section 251(c) obligations.[40/] The most reasonable, and, indeed, only logical construction of section 706, is that it must be read in a consistent manner which incorporates the section 10(d) prohibition against forbearing from section 271 and section 251(c) regulation. Contrary to Bell Atlantic's protestations, the incentives set forth in section 271 would be rendered meaningless if section 706 were read to supersede the forbearance limitations in section 10.[41/]

Market, Announces Organizational Changes," dated March 24, 1998. A copy of the March 24, 1998 Press Release is attached hereto as Attachment 1.

[40/] One day before the court issued its decision, Bell Atlantic successfully intervened in the Texas federal court lawsuit challenging the constitutionality of sections 271 and 272. See SBC Communications v. FCC, 981 F. Supp. 996 (N.D. Tex. 1997). The Texas decision has been appealed to the Fifth Circuit, and -- if upheld -- would eviscerate the local competition goals that Congress and the Commission had sought to promote. See, e.g., Sanford Nowlin, "Feds Set to Appeal Phone Ruling," San Antonio Express-News, Jan. 3, 1998 at, 1A.

[41/] Bell Atlantic also erroneously argues that section 3(25)(B), a definitional subsection of the 1996 Act, gives the Commission the requisite authority to grant immediate interLATA relief for high-speed data services. See Bell Atlantic Petition at 11. In fact, section 3(25)(B) merely defines the term "LATA" and in doing so, notes that the Commission has authority to "modif[y]" contiguous geographic LATA boundaries. See 47 U.S.C. § 153(25)(A), (B). Significantly, the large majority of cases cited to by Bell Atlantic in support of its argument, Bell Atlantic Petition at n.12, were simply exercises of the MFJ's waiver authority; not modifications of LATA boundaries.

The 1996 Act supersedes the MFJ and, necessarily, incorporates the MFJ's line of business restrictions and the path toward elimination of those restrictions. The means toward elimination of the crossLATA line of business restrictions is clearly set forth in section 271, not in the section 3(25)(B) definition. Section 3(25)(B) cannot be read to provide the Commission any authority to obliterate LATA boundaries and the competitive checklist obligations of section 271 for the purpose of allowing the interLATA transmission of high-speed data traffic.

II. BELL ATLANTIC'S ADDITIONAL ARGUMENTS FOR REGULATORY RELIEF SHOULD BE DISMISSED AS MERITLESS

As additional support for its petition, Bell Atlantic claims that relief from interLATA service restrictions and other prohibitions would enable Bell Atlantic: (1) to invest in advanced technologies;[42/] (2) revitalize its "uniquely hobbled" Internet access service;[43/] and (3) promote "sorely" needed deployment of, and competition in, advanced telecommunications services on a national scale.[44/] Notwithstanding the legal restrictions which prohibit the Commission from forbearing against such relief and the harm to local competition that such forbearance would cause, each of these arguments is meritless.

First, Bell Atlantic asserts that, absent immediate relief from interLATA services and other restrictions with respect to its high speed services, it simply will not makes the necessary investment to deploy advanced technologies quickly and extensively.[45/] The Commission should dismiss this argument as the red herring that it is. Many BOCs have already announced major initiatives to upgrade their broadband networks to handle high-speed voice and data.[46/] Significantly, Bell Atlantic, declared its system to be the "Most Competitive State-of-the-Art System in the Region" and recently announced a "five year, $1.5 billion construction investment

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[42/] Bell Atlantic Petition at 17-18; Bell Atlantic Ex Parte Letter at 2-3.

[43/] Bell Atlantic Petition at 16, 20.

[44/] Bell Atlantic Petition at 12-19.

[45/] See Bell Atlantic Petition at 17; Bell Atlantic Ex Parte at 2-3.

[46/] See, e.g., "Bell Atlantic Steps Up Deployment of High-Speed, Broadband Data Network," (Mar. 30, 1998) (available at http://www.ba.com/nr/1998/Mar/19980330001.html) ("Bell Atlantic Press Release"); "BellSouth.net and Cisco Systems Team to Provide Business Internet/Intranet Dial Access Service," (Feb. 23, 1998).

accelerating its next generation broadband data network" at speeds of up to OC-192 in "response to the explosion in demand" for such infrastructure.[47]

Similarly, Bell Atlantic's assertion that its failure to invest in broadband because of the Commission's section 251(c) requirement that ILECs must make available their unbundled facilities to competitors should also be dismissed as meritless.[48] While Bell Atlantic also claims that setting wholesale rates at TELRIC prices requires the company to bear all of the business risk while enabling its competitors to buy those services as significant discounts,[49] most state agencies have enabled ILECs to set prices at forward looking costs which enable the ILECs to collect a return on capital, or "reasonable profit" for their investment.[50] Thus, under the 1996 Act's unbundling requirements, Bell Atlantic actually bears little, if any, of the risk of deploying such advanced services.

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[47] See Bell Atlantic Press Release, "Bell Atlantic Steps Up Deployment of High-Speed, Broadband Data Network, Company Selects Suppliers to Enhance the Most Competitive State-of the-Art System in the Region," dated March 30, 1998. A copy of the March 30, 1998 press release is attached hereto as Attachment 2.

[48] See Bell Atlantic Ex Parte Letter at 1-2.

[49] See id. at 2-3.

[50] See, e.g., Case Nos. 95-C-0657, 94-C-0095, 91-C-1174, Joint Complaint of AT&T Communications of New York, Inc., MCI Telecommunications Corporation, WorldCom, Inc. d/b/a LDDS WorldCom and the Empire Association of Long Distance Telephone Companies, Inc. Against New York Telephone Company Concerning Wholesale Provisioning of Local Exchange Service by New York Telephone Company and Sections of New York Telephone's Tariff No. 900, Opinion and Order Setting Rates for First Group of Network Elements (issued and effective Apr. 1, 1997) at 8-15; D.P.U. 96-73-74, et al., Consolidated Petitions of New England Telephone and Telegraph Company d/b/a NYNEX, Teleport Communications Group, Inc., Brooks Fiber Communications, AT&T Communications of New England, Inc., MCI Communications Company, and Spring Communications Company, L.P. pursuant to Section 252(b) of the Telecommunications Act of 1996, for Arbitration of Interconnection Agreements Between NYNEX and the Aforementioned Companies, Phase 4 Order (issued Dec. 4, 1996) at 7, 10, 36.

Second, Bell Atlantic suggests that it is "uniquely hobbled" by the fact that, until section 271 approval, the customers of Bell Atlantic's Internet services, unlike other providers, must obtain a separate interLATA provider. This argument, like the first, provides it with no support for removing statutory obligations set forth in the 1996 Act. To date, every BOC has launched Internet access services in an aggressive fashion.[51/] While it is certainly true that Bell Atlantic's purchases services from a separate interLATA provider to transport this service, the initial process of choosing this separate provider is virtually meaningless to the customer.[52/] Despite its

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[51/] BellSouth, for example, has stated that its Internet service, BellSouth.net, is on a track to be the fastest growing Internet service in the southeast. BellSouth has begun to market its services through its customer service centers, allowing it to offer ISP services to customers placing new orders or service orders for telecommunications services. "BellSouth is the First Regional Bell Company To Sell Internet Service Through Its Telephone Business Offices," BellSouth Press Release, June 2, 1997 <http://www.bellsouth.com/sc/newsroomo/PR-697-5.htm>. Similarly, Pacific Bell's service, Pacific Bell Internet, calls itself "the most successful Internet access start up in California history." Business Wire, "Pacific Bell Internet Tops 51,000 Subscriber Mark In First 3 Months," September 19, 1996 ("Pacific Bell press release"). In 1996, it offered five months worth of free Internet access to any customer purchasing a second telephone line for $11.25 per month. In Re: FCC Bandwidth Forum, January 23, 1997, Transcript at 43. It announced that it was also planning to "co-market[]" its Internet service to Pacific Bell customers who order voice mail, or to those who participate in the Pacific Bell "customer loyalty and retention programs." Pacific Bell press release. See also "Bell Atlantic Announces Plans for Affordable, Easy-to-use Internet Product Line," Bell Atlantic Press Release, April 10, 1996 <http://www.ba.com//nr/96/apr/4-10inet.htm> (announcing intent to enter ISP market and offer discounted pricing with the purchase of second telephone lines or ISDN service); "Ameritech offers dedicated Internet access service," Ameritech Press Release, March 4, 1998, <http://www.ameritech.com/news/releases/mar_1998/04_01.html> (announcing addition of business dedicated access service to other Internet access service offerings).

[52/] See Bell Atlantic News Release, "New Bell Atlantic Offers Internet Access As First New Service in the North East," dated August 20, 1997. The News Release describes Bell Atlantic's Internet access service, "Bell Atlantic.net," as "easy as making a phone call." The price for Bell Atlantic's Internet access service is $19.95 for unlimited access, which includes a separate $2.00 monthly fee for a designated interLATA provider which is agreed to by the customer at the time of registration. Id.

unsubstantiated claims to the contrary, Bell Atlantic simply has offered no evidence to support its claim that its Internet access service has been "uniquely hobbled."

Finally, Bell Atlantic claims that immediate regulatory relief would promote sorely needed deployment or and competition in advanced telecommunications services.[53/] These claims are meritless. As a threshold matter, Bell Atlantic is certainly capable of deploying those facilities now, and, according to its business personnel, it has apparently devoted considerable resources to do so.[54/] Moreover, the notion that the Internet backbone industry is not a competitive one furiously working to improve performance is patently absurd.[55/] Since the summer of 1996, the number of national Internet Service Providers has grown from 10 to 32 in the fall of 1997.[56/] Moreover, the Internet backbone industry is deploying high-speed fiber that can handle increasing levels of capacity under timetables that are truly staggering. In light the fiercely competitive marketplace and rapid technology advancements that are occurring in the Internet backbone marketplace today, Bell Atlantic's argument that the Commission must remove core Section 271 restrictions and Section 251(c) obligations before Bell Atlantic has

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[53/] See Bell Atlantic Petition at 12-19.

[54/] See supra n.46.

[55/] For example, a comprehensive independent study of 39 United States and Canadian Internet backbone providers performed by Keynote Systems and Boardwatch magazine during December 1997 and January 1998 noted that overall backbone performance improved by over 40 percent over the past study conducted in August/September 1997. The performance of individual backbones also improved dramatically, with half delivering web downloads in under five seconds, as compared to only one provider in the August/September study. See WorldCom Press Release, "Third Keynote/Boardwatch Index of Backbone Providers Rates CompuServe Tops in Performance," dated March 18, 1998.

[56/] See Boardwatch Internet Service Providers Directories, Fall 1997.

opened its markets to local competition because its participation is necessary to create "universally high-quality Internet access" for all Americans should be disregarded.

CONCLUSION

Accordingly, for the reasons set forth herein, XCOM respectfully requests that the Commission deny Bell Atlantic's petition for regulatory relief from barriers to deployment of advanced telecommunications services.

Respectfully submitted,

Bartlett L. Thomas
James J. Valentino
MINTZ, LEVIN, COHN, FERRIS,
GLOVSKY AND POPEO, P.C.
701 Pennsylvania Avenue, N.W.
Suite 900
Washington, D.C. 20004-2608
202/434-7300

David F. Callan
President and Chief Executive Officer
XCOM TECHNOLOGIES, INC.
One Main Street
Cambridge, MA 02142
617/500-0000

Dated: April 6, 1998

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ATTACHMENT 1

Bell Atlantic Builds on Strength in Business Data Market; Announces Organizational Changes

Farina named president and chief executive officer of Bell Atlantic Data Solutions Group

March 24, 1998

Media contacts: Larry Plumb
703-295-4360

Group to best organize the corporation's robust data services capabilities and accelerate its drive into the rapidly growing business data market.

Bell Atlantic today named Joseph C. Farina to head the newly formed company. The new unit draws together personnel, skills and resources from several Bell Atlantic companies that serve the data market today. Data Solutions will provide complete, end-to-end advanced data solutions for customers on a national and worldwide basis. The new company will use both Bell Atlantic facilities and third party capabilities afforded by alliances and partnerships to be announced in the coming months.

"Bell Atlantic has long been an industry leader in data communications," said Ivan Seidenberg, vice chairman, president and chief operating officer, Bell Atlantic Corporation. "We're determined to build on that leadership across the country and around the globe."

The demand for Bell Atlantic's large business data services is growing more than 25 percent a year on a current base of nearly $2 billion in annual revenues, which includes more than $200 million annually from Bell Atlantic's network integration unit.

Bell Atlantic's current data revenue is based on a strong portfolio of data transmission and network integration services, including 2300 SONET (Synchronous Optical Network) rings, the capabilities of Bell Atlantic Network Integration and services such as frame relay, SMDS (switched multi-megabit data service) and ATM (asynchronous transfer mode).

Bell Atlantic offers, as well, a complete suite of Internet services, including high-speed Internet access and Web hosting. The company counts more than 1,000 businesses among its customers for these Internet services. Bell Atlantic also is developing Intranet/Extranet services that entail the movement of LAN/WAN (local area network/wide area network), enterprise-wide corporate network applications and capabilities to the data communications Internet Protocol.

"Bell Atlantic will continue to make significant investments in capabilities to serve the demand from all our customers, large and small," said Seidenberg. "But what about the opportunities that will

open once Bell Atlantic can address the data market unfettered by long distance restrictions? As significant as the current opportunity is, it is only a small portion of the total data market once long distance and Internet backbone revenues are added. This is where Farina and Data Solutions come in."

Mr. Farina, age 48, is a Bell Atlantic executive with extensive background in international and domestic operations for both wire-free and wire-line networks, including past responsibility for delivering complex data services in New York City. Farina is charged with executing Bell Atlantic's data strategy in the large business and enterprise marketplace.

The national data market is expected to grow to more than $250 billion across the nation in the next five years. Bell Atlantic is well positioned to participate in this growth, serving as it does the headquarters of more than one-third of the Fortune 500 companies. The company is prepared to make significant capital investments in a regional high speed network once the company is granted the needed regulatory approvals. Bell Atlantic has applied to provide long distance services in New York, and it has a pending application to offer advanced telecommunications services across the Mid-Atlantic and Northeast region under section 706 of the 1996 Telecommunications Act.

When regulatory approval is granted Bell Atlantic Data Solutions intends to become a one-stop shop for business customer data needs on a regional, national and global basis using a combination of Bell Atlantic and third-party capabilities. The design for a Bell Atlantic regional long distance, integrated voice and data network is complete and vendor selection will be finalized in the coming weeks. The new ATM- and SONET-based network will be ready for service by late 1998. When available, the Bell Atlantic network also will be used to provide Internet-related services to the small business and consumer markets.

"With this reorganization, Bell Atlantic will be better positioned to meet our business customers' requirements for advanced data services," said Farina. "Bell Atlantic will build on this capability to become a one-stop service provider for the national and global data connectivity requirements of our customers.

Bell Atlantic - formed through the merger of Bell Atlantic and NYNEX - is at the forefront of the new communications and information industry. With 40.5 million telephone access lines and six million wireless customers worldwide, Bell Atlantic companies are premier providers of advanced wireline voice and data services, market leaders in wireless services and the world's largest publishers of directory information. Bell Atlantic companies are also among the world's largest investors in high-growth global communications markets, with operations and investments in 21 countries.

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