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

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FEDERAL COMMUNICATIONS COMMISSION
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In the matter of	)	
	)	
LCI Petition for Declaratory Ruling	)	
Concerning Bell Operating Company Entry	)	CC Docket No. 98-5
Into In-Region Long Distance Markets	)	
	)	

BELL ATLANTIC[1] REPLY COMMENTS

Bell Atlantic respectfully submits these reply comments in response to the comments filed by several parties in this proceeding.

While some competing local companies recommend that the Commission force incumbent carriers to divest entirely their current local telephone operations, only three commenters – KMC Telecom, RCN Telecomm, and Cleartel Communications – argue that the Commission has the authority to do so.[2] The Commission should reject this recommendation for both policy and legal reasons.

As Bell Atlantic explained in its comments, forcing incumbent carriers to divest any part of their retail local telephone operations would be contrary to the public interest.

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[1] The Bell Atlantic telephone companies ("Bell Atlantic") are Bell Atlantic-Delaware, Inc.; Bell Atlantic-Maryland, Inc.; Bell Atlantic-New Jersey, Inc.; Bell Atlantic-Pennsylvania, Inc.; Bell Atlantic-Virginia, Inc.; Bell Atlantic-Washington, D.C., Inc.; Bell Atlantic-West Virginia, Inc., New York Telephone Company and New England Telephone and Telegraph Company.

[2] This recommendation was not universally supported by competing local carriers. At least one competitor candidly admitted that "[w]ere the Commission to impose the NetCo/ServeCo structure on a [Bell company], the issue of the FCC's authority to do so under the Act would be problematic." Excel Telecommunications' Comments at 7.

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Such a divestiture would confuse and irritate the incumbents' current local service customers by forcing them to select another company for their local service or be allocated to another company, even if they did not want to. The State Consumer Advocates echoed this same concern, noting that the LCI proposal "could also lead to some confusion among consumers - some of whom will continue to be served by NetCo for some period and others will be compelled to purchase service from ServeCo or other CLECs." State Advocates Comments at 4. According to the State Advocates, "[a]s set forth within the Act, consumers are to realize the opportunity to choose as to whether or not they wish to be served by their incumbent provider or switch to a new competitor that offers more attractive service." *Id.*

Bell Atlantic also explained that by severely limiting the services that the wholesale companies can offer and by capping their prices "at cost," there would be no incentive for them to invest in their networks or to upgrade them with newer technology. This same concern was expressed by the Campaign for Telecommunications Access: "the proposal would add further burdens to already existing disincentives to bringing affordable and usable new technologies to people with disabilities and older adults where they live, and it may even foster a decline in service using existing technologies." Campaign for Telecommunications Access Comments at 5.

There is also no legal basis for the Commission to require incumbent carriers to divest their retail local telephone operations. Nearly all of the cases cited by three commenters – KMC Telecom, RCN Telecomm, and Cleartel Communications – do not even mention divestiture. Instead, these cases simply discuss instances where the Commission required structural separation of local telephone operations from other

competitive lines of business. But structural separation is not divestiture. In each case, the local telephone companies were permitted to retain full ownership of their local telephone operations and their separated competitive business operations. And the Commission has more recently found that structural separation requirements are too burdensome and has abandoned them in favor of nonstructural or accounting safeguards. *See, e.g.,* Computer III: *Further Remand Proceedings*, CC Docket No. 95-20, ¶ 48 ("the Commission found, based on its experience, that the introduction of new information services by the BOCs was slowed or prevented altogether by structural separation, thus denying the public the benefits of innovation" and "that structural separation imposed direct costs on the BOCs resulting from duplication of facilities and personnel, limitations on joint marketing, and deprivation of economies of scope"); *Furnishing of Customer Premises Equipment by the Bell Operating Telephone Companies and the Independent Telephone Companies,* 2 FCCRcd 143 at ¶16 (1987), *on recon.,* 3 FCCRcd 22 (1987), *aff'd, Illinois Bell Telephone Co. v. FCC,* 883 F.2d 104 (D.C. Cir. 1989).

Only two of the cases cited by the three commenters mention divestiture, but neither establishes the Commission's authority to require local telephone companies to divest their retail operations in whole or in part. The first case is the Commission's order approving the Section 214 applications necessary to complete the AT&T divestiture required under the Modification of Final Judgment. *See, e.g.,* Comments of KMC Telecom at 14-15, *citing AT&T Divestiture,* 96 FCC2d 18, 44 (1983), *recon.,* 98 FCC 2d 141 (1984), *aff'd on other grounds sub nom. GTE Service Corp. v. FCC,* 782 F.2d 263 (D.C. Cir. 1986). The language referenced by the commenters is merely dictum noting

that the record before the Commission was completely insufficient to justify divestiture of AT&T. This dictum does not establish authority for the Commission to order any local telephone carrier to divest its retail operations.

The other case – *General Telephone* – is completely distinguishable from the commenters' divestiture proposal. In *General Telephone*, the Commission barred local telephone companies from entering a new line of business, cable television service. As a result of this order, several local telephone companies that had invested in cable television operations while the Commission was considering the issue were required to divest their cable television investments. This case provides no support for the divestiture the commenters now propose.

First, the Commission's ruling in *General Telephone* barred local telephone companies from entering a new and emerging business and only incidentally required divestiture by those local telephone companies that had invested in cable television business. The Court did not address whether the Commission could bar incumbent carriers from a line of business they have been in for nearly 100 years. In fact, the Court found that local telephone companies entered the cable television business with full knowledge that the Commission was considering whether to bar them from that line of business: "reliance by the carriers on the Commission's putative acquiescence in their CATV involvements should not have been great" because of the fact that "such a rule might eventually come into being was signaled as far back as 1956 . . . ." *General Telephone Co. v. United States, et al.*, 449 F.2d 846, 864 (5th Cir. 1971). The same finding could not be made under the commenters' proposal because incumbent carriers

have long relied on their ability to continue providing retail local telephone services without any notice that the Commission might force them to divest their retail operations.

Second, in *General Telephone,* the Commission barred the telephone carriers from providing an interstate service: "[c]ertainly CATV systems are engaged in interstate communication . . . ." *General Telephone,* 449 F.2d at 855. The commenters, on the other hand, propose that the Commission require divestiture of local telephone operations which involve intrastate, not interstate, services. The Commission does not have the authority to regulate how the incumbent carriers offer local intrastate telephone services. Section 2(b) of the Communications Act makes clear that "nothing in this Act shall be construed to apply or to give the Commission jurisdiction with respect to (1) charges, classifications, practices, services, facilities, or regulations for or in connection with intrastate communication service by wire or radio of any carrier. . ." 47 U.S.C. § 2(b).

Finally, the rule first established in *General Telephone* and later codified by Congress was ultimately invalidated as a First Amendment violation. *See Chesapeake and Potomac Tel. Co. v. U.S.,* 830 F. Supp. 909 (E.D. Va. 1993), *aff'd,* 42 F.3d 181 (4th Cir. 1994), *vacated,* 516 U.S. 415 (1996). The Commission therefore cannot bar incumbent telephone companies from lawful lines of business.

CONCLUSION

There is no legal or policy basis for the Commission to require incumbent carriers to divest their retail local telephone operations.

Respectfully submitted,

James G. Pachulski
1320 North Court House Road
Eighth Floor
Arlington, Virginia 22201
(703) 974-2804

Edward D. Young III
Michael E. Glover
Of Counsel

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CERTIFICATE OF SERVICE

I hereby certify that on this 22nd day of April, 1998, a copy of the foregoing "Bell Atlantic Reply Comments" were served by first class mail, postage prepaid, to the following parties:

Anne K. Bingaman
Douglas W. Kinkoph
LCI International Telecom Corp.
8180 Greensboro Drive
Suite 800
McLean, Virginia 22102

Janice M. Myles
Common Carrier Bureau
FCC
1919 M Street, N.W.
Room 544
Washington, D.C. 20554

Peter A. Rohrbach
Linda L. Oliver
Hogan & Hartson
Columbia Square
555 Thirteenth Street, N.W.
Washington, D.C. 20004

Rocky N. Unruh
Morgenstein & Jubelirer
One Market
Spear Street Tower, 32nd Floor
San Francisco, California 94105

Eugene D. Cohen
326 West Granada Road
Phoenix, Arizona 85003

ITS, Inc.
1919 M Street, N.W.
Room 246
Washington, D.C. 20554

Nancyann Hunt