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May 6, 1998

DELIVERY VIA MESSENGER

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

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

Dear Ms. Roman Salas,

Enclosed for filing please find an original and 12 copies of DSL Access Telecommunications Alliance's ("DATA's") Reply Comments in the above referenced proceeding. Also, enclosed please find a receipt copy to be date-stamped and returned to the messenger. Copies of the Reply Comments and this transmittal letter are being served on all active parties in accordance with the service list.

Should you have any questions please do not hesitate to contact me.

Sincerely,

Christy C. Kunin /aew

Christy C. Kunin

CCK/aew
Enclosures

cc: Active Parties

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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
Petition of US WEST Communications, Inc. for Relief from Barriers to Deployment of Advanced Telecommunications Services	CC Docket No. 98-26
Petition of Ameritech Corporation to Remove Barriers to Investment in Advanced Telecommunications Services	CC Docket No. 98-32

REPLY COMMENTS OF THE DSL ACCESS TELECOMMUNICATIONS ALLIANCE ("DATA")

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Dated: May 6, 1998

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REPLY COMMENTS OF
DSL ACCESS TELECOMMUNICATIONS ALLIANCE ("DATA")

The DSL Access Telecommunications Alliance ("DATA"), by its attorneys, respectfully submits these Reply Comments in the above-referenced proceedings pursuant to the Order, DA 98-513, issued by the Common Carrier Bureau of the Federal Communications Commission ("FCC" or "Commission") on March 16, 1998.

INTRODUCTION

The Commission should deny the RBOC petitions in their entirety. The petitions are based on "extreme" and "flimsy" legal arguments[1] that are contrary to

[1] Level 3 Communications at 4.

the plain meaning of Section 706[2] and only seek to ensure RBOC private gains at the expense of an effectively competitive marketplace for advanced telecommunications service. The RBOCs' petitions mischaracterize the market suggesting that only if they are relieved of their legal and regulatory obligations through forbearance can advanced telecommunications services thrive. Such a view totally distorts market realities. In fact, as the opening comments demonstrate, the advanced telecommunications service market is characterized by budding competition that has the potential to provide consumers, both business and residence, urban and rural, with a plethora of new services from a multitude of providers. Increased deployment of DSL service is currently limited by the ILECs' failure to provide the collocation and unbundled loops "guaranteed" by the 1996 Act on a parity basis to DSL CLECs. The Commission should thus deny the RBOC petitions, strictly enforce existing pro-competitive regulatory safeguards and adopt the further pro-competitive suggestions raised by DATA in its opening comments.[3]

DISCUSSION

I. GRANTING THE RBOC PETITIONS WOULD IMPEDE, NOT ENHANCE, ADVANCED TELECOMMUNICATIONS SERVICE COMPETITION

The Commission must resist the temptation to grant relief that removes any loop-based network elements or services from the pro-competitive provisions of the 1996 Act and therefore sacrifices the long term benefits of a vibrant and competitive advanced communications service market. The petitioning RBOCs assert that they will not invest in DSL or other data services without obtaining interLATA and

[2] XCOM Technology at 5.
[3] DATA at 25.

other vague resale, pricing and unbundling relief. Yet they discuss the need for these excessive demands for relief in a few cursory paragraphs without any supporting economic analysis or proof. In fact, however, the slow pace of the ILECs' DSL deployment is more readily attributable to a host of *non-regulatory* strategic decisions, including ILEC reluctance to provide a cost-effective data solution that would cannibalize their lucrative multi-billion dollar T-1 market. Thus, granting the RBOC petitions will serve only to provide them with interLATA and other relief unnecessary to deployment of DSL and other data services, and ultimately leave consumers with fewer choices. The RBOCs' pleas for relief also flatly contradict their claims to regulators and the financial community that they are investing hundreds of millions of dollars in network upgrades to provide data and other advanced services.

There is little doubt that granting the RBOCs the relief they seek will enable them to provide interLATA services they are now prohibited from providing and garner a greater share of the advanced telecommunications market, exactly because they will not face the same risks as their competitors.[4] Granting the RBOC petitions, however, is not only unnecessary to promote competition, but will ultimately leave consumers with less choice and fewer innovative services.[5] Such an action "would tend to perpetuate the ILECs' monopoly control of a critical bottleneck asset—existing copper facilities running to the nation's homes and businesses."[6]

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[4] DATA at 3; MCI at 41.
[5] Cablevision Lightpath at 3; MCI at 8, 14; Commercial Internet Exchange at 9.
[6] APK Net, *et al.* at 3; *see also, e.g., id.* at 9; EXCEL at 9-11; TCG at 2-3; MCI at 14; Joint CLECs at 16.

In fact, "some incumbent LECs already are delaying negotiation of local data service interconnection arrangements, presumably in the hope that favorable action on the pending Section 706 Petitions will free them from the obligation to interconnect with competitors to exchange data traffic."[7] The perpetuation of this monopoly control would only tend to increase current difficulties in gaining access to local loops, thereby obstructing competitive alternatives and blocking the aggressive commercial roll-out of DSL-based services now being offered by many start-up providers of advanced communications services. The Commission's objective should not be to enable ILECs to earn higher profits, but to maximize competition and consumer choice in both services and service providers.

A multitude of existing and new service providers are driving tremendous innovation and growth of advanced telecommunications services. As the opening comments demonstrate, the RBOCs understate the aggressiveness with which competitive carriers and ILECs are deploying xDSL technology.[8] Contrary to the RBOCs' characterization, the market is vigorously responding to the public demand for increased capacity and increased access to the Internet,[9] including huge investments the ILECs are currently putting into their networks to provide advanced telecommunications services.[10] Indeed, as MCI indicated, regulatory forbearance in favor of the ILECs is simply not necessary to foster development

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[7] ACSI at 3.

[8] *See, e.g.*, Intermedia at 2, 15; Commercial Internet Exchange at 8-10; APK Net at 9, 15-16; Level 3 Communications at 9; Sprint at 13.

[9] *E.g.*, Level 3 Communications at 9.

[10] *See e.g.*, Intermedia at 16 ("Bell Atlantic 'announced its response to the explosion in demand for an anytime, anywhere system with a five year, $1.5 billion construction investment accelerating its next generation broadband data network."); *Id.* at 18 ("US West's ADSL rollout will reach over 5.5 million

because the level of competition presently at work in the marketplace will accomplish "rapid innovation and deployment of advanced telecommunications services."[11]

Such rapid innovation and deployment of advanced telecommunications services will reach all of America, business and residence, urban and suburban. In their petitions, the RBOCs attempt to mislead the Commission by suggesting that only through regulatory forbearance will advanced telecommunications services reach rural America and other under-served portions of the American populace.[12]

This claim is disingenuous for several reasons. First, as the ILECs well know, since their commonly-owned research arm helped develop the technology, current xDSL technology is limited by loop length, and can currently be provided only over loops shorter than those commonly found in rural areas. Second, as the ILECs equally well know, since they have been slowly negotiating interconnection agreements and even more grudgingly providing collocation and UNEs to them, there are several well-financed, sophisticated, companies seeking to provide xDSL-based, and other, data services throughout the country. And third, as the ILECs also know, when technology is available to reach further from the central offices, the competitors will be expanding their service reach.

Many emerging competitors specifically have strategies to address these under-served portions of the market. In fact, competitive DSL providers are focusing on telecommuting solutions that use DSL technology to reach out to

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customers."); ACSI at 15 ("US WEST proudly notes in its petition that it already has deployed the third largest frame relay operation in the nation.")

[11] MCI at 33.

[12] *Id.* at 26.

consumers in suburban areas, as well as on fostering Internet access for the under-served small business market. Furthermore, the Commission's initiatives under the Universal Service Fund to promote advanced telecommunications services to schools and rural health care providers also addresses this need, and will lead to increased choices for rural America. Indeed, even the United Homeowner's Associations and Organizations Concerned About Rural Education, who support the RBOC petitions,[13] appear to have as a primary goal "jump start[ing] the high-speed, broadband revolution of the next millennium."[14] However, market forces have already "jump started" this revolution, and the Commission should not grant the requested relief and risk depriving consumers the benefits of a long-term competitive market with many service providers, unfettered by ILEC monopoly gatekeepers.

II. THE BEST ROUTE TO MORE DATA COMPETITION IS COMMISSION ENFORCEMENT OF SECTION 251 AND 271 OBLIGATIONS IN A MANNER THAT ENSURES PARITY FOR DATA COMPETITORS

A. The Comments Reveal Numerous Examples of How ILECs Delay Competition for Data Services and Deny Competitors Parity

There is wide consensus in the comments that the ILECs' anticompetitive actions are at the root of the problems underlying the delay of the deployment of competitive alternatives.[15] Given the ILECs' intransigence and failure to support the development of competition, the Commission's aim should be to ensure that as many competitive providers as possible are able to enter the data services market. The first step is for the ILECs to recognize and agree that they must provide loops

[13] *See* United Homeowners Association, *et. al.* at 3; Organizations Concerned About Rural Education at 1.
[14] United Homeowner's Association, *et. al.* at 6.

and physical collocation to data competitors. Only two of three petitioners expressly acknowledged their continued obligations under sections 251 and 271.[16] Similarly, only one of three non-petitioner ILEC commenters, BellSouth, agreed it must meet its 251 obligations.[17] GTE and SBC, however, did not explicitly acknowledge their 251 obligation to provide physical collocation and unbundled loops to CLECs seeking to offer data services such as DSL.[18]

As DATA noted in its opening comments, provision of DSL requires *both* physical collocation *and* access to clean copper loops.[19] Many commenters outside the DATA coalition echoed our grave disappointment and concern over the lack of availability of both these key elements.[20] As one commenter summarized, "the false premise in US WEST's argument, however, is that competitors can be assured of receiving the *same* access to US WEST's loops and central offices that the BOC will provide to its own data communications enterprise."[21] ILECs have both the incentive and the ability to delay data services competition.[22] The comments demonstrate that today, even with section 251/271 obligations, ILECs are engaging in anticompetitive actions to prevent the deployment of DSL services by competitors by denying physical collocation and DSL-capable loops. This ILEC strategic delay in

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[15] Worldcom at 4; ICG at 5-9; Intermedia at 23-25; TCG at 9-11; AT&T at 7-9; MCI at 39; ACSI at 3; Level 3 Communications at 11; AOL at 5-6; DATA at 9-14.
[16] DATA at 14-16.
[17] BellSouth at 11.
[18] *See, e.g.*, GTE at 5-7; SBC at 3-4.
[19] DATA at 7-9.
[20] *See, e.g.*, Commercial Internet Exchange Association at 17-19; MCI at 18; AOL at 4; Internet Access Coalition at 4-5; XCOM Technology at 7, n.19; APK Net at 4, 10.
[21] Level 3 Communications at 11.
[22] *See, e.g.*, DATA at 9-14.

providing competitors both physical collocation and loops is an abuse of the 1996 Act and of the antitrust laws that must be halted.[23]

1. ILECs Are Not Providing Physical Collocation In A Manner That Ensures Data Competitors Parity

CLECs are currently being denied critical physical collocation space necessary for provision of DSL based on unproven ILEC claims that space is limited.[24] These unilateral determinations are in direct violation of the Act.[25] State commissions are not enforcing the Act's requirement that the ILECs "demonstrate" lack of space to the state commission. Thus, buildings with empty floors "reserved" for future use, lunch rooms, "administrative" functions or other non-central office needs could be used for collocation, but are not. In addition, there may well be many central offices in which the ILECs could demonstrate lack of space for additional collocation. And this lack of space is made even worse by the ILECs' insistence, following their Eighth Circuit victory, that CLECs can combine UNEs only in collocated space. Consequently, space constraints and limitations are surfacing everywhere, and can only be expected to increase without a significant change in circumstances.[26] Indeed, CLEC collocation requests are commonly rejected in a high percentage of the ILECs' central offices, including those offices from which any DSL provider, including the ILECs, would logically offer service.

[23] Level 3 Communications at ii-iii; MCI at 26-27.
[24] DATA at 9-10; Covad at 13-18; AT&T at 17-18.
[25] DATA, Gorosh Aff. at ¶ 16.
[26] As DATA and other commenters noted, the collocation space constraints are only exacerbated by the ILECs' implementation of the Eighth Circuit's ruling on combination of elements, which has been interpreted by ILECs to require that UNEs may only be combined in a physical collocation. This places even greater demand on physical collocation space. DATA at 10.

In contrast to the collocation space problems faced by CLECs, ILECs are not required to collocate in a designated space. Thus, ILECs are free to add DSL equipment anywhere in a central office, free of the space limitations and delays imposed on CLECs. This provides unfair advantages to ILECs, which are then able to provide DSL services without gaps in their DSL coverage and without undue delays. Further, this dynamic enables the ILEC to locate its equipment optimally in the central office to minimize loop lengths or otherwise maximize efficient use of central office space.

In addition to advantages with regard to space availability, CLECs face substantial installation intervals, onerous cage requirements and exorbitant costs associated with physical collocation. The ILEC collocation tariffs and interconnection agreements provide for installation intervals of about 4 months. In reality, however, collocation intervals have been between 6-18 months.[27] Aggravating the substantial delay in constructing a physical collocation cage is the fact that the costs of collocation are exorbitant. The cost of securing a collocation space typically runs from between $30,000 and $60,000 to several hundred thousand dollars where space has to be conditioned for collocation.[28]

In contrast, ILECs are not required to "collocate." The ILECs thus have the luxury of offering DSL services out of any central office, even those where there is in fact no space for physical collocation for CLEC competitors. Neither must they wait for months or years for "cage" construction that frequently exceeds predicted

[27] AT&T at 18, n.35. US West requires 40 business days—eight weeks—just to provide a price to a CLEC requesting collocation.
[28] Covad at 15; AT&T at 18, n.36.

intervals. The ILECs have the further luxury of imposing outrageously high state-commission-approved collocation charges on their DSL competitors while facing no such costs themselves. The ILECs are neither constrained nor compelled to purchase a specific cage size. Similarly, ILEC entry strategies do not need to account for steep and unpredictable costs of collocation cage construction.

The overall impact of these disparities is to provide the ILECs with a considerable competitive advantage when deploying their data services.[29] CLECs face considerable uncertainty, delay and cost in obtaining the physical collocation facilities necessary to provision data services such as DSL. This unpredictable availability, delay and cost is imposed by the ILEC with whom the CLECs must compete. One could hardly conceive of a more anticompetitive arrangement. Such anticompetitive abuse and discriminatory behavior should not be countenanced as the market for data services is opened to competition. Thus, the Commission should increase advanced telecommunications services by requiring collocation parity, not by further circumscribing already limited protections.

2. ILECs Are Not Providing Loops In A Manner That Ensures the Parity Necessary for Data Service Providers to Compete

The record is also clear that ILECs are not providing loops necessary for provision of data services, including DSL, at parity.[30] For instance, the ILECs refuse to provide loop data on a timely basis to competitors that would enable them to

[29] US West, in particular, has adopted a unilateral and extremely anticompetitive position of refusing to accept collocation orders from CLECs until they have approved CLEC interconnection authority. This automatically increases in many cases the wait for collocation space to more than a year and leads CLECs to be foreclosed from access to increasingly scarce collocation space.

[30] Level 3 Communications at ii; Sprint at 9; APK Net at 4, 15; Joint CLECs at 17-20; MCI at 13-14.

know whether loops are suitable or allow them to select workable loops.[31] Likewise, ILECs deny loops to competitors claiming that they have determined that suitable facilities are not available. A CLEC has no information about how that decision was made, what "available" means, or how close to "workable" the existing loops may be. Under such circumstances, CLECs can only obtain the necessary loops by ordering them through RBOC special construction tariffs at exorbitant, non-cost based prices; and some RBOCs even refuse the special construction option. Yet when an ILEC needs a copper loop to provision DSL, it simply coordinates with its network engineers and planners, who can put in loops as part of overall facilities reinforcement. The ILEC retail unit can then plan on and use the loop for provision of DSL services without incurring the exorbitant special construction charges.

Further, as DATA, Covad and others commented, DSL cannot be furnished on loops provisioned using Digital Loop Carrier ("DLC") technology.[32] Thus, in order for a CLEC to provide service to a customer served by DLC, the CLEC must be able to obtain access to the copper portion of the loop. Yet the ILECs steadfastly and uniformly refuse to offer access to the copper portions of the loop, claiming that they are not required to, and therefore will not, provide "subloop unbundling." The ILEC could also rearrange facilities to serve the customer with a copper loop, moving that customer off DLC. But most ILECs routinely refuse to agree even to such rearrangements or to make other similar accommodations that are identified by CLECs.

[31] DATA at 14; Covad at 8, n.16.
[32] DATA at 13-14.

Once again, there is a strong contrast in the choices facing the ILEC retail entity. The ILEC retail entity can request rearrangement to suitable copper facilities by virtue of its internal access to loop data, enabling it to select the best loop for provisioning DSL. In contrast to competitive DSL providers, an ILEC seeking to provide DSL services to customers served by DLC is also not constrained by a refusal to provide access to copper under the guise of "subloop" unbundling. The ILEC retail entity can connect to the copper portion of the loop at any point, including at the distribution point. That is, the ILEC retail entity presumes it has the right to locate its DSL and other equipment anywhere in the network, including at the "subloop" interface. Thus, ILECs can easily avail themselves of copper facilities, such as subloops, while denying copper facilities to their competitors.

ILECs also unilaterally decide not to honor loop obligations to CLECs, creating seriously disparate treatment. For example, several RBOCs, including SBC and Bell Atlantic, have recently attempted to impose onerous unilateral "spectrum management" guidelines on their data competitors. These unilaterally-imposed "guidelines" appear to be an attempt to dictate use of specific technologies, completely contrary to this Commission's policies, the letter and intent of the Telecommunications Act, and the antitrust laws. There is no opportunity for input or cooperation in the development of the guidelines, and yet the RBOCs threaten that failure to comply with them will result in loop denial by the ILEC. As a result, such "guidelines" have the potential to seriously impair or delay competitors' data service offerings.

In stark contrast, when developing so-called "guidelines," the ILEC ensures that its retail services are fully accommodated by designing such guidelines around the dictates of its retail entity. This gives the ILEC a double benefit. The ILEC guidelines guarantee operational impunity to their own retail entities while affording the ILECs an opportunity to limit their competitors. And, without a trace of irony, the ILECs claim these guidelines are applied in a nondiscriminatory manner.

Thus, the Commission should mandate loop "parity," not remove existing ILEC obligations, in order to spur DSL accessibility.

3. Separate Subsidiaries Raise Numerous Anticompetitive Concerns

In its comments, US West indicated that under some circumstances, it would be amenable to offering services through a separate subsidiary.[33] Yet even while supporting the concept, US West identifies several problems with such an approach and therefore continues to press for deregulation of data services offered on a retail basis.[34] As DATA emphasized in its comments, the only way to ensure robust competition is to deny the petitions and vigorously enforce the requirements of sections 251 and 271.

Nevertheless, DATA is extremely concerned that suggestions for use of a separate subsidiary grossly underestimate the anticompetitive incentives and abilities of the ILECs and overestimate the Commission's ability, and perhaps even jurisdiction, to enforce the necessary rules and safeguards. While the separate

[33] US West at 5-7.
[34] *Id.*

subsidiary approach has some intuitive appeal, it rewards the ILECs for their intransigence in failing to deploy DSL or enabling competitors to deploy DSL by giving them the relief they request. If, despite the strong opposition, the Commission opts to take this approach, it must recognize that the ILECs will continue to have the same incentives and ability to delay competitive entry of data CLECs. Thus, if ILECs choose entry into data services through a separate subsidiary, then in addition to the requirements that the ILEC continue to honor their obligations under sections 251 and 271 (including provision of physical collocation, cost-based unbundling and resale) any rational implementation also must ensure that detailed and specific safeguards, such as those listed below, are in place governing the subsidiary before permitting an ILEC separate subsidiary to provide data services:[35]

- The ILEC should only be permitted to provide DSL through a separate subsidiary that operates at arms length as a CLEC within its own region.[36]
- The subsidiary must become certified as a CLEC, through the same certification processes as any other CLEC and without special treatment or concessions due to its ILEC affiliation.
- The subsidiary must operate under an interconnection agreement it negotiates at arms length with the ILEC. Further, the ILEC must be required to give any or all of the provisions in the subsidiary's interconnection agreement to any requesting CLEC under a "fresh look" mechanism.
- The subsidiary must be subject to the same Bona Fide Request ("BFR") process and requirements that other CLECs must use.
- The subsidiary must only obtain information about the ILEC network, operations and processes in the same manner as other CLECs.

[35] Of course, even if DSL is offered through separate subsidiaries, ILEC parents must be required to fulfill the requirements of section 251. Similarly, if ILECs choose not to enter through a separate subsidiary, they must continue to honor their obligations under sections 251 and 271, including provision of physical collocation, unbundling at cost-based prices and resale.

[36] There should be no objections by the ILECs to this suggestion since they have repeatedly argued that their treatment of CLECs is fair, reasonable and nondiscriminatory. Thus, there should be no basis for them to argue that they would be hampered if forced to operate as CLECs.

- The subsidiary must have only the same access to and use of ILEC Operations Support System ("OSS") interfaces and systems as any other CLEC.
- The subsidiary must be required to collocate as a CLEC and submit orders for collocation in the same manner as CLECs, wait in line for collocation space like other CLECs, endure the same collocation intervals as other CLECs, and pay the same costs for collocation as other CLECs.
- The subsidiary must obtain loops using the same processes and under the same terms and conditions as all other CLECs.
- Neither the ILEC nor its subsidiary should be allowed to offer DSL out of a central offices where DSL loops or physical collocation have been denied to other CLECs.
- Both the ILEC and the subsidiary must provide detailed performance monitoring reports for services provided to the subsidiary to enable other CLECs to ascertain whether services were being provided at parity.
- The ILEC must be subject to serious penalties for discriminatory performance detected through the performance reporting process.

DATA cautions that it would be particularly invidious if DSL were not provided through the ILEC separate subsidiary. As long as DSL is provided through the ILEC parent, the ILEC will be able to leverage its incumbent advantages, such as those identified above with respect to physical collocation and loops.

Moreover, even a carefully defined separate subsidiary regime will face practical realities of the regulatory, business and operating environment that are likely to ensure that ILECs' CLEC subsidiaries are at a significant competitive advantage over other data CLECs. Notwithstanding the use of separate subsidiaries, even with safeguards, ILECs will continue to have the incentive and ability to act anticompetitively toward competing data CLECs and in favor of their ILEC subsidiaries. Safeguards are plainly inadequate to prevent ILECs from manipulating the regulatory and business environment to discriminate anticompetitively against data CLECs competing with the ILEC subsidiaries. How can one ensure that the ILEC's CLEC was forced to negotiate interconnection at arms' length? Indeed, when

both are subsidiaries of the same company and the personnel have been jointly developing the DSL products until the separation, arms length negotiation is a practical impossibility. Further, depending on the decisions of various federal courts, this Commission could be without jurisdiction or control over many facets of the implementation and operation of such ILEC subsidiaries, which will only exacerbate the potential for anticompetitive and discriminatory treatment of data CLECs competing with the ILEC subsidiary.

There are numerous other specific examples of enforcement difficulties. The FCC may not have authority to require the state commissions to treat ILEC/CLEC certification comparably to CLEC certification. In addition, the subsidiary will have inherently better access to information about the network and the operations of the ILEC through its affiliate relationship and historical connection—not least including long-standing personal relationships—that will enable it to obtain favorable treatment and provide it with a superior ability to identify and obtain loops suitable for DSL. Similarly, performance reporting, monitoring and penalties are effective only if they are effectively policed and enforced, and subject to independent and random audits. There is no such policing or auditing mechanism in place at the federal or state level. Further, if the separate subsidiary is exempted from the requirements of sections 251 and 271, the Act's important policing mechanisms of resale and cost-based unbundling would also be extinguished for these data services.

Moreover, once RBOCs obtain interLATA relief, they may decide to use their incumbent advantages to disadvantage even their own subsidiaries. In other words, the RBOCs may forestall the development of competition by limiting the

development, growth and reach of their own subsidiaries in order to meet a strategic goal to forestall competition.

As DATA and other commenters noted, DSL can be used to provide faster service at lower prices than current RBOC services.[37] Thus, DSL services present a substantial threat to RBOC traditional revenue streams and the RBOCs have a significant incentive to limit all DSL growth.[38] This incentive explains why no RBOCs have implemented DSL services over the past decades that the technology has been available to them, and why the RBOCs' sudden and passionate dedication to the principle of "DSL for all people" coincides so exactly with the emergence of competitors who are actually providing DSL to customers.

> xDSL is the RBOCs' worst nightmare. . . . Essentially all of the RBOCs' elaborate embedded networks are irrelevant to xDSL. As a result—other than their raw and essentially unchallenged monopolistic control over the copper communications paths on poles and through conduits to end users—the RBOCs are irrelevant to xDSL as well.[39]

Because even their own DSL services will cannibalize their higher-priced and more profitable private line services, the RBOCs may be willing to limit their own DSL service provided through a separate subsidiary in order to impose the same "parity" limitation on their DSL competitors, and thereby enhance ILEC coffers.

As this discussion illustrates, there are serious and substantial concerns with permitting the ILECs to offer data services through a separate subsidiary.[40] In order

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[37] DATA at 5-6; MCI at 11 (noting that RBOCs do not pass on the savings to their customers).
[38] This explains why the RBOCs did not roll out DSL services before the 1996 Act. DATA at 5-7; MCI at 21-22.
[39] APK Net at 10.
[40] Not the least of these concerns is the probability that once a separate subsidiary is permitted to offer DSL services, capable of providing data, voice and a host of other broadband services, through a separate deregulated subsidiary, soon the vast majority of services, including voice, would be provided to consumers through this deregulated subsidiary. "Freed of the Section 251 unbundling and resale

to effectively safeguard the development of competition, the Commission would need to adopt and be able to enforce very specific and stringent requirements on the nature and operation of the ILEC subsidiary. Without further information and exploration of these critical issues, however, the Commission cannot proceed with this course of action consistent with its public interest obligations and its stated policy goal of promoting competition for data services.

B. Compliance With the Requirements of Sections 251 and 271 Must Be Required Prior to InterLATA Relief

Given the unique issues facing data services competition, the requirements of the Act should be "underscored, not scaled back."[41] In light of the RBOCs' reluctance to comply with the requirements of sections 251 and 271, the vast majority of commenters agree that the Commission must ensure that meeting these requirements remains as a carrot for interLATA relief, just as Congress intended.[42] "Bell Atlantic is well aware of the leveling effect of section 251's pricing requirements. It is precisely to take advantage of its inherent economic advantages that Bell Atlantic asks that it be relieved entirely from any resale and unbundling obligation."[43] Moreover, as several commenters noted, the RBOCs can obtain the requested relief by complying with the requirements of sections 251 and 271.[44] Their failure to do so is all that stands between them and the ability to offer interLATA

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obligations, Bell Atlantic could load the bulk of its network costs onto its regulated entity, continue to receive monopoly returns on those costs, and price its advanced telecommunications services to its end user customers on the basis of incremental costs alone." AT&T at 21; *see also* US West at 6.

[41] ACSI at 17; *accord* DATA at 25-26.

[42] *See, e.g.*, DATA at 16-17; 20-22; AOL at 4; AT&T at 13; Internet Access Coalition at 5; Level 3 Communications at iii; XCOM Technology at 7; Minnesota DPS at 6-7.

[43] AT&T at 20.

[44] ACSI at 3; CompTel at 17; Commercial Internet Exchange at 10; Minnesota DPS at 2; Telecommunications Resellers Assoc. at 9.

services.[45] As one commenter notes, "if offering normal interLATA voice telephony has not been enough of a 'carrot' to motivate RBOCs to meet the requirements of Section 271, perhaps the prospect of offering in-region interLATA Internet backbone service would."[46]

III. THE COMMISSION SHOULD CONDUCT A COMPREHENSIVE REVIEW OF ADVANCED TELECOMMUNICATIONS ISSUES, AND AVOID CREATING A BYZANTINE PATCHWORK OF REGULATION

The Commission must not stymie the tremendous growth of advanced telecommunications services by prematurely abandoning existing competitive safeguards or by adopting new regulations without a comprehensive review. In the Telecommunications Act of 1996, Congress had the wisdom and foresight to recognize, as had the MFJ fourteen years earlier, that premature entry of the RBOCs into interLATA services would thwart the growth of competition, and imperil the introduction of future innovative services. Congress did not distinguish between voice and data services, because the same logic applies to both. The comments of many parties illustrating the abusive use of monopoly power by ILECs to thwart competition demonstrate the need to strongly enforce the pro-competitive components of the 1996 Act, and not to abandon enforcement of the market-opening provisions.[47] While the time may come to remove some of the pro-competitive safeguards that restrain the ILECs from misusing their substantial

[45] Worldcom at 4 ("Indeed it is the RBOCs' continuing violations of the very laws and rules that they seek to eliminate that pose the central impediment to Congress' vision of fully competitive telecommunications markets.")
[46] APK Net at 6.
[47] DATA at 16-17; APK Net at 9; Level 3 Communications at 9; CompTel at 8; ACSI at 17; AOL at 4; AT&T at 21; Internet Access Coalition at 5; TCG at 10-11; XCOM Technology at 7; LCI at 13.

market power—namely, once the ILECs have opened their markets to competition—now is not that time.

Rather than prematurely abandoning the enforcement of pro-competitive safeguards, or beginning to create a Byzantine patchwork of exceptions, waivers and disparate regulations, the Commission should undertake a comprehensive review of the advanced telecommunications market, its regulations and their impacts on the market. The Commission may use as a starting point for this analysis the information it has gleaned from its recent Section 706 proceeding, the arguments made by the RBOCs in their petitions in this proceeding, and the many suggestions presented by commenters on the RBOC petitions. Once the Commission has analyzed this information, then and only then, should it issue a comprehensive Notice of Inquiry ("NOI") that sketches out its long term view on the evolution of advanced telecommunications services regulation.

By conducting a thorough review of the industry prior to issuing an NOI, the Commission will minimize industry uncertainty, and minimize the risk of impeding advanced telecommunications services growth. Once the NOI has been issued, however, the Commission should move expeditiously through the Notice of Proposed Rulemaking and Order stages to avoid the concerns expressed by Next Level Communications that the Commission has been slow to address advanced technology issues in the past,[48] and minimize the period of greatest uncertainty when proposed rules are publicly available, but not yet adopted.

[48] Next Level Communications at 9.

Many parties encourage the Commission to conduct a comprehensive review of the regulation of advanced telecommunications service regulation.[49] As aptly stated by the Internet Access Coalition, which represents many of the largest industry manufacturers and service providers, "[t]hese petitions raise important issues, and they create an opportunity for policymakers and industry participants to review existing regulations with the goal of creating an environment that promotes the competitive deployment of broadband services."[50] This sentiment was echoed by many other parties including Cablevision Lightpath, which noted that "[i]t would be dangerous for the Commission to deregulate parts of the Bell companies' networks before an extensive dialogue and evaluation has taken place to address fully the effect of such actions."[51] Additionally, DATA shares the view expressed by the Commercial Internet Exchange Association that "a general rulemaking avoids the implicit bargaining of ad hoc regulatory relief for one technology deployment or another; it also adds a context of regulatory principles to apply to specific decisions." Without such a general rulemaking, DATA fears that the ILECs will remain the monopoly gatekeepers to advanced communications services, and jeopardize the ability of companies like those of DATA to effectively compete.

The many interesting, creative and wide-ranging suggestions regarding regulation to promote the growth of advanced telecommunications services further demonstrates the need for the Commission to institute a comprehensive rulemaking. Commenters raise a plethora of possible ways to reform Commission

[49] *See, e.g.*, DATA at 26; Internet Access Coalition at 4; Cablevision Lightpath at 4; Telecommunications Resellers Association at 4-5; Transwire at 11; Commercial Internet Exchange Association at 21.
[50] Internet Access Coalition at 4.
[51] Cablevision Lightpath at 4.

regulation of advanced communications services. Perhaps, the most far-reaching suggestion is the one by Level 3 Communications that encourages the Commission to divest the BOCs of their copper loop distribution facilities and wire center buildings that control access to those facilities, while noting that "[h]istory teaches that the only effective solution to the bottleneck problem is to separate the control of bottleneck facilities from the entity participating in competitive markets."[52] Other parties do not make such far-reaching suggestions, but offer a wide range of ideas including "direct[ing] all LECs to offer a technically and economically non-discriminatory, cost-based, federally-tariffed 'unswitched clean copper circuit' service to end users, including ISPs."[53] Still others raise issues related to the regulatory distinction between Title II carriers and Title VI cable operators, and the impact on CPE rules that should be clarified as technologies converge.[54] Some of these ideas have been previously raised in the Section 706 proceeding, while others have not. The wide range of issues and suggestions demonstrate that the Commission should, as suggested above, analyze all of these inputs and issue a comprehensive NOI that provides interested parties with the Commission's vision for regulation of advanced telecommunications services.[55]

The significance and complexity of advanced telecommunications services regulation also supports the need for a comprehensive rulemaking. As discussed

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[52] Level 3 Communications at 12.
[53] APK Net, *et al.* at 4.
[54] Next Level Communications at v.
[55] There is also a lack of clarity in the record regarding ILEC calls for price deregulation of DSL. Currently, there are no tariffed ILEC DSL offerings and little evidence to judge the adequacy of existing controls. DATA is concerned that ILECs will not charge themselves the loop or collocation costs that are the primary cost components for competing DSL CLECs. This would be highly anticompetitive and must not be allowed via sweeping DSL price deregulation for ILECs.