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CC Docket Nos. 98-11, 98-26, 98-32 97-6
Petitions of BA, US WEST, and Ameritech
Reply Comments of the PaPUC
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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C. 20554

Petition of BA Corporation for Relief from Barriers to Deployment of Advanced Telecommunications Services	CCB Docket No. 98-11
Petition of US WEST Communications, Inc. for Relief from Barriers to Deployment of Advanced Telecommunications Services	CCB Docket No. 98-26
Petition of Ameritech Corporation to Remove Barriers to Investment in Advanced Telecommunications Services	CCB Docket No. 98-32

COMMENTS OF THE PENNSYLVANIA PUBLIC UTILITY COMMISSION IN OPPOSITION TO THE PETITIONS OF BA, US WEST AND AMERITECH CORPORATION FOR RELIEF UNDER SECTION 706 OF THE TELECOMMUNICATIONS ACT OF 1996

I. INTRODUCTION

1. Pursuant to FCC Public Notice DA 98-184 released on January 30, 1998, and amended by subsequent public notice, the Pennsylvania Public Utility Commission (PaPUC) submits these Reply Comments opposing the Petitions of BA, Inc. (BA), US WEST (US WEST) and Ameritech Corporation (Ameritech) (collectively, the Petitioners) for Relief under Section 706 of the Telecommunications Act of 1996 (TA-96). The PaPUC filed comments in this proceeding. The PaPUC incorporates those comments and any other Comment or Reply Comment consistent with this Reply.

II. SUMMARY OF THE PROCEEDING

2. This proceeding involves Sections 10, 251, 271, 272, and 706 of the TA-96. The Regional Bell Operating Companies (RBOC) want the Federal Communications Commission (FCC) to forebear from the statutory requirements of Sections 251 and 271. The RBOCs claim that Section 706 authorizes that action. In return, the RBOCs commit to delivering high-speed services using xDSL technology over the current copper system.

This new technology allegedly enhances the current network, alleviates congestion on the internet backbone and connection, and facilitates deployment of high-speed, broadband services throughout America.

3. The RBOCs seek relief under Section 706 of the TA-96. The RBOCs claim that Section 706 authorizes the FCC to refrain from enforcing the resale, unbundling, and interconnection requirements of Section 251. The RBOCs also claim that Section 706 allows the FCC to refrain from enforcing the requirements of Section 271 governing the RBOCs' entry into the interLATA market. The RBOCs allege that Section 706's commitment to deployment of an advanced telecommunications network constitutes and justifies an independent forebearance authority.

4. The RBOCs propose to deliver enhanced services over the current copper wire system through the use of Digital Subscriber Line technology (xDSL), packet-switching and "dry copper" loops.[1] The RBOCs want to provide these services on an

[1] xDSL is a term of art referring to several forms of Digital Signal Line technology (DSL). DSL enables the provision of different combinations of high-speed data, voice, and fax through copper loops using packed-switched routing.

interLATA basis without complying with the resale, unbundling, and interconnection requirements of Section 251. The RBOCs also want to provide these services on an interLATA basis without complying with the Section 271 requirement that the local network for these services be open to other competitors. The RBOCs claim these considerations are necessary given the business, investment, and demand risks associated with providing xDSL over the current copper network.

Packet switching is a term of art referring to a more-efficient routing compared to older circuit-switching. Under the current network configuration, a residential customer accessing the internet over an ILECs phone line uses a circuit switch dedicated to serving that customer. Under packet switching, the customer's internet access is routed to any available location which may, or may not, include the dedicated circuit switch.

Dry copper is a term of art referring to the quality of the current copper network. Under the current system, loop lengths over 18,000 feet (the 18K problem) need signal boosters referred to as "coils" or "taps" to provide a quality signal. xDSL equipment, however, must have the coils or taps removed to provide for the unimpeded flow of information at high-speeds. This copper is referred to as "dry copper" or "conditioned copper" or "DSL-compatible copper." BA does not provide any DSL-compabtible copper in any of its current service territories. BA's interconnection agreement also obviate any obligation to provide DSL-compatible copper.

DSL-compatible copper, however, is essential to BA's ability to provide the xDSL services and network contemplated in the pending Petition in this proceeding. Moreover, BA wants the FCC to forebear from requiring the delivery of DSL-compatible copper, or space to collocate xDSL equipment, to any ISP or CLEC as part of the relief in its Petition.

5. The Internet Service Providers (ISPs), Competitive Local Exchange Carriers (CLECs), and Interexchange Carriers (IXCs) oppose the RBOCs. The ISPs claim that forebearance from Section 251 under Section 706 perpetuates the RBOCs' monopoly control over the local loop. The ISPs claim that the local loop and subloop resale, unbundling, and interconnection are essential to deployment of xDSL on a competitive basis. The ISPs claim that Section 706 does not allow the FCC to exempt the RBOCs from offering the xDSL, dry copper, and related services on a resale, interconnection, and unbundled basis under Sections 251. The ISPs also claim that Section 706 does not allow the FCC to exempt the RBOCs from the Section 271 requirements before the RBOCs can enter the interLATA market for data services or any other services.

6. The CLECs also claim that the Petitioners' proposal to limit interLATA services to "data only" is an ineffective restraint because the proposed relief, if granted, allows the packaging of voice, fax, and data services. The CLECs conclude that the RBOCs can provide such services only if they comply with Section 271 and that Section 706 does not obviate that ongoing obligation.

III. SUMMARY OF THE PaPUC POSITION

7. The PaPUC urges the FCC to deny the Petitioners' requests. The requests must be denied because they rest on an untenable reading of Section 706. Section 706 of the TA-96 provides the FCC with no independent grant of authority regarding forbearance. Any Section 706 forebearance must be consistent with Sections 10, 251, 271, and 272 of the TA-96.

8. The PaPUC urges the FCC to deny the Petitioners' request, even if the FCC concludes that Section 706 does provide an independent source of regulatory forebearance, because the Petitioners have not met the Section 706(a) criteria. The Petitioners have not established that advanced telecommunications are not deployed in a reasonable and timely basis. The Petitioners do not identify what federal laws and regulations are barriers to deployment or that the FCC has independent authority to remove those laws or regulations. The Petitioners do not establish that removal is consistent with the public interest, convenience, and necessity.

9. The PaPUC urges the FCC to deny the Petitioners' request, even if the FCC concludes that Section 706 provides an independent source of regulatory authority, because there has been no Section 706(b) inquiry. Section 706(b) of the TA-96 requires initiation and completion of an inquiry concerning the reasonable and timely deployment of advanced telecommunications before any Section 706(a) relief is granted.

10. The PaPUC, while it supports and will encourage the Petitioners' proposals to provide high-speed services using xDSL technology over twisted copper lines, opposes the Petitioners' request. The PaPUC rejects the Petitioners' claims that they do not have to comply with the unbundling, resale, interconnection requirements of Sections 251 and 271 of the TA-96 as regards the services contemplated by the Petitions.

11. The PaPUC opposes the Petitioners' request to create a "Data LATA." That dataLATA will provide interLATA services without complying with the requirements of Sections 251, 271 and 272 of the TA-96. The PaPUC does not believe that Section 706 authorizes obviation of those statutory provisions to create such a LATA.

12. The PaPUC opposes the Petitioners' request because the end result is a packaging of high-speed services and Plain Ordinary Telephone Service (POTS) without complying with the statutory requirements of Sections 251, 271 and 272 of the TA-96. Non-compliance with the pro-competitive provisions of these statutory requirements will stifle competition contrary to the TA-96. The PaPUC believes that compliance with Sections 251, 271 and 272 of the TA-96 is the sine qua non required for RBOC entry into the interLATA market.

13. The PaPUC opposes the Petitioners' requests because they rest on unsubstantiated claims of internet backbone and connectivity problems. The PaPUC recognizes that internet connectivity problems at the local loop have frustrated consumers although that frustration is not adequate to dispense with the pro-competitive provisions of Sections 251, 271, and 272 as well as Pennsylvania's own Chapter 30. The PaPUC is concerned that granting the Petitioners' request will stifle the delivery of competitive internet services by independent internet service providers (ISPs). The PaPUC believes that the aim of the TA-96 and Pennsylvania's own Chapter 30, 66 Pa.C.S. §§3001-3009,

is to encourage competition. Eliminating compliance with these pro-competitive provisions on the basis of anecdotal evidence is not in the public interest.

14. The PaPUC opposes the Petitioners' requests, especially that of BA, given the disturbing allegations in many Reply Comments about RBOC practices regarding physical and virtual collocation, the non-delivery of "dry copper" to ISPs and CLECs, and the delays in responding to ISP and CLEC requests for services in support of the TA-96. The PaPUC urges the FCC to take a very close look at these allegations, and conduct the necessary inquiry, before considering any Section 706 relief. The PaPUC also intends to monitor developments in that regard at the state level.

15. The PaPUC opposes the Petitioners' requests given the current state of private and public peering arrangements for the delivery of ISP services. The PaPUC urges the FCC to take a very close look at these allegations, and conduct the necessary inquiry, before considering any Section 706 relief. The PaPUC also intends to monitor developments in that regard at the state level.

16. The PaPUC opposes the Petitioners' requests given the allegations in the Reply Comments on the RBOCs collation practices, especially the resistance to placement of digital electronic interfaces and equipment in the RBOCs' central offices. The PaPUC does not believe that granting the Section 706 relief will alleviate the problems raised with these allegations. If anything, the relief could aggravate the current situation. The PaPUC urges the FCC to take a very close look at these allegations, and conduct the necessary inquiry, before considering any Section 706 relief. These allegations, if substantiated, constitute a very real threat to the competition envisioned by the TA-96. The PaPUC will monitor developments in that regard at the state level.

IV. THE PaPUC POSITION

A. The Petitioners Have Not Established That Section 706 Provides A Separate Source Of Forebearance Authority Independent Of Section 10.

17. The RBOCs petition is premised on the claim that Section 706 allows the FCC to dispense with the requirements of Sections 251 and 271 of the TA-96 if, in the FCC's opinion, forebearance under Section 706 promotes the deployment of advanced

telecommunications services. The ISPs and CLECs oppose this reading of Section 706. They claim that any forebearance under Section 706 is authorized only if it is consistent with Section 10 and Sections 251, 271 and 272.

18. The PaPUC does not support the RBOCs' interpretation. That interpretation, if adopted, allows the FCC to void any statutory provision in the TA-96 on a bare showing under Section 706. The PaPUC does not believe that Congress established the detailed requirements of the TA-96 only to obviate them whenever convenient under Section 706. That interpretation, if adopted, would also mean that the FCC could simply circumvent the detailed authority provided to the states under the TA-96 whenever, in the FCC's opinion, such circumvention was justified under Section 706. The PaPUC does not believe that Congress provided for detailed state authority only to destroy it with a general clause under Section 706.

19. Consequently, the PaPUC agrees with the CLECs and ISPs that Section 706 is not a separate source of legal forebearance authority. The FCC can only forebear

consistent with the tests set forth in Section 10 of the TA-96. Since the RBOCs' requests do not meet the Section 10 tests, the RBOCs Petitions must be denied.

B. If The FCC Concludes That Section 706 Provides Separate Forebearance Authority, The FCC Must Reject The RBOCs' Requests For Failure To Meet The Section 706 Requirements Or Consult The States Under Section 706(a)

20. Section 706 consists of two sections. Section 706(a) authorizes the FCC and each State commission to encourage the deployment of advanced telecommunications services by utilizing, in a manner consistent with the public interest, convenience and necessity, price cap regulation, forebearance, measures that promote competition, or other regulating methods that remove barriers to infrastructure investment. Section 706(b) requires the Commission to initiate, within 30 months of the enactment date (February 1996) and regularly thereafter, regarding the delivery of advanced telecommunications services to all Americans. The Commission must complete that inquiry within 180 days.

21. The PaPUC opposes the Petitions because they do not comply with Section 706(a). The PaPUC, as a state commission jointly authorized with the FCC in the

management of Section 706 matters, has been neither consulted nor petitioned by the RBOCs in this regard. The PaPUC opposes the Petitions because the claims and counterclaims present substantially conflicting evidence that cannot be resolved without additional hearings. Moreover, the evidentiary conflicts preclude any conclusion that the public interest, convenience, and necessity is enhanced by Section 706 forebearance. Finally, the RBOCs have not established that the public is better served by stopping the competition envisioned under Sections 251, 271, and 272 in favor of monopoly.

22. The PaPUC also opposes BA's request. BA has not established that the current network modernization efforts underway in Pennsylvania are not encouraging deployment of the advanced telecommunications network envisioned by the TA-96 and Pennsylvania's own Chapter 30. Moreover, BA has not identified any federal law or regulation in current need of removal in order to promote network modernization in Pennsylvania. Finally, BA's claim is contradicted by BA's commitment to a $1.5 billion infrastructure investment that predates this Section 706 Petition.

23 Finally, the PaPUC opposes these Petitions because they threaten Pennsylvania's commitment to price cap regulation, the promotion of competition, and the removal of barriers to infrastructure investment at 66 Pa.C.S. §3001 et seq. (Chapter 30). BA has not claimed that the advanced network deployment requirements of Chapter 30 are further advanced by this Petition nor has BA submitted detailed Pennsylvania-specific information that would support FCC action regarding Pennsylvania. BA has not provided sufficient evidence that the public interest in Pennsylvania is better served by an exemption from the requirements of Sections 251 and 271 when such an exemption could obviate competition in many parts of Pennsylvania. That concern is particularly pronounced with regard to rural Pennsylvania, as well as Pennsylvania's schools and libraries.

24. The PaPUC also opposes the RBOCs' request for historical reasons. This is not the first time the RBOCs, and BA in particular, have come to the FCC promising to deliver a state-of-the-art network in exchange for regulatory relief. A little less than five years ago, BA promised to construct a network capable of delivering video on demand in exchange for regulatory relief. BA, however, never followed through on that

commitment and subsequently withdrew the request. The PaPUC urges the FCC to consider the historical conduct and promises of the RBOCs, including BA, when evaluating the promises made in the current Section 706 request.

25. The PaPUC opposes the Petitions because they do not comply with Section 706(b). There is no record evidence in the Petitions that the FCC has initiated, let alone concluded, the Section 706(b) inquiry required before any forebearance is granted under Sections 10 and 706(a). The RBOCs have not made a request for action under Section 706(b) nor have they consulted the states as suggested by Section 706(a). Moreover, the opposing Comments in this proceeding strongly suggest that any Section 706(b) inquiry will NOT support Section 706 relief.

26. Consequently, the PaPUC urges the FCC to avoid making a premature Section 706 determination in the face of conflicting evidence, the absence of any Section 706(b) inquiry, an untenable legal theory, and insufficient evidence on the criteria needed to support a Section 706 finding.

C. The PaPUC Supports and Encourages the Petitioners' Proposals To The Extent The Proposals Contemplate Delivery of High-Speed Services Using xDSL Technology over the Current Copper Network Although There Must Be No Forebearance From the Requirements of Sections 251, 271 and 272 of the TA-96.

27. The Petitioners, especially BA, promise to provide high-speed services using xDSL technology over the existing copper network provided the RBOC is exempted from the interconnection, resale, and unbundling requirements of Section 251. Moreover, the BA commitment is accompanied by a similar request that the FCC forebear from enforcing the Section 271 requirements regarding these high-speed services.

28. The PaPUC opposes any forebearance from the requirements of Sections 251, 271 and 272 of the TA-96. The PaPUC believes that the high-speed services contemplated by the Petitions, to the extent they are enhancements of services predating the TA-96 and arguably within the FCC's jurisdiction, must be subject to Sections 251, 271 and 272 in order to promote competition. The PaPUC also believes that the high-speed services contemplated by the Petitions, to the extent they constitute new services and arguably within the states' authority, must be subjected to Sections 251, 271 and 272 at the state level.

29. The PaPUC rejects the claim that an RBOC's promise to deploy services already provided or contemplated by competitors is sufficient to justify federal relief that excludes those very competitors. The PaPUC notes, in particular, that BA has already committed to deploying a state-of-the-art network in Pennsylvania in exchange for regulatory relief and incentives. The PaPUC does not see how that commitment, given Pennsylvania's own regulatory restructuring undertaken to promote that goal, can be reconciled with claims at the FCC that Section 706 relief is necessary to deploy the same state-of-the-art network. Moreover, BA-PA must file its 2nd Biennial Report on its Network Modernization Plan (NMP), already required as a matter of state law under Chapter 30, detailing progress in network modernization underway since 1995. The PaPUC does not believe this commitment, and the evidence contained in the Biennial Report, can be reconciled with the need for Section 706 relief.

30. The PaPUC also rejects the RBOCs' request because it rests on resurrecting a monopoly in lieu of competition. That is because the RBOCs Section 706 relief effectively creates a monopoly in the delivery of xDSL service over the current copper

network. Forebearance from the resale, interconnection, and unbundling provisions of Section 251 will establish that monopoly. Forebearance from the competitive provisions of Section 271 will sustain that monopoly because the RBOCs will be able to deliver interLATA services without having to make those same services available to others. The PaPUC does not believe that this emasculation of competitors is a minor consideration.

31. The PaPUC believes that the delivery of advanced telecommunications services to Americans through xDSL cannot be accomplished by anticompetitive decisions. The PaPUC believes, however, that deployment of advanced telecommunications can be facilitated by compliance with Sections 251, 271, and 272.

32. The PaPUC also opposes the RBOCs' request given the grave indications of problems with collocation and, in the case of BA, the refusal to provide unbundled "dry copper" to potential xDSL service providers. The PaPUC does not believe that the provisions governing the delivery of "dry copper," as indicated in the Comments of some parties, should be ignored by the FCC. The PaPUC believes that any Section 706 relief

can be granted only after conducting the Section 706(b) inquiry, including the allegations raised by the ISPs and CLECs.

33. The PaPUC recognizes that its authority regarding Section 706 may be more circumscribed when it concerns the interstate matters that are the subject of the Petitions. However, the joint authority referred to in Section 706(a), the evident problems with collocation, and the myriad issues concerning the delivery of "dry copper" to xDLS providers must be examined before granting any Section 706 relief.

34. The PaPUC, while it supports and will encourage the Petitioners' proposals to provide xDSL over the current copper network, opposes the creation of a "Data LATA" and any packaging of high-speed services with POTS. The PaPUC does not believe that this relief can be granted because it rests on forebearance from Sections 251, 271, and 272. The PaPUC does not believe that the RBOCs can limit the use of any "data LATA" to data services since, in the logical course of events, packaging of data, voice, and fax should be the order of the day in the near future. Moreover, the RBOCs' delivery of interLATA basis without complying with Section 271 is fraught with peril for

competition. Finally, the premature grant of the Section 706 relief in the Petitions is almost certainly guaranteed to generate litigation that can be avoided by denial.

35. In the alternative, the PaPUC urges the FCC to examine the collocation, resale, interconnection, and unbundling issues raised in the case. The PaPUC suggests that these issues be examined on a site-specific basis or, at the very least, through the examination of progress at pre-selected sites on an intrastate and interstate basis in consultation with the states.

36. The PaPUC urges the FCC to recognize that any alternative must include a Section 706(b) inquiry, in cooperation with the states under Section 706(a), before any Section 706 relief can be granted. The PaPUC urges the FCC to work with the states to exercise the governments' joint authority under Section 706(a) and monitor the RBOCs actual compliance with the terms of any Section 706 relief that could then be granted.

37. The PaPUC underscores its belief, however, that any relief the FCC fashions under this alternative must impose some pro-competitive version of

Sections 251, 271, and 272 in order to encourage the technology-specific goals contemplated by the RBOCs' Section 706 request. The FCC must also recognize, and reconcile, the technology-specific nature of the RBOCs' Section 706 request with the requirement in the TA-96 that regulatory action must be technology-neutral.

38. Finally, the PaPUC reiterates its belief that any relief the FCC fashions under this alternative must include, at a minimum, the express authority of the states to impose additional requirements under Section 706(a) as part of the goals of the TA-96.

39. The PaPUC believes these minimum requirements to any alternative fashioned by the FC represent the bare minimum needed to defend any Section 706 relief in light of Sections 251, 271, and 272.

D. The RBOCs Have Not Provided Evidence That Competition Must Be Foreclosed to Alleviate Internet Problems And Deploy Advanced Networks. The FCC Should Be Concerned About the Proliferation of Private Peering Arrangements In The Wake of the Pending MCI-WorldComm Merger.

40. The Petitioners claim that xDSL technology over the current copper wire system will alleviate an alleged congestion problem on the internet. The Petitioners claim

that the use of packet switching and xDSL will alleviate congestion at the local loop and on the internet itself. The Petitions promise to deploy this advanced telecommunications network only if the FCC forebears from imposing the requirements of Sections 251, 271, and 272 for this advanced technology.

41 The PaPUC opposes the Petitioners' request. The Petitioners have obfuscated the difference between problems with local loop access to the internet (Internet Connectivity) with information transmission on the Internet itself (Internet Backbone). The PaPUC recognizes that Internet Connectivity problems exist at the local loop, which local loop is largely within the control of the RBOCs, and does not believe that the harm to competition, caused by granting this Section 706 relief, is adequate grounds for granting the Section 706 relief. The PaPUC is not convinced, particularly in light of the Comments filed by the ISPs and CLECs, that there is a problem with the Internet Backbone. The PaPUC is not convinced that that Internet Connectivity problems can only be solved by grants of Section 706 forebearance when that forebearance forecloses competition in the delivery of xDSL services. That concerned is underscored

by the absence of any Section 706(b) inquiry and the exercise of the joint authority called for in Section 706(a).

42. The PaPUC agrees with the RBOCs that ordering the delivery of "dry copper" for xDSL purposes and the deployment of xDSL equipment in central offices may not automatically deliver high-speed network services to Americans. There is a very real risk, as was the case with fiber deployment and video-platform promises, that technological change can overcome the best-ordered mandates of government or the overly-optimistic paeans of an RBOC, ISP, or CLEC.

43. The PaPUC recognizes that there is a truth in the RBOCs challenges to the claim that dry copper mandates and xDSL equipment dictates, especially if accompanied by the retreat of public accountability, will usher in a high-speed golden age. Neither the current copper network nor the current technological innovations were generated overnight. Moreover, the actions of the states, including Pennsylvania's own Chapter 30, already encourage deployment of a state-of-the-art network.

44. Consequently, the PaPUC endorses the RBOCs skepticism regarding the ISPs and CLECs claim that regulatory action or non-action guarantees a new golden era in telecommunications. The skepticism is underscored by the governments' experience with video-platform under Section 214. At that time, the RBOCs (including BA), promised to usher in a golden era in telecommunications if action would be taken under Section 214. This much-toured golden era of video-platforms, however, never emerged because of subsequent developments which culminated in BA's petition being withdrawn.

45. Moreover, the RBOCs correctly identify the very real risks associated with this new technology. The PaPUC disagrees with the RBOCs, however, that the best way to manage that risk is to protect the CLECs and ISPs from assuming their portion of the financial, market, and demand risks associated with xDSL. The avoidance of competitive risk was not the primary thrust of the TA-96 vis-a-vis ISPs, CLECs, and IXCs.

46. Finally, the PaPUC is concerned about the profusion of private peering arrangements referred to in the Comments. These arrangements, which supplant public