NEXTLINK®

July 23, 1998

EX PARTE OR LATE FILED

Ms. Magalie Roman Salas
Secretary
Federal Communications Commission
1919 M Street, N.W.
Washington, D.C. 20054

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JUL 23 1998
FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

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Re:

(1) Petition of Bell Atlantic Corporation for Relief from Barriers to Deployment of Advanced Telecommunications Services, CC Docket No. 98-11;
(2) Petition of US West for Relief from Barriers to the Deployment of Advanced Telecommunications Services, CC Docket No. 98-26;
(3) Petition of Ameritech Corporation to Remove Barriers to Investment in Advanced Telecommunications Services, CC Docket No. 98-32.

Dear Ms. Salas:

Pursuant to the requirements of Sections 1.1200 et seq. of the Commission's rules, you are hereby notified on behalf of NEXTLINK Communications, Inc. that yesterday R. Gerard Salemme, Senior Vice President of NEXTLINK Communications, Inc., and the undersigned met with Paul Misener and Kevin Martin of Commissioner Furchgott-Roth's Office and Kyle Dixon of Commissioner Powell's Office.

NEXTLINK representatives met with Mr. Misener, Mr. Martin, and Mr. Dixon yesterday to discuss various RBOC petitions requesting regulatory relief under Section 706 of the 1996 Telecommunications Act. At this meeting, NEXTLINK summarized and clarified its policy positions as previously submitted into the record at the FCC's July 9th En Banc hearing and also raised additional issues regarding the RBOC 706 petitions that are outlined in the attachment to this letter.

Should there be any questions regarding this matter, please do not hesitate to contact me.

Sincerely,

Daniel Gonzalez
Director, Regulatory Affairs

cc: Paul Misener, Chief of Staff, Office of Commissioner Furchgott-Roth
Kevin Martin, Legal Advisor, Office of Commissioner Furchgott-Roth
Kyle Dixon, Legal Advisor, Office of Commissioner Powell

Tom Power, Legal Advisor, Office of Chairman Kennard
Jim Casserly, Senior Advisor, Office of Commissioner Ness
Paul Gallant, Legal Advisor, Office of Commissioner Tristani
Kathryn Brown, Chief, Common Carrier Bureau
Larry Strickling, Deputy Chief, Common Carrier Bureau
Linda Kinney, Policy and Program Planning Division
Robert Pepper, Chief, Office of Plans and Policy

Attachment Enclosed

NEXTLINK Communications Ex Parte Attachment

Recent press accounts suggest that the Commission, as part of its on-going Section 706 proceeding, is considering granting Bell Operating Companies ("BOCs") "interim" authority to form separate subsidiaries through which the BOCs would provide advanced data telecommunications services without complying with all of the statutory and regulatory requirements of sections 251(c) and 271.

NEXTLINK, in its comments in this proceeding, essentially argued that forbearance from Sections 251 and 271 for BOC data services would disrupt Congress's carefully crafted statutory scheme to encourage competition in the local exchange market. In addition, NEXTLINK argued that the FCC does not have the legal authority to forbear from applying the requirements of Sections 251(C) and 271. While reiterating this position in its ex parte meetings, NEXTLINK also addressed the merits of the separate subsidiary proposal as described in these recent press reports.

1. In The Interest Of Promoting Procedural Fairness And Encouraging The Formulation of Sound Public Policy, The FCC Should Not Hastily Grant the BOCs Immediate "Interim" Authority To Provide Advanced Data Services Through a Separate Subsidiary.

Interested parties have not had adequate notice that the FCC was seriously considering granting the BOCs immediate "interim" authority to provide advanced data services through a separate subsidiary. Irrespective of whether granting the BOCs "interim" authority is or is not in the public interest, it is undeniable that the immediate creation of BOC separate subsidiaries will significantly alter the existing regulatory and competitive market landscape for the provision of advanced data services. Given the impact of this decision, the FCC should not adopt an eleventh hour proposal without providing interested parties with a reasonable opportunity to comment on the merits of such a proposed separate subsidiary and its impact on local competition.

2. Granting Immediate "Interim" Authority To Provide Advanced Data Services Will Skew Existing Incentives That Require BOCs to Open Their Networks and Promote Local Competition.

The proposal to provide "interim" authority would in essence put the cart before the horse. Instead of trying first to determine - - through the notice and comment process - -the type of structural safeguards necessary to effectively promote deployment of advanced services and not harm local competition, the FCC seems poised to allow the BOCs to deploy advanced data facilities and services free of the critical 251(c) pro-competitive unbundling requirements, and then subsequently receive

comment on whether these safeguards sufficiently promote advanced services as well as local competition.

Section 271 of the Act and even NTIA's recent "roadmap" recognizes the importance of withholding any "carrot" until the BOCs demonstrate full compliance with the pro-competitive statutory and regulatory requirements. The issuance of "interim" authority would effectively abandon the existing statutory and regulatory framework where the "carrot" of regulatory relief is not granted until the BOC demonstrates pro-competitive compliance.

3. The FCC's Experience In The Cellular Market Demonstrates That Separate Subsidiaries May Assist In Detecting Anti-Competitive Behavior But Fail To Diminish the Incentive For BOCs To Discriminate Against Competitors.

The Commission's prior experience with allowing monopolists such as the BOCs into new lines of businesses through a separate subsidiary shows that while establishing separate subsidiaries assists in the detection of anti-competitive behavior, it does not diminish the incentive for the BOCs to discriminate against their competitors. The limited utility of separate subsidiaries as an anti-competitive safeguard is well documented in the cellular industry. The in-region B-block cellular licenses set aside for each BOC are required by the FCC to be held in separate subsidiaries. The FCC reasoned that so long as the BOCs were required to treat their separate subsidiary in the same manner as their competitors, anti-competitive activity would be curbed. In fact, the BOCs responded by deliberately handicapping their own affiliates in order to avoid providing reasonable and efficient interconnection arrangements to non-affiliated wireless carriers. This state of affairs arguably persisted for more than a decade until the passage of the Telecommunications Act of 1996.

For example, the FCC's early pronouncements on cellular interconnection were designed to prevent the telephone companies from discriminating against nonwireline cellular carriers in favor of their own wireline affiliates by requiring that the BOCs provide interconnection to nonwireline carriers on terms no less favorable than those offered to their own affiliates.[1] The BOCs responded by refusing to provide reasonable and efficient interconnection arrangements – such as trunkside (Type 2) interconnection -- to any wireless carrier, including their own affiliates.[2] After more

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[1] See, e.g., *Cellular Communications Systems,* 86 FCC2d 469, 496 (1981), recon, 89 FCC2d 58, 80-82 (1982).

[2] See, *Equal Access and Interconnection Obligations Pertaining to Commercial Mobile Radio Services,* Notice of Proposed Rulemaking and Notice of Inquiry, 9 FCC Rcd 5408, 5450 (1994) (describing history of LEC and cellular interconnection negotiations, including a time during which LECs refused to provide trunkside interconnection to nonwireline carrier).

than five years of persistent problems, the Commission was required to intercede and issue a policy statement setting forth standards for LEC-to-cellular interconnection.[3]

In addition to denying wireless carriers reasonable and efficient interconnection arrangements, the BOCs historically used their monopoly power to charge wireless carriers exorbitant interconnection rates and deny them reciprocal compensation for the termination of traffic. At the point that the FCC launched its local competition proceeding, wireless carriers were paying an average of 2.5 cents a minute for interconnection – in some cases five times more than rates changed to the CLEC industry. The wireline affiliated carriers were notoriously absent from the battle for fair wireless interconnection rates and terms – both at the FCC and in the states – because for them the payment of inflated interconnection bills was merely a "pocket to pocket" transfer from the subsidiary to the parent. The payment of inflated and unreasonable interconnection fees by nonaffiliated carriers, however, lined the pockets of their direct competitors and impaired their ability to effectively compete. Interconnection rates and the issue of reciprocal compensation only began to be reformed after the passage of the Telecommunications Act of 1996, more than a decade after the commercial deployment of cellular networks.

Similarly, once the BOCs were permitted to acquire out-of-region nonwireline cellular licenses, the domination of the parent BOC over its out-of-region wireless subsidiaries became even more striking. For example, a consortium of nonwireline carriers instituted the North American Cellular Network ("NACN") to promote automatic roaming among its members and other service features that would make the carriers more competitive with their wireline counterparts. All of non-RBOC affiliated A side carriers joined the NACN. None of the BOCs allowed their A side licensees to join, presumably because it would increase competition to their in-region properties.

Finally, the story of AirTouch Communications is an illustration of the pro-competitive distinctions between requiring a separate subsidiary and the establishment of a wholly independent enterprise. AirTouch's predecessor, the wireline affiliate of Pacific Telesis, consistently aligned its position on policy matters with its parent, even when the position was to its detriment. When the wireless properties were spun-off into the newly created, independent AirTouch Communications, AirTouch became one of the most high profile, vocal advocates for wireless interests. In fact, AirTouch has filed complaints against its former parent for refusing to pay reciprocal compensation and for denying it the ability to deploy "calling party pays."

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[3] See, *Need to Promote Competition and Efficient Use of Spectrum for Radio Common Carrier Services,* Memorandum Opinion and Order, 59 RR 2d 1275 (1986).

4. Competition, Not Separate Subsidiaries, Will Lead to Lower Prices, Greater Customer Choice, and Rapid Deployment of Advanced Telecommunications Facilities and Services.

Throughout this proceeding the BOCs have argued that without regulatory relief little, if any, incentive exists to deploy advanced data telecommunications services. It now appears that the incumbents contend that without immediate "interim" authority to provide advanced services through a separate subsidiary, rapid deployment of advanced data networks and services will not occur. The Commission, however, cannot ignore contradictory record evidence that demonstrates the BOCs are either currently deploying or have announced plans to invest and deploy advanced telecommunications services throughout the nation.

An incumbent's willingness to deploy advanced data facilities and services will not be affected by Commission issuance of any "Interim" authority for separate subsidiaries. Instead, competition and the actions of facilities-based competitors in the marketplace is the driving force behind the BOC's efforts to innovate, invest, and deploy advanced services. As recently stated in testimony at the FCC's En Banc Bandwidth Hearing, facilities-based competitors believe that the best way to speed the deploy of advanced data facilities and services is for the FCC to hold firm on its local competition rules and enforce the statutory and regulatory requirements of sections 251(C) and 271.

NEXTLINK urges the Commission to identify in this proceeding the regulatory changes necessary to bring about deployment of advanced telecommunications networks and services consistent with the statutory mandate to promote competition. Finally, NEXTLINK supports the NTIA "roadmap" that: 1) urges the FCC to ensure that new entrants have reasonable and fair access to local loops; and 2) requests the FCC to modify its collocation policies to further encourage ILECs to reduce collocation costs for all providers as preconditions before granting BOCs further regulatory relief.