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

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

In the Matter of	)	
	)	CC Docket Nos. 98-147, 98-11, 26,
Deployment of Wireline Services Offering	)	98-32, 98-15, 98-78, 98-91,
Advanced Telecommunications Capability	)	CCB/CPD No. 98-15, RM 9244

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OPPOSITION OF THE COMMERCIAL INTERNET EXCHANGE ASSOCIATION

The Commercial Internet eXchange Association ("CIX"), by its attorneys, files this opposition to the petitions for reconsideration and/or clarification of Bell Atlantic and SBC Communications, et al.,[1] which request modification of two aspects of the Memorandum Opinion and Order.[2] CIX respectfully disagrees with the Petitions. The Commission should reaffirm its directive that incumbent local exchange carriers ("ILECs") provide loops which are conditioned for new entrants to offer advanced telecommunications services, subject only to limitations of technical feasibility. Access to unbundled and conditioned local loops is required by Section 251 of the Act and is integral for the timely deployment of advanced services in a competitive manner. In addition, the Commission should reaffirm its decision that Section 706 of the Telecommunications Act of 1996 (the "1996 Act") provides no independent basis of authority for regulatory forbearance. Forbearance actions that further the goals of Section 706 must also

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1 "Petition of Bell Atlantic for Partial Reconsideration or, Alternatively, for Clarification," (filed Sept. 8, 1998), and "Petition for Reconsideration of SBC Communications Inc., Southwestern Bell Telephone Company, Pacific Bell, and Nevada Bell," (filed Sept. 8, 1998) (collectively, the "Petitions"). CIX files this Opposition pursuant to the Commission's September 18, 1998 Public Notice (Report No. 2297).

2 FCC 98-188 (released August 7, 1998) (the "MO&O").

meet the standards of the Commission's express forbearance authority found in Section 10 of the Act, 47 U.S.C. §160. A standard of forbearance that merely meets Section 706 objectives for the promotion of advanced telecommunications capability not only violates the statutory law, but it also invites untethered forbearance actions that conflict with the overarching objectives of the 1996 Act to move from a monopoly to a competitive market in local telecommunications.

Discussion

I. The MO&O Correctly Directed the ILECs to Provide Requesting New Entrants With Conditioned Local Loops.

The Petitioners contend that the Eight Circuit's holding in Iowa[3] means that the Commission may not require ILECs to provide a conditioned loop to a requesting new entrant, where the loop has not been previously conditioned for the ILEC's own purposes. This argument is premised on the Court's ruling that an ILEC's duty under Section 251(c)(2)(C) of the Act to provide nondiscriminatory access to network elements on an unbundled basis "does not mandate that requesting carriers receive *superior quality access* to network elements upon demand."[4] Contrary to petitioners assertions, however, an ILEC's requirement to condition loops is entirely consistent with the Iowa decision and with Section 251(c)(2)(C).

First, the offering of a loop which requires some prior conditioning is not a form of "superior access" obligation that the Court found objectionable. Access to a conditioned loop is not functionally a "superior quality access" arrangement because it is the basic and minimal network element necessary for the deployment of many data services, including xDSL services.

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3 Iowa Util. Bd. v. FCC, 120 F.3d 753 (8th Cir. 1997); cert. granted, 118 S.Ct. 879 (1998).

4 *Id.* at 812 (emphasis added).

Conditioning is, in fact, a form of repair of the local loop, in the same way as a loop that is impaired or damaged for voice telecommunications services. It is in no way an optional arrangement "cater[ing] to the every desire of every requesting carrier."[5] Rather, a conditioned local loop is an absolute necessity if other providers are also to offer data services in competition with the ILEC.

Moreover, since the ILECs are rolling-out xDSL retail mass market services using conditioned loops, an obligation to provide all competitors with the same loop conditioning functions as *equal access*, not as "superior quality access." Both Bell Atlantic and SBC are presumably providing the same loop conditioning for their own xDSL services that they wish to deny to competing providers.[6] As the Commission has noted, the ability to deny loop conditioning effectively precludes new entrants from gaining access to customers in a manner that supports competitive services.[7] Thus, the ability of a new entrant to request a conditioned loop only puts it in an *equal position* to the ILEC, no more and no less; without such a right, competitors are offered only *inferior access*. It is plainly a mischaracterization of the Court's decision to assert that such equal provisioning for competing providers somehow offers "superior access." While the Court admonished that the statute does not require "superior access," it also agreed that the plain meaning of the Act requires equality of access to network elements for both

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5 *Id.* at 813.

6 See, Pacific Bell Telephone Co., Tariff F.C.C. No. 128, Transmittal No. 1986, Description and Justification at 6 (filed June 15, 1998) ("Line conditioning may be required if the line will not accommodate ADSL service."); The Bell Atlantic Telephone Companies, Tariff F.C.C. No. 1, Transmittal No. 1076, Description and Justification (filed Sept. 1, 1998).

7 MO&O, ¶ 51.

the ILEC and the requesting new entrant.[8] Since the ILEC can, at any time, decide to condition a loop to provide its own retail ADSL services, a right of competing providers to order conditioned loops best implements the Section 251(c)(3) scheme of ensuring that new entrants are on an equal footing.

Further, where the loop requires some pre-conditioning, it is more accurately viewed as a modification enabling adequate access to the unbundled loop, rather than as superior quality access. The Court noted that such "modifications" are contemplated by the 1996 Act:

> [a]lthough we strike down the Commission's rules requiring incumbent LECs to alter substantially their networks in order to provide superior quality interconnection and unbundled access, we endorse the Commission's statement that 'the obligations imposed by sections 251(c)(2) and 251(c)(3) include modifications necessary to accommodate interconnection or access to network elements.'[9]

As the Commission has noted, for loops that contain electrical impediments (e.g., bridged taps, excessive loading coils, etc.), some conditioning is necessary to support local loop services such as xDSL. The petitioners do not and cannot disagree.[10] Thus, to enable local loop service such as xDSL, conditioning is a necessary step "to accommodate . . . access to" the functionality of the unbundled local loop.

CIX also finds that Petitioner's argument amounts to a second and untimely petition for reconsideration of the definition of "loop" in the Local Competition Order, which the Court did

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8 Iowa, 120 F.3d at 812.

9 Iowa, 120 F.3d at n.33.

10 Indeed, the Bell Atlantic and SBC ADSL tariffs appear to recognize that some conditioning may be necessary prior to initiation of ADSL services. See, n. 6, *supra*.

not find to be arbitrary.[11] In Iowa, the Court articulated with precision those aspects of the Commission's rules and order that were vacated. For example, the Court struck down rule sections 51.305(a)(4) and 51.311(c) because, in the Court's view, they impermissibly obligate ILECs to offer superior levels of interconnection and access to unbundled network elements, if requested by competing carriers.[12] By contrast, the Court vacated neither the statements of the Local Competition Order describing "local loop" to include conditioning, nor did it vacate the rule section 51.319(a) "local loop" definition. In fact, the Court "uph[e]ld all of the Commission's unbundling regulations" except as specified in note 38 of the Iowa decision. Thus, the Court did not strike down the Commission's definition of a loop with conditioning. The Petitioners should not be afforded a new forum years later in which to litigate this issue. 47 U.S.C. § 405(a) (petitions for reconsideration *must* be filed within 30 days of appropriate public notice of Commission action).

Finally, as a matter of public policy, it is fundamentally inconsistent with the goals of the 1996 Act to allow the ILECs to control the rate at which in-region competition emerges in the

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11 The Commission defined the local loop element as "a transmission facility between a distribution frame, or its equivalent in an incumbent LEC central office, and a network interface device at the customer premises." Local Competition Provisions of the Telecommunications Act of 1996, First Report and Order, 11 FCC Rcd. 15499 (¶ 380) (1996) ("Local Competition Order"). Further, "this definition includes, for example, two-wire and four-wire analog voice grade loops, and two-wire and four-wire loops that are conditioned to transmit the data signals to provide such services as ISDN, ADSL, HDSL, and DS-1 level signals." *Id.* The Commission noted that "[its] definition of loop will in some instances require the incumbent LEC to take affirmative steps to condition existing loops to enable requesting carriers to provide services not currently provided over such facilities." *Id.* at ¶ 382.

12 Iowa, 120 F.3d at n. 38 &39.

advanced services market.[13] If the ILEC can refuse to condition loops for the provision of competitive local data services, it obtains complete power to frustrate the Section 251(c) rights of any competitive xDSL service providers to gain access to end-users. This is ILEC monopoly market abuse at its most plain. Because the 1996 Act vested the Commission with the duty to promote local competition and competitive provision of advanced services, the Commission cannot permit the ILECs to unilaterally dictate the terms and timing of access to conditioned local loops for competing providers.

II. Section 706 of the 1996 Act Must Be Implemented in Conjunction With The Other Provisions of the 1996 Act Designed to Promote Local Competition.

The Petitioners' arguments that Section 706 provides independent forbearance authority, including authority to undercut the cornerstone Section 251 and 271 local competition provisions, should be summarily dismissed. The MO&O (at ¶¶ 69-79) thoroughly discusses the relevant statutory and policy considerations and reaches sensible statutory interpretations of Sections 706 and 10. Petitioners present no new statutory interpretations and, indeed, have added nothing to their arguments already offered in the proceedings below.

SBC contends that the MO&O "reflects a fundamental misunderstanding of sections 10 and 706." SBC Petition at 6. However, the language of Section 706 does not direct the Commission to countermand or act with blindness toward other equally essential provisions of the 1996 Act. Rather, Section 706 directs the Commission to encourage the deployment of advanced telecommunications capability by "utilizing . . . regulatory forbearance . . ." in ways that "promote competition in the local telecommunications market . . . ." As the Commission

13 H. Rep. No. 104-458, at 113 (1996 Act intended to accelerate deployment of advanced

(footnote continued to next page)

found, this statutory direction must be interpreted in conjunction with the other, more specific statutory objectives of the 1996 Act, including Sections 251 and 271. However, the Petitioners' requests for forbearance under Section 706 would force the Commission to take action in conflict with the very commands of Sections 251 and 271 of the 1996 Act.[14]

In addition, no amount of the Petitioners' dissembling can support the assertion that the Commission failed to interpret Section 10(d) meaningfully. SBC Petition at 6. As the MO&O (at ¶¶ 69-79) explains, the Section 10 prohibition on forbearance from the obligations of Sections 251 and 271 are meaningful and relevant to interpreting Section 706. Since the Petitioners had requested forbearance from Sections 251 and 271, it is perfectly appropriate for the Commission to interpret Section 706 in light of the express language of Section 10 restricting such forbearance, since it underscores the importance of strict compliance of Sections 251 and 271 obligations to the overall Congressional scheme. Oddly, it is the Petitioners' arguments that would render meaningless the careful forbearance test articulated in Section 10. Petitioners contend that the forbearance language of Section 706 is so potent as to supply the Commission with unbounded authority to override all other statutory mandates of the Act, so long as such actions further the deployment of advanced services. The absurdity of the Petitioners' statutory

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(footnote continued from previous page)
services by "opening all telecommunications markets to competition").

14 The contention that Sections 251 and 271 were limited to "open to competition the markets for conventional local exchange service" has no merit. SBC Petition at 8. As the Commission correctly determined, the local competition provisions of Section 251 apply regardless of whether the service is data or voice telecommunications. MO&O, ¶ 35. Moreover, Section 271 applies not just to voice long-distance service, but to interLATA Internet and information services, as well. Non-Accounting Safeguards of Sections 271 and 272 of the Communications Act, First Report and Order, 11 FCC Rcd. 21905 (¶¶ 56-57) (1996).

argument fails on its own weight, as the language of Section 706 and its legislative history offer no support for asserting such broad forbearance authority.

Finally, Petitioners contend that the Commission's decision will not further local competition for advanced services. SBC Petition at 8. This contention, of course, is meaningless once the Commission has correctly determined that Section 706 provides no statutory authority to forbear from the Section 251 and 271 obligations. The contention is also easily rebutted, because Section 706 obligates the Commission to "promote local competition" and Sections 251 and 271 are Congress' specific plan for achieving those objectives. Since Congress invested the provisions of the 1996 Act with cohesion and statutory logic, the Petitioners' argument -- that the Commission may undo by Section 706 the very detailed plan for local competition laid out in Sections 251 and 271 – is not tenable.

Conclusion

For the reasons stated above, and as explained in its prior pleadings, CIX urges the Commission to dismiss the Petitions of SBC and Bell Atlantic requesting reconsideration and/or clarification of the MO&O.

Respectfully submitted,

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