

RECEIVED

OCT - 5 1998

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

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

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

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 (rel. Aug. 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 Iowa³ 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.

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

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.”

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.⁹ 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

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 "up[h]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

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

(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

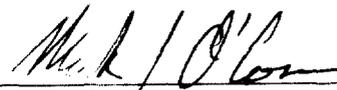
For the reasons stated above, and as explained in its prior pleadings, CIX urges the Commission to dismiss the Petitions of SBC and Bell Atlantic requesting reconsideration and/or clarification of the MO&O.

Respectfully submitted,

COMMERCIAL INTERNET EXCHANGE
ASSOCIATION

Robert D. Collet
Chairman of the Board
Commercial Internet eXchange
Association

Barbara A. Dooley
Executive Director
Commercial Internet eXchange
Association



Ronald L. Flesser
Mark J. O'Connor

Piper & Marbury L.L.P.
1200 Nineteenth Street, N.W.
Suite 700
Washington, D.C. 20036
(202) 861-3900

Date: October 5, 1998

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Opposition of the Commercial Internet eXchange Association was this 5th day of October, 1998 served by first class mail, postage prepaid upon the following:

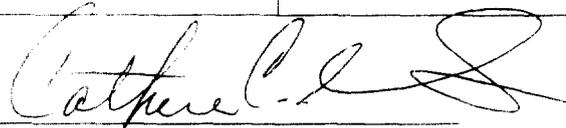
J Manning Lee	Teleport Communications Group, Inc.	Two Teleport Drive Suite 300 Staten Island, NY 10311
Mark C. Rosenblum	AT&T Corp	292 North Maple Avenue Room 5460C2 Basking Ridge, NJ 07920
Genevieve Morelli	Executive Vice President & General Counsel Competitive Telecommunications Association	1919 M Street, N.W. Suite 800 Washington, DC 20036
Brad E Mutschelknaus	Kelley Drye & Warren I L P	1200 19 th Street, N.W Suite 500 Washington, DC 20036
Keith Townsend	United States Telephone Association	1401 H Street, N.W. Suite 600 Washington, DC 20005
Steven Gorosh	Vice President & General Counsel Northpoint Communications, Inc.	222 Sutter Street San Francisco, CA 94108
Riley M. Murphy	Vice President & General Counsel E.Spire Communications, Inc.	131 National Business Parkway Suite 100 Annapolis Junction, MD 20701
Catherine R. Sloan	Worldcom Inc.	1120 Connecticut Avenue, N.W. Suite 400 Washington, DC 20036
Jonathan E. Canis	Kelley Drye & Warren LLP Counsel for Intermedia Communications, Inc.	1200 19 th Street, N.W. Suite 500 Washington, DC 20554
Robert W. McCausland	Vice President Regulatory & Interconnection Allegiance Telecom	1950 Stemmons Freeway Suite 3026 Dallas, Texas 75207-3118
Kevin Timpane	Vice President Public Policy Firstworld Communications, Inc.	9333 Genessee Avenue Suite 200 San Diego, CA 92121

Jeffrey Blumenfeld	Counsel for Rhythms Netconnections, Inc.	1615 M Street, N.W. Suite 700 Washington, DC 20036
Anne K. Bingaman	LCI International Telecom Corp	8180 Greensboro Drive Suite 800 McLean, VA 22102
Leon M. Kenstenbaum	Spring Corporation	1850 M Street, N.W. 11 th Floor Washington, DC 20036
Cindy Z. Schonhaut	Senior Vice President of Government Affairs & External Affairs ICG Communications, Inc.	161 Inverness Drive Englewood, CO 80112
Peter A. Rohrbach	Hogan & Hartson LLP Counsel for LCI International Telecom Corp.	555 Thirteenth Street, N.W. Washington, DC 20004
David J. Newburger	Newburger & Vossmeier Counsel for Campaign for Telecommunications Access	One Metropolitan Square Suite 2400 St. Louis, MO 63102
Charles C. Hunter	Hunter Communications Law Group Counsel for Telecommunications Resellers Association	1620 I Street, N.W. Suite 701 Washington, DC 20006
Albert H. Kramer	Dickstein Shapiro Morin & Oshinsky LLP Counsel For ICG Telecom Group, Inc.	2101 L Street, N.W. Washington, DC 20037-1526
Kecia Boney	MCI Telecommunications Corp.	1801 Pennsylvania Avenue, N.W. Washington, DC 20006
Anthony C. Epstein	Jenner & Block	601 13 th Street 12 th Floor South Washington, DC 20005
W Scott McCollough	McCollough & Associates PC	1801 North Lamar Suite 104 Austin, TX 78701
Russell M. Blau	Swidler & Berlin Chtd Counsel For KMC Telecom Inc.	3000 K Street, N.W. Suite 300 Washington, DC 20007
M. Robert Sutherland	Bellsouth Corporation	1155 Peachtree Street, N.W. Suite 1700 Atlanta, GA 30309-3610
Frank Michael Panek	Ameritech	2000 W. Ameritech Center Drive Room 4H84 Hoffman Estates, IL 60196
Kevin Sievert	MCI Communications Local Network	400 International Parkway

	Technology	Richardson, TX 75081
Dana Frix	Swidler & Berlin Chtd Counsel for Hyperion Telecommunications, Inc.	3000 K Street, N.W. Suite 300 Washington, DC 20007-5116
Steven M. hoffer	Coalition Representing Internet Service Providers	95 Mariner Green Drive Corte Madera, CA 94925
Thomas M. Koutsky	Assistant General Counsel Covad Communications Company	6849 Old Dominion Drive Suite 220 McLean, VA 22101
Lawrence G. Malone	General Counsel State of NY Department of Public Service	Three Empire State Plaza Albany, NY 12223-1350
L. Marie Guillory	National Telephone Cooperative Association	2626 Pennsylvania Ave., NW Washington, DC 20037
Riley M. Murphy	Vice President & General Counsel E.Spire Communications, Inc	131 National Business Parkway Suite 100 Annapolis Junction, MD 20701
Charles Hunder	Hunter Communications Law Group	1620 I Street, N.W. Suite 701 Washington, DC 20006
Christopher W. Savage	Cole Raywid & Braverman Counsel for COMCAST Corporation	1919 Pennslyvania Avenue, NW Suite 200 Wshington, DC 20006
Robert W. McCausland	Vice President Regulatory & Interconnection Allegiance Telecom, Inc.	1950 Stemmon Freeway Suite 3026 Dallas, TX 75207-3118
Peter Arth, Jr.	Mary Mack ADU	505 Van Ness Avenue San Francisco, CA 94102
International Transscription Services, Inc.		1231 20 th Street, N.W. Washington, DC 20036
Maureen Lewis	General Counsel Alliance For Public Technology	901 15 th Street, N.W. Washington, DC 20038-7146
Robert B. McKenna	US West Communications, Inc.	1020 19 th Street, N.W. Suite 700 Washington, DC 20036
Ronald L. Plessler	Piper & Marbury, LLP Counsel for Commercial Internet Exchange Association	1200 19 th Street, N.W. Washington, DC 20036
Angela Ledford	Keep America Connected'	P.O. Box 27911 Washington, DC 20005

Competitive Pricing Division	Federal Communications Commission	1919 M Street, N.W. Room 518 Washington, DC 20554
Mark C. Rosenblum	AT&T	295 North Maple Avenue Room 3252J1 Basking Ridge, NJ 07920
Frank Michael Panek	Ameritech	2000 West Ameritech Center Drive Room 4H84 Hoffman Estates, IL 60196
Economic Strategy Institute		1401 H Street, N.W. Suite 750 Washington, DC 20005
Peter A. Rohrbach	Hogan & Hartson LLP Counsel for LCI Internation Corp.	555 13 th Street, N.W. Washington, DC 20004
Richard J. Metzger	Association for Local Telecommunications Services	888 17 th Street, N.W. Suite 900 Washington, DC 20006
Karen Peltz Strauss	Legal Counsel for Telecommunications Polich National. Association of the Deaf	814 Thayer Avenue Silver Spring, MD 20910
Leon M. Kestenbaum	Sprint Corporation	1850 M Street, N.W. 11 th Floor Washington, DC 20036
M. Robert Sutherland	Bellsouth Corporation	1155 Peachtree Street, N.W. Atlanta, GA 30309
Catherine R. Sloan	Worldcom Inc.	1120 Connecticut Avenue, N.W. Suite 400 Washington, DC 20036
Kecia Boney	MCI Telecommunications Corporation	1801 Pennslyvania Avenue, N.W. Washington, DC 20006
Charles D. Gray	National Association of Regulatory Utility Commissioners	1100 Pennslyvania Avenue Suite 608 P.O. Box 684 Washington, DC 20044
Mary McDermott	United States Telephone Association	1401 H Street, N.W. Suite 600 Washington, DC 20005
Gail L. Polivy	GTE Service Corporation	1850 M Street, NW Washington, DC 20036
Eric R. Olbeter	Economic Strategy Institute	1401 H Street, N.W. Suite 750

		Washington, DC 20005
Ronald B. Lowe	Piper & Marbury LLP Counsel for Transwire Communications	1200 19 th Street, N.W. Washington, DC 20036
Dr. Janet K. Poley	University of nebraska C218 Animal Sciences	P.O. Box 830952 Lincoln, NE 68583
David W. Zeisger	Independent Telephone & Telecommunications Alliance	1300 Connecticut Avenue, N.W. Suite 600 Washington, DC 20036



Catherine C. Ennels