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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

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

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

TO: The Commission

OPPOSITION OF COMPETITIVE TELECOMMUNICATIONS ASSOCIATION TO PETITIONS FOR RECONSIDERATION

The Competitive Telecommunications Association ("CompTel"), by its attorneys, hereby opposes the petitions for reconsideration filed by the Bell Atlantic and SBC telephone companies regarding the Memorandum Opinion and Order ["MO&O"] portion of the FCC's decision in the above-captioned proceedings on August 7, 1998. See Memorandum Opinion and Order, and Notice of Proposed Rulemaking, CC Docket Nos. 98-147. et al., FCC 98-188, rel. Aug. 7, 1998. Bell Atlantic and SBC raise two issues. First, they ask the FCC to reconsider its decision that incumbent local exchange carriers ("ILECs") must condition local loops that are purchased as unbundled network elements ("UNEs") so requesting carriers can provide advanced communications services. See Bell Atlantic Petition at 2-5; SBC Petition at 2-5. Second, they ask the FCC to reconsider its decision that Section 706 does not constitute an independent grant of forbearance authority. See Bell Atlantic Petition at 6; SBC Petition at 5-9. For the reasons stated below, the FCC should deny the petitions.

I. CONDITIONED LOCAL LOOPS AS UNBUNDLED NETWORK ELEMENTS

SBC and Bell Atlantic raise similar but slightly different points. They are similar in that each one argues that the FCC's requirement that ILECs provide conditioned local loops as UNEs is contrary to the Eighth Circuit's holding that the FCC may not require ILECs to provide superior-quality UNEs to requesting carriers. Iowa Utilities Board v. FCC, 120 F.3d 753, 812-813 (8th Cir. 1997) ("Iowa Utilities Board"). They are different in the breadth of the ruling they seek. SBC argues that even if it conditions some local loops for the provision of advanced services, it cannot be required to provide a conditioned local loop as a UNE unless it previously has conditioned that particular local loop for itself. By contrast, Bell Atlantic appears to argue only that it cannot be required to condition a local loop in ways that it declines or fails to do for any other local loops. Both contentions should be rejected because they stem from a misreading of Iowa Utilities Board and would defeat Congress' goals in adopting Section 251(c)(3).

A. The FCC Should Reject SBC's Contention

SBC's contention need not detain the FCC long. In effect, SBC contends that it can provide local loops of different quality based solely upon its own prior decision whether to condition the specific loops in question. That contention is flatly contrary to Sections 51.311(a)-(b) of the FCC's rules. Section 51.311(a) states:

> "The quality of an unbundled network element, as well as the quality of the access to the unbundled network element, that an incumbent LEC provides to a requesting telecommunications carrier shall be the same for all telecommunications carriers requesting access to that network element."[1]

[1] 47 C.F.R. § 51.311(a).

Similarly, Section 51.111(b) states:

> "[T]o the extent technically feasible, the quality of an unbundled network element, as well as the quality of the access to such unbundled network element, that an incumbent LEC provides to a requesting telecommunications carrier shall be at least equal in quality to that which the incumbent LEC provides to itself."[2]

Under these provisions, if an ILEC has provided any conditioned local loops as UNEs to itself or another carrier, it must condition all local loops as UNEs upon request where technically feasible.

The Eighth Circuit did not vacate or otherwise question the lawfulness of these straight-forward provisions in Iowa Utilities Board. To the contrary, the Court recognized that ILECs must provide UNEs "on rates, terms, and conditions that are nondiscriminatory" in order to "prevent[] an incumbent LEC from arbitrarily treating some of its competing carriers differently than others." 120 F.3d at 813. The Court's holding tracked the language of Section 251(c)(3) itself, which requires the ILECs to offer "nondiscriminatory access to network elements . . . on rates, terms and conditions that are just, reasonable, and nondiscriminatory." 47 U.S.C. § 251(c)(3). SBC's petition must be rejected because it would write the non-discrimination provisions out of Section 251(c)(3) and the FCC's rules.

Lastly, SBC's position would lead to the absurd result that new entrants could not offer advanced communications services through UNEs except to subscribers who already have received a conditioned loop from the ILEC and, therefore, presumably are ILEC customers for advanced services. In effect, SBC reads Iowa Utilities Board to eliminate all competition to the ILECs for first-time advanced services customers. Plainly, that result would undermine competition and harm consumers contrary to Congress' objectives in adopting Section 251(c)(3).

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2 Id. § 51.311(b).

B. The FCC Should Reject Bell Atlantic's Contention.

Unlike SBC, Bell Atlantic does not argue that it should be free to decline to provide a conditioned local loop even though it provides similarly conditioned local loops to itself or other carriers as UNEs. Rather, Bell Atlantic argues that it cannot be required to condition local loops for a requesting carrier in ways that are different from how it conditions the local loops it provides to itself or other carriers. While less extreme than SBC's position, Bell Atlantic's contention also misreads Iowa Utilities Board and contravenes Section 251(c)(3).

Like SBC, Bell Atlantic reads Iowa Utilities Board to mean that ILECs need not lift a finger in providing UNEs to a requesting carrier beyond what they have already decided to do for themselves or agreed to do for other carriers. In fact, the Court deliberately stopped short of such a far-reaching holding. The Court stressed: "[W]e endorse the Commission's statement that 'the obligations imposed by sections 251(c)(2) and 251(c)(3) include modifications to incumbent LEC facilities to the extent necessary to accommodate . . . access to network elements.'" 120 F.3d at 813 n.33 (citing Local Competition Order, 11 FCC Rcd 15499, ¶ 198 (1996)).[3] The Court did not object to the FCC's determination that ILECs must take certain "affirmative steps" when providing UNEs to requesting carriers (MO&O at ¶ 53); the Court objected to a broad requirement that ILECs provide requesting carriers with access to a "yet unbuilt superior" network. The question is whether the FCC's decision that ILECs must provide conditioned loops – even if they do not provide similarly conditioned loops to itself or other carriers – is a lawful "modification" necessary to accommodate access to UNEs, or an unlawful

[3] The petitioners note that the FCC identified conditioned local loops as a type of superior-quality access. Local Competition Order, 11 FCC Rcd at 314 n.680. However, the Court did not indicate whether conditioned local loops constituted an "as yet unbuilt superior" network (which obligation may not be imposed upon ILECs) or a "modification" to accommodate access to UNEs (which ILECs can be required to undertake).

requirement that the ILEC build a superior network to the one in place today. CompTel submits that it is the former rather than the latter.[4]

The Court's rationale for striking down the superior-quality rule was its belief that requesting carriers should not be able to force ILECs to develop something that does not exist today. As regards loop conditioning, the question is whether a requesting carrier is asking the ILEC to perform tasks that it does not currently have the capability to perform. The answer to that question does not depend upon whether the ILEC currently provides such conditioning to itself or any other carrier. If a conditioning request can be fairly accommodated by an ILEC acting within its current technical capabilities, then it is the type of modification that the Court found acceptable. Certainly, neither petitioner disputes that the types of conditioning ordered by the FCC – e.g., removing loading coils, bridged taps and other electronic impediments (MO&O at ¶ 53) – are clearly within the current capabilities of ILECs.

Bell Atlantic's position would lead to untenable results. According to Bell Atlantic, if a competing carrier develops a new service that requires the ILEC to condition loops in a slightly different way than it does today, the ILEC is entitled to deny the request even though it can perform the task easily within its current capabilities. An ILEC should not be permitted to reject conditioning requests on such spurious grounds. Moreover, Bell Atlantic's position would lead to interminable disputes and litigation – all to the detriment of new entry and local competition – over precisely what types of local loop conditioning an ILEC currently provides for itself or

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4 Other ILECs accept the lawfulness of a requirement to provide conditioned local loops as UNEs to requesting carriers. *E.g.,* Comments of Ameritech, CC Docket No. 98-147, filed Sept. 25, 1998, at 11-12 ("Ameritech agrees that an ILEC is required to make reasonable modifications to its existing facilities, such as conditioning, to the extent necessary to accommodate interconnection or access to network elements").

other carriers. Neither Congress nor the Court contemplated that ILECs should be able to defeat the pro-competition and pro-consumer benefits of the statute in that manner.

The problems identified by Bell Atlantic as potential grounds to reject a request for conditioned loops (e.g., interference and incompatible uses) relate to technical feasibility rather than to superior-quality access to the network. Certainly, there is no reason to believe that possible interference or incompatible uses presents the ILECs with conditioning tasks which are beyond their current technical capabilities. At a minimum, the burden should be on an ILEC to justify denial of a request for conditioned loops on the ground that it lacks the capability to comply with the request.

II. THE COMMISSION SHOULD REAFFIRM THAT SECTION 706 IS NOT AN INDEPENDENT GRANT OF FORBEARANCE AUTHORITY

Both petitioners challenge the FCC's determination that Section 706 does not constitute an independent grant of forbearance authority to the FCC. Neither petitioner has raised anything new, and the FCC addressed that issue comprehensively in the MO&O (at ¶¶ 69-79). After a thorough examination of the statutory language, legislative history and congressional intent, the FCC correctly concluded that Congress adopted Section 706 to encourage the FCC to promote the development of advanced communications services through, inter alia, the FCC's forbearance authority under Section 10.

The petitioners rely upon Section 10(d), which limits the FCC's ability to exercise forbearance authority under Section 10 but does not mention Section 706. 47 U.S.C. § 160(d). They read into that provision the negative implication that Congress meant to free the FCC to use Section 706 to accomplish what Congress expressly prohibited the FCC from doing under Section 10. That interpretation makes absolutely no sense. Congress did not expressly apply the

forbearance limitation to Section 706 because there was no need to do so -- Section 706 is not an independent grant of forbearance authority. When Congress intended to exclude provisions from Section 10(d)'s forbearance limitation, it said so expressly in the opening clause – "[e]xcept as provided in section 251(f)." If Congress had intended the interpretation put forward by the petitioners, it would have said "[e]xcept as provided in section 251(f) and section 706." It did not, and the petitioners' argument falls of its own weight.

CONCLUSION

For the foregoing reasons, the FCC should reject the petitions for reconsideration filed by Bell Atlantic and SBC.

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