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(CC Docket Nos. 98-147, 98-11, 98-26, 98-32, 98-15, 98-78, 98-91, and CCB/CPD No. 98-15, RM-9244)

US WEST
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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

BACKGROUND ON THE SECTION 706 PROCEEDINGS

Earlier this year, four Bell Operating Companies and a public interest organization filed petitions asking the Commission to implement Section 706 of the Telecommunications Act and encourage investment in advanced infrastructure by permitting ILECs to offer high-speed data services free from LATA restrictions, unbundling requirements, avoided-cost resale discounts, and other regulatory restrictions. Section 706(a) provides that the Commission "shall encourage the deployment on a reasonable and timely basis of advanced telecommunications capability to all Americans" by using "regulatory forbearance . . . or other regulating methods that remove barriers to infrastructure investment." These petitions, together with a counter-petition filed by an association of CLECs, have triggered a broader debate on whether traditional telephone regulation can or should be extended into the burgeoning, highly competitive data services marketplace. The legal debate has expanded beyond Section 706 to a discussion of whether the Telecommunications Act's local market restrictions apply at all to carriers' advanced data offerings.

The Petitions

On January 26, 1998, Bell Atlantic filed a petition under Section 706(a) asking the Commission to permit the carrier to provide Internet backbone services across LATA and state boundaries and without having to unbundle the underlying networks, offer avoided-cost resale discounts, use separate affiliates, or comply with price-cap and other regulations. (CC Dkt. No. 98-11) The petition included a white paper detailing the current congestion on the Internet backbone and its increasingly concentrated ownership. Bell Atlantic suggested that permitting it to enter the interLATA data market and deploy backbone would alleviate that congestion and build the market for high-speed last-mile data technologies such as xDSL.

On February 18, the Alliance for Public Technology — a group representing end users with an interest in accelerating the deployment of advanced technologies — filed a petition asking the Commission to immediately begin the inquiry into the availability of data services mandated by Section 706(b).[1/] (CC Dkt. No. 98-15) APT asked the Commission to accelerate that process by issuing a Notice of Proposed Rulemaking rather than simply a Notice of Inquiry.

1/ Section 706(b) directs the Commission to begin, by this August, a formal inquiry into whether "all Americans" have access to advanced telecommunications, and to complete that inquiry within 180 days. If the Commission finds that advanced infrastructure is not being deployed to all Americans "in a reasonable and timely fashion," Section 706(b) requires the agency to "take immediate action to accelerate deployment . . . by removing barriers to infrastructure investment and by promoting competition in the telecommunications market."

APT proposed that the Commission encourage investment in competitive facilities by limiting unbundling and discounted resale to existing ILEC networks and services, sunsetting the Section 251(c) regime after some period, and reforming pricing and depreciation rules.

On February 25, U S WEST filed a petition similar to, but more limited than, that submitted by Bell Atlantic. (CC Dkt. No. 98-26) U S WEST asked for permission to (1) operate cell- and packet-switched networks across LATA boundaries, (2) carry interLATA data traffic incident to its xDSL services, and (3) provide backbone and xDSL services without having to unbundle their constituent elements or offer the finished services at discounts for resale. U S WEST's petition focused on the scarcity and higher cost of high-capacity data facilities in its largely rural service region, and on the special difficulties of deploying xDSL in these communities. In addition to invoking the Commission's forbearance authority under Section 706(a), the petition suggested that Section 251(c) does not apply at all to the data services at issue because U S WEST would not be providing them in its capacity as an "incumbent local exchange carrier," as defined in the Act. The petition also sought to distinguish the network facilities that are currently bottlenecks from those that CLECs can obtain from multiple sources; U S WEST committed to continue providing CLECs with unbundled, conditioned loops and collocation (including cageless collocation) sufficient to enable CLECs to use their own electronics to offer competitive services, but argued that unbundling of non-bottleneck elements is unnecessary and unwise. U S WEST subsequently committed not to market packet-switched voice services over its data networks until it receives appropriate Section 271 authorization.

Ameritech filed a third petition for individual interLATA, unbundling, and resale relief on March 5. (CC Dkt. No. 98-32) The petition adopted the policy arguments of the two earlier BOC petitions and included a study detailing the effects of regulation on the pace of carrier innovation. The petition also sought relief based on Section 706(a); in addition, Ameritech asked the Commission to use its power under the Act to modify LATA boundaries to create a single "data LATA" in its service region. Ameritech suggested that, if granted regulatory relief, it would offer data services through an affiliate that would keep separate books of account, own transmission and switching facilities separately from its parent, and obtain services from its parent only at tariffed rates, terms, and conditions.

On May 27, after completion of the comment cycles on the BOC and APT petitions, the Association for Local Telecommunications Services filed a petition asking the Commission to declare that it did not have legal authority to grant the BOCs' requests. (CC Dkt. No. 98-78) ALTS argued that Sections 251 and 252 of the Act apply to ILECs' advanced data networks and services, entitling CLECs to request unbundled access to all of the network elements used to provide these services, including the non-bottleneck electronics (such as DSLAMs) used to provide xDSL. ALTS also asked the Commission to reopen its collocation docket and adopt rules giving CLECs more collocation options in ILECs' central offices and at their remote terminals.

Finally, on June 9, the SBC LECs filed a petition seeking permission to provide

ADSL services free from unbundling and discounted resale obligations, dominant carrier regulation, and the Commission's pick-and-choose rule. The petition provided information on the state of competition in the high-speed data marketplace (including technologies, such as cable modems, that compete with ADSL) and sought relief under Section 10 of the Act as well as Section 706(a). Unlike the other BOCs, the SBC LECs did not seek permission to provide interLATA data services.

Legal and Policy Issues Presented

Although most of the legal debate has focused on the scope of the forbearance authority described in Section 706(a), the Commission may not have to reach that issue: Several parties, including U S WEST, have argued that some of the legal restrictions at issue do not apply to advanced data services and networks at all, and that the Commission has discretion outside of Section 706 to lift the remainder. By its plain language, for example, the unbundling and discounted resale obligations of Section 251(c) govern a carrier only when it is acting as an "incumbent local exchange carrier" — that is, only when it is providing "telephone exchange service or exchange access" in a geographic area where it is an incumbent. See 47 U.S.C. §§ 153(26), 251(h)(1). Because xDSL and backbone services do not meet the definition of "telephone exchange services or exchange access," a carrier providing them is not acting in its capacity as an "incumbent local exchange carrier" and is not subject to Section 251(c)'s unbundling and discounted resale requirements.

Even if Section 251(c) does govern the provision of advanced data services, it may not automatically follow that the network elements used to provide those services must be unbundled. The Act gives the Commission discretion to "determin[e] what network elements should be made available," directing it to consider whether access to a particular element is "necessary" for competitors and whether denying access would "impair" their ability to offer service. Id. § 251(d)(2). Several BOCs have urged the Commission to use this authority to rule that ILECs need not unbundle the DSLAMs and other non-bottleneck electronics used to provide data services. These parties argue that all a CLEC needs from an ILEC to be able to offer competitive data services is an unbundled, conditioned loop and collocation space; the CLEC can obtain the remaining electronics from third parties and collocate them on the ILEC's premises. Access to the ILECs' electronics is therefore not "necessary," and denying CLECs such access would not "impair" their ability to provide service.

With respect to the restrictions in Section 271 on BOC provision of interLATA services, some parties have noted that the Act gives the Commission express authority to modify LATA boundaries. 47 U.S.C. § 153(25)(B). The Commission has recently held that this authority allows it to lift LATA restrictions for the limited purpose of enabling carriers to provide data services to customers who would otherwise be uneconomic to serve. See Southwestern Bell Tel. Co. Petition for Limited Modification of LATA Boundaries To Provide Integrated Services Digital Network (ISDN) at Hearne, Texas, Mem. Op. and Order, File No. NDS-LM-97-26, ¶¶

11-13 (rel. May 18, 1998). Modifying LATA restrictions to allow BOCs to operate cell- and packet-switched networks across these lines would leave the boundaries (and the Section 271 approval process) in place for voice, since carriers such as U S WEST have committed not to market packetized voice services over these networks without Section 271 authorization.

Section 706(a) comes into play only if the Commission determines that Section 251(c) governs a carrier's provision of backbone and xDSL services and the Commission declines to exercise its authority exclude data facilities from the list of unbundled elements and modify LATA boundaries. The primary legal dispute regarding Section 706(a) is whether, in directing the Commission to use "regulatory forbearance" to encourage the deployment of advanced capability to all Americans, the section provides an independent source of forbearance authority, or whether it simply cross-references the forbearance powers given to the Commission elsewhere in the Act. The parties opposed to the BOCs' petitions contend that Section 706(a) is merely an implied cross-reference to Section 10 of the Act, which directs the Commission to "forbear from applying any regulation or any provision of this Act" if it determines that the development of competition has made the regulation unnecessary to protect consumers. See 47 U.S.C. § 160(a). By its express terms, Section 10 cannot be used to forbear from enforcing Sections 251 and 271 until those latter sections have been fully implemented. Id. § 160(d).

In response, the BOCs and their supporters have argued that the forbearance authority in Section 706 is independent of that in Section 10. Section 706(a) contains no express cross-reference to Section 10, and the key term — "regulatory forbearance" — has long had an independent, generally understood meaning apart from that provision. Section 706(a) is framed in broad and mandatory language, and, unlike Section 10, contains no limits as to the types of barriers the Commission is required to remove. In addition, these parties argue, Congress intended Section 706 to be a robust tool for ensuring that smaller and rural communities receive the benefits of advanced infrastructure, while Section 10 focuses on a very different question — whether competition has made regulation unnecessary. Since Section 10 does not permit the Commission to consider infrastructure issues in deciding whether to forbear, reading Section 706 as a simple cross-reference to Section 10 would eliminate Section 706 as a tool for promoting the deployment of advanced infrastructure, in frustration of Congress's intention.

Finally, since Chairman Kennard's June 24 speech declaring that ILECs should be allowed to provide data services without the full complement of unbundling and resale restrictions, the focus of the debate has shifted to identifying what a CLEC needs from an ILEC to be able to provide data services on a par with the ILEC. The Chairman identified three things: conditioned loops, collocation, and OSS. Loop issues include how to permit ILECs to manage spectrum conflicts and how to allow CLECs to deploy next-generation xDSL technologies that use mid-loop electronics to extend the service range. As for collocation, the Commission is looking at whether to require ILECs to offer CLECs cageless options, such as U S WEST's SPOT collocation. Finally, with respect to OSS, the Commission is determining what information ILECs can reasonably gather regarding their inventory of loops and how that information can and should be shared with CLECs in the preordering and ordering process.