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

In the Matter of	
Deployment of Wireline Services Offering Advanced Telecommunications Capability	**CC Docket No. 98-147**
Petition of Bell Atlantic Corporation for Relief from Barriers to Deployment of Advanced Telecommunications Services	**CC Docket No. 98-11**
Petition of US WEST Communications, Inc. for Relief from Barriers to Deployment of Advanced Telecommunications Services	**CC Docket No. 98-26**
Petition of Ameritech Corporation to Remove Barriers to Investment in Advanced Telecommunications Technology	**CC Docket No. 98-32**
Petition of Alliance for Public Technology Requesting Issuance of Notice of Inquiry and Notice of Proposed Rulemaking to Implement Section 706 of the 1996 Telecommunications Act	**CCB/CPD No. 98-15** **RM 9244**
Petition of Association for Local Telecommunications Services (ALTS) for a Declaratory Ruling Establishing Conditions Necessary to Promote Deployment of Advanced Telecommunications Capability Under Section 706 of the Telecommunications Act of 1996	**CC Docket No. 98-78**
Southwestern Bell Telephone Company , Pacific Bell, and Nevada Bell Petition for Relief from Regulation Pursuant to Section 706 of the Telecommunications Act of 1996 and 47 47 U.S.C. § 160 for ADSL Infrastructure and Service	**CC Docket No. 98-91**

COMMENTS OF THE
TELECOMMUNICATIONS RESELLERS ASSOCIATION

The Telecommunications Resellers Association, through undersigned counsel, hereby opposes the Petition for Reconsideration filed by SBC Communications Inc., Southwestern Bell,

Pacific Bell and Nevada Bell (collectively, "SBC") and the Petition for Partial Reconsideration or, Alternatively, for Clarification filed by the Bell Atlantic Telephone Companies (collectively, "Bell Atlantic") in the captioned proceedings on September 8, 1998 (collectively, the "Petitions" and the "Petitioners").[1] In their Petitions, Petitioners both urge the Commission to reconsider two key provisions of the *Memorandum Opinion and Order* ("*MO&O*") issued in the captioned proceedings on August 7, 1998. Specifically, Petitioners contend that the Commission erred both (i) in concluding that Section 706 of the Telecommunications Act of 1996 ("Telecommunications Act")[2] does not provide the Commission with independent authority to forbear from applying with respect to advanced telecommunications services Section 251(c)'s resale and network unbundling requirements[3] and Section 271's in-region, interLATA prohibitions,[4] and (ii) in directing incumbent local exchange carriers ("LEC") to condition loops for advanced telecommunications services at the behest of competitive providers. TRA submits that Petitioners are wrong on both counts; the Commission, accordingly, should deny the Petitioners the relief they seek and affirm the *MO&O*.

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[1] A national trade association, TRA represents nearly 700 entities engaged in, or providing products and services in support of, telecommunications resale. TRA was created, and carries a continuing mandate, to foster and promote telecommunications resale, to support the telecommunications resale industry and to protect and further the interests of entities engaged in the resale of telecommunications services. TRA is the largest association of competitive carriers in the United States, numbering among its members not only the majority of domestic providers of domestic interexchange and international services, but the majority of competitive local exchange carriers.

[2] 47 U.S.C. § 157 (note); Pub. L. No. 104-104, 110 Stat. 56, § 706 (1996).

[3] 47 U.S.C. § 251(c).

[4] 47 U.S.C. § 271.

I. Section 706 Does Not Constitute An Independent Grant Of Forbearance Authority

Petitioners contend that the Commission has "fundamentally misunderstood" the "plain language" of Sections 10(d)[5] and 706 as adopted in the Telecommunications Act. According to Petitioners, the limitations set forth in Section 10(d) apply only to Commission exercises of forbearance authority under Section 10(a); Section 706, Petitioners thus assert, provides the Commission *carte blanche* to forbear without constraint from applying Section 251(c)'s resale and network unbundling requirements and Section 271's in-region, interLATA prohibitions as they relate to advanced telecommunications services. In so arguing, Petitioners claim that their views are supported not only by the text of Sections 10(d) and 706, but the mandate of Section 706 and the pro-competitive policies underlying the Telecommunications Act as a whole. Petitioners are seriously mistaken.

Initially, Petitioners' mantra of "plain terms" and "plain language" is reminiscent of contentions made by Bell Atlantic and Pacific Bell in seeking judicial review of that portion of the Commission's *First Report and Order and Further Notice of Proposed Rulemaking* in CC Docket No. 96-149[6] implementing the safeguards embodied in Section 272(e)(4) of the Communications

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[5] 47 U.S.C. § 160.

[6] Implementation of the Non-Accounting Safeguards of Sections 271 and 272 of the Communications Act of 1934 (First Report and Order), 11 FCC Rcd. 21905, ¶¶ 260 - 66 (1996), *recon.* 12 FCC Rcd. 2297 (1997), *pet. for rev. pending sub nom.* SBC Communications Corp. v. FCC, Case No. 97-1118 (D.C. Cir. Mar. 6, 1997), *remanded in part sub nom.* Bell Atlantic Tel. Cos. v. FCC, Case No. 97-1067 (D.C. Cir. Mar. 31, 1997), *further recon on remand* FCC 97-222 (released June 24, 1997), *aff'd sub nom* Bell Atlantic Tel. Cos. v. FCC, 131 F.3d 1044 (D.C. Cir. 1997).

Act of 1934, as amended ("Communications Act").[7] There, having referred to Section 272(e)(4) as "unambiguous," "clear," "crystal clear," "clear as sunlight," plain," and "straightforward," Bell Atlantic and Pacific Bell claimed that the Commission had "twisted [the provision] so badly out of shape that it has become unrecognizable."[8] The Court ultimately disagreed with Bell Atlantic's and Pacific Bell's assessment, concluding not only that "Petitioners' plain meaning arguments . . . fail[ed]," but that "[t]he Commission's interpretation . . . [was] reasonable and consistent with the statute's legislative history and purpose."[9] As there, Petitioners here once again misread statutory provisions, wrongly asserting a "plain meaning" that is apparent to no one but themselves.

Contrary to Petitioners' claims, the Commission not only analyzed the text of Sections 10(d) and 706, but looked as well to the "legislative history, the broader statutory scheme, and Congress' policy objectives," before concluding that "section 706(a) does not constitute an independent grant of forbearance authority."[10] That in-depth analysis revealed that "nothing in the legislative history of section 706 . . . indicate[s] that Congress gave . . . [the Commission] independent authority in section 706 to forbear from provisions of the Act," and that "as a matter of public policy, . . . interpreting section 706, not as an independent grant of authority, but rather, as a direction to the Commission to use the forbearance authority granted elsewhere in the Act, . . . [would] further Congress' objective of opening all telecommunications market to competition,

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[7] 47 U.S.C. § 272(e)(4).

[8] Motion of Petitioners Bell Atlantic Telephone Companies, Bell Atlantic Communications, Inc., and Pacific Telesis Group for Partial Summary Reversal filed in Case No. 97-1067 on February 12, 1998 with the U.S. Court of Appeals for the District of Columbia Circuit.

[9] Bell Atlantic Tel. Cos. v. FCC, 131 F.3d 1044, 1047 - 50 (D.C. Cir. 1997).

[10] MO&O, FCC 98-188 at ¶ 69.

including the market for advanced services."[11] Moreover, that analysis also led the Commission to find that it would be "unreasonable to conclude that Congress would have intended that section 706 allow the Commission to eviscerate those forbearance exclusions after having expressly singled out sections 251(c) and 271 for different treatment in section 10."[12]

Petitioners' fixation with Section 10(d)'s reference back to Section 10(a) is misplaced. Section 10(d) references Section 10(a) not because Congress meant to circumscribe only Commission exercises of the regulatory forbearance authority granted in Section 10(a) as opposed to Commission exercises of other forbearance authority, but because Section 10(a) is the only source of regulatory forbearance authority available to the Commission and hence the only regulatory forbearance authority that need be limited. When Congress empowered the Commission to utilize "price cap regulation, regulatory forbearance, measures that promote competition in the local telecommunications market, or other regulating methods that remove barriers to infrastructure investments," in order "to encourage the deployment on a reasonable and timely basis of advanced telecommunications capability to all Americans,"[13] it was thereby directing the Commission to use the various regulatory tools at its disposal to achieve an identified end. Thus, Congress referenced the Commission's existing "price cap regulation[s]," as well as the "measures" it had directed the Commission to take to "promote competition in the local telecommunications market," and the new "regulatory forbearance" authority it had granted the agency in Section 10(a).[14]

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[11] Id. at ¶¶ 75 - 76.

[12] Id. at ¶ 73.

[13] 47 U.S.C. § 706(a).

[14] Id..

Apart from Section 10(a), the term "regulatory forbearance" has no meaning, much less a defined scope. In Section 10, Congress carefully crafted, and constrained the Commission's use of, regulatory forbearance authority, requiring the Commission to make a series of determinations involving protection of consumers and the public interest, as well as the potential for unjust, unreasonable and discriminatory carrier conduct and the impact on competition of any act of forbearance, before exercising that authority. It would have made little sense for Congress to have taken the time to construct these safeguards if it intended to grant the Commission unbridled regulatory forbearance authority in Section 706. It is well settled that statutory construction is "a holistic endeavor" and that various provisions of a statute must be read in harmony with one another.[15] Here, the only reading that looks to the overall design, structure and purpose of the Telecommunications Act requires that the Section 706 reference to regulatory forbearance be viewed in conjunction with Section 10.

TRA further concurs with the Commission that policy considerations strongly support the Commission's view that any exercise of regulatory forbearance authority must be subject to the constraints of Section 10. Certainly, the Commission is correct that "Sections 251(c) and 271 are cornerstones of the framework Congress established in the 1996 Act to open local markets to competition."[16] As the Commission has recognized, the "overriding goal" of the

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[15] U.S. Nat. Bank of Oregon v. Independent Inc. Agents of America, Inc., 508 U.S. 439, 449 (1993); United Savings Assn. Of Texas v. Timbers of Inwood Forest Associates, Ltd., 484 U.S. 365, 371 (1988); James Madison Ltd. by Hecht v. Ludwig, 82 F.ed 1085, 1093 (D.C.Cir. 1996), *rehearing en banc denied, cert. denied* 117 S.Ct 737 (1997).

[16] MO&O, FCC 98-188 at ¶ 73.

Telecommunications Act is "to open all telecommunications markets to competition."[17] In "enact[ing] the sweeping reforms contained in the 1996 Act, . . . Congress . . . sought to open local telecommunications markets to previously precluded competitors not only by removing legislative and regulatory impediments to competition, but also by reducing inherent economic and operational advantages possessed by incumbents."[18] To this end, Congress "require[d] incumbent LECs, including BOCs, to share their networks in a manner that enables competitors to choose among three methods of entry into local telecommunications markets, including those methods that do not require a new entrant, as an initial matter, to duplicate the incumbent's networks."[19]

Unbundled access to network elements at forward-looking economic cost and resale service availability at wholesale rates – the two methods that do not require duplication of an incumbent LEC's network -- are designed to remove "the most significant economic impediments to efficient entry into the monopolized local market," enabling new market entrants to share "the economies of density, connectivity, and scale" which characterize incumbent LEC networks.[20] As succinctly stated by the Commission, "the ability of new entrants to use unbundled network

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[17] Application of Ameritech Michigan Pursuant to Section 271 of the Communications Act of 1934, as amended, to Provide In-Region, InterLATA Services in Michigan (Memorandum Opinion and Order), 12 FCC Rcd. 20543, ¶ 10 (1997).

[18] Implementation of the Local Competition Provisions in the Telecommunications Act of 1996 (First Report and Order), 11 FCC Rcd. 15499, ¶ 13 (1996), *recon.* 11 FCC Rcd. 13042 (1996), *further recon.* 11 FCC Rcd. 19738 (1996), *further recon.*, FCC 97-295 (Oct. 2, 1997), *aff'd in part, vacated in part sub. nom.* Iowa Utilities Board v. FCC, 120 F.3d 753 (1997), *modified* 120 F.3d 820 (8th Cir. 1997), *cert. granted sub. nom* AT&T Corp. v. Iowa Utilities Board, 118 S.Ct. 879 (1998), *aff'd sub. nom.*, Southwestern Bell Telephone Co. v. FCC, Case No. 97-3389 (Aug. 10, 1998), *pet. for cert. pending*.

[19] Id.

[20] Id. at ¶ 11.

elements, as well as combinations of unbundled network elements, is integral to achieving Congress' objective of promoting competition in the local telecommunications market."[21] "Resale," the Commission has recognized, "will . . . be an important entry strategy for small businesses that may lack capital to compete in the local exchange market by purchasing unbundled network elements."[22]

Likewise, the Commission has recognized "the relationship between fostering competition in local telecommunications markets and promoting greater competition in the long distance market is fundamental to the 1996 Act."[23] As explained by the Commission, "[i]ndependent of the incentives set forth in sec5tions 271 and 274," incumbent LECs "have no economic incentive . . . to provide potential competitors with opportunities to interconnect with and make use of the incumbent LEC's network and services."[24] Thus, "[s]ection 271 . . . creates a critically important incentive for BOCs to cooperate in introducing competition in their historically monopolized local telecommunications markets."[25]

TRA believes that Congress intended for local competition to be the engine that drives the broad availability of advanced telecommunications services. As Congress declared, the

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[21] Application of BellSouth Corporation, *et al.* Pursuant to Section 271 of the Communications Act of 1934, as amended, to Provide In-Region, InterLATA Services in South Carolina (Memorandum Opinion and Order), 13 FCC Rcd. 539 CC Docket No. 97-208, FCC 97-418, ¶ 195 (released Dec. 24, 1997).

[22] Implementation of the Local Competition Provisions in the Telecommunications Act of 1996 (First Report and Order), 11 FCC Rcd. 15499 at ¶ 907.

[23] Id. at ¶ 4.

[24] Id. at ¶ 55.

[25] Application of Ameritech Michigan Pursuant to Section 271 of the Communications Act of 1934, as amended, to Provide In-Region, InterLATA Services in Michigan (Memorandum Opinion and Order), 12 FCC Rcd. 20543 at ¶ 14.

Telecommunications Act was intended to "provide for a pro-competitive, de-regulatory national policy framework designed to accelerate rapidly private sector deployment of *advanced telecommunications and information technologies and services* to all Americans *by opening all telecommunications markets to competition*."[26] Thus, as noted above, among the other "regulating methods" Congress directed the Commission to use "to encourage the deployment on a reasonable and timely basis of advanced telecommunications capability" were "measures that promote competition in the local telecommunications market." Certainly, Congress did not intend to sacrifice local competition to speed the availability of advanced telecommunications services, as Petitioners seemingly suggest.

In other words, the Commission got it right; "in light of the statutory language, the framework of the 1996 Act, its legislative history, and Congress' policy objectives, the most logical statutory interpretation is that section 706 does not constitute an independent grant of authority."[27]

II. The Commission Mandate That Incumbent LECs Must Condition Loops For The Provision of xDSL Services At The Behest Of Competitors Is Consistent With Eight Circuit Directives

Petitioners contend that the Commission mandate that incumbent LECs must, to the extent technically feasible, "take affirmative steps to condition existing loop facilities to enable requesting carriers to provide services not currently provided over such facilities"[28] "squarely conflicts" with the holding of the U.S. Court of Appeals for the Eighth Circuit ("Eight Circuit") in

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[26] S. Conf. Rep. No. 104-230, 104th Cong., 2d Sess. 113 (1996) ("Joint Explanatory Statement") (emphasis added).

[27] MO&O, FCC 98-188 at ¶ 77.

[28] Id. at ¶ 53.

Iowa Utilities Commission v. FCC, 120 F.3d 753, 812 - 13 (8th Cir. 1997), *cert. granted* 118 S.Ct. 879 (1998), that the Commission may not require incumbent LECs to "alter substantially their networks in order to provide superior quality interconnection and unbundled access." TRA submits that Petitioners read the Eighth Circuit ruling far too narrowly.

Admittedly, the Eighth Circuit vacated general Commission rules requiring incumbent LECs to provide network interconnection and access superior in quality to that they provide to themselves and their affiliates. In so doing, however, the Court "endorsed the Commission's statements 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 interconnection or access to network elements'"[29] Indeed, the Court noted that even the various incumbent LEC petitioners "acknowledge[d] that the Act requires some modification of their facilities."[30]

Moreover, the Eighth Circuit upheld the Commission's definition of network elements, which included "two-wire and four-wire loops that are conditioned to transmit the digital signals needed to provide services such as ISDN, ADSL, HDSL and DS1-level signals."[31] And the Court did not disturb the Commission's reasoning that its "definition of loops will in some instances require the incumbent LEC to take affirmative steps to condition existing loop facilities to enable requesting carriers to provide services not currently provided over such facilities."[32] Nor did the

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29 Iowa Utilities Commission v. FCC, 120 F.3d 753 at 813, fn. 33.

30 Id.

31 Id. at ¶¶ 808 - 10; at ¶ 380.

32 Implementation of the Local Competition Provisions in the Telecommunications Act of 1996 (First Report and Order), 11 FCC Rcd. 15499 at ¶ 382.

Court object to the Commission's statement that "some modification of incumbent LEC facilities, such as loop conditioning, is encompassed within the duty imposed by section 251(c)(3)."[33] Indeed, the Court virtually echoed the Commission's words in the statement quoted above recognizing that facilities modifications necessary to accommodate interconnection and access to network elements could be mandated by the Commission.

In other words, the Eighth Circuit did not preclude the Commission from requiring carriers to modify facilities to make them available as network elements. And this of course is precisely what the Commission has mandated here. Incumbent LECs must, if requested to do so by a competitor and if the request is technically feasible, modify a loop element to allow for the provision thereon of advanced telecommunications services. Otherwise, the incumbent LEC would not be providing access to network elements as prescribed by Section 251(c)(3) and as affirmed by the Eighth Circuit. And this is the case whether or not the incumbent LEC is currently providing the service the competitor desires to offer, because, as the Commission has pointed out, "section 251(c)(3) does not limit the types of telecommunications services that competitors may provide over unbundled elements to those offered by the incumbent LEC."[34]

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[33] Id.

[34] Id. at ¶ 381.

III. Conclusion

By reason of the foregoing, the Telecommunications Resellers Association urges the Commission to deny Petitioners the relief they seek and affirm its *Memorandum Opinion and Order*.

Respectfully submitted,

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October 5, 1998

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CERTIFICATE OF SERVICE

I, Evelyn Correa, hereby certify that a true and correct copy of the foregoing Comments of the Telecommunications Resellers Association has been served by United States First Class Mail, postage prepaid, to the individuals listed below, this 5th day of October, 1998:

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