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

In the Matter of	)	
	)	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
Deployment of Wireline Services Offering Advanced Telecommunications Capability, *et al.*	)	

To: The Commission

OPPOSITION OF
e.spire COMMUNICATIONS, INC. and
INTERMEDIA COMMUNICATIONS, INC.

e.spire Communications, Inc. ("e.spire") and Intermedia Communications, Inc. ("Intermedia"), by their attorneys, jointly submit this Opposition to Petitions for Reconsideration filed by the Bell Atlantic telephone companies ("Bell Atlantic")[1] and SBC Communications Inc. and its local operating companies ("SBC") (collectively, "Petitioners")[2] regarding the *Memorandum Opinion and Order* (*"Advanced Services Order"*) issued by the Commission on August 7, 1998 in the above-captioned proceedings.[3]

Introduction and Summary

In similar pleadings, Bell Atlantic and SBC each challenge two aspects of the Commission's *Advanced Services Order*. First, Petitioners seek reconsideration of the Commission's affirmation of its longstanding decision, made in the Commission's *Local Competition Order*, defining the

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1 Petition of Bell Atlantic for Partial Reconsideration or, Alternatively, for Clarification, CC Docket Nos. 98-147 *et al.* (filed Sept. 8, 1998) [hereinafter "Bell Atlantic Petition"].

2 Petition for Reconsideration of SBC Communications Inc., Southwestern Bell Telephone Company, Pacific Bell and Nevada Bell, CC Docket Nos. 98-147 *et al.* (filed Sept. 8, 1998) [hereinafter "SBC Petition"].

3 *Deployment of Wireline Services Offering Advanced Telecommunications Capability*, Memorandum Opinion and Order, and Notice of Proposed Rulemaking, CC Docket Nos. 98-147 *et al.*, FCC 98-188 (rel. Aug. 7, 1998) [hereinafter *"Advanced Services Order"*]; (continued...)

unbundled local loop network element ("ULL") to include "two-wire and four-wire loops that are conditioned to transmit the digital signals necessary to provide services such as ISDN, ADSL, HDSL, and DS-1-level signals" and requiring incumbent local exchange carriers ("ILECs"), to the extent technically feasible, to "take affirmative steps to condition existing loop facilities to enable requesting carriers to provide services not currently provided over such facilities."[4] Oddly, Petitioners base their challenges on the Eighth Circuit's *Iowa Utilities Board* decision that, while gutting large portions of the Commission's *Local Competition Order* and overturning many rules adopted therein, left intact the Commission's ULL definition and its explanation of the obligations imposed on ILECs by it. As explained below, Petitioner's attempt to expand the Eighth Circuit's reversal of the Commission's "superior quality" rules is misguided and runs contrary to the language of and intent underlying Section 251(c), as well as that same court's recent pronouncements regarding the Commission's ability to define unbundled network elements ("UNEs").

Second, Petitioners seek reconsideration of the Commission's decision finding that Section 706 does not constitute an independent grant of forbearance authority. Here, Petitioners argue that Section 10(d) limits only the Commission's ability to forbear under Section 10(a) and that Section 706 constitutes an independent grant of forbearance authority. As explained below, Petitioners' arguments, once again, fail to provide a reasonable basis for concluding that Congress intended to sprinkle the Commission's newly minted forbearance authority in multiple provisions of the Act and sought only to limit it when the Commission decided to pick Section 10 as the basis for exercising it.

(...continued)
see also Public Notice (Corrected), Petitions for Reconsideration and Clarification of Action in Docketed Proceedings, Report No. 2297 (rel. Sept. 18, 1998).

4 *Advanced Services Order*, ¶ 53 (quoting *Local Competition Order*, 11 FCC Rcd. 15499, 15691 (¶ 380), 15692 (¶ 382) (1996)) (internal quotation marks omitted).

In sum, e.spire and Intermedia believe that the Commission should deny both Bell Atlantic and SBC's Petitions for Reconsideration. Petitioners have provided no basis on which the Commission must, or even should, reconsider the challenged aspects of the Commission's *Advanced Services Order*. Indeed, the conclusions challenged are consistent with current case law and with the specific provisions and broader purposes of the 1996 Act.

I. THE COMMISSION'S "LOOP CONDITIONING REQUIREMENT" IS CONSISTENT WITH EXISTING CASE LAW AND SECTIONS 251(c) AND 706

SBC and Bell Atlantic both argue that the Commission's affirmation of its *Local Competition Order* decision requiring ILECs, to the extent technically feasible, to "take affirmative steps to condition existing loop facilities to enable requesting carriers to provide services not currently provided over such facilities" is contrary to the Eighth Circuit's *Iowa Utilities Board* holding that the FCC may not impose superior quality requirements.[5] However, the Petitioners differ with regard to the degree to which they attempt to derail the Commission's unbundling rules through a misreading of that decision. SBC apparently maintains the view that the Eighth Circuit's holding compels the conclusion that it only can be required to provide access to a conditioned loop in cases where it already has conditioned a particular loop for its own use.[6] Taking a less audacious, but no less unfounded position, Bell Atlantic apparently contends that, in light of the *Iowa Utilities Board* decision, it cannot be required to condition loops for competitors in ways that it does not do for itself.[7] Both arguments, however, must be rejected as they merely are based on a misreading of the Eighth Circuit's *Iowa Utilities Board* and are inconsistent with that same court's *Shared Transport*

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5 Bell Atlantic Petition at 2-5; SBC Petition at 2-5.

6 SBC Petition at 2-5.

7 Bell Atlantic Petition at 2-5.

decision. Moreover, adoption of either view would undermine congressional goals manifest in both Sections 251(c)(3) and 706.

A. Petitioners' Contentions Are Contrary to the Eighth Circuit's *Iowa Utilities Board* and *Shared Transport* Decisions

SBC and Bell Atlantic's reliance on the *Iowa Utilities Board* decision as a basis for reversing the Commission's loop conditioning requirement is misplaced. In particular, Petitioners' arguments are based on a misreading of the Eighth Circuit's decision to overturn Commission Rules 51.305(a)(4) and 51.311(c) which required ILECs to provide interconnection and access to UNEs at superior levels of quality, if requested to do so by a competing carrier. To be sure, the Court found that the "superior quality" requirements manifest in those two rules were not supported by the Act's language.[8] However, the Commission's loop conditioning requirement was not overturned with, nor is it analogous to, those superior quality rules. Rather, the affirmative loop conditioning requirement and the Commission's loop UNE definition from which it stems were left untouched by the *Iowa Utilities Board* decision. Moreover, the loop conditioning requirement does not require construction of a new and superior network, but merely requires modifications to the ILECs' existing networks – modifications which the Court recognized, and even the ILECs acknowledged, were compelled by Sections 251(c)(2) and 251(c)(3).

[8] *Iowa Utilities Bd. v. FCC*, 120 F.3d 753, 812-13 (8th Cir. 1997) [hereinafter "*Iowa Utilities Bd.*"].

1. The Eighth Circuit Did Not Overturn the Commission's ULL Definition or The Loop Conditioning Requirement that Stems from It

Neither the Commission's loop conditioning requirement nor the ULL definition from which it stems are new. Both were set forth in the Commission's *Local Competition Order.*[9] Both also were among the pieces of that order left standing after the ILECs succeeded in convincing the Eighth Circuit to gut large portions of it and overturn many of the rules adopted therein. Petitioners' arguments that the Eighth Circuit's decision to overturn the superior quality rules somehow toppled the Commission's ULL definition and loop conditioning requirement are not convincing. The Court was not that clumsy. In fact, the Court was not clumsy at all. Rather, in the *Iowa Utilities Board* decision, its analysis was pointed and its conclusions were clear. The Court's discussion of the Commission's superior quality rules led to the explicit conclusion that Commission Rules 51.305(a)(4) and 51.311(c) could not stand. It gave no indication that it intended to wipe out Rule 51.319(a) (the Commission's ULL definition), or other parts of the Commission's *Local Competition Order* interpreting the requirements of that rule.

The Eighth Circuit's subsequent *Shared Transport* decision also undermines the Petitioners' arguments. There, the Eighth Circuit again affirmed and clarified the scope of the Commission's broad statutory authority to define UNEs pursuant to Section 251(d)(2).[10] The Court also indicated that in cases such as that presented by Section 251(d)(2), where Congress expressly delegates to the Commission the power to formulate policy and fill gaps in the statutory scheme, the Commission is entitled to "*Chevron* deference", and its rules and policies promulgated pursuant to such delegation

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9 *See Advanced Services Order*, ¶ 53 (quoting *Local Competition Order*, 11 FCC Rcd. 15499, 15691 (¶ 380), 15692 (¶ 382) (1996)) (internal quotation marks omitted).

10 *Southwestern Bell Tel. Co. v. FCC*, 1998 WL 459536, *5 (8th Cir. Aug. 10, 1998).

will stand "unless they are arbitrary, capricious, or manifestly contrary to the statute."[11] Petitioners have made no case (nor could they) that the Commission's loop conditioning requirement meets any of those standards.

2. The Commission's Loop Conditioning Requirement Permissibly Mandates Modifications to ILECs' Existing Networks

The Commission's loop conditioning requirement is not analogous to the superior quality rules vacated by the Eighth Circuit in its *Iowa Utilities Board* decision. Despite Petitioners' contentions, the loop conditioning requirement does not compel ILECs to construct an "unbuilt superior [network]", nor does it require them to "cater to every desire of a requesting carrier."[12] Rather, the Commission has required ILECs to make specific modifications to their *existing* networks for the specific purpose of making existing loop plant capable of transmitting digital signals. This requires the removal of bridged taps, loading coils and other electronic impediments – not the establishment of a "construction company", as Bell Atlantic franticly and implausibly contends.[13] It certainly does not mandate construction of an unbuilt superior network designed to meet competitors' specifications.

The Commission's pre-*Iowa Utilities Board* use of loop conditioning as an example of a superior quality requirement also cannot support Petitioners' contentions that the Commission's loop conditioning requirement is inconsistent with the Eighth Circuit's decision to vacate two open-ended superior quality rules. Again, the Eighth Circuit's discussion of the Commission's superior quality

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11 *Id.* at *6 (quoting *Chevron,* 467 U.S. 837, 843 (1984)) (internal quotation marks omitted).

12 Bell Atlantic Petition at 3; SBC Petition at 4.

13 Bell Atlantic Petition at 4. e.spire and Intermedia also note that Bell Atlantic's contention that consumers will be harmed by and will have to foot the bill for the Commission's imposition of the loop conditioning requirement is similarly ludicrous. By statute, Bell (continued...)

rules did not encompass, nor does it appear applicable to, the Commission's loop conditioning requirement. Indeed, the Court explicitly endorsed the Commission's view 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" and noted that the ILECs themselves "appear to acknowledge that the Act requires some modifications of their facilities."[14] Notably, the Commission, in its *Local Competition Order,* also used loop conditioning as an example of the type of *modification* required by Section 251(c)(3).[15] Thus, it seems evident that the Court intended to make clear that its objection was limited to the Commission's open-ended requirements that ILECs must cater to competitors' requests to provide them with access to "yet unbuilt superior [networks]" of their choosing – it did not intend to limit the Commission's authority to require ILECs to modify their networks in ways, such as loop conditioning, that are necessary to accommodate competitive entry into the market for local digital and data services and to achieve the goals of Section 251 and the 1996 Act in general.

B. Petitioners' Contentions Cannot Be Squared with Section 251(c)(3)

As noted above, SBC contends that ILECs should not be required to provide competitors with access to conditioned loops, unless SBC already has conditioned them for its own use. Under this theory, competitors could not use ULLs to provide digital and advanced telecommunications services, unless SBC already is providing such services to a particular subscriber. Thus, SBC

(...continued)
Atlantic is entitled to recover its forward-looking costs, plus a reasonable profit, for provisioning UNEs.

14 *Iowa Utilities Bd.* at n.33.

15 *Local Competition Order,* 15692 (¶ 382) ("some modification of incumbent LEC facilities, such as loop conditioning, is encompassed within the duty imposed by section 251(c)(3)").

attempts to limit competition to particular customers and the services to which they subscribe. Nothing could be less consistent with the congressional purpose in enacting Section 251(c), or for that matter, Section 706. Indeed, SBC's position is directly at odds with the Commission's determination that "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."[16] It also ignores the Commission's determination that "some modification of incumbent LEC facilities, such as loop conditioning, is encompassed within the duty imposed by section 251(c)(3)."[17] As discussed above, the Eighth Circuit explicitly endorsed the Commission's view that Section 251(c)(3) imposes on ILECs a duty to modify their networks in certain ways. In endorsing that view, the Court implicitly rejected SBC's position that it need not lift a finger to facilitate access by competitors to the network it built with more than 100 years of ratepayer contributions.

Bell Atlantic's position, although milder, also runs afoul of these principles. Bell Atlantic appears to argue that the Commission cannot require it to condition loops in any way other than that which meets the needs of its own service offerings. Thus, Bell Atlantic attempts to limit competition – and innovation – to particular services of its own choosing.[18] Again, this position cannot be (and has not been) squared with the Act, the Commission's decisions interpreting it, and the Eighth Circuit's review of those decisions. Moreover, Bell Atlantic's arguments appear more closely tied to an irrational concern that the Commission will require loop conditioning that is not "technically

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16 *Advanced Services Order*, ¶ 53 (quoting *Local Competition Order*, 11 FCC Rcd. 15691-92 (¶ 381)).

17 *Local Competition Order*, 11 FCC Rcd. at 15692 (¶ 382).

18 Indeed, Bell Atlantic attempts to set up a rule by which it could deny competitors' conditioning requests – and stop them from delivering new service offerings via ULLs – on grounds that the conditioning requested is not identical to that employed by Bell Atlantic, regardless of whether such conditioning is technically feasible.

feasible".[19] Once again, Bell Atlantic raises a non-issue, as the Commission has limited its loop conditioning requirement to require nothing more than that which is technically feasible.[20]

II. THE COMMISSION CORRECTLY CONCLUDED THAT SECTION 706 DOES NOT CONSTITUTE AN INDEPENDENT GRANT OF FORBEARANCE AUTHORITY

Bell Atlantic and SBC both challenge the Commission's conclusion that Section 706 does not constitute an independent grant of forbearance authority.[21] However, neither Petitioner raises any arguments that have not been considered already and soundly rejected by the Commission in its *Advanced Services Order.* Indeed, after a thorough examination of the statutory language, legislative history and congressional intent, the Commission correctly concluded Section 706 requires the Commission to encourage the timely deployment of advanced telecommunications capability through the use of "authority granted in other provisions", including its new Section 10 forbearance authority granted to the Commission by Congress in the 1996 Act.[22]

Nevertheless, Petitioners contend that the Commission should reverse its decision because Section 10(d) limits only the Commission's ability to exercise its forbearance authority *under that section* and does not limit the Commission's authority to forbear under Section 706.[23] Thus, based on the false premise that Section 706 constitutes an independent grant of forbearance authority, Petitioners contend that such authority is in no way limited by Section 10(d). This reasoning is absurd. Quite plainly, Congress had no reason to limit the Commission's authority to forbear under Section 706 because no such authority exists. Moreover, Congress clearly indicated which of the

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19 *See id.* at 5.

20 *Advanced Services Order,* ¶ 53.

21 Bell Atlantic Petition at 6; SBC Petition at 5-9.

22 *Advanced Services Order,* ¶¶ 69-79.

23 Bell Atlantic Petition at 6; SBC Petition at 6.

Act's other provisions it intended to exclude from Section 10(d)'s forbearance limitation. Indeed, the limitation of the Commission's forbearance authority applies "[e]xcept as provided in section 251(f)".[24] Reference to Section 706 is conspicuously absent from that provision; as a result, Petitioners' arguments must fail.

Finally, SBC argues that the Commission's conclusion "essentially guts the forbearance obligations of section 706(a) of any meaning."[25] Here, too, SBC bases its conclusion on a false premise. Section 706 imposes on the Commission no specific obligation to forbear. Rather, it imposes on the Commission a duty to encourage the timely deployment of advanced telecommunications capability. Forbearance (pursuant to Section 10) is just one of the regulatory methods by which the Commission may choose to accomplish this goal.

Conclusion

For all the foregoing reasons, the Commission should deny the petitions by Bell Atlantic and SBC for reconsideration or clarification of its *Advanced Services Order*.

Respectfully submitted,

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October 5, 1998

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24 47 U.S.C. § 160(f).

25 SBC Petition at 7.

CERTIFICATE OF SERVICE

I, Marlene Borack, hereby certify that on this 5th day of October, 1998, I caused true and correct copies of the **OPPOSITION OF e.spire COMMUNICATIONS, INC. and INTERMEDIA COMMUNICATIONS, INC.** to be served via first class mail, postage prepaid, upon those persons listed below:

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