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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

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

In the Matters 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 U S 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 Capability	CC Docket No. 98-32
Petition of the 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 the 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 U.S.C. § 160 for ADSL Infrastructure and Service	CC Docket No. 98-91

OPPOSITION OF LEVEL 3 COMMUNICATIONS, INC.

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Summary

The Petitioners ask the Commission to reconsider two aspects of its *Section 706 Order*. Their requests should be denied on both counts. The Commission must swiftly rebuff yet another BOC attempt to obfuscate and delay the implementation of local competition.

The Commission properly construed Section 706 of the Act. The Petitioners present only one statutory construction argument, in isolation, in their Petitions. As the Commission has already determined, a proper reading of Section 706, construed in context with other Sections of the Act and with the underlying purposes of the Act, undeniably compels the Commission's holding. Section 706 does not grant the Commission forbearance authority independent of the specific grant of forbearance authority contained in Section 10. The Petitioners' request for reconsideration of this holding must be rejected.

The Petitioners' attempt to overturn the Commission's loop conditioning rules is based on a tortured reading of the Eighth Circuit's holding. Although the BOCs asked the appellate court to vacate the *Local Competition Order* in its entirety, the court refused and vacated only specific portions of the *Local Competition Order* and accompanying rules. The majority of the Commission's unbundling rules were upheld. In particular, the Eighth Circuit upheld the requirement that ILECs provide unbundled access to conditioned loops and endorsed the Commission's statement that the duty imposed by Section 251(c)(3) includes modifications to an ILEC's network necessary to permit interconnection and unbundled access. Because the Petitioners' argument finds no support in either the *Local Competition Order* or the Eighth Circuit's order, the Petitioners' request for reconsideration of this issue must be rejected.

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<u>OPPOSITION OF LEVEL 3 COMMUNICATIONS, INC.</u>

Level 3 Communications, Inc. ("Level 3")[1] pursuant to the Commission's *Public Notice*, Report No. 2297 (rel. September 18, 1998), respectfully submits the following opposition to the Petitions for Reconsideration of the Commission's *Section 706 Order*[2] filed by the Bell Atlantic telephone companies ("Bell Atlantic") and SBC Communications, Inc., Southwestern Bell Telephone Company, Pacific Bell, and Nevada Bell (together, "SBC") (collectively, the "Petitioners").

I. Section 706 Cannot Be Construed As an Independent Grant of Forbearance Authority to the Commission

Notwithstanding the Commission's clear rejection of their position, the Petitioners continue to argue that because Section 706(a) of the Telecommunications Act of 1996 ("1996 Act") includes the word "forbearance," it somehow constitutes an independent grant of broad authority to the Commission that overrides any contrary provision of law. As the Commission well knows, this is not a new argument. Rather, it is the same old BOC argument with one small new twist -- an emphasis on a "limitation" contained in Section 10(d) of the Communications Act of 1934, as amended ("Act"). Specifically, the Petitioners claim that because Section 10(d) limits the Commission's authority to forbear from enforcing the requirements of Section 251(c) and 271 only when the Commission acts under Section 10(a), the Commission is not so restricted when acting under Section 706(a). The plain language of the statute does not support this interpretation. Although

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[1] Level 3 is a communications and information service provider that is building an advanced Internet Protocol technology-based network across the United States. Through its subsidiaries Level 3 Communications, LLC and PKS Information Services, Inc., Level 3 will provide a full range of communications services -- including local, long distance, and data transmission -- as well as other enhanced services, to its customers.

[2] *Deployment of Wireline Services Offering Advanced Telecommunications Capability*, CC Dockets No. 98-147 et al, Memorandum Opinion and Order, FCC 98-188 (rel. Aug. 7, 1998) ("*Section 706 Order*"). Level 3 filed comments opposing the original Section 706 petitions filed by Bell Atlantic, U S West and Ameritech.

it has been quoted numerous times, it bears repeating the statutory text of Section 706(a) yet again:

> (a) In General.--The Commission and each State commission with regulatory jurisdiction over telecommunications services shall encourage the deployment on a reasonable and timely basis of advanced telecommunications capability to all Americans (including, in particular, elementary and secondary schools and classrooms) by utilizing, in a manner consistent with the public interest, convenience, and necessity, price cap regulation, regulatory forbearance, measures that promote competition in the local telecommunications market, or other regulating methods that remove barriers to infrastructure investment.

Section 706 cannot be construed as a positive, independent grant of authority; rather, it plainly is a policy statement directing the Commission *how to use* the authority granted to it in other provisions of law. This interpretation is bolstered by the fact that every specific action mentioned in Section 706 is something the Commission already has authority to do under provisions of the Act -- price cap regulation under Section 201 (authority which the Commission had exercised for years before adoption of the 1996 Act), forbearance under Section 10, and "measures that promote competition in the local telecommunications market" under Sections 251 to 260. If Congress had meant to expand the Commission's substantive powers by adopting Section 706, it would not have limited itself to listing powers that the agency already had. Because Section 706 creates no forbearance authority independent of Section 10, the purported "limitation" of Section 10(d) has no relevance.

The Commission's reading of Section 706 is compelled by a rule of statutory construction providing that more specific provisions prevail over general ones. Section 706 makes only a very general reference to forbearance. By contrast, Section 10 of the Act, 47 USC § 160, contains very specific provisions governing forbearance. In particular, Section 10(a) provides as follows:

> Notwithstanding section 332(c)(1)(A) of this Act, the Commission shall forbear from applying any regulation or any provision of this Act to a

> telecommunications carrier or telecommunications service, or class of telecommunications carriers or telecommunications services, in any or some of its or their geographic markets if the Commission determines that [its action meets three specific criteria].

47 U.S.C. § 160(a). Petitioners are correct that Section 10(d) limits the Commission's authority, granted under Section 10(a), to forbear from enforcing Section 251(c) and 271. But Section 10(d)'s limitation does not affect the fact that Section 10, which specifically enumerates the Commission's forbearance authority, controls the more general Section 706(a), which merely references regulatory forbearance.

In reaching the correct conclusion that Section 706(a) does not constitute an independent grant of authority to forbear from regulation, the Commission relied on the statutory language, the whole framework of the Act, its legislative history, and Congress's fundamental purpose of opening local markets to competition.[3] It is absurd to allege, as Petitioners implicitly do, that Congress without directly saying so would undo the entire framework and purpose of the Act by permitting a wholesale abandonment of the key market opening provisions of the Act under Section 706. The Commission has already rejected the Petitioners' arguments and their "new" Section 10(d) argument is similarly unpersuasive. The Petitioners' request for reconsideration of this issue must be denied.

II. Currently Effective Rules Promulgated in the *Local Competition Order* Control the Loop Conditioning Duty; The Vacated "Superior Quality" Rules Are Not on Point

In the *Section 706 Order,* the Commission affirmed its previous finding that ILECs must condition loops for requesting CLECs. *See, Section 706 Order* at ¶¶52-55. Petitioners argue that the loop conditioning requirement either requires (SBC), or could be interpreted to require (Bell Atlantic), ILECs to provide CLECs with superior quality access

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[3] *Section 706 Order* at ¶77.

in violation of the Act and *Iowa Utilities Board*.[4] Bell Atlantic claims that where it "does not condition loops for its own advanced services, not conditioning loops for competitors could not violate any conceivable interpretation of the section 251 non-discrimination standard." Bell Atlantic Petition at 4. SBC agrees, stating that the "conditioning obligations require incumbents to improve their facilities so that they can be used to provide services that the incumbents do not currently provide over those facilities." SBC Petition at 5. Both Petitioners also argue that in its *Local Competition Order*,[5] the Commission referred to loop conditioning as an example of the "superior quality" obligation it was imposing on ILECs, an obligation that was subsequently vacated by the Eighth Circuit. Bell Atlantic Petition at 3-4; SBC Petition at 4. As Level 3 shows below, both of these arguments are incorrect and easily refuted.

It is clear from the Commission's *Section 706 Order* that its statements regarding ILECs' loop conditioning duties are affirmations of a currently effective rule the Commission promulgated in the *Local Competition Order*.

> In the *Local Competition Order*, the Commission identified the local loop as a network element that incumbent LECs must unbundle "at any technically feasible point." It defined the local loop to include "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."

Section 706 Order at ¶53 (footnotes omitted, emphasis added). In affirming the loop conditioning requirement set forth in the *Local Competition Order*, the Commission cited paragraphs 379 to 382 of that Order. Those paragraphs are in the section entitled

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[4] *Iowa Utils. Bd. v. FCC*, 120 F.3d 753 (8th Cir. 1997), *cert. granted sub nom. AT&T Corp. v. Iowa Utils. Bd.*, 118 S. Ct. 879 (1998).

[5] *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, CC Docket No. 96-98, First Report and Order, 11 FCC Rcd 15499 (1996) ("*Local Competition Order*"), *vacated in part and aff'd in part sub nom. Iowa Utils. Bd. v. FCC*, 120 F.3d 753 (8th Cir. 1997), *cert. granted sub nom. AT&T Corp. v. Iowa Utils. Bd.*, 118 S. Ct. 879 (1998).

"Specific Unbundling Requirements - Local Loops " The Commission's authority to issue rules implementing Section 251(d)(2) (unbundled network elements) and the rule which lists the minimum network elements ILECs must unbundle, 47 C.F.R. § 51.319, was upheld on appeal. *Iowa Utils. Bd.*, 120 F.3d at 794, n.10 & 818, n.38.[6] Paragraph 382 delineates the scope of an ILEC's duty to provide unbundled local loops under 47 C.F.R. § 51.319(a). Like the regulation itself, the requirements included in the text of a Commission order are binding and must be followed unless overturned on appeal. *Iowa Utils. Bd.*, 120 F.3d at 803 ("the fact that the FCC asserts its authority in the commentary section of its First Report and Order as opposed to stating its position as a rule is immaterial"). An ILEC's duty to provide unbundled access to a conditioned loop is thus explicitly established in the *Local Competition Order* and has been upheld on review by the Eighth Circuit.

Notwithstanding the Eighth Circuit's clear affirmation of an ILEC's duty to provide unbundled access to conditioned loops, Petitioners argue that the footnoted reference to loop conditioning as an example of the vacated "superior quality" rules controls this issue. They are wrong. In vacating the so-called superior quality rules, the Eighth Circuit explicitly ***endorsed*** 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 interconnection or access to network elements." *Iowa Utils. Bd.*, 120 F.3d at 812, n.33.[7] The court's endorsement of this statement is noteworthy because the Commission specifically found that loop conditioning was encompassed within an ILEC's Section 251(c)(3) duties. In discussing its loop unbundling rules, the Commission

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[6] Although the Eighth Circuit vacated the presumption that a network element must be unbundled if "technically feasible," *Iowa Utils. Bd.*, 120 F.3d at 810 & n.30, that requirement has no relevance here.

[7] Indeed, even Petitioners have previously acknowledged that the Act requires some modifications of their facilities. *See*, Reply Brief of Regional Bell Operating Companies and GTE at 40 (filed Jan. 6, 1997 in *Iowa Utils. Bd.* appeal) ("We do not dispute that LECs may have to make minor modifications to their networks where directly necessary to accomplish the interconnection and access mandated by the Act").

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

In summary, the Commission has made three findings relevant to ILECs' duty to condition loops and all three of these findings have been upheld by the Eighth Circuit. First, the Commission found that the duty to provide loop conditioning is part of the ILECs' duty to provide unbundled loops. Second, the Commission found that the duty to provide access to unbundled elements under Section 251(c)(3) encompasses the duty to provide loop conditioning. Third, the Commission found that the obligations imposed by Sections 251(c)(2) & (3) include modifications to ILEC facilities to the extent necessary to accommodate access to network elements. Contrary to Petitioners' tortured arguments, the duty to provide loop conditioning does not require the ILECs to provide CLECs with access to superior, yet unbuilt networks. Petitioners' blatant attempt to frustrate CLECs' access to and use of the ILECs' bottleneck network must be rejected out of hand.

The Eighth Circuit vacated the so-called superior quality rules because "subsection 251(c)(3) implicitly requires unbundled access only to an incumbent LEC's existing network -- not to a yet unbuilt superior one." *Iowa Utils. Bd.*, 120 F.3d at 813. That Petitioners' superior quality argument totally misses the mark is easily demonstrated by a simple example. Where ILECs are conditioning loops for themselves and the loops CLECs request already exist, albeit without the necessary conditioning, a loop conditioning duty falls far short of requiring ILECs to build new networks for CLECs. It is widely acknowledged that all of the RBOCs and GTE have begun to deploy xDSL services to the public.[8]

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[8] *Ameritech Changes Prices for Internet Access Service*, Ameritech News Release (May 1, 1998) (available at http://www.ameritech.com/media/releases/release-1492.html) (noting availability of ADSL service in Royal Oak and Ann Arbor, Michigan and summer availability in Chicago, Illinois); *Bell Atlantic, SBC to Roll Out ADSL*, Communications Today, June 16, 1998 (describing Bell Atlantic's plan to make ADSL available on approximately 2 million lines by the end of 1998; reporting that SBC announced plans to make available ADSL available on approximately 2 million lines by the end of 1998); *SBC*

Clearly, these ILECs have networks capable of providing advanced services and are making upgrades to loops and other network elements where necessary to provide advanced services to their own customers.

If the Commission were to adopt Petitioners' position, it would lead to the absurd result of permitting the ILECs to limit upgrades to individual network elements that the ILECs use to serve their own end user customers, while ignoring the remainder of their bottleneck local network. Under Petitioners' theory, by selectively upgrading individual elements in their networks, ILECs could prohibit CLECs from providing advanced services over a bottleneck local loop unless and until the ILEC conditioned the loop for its own end user customer and the CLEC subsequently earned that same customer's business over the same loop. Neither Congress nor the Eighth Circuit condoned such absurd limitations on the unbundled access ILECs provide to CLECs.

Even assuming *arguendo* that the "superior quality" point were correct, it does not follow that an ILEC must be providing xDSL service before it has an obligation to offer conditioned loops. If the ILEC performs the function of conditioning loops for ***any*** service it offers (such as special access or ISDN), then it must do the same for CLECs. As Petitioners have previously argued, unbundling obligations apply to ***facilities***, not

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Promises to Roll Out of ADSL in California, Communications Today, June 5, 1998 (reporting SBC's announcement that Pacific Bell is beginning to deploy ADSL service to more than 200 communities in California); *BellSouth to Roll Out ADSL in 30 Markets*, Communications Today, May 5, 1998 (describing BellSouth's plans for a 30-city deployment of ADSL to 1.7 million customers in late August); *GTE to Offer Ultra-Fast Internet Access; Nation's Largest Deployment of Asymmetric Digital Subscriber Line (ADSL) Service to Roll Out in Two Phases Starting this June in Current Market Trial Locations; Fujitsu Network Communications Selected as Supplier of High-Speed Internet Access Equipment*, GTE News (April 27, 1998) (available at http://www.gte.com/g/news/980427.html) (announcing GTE plans to provide ADSL service in 300 central offices in 16 states); *U S West Launches Ultra-Fast DSL Internet Service in Twin Cities; Continuous Deployment of Always-on "Web-Tone" Data Version of Dial-Tone*, U S West Press Release, May 13, 1998 (announcing its launch of its Mega Bit Services ADSL).

services.[9] If the ILECs are conditioning facilities for themselves, regardless of what services they are providing over such conditioned facilities, they must also condition their facilities for CLECs. ILECs may not restrict the types of telecommunications services CLECs provide using unbundled network elements.[10]

Conclusion

For the foregoing reasons, the Petitions of Bell Atlantic and SBC should be denied.

Respectfully submitted,

Terrence J. Ferguson
Senior Vice President and Special Counsel
Level 3 Communications, Inc.
3555 Farnam Street
Omaha, Nebraska 68131
(402) 536-3624 (Tel.)
(402) 536-3632 (Fax)

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[9] The Petitioners' own brief submitted to the Eighth Circuit argues that unbundling obligations apply to facilities and not services. *See*, Reply Brief of Regional Bell Operating Companies and GTE (filed Jan. 6, 1997) ("no reason for unbundling services, especially when Congress eliminated language from an earlier version of the Act that would have accomplished that end"). Level 3 notes that the Eighth Circuit ultimately rejected the BOCs' arguments that operator services, directory assistance, caller I.D., call forwarding, and call waiting are "services," and upheld Commission rules requiring ILECs to unbundle these network elements. *Iowa Utils. Bd.*, 120 F.3d at 809.

[10] *Local Competition Order* at ¶292.

CERTIFICATE OF SERVICE

I, Terrence J. Ferguson, do hereby certify that a copy of Level 3 Communications, Inc.'s Opposition was served on the following by first class U.S. mail, postage prepaid, or hand delivery (*) this 5th day of October, 1998:

Magalie Roman Salas, Esq.* (orig. +9)
Secretary
Federal Communications Commission
1919 M Street, N.W.
Room 222
Washington, DC 20554

Janice Myles* (1+ disk)
Common Carrier Bureau
Federal Communications Commission
1919 M Street, N.W.
Room 544
Washington, DC 20554

ITS* (1+ disk)
1231 20th Street, N.W.
Washington, DC 20554

Michael E. Glover
Lawrence W. Katz
1320 North Court House Road
8th Floor
Arlington, VA 22201

Mark L. Evans
Sean A. Lev
Rebecca A. Beynon
Kellogg, Huber, Hansen,
Todd & Evans
1301 K Street, N.W.., Suite 1000 West
Washington, DC 20005

James D. Ellis
Robert M. Lynch
Durward D. Dupre
Darryl W. Howard
One Bell Center
Room 3528
St. Louis, MO 63101

Terrence J. Ferguson

Terrence J. Ferguson