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

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

In the Matter of	)	
	)	
Deployment of Wireline Services	)	CC Docket No. 98-147
Offering Advanced Telecommunications	)	
Capability	)	

Comments of Network Plus, Inc.

Andrew D. Lipman
Tamar E. Finn
Swidler Berlin Shereff Friedman, LLP
3000 K Street, N.W., Suite 300
Washington, DC 20007
Counsel for Network Plus, Inc.

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Network Plus, Inc. ("Network Plus"), through undersigned counsel, respectfully submits the following comments in response to the Notice of Proposed Rulemaking ("NPRM") issued in the above-captioned proceeding concerning deployment of advanced telecommunications capability to all Americans.

Introduction

Network Plus, founded in 1990, is a leading facilities-based communications provider offering switched long distance, data and enhanced telecommunications services on an integrated basis. Network Plus is authorized to provide intrastate long distance services in 49 states and its application to provide intrastate long distance in Alaska is currently pending. The Company's customers consist primarily of small and medium-sized businesses located in major markets in the Northeast (the New England states, New York and New Jersey) and Southeast (Florida, Georgia, North Carolina, South Carolina and Tennessee). Network Plus also provides international wholesale transport and termination services to major domestic and international telecommunications carriers.

As of July 15, 1998, the Company served over 34,000 customers representing in excess of 150,000 access lines and 30,000 toll-free numbers.

Network Plus intends to offer local services on a commercial basis beginning in the third quarter of 1998 and intends to add Internet services to its offerings in the later part of 1998. Network Plus has received authorization to provide competitive local exchange ("CLEC") services in Massachusetts, New Hampshire and Rhode Island and has filed applications for CLEC authority in Connecticut, Florida, Georgia, Maine, New Jersey, New York, Pennsylvania, Tennessee, and Vermont. The Company has executed an interconnection agreement with Bell Atlantic in Massachusetts and is negotiating with incumbent local exchange carriers ("ILECs") in other states where it will offer local exchange services. Network Plus intends to provide its local services via resale initially, eventually transitioning its customers to the Company's own network. Network Plus also plans to expand its customer base to the work-at-home market and other residential customers. xDSL services will be an important service offering for both Network Plus' business and residential customers. Thus Network Plus, as an interexchange carrier, CLEC, and provider of advanced services such as xDSL, has a keen interest in the rules proposed by the FCC in this docket.

I. The FCC Must Interpret Narrowly Any Exemption from Section 251(h)(1).

A. Applicable Standards of the Act

Section 251(h)(1) of the Communications Act of 1934, as amended by the Telecommunications Act of 1996 ("Act"), provides that:

> For purposes of this section, the term "incumbent local exchange carrier" means, with respect to an area, the local exchange carrier that–

> (A) on the date of enactment of the Telecommunications Act of 1996, provided telephone exchange service in such area; and
>
> (B)(i) on such date of enactment, was deemed to be a member of the exchange carrier association pursuant to section 69.601(b) of the Commission's regulations (47 C.F.R. 69.601(b)); or
>
> (ii) is a person or entity that, on or after such date of enactment, became a ***successor or assign*** of a member described in clause (i).

47 U.S.C. § 251(h)(1) (emphasis added). Furthermore, Section 10(d) of the Act provides:

> Except as provided in section 251(f) [rural telco exemptions], the Commission may not forbear from applying the requirements of section 251(c) or 271 ... until it determines that those requirements have been fully implemented.

47 U.S.C. § 160(d).

With Section 10, Congress made clear that the ***core*** provisions of Section 251 are the market opening obligations placed on ILECs to help achieve Congress' purposes of building a competitive market for the provision of local telecommunications. Given the pro-competitive purposes of the 1996 Act, and the limitations in Section 10(d) of the Act, it is clear that the successor or assign limitation is meant to ***prevent*** ILECs from escaping their Section 251(c) duties by significant transfers of communications assets to an affiliated entity. Given these purposes, FCC rules that define any successor or assign exemption must be narrowly construed in light of, and in order to achieve, Congress' overriding objectives.

B. Defining a "Successor or Assign" Subject to ILEC Obligations

It is clear that the statutory "successor or assign" safeguard would permit few transfers from an ILEC to an affiliate. To determine whether or not one entity is the "successor" of another, courts usually engage in a fact-specific inquiry focusing on whether one entity has succeeded to the

obligations of another.[1] Any FCC rules construing the Section 251(h)(1) exemption must therefore reserve the FCC's authority to examine the relationship between an ILEC and its affiliate on a case-by-case basis. FCC rules must also strictly construe any exemptions from classification of the affiliate as an "assign." An assign is an entity "to whom, property is, or will, or may be assigned."[2]

The FCC has previously found that transfers of network facilities to an affiliate would render that affiliate an ILEC under Section 251(h)(1).[3] The FCC should ***not*** reverse that finding with respect to data services and permit ILECs to transfer advanced services equipment to affiliates without any Section 251(h)(1) implications. As the FCC stated in its accompanying Section 706 Order, with respect to an ILEC's Section 251(c) duties, the Act makes no distinction between voice and data services.[4] Permitting ILEC affiliates to escape classification as a successor or assign for transfers of data equipment but not voice equipment thus violates the Act.

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[1] *See, Howard Johnson Co. Inc. v. Detroit Local Joint Executive Bd., etc.*, 417 U.S. 249, 262 n.9 (1974).

[2] *Restatement of Contracts Second*, § 323, Comment b.

[3] *Non-Accounting Safeguards Order*, 11 FCC Rcd 21905, ¶309 (1996).

[4] *Deployment of Wireline Services Offering Advanced Telecommunications Capability*, CC Docket No. 98-147, Memorandum Opinion and Order, FCC 98-188, ¶47 (rel. Aug. 7, 1998) ("for purposes of determining the interconnection obligation of carriers, the Act does not draw a regulatory distinction between voice and data services").

C. Necessary Limitations on Transfers

Permitting a *de minimis* transfer of assets from the ILEC to its affiliate also fails to meet the FCC's stated objective of encouraging ILEC investment in advanced services.[5] ILECs purchased existing equipment knowing that they would be subject to the unbundling and resale obligations of Section 251(c) with respect to such equipment. Thus with respect to existing equipment, the *de minimis* exemption stimulates no additional investment.

Under a strict interpretation of "assign," the ILEC would be prohibited from transferring not only equipment and real property to its affiliate, but also its trade name. Trade names are "property interests that may be protected under both state and federal law."[6] So long as the ILEC maintains bottleneck control over the local network, any advanced services affiliate permitted to use the ILEC's brand name will not be viewed as "separate" from a consumer perspective and will obtain a substantial marketing advantage *vis-a-vis* its competitors. Therefore, if the affiliate is permitted to use the ILEC's brand name, transfer of a significant business asset has occurred and the affiliate should be classified as an assign subject to Section 251(c) obligations.

Customer lists also constitute significant business assets that cannot be transferred to an affiliate without incurring ILEC obligations. Joint marketing of the ILEC's and affiliate's services must be prohibited. Nor may the affiliate be permitted to use the ILEC's customer proprietary network information ("CPNI").

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[5] Section 706 Order at ¶ 13.

[6] *Dial-a-Mattress Operating Corp. v. Mattress Madness, Inc.*, 841 F. Supp. 1339, 1345 (E.D. N.Y. 1994).

This strict interpretation of the successor or assign limitation is most consistent with the purposes of Section 251, namely to apply pro-competitive unbundling obligations to ILECs – not to establish mechanisms that permit them to escape those obligations. It is clear that the proposals contained in the NPRM do not meet this strict interpretation standard. The FCC's NPRM proposal would essentially pass to the affiliate virtually all the advantages and status of incumbency, with none of the corresponding obligations. This clearly contravenes the intent and letter of the Act.

If the FCC decides to adopt some variation of its separate affiliate proposal, Network Plus strongly recommends that the safeguards be significantly strengthened and any *de minimis* exemption for transfers of assets (which Network Plus strongly opposes as violating the Act) be subject to the non-discrimination requirement. Furthermore, the FCC should establish a stringent preapproval process which requires the ILEC to submit a complete plan for establishing the affiliate and permits public comment on that plan. *See* Section 271(d)(3)(B).

D. Non-Discrimination Requirements

Another important part of the FCC's separate affiliate proposal is the non-discrimination requirement. Network Plus believes that there must be two essential components to any non-discrimination rules adopted by the FCC. First, any services or unbundled network elements the ILEC provides to its advanced services affiliate must be made available to other CLECs on the same terms and conditions. This non-discrimination requirement must extend to enhanced services provided by the ILEC or another ILEC affiliate to the advanced services affiliate. For example, in the State of Massachusetts, Bell Atlantic has refused to provide voice mail to Network Plus for

resale.[7] Thus until Network Plus obtains the capability to provide its own voice mail services, a former Bell Atlantic customer that uses voice mail and wishes to switch to Network Plus loses its voice mail service. While the FCC may have defined voice mail as an enhanced service, customers view it as an important part of their local telephone service and may not be willing to switch carriers if they cannot retain their voice mail. Similarly, if the ILEC and its advanced services affiliate are able to provide voice and xDSL services over the same copper loop, but another CLEC can only provide xDSL services over a second line which the customer must have installed, the CLEC is inherently disadvantaged. The FCC must ensure this type of discrimination is prohibited. Conversely, the non-discrimination requirement must apply equally to the advanced services affiliate. Any advanced services that the affiliate may bundle, or provide in conjunction with, an ILEC's basic services must also be offered to CLECs.

II. Federal Preemption of Inconsistent State Regulation May Be Necessary.

The NPRM urges state commissions to exercise their authority over an ILEC affiliate in a way consistent with the FCC's rules and goals. This laissez-faire approach to preserving state authority could undermine the very safeguards the FCC proposes to establish. The FCC's failure to preempt contradictory or less stringent state regulation leaves in place state authority to authorize significant transfers to any affiliate, or adopt relaxed safeguards, for the affiliate's provision of intrastate services. Yet at the same time, the FCC inquires whether or not xDSL services should be

[7] An open docket pending before the Massachusetts Department of Telecommunications and Energy may result in Bell Atlantic being required to reverse its position.

classified as interstate services. Thus the FCC recognizes the danger that equipment used to provide advanced service may be inseverable for purposes of intra versus interstate classification. The FCC made such a finding with respect to customer premises equipment ("CPE") and preempted states' ability to regulate CPE.[8] Until it makes a determination regarding the jurisdictional nature of advanced services and equipment used to provide advanced services, the FCC should reserve the right to preempt inconsistent state law.

III. The FCC Should Strengthen Its National Collocation Rules.

Network Plus strongly supports the FCC's proposal to adopt stronger national collocation standards. ILECs' inconsistent standards for collocation create unreasonable delays for CLECs seeking to establish collocation in multiple states. As noted in the NPRM, adoption of stronger and more detailed national standards would encourage the deployment of advanced services by increasing predictability and certainty for carriers such as Network Plus that seek to enter numerous markets. National standards should be established as minimums that states can supplement. The FCC must make clear, however, that state rules may not undercut federal rules.

A. Collocation of CLEC Equipment

The FCC should mandate that ILECs permit collocation by CLECs of any telecommunications equipment, regardless of voice or data classifications. Network Plus supports the FCC's proposal that CLECs be permitted to collocate all NEBS compliant equipment, and notes

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[8] *See, Independent Data Communications Manufacturers Ass'n v. FCC*, 693 F.2d 198, 214 (affirming FCC's preemption of state regulation of CPE).

that Digital Subscriber Line Multiplexers ("DSLAMs") are NEBS compliant. Network Plus also supports the FCC's proposal that ILECs be required to list equipment located in their central offices and permit CLECs to collocate any non-NEBS compliant equipment that the ILEC already uses. NEBS safety standards[9] are reasonable prerequisites for approval of collocated equipment. However, where an ILEC uses non-NEBS compliant equipment, it must permit CLECs to do the same under the nondiscrimination standards of Section 251(c)(2)(C).

B. Exhaustion of Space Issues

Network Plus urges the FCC to mandate that ILECs offer cageless and shared collocation. There is no reason to prohibit either type of collocation based on security issues.

Whether or not the FCC chooses to establish a cageless or shared collocation obligation, it should set minimum terms and conditions for collocation generally, including procedures that CLECs use to obtain collocation. The FCC should establish time limits under which ILECs must provide collocation (these time limits should vary based on the type of collocation -- cage, cageless, or virtual). The FCC should also modify its rules concerning ILEC space warehousing. Current rules require that ILECs give up space before denying virtual collocation, but not for physical collocation. This limitation provides no meaningful constraint on an ILEC's ability to warehouse space. Network Plus is also concerned that other collocated entities be restricted from warehousing

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[9] Network Plus opposes any requirement that CLEC collocated equipment meet NEBS performance standards. CLECs have strong market incentives to employ equipment that meets acceptable performance standards and there is no reason to give ILECs an opportunity to use performance standards to delay or prohibit collocation of equipment.

space. Many ILECs have tariff or contract use-it-or-lose-it provisions regarding CLEC use of collocated space. While Network Plus believes such provisions are necessary, ILECs must not be allowed to abuse these restrictions.

Network Plus also supports the FCC's proposal that ILECs be required to permit CLECs to tour a central office where the ILEC alleges space exhaustion. Network Plus urges the FCC to draft such a rule to make clear that state and federal regulators, as well as CLECs, enjoy this right. Network Plus also supports the FCC's proposal that ILECs provide to CLECs a report showing available collocation space. However, Network Plus recommends that the FCC impose a continuing duty on ILECs to compile and make such information available. Current, accurate information on space availability will allow both the ILEC and CLEC to predict potential space exhaustion problems and reduce application processing burdens for both parties, minimizing applications rejected based on space exhaustion.

IV. The FCC Should Strengthen Its Loop Unbundling Requirements.

The FCC has expressed concern that its current loop unbundling rules do not fully ensure that competitive providers have adequate access to the "last mile." Network Plus agrees with this concern. In order for CLECs to provide any telecommunications service, advanced or basic, CLECs must have access to the monopolist's bottleneck local loop. Furthermore, ILECs must provide loops upon request that are free of bridge taps, load coils, and midspan repeaters that foreclose the provision of high-speed services over such loops.

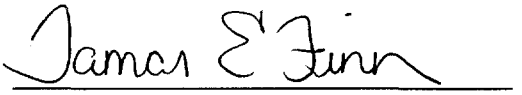
ILECs should also be required to move loops off of loop carrier equipment that inhibits the provision of advanced services. Similarly, the FCC's loop unbundling rules should be strengthened to require ILECs to permit CLECs interconnection at and access to fiber huts and other remote terminals where copper loops are multiplexed to fiber for delivery to the central office. Whether or not sufficient space exists at such remote terminals for collocation, CLECs should have the option of building out their own fiber to remote terminals and establishing a point of interconnection to such terminals.

Finally, Network Plus strongly recommends that the FCC require ILECs to unbundle dark fiber. Network Plus intends to serve the work-at-home and 3 to 5 line small business markets. Although Network Plus is installing its own fiber, without access to ILEC dark fiber, it could take years for Network Plus to build out into the suburban and residential neighborhoods where these customers are located. While some competitive providers have built or are installing dark fiber to ILEC central offices, the ILECs still control the majority of such dark fiber. Furthermore, at least two federal district courts have found that dark fiber is a network element. *MCI v. BellSouth Telecommunications*, 7 F.Supp.2d 674 (E.D.N.C. 1998); *MCIMetro Access Transmission Services, Inc. v. GTE Northwest, Inc.*, No. C97-9058WD, slip op. (W.D. Wash. July 7, 1998). Network Plus therefore urges the FCC to order ILECs to offer dark fiber as an unbundled network element.

Conclusion

In order to be consistent with both the purpose and the letter of the Act, the FCC's proposed safeguards for a "truly separate" ILEC advanced services affiliate must be strengthened. In addition, the FCC should take this opportunity to strengthen both its collocation and loop unbundling rules. Network Plus urges the FCC to adopt such rules consistent with those recommendations made herein.

Respectfully submitted,



Andrew D. Lipman
Tamar E. Finn
Swidler Berlin Shereff Friedman, LLP
3000 K Street, N.W., Suite 300
Washington, DC 20007
Counsel for Network Plus, Inc.

September 25, 1998

CERTIFICATE OF SERVICE

I, Wendy Mills, hereby certify that I have on this 25th day of September, 1998, served copies of the foregoing Comments of Network Plus, Inc. on the following via hand delivery:

Magalie Roman Salas, Esq. (orig. +9)
Secretary
Federal Communication Commission
1919 M Street, NW
Room 222
Washington, DC 20554

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

ITS (1 + disk)
1231 19th Street, N.W.
Washington, DC 20554

Wendy Mills

Wendy Mills