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

In the Matters of Deployment of Wireline Services Offering Advanced Telecommunications Capability, et al.	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

REPLY COMMENTS IN SUPPORT OF PETITION FOR RECONSIDERATION OF SBC COMMUNICATIONS INC., SOUTHWESTERN BELL TELEPHONE COMPANY, PACIFIC BELL, AND NEVADA BELL

SBC Communications Inc., Southwestern Bell Telephone Company, Pacific Bell, and Nevada Bell (collectively, "SBC") file these reply comments in support of their Petition for Reconsideration of the Commission's recent Advanced Services Order.[1]

None of the comments filed in opposition to that Petition respond to SBC's central arguments. First, no commenter successfully explains away the dispositive fact that the Commission itself has specifically acknowledged that a loop conditioning requirement is a type of superior quality rule -- precisely the kind of rule that the Eighth Circuit has held the Commission may not impose. Accordingly, the Commission should promptly rescind the loop conditioning portion of its Advanced Services Order to avoid violating the court of appeals' clear mandate.

[1]Memorandum Opinion and Order, and Notice of Proposed Rulemaking, Deployment of Wireline Services Offering Advanced Telecommunications Capability, FCC 98-188, CC Dkt Nos. 98-147, 98-11, 98-26, 98-32, 98-15, 98-78, 98-91 and CCB/CPD No. 98-15 RM 9244 (rel. Aug. 7, 1998).

The comments filed in opposition to SBC's Petition are no more successful in addressing the plain language of section 706 granting the Commission authority to forbear from regulating to promote development of advanced services. Indeed, instead of discussing section 706, most commenters focus on section 10 of the 1996 Act and the limitations contained in that other provision. But those limitations, which by their terms restrict only the Commission's general forbearance authority under that provision, do not limit the separate power that section 706 gives the Commission to forbear from regulating in the specific area of advanced services.

I. THE ADVANCED SERVICES ORDER'S LOOP CONDITIONING REQUIREMENT VIOLATES THE EIGHTH CIRCUIT'S MANDATE AND SHOULD BE RECONSIDERED

a. SBC's Petition for Reconsideration in this matter demonstrated beyond serious dispute that the Commission's recent Advanced Services Order is unlawful to the extent it requires incumbent LECs to "condition" loops at the request of new entrants. See SBC Pet. at 2-5.

Two points are decisive here. First, the Commission itself has frankly acknowledged that a loop conditioning requirement is a form of superior quality rule. In fact, the Local Competition Order explicitly singled out an incumbent LEC's obligation to "provide local loops conditioned to enable the provision of digital services (where technically feasible) even if the incumbent does not itself provide such digital services" as a paradigmatic "example" of a superior quality requirement. Local Competition Order, 11 FCC Rcd 15499, 15659 n.680 (1996) (emphasis added).

Second, and equally plainly, the Eighth Circuit has squarely held that the Commission has no authority to impose such superior quality rules. See Iowa Utilities Board v. FCC, 120 F.3d

753, 813 (8th Cir. 1997), cert. granted on other grounds, 118 S. Ct. 879 (1998). As the court of appeals explained, section 251(c)(3) requires incumbents to provide access only to their "existing networks." Id.

In sum, under the Commission's own statements, a loop conditioning requirement violates the Eighth Circuit's mandate. That requirement, accordingly, cannot stand. "After a court has spoken, the FCC is bound to follow that court's mandate, because the FCC is not a court nor is it equal to [a] court in matters of statutory interpretation." Iowa Utilities Bd. v. FCC, 135 F.3d 535, 540 (8th Cir.) (internal quotation omitted), petition for cert. filed, 66 U.S.L.W. 3623 (1998).

b. None of the comments provide any plausible basis to reach a different result. Perhaps most tellingly, AT&T, MCI Worldcom, and the vast majority of other commenters completely ignore the dispositive language in the Commission's Local Competition Order explaining that loop conditioning is an "example" of a superior quality requirement. Their collective silence on this point is understandable, because there simply is no way to square the Commission's statement with their position that incumbent LECs may lawfully be required to condition loops at the request of new entrants. The language in the Local Competition Order is both direct and unequivocal, and it fatally undermines these commenters' arguments.[2]

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[2] Given the clarity of the Commission's language and the equally unequivocal Eighth Circuit holding that the Commission may not impose superior quality requirements, it is, to say the least, odd that some commenters suggest that SBC has not preserved its objection on the loop conditioning issue. See, e.g., ALTS Comments at 3. In fact, SBC raised its objection to all forms of superior quality obligations explicitly in its Eighth Circuit appeal and was successful both in having those obligations declared unlawful and in having the relevant regulation vacated. Indeed, as Sprint grudgingly admits (Sprint Comments at 3 & n.1), SBC's brief specifically pointed to the paragraph in the Local Competition Order that created the loop conditioning requirement as an example of an impermissible superior quality rule. See Brief for Regional Bell

The few commenters who do address the decisive portion of the Local Competition Order have nothing of relevance to say here. For instance, Sprint claims that the Commission simply "miss[ed] the point" in the relevant part of the Local Competition Order because that Order spoke of requiring incumbents to "'provide local loops conditioned to enable the provision of digital services . . . even if the incumbent does not itself provide such digital service.'" Sprint Comments at 3-4 (quoting Local Competition Order n.680) (emphasis supplied by Sprint). Stressing the underscored language, Sprint argues that the Commission erred in its prior analysis because the relevant question in the superior quality context is not the services that the incumbent provides, but the facilities it owns. Id. But that is a distinction without a difference. An incumbent cannot provide digital services without a facility that supports such services, and the question here is precisely whether requesting carriers can mandate that incumbents do the work necessary to transform its facilities so that they can in fact support those services, rather than take the facilities as they already exist.

c. Commenters are no more successful in suggesting that the conditioning requirement is consistent with the Eighth Circuit's decision because it is actually not a superior quality rule at all, but rather the kind of "modification" requirement that the court of appeals found permissible. See, e.g., Level 3 Comments at 6; Transwire Comments at 6. As an initial matter, for the reasons we have discussed, that argument is flatly inconsistent with the Commission's own understanding that loop conditioning is a superior quality requirement. The Commission has

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Companies and GTE, Iowa Utils. Bd. v. FCC, at 15 (8th Cir. filed Nov. 18, 1996). SBC thus seeks to vindicate rights that it has already obtained, not to raise a new challenge to the Local Competition Order.

already addressed this precise issue, and it (correctly) reached a conclusion diametrically opposed to the one advanced in these comments.

Moreover, and in any event, the Eighth Circuit -- quoting the technical feasibility discussion in the Commission's Local Competition Order -- merely found that it was permissible to mandate "modifications" where that was "'necessary to accommodate interconnection or access to network elements.'" 120 F.3d at 813 n.33 (quoting Local Competition Order ¶ 198) (emphasis added). As both the plain text of that statement and its genesis in the Commission's explanation of the 1996 Act's technical feasibility requirement indicate, the court of appeals was concerned with situations where it might not be technically possible to interconnect or obtain access to network elements at a particular point without some modification to the incumbent's network. There can be no real dispute, however, that access to a particular local loop is technically feasible, whether or not that loop is conditioned. Conditioning is necessary to improve the network so that it can support particular services that the incumbent currently cannot provide using the facilities at issue, not to allow interconnection or access in the first place.

Nor, contrary to AT&T's suggestion (AT&T Comments at 3), did the Local Competition Order ever suggest that loop conditioning fit within the narrow subcategory of modifications that the Eighth Circuit subsequently found permissible. Rather, the Commission simply stated 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 ¶ 382. There is no controversy here as to whether a loop conditioning requirement is a kind of network "modification." But, as the Commission explicitly recognized elsewhere in its Order, it is the type of modification that requires incumbents to improve their networks so that new entrants may

provide services that the incumbent cannot currently provide -- or, simply put, to provide superior quality access to entrants. That, of course, is exactly what the Eighth Circuit has held that the Commission may not mandate.

d. The remaining arguments raised in the comments are no more persuasive. Many commenters err by suggesting that a conditioning requirement is not a superior quality rule because it requires the removal of certain features, not the addition of whole new facilities, and because, in any event, the effort involved is not sufficiently onerous to qualify as a superior quality requirement. See, e.g., CompTel Comments at 5; AT&T Comments at 2. But, as the Eighth Circuit explained, an incumbent's obligation is to provide access to its "existing network." A loop conditioning requirement contravenes that aspect of the court's mandate because it requires incumbents to create a new network configuration in order to support services that the incumbent cannot currently provide over the relevant facilities. It does not matter whether that new network is created by removing parts of the incumbents' facilities instead of adding new facilities. Both those activities require work to alter the incumbent's network from its existing form, and both are impermissible under the Eighth Circuit's decision.

Nor does anything in the Eighth Circuit's decision suggest that an incumbent may be required to provide superior quality so long as that requirement does not pass a certain threshold of burdensomeness. In any event, as demonstrated in the attached affidavit of Mr. William C. Deere, a conditioning requirement does often impose substantial burdens on incumbents like

SBC, particularly where no loops have previously been conditioned in a particular wire center. See Deere Affidavit ¶¶ 4-18.[3]

Similarly, that an incumbent may have conditioned some loops for its own purposes does not imply, as a legal matter, that the incumbent incurs an obligation to condition other loops for its competitors. Indeed, even if the Commission concluded that it could avoid the Eighth Circuit's ruling based on a "nondiscrimination" theory (see, e.g., CIX Comments at 3), it could not plausibly apply such a theory to any wire centers other than ones where an incumbent LEC conditions loops for its own provision of digital services -- particularly because, as demonstrated in the Deere Affidavit, it is especially burdensome to condition loops where none have previously been conditioned in a particular wire center. Under no circumstances would the Commission be remotely justified in extending such an obligation beyond the bounds of a State within which the incumbent conditions loops for its use.

Moreover, such arguments plainly provide no basis for any requirement that SBC condition loops in a way that it does not do for itself. Thus, the Commission should repudiate suggestions in paragraph 54 of the Advanced Services Order that incumbents' obligations to provide "fully functional conditioned loops" extends to loops with digital loop carriers or conceivably to any loop alterations that are "technically feasible" (including, possibly, the deployment of new copper) but that the incumbent does not currently undertake for its own purposes. See also Advanced Services NPRM ¶¶ 152-53 (suggesting that the only limitation on

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[3] Sprint suggests (Sprint Comments at 4) that SBC previously offered to provide conditioned loops for entrants. That offer, however, was made in the context of SBC's petition for forbearance relief under section 706 and was contingent on obtaining that forbearance. It thus has no relevance here.

incumbents' obligation to provide conditioned loops is technical feasibility); id. ¶ 167 (discussing obligation to unbundle high-speed data-compatible loops even if a digital loop carrier is in place on the loop); id. ¶ 170 (seeking proposals on how to make loop provisioned using fiber able to provide advanced services that need copper).

II. THE ADVANCED SERVICES ORDER MISAPPREHENDS THE SCOPE OF THE COMMISSION'S SECTION 706 FORBEARANCE AUTHORITY

The Advanced Services Order concludes that section 706 contains no independent grant of forbearance authority, but merely authorizes the Commission to use forbearance authority granted in other sections of the Act. Advanced Services Order ¶ 69. As SBC demonstrated in its Petition, that conclusion reflects a fundamental misunderstanding of the 1996 Act and, in particular, of the interplay between sections 10 and 706. The Commission mistakenly interpreted subsection 10(d), which by its express terms merely limits the agency's forbearance authority under section 10(a), as a limitation on its separate authority under section 706.

Almost without exception, commenters defend this countertextual approach by suggesting that it is necessary to preserve the limitations contained in section 10. As one party puts the point, any other result would "eviscerate" those section 10(d) restrictions. RCN Telecom Comments at 6. That is plainly incorrect, however. Section 706 authorizes the Commission to forbear only in the discrete context of advanced services regulation. It would no way eviscerate the limitations on the Commission's general forbearance authority to conclude -- as the plain language of section 706 requires -- that the Commission has separate and independent authority to forbear from applying regulation in this one particular context. These comments thus miss the mark and provide no basis to ignore the mandate of section 706.

CONCLUSION

The Commission should (1) reconsider and vacate its order insofar as it imposes loop-conditioning obligations on incumbent LECs. and (2) reconsider its order insofar as it denies the petitions of Southwestern Bell Telephone Company, Pacific Bell, and Nevada Bell for relief from regulation pursuant to section 706.

Respectfully submitted,

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AFFIDAVIT OF WILLIAM C. DEERE

STATE OF TEXAS §
§
COUNTY OF DALLAS §

I, WILLIAM C. DEERE, being of lawful age and duly sworn upon my oath, do hereby depose and state:

1. My name is William C. Deere. My business address is Room 2312, One Bell Plaza, Dallas, Texas 75202. I am the Executive Director-Planning and Engineering for Southwestern Bell Telephone Company ("SWBT"), a subsidiary of SBC Communications Inc. ("SBC"). In this position I participate in the development, planning, and engineering of SWBT's, Pacific Bell's and Nevada Bell's telephone networks within the combined seven-state service area and act as the regulatory and legislative technical liaison in those states. In this position I have testified before the several state regulatory commissions concerning the technical issues contained in this affidavit.

2. I have a Bachelor of Science - Electrical Engineering degree from Southern Methodist University in Dallas, Texas. I am a Licensed Professional Engineer in Texas. I have also completed training conducted by the Bell System, AT&T (Lucent), Northern Telcom (Nortel), Ericsson, Bellcore and Southwestern Bell Telephone Company on switching systems, transmission systems, and local network distribution systems.

3. Southwestern Bell employed me in 1961 as a Student Engineer. I worked in the central office and the PBX engineering groups of the Engineering Department until October 1969. At that time I was transferred to the Traffic Department where I worked as the Manager-Switching Design and then the Traffic Manager-Network Design where I supervised the PBX design group for the north part of Texas until October 1978. I worked in St. Louis for 18 months as the head of the Business Services staff and then returned to Dallas as the Division Manager-Network Administration. In October 1984, I assumed the duties of Division Staff Manager-Network Planning Staff. My title was changed to Division Manager-Network Engineering (Customer Services) on October 1, 1986, as a result of a reorganization of the SWBT Network Department. I assumed my present title and responsibilities for the five states served by Southwestern Bell Telephone Company in October 1993. When SBC and Pacific Telesis merged in 1997, I assumed duties in Pacific Bell and Nevada Bell.

4. As I explain in more detail below, conditioning loops so that they can provide digital services like Asymmetrical Digital Subscriber Line ("ADSL") can be, and often is, a

substantial undertaking that requires a significant amount of labor and heavy manual intervention, particularly in those instances where loops have not previously been conditioned in a particular central office.

5. In order to provide unbundled local loops capable of providing ADSL services without interference with, or from, other services, SWBT, Pacific Bell, or Nevada Bell (each an "SBC LEC") must use spectrum management procedures in assigning the cable pairs. In addition, the SBC LEC must make a review of the physical parameters of the selected cable pairs to determine if they will support ADSL services. At the present time, these are both manual processes.

6. Spectrum management is necessary in order to prevent analog and/or digital signals and services from interfering with each other in exchange facilities, and thereby, causing harm to the network and to existing customers and services.

7. Signal interference can occur in exchange facilities composed of copper cable or other types of facilities such as electronic transport systems. Administratively controlling the assignment location and/or type of transmission equipment used to transport the wide variety of analog and digital signals is especially important as different transport technologies, many with overlapping frequency spectrums, are introduced into the exchange facility environment.

8. Without spectrum management, signal interference between different transport technologies can occur, causing harm to the network and disruption to existing customers and their services.

9. Twisted pairs used for digital subscriber loop services typically are housed within binder groups with other pairs for at least part of their run length. Within a binder group, electromagnetic coupling, termed "crosstalk," will result in the signal from one pair generating noise onto other pairs. This crosstalk interference can often be a limiting factor in service performance. In order to ensure proper service performance, the spectral usage of services must be carefully managed.

10. The SBC LECs employ Binder Group Management to assign loops to be used for ADSL in dedicated binder groups that are separated from other services that may be affected by ADSL services. Within a copper cable, there are a number of binder groups arranged in concentric circles around the cable's central core. When a Competitive Local Exchange Carrier ("CLEC") requests an unbundled local loop capable of supporting ADSL services, the SBC LEC must first determine the specific cable serving the customer location. The SBC LEC must manually identify the location of all digital services served in that cable and then identify a binder group that is free of other types of digital services that would interfere with or be affected by the requested ADSL circuit.

11. Once a binder group is identified as being free of other types of digital circuits, the physical characteristics of that cable must be identified to determine if it is physically capable of being used to provide ADSL services. This requires a manual review of the cable records to determine the length of the cable, the gauge of the cable, and the presence of any bridge tap or load coils.

12. Once a binder group is identified and qualified as physically capable of supporting ADSL services, it is designated as being for ADSL and other types of digital services are not assigned in that binder group or adjacent binder groups.

13. In locations where the SBC LEC offers ADSL services, company technicians have, or are in the process of identifying binder groups to be used for ADSL services. This is very labor-intensive manual work. In locations where the SBC LEC does not offer ADSL services, this work will have to be done on a request basis for each requested service location. In addition to the other burdens that such a rule would impose on the SBC LECs, this may require the addition of employees to process the requests.

14. If a binder group exists that is capable of supporting ADSL and other digital services, the available loop that will actually be used to provision such service may require "conditioning." With the exception of Integrated Digital Services Network ("ISDN"), the services grouped under the rubric "xDSL" all require a copper loop and thus cannot be provisioned over a digital loop carrier (whether integrated or universal).

15. There are essentially three removable "conditions" that might exist on a copper loop that may prevent or restrict (e.g., lower the achievable speed) its use for digital services like ADSL: (i) load coils; (ii) bridged taps; and (iii) repeaters. Other attributes of a loop which may prevent or restrict its use are inherent and cannot be removed, e.g., loop length and gauge of the wire.

16. The process of removing those conditions, referred to as "conditioning," involves a manual inspection of the cable design records to identify the impediments to be removed. An engineer must prepare a job description of the work to be done. This work will require from two to eight hours. Next, one or more technicians must be dispatched to the site of each impediment to be removed. The number of impediments can run from one to four or more. All of these are located along the length of the cable in exposed areas. The actual work to be done will normally require that an old cable splice be opened and the load coil or repeater removed, or the bridge tap be separated from the main cable. The splice must then be closed and the cable tested to determine its new operating characteristics. These actions will be required at the location of each transmission impediment. The amount of time required to write the job order will be based upon the number of transmission impediments to be removed, and typically each location in a metropolitan area will require two technicians for four to eight hours.. The actual work time could range from one to several days. Likewise, the time require by the technicians to remove the impediments will be determined by the location and type of cable being worked on. The cable may be buried, aerial or in an underground manhole. The work time, after the cable is accessed, would normally be less than one day per location.

17. If the customer loop is currently served using a digital loop carrier system, a copper pair must be assigned if available and the new loop assigned for the ADSL service if possible.

18. The removable conditions listed above are placed onto loops for various network reasons to support traditional voice traffic. The conditioning needed to provide high-speed digital services is in reality the removal of the conditioning that was placed when the loop was designed to serve voice customers. Without the desire to provide digital services such as ADSL, new loop conditioning would not be performed.

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Executive Director–Planning and Engineering

STATE OF TEXAS)
) ss
COUNTY OF DALLAS)

Subscribed and sworn to before me, the undersigned authority, on this 14th day of October, 1998.

HATTIE C. WYATT
NOTARY PUBLIC
State of Texas
Comm. Exp. 09-17-2000

NOTARY PUBLIC

CERTIFICATE OF SERVICE

I hereby certify that on this 15th day of October, 1998, I caused a copy of the Reply Comments in Support of the Petition for Reconsideration of SBC Communications Inc., Southwestern Bell Telephone Company, Pacific Bell, and Nevada Bell, to be served on the individuals on the attached service list by first-class mail.

Darryl W. Howard/SAL

Darryl W. Howard

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