

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 Offering) CC Docket No. 98-147
Advanced Telecommunications Capability)

REPLY COMMENTS
OF
AMERITECH

John T. Lenahan
Frank Michael Panek
Michael S. Pabian
Larry A. Peck
Gary L. Phillips
Attorneys for Ameritech
2000 W. Ameritech Center Drive
Room 4H84
Hoffman Estates, IL 60196
847-248-6064

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I. INTRODUCTION AND SUMMARY

This proceeding presents the Commission with a unique opportunity to employ a collaborative “win/win” approach between incumbent local exchange carriers (“ILECs”) and new entrants that is both pro-competitive and pro-investment. In their Comments, Ameritech and NorthPoint Communications (“NorthPoint”) jointly presented a proposal by which the Commission could jump-start the deployment of advanced telecommunications capability not only by ILECs, but by CLECs as well. This proposal was the result of a collaborative process which sought to identify the real needs of CLEC providers of advanced telecommunications capability and the steps a BOC could reasonably be expected to take to address those needs.

The collaborative effort between Ameritech and NorthPoint stands in sharp contrast to the usual adversarial posturing offered by most other commenters. For example, instead of presenting a balanced view, the large interexchange carrier (“IXC”) conglomerates and most of the new competitive local exchange carriers (“CLECs”) have attempted to use this proceeding to obtain their “wish list” of new regulatory

requirements. The fact that most of the items on this “wish list” bear no relation to the Communications Act or even to any legitimate business need should come as no surprise. The goal of these parties is not to see that the Commission properly implements the Communications Act. Their goal is to minimize their own costs of doing business in any and every way possible, by transferring those costs onto the backs of the ILECs. In some cases, the goal is also to impede the ability of Bell Operating Companies (“BOCs”) to obtain section 271 authority. Indeed, some of these “wish lists” contain items that the carriers do not even intend to use.

This is not to say that every IXC and CLEC concern raised in the record is illegitimate. Ameritech believes that some of their points are well-taken. The Commission must, however, separate the demands that are legitimate from those that are not by carefully identifying which items on these “wish lists” are truly necessary to those carriers’ ability to compete. It must also find the best way to address these concerns on a timely basis.

Ameritech submits that the Ameritech/NorthPoint proposal offers the key to achieving both these ends. This proposal was the end result of a dialogue the very purpose of which was to identify the needs of CLEC providers of advanced services and the steps a n ILEC could reasonably be expected to take to address those needs. The fact that two competitors were able to agree on these matters is compelling reason to use this proposal as a blueprint in separating demands that are legitimate from those that are not.

This proposal also offers the best route to addressing these demands on a timely basis. By establishing a regulatory framework that creates incentives for ILECs to incorporate certain principles into their interconnection agreements, the Commission can

ensure that those principles are implemented quickly and in a way that makes sense for all concerned.

In contrast, pursuing this goal through new national rules imposing new obligations on ILECs would be a sure recipe for delay and more litigation. For one thing, many of the principles at stake cannot be reduced to a one-size-fits-all blanket rule. Their application can only be considered on a fact-specific basis. For this reason alone, rules are bound to be problematic. Moreover, the Commission's jurisdiction to adopt new rules with respect to such issues as physical collocation has been questioned by some parties. Irrespective of how these jurisdictional issues ultimately play out, one thing is clear: new rules will precipitate new challenges. Those new challenges will, in turn, delay the implementation of the principles embodied in those rules. New rules will thus not expedite the availability of advanced telecommunications services to all Americans; they will simply line the pockets of lawyers and consume FCC resources, while consumers wait on the sidelines for the battles to play themselves out.

Accordingly, and consistent with the intent of the 1996 Act to foster negotiated solutions to competitive issues, Ameritech urges the Commission to adopt the Ameritech/NorthPoint proposal. This proposal offers a true "win-win" opportunity – an opportunity to spur deployment of advanced telecommunications services, not only by ILECs, but also by CLECs, and to thereby expedite the availability to all American consumers of the advanced telecommunications services that are so critical to this nation's economy.

Details of the Ameritech/NorthPoint proposal, and responses to specific issues raised in the Comments, are discussed below:

xDSL-compatible loops. Ameritech agrees that incumbent LECs (“ILECs”) currently are required to provide nondiscriminatory access to unbundled loops capable of supporting high-speed digital signals. But, although ILECs must provide xDSL-compatible loops, such requirement only applies to existing loops that are technically capable of supporting high-speed digital signaling, and only to the extent all costs incurred by ILECs in conditioning existing loops to support xDSL and other broadband data technologies are recovered from the requesting carrier.

On the other hand, the Commission should not expand that requirement to mandate access to xDSL-equipped loops. The Commission cannot adopt a standard that requires access just because a competitor wants a particular item, or because obtaining that item from the incumbent would be helpful. That is not the standard in the Act. Section 251(d)(2) reflects well-established public policy that competitors are entitled to obtain certain essential facilities and services from incumbents that enable them to compete. It is not the policy of the Act that competitors are entitled to whatever facilities and services would be useful or helpful for them to compete. Such a boundaryless standard is inappropriate and inconsistent with the Act and those well-established public policies. Rather, the Commission should enforce its existing rules, and adopt a de-regulatory approach regarding new investment in xDSL equipment, such as DSLAMs, which are clearly not essential facilities.

Parties arguing for access to ILECs’ operations support systems (“OSS”) -- some at extreme levels of detail -- disregard the fact that some ILECs do not maintain in electronic format loop length or conditioning data needed to identify xDSL-compatible loops, to the extent such databases exist, they do not necessarily provide all the

information required to determine xDSL compatibility of a particular loop. The answer to these concerns is simple: The Commission need only enforce its existing nondiscrimination rules regarding access to OSS.

Despite the “wish list” attitude of some comments, subloop unbundling should continue to be requested on a case-by-case basis, and provided where technically feasible and subject to space availability. Moreover, it is clear from the comments that mandatory spectrum unbundling of existing copper loop plant would be premature, given the range and complexity of open issues currently under consideration by industry standards bodies.

Collocation Arrangements. The Commission must reject calls for national regulations for collocation because it lacks legal authority to do so. However, the Commission could satisfy the claimed needs of some new entrants and avoid litigation uncertainty by including collocation requirements as conditions for granting limited LATA boundary modifications. These conditions could include, for example, requiring the requesting BOC to permit collocation of DSLAM equipment, cross-connection between carriers in the same collocation space, and minimal equipment-related standards (NEBS Level 1, plus RFI and interoperability standards). To encourage the efficient use of space, the Commission could condition its approval of a LATA boundary modification upon BOC offering of “cageless” collocation arrangements, “shared” space arrangements without minimum space requirements, and “enhanced” virtual collocation whereby collocating carriers would be permitted to access equipment for maintenance and repair purposes.

Structural Separation. Ameritech recognizes the Commission's concerns, at least in the short term, about fostering an environment that helps ensure nondiscriminatory access to xDSL-compatible loops and related collocation arrangements. As discussed in more detail in Ameritech's initial comments and in these Reply Comments, Ameritech's proposed separate data subsidiary is a proven way to establish and provide for easy enforcement of these nondiscrimination obligations.

However, the record does not support the imposition of artificial regulatory handicaps on ILECs, as urged by a number of parties who seek only an unjustified marketplace advantage. Clearly, there is no legal or policy reason to require that a data affiliate needs to be "more separate" than a section 272 affiliate.

Beyond some minor modifications -- most notably joint marketing authority and permission for ILECs to perform operations, maintenance and installation effort on facilities and equipment owned by their separate data affiliates -- no further changes to the separation requirements are warranted. And, if adopted, the structural separation requirements should be permitted to sunset two years after their imposition, unless the Commission later chooses to extend this period.

Limited LATA Boundary Modifications. The collaborative approach offered by Ameritech and NorthPoint is consistent with both the relevant statutory language and precedent under both the modified final judgement ("MFJ"), and prior Commission holdings. The comments concede -- as they must -- that the Commission has the legal authority under section 3(25)(B) to modify or establish new LATA boundaries, however, the hard-liners argue that such authority is extremely limited. As shown in this Reply,

the Commission has the authority to approve the LATA boundary proposal of Ameritech and NorthPoint.

II. UNBUNDLED LOOPS

A. Nondiscriminatory Access To Unbundled Loops Capable of Transporting High-Speed Digital Signals Is Already Required, Subject To Technical Feasibility And Reasonable Cost Recovery.

1. ILECs Are Already Required to Provide xDSL Compatible Loops, But Should Not Be Required To Provide xDSL-Equipped Loops.

Ameritech supports Commission's finding in the NPRM that the Local Competition Order already imposes an obligation "to take alternative steps to condition existing loop facilities to enable carriers to provide services not currently provided over such facilities."¹ Indeed, Ameritech is providing conditioned loops to CLECs today.²

Thus, CLECs have what they need from the Commission to request conditioning as a part of the negotiation process and, the states have what they need to consider such requirements through the arbitration process.³ If certain ILECs refuse to perform conditioning, that is a matter for arbitration and enforcement proceedings, rather than an occasion for new more onerous regulations. For example, the Comments of the Illinois

¹ In fact, the Commission specifically stated that if a competitor seeks to provide a digital loop functionality, such as ADSL, and the loop is not currently conditioned to carry digital signals, but it is technically feasible to condition the facility, the ILEC must condition the loop to permit the transmission of digital signals. Implementation of the Local Exchange Competition Provisions of the Telecommunications Act of 1996 and Interconnection between Local Exchange and Commercial Mobile Radio Service Providers, CC Dockets No. 96-98 and 95-185, First Report and Order, rel. August 8, 1996 (hereinafter "Local Competition Order"), ¶382.

² GTE (at 78) shares Ameritech's view that the Commission's existing rules already require performance of conditioning and GTE is in fact also performing that function.

³ Of course, any such proceeding would be fact specific and would depend on the request not requiring significant modification of the ILEC's network, which the ILEC is not required to provide in accordance

Commerce Commission (“ICC”) demonstrate beyond any doubt that the state commissions have the tools they need to ensure that ILECs meet their unbundling obligations.⁴

Moreover, to the extent that an ILEC performs conditioning for itself or its affiliate, it would be required to offer the same function to similarly situated CLECs on a nondiscriminatory basis. Thus, one of the major benefits of ILEC affiliate entry into this area is that it will incent the ILECs to voluntarily perform the functions in their networks necessary to make digital services feasible – something that will benefit both the ILECs’ affiliate and CLECs.

Notwithstanding their right to xDSL-compatible loops, AT&T and MCI ask the Commission to go further and mandate that ILECs offer unbundled xDSL-equipped loops.⁵ Apparently, in contrast to xDSL-compatible loops that are capable of transmitting signals at certain frequencies, xDSL-equipped loops would also include the electronics at each end of the loop necessary to actually provide DSL-grade service. GTE refutes this proposal in detail in its Comments.⁶ Ameritech agrees with GTE that ILECs cannot be required to provide advanced data electronics at each end of their xDSL-compatible loops. Moreover, such a requirement would be a poor policy choice that is inconsistent

with the Eight Circuit Court of Appeals’ Order in the Iowa Utilities Board v FCC, 120 F 3d 753, 812, 813 and n. 33.

⁴ The Comments of the ICC (at 13-15) describe the many policies and rules that the ICC has adopted to eliminate any barriers to local competition in Illinois and to ensure that ILECs are responsive to the needs of CLECs for access to unbundled network elements that support advanced services.

⁵ Comments of AT&T, at 44-45; Comments of MCI, at 73.

⁶ Comments of GTE, at 101-108. GTE actually addresses the Commission’s tentative conclusion that loops should include “all equipment and facilities used in the provision of advanced services are ‘network elements’ subject to the obligations of section 251(c).” NPRM, ¶180. But GTE’s analysis applies with equal force to AT&T’s and MCI’s proposals.

with sections 706 and 251(d)(2) of the Act, as well as the Commission's policies.

Ameritech will not repeat GTE's arguments here. Suffice it to say that a wide range of advanced digital transmission equipment used to transform an ADSL-compatible loop into a high-speed digital service is readily available in the competitive marketplace. As a result, the Commission should use its discretion under section 251(d)(2) of the Act to determine that it is not "necessary" for ILECs to also provide such equipment, nor would the ILECs' failure to do so "impair" CLEC's ability to offer the service. What is necessary, at most, is that ILECs provide access to conditioned loops via collocation, not that they also provide the electronics.

Moreover, ILECs cannot be required to install or modify equipment in their network specifically to create unbundled network elements, nor are they required to provide "superior service" to CLECs.⁷ Requiring Ameritech to provide xDSL-equipped loops, rather than xDSL-compatible loops, would be in direct conflict with these legal limitations. In addition, the provision of xDSL-equipped loops would improperly require the ILEC to combine what the Commission has determined are two separate network elements -- xDSL-compatible loops and the electronics.

In short, the Commission and the state commission concentrate on the requirements for xDSL-compatible loops, but should not mandate that ILECs offer equipment under utility-type regulation that which can be readily obtained and installed by an end user as CPE, or a CLEC. Instead, the Commission should allow the competitive marketplace for advanced digital transmission equipment to evolve naturally, without the distortions introduced by regulation.

⁷ Comments of GTE, at 105.

2. Many Loops Are Not Technically Capable of Supporting High-Speed Data Transmissions.

In its Comments, Ameritech demonstrated that there are well-established network limitations that preclude the provision of advanced data loops in certain cases. For instance, as the Commission noted in the NPRM, “xDSL is distance sensitive, and bandwidth for xDSL-based services decreases as loop length increases.”⁸ This conclusion is consistent with the Local Competition Order.⁹ No CLEC or interexchange carrier disputed that these limitations exist. The Commission also recognized in the NPRM that “xDSL transmissions can only be supported over continuous copper loops.”¹⁰ Again, no party presented any evidence disputing the Commission’s conclusion. Furthermore, as ALTS notes, Digital Loop Carrier (“DLC”) systems cannot currently be “upgraded to provide xDSL service.”¹¹

Yet, a few CLECs ignore these fundamental technical limitations and propose that the Commission mandate provision of ADSL-compatible loops, even where DLC systems are in use.¹² The Commission should not be misled; these technical limitations are real and cannot be dismissed.

⁸ NPRM, ¶166.

⁹ Local Competition Order, ¶381. The Commission found that “a local loop that exceeds the maximum length allowable for the provision of a high-bit-rate digital service could not feasibly be conditioned for such service”.

¹⁰ NPRM, ¶166.

¹¹ Comments of ALTS, at 63. See, also Comments of AT&T, at 65; Comments of ICI, at 56; Comments of KMC, at 22; Comments of NorthPoint, at 19; Comments of Sprint, at 27-30 (adds “complexities”, “[m]ay not be enough industry experience”, “difficult and expensive”, and “impractical”).

¹² Comments of AT&T (at 65-67) propose that the Commission ignore these limitations and “that ILECs cannot use remote terminal deployment of transmission enhancing or multiplexing equipment to justify limits on loop functionality. . . .” See also, Comments of McLeod USA TeleCom, at 10; Comments of KMC Telecom, at 38; and Comments of Transwire Communications at 38.

AT&T further requests that the Commission require that ILECs give “assurances that, when equipped with conforming equipment the loop will support data transmission within accepted ranges and neither experience unacceptable interference from, nor cause unacceptable interference with, other services. . . .”¹³ Ameritech already provides xDSL compatible loops pursuant to a published technical specification, but cannot be held responsible for the service performance of the CLEC’s advanced data services, which are dependant upon the performance of equipment the CLEC interconnects to the unbundled loop. Furthermore, AT&T’s suggestion that the ILEC perform compatibility testing for the CLEC is misguided. Any testing process would only provide a momentary snapshot of a loop’s group capability, and may not be valid at time the CLEC adds its electronics to the loop.

3. CLECs Are Required to Compensate ILECs for Costs They Incur in Conditioning Loops.

Most CLECs evade the issue of whether or not they should pay for the conditioning work required to provide unbundled loops capable of supporting high-speed data services. In fact, one CLEC, Allegiance, seeks to have loops moved off of Subscriber Line Carrier (“SLC”) and DLC so they can be xDSL-compatible at no charge.¹⁴ However, Section 252(d) of the Act requires that rates for unbundled network elements “shall be . . . based on the cost . . . of providing the . . . network element.” Such costs clearly include costs of rearrangements and conditioning required to provide network elements. In fact, in the Local Competition Order, the Commission specifically held that the CLECs must compensate ILECs for the costs they incur in performing any

¹³ Comments of AT&T, at 46.

¹⁴ Comments of Allegiance, at 19.

conditioning work.¹⁵ The Commission cannot and should not reverse itself.

B. Ameritech's OSS Do Not Contain the Information Necessary to Determine If It Can Provision xDSL-Compatible Loops.

The NPRM seeks input on the use of operations support systems ("OSS") to support CLEC ordering and provisioning of unbundled loops for advanced data services, and tentatively concluded that ILECs should provide access to their databases so CLECs can identify xDSL-compatible loops.¹⁶ Ameritech demonstrated in its Comments that it does not have such a loop inventory database containing all the data it uses to identify and assign xDSL-compatible loops, nor does it have plans to develop one. Moreover, neither Ameritech's data affiliate, nor its retail customer contact personnel have access to its loop inventory database. Equally as important, even if such database is created, and is available to customer contact services representatives, it would not, in many cases, provide all the data necessary to determine if Ameritech will be able to provision an xDSL-compatible loop to a specific location.

The Comments confirm that at least one other ILEC, like Ameritech, does not have an electronic loop inventory database that determines if an ADSL-compatible or HDSL-compatible loop can be provisioned.¹⁷ Moreover, even MCI admit that such databases do not exist today.¹⁸ Further, other ILECs agree with Ameritech that no such database can reasonably contain all information necessary to determine if it is feasible to

¹⁵ Local Competition Order, at ¶382.

¹⁶ NPRM, ¶¶157-8.

¹⁷ See, Comments of Sprint at 20, where it admits that it "does not have a detailed inventory of existing loops available electronically to itself."

¹⁸ See Comments of MCI, at 72 (when it admits that ILECs "have not compiled a comprehensive and detailed survey of existing loops for many years").

provision an xDSL-compatible loop to a specific location, and that further manual evaluation is often required to determine if existing facilities can support xDSL or if alternate compatible facilities can be made available.¹⁹ For example, as SBC notes: “[m]erely giving the CLEC direct access to LFACS (“Loop Assignment and Control System”) would not provide the knowledge of what is available or what rearrangement could be done to provide the service.”²⁰

Some CLECs mistakenly argue that ILECs have or are developing loop inventory databases that will enable them to electronically determine if a high-speed capable loop and services can be provisioned.²¹ At least as to Ameritech these CLECs are mistaken. As previously discussed, the Eight Circuit has held, ILECs are not required to create new systems or provide “superior” service to CLECs.²² Thus, ILECs that have not and are not creating such databases for their own purposes, cannot and should not be forced to do so.

The absurd lengths to which the CLECs will go in seeking superior information is epitomized by AT&T, who proposes that ILECs report on loop performance capabilities by binder group.²³ Ameritech has an exceedingly large number of binder groups (around 1,160,000) that it uses to provision approximately 29 million copper cable pairs. The creation, compiling and reporting of the requested technical performance data, even at this level of aggregation, would require over one million binder groups reports, which

¹⁹ See Comments of SBC, at 82; Comments of GTE, at 82-83 (no database is “100% accurate”).

²⁰ Id.

²¹ See, Comments of AT&T, at 54; Comments of ICG, at 29, 32; Comments of ICI, at 42.

²² Id.

²³ Comments of AT&T, at 43. A binder group is a group of wires within a large cable that can be distinguished from other group of wires within the same cable because they are strapped together with colored threads. For example, groups of 25 cable pairs may be wrapped together within a 100 pair cable.

would be a daunting undertaking that would be exceedingly expensive and resources intensive and time consuming to complete. Moreover, there is no guarantee that the information about a specific binder group will remain intact after the first splice and, therefore, provides a valid reporting entry. Thus, to provide a reliable snapshot, the report would have to be done on a cable pair-by-cable-pair basis, which, in the case of Ameritech could entail 29 million reports.

The magnitude of the resources required to create this massive “report” is not offset by its value, since this massive report would only provide, at best, a partial snapshot of dynamically changing data. The effect of developing such a report exclusively for use by CLECs on qualifying xDSL-compatible loops would be to inflate rates for such unbundled loops and distract Ameritech’s personnel from the task identifying, conditioning, provisioning and maintaining high quality xDSL-compatible loops.

C. Subloop Unbundling Should Continue To Be Provided On a Case-By-Case Basis, Where Technically Feasible and Space Permits.

The Commission tentatively concludes in the NPRM that an ILEC must provide access to loops at remote terminals, where feasible and if space permits, because this form of unbundling may be “the only means by which competitive LECs can provide xDSL-based services to those end users whose connection to the central office is currently provided via digital loop carrier systems.”²⁴ In its Comments, Ameritech explained that in accordance with the Local Competition Order, it handles requests for subloop unbundling on a case-by-case basis at the state level.²⁵ To date, no such request

²⁴ NPRM, ¶174.

²⁵ The Commission found that “proponents of subloop unbundling do not address certain technical issues . . . [and that] the technical feasibility of subloop unbundling is best addressed at the state level on a case-by-case basis at this time”. Local Competition Order, ¶391 (emphasis added). Ameritech will provide such

has been received.

No party provided any evidence disputing the Commission's finding in the Local Competition Order that subloop unbundling creates technical and space limitations at some locations.²⁶ Yet, in their comments a few CLECs choose to ignore these limitations and urge that the Commission mandate subloop unbundling at remote terminal locations in order to enable CLECs to bypass DLC systems that do not support xDSL services.²⁷ These proposals to mandate subloop unbundling must be rejected as technically infeasible.

Specifically, these calls for mandatory subloop unbundling do not recognize the wide range of complex operational, administrative, service quality, and cost issues associated with any form of subloop unbundling. Ameritech and some other ILECs discussed these limitations in detail in their Comments.²⁸ Suffice it to say that from a technical and space perspective, subloop unbundling is not feasible at many locations in a ILEC's network depending on the technology, equipment, configuration, number and physical condition of facilities involved.

For instance, as GTE notes, if CLEC were to seek to deploy DSLAMs at an ILEC's remote terminals, "[m]any first generation DLCs do not have any spare capacity within the cabinets."²⁹ Moreover, any space that is available would quickly be exhausted.

subloops where they are network elements, it is technically feasible to provide unbundled access to them, and there is sufficient space to permit such access.

²⁶ Local Competition Order, at ¶390.

²⁷ Comments of NextLink, at 20-21 (access where the "copper loop is connected to the incumbent's IDLC facilities"); Comments of KMC, at 21 (likely only way to provide xDSL-compatible loops using DLC systems is through "subloop" unbundling at the "remote terminal").

²⁸ See Comments of GTE, at 99; Comments of Bell Atlantic, at 52-3.

²⁹ Comments of GTE, at 99.

Access to the ILEC's DSLAM at an unmanned remote location would also create network security and administrative problems. Subloop unbundling at DLCs would further complicate the task of designing and implementing network and equipment changes and upgrades to the detriment of all users.

Thus, the best solution for subloop unbundling is the one already chosen by the Commission -- a case-by-case analysis at the local level.

D. It is Premature to Require Spectrum Sharing on Loops.

The Commission requests input on a number of issues related to spectrum management and spectrum sharing on local loops. It specifically asks parties to address whether and how the same physical local loop could be shared among multiple providers through the use of different ranges of the spectrum.³⁰

In its Comments, Ameritech points out that the advent of high-speed data services and associated loop transmission equipment has created increased risks of interference between two services using the same loop or cable. Parties representing different industry segments, including CLECs and IXCs, recognize the increased risk to network reliability posed by the connection of high-speed data equipment to ILEC loops.³¹ Most of these parties agree with Ameritech that the best method of addressing loop spectrum issues is through national standards, procedures and practices adopted through industry

³⁰ NPRM, ¶¶160-2.

³¹ See, e.g., Comments of Allegiance, at 8; Comments of ICG, at 30 (“technically infeasible”); Comments of BellSouth, at 51-3; Comments of KMC, at 20 (rely on “industry input / industry consensus”); Comments of MCI, at 73 (raises “spectrum management issues such as compatibility and interference.”); Comments of SBC, at 33-34; Comments of USWest, at 44.

fora that address the level of compatibility necessary to avoid harmful interference between equipment, carriers and services.³²

In its Comments, Ameritech demonstrated that sharing of spectrum by multiple carriers on the same loop is a complex, multi-faceted undertaking that will require development of new and modified industry standards, administration capabilities, operational procedures, and OSS. Other ILECs agree that spectrum sharing creates many new technical, operational and administrative issues beyond those that are encountered when a single ILEC provides two services over the same loop through the use of different portions of spectrum. In fact, several ILECs, like Ameritech, discussed some of the technical, operational, procedural, and administrative issues that arise as a result of spectrum sharing.³³ Each of these issues must be resolved before the arrangement can be offered, let alone mandated by federal regulation.³⁴

Other ILECs also argue that spectrum cannot be a network element under the Act, nor is it consistent with the Commission's Local Competition Order.³⁵ Ameritech agrees. Moreover, Ameritech agrees with the other ILECs that the Commission should use its discretion under section 251(d)(2) of the Act to find that such unbundling is not

³² Comments of KMC, at 20. See also, Comments of Allegiance, at 8; Comments of AT&T, at 60; Comments of ICG, at 30; Comments of BellSouth, 51-3 (ATIS Committee T1); Comments of MCI, at 74-5; Comments of NorthPoint, at 18; Comments of SBC, at 33-4; Comments of Sprint, at 21; Comments of USWest, at 44; all of these generally support the use of industry forum consensus processes to resolve technical issues and to establish standards.

³³ See, Comments of GTE at 88-89; Comments of SBC, at 36-41. Non-ILECs that who also express concern, include Internet Access Coalition at 20; Kiesling at 21; New World Paradigm at 6-7.

³⁴ Comments of BellSouth, at 51-3 also points out that there are not yet even any "standards" for spectrum sharing.

³⁵ Comments of Bell Atlantic, at 50-1; Comments of GTE, at 87-8; Comments of SBC, at 36-7; Comments of USWest, at 48.

“necessary”, nor will failure to offer it “impair” any CLEC’s ability to offer advanced data services.

Ameritech will not repeat the arguments made by the other ILECs. In summary, the advanced data services marketplace is a highly competitive business, and CLECs have many other alternatives available to them, including use of the ILEC’s xDSL-compatible loops in conjunction with the CLEC’s electronics. For this reason, the Commission should regard skeptically any alleged showing that requiring a CLEC to take the entire unbundled loop and provide all services from it (as imposed by the Local Competition Order under the Act) will impair any CLEC’s ability to offer either voice or data services to their customers.

Again, the Commission should not distort the natural evolution of new technologies and the competitive marketplaces through the introduction of utility-type regulation. Rather, the marketplace should be allowed to determine the most efficient and effective technologies and serving arrangements.

III. THE COMMISSION SHOULD NOT ISSUE COLLOCATION RULES, BUT COULD INCLUDE COLLOCATION REQUIREMENTS AS PRECONDITIONS FOR A LIMITED LATA BOUNDARY MODIFICATION FOR ADVANCED DATA SERVICES.

Several parties have asked the Commission to promulgate “national rules” on many aspects of collocation.³⁶ Some simply state their support for the Commission’s adoption of such standards, without explaining why such standards are necessary.³⁷ Others claim that ILECs are “bad actors” and that the “deployment of traditional and

³⁶ See, e.g., Comments of Allegiance, at 2; Comments of ALTS, at 41; Comments of CompTel, at 38.

³⁷ See, e.g., Comments of CompTel, at 38.

advanced local services” will be delayed unless “this Commission . . . develop[s] minimum national standards to address these issues.”³⁸ Yet there is very little explanation of how such regulations would relate to the deployment of “advanced telecommunications capability” which Congress addresses in section 706 -- especially given the breadth of subsequent related requests.³⁹

As discussed below, the Commission has no authority under the Act to issue additional rules on physical collocation, nor is there any policy need to do so. However, the Commission could require that certain conditions relating to collocation be met before granting BOCs’ requests for limited LATA boundary modifications for the provision of advanced data services.

A. The Commission Lacks Authority to Promulgate Intrastate Collocation Rules.

As noted in Ameritech’s comments in this proceeding,⁴⁰ the Commission lacks authority to promulgate stand-alone physical collocation rules. The language of sections 251 and 252 of the Act indicate Congress’s intent to rely on private negotiations, supplemented by arbitrations by state commissions and by review in the federal courts, to establish terms and conditions relating to section 251(c) obligations. When used in sections 251 and 252, the phrase “rates, terms, and conditions” clearly contemplates “rates,” “terms,” and “conditions” established in the process of negotiating an agreement under section 251(c)(1) -- which deals with an ILEC’s responsibilities under subsections

³⁸ Comments of MCI, at 58-9.

³⁹ See, e.g., Intermedia’s request (at 32) to require the collocation of remote switching modules (“RSMs”) which are used entirely for the delivery of plain old telephone service (“POTS”) and which, therefore, have nothing to do with advanced telecommunications capability or section 706.

⁴⁰ Comments of Ameritech, at 32-7.

251(b) and (c), including “rates, terms, and conditions” of collocation referred to in section 251(c)(6).⁴¹ Moreover, it is significant that section 251(c)(6) refers issues of space limitation to state commissions -- consistent with the arbitration remedy for negotiated agreements -- indicating Congress’s intent that this Commission not be actively involved in this area.

As noted in Ameritech’s comments,⁴² the Commission’s reliance on the Eighth Circuit’s decision for ratification of its authority to promulgate intrastate collocation rules is misplaced.⁴³ That issue was not before the Court. And, significantly, the Court found that section 251(d)(1), requiring the Commission to act within 6 months to establish regulations to implement the requirements of section 251, applied only to those portions of that section that specifically call for Commission action.⁴⁴ Notably, section 251(c)(6) contains no requirement for the Commission to promulgate rules and, therefore, itself provides no separate authority for the Commission to promulgate any rules implementing any portion of section 251.

Moreover, even if the Commission were to find that xDSL capability over ILEC loops is interstate in nature, the Commission would still have no general authority to issue rules regarding physical collocation. That issue was specifically resolved against the Commission by the Court of Appeals.⁴⁵

⁴¹ In fact, two years of practice under the Act have validated the wisdom of relying on, in the first instance, negotiations between the parties to define the terms and conditions and the related rates for collocation arrangements which may involve unique requirements.

⁴² Comments of Ameritech, at 36-37.

⁴³ NPRM, note 219.

⁴⁴ See, Iowa Utilities Board v. FCC, 120 F.3d 753 (8th Cir. 1997) at 794.

⁴⁵ Bell Atlantic v. FCC, 24 F. 3d 1441 (D.C. Cir. 1994).

Therefore, regardless of the source of authority on which the Commission would attempt to rely, issuance of stand-alone rules regarding physical collocation would simply result in a lingering legal uncertainty while the courts addressed the issue of the Commission's ultra vires action.

B. The Commission Might Include Certain Collocation Requirements as Pre-Conditions for a Limited LATA Boundary Modification for Advanced Services.

These legal uncertainties, however, could easily be avoided by looking to recent BOC section 706-related requests. For example, Ameritech, in the context of its petition and in this proceeding, has requested a LATA boundary modification for the limited purpose of providing advanced data services. This and similar requests of other RBOCs are outside the scope of the section 271 "checklist."⁴⁶ Accordingly, the Commission could establish a limited set of conditions for advanced services LATA boundary modifications, which, if met, would satisfy the Commission that competitive providers of advanced telecommunications capability would not be placed at an unreasonable competitive disadvantage vis-à-vis the BOCs' or its affiliate's provision of this capability. For example, the principles that have been agreed to between Ameritech and NorthPoint could be used to define the necessary conditions. Such collocation conditions could include the following:

1. Collocation Equipment.

DSLAMs. The Commission could establish a condition that BOCs permit collocating carriers to place digital subscriber line access multiplexers ("DSLAMs") in collocation space. DSLAMs must be collocated in order for interconnecting carriers to

be able to use xDSL technology with those ILEC loops that are capable of accommodating that technology.

However, some parties in this proceeding have made much broader requests as to the type of equipment that ILECs should be required to permit in collocation space. For example, some carriers ask for the Commission to require ILECs to permit the collocation of switching functionality if it exists in equipment already in collocation space for the purpose of interconnection or access to unbundled network elements.⁴⁷ Other carriers specifically request collocation of routing functionality and even POTS switching functionality.⁴⁸

Although some level of switching functionality may be integral to the offering of advanced telecommunications capability, there is nothing unique about ILEC premises that should cause them to be regarded as a “bottleneck” for the location of that equipment or that functionality. Unlike DSLAMs -- which have to be located at the central office end of a copper loop -- routing and switching functionality can be located anywhere in a carrier’s network. Moreover, there is nothing in the Act that would indicate that Congress intended that ILECs be required to unbundle real estate for the simple convenience of competitive providers. In fact, just the opposite is the case. Section 251(c)(6) speaks of compelling physical collocation only for the purpose of interconnection and access to unbundled network elements. Therefore, the right to collocate contemplated by the Act is not unrestricted. Certainly, then, the Commission

⁴⁶ To the extent a BOC receives permission under §271 to provide interLATA services through a §272 affiliate, the relief requested in these petitions would be moot except to the extent that they may have involved a request to do so on an integrated basis.

⁴⁷ Comments of US Xchange, at 7.

⁴⁸ Comments of ICI, at 32-4.

must reject claims that there be no restrictions whatsoever on the type of equipment placed on ILEC premises.⁴⁹ Granting such a request would go well beyond the “taking” of ILEC property authorized by the Act.⁵⁰

Cross-connecting with other collocating carriers. The Commission could also establish a condition that the BOC permit collocating carriers whose equipment is located in the same collocation space to directly connect with each other. As long as the connecting arrangement stays within the collocation space,⁵¹ collocating carriers should be able to perform that work themselves through the utilization of authorized contractors, subject to notifying the BOC and complying with reasonable BOC procedures concerning use of cable racks, etc.

Equipment specifications. The Commission could also condition the requested LATA modification on the BOC’s adoption of only minimal standards with which a collocating carrier’s equipment must comply. Specifically, the limitations could be restricted generally to NEBS Level 1 and electrical interference standards. However, to the extent that the equipment interconnects with the BOC’s network, the BOC should be able to insist that it comply with applicable industry-approved interoperability standards. Clearly, BOCs have the right to protect their personnel and property by insisting that any equipment located on premises not pose a hazard. In addition, because of proximity of this equipment to other sensitive electronic equipment, appropriate electrical interference

⁴⁹ See, e.g., Comments of CompTel, at 39.

⁵⁰ See, Bell Atlantic v. FCC, supra n. 45.

⁵¹ These would be physical collocation arrangements on the same floor without any intervening BOC equipment. For other types of cross-connections, the BOC’s cross-connection service should be available to fill the interconnectors’ needs.

standards must be applied. Further, since any interconnected equipment could cause significant spill-over problems into other networks, such equipment should be subject to appropriate industry-approved performance standards. If the CLEC's interconnected equipment "goes out" or malfunctions, it will quickly be perceived as an outage in the incumbent carrier's own network. Because of this interconnectedness, it is important that collocated interconnecting equipment adhere to appropriate industry-approved performance standards. Since those standards will be readily apparent to any member of the industry, there is no necessity to require that the BOC to issue a report of all equipment that the BOC itself utilizes in "collocation" space.

2. Allocation of Space.

"Cageless" physical collocation. The Commission could also condition the LATA boundary modification for the provision of advanced services on the BOC's agreement not to require cages for physical collocation arrangements.⁵² For the most part, cages serve primarily to protect the property of the collocating carrier. If the collocating carrier wishes to forgo that opportunity, a cage is not necessary.

That is not to say, however, that the BOC (or any ILEC) should not be able to impose reasonable security measures -- including requiring escorts in those cases in which collocation equipment is not located in partitioned space with separate keyed entrances. While it is true that ILEC contractors may have access to that space without escorts, ILEC contractors have a contractual obligation with and are responsible to the ILECs. No such relationship exists between collocating carriers' technicians or

⁵² The Commission should note that, despite the clamor for cageless collocation, Ameritech has been offering cage-optional physical collocation. Yet, in every case of physical collocation, the collocating carrier has elected to install a cage -- and has requested that Ameritech do the installation, despite the ability to use independent contractors.

contractors and ILECs. Again, ILECs have responsibility for basic services provided out of the central office -- including lifeline and 911 services. Therefore, it is the ILECs' responsibility to ensure that nothing be done -- even inadvertently -- to jeopardize that service; and reasonable security measures are appropriate to the fulfillment of that responsibility.

Shared space physical collocation. CompTel has asked the Commission to consider requiring ILECs to offer what it terms as "shared space collocation" -- cageless collocation involving a shared area dedicated to CLEC collocation equipment.⁵³ Again, the Commission could require the offering of this type of collocation arrangement where space permits the creation of such a dedicated area -- as a condition for limited LATA boundary modification.

Minimum space requirements. Certain parties have asked the Commission to eliminate minimum space requirements, typically 100 square feet, that may exceed the need of collocating carriers.⁵⁴ The Commission again could, as a condition to a limited LATA boundary modification, require that the BOC agree to offer less than 100 square feet of space for individual collocation arrangements in the context of the "shared space collocation" arrangements noted above. If either party is dissatisfied with negotiation process in this regard, recourse must be limited to the mechanism provided by the Act -- i.e., arbitration before the state commission with review by the federal court. This is simply consistent with the fact that collocation is, like other aspects of §251(c), a negotiation item between CLECs and ILECs.

⁵³ Comments of CompTel, at 40.

Nonrecurring charges. Certain parties have suggested that nonrecurring charges designed to recover the total cost of conditioning space that could eventually be shared by other parties constitute a barrier to a single carrier's utilization of collocation space.⁵⁵ In this regard, the Commission could impose a condition on a limited LATA boundary modification that the BOC must undertake steps to ensure that nonrecurring charges for space preparation recover only an appropriate portion the cost of conditioning the collocation space.

"Enhanced" virtual collocation. Many "problems" associated with physical collocation space limitations could be solved if an ILEC offered "enhanced" virtual collocation. Such an arrangement would permit a collocating carrier to purchase its own equipment and lease it to the ILEC for a nominal amount (e.g., \$1.00), but also permit the collocating carrier to access such equipment for maintenance and repair purposes, provided appropriate security measures are observed -- e.g., escorts in the case of equipment located in the middle of the ILEC's own equipment array. This "enhanced" arrangement would provide the benefits of virtual collocation in terms of minimization of cost and space utilized, while at the same time providing collocating carriers with the advantages of access to the collocated equipment for maintenance and repair purposes without having to train ILEC technicians to do that work. In fact, such an offering should eliminate any complaints about minimum space requirements or lack of space for physical collocation. The Commission, again, as a condition to limited LATA boundary

⁵⁴ See, e.g., Comments of CompTel, at 40; Comments of Covad, at 26; Comments of Intermedia, at 40; Comments of MGC, at 19.

⁵⁵ See, e.g., Comments of e.spire, at 30-31; Comments of Intermedia, at 43-44; Comments of MGC, at 27-28.

modifications for advanced services, could require that the BOC agree to offer such “enhanced” virtual collocation arrangements.

3. Space Exhaustion.

The above pre-conditions should reduce the number of circumstances in which space is not available for physical collocation arrangements. Eliminating cage and minimum space requirements or alternatively the offering of enhanced virtual collocation should result in a more efficient use of the BOC’s space. Beyond that, however, the Commission should not impose any other collocation conditions. The statute already provides that an ILEC must make a showing to the state commission any time it claims that physical collocation is “not practical for technical reasons or because of space limitations”.⁵⁶ Certainly, this arrangement provides BOCs with every incentive to act reasonably in order to avoid repeated appearances before their state commissions on the same issue.

Moreover, there is especially no need for the Commission to issue a rule requiring BOCs (or any ILEC) to give up reserved space prior to denying space for physical collocation.⁵⁷ The Commission’s rules already prohibit ILECs from reserving space for future use on terms more favorable than those that apply to other telecommunications carriers seeking to reserve collocation space for their own future use.⁵⁸ Ameritech’s own policy places significant restrictions on its own ability to reserve space.⁵⁹ In Ameritech’s case, “enforcing” a space reservation against a potential collocating party would involve

⁵⁶ §251(c)(6).

⁵⁷ See, e.g., Comments of Allegiance, at 6; Comments of KMC, at 17.

⁵⁸ 47 CFR §51.323(f)(4).

having to pay the appropriate recurring floor space charge. If the ILEC can only “enforce” that reservation on the same terms that a third party could “enforce” its reservation against another prospective collocator, there is no reason to deny the ILEC that ability.

C. Ameritech Has Satisfied its Collocation Obligations in a Reasonable and Nondiscriminatory Manner.

As Ameritech noted in its comments, it has been a pioneer among ILECs with respect to collocation arrangements.⁶⁰ The agreement with NorthPoint included in Ameritech’s and NorthPoint’s comments is an example of how potentially contentious issues involving collocation can be resolved by agreement between the parties. Ameritech suggests that the agreement addresses many of the concerns raised by CLECs in this proceeding in a way that should be satisfactory to them. For example, Ameritech understands that all requests for collocation, including requests to reserve space for future use, should be handled on a first-come, first-served nondiscriminatory basis. Ameritech also agrees that options such as removal of inactive equipment and conversion of administrative space should be explored when collocation space is not otherwise available. Ameritech agrees that there should be no “first-in” penalties because of the manner in which nonrecurring charges are calculated. Ameritech also agrees to negotiate alternatives to traditional physical collocation arrangements and offers “enhanced” virtual collocation as an alternative to physical collocation.

⁵⁹ See Comments of Ameritech, at 47-8 and Attachments 4-5.

⁶⁰ Comments of Ameritech, at 37-8.

Nonetheless, MGC and Covad complain that Ameritech has denied some of the collocation requests.⁶¹ First, it is important to note that demand for collocation space is significant. In all 45 of the offices at which Covad requested physical collocation, there are already 204 physical collocation arrangements, pending and in-service, including “enforced” reservations by parties who have reserved space. Covad’s requests were granted in 30 offices. In the 15 offices in which Covad’s requests were denied, there are already 64 physical collocation arrangements. In all of these cases, Covad was offered virtual collocation as an alternative. It is important to note that many of these physical collocation arrangements are for more than the standard 100 square feet and that the average area of all those arrangements is in excess of 100 square feet. Similarly, in the ten offices in which MGC has requested physical collocation, there are already 38 arrangements – nine in the two offices in which their requests for physical collocation were denied.

In addition, MGC complains that Ameritech’s per square foot charge is, relative to other LECs, excessive.⁶² However, a direct comparison of these charges is misleading because of the different rate structures used by different carriers. The per square foot charge will recover different costs, carrier to carrier, with other costs being recouped via other rate elements. In any event, these rates have already been approved by state commissions in the Ameritech region. Unless the Eighth Circuit is reversed, this Commission has no pricing jurisdiction over these intrastate collocation rates.

⁶¹ Comments of MGC, at 17; Comments of Covad, at 6.

⁶² Comments of MGC, at 29.

MGC also complains that Ameritech would not honor Sprint's agreement to permit the collocation of remote switching centers ("RSC") in Sprint's Chicago area exchanges purchased by Ameritech.⁶³ This is true; however, at the time of the purchase MGC had no collocation arrangements in any of the offices in question. MGC did not have to remove any equipment and none of its operations were disrupted. Finally, MGC complains that, in September, Ameritech delayed MGC's installation crews entry into five central offices.⁶⁴ This was a case of MGC personnel's and vendors' failure to finish the appropriate paperwork for clearance by Ameritech employees.

IV. SEPARATE AFFILIATE ISSUES

A. Section 10 Is No Bar To the Commission's Proposed Treatment of ILEC Data Affiliates.

No party has raised a serious argument that the Commission has the legal authority to find that ILEC data subsidiaries are not incumbent LECs as that term is defined in the 1996 Act. Several parties claim incorrectly that section 10(d) of the Act, which limits the Commission's authority to forbear from applying requirements of sections 251(c) and 271, somehow precludes the proposed action.⁶⁵ These parties either do not realize, or would have the Commission forget that, as discussed below, no "forbearance" is necessary in this situation. Accordingly, section 10(d) does not apply, and does not limit the Commission's authority to implement the proposed measures.

⁶³ Montgomery Declaration, at 2-3.

⁶⁴ Id. at 12-13.

⁶⁵ See, e.g., Comments of AT&T, at 35; Comments of Comptel, at 8; Comments of MCI, at 10.

Since section 251(c) applies only to ILECs,⁶⁶ entities which do not meet the statutory definition of an ILEC⁶⁷ are not subject to the duties imposed by that provision of the Act.⁶⁸ As explained in Ameritech's Comments,⁶⁹ the 1996 Act provides three ways in which an entity can be treated as an ILEC under section 251. First, an entity is an ILEC if it provided telephone exchange service and was a member of NECA on the date of enactment of the Act.⁷⁰ Second, an entity is an ILEC if it is a successor or assign of an entity meeting the two-pronged test above.⁷¹ Third, the Commission may provide by rule that an entity will be treated as an ILEC if certain conditions are met.⁷² Since none of these three conditions are met by ILEC data affiliates as proposed by the Commission, section 251(c) does not apply to them.

Likewise, because the Commission proposes "LATA boundary modifications that would encourage deployment of advanced telecommunications capability"⁷³ by facilitating the transport by ILEC data subsidiaries of certain telecommunications without crossing LATA boundaries, such transport would not involve an "interLATA service".⁷⁴

⁶⁶ 47 U.S.C. 251(c) is entitled "Additional Obligations of Incumbent Local Exchange Carriers."

⁶⁷ 47 U.S.C. 251(h)(1). AT&T would have the Commission ignore the statutory definition and give the term "ILEC" a "naturally broad meaning." Comments of AT&T, at 7.

⁶⁸ 47 U.S.C. 251(c)(3) and (4) impose upon ILECs the duties of unbundled access to network elements and resale.

⁶⁹ Comments of Ameritech, at 49-54.

⁷⁰ 47 U.S.C. 251(h)(1)(A), (B)(i). No ILEC data affiliate meets these requirements.

⁷¹ 47 U.S.C. 251(h)(1)(B)(ii). No ILEC data subsidiary would meet these requirements unless it replaced its affiliated ILEC's local exchange operations through transfer of network facilities that the ILEC formerly used to offer its local exchange services. No ILEC data subsidiary currently meets these requirements.

⁷² 47 U.S.C. 251(h)(2). The Commission has never done so.

⁷³ NPRM, ¶ 192.

Hence, section 271, which governs BOC provision of “interLATA services,”⁷⁵ cannot apply to the construct proposed in the NPRM. Because there is no “forbearance” required as to the requirements of either section 251(c) or section 271, section 10(c) simply does not apply.

B. The Commission’s Proposed Structural Separation Requirements Contain Sufficient Safeguards Against Potential ILEC Misconduct.

Of the numerous comments filed suggesting more onerous separation for advanced data affiliates, none offer any legal or policy justification for why a data affiliate, which does not rely on circuit-switched technology, should be “more separate” than a interLATA section 272 affiliate, which does. Of course, there is no principled justification. Likewise, some parties argue that unless a data affiliate complies with additional separation conditions – even beyond those required in section 272 – the data affiliate must be deemed an incumbent. Again, no legal or policy justification is offered, because there is none. Indeed, if additional conditions beyond those in section 272 were required to avoid classification as an incumbent, then presumably a section 272 affiliate would be an incumbent. This result is flatly inconsistent with the text and structure of the 1996 Act and must be rejected. Ameritech replies to a number of these specific claims below.

⁷⁴ The term “InterLATA service” is defined as “telecommunications between a point in a local access and transport area and a point outside such area.” 47 U.S.C. 153(3).

⁷⁵ 47 U.S.C. 271(a).

1. Calls for Artificial ILEC Regulatory Handicaps Should Be Rejected.

A number of parties urge the Commission to create and impose new regulatory handicaps upon ILECs who choose to deploy advanced telecommunications capability through separate subsidiaries. Most of these suggestions should be recognized and rejected as a “wish list” of artificial advantages which would prevent fair competition in the marketplace. For example, ALTS declares that any transfer of assets from an ILEC to its data affiliate should trigger a nondiscrimination requirement to offer a free transfer of its assets to “all competitors.”⁷⁶ CompTel and Westel argue that CLECs should be permitted to “pick and choose” among the provisions of interconnection agreements between an ILEC and its data affiliate,⁷⁷ without even attempting to square this proposal with the clear holding of the 8th Circuit Court of Appeals that disposed of the same argument. MCI warns the Commission against “detailed, intrusive regulation,” and then argues for the imposition of extensive new performance and service quality reporting requirements upon the ILECs.⁷⁸ ICG proposes that ILEC employees who transfer to a data affiliate should be required to simply “start over” with respect to years of service, pension and stock option vesting, and seniority.⁷⁹ TRA calls for “balloting” or some other allocation process by which existing ILEC customers would simply be handed over to competitors rather than transferred to a data affiliate.⁸⁰ In addition to being blatantly

⁷⁶ Comments of ALTS, at 26.

⁷⁷ Comments of CompTel, at 32; Comments of Westel, at 7-12.

⁷⁸ Comments of MCI, at 39, 50.

⁷⁹ Comments of ICG, at 11-12.

self-serving, these parties would have the Commission ignore the deregulatory thrust of both the 1996 Act and section 706.⁸¹

2. Joint Marketing by ILECs of Their Data Affiliates' Services Should Be Permitted.

Those with whom the ILECs' data affiliates would compete argue for a ban on ILEC joint marketing of their data affiliates' services with their own local exchange services.⁸² Significantly, this cry is not supported by state regulators, consumer groups, or others who give strong voice to the needs of customers. This is not surprising because consumers are the parties who stand to benefit from the ease of "one-stop shopping" and convenient packaging and discounting of related and complementary services, as well as from the lower prices made possible by integrated service fulfillment, delivery and other marketing functions.

The Commission should favor the interests of consumers, and reject calls for protection from full and fair competition, as it did in the case of joint BOC marketing of their affiliates' interLATA services. In that context, rejecting the same protectionist arguments of AT&T, MCI, Sprint and Comptel for BOC interLATA joint marketing restrictions "because of their status as incumbent local exchange carriers," the Commission held that after it receives 271 authorization, a BOC "will be permitted to engage in the same type of marketing activities as other service providers."⁸³ Precisely

⁸⁰ Comments of TRA, at 34.

⁸¹ The 1996 Act was intended by Congress to "promote competition and reduce regulation ... in order to encourage the rapid deployment of new telecommunications technologies." 1996 Act, Preamble (emphasis added). Likewise, section 706 mandates that regulators take "action to accelerate deployment ... by removing barriers to infrastructure investment ...". Section 706(b) (emphasis added).

⁸² Comments of ICI, at 12; Comments of Supra, at 3; Comments of CTSI, at 4; Comments of Allegiance, at 21; Comments of e.spire, at 9; Comments of CIX, at 16; Comments of Network Plus, at 5.

because of its importance to consumers, an ILEC's ability to jointly market its affiliate's advanced data services is critical to commercial success. Without this ability, the proposed separate subsidiary construct will likely not achieve the goal of timely and widespread deployment of advanced telecommunications capability to all Americans.

3. The Commission Should Permit Joint Operations, Maintenance and Installation by ILECs on Data Affiliates' Facilities and Equipment.

As noted in Ameritech's Comments, the Commission should not prohibit ILECs from performing operations, maintenance and installation effort on equipment and facilities owned by a data affiliate, a service which ILECs can and do perform for non-affiliates who collocate equipment or facilities in ILEC space. To hold otherwise would place ILECs at a severe artificial disadvantage compared to their competitors, who would not likewise be required to hire, train and dispatch their own technicians on collocated equipment. Moreover, such a holding would ignore the Commission's stated intention "to facilitate the ability of competing carriers to offer advanced services on an equal footing with incumbent carriers and their affiliates."⁸⁴ In addition to imposing duplicative operational and personnel requirements upon ILECs, such an arrangement would necessarily degrade customer service. As CWA notes, resolving a customer trouble report "could require double, triple, or even quadruple dispatch,"⁸⁵ as well as eliminating the possibility of open competition on the merits of providers' products and customer service.

⁸³ Non-Accounting Safeguards Order, 11 FCC Rcd at 22055, ¶¶290-1. See also, BellSouth, South Carolina 271 Order Memorandum Opinion and Order, 13 FCC Rcd 539 (1997), ¶238.

⁸⁴ NPRM, ¶ 14.

⁸⁵ Comments of CWA, at 6-7.

4. Outside Ownership or Management of Data Affiliates Should Not Be Required.

Several commenters advocate a requirement that ILEC data affiliates must be owned and/or managed, in whole or in part, by non-affiliates.⁸⁶ The Commission should not ignore the significant financial burden that would be imposed by such a requirement, which includes the “double taxation effect” of subjecting ILEC data affiliates to federal taxes on their net income while the same tax would apply again to their retail earnings that flow to the parent holding company. This direct cost would be in addition to the increased costs of financial reporting (since consolidated parent-subsidary tax filings would not be permitted) and possible adverse tax consequences from the reorganization itself.

An outside management requirement would introduce significant complexity and cost to routine operations, if not render them impossible. It is unclear, for example, how directors of the parent company (who are typically required to own stock, which would disqualify them from holding “outside” seats on the subsidiary’s board) could possibly fulfill their fiduciary duties over a subsidiary in which they have no directorship rights. Although none of the parties suggesting these measures even acknowledges the structural inefficiencies and increased transaction costs that would result, it is obvious that such steps would hardly advance the Commission’s stated goal of “ensuring that incumbent LECs make their decisions to invest in and deploy advanced telecommunications services

⁸⁶ Comments of AT&T, at 20 (a “meaningful quantum” of outside ownership and directorship); Comments of ALTS, at 18 (“appreciable” outside ownership); Comments of CompTel, at 22 (“substantial” outside ownership, perhaps 40%); Comments of MCI (“sizable” outside ownership, if not a complete spinoff); Comments of Telehub, at 5 (complete divestiture after startup); Comments of ICG (“significant” public ownership, at least 20%); Comments of TRA (“majority” of stock held apart from ILEC and its stockholders); Comments of e.spire, at 11 (“substantial percentage” of outside ownership).

based on the market and their business plans, rather than regulation.”⁸⁷ Clearly, implementing such measures would be a step in the opposite direction from section 706’s mandate for “removing barriers to infrastructure investment.”

5. Resale by Data Affiliates of ILEC Local Exchange Services Should Be Permitted.

Several parties argue that ILEC data subsidiaries should be barred from reselling the local exchange services of their ILEC affiliates, although their competitors would remain free to do so. For example, AT&T claims, without factual support, that “(o)ne of the chief aims of the NPRM’s (separate affiliate proposal) is to incent ILECs to make UNEs and resale available on reasonable terms -- as the Act has unequivocally required since its passage ... but no ILEC has yet done.”⁸⁸ Likewise, Qwest flatly states that “(b)ecause the resale price paid by the affiliate is an artificial one, the affiliate has no need to cut costs by purchasing UNEs”⁸⁹

No party has put forth any coherent policy-based justification for imposing such a drastic handicap as to deny separate affiliates the ability to sell the services of their affiliated ILECs. Certainly Congress saw none when it specifically permitted joint marketing by ILECs of their 271 subsidiaries’ interLATA services.⁹⁰ Likewise, the Commission saw no such policy problems when it declined to impose additional regulation (beyond existing cost allocation and affiliate transaction rules) upon the

⁸⁷ NPRM, ¶13.

⁸⁸ Comments of AT&T, at 28-30. In fact, Ameritech continues to offer both UNEs and wholesale services on reasonable and nondiscriminatory terms, as required by the 1996 Act and the Commission’s rules. 47 U.S.C. 251(c)(3), (4); 47 CFR §§ 51.313(a), 51.603(a).

⁸⁹ Comments of Qwest, at 43. In fact, the prices of Ameritech’s wholesale services are not “artificial” but rather equal to Ameritech’s existing retail rate less avoided retail costs, as required by the Commission’s rules. 47 CFR § 51.607.

purchase or sale by a BOC Commercial Mobile Radio Service (“CMRS”) entity of the services of its affiliated ILEC.⁹¹

6. The Separate Data Affiliate Requirement Should Be Permitted to Sunset.

No party has offered any concrete reason why the proposed separation requirements should not be permitted to “sunset” upon the expiration of a set period.⁹² Because regulatory certainty is always conducive to long-term business planning, the Commission should structure a definite sunset period upon adoption of structural separation requirements.

The Commission has seen fit to revisit and eliminate structural separation requirements in many other contexts. For example, in eliminating its separation requirement for BOC provision of customer premises equipment (“CPE”), the Commission cited higher prices and lower service quality as results of the lost economies associated with structural separation, which had resulted in substantial and unnecessary costs.⁹³ The Commission concluded in that context:

(w)hile we acknowledge the direct costs of structural separation caused by the mandatory duplication of personnel and facilities ..., we tentatively concluded that additional and more important costs of structural separation result from the inability of carriers to organize their businesses in the

⁹⁰ 47 U.S.C. 272(g)(3).

⁹¹ Report & Order, 12 FCC Rcd 15668 (1997), hereinafter “CMRS Safeguards Order”); 47 CFR §20.20(c)(3).

⁹² See, e.g., Comments of ACTA, at 16 (removal should be on a case-by-case basis); Comments of AT&T, at 27 (warning in convoluted logic that “establishing a sunset date could actually delay ILEC deployment ... , because by delaying deployment an ILEC could avoid the burdens of creating and operating a separate affiliate, and therefore might simply deploy such facilities after the sunset date had passed”); Comments of MCI, at 51-2 (“it will take time to determine whether the ILECs are actually complying with the safeguards”); Comments of Allegiance, at 23 (no sunset until after section 272 has done so); Comments of CIX, at 12 (premature to even consider sunset).

⁹³ Report and Order, 2 FCC Rcd 143 (1987), (hereinafter “CPE Order”), ¶29.

manner best suited to their operating environment. The record confirms our analysis.⁹⁴

In deciding to lift its structural separation requirements from BOCs who wished to provide enhanced services, the Commission likewise found that:

(f)or the provision of enhanced services, the costs from the structural separation requirements in lost innovation and inefficiency render these requirements far less desirable than nonstructural safeguards. These conclusions are based on the continuing competitive evolution of telecommunications markets, as well as our experience applying both structural and nonstructural safeguards.⁹⁵

Moreover, despite the dire warnings of competing enhanced service providers that removal of structural separation requirements would unleash all manner of anticompetitive BOC behavior, no such result occurred. To the contrary, enhanced services have experienced impressive growth rates for both BOCs and new service providers since regulation was scaled back by the Commission.

A similar conclusion was reached when the Commission recently dropped its decades-old requirement of structural separation for BOC cellular affiliates. As with the above examples, structural separation was originally imposed in part because competing service providers claimed the BOCs had both the opportunity and the motive to discriminate with respect to its local exchange services, in favor of their wireless affiliates through cost-shifting and various other devious measures. In electing to replace full structural separation with an accounting subsidiary that may share personnel and

⁹⁴ Id.

⁹⁵ Report and Order, CC Docket No. 85-229, 104 FCC 2d 958, ¶98.

facilities with its affiliated BOC -- as well as use the full resale and joint marketing capability enjoyed by its wireless service competitors -- the Commission concluded that:

(w)e are persuaded that less-stringent CMRS affiliate requirements than those currently in place ... will be sufficient for the Commission and competitors to detect cost-shifting, discrimination, and other anticompetitive behavior by incumbent LECs.⁹⁶

There is every reason to believe that the result will be similar when the Commission revisits its current proposals to require structural separation as a condition of granting ILECs needed LATA boundary modifications, as well as relief from the unbundling and resale obligations imposed on ILECs by section 251(c) of the Act. Nonetheless, to assuage any concerns that ILECs would delay all deployment of advanced telecommunications capability -- voluntarily foregoing entry into the exploding marketplace for these services -- in order to avoid unbundling or resale of that capability, the Commission could retain the flexibility used by Congress in implementing the manufacturing, long distance and interLATA information services separation requirements, each of which sunsets after a specific period unless the Commission extends that period "by rule or order."⁹⁷ Ameritech proposes that any ILEC structural separation requirements for ILEC provision of advanced telecommunications capability, if imposed in this proceeding, be worded so as to sunset two years after they are imposed, unless the Commission by rule or order extends that period based on a record clearly substantiating the continued need for such measures.

⁹⁶ CMRS Safeguards Order, supra n. 91, ¶58.

⁹⁷ 47 U.S.C. 272(f)(1), (2).

V. THE COMMISSION HAS AUTHORITY UNDER SECTION 3(25)(B) OF THE ACT TO ADOPT THE AMERITECH/NORTHPOINT FRAMEWORK FOR LIMITED LATA BOUNDARY MODIFICATIONS.

In their Comments, Ameritech and NorthPoint jointly presented a proposal by which the Commission could use its authority to modify or establish LATA boundaries to jump-start the deployment of advanced telecommunications capability not only by ILECs, but by CLECs as well. As demonstrated in Ameritech's Comments, and as contemplated by Section 706(a), this LATA boundary proposal is another "regulating method(s) that remove barriers to infrastructure investment."

This joint proposal is far different from the "global, data LATA" the Commission has already rejected; and in no way seeks forbearance from or evasion of Section 271. Rather, similar to Section 271, this proposal encourages competitive entry by new and incumbent providers alike. The Commission has the legal authority to approve this joint proposal, and the mandate in Section 706 dictates that it exercise that authority here.

Under this narrowly-tailored joint proposal, a BOC applying for a limited LATA boundary modification would first have to document and demonstrate that it: (i) provides advanced data services through a separate affiliate that satisfies the separation framework adopted by the Commission; and (ii) complies with applicable state and federal rules, tariffs and interconnection agreements with respect to collocation and xDSL compatible loops. A BOC satisfying this test in a state would be eligible for LATA boundary modifications limited to three specific purposes: (1) to permit transport anywhere within such state for data services provided to customers with multiple locations in that state; (2) for access to an ATM switch within the state; and (3) for transport from the ATM switch to the closest Network Access Point, wherever that might be.

In agreeing on this proposal, NorthPoint and Ameritech started from two different places: NorthPoint's primary goal was to incent BOCs to adopt procompetitive policies. It believed that the availability of meaningful, albeit limited, LATA relief could provide such incentives to a far greater extent than the token relief broadly intimated in the NPRM. Ameritech's goal was to find a way to loosen the shackles of boundaries that were based upon the economics of circuit-switched networks and that effectively deny Ameritech the opportunity to participate in the developing market for advanced data services. They found common ground on this issue because they both recognized that they could forge a framework for limited LATA relief that achieves both goals in a manner consistent with the 1996 Act. Both companies believe that the proposal they fashioned presents a "win-win" opportunity for the Commission – an opportunity to promote accelerated advanced infrastructure deployment by ILECs and CLECs alike, thereby bringing to a broader sector of the public the full benefits of the information age.⁹⁸

Not surprisingly, the Ameritech/NorthPoint collaboration stands in sharp contrast to the "take no prisoners" approach of most other parties in this proceeding. For example, assuming their now customary hard-line posture, IXCs and most other CLECs argue that anything but the most trivial LATA boundary modification would exceed the Commission's authority. Although these parties concede, as they must, that section

⁹⁸ Some parties claim that the Commission need not concern itself with advanced infrastructure deployment in exurban areas. They argue that, to the extent the BOCs do not serve these areas, other companies will. See, e.g., Comments of MCI, at 80. Tellingly, not one of these parties offers a shred of evidence to corroborate this empty claim, and not one of them describes its own plans with respect to these areas. They simply urge the Commission: "don't worry, be happy." Aside from that, customers in exurban areas, like other customers, deserve a choice. They deserve the benefits of competition. Thus, whether or not some other carrier might decide to provide service in a particular area is beside the point. The Commission has an obligation to eliminate regulations that deny those customers additional choices.

3(25)(B) permits the Commission to modify or establish new LATA boundaries, they almost universally argue that this authority is extremely limited. They assert, in particular, that any change in LATA boundaries for anything but the most narrow of purposes would be: (i) an impermissible departure from MFJ practice; and (ii) inconsistent with the forbearance limitations of section 10(d) of the Communications Act and the US West LATA Boundary Order.⁹⁹ These arguments are addressed, in turn, below.

A. The Statute, Not MFJ Precedent, is Controlling, But the Ameritech/NorthPoint Proposal is Not Inconsistent With MFJ Precedent, in any Event.

The argument voiced most commonly with respect to the Commission's proposal to consider LATA boundary modifications is that it is inconsistent with MFJ precedent. Parties assert that the MFJ Court modified LATA boundaries only for limited "non-controversial" purposes – such as to permit BOCs to provide expanded local calling service (ELCS) or to effect a change in LATA association by an independent telephone company. They argue that the Commission's authority to approve LATA changes under section 3(25)(B) is limited to these same narrow contexts.¹⁰⁰

This argument must fail for three separate reasons. First, contrary to the claims of AT&T and others, the MFJ is no longer the law. Sections 601(a)(1) and 601(e)(1) explicitly repealed and terminated the MFJ, along with the judicial decisions rendered under it. Indeed, the MFJ is not even "instructive" as to the meaning of section 3(25)(B).

⁹⁹ Petition for Declaratory Ruling Regarding US West Petitions to Consolidate LATAs in Minnesota and Arizona, 12 FCC Rcd 4738 (Com. Car. Bur. 1997).

¹⁰⁰ See e.g., Comments of AT&T, at 105-7; Comments of ALTS, at 68-70; Comments of Allegiance, at 26; Comments of KMC, at 26; Comments of ICI, at 65.

The Commission's authority to modify LATA boundaries is thus dictated – not by MFJ practice - but by the language of section 3(25)(B), which contains none of the restrictions that AT&T and others would graft into it. Second, even assuming MFJ precedent is “instructive,” that precedent does not support the excessively narrow reading of section 3(25)(B) that these parties advance. To the contrary, the Court repeatedly modified LATA boundaries on a broader scale to reflect the economic realities of new services and technologies when such changes did not impede competition. Third, the Common Carrier Bureau has already considered and rejected claims that the Commission's authority under section 3(25)(B) is limited to LATA modifications involving ELCS or changes in LATA association. The Bureau held that the test is whether there is a “demonstrated need” for a modification and little potential for competitive harm. Both prongs of this test are met by the Ameritech/NorthPoint proposal.

1. The Terms of Section 3(25)(B), Not MFJ Practice, are Controlling, and the Terms Do Not Reflect the Limitations on Commission Authority That IXCs and CLECs Suggest.

As in any matter of statutory interpretation, the place to begin is the statute itself. Section 3(25)(B) of the Communications Act provides: LOCAL ACCESS AND TRANSPORT AREA.—The term “local access and transport area” or “LATA” means a contiguous geographic area—

- (A) established before the date of enactment of the Telecommunications Act of 1996 by a Bell operating company ...; or
- (B) established or modified by a Bell operating company after such date of enactment and approved by the Commission.

The central premise of AT&T and others is that the Commission's authority under this provision to approve LATAs “established or modified” by a BOC is “limited to the

same ‘non-controversial’ types of modifications that the District Court frequently considered and granted under the MFJ,” such as modifications to permit individual BOCs to provide flat-rated non-optional ELCS to single communities of interest straddling LATA boundaries or to change an independent telephone company’s LATA association.¹⁰¹

This argument is, of course, contrary to the plain language of the Act. Section 3(25)(B) authorizes the Commission to approve LATA boundaries that a BOC has “modified” or “established.” Nothing in the language of this provision suggests that only “non-controversial” LATA modifications are permitted. Nothing limits the Commission to modifications relating to ELCS or changes in LATA association or to other trivial modifications. Nothing prevents the Commission from approving any modification that the Commission believes is in the public interest and consistent with the goals of the Communications Act. The authority in section 3(25)(B) to approve LATA boundaries that a BOC has “modified” or “established” is, by its terms, unencumbered¹⁰².

Indeed, the Commission has previously construed its authority to “modify” a statutory requirement as conferring broad power to effect sweeping change in that requirement - ironically, at the urging of many of the same parties who now ask the Commission to read all kinds of limits into the term “modified.” Most notably, the

¹⁰¹ Comments of AT&T, at 104-5.

¹⁰² In note 161 of the Memorandum Opinion and Order in this proceeding, the Commission stated that section 3(25)(B) appears to have been crafted to give the Commission the same authority that the MFJ court exercised in adjusting LATA boundaries under the MFJ. The Commission offered no authority for this tentative conclusion, and as shown above, it is incorrect. In any event, as discussed *infra*, the Ameritech/NorthPoint proposal is no way inconsistent with the standards applied by the MFJ Court in considering LATA modifications. Indeed, the Commission appears to recognize this because it cites in note 161, as an example of an MFJ Court LATA modification, a case that does not reflect the narrow limits advocated by IXCs and some CLECs.

Commission has held that its power to “modify” the 120 day advance notice requirement for tariffs specified in section 203(b)(1) permits it to adopt a one-day notice requirement for nondominant carriers.¹⁰³ This is hardly the type of incremental, “non-controversial” change that some parties claim is assumed in section 3(25)(B).

Moreover, section 3(25)(B) authorizes the Commission to approve not only modified LATAs, but LATAs that a BOC has established after the date of enactment. By its terms, therefore, section 3(25)(B) authorizes the Commission to approve something more than a mere juggling of pre-existing LATA boundaries; it permits the Commission to approve a new set of LATAs that a BOC has established. Obviously, Congress did not contemplate that the BOCs would establish new LATAs within the existing LATAs: Congress had to have recognized that the BOCs would not seek tighter LATA restrictions. To the contrary, Congress had to be contemplating the establishment of new LATAs that were broader – i.e., bigger - than the existing LATAs. No other reading makes sense.

To be sure, by requiring that the Commission approve LATAs that a BOC has established, Congress expected that the Commission would withhold approval of any new LATA construct that was contrary to the public interest and the goals of the Communications Act. The suggestion, however, that the Commission lacks authority to approve anything but the most trivial shuffling of existing LATA boundaries simply cannot be squared with the language of the Act.

It is not the language of section 3(25)(B), however, upon which AT&T and others rely. In fact, they all but ignore the terms of the provision in arguing about its meaning.

¹⁰³ Tariff Filing Requirements for Nondominant Common Carriers, 8 FCC Rcd 6752 (1993) vacated on other grounds, 43 F.3d 1515 (D.C. Cir. 1995).

They rely instead on their old standby, the MFJ, claiming that MFJ practice should be read into the language of the statute.

AT&T's attachment to the MFJ is understandable. Whatever its original merit, the decree helped to sustain the long-distance oligopoly structure. Moreover, now that AT&T plans to merge with TCI, which is soon to be the largest de-regulated monopoly in the country, it hopes to keep the shackles on those who could compete with TCI's cable modem and other advanced data offerings.

The MFJ, however, is no longer the law. The 1996 Act expressly terminated the MFJ, including the decisions rendered under it, and substituted a statutory framework that includes section 3(25)(B).¹⁰⁴ When Congress intended to codify the MFJ and the cases decided under it, it did so expressly – for example, in sections 251(g) and 273(h) of the Act. It did not do so here. Nothing in section 3(25)(B) itself or in any other provision of the Act suggests that Congress intended to codify and freeze in time MFJ policy with respect to LATA boundary changes. Nor does the legislative history of the 1996 Act, which is silent as to the meaning of section 3(25)(B), offer any such suggestion. That being the case, the language of the statute, not MFJ policy, controls.

In fact, MFJ precedent is not even particularly relevant to the Commission's authority under section 3(25)(B). While the Commission has recently concluded that MFJ precedent is "instructive" (though not controlling) in interpreting the term "provide" in section 271(a) of the 1996 Act, the Commission's reasoning does not extend

¹⁰⁴ See 47 U.S.C. §§601(a)(1) and 601(e)(1).

to section 3(25)(B).¹⁰⁵ For one thing, while the term at issue in the Qwest Litigation – “provide” – was used in the MFJ, the MFJ contained no provisions comparable to section 3(25)(B). When the Court waived LATA boundaries, it did so pursuant to the general powers conferred in sections VII and VIII(C) of the decree.

More importantly, the MFJ did not reflect the policies of section 706 of the 1996 Act. In deciding whether to waive LATA boundaries, the Court was under no obligation to consider the impact of such waiver on the deployment of advanced services to all Americans. The Commission, however, is under such a mandate, and it must exercise its authority under section 3(25)(B) in a manner consistent with that mandate.

On a broader level, wholly apart from section 706(a), it is time for the Commission to put the MFJ to rest and to blaze its own trail based on today’s realities, not yesterday’s anachronisms. As Commissioner Powell recently observed:

[T]he phone company that AT&T was in 1982 isn’t what we’re dealing with. We can’t be haunted by the MFJ indefinitely. I call it the ghost of the MFJ – it just haunts everything. It was a terrific moment in policy, I think a terrific victory for the federal government, and a great consumer-benefitting thing. But Judge Greene’s world in 1985 isn’t the world of 1998.¹⁰⁶

The Commissioner is dead-on. LATA boundaries established fifteen years ago for a different industry and for different network technology are not suited to today’s

¹⁰⁵ See AT&T et al. v. Ameritech Corporation, et al., File No. E-98-41, FCC 98-242, Memorandum Opinion and Order, released to the public October 7, 1998 (hereinafter “Qwest Litigation”) at note 168: “[I]nsofar as the Act supplants the MFJ in the “line-of-business” jurisprudence, see, e.g., 47 U.S.C. § 601, we do not believe these cases are controlling here. As we concluded in the Ameritech Michigan 271 Order, however, we find that the principles underlying MFJ case law . . . are instructive.”

¹⁰⁶ Bureau of National Affairs, Daily Report for Executive, October 5, 1998, “Powell Addresses Subsidies, Innovations, Cable Upgrades, Attorneys, Regulators’ Jobs” at 3C (hereinafter “Powell speech”).

packet-switched networks.¹⁰⁷ The public interest requires that the Commission adjust them accordingly, particularly when it is so clear that these adjustments will help to bring the benefits of advanced services to all Americans.¹⁰⁸

2. The LATA Boundary Modification Proposal Advanced by Ameritech and NorthPoint is Not, In any Event, Inconsistent With MFJ Precedent.

Even if the Commission found MFJ precedent to be “instructive” as to meaning of section 3(25)(B), that precedent does not support the narrow reading of that provision that some suggest. As the Bureau has recognized “[t]he [MFJ] Court sometimes allowed BOCs to provide interLATA communications service in other than traditional ELCS or association circumstances if the dangers to fair competition were determined to be *de*

¹⁰⁷ LATA boundaries were set under the MFJ to reflect several competing goals. A primary consideration was promoting long-distance competition by making LATAs large enough to justify the cost of new facilities. In this regard, the LATAs were based on the Justice Department’s conclusion that the minimum LATA size should be 100,000 telephone stations, based on its assumptions that an IXC would need a 5% market share to compete and at least 5000 subscribers to justify the cost of establishing a point of presence. Whatever the merits of these assumptions fifteen years ago, they have nothing to do with the economics of today’s advanced data networks.

Other key goals were to leave the BOCs enough profitable toll traffic to augment their financial viability and decrease pressure for local rate increases. The Court also sought to avoid significant network rearrangement costs that would otherwise be incurred if integrated local networks were severed by LATA boundaries. See Michael K. Kellogg, John Thorne, and Peter W. Huber, Federal Telecommunications Law, 1992, at §4.8.

¹⁰⁸ In his comments, Commissioner Powell also talked about what he termed “the curse of stare decisis:”

One worry about regulation being dominated by [attorneys] is our training is incremental: we’re trained to be risk avoiders; we’re trained to be cautious; and we’re trained to move incrementally, always tying back to something in the past – precedent. ... And sometimes I pull my hair out – what’s left of it’ and say: this calls for more than that. This calls for us to stand up and take a courageous, bold break-precedent action. ...

See Powell speech, at 3. Ameritech would not necessarily characterize its LATA modification proposal as “bold.” Its bold proposal was presented in its initial petition and rejected by the Commission. Nevertheless, this scaled-back proposal would represent a positive, if incremental, step forward, and Ameritech urges the Commission to heed the words of Commissioner Powell in considering it.

minimis.”¹⁰⁹ Indeed, throughout the 1980s, the Court repeatedly approved more extensive LATA relief for the provision of one-way paging services. For example, Bell Atlantic received permission to provide paging services in an area extending from Harrisburg, Pennsylvania to Atlantic City, New Jersey.¹¹⁰ Ameritech itself received permission to operate a statewide paging network in Michigan.¹¹¹ Other BOCs obtained similar LATA boundary waivers.¹¹²

The Court also granted dozens of waivers permitting BOCs to provide cellular services across LATA boundaries. For example, in November 1983, the Court granted waivers to several BOCs so that they could provide cellular services throughout the FCC-defined cellular geographic service area (CGSA). Through these waivers, the Court effectively permitted the FCC to preempt the LATA construct in defining the permissible service area for BOC provision of cellular service. In 1987, the Court went further and permitted NYNEX to provide integrated cellular service in specified areas beyond its

¹⁰⁹ Southwestern Bell Telephone Company Petition for Limited Modification of LATA Boundaries to Provide Integrated Services Digital Network (ISDN) at Hearne, Texas, File No. NS-LM-97-26, FCC 98-923 (Com. Car. Bur. May 18, 1998), at ¶ 4.

¹¹⁰ See United States v. Western Electric Co., No. 82-0192 (D. D.C. June 20, 1986), 1986-1 Trade Cas., ¶ 67,148.

¹¹¹ Id.

¹¹² The fact that these cases involved MFJ waivers – as opposed to LATA modifications – is irrelevant. All of the LATA modification cases, including those involving ELCS and changes in LATA association, were presented as MFJ waivers. See e.g. United States v. Western Electric Co., Civil Action No. 82-0192 (D. D.C. May 18, 1993); United States v. Western Electric Co., Civil Action No. 82-0192 (D. D.C. Jan. 28, 1987). See also, Petitions for Limited Modification of LATA Boundaries to Provide Expanded Local Calling Service (ELCS) at Various Locations, 12 FCC Rcd 10646 (1997), (noting that the MFJ Court “granted wavers for more than a hundred flat-rate, non-optional ELCS plans[.]” id. at 10649 (emphasis added)). Thus, NextLink’s claim that the LATA changes proposed by the BOCs in this proceeding are impermissible LATA waivers, as opposed to permissible LATA modifications, is frivolous. In fact, the Commission has recognized that there is no substantive difference between a LATA waiver and a LATA modification. Thus, it has treated a Southwestern Bell request for a LATA boundary waiver under section 3(25)(B) as a request for a LATA boundary modification for the limited purposes indicated in the request. See Commission Seeks Comment on Petitions for Waiver of LATA Boundaries to Provide Expanded Local Calling Service in Texas and North Carolina, Public Notice, DA 97-109 (Net. Serv. Div. Rel. Jan. 15, 1997).

CGSA boundaries.¹¹³ The Court found unconvincing the arguments of opponents who claimed that the waiver should be denied because it would involve NYNEX in the carriage of interexchange traffic. It concluded the waiver “would not impede competition in the market [NYNEX] seeks to enter” and that denying the waiver “would stifle advances in cellular services.”

These broad waivers were not limited to the provision of wireless services; they also extended to wireline services. For example, in 1983, the court permitted the BOCs to offer time and weather services using facilities that crossed LATA boundaries.¹¹⁴ The court found that provision of these services by a BOC “has no anticompetitive potential” and that “if these companies were required to reconfigure their networks to avoid all interLATA transmissions, their costs would rise substantially.”¹¹⁵

The common denominator in all of these cases was the Court’s willingness to modify LATA boundaries as necessary to permit the efficient provision of new services when such modifications did not pose a substantial risk of competitive harm. The Court recognized that the MFJ’s LATA boundaries were defined with reference to the economics of traditional circuit-switched landline voice networks.¹¹⁶ It understood the need to alter these boundaries to reflect the realities of different networks so long as such

¹¹³ United States v. Western Electric Co., No. 82-0192 (D. D.C. Jan. 28, 1987), 1987-1 Trade Cases ¶ 67,452 (hereinafter “NYNEX Waiver”).

¹¹⁴ United States v. Western Electric Co., 548 F. Supp. 658 (D.D.C. 1983).

¹¹⁵ The Court also approved LATA boundary changes in connection BOC carriage of cable television signals. For example, in September 1993, the Court approved a request by Southwestern Bell Corporation to operate interLATA cable distribution facilities across the LATA boundary between Washington, D.C. and various points in Maryland. United States v. Western Electric Co., Civil Action No. 82-0192 (D. D.C. Sept. 21, 1993).

¹¹⁶ See supra, n. 107.

alterations were consistent with the pro-competitive purposes of the Decree. To the extent the MFJ is instructive, it therefore does not support the narrow reading of the Commission's authority that IXC's and CLEC's suggest.

3. The Bureau Has Recognized That the Commission Is Not Limited to LATA Modifications Relating to ELCS and Changes in LATA Associations.

The third reason why the Commission should reject the overly narrow interpretation of its authority offered by IXC's and CLEC's is that the Common Carrier Bureau has already done so. In the Southwestern Bell LATA Modification Order,¹¹⁷ the Common Carrier Bureau considered a request for LATA modification to permit Southwestern Bell to provide ISDN services in the Hearne, Texas, LATA through facilities in the Austin LATA. AT&T and Intelcom opposed this request on the very same grounds they cite here: that the request involved neither ELCS nor a change in LATA association. The Bureau squarely rejected this claim:

SWBT's request does not involve ELCS or a change in LATA association as did the requests routinely granted by the Court as well as the requests granted by the Commission in the ELCS Order and Association Order. Nevertheless, the request satisfies the same broad criteria as did these other requests, including accommodation of a demonstrated need and little, if any, competitive impact. . . . Contrary . . . to AT&T and Intelcom the Commission does have the authority to approve LATA boundary modifications that are not anti-competitive. Under the above facts, we believe that it is uneconomical for SWBT to provide ISDN service on an intraLATA basis, and that a LATA modification is in the public interest. We believe that the potential for harm is minimal due to the limited scope of SWBT's request.¹¹⁸

¹¹⁷ Southwestern Bell Telephone Company Petition for Limited Modification of LATA Boundaries to Provide Integrated Services Digital Network (ISDN) at Hearne, Texas, File No. NS-LM-97-26, FCC 98-923 (Com. Car. Bur. May 18, 1998).

¹¹⁸ Id. at ¶¶ 12-13. The fact that it took the Bureau two years to grant this waiver underscores the necessity of a streamline process for limited LATA boundary modifications. As CompTel notes, the Commission's proposal to consider LATA boundary modifications on a case-by-case basis could create an "administrative nightmare, as the Commission and industry participants would be swamped by the hundreds and thousands of fact-specific requests." Comments of CompTel, at 51.

For the reasons discussed above, the Bureau was correct to reject the cramped reading of the Commission's authority for which AT&T and others continue to argue. The position of these parties is inconsistent with the plain language of the statute, and it is a distortion of MFJ practice, to the extent that practice has any relevance.¹¹⁹

As recognized by the Bureau, the real test is whether the proposed LATA modification is in the public interest – based on a balancing of the benefits against any risks to competition from such modification. Ameritech demonstrated in its Comments, that the benefits that would accrue from the limited LATA modification are concrete and real. The proposed modification would fundamentally change the economics of deploying advanced services in exurban areas. It would also place Ameritech on a more (though not completely) level playing field with other providers of advanced services, including monopoly cable providers – thereby reducing regulatory bias that distorts the operation of a free market. By the same token, the preconditions for obtaining this limited relief ensure that a BOC could not possibly use this relief to anticompetitive ends. The case is clear and compelling. It is up to the Commission to seize the moment.

B. Neither Section 10(d) Nor the US West LATA Boundary Waiver Order Suggests That the Commission Lacks Authority to Implement the Ameritech/NorthPoint Proposal.

¹¹⁹ Some parties argue that LATA boundary changes for purposes other than the provision of ELCS or a change in LATA association would be an impermissible expansion of section 271(g) of the Act. This argument is frivolous. Section 271(g) listed particular types of incidental interLATA services for which Congress gave the BOCs immediate blanket statutory authority. That provision in no way limits the Commission's authority conferred elsewhere in the Act. It certainly does not limit the Commission's right to use the authority conferred elsewhere in the Act to fulfill its section 706 mandate to promote the availability of advanced telecommunications infrastructure to all Americans.

Some commenters also argue that anything other than a trivial modification of LATA boundaries would violate section 10(d) of the Communications Act and the US West LATA Boundary Order.¹²⁰ These arguments are fundamentally misconceived.

Section 10(d) states that “the Commission may not forbear from applying the requirements of section ... 271 under subsection (a) of this section until it determines that those requirements have been fully implemented.” Ameritech and NorthPoint, however, do not propose that the Commission forbear from applying section 271; they propose that the Commission exercise its express authority under section 3(25)(B) to approve a relatively modest change in LATA boundaries for three specified purposes. Even after such change, a BOC would remain fully subject to the restrictions of section 271. It would be prohibited from providing service from any point within the newly drawn LATA to any point outside that LATA. Moreover, the old LATA boundaries would continue to apply for any purpose other than the three purposes for which the modification was approved.

AT&T, MCI, ALTS and others nevertheless suggest that that any action that has the *effect* of easing the burdens of the interLATA prohibition, even if that prohibition remains in tact, is the legal equivalent of forbearance. That simply is not the case. If it were, section 3(25)(B) would be meaningless because *any* modification of LATA boundaries – even the type of incremental change that these parties concede is permitted – has some impact on the burdens of section 271. If it did not, the modification would not be sought in the first place.

¹²⁰ Comments of AT&T, at 103; Comments of ALTS, at 68-70; Comments of MCI, at 81.

Nor is it an answer, as suggested by these parties, that the test is whether the modification is trivial and limits the BOC to the provision of exchange service. For one thing, no such limit can be found in the text of the Act. The Act states that the Commission may approve LATAs that are established or modified. It does not differentiate between trivial changes, on the one hand, and more meaningful changes, on the other.

Moreover, the Commission has already held that even a significant modification of a statutory requirement is not the equivalent of forbearance. Thus, in the face of a federal court holding that the Commission lacked authority to forbear from applying the tariff filing requirements of section 203 of the Communications Act, the Commission held that its statutory power to “modify” those requirements nevertheless permitted a reduction in the statutory advance filing requirement from 120 days to 1 day and the elimination of advance review of tariff filings.

As Ameritech has previously argued, this precedent would have sanctioned broader LATA boundary relief – such as regional, national, or even global. After all, if anything but a complete elimination of tariff filing requirements represents a modification of those requirements, then anything but a complete elimination of all LATAs could be deemed a LATA modification. Be that as it may, surely the scaled-back proposal that Ameritech and NorthPoint now jointly offer falls within the scope of terms “modified” or “established.”¹²¹ The argument of AT&T, MCI/WorldCom, and ALTS to the contrary is frivolous.

¹²¹ MCI Telecommunications Corp. v. AT&T, 512 U.S. 218 (1994) is not to the contrary. The Court there held that the power to modify a statutory provision permits only moderate changes to that provision, not its complete elimination through the exercise of forbearance. As noted, Ameritech and NorthPoint do not contemplate anything approaching the elimination through forbearance of section 271 requirements. To the

Nor does the US West LATA Boundary Order require a different result. In that order, the Common Carrier Bureau held that the Commission had not delegated authority its authority to modify LATA boundaries pursuant to section 3(25)(B) of the Act to the states. While the Bureau suggested that, had US West filed its LATA modification petition at the FCC, the Bureau would consider the relief requested to be inconsistent with section 10(d), that suggestion was pure dicta, offered without public notice that the issue would be considered, and without the benefit of a record.

Ameritech respectfully submits that this dicta cannot be squared with prior Commission precedent, including the Commission's streamlined tariff requirements, or with the language of section 3(25)(B). The Commission need not address that issue, however, because the LATA boundary changes proposed by Ameritech and NorthPoint are far more limited than the ones to which the Commission's dicta was directed in the US West LATA Boundary Order. Specifically, US West had proposed statewide LATAs in Arizona and Minnesota for *all* traffic, including circuit-switched traffic. In contrast, Ameritech and NorthPoint have proposed LATA boundary changes for three specified purposes, all of which are tied directly to the goals of section 706. Irrespective of whether the US West proposal would have been lawful, the more targeted relief advocated by Ameritech and NorthPoint surely is. Thus, aside from the fact that the Commission's comments in the case were pure dicta, they are not on point in any event.

contrary, they propose modest changes in LATA boundaries for three specified purposes only. Those moderate changes are precisely the kinds of changes contemplated by the Court.

VI. CONCLUSION

For the above-mentioned reasons, the Commission should implement its recommended separate subsidiary approach as outlined herein.

Respectfully submitted,

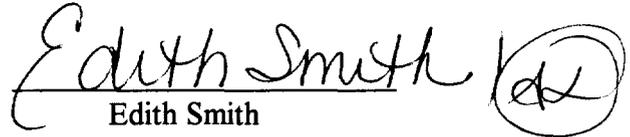
A handwritten signature in cursive script, appearing to read "Frank M. Panek", with a circled initial "A" to the right.

John T. Lenahan
Frank Michael Panek
Michael S. Pabian
Larry A. Peck
Gary L. Phillips
Attorneys for Ameritech
2000 West Ameritech Center Drive
Room 4H84
Hoffman Estates, IL 60196
847-248-6064

Dated: October 16, 1998

CERTIFICATE OF SERVICE

I, Edith Smith, do hereby certify that a copy of Ameritech's Reply Comments has been served on the parties listed on the attached service list, via first class mail, postage prepaid, on this 16th day of October, 1998.

A handwritten signature in cursive script that reads "Edith Smith" followed by a circled monogram or initials. Below the signature is a horizontal line.

Edith Smith

**RUSSELL M BLAU
PATRICK DONOVAN
KMC TELECOM INC
SWIDLER BERLIN SHEREFF FRIEDMAN LLP
3000 K STREET NW
SUITE 300
WASHINGTON DC 20007**

**KECIA BONEY
R DALE DIXON
LISA B SMITH
MCI WORLDCOM INC
1801 PENNSYLVANIA AVENUE NW
WASHINGTON DC 20006**

**CATHERINE R SLOAN
DAVID N PORTER
RICHARD L FRUCHTERMAN III
RICHARD S WHITT
MCI WORLDCOM INC
1120 CONNECTICUT AVENUE NW
SUITE 400
WASHINGTON DC 20036**

**PAMELA ARLUK
RCN TELECOM SERVICES INC
SWIDLER BERLIN SHEREFF FRIEDMAN LLP
3000 K STREET NW SUITE 300
WASHINGTON DC 20007**

**JOSEPH KAHL
DIRECTOR
RCN TELECOM SERVICES INC
105 CARNEGIE CENTER 2ND FLOOR
PRINCETON NJ 08504**

**DANA FRIX
ROBERT V ZENER
FLORIDA DIGITAL NETWORK INC
SWIDLER BERLIN SHEREFF FRIEDMAN LLP
300 K STREET NW
SUITE 300
WASHINGTON DC 20007**

**LAWRENCE G MALONE
GENERAL COUNSEL
NEW YORK STATE DEPARTMENT OF
PUBLIC SERVICE
THREE EMPIRE STATE PLAZA
ALBANY NY 12223-1350**

**RONALD J JARVIS
TAMAR E FINN
XDSL NETWORKS INC
SWIDLER BERLIN SHEREFF FRIEDMAN LLP
3000 K STREET NW SUITE 300
WASHINGTON DC 20007**

**GARY ROBERT GARDNER
EXECUTIVE DIRECTOR
WASHINGTON ASSOCIATION OF INTERNET
SERVICE PROVIDERS
9445 37TH AVE SW
SEATTLE WA 98126**

**RONALD L PARRISH
VICE PRESIDENT
TANDY CORPORATION
100 THROCKMORTON STREET
SUITE 1800
FORT WORTH TX 76102**

**BARRY PINELES
REGULATORY COUNSEL
GST TELECOM INC
4001 MAIN STREET
VANCOUVER WA 98663**

**HOWARD J SYMONS
MICHELLE M MUNDT
MINTZ LEVIN COHN FERRIS GLOVSKY & POPEO
PC
SUITE 900
701 PENNSYLVANIA AVENUE NW
WASHINGTON DC 20004**

**JEFFREY L SHELDON
THOMAS E GOODE
UTC
1140 CONNECTICUT AVE NW
SUITE 1140
WASHINGTON DC 20036**

**RODNEY L JOYCE
J THOMAS NOLAN
NETWORK ACCESS SOLUTIONS INC
SHOOK HARDY & BACON
1850 K STREET NW
WASHINGTON DC 20004**

**PETER ARTH JR
LIONEL B WILSON
MARY MACK ADU
PUBLIC UTILITIES COMMISSION STATE OF
CALIFORNIA
505 VAN NESS AVE
SAN FRANCISCO CA 94102**

**ROBERT L HOGGARTH ESQ
SENIOR VICE PRESIDENT
PAGING AND MESSAGE ALLIANCE OF THE
PERSONAL COMMUNICATIONS INDUSTRY
ASSOCIATION
500 MONTGOMERY STREET
SUITE 700
ALEXANDRIA VA 22314-1561**

**MARK BUECHELE ESQ
ASSISTANT GENERAL
SUPRA TELECOMMUNICATIONS &
INFORMATION SYSTEMS INC
2620 S W 27TH AVENUE
MIAMI FLORIDA 33133**

**RICHARD N DAHLGREN
VICE PRESIDENT
COTTONWOOD COMMUNICATIONS
P O BOX 451037
OMAHA NE 68145-5037**

**MARGOT SMILEY HUMPHREY
NRTA
KOTEEN & NAFTALIN LLP
SUITE 1000
1150 CONNECTICUT AVE NW
WASHINGTON DC 20036**

**STUART POLIKOFF
STEPHEN PASTORKOVICH
OPASTCO
SUITE 700
21 DUPONT CIRCLE NW
WASHINGTON DC 20036**

**GLENN B MANISHIN
FRANK V PAGANELLI
FIRST REGIONAL TELECOM LLC &
FIRSTWORLD COMMUNICATIONS INC
BLUMENFELD & COHEN TECHNOLOGY LAW
GROUP
SUITE 700 1615 M STREET NW
WASHINGTON DC 20036**

**COLIN M ALBERTS
LISA ANDERSON
FIRST REGIONAL TELECOM LLC &
FIRSTWORLD COMMUNICATIONS INC
BLUMENFELD & COHEN TECHNOLOGY LAW
GROUP
SUITE 700 1615 M STREET NW
WASHINGTON DC 20036**

**KEVIN TIMPANE
ESTHER H ROSENTHAL
FIRSTWORLD COMMUNICATIONS INC
9333 GENESEE AVENUE
SAN DIEGO CA 92121**

**MICHAEL D SPECHT
FIRST REGIONAL TELECOM LLC
2814 UPTON STREET NW
WASHINGTON DC 20008**

**CARESSA D BENNET
GREGORY W WHITEAKER
RURAL TELECOMMUNICATIONS GROUP
BENNET & BENNET PLLC
SUITE 500
1019 NINETEENTH STREET NW
WASHINGTON DC 20036**

**JEFFREY BLUMENFELD
RHYTHMS NETCONNECTIONS INC
BLUMENFELD & COHEN TECHNOLOGY
LAW GROUP
SUITE 700
1615 M STREET NW
WASHINGTON DC 20036**

**COLIN M ALBERTS
LISA ANDERSON
RHYTHMS NETCONNECTIONS INC
BLUMENFELD & COHEN TECHNOLOGY
LAW GROUP
SUITE 700
1615 M STREET NW
WASHINGTON DC 20036**

**MICHAEL L THEIS
PRESIDENT
KIESLING CONSULTING LLC
6401 ODANA ROAD
MADISON WISCONSIN 53719-1155**

**BRUCE A KUSHNICK
EXECUTIVE DIRECTOR
NEW NETWORKS INSTITUTE
SUITE 900
826 BROADWAY
NEW YORK NEW YORK 10003**

**CARESSA D BENNET
MICHAEL R BENNET
CENTRAL TEXAS TELEPHONE COOPERATIVE
INC
BENNET & BENNET PLLC
SUITE 500
1019 NINETEENTH STREET NW
WASHINGTON DC 20036**

**ROBERT J AAMOTH
STEVEN A AUGUSTINO
MELISSA M SMITH
WESTEL INC
KELLEY DRYE & WARREN LLP
SUITE 500
1200 19TH ST NW
WASHINGTON DC 20036**

**GWEN ROWLING
DIRECTOR OF BUSINESS AND GOVERNMENT
RELATIONS
WESTEL INC
111 CONGRESS AVE #600
AUSTIN TX 78701**

**PAMELA ARLUK
CTSI INC
SWIDLER BERLIN SHEREFF FRIEDMAN LLP
SUITE 300
3000 K STREET NW
WASHINGTON DC 20007**

**SHAD NYGREN
PRESIDENT
VIRTUAL HIPSTER CORPORATION
CROWELL SUSICH OWEN & TACKES LTD
P O BOX 1091
FALLON NV 89407**

**THOMAS M KOUTSKY
JAMES D EARL
COVAD COMMUNICATIONS COMPANY
SUITE 220
6849 OLD DOMINION DRIVE
MCLEAN VA 22101**

**BRAD E MUTSCHELKNAUS
JOHN J HEITMANN
E SPIRE COMMUNICATIONS INC
KELLEY DRYE & WARREN LLP
FIFTH FLOOR
1200 19TH STREET NW
WASHINGTON DC 20036**

**RILEY M MURPHY
CHARLES H N KALLENBACH
JAMES C FALVEY
E SPIRE COMMUNICATIONS INC
SUITE 200
133 NATIONAL BUSINESS PARKWAY
ANNAPOLIS JUNCTION MD 20701**

**JAMES D ELLIS
ROBERT M LYNCH
DURWARD D DUPRE
DARRYL W HOWARD
SBC COMMUNICATIONS INC
ROOM 3703
ONE BELL PLAZA
DALLAS TEXAS 75202**

**SANDY IBAUGH
DIRECTOR
TELECOMMUNICATIONS DIVISION
INDIANA UTILITY REGULATORY
COMMISSION
ROOM E306
302 W WASHINGTON STREET
INDIANAPOLIS IN 46204**

**SCOT CULLEN
ADMINISTRATOR
TELECOMMUNICATIONS DIVISION
PUBLIC SERVICE COMMISSION OF WISCONSIN
P O BOX 7854
MADISON WI 53707-7854**

**DANA FRIX
US XCHANGE LLC
SWIDLER BERLIN SHREFF FRIEDMAN LLP
SUITE 300
3000 K STREET NW
WASHINGTON DC 20007-5116**

**COLLEEN BOOTHBY
KEVIN DILALLO
VALERIE YATES
THE INTERNET ACCESS COALITION
LEVINE BLASZAK BLOCK & BOOTHBY LLP
SUITE 900
2001 L STREET NW
WASHINGTON DC 20036**

**DAVID R CONN
WILLIAM A HAAS
RICHARD S LIPMAN
MCLEODUSA TELECOMMUNICATIONS
SERVICES INC
P O BOX 3177
6400 C STREET SW
CEDAR RAPIDS IA 52406-3177**

**ANTHONY EPSTEIN
MARK SCHNEIDER
JEFFERY I RYEN
JENNER & BLOCK
TWELFTH FLOOR
601 THIRTEENTH STREET NW
WASHINGTON DC 20005**

**KEVIN SIEVERT
GLEN GROCHOWSKI
LOCAL NETWORK TECHNOLOGY
400 INTERNATIONAL PARKWAY
RICHARDSON TEXAS 75081**

**GEORGE VRADENBURG III
WILLIAM W BURRINGTON
JILL A LESSER
STEVEN N TEPLITZ
AMERICA ONLINE INC
SUITE 400
1101 CONNECTICUT AVENUE NW
WASHINGTON DC 20036**

**R MICHAEL SENKOWSKI
JEFFREY S LINDER
TIMOTHY SIMEONE
GTE
WILEY REIN & FIELDING
1776 K STREET NW
WASHINGTON DC 20006**

**GAIL L POLIVY
GTE SERVICE CORPORATION
SUITE 1200
1850 M STREET NW
WASHINGTON DC 20036**

**JOHN F RAPOSA
GTE SERVICE CORPORATION
600 HIDDEN RIDGE HQE03J27
IRVING TEXAS 75038**

**MARK C ROSENBLUM
AVA B KLEINMAN
AT&T CORPORATION
ROOM 3252J1
295 NORTH MAPLE AVENUE
BASKING RIDGE NJ 07920**

**J MANNING LEE
JAMES H BOLIN JR
AT&T CORPORATION
ROOM 3252J1
295 NORTH MAPLE AVENUE
BASKING RIDGE NJ 07920**

**PETER D KEISLER
DAVID L LAWSON
SIDLEY & AUSTIN
1722 EYE STREET NW
WASHINGTON DC 20006**

**MICHAEL DOSS
DANIEL MERON
SCOTT M BOHANNON
SIDLEY & AUSTIN
1722 EYE STREET NW
WASHINGTON DC 20006**

**STEVEN GOROSH
VICE PRESIDENT
NORTHPOINT COMMUNICATIONS INC
SUITE 700
222 SUTTER STREET
SAN FRANCISCO CA 94108**

**RUTH MILKMAN
DANIEL SEGAL
THE LAWLER GROUP
SUITE 400
7316 WISCONSIN AVE
BETHESDA MD 20814**

**ROBERT J AAMOTH
STEVEN A AUGUSTINO
MELISSA M SMITH
THE COMPETITIVE TELECOMMUNICATIONS
ASSOCIATION
KELLEY DRYE & WARREN LLP
1200 19TH STREET NW SUITE 500
WASHINGTON DC 20036**

**GENEVIEVE MORELLI
EXECUTIVE VICE PRESIDENT
THE COMPETITIVE TELECOMMUNICATIONS
ASSOCIATION
SUITE 800
1900 M STREET NW
WASHINGTON DC 20036**

**WILLIAM T LAKE
JOHN H HARWOOD II
LYNN R CHARYTAN
U S WEST COMMUNICATIONS INC
WILMER CUTLER & PICKERING
2445 M STREET NW
WASHINGTON DC 20036**

**JONATHAN J FRANKEL
MATTHEW A BRILL
U S WEST COMMUNICATIONS INC
WILMER CUTLER & PICKERING
2445 M STREET NW
WASHINGTON DC 20036**

**ROBERT B MCKENNA
JEFFRY A BRUEGGEMAN
U S WEST INC
SUITE 700
1020 19TH STREET NW
WASHINGTON DC 20036**

**LAWRENCE W KATZ
JAMES G PACHULSI
ROBERT H GRIFFEN
JOHN S CULLINA
BELL ATLANTIC
EIGHTH FLOOR
1320 NORTH COURT HOUSE ROAD
ARLINGTON VIRGINIA 22201**

**BRIAN CONBOY
THOMAS JONES
TIME WARNER TELECOM
WILLKIE FARR & GALLAGHER
THREE LAFAYETTE CENTRE
1155 21ST STREET NW
WASHINGTON DC 20036**

**ANDREW D LIPMAN
TAMAR E FINN
NETWORK PLUS INC
SWIDLER BERLIN SHEREFF FRIEDMAN LLP
SUITE 300
3000 K STREET NW
WASHINGTON DC 20007**

**JONATHAN E CANIS
ERIN M REILLY
MGC COMMUNICATIONS INC
KELLEY DRYE & WARREN LLP
SUITE 500
1200 19TH STREET NW
WASHINGTON DC 20036**

**KENT F HEYMAN
RICHARD E HEATTER
SCOTT A SAREM
MGC COMMUNICATIONS INC
3301 N BUFFALO DRIVE
LAS VEGAS NV 89129**

**RICHARD J METZGER
EMILY M WILLIAMS
ASSOCIATION FOR LOCAL
TELECOMMUNICATIONS SERVICES
SUITE 900
888 17TH STREET NW
WASHINGTON DC 20006**

**STEPHEN L GOODMAN
NORTHERN TELECOM INC
HALPRIN TEMPLE GOODMAN & SUGRUE
SUITE 650 EAST TOWER
1100 NEW YORK AVENUE NW
WASHINGTON DC 20005**

**JOHN G LAMB JR
NORTHERN TELECOM INC
2100 LAKESIDE BOULEVARD
RICHARDSON TEXAS 75081-1599**

**JONATHAN E CANIS
ROSS A BUNTROCK
INTERMEDIA COMMUNICATIONS INC
KELLEY DRYE & WARREN LLP
FIFTH FLOOR
1200 NINETEENTH STREET NW
WASHINGTON DC 30036**

**R GERARD SALEMME
SENIOR VICE PRESIDENT
DANIEL GONZALEZ
DIRECTOR
NEXTLINK COMMUNICATIONS INC
SUITE 1000
1730 RHODE ISLAND AVENUE NW
WASHINGTON DC 20036**

**CHARLES C HUNTER
CATHERINE M HANNAN
TELECOMMUNICATIONS RESELLERS
ASSOCIATION
HUNTER COMMUNICATIONS LAW GROUP
SUITE 701
1620 I STREET NW
WASHINGTON DC 20006**

**M ROBERT SUTHERLAND
STEPHEN L EARNEST
BELLSOUTH CORPORATION
SUITE 1700
1155 PEACHTREE STREET NE
ATLANTA GA 30309-3610**

**PETER A ROHRBACH
LINDA L OLIVER
QWEST COMMUNICATIONS
HOGAN & HARTSON LLP
COLUMBIA SQUARE
555 THIRTEENTH STREET NW
WASHINGTON DC 20004**

**JOSEPH T GARRITY
SENIOR DIRECTOR
QWEST COMMUNICATIONS
555 17TH STREET
DENVER CO 80202**

**EARL W COMSTOCK
SHER & BLACKWELL
SUITE 900
1850 M STREET NW
WASHINGTON DC 20036**

**CHERIE R KISER
GIL M STROBEL
YARON DORI
CABLEVISION LIGHTPATH INC
MINTZ LEVIN COHN FERRIS GLOVSKY & POPEO
PC
701 PENNSYLVANIA AVE NW
WASHINGTON DC 20004-2608**

**DAVID ELLEN ESQ
SENIOR COUNSEL
CABLEVISION LIGHTPATH INC
ONE MEDIA CROSSWAYS
WOODBURY NEW YORK 11797**

**DONALD WEIGHTMAN
COALITION OF UTAH INDEPENDENT INTERNET
SERVICE PROVIDERS
510 C STREET NE
WASHINGTON DC 20002**

**WILLIAM J EVANS
CUISP
PARSONS BEHLE & LATIMER
ONE UTAH CENTER
SUITE 1800
201 SOUTH MAIN STREET
POST OFFICE BOX 45898
SALT LAKE CITY UTAH 84145-45898**

**CHRIS BARRON
REGULATORY CONSULTANT
TCA INC TELECOM CONSULTING ASSOCIATES
SUITE 200
1465 KELLY JOHNSON BLVD
COLORADO SPRINGS CO 80920**

**LAWRENCE J SPIWAK
GENERAL COUNSEL
TECHNOLOGY ENTREPRENEURS COALITION
SUITE 440
5335 WISCONSIN AVE NW
WASHINGTON DC 20015**

**ROBERT M MCDOWELL
EXECUTIVE VICE PRESIDENT
AMERICA'S CARRIERS TELECOMMUNICATION
ASSOCIATION
SUITE 700
8180 GREENSBORO DRIVE
MCLEAN VIRGINIA 22102**

**DANNY E ADAMS
REBEKAH J KINNETT
CABLE & WIRELESS INC
KELLEY DRYE & WARREN LLP
SUITE 500
1200 19TH STREET NW
WASHINGTON DC 20036**

**RACHEL J ROTHSTEIN
VICE PRESIDENT
CABLE & WIRELESS INC
8219 LEESBURG PIKE
VIENNA VIRGINIA 22182**

**RANDALL B LOWE
JULIE A KAMINSKI
RENEE ROLAND CRITTENDON
J TODD METCALF
TRANSWIRE COMMUNICATIONS INC
PIPER & MARBURY LLP
SUITE 700
1900 NINETEENTH STREET NW
WASHINGTON DC 20036**

**L MARIE GUILLORY
JILL CANFIELD
NATIONAL TELEPHONE COOPERATIVE
2626 PENNSYLVANIA AVENUE NW
WASHINGTON DC 20037**

**JONATHAN JACOB NADLER
BRIAN J MCHUGH
INFORMATION TECHNOLOGY ASSOCIATION
OF AMERICA
SQUIRE SANDERS & DEMPSEY LLP
BOX 407
1201 PENNSYLVANIA AVE NW
WASHINGTON DC 20044**

**GARY M EPSTEIN
JAMES H BARKER
KAREN BRINKMANN
NANDAN M JOSHI
BELLSOUTH CORPORATION
SUITE 1300
1001 PENNSYLVANIA AVENUE NW
WASHINGTON DC 20004-2505**

**M ROBERT SUTHERLAND
MICHAEL A TANNER
STEPHEN L EARNEST
BELLSOUTH CORPORATION
SUITE 1700
1155 PEACHTREE STREET
ATLANTA GA 30309**

**JEANNIE SU
ASSISTANT ATTORNEY GENERAL
MINNESOTA DEPARTMENT OF PUBLIC
SERVICE
SUITE 1200 NCL TOWER
ST PAUL MN 55101-2130**

**CHARLES M BREWER
CHAIRMAN & CHIEF EXECUTIVE OFFICER
MINDSPRING ENTERPRISES INC
SUITE 400
1430 WEST PEACHTREE STREET
ATLANTA GA 30309**

**GLENN B MANISHIN
STEPHEN P BOWEN
CHRISTINE A MAILOUX
MACHONE COMMUNICATIONS INC
BLUMENFELD & COHN - TECHNOLOGY LAW
GROUP
SUITE 700
1615 M STREET NW
WASHINGTON DC 20036**

**PAT WOOD III
CHAIRMAN
JUDY WALSH
COMMISSIONER
PUBLIC UTILITY COMMISSION OF TEXAS
1701 N CONGRESS AVE
AUSTIN TEXAS 78711**

**EMILY C HEWITT
GEORGE N BARCLAY
MICHAEL J ETTNER
GENERAL SERVICES ADMINISTRATION
ROOM 4002
1800 F STREET NW
WASHINGTON DC 20405**

**SNAVELY KING MAJOROS OCONNOR & LEE
INC
ECONOMIC CONSULTANTS
SUITE 410
1220 L STREET NW
WASHINGTON DC 20005**

**RONALD BINZ
PRESIDENT
DEBRA BERLYN
EXECUTIVE DIRECTOR
COMPETITION POLICY INSTITUTE
SUITE 520
1156 15TH ST NW
WASHINGTON DC 20005**

**GEORGE KOHL
DEBBIE GOLDMAN
COMMUNICATIONS WORKERS OF AMERICA
501 THIRD ST NW
WASHINGTON DC 20001**

**STEPHEN N BROWN
DIRECTOR
NEW WORLD PARADIGM LTD
SUITE 1421
401 12TH STREET SOUTH
ARLINGTON VA 22202**

**JERE W GLOVER ESQ
S JENELL TRIGG ESQ
ERIC C MENGE ESQ
UNITED STATES SMALL BUSINESS
ADMINISTRATION
SUITE 7800
409 THIRD STREET SW
WASHINGTON DC 20416**

**DAVID F FISHER
VICE PRESIDENT
ADC TELECOMMUNICATIONS INC
12501 WHITEWATER DRIVE
MINNETONKA MN 55343**

**RONALD L PLESSER
MARK J OCONNOR
SUSAN B ROSS
PSINET INC
PIPER & MARBURY LLP
SEVENTH FLOOR
1200 NINETEENTH STREET NW
WASHINGTON DC 20036**

**TERRENCE J FERGUSON
SENIOR VICE PRESIDENT
LEVEL 3 COMMUNICATIONS INC
3555 FARNAM STREET
OMAHA NEBRASKA 68131**

**BRAD E MUTSCHELKNAUS
JOHN J HEITMANN
ESPIRE COMMUNICATIONS INC
KELLEY DRYE & WARREN LLP
FIFTH FLOOR
1200 19TH STREET NW
WASHINGTON DC 20036**

**LAWRENCE E SARJEANT
LINDA KENT
KEITH TOWNSEND
JOHN HUNTER
UNITED STATES TELEPHONE ASSOCIATION
SUITE 600
1401 H STREET NW
WASHINGTON DC 20005**

**JAMES L SLATTERY
PETER J WALSH NCE
PARADYNE CORPORATION
P O BOX 2826
LARGO FLORIDA 33779-2826**

**DAVID A IRWIN
TARA S BECHT
NATHANIEL J HARDY
MOULTRIE INDEPENDENT TELEPHONE
COMPANY
IRWIN CAMPBELL & TANNENWALD PC
SUITE 200
1730 RHODE ISLAND AVENUE NW
WASHINGTON DC 20036-3101**

**MAUREEN A LEWIS
HENRY GELLER
DONALD VIAL
ALLIANCE FOR PUBLIC TECHNOLOGY
SUITE 230
901 15TH STREET NW
WASHINGTON DC 20038**

**RILEY M MURPHY
CHARLES HN KALLENBACH
JAMES C FALVEY
ESPIRE COMMUNICATIONS INC
SUITE 200
133 NATIONAL BUSINESS PARKWAY
ANNAPOLIS JUNCTION MD 20701**

**SCOTT BLAKE HARRIS
KENT D BRESSIE
PARADYNE CORPORATION
HARRIS WILTSHIRE & GRANNIS LLP
SUITE 1200
1200 EIGHTEENTH STREET NW
WASHINGTON DC 20036-2560**

**JONATHAN B BAKER
SUSAN P BRAMAN
FEDERAL TRADE COMMISSION
6TH STREET & PENNSYLVANIA AVE NW
WASHINGTON DC 20580**

**JOSEPH W MILLER
SENIOR ATTORNEY
WILLIAMS COMMUNICATIONS INC
4100 ONE WILLIAMS CENTER
TULSA OK 74172**

**MICKEY S MOON
DIRECTOR OF REGULATORY AFFAIRS
WILLIAMS COMMUNICATIONS INC
ONE WILLIAMS CENTER RC3
TULSA OK 74172**

**BARBARA A DOOLEY
RONALD L PLESSER
MARK J OCONNOR
STUART P INGIS
COMMERCIAL INTERNET EXCHANGE
ASSOCIATION
PIPER & MARBURY LLP
SEVENTH FLOOR
1200 NINETEENTH STREET NW
WASHINGTON DC 20036**

**ROBERT W MCCAUSLAND
VICE PRESIDENT
ALLEGIANCE TELECOM INC
SUITE 3026
1950 STEMMONS FREEWAY
DALLAS TX 75207-3118**

**ALBERT H KRAMER
MICHAEL CAROWITZ
JACOB S FARBER
ICG TELECOM GROUP INC
DICKSTEIN SHAPIRO MORIN & OSHINSKY
2101 L STREET NW
WASHINGTON DC 20037**

**CINDY Z SCHONAUT
SENIOR VICE PRESIDENT
GOVERNMENT & EXTERNAL AFFAIRS
ICG COMMUNICATIONS INC
161 INVERNESS DRIVE WEST
ENGLEWOOD CO 80112**

**MYRA L KARENGAINES
GENERAL COUNSEL
SPECIAL ASSISTANT ATTORNEY GENERAL
SARAH NAUMER
SPECIAL ASSISTANT ATTORNEY GENERAL
ILLINOIS COMMERCE COMMISSION
SUITE C-800
160 NORTH LASALLE ST
CHICAGO IL 60601-3104**

**LEON M KESTENBAUM
JAY C KEITHLEY
H RICHARD JUHNKE
SPRINT CORPORATION
11TH FLOOR
1850 M STREET NW
WASHINGTON DC 20036**

**W KENNETH FERREE
HENRY GOLDBERG
OPTEL INC
GOLDBERG GODLES WIENER & WRIGHT
1229 NINETEENTH STREET NW
WASHINGTON DC 20036**

**MICHAEL E KATZENSTEIN
VICE PRESIDENT
OPTEL INC
1111 W MOCKINGBIRD LANE
DALLAS TEXAS 75247**

**DANA FRIX
ROBERT V ZENER
HYPERION TELECOMMUNICATIONS INC
SWIDLER BERLIN SHEREFF FRIEDMAN LLP
SUITE 300
3000 K STREET NW
WASHINGTON DC 20007**

**JANET S LIVENGOOD ESQ
DIRECTOR
HYPERION TELECOMMUNICATIONS INC
DDI PLAZA TWO
SUITE 400
500 THOMAS STREET
BRIDGEVILLE PA 15017-2838**

**RICHARD D MARKS
MEGAN H TROY
COMPUTER & COMMUNICATIONS INDUSTRY
ASSOCIATION
VINSON & ELKINS LLP
1455 PENNSYLVANIA AVE NW
WASHINGTON DC 20004**

**STEPHEN I JACOBS
VICE PRESIDENT
CCIA
SUITE 600
666 ELEVENTH STREET NW
WASHINGTON DC 20001**

**CYNTHIA S MILLER
SENIOR ATTORNEY
FLORIDA PUBLIC SERVICE COMMISSION
2540 SHUMARD OAK BOULEVARD
TALLAHASSEE FLORIDA 32399-0850**

**JAMES G PACHULSKI
LAWRENCE W KATZ
ROBERT H GRIFFEN
JOHN S CULLINA
BELL ATLANTIC
EIGHTH FLOOR
1320 NORTH COURT HOUSE ROAD
ARLINGTON VIRGINIA 22201**

**JAMES S BLAZAK
KEVIN S DILALLO
AD HOC TELECOMMUNICATIONS USERS
COMMITTEE
LEVINE BLASZAK BLOCK & BOOTHBY LLP
SUITE 900
2001 L STREET NW
WASHINGTON DC 20036**

**LEE SELWYN PH D
JOSEPH LASZLO
ECONOMICS AND TECHNOLOGY INC
ONE WASHINGTON MALL
BOSTON MA 02108-2617**