

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554**

In the Matter of

Implementation of Section 621(a) of the Cable)
Communications Policy Act of 1984 as amended) MB Docket No. 05-311
By the Cable Television Consumer Protection and)
Competition Act of 1992)

**COMMENTS
OF
PAC-WEST TELECOMM, INC.**

Pac-West Telecomm, Inc. (“Pac-West”) submits these comments in response to the Commission’s *NPRM* in the above-captioned proceeding.¹ In the *NPRM*, the Commission seeks comment on how it should implement Section 621(a)(1) of the Act which provides in part that “a franchising authority may not unreasonably refuse to award an additional competitive franchise.”² Whatever conclusions the Commission reaches in this proceeding concerning BOC requests for reduced or streamlined franchising obligations for their participation in the video marketplace, the Commission should consider in this proceeding, and in other proceedings, the need for oversight of BOC participation in markets not currently reached by Title II safeguards against unreasonable discrimination.

¹ *Implementation of Section 621(a)(1) of the Cable Communications Policy Act of 1984 as amended by the Cable Television Consumer and Competition Act of 1992*, Notice of Proposed Rulemaking, MB Docket No. 05-311, FCC 05-189, released November 18, 2005 (“*NPRM*”).

² 47 U.S.C. Section 541(a)(1).

I. NON-DISCRIMINATORY IP INTERCONNECTION OBLIGATIONS SHOULD BE ESTABLISHED

The Commission's *Net Neutrality Policy Statement* is a helpful recognition of consumers' rights to access information content on the Internet.³ The Commission should go further in connection with BOC participation in the IP-enabled marketplace. In controlling significant IP backbone facilities, BOCs have the clear ability to undermine competitive video and other providers in the market for IP-enabled services by imposing higher costs on critical inputs, and by refusing to provide, or discriminating in the provision of, access to the IP broadband backbone. Even before the recent mergers of AT&T/SBC and Verizon/MCI, there was a critical need for the Commission to assure that BOCs could not adversely affect competition in the IP broadband market by discrimination in the rates, terms and conditions of the broadband services and facilities they offer. Indeed, prior to the recent mergers, even the BOCs' merger partners acknowledged that consolidation in the IP broadband backbone networks would hamper competition.⁴

³ *Appropriate Framework for Broadband Access to the Internet over Wireline Facilities, Policy Statement*, CC Docket No. 02-33, FCC 05-151, released September 23, 2005 ("*Net Neutrality Statement*").

⁴ In opposing the MCI and Sprint merger several years ago, SBC stated:

The size of a backbone is critical because a backbone's value to its users lies in its ability to provide connectivity to the entire Internet. . . . [W]here one backbone achieves a substantial size advantage over its rivals, it necessarily "reduces the value of, and therefore the demand for, the rivals' products." At some point, "the market may 'tip,' with customers abandoning the rivals altogether because their networks are too small to be viable." *Opposition of SBC Communications Inc.*, CC Docket No. 99-333 at 41 (Feb. 18, 2000).

Likewise, AT&T stated that:

IBPs [Internet Backbone Providers] with unbalanced traffic, then, are expected to become customers rather than be peers. They can do so by entering into a "transit arrangement" pursuant to which, for a fee, an Internet Backbone Provider [] agrees to transport the traffic to terminating points on its network or on the networks of other IBPs with whom it has a private peering relationship. Alternatively, a large IBP

The likelihood of anticompetitive behavior by the BOCs that could harm consumers is very real. Barely had the ink dried on the *Wireline Broadband Order* than BOCs began proposing ways to exploit the absence of Title II assurances of reasonable rates and nondiscrimination. BOCs are discussing various plans that would effectively require non-affiliated competitors to pay for priority routing that BOCs' own IP services presumably would enjoy.⁵ Furthermore, it is no secret that ILECs are very capable of engaging in port blocking.⁶ While Pac-West is not opposed in all cases to pricing proposals for different levels of service, it is very problematic to permit ILECs to offer pricing proposals for different levels of service without adequate safeguards to protect against discrimination against non-affiliated competitors.

BOCs apparently are developing and implementing plans to engage in the classic strategy of monopolists and duopolists of increasing revenues by restricting output, in this case in the form of lower speeds for non-affiliated application providers. If the backbone market were genuinely competitive, ILECs would be competing to provide the most non-discriminatory peering arrangements.

It is also clear that there are myriad ways in which BOCs can discriminate against competing content providers in provision of backbone access. Apart from price discrimination,

might agree to a "paid-for" private peering relationship allowing traffic to be terminated on its network, but the IBP paying for such an interconnection cannot represent to its customer that it has a private peering relationship. This significantly hampers its ability to compete with those that do have settlements-free private peering relationships. *Petition of AT&T Corp. to Deny Application*, CC Docket No. 99-333, Affidavit of Rose Klimovich on Behalf of AT&T at ¶9 (Feb. 18, 2000).

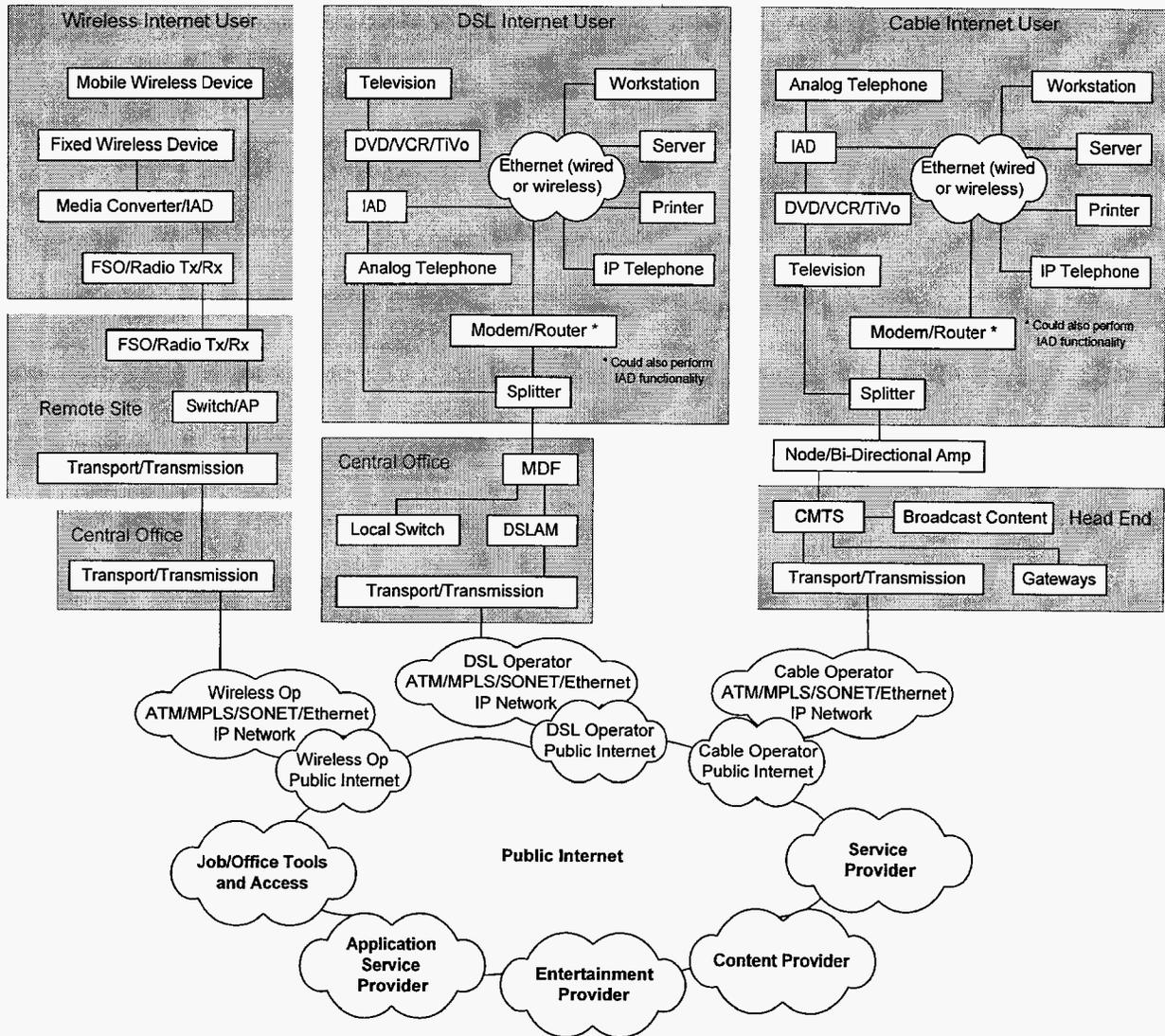
⁵ See *Phone Companies Set Off a Battle Over Internet Fees: Content Providers May Face Charges for Fast Access; Billing the Consumer Twice?*, The Wall Street Journal, A1 (Jan. 6, 2006); see also *Executives Want to Charge for Web Speed: Some Say Small Firms Could be Shut Out of Market by Championed by BellSouth Officer*, Washington Post, D05 (Dec. 1, 2005).

⁶ See, e.g., Consent Decree, *In re Madison River Communications, LLC*, DA 05-543 (2005). Madison River, and ILEC, was blocking ports used for VoIP applications, thereby affecting customers' ability to use VoIP.

BOCs could engage in various forms of non-price discrimination, such as providing non-affiliated competitors inferior circuits, and providing priority backbone routing to themselves. Electronic data exchange traverses a series of points where data is converted from one medium, format, language, or technology to another. Each of these control points in the IP network provides the ILECs with an opportunity to discriminate. For example, at each switch or router, control over the end user's data could be exercised via firewalls, IP port forwarding, rate limiting, packet inspection and restriction, or forced caching. ATM cells flowing across any ATM network could be subject to a wide variety of controls for anticompetitive purposes. The following diagram provides a high level view of how customers served by wireless, DSL, or cable modem service connect to the IP backbone and the various control points that could be used by the ILECs to engage in non-price discrimination.

**SIMPLIFIED HIGH SPEED INTERMODAL
 ACCESS TECHNOLOGIES**

Darren Sandford, Pac-West
 Current Revision 1.0, Apr 6 2005



In fact, one vendor apparently views non-net neutrality as a revenue opportunity. It is offering to sell the BOCs an “IP session management platform” for backbone and other IP platforms which will permit BOCs to “classify packets 64 different ways” and help them “set up tiers of broadband service for sale to third party vendors.”⁷ It would be very harmful for the

⁷ “Stoke Stokes ‘Net Neutrality’ Flames,”
http://www.lightreading.com/document.asp?doc_id=88598&WT.svl=news1_3.

Commission's goal of competition if BOCs are permitted without supervision to become the gatekeepers for access across the backbone to information content on the Internet.

The "interconnection" of IP broadband networks used to provide video and other services is currently implemented outside the traditional telephony regulatory framework via "peer-to-peer" relationships. But the ILECs' significant and growing participation in the provision of IP-backbone services, and the frequent necessity of using ILECs as transit carriers, increases the ability of ILECs to harm non-affiliated competitors in the provision of IP-enabled services. Although the conditions imposed by the Commission as part of its approvals of the SBC/AT&T and Verizon/MCI mergers require the merged companies to maintain for three years the same number of settlement-free peering arrangements as on the date of the merger, and to post their peering policies for an additional two years, these conditions, as well as being temporary, do not proscribe discrimination in provision of settlement-free peering or other IP interconnection.⁸

For instance, ILECs can discriminate against CLECs and other competitive providers by peering with each other at no charge while at the same time demanding peering fees from CLECs and other competitive providers. ILECs are also in a position to raise fees for network interconnection.

Accordingly, as BOCs seek streamlined or reduced safeguards in this proceeding for their participation in the video marketplace the Commission should consider the need to establish IP backbone obligations.

⁸ *SBC Communications, Inc. and AT&T Corp. Application for Approval of Transfer of Control*, Memorandum Opinion and Order, WC Docket No. 05-65, FCC 05-183, released November 17, 2005; *Verizon Communications, Inc. and MCI, Inc. Applications for Approval of Transfer of Control*, Memorandum Opinion and Order, WC Docket No. 05-75, FCC 05-184, released November 17, 2005.

II. PROPOSED SAFEGUARDS

The Commission should adopt the following safeguards to assure net neutrality and reasonable terms and conditions of IP interconnection.

- (1) Require ILECs to allow any IP network to peer with their networks if the competitive network interconnects at a specified number of peering points;
- (2) Require ILECs to provision interconnection to the IP backbone and transit service to non-peering competing carriers on just, reasonable, and nondiscriminatory prices, terms and conditions;
- (3) Implement binding net neutrality requirements to preclude ILECs from blocking or providing inferior quality access to non-ILEC IP-enabled content or services; and
- (4) Prohibit ILECs from imposing any restrictions or limitations on use of any signaling protocol that would be used for establishing sessions in an IP network that could be a useful tool for content or service discrimination by the ILECs.

Respectfully submitted,

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February 13, 2006

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