

Before the  
Federal Communications Commission  
Washington, D.C. 20554

In the Matters of	)	
	)	
Deployment of Wireline Services Offering Advanced Telecommunications Capability	)	CC Docket No. 98-147
	)	
Petition of Bell Atlantic Corporation	)	CC Docket No. 98-11
	)	
For Relief from Barriers to Deployment of Advanced Telecommunications Services	)	
	)	
Petition of U S WEST Communications, Inc. For Relief from Barriers to Deployment of Advanced Telecommunications Services	)	CC Docket No. 98-26
	)	
Petition of Ameritech Corporation to Remove Barriers to Investment in Advanced Telecommunications Technology	)	CC Docket No. 98-32
	)	
Petition of the Alliance for Public Technology Requesting Issuance of Notice of Inquiry and Notice of Proposed Rulemaking to Implement Section 706 of the 1996 Telecommunications Act	)	CCB/CPD No. 98-15 RM 9244
	)	
Petition of the Association for Local Telecommunications Services (ALTS) for a Declaratory Ruling Establishing Conditions Necessary to Promote Deployment of Advanced Telecommunications Capability Under Section 706 of the Telecommunications Act of 1996	)	CC Docket No. 98-78
	)	
Southwestern Bell Telephone Company, Pacific Bell, and Nevada Bell Petition for Relief from Regulation Pursuant to Section 706 of the Telecommunications Act of 1996 and 47 U.S.C. § 160 for ADSL Infrastructure and Service	)	CC Docket No. 98-91
	)	

optimizes the amount of space available for collocation. We conclude that measures that optimize the available collocation space and that reduce costs and delays for competing providers are consistent with an incumbent LEC's obligation under both the statute and our rules. In addition, we agree with ALTS that we should build upon our current physical and virtual collocation requirements adopted in the *Expanded Interconnection*<sup>126</sup> and *Local Competition*<sup>127</sup> proceedings to ensure that our rules promote, to the greatest extent possible, the rapid deployment of advanced telecommunications capability to all Americans. We, therefore, propose specific additional physical and virtual collocation requirements in the NPRM below.<sup>128</sup>

## B. Forbearance and LATA Boundary Modifications

### 1. Background

65. As discussed above, sections 251(c)(3) and (4) require incumbent LECs to provide nondiscriminatory access to unbundled network elements and to offer for resale, at wholesale rates, any telecommunications service the carrier provides at retail.<sup>129</sup> Section 271(b)(1) provides that a BOC or BOC affiliate "may provide interLATA services originating in any of its in-region States" only "if the Commission approves the application of such company for such State under [section 271(d)(3)]."<sup>130</sup> Under section 271(d)(3), the Commission may grant a BOC authorization

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<sup>126</sup> *Expanded Interconnection with Local Telephone Company Facilities*, First Report and Order, 7 FCC Rcd 7369 (1992) (*Special Access Order*), *vacated in part and remanded, Bell Atlantic Telephone Cos. v. FCC*, 24 F.3d 1441 (D.C. Cir. 1994) (*Bell Atlantic v. FCC*); First Reconsideration, 8 FCC Rcd 127 (1993); *vacated in part and remanded, Bell Atlantic v. FCC*, 24 F.3d 1441; Second Reconsideration, 8 FCC Rcd 7341 (1993); Second Report and Order, 8 FCC Rcd 7374 (1993) (*Switched Transport Order*), *vacated in part and remanded, Bell Atlantic v. FCC*, 24 F.3d 1441; Remand Order, 9 FCC Rcd 5154 (1994) (*Virtual Collocation Order*), *remanded, Pacific Bell v. FCC*, 81 F.3d 1147 (D.C. Cir. 1996), *further recon. pending* (collectively referred to as *Expanded Interconnection*).

<sup>127</sup> *Local Competition Order*, 11 FCC Rcd at 15782-15811, ¶¶ 555-617.

<sup>128</sup> *See infra* ¶¶ 118-150.

<sup>129</sup> *See* 47 U.S.C. §§ 251(c)(3), (4).

<sup>130</sup> 47 U.S.C. § 271(b)(1). Section 3(25) of that Act defines local access and transport area (LATA) as:

[A] contiguous geographic area --

(A) established before the date of enactment of the Telecommunications Act of 1996 by a Bell operating company such that no exchange area includes points within more than 1 metropolitan statistical area, consolidated metropolitan statistical area, or State, except as expressly permitted under the AT&T Consent Decree; or

(B) established or modified by a Bell operating company after such date of enactment and approved by the Commission.

47 U.S.C. § 153(25).

to originate in-region, interLATA services only if it finds that the BOC has met the competitive checklist set forth in section 271(c)(2)(B) and other statutory requirements.<sup>131</sup>

66. Section 706(a) of the 1996 Act instructs the Commission and each state commission to "encourage the deployment on a reasonable and timely basis of advanced telecommunications capability to all Americans . . . by utilizing, in a manner consistent with the public interest, convenience, and necessity, price cap regulation, *regulatory forbearance*, measures that promote competition in the local telecommunications market, or other regulating methods that remove barriers to infrastructure investment."<sup>132</sup>

67. Section 10 of the Communications Act requires the Commission to forbear from applying any regulation or any provision of the Communications Act to telecommunications carriers or telecommunications services, or classes thereof, if the Commission determines that certain conditions are satisfied.<sup>133</sup> Section 10(d) specifies, however, that "[e]xcept as provided in section 251(f), the Commission may not forbear from applying the requirements of section 251(c) or 271 under [section 10(a)] until it determines that those requirements have been fully implemented."<sup>134</sup>

68. In their petitions, Ameritech, U S WEST, Bell Atlantic, and SBC seek regulatory relief from the application of section 251 and/or section 271 through Commission forbearance from applying those sections or through LATA boundary changes.<sup>135</sup> Recognizing that the Commission may not forbear from application of sections 251(c) and 271 under section 10(a)

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<sup>131</sup> 47 U.S.C. § 271(d)(3).

<sup>132</sup> 47 U.S.C. § 157 note (emphasis added).

<sup>133</sup> 47 U.S.C. § 160.

<sup>134</sup> 47 U.S.C. § 160(d).

<sup>135</sup> We note that each petitioner seeks slightly different relief. Ameritech requests that the Commission provide section 271 relief either by exercising forbearance authority with respect to advanced data services or by establishing a single, global "data LATA" for packet switched services. *See* Ameritech Petition at 2-3 & 12-14. Ameritech notes that if the Commission grants section 271 relief through forbearance, it should likewise forbear from applying section 272 requirements. *Id.* at 3 n.4. Bell Atlantic seeks regulatory relief from the requirements of section 271 through, among other things, forbearance pursuant to section 706, and relief from LATA boundaries, with "one large access area." *See* Bell Atlantic Petition at 10-12. U S WEST and SBC argue that the Commission should forbear from applying the unbundling requirements of section 251(c)(3) and the resale requirements of section 251(c)(4) to non-circuit-switched data services and facilities and to the provision of ADSL, respectively. *See* U S WEST Petition at 44-45; SBC Petition at 25-28. U S WEST requests, in addition, that the Commission permit it to carry data across current LATA boundaries either by lifting the ban on such carriage in section 271 or by redefining LATA boundaries. *See* U S WEST Petition at 42-44. SBC does not seek relief from section 271, either through forbearance or modification of LATA boundaries. SBC, however, requests forbearance from dominant carrier regulation for provision of ADSL as well as from the obligations of section 252(i). *See* SBC Petition at 28-34.

until the requirements in those sections have been fully implemented, petitioners seek forbearance pursuant to section 706(a). Petitioners contend that section 706(a) constitutes an independent grant of forbearance authority that encompasses the ability to forbear from sections 251(c) and 271. Ameritech, Bell Atlantic, and U S WEST seek regulatory relief not only to provide xDSL-based services to end users, but also to obtain freedom to become Internet backbone providers.<sup>136</sup> Ameritech and U S WEST, notwithstanding their request here for LATA boundary changes, argue that this relief would not affect their compliance with section 271 for voice services.<sup>137</sup>

## 2. Discussion

### a. Forbearance

69. After reviewing the language of section 706(a), its legislative history, the broader statutory scheme, and Congress' policy objectives, we agree with numerous commenters that section 706(a) does not constitute an independent grant of forbearance authority or of authority to employ other regulating methods.<sup>138</sup> Rather, we conclude that section 706(a) directs the Commission to use the authority granted in other provisions, including the forbearance authority under section 10(a), to encourage the deployment of advanced services.

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<sup>136</sup> See Ameritech Petition at 9 (stating that section 271 bars Ameritech from providing Internet backbone services); Bell Atlantic Petition at 4 (stating that Commission relief "would enable Bell Atlantic to proceed with current plans to build a regional backbone network"); U S WEST Petition at 42 (urging that the Commission "carry out its mandate [under section 706] by allowing U S WEST to enter and compete in th[e] market for [I]nternet backbone services").

<sup>137</sup> Ameritech argues that its proposal would not undermine the objectives of section 271 and 10(d). Ameritech asserts that it "remains committed to meeting the requirements of section 271 . . . so that it can satisfy its customers' demands for integrated packages that include circuit-switched, voice-grade, long distance services." Ameritech Reply Comments (CC Docket No. 98-32) at 10. U S WEST asserts that the LATA boundary relief proposed by Ameritech would not affect LATA boundaries and associated restrictions applicable to two-way voice telephone service. U S WEST asserts further that it "has made a firm commitment that it will not use . . . relief [for the provision of advanced data services] to evade restrictions on the provision of voice services." U S WEST Reply Comments (CC Docket No. 98-26) at 21-22.

<sup>138</sup> See, e.g., ACSI Comments (CC Docket Nos. 98-11, 98-26, 98-32) at 5; AT&T Comments (CC Docket No. 98-11) at 5-6; Cablevision Lightpath Comments (CC Docket Nos. 98-11, 98-26, 98-32) at 8; CIX Comments (CC Docket No. 98-11) at 24-26; CompTel Comments (CC Docket Nos. 98-11, 98-26, 98-32) at 10-12; CPI Comments (CC Docket Nos. 98-11, 98-26, 98-32) at 21; Electric Lightwave Comments (CC Docket Nos. 98-11, 98-26, 98-32) at 31; Excel Comments (CC Docket Nos. 98-11, 98-26, 98-32) at 4-5; Focal Communications Comments (CC Docket Nos. 98-11, 98-26, 98-32) at 5-6; ITAA Comments (CC Docket No. 98-11) at 5; LCI Comments (CC Docket Nos. 98-11, 98-26, 98-32) at 18; Level 3 Communications Comments (CC Docket Nos. 98-11, 98-26, 98-32) at 8; MCI Comments (CC Docket No. 98-32) at 24-25; TRA Comments (CC Docket Nos. 98-11, 98-26, 98-32) at 5-6; WorldCom Comments (CC Docket Nos. 98-11, 98-26, 98-32) at 10-11, 28-29; XCOM Comments (CC Docket Nos. 98-11, 98-26, 98-32) at 4-5, 11-14; NTIA July 17 *Ex Parte* at 5-7. *But see, e.g.*, Ameritech Petition at 14; Bell Atlantic Petition at 10-11; SBC Petition at 5-6; U S WEST Petition at 37-40.

70. To determine whether section 706(a) constitutes an independent grant of forbearance authority, we look first to the text of the statute. We recognize that the language of section 706 directs the Commission to encourage the deployment of advanced services "by utilizing . . . regulatory forbearance . . . ." <sup>139</sup> It is not clear from the text of section 706(a), however, whether Congress intended that provision to constitute an independent grant of forbearance authority, or, alternatively, a directive that the Commission use forbearance authority granted elsewhere, in encouraging the deployment of advanced services. <sup>140</sup>

71. Because the language of section 706(a) does not make clear whether section 706(a) constitutes an independent grant of forbearance authority, we look to the broader statutory scheme, its legislative history, and the underlying policy objectives to resolve the ambiguity. We examine the structure of the 1996 Act as a whole. As the courts have recognized, "[t]he literal language of a provision taken out of context cannot provide conclusive proof of congressional intent, any more than a word can have meaning without context to illuminate its use." <sup>141</sup> Rather, when we are "charged with understanding the relationship between two different provisions within the same statute, we must analyze the language of each to make sense of the whole." <sup>142</sup>

72. As stated above, section 10(d) expressly forbids the Commission from forbearing from the requirements of sections 251(c) and 271 "until it determines that those requirements have been fully implemented." <sup>143</sup> There is no language in section 10 that carves out an exclusion from this prohibition for actions taken pursuant to section 706.

73. If section 706(a) were an independent grant of authority, as the BOCs argue, <sup>144</sup> then it would allow us to forbear from applying sections 251(c) and 271 regardless of whether either section were fully implemented. Sections 251(c) and 271 are cornerstones of the framework Congress established in the 1996 Act to open local markets to competition. <sup>145</sup> The central importance of these provisions is reflected in the fact that they are the only two provisions

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<sup>139</sup> 47 U.S.C. § 157 note.

<sup>140</sup> Compare *Chevron v. National Resources Defense Council*, 467 U.S. 837, 842-43 (1984).

<sup>141</sup> See *Bell Atlantic Tel. Cos. v. FCC*, 131 F.3d 1044, 1047 (D.C. Cir. 1997) (construing section 272(e)(4) of the Act).

<sup>142</sup> *Id.*

<sup>143</sup> 47 U.S.C. § 157 note.

<sup>144</sup> See, e.g., Bell Atlantic Reply (CC Docket Nos. 98-11, 98-26, 98-32) at 4-9; SBC Reply (RM 9244) at 1-9; U S WEST Reply (CC Docket No. 98-26) at 8.

<sup>145</sup> See, e.g., ALTS Comments (CC Docket Nos. 98-11, 98-26, 98-32) at 1; MCI Comments (CC Docket No. 98-32) at 13; TRA Comments (CC Docket Nos. 98-11, 98-26, 98-32) at 7; Level 3 Communications Reply (CC Docket Nos. 98-11, 98-26, 98-32) at 5; NTIA July 17 *Ex Parte* at 6.

that Congress carved out in limiting the Commission's otherwise broad forbearance authority under section 10. We find it unreasonable to conclude that Congress would have intended that section 706 allow the Commission to eviscerate those forbearance exclusions after having expressly singled out sections 251(c) and 271 for different treatment in section 10.<sup>146</sup>

74. We are not persuaded by Bell Atlantic's argument that a conclusion that section 706(a) confers no independent authority would make that section redundant.<sup>147</sup> On the contrary, we conclude that section 706(a) gives this Commission an affirmative obligation to encourage the deployment of advanced services, relying on our authority established elsewhere in the Act. Our actions and proposals in this Order and NPRM make clear that this obligation has substance.

75. Furthermore, we find nothing in the legislative history of section 706 to indicate that Congress gave us independent authority in section 706(a) to forbear from provisions of the Act. Section 706 was adopted contemporaneously with the forbearance authority in section 10, with section 706 contained in section 304 of the Senate version of the Communications Act of 1996, and the forbearance authority that was later included in section 10 contained in section 303 of that bill.<sup>148</sup> Thus, when enacting section 706, Congress was well aware of the explicit exclusions of our forbearance authority in section 10(d). Congress presumably would have stated explicitly that those exclusions would not apply to forbearance under section 706 had it so intended. We are not persuaded by Ameritech's argument that the statement in the Senate Commerce Committee's Report that section 706 is intended as a "fail-safe" indicates that Congress provided independent forbearance authority in section 706(a).<sup>149</sup> The Senate Commerce Committee's Report makes clear that section 706 "ensures that advanced telecommunications capability is promptly deployed by requiring the [Commission] to initiate and complete regular inquiries," and then take immediate action if it determines that such capability is not being deployed to all Americans.<sup>150</sup> The Report does not clarify, however, whether section 706 is an

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<sup>146</sup> See, e.g., ALTS Comments (CC Docket Nos. 98-11, 98-26, 98-32) at 3 (arguing that "[t]he only way the Telecommunications Act can be interpreted as a whole is [to] make the meaning of 'forbearance' in section 706 consistent with the . . . limitation of the same term as used in section 10"); MCI Comments (CC Docket No. 98-11) at 21-22 (stating that it is hard to imagine that Congress intended section 706 to override the specific limitations on forbearance in section 10).

<sup>147</sup> Bell Atlantic Reply (CC Docket Nos. 98-11, 98-26, 98-32) at 5.

<sup>148</sup> 141 Cong. Rec. H9954, H9970-71 (Oct. 12, 1995) (text of S. 652 as read in Senate); S. 652, 104th Cong., 1st Sess. 150-53 (1995) (S. 652 as passed by the Senate).

<sup>149</sup> Ameritech Reply (CC Docket No. 98-32) at 4, citing S. Rep. No. 104-23, 104th Cong., 1st Sess. 115 (1995) (*1995 Senate Report*).

<sup>150</sup> *1995 Senate Report, supra*, at 114.

independent grant of regulatory authority or directs the Commission to use regulatory measures granted in other provisions of the Act.<sup>151</sup>

76. Moreover, as a matter of policy, we believe that interpreting section 706, not as an independent grant of authority, but rather, as a direction to the Commission to use the forbearance authority granted elsewhere in the Act, will further Congress' objective of opening all telecommunications markets to competition, including the market for advanced services.<sup>152</sup> As discussed above, because of the central importance of the requirements in sections 251(c) and 271 to opening local markets to competition, we consider these sections to be cornerstones of the framework Congress established in the 1996 Act. We find that this conclusion that section 706 does not provide the statutory authority to forbear from sections 251(c) and 271 will better promote Congress' objectives in the Act.

77. For the foregoing reasons, we conclude that, in light of the statutory language, the framework of the 1996 Act, its legislative history, and Congress' policy objectives, the most logical statutory interpretation is that section 706 does not constitute an independent grant of authority. Rather, the better interpretation of section 706 is that it directs us to use, among other authority, our forbearance authority under section 10(a) to encourage the deployment of advanced services. Under section 10(d), we may not use that authority to forbear from applying the requirements of section 251(c) and 271 prior to their full implementation. Petitioners do not suggest that either section 251(c) or section 271 has been fully implemented, and we have no record on which to determine that either has been fully implemented. We, therefore, deny the BOC requests that we forbear from applying the requirements of sections 251(c) and 271. We seek comment in the NPRM below on whether there are avenues other than forbearance that might allow us to lessen the obligations of these sections in appropriate circumstances.<sup>153</sup>

78. Ameritech also requests forbearance pursuant to section 706 from application of section 272's requirements if we grant its request to forbear from applying section 271's

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<sup>151</sup> *Id.* at 113-15. Bell Atlantic also points to a floor statement that it claims supports its view that section 706 grants independent forbearance authority. Bell Atlantic Reply (CC Docket Nos. 98-11, 98-26, 98-32) at 7 (citing 141 Cong. Rec. S699-90 (daily ed. Feb. 1, 1996)). As with the statement in the Senate Commerce Committee Report, this statement does not indicate whether section 706(a) gives the Commission independent forbearance authority or whether it directs the Commission to use regulatory measures granted elsewhere in the Act to achieve the objectives stated in section 706. Even if that statement were interpreted to indicate that section 706 gives the Commission independent forbearance authority, we conclude that statements of an individual member of Congress does not overcome the other evidence discussed in this section that indicates Congress' intention that the Commission not forbear from sections 251(c) and 271 until those sections are fully implemented. See *Bath Iron Works Corp. v. Office of Workers Compensation Programs*, 506 U.S. 153, 166 (1993); *Pappas v. Buck Consultants, Inc.*, 923 F.2d 531, 536-37 (7th Cir. 1991).

<sup>152</sup> See *Joint Explanatory Statement, supra* at 1, 113.

<sup>153</sup> See *infra* ¶¶ 178-196.

requirements. Because we deny that request for section 271 forbearance, we also deny Ameritech's request for section 272 forbearance.

79. In addition, SBC requests forbearance, under section 10: (1) from the dominant treatment of ADSL service to the extent that treatment results in the imposition of tariff filing requirements and other obligations under the Act and under parts 61 and 69 of the Commission's rules; and (2) from the obligations of section 252(i).<sup>154</sup> Section 10(a) requires us to forbear from the application of a statutory provision or regulation if we determine that specific criteria are met.<sup>155</sup> We conclude, on the record before us, that SBC has not demonstrated that the relief it requests pursuant to section 10 meets these criteria. In particular, to the extent that advanced services are offered by an incumbent LEC, we find, on the record before us, that it is consistent with the public interest to subject such incumbents to full incumbent LEC regulation.<sup>156</sup> We therefore deny SBC's requests for forbearance under section 10. We note, however, that, in the NPRM below, we address the regulatory status of an advanced services affiliate that competes without any unfair advantages derived from its affiliation with the incumbent. In particular, we tentatively conclude below that such an affiliate, to the extent it provides interstate exchange access services, should, under existing Commission precedent, be presumed to be nondominant and should not be required to file tariffs for its provision of any interstate services that are exchange access.<sup>157</sup>

#### **b. LATA Boundary Modifications**

80. As an alternative to forbearance from enforcing section 271, Ameritech, Bell Atlantic and U S WEST request that the Commission permit them to change LATA boundaries pursuant to section 3(25) of the Communications Act in order to create a large-scale "LATA" for packet-switched services.<sup>158</sup> We decline to grant petitioners' requests for large-scale changes in LATA boundaries.

81. Although section 3(25)(B) of the Act permits a BOC to modify LATA boundaries upon Commission approval, we conclude that petitioners' requests for large-scale changes in LATA boundaries amount to more than requests for "modified" LATAs as that term is used in

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<sup>154</sup> SBC Petition at 5-6.

<sup>155</sup> 47 U.S.C. § 160(a).

<sup>156</sup> 47 U.S.C. § 160(a)(3); *see generally* AT&T Comments (CC Docket No. 98-11) at 17; CIEA Comments (CC Docket No. 98-11) at 17-18; Hyperion Comments (CC Docket No. 98-11) at 10; Sprint Comments (CC Docket No. 98-11) at 5.

<sup>157</sup> *See infra* ¶ 48.

<sup>158</sup> 47 U.S.C. § 3(25). *See supra* n.135, for a description of the individual petitioners' requests.