

CORRECTED

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

In the Matters of
Deployment of Wireline Services Offering
Advanced Telecommunications Capability
Request by Bell Atlantic-West Virginia
for Interim Relief Under Section 706,
or, in the Alternative, a LATA
Boundary Modification
CC Docket No. 98-147
NSD-L-98-99

FOURTH REPORT AND ORDER
AND MEMORANDUM OPINION AND ORDER

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I. INTRODUCTION

1. On March 31, 1999, we released the *Advanced Services Order and NPRM* in this docket.¹ In the *Advanced Services Order and NPRM*, we took certain initial steps to implement Congress's goal in the Telecommunications Act of 1996 (1996 Act)² that advanced services³ become available to all Americans on a reasonable and timely basis.⁴ The Commission concluded that the pro-competitive provisions of the 1996 Act equally applied to advanced services as to circuit-switched voice services,⁵ and that incumbent local exchange carriers (LECs) must offer advanced services to requesting carriers as part of the interconnection obligations of section 251.⁶ The Commission also denied petitions that requested the Commission to forbear from applying the requirements of sections 251(c) and 271 to the provision of advanced services.⁷ In this regard, the

¹ ? *Deployment of Wireline Services Offering Advanced Telecommunications Capability*, CC Docket No. 98-147, Memorandum Opinion and Order and Notice of Proposed Rulemaking, 13 FCC Rcd 24011 (1998) (*Advanced Services Order and NPRM*), petitions for recon. pending.

² ? Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56, codified at 47 U.S.C. §§ 151 *et seq.* Hereinafter, all citations to the 1996 Act will be to the 1996 Act as it is codified in the United States Code. The 1996 Act amended the Communications Act of 1934. We will refer to the Communications Act of 1934, as amended, as the "Communications Act" or as the "Act."

³ ? As in the *Advanced Services First Report and Order*, we use the term "advanced services" to mean high speed, switched, broadband, wireline telecommunications capability that enables users to originate and receive high-quality voice, data, graphics or video telecommunications using any technology. Further, as we discussed in the *Advanced Services First Report and Order*, the term "broadband" signifies sufficient capacity ("bandwidth") to transport large amounts of information. Services considered to be "broadband" will change as the underlying technology evolves. *Deployment of Wireline Services Offering Advanced Telecommunications Capability*, CC Docket No. 98-147, First Report and Order and Further Notice of Proposed Rulemaking, 14 FCC Rcd 4761, 4762 n.2 (1999) (*Advanced Services First Report and Order and FNPRM*).

⁴ ? *Advanced Services Order and NPRM*, 13 FCC Rcd at 24016, 24022-23.

⁵ ? *Id.* at 24017.

⁶ ? *Id.* at 24017, 24034-35.

⁷ ? *Id.* at 24018, 24042-50.

Commission specifically denied Bell operating company (BOC) requests for large-scale elimination or modification of local access and transport area (LATA) boundaries to allow BOCs to supply advanced services across currently recognized LATA boundaries.⁸ The Commission then adopted a Notice of Proposed Rulemaking, in which it proposed an alternative pathway for incumbent LECs to provide advanced services free from regulation if those LECs provided advanced services through separate affiliates.⁹ The NPRM also suggested rule changes to ensure that all entities offering advanced services have adequate access to collocation¹⁰ and loops,¹¹ and sought comment on the application of the unbundling rules to advanced services.¹² Finally, the Commission sought comment on the two subjects of this order: first, whether any targeted interLATA relief is necessary to ensure that rural consumers can obtain advanced telecommunications services in the same manner as other Americans, and if so, the scope of that relief,¹³ and second, the extent to which the sections of the Act that allow BOCs to provide certain incidental interLATA services¹⁴ apply to advanced services.¹⁵

2. Subsequently, on June 15, 1999, the Commission released the *Advanced Services First Report and Order and FNPRM*,¹⁶ in which we strengthened our collocation rules, adopted spectrum compatibility rules and released a Further Notice of Proposed Rulemaking in which we sought comment on whether we should require LECs to allow competitors to offer advanced services to end users over the same lines on which the LECs offer voice service. On November 9, 1999, we released the *Advanced Services Second Report and Order*¹⁷ in which we clarified that digital subscriber line services (xDSL) used to provide high-speed Internet service are not subject to the discounted resale obligations of the 1996 Act when sold in bulk to Internet Service Providers (ISPs). On November 18, 1999, we adopted the *Advanced Services Third Report and Order*,¹⁸ in

⁸ ? *Id.* at 24048.

⁹ ? *Id.* at 24050-64.

¹⁰ ? *Id.* at 24064-78.

¹¹ ? *Id.* at 24078-91.

¹² ? *Id.* at 24091-95.

¹³ ? *Id.* at 24095-99.

¹⁴ ? *See* 47 U.S.C. §§ 271(b)(3), 271(g).

¹⁵ ? *Advanced Services Order and NPRM*, 13 FCC Rcd at 24095-99.

¹⁶ ? *Advanced Services First Report and Order and FNPRM*, *supra* n.3.

¹⁷ ? *Deployment of Wireline Services Offering Advanced Telecommunications Capability*, CC Docket No. 98-147, Second Report and Order, FCC 99-330 (rel. Nov. 9, 1999) (*Advanced Services Second Report and Order*).

¹⁸ ? *Deployment of Wireline Services Offering Advanced Telecommunications Capability*, CC Docket No. 98-147, Third Report and Order, and *Implementation of the Local Competition Provisions of the Telecommunications Act of 1996*, CC Docket No. 96-98, Third Report and Order, FCC 99-355 (rel. Dec. 9, 1999) (*Advanced Services*

which we instituted line sharing obligations for incumbent LECs, and established spectrum management policies. Most recently, in the *U S WEST Remand Order*,¹⁹ we resolved the application of section 251 to advanced services.

3. Today, in this *Advanced Services Fourth Report and Order*, we take certain actions regarding LATA boundaries to further encourage the deployment of advanced services. We believe that limited modifications of LATA boundaries to allow a BOC to deploy advanced services are consistent with Congress's intent, as expressed by section 706 of the Act,²⁰ that the Commission encourage the deployment on a reasonable and timely basis of advanced services to all Americans. We conclude that it is within the authority over LATA boundaries granted to the Commission for us to approve such requests in appropriate circumstances. We adopt a two-part test that we will use to determine whether we may grant LATA boundary modification requests where necessary to encourage the deployment of advanced services. This order does not limit or otherwise circumscribe the circumstances under which the Commission may grant LATA boundary modifications, or limit the extent of the modification that the Commission may grant in particular instances. Other circumstances may exist where modifying a LATA boundary would be in the public interest and would be otherwise consistent with the Act. This order does not address or limit such circumstances.

4. We also specify criteria that a party must include in its petition for LATA boundary modifications applicable to advanced services. Applying the test and the criteria we adopt today, we deny Bell Atlantic's petition for emergency relief to allow it to provide high speed interstate interLATA connections to the Internet from Morgantown, West Virginia, to Pittsburgh, Pennsylvania. Finally, we resolve certain questions raised in the *Advanced Services Order and NPRM* regarding incidental interLATA services, and conclude that the Act, under a limited set of circumstances, permits BOCs to deploy certain incidental advanced services on an interLATA basis.

II. BACKGROUND

5. As we discuss above,²¹ in the *Advanced Services Order and NPRM*, we denied various BOC requests for large-scale elimination of LATA boundaries to provide advanced services pursuant to section 706²² and denied additional BOC requests for forbearance under section 10.²³

Third Report and Order).

¹⁹ ? *Deployment of Wireline Services Offering Advanced Telecommunications Capability*; CC Docket Nos. 98-147, 98-11, 98-26, 98-32, 98-78, 98-91, Order on Remand, FCC 99-413 (rel. December 23, 1999) (*U S WEST Remand Order*).

²⁰ ? 47 U.S.C. § 157(nt).

²¹ ? See paragraph 1, *supra*.

²² ? *Advanced Services Order and NPRM*, 13 FCC Rcd at 24049-24050.

²³ ? *Id.* at 24050; 47 U.S.C. § 160(d).

Nonetheless, we affirmed our commitment to facilitating the deployment of advanced services in a manner consistent with the procompetitive policies of the Act by requesting comment on whether some form of limited LATA modifications would be an appropriate method for allowing BOCs and their affiliates to deploy advanced services.²⁴

6. In the *Advanced Services Order and NPRM* we tentatively concluded that LATA modifications might be necessary in some cases to provide rural subscribers with the same type of high-speed access to the Internet that consumers in other parts of the country enjoy.²⁵ We sought comment on the types of targeted LATA modifications that would promote the deployment of advanced services on a reasonable and timely basis. For example, we sought comment on how to evaluate LATA modification requests that would allow a BOC to carry high-speed packet-switched traffic across current LATA boundaries so that it can connect with network access points (NAPs).²⁶ Commenters were asked to provide empirical data on the number and location of LATAs that do not contain high-speed NAPs. We also sought comment on whether the Commission has the authority to take other actions regarding LATA boundary modifications to facilitate the deployment of advanced services, and the criteria that the Commission should use to evaluate requests for such actions.²⁷

7. Additionally, the *Advanced Services Order and NPRM* requested comment on what type of documentation should be provided by a BOC seeking to qualify for a LATA boundary modification to encourage the deployment of advanced services. We asked whether the information submitted in Bell Atlantic's LATA modification request to provide high-speed connections in West Virginia is an example of appropriate documentation, and whether LATA modifications should be withdrawn or expire at a certain date if a NAP is established in the LATA.²⁸ We also sought comment on the competitive impact of permitting such LATA modifications, whether carriers other than BOCs are likely to serve areas lacking NAPs, and whether we should modify LATAs only to the extent that the advanced services are provided by a BOC affiliate rather than by the BOC.²⁹

²⁴ ? *Advanced Services Order and NPRM*, 13 FCC Rcd at 24097-98.

²⁵ ? *Id.* at 24097-98.

²⁶ ? *Id.* at 24097. See H. Newton, *NEWTON'S TELECOM DICTIONARY*, at 477 (14th ed. 1998) (Newton), for a definition of network access point.

²⁷ ? *Advanced Services Order and NPRM*, 13 FCC Rcd at 24098-99.

²⁸ ? *Id.*

²⁹ ? *Id.*

III. DISCUSSION

A. Legal Authority

8. We reject arguments that the Commission lacks the authority to approve targeted LATA boundary modifications where necessary to encourage the deployment of advanced services. The plain language of the 1996 Act and our precedent indicate that the Commission has the authority to approve such modifications to LATA boundaries.

9. On August 24, 1982, the U.S. District Court for the District of Columbia entered the Modification of Final Judgment (MFJ), in which it required AT&T to divest its ownership of the BOCs.³⁰ The U.S. District Court subsequently divided all territory in the continental United States served by the BOCs into LATAs.³¹ Under the MFJ, BOCs were permitted to provide telephone service within a LATA (intraLATA service), but were not permitted to carry traffic that crossed LATA boundaries (interLATA service).³² InterLATA traffic was to be carried by interexchange carriers.³³ Congress, in the 1996 amendments to the Act, shifted the authority over LATA boundaries from the U.S. District Court to the Commission. Sections 601(a)(1) and 601(e)(1) of the Act shift any "conduct or activity" previously subject to the AT&T Consent Decree to the requirements and obligations of the Act, as amended.³⁴ Section 3(25) of the Act defines a LATA, in part, to mean a "contiguous geographic area . . . established or modified by a Bell operating company after [February 8, 1996] and approved by the Commission."³⁵ As the Commission recently affirmed, the Act thus gives the Commission sole authority to approve any BOC action to establish or to modify LATA boundaries as they existed on February 8, 1996.³⁶

10. Given the latitude that the Act grants the Commission to approve the modification of LATA boundaries, we reject the arguments of commenters such as AT&T that suggest that our authority to approve LATA modifications is limited to that exercised by the U.S. District Court in its administration of the MFJ, or to situations analogous to those in which MFJ waivers were

³⁰ ? *United States v. American Telephone and Telegraph Co.*, 552 F. Supp. 131 (D.D.C. 1982), *aff'd sub nom. Maryland v. United States*, 460 U.S. 1001 (1983).

³¹ ? *See United States v. Western Electric*, 569 F. Supp. 990, 993-994 (D.D.C. 1983) (hereinafter *Western Electric*).

³² ? *Id.* at 994.

³³ ? *Id.*

³⁴ ? 47 U.S.C. §§ 152(a)(1), (e)(1).

³⁵ ? 47 U.S.C. § 153(25) (emphasis added).

³⁶ ? *See Application for Review and Petition for Reconsideration or Clarification of Declaratory Ruling Regarding U S West Petitions to Consolidate LATAs in Minnesota and Arizona*, NSD-297-6, Memorandum and Order, FCC 99-222 (rel. September 1, 1999) (*LATA Modification Order on Review*).

granted.³⁷ AT&T and other commenters would limit our LATA modification authority to "non-controversial" matters such as expanded local calling areas and association change petitions.³⁸ These parties assert that our authority to modify LATAs under section 3(25)(B) is "designed for, and limited to, a more modest purpose: 'to give the Commission the same authority that the district court exercised in adjusting LATA boundaries under the AT&T Consent Decree.'"³⁹ We find no such limitation in section 3(25), or elsewhere in the Act or its legislative history.

11. As we discuss below, this does not mean that our authority to modify LATAs is without limit; the limits, however, are prescribed by the provisions of the Act and not, as some commenters contend, by the MFJ.⁴⁰ Although MFJ precedent is instructive, it is not binding on the Commission's decisions regarding LATA boundary modifications. As the Commission concluded in the *LATA Modification Order on Review*, it is the Act, not the MFJ, that determines Commission authority over LATA boundaries.⁴¹

12. In section 271, Congress granted exclusive authority to the Commission to allow the BOCs to provide interLATA service.⁴² Section 271 prohibits a BOC from providing interLATA services until it has met a fourteen-point checklist to open its intraLATA markets to competition and the Commission approves the BOC's application to provide interLATA service.⁴³ Section 10(d)

³⁷ ? See Florida Digital Network Comments at 5-6; Nextlink Comments at 26-28; Cablevision Lightpath Comments at 4-5. ELCS petitions are requests for LATA boundary modifications to permit calls within certain expanded local calling service areas. See, e.g., Petitions for Limited Modifications of LATA Boundaries to Provide Expanded Local Calling Service (ELCS) at Various Locations, *Memorandum Opinion and Order*, 12 FCC Rcd 10646 (1997) (*ELCS Order*) (granting 23 requests for boundary modifications to permit calls within certain expanded local calling service areas that straddle LATA boundaries to be treated as intraLATA). LATA association modifications for independent telephone companies are requests to switch the LATAs with which small independent LECs are associated. See Petitions for LATA Association Changes by Independent Telephone Companies, *Memorandum Opinion and Order*, 12 FCC Rcd 11769 (1997) (*Association Order*) (granting requests to modify LATA boundaries to switch three independent LEC exchanges in Texas from one SAC LATA to another).

³⁸ ? AT&T Comments at 104 (quoting from *Advanced Services Order and NPRM*, 13 FCC Rcd at 24049). A list of parties that filed comments and replies in response to the *Advanced Services Order and NPRM* appears at Appendix A.

³⁹ ? *Id.* at 103-105; see also Letter from Frank S. Simone, Government Affairs Director, AT&T, to Magalie Roman Salas, Secretary, Federal Communications Commission, at 1, 2 (filed December 10, 1998) (AT&T December 10 *ex parte*); Supra Telecommunications & Information Systems Comments at 12; Transwire Comments at 42; US XCHANGE Comments at 12-13; QWEST Comments at 69; Local Telecommunications Services Comments at 69-70; MCI Comments at 87-92; Nextlink Comments at 28.

⁴⁰ ? See n.37, *supra*.

⁴¹ ? *LATA Modification Order on Review*, FCC 99-222, at para. 15-17.

⁴² ? 47 U.S.C. § 271.

⁴³ ? 47 U.S.C. § 271(c)(2)(b) sets out fourteen requirements that must be met before incumbent BOCs may provide in-region interLATA services. 47 U.S.C. § 271(d)(1) permits BOCs to apply to the Commission for interLATA service authority. 47 U.S.C. § 271(d)(3)(C) provides for the Commission to approve or deny the applications.

of the Act explicitly prohibits the Commission from taking any action that would constitute a forbearance of its authority to ensure that section 271's requirements are fully implemented.⁴⁴ In the *LATA Modification Order on Review*, the Commission affirmed the Common Carrier Bureau's conclusion that a LATA boundary modification allows a BOC to provide as intraLATA service what had previously been interLATA without satisfying the section 271 checklist, triggering the strictures of section 10(d).⁴⁵ Thus, the Commission may not grant a request that would constitute an impermissible forbearance of section 271.

13. Section 706 of the Act requires the Commission to “encourage the deployment on a reasonable and timely basis of advanced telecommunications services to all Americans.”⁴⁶ However, the Commission concluded in the *Advanced Services Order and NPRM* that section 706 is not an independent grant of forbearance authority.⁴⁷ Thus, while the Commission must seriously consider any LATA boundary modification request that would facilitate the deployment of advanced services, the Commission may only grant such a request where the request otherwise satisfies the requirements of the Act. The most pertinent sections of the Act in this regard are sections 271 and 10(d).

14. In the *ELCS Order*, the Commission adopted a two-part test to evaluate whether to grant petitions for LATA boundary modifications to permit BOCs to provide flat rate local calling service to extended local calling areas that crossed LATA boundaries. We believe that the two-prong test that the Commission adopted in the *ELCS Order* provides a model for us to analyze whether LATA boundary modifications to encourage the deployment of advanced services can satisfy both the mandate of section 706 and the limit imposed by section 10(d). In its *ELCS* analysis, the Commission first considered whether the public would benefit from the availability of local service within an expanded local calling area.⁴⁸ The Commission then considered whether the modification would constitute an impermissible section 10(d) forbearance by removing the incentive for the BOC to apply for section 271 relief.⁴⁹ The Bureau has subsequently used this

⁴⁴ ? *Id.* § 160(d).

⁴⁵ ? *LATA Modification Order on Review*, FCC 99-222, at para. 17-19.

⁴⁶ ? 47 U.S.C. § 157(nt).

⁴⁷ ? *Advanced Services Order and NPRM*, 13 FCC Rcd at 24044-48.

⁴⁸ ? Among the criteria the Bureau has used to evaluate the public benefit of a proposed modification are: the type of telephone service to be provided; whether there has been approval by the relevant state commission for the expanded local calling area; and whether the state has found that a community of interest exists in the area for which *ELCS* is sought. *ELCS Order*, 12 FCC Rcd at 10653.

⁴⁹ ? To determine whether the proposed LATA modification would reduce the BOC's incentive to file a section 271 application, the Bureau would generally look to the number of customer access lines affected by the LATA modification to determine whether the removal of these lines from the competitive interexchange market would affect the BOC's decision to open its local market and file a section 271 application. *Id.*

analysis to approve a petition filed by Southwestern Bell to provide ISDN service across a LATA boundary.⁵⁰

15. Adapting the *ELCS Order* test to analyze LATA boundary modifications would allow us to make case-by-case analyses to determine whether we can modify LATA boundaries where necessary to encourage the deployment of advanced services in a manner consistent with section 10(d) of the Act. We disagree with commenters that argue that section 10(d) permits only minor and routine LATA changes, and prohibits a LATA boundary modification to accelerate the deployment of advanced services.⁵¹ As the Commission concluded in the *ELCS Order*, "LATA modification for a limited purpose is both consistent with the statute and serves the public interest. Nothing in the statute or legislative history indicates that a LATA boundary cannot be modified for a specific purpose."⁵²

16. We adopt a two-part test for determining whether we may grant LATA boundary modifications where necessary to encourage the deployment of advanced services on a reasonable and timely basis. In the *ELCS* context, we considered first the benefit to the public that would accrue from the availability of local service within an expanded local calling area. Similarly, when evaluating a proposed LATA modification for the provision of advanced services, we will evaluate first whether the proposed LATA modification would be in the public interest. In section 706, Congress imposed an affirmative duty on the Commission to encourage the deployment of advanced services to all Americans on a reasonable and timely basis. Thus, Congress has determined that the rapid and efficient deployment of advanced services to all Americans is in the public interest. Therefore, the first prong of the test is satisfied when the Commission determines that granting the LATA boundary modification would be necessary to encourage the deployment of advanced services on a reasonable and timely basis to all Americans. Just as in the Commission's *ELCS* analysis, however, section 10(d)'s constraint on our forbearance authority precludes us from granting wholesale, unbridled LATA relief, even if it might result in more rapid deployment of certain advanced services.⁵³ Therefore, the second prong of the test requires the Commission to determine whether the level and types of services that the BOC wishes to provide would remove its incentive to apply for permission to provide other interLATA service under section 271.

17. We conclude that the Act gives the Commission the authority to grant LATA boundary modifications where necessary to encourage the deployment of advanced services to all Americans in a reasonable and timely basis. Under section 706 of the Act, we have an affirmative obligation to exercise this authority to accelerate the deployment of advanced services, as long as

⁵⁰ ? See Southwestern Bell Telephone Company Petition for Limited Modification of LATA Boundaries to Provide Integrated Services Digital Network (ISDN) at Hearne, Texas, *Memorandum Opinion and Order*, 13 FCC Rcd 13166 (Com. Car. Bur. 1998) (*Hearne*).

⁵¹ ? See AT&T December 10, 1998 *Ex Parte* at 1; Lightwave Comments at 6; PSInet Comments at 16, 17; AT&T Comments at 106; Commercial Internet Exchange Association at 32-34.

⁵² ? *ELCS Order*, 12 FCC Rcd at 10654.

⁵³ ? *Advanced Services Order and NPRM*, 13 FCC Rcd at 24047.

such action does not violate section 10(d) by circumventing or eviscerating section 271.⁵⁴ Accordingly, we adopt a two-part test as set forth above to evaluate requests to modify LATA boundaries where necessary to encourage the deployment of advanced services on a case-by-case basis.

B. Criteria for BOC Petitions for LATA Modifications

18. In order that we may evaluate requests for advanced services LATA boundary modifications on a case-by-case basis expeditiously, we will adopt criteria to help us rapidly evaluate BOC applications for LATA boundary modifications. We agree with commenters such as Telecommunications Resellers Association (TRA) that any petition for LATA modification for BOC provision of advanced services must be "seriously scrutiniz[ed]" and that the impact on competition and potential for abuse be assessed.⁵⁵ We will grant such LATA modification petitions when a BOC can show that the modification is necessary to encourage the deployment of advanced services on a reasonable and timely basis, and that granting such modification would not materially affect the BOC's incentive to enter the interexchange marketplace pursuant to section 271.⁵⁶ We believe that granting such modifications in such circumstances will help ensure that advanced services are made available to all Americans.

19. Such LATA boundary modifications would, under the proper circumstances, be especially appropriate in rural or underserved areas. For example, a BOC that provides advanced services to customers within a state may demonstrate that it cannot obtain an interLATA provider to connect its in-state network to the Internet and request a LATA modification to allow it to connect its network to the nearest out-of-state NAP.⁵⁷ A BOC could also request a LATA boundary modification to allow it to serve a particular customer, such as a hospital or university, where the customer cannot obtain an interLATA connection for its network. A BOC also may be able to demonstrate that it would not be able to deploy xDSL service to a LATA within a multi-LATA state unless the BOC is allowed to aggregate traffic from one LATA to another LATA, or may be

⁵⁴ ? We reject Bell Atlantic's position that the advanced services at issue in this order may actually be information services, distinct from telecommunications services, and thus not subject to section 271. As we stated in the *Advanced Services Order and NPRM*, advanced services are telecommunications services. *Id.*, 13 FCC Rcd at 24030. Further, we do not need to reach Bell Atlantic's contention that when a BOC provides an information service using the leased transmission facilities of a third party it is not providing telecommunications and thus not subject to interLATA restrictions where such information services are concerned. The information services referred to by Bell Atlantic, although unspecified, are acknowledged to be advanced services. See Bell Atlantic Comments at 10-11. As we discuss above, advanced services are by definition telecommunications services, to which section 271 applies.

⁵⁵ ? TRA Comments at 48.

⁵⁶ ? See n.49, *supra*.

⁵⁷ ? See NEWTON'S, *supra* n.26, at 477. We note that the definition of a NAP in this edition of Newton's would include any point where an Internet Service Provider could connect with the Internet, rather than the major NAPs that only exist in Chicago, San Francisco and New Jersey. As we discuss in paragraph 18, *infra*, in our review of any LATA boundary modification request, we will look to the specific need of the petitioner to craft the narrowest modification possible to supply advanced services to the BOC's customers. In this regard, we will look for the closest NAP that would allow the BOC to provide advanced services to its customers.

the advanced services provider of last resort for residential customers within a particular state. The BOC may then argue that it is uneconomical to deploy advanced services to such customers without a LATA boundary modification.

20. We are committed to reviewing requests by BOCs for LATA modifications that would provide customers with advanced services in an expeditious manner. We do not believe that it is in the best interest of consumers, the BOCs, or the Commission to adopt a cumbersome, time-consuming review process that would unnecessarily delay the timely deployment of advanced services.⁵⁸ Therefore, we will require a BOC petitioner to make a very specific showing in its initial petition. To help BOCs file pleadings that comply with our particularity requirement, we adopt a non-exclusive list of criteria that must be addressed by the petitioning BOC.

21. BOC compliance with the specific pleading criteria we adopt today is essential if our review of BOC petitions is to be timely and rapid.⁵⁹ The Bureau will seek comment on petitions that address the criteria set forth below on an expedited basis. We require the petitioning BOC to serve its state commission with a copy of the petition, and encourage state commissions to participate in our proceeding. We agree with the Illinois Commerce Commission (ICC) that states must be given an opportunity to comment.⁶⁰ The Commission will pay particular attention to the views of the affected state on whether a LATA modification will serve the public interest.

22. We believe this process will give the requesting BOC a full opportunity to seek a LATA modification, and at the same time allow the Commission to review the request rapidly, in a manner that both makes the most effective use of the Commission's limited resources and assures the customer the most rapid deployment possible of advanced services. We believe that the showing we are requiring today will also allow us to resolve requests for LATA modification in a manner consistent with the Act.

23. In the *Advanced Services Order and NPRM*, the Commission asked for comment on the criteria we should use in evaluating requests for LATA boundary modifications to provide advanced services.⁶¹ The comments in response to the NPRM provide part of the basis for the criteria we adopt today. The *Advanced Services Order and NPRM* also asked whether the request filed by Bell Atlantic for a LATA boundary modification to provide high-speed connections in West Virginia is an example of appropriate documentation, and whether LATA modifications should be withdrawn or expire at a certain date if a network access point is established in the LATA.⁶² Although, as we conclude below, the lack of specificity in the Bell Atlantic request serves

⁵⁸ ? Comptel Comments at 51; *see also* Ameritech Comments at 70; AT&T Reply Comments at 94.

⁵⁹ ? Requests for LATA modifications that do not include the information specified below may be dismissed by the Bureau without prejudice for the requesting carrier to renew in accordance with our requirements.

⁶⁰ ? ICC Comments at 17.

⁶¹ ? *Advanced Services Order and NPRM*, 13 FCC Rcd at 24098.

⁶² ? *Id.*

as one of the bases for our rejection of that request, the record in the West Virginia proceeding gives us a strong indication of what should be in a petition for a request to modify LATA boundaries to encourage the deployment of advanced services on a reasonable and timely basis.

24. We conclude that for the Commission to determine if the suggested LATA modification is consistent with our mandate pursuant to section 706 and sufficiently narrow to avoid a violation of section 10(d), BOCs must provide documentation that the area to which the LATA boundary modification would apply would encourage the deployment of advanced services in a reasonable and timely manner,⁶³ and that allowing the BOC to provide that service would not impair its incentive to file an application to provide other interLATA services under section 271.⁶⁴ As required on a case-by case basis, we anticipate that such documentation will generally require the petitioning BOC to identify, at a minimum, the customer(s) to be provided with advanced services if the LATA modification is granted, the service to be provided (including the bit rate required and protocols used to provide the service),⁶⁵ the physical mode of transport, (*e.g.*, fiber, microwave), the path that the network connection would take under the proposed LATA modification,⁶⁶ and the BOC's efforts to obtain interLATA advanced services.⁶⁷ We will also examine the quality of advanced services currently being provided, the affordability of such services,⁶⁸ and other information that, on a case-by-case basis, may be necessary for us to properly evaluate LATA modification requests.⁶⁹ Thus, a BOC must include the following criteria to the extent applicable in any request for LATA boundary modification to supply advanced services:

(i) the customer (or customers) and type of customer (*e.g.*, business, residential,

⁶³ ? U S WEST Comments at 54; MDPS Comments at 21.

⁶⁴ ? See TRA Comments at 49; Covad Comments at 63.

⁶⁵ ? See U S WEST Comments at 54.

⁶⁶ ? See MDPS Comments at 21; Northpoint Communications at 39-49.

⁶⁷ ? We anticipate that many of the requests for the type of LATA boundary modification we discuss today will be made in the context of a BOC's attempt to provide an integrated service package to a customer. Thus, the issue of whether we will permit BOCs, under certain circumstances, to provide high-speed, packet-switched data transport across current LATA boundaries is a decision that it is unlikely that the end-user customer would be involved in (or perhaps even be aware of). Certainly if the customer obtains the interLATA link, there would be no need for relief; however, we anticipate that the entities most likely to attempt to obtain interLATA data transport on the BOC's behalf would be the BOC, its ISP affiliate, or the Global Service Provider (GSP) contracted by the BOC or its ISP to provide interLATA transport. As a result, we believe that the BOC, as the party requesting a LATA boundary modification, bears the responsibility to provide information concerning the efforts that it has made, or that parties acting on its behalf have made, to obtain interLATA data transport from entities otherwise authorized to provide it.

⁶⁸ ? For example, the Minnesota Department of Public Service (MDPS) argues that the BOC should explain how its plan would provide advanced services to that rural area at lower cost than is currently available, and commit to following through on the projected lower cost. MDPS comments at 21.

⁶⁹ ? For example, in appropriate cases, we will look to see whether the BOC has complied with all state and federal rules relating to collocation and the availability of ADSL, HDSL, and ISDN compatible loops. See Ameritech Comments at 71-72; Northpoint Communications Comments at 39-49.

- government, schools, nonprofit) to be served;
- (ii) the specific service or services currently provided, or to be provided, to that customer. (*e.g.*, Internet access, virtual private network, E-mail, or last mile to the customer.)
 - (iii) the capacity (or bit rate) required to provide the service;
 - (iv) the protocols to be used to provide the service (*e.g.*, IP,⁷⁰ ATM,⁷¹ IP over SONET,⁷² ATM over SONET);⁷³
 - (v) the physical mode of transport (*e.g.*, fiber, microwave);
 - (vi) the path that the network would take if the LATA modification were to be granted, with a map of the proposed modification indicating the location of the nearest NAP⁷⁴; and,
 - (vii) efforts made to obtain interLATA access from an interexchange carrier (IXC), or other provider of interLATA services, *e.g.*, whether a Request for Proposal (RFP) was issued in appropriate circumstances, or whether the requesting BOC (or any Global Service Provider or Internet Service Provider (ISP) that the BOC has contracted to obtain interLATA service) has attempted to obtain service from non-traditional interLATA providers such as utility telecommunications providers.
 - (viii) any response, or offer to supply advanced service, received from another provider of

⁷⁰ ? The Internet can be defined as a "network of networks." See *e.g.*, Kevin Werbach, Digital Tornado: The Internet and Telecommunications Policy, OPP Working Paper No. 29, at 45 (Mar. 1997) (*Digital Tornado*). "IP or Internet Protocol," as defined by D. Comer, Internet Working with TCPIP, Vol. 1, p. 572, 585 (1995), is the TCPIP protocol suite that defines the IP datagram as the unit of information passed across the Internet and provides the basis for connectionless, best-effort, packet-delivery service. The entire Internet protocol suite is often referred to as TCPIP because TCP and IP are the two fundamental protocols contained within the suite.

⁷¹ ? "ATM or Asynchronous Transfer Mode" (ATM) is a very high-speed transmission technology that is characterized as a high bandwidth, low-delay, connection-oriented, packet-like switching and multiplexing technique. See NEWTON'S, *supra* n.26, at 67-68.

⁷² ? "IP over SONET" means that IP is used to transmit data over Synchronous Optical Network (SONET). SONET is a family of fiber-optic transmission rates from 51.84 Megabits per second to 13.22 Gigabits per second. *Id.* at 663-64.

⁷³ ? "ATM over SONET" means that ATM is used to transmit data over SONET. This definition, as with the three previous definitions, is by no means exclusive. We anticipate technology to continue to evolve. For example, IP over dense wavelength division multiplexing (DWDM) provides a simplified and more efficient transport mechanism for IP packets over fiber.

⁷⁴ ? See *supra* n.57, for the definition of a NAP.

interLATA transport.⁷⁵ The BOC should describe the quality of the service(s) offered by available interLATA providers; the affordability of the service(s); and include any other information that may be needed on a case-by-case basis.

25. We emphasize that the purpose of this order is to provide criteria by which we can grant tailored LATA modifications to ensure that advanced services are provided to all Americans on a reasonable and timely basis. To ensure that advanced services are provided where relief is granted, we agree with the Minnesota Department of Public Service that, where a BOC argues that it requires a LATA boundary modification to supply advanced services prospectively (*e.g.*, where a lack of interLATA transport precludes a BOC from offering broadband over the last mile to a rural area within a particular LATA), the BOC be required to commit to supplying those services as a precondition to its being granted the requested relief.⁷⁶ As part of this commitment, the requesting BOC must commit to install the specified advanced service facilities in the areas specified, and must include a timetable for construction and operation of those facilities. The BOC must also explain how its plan would provide advanced services to that rural area at lower cost than is currently available, and commit to actually providing the service at the projected lower cost.⁷⁷

26. Further, we reiterate that any relief we may grant to ensure that all Americans receive the benefits of advanced services will be narrowly tailored. We do not intend, by granting any LATA modification, to enable a BOC (or its affiliate) to provide full Internet backbone or other broadband infrastructure services either within a state or across multiple states. For the Commission to allow a BOC to provide backbone services to the public prior to the BOC's being granted permission to provide interLATA services pursuant to section 271 could greatly diminish the BOC's incentive to seek section 271 relief, and thus, as we discuss in paragraph 12 above, could violate section 10(d) of the Act.

27. As we noted in the *Advanced Services Order and NPRM*, Bell Atlantic filed a petition asking that we modify LATA boundaries to allow it to provide high-speed connections between West Virginia's two LATAs and between West Virginia and the nearest Internet access points located in other states.⁷⁸ Many parties responded to our request for comment by discussing in detail the Bell Atlantic request for interLATA high-speed bandwidth relief in West Virginia and the need for interLATA high bandwidth relief in rural areas. As we mention above, the petition filed by Bell Atlantic has provided us with a good opportunity to discuss what type of information

⁷⁵ ? The Act requires that a BOC seek Commission approval for any LATA modification it proposes. 47 U.S.C. § 3(25). We expect a petitioning BOC to demonstrate a timely, good faith, thorough effort to obtain the required interLATA service, such that the failure to obtain this service at the time of the filing of its petition cannot be attributed to inaction on the part of the BOC, its Global Service Provider (GSP, *see* n.81, *infra*), or the end-user customer. Similarly, we will not look with favor upon last-minute, post-filing offers by interLATA providers to supply the requested service where the record shows that the interLATA service provider was aware of the need for advanced services and effectively declined to provide it when offered an opportunity to do so.

⁷⁶ ? Minnesota Department of Public Service Comments at 21.

⁷⁷ ? *Id.*

⁷⁸ ? *Advanced Services Order and NPRM*, 13 FCC Rcd at 24098.

should be provided in requests to carry advanced services across LATA boundaries, whether in rural areas so that such traffic may be connected to the nearest NAP, or in any other area where a LATA boundary modification would be necessary to encourage the deployment of advanced services on a reasonable and timely basis. Accordingly, for the reasons set forth above, and to provide clarity to the process we will use to evaluate such case-by-case requests, we will apply the test we adopt today to resolve Bell Atlantic's petition in this order.

C. Bell Atlantic Petition for InterLATA High-Speed Bandwidth Relief in West Virginia

1. Background.

28. On July 23, 1998, Bell Atlantic-West Virginia (Bell Atlantic) filed a petition for emergency relief to allow Bell Atlantic to provide high speed interstate interLATA connections to the Internet from Morgantown, West Virginia to Pittsburgh, Pennsylvania.⁷⁹ In its request, Bell Atlantic states that it needs the requested relief to allow Bell Atlantic Internet Solutions, Bell Atlantic's Internet service provider affiliate, to provide high speed Internet access to the West Virginia Network for Educational Computing (WVNET).⁸⁰ Bell Atlantic Internet Solutions had been selected to supply the service to WVNET after submitting the winning bid to a request for proposal by WVNET. In pertinent part, the RFP had required that the current WVNET 22 Mbps Internet connection between Morgantown and Pittsburgh be upgraded via multiple dedicated DS-3s to two higher speed 34 Mbps connections to Internet access points in Charleston and Morgantown, West Virginia. Although Bell Atlantic Internet Solutions had won the bid to provide the high speed Internet service, "the award was partially based on the understanding that ICON, Bell Atlantic Internet Solutions's Global Service Provider ...⁸¹ had already secured DS-3 facilities from IXCs for both West Virginia Internet access points."⁸²

29. Notwithstanding this understanding on WVNET's part, Bell Atlantic concedes that ICON, a non-facilities-based ISP, had been unable to obtain the required high-speed connection between Morgantown and Pittsburgh. In its pleading, Bell Atlantic also stated that the problem with the WVNET Morgantown to Pittsburgh connection was indicative of a "high bandwidth famine" that exists within the state of West Virginia. According to Bell Atlantic, this "famine" has frustrated the West Virginia Development Office and Bell Atlantic in their joint efforts to attract and retain information services and other high technology companies under the Office of the Future

⁷⁹ ? Petition of Bell Atlantic-West Virginia for Authorization to end West Virginia's Bandwidth Crisis (Bell Atlantic Petition).

⁸⁰ ? West Virginia Network for Educational Computing, the West Virginia state network, supplies, *inter alia*, Internet connectivity to West Virginia's State government agencies, public libraries, K-12 schools, and universities. Bell Atlantic Request, Affidavit of Henry J. Blosser, Director of West Virginia Network for Educational Computing, dated July 13, 1998 (Blosser Affidavit), at 1.

⁸¹ ? A "Global Service Provider" is the non-BOC carrier that a BOC ISP uses to carry its traffic across LATA boundaries.

⁸² ? Blosser Affidavit at 1.

program.⁸³ Bell Atlantic asserts that in order to fully ameliorate this bandwidth "famine," it would be insufficient merely to allow Bell Atlantic to provide the DS-3 from Morgantown to Pittsburgh for the limited purpose of satisfying the contract with WVNET until other capacity was available. Rather, Bell Atlantic notes, its network was designed to satisfy user needs at "high speed (OC-3 or higher), on an ATM technology platform, with extensive (29 ring) SONET route diversity incorporated into the network for reliability," and that the "few strands of fiber or one SONET ring" that was being supplied by other bandwidth providers was not sufficient interLATA access.⁸⁴ Bell Atlantic argues that the only way for it to fully utilize its network would be to grant Bell Atlantic permanent broad-based LATA modifications. Thus, Bell Atlantic requests us not only to allow it to provide a DS-3 from Morgantown, West Virginia to Pittsburgh, Pennsylvania, but also to allow Bell Atlantic to provide transport between other LATAs within and without West Virginia.⁸⁵

30. Bell Atlantic argues that the Commission has the legal authority to provide the requested relief pursuant to section 706 of the Act or, in the alternative, as a LATA boundary modification pursuant to the Commission's authority under section 3(25) of the Act. On July 28, 1998, the Bureau released a Public Notice soliciting comments in response to the Bell Atlantic request.⁸⁶

2. Discussion

31. For the reasons indicated below, we deny Bell Atlantic's request. To the extent that Bell Atlantic requests a LATA modification to allow it to provide DS-3 capacity⁸⁷ between Morgantown, West Virginia and Pittsburgh, Pennsylvania, we dismiss that request as moot. To the extent that the Bell Atlantic request, because of the alleged lack of high-bandwidth capacity in West Virginia, seeks more general LATA modifications to allow Bell Atlantic to deploy its network on a more widespread interstate/interLATA basis, we deny Bell Atlantic's request as unsupported by the current record. If Bell Atlantic believes that any lack of bandwidth in West Virginia justifies

⁸³ ? Bell Atlantic Petition at 6. The West Virginia Development Office established with Bell Atlantic the Office of the Future program to attract and retain information services and high-technology companies. *Id.*

⁸⁴ ? Bell Atlantic Reply at 9. A "SONET Ring" refers to SONET transmission. Transmission systems are ideally laid out in a physical ring for purposes of redundancy. In practice, the topology often is that of a linear ring, which is linear in its physical appearance. See NEWTON'S, *supra* n.26, at 665.

⁸⁵ ? See Letter from Patricia E. Koch, Assistant Vice President, Federal Regulatory, Bell Atlantic, to Magalie Roman Salas, Secretary, Federal Communications Commission (filed September 10, 1998) (Bell Atlantic September 10 *ex parte*) (attachment entitled "Proposed Network for K-12, Higher Ed and State Agencies).

⁸⁶ ? See Request by Bell Atlantic-West Virginia for Interim Relief Under Section 706, or, in the alternative, a LATA Boundary Modification, *Public Notice*, DA 98-1506 (rel. July 28, 1998). Comments and reply comments on the petition were due on August 10, 1998, and August 15, 1998, respectively. On August 17, 1998, Bell Atlantic filed a motion to extend its time to reply, and it filed its reply on August 21, 1998. In the interests of creating as complete a record as possible, we grant Bell Atlantic's motion to file a late reply.

⁸⁷ ? "DS3" is a digital signal rate of 44.736 Mbs, corresponding to the North American T3 designator. See Telecom Glossary of Terms, National Communications System Technology and Standards Division (Aug. 7, 1996).

further relief, it may file a petition for LATA modification in accordance with the criteria we adopt today.

32. We first deny Bell Atlantic's request to provide interLATA high bandwidth service between Morgantown, West Virginia and Pittsburgh, Pennsylvania. In our review of the responsive pleadings to the Bell Atlantic request, we note that most parties opposed Bell Atlantic's request,⁸⁸ arguing, *inter alia*, that the request is moot because sufficient bandwidth already exists in West Virginia to satisfy the WVNET contract,⁸⁹ or would exist shortly.⁹⁰ Further, on August 14, 1998, ICON filed an *ex parte* letter in which ICON stated that it had procured sufficient bandwidth to supply the Morgantown to Pittsburgh connection.⁹¹ In subsequent *ex parte* meetings with Bell Atlantic, other parties to the proceeding, and a representative of the State of West Virginia,⁹² it became clear that ICON had established the 34 mbps connection between Morgantown to Pittsburgh. Although it was also clear that the system was not running at the 34 mbps called for in the RFP, and that other problems prevented WVNET from operating at its maximum capacity,⁹³ these problems did not arise from the unavailability of DS-3 capacity between Morgantown and Pittsburgh, but rather from ICON's failure to obtain capacity that had been available at the time. In this regard we note that a number of commenters argue that not only did they have the capacity to provide the DS-3 at the time ICON said such capacity was unavailable from Morgantown to Pittsburgh, but also insist that they have the capacity to provide the bandwidth requested by any of the businesses that Bell Atlantic alleges are unable to obtain interLATA connections. Thus, because the stated factual predicate for Bell Atlantic's emergency request no longer exists, Bell Atlantic's request to supply interLATA Internet service from Morgantown to Pittsburgh must be dismissed as moot.

⁸⁸ ? A list of parties that filed opposition and reply comments in response to the Bell Atlantic West Virginia Petition may be found in Appendix B. Only U S WEST and the National Organization of Development Organizations (NADO) supported Bell Atlantic's request for relief.

⁸⁹ ? See, e.g., AT&T Opposition to Bell Atlantic Petition at 2; Helicon Opposition to Bell Atlantic Petition at 2; Intermedia Opposition to Bell Atlantic Petition at 4; KMC Opposition to Bell Atlantic Petition at 5; WorldCom Opposition to Bell Atlantic Petition at 3.

⁹⁰ ? Allegheny Opposition to Bell Atlantic Petition at 4; FibreNet Opposition to Bell Atlantic Petition at 3; MCI Opposition to Bell Atlantic Petition at 3.

⁹¹ ? *Ex parte* letter from David L. Gore, Vice President, Business Affairs and General Counsel, ICON CMT Corp., to Magalie Roman Salas, Secretary, Federal Communications Commission FCC., dated August 10, 1998 (ICON *ex parte*).

⁹² ? Notice of Permit but Disclose *ex parte* Presentation in the Matter of the Emergency Petition of Bell Atlantic-West Virginia for Authorization to end West Virginia's Bandwidth Crisis, NSD No. L-98-99, September 22, 1998, telephone conversation among Anna M. Gomez, Acting Chief, Network Services Division, Gregory Cooke, Network Services Division, David Ward, Network Services Division, and Linda Kinney, Policy Division with Matthew W. Brown, Manager of the Communications Center for the Information Services and Communications Division of the West Virginia Department of Administration.

⁹³ ? *Id.*

33. We also deny Bell Atlantic's request that we approve a LATA modification to let Bell Atlantic fully deploy its network across LATA boundaries because of a purported lack of high bandwidth both within and across West Virginia's borders. Bell Atlantic's initial request does not specify the scope of the relief requested. In the Bell Atlantic September 10, 1998 *ex parte*, Bell Atlantic narrows its request to the extent that it requests that we make West Virginia a single-LATA state for the purposes of dealing with the State of West Virginia as a customer, and to allow Bell Atlantic to transport Internet traffic for the State to the nearest NAP, whether in-state or out-of-state. Further, Bell Atlantic requests that, for its call center customers, we allow Bell Atlantic to carry its traffic to the nearest IXC point of presence (POP) without regard for LATA boundaries. The attachment to the September 10 *ex parte* specifies some of the transport capacity requested, but does not indicate that any attempt was made to obtain this capacity from other sources. Further, the attachment states that "facilities shown are not necessarily dedicated to Internet traffic," thus allowing the possibility that the requested capacity also could be used to carry voice traffic over the public switched telephone network (PSTN).

34. The Bell Atlantic Petition bases its request that we allow it to transport data across current LATA boundaries initially pursuant to section 706.⁹⁴ Because the request would allow Bell Atlantic to transport significant interLATA traffic, the request is essentially identical to the global LATA relief that Bell Atlantic requested, and which we denied, in the *Advanced Services Order and NPRM*.⁹⁵ As we concluded in that order, section 706 does not constitute an independent grant of authority to allow the Commission to forbear from ensuring that section 271 is fully implemented,⁹⁶ and cannot, by itself, serve as the basis for granting relief from LATA boundary restrictions. Accordingly, we reject Bell Atlantic's request to the extent that the request is based on section 706.

35. As an alternative to its section 706 request, Bell Atlantic also requests modifications to the current intrastate and interstate LATA boundaries in West Virginia pursuant to the Commission's authority under section 3(25). As we discuss above, we conclude today that in order for the Commission to grant LATA relief pursuant to section 3(25) to promote the deployment of advanced services, we will apply a two-part test. We first must determine whether the LATA relief is necessary to encourage the deployment of advanced services on a reasonable and timely basis. If we determine that it does, then we must ensure that, by approving the LATA relief, we would not be forbearing from enforcement of section 271 before it is fully implemented. Bell Atlantic, however, has failed to supply sufficient specific evidence of a "bandwidth famine" to allow us to apply either prong of the test.

⁹⁴ ? Bell Atlantic Petition at 1.

⁹⁵ ? See, e.g., AT&T Opposition to Bell Atlantic Petition at 7; Allegheny Opposition to Bell Atlantic Petition at 3; Comptel Opposition to Bell Atlantic Petition at 3; Intermedia Opposition to Bell Atlantic Petition at 4; KMC Opposition to Bell Atlantic Petition at 2; Sprint Opposition to Bell Atlantic Petition at 2; WorldCom Opposition to Bell Atlantic Petition at 8 (citing *Advanced Services Order and NPRM*, 13 FCC Rcd at 24095-96).

⁹⁶ ? *Advanced Services Order and NPRM*, 13 FCC Rcd at 24044-48.

36. First, Bell Atlantic has failed to establish that there is a "bandwidth famine" in West Virginia, *i.e.*, that specific interLATA connections were otherwise unavailable absent a LATA modification.⁹⁷ Without a definitive demonstration that granting the LATA boundary modification is necessary to encourage the deployment of advanced services to all Americans on a reasonable and timely basis, we cannot conclude that Bell Atlantic West Virginia's LATA boundary modification request would be consistent with our mandate under section 706. As we discuss above, capacity exists for the Morgantown/Pittsburgh connection. Further, Bell Atlantic has made no showing that it has sought -- and been denied -- the capacity it seeks in the September 10 *ex parte*. There is also a dispute about whether interLATA providers are contacted early enough by Bell Atlantic when it initiates the process of supplying advanced services to schools or businesses to allow such interLATA providers the opportunity to supply the interLATA portion of the connection in a reasonable and timely fashion.⁹⁸ For example, AT&T argues that it did not respond to the WVNET RFP because it was never contacted by ICON, and had no evidence of the contact in its records. According to AT&T, ICON contacted Tel-Save, an AT&T reseller, whose refusal to supply the service cannot be attributed to AT&T.⁹⁹ It would not be in the public interest to grant a LATA modification request for a bandwidth deficiency that was in any part created or facilitated by a BOC's inaction. Similarly, although it is not the case before us today, it would not serve the public interest to deny such a request when the interLATA provider had full opportunity to provide the requested service in a timely basis, and declined to do so until the BOC filed its petition for a LATA modification.

37. It is also significant to note that a number of comments in the proceeding have been filed by new entrant, non-common carrier providers of high bandwidth infrastructure. Notwithstanding Bell Atlantic's characterization of such providers as providing "a few strands of fiber or a SONET ring," many of these entities, notably, power company affiliates such as AEP Communications and Allegheny Connect Communications, Inc., have sophisticated networks and have adopted business plans that target markets such as West Virginia.¹⁰⁰ We believe that it is consistent with the intent of Congress in adopting section 706 that we encourage the entry into the high bandwidth infrastructure market of new entrants committed to supplying advanced services to rural areas.

38. Second, although the Commission's authority over LATA boundaries is broad, as we discussed in the *Advanced Services Order and NPRM*, large-scale changes in LATA boundaries for advanced services could effectively eliminate LATA boundaries for such services, and thus circumvent the procompetitive incentives for opening the local market to competition that Congress

⁹⁷ ? A number of parties maintain that they have been able to provide any interLATA capacity requested by customers in West Virginia. *See, e.g.* AT&T Comments at 107, 108; AT&T Opposition to Bell Atlantic Petition at 5; FiberNet Opposition to Bell Atlantic Petition at 2-4; Hyperion Opposition to Bell Atlantic Petition at 1-2; Helicon Opposition to Bell Atlantic Petition at 2.

⁹⁸ ? AT&T Comments at 107-108.

⁹⁹ ? AT&T Opposition to Bell Atlantic Petition at 3-4.

¹⁰⁰ ? *See* Allegheny Opposition to Bell Atlantic Petition at 4.

sought to achieve in enacting section 271 of the Act.¹⁰¹ The widespread nature of Bell Atlantic's request could result in the kind of LATA boundary change that significantly expands a LATA beyond the state's boundary, a change that we have determined is generally prohibited by section 10(d). We conclude that Bell Atlantic's request as pled is too broad, and its allegations concerning a "bandwidth famine" insufficiently specific to allow the Commission to grant the requested relief, without providing relief so "far-reaching" that it could "effectively eviscerate section 271."¹⁰² For these reasons, we deny Bell Atlantic's petition for a LATA boundary modification, without prejudice for Bell Atlantic to refile its request under the criteria we adopt today.

D. Other LATA Issues

1. Incidental InterLATA Services

39. Background. The *Advanced Services Order and NPRM* sought comment on the scope of section 271(b)(3) of the Act, which permits BOCs and their affiliates to provide certain "incidental interLATA services,"¹⁰³ as defined in section 271(g). Additionally, we sought comment on whether "the ability to provide other incidental interLATA services as defined in [section] 271(g) affects a BOC's ability to deploy advanced services on a reasonable and timely basis."¹⁰⁴

40. Discussion. We conclude that the "incidental interLATA services" permitted under section 271(g) are to be construed narrowly. Section 271(h) clearly requires that "the provisions of section 271(g) are intended to be narrowly construed."¹⁰⁵ The wording of section 271(h) reflects Congress' awareness that a broad reading of section 271(g)'s exceptions could adversely affect implementation of sections 251 and 271. Just as we rejected in the *Advanced Services Order and NPRM* BOC requests for the creation of large-scale multiple-state LATAs for broadband services,¹⁰⁶ we are concerned here that a reading of "incidental interLATA services" that would exceed the specific exceptions listed in section 271(g) could effectively eliminate LATA boundaries for such services and result in merely a different means by which BOCs would attain the type of regulatory forbearance prohibited by section 10(d). We therefore reject suggestions that we broadly construe the incidental interLATA exception.¹⁰⁷

¹⁰¹ ? *Advanced Services Order and NPRM*, 13 FCC Rcd at 24049-50.

¹⁰² ? *Id.*

¹⁰³ ? *Id.*

¹⁰⁴ ? *Id.*

¹⁰⁵ ? 47 U.S.C. § 271(h).

¹⁰⁶ ? *Advanced Services Order and NPRM*, 13 FCC Rcd 24049-50.

¹⁰⁷ ? "The NPRM asks whether the existing exceptions to section 271 for 'incidental interLATA services' are sufficient to enable the BOCs to cure these infrastructure shortages ... the answer is clearly no. The traffic that these exceptions permit the BOCs to carry is simply too thin to justify building the needed facilities." See U S WEST Comments at 52-53.

2. LATA Boundary Modifications for Elementary and Secondary Schools

41. Background. In the *Advanced Services Order and NPRM*, we sought comment on whether additional relief beyond the incidental interLATA authority in section 271(g)(2) would help ensure that elementary and secondary schools and classrooms have adequate access to advanced services.¹⁰⁸ We tentatively concluded that LATA boundary modifications to ensure that elementary and secondary schools could avail themselves of certain advanced services would be acceptable where the school district straddles a LATA boundary. We also asked commenters whether other types of LATA modifications were necessary to encourage the deployment of advanced services in elementary and secondary schools.¹⁰⁹ Further, in evaluating requests for advanced services, we asked whether we should adopt the same criteria as used in the expanded local calling service proceedings and whether such services should be offered by a BOC affiliate rather than the BOC itself.¹¹⁰

42. Discussion. Section 271(g)(2) permits BOCs and their affiliates to provide, as an incidental interLATA service, "two-way interactive video services or Internet services over dedicated facilities to or for elementary and secondary schools."¹¹¹ This language is thorough and comprehensive, and consequently, we conclude that the Commission need not authorize additional LATA modifications to ensure that school districts avail themselves of advanced services, nor do we need to adopt the criteria used in the expanded local calling service proceedings in determining whether the BOC can provide two-way interactive video services or Internet services to elementary and secondary schools.

43. Section 271(g)(2) of the Act is clear that, where elementary and secondary schools are concerned, the definition of "incidental interLATA service" permits the provision of "two-way interactive video services or Internet services over dedicated facilities." None of the commenters contends otherwise. Given the clear statutory language, we do not believe that rules are necessary to implement this subsection. We emphasize, however, that the language of section 271(g)(2) explicitly limits the provision of interLATA advanced services to elementary and secondary schools on a dedicated basis. A carrier would be exceeding its statutory authority if it were to provide advanced services on an interLATA basis to other entities, such as universities or state Internet sites, without requesting permission from the Commission to do so in the manner required by this order.

44. U S WEST is one of the few commenters that states that additional relief is needed if elementary and secondary schools are to be provided with the advanced services specified in section 271(g)(2). U S WEST contends that it does not make economic sense to build a full data

¹⁰⁸ ? *Advanced Services Order and NPRM*, 13 FCC Rcd at 24096-97.

¹⁰⁹ ? *Id.*

¹¹⁰ ? *Id.*

¹¹¹ ? 47 U.S.C. § 271(g)(2).

network solely to serve Internet traffic generated by these schools.¹¹² Implicit in U S WEST's comments is the assumption that certain school districts will not be served and, thus, the plain language in section 271(g)(2) is inadequate. To address this situation, U S WEST suggests that BOCs be allowed to carry general data traffic over facilities constructed to serve schools; this broader authority, U S WEST contends, would allow BOCs to spread costs across other services. Ameritech states that the implication by the Commission that BOCs would be able to serve elementary and secondary schools represents an empty gesture because Congress granted BOCs such authority over two years ago.¹¹³ Ameritech also states that the procedure by which the Commission would approve LATA boundary modifications -- on a "LATA-by-LATA" or "customer-by-customer" basis -- would be cumbersome and time consuming.¹¹⁴ Ameritech favors a process by which broader relief can be quickly approved. We are not persuaded by U S WEST's general assertions, nor by Ameritech's concerns. They fail to provide evidence to support their statements. Neither U S WEST nor Ameritech overcome the statutory mandate that we construe section 271(g) narrowly. If, for example, U S West believes that the authority under section 271(g) (2) is too narrow, it may submit a LATA modification pursuant to the order we adopt today.

IV. CONCLUSION

45. The actions we take today should encourage the deployment of advanced services in a manner consistent with the Act and the public interest. We believe that where a BOC is carrier willing to provide broadband services to its customers in a certain market, a modification of LATA boundaries to allow them to provide such services may be consistent with Congress's intent that the Commission encourage the deployment of advanced services to all Americans on a reasonable and timely basis. We conclude that it is well within the broad authority over LATA boundaries granted to the Commission under the Act for us to approve such requests in appropriate circumstances. The criteria that a BOC must satisfy on a case-by-case basis should ensure the rapid deployment of advanced services to customers in rural or underserved areas while not encouraging anticompetitive behavior by the BOC. Further, because the factual predicate for the Petition of Bell Atlantic West Virginia has become moot, the Petition is accordingly dismissed.

V. FINAL REGULATORY FLEXIBILITY CERTIFICATION

46. Supplemental Final Regulatory Flexibility Certification. In the *Non-Accounting Order*,¹¹⁵ the Commission concluded that the rules adopted in that Order pertain to only Bell Operating Companies (BOCs), which do not qualify as small entities under the Regulatory Flexibility Act (RFA).¹¹⁶ We note again that each BOC is an affiliate of a Regional Holding

¹¹² ? U S WEST Comments at 54-55.

¹¹³ ? Ameritech Comments at 70.

¹¹⁴ ? *Id.* at 70-71.

¹¹⁵ *Non-Accounting Safeguards Order*, 11 FCC Rcd at 22077-70, paras. 357-61.

¹¹⁶ See 5 U.S.C. § 603. The RFA, see U.S.C. § 601. *et. seq.*, has been amended by the Contract With

Company, and that all of the BOCs and their RHCs have more than 1,500 employees, placing these entities above the small business size standard established by the Small Business Administration.¹¹⁷

47. The Commission will send a copy of this *Fourth Report and Order and Memorandum Opinion and Order*, including a copy of this final supplemental certification, in a report to Congress pursuant to the Small Business Regulatory Enforcement Fairness Act of 1996.¹¹⁸ In addition, the *Fourth Report and Order and Memorandum Opinion and Order* and this certification will be sent to the Chief Counsel for Advocacy of the Small Business Administration, and will be published in the Federal Register.¹¹⁹

VI. ORDERING CLAUSES

48. Accordingly, **IT IS ORDERED** that, pursuant to sections 1-4, 10, 201, 202, 251-253, 271, and 706 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 151-154, 160, 201, 202, 251-253, 271, 157nt, the FOURTH REPORT AND ORDER is hereby **ADOPTED**. The requirements adopted in this Order shall be effective 30 days after publication of a summary thereof in the Federal Register. The collection of information contained within is contingent upon approval by the OMB.

49. **IT IS FURTHER ORDERED** that, pursuant to section 3(25) of the Communications Act of 1934, as amended by the Telecommunications Act of 1996, 47 U.S.C. § 153(25), and pursuant to section 1.3 of the Commission's rules, 47 C.F.R. § 1.3, that the Petition of Bell Atlantic-West Virginia for Interim Relief Under Section 706, or, in the Alternative, a LATA Boundary Modification, **IS DENIED**.

50. **IT IS FURTHER ORDERED** that the Commission's Consumer Information Bureau, Consumer Information Center, SHALL SEND a copy of this FOURTH REPORT AND ORDER AND MEMORANDUM OPINION AND ORDER, including the Final Supplemental regulatory Flexibility Certification, to the Chief Counsel for Advocacy for the Small Business Administration.

FEDERAL COMMUNICATIONS COMMISSION

America Advancement Act of 1996, Pub. L. No. 104-121, 110 Stat. 847 (1996)(CWAAA). Title II of the CWAAA is the Small Business Regulatory Enforcement Fairness Act of 1996 (SBREFA).

¹¹⁷ SBA regulations, 13 C.F.R. § 121.201, define small telecommunications entities in SIC Code 4813 (Telecommunications Communications, Except Radiotelephone) as entities with no more than 1, 500 employees

¹¹⁸ See 5 U.S.C. § 801(a)(1)(A)

¹¹⁹ See 5 U.S.C. § 605(b)

Magalie Roman Salas
Secretary

APPENDIX A**List of Commenters to the
Advanced Telecommunications Services NPRM
CC Docket No. 98-147****Comments
September 25, 1998**

1. ADC Telecommunications, Inc.
2. Ad Hoc Telecommunications Users Committee
3. Alliance for Public Technology
4. Allegiance Telecom, Inc.
5. America Online, Inc.
6. America's Carriers Telecommunications Association (ACTA)
7. Ameritech
8. Association for Local Telecommunications Services (ALTS)
9. AT&T Corp.
10. Bell Atlantic
11. BellSouth Corporation
12. Cable & Wireless, Inc.
13. Cablevision Lightpath, Inc.
14. Central Texas Telephone Cooperative, Inc.
15. Cincinnati Bell Telephone Company
16. Coalition of Utah Independent Internet Service Providers
17. Commercial Internet Exchange Association
18. Communications Workers of America
19. Competition Policy Institute
20. Competitive Telecommunications Association (CompTel)
21. Computer & Communications Industry Association
22. Consumer Federation of America
23. Copper Mountain Networks, Inc.
24. Cottonwood Communications
25. Covad Communications Company
26. CTSI, Inc.
27. e.spire Communications, Inc.
28. Federal Trade Commission
29. First Regional TeleCOM, LLC and FirstWorld Communications, Inc.
30. Florida Digital Network, Inc.
31. Florida Public Service Commission
32. General Services Administration
33. GST Telecom Inc.
34. GTE Service Corporation
35. GVNW Inc.
36. Hyperion Telecommunications, Inc.

37. ICG Telecom Group, Inc.
38. Illinois Commerce Commission
39. Indiana Utility Regulatory Commission
40. Information Technology Association of America
41. Intermedia Communications Inc.
42. Internet Access Coalition
43. Internet Service Providers' Consortium
44. Keep America Connected, United Homeowners Association, Alpha One, American Council on Education, National Braille Press, National Association of Commissions for Women, the National Trust for the Development of African American Men, National Association for College and University Business Officers, Latin American Women and Supporters, Harlem Consumer Education Council, National Latino Telecommunications Task Force, Northern Virginia Resource Center for the Deaf and Hard of Hearing, Maine Coordinating Committee, Florida Association for the Deaf, American Telemedicine Association, World Institute on Disability, The Massachusetts Assistive Technology Partnership, and National Association of Development Organizations
45. Kiesling Consulting LLC
46. KMC Telecom, Inc.
47. Level 3 Communications, Inc.
48. MachOne Communications, Inc.
49. McLeodUSA Telecommunications Services, Inc.
50. MCI WorldCom, Inc.
51. MGC Communications, Inc.
52. Mindspring Enterprises, Inc.
53. Minnesota Department of Public Service
54. Moultrie Independent Telephone Company
55. National Rural Telecom Association and the Organization for the Promotion and Advancement of Small Telephone Companies (NRTA/OPASTCO)
56. National Telephone Cooperative Association
57. Network Access Solutions, Inc.
58. Network Plus, Inc.
59. New Networks Institute (Bruce Kushnick)
60. New World Paradigm, Ltd.
61. New York Department of Public Service
62. NEXTLINK Communications, Inc.
63. Northern Telecom, Inc.
64. Northpoint Communications Inc.
65. OpTel, Inc.
66. Paradyne Corporation
67. Paging and Messaging Alliance of the Personal Communications Industry Association
68. Paging Network, Inc. (PageNet)
69. People of the State of California and PUC of California
70. PSINet, Inc.
71. Public Utility Commission of Texas
72. Qwest Communications Corporation

73. RCN Telecom Services, Inc.
74. Rhythms NetConnections, Inc.
75. Rural Telecommunications Group
76. SBC Communications Inc.
77. Sprint Corporation
78. Supra Telecommunications and Information Systems, Inc.
79. Tandy Corporation
80. Technology Entrepreneurs Coalition
81. TCA, Inc.
82. Telecommunications Resellers Association
83. Telehub Network Services Corporation
84. Time Warner Telecom
85. Transwire Communications, Inc.
86. United States Small Business Association
87. United States Telephone Association
88. UTC
89. U S WEST Communications, Inc.
90. US Xchange, LLC
91. Virtual Hipster (Shad Nygren)
92. Warner, Jim
93. Washington Association of Internet Service Providers
94. Westel, Inc.
95. Williams Communications, Inc.
96. xDSL Networks, Inc.

Reply Comments - October 16, 1998

1. Allegiance Telecom, Inc.
2. ALLTEL Communications Services Corporation
3. Ameritech
4. Association for Local Telecommunications Services (ALTS)
5. AT&T Corp.
6. Aware, Inc.
7. Bell Atlantic
8. BellSouth Corporation
9. Coalition of Utah Independent Internet Service Providers
10. Commercial Internet Exchange Association
11. Consumer Federation of America
12. Covad Communications Company
13. CTSI, Inc.
14. DSL Access Telecommunications Alliance
15. e.spire Communications, Inc.
16. Excel Telecommunications, Inc.
17. Florida Digital Network, Inc.
18. General Services Administration

19. GST Telecom Inc.
20. GTE Service Corporation
21. Hyperion Telecommunications, Inc.
22. Intermedia Communications Inc.
23. Keep America Connected, United Homeowners Association, Harlem Consumer Education Council, National Latino Telecommunications Task Force, American Telemedicine Association, National Association of Development Organizations, Alpha One, and The World Institute on Disability
24. KMC Telecom, Inc.
25. Level 3 Communications, Inc.
26. MachOne Communications, Inc.
27. MCI WorldCom, Inc.
28. MGC Communications, Inc.
29. Mindspring Enterprises, Inc.
30. Moultrie Independent Telephone Company
31. National Cable Television Association
32. National Rural Telecom Association and the Organization for the Promotion and Advancement of Small Telecommunications Companies
33. National Telephone Cooperative Association
34. Network Access Solutions, Inc.
35. Network Plus, Inc.
36. New World Paradigm, Ltd.
37. Next Level Communications
38. NEXTLINK Communications, Inc.
39. Northpoint Communications Inc.
40. Qwest Communications Corporation
41. RCN Telecom Services, Inc.
42. Rural Telecommunications Group
43. SAC Communications Inc.
44. Sprint Corporation
45. Telecommunications Resellers Association
46. Telehub Network Services Corporation
47. Teligent, Inc. and Net2000 Group, Inc.
48. Time Warner Telecom
49. Transwire Communications, Inc.
50. United States Small Business Association
51. United States Telephone Association
52. Universal Service Alliance
53. U S WEST Communications, Inc.
54. Verio Inc.
55. Virgin Islands Telephone Corporation

APPENDIX B

**List of Commenters to the
Request by Bell Atlantic-West Virginia for Interim Relief
Under Section 706, or, in the Alternative,
a LATA Boundary Modification
NSD-L-98-99**

Comments

1. AT&T
2. Allegheny Communications Connect, Inc.
3. The Competitive Telecommunications Association (CompTel)
4. FibreNet, L.L.C.
5. The Helicon Group (Competing fiber provider)
6. Hyperion Telecommunications, Inc.
7. Intermedia Communications, Inc.
8. The Internet Service providers' Consortium (ISPC)
9. KMC Telecom, Inc
10. MCI
11. National Organization of Development Organizations (NADO)
12. Sprint
13. US WEST
14. WorldCom

Replies

1. AT&T
2. Ameritech
3. Bell Atlantic
4. BellSouth
5. Commercial Internet Exchange Association
6. Hyperion Telecommunications
7. Keep America Connected et al.
8. MCI/WorldCom
9. Northpoint Communications
10. QWEST Communications
11. Sprint
12. Transwire Communications
13. US West