

limitations associated with xDSL technology, so that they can offer more advanced services to more customers.<sup>45</sup>

In the *First Interconnection Order*, the Commission recognized that subloop unbundling would give new entrants greater flexibility and found no evidence of technical infeasibility in the record.<sup>46</sup> The Commission declined to mandate subloop unbundling only because several ILECs claimed mostly administrative obstacles to subloop unbundling, such as the identification, provisioning, billing and maintaining of subloop elements, and the Commission found the record insufficiently developed with respect to possible network reliability concerns.<sup>47</sup>

The comments filed in this proceeding, however, should now persuade the Commission to favor subloop unbundling. Several commenters have remarked on the enormous potential of xDSL technologies, for example, and the importance of subloop unbundling in ensuring the success of xDSL.<sup>48</sup> The record simply reveals no prohibitive technical, economic or logistical liabilities associated with subloop unbundling.

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<sup>44</sup> Comments of WorldCom, Inc., to the *Notice of Inquiry* in CC Dkt. No. 96-263, at 23 (March 24, 1997) [hereinafter *WorldCom Comments*]; MCI Comments at 13; IAC Comments at 45-46.

<sup>45</sup> IAC Comments at 45-46; see *supra*, note 9 & accompanying text.

<sup>46</sup> 11 FCC Rcd 15499, para. 390.

<sup>47</sup> *Id.* at paras. 390-391.

<sup>48</sup> MCI Comments at 11-13; IAC Comments at 18-22. In addition, the competitive entry which would be stimulated by such unbundling may inspire ILECs to deploy their own technologies.

3. In addition to subloop unbundling, the Commission should require equal access and interconnection for competitive data service providers and ISPs.

Packet technologies, not the circuit-switched network, are best suited for data traffic.<sup>49</sup> As discussed above, to facilitate the growth of data traffic, it is important to route such traffic to a packet environment as soon as possible in the network path. Yet current rules do not require ILECs to offer competing packet network providers either efficient interconnection opportunities at central offices or competitively neutral, *i.e.*, "equal," access. These limitations impede competing providers and ISPs from diverting data traffic from the circuit-switched network prior to reaching the local switch, thereby nullifying the potential benefits associated with packet technology. The Commission should amend its rules to require such interconnection, thereby making the potential efficiencies of packet technology available sooner.

4. The Commission should require that ILECs provide collocation of transmission, switching and enhanced service equipment on nondiscriminatory terms.

In many cases, competing data transmission providers and ISPs will be able to deploy innovative data technologies only if they can collocate equipment, such as xDSL modems, in ILEC end offices and elsewhere within ILEC networks.<sup>50</sup> The Commission's current interconnection rules restrict such collocation opportunities.

As noted by the Internet Access Coalition, although Congress recognized the considerable advantages of physical collocation in Section 251 of the 1996 Act, it

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<sup>49</sup> See MCI Comments at 6-7; IAC Comments at 47-48.

<sup>50</sup> See IAC Comments at 49.

failed to address several situations in which collocation would be valuable.<sup>51</sup> For example, only CLECs can take advantage of the Commission's Section 251 collocation rules.<sup>52</sup> Therefore, ISPs that do not become CLECs cannot collocate at an ILEC end office, thereby blocking an effective means of furnishing their own data transport services. Moreover, even a CLEC cannot physically collocate certain types of equipment, including splitters, routers, modem pools, and file servers, essential to the provision of competitive data services.<sup>53</sup>

"Virtual collocation" under the *Expanded Interconnection*<sup>54</sup> rules offers only a small improvement. Virtual collocation allows an interconnector to monitor and control equipment remotely.<sup>55</sup> The rules do not require collocation of switching or other equipment necessary to provide enhanced services, and, while virtual collocators are not required to be common carriers, they still must provide fiber optic or microwave connections to an ILEC's central office.<sup>56</sup> Thus, it is unlikely that ISPs, which seldom own transport facilities, will be able to benefit from virtual collocation.

The Internet Access Coalition points out that these constraints are not necessarily indicative of the Commission's desire to exclude ISPs from virtual

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<sup>51</sup> See *id.* at 49-50.

<sup>52</sup> *First Interconnection Order*, *supra*, note 18, at para. 611; 47 C.F.R. § 51.323 (a).

<sup>53</sup> *Id.* at paras. 579-581; 47 C.F.R. § 51.323 (c).

<sup>54</sup> See, *infra*, note 56.

<sup>55</sup> 47 C.F.R. § 64.1401(e).

<sup>56</sup> *Expanded Interconnection with Local Telephone Company Facilities*, Report and Order and Notice of Proposed Rulemaking, 7 FCC Rcd 7369, para. 94 & note 224 (1992); 47 C.F.R. § 64.1401(e)(1), (2).

collocation opportunities.<sup>57</sup> Instead, the record in earlier proceedings reflects that these restrictions were born out of the Commission's single-minded intention to promulgate rules that would enable new entrants to offer competitive telecommunications services.<sup>58</sup> The Commission simply did not focus on the needs of ISPs and their customers when it adopted the virtual collocation rules. It is time that it does so.

Finally, although the Commission recently adopted rules (pursuant to Section 272 of the 1996 Act) that entitle ISPs to limited collocation of enhanced service equipment,<sup>59</sup> these opportunities are ineffectual in many respects. First, they apply only to collocation with Bell Operating Company ("BOC") facilities. Second, because the purpose of the new collocation requirements is to preclude BOCs from discriminating in favor of their own ISP affiliates, a BOC must allow collocation by other ISPs only when the BOC is allowing its own ISP affiliate to collocate equipment.<sup>60</sup> Absent such circumstances, a non-affiliated ISP is out of luck.

The benefits of collocation are incontrovertible.<sup>61</sup> Where feasible, the Commission should at a minimum require *all* ILECs to allow virtual collocation of all forms of transmission, switching and enhanced service equipment on a

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<sup>57</sup> IAC Comments at 51.

<sup>58</sup> See, e.g., *Expanded Interconnection*, *supra*, note 56, 7 FCC Rcd 7369 at para. 93 & note 221.

<sup>59</sup> *Implementation of the Non-Accounting Safeguards of Sections 271 and 272 of the Communications Act of 1934*, CC Dkt. No. 96-149, First Report and Order and Further Notice of Proposed Rulemaking, FCC 96-489 (released December 24, 1996) at para. 221.

<sup>60</sup> *Id.*

<sup>61</sup> See IAC Comments at 26-49.

competitively neutral basis, whether or not they are allowing their own ISP affiliates to collocate its equipment.

5. **The Commission should require access elements and sub-elements to be priced according to their Long-Run Incremental Costs.**

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As discussed above, the Ad Hoc Committee endorses the comments that have urged the Commission to require use of a Long-Run Incremental Cost ("LRIC") standard in pricing access services and elements.<sup>62</sup> The records developed in prior proceedings, where the Commission has adopted or is considering a pricing standard based on forward-looking incremental costs, demonstrate that the benefits of LRIC pricing are significant: It allows ILECs to earn a fair rate of return on their investment; it discourages ILECs from providing bottleneck facilities at rates higher than the ILECs' economic costs; and it creates incentives for competitive and efficient entry by competing carriers.<sup>63</sup> For these reasons, the Commission should adopt LRIC pricing for unbundled Part 69 access elements.

III. **THE COMMISSION SHOULD NOT EXTEND ACCESS CHARGES OR A SIMILAR REGULATORY REGIME TO ISPs.**

Several commenters – predominantly, the ILECs and their allies – have focused on a single quick fix for the PSTN's failings with respect to data services. Their uninspired and self-serving answer to the network's technical

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<sup>62</sup> *Id.* at 52-54; MCI Comments at 6; Worldcom Comments at 8-9.

<sup>63</sup> *First Interconnection Order*, 11 FCC Rcd 15499, paras. 618-619 (1996); *Access Charge Reform*, CC Dkt. No. 96-262, Notice of Proposed Rulemaking, FCC 96-488 (rel. Dec. 24, 1996) (*Access Charge Reform NPRM*) at paras. 223-27; IAC Comments at 52-54.

inadequacies is to extend to ISPs the obligation to pay access charges. In the alternative, they would impose some new form of charge on ISPs' use of the ILECs' facilities<sup>64</sup> to boost the (already significant) revenues the ILECs currently derive from the provision of data services.<sup>65</sup>

Ignoring for a moment the glaring impropriety of raising this issue in this proceeding -- given that the Commission discussed it, tentatively settled it, and solicited comments on it in the related *Access Charge Reform* proceeding -- the proposal is legally indefensible and unsupportable as a policy matter. The ILECs are already garnering huge windfalls from their provision of data services. The Commission should not allow them to further line their pockets on the hope that they will use their riches to build better data networks. There is no assurance that ILECs will make good on their promises, and even if they did, their construction of new facilities would do nothing to advance competitive entry -- the best way to meet marketplace needs. Finally, imposition of access or other usage charges on ISPs would suppress demand for their services and nip a promising, fast-developing industry in the bud. Such a result would be contrary

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<sup>64</sup> See, e.g., PacTel Comments at 17; Bell Atlantic/NYNEX Comments at 13; USTA Comments at 15; US West Comments at 28. A number of these commenters inaccurately refer to the imposition of access or other usage charges on ISPs as removal or elimination of the "ESP exemption." For the sake of verbal economy, the Ad Hoc Committee will adopt that terminology here, but it does not mean to suggest thereby that the Commission did in fact exempt ISPs from payment of access charges. As explained in Section III.D., below, since ISPs are *users*, rather than carriers, they were never intended to be subject to the access charge regime, and therefore did not have to be "exempted." See *MTS and WATS Market Structure*, Memorandum Opinion and Order, 97 F.C.C.2d 682, paras. 80-90 (1983).

<sup>65</sup> For a discussion of the revenues the ILECs earn from the provision of data services, see *infra*, Section III.D.

to Congressional intent as expressed in the 1996 Act<sup>66</sup> and at odds with the Commission's own statement that it is "disinclined to take actions that would stifle, rather than enhance, the development of the Internet, or similar packet-switched networks."<sup>67</sup>

**A. Attempts to Re-Argue the ESP Exemption Issue, Under Consideration in the *Access Reform* Proceeding, Should Be Rejected and Such Comments Should Either Be Stricken As Unauthorized Pleadings or Limited as *Ex Parte* Contacts.**

In the *Access Charge Reform NPRM*<sup>68</sup> the Commission tentatively determined that ESPs should not be required to pay access charges.<sup>69</sup> Comments and reply comments have been filed in that proceeding and parties have presented their views in numerous *ex parte* contacts at the Commission since the comment rounds closed. Parties that wanted to address the Commission's proposal with respect to the so-called "ESP exemption"<sup>70</sup> have had ample opportunity to do so. They should not be given another bite at the apple in this proceeding.

Because the question of imposing access charges on ESPs was raised in the *Access Reform* proceeding, and not even mentioned in the NOI, the Commission should strike the portions of comments that have been filed in this

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<sup>66</sup> See *supra*, note 28.

<sup>67</sup> NOI at para. 315.

<sup>68</sup> *Supra*, note 63.

<sup>69</sup> *Access Charge Reform NPRM* at para. 288.

<sup>70</sup> See *supra*, note 64.

docket that deal with that issue as unauthorized pleadings because they are unresponsive to the NOI.

In the alternative, to the extent that parties are permitted to address the so-called "ESP exemption" again, the Commission should treat their submissions here as *ex parte* contacts concerning an issue raised in the *Access Reform* proceeding. As *ex parte* contacts, they are subject to the ten-page limit the Commission prescribed in the *Access Charge Reform NPRM*.<sup>71</sup> Thus, the Commission should, at most, limit commenting parties' arguments *for or against* the "ESP exemption" to ten pages, perhaps selected by the commenters themselves.

That said, the Ad Hoc Committee is compelled to respond substantively to the sheer number of words that commenters have devoted to the so-called "ESP exemption."

Advocates of eliminating the ESP exemption, that is, those proposing to extend access charges or some new government-sanctioned usage fee on ESPs, cite four primary reasons for their request: First, they claim that it would give the ILECs the incentive (and the means) to build more data-friendly networks.<sup>72</sup> Second, they claim that it would decrease use of the PSTN for information services, presumably by decreasing demand generally, but also, they claim, by encouraging information service users to move to other

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<sup>71</sup> *Access Charge Reform NPRM* at para. 341.

<sup>72</sup> *E.g.*, USTA Comments at 8-9; PacTel Comments at 14, 25; Comments of AT&T Corp., on the *Notice of Inquiry* in CC Dkt. No. 96-263, at 18-19 (March 24, 1997) [hereinafter *AT&T Comments*].

networks.<sup>73</sup> Third, they allege that ESPs are similarly situated to interexchange carriers and therefore should be subject to the same regulatory regime.<sup>74</sup>

Finally, some have argued that ISP traffic is inherently interstate, and thus ISPs should pay federal access charges rather than state business line rates.<sup>75</sup> Each of these arguments is easily dissembled.

**B. Removal of the ESP Exemption Will Not Encourage the ILECs to Deploy Data-Friendly Networks.**

It is counterintuitive to suggest that increasing the revenues ILECs can earn from services provided over their existing networks will create the incentive for them to invest in building new data-friendly networks. Yet, this is what the ILECs and their supporters have suggested.<sup>76</sup>

They would have the Commission forget that they are monopolists. Until there are competitive alternatives to their circuit-switched networks, and as long as they are reaping revenues from those networks, the ILECs have no impetus to build new networks that will essentially compete with their old ones. In this regard, CompuServe/Prodigy have commented<sup>77</sup> that

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<sup>73</sup> *Which* other networks is an issue they do not address. See, e.g., Bell Atlantic/NYNEX Comments at 12; USTA Comments at 8; Southwestern Bell Comments at 4; PacTel Comments at 33-35.

<sup>74</sup> E.g., Comments of America's Carriers Telecommunications Association on the *Notice of Inquiry* in CC Dkt. No. 96-263, at 4 (March 24, 1997) [hereinafter *ACTA Comments*]; USTA Comments at 15.

<sup>75</sup> E.g., US West Comments at 8, 22; USTA Comments at 2; AT&T Comments at 28; GTE Comments at 31.

<sup>76</sup> See *supra*, note 71; see also PacTel Comments, Exhibit A, "Surfing the Second Wave," at 26.

<sup>77</sup> CompuServe/Prodigy Comments at 8.  
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as long as the incumbent local telephone companies retain their dominant market power in the local marketplace, they will lack the incentive to upgrade their existing circuit-switched networks to provide a more data-friendly fast packet network environment more suitable for carrying enhanced services traffic.

Similarly, MCI has criticized the ILECs' "incentive" argument<sup>78</sup> as

turn[ing] the notion of the competitive market on its head. . . . Where competitive companies see the increased demand for enhanced services as a meaningful revenue opportunity worthy of new investment, the [ILECs] want the money up-front and will decide later whether to make the investments or not.

MCI raises a crucial point, echoed by GSA/DOD: Although the ILECs claim that they would have an "incentive" to build more data-friendly networks if they were permitted to impose access or usage charges on ESPs, "there is no way to ensure that the revenues generated from a hypothetical access charge would be used to invest in a network that can accommodate more traffic."<sup>79</sup>

The ILECs' lack of motivation to build new networks is not about lack of money; it is about a lack of competition. They can not credibly claim that they require revenues from ESP access or usage charges to finance the construction of new networks. The revenues ILECs derive from data services -- both from ESPs and their customers -- more than compensate ILECs for the cost of providing those services and indeed have brought them big profits. Thus, the

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<sup>78</sup> MCI Comments at 3.

<sup>79</sup> GSA/DOD Comments at 10.

ILECs' claims that they are losing money on information services are contradicted by the evidence.

First, ILECs earn substantial revenues from the subscriber line charges ("SLCs") paid by their ISP customers. Most of the ISPs subscribe to numerous business lines, each of which has a monthly SLC cap of \$6.00. According to GSA/DOD,<sup>80</sup> given the difference between the SLCs that multi-line business users and residential subscribers pay,

information service providers are paying more than their fair share of the access charges on end users. In any event, they should not be required to pay any additional access charges that other business users do not pay.

Since business lines are not priced below cost, the ILECs are making money on them.<sup>81</sup> And this does not even include revenues they earn from providing other services that ESPs use, such as hunt groups, Direct Inward Dialing, and connection and installation.<sup>82</sup>

Second, the profits ILECs derive from second lines used by the ISPs' customers to access information services are considerable. Because the ILECs have been installing two or more lines in most residences for years,<sup>83</sup> the

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<sup>80</sup> GSA/DOD Comments at 8.

<sup>81</sup> See Economics and Technology, Inc., "The Effect of Internet Use on the Nation's Telephone Network," prepared for the Internet Access Coalition (Jan. 22, 1997) (hereinafter cited as "ETI Study") (Exhibit C to IAC Comments filed March 24, 1997) at 25.

<sup>82</sup> ETI Study at 25; IUC Comments at 34.

<sup>83</sup> ETI Study at 24 & note 47 (citing Deposition of William L. Vowell (March 11, 1996), PUC R.93-04-003/I.93-04-002, vol.1 at 143).

provision of second-line service to residential customers means nothing more to the ILECs than putting idle capacity to use. And put it to use they have.

According to the Commission, almost 15% of U.S. households had second-line service by the end of 1995.<sup>84</sup> PacTel reported last October that, as of September, 1996, the number of residential second lines it had in service jumped 105% over the number of such lines for the entire previous year.<sup>85</sup> And Bell Atlantic has predicted that one-third of the nation's households will have second lines by the year 2000.<sup>86</sup>

The revenues produced by all these second lines should not be overlooked: \$1.4 billion in 1995.<sup>87</sup> With these kinds of revenues being generated by use of the existing network for information services, it is difficult to imagine how the imposition of access or usage charges would encourage the ILECs to build new networks to which information services might migrate. The "economic incentive" argument fails the straight-faced test.

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<sup>84</sup> FCC Industry Analysis Division, "Percentage of Additional Residential Lines for Households with Telephone Service" (End of Year Data) (December 6, 1996).

<sup>85</sup> "Pacific Telesis Continues Earnings Growth in Third Quarter," (October 17, 1996) (downloaded from <http://www.pactel.com/cgi-bin/getrel?1309>) at 1 (cited in IUC Comments at 33).

<sup>86</sup> "Network Services, Strategic Overview" (downloaded from <http://www.bellatl.com/invest/businvpr/netserv/overview.htm>) at 3 (cited in IUC Comments at 33).

<sup>87</sup> ETI Study at 26; David Braun, "Baby Bells Score \$1.4B From Net," *TechInvestor* (March 13, 1997) (downloaded from <http://www.techweb.com/80/investor/newsroom/tinews/mar/0313bells.html.body?>) (cited in IUC Comments at 33).

C. Elimination of the ESP Exemption Would Thwart the Commission's Goal of Promoting the Development of the Internet Because It Would Suppress Demand for Information Services.

As noted above, several of the ILEC commenters have asserted that imposition of access or usage charges on ESPs would reduce the use of the PSTN for ISP traffic.<sup>88</sup> These parties suggest that some form of usage charges would spur ESPs to migrate to other networks, but given the scarcity of competitive alternatives to the ILECs' networks, this argument is dubious at best. Indeed, the Internet Users Coalition notes that economic incentives are unnecessary to drive ESPs from the PSTN to new more advanced data networks. The Coalition writes<sup>89</sup> that

[t]here is every indication that users who want more data-friendly networks and/or less congestion will demand it, and will vote with their feet . . . . Therefore, an ISP already has a powerful, direct economic incentive to adopt more efficient service.

Whether or not alternative data networks are available, the ILECs are correct about one thing: Imposing access or usage charges on ESPs would reduce the demand for the ILECs' services – by suppressing demand for information services and (without mandatory unbundling of network elements and sub-elements) forcing ESPs to pay for network elements and services that they do not want and that are inadequate for their needs.

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<sup>88</sup> See *supra*, note 72.

<sup>89</sup> IUC Comments at 11.

As the Internet Users Coalition has pointed out, competition among ESPs has already driven their profit margins to razor-thin levels.<sup>90</sup> The Coalition hypothecates<sup>91</sup> that

[t]he result [of imposing access charges on ISPs] is likely to be widespread industry fallout, which in turn would lead to less competition, less innovation, and insufficient consumer choice. The IUC believes that, therefore, ISPs are far more likely to pass these new costs along to users.

The Coalition goes on to predict that ESPs affiliated with the well-financed ILECs would be in the best position to absorb access or usage charges and therefore would be less likely to pass those costs along to their customers, thereby obtaining a competitive advantage over non-ILEC-affiliated ISPs.<sup>92</sup>

As noted above, not only has Congress stated a policy objective of encouraging the proliferation of advanced information services,<sup>93</sup> but the Commission, too, has indicated its strong resistance to any action that would impede the development of those services and the technologies on which they depend.<sup>94</sup> Inasmuch as the imposition of new charges on ESPs would discourage the growth of the Internet and other information services, such a plan

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<sup>90</sup> IUC Comments at 15 (citing Wayne Rash, Jr., "Expensive Access Lessons Loom for Internet Users," *Communications Week* (January 13, 1997)).

<sup>91</sup> IUC Comments at 15.

<sup>92</sup> *Id.*

<sup>93</sup> *See supra*, note 28.

<sup>94</sup> *See supra*, note 67.

would contravene the objectives of both Congress and the Commission and disserve the public interest.

**D. The ESP Exemption Does Not Unreasonably Discriminate Against Interexchange Carriers Because Interexchange Carriers and ESPs Are Not Similarly Situated Customers of Access Services.**

Certain commenters have argued that the Commission must permit imposition of access charges on ESPs because they are similarly situated customers of the ILECs' interstate access services, and thus must be treated on a nondiscriminatory basis, with interexchange carriers ("IXCs") who pay access charges.<sup>95</sup> This argument is flawed on several levels.

First, as the Commission found when it decided not to impose access charges on ESPs, such providers are users of network services, not carriers.<sup>96</sup> That same conclusion is warranted today. ESPs do not provide transmission services to their customers; IXCs do. IXCs use the ILEC networks to originate and terminate interexchange traffic, most of which is voice. ESPs use ILEC facilities to allow the ESPs' customers to access their services; the traffic is local and is almost entirely data traffic. Thus, ESPs and IXCs are not similarly situated customers of the ILECs.

Second, as business users of ILEC facilities, ESPs must be treated in a nondiscriminatory fashion, relative to other similarly situated business users. For example, there is little operational difference between a pizza delivery service's use of ILEC facilities and that of an ESP; nor is there any meaningful

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<sup>95</sup> ACTA Comments at 4; USTA Comments at 15.

<sup>96</sup> *MTS and WATS Market Structure*, 97 F.C.C.2d 682, paras. 77-90 (1983).

difference between another business user's customer service call center and an ESP's server. In both examples, the traffic patterns of both the ESP and the non-ESP users are both predominantly inbound. And yet, there is no outcry to make pizza delivery services pay interstate access charges. There is no legal or policy basis for allowing ILECs to discriminate between similarly situated classes of users, as they propose to do.<sup>97</sup> To allow the ILECs to impose such charges on ESPs would be to sanction unreasonable discrimination in violation of Section 202(a) of the Communications Act.

As the Commission Office of Plans and Policy has recognized, the Commission should not apply to Internet-related issues the same approaches it has used for years when dealing with telecommunications services.<sup>98</sup> It would be a serious mistake for the Commission to try to pigeonhole ISPs and the valuable services they provide into regulatory paradigms that were developed well before the types of information services available today emerged. In its attempts to promote these new advanced services, the Commission should look forward, not back.

**E. ILECs' Claims that the ESP Exemption Has Done More Harm Than Good Are Unsubstantiated and Misleading.**

Several commenters have argued that Internet usage has been detrimental to LEC networks, and that the ESP exemption has exacerbated the alleged "problem" by not requiring ESPs to compensate ILECs fully for data

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<sup>97</sup> See GSA/DOD Comments at 5-8; WorldCom Comments at 16-17.

<sup>98</sup> *Digital Tornado* at 26.

traffic.<sup>99</sup> Specifically, these commenters have argued that the continuation of the ESP exemption will result in network congestion and inadequate ILEC investment in the PSTN, which, in turn, will harm customers by unreasonably delaying the migration of Internet traffic to data networks, accelerating deterioration of the PSTN, and raising reliability concerns.<sup>100</sup>

There is no reliable evidence that ESPs are in fact causing any serious congestion in the PSTN. Instead, ILEC claims appear to be based primarily on anecdotal evidence or isolated incidents which ignore the true nature of Internet traffic and cannot reasonably be generalized to apply to all such traffic.<sup>101</sup> For example, the Internet Access Coalition, GSA/DOD and others point out that most ESP traffic occurs during off-peak periods, when the network is not otherwise being used.<sup>102</sup> Under these circumstances, information services should, contrary to the ILECs' allegations, have a comparatively *limited* impact on network capacity requirements. Indeed, far from imposing heavy costs on the PSTN, the increase in data traffic arguably should result in more efficient use of network capacity than would otherwise exist.<sup>103</sup> Moreover, because interoffice trunks are

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<sup>99</sup> GTE Comments at 20-23; PacTel Comments at 3-4; Bell Atlantic/NYNEX Comments at 4-9; USTA Comments at 7.

<sup>100</sup> USTA Comments at 7; PacTel Comments at 3.

<sup>101</sup> IUC Comments at 23-27; MCI Comments at 21; IAC Comments at 7-13, and note 21, citing (ETI Study); ETI Study at 52.

<sup>102</sup> IAC Comments at 8-9 (citing ETI Study); GSA Comments at 14-15; IUC Comments at 26-27.

<sup>103</sup> IAC Comments at 9; IUC Comments at 26-27. It is unclear, moreover, how many ILEC studies have failed to take into account the off-peak nature of ISP traffic. See, e.g. GTE Comments at 10-13.

distributed to ensure redundant call paths, it is unlikely that ESP traffic could be of such a volume as to block all paths between two ILEC central offices.<sup>104</sup>

The limited data that *is* available concerning changes in the ILECs' traffic volumes tells a story far different from that which the ILECs are peddling. As Exhibit A<sup>105</sup> hereto demonstrates, between 1980 and 1995, the ILECs' average daily total Dial Equipment Minutes ("DEMs") per local loop increased from 46 to 52 minutes, but the number of those minutes that represented local calls were actually less in 1989-1995 than they were in 1980-1988 -- before the Internet emerged.

Between 1980 and 1995, the percentage of DEMs associated with local calls decreased while the percentage associated with intra- and interstate toll calls jumped by 63%. Thus, ILECs' claims that the increased use of their networks to place local calls to ISPs has congested their networks are contradicted by their own data.

Other data also discredits the ILECs' claims that Internet traffic is congesting their networks. As Exhibit B<sup>106</sup> illustrates, between 1990 and 1995 -- a period during which the Internet went from relative obscurity to surging popularity -- the ILECs' average local exchange originating minutes per line per day did not increase significantly, and in several cases, not at all. Where they

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<sup>104</sup> IUC Comments at 24, (citing ETI Study at 8).

<sup>105</sup> FCC, Industry Analysis Division Common Carrier Bureau, *Trends in Telephone Service* (March 1997) at 35-6 (*Exhibit A*).

<sup>106</sup> 1996 NECA Report, 1996 Monitoring Report, "Local Exchange Originating Minutes Per Subscriber Line Per Day 1990-1995." (*Exhibit B*).

*did* increase, the change was generally modest, and indeed a number of ILECs experienced a *decrease* in originating local exchange minutes between 1990 and 1995. In light of this clear repudiation of the ILECs' congestion claims, the Commission should critically evaluate the merits of those claims before according them any weight whatsoever.

Whatever congestion may have occurred, however, is likely the result of the ILECs' inertia, that is, their failure to open their networks and properly invest in up-to-date technologies that would facilitate the efficient flow of data traffic, not the result of the ESP exemption.<sup>107</sup> The Internet Access Coalition has proposed several relatively simple modifications, such as load balancing, switch deloading and rational pricing of trunk-side connections, that ILECs could implement immediately to allow data traffic to move more efficiently over the PSTN.<sup>108</sup> In addition, several telecommunications companies have introduced new products and services that could reroute data traffic around ILEC bottlenecks.<sup>109</sup> At the same time, many technological solutions (e.g. xDSL) rely on "open network" environments discussed in Parts I and II above, which subloop unbundling and equipment collocation would help to achieve.<sup>110</sup>

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<sup>107</sup> See, WorldCom Comments at 18 ("any purported network traffic problems created by Internet growth should be addressed by pursuit of technological means in the marketplace, rather than regulatory strictures at the Commission").

<sup>108</sup> IAC Comments at 10-14, *citing ETI Study*; see also *Digital Tornado* at 53-54.

<sup>109</sup> WorldCom Comments at 18-19; MCI Comments at 7-10.

<sup>110</sup> In addition, increased bandwidth will facilitate efforts to avoid congestion. See WorldCom Comments at 19; MCI Comments at 7-8.

The Commission should reject any claims that link the ESP exemption to the ILECs' failure to transition from use of a circuit-switched network to a more efficient packet-switched network for Internet access. In fact, it is the ILECs' own investment decisions, compounded by their stranglehold on the network elements competitors need to build competing networks, that deserve a large share of the blame for the inefficiencies of the PSTN.<sup>111</sup>

According to a study by Economics and Technology, Inc. ("ETI"), approximately 65% of ILEC historic book investment has been accumulated since January 1, 1990, and of this investment, almost \$9 billion cannot be explained by the growth in demand for basic services.<sup>112</sup> Much of this alternative investment can be attributed to the ILECs' pursuit of "strategic business goals."<sup>113</sup> For example, the ILECs' involvement in advanced Centrex-like services has triggered premature replacement of analog central office switching plants and overconstruction of outside plant facilities. ILECs' plans to expand the market for discretionary services, such as second lines, has forced them to construct more feeder and distribution infrastructures than would be required to provide basic local exchange service. And their desire to position themselves to

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<sup>111</sup> Even USTA acknowledges that its expansion of existing circuit-switched facilities "is not the most efficient long term solution to the related growth in traffic." USTA Comments at 8.

<sup>112</sup> Selwyn and Kravtin, Economics and Technology, Inc., "Assessing Incumbent LEC Claims to Special Revenue Recovery Mechanisms: Revenue Opportunities, Market Assessments, and Further Empirical Analysis of the "Gap" Between Embedded and Forward-looking Costs", (Jan. 29, 1997), Appendix B to AT&T Comments submitted in *In the Matter of Access Charge Reform*, CC Docket No. 96-262 ("Gap Study"), pp. 13-14.

<sup>113</sup> Gap Study at vi.

participate in the advanced and broadband digital and video services markets has resulted in greatly increased feeder facilities.<sup>114</sup>

The problem therefore lies not in the amount of money the ILECs have been able to invest, but in how they have chosen to invest that money. ILECs have the resources to update their networks to accommodate data-friendly services. The Commission should not allow them to hide behind the ESP exemption in order to add more money to their already brimming coffers.

#### IV. THE COMMISSION SHOULD NOT DRAW ARTIFICIAL JURISDICTIONAL LINES WITH RESPECT TO INFORMATION SERVICES.

Bell Atlantic/NYNEX has argued that Internet traffic is “inherently interexchange and international,” and that “[t]o the extent that the jurisdictional nature of this traffic cannot be measured, the Commission should follow its “10 percent rule” for special access and find that all Internet traffic is subject to interstate jurisdiction.”<sup>115</sup> The record in this proceeding provides no justification for the adoption of such a presumption.

It is difficult to draw jurisdictional lines around the Internet. When classifying new services, governmental agencies tend to analogize to existing services.<sup>116</sup> Yet the Internet defies all such analogies. Unlike any other communications service today, the Internet is “simultaneously local, national,

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<sup>114</sup> *Id.* at 14.

<sup>115</sup> Bell Atlantic/NYNEX Comments at 14-15, note 25.

<sup>116</sup> *Digital Tornado* at 26.

and global, and is almost infinitely plastic in terms of the services it can support.”<sup>117</sup> A single online session could involve an intrastate connection to an ISP as well as interstate and international links to remote databases. Because today’s Internet routers are not equipped to differentiate between types of packets, they cannot provide the data necessary to make jurisdictional classifications. And there is no justification for requiring the considerable investment that would be necessary to install metering equipment capable of tracking ‘Internet users’ traffic as they “surf the net.”<sup>118</sup>

Bell Atlantic/NYNEX’s “ten percent” proposal disregards the unique nature of the Internet and is unsupported by the record. In adopting the “ten percent rule” for mixed use special access lines, the Commission and Federal-State Joint Board made a specific determination that where the interstate traffic on such a line exceeded 10% of the overall traffic, the access line would be deemed interstate.<sup>119</sup> This determination was based on a well-developed record. Here there is no record regarding the jurisdictional character of the traffic, nor is there any indication that the considerations in the special access line scenario apply to ISP traffic as well.<sup>120</sup> In short, there is no rationale for using the 10%

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<sup>117</sup> *Id.*

<sup>118</sup> *Id.* at 45.

<sup>119</sup> *MTS and WATS Market Structure -- Amendment of Part 36 of the Commission's Rules and Establishment of a Joint Board*, Decision and Order, 4 FCC Rcd 5660 (1989).

<sup>120</sup> *The Petition for Emergency Relief and Declaratory Ruling Filed by the BellSouth Corporation*, Memorandum Opinion and Order, 7 FCC Rcd. 1619 (1992), which was referenced by Bell Atlantic/NYNEX in support of its position, is inapplicable to this proceeding. In *BellSouth*, the Georgia PSC issued an order which effectively froze BellSouth’s in-state voice mail service until the adoption of certain regulatory controls. The Georgia PSC reasoned that BellSouth’s service was solely intrastate and therefore the freeze would not affect federal interests. The Ad Hoc Telecommunications Users Committee

threshold to assign ISP traffic to the interstate jurisdiction, and the Commission should not adopt such an approach.

The Commission also should reject related ILEC complaints that intrastate business line rates do not adequately compensate ILECs for costs associated with ISP traffic.<sup>121</sup> PacTel, in particular, has urged the Commission to consider the need for state regulatory reforms in considering continuation of the ESP exemption. PacTel has argued that, because of the ESP exemption, California's intrastate price structures ensure that PacTel will be unable to recover the costs of ESP traffic.<sup>122</sup> This line of argument is unsupported by the record, and is, in any event, outside of the Commission's jurisdiction.

### CONCLUSION

For the reasons set forth above, the Commission should reject requests for elimination of the ESP exemption and instead should adopt rules that would require ILECs to open their networks to competitive data service providers and ISPs that can and will provide the types of innovative products and services that users need. For three decades, dominant carriers have resisted the Commission's efforts to encourage competition and have forced the conclusion that only rules requiring such

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Commission disagreed. It found that BellSouth's service was, in fact, jurisdictionally mixed because it was accessed by both in-state and out-of-state callers and that BellSouth could not freeze its intrastate service without also freezing the interstate portion of that service. Nevertheless, the Commission specifically stated that it is "generally reluctant to preempt state authority over intrastate communications." *Id.* at para. 21. The Commission made it clear that, in issuing an order affecting a jurisdictionally mixed service, the nature of the traffic and the impact of any jurisdictional decision must be carefully considered. Bell Atlantic/NYNEX has added nothing to the record in this regard. And this is precisely where the use of the Internet and other information services, with their jurisdictionally mixed and unmeasurable traffic patterns, present a challenge defying traditional regulatory approaches.

<sup>121</sup> See, e.g., Bell Atlantic/NYNEX Comments at 7; PacTel Comments at 18.

carriers to open their networks through unbundling and interconnection will spur meaningful competition. Adoption of such rules here would further the Commission's efforts to encourage innovation and the deployment of data-friendly technologies.

Respectfully submitted,

AD HOC TELECOMMUNICATIONS  
USERS COMMITTEE

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# **EXHIBIT A**