

enable nationwide end-to-end connectivity from customer premises to customer premises. In addition, AT&T will add seven high-capacity 4ESS switches over the next 1-1/2 years to its base of 136 such switches. To meet near-term demand, AT&T plans to add a variety of smaller, more flexible local switches that can handle voice traffic initially and data in the longer term. These so-called "edge" vehicles (because they sit closest to the customer on the "edge" of the network) will augment TCG's switches that are now part of the AT&T network.

AT&T also has been employing a similar edge vehicle architecture for its growing data network, and plans to add some 200 edge switches to meet the growing demand for Frame Relay, ATM and Internet Protocol ("IP") services. These vehicles will support AT&T's unprecedented growth in frame relay and also support services such as AT&T WorldNet® Service and WorldNet Virtual Private Network Service.

2. Other Carriers' Backbone Deployment

Other carriers, both established companies and new entrants, are rapidly expanding the capacities of their backbone networks and many have already begun significant implementations. From public reports, examples of other carriers' activities in this regard are summarized below.

In 1996, MCI quadrupled the speed of its Internet backbone to 622 Mbps, or OC-12. Its network continues to grow and in 1997 MCI doubled the capacity of its Internet backbone. Using Quad-WDM (Four-Wavelength Wave Division Multiplexing), MCI's fiber capacity was increased by a factor of four from 2.5 Gbps to 10 Gbps. The use of Quad-WDM allows MCI to offer Frame Relay packet data service with access speeds from 56 Kbps to 12 Mbps. MCI also offers Switched Multimegabit Data Service

(SMDS), a high-speed, packet-switched service that gives users bandwidth linking local area networks over a wide area, and Asynchronous Transfer Mode (ATM) service, which allows customers to transmit video, voice, and data applications at DS3 (45 Mbps) or greater transmission speeds.²⁶

In June of this year Sprint announced its new Integrated On-Demand Network ("ION"), a telecommunications capability that can provide homes and businesses with high-capacity bandwidth using a single telephone line for simultaneous voice and data services.²⁷ As recently as August 24, 1998, Sprint announced it plans to significantly boost the transmission speed and bandwidth of its Internet backbone to OC-48 (2.5 Gbps). This upgrade from OC-12 (622 Mbps) will increase Sprint's bandwidth by 400 percent.²⁸

Qwest Communications is building a domestic fiber-optic network using Wave Division Multiplexing that is targeted to extend 18,449 miles and serve 130 cities. It is scheduled to be completed by the second quarter of 1999. To date, over 8,550 miles of its fiber network are activated. The Qwest network uses IP (Internet Protocol) architecture, which supports ATM and Frame Relay services.²⁹

²⁶ MCI website, www.mci.com/aboutyou/interests/technology/icn/network.shtml.

²⁷ Southwestern Bell Telephone Company, Pacific Bell and Nevada Bell Petition for Relief from Regulation Pursuant to Section 706 of the Telecommunications Act of 1996 and 47 U.S.C. §160 for ADSL Infrastructure and Service, CC Docket No. 98-91, Comments of Sprint, filed April 6, 1998, pp. 1-2.

²⁸ Sprint Press Release, August 24, 1998. Sprint does not directly address the last mile problem in its announcements.

²⁹ Qwest website, www.qwest.com/Vision.html.

Level 3 Communications is building an advanced IP technology-based network across the US that is expected to be completed in phases by 2001. It plans to begin providing services in as many as 15 major US cities by the end of 1998. Its core services include private lines, Internet access, and both local and long distance services.³⁰

Williams Communications has an 11,000 mile US fiber-optic network which it plans to grow to 20,000 miles by the end of 1998. It currently has the fifth largest fiber-optic network in the US. The transport layer of the Williams Network includes an advanced ATM switching infrastructure which enables Williams to provide video/audio conferencing, multimedia Internet and emerging packet-based multimedia communications.³¹

On April 7, 1998, IXC Communications completed its coast-to-coast fiber-optic network. Its network incorporates the latest in fiber and optical transmission technologies to support all packetized applications, including the Internet, Intranets, Extranets, advanced data services, and multimedia applications. The completion of the New York-Los Angeles portion of the network bring IXC's total fiber miles to 150,000, and more than 11,500 digital route miles. By the end of 1998, the number of fiber miles is scheduled to double to 300,000, with more than 18,000 digital route miles. Continued expansion of the network through 1999 will bring the totals up to more than 410,000 fiber route miles and 20,000 digital route miles. IXC's nationwide fiber-optic network allows it

³⁰ Level 3 website, www.l3.com/background.html.

³¹ Williams website, www.wilcom.com/4info.shtml.

to offer a range of services to include: private lines, OC-3 and OC-12 capacity for high speed, coast-to-coast transmission, Frame Relay services from 56 Kbps to 1.5 Mbps and ATM services from 45 Mbps to 622 Mbps.³²

III. ADVANCED TELECOMMUNICATIONS CAPABILITIES ARE NOT BEING DEPLOYED AS QUICKLY AS THEY MIGHT BECAUSE THE LOCAL MARKET IS NOT FULLY OPEN TO COMPETITION.

Section 706 instructs the Commission to determine (and the Commission seeks comment on) whether "advanced telecommunications capability is being deployed to all Americans in a reasonable and timely fashion."³³ When judging whether the rate of deployment of advanced telecommunications capabilities has been "reasonable and timely," the Commission's benchmark should be the rate of deployment that would occur in an open and competitive market. Because incumbent LECs have refused to implement the market-opening provisions of the Act, and instead have chosen to engage in anticompetitive conduct, massive mergers and foreign acquisitions, and endless litigation, deployment of advanced services in the local exchange has been retarded.

A. The Commission Should Define "Reasonable And Timely" Deployment As The Deployment That Would Occur In A Fully Open And Competitive Market.

As an initial matter, the Commission must determine what rate of deployment would be "reasonable and timely" within the meaning of the statute.³⁴ The

³² IXC website, www.ixc-comm.com.

³³ See Section 706(b); NOI, ¶¶ 59-69.

³⁴ See NOI, ¶ 59.

Commission should recognize that a "reasonable and timely" rate of deployment would be whatever deployment would occur in a fully open and competitive market. As the Commission itself has stated, "we intend to rely as much as possible on free markets and private enterprise to deploy advanced services."³⁵ In the 1996 Act, Congress already has established a set of duties and rights that, if fully implemented, will allow new entrants to compete with incumbents in the provision of advanced services and deploy the facilities necessary to provide those services. The most efficient, most "reasonable," and most "timely" deployment of advanced telecommunications capabilities will occur through the operation of that competition, as individual companies strive to maximize customer value by offering improved features and functions while driving prices to their economic cost.

Equally important, because no one can predict the specific outcomes of that competitive process, the Commission should not try to predict them or to out-guess the market by adopting its own timetable.³⁶ Competitive entry by a new participant in a

³⁵ NOI, ¶ 5.

³⁶ Cf. NOI, ¶ 59 (asking whether Commission should "adopt a time-specific schedule or set objective targets to meet this requirement"). It is notable in this regard that Congress, before settling on the 30-month interval provided in section 706(b) to assess the deployment of advanced telecommunications capabilities, first considered and rejected requiring that the Commission's evaluation take place within 1 year or within 2 years of the Act's enactment. See S. 652, Telecommunications Competition and Deregulation Act, 104th Cong., 1st Sess., 141 Cong. Record S8570, June 16, 1995 (proposing two-year period); Hearings, Communications Law Reform, Subcommittee On Telecommunications and Finance of the Committee on Commerce, 104th Cong., 1st Sess, May 10-12, 1995, WESTLAW A&P Telecom Hearings (16) * 547 (proposing one-year period). Congress no doubt expected that, by adopting the longer 30-month interval, the market-opening provisions of the Act would have had time to result in substantial

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market inevitably triggers a chain reaction of competitive responses, which lead companies in the market to further innovate and adapt.

Finally, in assessing the rate of deployment of advanced services, the Commission should focus on market acceptance of advanced-service offerings, and not mere technical availability.³⁷ There are a number of data telecommunications services today that, in the strictest sense, are "deployed" and "available" to most Americans. Such deployment is meaningless, however, if they have not won market acceptance. An excellent example is ISDN. The ILECs and Bellcore worked on developing standards and deploying this technology for well over a decade, and today (after much delay) it is broadly available to the ILECs' residential and business customers. Only a tiny percentage of residential customers request this service, however, because of the high price and the complexity in ordering and installation.³⁸

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CLEC competition in the local exchange, and thus the Act's effect on the deployment of advanced services could be accurately assessed. Any such expectation was mistaken, however, as the RBOCs and GTE have effectively stymied local exchange competition by refusing to implement the market-opening provisions of the Act.

³⁷ See NOI, ¶ 59 (asking whether the Commission should focus on deployment or the actual use of services by subscribers).

³⁸ Indeed, by the time ISDN became widely available on a dial-up basis, its offering of 128 Kbps speed was already out of date, given that consumers using 56 Kbps voice-band modems are anticipating that their next logical upgrade will be to broadband.

B. The Rate Of Deployment Of Advanced Telecommunications Capabilities Has Been Impeded By The Anti-Competitive Conduct Of The ILECs.

1. The ILECs' Refusal To Fully Implement The Market-Opening Provisions Of The Act Has Retarded Deployment Of Advanced Telecommunications Facilities In The Last Mile

As this Commission repeatedly has recognized,³⁹ the local exchange market today is not open and competitive, and continues to be dominated by the ILECs that control the loops "that go the last mile to nearly every home and business in the United

³⁹ See, e.g., Memorandum Opinion and Order, Application by SBC Communications Inc., Pursuant to Section 271 of the Communications Act of 1934, as amended, To Provide In-Region, InterLATA Services In Oklahoma, CC Docket No. 97-121, FCC 97-228 ¶ 20 (rel. June 26, 1997) (finding that, "as a practical matter, competing telephone exchange service is not available on a commercial basis to any residential subscribers in Oklahoma"); Memorandum Opinion and Order, Application of Ameritech Michigan Pursuant to Section 271 of the Communications Act of 1934, as amended, To Provide In-Region, InterLATA Services In Michigan, CC Docket No. 97-137, FCC 97-298 ¶¶ 5-6, 21 (rel. Aug. 19, 1997) (concluding that Ameritech had failed to meet the statutory checklist conditions "designed to ensure that local telecommunications markets are open to competition"); Memorandum Opinion and Order, Application by BellSouth Corporation, et al. Pursuant to Section 271 of the Communications Act of 1934, as amended, To Provide In-Region, InterLATA Services In Louisiana, CC Docket No. 97-231, FCC 98-17, ¶¶ 3-6 (rel. Feb. 4, 1998) (same); Memorandum Opinion and Order, Applications of Pacific Telesis Group and SBC Communications, Inc., Rep. No. LB-96-32, FCC 97-28, 12 FCC Rcd. 2624, ¶ 23 (rel. Jan. 31, 1997) (noting that the "Commission has recently found that incumbent local exchange carriers such as PacTel have approximately 99.5 percent of local exchange service nationwide"); Memorandum Opinion and Order, Applications of NYNEX Corporation and Bell Atlantic Corporation For Consent to Transfer Control of NYNEX Corporation and Its Subsidiaries ("Bell Atlantic/NYNEX Merger Order"), File No. NSD-L-96-10, FCC 97-286, ¶¶ 4, 96 (rel. Aug. 14, 1997) (recognizing that "[c]ompetition in the local exchange and exchange access marketplace is still in its earliest stages").

States."⁴⁰ Competition in the local exchange has been stifled by the ILECs' refusal to fully implement the market-opening provisions of the Act. By refusing to open their local exchange monopolies to competition, the ILECs necessarily have retarded deployment of advanced telecommunication facilities in at least two related ways.

First, by refusing to provide nondiscriminatory, cost-based access to UNEs, collocation, resale at viable wholesale rates, and OSS interfaces, ILECs have frustrated most attempts by the CLECs to bring alternative offerings to the market for critical POTS services, let alone for the provision of competitive advanced services. Thus, although some limited deployment of competitive broadband services has occurred and others are planning more deployment,⁴¹ it is plain that the rate of deployment of advanced services (as well as traditional services) has been far short of what it would have been if the ILECs had fully opened their markets to UNE-based competition. Second, the absence of viable local exchange competition gives the ILECs themselves little incentive to develop and deploy new and different service offerings, including advanced services, to keep and attract customers. This fact is shown both by the ILECs' glacially slow deployment of ISDN and by the ILECs' pattern of rolling out advanced services only after they have begun facing some limited competition in certain geographic areas.⁴²

⁴⁰ NOI, ¶ 19.

⁴¹ See Exhibit B.

⁴² See Section II.B.1, supra. Indeed, AT&T's recent announcement that it intends to invest approximately \$48 billion to acquire TCI may cause ILECs to expand significantly their investment in advanced services. As AT&T's Chairman C. Michael Armstrong recently testified before the Senate Judiciary Committee,

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The benefits of a fully open and competitive market in the context of advanced services deployment are seen most starkly by the current deployment of long-haul backbone transport facilities. As discussed in Section II.C above, the market for backbone facilities is open and very competitive. Numerous companies have entered that market and the resulting competition has spurred continuing deployment of backbone facilities in response to the demand explosion. As a result, advanced services can be carried today over backbone facilities at incredible speeds and bandwidth, far surpassing the capabilities of the local networks. Such deployment, occurring as it does in a competitive environment, plainly is "reasonable and timely" within the meaning of Section 706.

In contrast to the vigorous competition in the interLATA long-haul backbone market, the ILECs have proven adept at staving off competition in the local exchange market and continue to be the only alternative for local telephone service for

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Subcommittee on Antitrust, Business Rights and Competition, the TCI acquisition changes the equation for broad-based telecommunications competition in the local exchange. After \$1.8 billion in network upgrades is completed in the coming three years, and AT&T adds equipment that permits these upgraded facilities to be used for the provision of telephony services, AT&T will have an avenue to provide high-speed data and telephone services over two-way broadband facilities to the approximately 17 million households currently passed by TCI (assuming AT&T can obtain the necessary interconnection and other arrangements from the ILECs). The threat of such a massive deployment of advanced services by AT&T will surely cause the ILECs themselves to expand their capabilities in this area. See also Prudential at 1 ("We believe that competition from cable modems - especially in light of AT&T's pending acquisition of TCI - will spur on the large LECs to deploy ADSL as quickly as possible").

virtually all their customers. The ILECs have maintained their monopoly control of the local exchange by refusing to implement the market-opening provisions of the Act and, at times, by openly defying the plain rulings of the Commission. The ILECs' failures to implement the market-opening provisions of the Act for both advanced and traditional services have been well documented.⁴³ For example, some ILECs have refused to provide DSL-capable loops to CLECs,⁴⁴ and all have impeded CLEC efforts to collocate equipment in RBOC central offices.⁴⁵ None of the ILECs has a properly functioning, automated and nondiscriminatory operations support system (OSS) interface.⁴⁶ A number of ILECs have refused to provide shared transport, in defiance of Commission orders that have been affirmed by the courts.⁴⁷

⁴³ See, e.g., Request for Amendment of the Commission's Rules Regarding Access Charge Reform and Price Cap Performance Review for Local Exchange Carriers, RM No. 9210, Comments of AT&T Corp., pp. 6-16 (filed January 30, 1998) and Reply Comments of AT&T Corp., pp. 3-6 (filed February 17, 1998).

⁴⁴ See, e.g., Petition of Bell Atlantic Corporation for Relief from Barriers to Deployment of Advanced Telecommunications Services, Comments of AT&T Corp., p. 17 n.33 (filed April 6, 1998); see also Section 706 Order, ¶ 151 (Commission is "concerned, however, that our existing rules requiring the unbundling of loops do not fully ensure that competitive providers of advanced services have adequate access to the 'last mile'").

⁴⁵ See, e.g., Petition of Bell Atlantic Corporation for Relief from Barriers to Deployment of Advanced Telecommunications Services, Comments of AT&T Corp., pp. 17-18 (filed April 6, 1998).

⁴⁶ See, e.g., Request for Amendment of the Commission's Rules Regarding Access Charge Reform and Price Cap Performance Review for Local Exchange Carriers, RM No. 9210, Comments of AT&T Corp., p. 15 (filed January 30, 1998).

⁴⁷ See Southwestern Bell Tel Co. v. FCC, No. 97-3389 (8th Cir. Aug. 10, 1998) (upholding Commission regulations requiring shared transport).

Finally, RBOCs have imposed a number of anticompetitive conditions on the use of combinations of UNEs, which has rendered competition based on UNEs inherently impractical.⁴⁸ These failures to provide UNEs on a nondiscriminatory basis impede new entrants from deploying and providing advanced services and capabilities, regardless of what technology the new entrant is using. As the Commission has recognized, new entrants seeking to provide xDSL services must have access to, at a minimum, unbundled loops that have been rendered capable of supporting digital services, collocation arrangements in the central office, and other UNEs associated with high-speed electronics.⁴⁹ The inability of CLECs to obtain these arrangements on a cost-based, nondiscriminatory basis has effectively limited competition to small market niches, and has prevented the possibility of broad-based entry to serve small businesses and residential customers (or as Section 706 puts it, "to all Americans").⁵⁰

⁴⁸ See, e.g., Second Application by BellSouth Corporation, BellSouth Telecommunications, Inc., and BellSouth Long Distance, Inc., for Provision of In-Region, InterLATA Services in Louisiana, Comments of AT&T Corp., pp. 11-25 (filed August 4, 1998).

⁴⁹ See Section 706 Order, ¶ 52 ("if we are to promote the deployment of advanced telecommunications capability to all Americans, competitive LECs must be able to obtain access to incumbent LEC xDSL-capable loops on an unbundled and nondiscriminatory basis"); id., ¶ 64 ("We conclude that the availability of cost efficient collocation arrangements is essential for the deployment of advanced services by facilities-based competing providers.").

⁵⁰ At the same time as the ILECs are asking this Commission for regulatory relief in order to invest in advanced data services, they are engaging in a consistent nationwide pattern of conduct designed to harm their competitors for advanced data services, as well as the information service providers (ISPs) that use those competitors' services. Despite unanimous court and state public utility commission findings that the ILECs are obligated to pay reciprocal compensation to

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New entrants providing, or planning to provide, advanced services over cable networks, including AT&T/TCI, still must interconnect with the ILECs in order to exchange traffic and provide customers with the connectivity required under the 1996 Act. Consequently, once TCI's planned network upgrades are accomplished to provide high-speed data and telephony services, AT&T must be able to obtain interconnection and other crucial arrangements from the ILECs in TCI's service areas, such as number portability, 911 services, and directory listings, consistent with the mandates of Sections 251, 252, and 271 of the Act.

At bottom, therefore, the ILECs' steadfast refusal to open their local markets to competition, and most importantly to UNE-based competition, inevitably has stifled the deployment of advanced services. Precisely what form these services would have taken in a competitive environment, and in what manner and how broadly they would have been deployed and accepted, is impossible to gauge. However, given the level of

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competitive local exchange carriers that provide local dial tone services to ISPs, virtually all the ILECs have refused to make such payments. See, e.g., Illinois Bell Telephone Company d/b/a Ameritech Illinois v. Worldcom Technologies, Inc., Case No. 98 C 1925, slip op. at 6. (N.D. Ill. 1998). The result is that the ILECs are withholding literally tens of millions of dollars in payments that could be used by those competitors to invest in their own advanced data infrastructure. Instead, the competitors are being forced to complete calls to ISPs from ILEC customers without payment, while the ILECs continue to be compensated by their own customers for the calls that they originate. In this, their most public action with respect to the competitive provision of ISP services, the ILECs have demonstrated their willingness to ignore commission and court decisions with which they disagree, and to behave in a distinctly anticompetitive manner.

activity over the past two years in long-haul backbone networks spurred by the very same customer demand that exists in the local access market, it is reasonable to assume that the deployment of "last mile" advanced telecommunications capability would have been far greater in a similarly competitive setting.

2. Incumbent LEC Mergers Can Only Impeded Deployment Of Advanced Telecommunications Capabilities

The Commission also asks for comment on "the effect of mergers and other consolidations on the deployment of advanced telecommunications capability."⁵¹ There can be little question that the horizontal mergers between incumbent LECs in the U.S., as well as their huge investments in foreign telecommunications ventures, have had serious negative effects on the progress of deployment of advanced telecommunications capabilities. This is true for at least three reasons.

First, the incumbent LECs' mergers and other acquisitions have diverted vital capital that could otherwise have been used to upgrade their networks and to deploy advanced telecommunications capabilities. In particular, SBC, with its \$23.8 billion merger with Pacific Bell and its proposed \$62 billion merger with Ameritech and \$4.4 billion merger with Southern New England Telecommunications Corp. (SNET), and Bell Atlantic, with its \$22.7 billion merger with NYNEX and its planned \$52.8 billion merger with GTE, have committed tremendous resources to merging with other large LECs.⁵²

⁵¹ NOI, ¶ 24.

⁵² Moreover, as the Commission found regarding the Bell Atlantic/NYNEX merger, claims by the ILECs that such mergers will actually create efficiencies with respect

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Similarly, ILECs have committed billions of dollars to acquire substantial positions in foreign telecommunications companies, often via all-cash transactions where the diversion of capital from domestic network upgrades is especially severe. These activities represent billions of dollars committed elsewhere that could have been invested in advanced telecommunications capabilities in the U.S., and belie any ILEC claims that they require regulatory exemptions from the Act before they can afford to expand further their advanced telecommunications services.

Second, as was detailed in Section III.B.1 above, free and open competition is the most effective means of encouraging deployment of advanced services. The incumbent LEC mergers, however, are removing many of the most promising advanced services competitors from the playing field. The original seven RBOCs and GTE each had a number of unique advantages as potential competitors in each others' markets, including the market for advanced telecommunications services. As the Commission has recognized, these companies had both the financial resources and the long-established expertise in the technical and operational aspects of local exchange networks and related advanced services to become formidable competitors in other ILECs'

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to broadband deployment are unfounded. Bell Atlantic/NYNEX Merger Order, ¶¶ 175, 176 ("Applicants do not even assert, much less demonstrate, that accelerated broadband deployment and improved connectivity between broadband systems cannot be achieved in the absence of the proposed merger ...").

regions.⁵³ Since the Act was passed, however, not one of the incumbent LECs has entered any of the other LECs' home markets in any significant fashion. Instead, the incumbent LECs have chosen to devote tremendous resources to merge with one another and expand their areas of monopoly control. As recent experience has shown, if these companies had chosen to compete with one another, rather than to merge, the resulting competitive pressures would have spurred more rapid deployment of advanced telecommunications facilities and services.⁵⁴

Third, the Commission's efforts to offset the anticompetitive effects of these mergers by obtaining procompetitive commitments as conditions for approval have so far failed, because the ILECs have refused to abide by those commitments. For example, among the crucial commitments made by Bell Atlantic to gain approval of its merger with NYNEX was its commitment to base its proposals for network element and interconnection rates on forward-looking, economic costs.⁵⁵ If faithfully followed, this commitment might have facilitated CLEC entry into the local market to compete directly

⁵³ See, e.g. Bell Atlantic/NYNEX Merger Order, ¶¶ 10, 107, 127.

⁵⁴ See Section II.B.1, supra (detailing pattern of incumbent LECs deploying advanced services in various geographic areas only after competing providers began offering such services in same area). The ILECs' failure to seek to compete in each other's local markets is especially ironic, given their constant claim that they are making competitive entry easy for CLECs. See, e.g., Second Application by BellSouth Corporation, BellSouth Telecommunications, Inc., and BellSouth Long Distance, Inc. for Provisions of In-Region, InterLATA Services in Louisiana, CC Docket No. 98-121, Brief in Support at 16 (filed July 9, 1998) ("BellSouth has offered CLECs everything they need to provide local, facilities-based service").

⁵⁵ Bell Atlantic/NYNEX Merger Order, Appendix C.

with Bell Atlantic, which competition would encourage deployment of advanced services. Bell Atlantic, however, now seeks to effectively nullify this commitment by asserting that it applies only to rates proposed for the first time after the Commission issued its merger decision on August 14, 1997, and not to rates it initially proposed in every state jurisdiction before this Commission's merger decision.⁵⁶ Indeed, Bell Atlantic openly defies the Commission by asserting that the Commission does not even have authority to enforce these merger conditions, claiming that the sole enforcement responsibility rests with the various state regulatory commissions.⁵⁷ Similarly, despite assurances by SBC in the PacTel merger proceedings that led the Commission to conclude that "[i]mproved local exchange service might result from the [merger]" and that "anti-competitive activity

⁵⁶ See AT&T Corp. v. Bell Atlantic Corp., File No. E-98-05, Bell Atlantic Motion to Dismiss, pp. 5-8 (filed December 15, 1997); id., Opposition of AT&T Corp. to Motion to Dismiss, pp. 3-7 (filed December 29, 1997). Thus, Bell Atlantic asserts that the commitment is irrelevant to all rates reflected in interconnection agreements entered into prior to the August 14, 1997 decision, and will come into play only when and if Bell Atlantic proposes new rates when those agreements expire in the year 2000, about a year before the merger commitments expire in 2001. Id.

⁵⁷ See AT&T Corp. v. Bell Atlantic Corp., File No. E-98-05, Bell Atlantic Motion to Dismiss, pp. 9-12 (filed December 15, 1997); id., Opposition of AT&T Corp. to Motion to Dismiss, pp. 7-11 (filed December 29, 1997). Bell Atlantic also has failed to comply with a number of other important merger conditions. For example, Bell Atlantic has failed to produce sufficient performance reports, see Letter from K. Morgan, Accounting Safeguards Div., CCB, to P. Koch, Bell Atlantic, dated April 13, 1998, has refused to negotiate additional performance measures, see MCI Telecommunications Corp. v. Bell Atlantic Corp., File No. E-98-32, Complaint (filed March 17, 1998), and has failed to establish adequate OSS interfaces within the prescribed time periods.

[by SBC] in Texas ... will not be repeated in California,"⁵⁸ SBC has now instituted sales tactics in California that the Office of Ratepayer Advocates has sought to stop because they are "aggressive and misleading" and have caused a deterioration of service to residential customers.⁵⁹

IV. SPECIFIC REGULATORY ACTION.

Finally, the Commission notes that Section 706 requires the Commission to use regulatory methods to remove barriers to infrastructure investment and deployment, and seeks comment on whether and how it should apply these various regulatory

⁵⁸ Memorandum Opinion and Order, Applications of Pacific Telesis Group and SBC Communications, Inc., Rep. No. LB-96-32, FCC 97-28, 12 FCC Rcd. 2624, ¶¶ 2, 76 (rel. Jan. 31, 1997).

⁵⁹ Petition Of The Office Of Ratepayer Advocates For An Order That Pacific Bell Immediately Cease All Improper Practices At Its Residential Order Centers And For Other Appropriate Relief, Investigation on the Commission's Own Motion into the Establishment of a Forum to Consider Rates, Rules, Practices and Policies of Pacific Bell and GTE California Incorporated, Calif. PUC, I.90-02-047 at 2-7 (filed June 4, 1998). Similarly, a complaint filed in April 1998 before the California PUC by the Telecommunications International Union, California Local 103 alleged as follows:

Since the acquisition of Pacific Bell and Pacific Telesis by Southwestern Bell Communications ("SBC"), Pacific Bell has implemented a new aggressive sales program which has the intent and is having the effect of forcing service representatives to engage in unethical, deceptive, and high-pressure sales tactics in order to avoid poor performance ratings and discipline, and earn wages based on sales performance.

Telecommunications International Union, California Local 103 v. Pacific Bell, Pacific Telesis, Southwestern Bell Communications, Complaint, Calif. PUC, No. C 98-06-049, ¶ 2 (filed April 7, 1998).

techniques.⁶⁰ The Commission further seeks comment on whether it continues to be appropriate to apply different "regulatory models" to different industries providing advanced telecommunications services.⁶¹ As discussed below, the application of different regulatory models to distinct industries and industry segments is both mandated by the Act and sound public policy. Further, the most important action the Commission can take to speed deployment of advanced telecommunications services is to vigorously implement and enforce the market-opening obligations that Section 251 imposes on incumbent LECs.

A. There Is No Basis to Alter The Regulatory Models Established By Congress.

As the NOI observes, different legal and regulatory models currently apply to the various industries that provide, or are seeking to provide, advanced telecommunications capability. In particular, the 1996 Act imposes unique obligations on incumbent LECs, such as the resale and unbundling provisions of § 251(c)(3), in recognition of their monopoly over the facilities through which virtually all customers today can connect with other users or reach ISPs. In contrast, firms seeking to offer alternatives to ILEC loops are subject to different regulatory schemes that recognize that they do not possess market power, and that seek to encourage them to invest in unproven new technologies. AT&T strongly concurs with the Commission's conclusion that

⁶⁰ NOI, ¶ 69.

⁶¹ Id., ¶ 77

"Congress, when it enacted the Act, created or retained these models and thereby endorsed their continued use."⁶²

The evidence is especially clear, for example, that Congress specifically amended the Act to make certain that the "cable TV model," and not the "telephone model" or the "resale/UNE model"⁶³ would apply to Internet-based services provided over cable television systems. As the staff working paper recently released by the Office of Plans and Policy ("OPP") explains, Congress in 1996 modified the definition of "cable service" in Section 602(6) of the Act by adding the words "or use," as follows: "the one-way transmission to subscribers of video programming or other programming service, and subscriber interaction, if any, which is required for the selection *or use* of such video programming or other programming service."⁶⁴ The OPP Working Paper properly suggests that "the phrase 'or use' was intended to cover the two-way interactive nature of the types of communications that typically characterize interactive computer, enhanced and information services and Internet access services."⁶⁵ The OPP Working Paper further concludes that the legislative history of the 1996 Act -- both the conference report and floor statements -- provide "further support" for the proposition "that Congress intended

⁶² NOI, ¶ 77.

⁶³ Id., ¶ 77.

⁶⁴ 47 U.S.C. § 522(6) (quoted in "Internet Over Cable: Defining the Future in Terms of the Past," Office of Plans and Policy Working Paper (released September 3, 1998) (hereafter "OPP Working Paper"), p. 83.

⁶⁵ OPP Working Paper, p. 84.

the revised cable service definition to include cable-provided Internet access and other Internet-based services," and thus to exclude such services from Title II regulation.⁶⁶

Thus, while Congress undoubtedly recognized that broadcast, cable, wireless, telephony and other industries might at some undetermined future point "converge,"⁶⁷ it manifestly did not adopt a uniform regulatory model applicable to all. To the contrary, Congress understood that, at least for now, different models are appropriate for different industries, and it thus adopted or maintained for the various industries those models that it believed would best promote and accelerate the deployment by those industries of the services that consumers desire.

In particular, Congress chose to "isolate" cable operators "from Title II regulation" precisely to "foster the development of competitive broadband and advanced telecommunications."⁶⁸ Congress likewise did not impose the unbundling and resale obligations of § 251(c) that are applicable to incumbent LECs on CLECs, cable providers, wireless carriers, providers of satellite services, or power companies because their facilities are not essential facilities for new entrants, and these firms do not possess market power over telecommunications. A firm's ownership of facilities such as cable systems, or

⁶⁶ Id., p. 86 (citing Joint Explanatory Statement at 169 and 142 Cong. Rec. H1156 (daily ed. Feb. 1, 1996) (statement of Rep. Dingell); see also id., p. 88 ("The Commission could reasonably conclude that Internet access services, such as @Home and Road Runner, when provided by a cable operator over its cable system, come within the revised definition of 'cable services' under Title VI").

⁶⁷ See NOI, ¶ 77.

⁶⁸ OPP Working Paper, p. 88.

wireless spectrum, or electrical lines that could potentially serve -- after extensive upgrading -- as an alternative to those of incumbent LEC monopolists does not give rise, Congress recognized, to the concerns that prompted the 1996 Act's restrictions on ILECs. Moreover, imposing incumbent-style obligations on new entrants would inhibit those companies' ability and incentive to invest in building the very facilities that the 1996 Act seeks to promote -- alternatives to the existing LEC monopolies.

The overriding reality is that the cable Internet platforms being built are speeding deployment of advanced services to consumers in a manner that exceeds the CLECs' ability to do so via resale and UNE-based competition. These efforts should not be dampened by imposition of regulation designed to curb monopoly power. The success of cable providers' endeavors -- or the LECs' fears that those endeavors will be successful -- will be the critical factor determining the extent to which the LECs will feel the need themselves to deploy advanced services at attractive prices in order to respond effectively.

Accordingly, there is no basis for any concern that the use of different models in different industries will "distort" or "impair" market performance.⁶⁹ To the contrary, differential, flexible regulation of new entrants is a familiar concept to both Congress and the Commission that, properly applied, can dramatically improve market performance. The ISP industry has been exempted from paying access charges -- which as users of interstate access they would otherwise be required to pay -- since 1983, when the Commission determined that relief from those subsidy-laden fees was essential to give

⁶⁹ NOI, ¶ 77.

ISPs an opportunity to establish themselves.⁷⁰ This "hands off" policy has now been in place for fifteen years,⁷¹ and has resulted in a dynamic and diverse ISP marketplace that offers consumers a multitude of choices for their Internet access and content needs. Similarly, Congress exempted providers of Commercial Mobile Radio Service ("CMRS") from regulation as "local exchange carriers" in the 1996 Act,⁷² and the Commission has forborne from applying many of the requirements of Title II of the Act to CMRS providers.⁷³ The wireless marketplace has flourished as a result, and most consumers can now chose from among multiple CMRS providers.

In sum, any attempt to prescribe a new, uniform regulatory model would have to come from Congress, and it would be wholly counterproductive for the Commission to consider changing the regulatory models established by the 1996 Act in anticipation of a hoped-for "convergence" of industry services. Such an alteration in the

⁷⁰ Implementation of Sections 3(N) and 322 of the Communications Act, Regulatory Treatment of Mobile Services, 9 FCC Rcd. 1411 (rel. March 7, 1994); see also Forbearance from Applying Provisions of the Communications Act to Wireless Telecommunications Carriers, WT Docket No. 98-100, Memorandum Opinion and Order and Notice of Proposed Rulemaking, FCC 98-134 (rel. July 2, 1998).

⁷¹ AT&T has urged the Commission to review this exemption in light of the extended length of time in which ISPs have been given an advantage in the market over competitive telecommunications services, and to impose cost-based access charges on all users of access. See, e.g., In the Matter of Access Charge Reform et al., CC Docket Nos. 96-262 et al., Comments of AT&T Corp., filed March 24, 1997.

⁷² See 47 U.S.C. § 153(26).

⁷³ MTS and WATS Market Structure, Memorandum Report and Order, 97 F.C.C.2d 682, 715 (1983).

underlying statutory scheme -- applying a "one-size fits all" approach to radically different situations -- would be far more likely to assure that no such convergence occurs.

B. The Most Important Action To Speed Deployment Of Advanced Telecommunications Services Is Implementation Of The Requirements Imposed By The 1996 Act.

As shown in Section III above, the market for local services is not fully open to competition, and as a result deployment of advanced telecommunications capabilities in the "last mile" is not occurring as quickly as it could be. The remainder of these comments addresses three areas of action for the Commission: (1) enforcing the market-opening provisions of Section 251; (2) opening access to the "last hundred feet" of the facilities used to reach customers; and (3) implementing the new universal service system under Section 254.

1. The Commission Should Enforce The Market-Opening Provisions Of Section 251 Of The Act

The most important effort the Commission can undertake to encourage the reasonable and timely deployment of advanced telecommunications capabilities is to vigorously implement and enforce the market-opening provisions of Section 251. As the Commission has repeatedly recognized, "private sector competition . . . stimulates creation of innovative services and investment in infrastructure deployment."⁷⁴ Congress itself "provided the blueprint" in Section 251 for ensuring that the local market is open to

⁷⁴ Rules and Policies on Foreign Participation in the U.S. Telecommunications Market, et al., IB Docket Nos. 97-142 et al., Report and Order and Order on Reconsideration, 12 FCC Rcd. 23891, 23893 (¶ 1) (1997).

competition,⁷⁵ and the best way to encourage deployment of advanced capabilities is to implement and enforce that blueprint.

AT&T will explain in greater detail in its forthcoming Comments on the Section 706 Order how this should be done in the context of advanced services. In brief, however, it is essential that the Commission vigorously enforce the provisions of Section 251 to ensure that new entrants providing advanced telecommunications services have full access to collocation space and to UNEs, especially loops capable of carrying digital services, and OSS interfaces. Without full access to collocation and to UNEs, a functioning competitive market for data services available both to business and residential customers cannot develop.⁷⁶ Indeed, virtually all new entrants that provide data services will require access to a seamless, functioning OSS interface.⁷⁷ Many new entrants will also require collocation and/or access to other UNEs or UNE combinations.⁷⁸ To the

⁷⁵ Section 706 Order, ¶ 1.

⁷⁶ See Remarks of William E. Kennard, Chairman of the Federal Communications Commission, to the National Association of Regulatory Utility Commissioners, Seattle, Washington, July 27, 1998, p. 5 ("[A] competitive market for advanced services depends upon strict enforcement of the incumbent's unbundling obligations when it comes to the basic underlying elements. At a minimum, a competitor must have access to the incumbent's loops and must have access to the incumbent's central offices in the form of collocation").

⁷⁷ See, e.g., Section 706 Order, ¶ 56 ("If new entrants are to have a meaningful opportunity to compete, they must be able to determine during the pre-ordering and ordering process as quickly and efficiently as can the incumbent whether or not a loop is capable of supporting xDSL-based services").

⁷⁸ See, e.g., Section 706 Order, ¶ 52 ("if we are to promote the deployment of advanced telecommunications capability to all Americans, competitive LECs must be able to obtain access to incumbent LEC xDSL-capable loops on an unbundled

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extent that ILECs are not providing these arrangements to CLECs today on a nondiscriminatory basis -- and they are not -- that unavailability is directly thwarting more rapid deployment of advanced telecommunications capabilities.

The NOI seeks comment (§ 83) on the respective authority of this Commission and State Commissions in promoting the deployment of advanced technologies, and asks whether steps that this Commission might take could "intrud[e]" upon the States' jurisdiction. The answer to this inquiry is clear. The Commission has already held that advanced services are "telecommunications services" and either "telephone exchange service" or "exchange access" within the meaning of the Act,⁷⁹ and therefore subject, inter alia, to the interconnection, network element, resale, and collocation obligations of Sections 251(c).⁸⁰ This means that this Commission's jurisdiction, and that of the State Commissions, is the same for advanced services as for other telecommunications services subject to Section 251.⁸¹

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and nondiscriminatory basis"), § 64 ("the availability of cost efficient collocation arrangements is essential to for the deployment of advanced services by facilities-based competing providers").

⁷⁹ Section 706 Order, §§ 35-37, 40-44.

⁸⁰ Id., §§ 45-64.

⁸¹ This conclusion is fortified by the Commission's conclusion that Section 706(a) does not itself confer new authority, but rather directs the Commission to encourage the deployment of advanced services "relying on our authority established elsewhere in the Act." See Section 706 Order, § 74. Thus, while Section 706(a) likewise directs the State Commissions to encourage such deployment, it does not expand or contract the authority elsewhere conferred on

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