proposal Old LEC may refuse to offer this service to the customer because it wants the customer to buy the loop from New LEC, where the customer would be locked into New LEC's ISP and other services.

More generally, Old LEC would have far more opportunities to discriminate if New LEC is allowed to deploy exclusive last mile network. Old LEC can grant preferences in price, in availability of network elements, collocation opportunities, conduit and rights of way, and many other parameters. The NPRM would prohibit such conduct, but it does not fully appreciate the huge resources that would be required to audit ILEC conduct and enforce the rules. MindSpring appreciates that these discrimination problems will exist for CLECs whether or not partial separation occurs. But our point is that they cannot be allowed to contaminate the competitive Internet market by giving ILECs a means to exploit their last mile ownership over competing ISPs. This contamination would occur if the New LEC is able to use the fruits of discrimination to compete as an ISP on an unregulated basis.

The second major problem with the NPRM proposal is that it does not adequately deal with the ILEC's incentives to engage in anticompetitive cost-shifting. The NPRM suggests without explanation that affiliate transaction rules would prevent "telephone ratepayers" from covering the cost of "competitive ventures." 25/ However, nothing in the proposal would prevent Old LEC from

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25/ NPRM at ¶96.

charging New LEC and its competitors excessive amounts for the use of Old LEC services or assets, to the net benefit of the ILEC corporation. Furthermore, since Old LEC would generally be under price cap regulation, profits from this conduct would go to ILEC shareholders because Old LEC would not need to reduce its rates to consumers.

These dangers are exacerbated by the fact that Old LEC and New LEC apparently would be allowed to market services together. As a result, New LEC will have the full benefit of Old LEC's historical position as vendor to 100% of the local customer base. The ILEC enterprise can use these relationships, and any supra-competitive profits derived from its last mile position, to subsidize pricing in markets where it faces the most competition.

Again, the best answer to all of these problems would be full divestiture of the last mile ILEC operations. Short of that, the Commission and the states will have a continuing need to regulate ILEC conduct, with all the resource demands that this entails. Partial structural separation makes that regulatory task easier, especially with respect to discrimination problems. But it is not the whole answer.

III. AN ALTERNATIVE PLAN FOR STRUCTURAL SEPARATION.

[NPRM SECTION VI(B)(2)]

Despite its flaws, the Commission's proposal does provide the foundation for a discussion of how an ILEC affiliate might safely be allowed to offer

unregulated broadband services. MindSpring shares the Commission's frustration with the status quo. We agree that more must be done to encourage ILECs to deploy broadband last mile plant. However, that plant must be available to all parties on an "Open Systems" basis.

Even if the Commission is not prepared to order last mile divestiture (by far the best solution to the last mile Internet barrier), then it still must look to that remedy for the structure of any partial separation plan. The Commission will not be curing incentives of the overall ILEC enterprise to discriminate, but it at least may simplify the task of policing such discrimination.

A. Last Mile Plant Should Only Be Operated by the Regulated Operating Company.

First, the Commission must draw the separation line in the right place -- between the last mile operation and the services using that last mile. MindSpring has discussed above why it is illogical, impractical, and counter to the Telecom Act to draw distinctions on any other basis. On the other hand, consumer interests would be served if all last mile ILEC activity was centered in the Old LEC, and companies needing connectivity over that network (including New LEC) could purchase that connectivity on the same terms and conditions.

This solution is not perfect; incentives to discriminate would remain. Furthermore, ILECs are likely to continue to slow-roll broadband deployment to prevent cannibalization of their existing service products, and to prevent unaffiliated firms from offering services to customers before New LEC is ready to

compete. ILECs will tend to increase bandwidth in the large business market where they face the most competition, but be far slower to meet today's unsatisfied demand in the residential and small business markets. Nevertheless, partial separation at least should improve the existing situation, where discrimination is even more difficult to detect and deter.

B. The Old LEC Operating Company Should Be Required to Offer Last Mile Connectivity for Packet Data On Equal Terms to All ISPs.

MindSpring assumes that under this structure an ILEC would offer ISP and other packet-switched services through the unregulated New LEC. 26/ The Old LEC should be required to provide last mile connectivity for this purpose to New LEC and all competitors on equal terms.

MindSpring discussed this principle previously in its comments in response to the Advanced Services NOI. 27/ We explained that we recently entered into an agreement with a competitive cable company that could serve as a model for such an arrangement. MindSpring interconnects with a router at the cable headend, and the cable operator transports data packets over its HFC network to and from our customer's premise. MindSpring supplies and installs customer

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26/ MindSpring assumes that even under the NPRM partial separation plan the ILEC would not be allowed to offer broadband services through both Old LEC and New LEC, with the latter unregulated. Such a mix and match approach would undermine the foundation of separation. However, the NPRM is not clear on this issue. *See* Section E, infra.

27/ MindSpring NOI Comments at 28-30.

premises equipment and provides other end user Internet support. We pay the cable operator to connect to their router on a per customer basis. Significantly, this kind of transport arrangement can be done on a non-exclusive basis. Various ISPs can attempt to win the customer, and the successful vendor can then use the transport to the customer premise.

MindSpring strongly believes that regulators must prohibit discrimination by an ILEC against unaffiliated ISPs whether or not the ILEC separates its ISP activities into a separate affiliate. Our point here is only that such separation, done correctly, could be associated with reduced regulation of the non-last-mile ILEC subsidiary.

C. The Commission Should Consider Additional Structural Safeguards to Address ILEC Market Power.

As discussed above, the separation requirements set forth in the NPRM are necessary but not sufficient to address all competitive issues presented by the ILEC market power. We agree that they should be adopted in full, but we also recommend that the Commission consider additional remedies to deter discrimination and reduce the ability of the overall ILEC enterprise to obtain monopoly rents, especially rents that can be used to cross-subsidize more competitive activities. MindSpring understands that other parties will be addressing this issue in detail and we may comment further after reviewing their views.

D. No Network Assets Should Be Transferred to the New LEC Affiliate.

MindSpring strongly submits that the Old LEC should not be allowed to transfer to or share any network assets with New LEC. Any other conclusion would undermine the goal of establishing an affiliate that does not draw unfairly on the benefits of its affiliation with the last mile owner.

The NPRM suggests that Old LEC would not be allowed to transfer bare loops, but would be allowed to transfer "facilities used specifically to provide advanced services, such as DSLAMs, packet switches and transport facilities other than the loop itself." 28/ The short answer is that no such transfers should be permitted because New LEC should not be providing the last mile for the reasons discussed above. 29/ If it is, then New LEC is also an incumbent LEC subject to Section 251 interconnection rules.

E. The New LEC Affiliate Should Not Receive Any Assets Related to Old LEC's Customer Base.

Finally, the NPRM raises important issues with respect to other assets that the ILEC might transfer to its unregulated New LEC affiliate. We agree that employees could be transferred -- provided that Old LEC retains employees with the experience to conduct the last mile business. Indeed, this is another reason why last mile operations must remain wholly with Old LEC. The ILEC otherwise will

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28/ NPRM at ¶108.

29/ This renders moot the Commission's question regarding whether New LEC could receive such asset transfers "in place." See id. at ¶110.

have an incentive to give New LEC those employees most familiar with the last mile network, leaving Old LEC in a poor position to supply customers who want broadband connectivity to reach New LEC competitors.

Special care is required not to give New LEC advantages related to a unique asset -- Old LEC's ubiquitous relationship with every customer in its serving area. New LEC cannot be given preferential ability to exploit those relationships through access to Old LEC's customer information, let alone transfer of customer accounts themselves.

More generally, the NPRM does not pay adequate attention to two much larger issues related to how Old LEC and New LEC interact with respect to customers. First, New LEC should not be allowed to engage in joint marketing activities with Old LEC given that no other service providers will have a similar opportunity to interface with customers and sell products together. Otherwise New LEC will have substantial advantages related to its ability to offer so-called "new" services with jointly with Old LEC's conventional local exchange products.

Second, and more fundamentally, the Commission should give more consideration to how lines are drawn between the services that a New LEC can offer on an unregulated basis, and those offered by the Old LEC. This question immediately arises with regard to dedicated last mile connectivity provided by ILECs today. Under the Commission's scheme, for example, it apparently would be possible for an ILEC to offer "broadband" T-1 loops through either the regulated ILEC as today, or the New LEC -- or both. The NPRM is not clear as to whether, if

an ILEC sets up an unregulated subsidiary, it would be able to pick and choose which entity markets to which customers. This problem will increase as all customers come to demand dedicated lines (of some capacity) as their primary source of connectivity to the Internet and other en user services.

Again, MindSpring believes that ultimately the answer should be divestiture of the last mile network, with the ILEC operator of that network out of the business of providing end user retail services altogether. But short of full divestiture, the Commission should consider how to reconcile these issues in the context of its structural proposals. At a minimum, the ILEC last mile ownership should remain with the regulated Old LEC operating company.

IV. THE COMMISSION MUST ENSURE THAT ISPS CAN PURCHASE CONNECTIVITY OVER ILEC LOOPS ON NON-DISCRIMINATORY TERMS AND CONDITIONS.

[NPRM SECTION 6(C)]

The NPRM contains a number of proposals intended to enhance the ability of CLECs to use ILEC network elements to assemble their own last miles capable of providing broadband connectivity. MindSpring fully supports improvements to the Commission's rules that would permit CLECs to better deploy high speed loops. Stronger interconnection policies are crucial if CLECs are to have any chance of providing the next generation of local exchange services.

MindSpring will leave it to the CLECs themselves to address the adequacy of the Commission's proposals for collocation and last mile unbundling.

However, we have several comments from the perspective of ISPs who will require use of broadband connectivity between ourselves and our customers.

A. ISPs Cannot Be Required To Become CLEC-Style Operators Of Local Exchange Networks In Order To Reach Their Customers.

First of all, ISPs are not CLECs, and we should not have to become CLECs to continue our key role in the Internet revolution. An ISP's expertise is in helping people access and make use of the Internet, including the multiple Internet-based service applications that will arise in the future. We specialize in establishing and then supporting Internet applications at the customer premise -- which today is focused on access through personal computers, but tomorrow will include support for many other Internet-related devices installed on the premise. We also are active at our gateway, specializing in helping users more efficiently reach useful content and services accessible on the Internet. But our expertise is not in local network construction, operation and management. We need others to sell us connectivity to carry data packets between our customer and our gateway.

Of course, ILECs and CLECs may want to offer Internet access themselves, but this is not a reason why ISPs should be forced to enter the local exchange business to remain competitive. Perhaps some ISPs may decide to become CLECs, assembling local networks from UNEs and their own installed plant. But the Commission must not create an environment in which every ISP is effectively required to do so because it has no other efficient and practical way to connect with customers. That result would create a major barrier to Internet competition and, as

discussed above, could give ILECs and CLECs a disproportionate advantage in promoting their own editorial perspectives. 30/ In short, it would kill the "vibrant" Internet competition that Section 230(b) of the Telecom Act charged the Commission to preserve and promote.

B. ILECs Must Provide Non-Discriminatory Last Mile Connectivity Even If The Proposed CLEC Rules Are Adopted.

It follows from the above that, even assuming the Commission adopts its CLEC-related interconnection rules, this would in no way eliminate the need to ensure that ILECs sell last mile connectivity to ISPs on reasonable and non-discriminatory terms. First of all, the mere potential for CLEC last mile loops does nothing to address an ISP's requirement for broadband connectivity on as ubiquitous a basis as the ILEC itself enjoys. While the NPRM proposals are useful, the Commission still will have to test them in practice against the natural recalcitrance and discrimination incentives of the ILECs. CLECs have had serious problems enforcing their interconnection rights even in the relatively straightforward circuit-switched environment. It remains to be seen where CLECs actually can and will deploy local broadband network.

Second, and in any event, CLECs using ILEC UNEs are unlikely to be a source of broadband connectivity to ISPs serving the residential and small business market any time soon. CLECs are naturally focusing on the large business segment, and will continue to do so over the next several years, . Thus, no

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30/ See Section I, supra.

matter what CLEC-related rules the Commission adopts here, they are not a substitute for enforcing obligations on ILECs to supply non-last-mile ISPs with connectivity to the customer on the same terms and conditions that the ILEC provides to its own affiliated ISP business.

MindSpring has previously discussed its concern that cable operators may come to exercise market power based on their ownership of the only (or one of only two) broadband wires to a customer premise. In our comments in response to the Advanced Services NOI we commended the Commission for opening a dialog concerning how to treat Internet services provided over cable. 31/ MindSpring believes that customers must have the ability to select the ISP of their choice if the only broadband access to their premise is provided over cable. And even if the customer is served by broadband owned by both the cable company and the ILEC, he or she still should be able to select both (i) the preferred last mile network to connect to the Internet, and (ii) the preferred ISP who will help the customer use that connectivity to draw information and services from the Web. 32/

31/ MindSpring NOI Comments at 9.

32/ This approach essentially consists of an unbundling of the consumer's purchase of loop facility supplier from the purchase of ISP services. The consumer may or may not have more than one broadband facility to its premise. If not, it still can reach the ISP of its choice. If so (say both an ILEC wire and a cable wire), the consumer can choose which wire he or she prefers, as well as which ISP to provide services over that wire.

These are matters that go beyond the specific questions presented in the NPRM. For present purposes, MindSpring would simply reemphasize that as last mile connectivity requirements evolve to broadband, ISPs must continue to be able to reach any customer -- including any individual or small business customer -- who has access to a broadband-capable loop. ILECs must offer non-discriminatory last mile connectivity to all ISPs, whether or not this obligation also should apply to the cable operator.

CONCLUSION

The NPRM correctly recognizes that ILECs have a strong incentive to discriminate against non-last-mile owners. The best solution to this problem would be full divestiture of the ILEC's last mile operation from the business of providing services over that local network. The ILEC last mile company would then have an incentive to build and sell broadband connectivity from customers to as many different ISPs as possible.

Short of that, structural separation at least can make ILEC discrimination more difficult, and enforcement of non-discrimination rules less costly and difficult. Unfortunately, the NPRM's proposed "advanced services" subsidiary does not further those goals. It fails to separate the ILEC last mile from services offered over that network. Instead, it allows the ILEC to migrate non-competitive last mile activities to the New LEC subsidiary, and allows the subsidiary to fully exploit the resulting market power against unaffiliated ISPs.

This result would violate Section 251(h) of the Telecom Act, which was included in the Act expressly to prevent an ILEC from evading its local interconnection duties through corporate shell games.

The Commission at least must revise its structural separation proposal to require that last mile network only be owned by the regulated Old LEC operating company. The Commission also must take other actions to better address the incentives and opportunities for discrimination in favor of the New LEC subsidiary that the parent ILEC holding company would retain in the absence of full separation. More generally, the Commission should ensure that last mile connectivity is offered to all ISPs on nondiscriminatory terms and conditions. This requirement is necessary whether or not the ILEC chooses to adopt a separation plan arising out of this rulemaking proceeding, and whether or not the Commission's proposals with respect to CLEC broadband deployment eventually permit CLEC competition to develop.

Finally, the Commission should make clear to ILECs that structural separation is only a tool that permits a reduction in regulatory oversight. If New LEC is properly organized, its services can be treated as non-dominant. But the Commission and others will still need to scrutinize Old LEC-New LEC relationships, and Old LEC conduct, to ensure that the overall ILEC enterprise is not engaged in the anticompetitive conduct that it still would have every incentive to pursue. This regulatory oversight could be reduced from that which would be required if the ILEC continued to integrate its last mile and retail service activity.

But full deregulation should be reserved for full separation through divestiture, whether done by the ILEC on a voluntary basis or otherwise.

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by PAR

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September 25, 1998

CERTIFICATE OF SERVICE

I, Patricia A. Green, hereby certify that on this 25th day of September, 1998, a copy of the Comments of MindSpring Enterprises, Inc. filed in CC Docket No. 98-147 was hand delivered to the parties listed below.

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