

Before the  
FEDERAL COMMUNICATIONS COMMISSION  
Washington, D.C. 20554

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FEDERAL COMMUNICATIONS COMMISSION  
OFFICE OF THE SECRETARY

In the Matter of	)	
	)	
Inquiry Concerning the Deployment of	)	
Advanced Telecommunications Capability	)	
to All Americans in a Reasonable and	)	CC Docket No. 98-146
Timely Fashion, and Possible Steps to	)	
Accelerate Such Deployment Pursuant to	)	
Section 706 of the Telecommunications	)	
Act of 1996	)	

REQUEST FOR LEAVE TO FILE REPLY COMMENTS ONE DAY OUT OF TIME

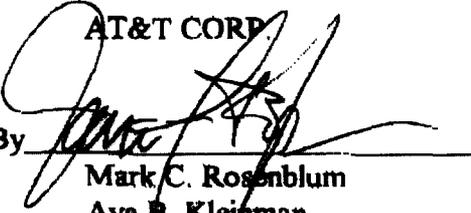
AT&T Corp. ("AT&T") hereby respectfully requests permission to file the attached "Reply Comments Of AT&T Corp." in the above-captioned docket one day out of time. Although these reply comments were completed in time for timely filing on October 8, 1998, computer software problems caused errors in the document's footnotes and pagination that AT&T was unable to resolve until after the Commission's filing deadline.

Because the instant pleading is a reply, no party will be prejudiced if AT&T is permitted to file one day out of time, as any response to AT&T's arguments must be offered through the ex parte process, rather than via a Commission-scheduled pleading.

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REPLY COMMENTS OF AT&T CORP.

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October 8, 1998

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## SUMMARY

The comments filed in the instant NOI provide the Commission with a wealth of information concerning the status and capabilities of existing and planned broadband network. What is striking about these comments is the fact that new entrants to local exchange markets are driving the deployment of advanced telecommunications capability; while ILECs have been reluctant to install those capabilities for fear of cannibalizing their current monopoly services, and accordingly have introduced xDSL services only in response to broadband services offered by facilities-based competitors. In contrast, the comments demonstrate that full and open competition in the interexchange market has led IXC's to respond rapidly to the booming demand for "backbone" facilities. Established IXC's are dramatically increasing the capacity of their networks, while new entrants are building nationwide networks of their own using the latest technologies.

Although characterized in different ways, there is broad consensus among commenters that deployment of advanced telecommunications capability is not occurring quickly enough to meet customer demand, chiefly because ILECs are refusing to comply with their statutory obligations to open their networks to competitors. New entrants catalog the numerous obstacles erected by the ILECs, which are the primary reason such facilities are not being deployed as quickly as they would be if competitors could access incumbent LEC facilities on the terms mandated by law. Although the ILECs predictably allege that their deployment of advanced telecommunications services is being hampered by regulation, they offer no arguments that the Commission has not already considered -- and correctly rejected -- in its recent Advanced Services Order. Rather than releasing the ILECs from their obligations under the Act, the

Commission should enforce the pro-competitive provisions of the Act where ILECs fail to meet their obligations.

A broad array of commenters supports the Commission's tentative conclusion that by creating or retaining different regulatory models for telephone carriers and cable television providers in the 1996 Act, Congress endorsed those models' continued use. The parties that diverge from this consensus propose one of two extreme alternatives, neither of which can be reconciled with the Telecom Act or the policies it seeks to promote.

First, seeking to re-litigate an issue already decided against them in the Advanced Services Order, the ILECs make a vague request for permission to provide advanced services free from the requirements Congress imposed on monopoly providers of telephone service in § 251. The incumbent LECs offer only the absurd claim that they are "new entrants" into the market for broadband services to residential customers. This ignores the undeniable fact that the ILECs today provide service to 99% of all residence and small business customers, and they can easily upgrade their existing loops to their existing customer base to provide high-speed services. In stark contrast, cable operators today provide high speed Internet access to only a tiny fraction of the homes served by ILEC loops. Plainly, a new entrant does not suddenly become an incumbent monopolist -- and an incumbent monopolist does not suddenly become a new entrant -- each time a new entrant innovates by developing and deploying a faster or more reliable means of providing service.

Second, AOL contends that cable providers that provide ISP connectivity should be subject to the same access obligations Congress imposed on ILECs. However AOL does not -- and cannot -- offer any statutory basis for this claim. Congress clearly was aware that cable providers intended to offer Internet access when it enacted the 1996 Act, and not only declined to

subject those firms to Title II regulation, but amended the Communications Act to clarify that cable providers are not to be treated as common carriers. Moreover, it would even more clearly violate Congress' intent if the Commission subjected cable providers to the incumbent LEC-specific provisions of § 251(c). To the extent cable operators provide any telecommunications services, they plainly would do so as new entrants, not as incumbent monopolists.

Finally, the comments confirm that it would be premature for the Commission to include advanced services in the definition of "universal service" at this time, and that to do so would violate Congress' intent by causing deployment patterns different from those that might result absent Commission interference with market forces.

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REPLY COMMENTS OF AT&T CORP.

Pursuant to the Revised Public Notice released on August 12, 1998, AT&T Corp. ("AT&T") hereby respectfully submits its Reply Comments on the Notice of Inquiry ("NOI") mandated under § 706 of the Telecom Act to review the status of the actual and planned deployment of advanced telecommunications capability to serve all Americans.<sup>1</sup>

- I. THE COMMENTS CONFIRM THAT NEW ENTRANTS ARE DRIVING DEPLOYMENT OF "LAST MILE" ADVANCED TELECOMMUNICATIONS CAPABILITY, AND THAT THE COMPETITIVE INTEREXCHANGE MARKET IS PRODUCING ADEQUATE "BACKBONE" FACILITIES.

The comments demonstrate that new entrants to local exchange markets –

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<sup>1</sup> A list of parties submitting comments and the abbreviations used to identify them are set forth in an appendix to these reply comments. Unless otherwise indicated, all citations are to parties' comments in the instant proceeding.

including CLECs,<sup>2</sup> wireless carriers,<sup>3</sup> cable providers,<sup>4</sup> and electric utilities<sup>5</sup> -- are driving the deployment of advanced telecommunications capability, and are doing so via a variety of technologies. In contrast, although incumbent LECs have had the resources and capability to deploy xDSL services for some time, they have been reluctant to introduce those services for fear of cannibalizing their current monopoly over their existing services.<sup>6</sup> Indeed, in the vast majority of cases, ILECs have introduced xDSL services only after a competing facilities-based carrier -- in most cases a cable provider -- announced plans to make broadband services available to consumers and small businesses in the ILECs' territories.<sup>7</sup> Meanwhile, the ILECs have made no competitive inroads whatsoever outside of their respective local exchange service areas.

In stark contrast to the monopoly-controlled market for the "last mile" of advanced telecommunications capability, the interexchange market is fully competitive, and that competition is responding rapidly to the booming demand for "backbone" facilities. Technologies such as Dense Wave Division Multiplexing ("DWDM"), the proliferation of SONET, ATM, frame relay and other broadband technologies, and other developments are permitting established IXCs to dramatically increase the capacity of their networks, and the comments confirm that these carriers

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<sup>2</sup> See, e.g., Intermedia, p. 11; NorthPoint, p. 4.

<sup>3</sup> See, e.g., Teligent, p. 5, WinStar, pp. 2-3.

<sup>4</sup> See AT&T, pp. 11-15; Cablevision, p. 2; Comcast, p. 9; Media One, p. 4; NCTA, p. 4; Time Warner, p. 4.

<sup>5</sup> See APPA, pp. 14-16.

<sup>6</sup> See, e.g., DATA, pp. 8-9; ITAA, pp. i, 6-7; Sprint, p. i.

<sup>7</sup> See AT&T, pp. 9-11 & Exhibit B.

are investing aggressively in order to do so.<sup>8</sup> At the same time, new entrants have acquired strong backing in the capital markets and are building nationwide networks using the latest technology.<sup>9</sup>

A recent news report observes that:

Four companies -- Qwest, Level 3, ITXC and Williams Communications -- are building the equivalent of 80 AT&Ts in the USA .... On top of that, AT&T, WorldCom and Sprint have begun work recently on new data networks, and technological advances are boosting the capabilities of the networks by the day.<sup>10</sup>

This report also cites Teledesic's planned \$9 billion satellite network and concludes that the U.S. in the midst of a "bandwidth explosion," but expresses concern that users may not be able to take full advantage of these backbone facilities because of the "comparatively slow connections going to most homes and small businesses" -- that is ILEC-controlled copper loops.<sup>11</sup>

While the market for backbone facilities has experienced occasional, temporary supply constraints, such "hiccups" are to be expected in any new market in which demand is growing exponentially. The BOCs' tired and wholly unsupported refrain that there is a shortage of backbone facilities (a shortage that only they purportedly can remedy) simply blinks reality.

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<sup>8</sup> See, e.g., AT&T, pp. 18-20; Sprint, p. 6; MCI/WorldCom, p. 20.

<sup>9</sup> See Level 3, p. 3 ("The Level 3 network will be the first national communications network to use Internet technology end-to-end."); Qwest, p. 6 ("When completed, the Qwest network will span 18,449 miles in 130 cities, representing approximately 80 percent of the originating data and voice traffic in the U.S."); Teledesic, pp. 4-5 (Teledesic's satellite network "will be capable of providing broadband coverage to every part of every state and territory of the United States."); Williams, p. 3 (Williams "is constructing a fiber optic network that will expand to 32,000 miles by the end of 2001" and connect "over 80 major markets.").

<sup>10</sup> Communications Industry Booming, USA Today, October 7, 1998, <http://www.usatoday.com/money/bcovthu.htm>.

<sup>11</sup> Id.

To take the most glaring example, Bell Atlantic again rehashes its allegations that adequate backbone facilities are not available in West Virginia.<sup>12</sup> Bell Atlantic's claims are based on its assertion that its ISP affiliate, Bell Atlantic Internet Services ("BAIS") had purportedly been unable to obtain a high capacity ("T3") link in that state. However, as AT&T has shown in a prior proceeding, neither Bell Atlantic, BAIS, nor any entity acting on their behalf ever sought this T3 circuit from AT&T. More importantly, AT&T also showed that if Bell Atlantic had requested a circuit, AT&T could have provided it. In fact, when AT&T offered a T3 to Bell Atlantic shortly after its petition was filed, that RBOC stated that it already had obtained this purportedly "unavailable" circuit from another IXC.<sup>13</sup> The other BOCs similarly present only generalized allegations as to an alleged shortage of backbone facilities. Such broad, unsupported claims plainly are an inadequate basis for the Commission to make a reasoned finding in this proceeding.<sup>14</sup>

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<sup>12</sup> See Bell Atlantic, p. 16.

<sup>13</sup> See AT&T Corp. Opposition, filed August 10, 1998, in Request By Bell Atlantic - West Virginia For Interim Relief Under Section 706, Or, In The Alternative, A LATA Boundary Modification, NSD-L-98-99, DA 98-1506; Letter from Frank S. Simone, Government Affairs Director, AT&T, to Magalie Roman Salas, Secretary, FCC, August 31, 1998 in id. AT&T hereby incorporates by reference both of these documents, in their entirety, into the record of the instant proceeding.

<sup>14</sup> Even if the BOCs' claims that there is a backbone shortage had any merit (as they do not), there is no reason to believe that they could relieve that problem any more effectively than participants in the interLATA market. The only interLATA networks the BOCs currently possess are their official services networks, and their use for interLATA services is strictly limited. See Implementation of the Non-Accounting Safeguards of Sections 271 and 272 of the Communications Act of 1934, as amended, 11 FCC Rcd 21905, 22008 (1996). Moreover, there is no reason to believe that the BOCs can provide interLATA services better, or at a lower cost, than any other carrier. See AT&T Corp. Opposition, filed August 10, 1998, p. 9, in Request By Bell Atlantic - West Virginia For Interim Relief

(footnote continued on following page)

II. THE COMMENTS CONFIRM THAT ADVANCED TELECOMMUNICATIONS CAPABILITIES ARE NOT BEING DEPLOYED IN LOCAL MARKETS AS QUICKLY AS THEY MIGHT -- AND AS THE MARKET DEMANDS -- BECAUSE OF THE ANTICOMPETITIVE ACTIONS OF INCUMBENT LEC MONOPOLISTS.

There is broad consensus among the commenters -- especially among new entrants that are dependent on incumbent LEC facilities -- that deployment of advanced telecommunications capability is not occurring quickly enough to meet customer demand,<sup>15</sup> primarily because incumbent LECs are refusing to comply with their statutory obligations to open their networks to competitors. The comments make plain that whether or not a particular party characterizes the deployment of advanced telecommunications capability as "reasonable and timely," as a result of the documented obstacles created by the ILECs, such facilities are not being deployed as quickly as they would be (or as quickly as marketplace demand would otherwise dictate) if competitors had the access to ILEC facilities to which they are entitled by law.<sup>16</sup>

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(footnote continued from previous page)

Under Section 706, Or, In The Alternative, A LATA Boundary Modification, NSD-L-98-99, DA 98-1506.

<sup>15</sup> There is, however, no serious dispute that deployment of interexchange advanced telecommunications capability is proceeding at a rapid pace. See, e.g., AT&T, p. 26-32; e.spire, pp. 5-7; Intermedia, pp. 11-12; MCI/WorldCom, pp. 19-21; Qwest, pp. 5-12; Sprint, pp. 4-7; Transwire, pp. 9-12.

<sup>16</sup> See, e.g., AT&T, pp. 30-32; CIX, pp. 15-16; e.spire, pp. 8-9 ("for now, it remains clear that ILEC interconnection, unbundling and resale policies continue to hamstring the ability of e.spire and other CLECs to deploy advanced services to consumers"); Intermedia, p. 11 ("ILECs' collective failure to respond to the procompetitive mandates of the Act is the single largest barrier to the deployment of advanced telecommunications capability."); ITAA, p. 4 ("The critical shortage of bandwidth which threatens to prevent millions of Americans from realizing the full promise of the Internet and other advanced services is in the 'last mile' where the ILECs--which retain de facto monopoly control in most markets-- have uniformly failed to deploy broadband technology."); NorthPoint, p. 4 (citing

(footnote continued on following page)

The comments also confirm the dual nature of the harms fostered by ILEC intransigence. Not only are new entrants unable to launch local broadband services as quickly as they would like (and as customers seek), the incumbent LECs are using their monopoly power to hold back their own deployment of local broadband services as well. As Sprint correctly notes, "the ILECs have a strong economic incentive *not* to invest in these technologies because they can provide customers with a low-cost alternative to the ILEC's frequently over-priced T-1 services."<sup>17</sup> This is particularly egregious, because -- unlike CLECs or other new entrants, which enter the market with no embedded customer base, no economies of scale and significant market risk -- the ILECs face no economic barriers and virtually no marketplace risk in offering these services to their captive customer base.<sup>18</sup> The record demonstrates that incumbent LECs have offered broadband services only after specific competitive threats have arisen. Accordingly, customers are being denied access to these new services, except in limited areas where CLECs have been able to wrest network facilities from the ILECs, or where cable operators have invested in expensive upgrades and offer Internet access services.

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"ILEC-imposed charges and policies that limit widespread deployment of xDSL"); Transwire, pp. 9-17 ("... deployment is not feasible if monopoly access network practices and other legal and functional barriers are not eliminated").

<sup>17</sup> Sprint, p. i.

<sup>18</sup> As AT&T explained in its comments (p. 9), "ADSL is deployed on a case-by-case basis, per individual subscriber request, thus minimizing investment risk. Further, ILECs can readily integrate ADSL services into their embedded plant and equipment." See also NorthPoint, p. 4 ("neither technical factors nor access to capital is a constraint on widespread deployment of xDSL service.").

The ILECs, in contrast, predictably argue that advanced telecommunications capability is not being deployed in a reasonable and timely manner because they are being hampered by regulation, and that they should be relieved of their unbundling, resale and UNE obligations under § 251 of the Act as a means to encourage them to deploy advanced services.<sup>19</sup> This argument is no more accurate or compelling for advanced services than it is for other, more traditional telecommunications services. The Commission has steadfastly upheld ILECs' obligations under the Act to open their local markets to competitors,<sup>20</sup> and has, as recently as in Advanced Services Order confirmed that the requirements of the Act apply equally to traditional and advanced telecommunications.<sup>21</sup> The ILECs offer no arguments in support of avoiding these statutory mandates that have not already been considered and rejected by the Commission. Nor should the Commission even consider rewarding the ILECs -- who have flouted their obligations under the Act -- by allowing them to extend their existing monopolies into the market for broadband services.<sup>22</sup>

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<sup>19</sup> See, e.g., Ameritech, pp. 8-11; BellSouth, p. 37; SBC, pp. 2-5; USTA, pp. 7-10; US West, p. 18.

<sup>20</sup> See Memorandum Opinion and Order and Notice of Proposed Rulemaking, Deployment of Wireline Services Offering Advanced Telecommunications Capability et al., CC Docket Nos. 98-147 et al., FCC 98-188, released August 7, 1998 ("Advanced Services Order"); First Report and Order, Implementation Of The Local Competition Provisions In The Telecommunications Act Of 1996, 11 FCC Rcd 15499 (1996) ("Local Competition Order").

<sup>21</sup> See Advanced Services Order, ¶ 11.

<sup>22</sup> See Qwest, p. 20.

Indeed, in light of the relatively low incremental investment that incumbent LECs incur to deploy xDSL services,<sup>23</sup> their claims of hardship due to regulation ring hollow. As the comments point out, the ILECs are aggressively turning their attention -- and their financial resources -- to horizontal mergers and out-of-region investments instead of developing the infrastructure required to meet consumer demand for broadband services in their home territories. Moreover, ILECs can today provide broadband services outside of their serving areas without being subjected to regulation as "incumbent local exchange carriers" under the Act. They have shown no interest in doing so, however, choosing instead to merge with their sister ILECs rather than compete against them. As Sprint correctly notes (pp. 3-4), "[w]ith each merger, the individual RBOC eliminates a potential competitor to its existing local exchange operations, and thus eliminates some competitive pressure to deploy advanced technology as a means of retaining existing local and access service customers."<sup>24</sup>

The ILECs' interest to date in merging with other incumbents rather than competing against them leads ineluctably to the conclusion that they perceive a market advantage (in the form of leveraging of their existing monopoly customer base) in controlling the timing and location of their broadband deployment in their serving areas -- an advantage that far outweighs the perceived benefits of competing among themselves in each other's territories. Sprint correctly observes that:

Although the RBOCs are free to offer services such as DSL and to build broadband networks free of the regulatory requirements contained in Section 251

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<sup>23</sup> See, e.g., AT&T, p. 9; Transwire, pp. 10-11.

<sup>24</sup> ALTS, p. 17.

and 271 of the Act outside their ILEC territories, they have failed to do so. The fact that several RBOCs (Bell Atlantic, US West, Ameritech and Southwestern/Pacific/Nevada Bell) requested that they be allowed to deploy broadband services within their ILEC regions, free of their Section 251 and 271 obligations, would seem to demonstrate their interest in deploying such technologies primarily as a means of protecting their local bottleneck rather than increasing competition.<sup>25</sup>

Plainly, if there were any merit to the ILECs' charge that their deployment of advanced services has been slowed by the requirements Congress imposed on them in the 1996 Act, then they would be rushing to deploy advanced telecommunications capabilities outside their territories, where those restrictions do not apply to them. The fact that no ILEC has made a serious attempt -- much less a successful attempt -- to enter another ILEC's territory demonstrates conclusively that (i) the Act's incumbent-specific provisions are not an impediment to ILEC deployment of advanced telecommunications services, and (ii) incumbent LECs have not opened their monopoly local exchange markets in a manner that permits other carriers (including other ILECs) to compete with them.

**III. THE COMMISSION CANNOT AND SHOULD NOT COLLAPSE THE STATUTORY DISTINCTIONS BETWEEN REGULATION OF INCUMBENT LECs UNDER TITLE II AND REGULATION OF CABLE PROVIDERS UNDER TITLE VI.**

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A wide array of commenters supports the Commission's tentative conclusion that "when it enacted the [1996] Act," Congress "created or retained" different "models" for regulation of "telephone" and "cable TV" providers, "and thereby endorsed their continued use."<sup>26</sup> In particular, those commenters confirm that the ILECs remain the single bottleneck to vigorous

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<sup>25</sup> Sprint, p. 4; see also MCI/WorldCom, pp. 15-16.

<sup>26</sup> NOI, ¶ 77.

competition for the provision of all forms of local exchange service, at whatever speed and bandwidth.<sup>27</sup> If effective competition for the provision of advanced services is to emerge, the Commission must therefore remain vigilant in ensuring that the incumbent LECs fully satisfy all of the requirements of § 251, and should avoid placing any regulatory barriers before those competitors, such as cable providers, electric companies and wireless carriers, who are seeking as new entrants to deploy alternatives to the ILECs' bottleneck facilities.

In the face of this strong consensus, a number of commenters ask the Commission to ignore the statutory distinctions so carefully drawn by Congress, and instead subject incumbent LECs and cable operators who provide advanced services to the same set of regulations. The vast majority of those commenters are the ILECs and their trade associations. Seeking to re-litigate an issue that the Commission has already decided against them in the Advanced Services Order, the ILECs make a vague request for permission to provide advanced services free from the regulatory "encumbrances" (presumably, the interconnection, unbundling and resale requirements of § 251) that apply to monopoly "telephone service" generally.<sup>28</sup> At the opposite extreme, AOL makes the remarkable claim that the Commission should subject cable providers seeking to offer Internet access service in competition with incumbent LECs to the same regulatory obligations imposed on incumbent LECs, and require cable operators to provide all ISPs with unbundled "access" to what it refers to as the cable providers' "last mile" "loop" facilities.<sup>29</sup> Each of these efforts to collapse

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<sup>27</sup> See, e.g., AT&T, pp. 23-36; MCI/WorldCom, pp. 3-5, 22-27; NorthPoint, p. 4; Qwest, p. 23.

<sup>28</sup> Bell Atlantic, p. 8; see also Ameritech, pp. 12-16; GTE, pp. 13-26; U S WEST, pp. 26-32.

<sup>29</sup> AOL at 11.

the regulatory distinctions between telecommunications carriers and cable providers is contrary to the terms of the Act and should be rejected.

The Commission should squarely reject the ILECs' claims that they should be permitted to provide advanced services on an unregulated basis, and thereby be freed from the Act's resale, unbundling and interconnection obligations. Indeed, in advancing these claims the ILECs simply ignore the Advanced Services Order that the Commission released on the same day it issued the NOI. That Order clearly held that advanced services are telecommunications services, and therefore that "all equipment and facilities used in the provision of advanced services are 'network elements'" subject to the obligations in § 251(c).<sup>30</sup> The Commission similarly held in that Order that "section 10(d) expressly forbids the Commission from forbearing from the requirements of section[] 251(c) . . . 'until it determines that those requirements have been fully implemented.'"<sup>31</sup> Finally, in rejecting SBC's petition for forbearance under § 10, the Commission concluded that "to the extent that advanced services are offered by an incumbent LEC . . . it is in the public interest to subject such incumbents to full incumbent LEC regulation."<sup>32</sup>

The ILECs offer only one argument in support of their effort to have the Commission revisit these conclusions. Specifically, the ILECs claim that "[c]able companies are the incumbent providers of high-speed services to residential customers," and that the ILECs are

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<sup>30</sup> See Advanced Services Order, ¶¶ 35, 57.

<sup>31</sup> Id., ¶ 72.

<sup>32</sup> Id., ¶ 79.

the "competitors" in that market.<sup>33</sup> That claim is nonsense. The ILECs currently have an overwhelming 99% share of the market for ISP access. Contrary to the ILECs' apparent claims, a new entrant does not suddenly become an incumbent monopolist -- and the incumbent monopolist does not suddenly become a new entrant -- each time a new entrant innovates by developing and deploying a faster or more reliable means of providing service. This also ignores the obvious facts that today cable operators provide Internet access to only approximately 300,000 subscribers -- less than 0.2% of the over 140 million individual telephone lines, and that, to take just one cable provider, it will take a vast capital investment of \$1.8 billion to upgrade TCI's cable network to provide high-speed Internet services more broadly. Thus, it is patently incredible to characterize an industry with such small market penetration and high investment risk as "incumbent monopolists."<sup>34</sup>

As AT&T demonstrated in its opening comments, the ILECs' monopoly control of the "last mile" thus makes it vitally important that the Commission vigorously implement and enforce the market opening provisions of § 251.<sup>35</sup> In particular, the Commission should ensure that new entrants seeking to provide advanced services have full access to UNEs and to collocation space, interconnection and resale, as well as to a seamless, functioning OSS.

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<sup>33</sup> Bell Atlantic, p.5.

<sup>34</sup> In contrast, the ILECs can easily upgrade their existing loops to provide high-speed ADSL services to their existing base of customers. See, e.g., Bell Atlantic Introduces Infospeed DSL Service to the Washington, D.C., and Pittsburgh Markets, October 5, 1998, <http://www.ba.com/nr/1998/Oct/19981005001.html> (Bell Atlantic press release announcing an ADSL offer that it intends to make available to "millions of consumers in the coming weeks").

<sup>35</sup> See AT&T, pp. 42-46.

Anything short of full and complete implementation of § 251(c)'s requirements would violate Congress' intent, and would be insufficient to ensure the viability of competitive alternatives for the provision of advanced services.

The Commission should likewise reject AOL's startling claim that the Commission should subject cable providers that provide ISP connectivity to the same access obligations that Congress imposed on incumbent providers of telecommunications services. AOL offers no statutory basis for its claim, and none exists. Congress was clearly aware that cable providers were planning to offer Internet access over their cable lines when it enacted the 1996 Act; however, it made no attempt to alter longstanding statutory classifications and subject cable providers to Title II regulation, even to the limited extent that they offered such access. To the contrary, in 1996 Congress deliberately amended the Act's definition of "cable service" to include "one-way transmission, . . . and subscriber interaction, if any, which is required for the . . . use of such . . . other programming service."<sup>36</sup> Congress adopted this amendment "to reflect the evolution of cable to include interactive services such as game channels and information services made available to subscribers by the cable operator, as well as enhanced services" and thereby to ensure that such interactive information services, including the transmission itself, constituted "cable service."<sup>37</sup> The Act expressly exempts "any cable system" from "regulation as a common carrier or utility by reason of providing any cable service."<sup>38</sup> As the Commission has tentatively

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<sup>36</sup> 47 U.S.C. § 522(6) (emphasis added -- underlining indicates text added by 1996 Act).

<sup>37</sup> H.R. Conf. Rep. 104-458, 104th Cong., 2d Sess. at 169. (emphasis added) ("Joint Explanatory Statement").

<sup>38</sup> 47 U.S.C. § 541(c).

concluded, in the 1996 Act Congress thus deliberately chose to maintain a statutory prohibition on regulating cable providers as common carriers, even insofar as those carriers provided transmission and interaction capability in connection with the provision of information and enhanced services.<sup>39</sup>

In order to provide Internet access over cable, a cable provider must provide channels for "upstream" (in addition to downstream) traffic. The entire spectrum available for such upstream traffic, however, even assuming that the cable plant has been upgraded to provide a full 750 MHz bandwidth, is only approximately 40 MHz. To the extent that the cable provider also provides telephony (as AT&T/TCI intends to do), it must use that spectrum not only for its own upstream Internet traffic, but also for telephony. Because telephone users are highly sensitive to delay and noise, a great deal of that 40 MHz of spectrum must be reserved for the upstream portion of telephony traffic.<sup>40</sup> Requiring a cable provider to provide access to additional ISPs thus would cripple a cable provider's ability to compete with incumbent LECs in the market for telephony service -- a critical objective of the Telecom Act.

Indeed, it would be further contrary to the statute, and thus to Congress' intent, for the Commission to subject cable providers to § 251(c)'s unbundled access obligations even in the event cable providers were otherwise subject to Title II. Although Congress did impose certain

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<sup>39</sup> See Comcast, p. 6.

<sup>40</sup> Because the lower range of the spectrum is highly susceptible to interference, providers utilizing that spectrum must reserve multiple 1.5 MHz "backup" channels for each such channel they utilize in order to be able to shift traffic from one channel to another when the first channel experiences unacceptable levels of "noise."

obligations on all local exchange carriers in § 251,<sup>41</sup> the duty to provide unbundled access to competitors is an "additional" duty Congress imposed only on "incumbent local exchange carriers."<sup>42</sup> Insofar as cable operators would provide any telecommunications service, they would clearly be doing so as new entrants that compete with the incumbent LECs, not as incumbent monopolists.<sup>43</sup>

Far from promoting the widespread availability of advanced services, subjecting new entrants such as cable companies to the unbundling and other obligations that Congress imposed on incumbent LECs would thwart the Act's competitive goals. As Congress well understood, cable companies offer the best hope of providing a competitive alternative to the incumbent LECs' bottleneck facilities for a broad number of residential customers.<sup>44</sup> In order to do so, however, cable providers will be required to invest billions of dollars to upgrade their networks -- an economic and technological risk that cable companies will not undertake if they would then have to provide unbundled access to those upgraded facilities to third parties whose business plans did not include the development and deployment of advanced infrastructure.<sup>45</sup> In the two and one half year period since the 1996 Act was passed, there has been virtually no erosion in the

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<sup>41</sup> See 47 U.S.C. § 251(b).

<sup>42</sup> 47 U.S.C. § 251(c).

<sup>43</sup> See Comcast, p. 5.

<sup>44</sup> See Joint Explanatory Statement, p. 148.

<sup>45</sup> By contrast, the incumbent LECs deployed their networks at a time when they had a legal monopoly and were guaranteed to earn a return on their investment from captive ratepayers.

monopoly power of the incumbent LECs. The last thing the Commission should do now is subject the most promising facilities-based competitive providers of Internet access to residential consumers to common carriage regulation -- much less to regulations that were designed for incumbent monopolists.

**IV. THE COMMISSION SHOULD RELY ON ITS EXISTING UNIVERSAL SUPPORT MECHANISMS TO FACILITATE DEPLOYMENT OF ADVANCED TELECOMMUNICATIONS CAPABILITY TO AREAS THAT ARE NOT THE EARLY BENEFICIARIES OF ADVANCED SERVICES.**

The provisions of § 254 should be sufficient to ensure the deployment of advanced telecommunications capability to rural areas. Section 254(b)(3) provides for the capability of rural areas to access advanced services on the same terms and conditions as urban areas, once those advanced services are incorporated in the definition of "universal service."

In response to the Commission's inquiry, RTG contends that rural areas have heightened needs for advanced communications as compared to other communities because a key factor in their economic development is to close the "distance gap" via telecommunications; for example, by providing equivalent education and healthcare opportunities.<sup>46</sup> Whether or not RTG is correct on this point, in all areas (urban, suburban, and rural), consumers are likely to access advanced telecommunications services at centralized community locations such as schools and libraries before those services are widely available from residential locations.<sup>47</sup> As AT&T

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<sup>46</sup> NOI, ¶ 65; RTG at 3-5.

<sup>47</sup> As the Commission acknowledges, under § 254(h), it has made support available for telecommunications services, Internet access, and internal connections for schools and libraries, although it has not specifically addressed whether such services constitute advanced telecommunications capability. See NOI, ¶ 72. Although Internet access and

(footnote continued on following page)

explained in its comments, USF funding for schools and libraries will help provide this centralized access to advanced services.<sup>48</sup> Support for rural healthcare also will address RTG's concerns regarding medical care. Only when an advanced telecommunications service has been accepted in the marketplace by a majority of consumers in their homes and becomes necessary for an individual's social and economic well-being should the Commission consider adding it to the definition of universal service.

The comments confirm that it would be premature for the Commission to include advanced services in the definition of universal service at this time. As Ameritech points out, § 254(c)(1) contemplates that "the evolving definition of universal service should include only those . . . telecommunications services which 'have through the operation of market choices by customers, been subscribed to by a substantial majority of residential customers.'"<sup>49</sup> For the Commission to include any aspect of advanced telecommunications capability or services prior to that time would violate Congress' intent by causing deployment patterns different from those that might have resulted absent Commission interference with market forces.<sup>50</sup>

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(footnote continued from previous page)

internal connections are not "telecommunications" services, schools and libraries can use their USF funds to purchase advanced telecommunications services which will be used for many applications, including Internet access. This bandwidth can be purchased at the discretion of the eligible institution, at discounted rates. See NOI, ¶ 425.

<sup>48</sup> AT&T, p. 55 n.109.

<sup>49</sup> Ameritech, pp. 14-15.

<sup>50</sup> See Sprint, p. 10 (The "market, rather than a regulatory entity, should determine the rate at which xDSL technology is deployed.").

Moreover, there is no need for the Commission to provide early funding to rural areas. As RTG shows,

contrary to the BOCs' claim, there is no reason to expect a shortage of backbone facilities capable of supporting Internet-related and advanced services in rural areas. Responding to demand for backbone facilities, rural telephone companies across the country have joined together to construct fiber facilities capable of supporting advanced services.<sup>51</sup>

Rather than providing premature support for advanced telecommunications capabilities, the Commission should act to create the competitive market that is the best means to further this objective.<sup>52</sup>

The approach described above is fully consistent with the fact that § 254 "envisions a gradually and continually evolving standard of what services must be made generally available and affordable as a matter of national policy."<sup>53</sup> As one commenter explains:

Market-driven deployment is never an overnight phenomenon. Even dense urban markets with a significant proportion of business customers need time to develop market demand, especially for the kind of mass market that Section 706 seems to contemplate. Moreover, when a mass market successfully develops, the costs of deploying the technology usually are driven down by competition among manufacturers and economies of scale, and the price to customers can be reduced because more costs can be shared. Thus, the Commission should not rush in to replace the market with regulatory directives before there is enough time to see where market failure is not likely to occur, so no regulatory intervention is necessary. If the Commission rushes forward now, when costs are at their highest developmental levels and demand has not had time to emerge, the Commission will need to provide more total universal service support in more markets to satisfy Section 706.<sup>54</sup>

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<sup>51</sup> RTG, p. 11

<sup>52</sup> See generally MCI/WorldCom, p. 10.

<sup>53</sup> NRTA, p. 11.

<sup>54</sup> Id., p. 9.