

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

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FEDERAL COMMUNICATIONS COMMISSION
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In the Matter of)
)
Inquiry Concerning the Deployment of)
Advanced Telecommunications)
Capability to All Americans in a Reasonable)
and Timely Fashion, and Possible Steps)
To Accelerate Such Deployment)
Pursuant to Section 706 of the)
Telecommunications Act of 1996)

CC Docket No. 98-146

REPLY COMMENTS OF THE
DSL ACCESS TELECOMMUNICATIONS ALLIANCE ("DATA")

Kevin Timpane
Esther H. Rosenthal
FirstWorld Communications, Inc.
9333 Genesee Avenue
San Diego, CA 92121
619.552.8010

Steven Gorosh
Vice President and General Counsel
Northpoint Communications, Inc.
222 Sutter Street, Suite 700
San Francisco, CA 94108
415.403.4003

Michael D. Specht
First Regional TeleCOM, LLC
2814 Upton Street, N.W.
Washington, D.C. 20008
202.244.1254

Jeffrey Blumenfeld
Rhythms NetConnections Inc.
7337 So. Revere Parkway, Suite 100
Englewood, CO 80112
303.476.4200

Jeffrey Blumenfeld
Glenn B. Manishin
Colin M. Alberts
Stephanie A. Joyce
Frank V. Paganelli
Blumenfeld & Cohen—Technology Law Group
1615 M Street, N.W., Suite 700
Washington, D.C. 20036
202.955.6300 phone
202.955.6460 facsimile

*Counsel for DSL Access
Telecommunications Alliance*

Dated: October 8, 1998

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SUMMARY

The DSL Access Telecommunications Alliance (“DATA”) is a coalition of advanced data and voice service providers seeking to ensure and promote competition in digital subscriber line (“xDSL”) services. The Commission must continue to regulate incumbent local exchange carriers (ILECs) as dominant carriers under Title II because they enjoy and exercise dominant market power in the market for advanced services inputs. The Commission’s tradition of ensuring fair and robust competition in telecommunications requires that it examine closely the overwhelming advantage that the ILECs retain by virtue of their vertical integration, particularly their bottleneck control of network facilities and regulate them accordingly.

The chief impediment to the development of a truly competitive advanced services market is the incumbent LECs’ continuing control of essential facilities, including loops and collocation facilities, to which providers of advanced, xDSL-based service must have open and nondiscriminatory access in order to compete. At this stage, it is crucial that the Commission recognize that ILECs control the roll-out of advanced telecommunications via their stranglehold over the local loop and ensure that the ILECs adhere to the pro-competitive regulations in Title II until their control of these bottleneck facilities is eradicated. Therefore, the Commission should enforce the provisions of Sections 251 and 252 of the 1996 Act, specifically the loop unbundling and collocation requirements, on the incumbents until competitive carriers have nondiscriminatory access to the facilities required for provision of advanced services.

Further, the Commission’s proposal to allow ILECs to provide advanced services through a wholly separate affiliate is a viable solution for minimizing ILEC opportunities to abuse their market power. The separate affiliate option will provide significant protection that incumbents will not engage in discriminatory practices by obliging them to treat their own subsidiary in the

same manner as they do competitors. By limiting the incumbents' incentive to discriminate in favor of themselves, the separate affiliate option will help to ensure that all providers of advanced telecommunications services operate on a level playing field and are thus truly competitive with one another. Such competition will promote most efficiently and reliably the reasonable and timely deployment and development of advanced services.

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**REPLY COMMENTS OF THE
DSL ACCESS TELECOMMUNICATIONS ALLIANCE (“DATA”)**

The DSL Access Telecommunications Alliance (“DATA” or “Commenters”), by its attorneys, respectfully submits these comments in response to the Commission’s August 7, 1998 Notice of Inquiry¹ in the above-captioned docket.

INTRODUCTION

DATA is a coalition of advanced data and voice service providers seeking to ensure and promote competition in digital subscriber line (“DSL”) services. Member companies include Rhythms NetConnections Inc. (“Rhythms”), FirstWorld Communications, Inc. (“FirstWorld”), First Regional TeleCOM, LLC (“First Regional”), and NorthPoint Communications, Inc. (“NorthPoint”).

There is no question that incumbent local exchange carriers (“ILECs” or “incumbent LECs”) continue to wield monopoly power over local exchange loop and collocation facilities that are necessary wholesale inputs for the provision of wireline-based advanced services.

¹ *Inquiry Concerning the Deployment of Advanced Telecommunications Services Capability to Americans in a Reasonable and Timely Fashion, and Possible Steps to Accelerate Such Deployment Pursuant to Section 706 of the Telecommunications Act of 1996*, Notice of Inquiry, CC Docket No. 98-146 (rel. August 7, 1998)(“NOI”).

Because of the existing ubiquity of the copper line telephone network, wireline-based advanced services, and in particular xDSL services, are the preeminent source of two-way, high-speed, interactive advanced services for most Americans. Thus, the ILECs have the power to leverage their monopoly control of the local loop into a vertically integrated dominance of advanced services.

Consistent with its long tradition of opening telecommunications markets to competition, the Commission must recognize the source and existence of this market power and constrain it by refusing to grant the ILECs' request for release from the regulatory regime of Title II. Continued regulation of the ILECs will ensure equal access by all competitors to the essential network inputs controlled by the ILECs and therefore assure viable competition for the advanced services retail market. In particular, the Commission's proposed separate affiliate option is the best available mechanism, if fully enforced, for balancing on the one hand the ILEC desire to offer advanced services free of regulation, and on the other hand the promotion of true competition in the retail advanced services market. The separate affiliate proposal would minimize the ability of the ILECs to avoid detection if they engage in anticompetitive abuse of their continuing monopoly on wholesale inputs, and thereby would help to preserve the retail marketplace for open competition.

DISCUSSION

I. ILECS RETAIN MARKET POWER CONTROL OVER THE LOCAL LOOP THEREFORE THE COMMISSION SHOULD NOT DEREGULATE THEIR ADVANCED SERVICES UNLESS OFFERED THROUGH A SEPARATE AFFILIATE

In commenting on the Commission's August 7th Notice of Inquiry, the ILECs speciously argue that they do not currently control a monopoly bottleneck over the provision of advanced

services in America.² They further argue that, as a result of the various technical alternatives available for delivery of advanced services over the "last mile," the retail market for advanced services is sufficiently competitive to allow the Commission to eliminate its existing regulatory controls. SBC Comments at 8 ("the FCC should provide for non-dominant treatment of interstate services based upon [advanced telecommunications] capability"); BA Comments at 8-14; GTE Comments at 19-26. The ILECs are wrong on both counts.

In crafting their analysis, the ILECs fail to acknowledge several critical facts regarding the advanced services marketplace, including: First, that the ILECs exclusively and completely control collocation and loops, the inputs necessary to deliver the most reliable and affordable means for providing advanced services — xDSL-based services; Second, that xDSL — the service over which the incumbent LECs can exert market power via their control of collocation and the local loop — is the *only* technology *currently* capable of ubiquitous, two-way, interactive broadband services; Third, that neither the ILECs nor the Commission can accurately predict at this stage whether the ILECs' monopoly over wireline network inputs will be dissipated by the development of technologies other than xDSL that may some day be capable of providing ubiquitous, two-way, advanced services; and Fourth, that in fact there exist numerous economic, technical and marketing barriers to the future success of alternative non-wireline broadband services that raise serious questions about when and if they will ever be widely available as outlets for the delivery of advanced services.

² Comments of Bell Atlantic to the NOI, CC Docket No. 98-146, (September 14, 1998) ("BA Comments") at 8; Comments of GTE to the NOI, CC Docket No. 98-146, (September 14, 1998) ("GTE Comments") at 6-9. Hereinafter all references to comments made in response to the Commission's NOI proceeding will be designated as "Party Comments at page number," *e.g.*, "MCI Comments at 6."

As a result, the factual foundation of the ILECs' position is wholly inaccurate and their deregulation proposal, if implemented, would result in the massive delay, if not the termination of, competition in xDSL-based services, and therefore in advanced services generally.

While the delivery of bandwidth into the home is a competitive battle that spans a number of different technologies, including xDSL, wireless local loop, satellite, utility wire and cable modem solutions, only xDSL is *immediately available* as a two-way interactive voice, data and video solution in virtually every home across America. DATA Comments at 5-7; *see* NorthPoint Comments at 2-4. As such, the Commission has a particularly strong obligation to continue to ensure that all potential xDSL providers have open and nondiscriminatory access to the ILEC-controlled network facilities that are required to provide xDSL-based advanced services.

A. ILECs Control Market Power Over the Essential Facilities Required to Provide Wireline (xDSL-based) Advanced Services

Monopoly or market power is defined as "the power to control market prices or exclude competition." *United States v. E.I. du Pont de Nemours & Co.*, 351 U.S. 377, 391 (1956). A particularly dangerous form of market power exists when a monopolist controls the "essential facilities" needed for others to compete and therefore has the power to exclude or impede competition. Generally, a facility is "essential" if it is vital to competitive viability and competitors cannot effectively compete in the relevant market without access to it. *Alaska Airlines v. United Airlines*, 948 F.2d 536, 544-45 (9th Cir. 1991). Under the antitrust laws, a monopolist controlling an essential facility may be found liable for monopolization if it refuses to deal with a competitor who utilizes that facility. The elements necessary to establish liability under the well-settled essential facility doctrine are:

(1) control of the essential facility by a monopolist; (2) a competitor's inability practically or reasonably to duplicate the essential facility; (3) the denial of the use of the facility to a competitor; and (4) the feasibility of providing the facility.

MCI Corporation v. AT&T, 708 F.2d 1081, 1032-33 (7th Cir.), *cert. denied*, 464 U.S. 891 (1983).

See also United States v. Terminal Railroad Ass'n., 224 U.S. 383 (1912); *Associated Press v.*

United States, 326 U.S. 1 (1945). Moreover, the courts have clearly recognized that a

monopolist's control over essential facilities in one market can often be detrimentally leveraged to create anticompetitive effect in another, particularly where the essential facilities in question are necessary inputs for the second market.

a refusal [to deal] may be unlawful because a monopolist's control of an essential facility (sometimes called a "bottleneck") can extend monopoly power from one stage of production to another, and from one market into another. Thus, the antitrust laws have imposed on firms controlling an essential facility the obligation to make the facility available on nondiscriminatory terms.

MCI v. ATT, 708 F.2d at 1032.

It is beyond question that incumbent LECs currently have the market power to exclude competition in the provision of xDSL services because they control "essential facilities" necessary for xDSL competition. In order to participate in the xDSL advanced services marketplace, competitive LECs require two essential inputs: access to ILEC-owned copper loops, and access to collocation space where the loops terminate, also owned and controlled by the incumbents. By denying access to these critical inputs, incumbents are capable of excluding any or all competition in the xDSL market.

Anticompetitive ILEC abuse of their essential facilities is not merely a theoretical or speculative concern. As the Commission is aware, the ILECs have been actively denying xDSL providers access to DSL-capable loops and physical collocation for some time. DATA Comments at 8-18; NorthPoint Comments at 4-6.

Just as incumbent LEC monopoly control of collocation and loops gives them confirmed monopoly power in the provision of local telephone service, so it also gives them bottleneck control over the developing xDSL-based advanced services industry. Therefore, the ILECs must remain subject to the Commission's existing regulatory control and its proposed separate affiliate rules if a structurally and actually competitive marketplace is to emerge in xDSL-based advanced services.

B. xDSL is the Only Technology Currently Capable of Ubiquitous, Two-Way Interactive High-Speed Services

For the nationwide provision of advanced high-speed data services in the near term, there are no effective substitutes for xDSL. Unlike other high-speed or broadband technologies, xDSL is based on an infrastructure that currently exists: the copper phone line network. Virtually every home and business in America is equipped with one or more copper loops. Once those loops have been stripped down to clean copper loops, and equipped with DSL "modems," interactive two-way high-speed services are immediately available. The advantages of the xDSL solution are sufficiently clear that numerous new advanced services providers, many of whom are indifferent to the technological medium over which their services are offered, have selected xDSL as the technology of choice for their services. Relatedly, price decreases for other technologies will not lead these providers to switch away from xDSL services to a significant degree because the other technologies are simply not universally available nor capable of high-speed, two-way, interactive capabilities (*see infra* section I(C)).

In an attempt to sneak past the Commission's guard, the ILECs down-play and unjustifiably minimize the advantages of the xDSL medium. Bell Atlantic claims that non-xDSL services are adequate or superior economic substitutes for non-xDSL-based advanced services: "Cable modems are the incumbent provider of high-speed broadband services." BA Comments

at 5. US West confidently claims that "all of these providers [wireless, cable and satellite] compete in a single, converged market for digital broadband services because they all offer end users essentially the same thing: high-speed transmission of information packets." US West Comments at 9.

The ILECs' analysis totally misconceives the current ability of non-xDSL technologies to provide advanced services. The ILECs' claims regarding the convergence of the advanced service market completely ignore clear evidence that the fixed wireless, satellite and cable industries face significant barriers to entry into the advanced services industry and that, in fact, xDSL is the most likely technology to achieve widespread success in the near future.

Moreover, the incumbents' analysis runs directly counter to the pro-competition goals of Section 706 of the Act. Rather than base its regulatory decisions on the incumbent monopolists' self-serving predictions of future competition in the retail advanced services market, the Commission should adhere to the language and intent of Section 706 and "promote competition" by ensuring that the incumbent LECs do not abuse their bottleneck control of the network facilities needed *today* by competitors to provide xDSL-based advanced services. 47 U.S.C. § 706(a).

1. The Commission cannot deregulate the ILECs based upon ILEC predictions of future competition

As the incumbent LECs so readily point out, there are numerous technologies that are being developed for delivering advanced services to the doorstep. Among those is xDSL. Under the Commission's own historical practice — *see infra* section II — and sound competition policy, it is far too early for the ILECs or the Commission to attempt to use today's "marketshare" figures to predict which, if any, of the existing or future technologies will win. It

is also foolhardy to predict that the ILECs' control of the local loop needed by competitors to provide DSL-based advanced services will be dissipated in the near future by the emergence of new technologies.

The incumbent LECs prematurely claim that competitive market dynamics exist in the advanced services retail market, and that they should therefore go unregulated. Despite the ILECs' "crystal ball" predictions, it is completely unclear at this time, however, what the advanced services market is going to look like when it is truly formed. The competitive reality is that absent active regulation, the incumbent LECs will be free to employ their vertically integrated market power control over essential facilities to thwart competition in the retail services market.

Thus, assuming the Commission desires to remain technology-neutral, and seeks to encourage development of advanced services delivery as expeditiously as possible, it must continue to promote competition by ensuring a structurally competitive market in *each* of the various technology mediums that currently compete for the advanced services marketplace³ (*see infra* Section III).

2. Wireless, cable and satellite still face numerous economic, technical and marketing hurdles before true competition exists and any one of them can be considered an economic substitute for xDSL

Beyond the need for the Commission to remain technology-neutral and promote competition in *all* possible media for the delivery of advanced services, there exists significant evidence that in fact the "alternative" delivery vehicles acclaimed by the ILECs face numerous barriers that make xDSL the likely technology of choice for the near future. Because the non-

³ See MCI/WorldCom Comments at 15 ("deployment of advanced capabilities will occur at a faster pace in a competitive market where there are multiple service providers.").

wireline technologies are not currently effective substitutes for xDSL-based services, the Commission must work to prevent the ILECs from transferring their resilient market power over collocation and the local loop, and therefore xDSL, to the new advanced services retail market. By maintaining the existing regulatory structure and implementing the proposed separate affiliate option, the Commission can ensure as robust competition as possible among xDSL providers, and therefore among advanced service providers generally.

Cable Modems

Cable companies have talked about providing advanced services via cable modems for many years, yet even today they enjoy very low market penetration. Indeed, there are currently only about 200,000 cable modem subscribers nationwide.⁴ Despite the high hopes that existed earlier in the decade that coaxial cable would be the blunt instrument that would break open the incumbents' monopoly in local telephone service, cable telephony has not developed to any significant degree. Among other issues, the cable industry has found that "upgrading cable networks proved a nightmare of soaring expense and technical hassles."⁵

And still, years into the process, significant network redevelopment and tremendous capital outlays are still required: "upgrading wireless cable systems to support two-way transmission would require providers to convert what are now broadcast television systems into networks that more closely resemble a cellular telecommunications platform." AT&T Comments at 16.⁶ The Washington Post has further reported that

[i]t will take years before [cable] service is widely available and all the technical and marketing issues are resolved. And some cable companies may balk at the vast capital investment required.

⁴ "Industry: You'll Love Cable Modems," *Wired News Report* (May 4, 1998).

⁵ Leslie Cauley, "Changing Picture," *Wall Street Journal* (September 21, 1998) at R14.

⁶ See also Scott Thrum, "Keeping the Customer Satisfied," *Wall Street Journal* (September 21, 1998) at R24 ("Many cable systems need major upgrades to handle two-way traffic. AT&T says it will spend \$3.1 billion to improve TCI's facilities.").

Although cable TV lines pass more than 90 percent of all American homes, most are designed to send signals in only one direction, from the two-way traffic required by computer users, cable companies are investing hundreds of millions of dollars in new equipment and rebuilt wires — a job that will take several more years to complete.⁷

Significant doubts continue to exist as to whether the cable modem solution will *ever* be able to compete with xDSL. Bell Atlantic's retail services group president, Bruce Gordon, recently pointed out that xDSL services will ultimately work better than high-speed cable modems because xDSL offers a point-to-point connection to the central office, whereas cable modems are shared among users. "The more customers use a cable-modem service, the more degradation of service they'll get."⁸

It is clear that while some cable modem build-out has occurred, significant technological, economic and marketing barriers remain to be addressed before the technology is a viable option for providing advanced services. Until such time as the cable industry's broadband two-way offerings are available nationwide, and at a competitive price point, they are not effective substitutes for xDSL.

Fixed Wireless

As the ILECs admit, only a few wireless solutions exist with the capacity to deliver broadband services: "only the LMDS spectrum, 24 GHz spectrum, and the 39 GHz spectrum are likely capable of providing high bandwidth for advanced telecommunication capability and services . . . [t]he PCS and cellular spectrum does not today fulfill the broadband concept in terms of speed." SBC Comments at 13. The unstated implication of this admission is the most

significant: of those fixed wireless technologies capable of high-speed broadband services, *none* is currently in the marketplace, or likely to be available for wide deployment in the near future.

Teligent, seeking to offer corporate broadband services in 24 GHz spectrum, currently *plans* for roll-out of its services to occur in a number of cities by the end of 1999.⁹ Likewise, Winstar, hoping to compete in the 24 GHz range, is currently "testing its point-to-multipoint service now in Washington, DC and expects to *begin* rolling out commercial service . . . by the end of this year." *Id.* Neither of these services has completed testing, or proven its ability to attract customers, much less participate in the full rigors of competition, including the complicated challenges of interconnection, billing and customer service. To date, no LMDS provider is even close to joining the advanced services market.

In addition, prospective wireless providers may have gravely underestimated the pervasive technical problems associated with providing service with higher-end spectrum.¹⁰ These frequencies can be extremely vulnerable to moisture and other weather conditions as well as interference from other frequencies.¹¹ In fact, the largest proposed trial of fixed wireless service, AT&T's "Project Angel," has been shelved indefinitely.¹²

The ILECs' self-serving predictions of competition in the retail advanced services market from fixed wireless providers deserves no weight until those services are *actually* up and running nationwide, and competing effectively with xDSL services. Today, fixed wireless is simply not an effective and competing substitute for xDSL services.

⁷ Paul Farhi, "Slow Start for a Fast Connection," *Washington Post* (December 23, 1997) at C1.

⁸ Kate Gerwig, "Bell Atlantic Introduces ADSL Offerings," *InternetWeek* (October 6, 1998).

⁹ Claudia Graziano, "Wireless ISPs Go Multipoint," *Wired News* (September 29, 1998).

¹⁰ As a result, "[t]oday, most wireless data still travels over existing circuit-switched voice cellular networks -- despite the noise, interference, and high cost." Morris Edwards, "Wireless Internet Isn't Here Yet -- But It's Coming," *Communications News* (June 1998).

¹¹ Kathleen Cholewka, "Web Access Without the Wires," *Data Communications* (September 21, 1997) at 7 ("Microwave and satellite transmissions are particularly vulnerable to degradation when the rain comes down.").

¹² Rebecca Quick, "Wireless Sort Of," *Wall Street Journal* (September 21, 1998) at R18.

Satellite

Delivery of advanced services via satellite systems remains a distant goal. Most "broadband access satellite systems are scheduled for introduction in the year 2002 and after," AT&T Comments at 17, and those scheduled for earlier roll-out, such as Motorola's Iridium Service face continuous delays.¹³ Even when satellite services do come on-line, many will be too expensive for any but the most affluent customers — digital satellite receivers will cost about \$1,000 (for Hughes DirecDuo service), and about \$700 to install.¹⁴ Like the ILECs' claims regarding fixed wireless and cable modem technologies, the Commission must be left wondering, "where's the beef?" The equation is simple: no actual competition in retail services, no deregulation of the ILEC's control over the wholesale inputs. In addition, providing *two-way* broadband services presents even greater challenges.

C. Until ILEC Market Control Over the Local Loop Becomes Irrelevant, the Commission Cannot Speculate About Future Competition and Deregulate the ILECs

Because the incumbent LECs retain market power in essential xDSL inputs, they have the power to exclude xDSL competitors. Unless and until competition exists among a variety of advanced services delivery technologies, and advanced service providers are thus no longer dependant upon access to ILEC-controlled network facilities, the incumbent LECs will possess dangerous control of the advanced services marketplace. That is, unless and until the monopoly over the local loop becomes irrelevant, the ILECs still control an essential facility vital to the promotion of retail xDSL-based services, and must be required to provide reasonable access to those facilities.

¹³ See Sean Donahue, "Lost in Space," *Wired News* (September 9, 1998) at 1 ("Iridium will delay the rollout of its satellite telephone service as it completes the testing and debugging of its system in orbit.").

¹⁴ Mike Grebb, "Can One Dish Serve Net, TV Needs?," *Wired News* (July 18, 1998) at 1.

II. THE COMMISSION SHOULD ONLY DEREGULATE ILEC PROVISIONING OF ADVANCED TELECOMMUNICATIONS SERVICES UPON A CONCLUSION THAT ILECs HAVE NO MARKET POWER IN A MATURE MARKET, AS IT HAS DONE IN THE PAST

Despite the appeals of the incumbents, the Commission cannot turn a blind eye to current realities, so as to blithely “focus on the future”¹⁵ and thereby forbear from oversight based on speculation of some future fully competitive market. This imperative is well grounded in the FCC’s historical experience with respect to emerging technologies and the blunt realities of embedded monopoly power. Recognizing that there is a significant difference in time between the nascent emergence of a new telecommunications market and actual competition, the Commission has been well served by its past inclination to foster competitive conditions by regulating entities with market power until true competition exists in a fully-developed market.

A. The Commission Must Continue to Regulate ILECs With A Focus on the Actual Present Condition of the Incumbents’ Power to Exclude New Entrants from Competition

There are two specific historical examples that the Commission should consider in deciding whether to impose regulatory discipline on the chaos of emerging technologies where a provider continues to control market power: cable television and AT&T’s dominant status. The Commission’s past practices offer a model based on concepts drawn from antitrust analysis and the concept of reserving judgment regarding dissipation of monopoly power until a market fully matures.

1. Market power analysis and AT&T’s dominant status

On different occasions between 1979 and 1995, the Commission emphasized AT&T’s continuing market power when it refused to reclassify AT&T as a non-dominant carrier in the

¹⁵ Nortel Comments at 4.

interstate market. In investigating the status of competition in the long distance market,¹⁶ the Commission defined a dominant carrier as one that “possesses market power,” or controlled “bottleneck facilities.” *Id.* at 20. AT&T was found to be dominant on account of, *inter alia*, its controlling local access for over 80% of the nation’s phones, and that “the growing demand for long-distance telephone service and the current difficulties of entering this market . . . confer substantial market power upon AT&T.” *Id.* at 23. Therefore, the Commission refused to classify AT&T as non-dominant merely on the basis that new entrants were beginning to emerge in the interexchange market, some of whom employed new technologies and techniques. Chief among these entrants were carriers such as MCI, which also used microwave transmissions, and Sprint, which was busy exploring all-fiber solutions to long distance transport. Although both Sprint and MCI exhibited the potential to provide competition in the long distance market, the Commission found that “AT&T’s long-run profit maximizing behavior, in the absence of regulation, may continue to increase price above cost for long distance service, thus, given this very real possibility, [the FCC] will continue to apply the full panoply of our traditional regulations.” *Id.* at 23.

In a later proceeding,¹⁷ the FCC again declined to certify AT&T as non-dominant, despite the entrance of still more entrants into the domestic interexchange market of many more IXCs, resellers and MCCs. The Commission explicitly used economically valid methods of market power analysis, citing definitions found in Areeda and Turner,¹⁸ as well as in Landes and

¹⁶ *In the Matter of Policy and Rules Concerning Rates for Competitive Common Carrier Services and Facilities Authorizations Therefor*, First Report and Order, CC Docket No. 79-252, 85 FCC.2d 1 (1980)(“*Competitive Carrier Proceeding*”).

¹⁷ *Competitive Carrier Proceeding*, Fourth Report and Order, 95 FCC.2d 554 (1983).

¹⁸ Areeda and Turner define market power as the “ability to raise prices by restricting output.” *Id.* at 558.

Posner.¹⁹ The analytical approach outlined by the Commission explicitly recognized that although the future would eventually bring truly effective competition, *deregulation* was not appropriate until such time as that competition actually developed. In another proceeding shortly before divestiture,²⁰ the Commission recognized that although interstate interexchange competition had greatly increased, and again utilized an *actual* market power analysis as the primary tool to scrutinize AT&T's request for regulatory relief.²¹

It was only in 1995, sixteen years after the FCC began to examine the effect of the significant entrance of new interexchange carriers, that the Commission finally certified AT&T as non-dominant, when AT&T's market power was shown to have clearly dissipated based upon a variety of actual market conditions, including supply elasticity, demand elasticity, and AT&T's cost structures, resources and market share.²²

Though the result of today's highly competitive interexchange market was completely predictable a decade ago, the Commission continued to analyze the marketplace in terms of then-present realities. It must do the same with the emerging market for advanced telecommunications services, where the primary reality of today's developing market is the oppressive market power controlled and exercised by the ILECs to disadvantage competing xDSL providers.

¹⁹ Landes and Posner define market power as "the ability to raise and maintain prices above the unprofitable." *Id.* at 558.

²⁰ *Competition in the Interstate Interexchange Marketplace*, CC Docket No. 90-132, Notice of Proposed Rulemaking, 6 FCC Rcd. 2627 (1990) ("Interexchange Competition Proceeding").

²¹ *Interexchange Competition Proceeding*, First Order, 6 FCC Rcd. 5880, 5885-92 (1991).

²² *In the Matter of the Motion of AT&T Corp. to be Reclassified as a Non-Dominant Carrier*, Order, CC Docket 95-427, 11 FCC Rcd. 3271 (1995).

2. Cable television and market power oversight

In 1984, Congress enacted the first federal statute governing cable television regulation, adding Title VI to the Communications Act of 1934.²³ Section 601 of the Cable Act has a basic purposes the promotion of “competition and minimizing unnecessary regulation.”²⁴

Nevertheless, some eight years later Congress recognized the reality of the market power that was being exercised by the cable operators, and passed revisions to the Cable Act,²⁵ recognizing that, due to the incumbents’ continuing market power, the federal government was warranted in increasing the regulation of cable provisioning. Congress appreciated that the cable providers continue to maintain dominant market power,²⁶ despite the existence of present alternative video delivery systems, and the prospect of future media such as DBS, video dialtone, OVS and others that could potentially compete with cable television franchise holders. It is imperative that the Commission remain true to the methodology that has served it and the public so well in the past, by continuing to scrutinize the emerging provision of advanced telecommunications systems by withholding deregulation until an actual advanced services market can mature and the ILECs’ monopoly control of essential facilities within that market is effectively dissipated.

²³ Cable Communications Policy Act of 1984, Pub. L. No. 98-549, 98 Stat. 2779 (1984)(“Cable Act”).

²⁴ Cable Act § 601.

²⁵ Cable Television Consumer Protection and Competition Act of 1992, Pub. L. No. 103-385, 106 Stat. 1477 (1992).

²⁶ Cable Act § 623(k) provides in part that “the Commission shall annually publish statistical reports on the average rates for basic cable service . . . of cable systems that the Commission has found are not subject to such effective competition.”

**B. The Commission Must Regulate
Advanced Telecommunications Services
With Respect to Market Power
Not Simply the Potential Emergence of New Technologies**

The Commission must also recognize that the introduction of a new technology, such as broadband wireless or cable modems, does not instantly transform a nascent market dominated by the ILECs' market power into effective competition. For example, when Sprint deployed its all-fiber network (FON) in the mid- and late-1980s, the FCC properly refused to heed AT&T's protests that its analog/non-fiber Long Lines network was thereby rendered so technically backward that its dominant retail market power should be discounted. "The real issue is whether [Sprint and others] have enough . . . available capacity to constrain AT&T's market behavior."²⁷ The Commission's accurate assessment of AT&T's continuing market power in long distance service in the mid-1980s remains relevant for the ILECs' market power over essential inputs for advanced xDSL services. The issue the Commission must deal with today is one of market power, not one of technology.

The ILECs in their comments have gone to absurd lengths to exaggerate the impact and penetration of cable modems, wireless systems, and satellite services on their market power. For example, one wonders if Bell Atlantic's breathless claim that "[p]enetration rates for cable modems are very high . . . estimated to be 7% of all Time-Warner customers in Portland, Maine" is better read as sarcasm. Bell Atlantic Comments at 5-6.

The current federal regulatory regime for ILECs did not spring forth as by spontaneous generation. The system is the result of hard-won experience that regulators have gained in assessing market power and competitive conditions within new telecommunications arenas over the past twenty years. Just as the FCC in the past has acted to ensure that emerging competition

²⁷ *Interexchange Competition Proceeding*, First Order, 6 FCC Rcd. 5880, 5888 (1991).

is protected from anticompetitive abuse by an incumbent monopolist, the Commission must act to ensure that the ILECs current control over bottleneck facilities cannot be leveraged into dominance in the new advanced services market. At the time a mature and effectively competitive advanced services retail market emerges, and not before, the Commission can begin to deregulate. But the history of earlier services indicates as to when that day may arrive, it is quite clearly not yet here.

III. THE COMMISSION'S PROPOSED SEPARATE AFFILIATE OPTION IS THE SOLUTION FOR CONSTRAINING THE ILECs' MARKET DOMINANCE

Implementation of a separation requirement is a reasonable option, assuming effective enforcement, to minimize the opportunities for ILEC anticompetitive behavior arising out of their bottleneck control over the essential inputs for advanced communications services. ILEC commenters²⁸ have chosen this forum, in addition to the NPRM proceeding, to rail against this option in the name of "reasonable and timely deployment" of advanced services. As Commenters FirstWorld and First Regional noted in their NPRM comments, "[i]t is particularly instructive as to the true state of competition that incumbent LECs cannot imagine a worse alternative to regulation than having to offer services through an affiliate that is treated like a CLEC."²⁹

Contrary to ILEC assertions, however,³⁰ the separate affiliate option that the FCC has proposed³¹ will promote the deployment and ubiquity of advanced services in two ways: (1) helping to ensure that all providers of advanced services are treated equally by the ILECs, thus

²⁸ BellSouth Comments at 40-41; GTE Comments at 6.

²⁹ FirstWorld/First Regional Comments at 17.

³⁰ *But see* Joint Statement of Principles Applicable in a Separate Subsidiary Environment, NPRM Comments of Ameritech, as attached, and Comments of NorthPoint, as attached (filed Sept. 25, 1998).

³¹ NPRM ¶¶ 92-115.

constraining ILEC market dominance over service inputs; and (2) helping to ensure that all advanced services providers are truly non-dominant market entrants, eliminating the need for Commission regulation of advanced services at the retail level.

Far from being the draconian, counter-productive “micromanaging” that the ILECs claim,³² the separate affiliate option will further open the advanced services market to competitive providers that must obtain inputs on a level playing field and will remain themselves unregulated carriers.

A. Requiring That ILECs Provide Advanced Services Through a Separate Affiliate Minimizes Their Ability to Exercise Market Power Over Service Inputs

The basic tenet of the separate affiliate requirement is that an ILEC may create a subsidiary to provide advanced services, provided that the ILEC deal with its affiliate at arm’s length in all capacities.³³ That is, the incumbent’s CLEC affiliate must act and be treated just like all other CLECs. Most importantly for purposes of advanced services, an ILEC affiliate would be no more privy to loops and collocation space than any other competitor, thus constraining the ILEC’s ability to discriminate against competitor CLECs in the provision of these essential facilities. In this way, all CLECs would be subjected equally to the ILEC’s market power, helping to ensure that all retail providers of advanced services remain on equal footing. Further, the separate affiliate option affords the ILEC the opportunity to enter the advanced services market, but will curtail the ILEC’s ability to extend its market power at the wholesale, or input, level to the retail, or end user, level.

³² Bell Atlantic Comments at 13.

³³ Detailed description and analysis of each criterion of the separate affiliate option is unnecessary here. For such discussion, see NPRM ¶¶ 95-115 and FirstWorld/First Regional NPRM Comments (filed Sept. 25, 1998) at 19-24.

The most convincing argument in favor of the separate affiliate option is the ILEC response to them. Of the ILEC commenters, GTE in its acerbic description of the requirements is most revealing: “GTE would have to sacrifice virtually all integration efficiencies and incur massive costs of duplicating in the hyper-separated affiliate functions that could be obtained from the ILEC on a non-discriminatory basis.”³⁴ GTE offers no factual basis for this hyperbolic assessment of the impact of separation and its probative value amounts to no more than hysterical rhetoric. Further, this statement transparently shows GTE’s recognition of its “hyper-integration,” so to speak, and the anticompetitive disadvantages faced by the competitive CLECs, who are all “hyper-separated” from any entity that controls the input facilities necessary for providing advanced services. To break up this market power is the worst imaginable regulatory action for GTE. The Commission, however, is empowered to do just that, consistent with its historical role of constraining the market power of dominant telecommunications providers. The separate affiliate option as applied to advanced services will further the FCC’s and Congress’s goal of encouraging competition in advanced services.

**B. Constraining ILEC Market Power
Over Advanced Service Inputs at the Wholesale Level
Eliminates the Need for Commission Regulation
at the Advanced Services Retail Level**

DATA members agree that, consistent with the Commission’s tradition regarding non-dominant service providers, the Commission should consider as non-dominant, and therefore unregulated, an ILEC affiliate that is truly separate in both structure and operation.³⁵ This outcome is possible once the market power of the ILEC is neutralized at the input, or wholesale,

³⁴ GTE Comments at 16.

³⁵ NPRM ¶ 86.