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

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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 98-146

REPLY COMMENTS OF COMCAST CORPORATION

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REPLY COMMENTS OF COMCAST CORPORATION

1. Introduction and Summary

Comcast Corporation ("Comcast") respectfully files these reply comments in the above-captioned matter.[1]

The record clearly shows that market forces are already fulfilling the statutory mandate that "advanced telecommunications capabilities" be deployed in "a reasonable and timely fashion" — or, as USA TODAY put it this morning, "Companies [are] betting billions on bandwidth boom."[2] If the Commission nevertheless were somehow to conclude that the market is not leading to reasonable and timely deployment of advanced telecommunications capability, it should take some limited, practical steps to encourage deployment.

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[1] 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, *Notice of Inquiry*, CC Docket No. 98-146 (released August 7, 1998) ("*Notice of Inquiry*").

[2] K. Maney, "The Next Big Bang: Communications Capacity Exploding," USA TODAY (October 8, 1998) at B1 (quote in text is from headline on page B2) ("*Bandwidth Boom*").

Some commenters urge the Commission to pursue other goals that are at best tangentially related to Section 706. The Commission should disregard these distractions. Issues such as broad questions of regulatory parity, for example, have no place in this proceeding.

* * * * *

The comments confirm what was already clear from the earlier Section 706 petitions — the market is responding vigorously to emerging demand for advanced telecommunications capabilities. From the deployment of optical fiber and advanced routers on the Internet backbone, to the deployment of xDSL and broadband wireless loops, to nascent bypass of the landline network by satellite-based high-bandwidth systems, the record bears witness to the market system doing what it does best — identifying unmet consumer desires and spawning entrepreneurial efforts to meet those desires, deploying enormous amounts of capital in the process.

The unprecedented level of investment in new and advanced telecommunications capabilities has moved from being a matter of interest merely to industry insiders to being a matter of common interest. The cover story in the "Money" section of ***today's*** USA TODAY describes what is happening in the industry as a "bandwidth explosion," stating that:

> A stampede of new data communications networks that have astounding capabilities will be turned on over the next four years. The pace of improvements in communications power will make computers look like donkeys on a towpath.[3]

In these circumstances, there is no need for Commission action to encourage deployment of advanced telecommunications capabilities.

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[3] *Bandwidth Boom* at B1. The headline on page B2 proclaims what the record in this case already reveals: "Companies Betting Billions On Bandwidth Boom."

Even if action were warranted, however, Section 706 is not a roving charter for the Commission to accelerate infrastructure deployment without regard to other statutory provisions and the important policy goals they implement. If deployment is not proceeding at a reasonable and timely pace then — as Comcast explained in its opening comments — Section 706 directs the Commission to address the problem by modifying the regulatory rules applicable to some or all Title II carriers.

Some commenters have not accepted that Section 706 is limited in this way. They treat the statute as a sort of regulatory Rorschach test — devoid of content in and of itself, but a fertile field upon which to project the particular commenter's regulatory fears and desires.

Some incumbent local exchange carriers ("ILECs"), for example, argue that Section 706 requires the Commission to relieve them of their Section 251(c) obligations. At the same time, some competing local exchange carriers ("CLECs") claim that Section 706 requires special vigilance in enforcing ILEC Section 251(c) obligations. On a different front, AOL and some others involved in originating or delivering Internet-based content argue that cable operators should be made into common carriers for Internet services. And various parties present visions of a unified regulatory model that would apply to all advanced telecommunications capabilities, irrespective of the requirements of Title II, Title III, and Title VI.

The Commission should reject all of these arguments.

As to the ILECs, it was probably inevitable that they would use this proceeding to restate their general regulatory agenda, but the Commission should recognize these efforts for what they are and consider them accordingly. In fact,

Sections 251 — and the forbearance authority in Section 10 — speak for themselves, and are not trumped by Section 706.[4]

As to AOL, it was probably also inevitable that the premier, established, and highly proprietary online content provider would try to recruit the Commission's regulatory muscle against nascent competition from new players such as @Home and Roadrunner. Yet Title VI — which governs the provision of cable services (including @Home and Roadrunner) — also speaks for itself. What it says is that cable operators are ***not*** common carriers when they deliver cable service. Nothing in Section 706 remotely suggests that it even affects, much less abrogates, this clear command.[5] Moreover, the relief AOL seeks would fly in the face of the most relevant provision of Title II — Section 230 — which establishes a crystal clear national policy that Internet-related markets should be permitted to develop ***without*** government intervention of the type that AOL is trying to invoke.

Finally, crafting the "ideal" regulatory regime to apply in the market that will exist following ubiquitous deployment of advanced telecommunications capabilities

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[4] In the Matters of Deployment of Wireline Services Offering Advanced Telecommunications Capability; Petition of Bell Atlantic Corporation For Relief from Barriers to Deployment of Advanced Telecommunications Services; Petition of U S WEST Communications, Inc. For Relief from Barriers to Deployment of Advanced Telecommunications Services; Petition of Ameritech Corporation to Remove Barriers to Investment in Advanced Telecommunications Technology; Petition of the Alliance for Public Technology Requesting Issuance of Notice of Inquiry and Notice of Proposed Rulemaking to Implement Section 706 of the 1996 Telecommunications Act; Petition of the Association for Local Telecommunications Services (ALTS) for a Declaratory Ruling Establishing Conditions Necessary to Promote Deployment of Advanced Telecommunications Capability Under Section 706 of the Telecommunications Act of 1996; Southwestern Bell Telephone Company, Pacific Bell, and Nevada Bell Petition for Relief from Regulation Pursuant to Section 706 of the Telecommunications Act of 1996 and 47 U.S.C. § 160 for ADSL Infrastructure and Service, *Memorandum Opinion and Order and Notice of Proposed Rulemaking*, CC Docket Nos. 98-147, 98-11, 98-26, 98-78, and 98-91 (released August 7, 1998) ("*Section 706 Order*") at ¶ 69.

[5] Indeed, if — as the Commission has found — Section 706 does not override the terms of ***Title II***, then plainly it does not override the terms of Title VI either.

is an interesting policy exercise, but it is not one that is directly relevant to this proceeding. As Comcast noted in its opening comments, the problem at hand is not what regulatory regime should apply to such a market. The problem at hand is how to foster the ***development*** of such a market.

But Section 706 is not an open-ended invitation to Commission action even for that purpose. If the deployment of advanced telecommunications capability is not progressing in a reasonable and timely fashion, then Section 706 directs the Commission to address the problem by modifying its ***Title II*** regulatory policies to encourage such deployment. Section 706 does not even address, much less supersede, the various policy goals contained in the ***non-Title-II*** regimes applicable to, *e.g.*, broadband wireless carriers, direct broadcast satellite ("DBS") operators, broadcasters, Internet Service Providers ("ISPs") and cable operators. And Section 706 certainly does not authorize the Commission to set aside the statutory rules applicable to different industry segments in favor of a single-minded pursuit of inter-segment competition.

Focusing on Title II — as Section 706 requires — it would be reasonable for the Commission to clarify that entities that are not now Title II carriers (such as cable operators, ISPs and broadcasters) will not be subject to burdensome Title II requirements as a "reward" for devoting some of the capacity of their systems to the provision of advanced telecommunications capabilities. Such a course would reduce barriers to entry, encourage competition, and reduce regulation — precisely the type of steps Congress envisioned the Commission taking under Section 706.

The remainder of these Reply Comments is organized as follows. Section 2 briefly reviews the evidence that market forces are leading to the deployment of advanced telecommunications capability in a reasonable and timely manner. Section 3 reviews what Section 706 does and does not authorize the Commission to do, and explains why some particular suggestions for Commission action in this proceeding are misguided in light of the purpose and scope of Section 706. Finally, Section 4 identifies

some practical suggestions in the record for Commission action that ***are*** consistent with the purpose and terms of the statute.

2. Many Firms Are Rapidly Deploying Advanced Telecommunications Capabilities In Response To Market Demand, So No Commission Action Under Section 706 Is Warranted.

The market is moving with great enthusiasm to deploy technologies that can be used to provide advanced telecommunications capabilities. No Commission action under Section 706 is needed to ensure that such deployment occurs at a "reasonable and timely" pace.

a. The Record Confirms That The Market Is Aggressively Deploying Advanced Telecommunications Capability.

Section 706 requires the Commission to assess whether advanced telecommunications capabilities are being deployed in a reasonable and timely fashion. The evidence supports only one conclusion: "yes."

To place this question in perspective, consider the situation at the time the Telecommunications Act of 1996 passed. xDSL basically did not exist. Long-promised ILEC "fiber to the home" architectures had not materialized. Similarly, ISDN had been in some sense "rolled out," but the marketing and pricing had been handled in a manner that limited the actual number of customers — particularly individual residential customers — taking the service.[6] Most cable systems were one-way coaxial "tree-and-branch" architectures, unsuited for two-way services of any description. While the World Wide Web had been introduced, the Internet was still primarily a text-based medium used by academics and government contractors, accessed by 28.8 kbps (or slower) modems. High-bandwidth wireless local loops had been discussed but were not

[6] *See* Comments of New Networks Institute at 6-13 (noting RBOC failures to deliver on various state-level "network of the future" promises).

operational on any large scale. New satellite broadband services had been discussed, but no satellites had been launched.

From this perspective, one of the key purposes of the 1996 Act was to encourage all segments of the communications industry to move beyond their traditional markets and compete with each other by deploying new and more capable technologies. Section 706 is a "fail safe" directive to deal with the possibility that this might not occur for Title II carriers. If the main provisions of the 1996 Act did not get various technologies for advanced telecommunications capability off the drawing board, the Commission is to use its powers under Title II and Section 10 to get the industry moving.

If there is one thing the record shows, it is that many segments of the communications industry are, indeed, moving to deploy technologies that can be used to provide advanced telecommunications capabilities.

The evidence is overwhelming that the market is aggressively deploying technologies that can provide advanced telecommunications capabilities. To give a few examples, interexchange carriers are increasing the capacity of their interstate fiber networks;[7] Internet backbone providers are deploying new high-speed routers to serve as gateways in an increasing number of communities;[8] broadband wireless providers are using newly-acquired spectrum to bypass landline facilities -- copper, fiber, or coax -- to deliver high-bandwidth local loops to end users;[9] manufacturers of wireless equipment are developing ways to use traditional CMRS frequencies to deliver high-bandwidth

[7] *See* Comments of AT&T at 18-23; Comments of WorldCom at 19-21

[8] *See* Comments of PSINet at 5-8.

[9] *See* Comments of Winstar at 2-4; Comments of Teligent at 2-6.

services;[10] data-oriented CLECs are deploying xDSL-based high-capacity loops;[11] ILECs are as well;[12] broadband satellite services such as Teledesic and Skybridge are moving full-speed ahead to deploy their worldwide broadband systems;[13] and cable operators are continuing their efforts to upgrade one-way coaxial cable networks to two-way hybrid fiber coax systems capable of offering advanced telecommunications along with Title VI cable offerings.[14]

Comcast itself is participating in the deployment of new technologies with new capabilities. For example, Comcast has spent over $1.2 billion over the past three years to upgrade its cable systems. Eighty percent of Comcast's customers will be served by systems at 550 MHz or greater by the end of 1998, and 60 percent soon will be served by systems at 750 MHz or greater. As a result, Comcast is able to increase

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[10] *See* "QUALCOMM Announces Megabit-Per-Second-Capable cdmaOne Digital Wireless Data Technology," http://www.qualcomm.com/news/pr980923d.html ("Qualcomm Press Release"). According to Qualcomm, this new technology "will enable cdmaOne service providers worldwide to offer evolved, high-speed data services, with peak data rates greater than 1.5 megabits per second (Mbps)." *Id.*

[11] *See, e.g.*, Comments of the DSL Access Telecomunications Alliance ("DATA") at 3-7.

[12] Many ILECs have announced xDSL deployments or actually begun them. Bell Atlantic just three days ago announced an acceleration of its xDSL deployment plans:

> "The early response to our plans to offer this service has been even greater than we had hoped," said Bruce Gordon, group president-Retail for Bell Atlantic. "Bell Atlantic has received more than 13,000 inquiries about the service since we made our first announcement in June, spurring us to accelerate our efforts to bring Infospeed DSL to market with innovative programs and partnerships."

"Bell Atlantic Introduces Infospeed DSL Service to the Washington, D.C., and Pittsburgh Markets," http://www.ba.com/nr/1998/Oct/19981005001.html ("Bell Atlantic Press Release").

[13] *See* D. Bennehum, "The United Nations of Iridium," *Wired* 6.10 (October 1998) at 134, esp. chart entitled "Space Jam" at 142-43 (noting Teledesic and Skybridge as "broadband LEO" systems). *See also* Statement of Steve Hooper (Teledesic) at July 9, 1998 *en banc* Hearing on Bandwidth, available at http://www.fcc.gov/enbanc/070998/teledesi.pdf.

[14] *See* Comments of the National Cable Television Association ("NCTA Comments") at 2-14.

cable channel capacity and to offer greater customer choice for video service in these markets. Comcast has also begun providing new services, including both information services and telephony.[15]

Indeed, it is now commonplace in any discussion of the communications industry to note the massive expenditures on network improvements now underway. The USA TODAY article cited earlier, for example, notes that "high-profile start-ups such as Level 3 and Qwest are betting more than $3 billion ***each*** on" "networks based on the high speed and massive capacity of fiber optics and the flexibility of Internet-style, packet-switched technology."[16]

In assessing these developments, it is significant that Congress phrased the statutory test in terms of the physical "deployment" of certain "capabilities." By so doing, Congress directed the Commission to focus on a process involving the placement of new physical facilities. This process necessarily takes time. Billions of dollars of risk capital have to be raised. Networks have to be designed. Fiber has to be laid. Loops have to be conditioned. DSLAMs have to be installed. Wireless local loop antennae have to be erected. Satellites have to be built and launched. Reasonably-priced devices for the consumer end of various systems have to be designed, built and sold. And all participants have to constantly monitor what the others are doing (as well

[15] For example, Comcast now offers digital cable and high speed Internet access in seven markets. The high-speed Internet access service is available to 865,000 residential customers in those markets, and Comcast@Home now has 30,000 customers. Comcast Telecommunications, Inc. d/b/a Comcast Long Distance, provides intrastate and interstate long distance services to business and residential customers in more than a dozen states. Moreover, in the course of completing these system upgrades, Comcast also has expanded its community involvement and service activities. As a result, Comcast now leads the industry in the provision of high-speed Internet access free of charge to more than 400 schools, as well as over 30 public libraries.

[16] *Bandwidth Boom*, *supra* at B2 (emphasis added). The article also notes that one of the applications to which the profusion of new bandwidth will certainly be put is the transmission of video programming. *See id.*

as likely consumer demand), so that they can adjust their business plans on the fly as market conditions change.

For these reasons, it is also significant that Congress did not direct the Commission to ensure that deployment of advanced telecommunications capabilities occurs "as rapidly as possible," "without delay" or some similar exhortation. What Congress instead required is a more measured and market-sensitive response: only if deployment does not occur at a "reasonable and timely" pace must the Commission consider appropriate action.

An assessment of whether the pace of deployment is reasonable and timely can only be made in light of how long it takes in the real world to raise capital, lay fiber, erect antennae, condition loops, launch satellites, etc. And such an assessment must take account of the level of market demand for services provided using the newly deployed facilities. Comcast submits that the ongoing market-driven effort to deploy advanced telecommunications capabilities shows that such deployment is indeed occurring at a "reasonable and timely" pace.

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[17] *See* Comcast Comments at 7-8 (Section 706 calls for an assessment of the pace of deployment relative to market demand); Joint Comments of MCI Communications Corporation and WorldCom, Inc. ("WorldCom/MCI Comments") at 3. Just as markets can generally be relied upon to deploy facilities to meet demand, they must also be relied upon to avoid wasting money deploying facilities where demand is limited. For this reason, the Commission should avoid the temptation to look at less-than-immediate ubiquity in the deployment of advanced telecommunications capabilities as necessarily a problem to be solved. Aside from reflecting variations in demand, less-than-ubiquitous deployment of particular facilities may also reflect a recognition that some near-term technologies will be much more efficient than those available today in some areas. For example, a landline provider contemplating a multi-million dollar investment in land-based high-capacity transmission facilities to a remote area would likely hesitate to actually make the investment when it is considered that Teledesic's "Internet-in-the-Sky" service will be available to serve the same area at close to zero incremental cost for Teledesic.

b. In Light Of Ongoing Market Activity, No Action Under Section 706 Is Warranted.

The market's ongoing deployment of advanced telecommunications capability shows that no Commission action is needed. As long as such capability is being deployed in a reasonable and timely manner — and it is — the only Commission action consistent with the deregulatory philosophy of the 1996 Act is no action at all.

Essentially the only parties who argue that deployment of advanced telecommunications capabilities is ***not*** occurring at a reasonable and timely pace are the CLECs and the ILECs. The CLECs argue that the ILECs' refusal to honor their Section 251(c) obligations is unreasonably deterring CLEC deployment of xDSL.[18] For their part, the ILECs say that ***imposing*** Section 251(c) obligations on xDSL equipment and services unreasonably deters ***ILEC*** deployment of xDSL.[19]

This is a false dichotomy. The language Section 251(c) is clear, and, as the Commission has previously and properly found, Section 706 does not constitute an amendment or exception to it.[20] Comcast doubts whether Section 251(c) "deters" the ILECs from deploying xDSL quite as much as some of them claim; but if it does, the ILECs should take their complaints to Congress, because the Commission is not empowered to change it.[21]

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[18] *See* WorldCom/MCI Comments at 3-4;

[19] *See* Comments of Bell Atlantic at 16; Comments of SBC Communications, Inc. at 3-4; Comments of BellSouth Corporation at 55.

[20] *Section 706 Order* at ¶ 69.

[21] From another perspective, the Commission may credit the CLECs' argument that ILEC delays in deploying xDSL and related support technologies (*e.g.*, automated loop qualification systems) arise not from a lack of ILEC incentives but, instead, affirmative ILEC efforts to slow deployment by CLECs. To the extent that xDSL or other advanced telecommunications capabilities are used to provide jurisdictionally interstate services, the Commission may (continued...)

Within the context of this proceeding, however, this issue is an intramural dispute over details. Either the ILECs will find ways to aggressively deploy xDSL capability (which they and the CLECs can both exploit) or they won't. If they do, they will participate in meeting consumer demand for high-bandwidth telecommunications links to homes, schools and businesses.[22] If they don't, then they will hand critical market advantages to firms like WinStar and Teligent and Teledesic, not to mention cable-affiliated CLECs.[23] Either of these market outcomes fully satisfies the purpose of Section 706.

It is significant here that Congress defined advanced telecommunications capability without regard to technology. *See* Section 706(c)(1). Congress did not care which traditional industry segment (*e.g.* LEC, IXC, terrestrial wireless, satellite, cable) did the deploying, as long as there is "reasonable and timely" deployment by some segment using some technology. And Congress in Section 706 plainly did not care ***at all*** what specific role the ILECs might choose to play, if any.

For this reason, the Commission should view skeptically the claim that fulfilling the purpose of Section 706 hinges on xDSL deployment, collocation and unbundling. These are, of course, important issues in their own right. But the record

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[21](...continued)
invoke Section 201 to direct the ILECs to deploy such capabilities and to provide such services. *See* 47 U.S.C. § 201(a) (interstate services to be provided "upon reasonable demand therefor"). *See also* Comments of Retail Internet Service Providers, *et al.* (urging the Commission to direct ILECs to provide clean xDSL-suitable copper circuits to ISPs).

[22] In fact, they seem to be doing so. The most recent example is Bell Atlantic's announcement that it is accelerating the deployment of xDSL. Bell Atlantic announced on October 5, 1998 that its DSL service "is available in some Washington, D.C., and Pittsburgh areas now and will be expanded to additional communities in those areas throughout the fall and in 1999. It will be offered to consumers in the Philadelphia area and on the Hudson River waterfront in New Jersey beginning next month. New York City, Boston and other markets will be added early next year." *See* Bell Atlantic Press Release, *supra*.

[23] *See infra*.

shows that even if both the ILECs and existing CLECs do not deploy advanced telecommunications capabilities, other firms will. That is all that Section 706 requires.

3. Section 706 Directs The Commission To Ensure The Reasonable And Timely Deployment Of Advanced Telecommunications Capabilities, Not To Promote Or Protect Particular Entities Or Regulatory Systems.

Section 706 directs the Commission to assess the pace of deployment of advanced telecommunications capabilities and to adjust certain rules if it perceives the statutory standard is not being met. This statutory framework presented an irresistible temptation to some commenters to argue that their pet regulatory projects can be justified under Section 706. The Commission should recognize these filings for what they are — special pleadings, ultimately unrelated to the current proceeding — and reject them.

a. Section 706 Is Not A Mandate For Regulatory Parity.

The ILECs in general, and the RBOCs in particular, have found much not to like in the Telecommunications Act of 1996. Section 251(c) subjects all ILECs to significant burdens that no other telecommunications carrier has to bear. These include the obligation to permit rivals to interconnect at any technically feasible point; the obligation to permit rivals to purchase all, and only, the unbundled network elements needed to compete; and the obligation to permit rivals to physically place their equipment in the same buildings — indeed, the same rooms — as the ILECs' own equipment.[24] An ILEC accustomed to total control over its own facilities, its own services, and its own markets will understandably view these requirements with loathing.

[24] *See* Sections 251(c)(2), 251(c)(3), 251(c)(6).

Moreover, the ILECs are probably less than pleased with the statutory reward they receive for complying with these duties. Compliance will certainly erode profit margins in the local exchange market, but the primary benefit they receive is the right to enter the intensely competitive long distance market.[25] While they may indeed be able to prosper in this new environment, their success — as in any truly competitive market — is far from assured.

If, as antitrust courts have observed, what monopolists really want is a "quiet life,"[26] the 1996 Act is the legislative equivalent of a Metallica concert in the ILECs' front yard.

In addition, while essentially every other Title II carrier can argue that market conditions warrant forbearance from some or all Title II burdens under the terms of Section 10, Section 10 itself flatly prohibits granting relief to the ILECs from Section 251(c) until it has been "fully implemented." This language reflects in the clearest possible terms that Congress wanted Section 251(c) complied with — no ifs, ands, or buts.

In response to the special attention that Congress paid to the ILECs' enduring monopoly in the new law, the ILECs have adopted several strategies. In the earlier individual Section 706 petitions, they sought a Commission ruling that the normal Section 251(c) rules (and, for RBOCs, the Section 271 restrictions) do not apply to advanced telecommunications capabilities. Here, they take a slightly different tack.

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[25] *See* Section 271. Sections 272-275 offer the right to enter additional markets, such as the manufacturing of telecommunications equipment, but these, too, are quite competitive. GTE lacks even these "carrots," since it was never subject to the same restrictions as the RBOCs. It is hardly surprising, therefore, that GTE has in some respects been a leader in ILEC resistance to the mandates of Section 251.

[26] *United States v. United Shoe Machinery*, 110 F. Supp. 295, 347 (D. Mass. 1953) ("Some truth lurks in the cynical remark that not high profits but a quiet life is the chief reward of monopoly power").

arguing more generally that the Commission should establish a regulatory regime for advanced telecommunications capabilities in which all players are subject to the same rules.[27]

The ILECs' arguments for regulatory parity ignore the fact that there are only two ways to achieve that objective: either (a) the ILEC-specific obligations of Section 251(c) must be set aside; or (b) the ILEC-specific obligations of Section 251(c) must be imposed on others. The Commission has already (and quite properly) rejected both of these alternatives.[28] It follows that regulatory parity for the ILECs as such is not an available outcome under current law.[29]

Calls for "regulatory parity" under Section 706 are particularly disturbing to the extent that they are a cover for imposing new obligations on firms that are not now regulated as carriers. If any action under Section 706 is warranted, such action should be deregulatory, *i.e.*, the Commission should look for ways to encourage deployment of advanced telecommunications capabilities by forbearing (in a manner consistent with Section 10) from applying otherwise applicable requirements of Title

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[27] Another RBOC response to their special status in the 1996 Act is to argue that the very fact that they were subjected to special rules shows that those rules are invalid. *See SBC Communications v. FCC*, 981 F. Supp. 996 (N.D. Tex. 1997) (holding Sections 271-275 of the Act to be an unconstitutional "bill of attainder"), *reversed*, *SBC Communications v. FCC*, No. 98-10140, slip op. (5th Cir. September 4, 1998).

[28] In the Matter of Implementation of the Local Competition Provisions in the Telecommunications Act of 1996, Interconnection Between Local Exchange Carriers and Commercial Mobile Radio Service Providers, *First Report and Order*, CC Docket Nos. 96-98 and 95-185 (released August 8, 1996) ("*Local Competition Order*") at ¶¶ 1241-48;See also 47 C.F.R. § 51.223(a) (banning state application of Section 251(c) requirements to CLECs). *Section 706 Order* at ¶ 69.

[29] The Commission's proposal to permit ILECs to establish separate affiliates that will be able to engage in xDSL activities without the normal ILEC Section 251(c) obligations is, in this sense, an effort to give the ILECs as much "regulatory parity" as can be squared with the requirements of the law. As the Commission has noted, a key to the legality of this approach is to establish a separate entity that is not charged with the responsibilities of being an "ILEC" under Section 251(c). *See Section 706 Order* at ¶¶ 92-99, esp. ¶¶ 96-97.

II.[30] This will encourage entry by entities whose deployment efforts might be deterred by the prospect of being regulated as a full-blown Title II carrier.

Imposing regulatory obligations on others would also defeat the basic purpose of Section 251(c). The entire point of that statute is to force ILECs to do things for their competitors that the ILECs do not want to do and that the competitors do not have to do, either for each other or for the ILECs. In the context of xDSL, as long as Section 251(c) applies — and the Commission has held that it does — Section 706 provides no basis for relieving the ILECs from the requirements of the law.

It is not as though Congress mandated that disparate regulation of the ILECs must or should continue forever, however. To the contrary, once the ILECs have "fully implemented" the requirements of Section 251(c) — that is, once their local monopolies have been fully and irrevocably relinquished — then the ILECs are free to seek forbearance from their Section 251(c) obligations under Section 10.[31]

Regulatory parity, therefore, probably is ultimately in the cards for ILECs, although getting there may be wrenching. But Section 706 has nothing to do with it.

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[30] *See* Comcast Comments at 12-21. *See also infra*, Section 4.

[31] As noted in Comcast's earlier comments, the Commission has a long-standing policy of subjecting carriers to different degrees of regulation based on their respective market shares. Dominant carriers are relatively heavily regulated; non-dominant carriers are not. When a dominant carrier's market share (or other suitable index of market power) declines to a low enough level, the special regulatory requirements that previously applied are lifted. *See* Comcast Comments at 13-14. This simple and sensible policy is directly embodied in Section 10 and Section 251. Under Section 10, the Commission can forbear from almost any aspect of Title II regulation for almost any service or class of carrier — except for Section 251(c) and Section 271. These cannot be forborne until Section 251(c) is "fully implemented," *i.e.*, until local exchange markets are fully open to competition.

b. Section 706 Does Not Authorize Expansion Of Title II Regulation To Non-Carriers.

Where the ILECs use Section 706 to try to obtain relief from their Section 251(c) duties, AOL and others use Section 706 to argue that Section 251(c)-like duties should be applied to entities that are not LECs at all — specifically, to cable operators.[32] The Commission should reject these arguments as well.

Comcast understands why AOL and others would want to require cable operators to carry their content as common carriers. Such a requirement would spare them the inconvenience of either having to strike marketplace relationships with the ILECs (whether directly or indirectly through CLECs) or with cable or any of the numerous other broadband market entrants, or, alternatively, having to invest in their own delivery systems. But while the benefits to AOL's business plan of imposing common carrier obligations on cable operators may be evident, the lack of a legal or policy rationale for their position is even more so.[33]

As a statutory matter, there is no basis for the claim that cable operators should be required to act as common carriers in handling Internet data. The Internet functions, in effect, as a world-wide, jointly provided information service. End users interact with the Internet to obtain data (for example, from Web sites and email messages) and to transact business (for example, at sites such as amazon.com, e*trade.com, etc). For this reason, among others, the Commission has repeatedly and

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[32] *See* Comments of America Online, Inc., Comments of Mindspring Enterprises, Inc. ("Mindspring Comments"); Comments of Circuit City

[33] It appears to be AOL's business plan to abandon the construction and operation of telecommunications facilities in favor of building up its subscription base and broad dominance among Internet users. That is AOL's right. But for AOL to pursue such a plan and then ask the Commission to force cable operators to carry AOL's content as common carriers is akin to the apocryphal defendant who, having murdered his parents, throws himself upon the mercy of the court as an orphan

properly held that firms that provide access to the Internet — ISPs — are offering an information service, not a common carrier telecommunications service.[34]

This same logic applies to cable-delivered Internet data. Indeed, it is impossible to treat cable operators as common carriers of Internet data under the relevant statutory provisions without also treating all ISPs as carriers as well.[35]

Moreover, it is clear that Congress intended cable operators to be able to offer information services, such as Internet access, ***as cable services***. Comcast and others have already shown that the 1996 Act amended the definition of "cable service" to include subscriber interaction necessary for the "use" of a particular service, and noted that Congress expressly stated that the purpose of the change was to permit cable operators to offer information services.[36] This is one of several examples in the 1996

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[34] *See, e.g., e.g.*, In the Matter of Federal-State Joint Board on Universal Service, *Report To Congress*, CC Docket No. 96-45 (April 10, 1998) at ¶¶ 13, 21 ("*Report to Congress*").

[35] To see why this is so requires briefly parsing both the relevant statutory terms and the basic functions of ISPs. "Telecommunications" is sending users' data unchanged "***between or among points specified by the user***." The only place a cable operator as such sends end user data — *e.g.*, a URL requesting a particular web page — is from the user's computer to the head-end. Because the head-end is not likely to be any end user's selected destination, the only possible function that AOL or others could be relying upon to conclude that cable-operator provision of Internet access makes them Title II carriers is routing a URL (or other data) though the Internet (or a private network) to the appropriate server. But if this function is "telecommunications," then every ISP in the country is a telecommunication carrier — because every ISP in the country does exactly the same thing. The claim that cable operator transmission of Internet data constitutes "telecommunications," therefore (*see, e.g.*, Circuit City Comments at 8-11), flies in the face of the Commission's repeated, detailed, well-reasoned, and court-affirmed conclusion that ISPs are ***not carriers***. *See, e.g.*, In the *Report To Congress* at ¶¶ 13, 21. In the Matter of Access Charge Reform, Price Cap Performance Review for Local Exchange Carriers, Transport Rate Structure and Pricing, and End User Common Line Charges, *First Report and Order*, CC Docket Nos. 96-282 *et al.*, FCC 97-158 (released May 16, 1997) ("*Access Charge Order*") at ¶¶ 341-48, *affirmed*, *Southwestern Bell v. FCC*, Nos. 97-2618 *et al.* (8th Cir. August 19, 1998).

[36] *See* Comcast Comments at 16-17 & n. 29. B. Esbin (Office of Plans and Policy), "Internet over Cable: Defining the Future in Terms of the Past," Section VI.A.

Act where Congress tinkered with the statutory boundaries among different traditional industry segments in order to spur inter-segment competition.[37]

Neither this nor Congress' other similar efforts can properly be read as a statutory "bait-and-switch" scheme, first luring cable operators across the line into common carriage disguised as cable service, then imposing burdensome regulations as a "reward" for meeting the statutory objective of providing expanded, competitive services. More fundamentally, in light of the clear statutory distinction between telecommunications services and information services, it would make no sense to conclude that when Congress said it wanted cable operators to be able to offer "information services" as cable services, what it really meant was that it wanted cable operators to become common carriers for the transport of a particular type of information service.[38]

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[37] For example: (a) the modification to the definition of "cable service" discussed in the text enables cable operators to compete with unregulated providers of information services; (b) various changes in the law remove the prior ban on LEC provision of in-region cable services to encourage LECs to compete with cable companies; (c) new Sections 251 and Section 271 provide a means for the RBOCs to compete with long distance companies; (d) new Section 253(a) provides a means for long distance companies (and others) to compete with LECs; (e) new Section 336, by affirming the right of broadcast licensees to offer "ancillary and supplementary services," provides additional competition to carriers and information services providers (depending on the particular services broadcasters choose to offer); and (f) new Section 302(v) confirms that direct-to-home satellite services include both the broadcasting of "programming" and the broadcasting of "services," which allows these entities to offer additional competition to cable operators, terrestrial broadcasters, Title II carriers, and information service providers.

[38] To the contrary, Congress made clear in the 1996 Act that offering information services ***would not*** subject a firm to common carrier regulation. New Section 153(44), defining "telecommunications carrier," states that "[a] telecommunications carrier shall be treated as a common carrier under this Act ***only to the extent that it is engaged in providing telecommunications services***." Those seeking to impose common carrier obligations on cable operators are arguing, in effect, that Congress really meant to include the phrase, "or information services" as well.

AOL, therefore, wants the Commission to pursue a policy that is simply another version of what the Commission did not do for the ILECs in their individual Section 706 petitions: interpret Section 706 as overriding other statutory provisions. Specifically, just as the ILECs want the Commission to read Section 706 as authorizing the Commission to disregard the terms of newly enacted Section 251(c) and Section 10, AOL wants the Commission to read Section 706 as authorizing the Commission to disregard the terms of the newly-amended Section 602(6)(B) of the Cable Act, as well as the newly-enacted definitions of "telecommunications," "information service," and "telecommunications carrier." Section 706 authorizes no such action.[39]

As a policy matter, moreover, there is no basis for accepting AOL's position. To the extent that what AOL and others (such as Mindspring) want is common carriage, the place to get it is from carriers — in this case, ILECs, CLECs, and myriad other market entrants who hold themselves out as carriers. AOL's and Mindspring's stated concern that adequate carriage might not be available from certain of these entities lends urgency to the Commission's deliberations in the ongoing rulemaking regarding how to maximize the availability of xDSL (which could be purchased by AOL or Mindspring on behalf of their customers, or by the customers themselves) — especially xDSL provided by CLECs, who may be more responsive to market demand than the ILECs. In this regard, if the ILECs do not provide reasonable and adequate service to AOL, Mindspring, and other ISPs, such a failure might constitute grounds for complaints under Section 208 alleging violations of Section 201's obligation to provide interstate services upon reasonable demand. But it does not constitute a basis for forcing non-carrier entities to fill the gap.

[39] Indeed, not only does Section 706 not authorize it, Section 230 would appear to directly forbid it. Section 230 states that it is the policy of the United States to keep the Internet free from government regulation. It would hardly be consistent with that policy to use the development of the first widely available innovative alternative to dial-up access to emerge following the 1996 Act as an occasion for subjecting that alternative to intrusive common-carrier-like regulation.

Mindspring paints a particularly dire picture, in which none of the alternatives to cable-delivered Internet services — not ILECs, not CLECs, not terrestrial wireless carriers, not satellite systems — will be adequate to meet independent ISPs' demand for connections to their customers.[40] Mindspring thus concludes that only by forcing cable operators to act as carriers can independent ISPs survive. The facts, however, indicate that the industry will not fall into the one-supplier funk that Mindspring predicts.

Today there are roughly 98 million television households.[41] Of those, perhaps 66 million subscribe to cable.[42] At the same time, there are roughly 35 million households that have some form of Internet access.[43] That number is growing at a break-neck pace. By 2002 it is projected to grow to more than 77 million households.[44]

Against this vast (and, for Internet-related services, rapidly growing) market, cable modems are projected to capture less than 1 million customers by year-end 1998.[45] This is roughly 2% of the residential Internet access market, roughly 1% of the market of cable customers, and less than 1% of the market of television households.

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[40] Mindspring Comments at 6-7 and *passim*.

[41] NCTA, *Cable Television Developments* (Spring 1998) at 1.

[42] *Id.*

[43] Forrester Research, *Broadband Hits Home* at 4 (attachment A to BellSouth Comments) (700,000 broadband Internet access households at year-end 1998 is 2% of total on-line households).

[44] Forrester Research, *Internet Access Winners* at 6 (Attachment B to BellSouth Comments).

[45] Forrester Research, *Broadband Hits Home* at 4 (projecting 700,000 cable modem households by year-end 1998).

It is projected that the number of cable modem households will grow to approximately 13 million by 2002.[46] As noted above, by that time the number of households with Internet access is projected to grow to more than 77 million, so that even under these highly optimistic projections, cable operators would have only about 18% of the potential on-line market.

Moreover, by that time aggressive xDSL-based firms such as COVAD and its colleagues will have had many years to sell their services to independent ISPs and their customers. Indeed, ISPs (including, if it wishes, AOL) will have had that same period of time to form CLEC affiliates themselves (or partner with or acquire CLECs) to exploit the availability of unbundled xDSL-capable loops, and, if the Commission accepts the arguments of some ISPs, the ILECs will be offering unswitched point-to-point copper circuits to which ISPs can attach xDSL CPE to reach their customers directly.[47]

Even if the Commission rejects that suggestion, the ILECs themselves will have been rolling out xDSL services. Most recently, Bell Atlantic has announced an acceleration of its xDSL plans, with xDSL service to be available to millions of customers in the near future.[48] Unless the Commission ignores its long-standing rules requiring the ILECs to offer their services in an unbundled, non-discriminatory manner, these services, too, will be available to allow independent ISPs to connect with their end users.

But this is only part of the story. The Commission's recent ruling regarding "wireless cable" services was specifically designed (among other purposes) to permit wireless cable operators "to offer comparable, competitively-priced [Internet

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[46] *Id.*

[47] *See* Comments of Retail ISPs at 10-14.

[48] *See* Bell Atlantic Press Release, *supra*.

access] services to compete against" cable operators. DBS, SMATV and LMDS high-speed Internet access offerings.[49] Moreover, Teledesic's high-bandwidth "Internet-in-the-Sky" service is scheduled to go into operation in 2003. It seems unlikely that a joint venture backed by entrepreneurs such as Craig McCaw and Bill Gates will be slow off the blocks in trying to capture business.

At the same time — as recognized by the Commission in the *Wireless Cable Internet Order* — broadcast-like operations will also be available to delivery high-speed Internet access. DBS in particular is already used to offer high-speed Internet data delivery,[50] and that use can be expected to continue and expand. In addition, the transition to digital TV broadcasting will be well underway, and Internet access is one of the ancillary services that broadcasters may offer.[51] Moreover, other possible Commission actions — such as the suggestion that the current spectrum caps might be

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[49] In the Matter of Amendment of Parts 21 and 74 to Enable Multipoint Distribution Service and Instructional Television Fixed Service Licensees to Engage in Fixed Two-Way Transmissions, *Report and Order*, MM Docket No. 97-217 (released September 25, 1998) at ¶ 8. As the Commission stated in that order:

> [T]he cable operators with which MDS operators compete previously operated as providers of one-way video programming, but now are increasingly providing a variety of two-way services, including Internet access. As has been discussed in the press and as we noted in the *1997 Competition Report*, other services, including direct broadcast satellite ("DBS"), satellite master antenna television services ("SMATV"), and the nascent local multipoint distribution services ("LMDS"), are also moving towards the provision of Internet services. The MDS industry will need to be able to offer comparable, competitively-priced services to compete against these players. ***We believe the rule changes we adopt in this proceeding will enable the industry to meet this competitive challenge.***

Id., (emphasis added, footnotes omitted).

[50] *See id.*

[51] In addition, entirely new approaches to high-speed data delivery — such as Qualcomm's recently-announced 1.5 mbps service — will also have begun to penetrate the market. *See* Qualcomm Press Release, *supra*.