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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

Glenn B. Manishin
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VIA COURIER

Hon. Michael K. Powell
Chairman
Federal Communications Commission
445 12th Street, S.W., Room 814
Washington, DC 20554

Re: Ex Parte Comments; *1998 Biennial Regulatory Review — Review of Customer Premises Equipment and Enhanced Services Unbundling Rules in the Interexchange, Exchange Access and Local Exchange Markets*, CC Docket No. 98-183 /

Dear Chairman Powell:

The United States Internet Service Provider Alliance (“USISPA”) urges the Commission to maintain the competitive market for Internet access services. Internet Service Providers (“ISPs”) cannot effectively compete if the Commission grants the requests of incumbent local exchange carriers (“ILECs”) to eradicate long-standing FCC restrictions on the bundling of enhanced and basic telecommunications services and customer premises equipment (“CPE”). Specifically, USISPA is concerned that in the captioned proceeding, the Commission may permit ILECs to bundle local exchange service with advanced services, such as Digital Subscriber Line (“DSL”) services,¹ thus leveraging their persistent monopoly over the local loop into a dominant position within the nascent high-speed Internet access market.

The Commission’s stated aim in this proceeding is to “reduce regulations wherever conditions warrant,” in order to “benefit consumers by enabling them to take advantage of inno-

¹ The Commission requested comment on “whether to amend the enhanced services bundling restriction to allow any carrier to bundle enhanced services with local exchange and exchange access services.” *1998 Biennial Regulatory Review — Review of Customer Premises Equipment and Enhanced Services Unbundling Rules in the Interexchange, Exchange Access and Local Exchange Markets*, CC Docket 98-183, Further Notice of Proposed Rulemaking, 13 FCC Rcd. 21,53, 21,552. (1998) (“*CPE Unbundling FNPRM*”). This question encompasses DSL services, which the Commission has classified as exchange access services. *GTE Telephone Operating Cos., Tariff Transmittal No. 1148*, CC Docket No. 98-79, Memorandum Opinion and Order (rel. Oct. 20, 1998), recon. FCC 9-41 (rel. Feb. 20, 1999); *Bell Atlantic Telephone Co., Bell Atlantic Tariff No. 1, Bell Atlantic Transmittal No. 1076*, CC Docket No. 98-168, FCC 98-317 (rel. Nov. 30, 1998).

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vative and attractive packages of telecommunications equipment, enhanced services, and telecommunications services[.]”² In this instance, however, the Commission’s goals will not be served by deregulation of local monopolists. As the *CPE Unbundling FNPRM* emphasized, the Commission traditionally “has restricted bundling of CPE and enhanced services with telecommunications services out of a concern that carriers could use such bundling in anticompetitive ways.”³ Very little has occurred that should persuade the Commission to conclude otherwise today. The local market has not achieved meaningful, irreversible competition. The ILECs’ bottleneck control over the local loop has not diminished. Therefore, despite the progress that has been made by both the Commission and the industry, the competitive telecommunications market is not ready to permit monopoly providers with the unilateral power to tie basic local service with DSL and CPE.

USISPA agrees with the Commission’s “guiding principle,” which dictates that “allowing competitive markets to be driven by market forces, rather than unnecessary regulatory requirements, will produce maximum benefits for consumers[.]”⁴ The local telecommunications market, however, has not attained truly competitive status. Moreover, the advanced services market is in its early stages and, because of its direct link to local telecommunications facilities, remains peculiarly vulnerable to the efforts of ILECs to leverage their local loop monopolies. The unacceptable state of ILEC provisioning within the local market starkly demonstrates this vulnerability.

The ILECs’ provisioning of DSL loops remains anticompetitive. Despite the Commission’s creation of procompetitive advanced services rules, notably the *UNE Remand Order*⁵ and the *Line Sharing Order*,⁶ ISPs and competitive DSL providers are not obtaining loops with the same ease, quality and timeliness with which ILECs install loops for themselves. Even the “carrot” of interLATA relief has apparently not provided sufficient incentive for ILECs to provision xDSL loops in a timely fashion, as the Commission’s record in the pending Verizon-Massachusetts 271 proceeding demonstrates. This problem is evident in the Commission’s existing Section 271 decisions and persists despite its continued efforts to enforce its rules. For example, the Commission’s approval of Bell Atlantic-New York’s petition for 271 relief was granted absent a showing of compliance with the *UNE Remand Order* and the *Line Sharing Order*.⁷ On March 9,

² *CPE Unbundling FNPRM*, 13 FCC Rcd. at 21,534.

³ *CPE Unbundling FNPRM*, 13 FCC Rcd. at 51,533.

⁴ *CPE Unbundling FNPRM*, 13 FCC Rcd. at 51,532.

⁵ *Implementation of the Local Competition Provisions of the Telecommunications Act of 1996*, CC Docket 96-98, Third Report and Order, FCC 99-238 (rel. Nov. 5, 1999).

⁶ *Deployment of Wireline Services Offering Advanced Telecommunications Capability*, CC Docket 98-147, Third Report and Order, FCC 99-355 (rel. Dec. 9, 1999).

⁷ *Application by Bell Atlantic-New York for Authorization Under Section 271 of the Communications Act to Provide In-Region, InterLATA Service in the State of New York*, CC Docket No. 99-295, Memorandum Opinion and Order, FCC 99-404 ¶ 316 (rel. Dec. 22, 1999).

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2000, less than three months after granting Bell Atlantic-New York's application, the Commission assessed a \$3 million fine and reporting requirements on the company due to consistent, proven allegations of poor provisioning.⁸ This precedent suggests both that the Commission's grant of Section 271 relief provides no assurance that ILEC provisioning will remain competitive, and that the Commission's resources must remain continually devoted to rigorous policing of ILEC provisioning post-271 approval. If this is the case even with the anti-bundling rules in place, the situation is likely to become unimaginably more dire should the Commission repeal those rules.

As this record shows, the members of USISPA are already at a disadvantage in providing competitive advanced services. ISPs are forced to rely on ILEC-provisioned loops in order to offer their customers a meaningful choice for quality DSL services. Were the Commission to permit ILECs to bundle local and DSL services, ILECs would not only retain control of loops, but would have the opportunity to provide bundled services at low rates achieved through anti-competitive cross-subsidization and predatory pricing. It is already the case that ILECs are marketing DLS services by offering below-cost "promotional" bundles of free CPE, reduced or free installation and related, non-telecommunications services.⁹ At the same time, their ISP competitors are unable to offer realistic provisioning intervals to prospective DSL customers and increasingly are unable to meet the predatorily low prices charged by ILECs. If these trends continue, the disadvantages that ISPs now bear would become a permanent barrier to entry.

Further, the Commission's anti-bundling restrictions have become all the more crucial now that ILECs have publicly stated their intent to cease offering DSL through separate subsidiaries. As a result of the D.C. Circuit's vacating the SBC-Ameritech merger conditions,¹⁰ both SBC and Verizon, which are the incumbent local carriers in 20 states and which provide local service throughout the United States, are beginning the process of "rolling up" their DSL subsidiaries into their monopoly parent entities. This development increases exponentially the danger that SBC and Verizon will abuse the right to provide bundled services by engaging in anti-competitive behavior. Without a separate subsidiary to act as a check against ILEC loop provisioning practices, the ISP industry will have no opportunity to review the terms and conditions under which ILEC advanced services are offered to their customers. And without the sunshine of an arms-length subsidiary relationship, the Commission would have no way to oversee and enforce the relative treatment of ILEC and competitive DSL services in terms of pricing, provi-

⁸ *Bell Atlantic-York Authorization Under Section 271 of the Communications Act to Provide In-Region, InterLATA Service in the State of New York*, File No. EB-00-IH, Order, FCC 00-92 (rel. Mar. 9, 2000).

⁹ See attached advertisement for BellSouth "FastAccess Internet Service," available at <www.fastaccess.com/business/blss_home.jsp>.

¹⁰ *Association of Communications Enterprises v. FCC*, 235 F.3d 662 (D.C. Cir. 2001).

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sioning and quality of service. Were the unbundling rules relaxed, this regulatory "black hole" would become even more impenetrable.

For all these reasons, USISPA urges the Commission not to disturb its anti-unbundling rules as they apply to the provision of DSL services and CPE. The Commission instead should rigorously enforce its existing rules requiring the non-discriminatory delivery of cost-based loops and related local facilities to DSL-based ISPs. Only through strong enforcement of these 1996 Act and Commission requirements can the FCC maximize the likelihood that market forces will produce an outcome that enhances consumer welfare and offers end users an increased choice of competitive high-speed Internet access alternatives. As USISPA concluded in 1998, "[t]he only way to rid American consumers of [the local] bottleneck and offer all the benefits and services backed up and waiting behind that last mile, is, plain and simple, to enforce the 1996 Act."¹¹

Sincerely,



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Stephanie A. Joyce

Counsel for USISPA

and

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ALLIANCE:

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¹¹ Letter from USISPA to Chairman William E. Kennard at 2, *Deployment of Wireline Services Offering Advanced Telecommunications Capability*, CC Docket No. 98-147 (filed Dec. 10, 1998).

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