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March 13, 2001

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

Magalie Roman Salas
Secretary
Federal Communications Commission
445 12th Street, S.W.
TW-A325 12th Street Lobby
Washington, D.C. 20554

Re: ***Deployment of Wireline Services Offering Advanced telecommunications Capability,*** **CC Docket Nos. 98-147 & 96-98**

Dear Ms. Salas:

Enclosed for filing are the original and five copies of the Reply Comments of SBC Communications Inc. Please date-stamp one of the copies and return them to the messenger.

If you have any questions regarding this filing, please call me at (202) 326-7975. Thank you for your assistance with this matter.

Sincerely,

Sean A. Lev

Enclosures

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BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C.

In the Matter of	)	
	)	
Deployment of Wireline Services Offering	)	CC Docket No. 98-147
Advanced Telecommunications Capability	)	
	)	
And	)	
	)	
Implementation of the Local Competition	)	CC Docket No. 96-98
Provisions of the	)	
Telecommunications Act of 1996	)	

REPLY COMMENTS OF SBC COMMUNICATIONS INC.

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March 13, 2001

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INTRODUCTION AND SUMMARY

The comments in this proceeding place the choice before the Commission in sharp relief.

On one side, AT&T, the Nation's largest cable modem provider, and its supporters ask the Commission to impose crippling asymmetrical regulations exclusively on the broadband facilities of incumbent LECs – companies that are currently investing billions of dollars to catch up with the dominant cable modem providers in the highly competitive and rapidly expanding broadband market. Astonishingly, advocates of this position label as "insidious[]" incumbent LECs' massive investment in NGDLC facilities that will bring DSL access – and competitive choice – to tens of millions of consumers that currently cannot receive that service. Covad/Rhythms/WorldCom at i. In their view, the correct approach to such risk and investment of private capital is for the Commission to require incumbents to turn over their new facilities lock, stock, and barrel to their competitors, which can then provide service without having to bear any remotely equivalent investment risks.

On the other side, incumbent LECs ask only that the Commission live up to its words. As SBC emphasized in its opening comments, the Commission has spoken repeatedly of its "hands off" approach to broadband service. And Chairman Powell has stressed that the Commission must "place much greater emphasis on the importance of deregulation"[1] and, in particular, "work to harmonize regulatory treatment" of

[1] *Interview with FCC Chairman Michael Powell*, CNBC/Dow Jones Business Video (Feb. 9, 2001), http://www.telecomclick.com/newsarticle.asp?newsarticleid=132115.

"converged technology and markets" so that none is "examined in isolation."[2] The proposals raised in the Further Notice of Proposed Rulemaking ("*FNPRM*"), and endorsed by the cable modem providers and CLECs, crash head-on into those commitments. Instead of moving to "harmonize" its regulation of competing services through deregulation, the Commission would heap further asymmetrical obligations on one set of competitors, and the non-dominant ones at that.

If the Commission adopts that heavy-handed approach, it will regulate incumbent LECs' new, cutting-edge broadband facilities every bit as thoroughly as it regulates their legacy voice equipment. By allowing CLECs access to what is effectively a UNE platform for data, the Commission will extinguish the CLECs' incentive to engage in the facilities-based competition that, in section 706 of the 1996 Act, Congress expressly tasked this Commission with encouraging. At least as important, the Commission will rob incumbents of the incentive to deploy these facilities in the first place, and thus will impede the incumbent LECs' attempts to compete with dominant cable modem providers in the broadband market.

And it is not just the ILECs who say so. Equipment manufacturers agree with the ILECs that the Commission's proposals will stifle deployment of advanced services facilities. As one manufacturer has explained, "the regulatory obligations contemplated by the Commission create real disincentives to the ILECs' deployment of [the manufacturer's NGDLC-based] products." Catena at 6. *See also* Carol Wilson, *All Dressed Up with Nowhere to Go: Pending FCC Rules Are the Latest Roadblock to*

[2] Michael K. Powell, Commissioner, FCC, Remarks before the Progress & Freedom Foundation, Washington, D.C. (Dec. 8, 2000).

Bringing Broadband Access to Suburban Neighborhoods, The Net Economy, Mar. 5, 2001, at 28, 29 (quoting Alcatel's Vice President for Wireline Marketing: "[t]he Bell companies are totally holding back" in NGDLC deployment pending resolution of proceedings such as this one).

The view of equipment manufacturers and their opposition to the Commission's proposals ought to carry great weight in this proceeding. As the D.C. Circuit has explained: "Firms that sell goods and services that are *inputs* to the production and use of [advanced] services stand to gain an expanding market if the [ILECs'] prediction is right, and have the incentive to make a completely unbiased judgment on the matter." *United States v. Western Elec. Co.*, 993 F.2d 1572, 1582 (D.C. Cir. 1993).

The equipment manufacturers have it right. They know full well that they will sell more equipment if regulation does not strangle the incentive to deploy that equipment: output will increase and consumers will benefit from more competitive options. The Commission should thus reject all the *FNPRM* proposals and instead move quickly to dismantle its existing edifice of ILEC-only broadband regulation.

* * * * *

These Reply Comments demonstrate first that the claims of the cable-modem-provider and CLEC commenters rest on basic errors as to the market at issue here and as to the purpose and effect of NGDLC deployment. Once those errors are corrected, it is clear that the proposals championed by these commenters would reduce, not enhance, competition. The Reply Comments then establish that there is broad, albeit grudging, consensus that, by generally denying unbundling of packet switching facilities (including

DSLAMs), the Commission's *UNE Remand Order*[3] rejected the kinds of access now sought by AT&T and others. We then demonstrate that nothing in this record should cause the Commission to reverse that key deregulatory initiative from the *UNE Remand Order*. Finally, these Reply Comments establish that the record in this proceeding strongly supports SBC's argument that a line-card collocation obligation is unlawful, technically infeasible (as even many CLECs concede), and unwise.

I. THE COMMENTS FILED BY AT&T AND OTHERS IGNORE BOTH THE FACT THAT DSL IS A PART OF A LARGER BROADBAND MARKET AND THE FACT THAT DSL DEPLOYMENT ENHANCES OPPORTUNITIES FOR BOTH CONSUMERS AND CLECS.

A. Many of the comments in this proceeding mistakenly assume that DSL-based Internet access service constitutes a separate market. Covad, Rhythms, and WorldCom, for example, base their argument for additional asymmetrical regulation of incumbent LEC DSL facilities on the claim that incumbents are allegedly "perpetuat[ing] market control over DSL." Covad/Rhythms/WorldCom at 4 (heading). And AT&T – the nation's largest provider of cable modem service[4] – rather bizarrely ignores the existence of cable modem competition throughout its comments, claiming that incumbent LECs purportedly exercise "monopoly" control over a distinct DSL market. *See, e.g.*, AT&T at 4.

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[3] Third Report and Order and Fourth Further Notice of Proposed Rulemaking, *Implementation of the Local Competition Provisions of the Telecommunications Act of 1996*, 15 FCC Rcd 3696 (1999).

[4] *See* Cable Datacom News, *Cable Modem Market Stats & Projections*, http://cabledatacomnews.com/cmic/cmic16.html (updated Mar. 1, 2001).

This claim cannot survive scrutiny. As this Commission, the Federal Trade Commission, and the Department of Justice have all concluded, the relevant market here is not DSL Internet access alone, but the highly competitive and fast-growing market for broadband services.[5] That market includes at least three alternative service platforms – most importantly cable modem, but also fixed wireless and satellite – that are not dependent on access to an incumbent LEC's loop.[6]

Indeed, the cable modem service that is provided by AT&T, AOL Time Warner, and others is by far the dominant broadband technology right now, with 1.5 million more customers than DSL service.[7] Accordingly, the interest that AT&T – which resells only a

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[5] *See, e.g.*, FCC Staff Report, *Broadband Today* at 42 (Oct. 1999) ("*Broadband Today*") (arguing that cable's dominance over broadband will be tempered not by dial-up services but rather by "alternative platforms to use for high-speed data access"); Third Report and Order and Memorandum Opinion and Order, *Rulemaking to Amend Parts 1, 2, 21, and 25 of the Commission's Rules to Redesignate the 27.5-29.5 GHz Frequency Band*, 15 FCC Rcd 11857, 11864-65, ¶ 18 (2000) ("*Fixed Wireless Competition Order*") (discussing competition in the broadband market); Competitive Impact Statement at 9, *United States v. AT&T Corp.*, Civil No. 00-CV-1176 (D.D.C. filed May 25, 2000) ("A relevant product market affected by [the AT&T/MediaOne] transaction is the market for aggregation, promotion, and distribution of broadband content and services."); Complaint ¶ 21, *AOL, Inc. v. Time Warner, Inc.*, Docket No. C-3989 (FTC filed Dec. 14, 2000) ("The relevant product market in which to assess the effects of the proposed merger is the provision of residential broadband internet access service.").

[6] *See, e.g.*, *Fixed Wireless Competition Order*, 15 FCC Rcd at 11865, ¶ 19 (identifying "a continuing increase in consumer broadband choices within and among the various delivery technologies – xDSL, cable modems, satellite, fixed wireless, and mobile wireless"); Seventh Annual Report, *Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming*, CS Docket No. 00-132, FCC 01-1, ¶ 51 (rel. Jan. 8, 2001) ("*Seventh Video Competition Report*") ("wireless and satellite broadband technologies continue to be deployed"); *Broadband Today* at 21-22.

[7] *See* Cable Datacom News, *The Demise of the DLECs* (Feb. 1, 2001), http://cabledatacomnews.com/feb01/feb01-1.html; xDSL.com, *TeleChoice DSL Deployment Projections* (updated Feb. 13, 2000), http://www.xdsl.com/content/resources/deployment_info.asp; *see also Seventh Video Competition Report* ¶ 52 ("By June 2000, there were 820,000 DSL subscribers compared to more than 2.3 million cable Internet access subscribers.").

few thousand DSL lines[8] but has over 1.1 million cable modem subscribers[9] – is trying to further is clear. To borrow AT&T's own phrase in an analogous context, it is "more interested in hampering [ILECs'] ability to compete" than in fostering consumer choice. Comments of AT&T Corp. at 78, *Inquiry Concerning High-Speed Access to the Internet*, GN Docket No. 00-185 (FCC filed Dec. 1, 2000) ("Dec. 1, 2000 AT&T Comments").

Because the CLECs never acknowledge that DSL is part of the intensely competitive and still evolving broadband market, they never come to grips with the real question before the Commission here and in other proceedings: whether it makes any economic sense to burden the incumbent LECs with onerous regulations – and even add to those regulations, as contemplated by the *FNPRM* – while AT&T and the other dominant providers of broadband service are unregulated.

The obvious answer is that such a regime is economic nonsense. Where, as here, the Commission has determined that no entity in a market possesses monopoly power,[10] there is no justification for imposing heavier regulation on some technologies and business models than others. Such disparities distort prices, discourage investment, and penalize otherwise efficient technologies and firms. And shackling a *secondary* player in a market while the market leader remains free of regulation is, to say the least, perverse.

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[8] IXCs had 22,000 DSL lines in service as of the end of 2000. xDSL.com, *supra* note 7.

[9] AT&T Press Release, *AT&T Fourth Quarter Pro Forma Revenue Increases 2.5 Percent* (Jan. 29, 2001), http://www.att.com/press/item/0,1354,3637,00.html; Cable Datacom News, *supra* note 7.

[10] *See* Report, *Inquiry Concerning the Deployment of Advanced Telecommunications Capability*, 14 FCC Rcd 2398, 2423-24, ¶ 48 (1999) ("*First Advanced Services Report*") (the "preconditions for monopoly appear absent" in the broadband market).

Accordingly, the Commission's justification for its "hands off" policy toward cable modem providers – "the belief that 'multiple methods of increasing bandwidth are or soon will be made available to a broad range of customers'"[11] – applies with added force to the DSL Internet access providers that are seeking to compete with those dominant cable providers. As the Commission's staff has explained, "[a]s a guiding principle, regulators should not, without a compelling public policy rationale, skew technological development or choice by putting or keeping in place rules that favor one technology or technological application over another. Yet this is what might happen with broadband network development if lawmakers and regulators are not careful." Robert M. Pepper, *Through the Looking Glass: Integrated Broadband Networks, Regulatory Policies, and Institutional Change*, OPP Working Paper No. 24, ¶ 23 (FCC rel. Nov. 23, 1998).

For all these reasons, Chairman Powell has properly explained that the Commission must move to "some degree of less regulation" in the broadband market that would be "not so technology-centric."[12] The comments submitted by the CLECs, like the *FNPRM* itself, are directly contrary to that insight. The CLECs' proposals should be rejected for that reason alone.

B. The CLECs' arguments here also rest on an additional, highly significant error. The CLECs appear to believe that NGDLC deployment somehow diminishes their

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[11] Notice of Inquiry, *Inquiry Concerning High-Speed Access to the Internet Over Cable and Other Facilities*, 15 FCC Rcd 19287, 19288-89, ¶ 4 (2000) ("*Notice of Inquiry*") (citation omitted).

[12] *Cable Bureau Suggests Regulatory Forbearance for New Services*, Communications Daily, Feb. 23, 2001.

opportunities to compete. *See, e.g.*, Covad/Rhythms/WorldCom at i (describing NGDLC deployment as "insidious[]"). That is incorrect. In fact, NGDLC initiatives such as SBC's Project Pronto *expand* options and choices both for consumers *and* for CLECs. As the Commission has recognized, in the absence of Pronto, more than 20 million Americans would live too far from an SBC central office to use DSL service. *See Project Pronto Order*,[13] 15 FCC Rcd at 17533-34, ¶ 23 & n.65; *see also Fixed Wireless Competition Order*, 15 FCC Rcd at 11870, ¶ 29 ("Forty percent to fifty percent of local lines in the National Exchange Carrier Association pools exceed three miles, at or beyond DSL's practical limit of 3.4 miles . . . ."). SBC's multi-billion dollar investment, and similar investments by other companies, thus create enormous new opportunities for CLECs. The CLECs' argument is therefore directly contrary to this Commission's findings that SBC's massive investment to bring advanced services to millions of Americans who otherwise could not obtain DSL advances the public interest. *See Project Pronto Order*, 15 FCC Rcd at 17533-34, ¶ 23. Again, the proposals contained in the *FNPRM* and endorsed by the CLECs are contrary to that insight, and they should be rejected.

C. Because regulation at any governmental level will only hinder broadband competition, the Commission should not stop at rejecting the *FNPRM*'s proposals. Rather, it should also take prompt action to prevent state entities from imposing similar requirements.

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[13] Second Memorandum Opinion and Order, *Ameritech Corp., Transferor, and SBC Communications Inc., Transferee, For Consent to Transfer Control of Corporations*, 15 FCC Rcd 17521 (2000).

The Commission has properly recognized that "regulatory stability" is necessary to "encourage investment in all types of high-speed networks and innovation in high-speed services." *Notice of Inquiry*, 15 FCC Rcd at 19287-88, ¶ 2. The Commission has further stated that the way to achieve such stability is not through patchwork regulation at the state level, but rather by this Commission exercising its "role in establishing a national broadband policy." *Id.* As the Commission has explained, it is "the only agency with jurisdiction over all the current providers of broadband technology"; inconsistent regulation of different technologies at the state or local level "could undermine the development of intermodal competition."[14] In sum, as former Chairman Kennard explained, "Any policies concerning high speed access should be decided at the national level, because these issues, like the broadband networks themselves, are national in scope."[15]

The time has come for the Commission to act on that insight. A number of states are now considering proposals that mirror those in the *FNPRM*, and that are misguided for the same reason. Before the actions of these states destroy ILECs' incentives to deploy pro-competitive advanced services facilities, the Commission should act promptly to create a national, deregulatory broadband policy that will apply to all technologies and that will give companies the security that the value of their investments will not be undermined by regulatory action at the local, state, or federal level.

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[14] News Release, *FCC Court Brief Underscores Consumer Benefits from National Internet Policy of Unregulation; Urges Narrow Judicial Resolution* (FCC rel. Aug. 16, 1999) (citation and internal quotation marks omitted).

[15] Statement of Chairman William E. Kennard Concerning Notice of Inquiry Into High-Speed Internet Service (FCC rel. Sept. 28, 2000).

II. THE COMMISSION SHOULD NOT CHANGE ITS RULES TO PERMIT CLECS TO FREE-RIDE ON INCUMBENT LECS' INVESTMENTS IN NEW TECHNOLOGY.

A. Commenters Agree that the Commission's Current Rules Do Not Permit Unbundling of NGDLCs and Related Functionalities.

As SBC explained in its opening comments, although the *FNPRM* dresses the question up in several different ways, the basic issue posed by that notice is whether CLECs can obtain access to what amounts to a "UNE data platform." The Commission's rules already mandate line-shared access to the copper subloop. Accordingly, if the Commission requires ILECs to unbundle the functionality provided by the NGDLC, its line card, the associated fiber, and the optical concentration device ("OCD") in the central office, a CLEC could provide DSL service while investing in few, if any, facilities of its own. At most, the CLEC would need to invest only in obtaining a single ATM switch at the location where its ISPs have facilities. Simply put, what is at stake here is whether CLECs will be able to free-ride on incumbents' risk and investment and provide service without deploying their own facilities.

Although SBC and the CLEC commenters obviously differ greatly on the wisdom and legality of such an approach, there is a broad consensus on one point: the Commission's current rules do not authorize such a platform because they generally do not require access to the NGDLC's line card and its associated facilities. That is because those facilities are part of the packet switching network element, which ordinarily is not subject to unbundling. *See* 47 C.F.R. § 51.319(c); *see also* SBC at 30-31 (collecting Commission precedent establishing that these specific facilities are part of the packet switching element).

Virtually all commenters agree with that analysis. Thus, AT&T ultimately concedes that the "Commission's current packet switching rules . . . are not adequate to enable competitors to line share when there is fiber in the loop." AT&T at 23. AT&T then advocates an amendment to the Commission's rules that "should remove all reference to DSLAMs from [the] definition of packet switching." *Id.* at 27. Similarly, Covad, Rhythms, and WorldCom argue in the end that the Commission should "re-evaluate" the language in its rules that excludes DSLAMs from the loop element. *See* Covad/Rhythms/WorldCom at 12; *see id.* at 15 (recognizing that the Commission has "carve[d] out a DSLAM exception to its unbundling rules"). Other comments are to the same effect. *See* Sprint at 13 (discussing "changes" that should be made to the Commission's rules to permit fiber sharing); Mpower Communications at 15 (arguing that the Commission should exercise its "authority to unbundle packet switching" in order to permit access to the NGDLC's functionalities).[16]

At the same time, however, the CLECs seek to leave the impression that the current rules reflect an oversight on the Commission's part and that the Commission failed to consider the specific context of DLC architecture when it exempted DSLAMs from unbundling requirements. AT&T, for instance, asserts that the Commission's packet switching rules were "developed principally on the assumption that CLECs would access ordinary copper loops at the central office." AT&T at 24. And AT&T further argues that the Commission's inclusion of DSLAMs in the packet switching definition

[16] InfoHighway Communications claims (at 4) that the Commission's rules already require a UNE data platform, but it bases that argument exclusively on the Commission's rule preventing separation of combined UNEs. That rule is irrelevant where the relevant facilities – here, the NGDLC and associated equipment – do not have to be unbundled in the first place.

involves a basic misunderstanding of the role of such facilities. *See id.* at 25; *see also* Covad/Rhythms/WorldCom at 7-15.

Neither argument is correct. First, in the *UNE Remand Order*, the Commission considered the specific question of access to DSLAM functionalities in the context of DLC architecture, and it crafted specific rules to address that circumstance. The Commission explained that "[i]n locations where the incumbent has deployed digital loop carrier (DLC) systems, an uninterrupted copper loop is replaced with a fiber segment or shared copper in the distribution section," resulting in requesting carriers being required to "install [their] DSLAMs at the remote terminal" ("RT") instead of the central office in order to provide advanced services. *UNE Remand Order*, 15 FCC Rcd at 3838-39, ¶ 313. The Commission then held that, in the particular circumstance of DLC deployment, packet switching must be unbundled if, among other things, a DSLAM cannot be collocated at the remote terminal and no copper facilities are available. *Id.*

Thus, it is glaringly wrong for AT&T to claim that the existing packet switching rules were "developed principally on the assumption that CLECs would access ordinary copper loops at the central office." AT&T at 24. In fact, the Commission evaluated the specific issue of access *at the remote terminal* and determined that such access, where feasible, is a permissible manner of accommodating a CLEC's needs. Only where CLECs cannot obtain access to copper at the RT – that is, where they are denied collocation and other facilities-based methods of serving a customer are unavailable – may they obtain unbundled access to the packet switching functionality at issue in this proceeding. Accordingly, to the extent that commenters (*see, e.g.*, Covad/Rhythms/WorldCom at 14) argue that relief is warranted because they cannot

obtain such unbundled access, the Commission has already granted them a remedy. Their arguments, however, provide no basis for giving these companies *carte blanche* to use, on an unbundled basis, incumbent packet switching facilities even where facilities-based competition *is* possible.[17]

It is similarly wrong for commenters to argue that the Commission's decision to include DSLAMs within the packet switching element rests on the Commission's failure to comprehend that technology. *See* AT&T at 12 ("DSLAMs perform only *transmission*, not packet switching, functionality. Very simply, the DSLAM does not and cannot perform switching functions . . . ."). In fact, as the Commission has expressly recognized, DSLAM functionality is an integral part of packet switching. It is the DSLAM – or the line card and NGDLC common equipment and software that is providing DSLAM functionality (*see Project Pronto Order*, 15 FCC Rcd at 17524, ¶ 4 n.11) – that creates (that is, "packetizes") the data packets that are then routed by the packet switch; those facilities thus perform a function that is both integral and, in the Commission's phrase, "necessary" for packet switching, whether they are located at a remote terminal or a central office. *UNE Remand Order*, 15 FCC Rcd at 3834, ¶ 304; *see id.* (expressly "declin[ing] to adopt proposed definitions of packet switching that exclude

[17] Nor, contrary to some commenters' interpretation of the *Line Sharing Reconsideration Order*, did that order reverse course on this issue and permit access to packet switching from the central office regardless of whether collocation or copper is available. *See, e.g.*, AT&T at 6. As the Commission explained in its recent *Clarification Order*, the current law remains that incumbents need not provide access to unbundled packet switching capability except in the "limited set of circumstances" identified in the *UNE Remand Order*. Order on Clarification, *Deployment of Wireline Services Offering Advanced Telecommunications Capability*, CC Docket Nos. 98-147 & 96-98 (rel. Feb. 23, 2001).

DSLAMs").

Moreover, in the NGDLC architecture, the line card and supporting hardware and software that provide the DSLAM function cannot be severed from the OCD in the central office that separates the packets and routes them to different destinations. *See* SBC at 28-29 (explaining why it is not technically feasible to sever the DSLAM functionality from the OCD). Under any theory, that routing function qualifies as switching. *See Project Pronto Order*, 15 FCC Rcd at 17524, ¶ 4 n.12 ("The OCD is central office equipment that routes packet signals from several remote terminal sites to a carrier's packet switched network."); *id.* at 17531, ¶ 18 (the OCD is a "packet switch[]") (internal quotation marks omitted). Since the line card and associated hardware and software that perform the DSLAM function are effectively and exclusively "hard-wired" to the OCD, it makes no sense to consider them as anything other than part of the same network element.

Nor is this result altered by the fact that CLECs may access a voice loop from the central office even when DLC facilities are deployed. *See, e.g.*, AT&T at 10-11. When voice traffic is carried over DLC facilities, there is no packet switching involved. Rather, even in a NGDLC architecture, the voice signal is routed through a separate transport facility and is subject only to Time Division Multiplexing – it is *not* packetized. Since there is no packetizing of the data at the NGDLC and no routing through the OCD packet switch, that transmission does not require access to the packet switching network element. The voice facilities, unlike the separate data facilities, thus fall within the Commission's rule that the loop element is the transmission facility between the central office and the customer premises, including "attached electronics (*except those*

electronics used for the provision of advanced services, such as [DSLAMs])." 47 C.F.R. § 51.319(a)(1) (emphasis added).

In sum, there is no serious dispute that current law does not require access to the advanced services facilities at issue in this case – the NGDLC, its channel bank assembly and line card, the connected fiber facility, and the OCD.

B. Commenters Have Given the Commission No Reason To Reverse Its Prior Rulings and Provide Unbundled Access to Packet Switching Facilities.

1. Because the Commission's current rules do not require the unbundled access that AT&T and the CLECs seek here, those parties bear the burden of convincing the Commission to alter its rules to add a regulatory obligation that does not currently exist. As SBC explained in its opening Comments, that burden is particularly heavy in this instance. Indeed, the Commission addressed this very issue a little more than a year ago and explained that it intended to retain its current rules in order to provide the certainty necessary to support investment and competition: "The new standards and framework we adopt in this Order for determining which network elements incumbent LECs must make available on an unbundled basis will remove the uncertainties surrounding the incumbent's unbundling obligations since passage of the Act. More importantly, however, they will define the competitive landscape of telecommunications markets *for the foreseeable future*."[18]

2. AT&T and the CLEC commenters could not carry that burden even if they had an arguable claim – which, as we separately explain in the next subsection, they do

[18] *UNE Remand Order*, 15 FCC Rcd at 3700, ¶ 4 (emphasis added).

not – that they would be "impaired" within the meaning of section 251(d)(2) without unbundled access to incumbent packet switching facilities in instances where NGDLC is deployed. In the *UNE Remand Order* itself, the Commission declined to mandate unbundling even though it concluded that, because of the cost and delays associated with collocation, CLECs "*may* be impaired in their ability to offer service without access to an incumbent LEC [packet switching] facilities." *UNE Remand Order*, 15 FCC Rcd at 3835, ¶ 306 (emphasis added). The Commission explained that its "decision to decline to unbundle packet switching . . . reflects our concern that we not stifle burgeoning competition in the advanced services market." *Id.* at 3840, ¶ 316. "[R]egulatory restraint on our part may be the most prudent course of action in order to further the Act's goal of encouraging facilities-based investment and innovation." *Id.*

As SBC explained both in its opening Comments (at 34-37) and above, that analysis applies with particular strength to today's broadband market. DSL is just one part of a highly competitive broadband market that is currently dominated by the two cable modem giants. As AT&T explained in a related context, proponents of regulation must bear the burden of "proving a substantial risk of bottleneck monopoly abuse" before the Commission should consider such regulation. Dec. 1, 2000 AT&T Comments at 68.

Because that threshold showing of monopoly power has not been – and cannot be – made here, regulation would only distort marketplace results and substantially *lessen* competition. In particular, requiring unbundling of NGDLCs and related facilities would discourage SBC and these other companies from investing (or continuing to invest) in DSL-capable NGDLC facilities – as SBC has already done in Illinois pending a final

decision by the Illinois Commerce Commission on unbundling proposals much like those being considered here.[19]

Other commenters agree with SBC that the *FNPRM* proposals would undermine deployment of advanced services facilities. For example, Catena Networks, an equipment provider, has stressed that "the regulatory obligations contemplated by the Commission create real disincentives to the ILECs' deployment of Catena's [NGDLC-based] products." Catena at 6. Alcatel's Vice President for Wireline Marketing has similarly been quoted this week as saying that "[t]he Bell companies are totally holding back" in NGDLC deployment pending resolution of this proceeding.[20] And "[s]pokesmen for both Qwest and Verizon" have confirmed "that they would not put DSL-equipped DLC systems into their networks until regulatory issues were resolved."[21]

The Commission should be particularly hesitant to reverse course on its existing policy of "regulatory restraint" because consumer access to broadband is exploding without such intervention. As SBC demonstrated in its opening comments, although DSL is still a secondary technology in the broadband market, since the *UNE Remand Order*, residential broadband subscribership as a whole is up nearly **400%**, and

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[19] The investment incentive issue is highly significant if the Commission requires SBC to make its Broadband Offering (which provides a permanent virtual circuit or "PVC") into a UNE available at cost-based rates, and not at the market rates that SBC would otherwise negotiate. It is even *more* significant to the extent that the Commission would consider requiring the unbundling of permanent virtual paths or "PVPs." A PVP involves use of all of the physical capacity from one of the three DSL-capable channel bank assemblies in a large NGDLC. Requiring such access would be extraordinarily inefficient and would quickly exhaust the capacity of the NGDLC, undermining any business incentive to deploy it.

[20] Wilson, *supra* pages 2-3.

[21] *Id.* at 28.

residential DSL subscribership in particular is up over **800%.**[22] Moreover, because prices for DSL service are already restrained by competition from cable modem providers and other competitors, as well as other CLECs, there would be no consumer benefit from regulatory intervention.[23] In sum, there is no reason to believe that consumers, as opposed to competitors like AT&T and the CLECs, will benefit from the proposals championed in those parties' comments. For that reason, as in the *UNE Remand Order* itself, the Commission should decline to require unbundling regardless of the "impairment" analysis. *See UNE Remand Order*, 15 FCC Rcd at 3713-14, ¶¶ 26-27 (explaining that, in addition to "impairment," the Commission's unbundling analysis considers the "goals of the Act," including "encourag[ing] investment and innovation in new technologies and services"); *id.* at 3747, ¶ 106 (noting that there "may be circumstances in which there is significant evidence that competitors are impaired

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[22] *Compare* Cable Datacom News, *Cable Modem Market Stats & Projections* (updated Mar. 1, 2001) (estimating U.S. cable modem subscribers), http://cabledatacomnews.com/cmic/cmic16.html; xDSL.com, *TeleChoice DSL Deployment Projections* (updated Nov. 5, 1999), http://www.xdsl.com/content/resources/deployment_info.asp *with* Cable Datacom News, *The Demise of the DLECs* (Feb. 1, 2001), http://cabledatacomnews.com/feb01/feb01-1.html; xDSL.com, *TeleChoice DSL Deployment Projections* (updated Feb. 13, 2001), http://www.xdsl.com/content/resources/ deployment_info.asp.

[23] "Well at the same time there's some thought that the cost of rolling out DSL was very expensive, and that these companies artificially priced it at $40 *because that's what the cable operators priced their broadband connection at*, and also because that's roughly twice what dial up is and maybe that's not the case. Maybe $40 a month is not the price point for DSL. . . . Just the sheer cost of installing this is very high. And so what's happened is – these prices will come down over time but broadband is a new market. The equipment prices have not come down the way they have in the dial up market. So the cost of set up for an average consumer can run as high as 700, 800, $900. And in order to re-coop that cost that's a difficult proposition for the provider." *DSL Companies' Problems*, CNNfn, Transcript No. 01022710FN-l07 (Feb. 27, 2001) (quoting CNET news reporter) (emphasis added).

without unbundled access to a particular element," which is not even true here, but where "unbundling the element would not further the goals of the Act.").[24]

3. In any case, it is difficult to fathom how CLECs can be "impaired" without access to NGDLC facilities when their ability to provide DSL was not found to be impaired before these facilities were deployed. As SBC has explained (*supra* pages 7-8), NGDLC enhances CLECs' opportunities by allowing them to compete for millions of customers that previously were too far from the central office to obtain DSL service. Under no reasonable understanding of the word can deployment of facilities that open previously closed markets to CLECs be understood as an "impairment."

Moreover, in stark contrast to their current, opportunistic claims, many of the commenters here argued that the forms of access that the Commission now mandates – access to subloops and dark fiber and collocation at remote terminals – were crucial to enhancing competition. In the *UNE Remand* proceeding, AT&T claimed that CLECs "*need to be able to access unbundled loops at or near the remote terminal,* through transmission media, including but not limited to fiber or copper transmission cables, *and to install their own transmission enhancing equipment* (such as DSLAM functionality, DLC equipment, or both)." Comments of AT&T on Second Further Notice of Proposed Rulemaking at 79-80 n.172, *Implementation of the Local Competition Provisions of the*

[24] In any event, the Commission cannot lawfully require the ILEC to deploy additional technology or equipment in its network (such as NGDLCs to replace older equipment that might not support high-speed data traffic) to force the sharing of fiber by the ILEC and the CLEC, or to permit the CLEC to provide forms of service that the ILEC is not providing (for instance, constant bit rate instead of unspecified bit rate). Such obligations are directly contrary to the Eighth Circuit's holding in *Iowa Utilities Board v. FCC*, 120 F.3d 753, 813 (8th Cir. 1997), that the Commission lacks authority to mandate superior quality access.

Telecommunications Act of 1996, CC Docket No. 96-98 (FCC filed May 26, 1999) (emphasis added). WorldCom similarly argued that "*access to the remote terminal has become essential* to the competitive deployment of advanced services. In sum, it is time for the Commission to require subloop unbundling, and make clear that CLECs are entitled to access to the loop at a subloop level, including access to the remote terminal." Comments of MCI WorldCom at 78-79, *Deployment of Wireline Services Offering Advanced Telecommunications Capability*, CC Docket No. 98-147 (FCC filed Sept. 25, 1998) (emphasis added). And Rhythms has emphasized that "[r]emote terminal or DLC vault collocation is the most technically straightforward solution to the DLC/xDSL challenge." Comments of Rhythms NetConnections, Inc. at 9, *Deployment of Wireline Services Offering Advanced Telecommunications Capability*, CC Docket No. 98-147 (FCC filed Sept. 25, 1998).

It is obvious why these same commenters now claim that these same forms of access are inadequate: they are tantalized by the prospect of being able to compete without incurring the investment risk necessary to deploy their own facilities. As Professors Areeda and Hovenkamp explained, "when government forces a company to provide [a] facility and regulat[es] the price to competitive levels, then the [prospective entrant's] incentive to build an alternative facility is destroyed altogether." 3A Phillip Areeda & Herbert Hovenkamp, *Antitrust Law* ¶ 771b, at 175 (1996). While such a strategy may be in a CLEC's self-interest, it is directly contrary to the Commission's

recognition that "in the long term, the most substantial benefits to consumers will be achieved through facilities-based competition."[25]

Nor do the CLECs' attempts to explain why they are in fact impaired justify a different result. First, while the CLECs claim that investment in facilities is not economically feasible, their argument relies on distorted figures. For instance, Covad, Rhythms, and WorldCom suggest that SBC acknowledged in a Texas proceeding that it would cost $15,000 to $30,000 to collocate at every remote terminal. *See* Covad/Rhythms/WorldCom at 31-32. In fact, however, the SBC witness's testimony was that the cost would "be dependent upon all the parameters associated with that specific case" and that, in some instances, collocation could be accomplished for $3,000.[26] Similarly, although Sprint speculates (at 6) that it will cost over $100,000 to collocate in an adjacent space at a remote terminal, it provides no support for that figure.

In any event, competition remains feasible for a CLEC with a good business plan and aggressive marketing. A CLEC that collocates at an RT may normally access three to four Feeder Distribution Interfaces ("FDIs"), which collectively could serve 2000-4000 potential customers.[27] If the CLEC wins 20% of those customers, the CLEC could

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[25] Notice of Proposed Rulemaking and Notice of Inquiry in WT Docket No. 99-217, and Third Further Notice of Proposed Rulemaking in CC Docket No. 96-98, *Promotion of Competitive Networks in Local Telecommunications Markets*, 14 FCC Rcd 12673, 12676, ¶ 4 (1999).

[26] Hearing on the Merits Transcript at 449, *Petition of IP Communications Corp. to Establish Expedited Public Utility Commission of Texas Oversight Concerning Line Sharing Issues*, Docket Nos. 22168 & 22469 (Tex. Pub. Util. Comm'n Nov. 29, 2000) (test. of Mark Welch).

[27] At huts and CEVs, there may be more than one NGDLC.

expect $20,000 - $100,000 in monthly revenues.[28] Of course, such a business plan involves risk and up-front investment, and depends on execution of a sound business strategy, but that is precisely the case for SBC as well, which is investing billions of dollars in advanced services facilities.

Moreover, to the extent that commenters claim that lack of access to collocation space or transmission facilities creates an "impairment" (*e.g.*, Sprint at 5-6; Mpower at 4-10) in particular cases, the Commission's rules already address the issue. In such limited circumstances, the Commission's existing rules normally require unbundling of packet switching functionalities. *See* 47 C.F.R. § 51.319(c). The Commission's rules thus already provide a safety valve, but one that, unlike the CLEC proposals, does not undermine incentives for facilities-based investment.

III. THE COMMISSION SHOULD NOT REQUIRE COLLOCATION OF NGDLC LINE CARDS.

Some CLEC commenters also seek to require collocation of line cards. In doing so, however, they ignore (or, in some instances, concede) the three most important reasons that such a requirement should be rejected: (1) it is plainly unlawful under *GTE Service Corp. v. FCC*, 205 F.3d 416, 422 (D.C. Cir. 2000); (2) it is technically infeasible; and (3) it would result in substantial waste and inefficiency by stranding capacity.

A. As SBC explained in its opening comments (at 12-15), the 1996 Act, as authoritatively interpreted by the D.C. Circuit in *GTE Service Corp.*, does not permit a line-card collocation requirement. A line card is, at best, multi-function equipment of the type that the D.C. Circuit held is not "necessary" for interconnection or access to

[28] This assumes monthly fees of $50 to $200.

unbundled elements because it "unnecessarily '*includes a switching functionality, provides enhanced service capabilities, or offers other functionalities.*'"[29] Indeed, as SBC and others have explained, not only is a line card not necessary for interconnection or unbundled elements, it is not even useful for those purposes; nor is it even stand-alone equipment of the type that is subject to collocation. *See, e.g*, Verizon at 6-7.

Significantly, no CLEC commenter even addresses these legal issues, much less does any commenter explain how a line-card collocation requirement is consistent with *GTE Service Corp.* and the plain text of section 251(c)(6). *See* Covad/Rhythms/WorldCom at 23-27; IP Communications at 3; Mpower at 16.

B. Even if line-card collocation did not face that insuperable legal obstacle, it should be rejected because, as many parties agree, it is technically infeasible. As AT&T – which notably *declines* to support such a collocation requirement – has explained, "except possibly for line cards from the manufacturer of the ILEC's DLC equipment, such collocation may present additional technical issues." AT&T at 18. AT&T further notes that Alcatel has "indicated that a competitive LEC's collocation of its 'own line cards in an ILEC's NGDLC system' is not feasible, because line cards from different manufacturers vary in physical size and face software interface constraints." *Id.* Such issues, AT&T concedes, may raise "insurmountable" problems. *Id.*

Sprint similarly concedes that "[p]lacing line cards in an ILEC NGDLC raises legitimate questions as to the technical compatibility of the line card with the DLC, as well as security concerns." Sprint at 11. And while Covad, Rhythms, and WorldCom

[29] *GTE Serv. Corp.*, 205 F.3d at 424 (emphasis added) (quoting First Report and Order and Further Notice of Proposed Rulemaking, *Deployment of Wireline Services Offering Advanced Telecommunications Capability*, 14 FCC Rcd 4761, 4776, ¶ 28 (1999)).

purport to support a line-card collocation requirement, they too acknowledge that interoperability of line cards in DLC systems requires "open standards" that do not currently exist. Covad/Rhythms/WorldCom at 26[30]; *see also* Mpower at 16 (noting that "interoperability" issues would have to be addressed before collocation could be required).

The consensus on this point provides another powerful reason to reject the *FNPRM*'s collocation proposal. That is especially true because the incompatibility of a line card with the NGDLC environment could cause the entire system to fail, thus affecting many carriers other than the one that placed the improper card in the NGDLC slot. *See* SBC at 19.

C. Finally, even if commenters' intentions were to collocate only those line cards that were compatible with the ILEC's NGDLC, these same commenters are again silent as to the waste and inefficiency that would result from CLECs purchasing entire slots, but using fewer than the four ports contained in such slots. As SBC explained in its opening Comments, using conservative assumptions, 33% of the NGDLC's capacity would be stranded by CLECs' use of line-card collocation. *See id.* at 16. Furthermore, in instances where the CLECs use many of the ports in their line-card slots, the types of DSL that they might choose to offer could indiscriminately consume inordinate amounts of the total NGDLC system bandwidth capacity, which in turn would render numerous entire slots in the channel banks unusable, or degrade the level of DSL service experienced by other carriers' customers, or both. By any standard, a requirement that is

[30] Although Covad, *et al.*, assert that these technological limitations derive from some nefarious conspiracy between the ILECs and equipment manufacturers, they cite no evidence to support that specious allegation. No such evidence exists.

not only contrary to law and threatens to create system failures, but also would result in enormous waste is a bad idea that should be rejected.

CONCLUSION

For the foregoing reasons, and those stated in SBC's opening Comments, the Commission should reject the *FNPRM* proposals as inconsistent with law and sound competitive policy.

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