

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

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In the Matter of

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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 )  
Third Notice of Inquiry )

CC Docket No. 98-146

COMMENTS  
OF THE  
UNITED STATES TELECOM ASSOCIATION

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## SUMMARY

The nationwide deployment of advanced telecommunications services is taking place on a reasonable and timely basis. If future deployments of advanced telecommunications services are to continue to occur on a reasonable and timely basis, the Commission must adopt reforms that recognize that regulation of competitive services is unnecessary. These reforms must include policies that favor no provider or technological platform for the delivery of advanced telecommunications services. The Commission's reforms must ensure application of symmetrical regulation or deregulation for providers of functionally equivalent advanced services delivered over different network platforms. In addition, the Commission's reforms must recognize that deployment of advanced telecommunications services involves a business in which providers of such services, including ILECs, are entitled to receive a return on their investments. ILECs serving smaller and rural areas are particularly sensitive to the adverse impact of regulations that create disincentives to investment in network upgrades or deployment of new networks to provide advanced telecommunications services. The Commission's reforms must also recognize that deployment of advanced telecommunications services will depend upon market forces, including consumer and business demands, cost of deployments, and the availability and viability of technology for such services.

## TABLE OF CONTENTS

	<u>Page No.</u>
SUMMARY .....	i
INTRODUCTION .....	1
I.    ADVANCED TELECOMMUNICATIONS SERVICES - - AVAILABILITY AND TIMELY DEPLOYMENTS.....	3
Summary Statistics .....	3
II.   REGULATORY POLICY REFORM .....	6
A. Regulatory Parity - - Symmetry in Regulatory Applications.....	6
B. ILEC Advanced Telecommunications Networks And Services Should Not Be Subject To Unnecessary Obligations.....	9
C. Universal Service and Access to Advanced Telecommunications Services.....	13
CONCLUSION .....	14

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**COMMENTS  
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UNITED STATES TELECOM ASSOCIATION**

**INTRODUCTION**

The United States Telecom Association (“USTA”)<sup>1</sup> hereby files its comments in response to the Commission’s *Third Notice of Inquiry*<sup>2</sup> (“NOI”) on the deployment of advanced telecommunications services to all Americans pursuant to Section 706 of the 1996 Act. Advanced telecommunications services are being deployed nationwide on a reasonable and timely basis. Commission adoption of symmetrical regulations applied to all providers of advanced telecommunications services, elimination of unnecessary

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<sup>1</sup> USTA is the nation’s preeminent telecom trade association representing a diverse membership of over 1,200 telecommunications companies, including ILECs and CLECs, that provide competitive telecommunications products and services including voice, data and video services over wireline and wireless networks domestically and in international markets worldwide.

<sup>2</sup> FCC 01-223, released August 10, 2001.

ILEC regulatory obligations for such services and review of universal service issues involving advanced telecommunications services will ultimately determine whether the goals of Section 706 will be realized.<sup>3</sup>

The Commission's policy and regulatory reforms must recognize that deployment of advanced telecommunications networks and services involves a business decision by every carrier. Decisions by carriers to make the financial, technical and human resource commitments necessary to deploy new technologies and services should be made by carriers in response to market forces. Clearly, a number of market factors, including cost, network configuration, demand for services, and universal service issues may impact the deployment of advanced services in any given region of the country. Depending upon market forces, some providers of advanced services may find that it is not economically or financially viable to provide advanced telecommunications services over existing networks or to upgrade those networks or to deploy networks even under the best of regulatory policies and market conditions. Among ILECs, serving smaller and rural

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<sup>3</sup> USTA's comments address advanced services defined in the SBC/Ameritech merger agreement: "For purposes of these Conditions, the term "Advanced Services" means any intrastate or interstate wireline telecommunications services, such as ADSL, IDSL, xDSL, Frame Relay, Cell Relay and VPOP-Dial Access Service (an SBC Frame Relay-based service) that rely on packetized technology and have the capability of supporting transmissions speeds of at least 56 kilobits per second in both directions. This definition of Advanced Services does not include (1) data services that are not primarily based on packetized technology, such as ISDN, (2) x.25-based and x.75-based packet technologies, or (3) circuit switched services (such as circuit switched voice grade service) regardless of the technology, protocols or speeds used for the transmission of such services." See 14 FCC Rcd at 14969 (1999). USTA's comments in this proceeding are not intended to address elimination of regulations on ILEC high-capacity loops and dedicated transport in which USTA and USTA's CLEC Council filed comments. See *USTA's Comments and USTA's CLEC Council Comments on the Joint Petition of BellSouth, SBC, and Verizon for Elimination of Mandatory Unbundling of High-Capacity Loops and Dedicated Transport*, CC Docket No. 96-98, filed June 11, 2001.

communities, this may be particularly true. The Commission must ensure its rules are flexible enough to address the unique circumstances of individual companies, in order to ensure advanced services are deployed on a reasonable and timely basis.

## **I. ADVANCED TELECOMMUNICATIONS SERVICES - - AVAILABILITY AND TIMELY DEPLOYMENTS**

The Commission's *NOI* asks whether advanced telecommunications capability is being deployed to all Americans, whether deployment of such services are reasonable and timely, and what actions can accelerate deployment of advanced telecommunications services.

The Commission's recent report on the deployment of advanced services to all Americans entitled *High-Speed Services for Internet Access: Subscribership as of December 31, 2000* ("Advanced Services Report") provides insight on access and deployment of such services.<sup>4</sup> The data in the *Advanced Services Report* unequivocally supports the conclusion that advanced telecommunications services are being timely deployed throughout the country. As the Commission's *Advanced Services Report* explains:

### **Summary Statistics**

- High-speed lines connecting homes and businesses to the Internet increased by 63% during the second half of the year 2000, to a total of 7.1 million. The rate of growth for the full year was 158%.
- Of the total 7.1 million high-speed lines, 5.2 million were residential and small business subscribers.
- About 4.3 million of the 7.1 million high-speed lines provided services at speeds of over 200 kilobits per second (kbps) in both directions, and thus met the

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<sup>4</sup> *High-Speed Services for Internet Access: Subscribership as of December 31, 2000* by the Industry Analysis Division, Common Carrier Bureau, released August 10, 2001.

Commission's definition of advanced services, an increase of 51% during the last six months of the year 2000. The rate of growth for the full year was 118%.

- At the end of the year 2000, the presence of high-speed service subscribers was reported in all fifty states, the District of Columbia, Puerto Rico, and the Virgin Islands. Subscribers were reported present in 75% of the nation's zip codes, compared to 56% at the end of 1999.
- High-speed asymmetric DSL (ADSL) lines in service increased by 108% during the second half of the year 2000, to 2 million lines. The rate of growth for the full year was 435%.
- High-speed Internet connections over coaxial cable systems increased by 57% during the final six months of the year 2000, to a total of 3.6 million. The rate of growth for the full year was 153%.
- Although the provision of high-speed lines by satellite and fixed wireless technology represents a small fraction of the total high-speed lines in use, the number of lines grew from 50,000 in December 1999 to 112,000 in December 2000.
- High-speed subscribers are reported present in 97% of the most densely populated zip codes. The comparable figure is 45% among zip codes with the lowest population densities, compared to 24% a year earlier.
- For zip codes ranked by median family income, high-speed subscribers are reported present in 96% of the top one-tenth of zip codes and in 56% of the bottom one-tenth of zip codes, compared to 42% a year earlier.<sup>5</sup>

The data provides numbers which lead to a single, uncontroverted, conclusion: rapid deployment of advanced telecommunications services continues to occur on a nationwide basis. Future deployment of such services will depend upon Commission reforms which recognize that competition, driven by innovation, risk taking, and the demands of consumers and businesses must be the foundation of Commission public policy. Conversely, maintaining regulations that stifle competition, and create disincentives to investment in deployment of advanced telecommunications networks and services, will simply impede nationwide deployment of such services.

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<sup>5</sup> FCC News Release August 9, 2001.

Notwithstanding this general conclusion, however, there are a few multi-exchange rural telephone companies and other smaller local exchange carriers that suffer from unique situations that make the provision of advanced services more difficult or virtually impossible. Smaller carriers often face difficult economic circumstances, such as low density, long distances from central offices, and an inability to create sufficient demand for services, that has slowed the provision of advanced services to many rural Americans. Because of these unique economic circumstances, general regulations applicable to all local exchange carriers at the federal level can and do undermine some carriers' abilities to provide advanced services and hamper competitive responses. In addition, demand for advanced services at compensatory prices is often low because these prices are higher than some rural Americans can afford.

In particular, access charge rules in the CALLS plan do not provide in all cases sufficient flexibility to allow smaller carriers to meet competition and to modernize their networks. Because these rules are one-size-fits-all, they impact individual carriers disproportionately, depending on their unique circumstances. Obtaining waivers or forbearance from these rules is expensive, and is subject to extensive delays, which makes these procedural devices less than optimal. The Commission must reassess its overall rules in order to make them flexible enough to consider unique individual circumstances to permit carriers to deploy advanced services in rural America on a reasonable and timely basis.

## II. REGULATORY POLICY REFORM

The Commission can ensure that ongoing deployment of advanced telecommunications services continues to occur more rapidly by eliminating asymmetrical regulation of carriers providing functionally equivalent services,<sup>6</sup> and forbearing from applying burdensome and unnecessary regulations on ILEC advanced telecommunications networks and services. Commission action on these regulatory issues will provide incentives for all carriers to commit the technical, financial and human resources necessary for the full intent of Section 706 to be realized. Infrastructure deployments critical to the national economy will rest on decisions made by the Commission. Decisions by the Commission which foster confusion will only delay rapid deployment of advanced services, weaken the economy, and cast doubt on whether the vision of Section 706 will ever be attainable.

### A. Regulatory Parity - - Symmetry in Regulatory Applications

What is required in today's rapidly changing technological environment is a new regulatory paradigm that is competitively neutral. The Commission has raised the issue of regulatory policies that should be symmetrically applied and competitively neutral regardless of technology deployed to provide functionally equivalent services. In the initial *NOI* on Section 706, the Commission acknowledged that its "regulatory system is uneven in its treatment of different technologies."<sup>7</sup> As the Commission explained, "statutes and rules contain separate regimes for wireline and wireless, for local and long

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<sup>6</sup> USTA Comments filed December 1, 2000, and Reply Comments January 10, 2001, *In the Matter of Inquiry Concerning High-Speed Access to the Internet Over Cable and Other Facilities*, GN Docket No. 00-185.

<sup>7</sup> *NOI* at 2, ¶4, released August 7, 1998.

distance, for telecommunications, broadcasts, and cable television, and so on.”<sup>8</sup> According to the Commission, its regulations “may distort the performance of the market to have separate regimes of regulation for competitors in a converging market.”<sup>9</sup> The Commission should exercise its existing authority under Sections 706 and 10 of the 1996 Act to promote competition by eliminating application of asymmetrical regulations to companies in different market segments that provide functionally equivalent services, and forbear from imposing needless regulations on carriers based upon legacy policies. This new public policy approach would benefit consumers and businesses by allowing market forces to drive competition, which ultimately increases choices and lowers prices for services.

Functionally equivalent Internet transport services provided over different technological platforms should be free of unnecessary government regulations. Section 230(b)(1) of the Act states: “It is the policy of the United States - (1) to promote the continued development of the Internet and other interactive computer services and other interactive media.” 47 U.S.C. §230(b)(1). Section 230(b)(2) states that the Commission’s mission is “to preserve the vibrant and competitive free market that presently exists for the Internet and other interactive computer services, unfettered by Federal or State regulation.” 47 U.S.C. §230(b)(2).

Broadband Internet transport, although not ubiquitous, is a competitive service. There are multiple technological platforms (*e.g.*, DSL, cable, fixed wireless, satellite) used to transport high-speed broadband data, content, and Internet connections to

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<sup>8</sup> *NOI* at 2, ¶4, released August 7, 1998.

<sup>9</sup> *Id.*

endusers. *Deployment of Advanced Telecommunication Capability: Second Report at 6*, released August 2000 (“competition is emerging, rapid buildout of necessary infrastructure continues, and extensive investment is pouring into this segment of the economy ....”); *LMDS Order* at 11, ¶23, CC Docket No. 92-297, released June 27, 2000 (“ the competitive nature of the broadband market ... the number of consumer broadband options within the various broadband technologies ... together with ... price competition and price reductions in that market, convinces us that incumbent carriers will not be able to ... dominate the market ... [or] cause competitive harm in any market ....”). The Commission has determined that competition in the advanced telecommunications services market is becoming broader and more diverse with no single technological delivery system dominating: “The record before us, which shows a continuing increase in consumer broadband choices within and among the various delivery technologies – DSL, cable modems, satellite, fixed wireless, and mobile wireless suggest that no group of firms or technology will likely be able to dominate the provision of broadband services.” *LMDS Order* at 9, ¶19.

Commission regulations that discriminate against a particular technological platform that provides functionally equivalent Internet transport services to endusers (1) stifles competition and investment in deployment of advanced telecommunications capability, (2) is anti-competitive, (3) is protectionist in favor of a given technological platform providing functionally equivalent services, (4) is discriminatory public policy (5) is contrary to the public’s interest in receiving the benefits of competition and multiple choices of technological platforms providing functionally equivalent services, and (6) is inconsistent with the goals of section 706 (deployment of advanced services to

all Americans regardless of the technological platform), Sections 10 and 230(b), and Section 7, 47 U.S.C. §157 (“It shall be the policy of the United States to encourage the provision of new technologies and services to the public.”).

**B. ILEC Advanced Telecommunications Networks And Services Should Not Be Subject To Unnecessary Obligations**

Regulations invariably impose costs on those service providers who are regulated. In addition, regulations may also slow a service provider’s ability to respond to changes in the marketplace. The selective imposition of costs and constraints on a service provider’s operations unquestionably gives a competing nonregulated, or less regulated, service provider a competitive advantage over its regulated competitor. Such a dichotomy in regulatory treatment can only be justified when it has been clearly demonstrated that regulation is necessary in order to restrain the exercise of market power by the regulated service provider in the relevant service and geographic markets in which it is regulated.<sup>10</sup> Consequently, the Commission should continually strive to eliminate regulations which are no longer relevant in a competitive landscape and to refrain from imposing new regulation on carriers unless absolutely necessary. The Commission has defined market power as “the ability to raise and maintain price above the competitive level without driving away so many customers as to make the increase unprofitable.”<sup>11</sup> Similarly, the 1992 Department of Justice /Federal Trade Commission Merger Guidelines define market power as “the ability profitably to maintain prices above competitive levels for a significant period of time.”<sup>12</sup> The ability to exercise

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<sup>10</sup> *Competitive Carrier Fourth Report and Order*, 95 FCC 2d at 562, ¶13.

<sup>11</sup> *Id.* at 558, ¶¶ 7-8.

<sup>12</sup> *Id.*

market power by any of the existing service providers in the high-speed data services or broadband Internet access market, as evidenced by the Commission's own analysis and a recent study by the General Accounting Office,<sup>13</sup> is nonexistent.

ILEC DSL services and cable modem services are functionally equivalent services provided by carriers which have historically been regulated under different provisions of the Communications Act of 1934, as amended. The Commission chooses to adopt a hands-off policy for cable modem Internet access, while burdening ILEC DSL Internet access services with regulations that stifle competition. It is time for the Commission to recognize that functionally equivalent services should receive the same non-discriminatory, competitively neutral, regulatory treatment. Given the competitive landscape in advanced services, the Commission should examine regulatory parity between ILEC DSL services and cable modem services where appropriate.

The Supreme Court's decision in *AT&T v. Iowa*.<sup>14</sup> instructed the Commission to apply the necessary and impair standards of Section 251(d)(2) in its review of ILEC unbundling obligations in Section 251 (c)(3). According to the Court, the Commission must "determine on a rational basis *which* network elements must be made available, taking into account the objectives of the 1996 Act and giving some substance to the 'necessary' and 'impair' requirements"<sup>15</sup> The Commission should forbear from regulating advanced services because of the competition in the market for such services

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<sup>13</sup> *Technological and Regulatory Factors Affecting Consumer Choice of Internet Providers, Report to the Subcommittee on Anti-trust, Business Rights and Competition, Committee on the Judiciary, U.S. Senate, released October 2000.*

<sup>14</sup> 119 S.Ct. 721 (1999).

<sup>15</sup> *Id.* at 736.

and because no provider or technological platform dominates the delivering of these services.

The Commission, however, has imposed additional unbundling obligations, in perpetuity, on ILEC network and advanced telecommunications services deployments. In the Commission's *Reconsideration Order on Advanced Services* ("Reconsideration Order") released January 19, 2001, ILECs must continue to provide competitors with unbundled access to the high frequency portion of the local loop for broadband services where ILECs use the same loop to provide voice services. Also, the Commission's *Reconsideration Order* (1) requires ILECs to extend line sharing to their fiber and remote terminal deployments, (2) made clear that ILECs are required to provide unbundling over existing facilities and new facilities deployed in the future, (3) required ILECs to immediately provide operations support services to competitors using a UNE platform to provide both voice and DSL services over the same loop - - known as "line splitting," (4) requires BOCs to demonstrate compliance with the Commission's line splitting regulations in their Section 271 state applications for long distance authority, and (5) included a further notice requesting comments on how additional line sharing can take place over ILEC deployed fiber.<sup>16</sup>

In response to the *Further Notice of Proposed Rulemaking* ("FNPRM") on advanced services, USTA opposed adoption of additional burdensome regulations on ILEC deployment of advanced telecommunications networks and services in a market the

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<sup>16</sup> *Deployment of Wireline Services Offering Advanced Telecommunications Capability, 3rd R&O on Recon., 4th R&O on Recon., 3rd FNPRM, 6th NPRM, CC Docket Nos 98-146 & 96-98, released January 22, 2001.*

Commission has determined is competitive.<sup>17</sup> The Commission's proposed line sharing regulations in the *FNPRM*, if adopted, would hamper the ability of ILECs to compete against cable broadband service providers. Moreover, additional regulations would have a chilling affect on new carrier deployments by ILECs. It would be precipitous for the Commission to impose additional regulations for line sharing over ILEC fiber networks and remote terminals as suggested in the *FNPRM*, pending the outcome of litigation. The adoption of changes in the existing definition for shared transport is unnecessary. In addition, there is no basis for the Commission to adopt a UNE platform for data. Line sharing and UNE platforms for data are unnecessary because the Commission has consistently determined that the advanced telecommunications services market is in fact competitive. The Commission's proposals regarding line sharing are contrary to the public interest and inconsistent with the Supreme Court's necessary and impair analysis under Section 251(d)(2) of the Act which the Court made clear limits any efforts by the Commission to impose upon ILECs unbundling obligations. Additional line sharing regulations are not required to promote competition for advanced telecommunications services and should not be mandated by the Commission.

All ILECs with limited resources are constrained to invest financial resources to deploy new and innovative technologies and services in underserved markets given the ongoing requirement to provision line sharing over such facilities. Smaller and rural ILECs, in particular, face great financial limitations in providing advanced telecommunications services in the markets they serve. These are markets that the Commission has consistently expressed concerned about deployment of advanced

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<sup>17</sup> USTA Comments filed February 27, 2001.

telecommunications services. Compliance with unnecessary and complex regulations by carriers creates unnecessary business expenses. ILECs are not unlike businesses in other market segments. They are not in a position to invest limited financial resources in the deployment of network upgrades for advanced telecommunications networks and services, without the possibility of earning a market-driven return on that investment. Every market, and particularly those in underserved areas, is less likely to receive the benefits of advanced telecommunications networks and services where the risk of financial loss is enhanced by Commission regulations.

**C. Universal Service and Access to Advanced Telecommunications Services**

The Federal – State Joint Board (“Joint Board”) has requested comments on “what services, if any should be added to ... the list of core services eligible for federal universal service support and how those core services should be defined.”<sup>18</sup> In its Public Notice, the Joint Board inquires “whether any advanced or high-speed services should be included within the list of core services.”<sup>19</sup> USTA will file comments on this issue in the Joint Board proceedings. The Joint Board’s inquiry, along with the Commission’s assessment of the deployment of advanced telecommunications services, underscores the need for Commission policies that promote competition among all providers of such services under conditions that neither favors nor disadvantages any particular provider or technology.

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<sup>18</sup> FCC Public Notice 01-J-1 at 2, *Federal – State Joint Board on Universal Service*, CC Docket No. 96-45, released August 21, 2001.

<sup>19</sup> *Id.* at 3.

## CONCLUSION

Section 706 of the 1996 Act envisions that all Americans would benefit from access to advanced telecommunications networks and services. Advanced services are being provided over different wireline and wireless platforms. Carriers are responding to the demand for access to high-speed Internet access, data and advanced telecommunications services on a nationwide basis. However, a few multi-exchange rural and smaller carriers face unique circumstances that impede provision of advanced services to rural Americans, which are exacerbated by inflexible commission regulations. The Commission should impose regulatory parity among advanced service providers, as they deploy advanced networks and services, in a manner that enhances competition at all levels. The Commission must adopt regulatory and policy reforms which are symmetrical in application and competitively neutral - - regulations and policies favoring no carrier or technology - - to ensure that the future deployment of advanced telecommunications services will greatly exceed current standards and fulfill the promise of Section 706. In addition, the Commission must recognize that in rural and smaller communities, market conditions, financial and technological limitations and the level of consumer and business demand will dictate whether a particular network platform can economically provide advanced telecommunications services. ILECs, who serve these markets, may be particularly vulnerable to such conditions, and absent financial incentives, may not be in a position to deploy advanced telecommunications services over their networks.

Respectfully submitted,

**UNITED STATES TELECOM ASSOCIATION**

September 24, 2001

By:

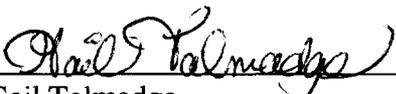
A handwritten signature in black ink that reads "Keith Townsend". The signature is written in a cursive style with a horizontal line underneath it.

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**CERTIFICATE OF SERVICE**

I, Gail Talmadge, do hereby certify that on September 24, 2001 a copy of *Comments of the United States Telecom Association*, in CC Docket No. 98-146, was hand-delivered to the persons on the attached service list.

  
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