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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

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

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/

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REPLY COMMENTS OF SBC COMMUNICATIONS INC.

SBC Communications Inc., on behalf of itself and its subsidiaries (collectively, "SBC") files these Reply Comments in the above captioned proceeding. This reply demonstrates first that the claims of WorldCom and other CLECs rest on basic errors as to the market at issue here and DSL's position in this market. Once these errors are corrected, it is clear that the proposals championed by these commenters would reduce, not enhance deployment of advanced services. The reply comments also establish that now, more than ever, the Commission needs to establish and act on a broad national policy so that local and state rights-of-way and other regulations do not continue to hinder the deployment of advanced services.

I. Reduced, not Increased, Regulation of Broadband Facilities and Services Will Accelerate Deployment of Advanced Services.

A. The DSL "Marketplace" is not a Discrete Product Market .

WorldCom and Sprint urge the FCC to add to the already excessive regulations that burden the ILECs under the pretense that the "DSL marketplace" is not sufficiently competitive."¹ This characterization of what these parties refer to as the DSL "marketplace" is

¹ See Comments of World Com at 1-2, Comments of Sprint at 4 (addressing DSL services while ignoring other broadband services that are part of the same product market).

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incorrect, but, more importantly, it is meaningless. The Commission has long recognized that it is impossible to assess the level of competition for a particular service without first defining the product market to which that service belongs.² The reason is quite simple: even a monopoly provider of a particular service has no market power if there are other services in the same product market – *i.e.*, consumers view alternative services as substitutes.³ By the same token, if consumers can use multiple services to obtain the same or similar functionalities, any evaluation of the availability of those functionalities to consumers must take into account all of the alternatives through which those functionalities can be provided.

WorldCom and Sprint, though, gloss right over these critical market definition issues. In focusing on the “DSL marketplace,” they ignore the fact that DSL service is one of several platforms that are part of the same product market – something that WorldCom itself has previously conceded.⁴

Indeed, this Commission, the Federal Trade Commission, and the Department of Justice have all concluded that broadband services comprise a discrete product market.⁵ They have

² *Motion of AT&T Corp. to be Reclassified as a Non-Dominant Carrier*, 11 FCC Rcd 3271 (1995), ¶ 19; *Applications for Consent to the transfer of Control of Licenses and Section 214 Authorizations by Time Warner Inc; and America Online Inc; Transferors, to AOL Time Warner Inc, Transferee*, 16 FCC Rcd. 6547 ¶ 68 (2001).

³ *Brown Shoe Co. v. United States*, 370 U.S. 294, 325 (1962); ABA Antitrust Section, *Antitrust Law Developments* 200 (3d ed. 1992).

⁴ Comments of MCI WorldCom Inc., CS Docket No. 99-251, Aug.23, 1999 at 8 (characterizing DSL service provided by ILECs as an alternative to AT&T’s broadband service).

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

recognized that the broadband 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 over three million more residential customers than DSL service.⁷

Because these parties 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 other Commission proceedings – particularly given that AT&T and the other providers of broadband service are unregulated.⁸

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, Comments of SBC at 10.

⁸ AT&T urges the Commission to stay away from regulatory action because the rapid deployment of advanced capabilities “confirms” that the marketplace is working. Yet, without a trace of irony, it argues for “vigorous enforcement” of the market opening requirements of the 1996 Act, implying that ILECs – but not other broadband providers – should be subject to unbundling requirements. Comments of AT&T at 2, 19. It is easy to understand why AT&T would advocate such an internally inconsistent position. It derives tremendous advantage from the Commission’s skewed approach to broadband services. As the Managing Director of

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,⁹ government regulation of that market is unnecessary. Certainly, there is no justification for imposing heavier regulation on some technologies and business models in that market 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.

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'"¹⁰ – applies with added force to the DSL providers that are seeking to compete with those 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).

Lehman Brothers recently observed: "It's no surprise that cable, which is nearly totally deregulated, has more than twice the penetration of RBOCs" in broadband services. The RBOCs are forced to jump through a lot of regulatory hoops." *Wall St. Appears to Favor Broadband Duopoly*, COMMUNICATIONS DAILY July 25, 2001, at 4.

⁹ 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).

¹⁰ 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).

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.”¹¹ The comments submitted by the CLECs are directly contrary to that insight. The CLECs’ proposals should be rejected for that reason alone.

B. Onerous Regulations Will Hinder-Not Accelerate-Additional Deployment of Advanced Services.

WorldCom also urges the Commission promptly to resolve outstanding advanced services issues that have been pending before the Commission. SBC agrees that prompt resolution of outstanding matters is critical to encouraging broadband deployment. As SBC explained in its comments, regulatory stability is essential to encourage investment in advanced services. Carriers need to have some certainty of the rules before they can commit large sums of money to deploy new technologies. That is why SBC has argued for quick and decisive Commission action to establish a comprehensive national policy for *all* broadband providers.

With respect to the substance of WorldCom’s request, SBC cannot emphasize strongly enough that the smothering array of regulations that WorldCom and certain other commenters self-servingly advocate will stifle, not promote, the deployment of advanced services. As SBC has shown in other proceedings, these proposals would dramatically increase the cost of and decrease the revenues from advanced infrastructure, spelling the difference between profit and loss in many geographic areas.

Because SBC has addressed these issues in detail in other proceedings, it will not repeat those arguments here. SBC must, however, respond to WorldCom’s continued misrepresentation of the facts with respect to SBC’s deployment of NGDLC technology. In asking the Commission to require incumbent LECs to provide unbundled access to NGDLC equipment,

¹¹ *Cable Bureau Suggests Regulatory Forbearance for New Services*, COMMUNICATIONS DAILY, Feb. 23, 2001.

WorldCom claims that CLECs should not be forced to incur additional costs and delays in securing space at remote terminals simply because the ILECs have unilaterally decided to change their network configuration.¹² As WorldCom well knows, however, CLECs need not incur additional costs as a result of SBC's NGDLC deployment. If they are already serving a customer with a DSLAM located in an SBC central office, they may continue to do so. SBC is *not* removing copper as it deploys new fiber. In fact, far from reducing CLEC options, Project Pronto expands the options available to CLECs by making it possible for them to collocate at SBC's remote terminal and thereby provide service to customers who would otherwise be ineligible for DSL service.

In sum, unbundling regulations in this burgeoning competitive area will create a disincentive for incumbents to invest. In turn, the gap between cable and all other forms of advanced services will widen. As the Chairman and CEO of AT&T has acknowledged, "[n]o company will invest billions of dollars to become a facilities-based . . . services provider if competitors who have not invested a penny of capital nor taken an ounce of risk can come along and *get a free ride* on the investments and risks of others".¹³ Thus, stringent unbundling and collocation rules will have precisely the opposite effect these commenters claim: even if they boost the immediate standing of individual CLECs, they will hinder the development of competition and investment in advanced services generally.

II. Qwest and Commenters Correctly Argue that the Commission Should Promptly Exercise Its Jurisdiction to Remove Local Barriers to Deployment.

¹² Comments of WorldCom at 10.

¹³ Remarks of C. Michael Armstrong, Chairman and CEO, AT&T, delivered to Washington Metropolitan Cable Club, Washington, D.C. (Nov.2,1998)(emphasis added), available at <http://www.att.com/speeches/item/0,1363,948,00.html>.

Qwest, Global Crossing, and other commenters argue that the Commission must assist in dismantling local government barriers to entry. In particular, Qwest and others provide numerous examples of how local rights-of-way regulations prohibit, or have the effect of erecting barriers to deployment of advanced services.¹⁴ They request that the Commission establish a comprehensive national framework on rights-of-way issues, act promptly under section 253 of the Telecommunications Act of 1996 (1996 Act) to preempt state and local laws that create a barrier to entry, and take a stand in court and other proceedings against unlawful rights-of-way regulations.¹⁵ SBC supports these comments.

Section 253 of the 1996 Act strikes a balance between the interests of local governments in managing the public rights-of-way and the pressing national need for rapid deployment of advanced infrastructure. It achieves this balance by invalidating any state or local regulation of telecommunications that prohibits or has the effect of prohibiting any entity from offering telecommunications services and reserving to local governments only the limited authority to manage public rights-of-way and to obtain fair and reasonable compensation for their use.

Although SBC recognizes and supports the importance of local governments' limited authority to manage public rights-of-way, numerous authorities have imposed regulations far beyond what can reasonably be called as "management" of their rights-of-way. These take the form of excessive entry and use regulations, assessment of fees and taxes that bear no relation to costs and can be in the millions of dollars, and a "third tier" of regulation ostensibly based on local governments' police powers and interests in the efficient management of rights-of-way.

In SBC's 13 state region, SBC has been frustrated by unnecessary and excessive rights-of-way requirements that have uniquely obstructed its deployment of Project Pronto. For

¹⁴ See, e.g., Comments of Qwest at pp.11-15; Comments of Global Crossing at pp. 6-12.

¹⁵ See Comments of Qwest at 15; Comments of Global Crossing at 5.

instance, in Madison Heights, Michigan, SBC has been forced to pay almost \$45,000 in permit fees for a two mile right of way to be used for conduits and manholes for advanced services projects.¹⁶ This fee is not even remotely related to the costs or the management of the city's rights-of-way and is neither fair nor reasonable.

Similarly, in Overland Park, Kansas, SBC has, for years, been using the public rights-of-way to place its equipment. However, the city recently proposed a new regulation that requires a telecommunications company to place equipment cabinets on private rights-of-way instead. This means that SBC will now have to negotiate contracts with a number of individual landowners, thus adding unanticipated delays and costs to all projects. SBC estimates that this will cost SBC an additional forty to sixty thousand dollars for each cabinet location and will delay each project by at least three months. Other local governments in Kansas are also changing their existing right-of-way rules so that in Kansas alone, SBC is now dealing with six authorities requiring special use permits, three issuing new ordinances, another three requiring additional fees, two requiring a lease for public rights-of-way, and one authority simply refusing to issue a permit.

Similarly, in California, local jurisdictions have been promulgating ordinances requiring telecommunications carriers to obtain local franchises and pay franchise fees even though such local regulation is prohibited under state and federal law. While some ordinances may contain exemptions from franchising for certain carriers or types of services, the applicability of, and the process of obtaining these exemptions is unclear. Moreover, all carriers are being asked to provide information unrelated to the city's authority to reasonably control the time, place, and manner in which the public rights-of-way may be accessed by a telephone corporation. For

¹⁶ Madison Heights requires SBC to pay, among other things, engineering plan review fees of 6% and an inspection fee of 4% of the value of each project. Other local authorities charge either nothing or a very negligible fee for such permit work.

instance, the County of San Louis Obispo, has adopted an ordinance that, among other things, provides:

“A Telecommunication Carrier shall furnish the County with the names and addresses of every Affiliated Person, third party, or Person other than the Applicant that has entered into a customer agreement, telecommunications agreement, or any other agreement which authorizes, directly or indirectly, any Affiliated Person, third party, or Person other than the Applicant to utilize, by way of sale, lease, or otherwise, telecommunications equipment, telecommunications facility, or all or a portion of the Telecommunications System (the “Telecommunications Agreement”) within the County upon the issuance of any License or Franchise.”

County of San Luis Obispo, Ordinance 2899, section 1.10.180 (adopted April 11, 2000)

Other authorities have adopted similarly burdensome permit requirements. One jurisdiction in California refuses to issue a permit under any circumstances. Some jurisdictions will not issue permits for anything other than emergency repair work absent the payment of exorbitant fees. Los Angeles has imposed a moratorium on new permits. SBC can only obtain a permit by availing itself of an “exception process,” which requires SBC to go through the local city council member’s office.

These myriad processes significantly raise the cost and delay deployment of the infrastructure needed for advanced services. Moreover, they are inconsistent with the balance struck in section 253 between the interests of the municipalities in managing public rights-of-way and the interests of the public at large in the elimination of barriers to broadband deployment.

This issue is not new to the Commission. The Commission recognized the difficulties faced by telecommunications carriers when it opened its Notice of Inquiry into rights-of-way issues in 1999.¹⁷ However, the Commission has taken no action on that Notice and carriers

¹⁷ Promotion of Competitive Networks in Local Telecommunication Markets, Notice of Proposed Rulemaking and Notice of Inquiry in WT Docket 99-217, and Third Further Notice of

continue to be subject to ever increasing burdensome rights-of-way regulations. As Qwest and others have argued, it is time for the Commission to take action.

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Proposed Rulemaking in CC Docket No. 96-98 14 FCC Rcd 12673(1999)(Competitive Networks NPRM).

CERTIFICATE OF SERVICE

I, Loretia Hill, do hereby certify that on this 9th day of October, a copy of the foregoing
“Reply Comments” was served via first class postage paid to the parties on the attached sheets.



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