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

FEDERAL COMMUNICATIONS COMMISSION  
OFFICE OF THE SECRETARY

In the Matter of

Inquiry Concerning 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 No. 98-146 /

REPLY COMMENTS OF AT&T CORP.

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## TABLE OF CONTENTS

	Page
INTRODUCTION AND SUMMARY .....	1
I. THE DEPLOYMENT OF ADVANCED TELECOMMUNICATIONS CAPABILITY IS OCCURRING ON A REASONABLE AND TIMELY BASIS .....	2
II. CHANGES TO THE CURRENT REGULATORY STRUCTURE ARE NEITHER NECESSARY TO ENHANCE DEPLOYMENT NOR PERMISSIBLE UNDER THE ACT .....	3
A. There Is No Regulatory “Disparity” Between Cable Operators and ILECs Affecting DSL Deployment .....	4
B. The ILECs’ Requested Changes in the Commission’s Unbundling Rules Are Not Possible or Permissible Under the Act.....	6
1. Unbundling only “DSL” network elements would be unworkable in practice and impermissible under the 1996 Act. ....	7
2. The requirements for regulatory forbearance from regulation of advanced services have not been met. ....	8
3. Deregulation in the wireless industry provides no support for deregulation of ILEC advanced services.....	10
C. Deregulation of Advanced Services Is Not Necessary to Spur ILEC Deployment.....	11
III. THE COMMISSION CAN AND SHOULD ACT TO ENSURE THAT DEPLOYMENT OF ADVANCED TELECOMMUNICATIONS CAPABILITY IS EVEN FASTER AND MORE WIDESPREAD IN THE FUTURE .....	14
A. The Commission Can And Should Vigorously Enforce the Market-Opening Provisions of the Telecommunications Act of 1996.....	14
B. The Commission Can And Should Remove Barriers to Deployment of Advanced Telecommunications Capacity Imposed by Local Governments. ....	16
CONCLUSION.....	19

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**REPLY COMMENTS OF AT&T CORP.**

AT&T Corp. (“AT&T”), by its attorneys, respectfully replies to the comments filed in response to the Commission’s *Third Notice of Inquiry* on advanced telecommunications deployment.<sup>1/</sup>

**INTRODUCTION AND SUMMARY**

The comments filed in this proceeding confirm that the deployment of advanced telecommunications capability is occurring on a reasonable and timely basis. While the incumbent carriers agree that deployment is reasonable and timely, they nevertheless attempt to use this docket to argue that the market-opening requirements of the Telecommunications Act of 1996 (“1996 Act”) are impeding their ability to compete with cable operators for high-speed customers. The extensive evidence of vigorous broadband deployment submitted in this proceeding -- including evidence offered by the ILECs themselves -- belies any claims that regulatory change is necessary. There are, however, other actions that the Commission can and

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<sup>1/</sup> *Inquiry Concerning 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, FCC 01-223 (rel. Aug. 10, 2001) (“*Third NOI*”).

should take to ensure that deployment is even faster and more widespread in the future, including vigorously enforcing the market-opening provisions of the 1996 Act and removing barriers to deployment of advanced telecommunications capability imposed by local governments.

**I. THE DEPLOYMENT OF ADVANCED TELECOMMUNICATIONS CAPABILITY IS OCCURRING ON A REASONABLE AND TIMELY BASIS**

Most commenters, including ILECs, CLECs, cable operators and satellite providers, agree that deployment of advanced telecommunications capability is reasonable and timely. Like AT&T, Sprint believes that the Commission's primary focus in this inquiry should be on the availability of advanced telecommunications capability, not levels of subscribership, because subscribership is more indicative of demand than supply.<sup>2/</sup> Using availability as an evaluative criteria, deployment is clearly reasonable and timely. But even if the Commission does focus on subscribership, the dramatic growth in the number of broadband subscribers that NCTA describes is further evidence of reasonable and timely deployment.<sup>3/</sup> As Sprint notes, the number of high-speed lines in service increased 158 percent during 2000.<sup>4/</sup>

Deployment is taking place in rural areas as well as in more densely populated areas.<sup>5/</sup> Indeed, as the Organization for the Protection and Advancement of Small Telecommunications Companies ("OPASTCO") notes, many small providers of advanced and high-speed services in rural areas are not required to file Form 477, so the true level of deployment in rural areas may be higher than reported.<sup>6/</sup> The multiple competing technologies and vendors that are deploying advanced telecommunications capability -- including fixed wireless, which is well suited to

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<sup>2/</sup> Comments of Sprint Corporation ("Sprint") at 3-4.

<sup>3/</sup> Comments of the National Cable & Telecommunications Association at 4, 11-15.

<sup>4/</sup> Comments of Sprint at 3-4.

<sup>5/</sup> See, e.g., Comments of BellSouth Corporation ("BellSouth") at 5.

<sup>6/</sup> Comments of OPASTCO at 3.

deployment in rural areas, and satellite, which can reach virtually anywhere -- will ensure that all Americans are reached by high-speed service.<sup>7/</sup> Hughes Network Systems agrees that satellite systems offer “instantaneous deployment to low-population density and low-income areas that may not have enough demand to justify a terrestrial buildout.”<sup>8/</sup>

## **II. CHANGES TO THE CURRENT REGULATORY STRUCTURE ARE NEITHER NECESSARY TO ENHANCE DEPLOYMENT NOR PERMISSIBLE UNDER THE ACT**

While acknowledging that deployment of advanced telecommunications capability is occurring on a reasonable and timely basis,<sup>9/</sup> the incumbent carriers use this docket as yet another opportunity to argue that the market-opening requirements of the Telecommunications Act of 1996 are impeding the carriers’ ability to compete with cable operators for high-speed customers. The extensive evidence of vigorous broadband deployment submitted in this proceeding -- including evidence offered by the ILECs themselves -- belies any claims that regulatory change is necessary. At the same time that SBC threatens that it is unable to continue to deploy DSL service without regulatory relief, for instance, it acknowledges that it “currently intends to invest \$6 billion in new facilities that will increase consumer access to advanced services throughout its region” and “make DSL service available to millions of customers for whom that service was technically infeasible” and “almost double the number of end users in its region that may obtain DSL service.”<sup>10/</sup> And despite BellSouth’s complaints that “[t]o foster growth and broadband deployment, immediate corrective action is needed to eliminate the

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<sup>7/</sup> Comments of Verizon at 5-7, 23-24.

<sup>8/</sup> Comments of Hughes Network Systems at 3.

<sup>9/</sup> Comments of BellSouth at 2-5; Comments of SBC Communications, Inc. (“SBC”) at 3-6; Comments of Verizon at 5-7, 23-24; Comments of the United States Telecom Association (“USTA”) at 3-4.

<sup>10/</sup> Comments of SBC at 3.

competitive disparities that exist . . .,”<sup>11/</sup> it “plans to have over fifteen million lines capable of delivering service at the end of 2001.”<sup>12/</sup> In fact, the evidence submitted in this proceeding should reassure the Commission that regulatory changes are not needed to ensure the continued reasonable and timely deployment of broadband services. To the contrary, the exemptions and forbearance advocated by the ILECs would slow broadband deployment by closing off the competitive pathways established by Congress in 1996. More vigorous enforcement of the market-opening requirements of the 1996 Act, not the abandonment of those requirements, will promote competition and choice in the provision of advanced telecommunications capability.

**A. There Is No Regulatory “Disparity” Between Cable Operators and ILECs Affecting DSL Deployment.**

While acknowledging their extensive DSL deployment, Verizon, Bell South, SBC and others insist that their ability and incentive to deploy is hindered because they are forced to compete with cable operators “unencumbered by regulatory constraints in their deployment of cable modems.”<sup>13/</sup> Such claims simply are not true.

Cable companies are not “unhampered by regulation.”<sup>14/</sup> Cable companies face local franchising requirements, pay billions of dollars in annual franchise fees, and often must provide free service to local governments and schools.<sup>15/</sup> Local telephone companies face nothing similar. Cable companies also face the possibility of limits on the number of subscribers that

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<sup>11/</sup> Comments of BellSouth at 4.

<sup>12/</sup> *Id.* at 3.

<sup>13/</sup> Comments of BellSouth at 5-9; *see* Comments of Qwest Communications International Inc. (“Qwest”) at 3; Comments of SBC at 3-6; Comments of Verizon at 9-12; Comments of USTA at 2-3.

<sup>14/</sup> Comments of Qwest at 3.

<sup>15/</sup> *See* 47 U.S.C. §§ 531, 541, 542.

they can serve, under a statutory scheme not applicable to local telephone companies.<sup>16/</sup>

Additionally, cable companies must provide access to their services without regard to the level of the residents' income.<sup>17/</sup> The incumbents, by contrast, can and likely will deploy broadband services where they stand to gain the biggest profits -- or face the greatest competition -- and avoid other communities that could greatly benefit from high-speed Internet access.

Congress chose, correctly, to regulate telephone and cable companies *differently* because telephone companies still dominate their core business while cable faces video competition from DBS and other providers. Only a tiny percentage of Americans actually have a choice for local phone service. By contrast, nearly everyone in the nation has an alternative to cable for multichannel video. Since 1993, the share of the multichannel video programming marketplace held by cable's competitors has increased to 20 percent.<sup>18/</sup> The incumbent telephone companies' demand for deregulation in the name of "parity" -- while their local markets remain closed -- ignores the facts that led Congress to reject a similar proposal prior to the enactment of the 1996 Act.

The ILEC providers cannot reasonably argue that without regulatory change, it is not economically or financially viable to provide advanced telecommunications services or to upgrade or deploy advanced telecommunications networks,<sup>19/</sup> when their own statements and actions belie such a claim. SBC alleges that it ceased deployment of Project Pronto in Illinois

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<sup>16/</sup> See 47 U.S.C. § 533. The Commission is currently considering how to implement the statutory directive to "prescribe reasonable limits on the number of cable subscribers a person is authorized to reach." *Id.*; see *Implementation of Section 11 of the Cable Television Consumer Protection and Competition Act of 1992; The Commission's Cable Horizontal and Vertical Ownership Limits and Attribution Rules*, FCC 01-263 (rel. Sept. 21, 2001).

<sup>17/</sup> 47 U.S.C. § 541(a)(3).

<sup>18/</sup> *Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming*, Seventh Annual Report, 16 FCC Rcd. 6005, ¶ 5 (2001).

<sup>19/</sup> See Comments of USTA at 2-3; 5.

because a state regulatory decision allowing competitors access to SBC's fiber optic facilities made the service "cost-prohibitive."<sup>20/</sup> Yet it simultaneously has boasted to investors that "[t]he network efficiency improvements alone pay for this [Project Pronto] initiative, leaving SBC with a data network that will be second to none."<sup>21/</sup> Beyond those savings, of course, SBC and the other ILECs also will earn substantial revenues from the new services made possible by the deployment of advanced facilities. And when the ILECs make advanced facilities available to competitors as unbundled network elements, they earn yet another revenue stream from competitors who must pay the costs of these elements plus "a reasonable profit."<sup>22/</sup> Indeed, BellSouth CEO Duane Ackerman has boasted that he anticipates "total DSL revenue of approximately \$225 million this year and \$500 million in 2002."<sup>23/</sup>

**B. The ILECs' Requested Changes in the Commission's Unbundling Rules Are Not Possible or Permissible Under the Act.**

BellSouth, Verizon and others use this proceeding as yet another forum to argue that the Commission should further limit the UNEs that ILECs must offer to competitive carriers and forbear from regulating advanced services altogether. In support of these demands, the ILECs advance a false distinction between network elements used to provide voice services and those used to provide advanced services, and offer the Commission's deregulation of the wireless industry as a model to be applied to the telephony industry. Contrary to the ILECs' arguments, there is no policy or statutory basis for the deregulation and forbearance they seek.

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<sup>20/</sup> Comments of SBC at 13-14.

<sup>21/</sup> SBC Investor Briefing, "SBC Announces Sweeping Broadband Initiative," at 2 (Oct. 18, 1999); *see also* <[www.sbc.com/data/network/0,2951,5,00.html](http://www.sbc.com/data/network/0,2951,5,00.html)>.

<sup>22/</sup> 47 U.S.C. § 252(d)(1)(B).

<sup>23/</sup> Duane Ackerman, *Talk Notes*, Salomon Smith Barney Conference (Jan. 9, 2001) at 15.

**1. Unbundling only “DSL” network elements would be unworkable in practice and impermissible under the 1996 Act.**

According to BellSouth, “[t]here are important differences between the effects of unbundling elements used to provide traditional telecommunications services and the effects of unbundling new investment used to provide advanced services.”<sup>24/</sup> But by focusing only on the purpose of its investment, BellSouth’s argument misses the point. A network upgraded so that it can offer advanced services is still the very same network that a competitor must use to offer basic voice service. While BellSouth may view its investment as very different from its original network construction in terms of risk and costs, this distinction is irrelevant for purposes of the pro-competitive requirements of the 1996 Act. And Verizon’s argument that the Commission should relieve ILECs of unbundling obligations as to network elements used to provide advanced services because “there would be no change in the UNEs a carrier providing voice service could obtain”<sup>25/</sup> is patently false. The ILECs are upgrading their networks to provide both voice and advanced services with increased efficiency; there are not two separate sets of network elements. Exempting “advanced capabilities” will have the effect of limiting overall access to unbundled elements by CLECs. The regulatory relief the ILECs seek would essentially hand them the tools they need to shut CLECs out from their networks completely, simply by upgrading any portion of the loop.

In any event, the distinction between network elements used for voice service and those used for DSL service that the ILECs seek to create is not supported by the 1996 Act. The Act sets forth very clear standards for determining which network elements must be unbundled and made available to competitors: ILECs must make available any network element when the

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<sup>24/</sup> Comments of BellSouth at 10.

<sup>25/</sup> Comments of Verizon at 20 n.52.

Commission finds that access to the element is “necessary” and failure to obtain such access would “impair the ability of the telecommunications carrier seeking access to provide the services that it seeks to offer.”<sup>26/</sup> Both DSL and voice service are telecommunications services.<sup>27/</sup> As such, each network element used to provide those services is subject to section 251’s requirements, unless the Commission determines that it is exempt under the “necessary” and “impair” standard.

**2. The requirements for regulatory forbearance from regulation of advanced services have not been met.**

Verizon and others argue that the Commission should forbear under section 10 of the Communications Act from regulating ILEC provision of advanced services, including price regulation of retail broadband services.<sup>28/</sup> Under the requirements of section 10, however, the Commission cannot forbear from enforcing section 251(c) until the requirements of that provision have been fully implemented.<sup>29/</sup> This standard clearly has not been met.

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<sup>26/</sup> 47 U.S.C. § 251(d)(2).

<sup>27/</sup> See, e.g., *In the Matter of Deployment of Wireline Service Offering Advanced Telecommunications Capability*, 15 FCC Rcd 385 (1999) (subsequent history omitted) (“*Advanced Services Remand Order*”) (reaffirming that DSL-based advanced services are telecommunications services and that ILECs must provide nondiscriminatory access to network elements used to provide such services); *vacated and remanded on other grounds by WorldCom, Inc. v. FCC*, 246 F.3d 690 (D.C. Cir. 2001).

<sup>28/</sup> Comments of Verizon at 20-22. Several commenters once again rehash long-discredited arguments seeking a forbearance determination under the Commission’s section 706 authority. See, e.g., Comments of Alliance for Public Technology at 8; Comments of Progress & Freedom Foundation at 26-29; Comments of Intel at 13-15. The Commission repeatedly has held that section 706 provides it no independent grant of forbearance authority. Rather, all forbearance decisions must proceed according to the requirements of section 10. *Deployment of Wireline Services Offering Advanced Telecommunications Capability*, 13 FCC Rcd 24012, ¶¶ 69-79 (1998).

<sup>29/</sup> 47 U.S.C. § 160(d).

The extensive evidence of anticompetitive ILEC behavior submitted in this proceeding alone is sufficient reason to conclude that any consideration of forbearance from the requirements of section 251(c) is premature. Adelphia Business Solutions offers numerous examples of ILECs that have overbilled for UNEs and refused to issue acknowledged refunds, delayed filling orders for new circuits, and disconnected CLEC customers at will.<sup>30/</sup> New Networks Institute similarly recounts the ILECs' predatory pricing and anticompetitive behavior.<sup>31/</sup> The Ruby Ranch Internet Cooperative Association, a cooperative attempting to provide DSL service to itself by purchasing subloops from Qwest, describes how Qwest has refused to provide subloops on reasonable terms and conditions.<sup>32/</sup> These accounts do not suggest that the market-opening requirements of the Act have been "fully implemented."

The penalties the incumbents have incurred as a result of their anticompetitive practices and failure to live up to their legal obligations under the 1996 Act provide further evidence that forbearance is not appropriate. The Bell companies were fined over \$370 million dollars in 2000 alone -- more than \$1 million per day -- and have continued to incur millions of dollars in fines throughout 2001.<sup>33/</sup> Such evidence cannot support a conclusion that these requirements are no longer necessary.

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<sup>30/</sup> Comments of Adelphia Business Solutions, Inc. ("ABS") at 3-5; 11-14.

<sup>31/</sup> Comments of New Networks Institute ("NNI") at 3.

<sup>32/</sup> Comments of Ruby Ranch Internet Cooperative Association at 3-5.

<sup>33/</sup> See Exhibit 1, "Fines and Penalties Haven't Stopped the Antitrust Abuses."

**3. Deregulation in the wireless industry provides no support for deregulation of ILEC advanced services.**

Verizon argues that the successful deregulation of the wireless industry proves that similar benefits will flow from deregulating the ILECs' provision of DSL.<sup>34/</sup> But there are substantial differences between the facts that gave rise to wireless deregulation in 1993 and the facts regarding ILEC DSL services and facilities today. Primary among these, the wireless marketplace is competitive today and was at the time of deregulation. Ninety-one percent of the total U.S. population has a choice of at least three wireless carriers today, and 75 percent has a choice of five or more wireless carriers.<sup>35/</sup> Even in 1993, when Congress authorized deregulation of the wireless industry,<sup>36/</sup> the Commission was on the verge of licensing six new PCS carriers in each market to compete with the two cellular carriers already there.<sup>37/</sup> There is and was no single dominant wireless provider in any market, and no wireless carrier controlled bottleneck facilities upon which its competitors depended. By contrast, the local telecommunications market is dominated in each community by a single monopoly provider with more than a century headstart over competitors, which also controls facilities needed by its competitors to provide advanced services.

Significantly, Congress did not deregulate the wireless industry in 1993 by fiat. Rather, it empowered the Commission to forbear from regulation if it found that forbearance would

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<sup>34/</sup> Comments of Verizon at 17.

<sup>35/</sup> *In the Matter of Implementation of Section 6002(b) of the Omnibus Budget Reconciliation Act of 1993, Annual Report and Analysis of Competitive Market Conditions with Respect to Commercial Mobile Services; Sixth Report* at 6 (rel. July 17, 2001).

<sup>36/</sup> See Omnibus Budget Reconciliation Act of 1993, P.L. No. 103-66, Title VI, §6002, 107 Stat 312, 387-97 (1993) (codified in part at 47 U.S.C. § 332(c)(1)(A)).

<sup>37/</sup> See *Amendment of the Commission's Rules to Establish New Personal Communications Services*, GEN Docket No. 90-314, *Notice of Proposed Rule Making and Tentative Decision*, 7 FCC Rcd 5676 (1992) and *Second Report and Order*, 8 FCC Rcd 7700 (1993).

promote the public interest and not subject customers to unjust and unreasonable rates.<sup>38/</sup> Only after conducting an extensive proceeding and concluding that the wireless marketplace was sufficiently competitive did the Commission exercise its forbearance authority.<sup>39/</sup> The same forbearance language enacted in 1993 to guide the Commission in determining the extent to which wireless should be deregulated was incorporated into the 1996 Act and applied to all telecommunications carriers. As noted above, that forbearance authority is found today in section 10 of the Communications Act, and to avail themselves of it, the ILECs must comply fully with the requirements of sections 251(c) and 271.<sup>40/</sup>

**C. Deregulation of Advanced Services Is Not Necessary to Spur ILEC Deployment.**

Even if they were permissible, changes to the Commission's unbundling obligations are not necessary to increase ILEC deployment. Alcatel, Intel, and others join the ILECs in arguing that without deregulation, deployment will cease.<sup>41/</sup> But the ILECs' threats to delay or suspend deployment of their advanced services facilities if the rules are not changed are simply not credible. The manufacturers' advocacy of the ILEC agenda is particularly puzzling. Granting the ILECs broad exemptions from the requirements of the 1996 Act will *reduce* overall deployment of advanced facilities by removing competitors from the marketplace and relieving the ILECs of competitive pressure to invest in such facilities, leaving the public and suppliers alike at the mercy of the ILECs' decisions regarding when or whether to deploy.

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<sup>38/</sup> 47 U.S.C. § 332(c)(1)(A).

<sup>39/</sup> *Implementation of Sections 3(n) and 332 of the Communications Act, Second Report and Order*, 9 FCC Rcd 1411 (1994).

<sup>40/</sup> *See supra* note 29.

<sup>41/</sup> *See* Comments of Alcatel USA, Inc. ("Alcatel") at 9-14; Comments of Intel Corporation ("Intel") at 13-15.

The incumbents have complained before that overregulation was deterring them from rolling out advanced services and facilities. In 1998, they demanded that the FCC give them the right to offer advanced services largely free of the market-opening requirements of the 1996 Act. But before they gained the relief they sought, competitors began to deploy broadband services and the incumbents responded with vigorous deployment of their own.<sup>42/</sup> Under the spur of competition, regulatory relief proved unnecessary. Now, with the competitors seriously weakened and their deployment plans curtailed, the incumbents are back with the same untenable claims of overregulation. They are as unjustified now as they have been for the past three years. Now, as then, the incumbents' threat that they will cancel deployment unless the rules are changed is nothing more than a ploy to retain and strengthen their monopoly position, and should be disregarded.<sup>43/</sup>

BellSouth and others' claim that the rate of ILEC deployment of DSL service has stalled because of the lack of clarity regarding whether ILECs will have to unbundle their advanced services equipment is also baseless.<sup>44/</sup> Ironically, if there is a lack of clarity it is traceable directly to the unceasing litigation over these requirements initiated and sustained by the ILECs themselves. In fact, as clearly demonstrated above, ILECs continue to deploy DSL service to

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<sup>42/</sup> *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, Report*, 14 FCC Rcd 2398 at ¶ 42 (1999).

<sup>43/</sup> The fact that ILECs are in a "down period between expansions," Comments of SBC at 5, does not, as the ILECs claim, demonstrate a need for regulatory change. Rather, it most likely demonstrates only that ILECs are not immune from the recent downturn in the economy. ILECs also could be experiencing lower subscription rates because of the widely reported customer service problems with DSL service. See, e.g., "New Yorkers Plan DSL Protest Summit," CNet News.com (Jan. 25, 2001).

<sup>44/</sup> Comments of BellSouth at 10-13; Comments of Alcatel at 11-14; Comments of Intel at 12-14; Comments of SBC at 11-14.

consumers at a rapid rate. And ILEC arguments that the Commission's delay in ruling on next generation issues has forced a delay in the deployment of advanced facilities are not consistent with their representations to the financial community. Indeed, some ILECs have expressly indicated that the Commission's unbundling rules do not inhibit DSL deployment activities. BellSouth's Duane Ackerman, for example, has acknowledged that the regulatory challenges BellSouth is facing "are unlikely to slow down the momentum of the marketplace."<sup>45/</sup>

The absence of meaningful penalties for failure to comply with the 1996 Act has left the ILECs free to suppress CLEC deployment of DSL services by resisting the unbundling obligations imposed upon them by law and regulation.<sup>46/</sup> Due primarily to the anticompetitive behavior of the incumbent telephone companies themselves -- and magnified by the recent market downturn -- the CLEC industry has virtually collapsed. Customers have no choice in many circumstances but to turn to ILECs for DSL service. Under these circumstances, the ILECs cannot complain that the lack of regulatory clarity is stalling their deployment.

Further, contrary to Alcatel's assertions,<sup>47/</sup> the Commission's TELRIC-based unbundling obligations have not discouraged ILEC investment in and deployment of advanced services equipment. Although the ILECs argue that deployment of advanced telecommunications

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<sup>45/</sup> Duane Ackerman, *Talk Notes*, Salomon Smith Barney Conference (Jan. 9, 2001) at 11.

<sup>46/</sup> As Chairman Powell has explained, "the enforcement tools made available to [the FCC] are inadequate with billion dollar industries. Our fines are trivial. They're the cost of doing business to many of these companies." Testimony of Michael K. Powell before the Telecommunications and Internet Subcommittee of the House Energy and Commerce Committee (March 29, 2001). The Commission nevertheless has not fully used the power it has in this regard, both to levy monetary penalties and to grant injunctive relief. *See, e.g.*, 47 U.S.C. § 312(b) (authorizing the Commission to issue cease-and-desist order to any "person" who violates Communications Act or FCC regulations); *United States v. Southwestern Cable Co.*, 392 U.S. 157 (1968) (holding that 47 U.S.C. § 154(i) authorized Commission to order CATV provider to refrain from expanding the area it served pending Commission hearing).

<sup>47/</sup> Comments of Alcatel at 7-8.

deployment is extremely costly and the Commission should not require ILECs to share that investment with competitors that do not share the risk, the Act and the Commission's pricing principles already ensure that ILECs receive a return on their investment under TELRIC.<sup>48/</sup> Any increased risk the ILECs might be able to demonstrate can be addressed in pricing proceedings before state commissions, for example, by factoring any such higher risk into the forward-looking cost study used to set UNE loop pricing.<sup>49/</sup>

The only clear effect of deregulating ILECs would be to further handicap CLECs, who are already reeling due in large measure to the ILECs' failure to adhere to the Act's requirements. The CLEC industry simply cannot withstand such a blow at this time. And if competitors leave the marketplace, ILECs will lose the incentive to continue investing. By eliminating competitors' ability and incumbents' incentive to invest, ILEC deregulation would threaten, rather than promote, competitive broadband deployment.

### **III. THE COMMISSION CAN AND SHOULD ACT TO ENSURE THAT DEPLOYMENT OF ADVANCED TELECOMMUNICATIONS CAPABILITY IS EVEN FASTER AND MORE WIDESPREAD IN THE FUTURE**

While deployment of advanced telecommunications capability is reasonable and timely, AT&T agrees with numerous other commenters that there are actions the Commission can and should take to ensure that deployment is even faster and more widespread in the future.

#### **A. The Commission Can And Should Vigorously Enforce the Market-Opening Provisions of the Telecommunications Act of 1996.**

Many commenters agree with AT&T that the deployment of advanced telecommunications capacity by CLECs has slowed significantly or stopped completely because

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<sup>48/</sup> 47 U.S.C. § 252(d)(1); 47 C.F.R. §§ 51.507, 51.509.

<sup>49/</sup> Because next-generation loop technology results in improved network efficiencies, however, the use of next-generation loops actually may lead to a lower overall cost.

of “continued ILEC opposition to complying with even the simplest of the [1996] Act’s requirements.”<sup>50/</sup> As the New Networks Institute argues, the lack of availability of advanced services is the result of the Bells’ “predatory pricing, anti-competitive behavior and downright illegal acts.”<sup>51/</sup> And WorldCom provides statistics that demonstrate that the BOCs’ resistance to the implementation of the Commission’s line sharing rules has led to low CLEC subscribership.<sup>52/</sup>

These commenters also agree with AT&T that the Commission can foster the competitive availability of advanced capabilities through vigorous enforcement of the market-opening requirements of the 1996 Act.<sup>53/</sup> For example, Adelphia Business Solutions urges the Commission to establish “clear, enforceable and significant penalties for ILEC non-compliance.”<sup>54/</sup> The New Networks Institute argues that the Commission, and the states, need to “administer a serious, penalty oriented, data-based, fast process” through which customers and competitors can be reimbursed for time lost and money spent.<sup>55/</sup> Strengthening enforcement and imposing the highest possible penalties for violations of the Act would go a long way toward opening markets to competitors and spurring the deployment of advanced telecommunications capability.

The Commission’s enforcement efforts would be greatly strengthened if the Bell companies were required to separate their wholesale and retail operations into different units. Genuine structural separation of a Bell company’s wholesale and retail businesses would make

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<sup>50/</sup> Comments of ABS at 4.

<sup>51/</sup> Comments of the NNI at 3.

<sup>52/</sup> Comments of WorldCom at 2-3.

<sup>53/</sup> *See, e.g.*, Comments of Sprint at 5; Comments of WorldCom at 7-8.

<sup>54/</sup> Comments of ABS at 18.

<sup>55/</sup> Comments of the NNI at 8.

discrimination harder to achieve and easier to detect, thereby reducing the need for costly monitoring and oversight by the Commission. A structural separation requirement would also improve the Bell companies' incentives to act as neutral wholesalers of services and facilities, and would put all local service providers on an equal footing with respect to access to network elements, so that the success or failure of their business plans would be determined in the marketplace rather than through affiliation with the incumbent.<sup>56/</sup>

**B. The Commission Can And Should Remove Barriers to Deployment of Advanced Telecommunications Capacity Imposed by Local Governments.**

As Global Crossing observes, access to public rights-of-way and other lands are “critical to the continued deployment of broadband telecommunications networks,” but local and state governments are using their monopoly control over public rights-of-way to extract unreasonable concessions.<sup>57/</sup> According to Global Photon, a facilities-based provider of wholesale broadband communications capacity and services, “government obstruction to ROW access is the single greatest challenge that Global Photon faces.”<sup>58/</sup> Numerous other commenters describe the proliferation of impermissible local telecommunications ordinances and unfair and unreasonable franchise fees and taxes that are creating a substantial barrier to the entry of advanced communications services by denying providers access to vital rights-of-way.

For example, Adelphia Business Solutions identifies specific municipalities across the country who have delayed its efforts to deploy advanced telecommunications facilities “for

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<sup>56/</sup> Separation of the Bells' retail and wholesale businesses would be required by S. 1364, the Telecommunications Fair Competition Enforcement Act of 2001, recently introduced by Senators Hollings, Stevens, and Inouye.

<sup>57/</sup> Comments of Global Crossing Ltd. at 2, 6-8.

<sup>58/</sup> Comments of Global Photon Systems, Inc. at 2.

months, years, or in some cases indefinitely.”<sup>59/</sup> Metromedia describes three recent cases where it has been forced to litigate in order to gain access to public rights-of-way to deploy fiber optic cable.<sup>60/</sup> Metromedia was ultimately victorious in each of these cases, but it lost revenues, incurred unnecessary construction costs, and in some cases was forced to defer market entry indefinitely.<sup>61/</sup> Even ILECs are not insulated from these impediments. Qwest explains that it has had difficulty placing remote DSL facilities within public rights-of-way, which has forced it to seek private easements or delay or cancel distribution of DSL services altogether.<sup>62/</sup>

AT&T has had similar experiences with municipalities who have abused their monopoly power over rights-of-way. These entities have sought to require AT&T to agree to onerous terms and conditions as a prerequisite to providing service, delaying deployment if AT&T did not acquiesce. For example, AT&T spent almost eight years negotiating with the City of White Plains, New York, for permission to deploy telecommunications facilities in White Plains.<sup>63/</sup> When the city refused to agree to reasonable rights-of-way regulation consistent with the limits in the 1996 Act, AT&T, through its Teleport Communications Group Inc. (“TCG”) subsidiary, was forced to seek relief in federal court. While AT&T and TCG were partially successful,<sup>64/</sup>

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<sup>59/</sup> Comments of ABS at 19-25.

<sup>60/</sup> Comments of Metromedia at 5-10.

<sup>61/</sup> *Id.* at 5.

<sup>62/</sup> Comments of Qwest at 13-14.

<sup>63/</sup> See Exhibit 2, Comments of AT&T Corp. at 30 and Exhibit 1, pp. 7-8, *In the Matter of Promotion of Competitive Networks in Local Telecommunications Markets*, WT Docket No. 99-217, CC Docket No. 96-98 (filed Oct. 12, 1999).

<sup>64/</sup> See *TCG New York, Inc. v. City of White Plains, New York*, 99 Civ. 4419 (S.D.N.Y. 2000), appeal pending, *TCG New York, Inc. et al. v. White Plains*, Nos. 01-7213(L), 01-7255(XAP) (2d Cir.) (finding that “the requirements imposed on TCG by the City and the ordinance, when viewed as a whole and in context, have the effect of prohibiting the ability of TCG to provide telecommunications services.”). AT&T has appealed the District Court’s finding that the city’s imposition of a rights-of-way fee on competitors but not ILECs does not violate section 253(c)’s

almost ten years have now passed since AT&T first sought permission to use the public rights-of-way to provide telecommunications services to residents and businesses in White Plains.

Many localities recognize the benefits of competition and broadband deployment, but others unfortunately view new providers as a means of generating monopoly rents for use of their rights-of-way. In these municipalities, AT&T and other service providers are faced with three undesirable alternatives: agree to the municipality's terms; be denied authorization to provide service through their own facilities; or engage in protracted negotiation and litigation to obtain reasonable terms. While section 253 in theory should prevent municipalities from engaging in these practices, local governments continue to ignore it.

AT&T agrees with other commenters in this proceeding and in the pending *Competitive Networks Notice of Inquiry* addressing local rights-of-way management<sup>65/</sup> who have urged the Commission to address this significant barrier to the deployment of broadband infrastructure by (1) adopting streamlined procedures for processing section 253 complaints,<sup>66/</sup> (2) filing amicus briefs or otherwise participating in litigation regarding the appropriate scope of municipal authority under section 253,<sup>67/</sup> (3) identifying the issue in its report to Congress,<sup>68/</sup> and otherwise supporting efforts of advanced services providers to obtain access to public rights-of-way.

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requirement that such fees must be “competitively neutral and nondiscriminatory.” The Commission has filed an amicus brief supporting AT&T. *See id.*, Brief of the Federal Communications Commission and the United States as Amici Curiae (filed June 12, 2001).

<sup>65/</sup> *In the Matter of Promotion of Competitive Networks in Local Telecommunications Markets*, WT Docket No. 99-217, CC Docket No. 96-98, *Notice of Proposed Rulemaking and Notice of Inquiry*, FCC 99-141 (rel. July 7, 1999) (“*Competitive Networks Notice of Inquiry*”).

<sup>66/</sup> Comments of ABS at 26.

<sup>67/</sup> Comments of Qwest at 15.

<sup>68/</sup> *See* Comments of Metromedia at 3; Comments of Global Crossing Ltd. at 5, 10.

## CONCLUSION

The comments filed in this proceeding confirm that deployment of advanced telecommunications capability is reasonable and timely. Any slowing of investment or subscribership in recent months simply reflects the slowdown in the American economy in general. Changing the regulatory regime governing DSL will not resolve these larger economic issues. Indeed, there is no need for regulatory relief to spur the supply of advanced telecommunications capability because the comments indicate that broadband deployment has outstripped consumer demand. Stimulating demand is a task that should be left to the competitive market.

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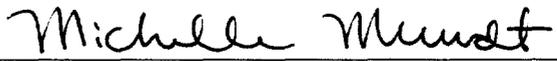
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