Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter ofReview of Regulatory Requirements for Incumbent LEC Broadband Telecommunications Services CC Docket No. 01-337

COMMENTS OF CITIZENS FOR A SOUND ECONOMY FOUNDATION

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Citizens for a Sound Economy Foundation (CSE Foundation) is a non-profit, 501 (c)(3), nonpartisan research and education foundation. For more than fifteen years, CSE Foundation has been educating consumers and the policy community about market-based solutions to public policy problems. CSE Foundation respectfully submits the following comments to the Federal Communications Commission's (FCC) docket, "Review of Regulatory Requirements for Incumbent LEC Broadband Telecommunications Services."

It is the intention of CSE Foundation to file comments on future proceedings, including Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers, CC Docket No. 01-338, "Implementation of the Local Competition Provisions of the Telecommunications Act of 1996, CC Docket No. 96-98; Deployment of Wireline Services Offering Advanced Telecommunications Capability, CC Docket No. 98-147; Notice of Proposed Rulemaking, FCC 01-361, Performance Measurements and Standards for Unbundled Network Elements and Interconnection, et al., CC Docket No. 01?318; Notice of Proposed Rulemaking, FCC 01?331 (rel. Nov. 19, 2001) (UNE Measurements and Standards Notice); Performance Measurements and Standards for Interstate Special Access Services, et al., CC Docket No. 01?321; Notice of Proposed Rulemaking, FCC No. 01?339 (rel. Nov. 19, 2001) (Special Access Measurements and Standards Notice). As such, the comments that follow will be brief, as this proceeding asks the relatively simple question of whether or not Digital Subscriber Line (DSL) service should be regulated under Title II of the Telecommunications Act.

CSE Foundation recognizes the authority of the FCC to set carriage obligations and requirements on facilities used by Incumbent Local Exchange Carriers (ILEC) to provide high-speed data services. However, CSE Foundation believes that such regulation, which arises out of Sections 201 and 202 of the Telecommunications Act, should not be applied to high-speed Internet service because of the emergence of facilities-based broadband competitors. Indeed, the most recent estimates available demonstrate that ILECs command less than 30 percent of the broadband market and that this share is dwindling(1).

No "one wire" problem exists in the market for high-speed Internet services as cable modem service is a substitute for DSL, outnumbers DSL subscribers by a 2-to-1 margin, and is available in nearly two-thirds of all homes(2). In addition, satellite, fixed wireless, and mobile wireless firms either have, or are investing in, infrastructure to compete in this market. With

viable investment alternatives that may actually provide higher margins than upgraded copper plant in the provision of broadband(3), there is sufficient evidence to conclude that no bottleneck exists in the broadband market, and that no monopoly characteristics are present.

Moreover, not only are monopoly characteristics absent, but no available evidence suggests that ILECs possess any market power in the provision of broadband services. Changes in the price of DSL service to consumers often reflect changes in the price of cable modem service(4) and have not resulted in profits exceeding those normally attributed to competitive markets.

Yet, due to Title II regulation of DSL service, wholesale prices charged for unbundled network elements (UNEs), as well as wholesale leasing rates, do not reflect the cost of investment in new broadband facilities. As a result, DSL deployment, quality, and terms of access have all suffered. In addition, Title II regulation of DSL has created an oportunistic class of new entrants that buy or lease incumbent facilities at sub-market rates instead of investing in new technology, or platforms to provide broadband service.

Such competition harms consumers in several ways. First, it discourages incumbents from investing in more advanced facilities by eliminating the profit motive for such action(5). Second, it undermines investment in rival facilities by handing control of the wholesale market to incumbents, who would otherwise charge market rates for access, as new facilities-based entrants are forced to do to recover deployment costs. Finally, it perverts capital markets by diverting discretionary risk capital towards unregulated facilities, such as long-haul fiber optic backbone, which has resulted in overcapacity, deflationary pressures, and bankruptcy(6).

When taken with evidence of a profoundly competitive broadband market, these negative economic consequences should be enough to prove that ILECs are as deserving of regulatory relief as was AT&T when it received its reclassification order in 1993(7). DSL service provided by ILECs should be reclassified as non-dominant and current regulations on facilities used to provide such service should be eliminated.

It is difficult to see how such action would create any competitive imbalance arising from cross-subsidization or bottleneck facilities. Cross-subsidization is unlikely to happen because state regulations already govern the price of local landline voice service, eliminating the pricing flexibility necessary to undertake such a strategy. Furthermore, as mentioned above, there is no bottleneck for broadband service; only those opportunistic competitors whose business model is injurious to competition argue otherwise.

Inputs judged to be essential to the provision of landline voice service should remain available to competitors in accordance with Section 251 of the Telecommunications Act. It is this market that requires the competitive impetus of an open-access and unbundling regime. But mandated unbundling of fiber loops and high-frequency spectrum - not to mention ordered collocation at remote terminals - impairs competition in the local landline voice market by reducing wholesale costs for broadband relative to voice, and further squeezing margins.

Finally, the FCC should transfer regulation of DSL from Title II to Title I simply to adhere to its own regulatory classifications. Title I, after all,

is for "information services," which is precisely what DSL technology is. While Section III of this NPRM contains questions about market segmentation, it seems to avoid the most obvious question of all: How can the continuous transfer of bits of data be classified as a voice service? Legion economists and lawyers will undoubtedly take this opportunity to define countless industry subsets and product markets and offer perspectives on the relative competitiveness of each, but the only real distinction of any consequence should be between voice and data service, irrespective of the subscriber or terms of service.

In future proceedings, CSE Foundation would like to offer expanded analysis of the broadband market, perspectives on 251 and 271 implementation, and strategies for greater deployment. The relative simplicity of this filing reflects the straightforwardness of the question posed by the NPRM: Should "information services" provided by ILECs be regulated as an "information service?" CSE Foundation believes the answer to that question is a resounding yes.

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1. FCC Report on the Availability of High-Speed Advanced Telecommunications Capability
http://www.fcc.gov/Bureaus/Common_Carrier/News_Releases/2002/nrcc0201.html.

2. E. Newberger, U.S. Census Bureau, Home Computers and Internet Use in the United States: August 2000 (Sept. 2001).
3. See Loral: http://www.loral.com/inthenews/third-qtr98-results.html.
4. See Jerry Ellig, Ph. D and Jason M. Thomas, "Issue Analysis 111 - Broadband Forced Access: Still a Solution in Search of a Problem." CSE Foundation. http://www.cse.org/informed/pdf_files/ia111_Forced_Access.pdf
5. Hausmann, Jerry. "The Effect of Sunk Costs in Telecommunications Regulation."
http://econ-www.mit.edu/faculty/jhausman/files/Colum98_rev3.pdf.
6. Lenard, Thomas, 'The Economics of the Telecom Meltdown." The Progress and Freedom Foundation.
http://www.pff.org/publications/pop9.6econtelecom.pdf.
7. Motion of AT&T Corp. to be Reclassified as a Non-Dominant Carrier, Order, 11 FCC Rcd 3271, 3283, para. 14 (1995) (AT&T Reclassification Order).

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