infrastructure investment."[62] And Sections 10 and 11 of the Communications Act require the Commission to remove regulatory requirements that it cannot justify as "necessary" to serve the public interest. Collectively, these statutory mandates require the Commission to lift the regulatory burdens that inhibit broadband deployment.

Given the sheer newness of and rapid rate of change in the broadband market, the lack of any market power by telephone companies in the broadband sphere, and the Commission's prudent historical reluctance to impose burdensome regulations on emerging industries, the most rational regulatory approach to the broadband market would be to forego Title II common carrier regulation entirely and treat all broadband services under Title I of the Communications Act. That approach is the subject of another proceeding. To the extent that any broadband facilities or services remain under Title II, however, the Commission should use its forbearance and interpretive powers under the Act to remove the disincentives to investment created by the current retail and wholesale rules that apply to local telephone companies' non-dominant provision of broadband services. Equally important, the resulting rules should be the same for all competing platforms and technologies.

A. Strong Policy Considerations Support Deregulation of Local Telephone Company Provision of Broadband

Traditionally, the Commission regulated services in order to counteract market power. By contrast, "[i]n markets where competition can act in place of regulation as the means to protect consumers from the exercise of market power, the Commission has long

[62] Telecommunications Act of 1996, Pub. L. No. 104-104, § 706(a), 110 Stat. 56, 153 (codified at 47 U.S.C. § 157 note).

chosen to abstain from imposing regulation."[63] As demonstrated above, the broadband market is already competitive, and local telephone companies have no market power in that market. Hence, there is no need to regulate local telephone companies as dominant carriers in their provision of broadband. And there is certainly no justification for doing so while declining to impose the same requirements on all other providers, including the incumbent cable operators and national IXCs.

The lopsided imposition of dominant-carrier regulation on local telephone company provision of broadband is bad competition policy. The Department of Justice has recognized that "[a]pplying different degrees of regulation to firms in the same market necessarily introduces distortions into the market; competition will be harmed if some firms face unwarranted regulatory burdens not imposed on their rivals."[64] Local telephone companies are not asking for guaranteed success in the market or even a leg up on the competition; they merely seek to remove regulatory constraints that have been applied to them alone and that inhibit the operation of the competitive market. Experience shows that the market will pick winning strategies and technologies if regulators will get out of the way and allow the market to work. As Professor Kahn and Dr. Tardiff explain: "No one can possibly know the ultimate size of the market and how

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[63] M. Kende, Director of Internet Policy Analysis, Office of Plans and Policy, FCC, *The Digital Handshake: Connecting Internet Backbone*, OPP Working Paper No. 32, at 12 (Sept. 2000).

[64] Reply Comments of the U.S. Department of Justice, *Competition in the Interstate Interexchange Marketplace*, CC Docket No. 90-132, at 26 n.42 (FCC filed Sept. 28, 1990).

it will be supplied. The task of policy is to remove all remedial hindrances to the competitive market's giving us the definitive answers."[65]

Professor Kahn and Dr. Tardiff also note the "absurdity of shackling a competitor running in second place," as the current regulatory scheme does to local telephone companies in the broadband market.[66] They then go on to identify four distinct harms to consumers from the application of Title II dominant-carrier regulations to local telephone companies, but not other broadband competitors: First, "by increasing the costs and risks of only one type of competitor," the regulatory scheme "makes it less likely that the services those competitors are uniquely qualified to offer will make it to the market."[67] Second, "handicapping one group could prevent the lower-cost supplier from taking over the share of the market that it would otherwise obtain."[68] Third, the regulatory advantage enjoyed by the local telephone companies' broadband competitors "could give them an advantage in the provision of services other than broadband – such as video – thereby weakening and conceivably distorting competition in the supply of such complementary services."[69] Fourth, by depressing the local telephone companies' incentives to invest and innovate, dominant-carrier regulation also dampens "the efforts of rivals of the successful innovator, by their own efforts, to invent around and surpass the originator."[70]

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[65] Declaration of Alfred E. Kahn & Timothy J. Tardiff, ¶ 8 (Dec. 18, 2001) ("Kahn/Tardiff Decl.") (attached as Exhibit C hereto). *See* Comments of Verizon, *Request for Comments on Deployment of Broadband Networks and Advanced Telecommunications*, Docket No. 011109273-1273-01 (NTIA filed Dec. 19, 2001).

[66] *Id.* ¶ 18.

[67] *Id.*

[68] *Id.*

[69] *Id.*

[70] *Id.* ¶ 18.

The Commission itself has previously recognized that applying regulation to carriers that lack market power causes affirmative harm to competition. In the *Competitive Carrier* proceeding the Commission explored the cost of imposing dominant-carrier regulation on entities lacking market power and suggested that, for instance, tariff filing requirements for non-dominant carriers could harm consumers by slowing "the introduction of new services, dampening competitive responses and ultimately encouraging price collusion through the forced publication of charges."[71] Mandatory tariffs may also reduce carriers' ability to make efficient responses to demand and cost; impose substantial administrative costs on carriers; limit the ability of customers to negotiate and obtain service arrangements specifically tailored to their needs; and inhibit carriers from introducing new services and responding to new offerings by rivals, who obtain advance notice of the tariffed carrier's services and promotions and can respond by undercutting the new offerings even before the tariff becomes effective.[72] The Commission went on to explain that continuing to regulate competitive carriers results in

> inefficiencies inevitably borne by consumers through the higher cost of goods and services. We are thus confronted with a critical conflict between our duty to act "so as to make available, so far as possible, to all the people of the United States a rapid, efficient, Nationwide, and world-wide wire and radio communications service with adequate facilities at

[71] *Policy and Rules Concerning Rates for Competitive Common Carrier Services and Facilities Authorizations Therefor*, Further Notice of Proposed Rulemaking, 84 F.C.C.2d 445, 471, ¶68 (1981) ("*Competitive Carrier FNPRM*"); *see also BOC Classification Order*, 12 FCC Rcd at 15808, ¶ 90 (finding that "regulations associated with dominant carrier classification can . . . have undesirable effects on competition").

[72] *See, e.g., Policy and Rules Concerning the Interstate, Interexchange Marketplace*, Second Report and Order, 11 FCC Rcd 20730, 20760-61, ¶ 53 (1996) ("*IXC Forbearance Order*"); *Motion of AT&T Corp. to be Reclassified as a Non-Dominant Carrier*, Order, 11 FCC Rcd 3271, 3288, ¶ 27 (1995) ("*AT&T Non-Dominance Order*").

> reasonable charges," and a continued practice of regulating all suppliers indiscriminately which directly and unquestionably works contrary to those goals. We are convinced, as a matter of law and policy, that the overriding goals of the Act must take precedence over specific sections initially provided to achieve those goals. The conflict identified above can be rationally resolved by forbearing in appropriate instances from specific application of the regulatory tools of Title II.[73]

Consistent with this view, the Commission has repeatedly loosened the regulatory requirements applicable to carriers that lack market power.[74]

The lack of market power on the part of the local telephone companies also means that these companies pose no threat to innovation on the Internet. Some observers have lamented that cable modem operators may be harming innovation by altering the architecture of the Internet in subtle ways including, for example, restricting the use of streaming video or filtering the types of data packets that can be transmitted to customers.[75] Although it is possible that these dominant players might dictate closed standards, it is *not* possible that the small minority players in the market could do so – and local telephone companies are decidedly small minority players in the broadband market. Moreover, unlike the cable companies, whose core video distribution business is threatened by the advent of streaming video, local telephone companies offer an open architecture at many levels thanks in part to their basic business structure. In fact, as

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[73] *Competitive Carrier FNPRM*, 84 F.C.C.2d at 471, ¶ 68.

[74] *See generally AT&T Non-Dominance Order*, 11 FCC Rcd 3271; *Comsat Corporation, Petition Pursuant to Section 10(c) of the Communications Act of 1934, as amended, for Forbearance from Dominant Carrier Regulation and for Reclassification as a Non-Dominant Carrier*, Order and Notice of Proposed Rulemaking, 13 FCC Rcd 14083 (1998) ("*Comsat Non-Dominance Order*"); *Competitive Carrier FNPRM*, 84 F.C.C.2d at 456, ¶ 33a; *BOC Classification Order*, 12 FCC Rcd 15756.

[75] Jerome H. Salzer, Essay, *"Open Access" is Just the Tip of the Iceberg* (Oct. 22, 1999), *at* http://web.mit.edu/Saltzer/www/publications/openaccess.html.

noted above, Verizon believes it to be in its own economic interest to offer wholesale service if it is allowed to do so at commercially reasonable, market-based rates.

Experience teaches that, once the Commission has identified a market as competitive, freeing non-dominant carriers from unnecessary regulatory burdens successfully stimulates both competition and investment. Wireless services, for instance, have flourished in the wake of detariffing and a leveling of the regulatory playing field. Investment in wireless services took off in earnest after Congress required the Commission to regulate all commercial wireless services in a similar manner in 1993, and the Commission shortly thereafter determined that it would subject wireless operators to minimal regulation.[76] Notwithstanding the fact that, at the time the Commission made its decision to deregulate wireless services, "the cellular services marketplace" was not "fully competitive," the Commission found that "[c]ompetition, along with the impending advent of additional competitors, leads to reasonable rates."[77] As a result of the Commission's deregulatory course, the number of wireless customers has increased nine-fold, and prices have fallen by nearly one third.[78]

B. Governing Principles of Federal Law Require Deregulation of Local Telephone Company Provision of Broadband

Removing dominant-carrier regulation of local telephone companies in the broadband market – particularly where their competitors go largely or completely

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[76] *See generally Broadband Fact Report* at 31.

[77] *Implementation of Sections 3(n) and 332 of the Communications Act*, Second Report and Order, 9 FCC Rcd 1411, 1478, ¶ 174 (1994) ("*Wireless Deregulation Order*").

[78] *See* Cellular Telecommunications & Internet Association, *Background on CTIA's Semi-Annual Wireless Industry Survey*, Charts on Wireless Subscribership & Average Local Monthly Bill (June 30, 2001), *available at* http://www.wow-com.com/industry/stats/surveys (measuring time-period between 1993 and 2001).

unregulated – is not just good policy, it is also the only result that is consistent with the law. Because local telephone companies do not have market power with respect to broadband, relaxing dominant-carrier regulation is both consistent with Commission precedent and required by the Communications Act and the U.S. Constitution.

The Commission has previously recognized that, where there is no potential for monopoly-type abuses, competitors should be free from dominant-carrier regulation. Accordingly, the Commission has used its forbearance authority to relax dominant-carrier regulation upon a finding of sufficiently robust competition in the markets for domestic[79] and international[80] long-distance, mobile wireless services,[81] and interstate access services.[82] It should now do the same in the broadband market.

Treating carriers as dominant for some purposes but not for others is fully consistent with Commission precedent. Although the Commission treated carriers as single output firms for purposes of the First Report and Order in its *Common Carrier* proceedings, it took this self-consciously overcautious approach in part to simplify its analysis.[83] Even at that time, however, the Commission recognized that it would have to

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[79] *See IXC Forbearance Order*, 11 FCC Rcd 20730.

[80] *See Comsat Non-Dominance Order*, 13 FCC Rcd 14083.

[81] *See Personal Communications Industry Association's Broadband Personal Communications Services Alliance's Petition for Forbearance for Broadband Personal Communications Services*, Memorandum Opinion and Order and Notice of Proposed Rulemaking, 13 FCC Rcd 16857 (1998).

[82] *See Hyperion Telecommunications, Inc. Petition Requesting Forbearance*, Memorandum Opinion and Order and Notice of Proposed Rulemaking, 12 FCC Rcd 8596 (1997).

[83] *Policy and Rules Concerning Rates for Competitive Common Carrier Services and Facilities Authorizations Therefor*, First Report and Order, 85 F.C.C.2d 1, 22, ¶ 60 n.55 (1980) ("We recognize this as a conservative approach to regulation and we plan to deal with the much more complex issue of the regulation of multi-output carriers in a further notice of proposed rulemaking.").

"shift from the carrier specific to market specific analysis in order to conform more closely to the dynamics of the marketplace."[84] And in fact, under the current regulatory regime, telephone companies can be dominant common carriers for some purposes, but not others. Indeed, the landmark *AT&T Non-Dominance Order* treated AT&T as non-dominant for domestic long-distance services, but not international long-distance services.[85] Declaring local telephone companies non-dominant in the broadband market is therefore entirely consistent with the Commission's own precedent.

In fact, given the lack of market power on the part of the local telephone companies with respect to broadband, the Communications Act affirmatively requires the Commission to eliminate the regulations that are inhibiting new investment and deployment. Section 10 of the Act commands that the Commission "*shall* forbear from applying any regulation or any provision of this Act" if the regulation or statutory provision is not necessary to ensure just and reasonable rates or to protect consumers. Likewise, Section 11 of the Act commands that the Commission shall review its telecom regulations in every even-numbered year and "*shall* repeal or modify any regulation" that, due "meaningful economic competition between providers" it can no longer justify as "necessary in the public interest" of telecommunications services.[86] And Section 706

[84] *Id.* (citing *Second Computer Inquiry*, 77 F.C.C. 2d 384 (1980)).

[85] *See AT&T Non-Dominance Order*, 11 FCC Rcd at 3273, ¶¶ 1-2 ("[W]e find that the record evidence demonstrates that AT&T lacks market power in the interstate, domestic, interexchange market, and accordingly, we grant its motion to be reclassified as a non-dominant carrier with respect to that market. . . . We defer consideration of AT&T's request to be reclassified as non-dominant in its provision of all international services because that category of services requires a different market analysis.")

[86] *See also Fox Television Stations, Inc. v. FCC*, No. 00-1222, 2002 WL 233650 (D.C. Cir. Feb. 19, 2002) (reversing as arbitrary and capricious Commission's decision to retain national television station ownership rule and cable/broadcasting cross-ownership rule).

of the 1996 Act provides an additional, independent mandate to use "regulatory forbearance" to "remove barriers to infrastructure investment" in the broadband context.

These three statutory provisions all require the Commission to ask the same basic question: Do local telephone companies possess market power in the broadband market? If the answer is no, then the Commission cannot continue to apply regulatory requirements designed for the traditional voice business.

Section 11 requires the Commission in every even-numbered year – 2002 included – to review its existing regulations to determine if they are justified as "necessary" given the state of competition in the marketplace. As the D.C. Circuit emphasized in *Fox Television Stations v. FCC*, "[t]he statute is clear that a regulation should be retained only insofar as it is necessary in, not merely consonant with, the public interest."[87] That is why the Court found that, in the absence of any showing that the Commission's national television station ownership rule and cable/broadcast cross-ownership rules was necessary to protect competition, the Commission's decision to retain those rules was arbitrary and capricious. In the broadband context, given the absence of market power on the part of local telephone companies, a decision by the Commission to retain dominant-carrier regulations would be similarly unlawful.

The present circumstances in broadband thus clearly meet the forbearance standards that the Commission has previously established. First, the Commission has held, in granting a petition under Section 10, that "competition is the most effective means of ensuring that the charges, practices, classifications, and regulations with respect to [a telecommunications service] are just and reasonable, and not unjustly or

[87] *Fox Television Stations*, 2002 WL 233650, at *20.

unreasonably discriminatory."[88] Competition is robust in this market, and there is nothing to suggest that a local telephone company with its share of the market could charge unjust or unreasonable prices or engage in unjust or unreasonable practices.

Second, for the same reason, dominant carrier regulations are not "necessary for the protection of consumers," as required by Section 10(a)(2). Instead, the opposite is true – consumers are best protected by allowing the marketplace to provide them with a robust choice of services from a variety of competing providers. Enforcement of dominant-carrier regulations is not necessary to constrain the prices that the local telephone companies charge for broadband services – competition provides that constraint. This competitive marketplace is more than adequate to protect consumers.[89] Moreover, in applying Section 10(a)(2), the Commission has noted that "the fundamental objective of the 1996 Act is to bring consumers of telecommunications services in all markets the full benefits of competition."[90] The record shows that current regulation stifles rather than stimulates investment in advanced services, the exact opposite of the situation that protects consumers.

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[88] *Petition of U S WEST Communications, Inc. for a Declaratory Ruling Regarding the Provision of National Directory Assistance*, Memorandum Opinion and Order, 14 FCC Rcd 16252, 16270, ¶ 31 (1999) ("*Directory Assistance Order*").

[89] *See, e.g., Policy and Rules Concerning Rates for Competitive Common Carrier Services and Facilities Authorizations Therefor*, Second Report and Order, 91 F.C.C.2d 59, 71, ¶ 24 (1982) ("Competitive market forces, together with our power to intervene in appropriate cases, are sufficient checks on the pricing of resale services."); *Comsat Non-Dominance Order*, 13 FCC Rcd at 14148, ¶ 131 ("In a competitive environment, . . . regulation is not needed to encourage competitive prices. . . . Competition, rather than rate of return regulation, provides . . . an incentive to reduce costs in order to earn greater profits. Reduced costs eventually will benefit rate payers in the form of lower rates.").

[90] *Directory Assistance Order* at 16277-78, ¶ 46.

Third, in determining whether forbearance is "in the public interest" under Section 10(a)(3), the Commission must "consider several factors, including benefits to consumers and whether forbearance will promote competitive market conditions."[91] The evidence shows that imposition of dominant-carrier regulation on one class of competitors while leaving the rest free of regulation skews, rather than promotes, competition. In granting other petitions, the Commission has held that the public interest test of Section 10 is satisfied when forbearance would make the petitioner "a more effective competitor."[92] Regulation adds costs to local telephone company provision of broadband services, and the Commission has found that the avoidance of unnecessary cost is also in the public interest.[93] Under these circumstances, Sections 10 and 11 (of the 1934 Act, as amended) and Section 706 (of the 1996 Act) require that the Commission forbear.

Beyond the policies of competitive and technological neutrality embodied in the Acts themselves, serious First Amendment concerns are raised by the one-sided burdens and restrictions that the present regulatory regime places on the deployment and use of local telephone companies' broadband services and facilities. Broadband is itself a medium through which telephone companies are able to deliver a form of speech – the companies' own Internet and other content and services – to their customers. It is no different in that regard from the pages of a newspaper, the screen at a movie theatre, or the bandwidth used by a cable operator to deliver its program guide and video programming. As discussed above, incumbent LECs must make significant capital

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[91] *Id.* at 16278, ¶ 48.

[92] *Id.* at 16278-79, ¶ 49.

[93] *Id.*

investments in order to create and maintain this medium through which they can speak. Incumbent LECs, like Verizon, seek to use this medium both to propagate messages of their own and to enter into commercial arrangements that will allow others to reach consumers as well. In the end, like any expressive commercial enterprise, telephone company broadband services must obtain a reasonable return on investment given the risks of the marketplace. One-sided regulatory constraints that inflate the cost and risk of deploying these services infringe on the ability of telephone companies to deliver their broadband content to customers. Consequently, these regulatory constrains implicate the First Amendment.

Indeed, case precedent makes abundantly clear that he First Amendment protects not merely the content of speech, but also the physical and commercial means by which it is delivered to the public. As the Supreme Court recognized more than a century ago, "[l]iberty of circulating is as essential to [freedom of the press] as liberty of publishing; indeed, without the circulation, the publication would be of little value."[94] Thus, the Supreme Court has extended First Amendment protection not only to the selection and formation of content, but to the means of its dissemination.[95] The Supreme Court has also recognized that burdensome economic regulation can silence free expression as

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[94] *Ex Parte Jackson*, 96 U.S. 727, 733 (1877).

[95] *See City of Lakewood v. Plain Dealer Publ'g Co.*, 486 U.S. 750, 768 (1988) ("The actual 'activity' at issue here [placement of newsracks] is the circulation of newspapers, which is constitutionally protected."); *Lovell v. City of Griffin*, 303 U.S. 444, 452 (1938) ("The ordinance [prohibiting the distribution of circulars] cannot be saved because it relates to distribution and not to publication."). *See also Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622, 629 (1994) ("*Turner I*") ("Cable programmers and cable operators engage in and *transmit speech*, and they are entitled to the protection of the speech and press provisions of the First Amendment.") (emphasis added).

effectively as outright prohibitions on speech.[96] The reasoning of these cases has already been applied to a cable operator's control of the cable modem platform and the commercial relationships necessary to sustain it.[97] Cable operators themselves have consistently maintained that in using their cable modem technology to deliver the content of their affiliated ISP to the public they are exercising "First Amendment rights to provide content and information."[98] No less protection can be afforded to the broadband services of telephone companies, which, like cable operators, use those services in part to deliver their own speech. Consequently, under Supreme Court precedent, the Commission would have to demonstrate that these significant regulatory burdens and restrictions on the distribution of protected speech serve a substantial governmental interest and do not burden more speech than necessary to promote that interest.[99]

Generally, in order to justify such an intrusion into otherwise private expressive activity, the government must demonstrate some significant market failure that its regulation is designed to redress. Thus, in *Turner II,* a narrow majority of the Court upheld must carry obligations placed on up to one-third of a cable operator's channel capacity based on cable's dominant position in the market for delivery of video

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[96] *See Minneapolis Star & Tribune Co. v. Minnesota Comm'r of Revenue*, 460 U.S. 575, 585 (1983) ("Differential taxation of the press . . . places such a burden on the interests protected by the First Amendment that we cannot countenance such treatment unless the State asserts a counterbalancing interest of compelling importance that it cannot achieve without differential taxation.").

[97] *See Comcast Cablevision of Broward Co., Inc. v. Broward County*, 124 F. Supp. 2d 685, 692 (2000) (applying heightened First Amendment scrutiny to an ordinance that "operates to impose a significant constraint and economic burden directly on a cable operator's means and methodology of expression").

[98] *MediaOne Group, Inc. v. County of Henrico*, Complaint for Declaratory Judgment and Injunction, Case No. 3:00CV33, at ¶ 36 (Jan. 20, 2000).

[99] *Turner I,* 512 U.S. at 645.

programming and its incentives to use that power to discriminate against broadcasters.[100] Given the Commission's repeated findings that the broadband market is competitive and the fact that it has repeatedly declined to place anything like common carriage or unbundling obligations on the dominant providers in that market,[101] the Commission could not demonstrate that the regulatory burdens imposed on telephone companies' broadband services further a substantial governmental interest.[102] Indeed, by deterring capital investment in broadband services and reducing the aggregate amount of news and information available to the public, those regulatory burdens actually *disserve* the important governmental interest recognized in Section 706 of the 1996 Act.

For the same reasons, it would be difficult to argue that these regulatory burdens are properly tailored to accomplish any substantial government interest. Any such argument is completely undercut by the failure to impose any regulation *at all* on cable operators—the dominant provider in the market. Where no adequate justification is

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[100] *See, e.g., Turner Broad. Sys., Inc. v. FCC*, 520 U.S. 180, 197 (1997) ("*Turner II*") (upholding requirement that cable operators carry the signals of broadcast stations because "cable operators possess a local monopoly over cable households");

[101] In both the AT&T/TCI and AT&T/MediaOne merger proceedings, the Commission specifically rejected calls for open access regulations based on robust intermodal competition in the mass market for broadband services. Even faced with the competitive concerns raised by the merger of the Nation's largest ISP with the Nation's second largest cable system, the Commission did not mandate common carrier treatment of the AOLTW's cable modem platform. *Application for Consent to the Transfer of Control of Licenses and Section 214 Authorizations from Telecommunications, Inc., Transferor To AT&T Corp., Transferee*, Memorandum Opinion and Order, 14 FCC Rcd 3160, 3176-77, ¶¶ 28-30 (1999); *Application for Consent to the Transfer of Control of Licenses and Section 214 Authorization from MediaOne Group, Inc., Transferor, To AT&T Corp., Transferee*, Memorandum Opinion and Order, 15 FCC Rcd 9816, 9858, ¶ 94 (2000).

[102] *See Time Warner Entm't Co. v. FCC*, 240 F.3d 1126, 1138 (D.C. Cir. 2001) (noting that in a competitive market cable operators have little incentive to favor affiliated video programming).

given, federal courts have not hesitated to strike down restrictions on incumbent LECs use of their facilities for expressive activity.[103] Indeed, the D.C. Circuit recently found in the *Fox Television Stations* case that an attempt to limit the expressive activities and audience reach of broadcasters where there was no evidence "that broadcasters have undue market power, such as to dampen competition, in any relevant market" was "irrational" and therefore arbitrary and capricious.[104] *A fortiori* the restrictions placed on the broadband offerings of local telephone companies – the smaller players in a market the Commission has repeatedly characterized as competitive—cannot withstand heightened scrutiny required by the First Amendment.

There is also the additional First Amendment problem of disparate treatment of similarly situated speakers. In *Turner I,* the Supreme Court warned that "[r]egulations that discriminate among media, or among different speakers within a single medium, often present serious First Amendment concerns."[105] Indeed, the majority and the dissent agreed on this point.[106] Because of this concern regarding disparate treatment, the First Amendment is one area where the greater has never been held to include the lesser. In other words, even if the Commission had sufficient grounds to regulate all providers of broadband, it could not do so in a selective or under-inclusive manner.

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[103] *See Chesapeake & Potomac Tel. Co. v. United States,* 42 F.3d 181, 189 n.10 (4th Cir. 1994) ("The First Amendment's problem with Section 553(b) is that the provision does not allow the telephone companies to engage in protected speech, that is, the provision, with editorial control, of cable television services.") (emphasis in original), *vacated on other grounds*, 516 U.S. 415 (1996). *Accord US West, Inc. v. United States*, 48 F.3d 1092, 1104-05 (9th Cir. 1995), *vacated on other grounds*, 516 U.S. 1155 (1996).

[104] *See Fox Television Stations*, 2002 WL 233650, at *11.

[105] *Turner I*, 512 U.S. at 659.

It is well settled that if a regulation "affecting speech appears underinclusive, *i.e.*, where it singles out some conduct for adverse treatment, and leaves untouched conduct that seems indistinguishable in terms" of the regulation's "ostensible purpose, the omission" itself is subject to heightened judicial scrutiny.[107] For example, in *City of Ladue v. Gilleo*, the Supreme Court invalidated a local government's prohibition against all residential signs except those falling into certain exempted categories.[108] Accepting the City's assertion that the exemptions were not content-based, the Court nevertheless affirmed the "basic First Amendment principle[]" that "a regulation of speech" may be unconstitutional if it is "impermissibly underinclusive."[109] Similarly, in *City of Cincinnati v. Discovery Network, Inc.*,[110] the Court held that a city could not draw a distinction between news racks containing handbills and news racks containing newspapers. The Court found that "the distinction bears no relationship whatsoever to the particular interests the city has asserted."[111] In this case it would be all but impossible for the Commission to justify a distinction between broadband services provided over the cable system platform and those using the telephone company wireline platform,

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[106] *See id.* at 676 (O'Connor, J., dissenting) (confirming that regulations "that single out particular speakers are substantially more dangerous" to First Amendment values, "even when they do not draw explicit content distinctions").

[107] *News America Publ'g, Inc. v. FCC*, 844 F.2d 800, 804-05 (D.C. Cir. 1988).

[108] *City of Ladue v. Gilleo*, 512 U.S. 43 (1994).

[109] *Id.* at 51.

[110] 507 U.S. 410 (1993)

[111] *Id.* at 424. *See also Rosenberger v. University of Viriginia*, 515 U.S. 819, 828 (1995) ("In the realm of private speech or expression, government regulation may not favor one speaker over another.").

particularly given their relative market positions.[112] The regulatory burdens of imposed on local telephone companies here are like a tax imposed only on expressive activity undertaken by them using their own networks. "A tax that singles out the press, *or that targets individual publications within the press,* places a heavy burden on the state to justify its action."[113]

C. The Commission Should Relax Both Retail and Wholesale Regulations on Local Companies' Non-Dominant Provision of Broadband to Promote Competition and Facilitate Deployment

Because local telephone companies do not have market power with respect to broadband, the Commission should declare them non-dominant and liberate them from current tariff and pricing regulations, unbundling and collocation obligations, and *Computer Inquiries* obligations with respect to broadband facilities and services.

Specifically, the Commission should eliminate the requirement that carriers must file tariffs but should allow them to do so on a permissive basis on one day's notice and without filing cost support. In addition, the Commission should forbear from any requirement under Section 201that rates for broadband services be justified in terms of the cost of providing service; the Commission should make clear that market-based rates are by definition just and reasonable.[114] Requiring rates to be set on a cost-plus basis is inconsistent with reliance on market forces to establish rates. With regard to competitive

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[112] Of course, Verizon recognizes that the Commission does not have authority to pass on the constitutionality of its own regulations. *See Johnson v. Robinson,* 415 U.S. 361, 368 (1974)). Verizon reserves all its rights to seek appropriate judicial relief in any available forum for violation of its First Amendment rights.

[113] *Minneapolis Star*, 460 U.S. at 592-93.

[114] Traditionally, the Commission has required that the rates of dominant carriers be cost-justified. *See, e.g.,* 47 C.F.R. §61.38 (requiring that dominant carriers submit cost studies to the Commission in order to justify tariff changes).

LECs that are not subject to price-cap or rate-of-return regulation, the Commission has expressly recognized not only that examining "costs as the touchstone of the reasonableness of [the competitive LEC's] rates would contradict [the] trend towards reliance on market factors to dictate appropriate rates,"[115] but also that "comparing CLEC rates to any objective [*i.e.* cost-based] standard of reasonableness" would involve "legal and practical difficulties."[116] Accordingly, the Commission should at the very least clarify that "just and reasonable" broadband rates need not be based on cost.

But in order to permit true price competition in the broadband sphere, the Commission must do more than simply clarify that local telephone company rates for broadband need not be cost-justified. For even when dealing with competitive LECs, the Commission has relied on rate comparisons and benchmarks to evaluate the justness and reasonableness of rates and to prescribe just and reasonable rates for regulated entities.[117]

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[115] *AT&T, Complainant, v. Business Telecom, Inc., Defendant*, Memorandum Opinion and Order, 16 FCC Rcd 12312, 12321-22, ¶ 18 (2001).

[116] *Id.* ¶ 19 (citing *Reform of Access Charges Imposed by Competitive Local Exchange Carriers*, Seventh Report and Order and Further Notice of Proposed Rulemaking, 16 FCC Rcd 9923, 9934, ¶ 27 (2001) ("*CLEC Access Charge Order*").

[117] *See, e.g., Access Charge Reform; Price Cap Performance Review for Local Exchange Carriers; Transport Rate Structure and Pricing; End User Common Line Charges*, First Report and Order, 12 FCC Rcd 15982, 16141-42, ¶ 364 (1997); *Local Exchange Carriers' Rates, Terms, and Conditions for Expanded Interconnection Through Physical Collocation for Special Access and Switched Transport*, Second Report and Order, 12 FCC Rcd 18730, 18790-93, ¶¶ 131-141 (1997) ("*Expanded Interconnection Order*"); *Annual 1990 Access Tariff Filings*, Memorandum Opinion and Order, 5 FCC Rcd 7487 (1990) (rejecting rates 8 times higher than benchmark rate); *Beehive Telephone Co. Inc.*, Memorandum Opinion and Order, 13 FCC Rcd 12275 (1998) (rejecting rate above "industry averages" for comparable companies); *Operator Communications, Inc. d.b.a. Oncor Communications, Inc.*, Memorandum Opinion and Order and Order to Show Cause, DA-95-02, 1995 WL 248343 (Com. Car. Bur. rel. Apr. 27, 1995) ("*Oncor Communications*") (finding that rates that "substantially exceed" rates charged by other service providers for comparable services in the same market to be unjust and unreasonable); *Capital Network System, Inc.*, Memorandum Opinion and Order and Order to Show Cause, 10 FCC Rcd 13732 (1995) (same as *Oncor*

These methods are likely not suitable for judging the reasonableness of rates based on, for example, a share of customer revenues or on the number of visits to customer Web pages or databases. These types of compensation arrangements are common in other competitive industries, including on the Internet. But the returns expected from these pricing methods can be highly variable and thus difficult to measure against traditional benchmarks. Hence, unless the Commission forbears from enforcing the Section 201 "just and reasonable" requirement as applied to broadband rates using traditional benchmarks, any carrier that attempts to use such market-based pricing models risks being the subject of a complaint alleging that its rates are not "just and reasonable" in the sense of being either justified based on the cost of providing service or comparable to rates for traditional wireline services. Local telephone companies should not be kept from experimenting with new pricing methods for broadband that are *already* being used by their cable and Internet competitors – for example, rates based on a percentage of the customer's revenue generated using the service, or on the number of clicks or "eyeballs" delivered to a particular customer. In recognition of their non-dominant status, local telephone companies should be free to price their services in nontraditional ways in order to remain competitive.

Relatedly, the Commission should remove the unbundling and other requirements adopted in its *Computer Inquiries* proceeding for use in the traditional narrowband market. Those rules were premised on the conclusion that local telephone companies possessed bottleneck facilities that gave them market power in the narrowband market.

Communications); *International Settlement Rates*, Report and Order, 12 FCC Rcd 19806, 19943, ¶ 295 (1997), *aff'd*, *Cable & Wireless PLC v. FCC*, 166 F.3d 1224 (D.C. Cir. 1999) (establishing benchmark governing international settlement rates).

But in the broadband market, there is no bottleneck and no market power to justify those rules as being "necessary" in the public interest. Accordingly, the Commission should clarify here that, if the basic transmission component of such services must be unbundled (which should not be a requirement), then that component need not be offered under tariff and at cost-justified rates but will instead benefit from the same permissive tariffing and pricing flexibility described above. It would make no sense to remove mandatory tariffing for a service under Title II only to reimpose it under the guise of the *Computer Inquiries*.

Furthermore, the Commission should refrain from imposing obligations on the wholesale side of the broadband business that deter investment and further deployment – for example, unbundling of broadband facilities and services. Because the unbundling issues relating to broadband are being addressed in the *UNE Triennial Review* proceedings,[118] it suffices to say for present purposes that there is no justification under 251(d)(2) for imposing unbundling obligations on already competitive broadband services. Nor should the Commission require local telephone companies to allow collocation at remote terminals – a requirement that inhibits deployment by telephone companies of their own broadband facilities and services. The very real facilities-based competition in the broadband marketplace demonstrates that competing broadband providers can succeed without collocating at remote terminals. Cable modem, satellite and wireless providers obviously access their end-user customers by securing their own space and deploying their own facilities.

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[118] *See Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*, Notice of Proposed Rulemaking, CC Docket Nos. 01-338, 96-98, 98-147, FCC 01-361 (rel. Dec. 20, 2001) ("*UNE Triennial Review NPRM*").

Providing DSL service through remote terminals already costs significantly more than providing DSL service through a central office. This cost difference would be even greater if telephone companies were required to provide unbundled access for line cards at remote terminals, or to try to find some way to allow line cards of other carriers to be collocated there, which the equipment manufacturers have said is not feasible.[119] Line card collocation would increase inventory management costs and other operational costs and complexities, and would require development of costly new operations support system capabilities. Furthermore, there would be added costs and security concerns related to the potential requirement that other providers would be entitled to access these remote locations. Any collocation requirement for remote terminals will require carriers to prepare, power, and condition larger remote terminals with space for potential collocation that may never be used. Because of these concerns, Verizon has to this point significantly constrained its own deployment of DSL capability at remote terminals.

Collocation at remote terminals not necessary for interconnection of broadband or other services. Although certain equipment must be placed within close proximity of the copper subloop facility in order to provide DSL service, it need not be placed in remote terminals, for interconnection with the subloop is not even possible at the overwhelming majority of Verizon's remote terminals. The connection to the subloop must be made

[119] At a public forum on remote terminal collocation held by the Commission, Alcatel referred to the concept of a "universal back plane" that would accommodate multiple types of line cards as "laughable." Public Forum: Competitive Access to Next-Generation Remote Terminals, Transcript at 108 (May 10, 2000). Likewise, Lucent commented that development of a universal back plane would not only be extremely time-consuming, it would also require a redesign of "the whole system management and integration." Id. at 110. Copper Mountain concurred, calling the required modifications "ludicrous." Id. at 111. In short, all of the manufacturers who appeared before the

outside the remote terminal in any event, and requiring collocation within the remote terminal only raises incumbents' costs without actually facilitating interconnection.

Competitive LECs can access the subloop by securing space near the incumbent's "accessible terminal" (i.e., point of access to the subloop) and interconnecting. Alternatives for doing so would include pole mounted cabinets, pedestals, or space in a nearby third-party premises. Verizon has also suggest that, where it has installed DSL capability at its own remote terminals, that competitors could purchase access to the transport service at the central office serving the end user over the hybrid fiber/copper broadband connection at commercially reasonable rates. At a minimum, incumbents should not be required to expend dollars and resources to accommodate "perceived space needs" of competitors outside their central offices. Accordingly, the Commission should decline to interpret Section 251(c)(6) as requiring that collocation take place outside the central offices in remote terminals.

Finally, in order to establish a truly national deregulatory broadband policy, the Commission should pre-empt any state efforts to regulate broadband either directly or indirectly, such as by imputing revenues from or allocating costs to broadband services. It would frustrate the purposes of the Communications Act and the 1996 Act for the Commission to remove significant federal regulatory obstacles to investment in broadband facilities and services only to have the states reimpose a patchwork of investment-deterring regulations of their own. Given the interstate nature of these services, the Commission clearly has authority to prevent that from happening.

Commission stated that the concept of attaching disparate line cards to incumbents' equipment is not a viable concept.

Conclusion

If the Commission should decide to regulate incumbent LEC provision of broadband under Title II, it should recognize that local telephone companies are non-dominant in the broadband market and then use its forbearance and interpretive powers under the Communications Act to remove the disincentives to investment created by the current regime of retail and wholesale regulations.

March 1, 2002

Respectfully submitted,

J.C. Rozendaal

Mark L. Evans
J.C. Rozendaal
KELLOGG, HUBER, HANSEN, TODD & EVANS, P.L.L.C.
Sumner Square
1615 M Street, N.W., Suite 400
Washington, D.C. 20036
(202) 326-7900

Michael E. Glover
Edward Shakin
VERIZON
1515 North Courthouse Road
Suite 500
Arlington, VA 22201-2909
(703) 351-3860

Counsel for Verizon