

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

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**In the Matter of**

**Review of Regulatory Requirements for  
Incumbent LEC Broadband  
Telecommunications Services**

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) **CC Docket No. 01-337**  
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**REPLY COMMENTS OF AT&T CORP.**

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

AT&T Corp. (“AT&T”) respectfully submits these reply comments in response to the Commission’s Notice of Proposed Rulemaking.<sup>1</sup>

**INTRODUCTION AND SUMMARY**

As AT&T and other commenters demonstrated in their initial comments, the ILECs retain pervasive market power in the provision of broadband services to both businesses and residences. Thus, the Commission’s well-established precedents require that the ILECs’ broadband services continue to be subject to dominant carrier regulation. Given the ILECs’ continuing market power, the tariffing, cost-support, and other regulations the ILECs seek to evade are as vital in detecting and deterring market power abuses with respect to broadband services as they are with respect to the ILECs’ other services. Indeed, if anything, the ILEC

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<sup>1</sup> *Review of Regulatory Requirements for Incumbent LEC Broadband Telecommunications Servs.*, 16 FCC Rcd. 22745 (2001) (“Notice”).

market power abuses documented in the comments confirm that greater vigilance in enforcing these dominant carrier regulations is needed to protect consumers and competition.

The RBOCs' contrary claims are based upon the same superficial and flawed analysis that SBC advanced in its Petition. Like the Petition, the RBOC comments fabricate low "market shares" by lumping together services that face competition with services that clearly do not, and they simply ignore direct evidence of their pervasive market power. Like the Petition, the RBOC comments rely entirely on national "share" figures when the relevant markets are plainly local. And like the Petition, the RBOC comments do not seriously address their continuing control over the bottleneck facilities used to provide both broadband and narrowband services or the incentives resulting from the RBOCs' enduring narrowband monopolies. In short, the RBOCs have not seriously attempted to show that *any* service that they provide to *any* customer class in *any* locality qualifies for nondominant status, much less provided the factual support necessary to justify the sweeping finding of nondominance that they seek.

The RBOC comments also confirm that their real aim has little to do with the dominant carrier regulations, which the RBOCs barely even address. Rather, their purpose is to use this proceeding to obtain overly broad – and inaccurate – market power determinations that they would export to other "broadband" proceedings to support rulings that would do even greater harm to consumers. Thus, the RBOCs seek elimination of the *Computer Inquiry* requirements,<sup>2</sup> evisceration of unbundling and collocation obligations,<sup>3</sup> preemption of pro-

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<sup>2</sup> See SBC at 62; Qwest at 59, Verizon at 3.

<sup>3</sup> See BellSouth at 53-55; Verizon at 3-4, 44.

competitive state efforts designed to regulate broadband directly or indirectly,<sup>4</sup> and – perhaps most brazen of all – forbearance from enforcing even the § 201 “just and reasonable” requirement.<sup>5</sup> The Commission should decline all of these anti-competitive requests, which would benefit no one but the RBOCs.

To make matters worse, the RBOCs’ comments make crystal clear that any non-dominance exception for “broadband” services – a term nowhere defined in the *Notice* – would quickly swallow the rule for “narrowband” services, and thus provide the RBOCs with boundless opportunities to evade dominant carrier regulations. SBC, for example, implores the Commission to extend its non-dominance findings: (a) not just to existing “broadband” services, but to all future services, whatever they might be and whenever they are deployed;<sup>6</sup> (b) not just to data services, but to voice services as well; and (c) not just to the large business services at issue, but to DS3 and other special access type circuits,<sup>7</sup> even though the Notice clearly states that special access is beyond the scope of this proceeding.<sup>8</sup> Verizon goes even further, urging a definition of “broadband” that would encompass *all* “packet-switched or successor technology” irrespective of speed<sup>9</sup> – a definition that, as even SBC admits, would encompass “virtually real-

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<sup>4</sup> *See id.* at 46.

<sup>5</sup> *See id.* at 43.

<sup>6</sup> As SBC concedes, however, the Commission flatly rejected such an open-ended approach to rulemaking in its pricing flexibility orders. *See SBC* at 15 (citing 47 C.F.R. § 69.701).

<sup>7</sup> *See SBC* at 14, 17, 23, 25-29.

<sup>8</sup> *See Notice* ¶ 22.

<sup>9</sup> *See Verizon* at 10.

time voice communications,”<sup>10</sup> and practically any private-line service. And BellSouth claims that “[b]roadband is not limited to any specific technology, speed, or provider,” or to always-on technology.<sup>11</sup> Instead, “‘broadband’ equals ‘digital data,’” a term BellSouth defines to include “an enormous range of information” including “words, numbers, voice, audio, pictures, video, etc.”<sup>12</sup> If “broadband” equals “digital data,” and if “digital data” includes anything that can be digitized, then virtually everything is “broadband,” and the proposed exceptions would swallow virtually all telecommunications services.

Finally, the ILECs’ comments confirm the analytical bankruptcy of their claim that dominant carrier regulation is impeding broadband investment. They offer only generalized assertions, directly contrary to all of the evidence and completely unrelated to the relevant dominant carrier regulations. In sharp contrast, AT&T and others have shown that appropriate regulation of market power encourages, rather than discourages, investment.<sup>13</sup>

## **I. ILECs HAVE PERVASIVE MARKET POWER IN THE PROVISION OF BROADBAND SERVICES.**

Any rational analysis of ILEC market power in the context of broadband services must give careful attention to: (1) geographic market boundaries and the varying levels of competition within those boundaries, (2) the incentives and ability that bottlenecks and enduring

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<sup>10</sup> See SBC at 17; *see also id.* at 23 (“[S]ome services in [the large business] market are capable of carrying voice traffic . . .”).

<sup>11</sup> *See id.* at 15 & n.28.

<sup>12</sup> BellSouth at 15.

<sup>13</sup> See AT&T at 67-76; US LEC Corp. at 21-22; Cbeyond and Nuvox at 13, 18; DIRECTV at 13; *see also* Declaration of Robert Willig ¶¶ 8, 19, 26, 75-122, 151-195, in Comments of AT&T Corp., *Review of the Section 251 Unbundling Obligations*, CC Docket No. 01-328 (FCC filed Apr. 5, 2002).

voice monopolies give ILECs both to leverage market power and otherwise to act anti-competitively, and (3) actual market experience and ILEC conduct that contradicts the ILECs' claim that they lack the incentives and ability to exercise market power.<sup>14</sup> Once these factors are taken into account, it is clear that the RBOCs retain pervasive market power over broadband services because markets are undeniably local and there is little intermodal competition in many of these local markets; RBOCs' voice monopolies give them powerful incentives to raise broadband prices above competitive levels even in the face of limited intermodal competition; and the marketplace evidence is consistent with these incentives, not the RBOCs' unsupported claim that they lack the ability and incentive to raise prices.<sup>15</sup> The RBOC comments, like the SBC Petition, ignore all of these vital considerations.

*Local Geographic Markets.* As AT&T explained in its initial comments, the relevant markets must be local because consumers can buy broadband (or narrowband) services only from providers that offer those services in their local communities.<sup>16</sup> Indeed, the RBOC economists concede that the economically relevant markets are, in fact, local.<sup>17</sup> Nevertheless, they argue that, for "federal policy-making" purposes, it is appropriate to "think in terms of a

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<sup>14</sup> See AT&T at 13-19, 43-48.

<sup>15</sup> See *id.*

<sup>16</sup> See *id.* at 16; see also *Applications for Consent to the Transfer of Control of Licenses and Section 214 Authorizations by Time Warner Inc. and America Online, Inc., Transferors, to AOL Time Warner Inc., Transferee*, Mem. Opinion and Order, 16 FCC Rcd 6547, ¶ 74 (2001) ("AOL-Time Warner Merger Order") ("The relevant geographic markets for residential high-speed Internet access services are local. . . . [T]he only way to obtain different choices is to move.").

<sup>17</sup> See Qwest, Haring-Shooshan Statement at 7; see also SBC at 32.

national orientation.”<sup>18</sup> This is nonsense and completely contradicted by Commission precedents, which make clear that “federal policy-making” must be based on sound economic principles. The Commission has repeatedly and correctly held that the application of dominant carrier regulations requires a rigorous assessment of the relevant markets.<sup>19</sup> More specifically, the Commission has made clear that the “first step” in competition analysis is “to define the relevant product and geographic markets” by following the well-established economic principles set forth in the DOJ/FTC 1992 Merger Guidelines, and any reasoned application of these guidelines yields local and point-to-point, not national, markets.<sup>20</sup>

The ILECs contend that a national focus is legitimate because there is no credible evidence of a lack of competition in any local markets.<sup>21</sup> Yet, as AT&T and others have demonstrated, the RBOCs face *no* real competition for many customers. The RBOCs have virtually monopolized the data business of the large business customers for whom they have

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<sup>18</sup> See Qwest, Haring-Shooshan Statement at 7

<sup>19</sup> *Regulatory Treatment of LEC Provision of Interexchange Servs. Originating in the LEC's Local Exchange Area*, Second Report and Order, 12 FCC Rcd. 15756, ¶ 28 (1997) (“[M]arket power is determined by delineating both the product and geographic market in which power may be exercised and, then, identifying those firms that are current suppliers and those firms that are potential suppliers in that particular market.”); see also *Motion of AT&T Corp. To Be Reclassified as a Non-Dominant Carrier*, Order, 11 FCC Rcd. 3271, ¶¶ 19-34 (1995); Order, *Motion of AT&T Corp. to be Declared Non-Dominant for International Service*, 11 FCC Rcd. 17963, ¶¶ 30-35 (1996) (“*AT&T International Reclassification Order*”); Notice ¶ 18 (“[O]ur goal is to rigorously define the relevant markets so as to include all reasonably substitutable services.”).

<sup>20</sup> See Memorandum Opinion And Order, *Applications Of NYNEX Corp., Transferor, And Bell Atlantic Corp., Transferee, For Consent To Transfer Control Of NYNEX Corp., And Its Subsidiaries*, 12 FCC Rcd. 19985, ¶ 50 (1997).

<sup>21</sup> See SBC at 32; Qwest at 26-29; see also Verizon at 22-24.

been allowed to compete.<sup>22</sup> And cable is not an option for small businesses and many residential customers.<sup>23</sup> As the Commission recently reported, the factual record demonstrates that competition “is not uniform across the nation.”<sup>24</sup>

Nor is it true, as Qwest suggests, that local markets can be analyzed in the aggregate because prices do not vary geographically.<sup>25</sup> SBC, for example, charges region-specific prices for its DSL services. SBC SNET, which covers New England, charges between \$5 and \$15 less for its services than do SBC Pacific Bell and SBC Southwestern Bell.<sup>26</sup> Similarly, Verizon charges more for its business DSL services in some parts of the country than it does in others.<sup>27</sup> Moreover, eliminating tariffs and cost support (and the transparency they provide) would only increase the likelihood of discrimination by limiting the Commission’s ability to detect price variations and to determine whether they are legitimately cost-based, as

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<sup>22</sup> See AT&T at 23-31; see also *infra* at 10-15.

<sup>23</sup> See AT&T at 40-43; see also Covad at 18 (“If DSL is not available in Rochester, its availability in New York [City] is not a substitute. . . . The Commission should reject SBC’s suggestion that the relevant geographic area include its entire region.”); WorldCom at 10 (“WorldCom agree with the FCC’s conclusion in the *AOL/Time Warner Merger Order* that ‘[t]he relevant geographic markets for residential high-speed Internet access services are local.’”) (quoting *AOL-Time Warner Merger Order* ¶ 74).

<sup>24</sup> *Inquiry Concerning the Development 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*, Second Report, 15 FCC Rcd 20913, ¶ 1 (2000) (“*Second Section 706 Report*”).

<sup>25</sup> See Qwest at 28.

<sup>26</sup> Compare, e.g., [www.snet.com/DSL\\_new/content/0,5289,3,00.html](http://www.snet.com/DSL_new/content/0,5289,3,00.html); [www.snet.com/DSL\\_new/content/0,5289,10,00.html](http://www.snet.com/DSL_new/content/0,5289,10,00.html); with [www.pacbell.com/DSL\\_new/content/0,5289,3,00.html](http://www.pacbell.com/DSL_new/content/0,5289,3,00.html); [www.pacbell.com/DSL\\_new/content/0,5289,10,00.html](http://www.pacbell.com/DSL_new/content/0,5289,10,00.html), and [www.swbell.com/DSL\\_new/content/0,5289,3,00.html](http://www.swbell.com/DSL_new/content/0,5289,3,00.html); [www.swbell.com/DSL\\_new/content/0,5289,10,00.html](http://www.swbell.com/DSL_new/content/0,5289,10,00.html).

<sup>27</sup> Compare [www2.verizon.net/pands/business/dslpricing.asp](http://www2.verizon.net/pands/business/dslpricing.asp), with [www.verizon.net/pands/e/small\\_business/internet\\_access/dsl/pricing.asp](http://www.verizon.net/pands/e/small_business/internet_access/dsl/pricing.asp).

§ 201 of the Act requires. Indeed, Verizon brazenly requests that the Commission forbear from applying § 201 at all, suggesting that it has every intention of charging higher prices where it faces less or no competition.

*Bottleneck Facilities.* The ILECs' discussions of bottleneck facilities are no more persuasive or logical. According to SBC, the fact that ILECs have been competing in the broadband services market for years and purportedly have not acquired market power is indisputable proof that they no longer control bottleneck facilities.<sup>28</sup> Yet SBC overlooks the fact that the ILECs now possess nearly unfettered control over all large business markets in which they are allowed to compete, and have recently demonstrated that they can profitably raise price on the broadband services they provide to residential consumers and small businesses.<sup>29</sup> SBC also contends, without any citation or authority, that intermodal competition is pervasive and that ILECs' competitors do not even use ILEC access services.<sup>30</sup> However, as AT&T and others demonstrated in their initial comments, intermodal competition for business services remains insignificant, intermodal competition for residential services varies geographically, and, consequently, CLECs and IXCs are often entirely dependent on ILEC facilities.<sup>31</sup> Nor is it true

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<sup>28</sup> See SBC at 48.

<sup>29</sup> See AT&T at 4, 19-36.

<sup>30</sup> See SBC at 50-51.

<sup>31</sup> See AT&T at 26-31; Fea/Taggart Decl. ¶ 6; Benway Decl. ¶ 6; Ad Hoc at 14-17; Time Warner at 6-7. Today, for the "backbone" portion of AT&T's local network, AT&T almost never self-provides DS1 transport and self-provides DS3 transport only a small minority of the time. Likewise, for the local loops used to provide connectivity between the customer's premise and the local serving office, AT&T provides only a tiny fraction of its DS1s entirely on its own network. The remaining service is provided almost exclusively by utilizing the facilities of the ILECs. See AT&T at 26-31.

that price cap regulation serves as a check on ILECs' ability to raise prices on bottleneck facilities;<sup>32</sup> the pricing flexibility order has taken away that protection with regard to special access facilities.<sup>33</sup> The Commission's complaint process and the antitrust laws have likewise failed to constrain the ILECs,<sup>34</sup> which view any penalties as mere costs of doing business.<sup>35</sup>

Qwest and Verizon present equally fallacious claims. According to Qwest, ILEC rivals are too big to be pushed out of the market, are not relying on ILEC facilities, and would easily be replaced by new entrants in the event any such rival exited the market.<sup>36</sup> According to Verizon, vigorous competition and sunk costs in new facilities preclude the ILECs from leveraging control of their bottleneck facilities.<sup>37</sup> But that logic could apply only to competition from cable providers. This claim thus runs headlong into the same competitive realities described above, i.e., that the RBOCs do not face such competition in all areas or for all customer classes and that the cable competition that does exist plainly has not constrained the RBOCs' incentives to raise prices.

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<sup>32</sup> See SBC at 51.

<sup>33</sup> See generally *Access Charge Reform, Price Cap Performance Review for Local Exchange Carriers, Interexchange Carrier Purchases of Switched Access Servs. Offered by Competitive Local Exchange Carriers, Petition of U.S. West Communications, Inc., for Forbearance from Regulation as a Dominant Carrier in the Phoenix, Arizona MSA*, Fifth Report and Order and Further Notice of Proposed Rulemaking, 14 FCC Rcd. 14221, ¶¶ 71-76 (1999).

<sup>34</sup> See SBC at 49.

<sup>35</sup> See AT&T at 54 n.170.

<sup>36</sup> See Qwest at 46-48.

<sup>37</sup> See Verizon at 22.

*Actual Market Experience.* Finally, sticking their heads further in the sand, the ILECs contend that they lack the ability to raise price.<sup>38</sup> As it happened, however, there *was* a price increase – a 25% price increase – that is flatly inconsistent with the RBOCs’ claim that they lack the incentive and the ability to exercise market power.

**A. Large Business Services.**

The initial comments demonstrate overwhelmingly that the ILECs possess, and will continue to possess, market power in the provision of advanced data services to large business customers.<sup>39</sup> Due to their continued domination of the special access facilities upon which retail data services are so critically dependent,<sup>40</sup> the ILECs have obtained a *90 percent* share of the local markets, in which they have been allowed to compete.<sup>41</sup> Control over bottleneck special access facilities enables ILECs to leverage their power into the provision of retail data services, and they have proven only too willing to use that leverage to increase their special access rates to levels that make it virtually impossible for rival carriers to compete,<sup>42</sup> and to hamper rivals with poor quality interconnections and unnecessary delays.<sup>43</sup>

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<sup>38</sup> *See id.* at 17; Qwest at 36.

<sup>39</sup> *See* AT&T at 19-35; Ad Hoc at 10-21; Competitive Telecommunications Association at 15-19; Time Warner at 5-10; WorldCom at 22-25; NYPSC at 1-2 (“ILECs still possess market power over the platform needed to provide telephone broadband services.”).

<sup>40</sup> *See* AT&T at 26-30; Time Warner at 9-10 (“[C]ontrol over bottleneck [special access] facilities . . . gives ILECs the incentive and opportunity to engage in anticompetitive conduct in the provision of broadband services to medium and large business customers in the future.”).

<sup>41</sup> *See* AT&T at 24-25.

<sup>42</sup> *See* AT&T at 31-33; Ad Hoc at 11-13; WorldCom at 25.

<sup>43</sup> *See* AT&T at 34-36; WorldCom at 18-19.

The RBOCs do not seriously challenge this showing of market power. Instead, they respond principally by trying to re-define the relevant market as the entire nation.<sup>44</sup> But as the ILECs themselves unwittingly confirm, national market share statistics – and the “market share” evidence cited by their economists<sup>45</sup> – are wholly irrelevant to this proceeding. Because § 271 precludes ILECs from competing in long-distance markets absent Commission approval,<sup>46</sup> the relevant focus must be on the areas where the law permits an ILEC presence, and in these areas the ILECs have achieved 90 to 100 percent market shares.<sup>47</sup> Indeed, the very study on which SBC and other ILECs rely concludes that “[t]he RBOCs will continue to dominate.”<sup>48</sup>

The ILECs also try to downplay their power over large business services by asserting that customers for these services “know their competitive alternatives and shop around.”<sup>49</sup> But the comments of the ILECs’ customers rebut that claim. These customers make clear that even after shopping around they typically have no real choice other than the ILECs, because the ILECs have abused their control over bottleneck special access inputs to drive potential competitors out of the business. Thus, Ad Hoc states that its members have “no competitive alternatives to ILEC services to meet their broadband business services requirements

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<sup>44</sup> See SBC at 42; Qwest at 43; Verizon at 19-24.

<sup>45</sup> See Qwest, Haring-Shooshan Statement at 10 (asserting *ipsi dixit* that large business services are provided “primarily by the large long-distance carriers (AT&T, WorldCom and Sprint),” which “account for about 70 percent of the [national] market.”)

<sup>46</sup> See BellSouth at 44; Qwest at 43-44; Verizon at 21.

<sup>47</sup> See AT&T 24-25; Willig Decl. ¶ 68 (explaining that national market shares reveal nothing about the true extent of the ILECs’ market power).

<sup>48</sup> IDC, U.S. Packet/Cell-Based Services Market Forecast and Analysis, 2000-2005, at 28, 34-35 (2001).

<sup>49</sup> SBC at 43; see also Qwest at 44; Verizon at 21.

in the overwhelming majority of their service locations.”<sup>50</sup> Moreover, “[e]ven where competitive alternatives are nominally ‘available,’ [Ad Hoc] members are able to make little use of those competitor services, for a variety of reasons,” including service quality, reliability, security, network ubiquity, and price.<sup>51</sup>

The ILECs, however, ignore this overwhelming evidence and persist in arguing that they do not dominate special access facilities.<sup>52</sup> This contention has been rejected by both this Commission and various state commissions,<sup>53</sup> and is belied by the evidence submitted by AT&T and other commenters.<sup>54</sup> As Time Warner documents, the ILECs’ continuing control over these local bottleneck facilities is confirmed, not only by the Commission’s *2002 Local Telephone Competition Report*, but also by the recent *Section 706 Report*.<sup>55</sup>

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<sup>50</sup> Ad Hoc at 14; *see also* AT&T at 28-29 (citing the findings of the NY PSC that Verizon remains the dominant provider of bottleneck special access facilities in all of New York, including lower Manhattan).

<sup>51</sup> Ad Hoc at 14-16; *see also* AT&T at 27-28; WorldCom at 29 (“[T]he vast majority of commercial office buildings can be reached only over SBC facilities.”)

<sup>52</sup> SBC at 52; Qwest at 52.

<sup>53</sup> *See, e.g., UNE Remand Order* ¶ 182; *see also id.* ¶ 321 (“[S]elf-provisioned transport, or transport from non-incumbent LEC sources, is not sufficiently available as a practical, economic and operational matter.”). *Proceeding on Motion of the Commission to Investigate Methods to Improve and Maintain High Quality Special Services Performance by Verizon New York Inc., Opinion and Order Modifying Special Services Guidelines for Verizon New York Inc., Conforming Tariff, and Requiring Additional Performance Reporting*, NY PSC Case 00-C-2051, at 6 (June 15, 2001) (“*NYPSC June Special Services Order*”).

<sup>54</sup> *See* AT&T at 26-28; WorldCom at 23-24. Qwest’s economists assert that the advent of gigabit ethernet reduces ILECs’ dominance of bottleneck facilities. Qwest, Haring-Shooshan Statement at 11-12. However, as with other large-business data services, gigabit ethernet services generally cannot be delivered without access to the local loops, almost all of which are controlled by the ILECs.

<sup>55</sup> *See* Time Warner at 6. The Commission should also quickly reject the makeweight argument advanced by economists Haring and Shooshan, who contend that ILECs lack market power in  
(continued ...)

The comments also confirm that bottleneck leveraging is not merely a theoretical concern, but a prevailing ILEC practice that will only get worse as ILECs obtain interLATA authority. There are numerous geographic areas, for example, where the ILEC special access charges that AT&T incurs are higher than the *retail* price that the ILEC is charging customers directly for its intraLATA frame relay or ATM ports.<sup>56</sup> In the face of such evidence, the ILECs' unsubstantiated claim that a price squeeze could never happen is simply not credible.

The ILECs' special access pricing does not remotely resemble what would be found in a competitive market.<sup>57</sup> In fact, the ILECs' special access prices have risen in those areas where ILECs received pricing flexibility – just the opposite of what would happen if there were true competition.<sup>58</sup> “The principal reason for these increases is the fact that, notwithstanding the ‘standards’ established by the Commission as threshold qualifications for pricing flexibility, the reality is that mere satisfaction of those standards does not a competitive market make.”<sup>59</sup> As Ad Hoc observes, “The fact that ILECs were able to raise prices in MSAs for which they received regulatory flexibility underscores the complete lack of competition in those markets, despite the Commission’s confidence that competition was present.”<sup>60</sup> Thus,

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(... continued)

the large business data services market because competitors can buy access to ILEC last-mile facilities at regulated rates. *See* Qwest Haring-Shooshan Statement at 9-10. The ILECs cannot rely on regulated rates – an aspect of dominant carrier regulation – as a reason why they should be treated as non-dominant.

<sup>56</sup> *See* AT&T at 32-33; Benway Decl. ¶ 13.

<sup>57</sup> *See* Ad Hoc at 11.

<sup>58</sup> *See id.* at 13; AT&T at 31; WorldCom at 25.

<sup>59</sup> Ad Hoc at 12.

<sup>60</sup> *Id.* at 13.

contrary to the ILECs' naive and unsupported claim, their actual marketplace behavior makes a compelling case against the complete deregulation they seek, and in favor of re-imposing a strict price cap regime.<sup>61</sup>

The ILECs' non-price discrimination is also well documented<sup>62</sup> and further confirms that the ILECs are exploiting their special access bottlenecks to gain market power in the provision of data services to large businesses.<sup>63</sup> There is thus no basis for the Commission to find that the ILECs will behave any differently once they obtain § 271 authority. In fact, the ILECs' incentives to discriminate will only increase. The ILECs will still control the last-mile facilities, and they will still have the incentive and ability to abuse their position through price squeezes and other discriminatory conduct. Indeed, given the ILECs' continuing pattern of anti-competitive activities, Verizon's pledge that it would maintain an "open network" in the absence

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<sup>61</sup> *See id.* at 25.

<sup>62</sup> *See* AT&T at 34-36 (describing poor quality, delays, and other discrimination in favor of the ILECs, their affiliates and their retail customers); WorldCom at 18-19 (explaining that SBC has restricted the availability of unbundled loops and transport and has failed to provide such facilities in a timely manner). Last year, in a related proceeding, commenters catalogued the ILECs' myriad, flagrant abuses of market power that have thwarted ISPs' opportunities to compete. *See Computer III Further Remand Proceedings: Bell Operating Company Provision of Enhanced Services*, CC Docket No. 95-20 ("*Refresh the Record*"). The commenters demonstrated that ILECs have imposed burdensome ordering systems on unaffiliated ISPs, practiced reprehensible marketing tactics, prevented customers from switching to competitors, discriminated in the provisioning of DSLAM ports and in the dissemination of information necessary to compete, and provided abysmal installation, maintenance, and repair. *See, e.g.,* Earthlink, Inc. in *Refresh the Record* at 13-18; CISPA in *Refresh the Record* at 10-29; AISPA in *Refresh the Record* at 10-13; eVoice, Inc. in *Refresh the Record* at 14-21.

<sup>63</sup> *See* Notice ¶ 29; *Applications of Ameritech Corp., Transferor, and SBC Communications Inc. Transferee*, Memorandum Opinion and Order, 14 FCC Rcd. 14712, ¶ 107 (1999) ("*SBC-Ameritech Merger Order*"); *see also* Willig Decl. ¶ 70 ("Furthermore, they will have both the incentive and the ability to discriminate against competing carriers in providing the inputs necessary to offer broadband services.").

of regulation<sup>64</sup> is nothing short of absurd. Letting the fox guard the hen house has never been sound regulatory policy – especially where, as here, the fox has already consumed most of the flock.

**B. Mass Market Services.**

The ILECs’ arguments regarding the mass market are no more persuasive. Once it is recognized that markets are local and that the level of competitive activity varies widely (and is virtually nonexistent in some areas), it is clear that there can be no across-the-board finding that ILECs lack market power. The ILECs, moreover, never confront the direct evidence of their continuing market power, including the recent 25% price increase for DSL services, or the anticompetitive incentives created by their enduring narrowband monopolies.

The wholesale mass market is even less competitive. As the ILECs’ customers demonstrate in their initial comments, the ILECs are the *only* significant providers of wholesale services.

**1. Services Provided at “Retail” to Consumers and Small Businesses.**

Because “[f]ew businesses are served by cable,”<sup>65</sup> there is almost no intermodal competition for small businesses.<sup>66</sup> Furthermore, because cable modem service is unavailable to 30% of all U.S.

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<sup>64</sup> Verizon at 7.

<sup>65</sup> Willig Decl. ¶ 20.

<sup>66</sup> See, e.g., AT&T at 40-41 Public Service Commission of Wisconsin at 4 (“DSL dominates the small business portion of the mass market.”); Covad at 15 (“Cable modems, satellites and fixed wireless are not available substitutes for these businesses.”); ALTS at 6 (“There is no intermodal alternative to the ILEC’s services . . . .”); IP Communications Corporation at 3 (“[C]able is not a substitute” for “a business that generally does not have cable access.”); WorldCom at 12 (“[C]able-based high-speed Internet access is rarely available to small business customers because cable plant generally is restricted to residential neighborhoods.”).

homes,<sup>67</sup> many residential customers have no alternative to DSL, which is provided almost exclusively by the ILECs.<sup>68</sup> These facts alone doom SBC's request for an across-the-board determination of non-dominance. Rather, the proper inquiry is "whether, *in a particular arena*, the incumbent LEC has demonstrated that it has neither the ability profitably to raise price by restricting its own output nor the ability to raise price profitably by raising its rivals' costs."<sup>69</sup>

The ILECs offer no cogent argument to the contrary. Instead, they simply parrot the superficial and erroneous analysis that SBC offered in its Petition. As the ILECs would have it, cable and DSL compete head-to-head throughout the entire nation without exception. The reality, however, is that the two platforms today compete for only *one-third* of American

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<sup>67</sup> See *Inquiry Concerning the Deployment of Advanced Telecommunications Capability to All Americans in a Reasonable and Timely Fashion, and Possible Steps to Accelerate Such Deployment Pursuant to Section 706 of the Telecommunications Act of 1996*, Third Report, FCC 02-33, 2002 WL 186930 ¶ 46 (Feb. 6, 2002) ("*Third Section 706 Report*"); see also *id.* ¶¶ 35, 109 (noting great disparities in high-speed subscribership at different population densities). Contrary to SBC's claim, the National Cable & Telecommunications Association ("NCTA") did not project that, by the end of 2002, 90 percent of homes passed by cable will have access to cable modem service. See SBC at 33. Rather, the NCTA merely reported an analyst's prediction. See *Cable & Telecommunications Industry Overview 2001*, National Cable & Telecommunications Association, at 2 (2001). Non-dominance findings cannot be based on an analyst's prediction of availability, but only on actual availability. Indeed, in past cases, the Commission made across-the-board non-dominance findings only *after* several facilities-based alternatives existed. See, e.g., *Motion of AT&T Corp. To Be Reclassified as a Non-Dominant Carrier*, Order, 11 FCC Rcd. 3271 (1995).

<sup>68</sup> See AT&T at 43 n.127; MoPSC at 3 (noting that SBC provides 90% of all DSL in Missouri); Fred Williamson at 9 ("The rural market is also characterized by an absence of significant intramodal and intermodal broadband competition in the residential and small and medium sized business market."); ALTS at 6 ("There are still a large number of residential areas where no cable modem alternative exists. In those areas, the ILEC clearly remains the dominant broadband provider.").

<sup>69</sup> Willig Decl. ¶ 36 (emphasis added) (citing *Notice* ¶ 28).

homes.<sup>70</sup> The ILECs also ask the Commission to believe that satellite and wireless services will check ILEC dominance. In fact, high-speed wireless services have encountered difficulties obtaining acceptance and – while showing great promise – are currently inadequate to constrain RBOC market power.<sup>71</sup> High-speed satellite services have experienced technical problems that have slowed down their acceptance.<sup>72</sup> Moreover, DIRECTV itself needs to purchase wholesale DSL from the ILECs,<sup>73</sup> which confirms that satellite broadband cannot be relied upon to constrain RBOC market power.<sup>74</sup>

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<sup>70</sup> See McKinsey & Co. and J.P. Morgan Chase & Co., H&Q, *Broadband 2001: A Comprehensive Analysis of Demand, Supply, Economics, and Industry Dynamics in the U.S. Broadband Market*, at 40-43 (Apr. 2, 2001); see also Cbeyond and Nuvox at 28 (“[T]he number of markets where cable and DSL providers are in direct competition with each other is relatively small.”).

<sup>71</sup> See Cahners In-Stat Group, *U.S. Residential DSL Continues to Grow Despite Turmoil*, at 26-27 (Oct. 2001); Eric Knorr, *Mobile Web vs. reality*, *MIT Technology Review* (June 1, 2001) (“Stray beyond urban areas, furthermore, and it’s hard to imagine a nanocell on every fifth fence post.”); Nikhil Hutheesing, *We Have Seen the Future – And It Works*, *Best of the Web*, Forbes, Mar. 25, 2002, at 4 (only Verizon Wireless has launched its 3G network and has priced it “in the stratosphere,” with a basic charge of \$30 per month plus 16 cents per minute).

<sup>72</sup> See Cahners In-Stat Group, *U.S. Residential DSL Continues to Grow Despite Turmoil*, at 27 (Oct. 2001); The Yankee Group, *Digital Broadcast Satellite: Market Maturation Underscores New Challenges* 7-8 (Dec. 2001); IP Communications Corporation at 3 (wireless and satellite broadband capabilities “suffer from geographic and climatic limitations,” and are “generally far more expensive than DSL.”); *DirecWay Sub. Growth Slips*, *Broadband Intelligence*, at [http://www.broadband-daily.com/subscribers/index.htm?article\\_id=3347](http://www.broadband-daily.com/subscribers/index.htm?article_id=3347) (Hughes’ satellite broadband arm, DirecWay, adds fewer subscribers each quarter); Cbeyond and Nuvox at 27 (“[D]eployment data show that the provision of high-speed services over satellite technology is still in the early stages of deployment, and that these services are generally marketed to residential customers.”).

<sup>73</sup> See DIRECTV at 2, 7.

<sup>74</sup> See also *Echostar and SBC Join to Market Bundled Broadband Services*, *Communications Daily*, at 5-6 (April 18, 2002) (“Analysts have been predicting possible EchoStar link with DSL provider, citing desire by EchoStar CEO Charles Ergen to ‘prove that satellite Internet can’t survive without merger.’ Hughes CEO Jack Shaw said in recent interview that without deal, he

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Attempting to gloss over this reality, Qwest argues that, under the Commission’s decision in the *AT&T International Reclassification Order*, a finding of non-dominance is permissible if “barriers to potential competition are low and . . . competition is expected to develop.”<sup>75</sup> In fact, the *AT&T International Reclassification Order* simply underscores the impropriety of the relief the ILECs seek. In that order, the Commission found that there was a “*strong possibility that more than one U.S. facilities-based carrier w[ould] soon enter [the relevant] markets,*” that there was “*no evidence in the record to suggest that there [we]re substantial barriers to entry which impede potential competitors from entering immediately,*” and that “*the tariffed rates to [the relevant markets] [we]re not out of line*” with those in competitive markets.<sup>76</sup>

Here, in stark contrast, there is almost no possibility that even cable (let alone multiple facilities-based carriers) will soon serve small business or all residential customers. To the contrary, there is overwhelming evidence – namely the years it has taken cable companies to roll out their broadband services – that barriers preclude “immediate[.]” entry. Moreover, the commenters here have submitted compelling proof that the ILECs’ DSL rates are not cost-based and are indicative of market power that ILECs are using to preclude market entry. Indeed, it is clear that ILECs, which own the wires used to provide virtually all of the immensely profitable second lines used for narrowband Internet services, have strong incentives to slow-roll

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didn’t see continued investment in satellite Internet. . . . At \$70 per month, satellite Internet business was losing money, EchoStar spokesman said.”).

<sup>75</sup> Qwest at 35 (emphasis omitted).

<sup>76</sup> *AT&T International Reclassification Order* ¶ 96 (emphasis added).

broadband acceptance, because it poses a threat to these services.<sup>77</sup> Recent developments indicate that these anti-broadband incentives have won out over any countervailing incentives ILECs possess. As New Edge reports, the ILECs have “restrict[ed] their output by limiting their DSL product offering to line-shared ADSL services only” and by failing to “condition loops in order to qualify a customer for DSL service.”<sup>78</sup> Led by SBC, moreover, ILECs lowered prices in response to the DLECs’ aggressive DSL roll-outs,<sup>79</sup> only to raise prices by a staggering 25% as soon as the DLECs were driven from the market.<sup>80</sup> As Cbeyond and Nuvox state, “[w]hen the ILECs perceive competition, they engage in aggressive roll-outs, including slashing their prices,” but “[w]hen the competition is gone, [the ILECs] revert to the *status quo ante*, going back to their prior high rates.”<sup>81</sup>

These real world facts refute ILEC claims that “the defections of DSL customers to cable modem service, satellite, and fixed wireless operations”<sup>82</sup> that would accompany DSL

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<sup>77</sup> See AT&T at 44-45. As Professor Willig explains, broadband services pose a serious threat to the ILECs’ narrowband revenues. Willig Decl. ¶¶ 81-85. Even the ILECs’ own DSL services, which the ILECs reluctantly launched in response to the DLECs, draw customers away from their more profitable narrowband access lines. *Id.* As customers cancel second lines, ILEC profits diminish. Verizon recently reported, for example, that it lost 2% of its access lines last year, due, in part, to customers who switched to DSL, and that DSL sales did not fully offset this access line loss. See *Verizon Plans 2 More Sec. 271 Applications This Month*, *Washington Telecom Newswire* (Mar. 13, 2002).

<sup>78</sup> New Edge at 5.

<sup>79</sup> See *PacBell Starts Price War to Secure Piece of DSL Market*, *Business Journal* (Feb. 18, 2001); *Verizon Slashes DSL Prices in Some Areas*, *CNET News.com* (Sept. 5, 2000).

<sup>80</sup> See AT&T at 45-46; Cbeyond and Nuvox at 22.

<sup>81</sup> Cbeyond and Nuvox at 22.

<sup>82</sup> Verizon at 17.

price increases mean that “ILECs could not profitably increase prices.”<sup>83</sup> As the Missouri Public Service Commission reports, “market power for ILECs in relationship to the provisioning of broadband telecommunications services is strong and is likely to remain strong until consumers successfully switch to services provided via some alternative method.”<sup>84</sup>

In any event, the ILECs’ claim that narrowband services should be excluded from the relevant market because they are distinct from broadband services is meritless, and when all Internet services are considered, the ILECs’ continuing dominance cannot be doubted. Verizon’s economists contend that some Internet content “can only be provided efficiently on broadband services.”<sup>85</sup> As the Yankee Group points out, however:

[B]roadband has yet to be defined by users in terms of the applications or services that high-speed access enables. Less than 2% of those surveyed cited listening to music online, watching video, or playing games as either a primary or secondary reason for subscribing to high-speed access services.<sup>86</sup>

For the most part, broadband subscribers use the Internet for essentially the same purposes as narrowband subscribers.<sup>87</sup> Although broadband has “greater speed” and is ‘always on,’<sup>88</sup> the dial-up alternative has its own advantages. For example, if the customer has a second line for

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<sup>83</sup> Qwest at 36.

<sup>84</sup> MoPSC at 6.

<sup>85</sup> Carlton-Sider Decl. ¶ 17.

<sup>86</sup> Yankee Group Press Release, *Streaming Music, Video Are Not Pulling in Broadband Subscribers, but Offering Secondary Benefit* (Oct. 22, 2001).

<sup>87</sup> See U.S. Dep’t of Commerce, *A Nation Online: How Americans Are Expanding Their Use of the Internet* at 41 (2002); see also AT&T at 18-19, 39-40.

<sup>88</sup> Qwest, Harris-Shooshan Statement at 5; Willig Decl. ¶ 126.

Internet access, that line can also be used for voice calls or a fax machine.<sup>89</sup> In addition, a customer with dial-up service can access the Internet from any telephone; a cable modem or DSL customer, by contrast, only has broadband access from home.<sup>90</sup>

But even if broadband is the “better” product, consumers often consider a slightly “inferior” product to be a substitute for a “superior” one as long as it is priced accordingly and provides comparable functionality. In the landmark case of *United States v. E.I. du Pont de Nemours & Co.*, 351 U.S. 377, 399 (1956), the Supreme Court rejected the claim that cellophane is in a different market from other wrapping materials because, “despite cellophane’s advantages, it has to meet competition from other materials.” In *FTC v. Owens-Illinois, Inc.*, 681 F. Supp. 27 (D.D.C.), *vacated as moot following completion of merger*, 850 F.2d 694 (D.C. Cir. 1988), the court held that glass containers were in the same market as metal and plastic containers, despite obvious differences in features and the fact that *some* customers would only purchase glass, because there was *enough* competition between the different materials. *See also United States v. Gillette Co.*, 828 F. Supp. 78 (D.D.C. 1993) (refusing to limit the market to fountain pens, even though some customers would purchase nothing else, because many other customers would “substitute other modes of writing”). In short, the ILECs cannot justify their proposed market definition simply by pointing to differences in the features supported by broadband and narrowband, or by showing that *some* customers do not regard the two as reasonable substitutes.<sup>91</sup>

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<sup>89</sup> *See* Willig Decl. ¶ 126.

<sup>90</sup> *See id.*

<sup>91</sup> Indeed, the RBOCs typically offer DSL at several speeds. *See* Willig Decl. ¶ 132. No one seriously disputes that the faster DSL connection is in the same product market as the slower  
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Nor does it matter that narrowband and broadband use “different facilities and equipment.”<sup>92</sup> As SBC’s economists recognize, cable modem and DSL services are in the same market, yet they each use different facilities.<sup>93</sup> What is relevant is the capabilities these facilities provide to consumers. Here, the facilities provide consumers with the same thing – access to the public Internet.<sup>94</sup>

Finally, despite the ILECs’ assertions, narrowband and broadband services are comparably priced. In contending otherwise, the ILECs’ economists make a comparison that improperly excludes the cost of telephone access.<sup>95</sup> As they are ultimately forced to concede, however, the correct comparison is between the price of broadband and the price of narrowband including the cost of a second line.<sup>96</sup> According to Carlton and Sider, the typical second line cost \$27 per month and Internet access (minus the cost of any proprietary content) ranges from \$0 - \$12 per month.<sup>97</sup> Even if this were the relevant range, the total narrowband cost per month

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DSL connection. “Despite the trade-off between price and speed, they are in the same market – just as broadband and narrowband should be treated as part of the same market despite the trade-off between price and speed.” *Id.*

<sup>92</sup> Crandall-Sidak Decl. ¶ 17.

<sup>93</sup> *See id.* ¶¶ 33-39.

<sup>94</sup> *See* Willig Decl. ¶ 43.

<sup>95</sup> *See* Carlton-Sider Decl. ¶ 17.

<sup>96</sup> *See id.* n.27. This fact is also the complete answer to the surveys cited by Haring and Shooshan that show that one of the reasons consumers chose broadband over narrowband is to “free[]-up the phone line.” Qwest, Harris-Shooshan Statement at 5-6. Narrowband access plus a second phone line “free[s] up” the primary line just the same as DSL or cable modem service.

<sup>97</sup> *See* Carlton-Sider Decl. ¶ 17 n.27.

would be comparable to cable modem services.<sup>98</sup> But the relevant range of narrowband Internet access services prices is much higher. Free Internet access has largely disappeared,<sup>99</sup> and most quality providers charge more than \$12 per month.<sup>100</sup> According to Forrester, the price differences are fairly small even after recent DSL price increases. “For consumers who maintain a second phone line for dial-up access to the Internet, the additional cost of moving to broadband is less than \$10.”<sup>101</sup> Other analysts have found that cable modem service could actually be cheaper than dial up access.<sup>102</sup>

Thus, no meaningful distinction can be made between “broadband” and “narrowband.”<sup>103</sup> At most, the ILECs can demonstrate that there is a price-quality continuum of

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<sup>98</sup> See, e.g., <http://www.comcast.com> (last visited Apr. 19, 2002) (Comcast high speed access services offered at \$39.95 per month); <http://www.cox.com/kansas/roadrunner/Pricing%20and%20Install%20Plans.asp> (last visited Apr. 19, 2002) (Cox high-speed access offered at \$34.95); [http://www.astound.net/pricing\\_contra\\_costa.htm](http://www.astound.net/pricing_contra_costa.htm) (last visited Apr. 19, 2002) (Astound high-speed access offered at \$39.95); [http://www.cablevision.com/customer/content/product/internet\\_c.html](http://www.cablevision.com/customer/content/product/internet_c.html) (last visited Apr. 19, 2002) (Cablevision high-speed access offered at \$39.95).

<sup>99</sup> See Gary H. Arlen, *TR's Online Census*, at 2 (Nov. 2001) (“The free, ad-supported Internet service model is all but dead.”).

<sup>100</sup> See, e.g., <http://download.att.net/wnetoffer> (last visited Apr. 19, 2002) (AT&T WorldNet Service offered at \$21.95 per month); <http://services.bellsouth.net/external/serviceplans.html> (last visited Apr. 19, 2002) (BellSouth internet access offered at \$20.95 per month); [http://qwest.com/pcat/for\\_home/product/1,1354,829\\_1\\_9,00.html](http://qwest.com/pcat/for_home/product/1,1354,829_1_9,00.html) (last visited Apr. 19, 2002) (Qwest internet access offered at \$21.95 per month).

<sup>101</sup> Forrester Research, Inc., *Sizing US Consumer Telecom*, at 5 (Jan. 2002).

<sup>102</sup> See, e.g., *Morgan Stanley Report, Broadband Cable Television*, at 32 (Dec. 28, 2001) (“A dial-up AOL subscription plus a second phone line typically totals more than the \$35-40 broadband cable subscription.”).

<sup>103</sup> Notably, even the ILECs do not try to distinguish broadband services based on any claimed difference in the ability to deliver voice services, and for good reason: broadband cannot be defined by distinguishing data from voice. See *US LEC Corp.* at 4 (“Here there is no bright line  
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Internet access services, which does nothing to alter the basic fact that consumers still compare the price and quality of narrowband access against the price and quality of broadband access. As Professor Willig explains, “broadband and narrowband access are in the same relevant market because there is now, and will continue to be for the foreseeable future, a great deal of demand cross-elasticity and opportunities for substitution between the two modes of Internet access.”<sup>104</sup> And when both broadband and narrowband services are considered, ILECs have an 80-90 percent share in virtually *every* local market.

**2. Services Provided at “Wholesale” to Other Carriers (and ISPs).** The

Commission should recognize the existence of a separate wholesale market for mass market broadband services.<sup>105</sup> The product sold in the wholesale market is the *input* necessary to

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between ‘broadband’ and traditional voice service.”); TCCFUI and Plano at 10. Because of products like Voice over DSL, Voice over ATM, and similar packetized voice products, voice can be delivered over the same facilities as “broadband.” Covad at 16. Even SBC concedes that “it has recently become possible to provide virtually real-time voice communications over packet-switched networks.” SBC at 17; *see also id.* at 23 (“[S]ome services in [the large business] market are capable of carrying voice traffic.”).

<sup>104</sup> Willig Decl. ¶ 123. Perhaps recognizing the validity of this position, SBC argues that “even if the Commission were to conclude that broadband and narrowband services were part of the same market, the fact that all of the incumbent LECs’ narrowband services will remain subject to dominant regulation merely strengthens the case for removing dominant carrier regulation of their broadband services.” SBC at 32. SBC is plainly incorrect. Because it is impossible to distinguish broadband from narrowband, any exception for broadband will swallow the rule. *See supra* at 3-4. Moreover, the Commission is statutorily obligated to “encourage the deployment on a reasonable and timely basis of advanced telecommunications capability to all Americans . . . by utilizing . . . measures that promote competition in the local telecommunications market, or other regulating methods that remove barriers to infrastructure investment.” Telecommunications Act of 1996, § 706. Were broadband unregulated, ILECs would have the incentive and ability to thwart broadband deployment. *See supra* at 18-19; AT&T at 44-48.

<sup>105</sup> *See* AT&T at 49; DIRECTV at 4 (wholesale market “is significantly different from the market for retail Broadband Services and should continue to be evaluated and regulated separately.”); *id.* at 2 (“because ILEC online affiliates typically sell retail broadband only as an  
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provide retail Internet access service, namely the provision of broadband last-mile transport. This wholesale market is undoubtedly distinct from the retail market, in which the product being offered generally includes internet access and other services that wholesale purchasers want to offer. If CLECs and ISPs could not purchase broadband last-mile transport separately on the wholesale market and instead had to buy the entire bundled retail product, they would be unable to realize any profit at all.<sup>106</sup>

There can be no dispute that, even under SBC's market-share driven analysis, ILECs possess market power in the wholesale market. They control virtually *all* of the traditional wireline last-mile facilities, and there is virtually no intermodal competition in the wholesale market.<sup>107</sup> The Commission itself has recognized that ILECs maintain "monopoly

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unregulated bundled information service, these markets are already differently regulated.") (emphasis omitted); Earthlink at 4 (noting that retail and wholesale are "two related but distinct services"); ITAA at 3 ("Consistent with established precedent, the Commission should recognize the existence of a separate market for wholesale broadband services, such as DSL-based services, that an ILEC provides to an ISP . . .").

<sup>106</sup> Qwest wrongly suggests that the Commission has already determined that wholesale and retail services are the same. See Qwest at 22 (citing *AOL-Time Warner Order* ¶ 69 n.202). In the *AOL-Time Warner Order*, the Commission simply noted that – for purposes of that proceeding – "any concerns [the Commission] share[d] with respect to [the wholesale] *market* are adequately addressed in [its] analysis of the consumer *market* for high-speed Internet access services, which is usually supplied using these transmission services as an input." *AOL-Time Warner Order* ¶ 69 n.202 (emphasis added). Thus, the Commission expressly recognized that its market analysis in that proceeding would not restrict its "ability to consider market definition questions that may arise in the context of the Notice of Inquiry concerning high-speed Internet service or any other future Commission proceeding." *Id.*

<sup>107</sup> See AT&T at 49; DIRECTV at 5-7 ("The ILECs' dominance is nearly total in the xDSL access market."); TCCFUI and Plano at 3 ("[T]he incumbent LECs today control a majority of the facilities that are used to provide broadband services."); ALTS at 8 ("[T]he ILECs still own[] the vast majority of bottleneck facilities."); Competitive Telecommunications Association at 5 ("[T]he ILECs retain control over monopoly local exchange facilities and networks throughout the United States."); ITAA at 7 ("Today, the ILECs control an estimated 75 to 85 percent of the  
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control over key inputs that rivals need in order to offer retail services.”<sup>108</sup> The ILECs’ bottleneck control extends to “loops and central office collocation space,” “Operations Support Systems (“OSS”) that ISPs must use to order wholesale DSL services,” and “essential backhaul facilities, such as ATM and Frame Relay, which ISPs purchase to provide end-to-end HSIA service.”<sup>109</sup> Some cable companies are currently negotiating carriage arrangements with some ISPs in some areas, but today CLECs and ISPs that want wholesale broadband transport generally have only one option – the incumbent LEC.<sup>110</sup>

As a result, ILECs are able to raise wholesale prices above the ILECs’ marginal costs and to “maintain[] unreasonable delays in the provisioning of local lines and collocation facilities.”<sup>111</sup> As Earthlink observes, the ILECs recently initiated wholesale price increases “even though the carriers had previously justified the [old] rates as cost-based, and even though the cost of providing DSL is declining.”<sup>112</sup> New Edge similarly notes that ILECs establish prices for their bottleneck facilities so that New Edge cannot effectively “compet[e] with the incumbent LECs’ services.”<sup>113</sup>

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wireline broadband Internet access service market.”); New Edge at 5 (“Incumbent LECs also control essential facilities that are required by competitive DSL providers.”); WorldCom at 15 (“[T]he vast majority of DSL lines are provided by incumbent LECs.”).

<sup>108</sup> *SBC-Ameritech Merger Order* ¶ 189; see also New Edge at 5 (“Incumbent LECs also control essential facilities that are required by competitive DSL providers.”).

<sup>109</sup> Earthlink at 24.

<sup>110</sup> See DIRECTV at 5-7; Earthlink at 24; New Edge at 5.

<sup>111</sup> Yale M. Braunstein, *Market Power and Price Increases in the DSL Market* 1 (July 2001).

<sup>112</sup> Earthlink at 24.

<sup>113</sup> New Edge at 5.

There is an additional, and more fundamental, reason why the Commission must not remove dominant carrier regulation and thereby make it easier for the ILECs to disadvantage their broadband competitors. Given the high cost of using ILEC bottleneck facilities, local entry may not be viable in some states unless entrants can offer both data *and* voice over a single line.<sup>114</sup> Without the ability to bundle – and the ability to spread the costs of access over multiple services – CLECs will be unable even to attempt to challenge the ILECs’ local *voice* monopolies in those areas. As the TCCFUI and the City of Plano explain, “[d]eregulation of the incumbent LECs with regard to broadband services” would impede competition “not only in the broadband service market but also in the local exchange market.”<sup>115</sup> As a result, “a new DSL monopoly would be created . . . and local exchange service competition would be reduced if not eliminated.”<sup>116</sup>

**II. THE ILECS’ PERVASIVE MARKET POWER REQUIRES NOT ONLY CONTINUED APPLICATION OF DOMINANT CARRIER REGULATIONS BUT ADDITIONAL, TARGETED INITIATIVES TO DISCOURAGE ILECS FROM RAISING POTENTIAL RIVALS’ COSTS.**

Because ILECs continue to wield tremendous power in the provision of both large business and mass market broadband services, the Commission must preserve the dominant carrier regulation of these services. Given the ILECs’ track record, now is not the time for paring back regulations, but rather for strengthening them to ensure the achievement of Congress’ pro-competitive goals.

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<sup>114</sup> See AT&T at 50-51.

<sup>115</sup> TCCFUI and Plano at 5.

<sup>116</sup> *Id.* at 5; see also ASCENT at 2 (“Competitive carriers in today’s telecommunications marketplace must provide a multiplicity of services in order to attract and retain customers.”).

**A. The Commission Must Maintain And Strengthen Existing Dominant Carrier Regulations.**

In their initial comments, the ILECs effectively concede that the Commission should maintain its price cap regulations. SBC, Qwest, and Verizon all argue that price caps help prevent price squeezes,<sup>117</sup> and no ILEC makes any reasoned argument to the contrary.

Preservation of existing tariffing requirements is also essential. Tariffing and related regulations perform an invaluable, pro-competitive role by providing needed transparency and by reducing transaction costs – all at very little expense to the ILECs.<sup>118</sup> As the Commission has correctly concluded, “incumbent LECs . . . have the incentive and ability to discriminate against competitors in the provision of advanced services.”<sup>119</sup> Without the transparency and restrictions on price changes that the tariffing requirements provide, “[t]he provisions allowing customers and competitors to challenge rates as unreasonable or as discriminatory would not be susceptible of effective enforcement.”<sup>120</sup> The tariffing process has alerted ISPs, CLECs and the Commission itself to ILEC attempts “to impose egregious terms” that allow for “DSL service degradation” and “rate increases for both monthly and one-time

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<sup>117</sup> See SBC at 51; Qwest at 52; Verizon at 18.

<sup>118</sup> See AT&T at 51-57.

<sup>119</sup> *SBC-Ameritech Merger Order* ¶ 186.

<sup>120</sup> *MCI Telecoms. Corp. v. AT&T*, 512 U.S. 218, 230-231 (1994) (citations omitted); see also *AT&T v. Central Office Tel., Inc.* 524 U.S. 214, 222 (1998) (concluding that tariffs are required in order to “prevent[ ] unreasonable and discriminatory charges”). Certainly, the Commission cannot depend on the ILECs for making the necessary disclosures on their own. Indeed, just last week, the Commission fined SBC \$100,000 for willfully refusing to provide a sworn statement attesting to the accuracy of responses regarding possible discrimination in DSL service. See Forfeiture Order, *SBC Communications, Inc.*, FCC 02-112, 2002 WL 549714 (Apr. 15, 2002).

charges.”<sup>121</sup> Not only does this process enable parties to object before changes become “set in stone,” but “it allows wholesale ISP customers to adjust their business and marketing plans in light of service changes.”<sup>122</sup>

Recent ILEC conduct confirms that continued enforcement of non-discrimination rules alone “cannot protect the market when the ILECs’ ISPs are effectively willing to be ‘disadvantaged’ by a policy that helps their parents at the expense of all ISPs.”<sup>123</sup> SBC and Verizon have “require[d] ISPs to purchase transport in each LATA.”<sup>124</sup> “[S]ome ILECs have initiated plans to unilaterally impose on ISPs a costly and counterproductive requirement to use Point-to-Point Protocol over Ethernet (PPPoE), a plan that is designed not to improve the product, but to protect the ILECs’ voice services from competition from [Voice over IP] service, which is incompatible with PPPoE.”<sup>125</sup> As the California ISP Association previously documented to the California Public Utilities Commission, “SBC threatened to disconnect ISPs that did not agree to a new contract that included unfavorable terms.”<sup>126</sup> And “SBC recently without notice unilaterally imposed a 70% speed reduction on a significant portion of the connections it provides to DIRECTV Broadband, without notice to the Commission or other

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<sup>121</sup> Earthlink at 25-26.

<sup>122</sup> *Id.* at 26.

<sup>123</sup> DIRECTV at 10.

<sup>124</sup> *Id.*

<sup>125</sup> *Id.*

<sup>126</sup> *Id.* at 11.

Broadband Services Providers, without change in its tariff specifications for the product, and over DIRECTV Broadband's objection."<sup>127</sup>

SBC's recent DSL price increases further demonstrate the need for tariffing. This past summer, without warning, SBC filed a request for special permission to file its tariff on only one day's notice and without any cost support. As DIRECTV observes, before most of SBC's customers became aware of the filing, the Commission granted permission and the tariff was filed.<sup>128</sup> Had the customers been given more time and data – as the dominant carrier regulations require – they could have initiated an objection to the price increase, which no doubt has depressed broadband subscriptions.

Finally, as Covad explains, tariffing with cost support (or some other mechanism that provides sufficient transparency to identify the validity of loop costs) is necessary to prevent a price squeeze.<sup>129</sup> Without transparency, ILECs will be able to charge CLECs a greater price for the high frequency portion of the loop than the ILECs impute to their own retail xDSL service.

Despite this overwhelming evidence of the need for tariffing requirements, the RBOCs implore the Commission to eliminate these regulations. Qwest contends that tariffs prevent ILECs from “flexibly respond[ing] to customer needs” and “distinguish[ing] among customers.”<sup>130</sup> But nothing precludes Qwest or any other ILEC from filing individualized

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<sup>127</sup> *Id.*

<sup>128</sup> *See id.* at 17.

<sup>129</sup> *See Covad* at 5-6.

<sup>130</sup> Qwest at 7; *see also Verizon* at 28 (asserting that tariffs preclude “tailored” offerings).

contract tariffs for business services, and ILECs obviously have no need to tailor services to individual residential customers. SBC complains that tariffs inhibit rapid price fluctuations.<sup>131</sup> In fact, SBC can file tariff changes electronically with only fourteen days notice (and, for cause, on even less notice). None of the ILECs has offered any evidence that tariffing requirements inhibit their ability to offer new services or terms. Earthlink has observed, “all of the [ILECs] offer wholesale ADSL via the FCC’s tariffing process and make frequent changes to their tariffs with little difficulty.”<sup>132</sup>

Verizon claims that applying tariffing to non-dominant carriers can harm competition and consumers and can depress investment.<sup>133</sup> Yet this argument (and the analysis of Verizon’s economists, Kahn and Tardiff) *assumes* non-dominance, even though the purpose of this proceeding is to determine that precise issue and even though the facts undeniably demonstrate that the ILECs maintain overwhelming market power. Similarly, in arguing that application of dominant carrier regulation is inconsistent with Commission precedent, the 1996 Act, and the First Amendment, Verizon predicates its argument on the plainly erroneous assumption that ILECs lack market power with respect to broadband.<sup>134</sup>

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<sup>131</sup> See SBC at 60.

<sup>132</sup> Earthlink at 33.

<sup>133</sup> See Verizon at 25-30

<sup>134</sup> In any event, as common carriers, telephone companies do not enjoy full First Amendment protections. See, e.g., *United States v. Western Elec. Co.*, 673 F. Supp. 525, 586 n.273 (D.D.C. 1987) (“There is no merit to the contention . . . that the information services restriction infringes the Regional Companies’ own First Amendment rights. . . . [C]ommon carriers are quite properly treated differently for First Amendment purposes than traditional news media.”), *aff’d in part and rev’d in part*, 900 F.2d 283 (D.C. Cir.) (per curium), *cert. denied*, 498 U.S. 911 (1990).

Given the marketplace realities and the ILECs' recent track record, the Commission should strengthen, not weaken, dominant carrier regulations. In particular, the Commission should adopt structural-separation and separate-affiliate rules, which enable dominant suppliers whose participation in a given market raises special problems to participate, while reducing the risks that their customers or competitors will be disadvantaged by such participation. This measure, as ITAA notes, "would not be difficult to implement," yet it would be "an effective means to deter competitive abuse."<sup>135</sup> Among other benefits, structural separation would help prevent the ILECs from misallocating joint costs, "discriminat[ing] against competitive providers," and "engag[ing] in price squeezes."<sup>136</sup>

**B. The Commission Must Shore Up Its Regulations Implementing The ILECs' Obligations To Provide Non-Discriminatory Access To Their Bottleneck Facilities.**

Ultimately, the ILECs' comments confirm that the real impetus behind SBC's Petition is not any concern over dominant carrier regulations, the costs of which the ILECs do not even bother to quantify.<sup>137</sup> Rather, SBC and other ILECs hope to catch the Commission off guard in this proceeding and parlay superficial market power analysis to their advantage in the far more important proceedings in which the Commission is examining the ILECs' systematic efforts to deny competitors access to bottleneck facilities and thus preclude most retail

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<sup>135</sup> ITAA at 28-29.

<sup>136</sup> Time Warner at 12; *see also* New Edge at 8-9 (proposing that the Commission adopt structural separation); Covad at 7-8.

<sup>137</sup> Only one ILEC, Moultrie, attempted to quantify any costs of regulation, and Moultrie examined only "the costs per subscriber of providing plain old *telephone* service," not broadband service. Moultrie at 4 (emphasis added). Moreover, Moultrie lumped together *all* federal regulatory costs for telephone service and did not separately analyze the costs of dominant carrier regulations. *See id.* at Matrices A and B.

broadband (and narrowband) competition altogether. Not even attempting to conceal their hand, the ILECs openly advocate elimination of the *Computer Inquiry* requirements,<sup>138</sup> evisceration of all unbundling and collocation obligations,<sup>139</sup> the preemption of state efforts designed to regulate broadband directly or indirectly,<sup>140</sup> and even forbearance from enforcing the § 201 “just and reasonable” requirement.<sup>141</sup>

The Commission should firmly reject each of these outlandish requests.<sup>142</sup> It has only recently affirmed the pro-investment and pro-competitive benefits of most of these rules. The collocation rules, for example, were designed “to advance the statutory goals of promoting investment, competition, and technological innovation in all telecommunications markets, including advanced services, while protecting incumbent LEC property interests against unnecessary takings.”<sup>143</sup> Likewise, the goal of the line-sharing rules was to encourage competitive delivery of DSL by allowing CLECs to provide DSL-based services over lines already served by ILECs for voice services.<sup>144</sup>

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<sup>138</sup> See SBC at 62; Qwest at 59.

<sup>139</sup> See BellSouth 8-10, 46; Verizon at 44.

<sup>140</sup> See Verizon at 46.

<sup>141</sup> *Id.* at 43.

<sup>142</sup> In any event, as long as the Commission is considering any of these ILEC requests for deregulation, it is premature to address non-dominance. As IP Communications Corporation explains, “[i]f significant changes to the unbundling rules are put in place that lessen a CLEC’s ability to access [UNEs] at rates based on [TELRIC], then it may require years to observe the effects of such rule changes before the Commission could make an informed decision on ILEC dominance in the DSL marketplace.” IP Communications Corporation at 3.

<sup>143</sup> *Third Section 706 Report* ¶ 136.

<sup>144</sup> See *id.* ¶ 136; see also Braunstein, *supra*, at 3 (concluding that the ILECs’ “near-monopoly control of the local loops” justified the 1996 Telecommunications Act’s line sharing and  
(continued ...)

In addition, to ensure that competitors have non-discriminatory access to the facilities necessary to compete, the Commission should take several pro-competitive actions. As more fully explained in AT&T's initial comments and in other proceedings, the Commission should: (a) eliminate existing barriers that preclude CLECs' from deploying facilities necessary for effective voice and broadband competition; (b) require ILECs to deploy automated alternatives to the manual and competition-inhibiting "hot cut" process; (c) subject the ILECs to detailed performance metrics for special access services that make transparent the speed and quality upon which an ILEC provisions network facilities to itself relative to competitors; (d) confirm that CLECs have access to the entire functionality of local loops irrespective of the architecture used; and (e) reform special access regulation.<sup>145</sup>

### **III. DEREGULATION OF ILEC BROADBAND SERVICES CANNOT BE JUSTIFIED UNDER AN APPROACH THAT IGNORES MARKET POWER IN PURSUIT OF INCREASED BROADBAND DEPLOYMENT OR "REGULATORY PARITY."**

The RBOCs provide absolutely no support for their claims that a broadband exemption from tariffing, cost support and other dominant carrier regulations is necessary to spur broadband investment. Indeed, they make no serious attempt even to link the costs of complying with those consumer protections to any investment decisions. And there is overwhelming evidence that none of the Commission regulations that the RBOCs are challenging in this or other proceedings is impeding broadband deployment. For example, ILEC working channels on fiber loop carrier grew at an average annual rate of 26% from 1991 to 2000. At the end of 2000,

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(... continued)

unbundling requirements, both of which are "appropriate and consistent with previous remedies seeking to guarantee access to 'bottleneck' facilities.").

<sup>145</sup> AT&T at 61-65.

the ILECs had 42.2 million channels working on fiber digital carrier. Over the same time period, the ILECs grew fiber-based CO terminations of loop plant by 29.7% annually and moved loops to fiber at a rate of 14.2% annually. All told, the DSL market experienced “remarkable” growth in 2001 despite the slowdown in the economy, the RBOCs’ 25% price increase, and the general sluggishness of the telecommunications industry.<sup>146</sup>

BellSouth recently provided analysts with a presentation demonstrating that the incremental cost of upgrading its existing network to deliver DSL service is minimal,<sup>147</sup> and that the company can show a positive return for DSL quickly – roughly 4-6 months for business DSL customers and 12-14 months for residential DSL consumers.<sup>148</sup> In addition, this past fall, BellSouth Chairman, Duane Ackerman, candidly told investors that “a large part of [DSL] investment has in fact already been made,” that BellSouth does not have to spend “anything” to

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<sup>146</sup> See IDC Bulletin, *Final 2001 U.S. DSL Market Shares by Vendor*, at 2-3, 7 (Mar. 2002); see also *Bells Pushing DSL Envelope*, Communications Today, Apr. 16, 2002 (RBOCs’ had 47% fourth-quarter increase in DSL subscribers compared to third quarter; cable had only 10% increase); *BellSouth Completes NC Central Office Deployment of Advanced Data Technology; DSL Investment at \$100 Million and Climbing*, at <http://www.xdsl.com/newsreleases/view.asp?newsid+168147> (Apr. 2, 2002) (BellSouth fulfilled pledge to equip 136 North Carolina central offices with the latest in high-speed data technology seven months ahead of schedule). BellSouth recently announced that it would soon deploy high-speed DSL service to an additional nine communities throughout rural Georgia. *Second Quarter 2002 Rollout Schedule Expands Service Across Georgia*, PR Newswire (March 25, 2002). And SBC recorded a net gain of 183,000 digital subscriber lines in the first quarter – a 25 percent jump from the fourth quarter, a 59 percent rise from a year ago, and well in excess of expectations. See *SBC Connects with DSL Subscribers*, CNET News.com, available at <http://news.com.com/2100-1033-885880.html>.

<sup>147</sup> See BellSouth, *BellSouth Broadband: Taking the Lead*, at slide 9 (Nov. 5, 2001), available at [http://media.corporate-ir.net/media\\_files/nys/bls/presentations/110501/delavega/sld009.htm](http://media.corporate-ir.net/media_files/nys/bls/presentations/110501/delavega/sld009.htm) (indicating that the deployment involves “[c]ost effective expansion through utilization of embedded network”).

<sup>148</sup> See *id.* at slide 19, available at [http://media.corporate-ir.net/media\\_files/nys/bls/presentations/110501/delavega/sld019.htm](http://media.corporate-ir.net/media_files/nys/bls/presentations/110501/delavega/sld019.htm).

deploy subscriber line carrier sites “because they’re already in place,” and that equipping terminals with DSLAMs is only a “modest expense” to the company.<sup>149</sup> Unsurprisingly, BellSouth’s rapid DSL rollout has continued.<sup>150</sup>

Moreover, the costs of dominant carrier regulation are so marginal<sup>151</sup> that neither BellSouth nor any other ILEC has even bothered to quantify them. The ILEC economists instead focus on the unbundling obligations imposed by Section 251(c) of the Act that are *not* at issue here.<sup>152</sup> Even there, they make clear that the “problem” in their minds is not the unbundling rules *per se*, but only the TELRIC methodology used to determine the prices for unbundled access to such facilities.<sup>153</sup> But even if TELRIC-based unbundling materially impaired the expected profitability of ILEC broadband services – and, as AT&T has explained in the *Triennial Review* proceeding, it does not<sup>154</sup> – this would not show that TELRIC-based unbundling materially impacts the pace or scope of ILEC investment. ILEC decisions whether to invest in or market a new service do not turn on the profits expected from that particular

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<sup>149</sup> Duane Ackerman, Remarks at the Goldman Sachs Communicopia X Conference (Oct. 3, 2001), available at [http://media.corporate-ir.net/media\\_files/nys/bls/presentations/BLS\\_100301.doc](http://media.corporate-ir.net/media_files/nys/bls/presentations/BLS_100301.doc).

<sup>150</sup> See, e.g., *BellSouth Sets DSL Expansion in 9 Rural Areas*, Atlanta Journal-Constitution, at D-8 (March 13, 2002) (“BellSouth plans to launch high-speed DSL service in nine additional rural Georgia markets before midyear.”); see also IDC Bulletin, *supra*, at 3 (reporting 188.6% growth in BellSouth DSL lines in 2001).

<sup>151</sup> See AT&T at 67-68.

<sup>152</sup> See Kahn/Tardiff Decl. ¶¶ 25-38; Harris Decl. at 15-23, 25-28.

<sup>153</sup> See Kahn/Tardiff Decl. ¶¶ 28-31.

<sup>154</sup> See AT&T in *Triennial Review* 20, 72, 181-84; see also Willig Decl. in *Triennial Review* ¶¶ 23, 25, 31, 159-166.

service, but on the ILEC's expected overall profits from *all* services. Because ILEC narrowband and broadband services are provided over the same facilities,<sup>155</sup> some investments in loop infrastructure may produce cost savings (*e.g.*, in lower maintenance expenses) that improve the profitability of *all* services, not just that of broadband service. As AT&T has demonstrated in the *Triennial Review* proceeding, the reality is that ILEC investment has been the greatest in the states that have taken the Act's unbundling requirements most seriously.<sup>156</sup>

Thus, if the ILECs do decide to decrease investment, that decision could not be attributable to unbundling rules or dominant carrier regulations. A more likely explanation would be that the ILECs are once again attempting to shelter existing services from the cannibalizing effects of new services. Knowing that the bulk of the potential customer base for a new service is likely to come from purchasers of the ILEC's existing services and that these purchasers will then drop the existing service,<sup>157</sup> ILECs have in the past scuttled innovations.<sup>158</sup>

In any event, any reasoned analysis of investment incentives must consider how unbundling obligations impact the investment incentives of all the relevant market participants for all the facilities necessary to provide broadband services. Broadband services require not just broadband-capable loops but also substantial investment in the DSLAMs routers, splitters, and

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<sup>155</sup> See, *e.g.*, Letter from ALTS and CompTel, to Gary Shapiro, *et al.* at 3 (Apr. 10, 2002) ("There is no new network for advanced services, and no policies can or should be based on such a faulty understanding.").

<sup>156</sup> See AT&T in *Triennial Review* at i, vi, 18, 47-50, 66-68; see also Willig Decl. in *Triennial Review* ¶¶ 108-122 & Exhibits 2, 3.

<sup>157</sup> See AT&T at 47-48; see also Willig Dec. ¶¶ 15, 24, 33, 81-85, 140.

<sup>158</sup> See AT&T at 75-76.

other equipment used to provide such service.<sup>159</sup> And there can be no question that UNE-loop unbundling *facilitates* investment in DSLAMs and related equipment.<sup>160</sup> By allowing DLECs to gain unbundled access to the loop, DLECs can collocate their own DSLAMs and associated electronics at ILEC central offices and use this equipment to provide broadband services.

Indeed, as other commenters have explained, competition generally promotes CLEC and DLEC investment as well as ILEC investment. Because of the natural monopoly character of most local loops, unless these facilities can be leased by competitors on the same economic terms as the Bells provide them for their own use, competitors will have lessened incentives to invest in the electronic and other systems that would permit them to offer broadband services to customers.<sup>161</sup> As DIRECTV argues, “the real value of broadband pipes is in the services that will be delivered over them,” and the CLECs have led the way in developing innovative services.<sup>162</sup> If the Commission permits ILECs to foreclose access to bottleneck

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<sup>159</sup> See Third Report And Order And Further Notice Of Proposed Rulemaking, *Implementation of the Local Competition Provisions of the Telecommunications Act of 1996*, 15 FCC Rcd. 3696, ¶ 303 (1999).

<sup>160</sup> See Willig Decl. in *Triennial Review* ¶ 76.

<sup>161</sup> See, e.g., Communication from the Commission to the Council, the European Parliament, the Economic and Social Committee and the Committee of the Regions: Seventh Annual Report on the Implementation of Telecommunications Regulatory Package, COM(2001)310 final at 18-22 (finding that one of the keys to competitive broadband access is opening up the local access network and recommending that the process be “speeded” up through “hands-on monitoring,” “the setting of binding deadlines and the imposition of credible financial penalties on incumbents not complying with the requirements imposed”).

<sup>162</sup> DIRECTV at 14.

facilities, then “investment in the development of innovative retail broadband services will be stifled.”<sup>163</sup>

In short, whether the focus is the dominant carrier regulations at issue in this proceeding or other consumer protection regulations that apply to the incumbent LECs, the RBOCs have not – and cannot – demonstrate that the public interest would be served by removing those regulations in vain hopes of increasing broadband deployment. The one clear lesson from the first “broadband” decade is that the ILECs are not leaders, but followers – and reluctant ones at that – in the deployment of broadband services.<sup>164</sup> As Cbeyond and Nuvox demonstrate, history shows that ILECs break promises of deployment even when they receive a *quid pro quo* from regulators.<sup>165</sup> For example, “[i]n the mid-1980s, the BOCs promised to promote and deploy ISDN, but the promised widespread deployment of ISDN service never

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<sup>163</sup> *Id.*; see also Cbeyond and Nuvox at 17-18 (“Proceedings such as this one, which question the importance of rules that have barely had an opportunity to take effect, serve only to divert resources of competitive carriers away from deploying networks and instead focus them on defending regulatory safeguards . . .”).

<sup>164</sup> See FCC Cable Services Bureau, *Broadband Today*, 27 (Oct. 1999) (“Although ILECs have possessed DSL technology since the 1980s, they did not offer the services, for concern that it would negatively impact their other lines of business.”).

<sup>165</sup> See Cbeyond and Nuvox at 25; see also Verizon, *The Philadelphia Inquirer* (Mar. 29, 2000) (“Verizon Communications Inc. is not living up to some of its promises to deliver super-fast Internet service throughout Pennsylvania, state Public Utility Commission member Terrance J. Fitzpatrick said in a motion yesterday.”)

materialized.”<sup>166</sup> The ILECs’ current threats of non-deployment are no more credible than past ILEC promises of deployment.<sup>167</sup>

Fully aware that “ILECs have continued to deploy facilities to provide DSL,” BellSouth is reduced to the ludicrous claim that ILECs are similarly situated with (and ought to be treated the same as) CLECs.<sup>168</sup> But ILECs and CLECs do not remotely stand “on the exact same footing” when it comes to investing in “new” facilities.<sup>169</sup> As AT&T explains in more detail in its *Triennial Review* comments, the loop infrastructure investments that ILECs are making today are not new, but purely incremental modifications or upgrades to the feeder portions of existing loops. Even if, contrary to real world facts, the ILECs could show that they were contemplating “fiber to the curb” systems, this simply means taking the existing fiber feeder portion of the loop and extending the fiber from the existing remote terminals closer to customers’ homes – another modification to an existing loop, and in no sense the construction of

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<sup>166</sup> *Id.* at 25; see also *Price Cap Performance Review for Local Exchange Carriers*, Notice of Proposed Rulemaking, 9 FCC Rcd. 1687, 1692 ¶ 32 (1995) (reasoning that price cap regulation would encourage the LECs to modernize their networks and develop advanced applications and new services).

<sup>167</sup> See also US LEC Corp. at 21-22 (As U.S. LEC Corp. reports, “ILECs ignored DSL until CLECs began to deploy it,” and “after two of the ‘big three’ CLEC DSL providers terminated operations and the third filed for bankruptcy . . . some ILECs announced they were scaling back somewhat DSL investment”); DIRECTV at 13 (“although DSL technology has been available for decades, the ILECs did not deploy it until after CLECs were able to introduce DSL services as a result of the Telecommunications Act of 1996”); ALTS at 3 (“The best way to advance the deployment of broadband technologies is to enforce the current policies that promote facilities-based competition.”); IP Communications Corporation at 2 (“The history of the advanced service market has shown that the fostering of competition by a large number of providers has been the best means to promote innovation.”). See also Letter from ALTS and CompTel, to Gary Shapiro, *et al.* at 2 (explaining that investment has been correlated with competition).

<sup>168</sup> BellSouth at 8, 12.

<sup>169</sup> *Id.* at 8.

a “new” network. Finally, even when ILECs deploy a truly new facility, they are not similarly situated to CLECs. By virtue of their huge customer bases, their ubiquitous networks, and their ability to use an existing monopoly base of assets to generate construction funds, ILECs enjoy scale efficiencies and access to capital that CLECs lack. CLECs, by contrast, must overcome both the operational problems of convincing customers to switch service and the practical hurdles inherent in deploying facilities at a cost that permits competition with the ILEC. Given this, there will be many instances where it will be economic for an ILEC to deploy new facilities, but where CLECs will not be able to do so.

Nor have the RBOCs remotely justified their cries for “regulatory parity.” As the Commission recognizes in the *Wireline Broadband NPRM*, regulatory parity demands no more than a “consistent *analytical framework*” across platforms in determining what regulations are appropriate.<sup>170</sup> And the Commission always has applied a consistent analytical framework across wireline, cable, wireless and satellite broadband platforms: regulate broadband facilities and services only where needed to protect consumers and competition from abuses of market power. And as the Commission also recognizes, “a consistent analytical framework may not lead to identical regulatory requirements across platforms. Indeed, legal, market, or technological distinctions may *require* different regulatory requirements between platforms.”<sup>171</sup> Dominant carrier (and unbundling) regulation of the RBOCs is warranted by market power considerations that simply have no analog in the cable, satellite or wireless environments.<sup>172</sup>

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<sup>170</sup> Notice of Proposed Rulemaking, *Appropriate Framework for Broadband Access to the Internet Over Wireline Facilities, et. al.*, 17 FCC Rcd. 3019, ¶ 7 (2002) (emphasis added).

<sup>171</sup> *Id.* ¶ 7 (emphasis added).

<sup>172</sup> See Ad Hoc at 22 (“If the Commission de-regulates a carrier with market power in the name  
(continued ...)”)

## CONCLUSION

For the foregoing reasons, there is no factual basis for the ILECs' request for an across-the-board determination that they lack market power regarding broadband service. The Commission should therefore reject these requests (including the SBC Petition), declare that all ILEC services remain subject to dominant carrier regulation, and clarify that any future ILEC petitions for exemptions from tariffing and other dominant carrier regulations will be denied absent clear and convincing proof – specific to the particular services, customer classes, and geographic areas for which the exemptions are sought – that the ILECs lack any relevant market power.

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(... continued)

of encouraging broadband deployment, it would expose consumers to the excessive prices, unreasonable terms and conditions of service, inferior service quality, and technological torpor that results when competition is not present”).

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April 22, 2002

**CERTIFICATE OF SERVICE**

I hereby certify that on this 22<sup>nd</sup> day of April, 2002, I caused true and correct copies of the forgoing Reply Comments of AT&T Corp. to be served on all parties by mailing, postage prepaid to their addresses listed on the attached service list.

Dated: April 22, 2002  
Washington, D.C.

/s/ Peter M. Andros

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