

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

In the Matter of

Review of Regulatory Requirements for)	
Incumbent LEC Broadband)	CC Docket No. 01-337
Telecommunications Services)	

**REPLY COMMENTS OF THE AD HOC
TELECOMMUNICATIONS USERS COMMITTEE**

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April 22, 2002

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SUMMARY

The FCC's decisions must be based on fact, not political fashion. As the expert agency charged with protecting end users from unjust and unreasonable rates, terms, and conditions, the Commission cannot jump on the broadband bandwagon until local markets are competitive. Premature de-regulation of the ILECs' broadband business services would merely allow them to exploit their considerable market power at the expense of end users. As discomfoting as the truth may be, the fact remains that, by any measure, local markets are not competitive enough to de-regulate. This emperor has no clothes.

The ILECs' arguments for de-regulation of their broadband business services have been fueled by rhetoric, not facts. The ILECs assert that "non-dominant" status is necessary to create financial incentives for ILECs to invest in a nationwide broadband network. Without ILEC participation in this market, they contend, the nation will be denied the benefits of a broadband telecom infrastructure altogether. Yet they simultaneously contend, despite all contrary indications and evidence, that sufficient competition already exists in the broadband services market to justify their nondominant status.

In other words, the broadband market is supposedly both overrun with competitors and desperately underserved at the same time.

The ILECs have failed to proffer any evidence that they face the kind of marketplace competition that would justify the sweeping de-regulation they seek. Nor have they refuted the considerable evidence that what little competition there was is fading. Pending the development of a fully competitive broadband

business services market, the Commission must not only continue regulation of the broadband business services market, but also re-tool its regulatory regime to reflect current competitive realities.

The ILECs have used their existing pricing flexibility for broadband business services to simply raise prices, despite record earnings for the past several years. Only companies facing insignificant levels of competition could do so. Since customers have no competitive alternative to which they can turn for better prices and service, the Commission must apply its “price caps”/incentive regulation regime to ensure just and reasonable rates, terms, and conditions.

As large business users, Ad Hoc members take this position only reluctantly. Ad Hoc members stand to benefit the most from de-regulatory initiatives because, as large users of telecommunications, they have the buying power to extract reasonable prices, terms, and conditions from the ILECs and thereby push down market prices for all when markets become competitive. As the biggest potential beneficiaries of de-regulation, Ad Hoc members are not shy about demanding de-regulatory reform when market conditions justify it. But the fact is that the broadband business services market is not competitive and can not justify de-regulation of the ILECs.

The Commission must also prevent the ILECs from leveraging their market power in broadband business markets to undermine existing competition in adjacent markets, such as the information services and customer premises equipment markets. Therefore, the Commission should require the ILECs to

make their broadband telecommunications services available to end users, competitors, and information service providers on a stand-alone basis, unbundled from information services or other unregulated products.

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The Ad Hoc Telecommunications Users Committee (the “Ad Hoc Committee” or “Ad Hoc”) submits these Reply Comments pursuant to the Notice of Proposed Rulemaking (“*Notice*” or “*NPRM*”) in the above-referenced docket.¹ As discussed below, the incumbent local exchange carriers have failed to provide persuasive evidence that they are non-dominant in the provision of broadband services to business customers while other commenters have provided compelling evidence of ILEC dominance.

INTRODUCTION

The incumbent local exchange carriers (“ILECs”), and primarily the regional Bell Operating Companies (“BOCs”), have indefatigably pursued their quest for de-regulation of their broadband services. But their core argument is not only circular in its reasoning, it also provides a compelling reason for *refraining* from any deregulatory action at this time. The ILECs assert that “non-

¹ *Review of Regulatory Requirements for Incumbent LEC Broadband Telecommunications Services*, CC Dkt. No. 01-337, Notice of Proposed Rulemaking, FCC 01-360, 2001 FCC LEXIS 6852 (rel. December 20, 2001) (“*Notice*”).

dominant” status is necessary to eliminate “regulatory uncertainty,” and provide them with the appropriate financial incentives for investing in a nationwide broadband network. Despite all contrary indications and evidence, they claim that sufficient competition exists in the nascent broadband services market to justify nondominant status. They simultaneously contend, however, that without ILEC participation in this market, the nation will be denied the benefits of a broadband telecom infrastructure altogether.

In other words, the broadband market is supposedly both overrun with competitors and desperately underserved at the same time.

While the ILECs’ public-spirited commitment to faster broadband deployment is laudable, the ILECs apparently do not require deregulatory action to stimulate their deployment of broadband facilities, because they are making those investments already, as they have repeatedly assured their shareholders, investment analysts, and potential investors, in their various quarterly and annual reports, investor briefings, and press releases. The Commission has itself noted that “[t]here have been tremendous recent increases in availability of DSL due to investments in deployment.”² Indeed, the Commission recently concluded that the deployment of advanced telecommunications capability to all Americans is reasonable and timely. “[The Commission] find[s] that there is *continued and*

² *Inquiry Concerning the Deployment of Advanced Telecommunications Capability to All Americans in a Reasonable And Timely Fashion, and Possible Steps To Accelerate Such Deployment Pursuant to Section 706 of the Telecommunications Act of 1996*, CC Docket No. 98-146, Third Report, FCC No. 02-33 (rel. February 6, 2002) (“*Third Broadband Report*”), at para. 70.

rapid growth in subscription to high-speed and advanced services on a nationwide basis, which is indicative of the increased availability of advanced services.³ Further, the Commission concluded that “investment in infrastructure for most advanced services markets remains strong,” and that deployment has grown at “an impressive rate.”⁴ Broadband services are even more available in those areas of the country “*previously* identified as being vulnerable to not receiving timely access to advanced services.”⁵

In light of these findings regarding the adequacy of current broadband deployment rates, the validity of any competitive justification for de-regulating the ILECs’ broadband services becomes even more important. Since there is no apparent deficiency in the rate at which broadband infrastructure is being deployed, there is no urgent need to forego conscientious scrutiny of the evidence of competition in broadband markets.

DISCUSSION

As to either type of market power identified in the *Notice* – the ability to restrict output or the exercise of control over an essential input,⁶ – ILECs continue to have market power in the provision of broadband services to business customers and interexchange carriers (“IXCs”). Because of their

³ *Third Broadband Report* at para. 89 (emphasis supplied).

⁴ *Id.* at paras. 89-90.

⁵ *Id.* at para. 94. “Vulnerable” consumer groups include “low-income consumers, those living in sparsely-populated areas, minority consumers, consumers living on tribal lands, persons with disabilities, and those living in the U.S. territories.” *Third Broadband Report* at para. 3.

⁶ See *Notice* at paras. 28 and 29.

overwhelming market power in the broadband services market, non-dominant status for the ILECs would expose end users and IXCs to unjust and unreasonable rates, terms, and conditions. Instead of de-regulating broadband services, the Commission should acknowledge the competitive realities of the broadband business services market and adopt a regulatory framework that will protect the interests of consumers.

I. The Small Business Location Market Is Separate And Distinct From the Mass Market.

In answering the Commission’s question, “which customer classes [should the Commission] include within a relevant product market,”⁷ Ad Hoc’s Initial Comments provided compelling evidence that the “small business location” market (which includes “SMEs” and “SOHOs”) is separate and distinct from the broadly defined “mass market.”⁸ Ad Hoc noted that small business locations have very different broadband service needs and should not be lumped together with residential customers simply because their geographical location or capacity requirements are the same. Unlike residential mass market customers, low-volume business locations typically require the qualitatively different security and reliability features of their high-volume business counterparts, despite their comparatively small scale. For these reasons, DSL is the primary broadband

⁷ Notice at ¶ 18.

⁸ Ad Hoc also clarified that the notion of “small” needs to refer to the amount of broadband service capacity needed at the location, rather than to the size of the corporate or institutional customer maintaining the particular business location. Ad Hoc Comments at 7.

option for many small business locations while cable modem service is simply not a viable substitute.

Other commenters confirmed Ad Hoc's position. Covad notes that SMEs are not subject to intermodal competition because cable modems, satellites, and fixed wireless are not substitutable services for these consumers.⁹ EarthLink concurs, noting that, because "cable is a shared medium and DSL is a virtual private connection, consumers may not view the characteristics of the two platforms as completely substitutable or competitive, since each service has unique issues of privacy, security, and service quality...."¹⁰ Covad also notes that speed and quality of service needs differ between small businesses and residential users.¹¹ CompTel and AT&T cite availability as a concern,¹² as cable systems "generally do not extend to business districts."¹³ The Commission itself has recognized that cable modem service is primarily available to the residential market.¹⁴ For that reason, AT&T is correct in concluding that, "for the great majority of small businesses, the only real broadband choice is DSL."¹⁵ Indeed, a report issued by Cahners In-Stat Group claims that businesses account for only

⁹ Covad Comments at 15.

¹⁰ EarthLink Comments at 17.

¹¹ Covad Comments at 17.

¹² CompTel Comments at 11.

¹³ AT&T Comments, Attachment A, Declaration of Robert Willig, at para. 10 ("Willig (AT&T)").

¹⁴ *Third Broadband Report*, Appendix B, at para. 23.

¹⁵ Willig (AT&T) at para. 20.

5% of cable modem subscribers, and penetration is only expected to increase to 10% by 2005.¹⁶

The relevant geographic market for DSL service is the local market since this is the market in which purchasing decisions are made by end users. As AT&T notes, “[t]he relevant markets are local because consumers in a given community can buy broadband (or narrowband) services only from providers that offer those services in that community.”¹⁷ This definition is also consistent with the FCC’s finding in the BOC Classification Order¹⁸ and in the Commission’s AOL-Time Warner Merger Order.¹⁹

II. ILECs Maintain Market Power in the Small Business DSL Market

Under the four-pronged market power test relied upon by the FCC in prior non-dominance proceedings (*i.e.*, market share, demand elasticity, supply elasticity, and comparability of cost structure, size and resources),²⁰ ILECs either fail outright or have failed to provide relevant, probative evidence that they can

¹⁶ AT&T Comments at 41, *citing* Cahners In-Stat Group, *Despite Service Provider Pratfalls, Cable Modem Subscriber Growth Remains Robust* at 1 (December 1, 2001).

¹⁷ AT&T Comments at 37-38.

¹⁸ *Regulatory Treatment of LEC Provision of Interexchange Services Originating in the LEC’s Local Exchange Area*, CC Dkt. 96-149, *and Policy and Rules Concerning the Interstate, Interexchange Marketplace*, CC Dkt 96-61, Second Report and Third Report and Order, 12 FCC Rcd 15756 (1997) (“*BOC Classification Order*”).

¹⁹ *Applications for Consent to the Transfer of Control of Licenses and Section 214 Authorizations by Time Warner Inc. and America Online, Inc., Transferors, to AOL Time Warner Inc., Transferee*, CS Docket 00-30, Memorandum Opinion and Order, 16 FCC Rcd 6547, 6578, ¶ 74 (“*AOL-Time Warner Merger Order*”).

²⁰ *Competition in the Interstate Interexchange Marketplace*, CC Docket No. 90-132, 6 FCC Rcd 5880 (1991).

satisfy any prong when it comes to the provision of broadband DSL services to small business locations.

A. ILECs Have An Overwhelming Share of the DSL Market

The ILECs attempt to dilute their broadband market share by highlighting various investment analyst and marketing reports that discuss DSL deployment and subscribership as compared to cable modems.²¹ But such a comparison is completely irrelevant to an assessment of ILEC market power *within* the DSL market. As to that market, the ILECs themselves concede that they maintain an overwhelming share and that their share is growing. Crandall and Sidak note that, according to TeleChoice data, ILECs held 84% of the DSL market as of December, 2000.²² By December, 2001, that figure had climbed to 88%.²³ Data analyzed by the FCC puts ILEC market share at 93%, as of June, 2001.²⁴ Even more compelling, however, is the fact that ILECs captured 98% of the more than 1-million net DSL additions in that same time frame.²⁵

²¹ See, e.g., “Declaration of Robert W. Crandall and J. Gregory Sidak,” SBC Comments at Attachment A, Attachment 1, at paras. 43-48; 55-61 (“Crandall/Sidak”).

²² Crandall/Sidak at para. 46.

²³ *North American DSL Market Reaches 5.5 Million, According to TeleChoice*, February 12, 2002, http://www.telechoice.com/newsdetail.asp?news_id=313 (accessed March 18, 2002).

²⁴ *Third Broadband Report* at para. 51.

²⁵ *Id.*; *North American DSL Market Reaches 3.5 Million in First Quarter*, May 14, 2001, http://www.telechoice.com/newsdetail.asp?news_id=98 (accessed March 18, 2002).

B. No Party Has Introduced Demand Elasticity Studies for Small Business Services

To demonstrate evidence of demand elasticity for DSL and cable modem service, SBC witnesses Crandall and Sidak present a “nested logit” model which purports to demonstrate that consumer demand responds to changes in price for these services.²⁶ However, the Crandall/Sidak model is fraught with methodological flaws that nullify its usefulness in assessing elasticity of demand for cable modem and DSL service, and offers no insight whatsoever to demand elasticity for these services with respect to business customers.

The flaws in the Crandall/Sidak model include, but are not necessarily limited to, the following:

- The study relies upon a patently unrepresentative sample. Only those consumers who had access to *both* DSL and cable modem service at the time of the survey (12% of the 63,000 survey respondents) were considered in the study. No evidence was presented regarding the price elasticity of demand for the remaining 88% of the population.
- The study ignores the relevant time frame. While the respondents may have had access to both technologies *at the time of the survey*, they did not necessarily have access to both at the time that they made their original purchase decision. If only one service was available when respondents made their initial purchase decision, relative prices could not have been a determining factor in choosing a service.
- The study relies on incomplete pricing information. Pricing information is only provided for the service chosen by the consumer. Prices for the other service (either DSL or cable) were inferred based upon the average price available in the fourth quarter of 2000 and first quarter of 2001, which may or may not represent the actual prices faced by consumers at their original time of purchase.

²⁶ Crandall/Sidak at paras. 62-71, 129-132.

- The study relies on skewed data. The study survey includes those consumers who are aware of the existence of alternate service options, which serves to pre-select those consumers who are knowledgeable about the service and thus more susceptible to a change in demand in response to a change in price.
- The study fails to account for all variables. By excluding any other variables from the nested logit model, the study assumes that price is the only factor upon which service demand decisions are made, when there is no basis for assuming that this is in fact the case.²⁷
- The study makes no attempt to study the cross-price elasticity of broadband services with respect to dial-up (*i.e.*, narrowband) internet access services, which other parties argue to be significant.²⁸

For all of these reasons, the results of the Crandall/Sidak demand elasticity study are useless for purposes of reaching conclusions regarding the price elasticity of demand for mass market broadband services.

Moreover, the claims by ILEC witnesses that these services are price elastic are inconsistent with actual consumer behavior in response to recent price increases for DSL. The significant 25% price increases for DSL service implemented by ILECs in the spring of 2001²⁹ have seemingly had little or no impact upon consumer demand, as overall DSL subscribership increased by over 1-million lines in the last two quarters of 2001. Such evidence actually supports a finding of *inelastic* demand, not elastic demand.

²⁷ In a report appended to Qwest's comments, Shooshan and Haring note that "86% of users cite 'speed of performance' as the key choice-determining factor, followed by the technology's reputation and (only) then price." Qwest Comments, Attachment A, John Haring and Harry Shooshan, "ILEC Non-Dominance in the Provision of Retail Broadband Services," at 6, citing an October 2001 Strategis Group survey.

²⁸ See, *e.g.*, AT&T Comments at 38-39.

²⁹ Several ILECs, including SBC, BellSouth and Verizon, raised prices from the \$40 level to

Significantly, the Crandall/Sidak study assesses only *residential* data since it relies on TNS Telecoms data which employs survey and bill harvesting data for residential users only. Thus, even if one were to accept the Crandall/Sidak model as accurate (which it is not), its conclusions do not apply to the business market. In fact, demand for DSL service by business users is likely to be very *inelastic*, given the inherent differences in demand between residential and business users and the fact that business users do not find cable modem service to be an adequate substitute for DSL.

No other commenting party has presented demand elasticity data that is probative of business use of broadband services, or even a study that incorporates *both* residential and business data. Absent any such evidence, the Commission has no basis for concluding that demand elasticity for business DSL service is sufficient to prevent market power abuses by the incumbent LECs.

C. Business DSL Services Are Characterized by Low Competitive Supply Elasticity

To support their claims of high competitive supply elasticities in the mass market for broadband services, the ILECs have focused primarily upon cable modem providers.³⁰ But, as discussed above, Ad Hoc and other commenters have established that cable modem service is not a viable substitute for small

the \$50 level in the spring of 2001. See Crandall/Sidak at para. 38; AT&T Comments at 46.

³⁰ SBC Comments at 38-40; Qwest Comments at 41-42.

business locations, and is therefore not relevant to an analysis of supply elasticity in the small business broadband market.

The dearth of intermodal competitive alternatives for business customers need not be fatal to the ILECs' claims that the broadband business services market is competitive, of course, if there were robust *intramodal* competitive alternatives, *i.e.*, Data Local Exchange Carriers ("DLECs") who could provide DSL services using ILEC facilities or similar, self-provisioned facilities. But, as discussed in Ad Hoc's comments, no such competition exists. Nor did any carrier attempt to discuss supply elasticity in the context of intramodal competition in their comments.

The carriers' reluctance to assess supply elasticity in the context of intramodal competition is understandable given the technological and economic characteristics of the ILECs' services and facilities. The ILECs' legacy investment and control over the local facilities required by non-facility-based DSL competitors results in extremely high entry barriers for would-be competitors. Competitive carriers seeking to provide DSL service as facility-based providers must establish a local *physical* presence in those areas where the ILEC makes DSL available in order to offer their competing retail services to end users. Establishing a competitive local presence is a costly and time-consuming undertaking and thus limits the ability of competitive local exchange carriers ("CLECs") to rapidly expand their supply in response to a change in price.

The ILECs' exclusive control over other critical inputs for competitive DSL service also results in low supply elasticity. As the FCC itself has repeatedly observed, CLECs can offer DSL more quickly only by using ILEC facilities that satisfy specific engineering and policy guidelines (*e.g.*, loops shorter than 18,000 feet, for most DSL services; no fiber segment in the subscriber line; collocation space in the ILEC central office; and subscriber outside plant that is, or can be made, suitable to carry a DSL channel). Most importantly, DSL can only be provided over loops that have been properly "conditioned" by the incumbent LEC. Additionally, as ILECs migrate their DSL services off of copper and onto fiber optic feeder, while refusing to provide CLECs with sub-loop unbundling or remote terminal access, CLECs are largely blocked from DSL entry altogether.

ILECs thus maintain substantial control over the supply of DSL services, not only for retail end user customers but also for competing retail service providers, *i.e.*, wholesale customers. ILEC control over DSL channel availability to competing retail providers therefore results in a very low (*i.e.*, near zero) competitive supply elasticity for DSL.

D. ILECs Have Cost Structure, Size, and Resource Advantages Over Competitors In the DSL Market,

The ILECs have argued in their comments that they do not enjoy any advantages in terms of cost structure, size or resources that would preclude the effective functioning of a competitive market compared to providers of cable

modem service³¹ and interLATA service.³² Yet, as was the case with respect to supply elasticity, these comparisons are moot since (1) cable modem service is not a viable substitute for DSL service for small business locations; and (2) the relevant geographic market for DSL connections is the local market, not the market for nation-wide broadband networks in which the IXCs operate. The correct comparison for business DSL services is between ILECs and CLECs.

Without question, ILECs dwarf their competitive counterparts in every metric. They completely dominate the local market, have substantial resources which permit significant cross-subsidization between broadband and other services,³³ and maintain bottleneck control over the essential facilities required by CLECs to provide DSL service.

Moreover, it does not appear that CLECs will have comparable cost structure, size, or resources any time soon. As discussed in Ad Hoc's Initial Comments, CLEC market capitalization has fallen 70% since September, 1999.³⁴ The "shakeout" within the CLEC market not only threatens to discourage additional investment in deploying facilities that might permit for more substantive competition in the DSL market, it threatens the very existence of CLECs as a whole. While there may be a very few CLECs of comparable size to the

³¹ BellSouth Comments at 43; SBC Comments at 40.

³² Qwest at 45-53.

³³ Crandall and Sidak provide direct evidence of cross-subsidization, as they indicate that SBC's cost of deploying DSL is \$86 per customer per month, well above the \$50 or so in monthly per-line revenues received for the service.

³⁴ Ad Hoc Comments at 19.

Incumbent LECs, it is important to note that even these larger carriers are every bit as dependent upon ILEC bottleneck facilities and the whims of ILEC DSL deployment in order to provide this service.

III. The ILECs' Special Access Price Increases Exemplify the Exercise of Market Power

The Commission recognized in the *Notice* that market power can result from control of local bottleneck facilities. Accordingly, the Commission sought comment on the extent to which the ILECs can leverage their market power in the local exchange and exchange access markets into the market for broadband services.

The exercise of market power which concerns the Commission was explained in the comments of several ILECs. It is an ILEC's ability to discriminate against competitors,³⁵ to raise competitors' costs,³⁶ or to engage in cross-subsidization "by raising its rates for the local exchange services or facilities over which it allegedly has market power."³⁷

The ILECs stoutly maintain that they have no such market power. For example, in their Declaration filed in support of SBC's Petition, Crandall and Sidak state that "SBC could not possibly finance a predatory pricing strategy through cross-subsidization [because] SBC's basic local exchange rates are subject to rigorous price regulation, including price ceilings, in each of its states.

³⁵ SBC Comments at 48.

³⁶ *Id.*

Thus, SBC has no ability to raise basic local exchange prices to finance below-cost DSL prices.³⁸ Qwest, Verizon, and BellSouth make identical arguments in their comments,³⁹ based on the “pervasive regulation”⁴⁰ by which they are “severely constrained”⁴¹ and which would “foreclose any attempt”⁴² to exercise this type of market power. Specifically, Crandall/Sidak note that “SBC’s switched access prices are capped ... at 0.55 cents per minute and its special-access rates are constrained by price cap regulation in all areas that do not exhibit sufficient competition to qualify for pricing flexibility.”⁴³

If only that were so. As large users of the ILEC special access services used to establish local broadband connections, Ad Hoc members are only too familiar with the ILECs’ broadband pricing practices. And those practices have been to engage in precisely the type of behavior the ILECs themselves say would occur where a carrier is in control of bottleneck facilities and is able to leverage its control over these facilities to the detriment of its competitors. As Ad Hoc demonstrated in the Commission’s *Performance Standards* rulemaking,⁴⁴ SBC and other BOCs have increased their special-access rates above the price-

³⁷ Qwest Comments at 52.

³⁸ Crandall/Sidak at 90.

³⁹ See Qwest Comments at 52-53; Verizon Comments at 22; BellSouth at 49.

⁴⁰ SBC Comments at 48.

⁴¹ *Id.*

⁴² Verizon Comments at 22.

⁴³ Crandall/Sidak at para. 90.

⁴⁴ See *Performance Measurements and Standards for Interstate Special Access*, CC Docket No. 01-321, Notice of Proposed Rulemaking, FCC No. 01-339, rel. November 19, 2001.

cap ceiling in each and all of the markets in which they have qualified for pricing flexibility.⁴⁵

The problem, of course, is that merely “exhibit[ing] sufficient competition to qualify for pricing flexibility,” *i.e.*, making the factual showing required by the Commission for pricing flexibility, is nowhere near the same as demonstrating the presence of actual, price-constraining competition. Nor has the Commission ever indicated differently. Moreover, the BOCs’ claims that they are subject to pervasive regulation are simply erroneous. The Commission’s price cap rules, which might otherwise ensure that BOC prices and earnings are “capped” at “competitive” or “regulated” levels, apply to only a rapidly shrinking subset of all BOC services, which does *not* include the local exchange and access services used by large business users and IXCs for broadband connections. Those services have been removed from the price caps baskets. And, once they were freed from regulatory price constraints, the BOCs promptly increased prices, despite record earnings levels which would belie any claim that price increases were necessary for a reasonable return.

IV. ILECS Dominate the Large Business Broadband Markets in Which They Are Legally Permitted to Participate

The ILECs are seeking non-dominant status for their large business broadband services as well. In support of this request, the ILECs have misrepresented their market share of the local exchange and exchange access

⁴⁵ See Comments of Ad Hoc Telecommunications Users Committee filed January 22, 2002,

markets for large business broadband services. SBC contends that it controls between 12% and 16% of the national frame relay and ATM markets⁴⁶ whereas Qwest claims its share is less than 5%.⁴⁷ Verizon states that its share of the national frame relay and ATM markets are 4.2% and 5.6%, respectively.⁴⁸

This data is misleading and grossly understates the extent of BOC dominance in the data services market. In their market share calculations, SBC, Qwest, and Verizon have included both interLATA and intraLATA markets. Doing so misrepresents the extent of the BOCs' dominance in the large business broadband services market because BOCs are by law excluded from participating in the interLATA market, with the exception of those states for which the BOC has received Section 271 interLATA authority. The ILECs' dominance in the broadband services market stems from their bottleneck control over the local exchange and exchange access facilities that end users and IXCs must use to access interLATA networks. Both IXCs and end users are dependent on the ILECs' local broadband services, such as the DS1, DS3, OCn, and frame relay services provided pursuant to the ILECs' special access tariffs, for local connections to nation-wide frame relay and ATM services. Thus, the relevant market share data for assessing ILEC market power in the large business broadband market is the ILECs' share of the local broadband access market.

at 3-6.

⁴⁶ SBC Comments at 42; Crandall/Sidak Declaration at para. 112.

⁴⁷ Qwest Comments at 43.

AT&T declarant Robert Willig has recalculated BOC market share for the “local” frame relay and ATM services market which, as he states, is the “market controlled by the incumbent LEC.”⁴⁹ Professor Willig found that the BOCs have a revenue share of over 90% of all “local” frame relay and ATM services in 2000. Thus, there can be no doubt that ILECs possess market power in the large business data services market – and this market power exists by virtue of the BOCs’ control over the essential bottleneck facilities required to provide these services.

CONCLUSION

In its Initial Comments, Ad Hoc demonstrated how the dearth of competition for business services is reason enough to refrain from deregulating ILEC broadband services. In these Reply Comments, Ad Hoc demonstrates that no additional evidence has been presented that can lead to anything but the same conclusion, and that any assessment of non-dominant status must address low-volume business locations separately from the mass market as defined in the Notice.

The Commission cannot allow the ILECs’ broadband bandwagon to roll over the interests of customers and the Commission’s statutory obligation to ensure just and reasonable rates, terms, and conditions. For business users, the problem is not broadband deployment but *competitive* broadband deployment. In

⁴⁸ Verizon Comments at 20.

⁴⁹ Willig (AT&T) at para. 67.

its rush to de-regulate the ILECs, the Commission cannot abdicate its responsibility to protect users from the ILECs' market power.

The Commission successfully transitioned to competition in the interstate, interexchange market through the use of incentive regulation,⁵⁰ continued enforcement of non-discrimination and tariffing requirements,⁵¹ and contract tariff authority.⁵² These requirements protected consumers and competition while preserving carrier flexibility to respond to competition as it emerged. Ad Hoc urges the Commission to apply the interstate interexchange model to the ILECs' broadband business services:

- Enforce the non-discrimination, pricing, and tariffing requirements in Sections 201, 202, and 203 of the Act
- Revive incentive regulation of ILEC prices for broadband business services
 - Initialize ILEC special access rates at the price cap-regulated levels in place before MSA pricing
 - Initiate and complete an X factor specification before the CALLS plan re-targets the X to GDP-PI in July 2004⁵³
- Continue the ILECs' contract tariff authority so that ILECs and customers can negotiate to respond to competition if it emerges

⁵⁰ *Policy and Rules Concerning Rates for Dominant Carriers*, CC Docket No. 87-313, Notice of Proposed Rulemaking, 2 FCC Rcd 5208 (1987), Further Notice of Proposed Rulemaking, 3 FCC Rcd 3195 (1988) ("*Further Notice*"), Report and Order and Second Further Notice, 4 FCC Rcd 2873 (1989) ("*AT&T Price Cap Order*"), Erratum, 4 FCC Rcd 3379 (1989).

⁵¹ *Competition in the Interexchange Marketplace*, Notice of Proposed Rulemaking, 5 FCC Rcd 2627 (1990) ("*NPRM*"), Report and Order, 6 FCC Rcd 5880, 5908 (1991) ("*Interexchange Proceeding*"), *recon.*, 6 FCC Rcd 7569 (1991), *further recon.*, 7 FCC Rcd 2677 (1992), Second Report and Order, 8 FCC Rcd 3668 (1993), *recon.*, 8 FCC Rcd 5046 (1993).

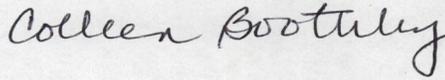
⁵² *Id.*

⁵³ *Initiation of Cost Review Proceeding for Residential and Single-Line Business Subscriber Line Charge (SLC) Caps*, CC Dkts. Nos. 92-262, 94-1, DA 01-2163 (rel. September 17, 2001) at para. 141.

In addition, since ILECs have continuing market power over essential “last mile” facilities, the Commission’s regulatory regime for the ILECs must ensure that ILECs make their telecommunications services available to end users, competitors, and information service providers on a stand-alone basis, unbundled from information services or other unregulated services, particularly those telecommunications services used by the ILEC in the provision of its unregulated services. Finally, the Commission must continue its efforts to eliminate barriers to competitive entry and vigorously enforce the Act’s market-opening requirements.

Respectfully submitted,
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April 22, 2002

Certificate of Service

I, Michaeleen I. Williams, hereby certify that true and correct copies of the preceding Comments of Ad Hoc Telecommunications Users Committee were served this 22nd day of April, 2002 via the FCC's ECFS system, and by first class mail upon the following:

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