Before the
Federal Communications Commission
Washington, DC 20554

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In the Matter of Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers	)	CC Docket No. 01-338
Implementation of the Local Competition Provisions of the Telecommunications Act Of 1996	)	CC Docket No. 96-98
Deployment of Wireless Services Offering Advanced Telecommunications Capability	)	CC Docket No. 98-147

COMMENTS OF THE TELECOMMUNICATIONS INDUSTRY ASSOCIATION

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EXECUTIVE SUMMARY

TIA is the principal voice of communications and information technology manufacturers and suppliers. TIA member companies design, build, and deploy the technologies that will drive the broadband revolution, and thus they stand to be impacted substantially by decisions made during the course of this Commission proceeding.

TIA long has believed that widespread broadband deployment is the critical issue for the communications industry, and also can be a major economic stimulator for the national and global economy. But these benefits from broadband technologies can only be realized if the services are made available widely and in a reasonable period of time, which is not happening today.

Although perhaps not the sole cause, TIA continues to believe that the regulatory framework that governs broadband and high-speed Internet access networks impedes the investment that is necessary to make these service offerings more widely available and more robust. TIA also has recognized that in order for the "broadband effect" to be realized, regulatory policy must promote increased and sustained facilities-based competition.

TIA recommends that the Commission not apply the unbundling obligations to new last mile, broadband facilities that are used for the provision of these services while maintaining the existing rules for legacy copper loops. TIA also supports the establishment of attainable yet substantial build-out requirements or benchmarks for wireline broadband services. TIA also emphasizes its support for the comments filed in this proceeding by the High Tech Broadband Coalition, of which it is a founding member.

TABLE OF CONTENTS

I. INTRODUCTION 2

II. TIA CONTINUES TO ADVOCATE THE IMPORTANCE OF BROADBAND AND A NEED FOR A MINIMAL REGULATORY ENVIRONMENT. 5

III. WIDESPREAD AVAILABILITY OF BROADBAND COMMUNICATIONS CAPABILITY WILL HAVE ENORMOUS AND LIMITLESS SOCIETAL IMPACTS. 7

A. The U.S. Government Cannot Ignore the Potential Economic Impact of Broadband Deployment that the Rest of the World Seems to Grasp. 7

B. Broadband Has an Important Role in Enhancing Homeland Security. 10

IV. THE COMMISSION HAS A CHANCE TO REMOVE REGULATORY IMPEDIMENTS TO INCREASED INVESTMENT IN BROADBAND COMMUNICATIONS INFRASTRUCTURE. 12

A. Massive Levels of Investment in Facilities are Needed to Enable Current-Generation and Especially Next-Generation Broadband Technologies to be Made Available Widely. 12

B. Not Applying the Unbundling Rules to New Broadband Network Facilities Will Remove an Obstacle to Increased Investment in, and Wider Deployment of, Broadband Communications Technologies. 14

C. Public Interest Considerations and the Law Support the Commission Taking This Action. 18

D. The Commission Should Establish Build-Out Requirements or Benchmarks for ILEC Deployment of Wireline Broadband Facilities. 24

V. CONCLUSION. 26

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COMMENTS OF THE TELECOMMUNICATIONS INDUSTRY ASSOCIATION

Pursuant to Section 1.415 of the Commission's Rules,[1] the Telecommunications Industry Association (TIA) hereby comments in response to the *Notice of Proposed Rulemaking* in the above-captioned proceeding.[2] TIA is the principal industry voice for communications and information technology manufacturers and suppliers. As the companies designing, building, and deploying the technologies that are driving the broadband revolution, TIA members will be impacted substantially by Commission decisions made during the course of this proceeding. TIA continues to support the

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[1] 47 C.F.R. § 1.415.

[2] *In the Matter of Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*, CC Docket No. 01-338; *Implementation of the Local Competition Provisions of the Telecommunications Act of 1996*, CC Docket No. 96-98; *Deployment of Wireline Service Offering Advanced Telecommunications Capability*, CC Docket No. 98-147, Notice of Proposed Rulemaking, FCC 01-361 (rel. Dec. 20, 2001) ("*NPRM*").

adoption and implementation of policies that incent investment in new and diverse communications technologies, for purposes of this proceeding those capable of delivering high-speed and broadband Internet access services to all residential and business consumers. In the comments that follow, TIA recommends that the Commission not apply the unbundling obligations to new last mile, broadband facilities that are used for the provision of these services while maintaining the existing rules for legacy copper loops. TIA also supports the establishment of attainable yet substantial build-out requirements or benchmarks for wireline broadband services. TIA also emphasizes its support for the comments filed in this proceeding by the High Tech Broadband Coalition,[3] of which it is a founding member.

I. INTRODUCTION.

TIA includes among its membership 1,100 large, medium and small companies that manufacture and provide communications and information technology products, materials, systems, distribution services, and professional services in the United States and around the globe. TIA represents its members on the full range of public policy issues affecting the communications industry, forges consensus on industry standards, organizes and co-owns SUPERCOMM, the world's largest annual communications exhibition and conference, and hosts the broadband-focused SUPERnet each year in Silicon Valley.

[3] Comments of High Tech Broadband Coalition (filed April 5, 2002) (hereafter *"HTBC Comments"*).

TIA member companies have substantial and material interests in issues surrounding the deployment of technologies that support broadband and high-speed Internet access. They offer for sale a wide range of landline and wireless communications technologies, both terrestrial and satellite, that enable high-speed and broadband access to the Internet for commercial and residential users. TIA members sell to all classes of network service providers holding the potential to provide these types of services. TIA's views thus are necessarily both technology-neutral and service provider-neutral, affording a unique perspective from which to advise the Commission.

TIA long has been focused on widespread broadband deployment as *the* critical issue for the communications industry, and as a major economic stimulator for the national and global economy. TIA also has recognized that in order for the "broadband effect" to be realized, regulatory policy must promote increased and sustained facilities-based competition.

The potentially transformative effect of broadband communications dwarves that of the first Internet revolution. Ubiquitous broadband deployment will bring enormous advances in education, healthcare and teleworking, as well as public safety and security, all critical to the future of our nation. Such capability will equip every American with the critical tools necessary to compete in the 21st century, tools that will make them far more productive, increase their standard of living, and enhance their economic and physical security.

But these benefits from broadband technologies can only be realized if the services are made available widely and in a reasonable period of time. Broadband

deployment and adoption, however, is not occurring as quickly as it could or should. Although perhaps not the sole cause, TIA continues to believe that the regulatory framework that governs broadband and high-speed Internet access networks, particularly "wireline" ones (referring to the evolving telecommunications infrastructure operated traditionally by local exchange carriers), impedes the investment that is necessary to make these service offerings more widely available and more robust.

TIA applauds the Commission for assessing the overall broadband regulatory framework through all of its recent initiatives, particularly this review of the unbundling rules. TIA believes that the unbundling rules are a clear instance where a policy change can have an immediate and lasting impact on investment in communications networks. Specifically, it seems evident and intuitive that a network operator has a much greater incentive to upgrade its facilities and extend the reach of its network without an obligation to share with its competitors all of the upside return on the investment it alone made. Not applying unbundling obligations to new broadband access facilities holds the promise of making wireline networks a stronger broadband competitor to the cable industry and terrestrial and satellite wireless technologies now and into the future. Moreover, TIA is confident that the Commission can accomplish this objective under the current statutory framework, largely because Title II of the Communications Act is focused on the monopoly environment of the legacy, local voice telephony market.

TIA also supports the adoption in this proceeding of build-out requirements or "benchmarks" that can afford the Commission an opportunity to review the progress of wireline broadband deployment and gauge the impact and success of its unbundling rules.

II. TIA CONTINUES TO ADVOCATE THE IMPORTANCE OF BROADBAND AND A NEED FOR A MINIMAL REGULATORY ENVIRONMENT.

TIA is not just now realizing the critical nature of broadband deployment and asking the government to do what it can and should to remove obstacles. TIA was an original supporter of Section 706's inclusion in the Telecommunications Act of 1996.[4] TIA has followed up that early interest with its comments in the Commission's inquiries under that provision of the law, maintaining that advanced telecommunications capability has not been deployed "in a reasonable and timely manner," that the Commission should set higher thresholds for interpreting the capability envisioned in Section 706, and that the Commission should take deregulatory steps to advance deployment.[5]

Moreover, it has been well over two years since TIA first offered its detailed proposal to the Commission for providing relief from the unbundling rules for new broadband-capable facilities.[6] TIA has continued to renew this call.[7] The comments

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[4] Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56 (1996) ("1996 Act").

[5] Reply Comments of the Telecommunications Industry Association, *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 (filed Oct. 9, 2001) (hereafter *"TIA Section 706 Reply Comments"*); "The Future of Broadband: A Case for FCC Action to Spur Deployment of Advanced Telecommunications Capability," TIA, filed as an *ex parte* submission in CC Docket No. 98-146 (Dec. 23, 1998); Letter from Matthew Flanigan, TIA President, to the Commission, filed in CC Docket No. 98-146 (Oct. 8, 1998).

[6] Letter to the Honorable William E. Kennard, Chairman, Federal Communications Commission, from Mathew J. Flanigan, President, Telecommunications Industry Association, filed in CC Docket No. 96-98, *Implementation of the Local Competition*

filed in this proceeding by the High Tech Broadband Coalition (HTBC) are evidence that this type of regulatory approach to investment in broadband and high-speed Internet access facilities has gained wide support.[8]

TIA has called on President George W. Bush to set a national broadband vision and policy, focusing on the economic and social benefits of the technologies and the critical role government can play.[9] An important recommendation to the President was for his Administration to support modifying the Commission's regulations "to relieve telecommunications service providers of the so-called federal and state 'unbundling' obligations on *new broadband network components* in order to give them the necessary incentives to invest."[10]

Finally, TIA's positions on broadband deployment policy are consistent across technology platforms. TIA believes that, to the extent feasible, regulatory burdens should not vary by the chosen delivery platform for services that essentially are functionally equivalent. Importantly, however, TIA strongly believes that this move to a more "level

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Provisions in the Telecommunications Act of 1996 (Aug. 2, 1999) (hereafter *"TIA 1999 UNE Filing"*).

[7] *See TIA Section 706 Reply Comments* at 9-11; Comments of the Telecommunications Industry Association, *Request for Comments on Deployment of Broadband Networks and Advanced Telecommunications*, NTIA Docket No. 011109273-1273-01 (filed Dec. 19, 2001).

[8] *See generally HTBC Comments.*

[9] *See* Letter to the Honorable George W. Bush, President, United States of America, from Matthew J. Flanigan, President, Telecommunications Industry Association (Oct. 4, 2001) (available at http://www.tiaonline.org/pubs/press_releases/letter_bush_100401.pdf) (*hereafter TIA Letter to President Bush*).

[10] *Id.*

playing field" for broadband should be deregulatory and should not impose legacy regulatory models on nascent technologies and services. For this reason, TIA has supported the Commission not imposing "open" or "forced" access obligations on high-speed cable modem Internet access services.[11]

III. WIDESPREAD AVAILABILITY OF BROADBAND COMMUNICATIONS CAPABILITY WILL HAVE ENORMOUS AND LIMITLESS SOCIETAL IMPACTS.

Broadband deployment certainly is an important component of telecommunications policy, but it's even bigger than that. It has fundamental economic and social implications for the United States and the world.

A. The U.S. Government Cannot Ignore the Potential Economic Impact of Broadband Deployment that the Rest of the World Seems to Grasp.

Most by now are aware of the major positive impact of the Internet and its associated information technology on the U.S. economy by way of productivity gains. The production and use of information technology accounted for nearly two-thirds of the dramatic productivity growth experienced in the second half of the last decade.[12]

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[11] Comments of the Telecommunications Industry Association, *Inquiry Concerning High-Speed Access to the Internet Over Cable and Other Facilities, Internet Over Cable Declaratory Ruling, Appropriate Regulatory Treatment for Broadband Access to the Internet Over Cable Facilities*, GN Docket No. 00-185, CS Docket No. 02-52 (filed Dec. 1, 2000) at 25 ("Cable operators have been investing heavily to upgrade the cable plant in order to provide residential high-speed Internet access and other services. These efforts have been undertaken outside the shadow of government-imposed open access regulation.")

[12] *See, e.g.*, Council of Economic Advisers, Economic Report of the President (Jan. 2001).

Businesses and consumers, however, have largely exploited if not exhausted the benefits of standard dial-up telephone connections that offer a connection to the Internet at speeds no greater than 56 kilobits per second (kbps). New tools that revolve around fast, interactive, content-rich broadband services are now needed to take our economy to the next level of growth and performance. This of course means opening the 'last mile bottleneck' for all Americans in such a way that consumers are able to gain broadband access to the Internet at increasingly higher speeds.

Analysts have estimated that the benefits for economic growth of ubiquitous broadband deployment may reach $500 billion per year should the rollout of these technologies be expedited.[13] Investments in broadband made today to capture these benefits would have a direct and positive impact on the economy. Unfortunately, however, broadband technologies are not being deployed in a timely manner in the U.S. By some estimates, current and next-generation broadband capability will not be available nationally until the years 2010 and 2030 respectively. TIA strongly believes that such a result is entirely unacceptable.

Other nations are surpassing the U.S. by aggressively promoting broadband deployment through well-conceived national policies in an effort to capture the economic and social benefits of this new infrastructure. At the end of 2000, the United States ranked no better than third in the deployment of high-speed Internet access and is falling

[13] *See* Robert W. Crandall and Charles L. Jackson, Criterion Economics LLC, *The $500 Billion Opportunity: Benefits of Widespread Diffusion of Broadband Internet Access,* July 2001.

farther behind literally by the day.[14] In Japan, next-generation broadband capability will be deployed to nearly 30 million households, nearly 63 percent, by the year 2005, and the government plans to make available via the Internet nearly all applicable government-related applications and services as early as 2003.[15] In South Korea, the government plans to achieve nearly 85 percent broadband penetration among households by 2005,[16] and one carrier has connected more broadband subscribers in a week than any major American carrier has in a quarter. China has adopted a $151 billion five-year investment plan for telecommunications focused on broadband. In Australia, the government recently announced its successful deployment of more than 1600 government services online, achieving its objective to place all appropriate Government services online by the end of 2001.[17] The Canadian Government has used its national broadband strategy to promote nationwide access to high-speed connections that in turn assist with e-government, distance learning and telemedicine applications.[18]

The European Commission announced in February 2002 that it was putting high-speed Internet access at the top of its strategy to boost e-commerce and turn the European

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[14] *See* "The Development of Broadband Access in OECD Countries," by the Organisation for Economic Co-operation and Development (OECD), Oct. 29, 2001.

[15] Comments from Mr. Shinichiro Sakata, Deputy Director General, Information and Communications Policy, Ministry of Public Management, Home Affairs, Posts and Telecommunications, Japan, at OECD workshop, Dec. 5, 2001.

[16] Comments from Mr. Su-Guen Rye, Informatization Planning Office, Ministry of Information & Communication, Korea, at OECD workshop, Dec. 5, 2001.

[17] *See* Media Release from Office of Australian Minister for Communications, Information Technology and the Arts, Senator Richard Alston, Feb. 27, 2002.

[18] *See* "The New National Dream: Networking the Nation for Broadband Access," Report of the Canadian National Broadband Task Force, 2001. (http://broadband.gc.ca).

Union into the world's most competitive economy by 2010.[19] At a national level, the U.K., the Netherlands, Italy and Sweden are also moving ahead with alacrity and all have adopted national strategies promoting broadband infrastructure and service rollout.[20] Thus, without aggressive national policies and concerted effort, the United States risks falling further and further behind other countries in terms of broadband penetration, service provision and use over the next decade.

B. Broadband Has an Important Role in Enhancing Homeland Security.

An increase in the level and pace of broadband deployment, and redundant, facilities-based, competitive networks promise to help address the security challenges we as a nation now face.

Prior to September 11, 2001, broadband certainly was being promoted as a means of stimulating economic growth and helping to lift the country from the grip of a recession. Many more are now coming to realize, however, that the technical characteristics and robust capabilities of broadband also make it a potentially important tool as the nation mobilizes to reduce its vulnerability to terrorism and other security threats.

According to most estimates, current-generation broadband communications services (*i.e.* high-speed Internet access services) are subscribed to by about 10 percent of

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[19] "EU Commission puts broadband at top of e-strategy," *Lisa Jucca, Reuters (as published by Total Telecom)*, Feb. 12, 2002.

[20] Documented in a draft OECD Report, "Broadband Infrastructure Deployment: The Role of Government Assistance," Nov. 14, 2001.

the U.S. population. By offering a high-speed connection, these services enable users to take much greater advantage of the high-capacity broadband backbone network blanketing the country. The access technology platforms delivering the services include cable modems, asymmetrical digital subscriber lines (ADSL), fixed wireless such as local multipoint distribution systems (LMDS), satellite and, increasingly, fiber-to-the-user (FTTU). A truly ubiquitous broadband network capable of linking residences, businesses and local and federal government agencies would be able to provide capabilities to both proactively defend against terrorism and respond in the event of an attack.

The fast, interactive, content-rich services that are the hallmark of broadband would enable voice, high-speed data and high-quality video applications that could:

- Enable biometrics screening at all designated points of entry into the U.S. and at sensitive facilities;
- Enhance *remote* surveillance of borders, airports, ports, and train stations to complement local surveillance;
- Quickly restore public services—and public confidence—by enabling teleworking by public officials and their staffs in the event of the damage or destruction of normal work spaces;
- Provide remote access to information systems necessary for either public or private business activities in the event of facility or area quarantines related to bio-chemical threats or attacks;

- Marshall geographically dispersed medical expertise and support at the scene of a crisis via telemedicine by complementing existing and future techniques with a ubiquitous network for delivering those capabilities wherever needed;
- Backup or replace letter mail services with high capacity electronic service in the event of a disruption caused by destruction, contamination or quarantine of mail facilities;
- Supplement conventional circuit-switched wireline and wireless telephony services with more survivable, dynamically routed Voice-over-IP services capable of TV-quality videoconferencing among other services.

This list by no means is exhaustive as broadband technologies dramatically quicken and enhance any electronic data intensive activity that could be brought to bear on the problem of protecting the U.S. or responding in the event of an attack.

IV. THE COMMISSION HAS A CHANCE TO REMOVE REGULATORY IMPEDIMENTS TO INCREASED INVESTMENT IN BROADBAND COMMUNICATIONS INFRASTRUCTURE.

A. Massive Levels of Investment in Facilities are Needed to Enable Current-Generation and Especially Next-Generation Broadband Technologies to be Made Available Widely.

Incumbent local exchange carriers (ILECs), by definition, are by far the largest class of facilities-based residential "last mile" telecommunications service providers. They control "essential" facilities, conduits and rights-of-way, and hence effectively are the "gatekeepers" of the national, local wired telecommunications infrastructure. Recognizing, of course, that a wide variety of communications companies contribute to

the functioning and upkeep of the telecommunications network, in the end, it is critical for the ILECs to make the investments needed to equip their networks with the capability to meet the increasing demand for broadband connectivity. An upgraded telecommunications infrastructure is essential to its usability as an important competitive alternative to the high-speed networks of cable operators, the other primary communications "pipe" into most American homes at this point in time.[21]

TIA observes that as ILECs in fact slowed down their capital expenditures in 2001 and have done so again in 2002, their collective investment in broadband and high-speed networks essentially has come close to a screeching halt. They are hesitating to upgrade their networks to enable remote subscribers to have access to DSL services, at least in part because of regulatory obligations and uncertainty surrounding unbundling, pricing, and collocation obligations. Further, the ILECs continue to lay copper in new builds and total plant rehabilitations when forward-looking and bandwidth-rich fiber solutions can be deployed economically, again apparently at least in part due to the unbundling, resale, and pricing rules.

In contrast, the spending of the same ILECs on their wireless networks, a largely unregulated and competitive side of the industry, has not suffered as extensively. This contrast likely is not coincidental. Uncertainty remains as to what exactly the rules are and will be in the wired high-speed Internet access and broadband services market. It would seem rational for an ILEC to reduce or simply stop necessary network upgrades if

[21] Terrestrial wireless, satellite, and even utility technologies of course hold substantial promise as competitive alternatives for the delivery of broadband services, but they are just beginning to make substantial inroads in the residential markets.

it fears bearing all of the risks of facilities upgrade investments and being forced to share the results of these investments with its competitors. Regulatory obligations threaten to reduce the ILECs' return on investment while increasing their risks, thereby undermining the incentive to innovate.

B. Not Applying the Unbundling Rules to New Broadband Network Facilities Will Remove an Obstacle to Increased Investment in, and Wider Deployment of, Broadband Communications Technologies.

The Commission in the *NPRM* seeks comment as to whether it should modify or limit incumbents' unbundling obligations going forward "so as to encourage incumbents and others to invest in new construction."[22] TIA believes that, in terms of application of the unbundling requirements of Section 251,[23] the Commission can and should draw a line between the legacy copper loop and the facilities necessary to support high-speed Internet access and broadband services. TIA supports a Commission determination that the latter class of facilities should not be subject to the unbundling obligations. This action is critical if broadband policy is going to help, rather than hinder, prospects for the increased investment in technology upgrades that are necessary to make broadband services more widely available.

In the fall of 1999, TIA first called on the Commission to immediately forbear from applying the unbundling obligations in instances where the network provider (*i.e.* an ILEC) installs next-generation broadband loop facilities in new build and total rehab

[22] *NPRM*, ¶ 24.

[23] *See* 47. U.S.C. § 251(b).

situations.[24] TIA believed that this proposal was a logical and easy step the Commission could take due to its very limited scope and the fact that legacy facilities would not be implicated.

Since that time, TIA has further suggested that the Commission address the regulatory barriers to new investment in the deployment of current-generation high-speed Internet access technologies to all residences and businesses.[25] TIA in fact has asked the Commission to adopt a sense of urgency in making the difficult but critical decisions that will begin shaping the broadband regulatory paradigm.[26] This rulemaking proceeding presents an opportunity to move ahead with this process. Extending high-speed Internet access capability to all Americans must be an important national priority. Regulations that have the practical effect of slowing network operators from extending out further the broadband capability of their networks are in conflict with this objective. For wireline advanced services to be available to a substantial number of consumers, fiber must be pushed out further and further into the telecommunications network, *i.e.* first to remote terminals and eventually beyond, and electronics components upgraded.

TIA believes that the FCC is taking the correct approach by looking at whether the unbundling rules are impeding this new investment, and whether changes in

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[24] *See TIA 1999 UNE Filing, supra* note 6.

[25] *See, e.g., TIA Section 706 Reply Comments, supra* note 5.

[26] *See* Letter to the Honorable Michael K. Powell, Chairman, Federal Communications Commission, from Matthew J. Flanigan, President, Telecommunications Industry Association (Dec. 5, 2001) (available at http://www.tiaonline.org/pubs/press_releases/TIA_Powell_Ltr_120501.pdf).

marketplace conditions warrant their updating. TIA in fact is of the opinion that a new or modified regulatory approach indeed is appropriate for this new investment. Further, this can be accomplished while leaving the regulatory regime in place for the core copper "local loop" facilities, so long as oversight of ILEC compliance with the Telecom Act's requirements for the core local loop remain vigilant and enforcement is carried out swiftly and effectively.

TIA recommends that the Commission in this proceeding conclude that ILECs are not required to provide unbundled access to new, last-mile broadband facilities. More specifically, the Section 251 unbundling obligations should not apply to any configuration of fiber, remote terminals, DSL and successor electronics, or any other similar wireline facilities that are used to provide high-speed Internet access or broadband services. Under this approach, ILECs would and should remain obligated to offer unbundled copper loops that could be used as part of DSL or other service offerings, and also would have to continue offering collocation space in their central offices at regulated, compensatory rates.

Network operators should have the flexibility to determine how best to configure their networks to support current and especially next-generation broadband services. New broadband facilities that would not be subject to unbundling requirements might include, for example, the type of network architecture outlined by SBC in its Project Pronto initiative.[27] It also could be a Very High-Speed DSL (VDSL) system, or fiber-to-

[27] *See SBC Launches $6 Billion Initiative To Transform It Into America's Largest Single Broadband Provider*, News Release, SBC Communications, Inc., San Antonio, Texas (Oct. 18, 1999).

the-home (FTTH) or to-the-curb. Or it might be a novel approach not yet unveiled but equally or even more efficient and effective. The point is that the Commission need not, and indeed should not, be overly restrictive in describing how a network must be configured in order to qualify for a lightened regulatory burden. The focus must be on whether, and not precisely how, the crucial objective is being achieved: making wireline broadband services far more capable and much more widely available.

TIA also notes that because the existing copper loops still would have to be made available to ILEC competitors, this relief should apply regardless of whether, in addition to enabling the network operator to offer broadband services, the new facilities could also support the provision of voice services. Manufacturers continue to introduce innovative equipment that allows network operators to converge their voice and data traffic in a way that maximizes their network investments. The Commission should not adopt policies that have the effect of discouraging operators from leveraging their existing facilities when they upgrade their networks to provide new services as they begin the transition to next-generation networks.

TIA also supports conditionally allowing ILECs to "retire" copper loop facilities once their continued maintenance becomes an inefficient expense of resources and their utility has been superseded by a next-generation network architecture.[28] An ILEC should be permitted to retire legacy facilities *only* after it (1) enters into a voluntary, negotiated agreement with at least one unaffiliated competitive local exchange carrier (CLEC) for access to its broadband facilities and (2) commits to offering the rates set forth in the

[28] *See* HTBC Comments at 36-37.

agreements to other CLECs on a non-discriminatory basis. This approach of course means that CLECs will be able to reach their customers with their service offerings because they will have access to either the legacy copper loop under existing regulations or to the next-generation facilities at commercially-negotiated rates.

C. Public Interest Considerations and the Law Support the Commission Taking This Action.

The Public Interest. As noted earlier in these comments, TIA has urged the President to make it a national priority that all Americans get access to broadband communications services.[29] The need is particularly important if the United States intends to maintain one of the leading positions among the world's top information technology economies.[30] The operation of the market likely will demonstrate a typical diffusion pattern where some consumers have access to services at an earlier point in time than others. The question is whether we can expect *all* Americans to get broadband access in a reasonable period of time and, if not, what should be done about it. The answer to whether broadband services are made available to most, if not all, Americans within the next five years may also affect the competitive advantage of the U.S. in broadband technology and service applications internationally. This is because many

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[29] *See TIA Letter to President Bush, supra* note 9.

[30] The U.S. was the top market for broadband services in the OECD and ranked third in the OECD in terms of broadband penetration at the end of 2000. "The Development of Broadband Access in OECD Countries," October 29, 2001.

countries, particularly in Europe and Asia, have set date-specific targets within this time frame for achieving widespread access to both urban and rural populations.[31]

TIA believes that competition is essential to drive industry participants to invest in new technologies and their networks, in turn leading to waves of innovation and protecting consumers from unreasonable price escalation. Effective intra-modal competition, particularly in the residential market, has proven difficult as this theoretical model has been put to the test under real world conditions. Moreover, unbundling and related regulation reduce not only the incentive of the incumbent network operator, in this case the ILEC, to invest and innovate, but the competitor that relies on its facilities as well. A CLEC has no reason to invest heavily in communications network infrastructure, with the inherent risks, if it can rely on the ILEC to assume that responsibility.

In any event, inter-modal competition may be even more important going forward for several reasons. The existence, in the market, of similar services offered over competing technology platforms expands the universe of continued innovative breakthroughs and reduces reliance on a single class of infrastructure. The latter point is especially important in light of the need for the network security and availability that redundant networks and facilities can provide in the wake of the terrorist attacks on the United States. In this proceeding, the Commission has the ability to address and remove regulatory obstacles to increased deployment by one class of competitor, the wireline

[31] According to a draft OECD Report, "Broadband Infrastructure Deployment: The Role of Government Assistance," Nov. 14, 2001, date-specific targets for broadband infrastructure and service deployment are listed for Australia, Canada, Denmark, Japan, Korea, Norway, the United Kingdom, and Sweden, among others.

broadband network operator. In turn, increased investment by the wireline network operator holds the promise of triggering continued and future responses from cable, wireless, and satellite providers, with the result being that broadband communications connections become more widely available, more innovative, and more capable.

The Law. The Communications Act is the law of the land, and its bedrock elements of competition policy should continue to apply; however, within its pages is the flexibility to allow their application to be governed by principles of a light regulatory touch for broadband services.

At the time Congress undertook its efforts to update the Communications Act, passing the 1996 Act, competition in the market for basic local telecommunications (voice telephony) was the central focus. Plain old telephone service (POTS) essentially remained a monopoly service. The popularity of the Internet as a mass medium was still not grasped. For that reason, even after amended, Title II of the Communications Act really squarely addresses only a monopoly, voice telephone services environment. The emergence of broadband and high-speed Internet access clearly challenges that paradigm. The nascent, competitive state of this market calls for a different regulatory paradigm, acknowledging the existence of an imperfect statutory framework.[32] The distinctness of this still-emerging market means that the law does not mandate the extension of common carrier Title II legacy regulation to wireline broadband services. The intent of the

[32] *See* TIA Section 706 Reply Comments, *supra* note 5, at 10 ("as substantial and risky new investment in advanced telecommunications facilities is required, it is less clear whether *all* of the regulations applicable to the traditional voice-over-copper telephone network should apply to investment in new last mile broadband facilities.")

monopoly market-opening provisions in the 1996 simply do not comport with the nascent and competitive nature of the broadband services market, or the fact that it really is not possible to classify any single class of service provider as the dominant incumbent in this market. As a result, the Commission should consider the least intrusive regulatory model to govern the broadband services market in order to encourage investment, deployment, and continued innovation.[33]

Because of the dearth of detailed statutory guidance regarding broadband deployment policy, the broad authority delegated to the Commission as the expert administrative agency on communications matters carries significant weight. Moreover, the Commission has specific statutory authority in the Communications Act, as amended by the Telecommunications Act of 1996, to carry out the objective of achieving a minimal regulatory framework for broadband services, including Sections 10 and 706.

Sections 251 and 706. As the Commission is well aware, the unbundling provisions of Section 251 of the Act specifically require the Commission to make a detailed threshold showing that access to any proprietary network element is necessary and that a failure to provide access to the network element impairs an entrant's ability to provide competitive services.[34] The U.S. Supreme Court further has stated that the

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[33] *See* Remarks of Michael K. Powell, Chairman, Federal Communications Commission, National Summit on Broadband Deployment (Oct. 25, 2001) ("broadband should exist in a minimally regulated space. Substantial investment is required to build these networks and we should limit regulatory costs and uncertainty. We should vigilantly guard against regulatory creep of existing models into broadband, in order to encourage investment.").

[34] 47 U.S.C. § 251(d)(2).

statute puts "clear limits" on the unbundling requirements, including requiring consideration of the availability of network elements outside of the ILEC's network.[35] On remand from the Supreme Court, the Commission updated its treatment of the "necessary" and "impair" clauses, such that a proprietary element is "necessary" if lack of access to that element would "preclude the requesting carrier from providing the services it seeks to offer."[36] It also defined "impair" as to "materially diminish a requesting carrier's ability to provide the services it seeks to offer."[37]

TIA believes that the Commission can and should determine that Section 251 does not require the unbundling of new, last-mile wireline broadband facilities. Access to these facilities is not necessary for competitors to offer competing broadband services, nor does their unavailability "materially diminish" an entrant's ability to provide such services.[38] As noted throughout these comments, high-speed Internet access and broadband services are being delivered to subscribers over a variety of competing technology platforms. The Commission's analysis must recognize these intermodal providers as competitive alternatives to the incumbent's network as access to the latter's last mile facilities is not the sole means to reach customers.[39] Further, unbundled copper

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[35] *AT&T v. Iowa Utils. Bd.*, 525 U.S. 366, 389, 397 (1999).

[36] *Implementation of the Local Competition Provisions of the Telecommunications Act of 1996*, Third Report and Order and Fourth Further Notice of Proposed Rulemaking, 15 FCC Rcd 3696, 3705 (1999).

[37] *Id.* at 3725, ¶ 51.

[38] *See HTBC Comments at 38-45.*

[39] *NPRM*, ¶ 28.

loops remain available to competitors who are free to invest in their own broadband-enabling electronics and other facilities as necessary.

The Commission also is compelled to look at other factors beyond this threshold analysis.[40] TIA believes that Section 251(d)(2)'s "at a minimum" language in fact does require the Commission to draw a distinction between unbundling of facilities used solely for analog voice telephony and those used for advanced technologies, *i.e.*, broadband services.[41] The Telecommunications Act of 1996, and Section 706 in particular, obligate the Commission to "encourage the deployment on a reasonable and timely basis of advanced telecommunications capability to all Americans."[42] Section 706 further states that the Commission has tools at its disposal to accomplish this, including "regulatory forbearance, measures that promote competition in the local telecommunications market, or other regulating methods that remove barriers to infrastructure investment."[43] TIA believes that the clear mandate of Section 706 and the goals of the 1996 Act support a Commission determination to not apply Section 251 unbundling obligations to new, last mile broadband facilities.

Section 10. The Commission also can rely on Section 10 of the Communications Act to forbear from applying the Section 251 unbundling obligations to new, last mile

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[40] 47 U.S.C. § 251(d)(2).

[41] *NPRM*, ¶ 24.

[42] *See* Pub. L. No. 104-104, Title VII, § 706, Feb. 8, 1996, 110 Stat. 153, reproduced in the notes under 47 U.S.C. § 157 ("Section 706").

[43] 1996 Act, § 706(a).

broadband facilities.[44] This Section was an important part of the 1996 Act's objective to remove outdated regulations that impede investment and are no longer necessary for competitive purposes. It requires the Commission to forbear from regulating upon a determination that competitive conditions no longer warrant it. TIA believes that Section 10's criteria are met in the instance of new, last mile broadband facilities.[45]

D. The Commission Should Establish Build-Out Requirements or Benchmarks for ILEC Deployment of Wireline Broadband Facilities.

TIA supports adoption in this proceeding of attainable, yet substantial build-out requirements or "benchmarks" for wireline broadband services. TIA first suggested the approach of linking unbundling and other regulatory relief to deployment schedules during the first Section 706 Inquiry.[46] These types of benchmarks can afford the Commission an opportunity to review the progress of ILEC broadband deployment and gauge the impact and success of its unbundling rules. It might even be possible for the Commission to utilize processes already in place, such as the Section 706 data collections, in addition to the triennial review of the unbundling rules.

Facilities-based competition and investment are critical to a competitive, innovative market for broadband services. Benchmarking in this instance is consistent with these goals, the bedrock principles underlying the Telecommunications Act of 1996, in particular Section 706. TIA believes that not applying the unbundling rules to new

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[44] Pub.L. 104-104, Title IV, § 401, 110 Stat. 128; 47 U.S.C. § 160.

[45] *See* HTBC Comments at 45-47.

[46] *See* "The Future of Broadband: A Case for FCC Action to Spur Deployment of Advanced Telecommunications Capability," *supra* note 5, at 33-34.

broadband facilities will result in their widespread deployment, and requirements to follow-through on this realistic assumption would be fair and not unduly burdensome. ILECs themselves repeatedly note the investment disincentive of the unbundling rules;[47] benchmarks offer a way to reaffirm that their non-application in fact resulted in wider deployment.

Precedent exists for this type of action from the Commission. In the context of cable incentive plans, or "social contracts," the Commission itself has noted that "in the 1996 Telecommunications Act, Congress sought to encourage the rapid deployment of advanced communications services and technologies for the benefits of all Americans. These are the goals that the Commission's upgrade incentive policy was designed to fulfill."[48]

The build-out requirements in this proceeding ideally should include two components: a percentage of customers served and required bandwidth speeds. In order to be effective, they likely need to be provider-specific as well to take into account,

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[47] *See, e.g.,* Comments of SBC and Verizon at 25-28, in *Implementation of the Local Competition Provisions of the Telecommunications Act of 1996,* CC Docket No. 96-98 (filed April 5, 2001); Letter from Thomas J. Tauke, Senior Vice President, Verizon Communications, to Michael Powell, Chairman, Federal Communications Commission (filed Nov. 6, 2001).

[48] In the Matter of Social Contract for Comcast Cable Communications, Inc., *Order* FCC 97-375 (rel. Oct. 10, 1997) at ¶ 3. Under the Commission's Incentive Plan, cable operators would enter into "social contracts" and in return receive pricing flexibility and profit incentives to introduce new services and operate efficiently, while customers would benefit from greater assurances of reasonable, stable rates for existing services. *See* In the Matter of Implementation of Sections of the Cable Television Consumer Protection and Competition Act of 1992: Rate Regulation and Adoption of a Uniform Accounting System for Provision of Regulated Cable Service, MM Docket No. 93-215 and CS Docket No. 94-28, *Report and Order and Further Notice of Proposed Rulemaking*, 9 FCC Rcd 4527, 4676-4680 (1994).

among other things, the varying current broadband deployments, and geographic and demographic considerations. As HTBC states in its comments, the "resulting deployment schedules should be aggressive, attainable, and economically rational from a business perspective."[49]

V. CONCLUSION.

Wider availability of current and next-generation broadband services can have an absolutely enormous impact on the economic and social health of this country and the world. Broadband can be delivered via many different access technologies, such as cable modems, telephone networks, satellite, and terrestrial wireless. TIA believes that this proceeding is important because it focuses on the most heavily regulated of these competitors. If the telecommunications network is to be an important competing platform for meeting the rising demand for broadband connectivity, its last mile infrastructure needs substantial upgrading. Current regulations, however, are impeding the massive investment that is needed today and for the foreseeable future.

The Commission should determine that the unbundling rules do not apply to new last mile broadband facilities. The FCC can do this under the framework of the Telecommunications Act of 1996, leaving the rules in place that require, for example, copper loops to be made available on an unbundled basis and collocation space in central offices to be offered to ILEC competitors.

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[49] HTBC Comments at 48.

Broadband regulation needs a new paradigm because the necessary investments are not being made and there are no indications that they will be made under the existing rules. TIA believes that removal of these regulatory roadblocks will result in increased investment in wireline broadband networks, spurring investment and innovation in competing broadband platforms. TIA urges the Commission to adopt the recommendations set forth above and in the comments of the High Tech Broadband Coalition.

Respectfully submitted,

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