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Before the
FEDERAL COMMUNICATIONS COMMISSION
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| In the Matter of | ) | |
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| Review of Regulatory Requirements for | ) | |
| Incumbent LEC Broadband | ) | CC Docket No. 01-337 |
| Telecommunications Services | ) | |

REPLY COMMENTS OF QWEST COMMUNICATIONS INTERNATIONAL INC.

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# REPLY COMMENTS OF QWEST COMMUNICATIONS INTERNATIONAL INC.

Qwest Communications International Inc. ("Qwest") respectfully submits its Reply Comments in response to the Commission's Notice of Proposed Rulemaking in the above-captioned proceeding.[1/]

## INTRODUCTION AND SUMMARY

The ILECs' nondominance in broadband services is so patent that many of the commenters who oppose the relief being considered in the Notice devote their energies largely to urging the Commission not to decide that question. In their efforts to avoid the main issue in this proceeding, they challenge the Commission's traditional market definitions, ask the Commission to depart from its established test for nondominance, or simply argue that this is not the right proceeding in which to decide the issue. The deficiency of the opponents' arguments confirms the merits of the Commission's proposal to eliminate dominant regulation of ILECs' broadband offerings.

1/ Notice of Proposed Rulemaking, *Review of Regulatory Requirements for Incumbent LEC Broadband Telecommunications Services,* CC Docket No. 01-337, FCC 01-360 (rel. Dec. 20, 2001) ("Notice").

The opponents' attacks on the market definitions proposed in the Notice are various and inconsistent. Some commenters still insist that there is no distinct broadband market, despite empirical evidence that there is little cross-elasticity of demand between broadband and dial-up services and the prior findings by the Commission, the FTC, and the Department of Justice that broadband is a separate market. The commenters do not support their argument with evidence but ask in effect that ILECs be treated as dominant in any market they enter because they have historically dominated local POTS. That sort of reflexive extension of legacy regulations is precisely what the Commission has wisely proposed to end.

Other commenters complain that the Commission has not sliced the markets finely enough. They assert, for example, that the mass market for broadband services should be subdivided into a residential market and a small and medium-sized business market. But they fail to justify departing from the Commission's traditional market categories, or to refute the evidence that residential and small business users need, and buy, essentially the same services from common suppliers. The commenters who argue that there are separate wholesale and retail mass markets similarly fail to establish that the Commission erred in previously declining to adopt that approach, or that it is justified here: the elasticity of demand for retail services constrains pricing of wholesale offerings, and each of the competing, intermodal providers of retail services is capable of selling also at wholesale, whether or not they do so now. Indeed, cable modem providers have begun to do so, as the Commission recently noted in its Cable Broadband Declaratory Ruling and Notice.[2/] Finally, breaking down the large business

[2/] *See* Declaratory Ruling and Notice of Proposed Rulemaking, *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 Internet Over Cable Facilities,* GN Docket No. 00-185, CS Docket No. 02-52, FCC 02-77, ¶¶ 26-28, 83 (rel. Mar. 15, 2002) ("Cable Broadband Declaratory Ruling and Notice").

broadband market into local and national submarkets would not change the fact that the large IXCs can and do serve those local markets, but have largely chosen to focus their efforts and resources on the overwhelming percentage of frame relay and ATM services that are interstate.

This proceeding simply does not turn on fine judgments about market definitions. Indeed, as AT&T noted in its recent Comcast merger petition, where the absence of market power and presence of competition are evident, "it is unnecessary .... to delineate the precise boundaries of the relevant ... market."[3/] Modifying market boundaries in this way or that for purposes of this proceeding would not obscure the fact that ILECs rank only second among the several intermodal rivals in the mass broadband market, and that their share of the large business market is dwarfed by that of the large IXCs. In both markets, ILECs' offerings face competition more than adequate to prevent anticompetitive behavior. The commenters who conjure up the specter of the ILECs' "leveraging" their local exchange market position into dominance in broadband fail to explain how this would occur or why it has not yet occurred in several years of competition, or how dominant carrier regulation in any way addresses that concern.

No more persuasive are the commenters' procedural avoidance stratagems. Some commenters suggest that the Commission should divide this proceeding into two — one to define markets and another to determine nondominance.[4/] Another tells the Commission to forbear if it wishes, but avoid finding ILECs to be nondominant.[5/] Both suggestions would depart from established procedures in nondominance proceedings, and both are transparent efforts to forestall

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3/ Applications and Public Interest Statement, *Applications for Consent to the Transfer of Control of Licenses, Comcast Corporation and AT&T Corp., Transferors, To AT&T Comcast Corporation, Transferee,* at 69, filed Feb. 28, 2002 ("AT&T-Comcast Merger Application").

4/ *See* ALTS Comments at 4.

5/ Covad Comments at 4-5.

the finding that is clearly warranted by the market evidence: ILECs lack dominance in broadband services. The evidence of nondominance is so irrefutable that one of the large IXCs, Sprint, to its credit acknowledges that sufficient competition exists in the large business market to allow for increased pricing and tariff filing flexibility.

Finally, it is too late to argue, as some commenters do, that dominant carrier regulation imposes no burdens on ILECs or consumers. The Commission has repeatedly recognized that complying with such (or any) tariff regulations inflicts significant costs and burdens. Unnecessary regulation is particularly undesirable here, where it handicaps one competitor in intermodal competition with others not burdened, and where it discourages the massive private investments that the Commission has acknowledged must be made to achieve the public benefits of widespread broadband deployment. And as many commenters simply fail to acknowledge altogether, customers ultimately lose the most in the face of the ILECs' inability to respond promptly to individualized service and pricing requirements. Accordingly, to enable ILECs to respond to market incentives to deploy the broadband infrastructure that the Commission has declared as its top priority, and to ensure that consumers enjoy the full benefits of broadband competition, the Commission should find that the ILECs are nondominant in their provision of broadband services and forbear from dominant carrier regulation — and should decline requests to impose similar constraints under a different name.

## I. THE ILECS ARE NOT DOMINANT IN THE MASS MARKET NO MATTER HOW DEFINED, AND EFFORTS AT SUBDIVIDING THE MARKET TO PROVE OTHERWISE ARE UNAVAILING

Although none of the commenters disputes that it is proper to divide the ILEC broadband product market into a mass market (for DSL services to residential and small business consumers) and larger business market (for frame relay and ATM services) for the purpose of analyzing dominance, some suggest that the ILECs are dominant in providing mass market broadband services. As discussed further below, however, there is no merit to this position. The ILECs face substantial and increasing competition in their provision of DSL services from cable modem, satellite, and wireless broadband providers that similarly target the mass market. Indeed, as the Commission has explicitly recognized, the ILECs are relative newcomers in this market, and cable modem services have acquired by far the largest share:[6/] in particular, the Commission recently noted that "[t]hroughout the brief history of the residential broadband business, cable modem service has been the most widely subscribed to technology."[7/] Rather than grapple with this unblinkable fact, a number of commenters simply try to avoid it by redefining the broadband mass market in various ways that might, they hope, support continued dominant carrier regulation in one way or another. But these efforts uniformly fail. The different approaches include an argument that the broadband mass market should be combined with the dial-up market, or the contention that the mass market should be divided into wholesale and retail submarkets, and that a separate market for sales to small businesses should be carved out, all in an effort to find a basis to defend continued dominant carrier classification for the ILECs' provision of at least *some* DSL services. But broadband clearly is distinct from narrowband, and within broadband services, there is no reason to depart from the Commission's

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6/ *See* Third Report, *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, FCC 02-33, App. C, Table 4 (rel. Feb. 6, 2002) ("*Third Advanced Services Report*") (noting that cable modem providers have 64 percent of the residential and small business broadband services market, while DSL providers have 34 percent). *See also* AT&T Comments at 74 (noting that "[c]able providers enter[ed] the [broadband] market first"); Verizon Comments at 15 ("Competition in the broadband mass market is robust, despite the cable modem operators' head start").

7/ *See* Cable Broadband Declaratory Ruling and Notice at ¶ 9.

traditional market categories for the purpose of analyzing an ILEC's market power. Moreover, even when the submarkets are examined, there is still no evidence of dominance. As the Commission has noted, "changes made in the approach to defining relevant markets will not necessarily produce different assessments of market power."[8/]

### A. Nondominance of ILECs in the Mass Market

The ILECs simply do not dominate the mass market for broadband services, which is characterized by substantial intermodal competition. To the contrary, cable modem service providers without question enjoy the largest share of that market. The Commission itself has noted that cable modem providers have approximately 64 percent of the residential and small business broadband market, while DSL providers in the aggregate have a share of only about 34 percent.[9/] Cable modem service is available to over 65 million homes across the United States[10/] and is far easier and less expensive to deploy than DSL.[11/] Indeed, the Commission has recognized that over the past year "cable's lead over DSL has grown."[12/] Moreover, as the CEO

8/ *See* Second Report and Order in CC Docket No. 96-149 and Third Report and Order in CC Docket No. 96-61, *Regulatory Treatment of LEC Provision of Interexchange Services Originating in the LEC's Local Exchange Area and Policy and Rules Concerning the Interstate, Interexchange Marketplance,* 12 FCC Rcd 15756, 15795 ¶ 69 (1997) ("*LEC Classification Order*").

9/ *Third Advanced Services Report*, Table 4.

10/ *See Cable Modem FAQ,* Cable Datacom News, at http://www.cabledatacomnews.com/cmic/cmic2.html.

11/ *See* J.P. Morgan Securities, Inc. and McKinsey & Company, *Broadband 2001 — A Comprehensive Analysis of Demand, Supply, Economics, and Industry Dynamics in the U.S. Broadband Market,* at Charts 43 and 44 (April 2, 2001) (explaining that on average it is significantly more expensive to deploy DSL than to upgrade cable plants to provide cable modem service).

12/ Cable Broadband Declaratory Ruling and Notice at ¶ 9.

of the National Cable Television Association ("NCTA") has noted, where cable modem and DSL service are both available, more consumers choose cable modems.[13]

This competition does not exist just in the residential market, as we discuss further below. Cable and satellite providers are targeting the small business market as well. There similarly is competition in the wholesale market. Both cable and satellite providers do provide service to ISPs. Indeed, the Commission discussed several different types of arrangements between cable operators and ISPs in the recent Cable Broadband Declaratory Ruling and Notice, and that it is considering an access requirement that would formalize and increase such arrangements.[14]

Even apart from the significant competition between cable modem service and DSL, as Qwest and many other commenters have demonstrated, satellite broadband services are available throughout the country, and broadband wireless service is available and expected to grow.[15] In fact, satellite and wireless providers are experiencing significantly higher growth rates than either cable modem or DSL providers (73 percent compared to 45 percent for cable modem and 36 percent for DSL).[16] Although some commenters suggest that these latter services should be discounted, and that in fact all that exists in the broadband market is a duopoly between cable

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13/ *Bells, Not Regulators, to Blame for DSL Lagging Cable Modems, NCTA Says,* Communications Daily, Mar. 13, 2002.

14/ Cable Broadband Declaratory Ruling and Notice at ¶¶ 48-55, 72.

15/ *See* BellSouth Comments, Exhibit 1: Harris Paper, at 6-7 (explaining that 3G services will soon be available in the U.S. and that fixed wireless service is also on the rise); *see also* SBC Comments at 34 (noting that wireless service "is increasingly a competitive alternative"); *EarthLink's Wireless Debut on Palm OS Handhelds Sets New Benchmark for On-the-Go Communication,* Newstream.com (Feb. 2002), at http://www.newstream.com/cgi-bin/display_story.cgi?5156 (reporting that EarthLink launched its e-mail and Internet access service for wireless devices in February of 2002).

16/ FCC Releases Report on the Availability of High Speed and Advanced Telecommunications Capability, FCC News Release, at 2 (Feb. 2, 2002).

modem and DSL providers,[17] these arguments simply do not conform to the facts, much less provide any basis to justify disparate regulation of cable modem and DSL services. Satellite and wireless broadband services are not illusory services that might one day be offered commercially; they are concrete, viable services that consumers order today, and that are growing rapidly. Their impact on competition cannot be ignored or dismissed simply because it does not fit within the pro-legacy regulation framework. As the Commission itself has found, "emerging technologies continue to stimulate competition and create new alternatives and choices for consumers."[18] And where services provided over each of the other three competing platforms — cable modem, satellite, and wireless — are essentially unregulated, it is simply illogical and arbitrary to subject the services of the number two provider, DSL, to rigorous price (or other) regulation because of a concern that the number of competitors is insufficient.[19]

Nor is it relevant that cable modem service and DSL services comprise a far larger share of the market than other rival platforms.[20] Competition between the two is sufficiently vibrant that there is no reasonable basis to conclude that ILEC DSL services can be deemed dominant.

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17/ *See* WorldCom Comments at 17-18 (arguing that the threat of entry from satellite and wireless is insufficient competition in broadband market, and that because entry itself is so costly, there is a need to show actual entry).

18/ *Third Advanced Services Report* at ¶ 89.

19/ In addition, there is also intramodal competition from CLECs. Qwest itself is a CLEC providing DSL services out of Qwest's ILEC region, where it serves approximately 20,000 DSL customers. As discussed below, CLEC competition should not be discounted just because CLECs may use ILEC inputs in the wholesale DSL services they provide. While true facilities-based competition obviously would be a more robust source of competition, all CLECs do constitute a real source of competition in this market because they still constrain the prices an ILEC can charge.

20/ Indeed, the Commission has recognized, in the context of regulating cable rates, that the presence of a second strong competitor in a market would be sufficient competition to make regulation of the incumbent's rates unnecessary to protect consumers. *See* 47 U.S.C. § 543.

Indeed, when defending its Comcast merger proposal, AT&T argued that the presence of competition from DBS, which has captured only 19% of the video market nationwide, is sufficient evidence that the cable provider lacks significant market power.[21/] And to further support this point, AT&T also pointed to evidence of additional competition from Multichannel Video Program Distribution competitors whose share of the market is insignificant.[22/] Yet, in the broadband market, no provider is nearly as entrenched as cable is in the video services market, and the alternative providers all have established a presence in the marketplace. Claims that the mass market for broadband is thus a "duopoly" in which the ILECs — and of course, just the ILECs — should be regulated as if they have market power, are thus insupportable.[23/]

Recognizing that it cannot actually show that ILECs are dominant in their provision of DSL services, AT&T asserts that the Commission can and should infer market power based on AT&T's allegations that the ILECs have been raising the prices of their retail DSL services, something AT&T apparently believes could not otherwise occur.[24/] But of course this is

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21/ AT&T-Comcast Merger Application at 66.

22/ *Id.* at 66-67.

23/ In any event, even if the prominence of cable modem service and DSL service in the mass market suggested a duopoly, notwithstanding the growing influence of other rival services, dominant carrier treatment for the ILECs would still be unjustified. Of the two providers, cable modem clearly has more market power, and it would be unjustifiable to subject the less established carrier to the more burdensome regulatory restraint. Nor is dominant carrier treatment a tonic for any of the abuses possible in a duopoly, such as collusive price gouging; it primarily operates now to make it more difficult for ILECs quickly to meet customer demands for lower priced services.

24/ AT&T Comments at 45-48 (claiming that the ILECs' ability to profitably raise their prices "confirms the market power it possesses"). This argument is particularly odd coming from AT&T, which recently raised its prices for cable modem, cable, and long distance, all services in which it would certainly contend it was nondominant. *See* James Evans, *AT&T Raises Broadband Cable Rates,* PCWorld.com (May 1, 2001), at http://www.pcworld.com/news/article/0,aid,48944,00.asp (stating that AT&T would raise its cable modem service rates by as much as 20 percent in June 2001); *AT&T Broadband Raises Cable Rates*, ISP News, Nov. 7, nonsense. Nondominant providers of all kinds of goods and services routinely raise their prices[25/] — and risk losing customers — because, for example, their own costs increase. A relative increase in prices, standing alone, indicates nothing about dominance. To the contrary, it may indicate that the service was priced overly low initially in an effort to capture market share — thus demonstrating the carrier's *lack* of market power, if anything. In fact, Qwest itself dropped its residential retail DSL rate by over 10 dollars in 1999 specifically to entice customers to order the service, thereby significantly reducing its profit margins; the fact that Qwest more recently has instituted a modest price increase of 2 dollars (or approximately 6 percent) is not an indication of market power, but an effort to better adjust price with costs. Moreover, DSL prices have risen due not to the ILECs' illusory broadband market power, but because of other factors, including the regulatory obligations and risks the ILECs bear, and the high costs of DSL deployment. While DIRECTV claims that DSL costs have dropped over time,[26/] in fact, remote deployment as significantly offset any cost savings that have been realized over time, and has actually *increased* the overall cost of providing DSL.

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2001, at http://www.internetnews.com/isp-news/article/0,,8_918751,00.html (reporting that AT&T announced that it would raise its cable rates by an average of 5.5 percent); *AT&T Increases Universal Service Fee Because of 'Lag' Problem*, Communications Daily, Jan. 3, 2002, Vol. 22, No. 2 (stating that all of the three largest long distance carriers raised their basic rates this past February, and that AT&T's basic rates, for instance, increased by 17 percent for daytime calling).

25/ For example, although there have been price increases in the long distance market, as noted above, this does not mean that any IXC has dominant market power and should be regulated as dominant, notwithstanding the Commission's finding regarding the highly competitive nature of this market. *See supra* note 24.

26/ DIRECTV Comments at 9.

Nor is it plausible, as AT&T suggests, that ILECs have raised DSL prices to steer customers back to more profitable narrowband services.[27] If ILECs simply wanted to sell narrowband services, they could save themselves the billions of dollars they are investing to deploy DSL. Rather, ILECs are in a race with AT&T and other carriers and providers to provide the broadband services that are widely regarded as the future of the telecommunications industry. If the prices ILECs must charge for their broadband services lose them broadband customers, those losses evince a *lack* of market power, whether a particular customer goes to a rival broadband provider or reverts back to a narrowband service. Indeed, in many cases, customers who order DSL do not abandon their second line, in Qwest's experience. Thus, where a customer cancels DSL and decides to rely on dial-up instead, Qwest may simply lose revenue, not gain any additional narrowband revenue. Those commenters suggesting otherwise are engaging in nothing more than pure speculation.

Nor, as some commenters have argued,[28] are ILECs likely to gain dominance in the broadband market through leveraging market power in the traditional local exchange market. There is no question that ILECs do provide broadband inputs to their intramodal CLEC competitors, as many commenters have stressed. Yet even *if* the ILECs somehow could use that position to attain market power vis-à-vis the CLECs, this would not translate into overall market power in the provision of broadband services. As noted, mass market broadband competition is substantially *intermodal*, and cable modem, satellite and wireless providers do not rely on ILEC facilities at all. Thus, when the focus is on the broadband mass market in its entirety (and not on one particular broadband service platform) — as it must be to determine overall market power —

27/ AT&T Comments at 18, 47-48.

28/ *Id.* at 44-46.

it is evident that the ILECs simply are not in a position of bottleneck control that can be abused to gain any overall advantage in the broadband market. As NCTA itself has stated, *no* company has bottleneck control over broadband access to the Internet.[29/] Moreover, the ILECs are not in a position to gain an advantage vis-à-vis their intramodal CLEC competitors. When the ILECs do provide inputs to CLEC broadband competitors, a panoply of regulatory constraints apply — constraints that are entirely unrelated to dominant carrier regulation. Even if no other protections were in place, such as CLEC access to the loop under section 251,[30/] the ILECs would be obligated to offer the competing CLECs the necessary services at rates, terms and conditions that are just, reasonable, and non-discriminatory. *See* 47 U.S.C. §§ 201(b), 202(a). The Commission has relied on this provision for years, and it is sufficient to ensure that the threat of leverage-based market power will be adequately policed by the ILECs' rivals, and addressed swiftly by the Commission itself. And, as noted, it simply is not clear how dominant carrier regulation would address any fears CLECs have regarding their access to necessary inputs. As the Commission observed, dominant carrier regulation "would not help to prevent . . . discrimination by the BOCs against rivals of their interLATA affiliates."[31/]

Finally, as Qwest noted in its comments,[32/] the best evidence of the ILECs' inability to exercise any leverage in the broadband market as a whole is the fact that the ILECs have not yet achieved market power, despite the fact that they have been providing broadband services — and

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29/ *See Digital Must Carry,* NCTA, at http://www.ncta.com/pdf_files/3-Policy-Total.pdf.

30/ Indeed, in its comments submitted in the Triennial Review proceeding, Qwest specifically suggested that the loop should still be considered a UNE, at least for the present time. *See* Comments of Qwest Communications International Inc., filed in CC Docket Nos. 01-338, 96-98, 98-147 (Apr. 5, 2002), at 8 ("Qwest Triennial Review Comments").

31/ *LEC Classification Order* at 15763 ¶ 6.

32/ Qwest Comments at 53-55.

broadband inputs to CLEC competitors — for several years now. In light of this real-world evidence, it hardly seems compelling to base continued dominant carrier treatment of the ILECs on the amorphous, hypothetical threat that some day, the ILECs might somehow be able to derive broadband market power from their position in the local exchange market. To the contrary, that evidence should give the Commission confidence that where, as here, an array of intermodal platforms have developed, all of which are viable providers of the relevant service, the market, rather than regulation, can operate to ensure that no provider is in a position to abuse its position. As NCTA has succinctly explained: "The availability of broadband alternatives . . . checks the potential for anticompetitive behavior . . . far more effectively than government regulation."[33/]

Finally, the point of dominant carrier regulation is not, by any means, to assist the dominant carrier's competitors. To the contrary, this regulation is designed to protect *consumers* from competitive harm.[34/] And the consumers that *are* the intended "protected class" under dominant carrier regulation are adequately protected without that regulatory overlay when competition is robust, especially, where, as here, it springs from several different platforms. That is equally true with respect to individual residential and small business customers and to ISP wholesale customers. As the Commission has found when considering applicability of the

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33/ Comments of the National Cable Television Association, *Concerning High-Speed Access to the Internet Over Cable and Other Facilities,* GN Docket No. 00-185, at 53 (Dec. 1, 2000) ("NCTA Cable Comments")

34/ *See* Notice ¶ 35 ("dominant carriers are subject to a broad range of regulatory requirements, that are generally intended to protect *consumers* from unjust and unreasonable rates, terms and conditions and unreasonable discrimination in the provision of communications services") (emphasis added); *see also* Order on Remand and Notice of Proposed Rulemaking, *Implementation of the Pay Telephone Reclassification and Compensation Provisions of the Telecommunications Act of 1996,* CC Docket No. 96-128, FCC 02-39, ¶ 86 (rel. Feb. 21, 2002). Moreover, where there is intermodal competition in the market, ensuring that the members of one class of providers all succeed is simply not a valid public interest goal.

Computer II/III rules, there is no need for such protective regulation where competition ensures "carriers have an incentive" to offer customers what they want.[35/]

## B. The Mass Market Does Not Include Narrowband Services

Perhaps recognizing that there ultimately is no valid argument that ILECs are dominant in the mass market for broadband services, a few commenters assert that narrowband and broadband services should be considered part of the same product market, and that ILECs accordingly should be deemed dominant given their market power in the provision of the former.[36/] But that position ignores the way the two types of services are viewed and used by consumers, as well as the manner in which they are marketed and priced. Indeed, the government agencies that have considered this issue have unanimously agreed that broadband is a separate product market from narrowband, and there is no reason to depart from that conclusion here. In reviewing the AOL-Time Warner merger, for example, the Commission squarely concluded that "high-speed Internet access services include features unavailable over narrowband, such as access to high-bandwidth content that is impractical over dial-up connections,"[37/] and the FTC agreed.[38/] The Department of Justice came to the same conclusion

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35/ Report and Order, *Policy and Rules Concerning the Interstate, Interexchange Marketplace, Implementation of Section 254(g) of the Communications Act of 1934, as amended, 1998 Biennial Regulatory Review—Review of Customer Premises Equipment and Advanced Services Unbundling Rules in the Interexchange, Exchange Access and Local Markets,* 16 FCC Rcd 7418, 7433-34 ¶ 26.

36/ *See* AT&T Comments at 17-18; US LEC Comments at 1-4.

37/ Memorandum Opinion and Order, *Application 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,* 16 FCC Rcd 6547, 6574-75 ¶ 69 (2001) ("*AOL-Time Warner Merger Order*").

in reviewing the AT&T-MediaOne merger, finding that the market encompassed the "aggregation, promotion, and distribution of broadband"[39] content and services and that narrowband Internet service is not a substitute for broadband service, as "much of this broadband content will not be readily accessible or attractive to narrowband users, because of the much longer times that are needed to transmit the data through narrowband facilities."[40] Indeed, as Qwest and others showed in their comments,[41] the demand for broadband and narrowband is distinct, as indicated by significant differences in price, purpose, and performance. The differences become even more marked as more specialized broadband content is introduced.[42]

AT&T's argument that the distinction between broadband and narrowband services will become meaningless in the future (because voice will be transmitted over DSL and narrowband will offer faster, "always on" connectivity) is not persuasive.[43] In the first place, the Commission cannot impose inappropriate regulations today because of what might theoretically happen in the next several years.[44] Some of what AT&T touts as imminent still may be several

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38/ Complaint, *America Online, Inc. and Time Warner, Inc.*, Federal Trade Commission Complaint, Docket No. C-3989, ¶ 21 (Dec. 14, 2000), at http://www.ftc.gov/os/2000/12/ aolcomplaint.pdf.

39/ Competitive Impact Statement, *U.S. v. AT&T Corp* (May 25, 2000) at http://www.usdoj.gov/atr/cases/ f4800/ 4842.htm.

40/ *Id.*

41/ Qwest Comments at 19-20; SBC Comments at 15-18; Verizon Comments at 9-12.

42/ *See* Notice ¶ 26; Qwest Comments, Att. A, SPR Report at 4 ("Narrowband access is generally perceived as qualitatively inferior, and is unsuitable for many applications (*e.g.* downloading of large files that may, increasingly, contain musical or video content)").

43/ AT&T's Comments at 17.

44/ While the Merger Guidelines of the Department of Justice and Federal Trade Commission do indicate that firms that are not currently in the market may be considered market participants, this is only true where they are likely to enter within one year without significant years from developing, and the contours of the services that may be offered or how consumers will respond are yet undefined. Moreover, the "narrowband" services about which AT&T speculates are qualitatively different from the narrowband services that the ILECs provide today. To the extent the exercise here involves looking off into the future, as AT&T would have it, the one certain prediction that can be made is that broadband competition in the mass market will continue to increase and expand, making dominant carrier treatment of any market participant entirely indefensible. That outcome, and the appropriate Commission response, are concrete; to the extent the explosion in broadband ultimately produces the outcome AT&T has predicted, the Commission can assess the market at that time and respond in whatever way proves warranted — which may be very different from what AT&T proposes. In fact, the full migration of voice services onto broadband would not make the ILECs dominant in the broadband market simply because the product being delivered would substitute for narrowband local exchange service — which is essentially what AT&T suggests. To the contrary, such migration would, if anything, begin to erode the position that ILECs have in the *voice* market by virtue of their circuit-switched voice networks, by making voice itself a market featuring intermodal competition. *All* broadband providers — including the cable operators whose broadband market share dwarfs the ILECs' — will have another means of offering voice without dependence on the ILECs' local loop. Indeed, Comcast, one of the major cable modem broadband competitors, claims it already

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expenditure. *See* United States Dept. of Justice and Federal Trade Commission, 1992 Horizontal Merger Guidelines, 57 Fed. Reg. 41552 (1992) ("Merger Guidelines"). While AT&T asserts that voice over DSL is already available, it provides no evidence for this assertion. *See* AT&T's Comments at 11. Certainly, voice over DSL has been a theoretical possibility in the market for years, and there is no indication it is likely to soon become viable market force. *See* Elizabeth Miller and Carol Wilson, *Talking DSL? Not So Fast*, The Net Economy, Apr. 30, 2001, at http://www.theneteconomy.com/article/0,3658,s%253D923%2526a%253D8528,00.asp (explaining that analysts report that "[v]oice over DSL 'is definitely not here yet'" and that "'VoDSL is a viable service, but it may take longer.'").

has been pursuing the promise of IP telephony — separate and apart from the cable telephony it now contends it will offer in conjunction with AT&T.[45] In short, if broadband someday engulfs services now offered over narrowband, that will further *erode* the ILECs' market position in the local exchange and exchange access markets, not extend it. The ability of broadband to provide such a variety of services is, in fact, one of the things that sets it apart from narrowband.

### C. Commenters' Proposals to Slice the Mass Market into Submarkets Ignore the Market Evidence and in Any Event, Do Not Ultimately Demonstrate ILEC Dominance.

Another tack some commenters have pursued in an effort to find some basis for continued dominant carrier regulation is to *narrow* the relevant market, whether by postulating a more focused product market or a smaller geographic market, in the hope that in this smaller pond, the ILECs will appear to the Commission to be a bigger fish. But these efforts do not obscure the fact that no matter how the market is segmented, all broadband competitors on all platforms stand ready or at least willing to serve. In such an environment, no provider has a particularly comfortable edge, and competition obviates the need for bottom down regulation to police market conduct.

#### 1. *There Is No Separate Small Business Broadband Mass Market*

First, some commenters claim that there is a separate broadband mass market for small businesses in particular in which the ILECs are dominant.[46] There simply is no evidence to support this assertion, however. Small business customers include small or home office businesses (SOHOs) or small to medium enterprises (SMEs) with more than one location.

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[45] *See* AT&T-Comcast Merger Application at 14 ("Comcast has taken a leadership role in developing cable-delivered IP telephony").

[46] Covad Comments at 14; ALTS Comments at 6.

However, the fact that they are a distinct group of *customers* does not mean the services they demand comprise a distinct "product market." The Commission has held that the relevant product market for analyzing dominance is defined primarily by demand elasticity[47/] — which clearly exists between small business and residential broadband services. Small business users purchase their broadband services through the same regional or national channels as other mass market customers — ILECs, CLECs, cable modem providers, and others. Contrary to Covad's claim,[48/] they primarily require the same features as other mass market customers: always-on connections and sufficient bandwidth to access the Internet efficiently at a moderate price. And they frequently choose among the same speed/price options as other mass market customers. It is not uncommon for SMEs or SOHOs, in particular, to purchase service advertised as residential; conversely, individuals can and do purchase from SOHO or SME "offerings,"[49/] a fact that makes it extremely difficult to even discern which subscribers even are business customers as opposed to other mass market customers. While Covad insists that there is a

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47/ *LEC Classification Order* at 15775 ¶ 28.

48/ Covad Comments at 14-15 (arguing that small and medium sized businesses use broadband services for different purposes compared to other mass market customers).

49/ Indeed, 2.7 percent of the residential broadband subscribers in Qwest's in-region market use Qwest's SME/SOHO offering, known as "Starter Pack." In addition, broadband services to SMEs or SOHOs are marketed in much the same way they are to other mass market customers. *See, e.g.,* Qwest website, at http://www.qwest.com/residential/products/dsl/index.html (offering nine different options for residential DSL, but recommending many of these services for home office and small business use); Verizon website, at http://www.verizon.net/pands/dsl/dsl_advisor.asp ("DSL Package Advisor") compared to http://www.verizon.net/pands/homeoffice_advisor.asp ("Work at Home Advisor") (while the four packages described on these pages are alternately directed towards business or entertainment use, the underlying services are actually identical); Comcast website, FAQ's - Products, http://www.comcastonline.com/code/FAQsList.asp?.=.&FAQCategoryID=2#7 (explaining that "DOCSIS (Data Over Cable Systems Interface Specifications) is a standard interface for cable modems, the devices that handle incoming and outgoing data signals between a cable TV operator and a *personal or business* computer").

separate product market for small and medium-sized businesses in part because it contends that cable modem services target only residential users,[50] this simply is not the case. As discussed below, cable modem providers do in fact target small and medium-sized business customers. But in any event, Covad's premise is irrelevant to defining whether small business broadband services in fact are a distinct product market. The focus on supply elasticity is relevant to determining market power, not defining a market.[51] As noted above, for the latter purpose, the relevant analysis is whether the product itself is substitutable — and viewed as such — by consumers. And clearly a small business user working out of her home in an area served by cable modem services could use the same service that she could order to serve her home broadband needs. Based on the facts just set forth, there is nothing here to suggest that the small business market is truly distinct from the residential market.

Even if there were a submarket for services provided to SMEs and SOHOs, Qwest and the other ILECs are not any more dominant here than in the broader broadband mass market. There is no merit to the argument that there is a lack of intermodal competition for broadband services provided to small and medium-sized businesses.[52] Satellite providers do in fact market and provide broadband services to small business customers,[53] as do cable modem providers

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50/ Covad Comments at 15.

51/ *LEC Classification Order* at 15774-5 ¶ 27.

52/ *See, e.g.,* ALTS Comments at 6; Covad Comments at 15-16; AT&T Comments at 40-41.

53/ *See, e.g.,* DIRECWAY Website, at http://www.hns.com/direcway/for_small_business/learn_more/overview.htm; *see also* Brian Robinson, *Satellite Speeds Internet to the Field* (Mar. 12, 2002), at http://www.fcw.com/geb/articles/2002/ 0311/web-band-03-12-02.asp (describing how firefighters in California are using a new satellite system service that provides 2 megbit/sec data rates to access web applications for planning logistics and operational strategies); Lou Hirsh, *Satellite Broadband Finding Its Market,* Wireless NewsFactor (Feb. 8, 2002), at http://www.wirelessnewsfactor.com/perl/story/ 16234.html (reporting that satellite services will be focused on the business market in coming years, and that satellite providers "are developing such as Comcast Cable and Cox Communications.[54] Indeed, cable modem connections are considered to be a "a cost-effective, high-bandwidth Internet option for small and mid-sized businesses,"[55] and cable operators do specifically market to these customers.[56] Fixed wireless providers offer business services as well.[57]

There is also significant *intramodal* competition in this market. Covad admits that 52 percent of its customers are small and medium-sized business customers,[58] and other CLECs serve those customers as well.[59] Moreover, *any* broadband carrier using *any* platform — cable,

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two-way satellite services . . . which experts say is well-suited to businesses that transmit large amounts of data").

54/ *See* Product Information: Small Business Solutions, at http://www.cable-modem.net/pi/business_solutions.html; Cox Communications website, at http://www.coxbusiness.com/; Comcast Cable website, at http://www.comcastbusiness.com/; Brenda Rios, *Comcast to Speed Internet Access: Broadband Services to Have Different Levels,* Detroit Free Press (Apr. 10, 2002), at http://www.freep/money/business/bband10_20020410.htm (reporting that "Comcast Corp. plans to unveil a high-speed Internet plan with faster download speeds designed for small businesses within the next few months").

55/ *See* Product Information: Small Business Solutions, at http://www.cable-modem.net/pi/business_solutions.htm.

56/ *See, e.g., Cisco and Comcast Form Joint Marketing Initiative to Deliver High-Speed Internet Access and Virtual Private Network Services to Telecommuters, Small Businesses and Schools,* at http://www.cisco.com/warp/public/146/pressroom/1999/jun99/24.html.

57/ *See, e.g.,* WorldCom website, at http://www1.worldcom.com/us/products/access/broadband/wireless (stating that its broadband fixed wireless service is "[b]uilt for the business world" and that it can "provide true 'business class' service"); *see also Corporate Use of Wireless Data Services Continues to Grow, Despite Industry Downturn According to In-Stat/MDR* (Mar. 5, 2002), at http://www.bbwexchange.com/news/2002/mar/instat030502.htm (stating that "the business segment (including SOHO, small, medium, and large companies) is currently, and will remain, the largest group of wireless data services users" from the end of 2001 to 2006).

58/ *See* Covad Comments at 17 n.26; *see also* Covad website, at http://www.covad.com/businessservices.

59/ *See, e.g.,* Network Access Solutions website, at http://www.nas-corp.com/dsl/index.shtml; Birch Telecom website, at http://www.birch.com/products/dsl_99_dollars.shtml;

DSL, satellite, or wireless — can easily serve these customers, even if it has not specifically focused on them to date. There certainly are no obstacles to serving SOHOs and SMEs, many of which are likely located in residential areas (including home businesses, for example) that cable modem providers already dominate.[60/] Such *potential* competition is significant because, as the Commission has noted, "potential competition can ensure that prices continue to remain just and reasonable," particularly when there are no "substantial barriers to entry which impede potential competitors from entering immediately."[61/] In sum, the concerted efforts to fence off a small business submarket are quixotic, because ILECs are no more dominant there than in the rest of the mass market.

### 2. *There Is No Separate Wholesale Mass Market*

A number of commenters next argue that the mass market for broadband services should be divided into retail and wholesale submarkets, with ILECs being declared dominant in the latter.[62/] However, as Qwest discussed in its comments,[63/] there is no reason to treat retail and wholesale services separately in assessing an ILEC's market power. There is no question that

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Time Warner Telecom website, at http://www.twtelecom.com/bizprod.html. As discussed above, efforts to dismiss CLEC competition because CLECs depend on ILEC inputs make no sense: the entire premise of section 251 of the Communications Act is that competition using the ILECs' inputs *is* relevant and worthwhile, even if ultimately more facilities-based competition is the clear preference.

60/ *See* Cable Broadband Declaratory Ruling and Notice at ¶ 9 ("[t]hroughout the brief history of the residential broadband business, cable modem service has been the most widely subscribed to technology").

61/ Order, *Motion of AT&T Corp. to be Declared Non-Dominant for International Service,* 11 FCC Rcd 17963, 17998-99 ¶ 96 (1996) ("*AT&T International Reclassification Order*"); *see also* BellSouth Comments at 49 ("Barriers to entry in the broadband services market are low").

62/ *See* DIRECTV Comments at 2, 6-8; WorldCom Comments at 6, 11; EarthLink Comments at 3, 12-13; AT&T Comments at 49.

63/ Qwest Comments at 20-21.

ILECs offer wholesale services on a volume basis to ISPs for use as an input to bundled ISP services those ISPs offer to their customers. However, these characteristics do not distinguish wholesale services from retail services sufficient to define two distinct product markets. In terms of customer demand, wholesale and retail services are precisely the same product, other than the amount that is ordered by the customer at any given time.[64/] Indeed, what customers are willing to pay for retail broadband services constrains what can be charged to ISPs at the wholesale level.[65/] The Commission has agreed. In reviewing the AOL-Time Warner merger, the Commission declined to treat the wholesale broadband market separately, noting that "any concerns we share with respect to this market are adequately addressed in our analysis of the consumer market for high-speed Internet access services, which is usually supplied using these transmission services as an input."[66/]

Even if there were a separate wholesale mass market, the ILECs would still not be dominant in this market because it is characterized by ample existing and potential competition. Contrary to what some have suggested,[67/] the ILECs are not the only provider of wholesale broadband services to ISPs. As in the mass market generally, there are real cable, satellite, and

64/ In fact, in the ASCENT II proceeding before the D.C. Circuit, ASCENT argued vigorously that there was *no* distinct wholesale broadband market, suggesting that "even an ILEC's offering that is tailored to the needs of ISPs is available likewise to any end-user that can use them" such as "large, corporate end-users." *Association of Communications Enterprises v. FCC,* 253 F.3d 29, 32 (D.C. Cir. 2001).

65/ It is well-accepted that the elasticity of demand for inputs for an end product is directly related to the elasticity of demand for the end product. *See* Declaration of Robert W. Crandall and S. Gregory Sidak, *Petition For Expedited Ruling That It Is Nondominant in Its Provision of Advanced Services and For Forbearance From Dominant Carrier Regulation of Those Services,* ¶ 39 n.51 (Oct. 3, 2001) ("SBC Petition, Crandall/Sidak Declaration").

66/ *AOL-Time Warner Merger Order* at 6575 ¶ 69 n.202.

67/ *See* EarthLink Comments at 9; DIRECTV Comments at 5.

CLEC alternatives for ISPs that buy services at wholesale. Here, especially, CLEC competition should not be dismissed simply because CLECs may use ILEC inputs in the wholesale DSL services they provide. CLECs nonetheless are and have been a real source of competition in this market: indeed, the Commission has previously recognized that "incumbent LECs have an incentive to provide an increased variety of telecommunications services to pure ISPs at lower prices in response to the market presence of [CLEC] competitors" — a result from which "ISPs are uniquely positioned to benefit."[68/]

But as noted, the most important feature of this market is the presence of actual and potential *intermodal* competition. After initial resistance, cable operators in particular are beginning to offer their customers a choice of ISPs.[69/] Time Warner, once alone in offering ISPs access,[70/] is being joined to some degree by Comcast and AT&T Broadband; and EarthLink has said that it is in active trial with some cable providers.[71/] AT&T Broadband has said that it "would 'pursue discussions with other ISPs to offer consumers additional choice.'"[72/] In fact, AT&T Broadband professes that it has specifically structured its network in a manner that will

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68/ Further Notice of Proposed Rulemaking, *In the Matter of Computer III Further Remand Proceedings: Bell Operating Company Provision of Advanced Services; 1998 Biennial Regulatory Review -- Review of Computer III and ONA Safeguards and Requirements,* 13 FCC Rcd 6040, 6061 ¶ 33 (1998) ("*Computer III Further Remand*").

69/ *See Mass Media,* Communications Daily, Mar. 13, 2002; *see also* Cable Broadband Declaratory Ruling and Notice, at ¶¶ 26, 49 (noting that "AOL Time Warner, Comcast, and AT&T have all embarked on a multiple-ISP approach to offering cable-modem service," as have other cable operators, and that they either partner with the unaffiliated ISPs, or "contract with an ISP, which . . . may not be affiliated with the cable operator, to provide many of the inputs needed to create the cable modem service offering").

70/ EarthLink Comments at 10.

71/ *Id.* at 10.

72/ *Id.*

allow it to offer access to unaffiliated ISPs. Its "Broadband Choice" network is a "network built 'from scratch' . . . [f]ounded on policy base architecture; designed to accommodate [multiple-ISP access]."[73] As AT&T has represented to the Commission, "[the] solution [AT&T is] building applies to any size and flavor (local, regional, national) ISP."[74] As NCTA has noted, "[T]he advent of competition among broadband providers creates strong economic incentives for cable operators to give their subscribers a choice of Internet services offering features, functions, and content that subscribers want."[75] Moreover, the Commission is considering adopting multiple ISP access requirements in the Cable Broadband Notice, and if it does so, that will help to ensure that the cable operators' declarations become reality, and that ISPs have even more robust choice of wholesale broadband service.

Meanwhile, satellite providers are also selling to ISPs. For instance, DIRECTV claims to offer "access to unaffiliated Broadband Services Providers,"[76] and though DIRECTV seeks to dismiss the relevance of this by arguing that satellite broadband is still "in its infancy,"[77] EarthLink began providing satellite-based broadband service through an arrangement with DIRECTV in May 2001.[78] And there is no reason that other satellite providers and wireless broadband providers cannot do the same. Indeed, even if some broadband providers have in the

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73/ Ex Parte Notice of AT&T Corp., *In the Matter of Inquiry Concerning High-Speed Access to the Internet Over Cable and Other Facilities*, filed in GN Docket 00-185 (Dec. 18, 2001), at 5.

74/ *Id.* at 6.

75/ *See* NCTA Cable Comments at 51.

76/ DIRECTV Comments at 6.

77/ *Id.*

78/ *See* Thor Olavsrud, *EarthLink Dives Into High-Speed Satellite Services*, ISP News (May 1, 2001), at http://www.internetnews.com/isp-news/article/0,,8_755931,00.html.

past made the deliberate choice not to provision services to the wholesale market, they plainly have the *capacity* to do so. Given that wholesale and retail services are functionally identical, any provider can easily shift its production from wholesale to retail services, or vice versa, in response to price signals. While the cable providers in the past have argued that it was technically impossible to do this, the actions of AOL-Time Warner, AT&T Broadband, and others have demonstrated that this is not the case.[79] Any increase in the ILEC's wholesale pricing would intensify ISPs' demand for wholesale services from other providers, and increase the incentives of other platform providers to enter or broaden their participation in the wholesale broadband "market." Again, such potential competition is significant in analyzing a carrier's dominance.[80]

Some commenters nonetheless argue that the Commission should infer dominance in the wholesale market from the fact that ILECs have increased prices for wholesale DSL services, and have allegedly engaged in non-price discrimination against ISPs.[81] But, as discussed above, that rates may have risen slightly does not indicate that the ILECs have market power; as noted, an increase in costs can occur in a competitive environment where no carrier is dominant.[82] In

79/ *See* Separate Statement of Commissioner Kathleen Abernathy, Declaratory Ruling and Notice of Proposed Rulemaking, *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 00-185, CS Docket 02-52, FCC 02-77 (rel. Mar. 15, 2002) ("Abernathy Statement") ("Most of the factors that cable operators had formerly cited as impediments to offering consumers a choice of ISPs — exclusive contracts with affiliated ISPs and technical feasibility concerns, for example — appear to have been resolved").

80/ *See supra* note 61.

81/ DIRECTV Comments at 8.

82/ DIRECTV also argues that the ILECs must be regulated as dominant in the wholesale market in order to eliminate any chance that ILECs might leverage their *wholesale* DSL market power into dominance in the *retail* DSL market. *See* DIRECTV Comments at 8-9. This any event, ILECs offer ISPs a menu of steeply discounted DSL prices; there simply is no credible argument that the ILECs are not sensitive to price signals — and the need to offer competitive pricing — in the wholesale market. For example, Qwest offers various steeply discounted wholesale packages to ISPs, with different pricing arrangements.[83/] Second, whether or not ILECs and their ISP customers agree on all counts with respect to how wholesale DSL services should be provisioned, there is no evidence of non-price discrimination against nonaffiliated ISPs.[84/] And, while DIRECTV claims that the ILECs in fact have engaged in anticompetitive measures that do not represent "behavior that would be expected of a supplier seeking to satisfy its wholesale customers in a competitive market,"[85/] Qwest has in fact taken

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argument is extremely puzzling because, of course, ILECs are not dominant in the wholesale market. Moreover, dominant carrier regulation would do nothing to alleviate DIRECTV's unrealistic fear that the ILECs could gain dominance in the retail market by engaging in cross-subsidization, because "dominant carrier regulation generally would not help prevent a BOC from improperly allocating costs." *LEC Classification Order* at 15819 ¶ 108. DIRECTV's arguments accordingly are simply an non sequitur. Instead, as the Commission has recognized, "when other telecommunications carriers, such as interexchange carriers (IXCs) or cable service providers, compete with the BOCs in providing basic services to ISPs, the BOCs are less able to engage successfully in discrimination and cost misallocation because they risk losing business from their ISP customers for basic services to these competing telecommunications carriers." *Computer III Further Remand* at 6072 ¶ 49. Thus, competition is the antidote to the concerns expressed by DIRECTV, not blunt-edged regulation.

83/ For instance, service may be ordered from Qwest on month-to-month basis or a rate plan for a fixed service period (12, 36, or 60 months), with additional discounts if the customer commits to higher usage levels. *See* Tariff FCC No. 1 § 8.4 at http://tariffs.uswest.com:8000/docs/TARIFFS/FCC/FCC1/fcc1_s008p301.pdf#USW-TOC00000.

84/ Indeed, given that the ILECs' ISP customers include well-known, popular ISPs such as AOL, it is difficult to see what ILECs would stand to gain by discriminating in their provision of wholesale DSL. AOL customers unwilling to abandon AOL will either not order DSL, or order it only if it is offered by or in conjunction with AOL service. Thus, an ILEC that discriminated against AOL and made AOL abandon its quest to purchase DSL would simply lose business — not gain it. Even with less popular ISPs, an ILEC that refuses to sell to them simply loses the revenue it might have gained with no assurance that those ISPs' customers will ever choose to abandon their preferred ISP just to use DSL.

85/ DIRECTV Comments at 8.

numerous steps to attract and satisfy its wholesale customers. In addition to the volume discounts Qwest offers its wholesale customers, Qwest also offers those customers a qualification program whereby Qwest will test CPE a wholesale provider is considering deploying in the network to ensure the CPE will work in Qwest's network, a gateway interface that allows volume plan customers to submit orders and trouble tickets electronically, and regular meetings with a Qwest account representative to ensure that any issues are addressed. Essentially, the argument being raised here is that because the ILECs have not agreed with every customer demand made by any ISP, they must be dominant in this market; the presumption being, apparently, that in competitive markets customers and providers agree on all points. Yet, there is little question that the highly competitive long distance market continues to feature disputes among some customers and some providers. The Commission certainly never suggested, when declaring AT&T nondominant in domestic and international long distance services, that AT&T had shown complete customer satisfaction.

Finally, Qwest notes that wholesale bulk DSL sales to ISPs are not the only means for ISPs to reach customers through DSL. Qwest provides ISPs with access to DSL end users not just via wholesale DSL sales, but by allowing DSL end users to specify one of a myriad of ISPs. Qwest DSL customers can directly access over 400 ISPs. These ISPs are thus able to benefit from and utilize broadband service to reach their customers even though the ISPs are not broadband customers themselves and thus do not rely on Qwest for wholesale service. Once a Qwest DSL customer designates a particular ISP, if the ISP's system is compatible with Qwest's, all the ISP needs to do is purchase ATM service and host bandwidth from Qwest, and the ISP is then able to have a broadband presence with its customers.

### 3. *The Geographic Market for Mass Market Services Is National*

Various commenters argue that the geographic market for broadband mass market services is local.[86] But the Commission has addressed the issue of classification for similar services in a closely analogous context. While the Commission in the *LEC Classification Order* determined that long distance calling is comprised of a collection of point-to-point markets, it also recognized that assessing market power in individual point-to-point markets would be impractical and inefficient.[87] Thus, the Commission explained that, when a group of point-to-point markets exhibit sufficiently similar competitive characteristics, the Commission will examine that group of markets using aggregate data that encompasses all point-to-point markets in the relevant area, rather than examining each individual point-to-point market separately.[88]

Under this test, there is no basis for assessing power in the broadband services mass market on a local level. Verizon and SBC have similarly advocated a national rather than local market approach because consumers of all types in the mass market have similar competitive choices available to them throughout the nation.[89] As Qwest described in its comments, satellite broadband is available nearly everywhere in the nation, cable modem services are available to 73 percent or more of the country,[90] and wireless broadband is being built out.[91] While a particular community may enjoy service on less than all of the four potential platforms (DSL, cable

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86/ WorldCom Comments at 10; EarthLink Comments at 23; AT&T Comments at 16.

87/ *LEC Classification Order* at 15794 ¶ 66. *See also AT&T International Reclassification Order* at 17999 ¶ 97 (explaining that the Commission would forbear from applying dominant carrier regulation even for point to point markets in which AT&T was the only international long distance provider, in part because the economic costs, including administrative costs on the Commission, would not be justified).

88/ *LEC Classification Order* at 15794 ¶ 66. The Commission also noted that it is important to "examine market share in the broadest geographic group of point-to-point markets in which competitive conditions are reasonably homogenous." *Id.* at 15795 ¶ 67 n.181.

modem, wireless, and satellite broadband) at any given moment, the availability of all four as potential sources of competition does not really vary on a city by city basis. Cable systems are expanding their broadband buildouts,[92/] as are satellite and wireless providers.[93/] Thus, all areas have the same *potential* competitors, which serves to constrain pricing on a national basis. Indeed, as noted in Qwest's initial comments,[94/] mass market broadband pricing is generally uniform across the country, making the availability or lack of certain modes of competition in any given local market irrelevant for the purposes of market power assessment.

AT&T suggests that there are many areas that today are served solely by DSL service.[95/] But in fact, DSL faces more constraints on its geographic availability than other platforms — certainly more than cable modems. DSL was available to only 45 percent of the country in June 2001, when cable modem service was available to 70 percent.[96/] DSL deployment is more expensive than cable modem deployment,[97/] and is subject to distance limitations that do not

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89/ *See* Verizon Comments at 22-23; SBC Comments at 32.

90/ Cable Broadband Declaratory Ruling and Notice at ¶ 1.

91/ *Third Advanced Services Report* at ¶¶ 46, 51.

92/ *See* J.P. Morgan Securities, Inc. and McKinsey & Company, *Broadband 2001 — A Comprehensive Analysis of Demand, Supply, Economics, and Industry Dynamics in the U.S. Broadband Market,* at 43 (Apr. 2, 2001); *see also Adelphia Communications Announces Fourth Quarter and Full Year 2001 Results*, PR Newswire (Mar. 27, 2002) (describing its cable plant build out project)

93/ *Third Advanced Services Report* at ¶¶ 46, 51.

94/ Qwest Comments at 27-28.

95/ AT&T Comments at 41-42.

96/ *Third Advanced Services Report* at ¶¶ 46, 51.

97/ *See* J.P. Morgan Securities, Inc. and McKinsey & Company, *Broadband 2001 — A Comprehensive Analysis of Demand, Supply, Economics, and Industry Dynamics in the U.S. Broadband Market,* at Charts 43 and 44 (April 2, 2001).

affect cable modem service. These factors make it likely that cable modem service will continue to surpass DSL in deployment in the future.[98] While the Commission could look until it found a particular community in which *only* an ILEC's DSL service was available, it is evident that the ILECs lack market power across the country. And because DSL pricing generally does not vary by community, the fact that there might be a community in which DSL is present and cable modem service is not is irrelevant: ILECs are obviously not setting uniform prices for DSL service based on what some group of arguably "captive" customers in a few less competitive local markets might be willing to pay. That makes no sense, and is easily dismissed. The Commission need not engage in a separate analysis for every locality.

## II. THE CHALLENGES TO THE DEFINITION OF THE LARGE BUSINESS MARKET ARE EQUALLY GROUNDLESS AND IRRELEVANT TO THE PLAIN FACT THAT ILECS DO NOT DOMINATE THAT MARKET

### A. ILECs Face Effective Competition in the Large Business Market, However Defined

Just as in the mass market, ILECs do not have the largest share of the business market for packet switching services, which is dominated by the large IXCs. AT&T, WorldCom, and Sprint collectively have a share of 68.7 percent of all frame relay revenues and 65.8 percent of all ATM revenues nationwide.[99] It is true that cable and satellite are not now reasonable alternatives in this market, as Time Warner and AT&T argue.[100] On the other hand, no carrier in the large

[98] *See* Qwest Comments, Att. A, SPR Report at 13 (explaining that it is unlikely that DSL will *ever* be able to reach more than two thirds of the total households in the United States, due to its technical limitations).

[99] SBC Petition, Crandall/Sidak Declaration at ¶ 106 (citing IDC, U.S. Frame Relay Services: Market Forecast and Analysis, 2000-2005, at Figure 5 (2001); IDC, ATM Services Market Share and Assessment, 2000-2005 at Figure 6 (2001)).

[100] *See* Time Warner Comments at 6; AT&T Comments at 14.