Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
Appropriate Framework for Broadband Access to the Internet over Wireline Facilities	)	CC Docket No. 02-33
	)	
Universal Service Obligations of Broadband Providers	)	
	)	
Computer III Further Remand Proceedings: Bell Operating Company Provision of Enhanced Services; 1998 Biennial Regulatory Review – Review of Computer III and ONA Safeguards and Requirements	)	CC Docket Nos. 95-20, 98-10

COMMENTS OF
ALLEGIANCE TELECOM, INC.

Andrew D. Lipman
Eric J. Branfman
Tamar E. Finn
Swidler Berlin Shereff Friedman, LLP
3000 K Street, N.W., Suite 300
Washington, D.C. 20007
(202) 424-7500 (Telephone)
(202) 424-7645 (Facsimile)

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COMMENTS OF
ALLEGIANCE TELECOM, INC.

Allegiance Telecom, Inc. ("Allegiance") submits these comments in response to the above-captioned notice of proposed rulemaking examining the appropriate regulatory framework for broadband access to the Internet over wireline facilities.[1]

I. INTRODUCTION AND SUMMARY

Allegiance, through its operating subsidiaries, is a facilities-based competitive local exchange carrier ("CLEC") that offers small and medium sized enterprises ("SMEs") a complete package of telecommunications and Internet services. Allegiance's operating subsidiaries provide service in 36 markets throughout the United States, are collocated in more than 815 central offices, and have more than one million access lines in services. Allegiance has designed

[1] *Appropriate Framework for Broadband Access to the Internet over Wireline Facilities*, CC Docket No. 02-33, Notice of Proposed Rulemaking, FCC 02-42 (rel. Feb. 15, 2002) ("*NPRM*").

its networks using a "smart build" approach – using a combination of its own network facilities, unbundled network elements ("UNEs"), and, where available, fiber leased from third parties. Allegiance uses its owned and leased network facilities to provide both telecommunications and information services to its customers. For example, Allegiance provides its SME customers an integrated access product that devotes some channels on a DS-1 loop to voice and others to broadband data services, including Internet access. Because the Commission's tentative conclusions in the *NPRM* could result in fundamental changes to Allegiance's ability to access and use incumbent local exchange carrier ("ILEC") facilities necessary to provide competitive broadband Internet access services, Allegiance urges the Commission not to adopt its tentative conclusions. Rather, in keeping with its overarching objective of promoting regulatory certainty, the Commission should not tamper with the statutory requirement that dominant facilities-based providers must offer separately and as a telecommunications service, the broadband transmission component that underlies their bundled information services.

In the *NPRM*, the Commission announces for the first time that promotion of broadband services to all Americans is now its primary goal[2] and cites this goal in an effort to justify reversal of several long-standing Commission determinations concerning the distinction between telecommunications and information services. While access to broadband services for all Americans is an important goal, the Commission must not erroneously and unlawfully relieve ILECs' of their key Title II obligations in the misguided view that such deregulation would further this goal. As the Commission has repeatedly determined, advanced telecommunications services are being made available in a timely fashion to all Americans, notwithstanding the fact

[2] *Cf.* Letter from Michael K. Powell, Chairman, Federal Communications Commission, to the Honorable Ernest F. Hollings, Chairman, Senate Committee on Commerce, Science, and Transportation, 22 (April 4, 2002)

that wireline broadband services are subject to Title II regulation. For the reasons stated in these Comments, the Commission should reject its tentative conclusion that broadband Internet access services be classified as information services subject to Title I. Instead, the Commission should reaffirm that facilities based wireline broadband Internet access service is a bundled offering of a telecommunications service (subject to Title II) and information service and that ILECs' broadband services and facilities are, and will continue to be, subject to Title II, all of the pro-competitive obligations of the Telecommunications Act of 1996 ("1996 Act"), and the Commission's *Computer Inquiry* obligations. The competition that these regulatory requirements make possible is the surest way to promote the Commission's broadband goals and to encourage ILECs and all other carriers to deploy and make available to their customers advanced broadband services. Indeed, competitive pressure from CLECs was the catalyst that forced ILECs to finally begin upgrading their networks in order to deploy digital subscriber line ("DSL") services. Deregulation of ILEC broadband services would merely enhance the ILECs' ability to thwart ***intramodal*** competition, especially in the SME market served by Allegiance, without resulting in any measurable increase in the availability of advanced services to all Americans.

The Commission would be hard pressed to justify the reversal of 25 years of precedent asserting Title II jurisdiction over the transmission component of ILEC networks used to provide information services. Under *the Computer Inquiry* requirements, ILECs may ***provide*** broadband transmission services to their information service operations and ***use*** their own broadband services to offer high speed Internet access services, but, pursuant to Title II, are required to make the broadband transmission component available to other competitors on a

("Powell Letter") ("[O]ne of our primary goals is to provide as much regulatory certainty as possible in order to promote investor confidence.").

nondiscriminatory basis. The legislative history of the 1996 Act confirms that Congress intended the Commission to maintain its Title II jurisdiction over such transmission services.

Moreover, applicable case law defining common carriage as well as all of the policy and public interest considerations underpinning common carrier designation require that this broadband transmission capability be subject to Title II and unbundling obligations. Under *NARUC I* and *II* and cases cited therein, ILECs are making an offer to the public at large to provide telecommunications for a fee sufficient to trigger common carrier status for this telecommunications component. Further, ILECs own and control the quintessential bottleneck facilities – the local loop – that compels common carrier status under the Act and common law. And, it is hard to imagine a more compelling public interest justification for application of Title II obligations to ILEC broadband services. The ability of independent ISPs to obtain basic network functions on a nondiscriminatory basis has been the foundation for the growth and success of the Internet and its attendant public interest benefits. The ability of CLECs to obtain UNEs has similarly been the foundation for the creation of integrated voice and data products and the wider deployment of less expensive broadband services, such as DSL, to residential customers and SMEs. Permitting ILECs to discriminate in favor of their own operations, or to tailor their service offerings in order to avoid common carrier regulation, would be a perfect recipe for ILECs to extend their monopoly control of the loop to the unregulated information services marketplace, which for 25 years the Commission has sought to avoid.

An overwhelming public interest benefit of preserving the Title II obligation is that this would preserve for competitive carriers Section 251(c) unbundled access to the network elements that can be used to provide competitive broadband services. It would also assure the long-term viability of universal service funding because only entities that "provide" telecommunications or

telecommunications service may be required to contribute to universal service. Maintaining the ILECs' obligation to offer broadband transmission as a telecommunications service would also preserve other important requirements that apply to provision of telecommunications service including CALEA, CPNI requirements, and access to telecommunications services by persons with disabilities.

Continued application of Title II to ILEC broadband transmission is the most effective means of achieving the Commission's goal of eliminating unnecessary regulations. The Commission may deregulate under Title II when it is appropriate to do so under its Section 10 forbearance authority. Accordingly, the Commission should fashion a deregulatory framework for broadband by retaining Title II authority and deregulating as appropriate, rather than attempting to "deregulate" by reclassifying all of broadband Internet access service as an information service subject to Title I.

Notwithstanding ILEC claims to the contrary, complete elimination of Title II regulation is not necessary in order to permit ILECs to compete intermodally in the broadband market. ILECs are currently permitted to compete and provide broadband information services as customers of their own tariffed broadband telecommunications services. Under this existing framework, ILECs have succeeded spectacularly in the broadband arena, experiencing record breaking growth in DSL subscribership.

The *NPRM* does not make a compelling case that marketplace conditions have changed sufficiently, or at all, to permit reversal of prior Commission determinations that broadband transmission services are telecommunications services whether provided alone or bundled with an information service. The *NPRM's* statements that *Computer III* and Title II safeguards were somehow limited to the voice network are incorrect. The Commission in *Computer III* stated

that it intended to, and did, fashion a framework that could accommodate changes in the network. Similarly, Congress in adopting the 1996 Act made clear that the Title II protections were meant to encompass evolving networks. Thus, these key safeguards are not technology-specific. Instead, they are broad anti-discrimination requirements that can and should be equally applied in a narrowband or broadband environment. The Commission should therefore conclude this proceeding by reaffirming that broadband transmission service is fully subject to Title II and *Computer Inquiry* safeguards.

II. RECLASSIFICATION OF BROADBAND INTERNET ACCESS SERVICE AND ITS TRANSMISSION COMPONENT AS INFORMATION SERVICES SUBJECT ONLY TO TITLE I WOULD NOT PROMOTE DEPLOYMENT OF ADVANCED TELECOMMUNICATIONS CAPABILITY OR REGULATORY CERTAINTY

A. The Commission Must Reassess Its Goals for This Proceeding

In the *NPRM's* introductory section, the Commission notes that it will be guided by four goals. One of those goals is encouraging the ubiquitous availability of broadband to all Americans.[3] As Allegiance shows in Section VIII.A., *infra*, ILECs have already widely deployed broadband service, and are rapidly upgrading their networks to offer even more robust broadband services, notwithstanding the regulatory and unbundling requirements currently imposed on these services and facilities. The Commission would act erroneously and unlawfully if it were to reduce or eliminate regulation of broadband services in the misguided view that this is necessary to promote the availability broadband services to all Americans.

Another stated Commission goal is ensuring that broadband services "exist in a minimal regulatory environment that promotes investment and innovation in a competitive market."[4] Yet the *NPRM* never requests comment on whether existing regulations actually deter ILEC

[3] *NPRM* at ¶ 3.

deployment of or investment in broadband infrastructure. The simple and obvious answer is that they do not. As Allegiance argues herein, maintaining the classification of broadband services as telecommunications services subject to Title II would not only be consistent with the statutory definitions, but would also be consistent with Congressional goals and the public interest. Moving broadband services to Title I could adversely affect the Commission's ability to enforce a number of key statutory provisions designed to protect consumers and promote competition. Because the Commission has ample authority to reduce regulation of Title II services, retaining the current classification of broadband transmission services as telecommunications services subject to Title II will permit the Commission to achieve this goal while at the same time implementing the plain text of the Act and promoting the public interest.

Noticeably absent from the list of objectives the Commission strives to attain in this proceeding is the goal of regulatory certainty. The absence of this goal is striking in that the Commission has repeatedly stated that it strives to create a period of regulatory certainty and stability by adopting rules upon which carriers can rely in seeking capital, building their business plans, and deploying network facilities.[5] The reason that the Commission cannot meet the goal of regulatory certainty in this proceeding is obvious. Rather than promoting regulatory certainty, the adoption of the proposals set forth in the *NPRM* would create regulatory havoc by reversing a number of previous Commission determinations, some as old as 25 years and others as recent as

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[4] *NPRM* at ¶ 5.

[5] *See, e.g., Access Charge Reform; Reform of Access Charges Imposed by Competitive Local Exchange Carriers*, CC Docket No. 96-262, Seventh Report and Order, FCC 01-146 (rel. Apr. 27, 2001), appeal pending. While Allegiance does not necessarily agree with the substantive outcome of this and other Commission decisions in which the stated purpose was to promote regulatory certainty, Allegiance fully supports the goal of promoting regulatory stability.

last year.[6] The Commission provides no reasoned explanations for proposing these sudden reversals. Rather, it continually falls back upon its desire to promote the deployment of advanced ***telecommunications*** capability, notwithstanding the fact that the Commission has repeatedly found such capability is already being deployed to all Americans in a reasonable and timely fashion. The fact that the Commission proposes to reclassify existing telecommunications service offerings as information services in order to promote the deployment of advanced telecommunications is ironic, at best.

B. The *NPRM* Proposes to Reverse Long-Standing Precedent That Facilities-Based Providers Cannot Use the Contamination Theory to Escape Regulation

To determine whether an entity is an information service provider, as opposed to a telecommunications service provider, the Commission has generally followed a "contamination" approach. The contamination theory, which originated in the Commission's *Computer Inquiry* proceedings, is predicated upon the inability to separate the telecommunications and information elements of a service offering. The Commission has, however, repeatedly found that the contamination theory applies only to non-facilities-based providers.[7] Under long-standing Commission precedent, facilities-based providers may not "contaminate" the basic transmission service that underlies the information service and must offer that basic transmission service separately to competing providers. In short, throughout the past 25 years, the Commission has

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[6] In fact, the Commission has created regulatory uncertainty just by issuing the *NPRM*. *See* Letter from Michael J. Copps, Commissioner, Federal Communications Commission, to the Honorable Ernest F. Hollings, Chairman, Senate Committee on Commerce, Science, and Transportation, 3 (March 5, 2002) ("These Notices have included some far-reaching 'tentative' conclusions. Some parties have read these Notices and concluded that the Commission has a predetermined agenda. This perception, coupled with the uncertainty created by these broad Notices, has the potential to damage competition and hinder access to capital as surely as any final rules adopted by the Commission.").

[7] *See, e.g., Implementation of the Non-Accounting Safeguards of Sections 271 and 272 of the Communications Act of 1934, as Amended*, CC Docket No. 96-149, First Report and Order and Further Notice of Proposed Rulemaking, 11 FCC Rcd. 21905, ¶ 136 (1996) ("*Non-Accounting Safeguards Order*").

consistently determined that facilities-based providers provide two separate services -- a telecommunications service and an information service.

This exception to the contamination theory is the basis for the two-service classification that the Commission now proposes to reverse. Just one year ago, the Commission noted that "[t]he separate availability of the transmission service is fundamental to ensuring that dominant carriers cannot discriminate against customers who do not purchase all the components of a bundle from the carriers, themselves."[8] Based upon this reasoning, the Commission refused to eliminate the requirement that facilities-based carriers offer the basic transmission service underlying their information services to other providers "on the same terms and conditions under which they ***provide*** such service to their own [information] service operations."[9] The Commission now asks, however, whether it should reach precisely the opposite conclusion. This flip-flop undermines regulatory certainty. Further, the Commission has supplied no reasoned basis that would justify such a sudden reversal.

C. The *NPRM* Moves Mature Services from One Statutory Classification to Another

Internet access and the broadband transmission facilities used to provide it are not fledging services that carriers have just recently introduced to the market. As the *NPRM* recognizes, the Commission first began examining the proper treatment of enhanced services more than three decades ago.[10] In *Computer II*, the Commission "classified all services offered

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[8] *Policy and Rules Concerning the Interstate, Interexchange Marketplace*, CC Docket No. 96-61, Report and Order, FCC 01-98, ¶ 44 (rel. March 30, 2001) ("*CPE/Bundling Order*").

[9] *Id*. at ¶ 39 (emphasis added).

[10] *NPRM* at ¶ 34, n.68. In the *Computer Inquiry* proceedings, the Commission established a dichotomy between basic (regulated) and enhanced (unregulated) services. After passage of the 1996 Act, the Commission determined that Congress intended to continue this dichotomy using the newly defined terms "telecommunications services" and "information services."

over a ***telecommunications network*** as either basic or enhanced."[11] The *Computer Inquiry* proceedings resulted in a number of classification rules that the Commission later had occasion to apply to various types of packet-switched services, including DSL. As the Commission established in these early proceedings, "an otherwise interstate basic service . . . does not lose its character as such simply because it is being used as a component in the provision of an [enhanced] service that is not subject to Title II."[12] To the contrary, "the underlying basic services are subject to Title II regulation."[13]

Applying these rules to DSL services, the Commission determined in 1998 that DSL services are telecommunications services. It also determined that the service provider is providing two services:

> An end-user may utilize a telecommunications service together with an information service, as in the case of Internet access. In such a case, however, we treat the two services separately: the first service is a telecommunications service (*e.g.*, the xDSL-enabled transmission path), and the second service is an information service, in this case Internet access.[14]

The Commission accordingly determined that advanced telecommunications facilities and services, such as DSL, are subject to Sections 251 and 252.[15]

Only last year, the Commission had occasion to address this regulatory classification in the case of bundled services provided by ILECs. In cases in which the ILEC offers

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[11] *Federal-State Joint Board on Universal Service,* Report to Congress, 13 FCC Rcd. 111501, ¶ 24 (1998) (emphasis added). After passage of the 1996 Act, the Commission determined that basic services were telecommunications services and enhanced services were information services under the definitions adopted by Congress.

[12] *Filing and Review of Open Network Architecture Plans*, 4 FCC Rcd 1, 141 (1998).

[13] *Id.*

[14] *Deployment of Wireline Services Offering Advanced Telecommunications Capability*, CC Docket No. 98-147, Memorandum Opinion and Order and Notice of Proposed Rulemaking, FCC 98-188, ¶ 36 (rel. Aug. 7, 1998) ("*Advanced Services Order*").

[15] *Id.* at ¶ 18.

telecommunications and information services through the same entity, the Commission clarified that the ILEC can "bundle" those services, selling them to end users for a single price.[16] The Commission nevertheless upheld the two-service treatment for regulatory purposes, finding that under Section 254 the carrier must continue to make universal service contributions for the telecommunications service that is bundled with the information service.[17]

Less than one year later, the Commission is now proposing to reverse its two-services determination and to treat broadband Internet access as a single, "contaminated" information service that is not subject to Title II regulation. Again, this flip-flop undermines regulatory certainty and also threatens the sufficiency of universal service.

III. FACILITIES-BASED WIRELINE BROADBAND INTERNET ACCESS SERVICE IS A BUNDLED OFFERING OF INFORMATION SERVICE AND TELECOMMUNICATIONS SERVICE

A. Wireline Broadband Internet Access Is Comprised of A Transparent Transmission Service And An Information Service

In the *NPRM*, the Commission stated that "[a]n entity provides telecommunications (as opposed to merely using telecommunications) when it both provides a transparent transmission path and it does not change the form or content of the information."[18] The Commission further stated, despite over 25 years of contrary precedent, that "it seems as if a provider offering the [broadband wireline Internet access] service over its own facilities does not offer 'telecommunications' to anyone, it merely ***uses*** telecommunications to provide end users with wireline broadband Internet access service."[19] This statement is incorrect because the provider is in fact providing telecommunications to its information services operations. Furthermore,

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16 *CPE/Bundling Order* at ¶ 39.

17 *Id*. at ¶¶ 47-54.

18 *NPRM* at ¶ 25.

sometimes the provider is providing telecommunications even to the end user, in that it provides no more than a transparent transmission path. As the Committee of Conference explained: "[t]he underlying transport and switching capabilities on which [information] services are based [] are ***included in the definition of 'telecommunications services***.'"[20] As such, self-provisioned wireline broadband Internet access is a bundled offering of a telecommunications service and information service.

While end users accessing the Internet will in many cases have the capability to change the appearance and format of content they receive or send, these capabilities are provided not by the wireline provider, but by software in the end user's computer and/or by the information content provider to which the end user chooses to connect. Thus, in Web access, changes in the appearance of information on the user's screen are controlled and determined either by the end user or by the content provider. The user also controls the points on the Internet to which he is connected. Thus, to a large extent, Internet access service involves no more than provision of a transparent transmission path.[21] In fact, the Committee of Conference explicitly addressed this in describing the definition of "telecommunications services" adopted in the 1996 Act when it stated that this definition does "not include information services, cable services, or 'wireless' cable services, ***but does include the transmission without change in the form or content of such services***."[22]

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19 *Id.* (emphasis added).

20 S. 652, Joint Explanatory Statement of the Committee of Conference, p. 1 (104th Cong. 1996) (emphasis added) ("Joint Explanatory Statement").

21 There are, of course, instances where the wireline provider is ***using*** self-provisioned telecommunications to provide information services functions, rather than ***providing*** telecommunications. When the user connects to stored information provided by the wireline carrier, such as the end user's personal web page or stored email, the provider is using telecommunications to provide an information service. However, all ISPs permit users to change the default opening Web page. Thus, the user in Web browsing may never connect to content provided by the ISP.

22 Joint Explanatory Statement, p. 2 (emphasis added).

Moreover, the fact that the user is using the transmission path provided by the wireline carrier to connect to content providers does not transform the transmission service into an information service. The traditional telephone network has always provided users the ability to retrieve and process information. Users are able to use the traditional network to connect to numerous sources of stored information, such as banking information, stock quotes, news, entertainment information, horoscope, weather, and time of day, and to manipulate such information, such as transferring money between two bank accounts. Users also access the Internet using the traditional network when they use dial-up access over their local phone line to access their ISP's and other websites. This use of the wireline network by the end user is conceptually identical to the use of broadband facilities to obtain Internet access to retrieve and process information on the Web.

Further, there is a charge associated with provision of the pure transmission path, which either is part of the total charge for wireline broadband Internet access or a separate charge. An end user can choose a bundled DSL and Internet access product, or it can purchase Internet access from an ISP for approximately $20/month, and pay a separate and additional monthly charge to the ILEC for the DSL connection. For example, a Qwest end user can buy a bundled "MSN Broadband powered by Qwest Deluxe" DSL service for $49.95 or it can buy Internet access from another ISP that "supports" Qwest DSL and buy Qwest Deluxe DSL service for $31.95.[23] In either case, the Internet access component is identical to that purchased by dial-up users who do not use DSL at all. The fact that most carriers do not currently sell local telephone service bundled with Internet access for a single price is not a principled distinction that justifies treating the transmission component underlying dial-up Internet access differently than the

transmission component underlying broadband Internet access. Therefore, the Commission may, and should, conclude that the self-provisioned transmission function of wireline broadband Internet access is a telecommunications service when provided to, and used by, the end user.

On the face of it, wireline broadband Internet access is thus a bundled offering of telecommunications service and information service because sometimes the wireline provider is providing no more than telecommunications service and at other times it is using telecommunications to provide an information service.

B. Wireline Broadband Internet Access Is Not a Single Inextricably Intertwined Service

In determining whether the offering is a single information service or a bundled offering of information service and telecommunications service for one price, the "issue is whether, functionally, the consumer is receiving two separate and distinct services."[24] The *NPRM* tentatively concluded that wireline broadband Internet access service is a single information service offering, but failed to explain why it is not, in fact, two functionally separate and distinct services. By statutory definition, telecommunications is functionally different from other add-ons that could constitute an information service, such as changes in the form and content of information. Therefore, when providers are providing no more than a pure transmission service they are offering something that is functionally distinct from the information services that are provided at different times when selected by the user.

Even from the perspective of the customer, it seems obvious that customers know when they are receiving a pure transmission path and when the provider is manipulating the content.

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[23] *See* Qwest DSL Residential Products, http://www.qwest.com/residential/products/dsl/index.html.

[24] *Federal-State Joint Board on Universal Service*, CC Docket No. 96-45, Fourth Order on Reconsideration, FCC 97-420, ¶ 282 (Dec. 30, 1997).

In fact, consumers demand and expect that when they use the Internet to access websites, the ISP will not change the form or content of the information provided by the third-party content provider. They therefore correctly perceive that provision of access to websites is provision of a pure transmission path. Another reason that there are two "separate and distinct services" is that they are currently sold separately, as well as bundled. Accordingly, under the functionally separate test, wireline broadband Internet access is provision of both a telecommunications service and an information service.

A meaningful application of the functionally separate test should rest at least in part on an empirical or factual examination of functionalities and/or customer perceptions. However, the *NPRM* provides no such empirical or factual analysis or studies that could support the conclusion that the transmission component of wireline broadband Internet access is "inextricably" intertwined with information service functions, most of the latter of which may in any event be provided by an independent third party. The *NPRM* therefore does not provide a basis for concluding that the information service and transmission components of bundled wireline broadband Internet access cannot be separated.

C. The Statute Mandates That The Transmission Component Be Classified As a Telecommunications Service

Some predict that the circuit switched network will soon be replaced by a network providing all services as applications traveling over digital packet-switched facilities using Internet Protocol.[25] In fact, some carriers are already providing both traditional telecommunications services and information services over packet-switched networks.[26] In this

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[25] *See* Lawrence K. Vanston, Ph.D., *The Local Exchange Network in 2015*, Technology Futures, Inc. (2001).

[26] *See, e.g., Sprint 2001 Annual Report and Form 10-K*, 7, http://www.sprint.com/sprint/ir/fn/ars.html ("[T]he local division's aggressive plans to transform its network from circuit to packet technology will be an important

environment, all services, including voice, will be merely different software defined applications traveling over digital packetized transmission services. Moreover, there will be no meaningful distinction between the telephone network and the Internet. Rather, the Internet will be the network for all applications. In short, the classification of all uses of Internet access service as one seamless information service is untenable. Instead, as suggested, the Commission should classify those applications, both dial up and broadband, which provide no more than a pure transmission path to the Internet, as telecommunications. This will result in a consistent approach for establishing an appropriate deregulatory framework for provision of telecommunications services. As noted elsewhere in these Comments, Title II in no way precludes deregulation where it is appropriate and consistent with the requirements of Section 10.

D. The Commission Should Resolve the Statutory Classification Issue in Light of Policy Goals and Objectives

In its previous application of the statutory definitions of telecommunications and information services, and before that of the definitions of basic and enhanced services, the Commission considered its policy goals and objectives. The Commission established its definitions of basic and enhanced services in order to assure that enhanced service providers would not be unnecessarily regulated as common carriers while, at the same time, assuring that telephone companies would not be able to leverage control of the local network into control of the enhanced services market as well.

As explained above, broadband wireline Internet access consists in part of a telecommunications service when the carrier provides a pure transmission path, such as in

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initiative over the next several years. . . . Most importantly, a 100 percent packet network will unleash a whole new set of possibilities to enhance the way our customers use communications.")

providing access to Internet websites. To the extent that the Commission harbors any doubt on this issue, however, it should resolve the statutory classification issues raised in this proceeding in light of the serious policy issues and possible consequences of its classification.

As widely reported in the press and elsewhere, one possible outcome of this proceeding is that ILEC broadband transmission service would be defined as an information service, and removed from Title II regulation. At the same time, the Commission might eliminate *Computer Inquiry* safeguards against discrimination. It is hard to imagine a more alarming prospect. Removal of safeguards against discrimination would permit ILECs to further extend their dominance in wireline broadband Internet access beyond the 93% of customers they already possess, resulting in an ILEC/cable duopoly in residential markets and perpetuation of the ILECs' telephony monopoly in SME broadband markets.[27] Reclassification of wireline broadband Internet access would also threaten the long-term viability of universal service programs because under the Act only ***providers*** of telecommunications or telecommunications service fall squarely under the statutory obligation to contribute to universal service funding.[28] And, reclassification of ILEC broadband transmission service as an information service could foreclose CLECs from offering competitive services by substantially restricting access to the unbundled network elements necessary to provide those services.[29] Nor would the proposed deregulatory steps promote broadband deployment.[30] Any one of these considerations standing alone warrants maintaining a framework in which ILEC broadband transmission service continues to be categorized as telecommunications service. Together, they present an

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[27] *See* Section VI.F., *infra*.

[28] *See* Section IX, *infra*.

[29] *See* Section VI, *infra*.

[30] *See* Sections VI.B. & VIII.B, *infra*.

overwhelming case that the Commission must maintain Title II common carrier obligations for ILECs providing broadband Internet access.

IV. THE TRANSMISSION COMPONENT OF FACILITIES-BASED WIRELINE BROADBAND INTERNET ACCESS SERVICE IS, AND SHOULD REMAIN, SUBJECT TO TITLE II

A. The Transmission Component Is Subject to Title II

While the *NPRM* purports to determine the appropriate framework for wireline broadband Internet access, the Commission already has such a framework pursuant to which ILECs may offer, and are offering, broadband Internet access over their own facilities. Under long standing *Computer III* rules adopted pursuant to the Commission's authority under Title II, "carriers that own common carrier transmission facilities and provide enhanced services must unbundle basic from enhanced services and offer transmission capacity to other enhanced service providers under the same tariffed terms and conditions under which they provide such services to their own enhanced service operations."[31] Clearly, the Commission has asserted Title II authority over the transmission component of wireline broadband Internet access. For the Commission to now conclude that the transmission component of wireline broadband Internet access is subject only to Title I can mean only one of two things, the Commission is either (1) overreaching now or (2) conceding that its past exercise of Title II jurisdiction was *ultra vires*. Allegiance submits that the Communications Act unquestionably subjects the transmission component to Title II jurisdiction and any attempt by the Commission to eliminate that jurisdiction would be an abrogation of its Congressionally mandated duties.

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[31] *Independent Data Communications Manufacturers Ass'n, Inc.,* Memorandum Opinion and Order, 10 FCC Rcd. 13717, ¶ 13 (1995) ("*Frame Relay Order*").

B. The Telecommunications Component of Wireline Broadband Internet Access Is Subject to Title II Under *NARUC I* and *II*

The traditional test for common carriage also requires that broadband transmission service be, and remain, subject to common carrier regulation. The Act defines a common carrier as "any person engaged as a common carrier for hire, in interstate or foreign communication by wire or radio . . . ."[32] The Commission's regulations define common carrier as "any person engaged in rendering communications service for hire to the public."[33] The U.S. Court of Appeals for the D.C. Circuit in *NARUC I* and *II* [34] established a test for determining whether an activity constitutes communications common carriage. The D.C. Circuit found that the "critical point" is the "quasi-public character of the activity involved," *i.e.*, "that the carrier undertakes to carry for all people indifferently."[35] The key is not how large a clientele the carrier serves, but "holding oneself out to serve the public indiscriminately."[36] Further, this quasi-public character can arise out of a legal compulsion to serve the public indifferently or it can arise because of the nature of the carrier's operations if, in practice, the carrier holds itself out to serve all those who seek to purchase the carrier's particular services.[37] Common carrier service is contrasted to private carriage which is "set aside for the use of particular customers, so as to not be generally available to the public."[38] Private carriage is characterized by a "clientele that might remain

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[32] 47 U.S.C. § 153(10).

[33] 47 C.F.R. § 21.2.

[34] *National Association of Regulatory Utility Commissioners v. Federal Communications Commission*, 525 F.2d 630 (D.C. Cir. 1976) ("*NARUC I*"); *National Association of Regulatory Utility Commissioners v. Federal Communications Commission*, 533 F.2d 601 (D.C. Cir. 1976) ("*NARUC II*").

[35] *NARUC I* at 641.

[36] *Id.* at 642.

[37] *NARUC I,* 525 F.2d at 641-42.

[38] *Id.*

relatively stable, with terminations and new clients, the exception rather than the rule."[39] The carrier would desire and expect to negotiate with and select future clients on an individualized basis.[40]

The Court in *NARUC II* added a second prong to the test for common carriage, *i.e*. that customers "transmit intelligence of their own design or choosing."[41] The key consideration is whether the content of the transmission may be under the customer's control. This "control" can be as simple as the decision whether to transmit information or not.[42] Post-*NARUC I* and *II,* the Supreme Court, in defining "communications common carrier," adopted the D.C. Circuit's approach. The Supreme Court defined a communications common carrier as a carrier "that makes a public offering to provide [communications facilities] whereby all members of the public who choose to employ such facilities may communicate or transmit intelligence of their own design and choosing."[43]

ILECs clearly provision broadband transmission services, including DS1s and DS3s and DSL where they have upgraded their networks, on a common carrier basis today. They offer their broadband transmission services to all end users, including ISPs. End users can buy broadband transmission services from ILECs and combine those services with Internet access service provided by a separate ISP. Even applying the *NARUC* principles to the self-provisioned transmission component of wireline broadband Internet access service leads to the inescapable conclusion that it is a common carrier offering subject to Title II. The part of the *NARUC I* test

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39 *Id.* at 643.

40 *Id.*

41 *NARUC II* at 609.

42 *Id.* at 610.

43 *FCC v. Midwest Video Corp.*, 440 U.S. 689, 701 (1979).

relating to legal compulsion to serve is met by the current regulatory requirement that ILECs tariff their own transmission service so that ISPs (including the ILEC's ISP operations) may use the service as an input in their information services.

Moreover, even if the *Computer III* legal compulsion to provide the underlying transmission service on a common carrier basis separate from the information service did not exist, the offering of the underlying transmission service meets the test for common carriage because ILECs provide the telecommunications portion of the service indiscriminately to the public at large. ILECs do not deal on an individual basis with millions of consumers. Instead, they undertake to provide service to all on the same terms and conditions. Indeed, it is the only way ILECs could provide services to the mass market. As discussed previously, the transmission component of self-provisioned wireline broadband Internet access is a separate offering to provide a pure transmission path for access to content on the Internet, and users expect and use it as such, even though they may also choose to receive more functions from the provider in which case the provider uses the telecommunications component to provide an information service. Therefore, the self-provisioned transmission component of wireline broadband Internet access is a common carrier offering under *NARUC I*.

It is important to note that the D.C. Circuit in *NARUC I* limited the Commission's discretion to apply or not apply common carrier status. The Court held:

> Further, we reject those parts of the Orders which imply an unfettered discretion in the Commission to confer or not confer common carrier status on a given entity, depending upon the regulatory goals it seeks to achieve. The common law definition of common carrier is sufficiently definite as not to admit of agency discretion in the classification of operating communications entities. A particular system is a common carrier by virtue of its functions, rather than because it is declared to be so. Thus, we affirm the Commission's classification not because it has any significant discretion in determining who is a common carrier, but

> because we find nothing in the record or the common carrier definition to cast doubt on its conclusions that SMRS are not common carriers.[44]

Thus, the Commission does not have the discretion to change the classification of broadband transmission from common carrier service based upon the erroneous assumption that this would promote deployment of broadband.[45] Rather, because the transmission component of wireline broadband Internet access satisfies the definition of common carriage under *NARUC I*, the Commission may not reclassify it as private carriage to achieve other policy goals.

C. ILECs' Market Power Mandates Application of Title II To Wireline Broadband Services

While dominant carrier status is not a precondition for application of Title II, it nonetheless fully justifies assertion of Title II jurisdiction. Only ILECs possess the ubiquitous loops and transport facilities necessary to reach all consumers and businesses. Although cable may be available in some residential markets as an alternative to the ILECs' broadband services, the fact remains that cable facilities are concentrated in residential areas and only very rarely serve SMEs.[46] Rather, like CLECs, even cable providers that have tested the voice telephony market and/or offered broadband services rely on unbundled ILEC facilities to reach SMEs.[47] Furthermore, even in the residential markets where ILECs and cable may compete for broadband customers, that "competition" has not constrained prices. To the contrary, both ILECs and cable

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[44] *NARUC I* at 644.

[45] The Court did intimate, however, that while the Commission has little discretion in defining what should be a common carrier service as a non-common carrier service it may have some discretion to refuse to exercise its common carrier regulatory powers. *NARUC II* at 620. Thus, as discussed elsewhere in these comments insofar as the Commission chooses to deregulate ILEC provision of broadband, it may do so under Title II.

[46] *See, e.g., Cable Telephone: Offering Consumers Competitive Choice*, National Cable & Telecommunications Ass'n, White Paper, 8 (July 2001) (business telephony services "are generally not provided through the same hybrid-fiber-coax facilities that provide cable television service").

[47] *See Local Telephone Competition: Status as of June 20, 2001*, Table 5 (Feb. 2002) (only 11% of CLEC access lines are provided using coaxial cable technology).

broadband providers raised their prices in 2001 at a time when many CLEC broadband providers were experiencing financial difficulties and exiting the market.[48] Finally, because the speed of a cable modem service varies depending on how many customers are using it simultaneously, cable modem service may not be a good substitute for many broadband users who need a guaranteed amount of bandwidth. Thus ubiquitous intermodal competition is nothing more than a fantasy. To the extent intermodal competition does exist, it exists in limited markets only, almost exclusively for residential customers and it has done nothing to constrain prices for broadband services. In its zeal to promote intermodal competition, the Commission must take care not to endanger the intramodal competition that spurred the ILECs to upgrade their networks to offer broadband Internet access services in the first place.

In its proceeding addressing the proper regulatory treatment of ILEC broadband services, the Commission has recognized that the ILECs continue to have market power with respect to basic local exchange service and that broadband services are provided over the same local exchange and exchange access facilities.[49] ILECs' ability to piggy-back the construction of broadband facilities upon the core voice telephone network gives them a significant economic and competitive advantage over non-incumbents. Inevitably, ILECs will be able to leverage this integration of the voice and broadband network in a manner that effectively excludes competing

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[48] *See Inquiry Concerning High-Speed Access to the Internet over Cable and Other Facilities,* GN Docket No. 00-185, Declaratory Ruling and Notice of Proposed Rulemaking, FCC 02-77, ¶ 9 & n.29 (rel. Mar. 15, 2002) (citing June 1, 2001 article on price increases) ("*Cable Modem Declaratory Ruling*"); *see also Requirements for Carriers to Obtain Authority before Discontinuing Service in Emergencies and Northpoint Communications, Inc. Authority to Discontinue Service*, NSD File No. W-P-D-488, Public Notice, DA 01-1257 (rel. May 22, 2001) (urging all carriers to assist NorthPoint in transitioning its customers to new service providers).

[49] *Review of Regulatory Requirements for Incumbent LEC Broadband Telecommunications Services*, Notice of Proposed Rulemaking, CC Docket No. 01-337, FCC 01-360, ¶ 6 (rel. Dec. 20, 2001) ("*ILEC Broadband NPRM*"). As Chairman Powell notes in his separate statement (at page 1) the ILECs remain "clearly dominant" in local exchange service.

providers from significant segments of the market, and they are doing so today. As economists Robert Hall and William Lehr argue:

> the on-ramps to the information highway remain in the hands of the monopolists. The last mile of the telecom network lacks the competition that has invigorated the rest of the network. The last mile remains in the hands of the traditional phone companies, the Bells. Bell control of the last mile means that continuing regulation is essential. Because homeowners and small businesses rarely have ways to gain access to the telecom network apart from the Bells' last mile connections, the Bells could extract full monopoly value of the network if they were not regulated. As competitive service providers add value to telecom products, the Bells would absorb that value through higher prices for the last mile, and consumers would be denied the benefit of added value.[50]

ILECs' market power in the wireline broadband market is shown by the fact that out of the 2.7 million high-speed DSL lines, about 93% were reported by ILECs; about 86% were reported by the Regional Bell Operating Companies ("RBOCs"); and about 7% were reported by non-ILECs.[51] ILEC DSL customer growth rates have far outstripped CLEC customer growth rates.[52] If ILECs are freed from their obligations to unbundle the facilities used to provide information services[53] and from their common carrier obligations to provide service on demand,[54]at tariffed rates that are just and reasonable,[55] without unreasonable discrimination,[56] then the ILECs will be able to drive competitors that rely on their facilities out of the market,

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[50] Robert E. Hall and William H. Lehr, *Promoting Broadband Investment and Avoiding Monopoly,* at 3 (Feb. 21, 2002).

[51] *FCC Releases Report on the Availability of High Speed and Advanced Telecommunications Capability*, FCC Press Release (Feb. 6, 2002).

[52] *Inquiry Concerning the Deployment of Advanced Telecommunications Capability to All Americans in a Reasonable and Timely Fashion, and Possible Steps to Accelerate Such Deployment Pursuant to Section 706 of the Telecommunications Act of 1996,* CC Docket No. 98-146, Third Report, FCC 02-33, ¶ 51 (rel. Feb. 6, 2002) ("*Third Section 706 Report*").

[53] 47 U.S.C. §§ 251, 252.

[54] 47 U.S.C. § 201(a).

[55] 47 U.S.C. § 203; § 201(b).

[56] 47 U.S.C. § 202.

which is their objective. Accordingly, ILECs' dominance in the wireline broadband marketplace fully justifies the continuation of Title II authority over the transmission component of broadband wireline Internet access.

D. The "Contamination Doctrine" Does Not, and Should Not, Apply to Facilities-Based Providers

As noted, the "contamination doctrine" does not apply to facilities-based carriers. When formulating its *Computer II* and *III* rules, the Commission rejected the application of the contamination doctrine to basic and enhanced services provided by facilities-based dominant carriers such as the ILECs. The Commission recognized that if it applied the contamination doctrine to facilities-based carriers, at some point conventional exchange service also would become unregulated because it would be contaminated with the enhanced service of protocol conversion.[57] The Commission noted that this would be an "improper policy result if exchange service remains, as it is now, a near monopoly otherwise warranting regulation."[58] For carriers with market power, the Commission stated:

> the offerings of dominant carriers are often monopoly or near-monopoly ones. Such offerings are needed and used by competitors and can be manipulated anticompetitively. Ensuring that such offerings continue to be made subject to the common carrier duties of reasonableness and avoidance of unreasonable discrimination serves important policy goals. We propose below to develop policies that apply such a dominant/non-dominant entity split.[59]

The Commission's fear that applying the "contamination doctrine" to facilities-based carriers would at some point result in conventional exchange service becoming unregulated will be realized if it adopts its tentative conclusions. As Allegiance explains below, any deregulation of broadband would permit ILECs to escape all current regulation by migrating all services to

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[57] *Third Computer Inquiry*, CC Docket No. 85-229, Proposed Rules, 50 Fed. Reg. 33581, ¶ 32 (1985).

[58] *Id.*

broadband and combining them with an Internet access capability. Since ILECs remain dominant in the provision of the transmission component of wireline broadband and competitors remain dependent on the ILECs for transmission capacity, the Commission should continue to resist application of the contamination doctrine to ILECs and to regulate separately the transmission component of Internet access service that ILECs provide over their own facilities.

V. TITLE II REGULATION IS CRITICAL FOR ESTABLISHING A LEVEL INTERMODAL PLAYING FIELD

A. ILECs May And Do Compete Intermodally As Common Carriers Subject to Title II

ILECs are actively promoting policy initiatives before Congress, state legislatures, and this Commission in an attempt to persuade legislators and regulators that they must be relieved of all obligations to permit access to the broadband facilities of their networks because of intermodal competition from cable operators. As part of these initiatives, ILECs have urged the Commission to deregulate their broadband network service offerings as the Commission has proposed to do in this proceeding.[60]

The Commission cannot ignore the reality that ILECs are already formidable intermodal competitors in their capacities as common carriers subject to Title II. Removal of the ILECs' Title II obligations, however, would be devastating for the ILECs' intramodal competitors who need access to the ILEC's unbundled network elements to provide their own broadband Internet access services. Under the current regulatory regime, ILECs provide Internet access and other information services including video programming as customers of their own common carrier services. They are in no way hampered from competing under current rules. In fact, as noted

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[59] *Id.* at ¶ 46.

[60] *See* Letter from William P. Barr, Verizon, to Michael K. Powell, Chairman, Federal Communications Commission (Jan. 9, 2002).

herein, ILECs have been spectacularly successful in rolling out DSL and other broadband services.[61] These facts demonstrate that ILECs are not hindered by Title II regulation in competing intermodally in the broadband marketplace. ILEC arguments that they should be relieved of Title II obligations in order to permit intermodal competition is no more than an attempt to manipulate policy makers to permit ILECs to retain their local telephony monopoly and extend that monopoly to information services.

B. Any Deregulation of "Broadband" Would Permit ILECs to Escape All Current Regulation by Migrating All Services to "Broadband"

The Commission seeks comment on its prior conclusion that an entity provides a "telecommunications service" if it provides only broadband transmission on a stand-alone basis.[62] In order to determine whether "broadband" transmission services could be reclassified as telecommunications, the Commission must first determine what services fall within the category of "broadband transmission." One of the purposes of this *NPRM* is to address the "fundamental definitional and classification questions for wireline broadband Internet access services."[63] The *NPRM* appears, however, to be purposefully vague on how and whether "broadband" is defined. In footnote two, the *NPRM* notes that the term "broadband" is an elusive concept with varying meanings, but does not remove that uncertainty by proposing a definition. Instead of defining broadband, footnote two refers to the Commission's definitions of advanced telecommunications capability and high-speed services. These definitions were adopted as part of the Commission's Section 706 Inquiries. The categories "advanced telecommunications capability" and "advanced services" describe services and facilities with both upstream and downstream transmission

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61 *See* Section VIII.A., *infra*.

62 *NPRM* at ¶ 26.

63 *NPRM* at ¶ 8.

speeds of more that 200 kbps. The category "high-speed" services describes services with over 200 kbps ***capability*** in at least one direction.[64] With respect to these categories, the Commission recently noted that:

> these definitions [do not] drive any regulatory result outside of this Report, beyond giving us a relatively static point at which to gauge the progress and growth in the advanced services market from one Report to the next… The Commission has launched a number of proceedings that will consider the advanced telecommunications market, including any necessary definitional issues.[65]

In this proceeding, however, the definition of broadband will have concrete, and far reaching, regulatory market place implications if the Commission determines that broadband transmission services are telecommunications, but not telecommunications services. The Commission's failure to define "broadband" with specificity could have disastrous consequences.

If the Commission means to equate the term "broadband" with its definition of high-speed services, a carrier may classify a service as broadband simply because the service has the ***capability*** of providing a unidirectional transmission speed in excess of 200 kbps. Using this definition, together with the contamination theory the Commission has previously rejected for facilities-based providers, could result in voice over DSL, DS1 and DS3 facilities being reclassified as information services. Similarly, if ILECs deploy fiber or other 200 kbps-capable facilities to the customer premise, they could presumably classify any service provided over that facility as an information service. For example, on its website, SBC states that it is working to enable access for consumers to an "integrated package of broadband access, premium data and Internet services and telephony."[66] This is precisely the type of integrated voice and data service

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64 *Third Section 706 Report* at ¶ 9.

65 *Third Section 706 Report* at ¶ 10.

66 *See* http://www.sbc.com/data_capabilities/0,5931,1,00.html.

that competitive providers such as Allegiance introduced to the market to meet the needs of SMEs, who had previously been largely ignored by the ILECs. It was only after CLECs offered SMEs such cost-effective integrated solutions that ILECs began introducing similar products in an effort to retain their SME market share.

Under the Commission's tentative conclusions, the telephony aspect of the ILEC's integrated product would also escape regulation because it would be bundled with the information service offerings and provided over a high-speed facility. If, contrary to Allegiance's recommendation, the Commission refuses to enforce the ILEC's obligation to unbundle network elements used to provide Internet access and does not require ILECs to offer broadband transmission on a common carrier basis, Allegiance and other CLECs could be precluded entirely from purchasing the facility needed to provide this integrated product. Alternatively, if the Commission reverses its dual use rule and prohibits CLECs from using a UNE to provide both telecommunications services and information services, Allegiance and other CLECs could be forced to either use two separate facilities to provide the same services the ILEC may provide using only one facility or pay substantially higher special access prices for the transmission component. In either case, reversal of the Commission's unbundling rules would make it substantially more expensive for Allegiance and other CLECs to provide an integrated access product, potentially pricing them out of the market. In short, using a bandwidth-based definition to describe a category of services that is not subject to Title II regulation could lead to any number of results that are inconsistent with the pro-competitive goals and requirements of the 1996 Act.

There are other reasons this definition may not be appropriate. As the Commission has recognized, using 200 kbps as the cut-off between high-speed and narrowband services may not

be appropriate as technology progresses.[67] To date, the Commission has been loathe to regulate based upon technology, and for good reason. The public switched telephone network ("PSTN") is constantly evolving and any regulatory classifications the Commission makes based upon today's technology could become outmoded by the time the Commission's rules become effective. ILECs have admitted that they are using an upgraded, rather than a new, telephone network to provide broadband services. For example, SBC notes that it will "Network your PCs and Internet devices using existing telephone wires - no new wiring required."[68] When ILECs moved from analog to digital switching to upgrade the capacity of their networks, the Commission did not propose deregulating digital-switched services. Yet as the ILECs upgrade their telephone networks from narrowband to broadband, even as it recognizes that broadband technology may ultimately ***replace*** narrowband technology,[69] the Commission is trying to use this technological upgrade as an excuse to enact a sea change in its current regulatory framework.

Congress did not intend for the benefits of competition, or the benefits of Title II regulation, to disappear simply because carriers continue to upgrade their networks. In fact, Congress fully expected competition to drive network upgrades and innovation that would benefit consumers and the PSTN. As it states in the preamble, the 1996 Act is:

> AN ACT To promote competition and reduce regulation in order to secure lower prices and higher quality services for American telecommunications consumers and encourage the rapid deployment of new telecommunications technologies.[70]

Plainly, Congress believed that the unbundling and other pro-competitive requirements set forth in the 1996 Act would be beneficial not only with respect to traditional voice service, but also

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67 *Third Section 706 Report* at ¶ 9, n.13.

68 *See* http://www.swbell.com/content/0,3854,7,00.html.

69 *NPRM* at ¶ 13.

70 Telecommunications Act of 1996, Pub. L. No. 104-104, preamble (1996).

with respect to "new communications technologies." In furtherance of the goal articulated in the preamble to the 1996 Act, the Commission crafted its rules that implement the 1996 Act to promote use of the most efficient network technology. For example, it established the TELRIC pricing standard based on ILEC use of the most efficient network technology.[71] It also adopted rules that recognize new technologies may perform some of the same functions historical technologies have performed.[72] It would therefore be inconsistent with the Act and Commission precedent to reverse course and determine that a specific "forward–looking" transmission technology (broadband) is somehow outside of Title II when used to access the Internet.

Drawing the line between regulated and unregulated services based on the class of customer[73] or the purpose for which the broadband transmission services are used would turn the Commission and/or the ILECs into censors who would have to be advised of the content the customer intended to transmit over the facilities. If ILECs offer a single broadband transmission service that is purchased by ISPs to provide Internet access and by other businesses to provide their employees telecommuting options, how could the Commission justify classifying the service provided to the ISP as telecommunications (private carriage) but the service provided to the employer and employee as a telecommunications service (common carriage)? Similarly, the ILECs could control access to their networks and the content their customers put over their facilities by classifying the service as Internet access or telecommuting. Line-drawing based on class of customer and use would require carriers to intrude in their customers' business, seeking

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[71] *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, CC Docket No. 96-98, First Report and Order, 11 FCC Rcd 15499, ¶ 685 (1996) ("*Local Competition Order*") (subsequent history omitted).

[72] *See, e.g.,* 47 C.F.R. §51.701(c) (equivalent facility).

[73] *See, e.g., NPRM* at ¶ 26 (requesting comment on "whether and how the Commission might regulate incumbent LEC provision of broadband to ***third-party ISPs*** as private carriage.") (emphasis added).

information not only about the customer, but also about the customer's use of the service. It could also give an ILEC the ability not only to restrict its competitor's use of the ILEC's network, but also an excuse to require competitively sensitive information concerning its competitor's business plans. It is unclear how, or even if, either carrier could monitor the service provided to end users to enforce such use restrictions. In practice, ILECs could enforce such customer or use restrictions only when it suited their own business purposes, and thwarting competition could very well suit those purposes. Basing rules upon the use of the transmission service would also be regulation of content, in violation of the First Amendment.

C. Any Statutory or Jurisdictional Conclusions Would Necessarily Apply to Wireline Narrowband Internet Access

The Commission's tentative conclusions could result in reclassification of narrowband Internet access service, and its underlying plain old telephone service ("POTS") transmission component, as an information service and telecommunications, respectively. This reclassification could occur because none of the reasons underlying the tentative conclusions provide a principled distinction between services that include a transmission capability above 200 kbps and services that include a transmission capability of 200 kbps or below. Therefore, any statutory or jurisdictional conclusions the Commission reaches for broadband Internet access service will necessarily also apply to narrowband Internet access.

The Commission tentatively concludes that broadband Internet access service is an information service with a bundled telecommunications component.[74] The Commission bases this conclusion on the fact that "providers of wireline broadband Internet access provide subscribers with the ***ability*** to run a variety of applications that fit under the characteristics stated

[74] *NPRM* at ¶ 17.

in the information service definition."[75] The Commission accordingly views "wireline broadband Internet access service as not consisting of two separate services, but as a single integrated offering to the end-user."[76] But narrowband Internet access also provides subscribers with the ability to use an information service. Therefore, if a provider bundles Internet access and POTS, under the Commission's tentative conclusion, the service is a "single integrated offering."

The Commission's second tentative conclusion is that "in the case where an entity combines transmission over its own facilities with its offering of wireline Internet access service, the classification of that input is telecommunications, and not a telecommunications service."[77] In this instance, the tentative conclusion doesn't even use the word "broadband." There is no principled reason that would support a determination that the ILEC provides only telecommunications when the end user pays $40 for POTS and Internet access but the ILEC provides a telecommunications service when the end user pays $20 for POTS and separately pays an additional $20 for Internet access. Nevertheless, applying the Commission's rationale in the narrowband context results in the POTS transmission service being reclassified from a telecommunications service to telecommunications simply because the provider has chosen to bundle it with Internet access.

Third, the Commission asks whether it should eliminate the requirement that facilities-based carriers provide the telecommunications component of a broadband Internet access service on an unbundled basis to competing providers.[78] As discussed in Section II.B, *infra*, eliminating this unbundling requirement will reverse the Commission's long-standing exception to its

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75 *NPRM* at ¶ 20 (emphasis added).

76 *NPRM* at ¶ 21.

77 *NPRM* at ¶ 25.

78 *NPRM* at ¶ 46.

contamination rule. That exception requires facilities-based providers to unbundle, and offer for a separate price, the telecommunications component underlying the information service.[79] Applying this same rationale to narrowband Internet access service, ILECs who bundle dial-up Internet access with POTS will also be able to take advantage of the Commission's revised contamination theory. The POTS service will become a "telecommunications component" that ILECs are not required to provide on a stand-alone basis. And if ILECs refuse to provide the bundled POTS component on a stand-alone basis, POTS will no longer be subject to state or federal regulation. In short, adopting the Commission's proposals will permit ILECs to determine to what type of regulation they are subject – private carrier or common carrier. By refusing to provide POTS for a separate charge, ILECs would escape common carrier regulation.[80]

Applying the Commission's tentative conclusions to bundled narrowband Internet access appears to lead to an absurd result. But if the only difference between narrowband Internet access and broadband Internet access is the speed with which the end user's information is transmitted, there is no principled reason why the Commission's tentative conclusions could not be applied to a carrier's bundled narrowband Internet access product. In order to avoid this slippery slope, the Commission must reject its tentative conclusions and confirm that broadband Internet access service is an information service with a telecommunications service component that facilities-based providers must offer separately from the information service.

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[79] *See, e.g., Non-Accounting Safeguards Order* at ¶ 136.

[80] As discussed in Section IV.B., *supra*, any rules that give ILECs the ability to "choose" whether or not they are subject to common carrier regulation are inconsistent with the principles of common carriage established by the courts.

VI. THE COMMISSION SHOULD RETAIN COMPETITIVE SAFEGUARDS THAT REQUIRE ILECS TO OFFER COMPETITORS UNBUNDLED ACCESS TO THEIR NETWORKS

A. Contrary to the Suggestion in the *NPRM*, *Computer Inquiry* Safeguards Are Not Obsolete in a Broadband Environment

In its *NPRM*, the Commission seeks comment on whether the *Computer Inquiry* requirements should be modified or eliminated for broadband Internet access services.[81] The Commission suggests that these requirements may not apply to broadband Internet access services because the restrictions imposed in the *Computer Inquiry* proceedings were initiated "at a time when very different legal, technological and market circumstances presented themselves to the Commission" and addressed services "more akin to voice mail and other narrowband applications," rather than broadband Internet access services.[82] Contrary to the Commission's suggestion, however, the safeguards established in the *Computer Inquiry* proceedings are equally applicable to, and necessary for, broadband Internet access services. Moreover, the legal, technological and market factors underlying the fundamental principles of the *Computer Inquiry* proceedings, upon which the safeguards are based, are equally valid today in the broadband services market. Thus, at a minimum, the existing *Computer Inquiry* safeguard that requires ILECs to offer separately the transmission component of broadband Internet access service must remain in place.

The Commission's initiation of the *Computer Inquiry* proceedings arose from the realization that the traditional telephone network was no longer limited to providing plain old telephone services and that technological evolution allowed the provision of computer and data

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[81] *NPRM* at ¶ 43.

[82] *Id.* at ¶¶ 31, 35.

processing (enhanced) services over these networks.[83] The Commission's *Computer Inquiry* proceedings focused on the degree of regulation that should apply to enhanced services and the basic services used to transmit them. The result was the creation of a basic/enhanced services dichotomy, in which the Commission separated the basic common carrier transmission services from the rapidly evolving enhanced services,[84] finding separate regulatory schemes for these services necessary to address the functional and competitive differences between them.[85]

The Commission's establishment of the basic/enhanced dichotomy evolved from advances in microprocessor technology that permitted data to be processed outside of a central location and at intermediate locations or even within customer premises equipment ("CPE").[86] "Distributed processing," as it is known, requires data to be transmitted within or interconnected with the telecommunications network and is the fundamental basis for the establishment of the basic transmission service classification in *Computer II*. In that proceeding, the Commission made it clear that its basic service classification was not meant to restrict "a carrier's ability to take advantage of advances in technology in designing its telecommunications network."[87] The Commission recognized that basic service can be offered utilizing different bandwidths, as well

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[83] *See Regulatory and Policy Problems Presented by the Interdependence of Computer and Communications Services and Facilities*, 7 F.C.C.2d 11 (1966) ("*Computer I NOI*").

[84] The Commission defined basic service as "the common carrier offering of transmission capacity for the movement of information," including, analog or digital transport of voice, data and video. *Id.* at 419. The Commission held that basic services provide "pure transmission capability over a communications path that is virtually transparent in terms of its interaction with customer-supplied information." *Id.* at 420. The Commission defined "enhanced service" as a service that "combines basic service with computer processing applications that act on the format, content, code, protocol or similar aspects of the subscriber's transmitted information or provide the subscriber additional, different, or restructured information, or involve subscriber interaction with stored information." *Id.* at 387; *see also* 47 C.F.R. § 64.702(a). Following the passage of the 1996 Act, the Commission found that Congress intended to maintain the basic/enhanced distinction in its definitions of "telecommunications services" and "information services" and that "enhanced services" and "information services" were synonymous. *See Report to Congress* at ¶ 39.

[85] *Computer II,* 77 F.C.C.2d at 384.

[86] *Id.* at 391-93.

as different analog and digital capabilities.[88] The Commission's establishment of the basic services classification and associated regulation thus considered the future technological potential of such services.

Throughout the history of the *Computer Inquiry* proceedings, the primary purpose of this dichotomy and the need for the safeguards has been to address the reliance of enhanced services on basic transmission services.[89] The Commission found that "enhanced services are dependent upon the common carrier offering of basic services and that a basic service is the 'building block' upon which enhanced services are offered."[90] The Commission has consistently determined that dominant facilities-based carriers providing both basic and enhanced services have an incentive to discriminate against competing providers that seek to purchase the underlying transmission capacity from them.[91] To protect the competitive nature of enhanced services, the Commission therefore retained Title II common carrier regulation of the basic transmission services used to provide these services.[92]

The Commission has also historically adapted its regulations to the changes in the enhanced services market and modified its restrictions and safeguards, accordingly. The Commission has, however, consistently found, even as recently as a year ago, that the continued dominance of the ILECs in the local market warrants the retention of the *Computer Inquiry* safeguards. The status of market conditions for broadband Internet access services has not

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87 *Id.* at 420.

88 *Id.* at 419.

89 *Computer I*, 28 F.C.C. at 269; *see also Computer II*, 77 F.C.C.2d 384; and *Amendment of Section 64.702 of the Commission's Rules and Regulations, Report and Order*, 104 F.C.C.2d 958 (1986) ("*Computer III Phase I Order*").

90 *Id.*

91 *See, e.g., CPE/Bundling Order* ¶ 12.

changed so dramatically in the last year to justify such a radical departure in the Commission's regulations aimed at protecting competing providers from discrimination.

B. Unbundling Promotes Innovation and Competition in Both Telecommunications and Information Services Markets

Although only ILECs possess ubiquitous networks that can be used to provide services to consumers and businesses, they are not the best source of innovation in provision of services over those networks. In fact, ILECs are slow to roll out new services, and have strong incentives not to deploy, new, efficient services that will compete with, and cannibalize, existing services. In contrast, CLECs, who worked cooperatively with ISPs to meet end user demand for Internet access, and with SMEs whose needs were not being met by ILECs, have been key drivers in the development and deployment of new advanced services. In contrast to ILECs, CLECs and ISPs have pioneered a myriad of advanced services, such as cost-effective integrated voice and data solutions for SMEs, Internet telephony, unified messaging, and MP3 technology, that promise to revolutionize the telecommunications industry.

The history of ILECs' deployment of DSL capable networks illustrates graphically that it is intramodal competition from CLECs that has spurred ILEC innovation. In a nutshell, ILECs ignored DSL until CLECs began to deploy it. As President Clinton's Council of Economic Advisers stated in early 1999:

> Although DSL technology has been available since the 1980s, only recently did [the ILECs] begin to offer DSL service to businesses and consumers seeking low-cost options for high-speed telecommunications. The incumbents' decision finally to offer DSL service followed closely the emergence of competitive pressure from … the entry of new direct competitors attempting to use the local-competition provisions of the Telecommunications Act of 1996 to provide DSL over the incumbents' facilities.[93]

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[92] *Id.* at 428.

[93] ALTS New Economy Analysis at 4 (citing Council of Economic Advisers, Economic Report of the President, February 1999, pp. 187-188, http://w3.access.gpo.gov/usbudget/fy2000/pdf/erp.pdf).

Or, as stated more succinctly by James Glassman, the ILECs "kept cheaper DSL on the shelf for a decade" to protect their higher revenue services.[94] That decision is unsurprising and perhaps even economically rational from the ILECs' point of view, but consumers and businesses were required to bear the higher costs and poorer quality of the ILECs' earlier "high speed" services.

Moreover, it is not coincidental that after two of the "big three" CLEC DSL providers terminated operations and the third filed for bankruptcy, some ILECs announced they were scaling back DSL investment– although even this maneuver did not prevent them from achieving the record-breaking growth discussed above, so that they now control over 90% of DSL customers.[95] For example, in October 2001, SBC scaled back its original deployment plan for Project Pronto and announced that it would reduce capital spending by 20%.[96] In short, to the extent that any cause other than the general recession is needed to explain these modest scalebacks, it is apparent that ILECs no longer feel the need to invest quite so rapidly in light of the diminished threat of competition from CLECs. It is also worth noting that some ILECs substantially raised prices for DSL service once their CLEC competitors exited the market, which never would have happened if the market was truly competitive. To name only one, in

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[94] James Glassman, "Best Remedy for Recession? Break Up the Bells," http://www.techcentralstation.com/NewsDesk.asp?FormMode=MainTerminalArticles&ID=131 (December 10, 2001).

[95] New York Times, August 6, 2001, at C1 "Bell Companies Blamed for D.S.L.'s Woes."

[96] SBC Advanced Solutions, Inc., Tariff FCC No. 1, pp. 60-69 (eff. Sept. 10, 2001); *SBC Pares Back Its DSL Efforts*, PCWorld.com (Oct. 23, 2001), http://www.pcworld.com/news/article/0,aid,67606,00.asp.

October 2001, SBC raised its wholesale prices for DSL services by approximately 15% (while admitting that its cost to provide DSL connectivity was declining).[97]

Similarly, it was CLECs, not ILECs, that pioneered integrated voice and data products for SMEs. Allegiance's integrated access product is fast becoming its most popular product:

> For the first time in the history of the company, the number of net installs for integrated access and other T-1 delivered voice and data services exceeded the net installs for unbundled network element (UNE) loop services. We expect integrated access to remain Allegiance Telecom's fastest growing product, continuing to make rapid gains in terms of our base of lines."[98]

Allegiance has made these gains because its integrated access product, which is provisioned over UNE DS1s, is a cost-effective alternative to purchasing ILECs' non-integrated services. In short, while SBC is "working" to be able to provide its end users an integrated offering, Allegiance is already providing one.

In a December 2001 letter to Commerce Secretary Donald Evans, a group of distinguished economists explained that "both history and economic theory have taught us [that] deregulating a monopoly without genuine prospects for competition does not induce it to deploy more infrastructure, only to exploit more severely the infrastructure that it has already in place by limiting its use and raising its price."[99] In a perfect illustration of this point, SBC reduced investment and raised prices as soon as the threat of broadband competition diminished.

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[97] SBC Investor Briefing, "Second-Quarter Diluted Earnings Per Share Increases by 8.9% with Focus on Disciplined Financial Management," Growth Drivers (July 25, 2001) at 5 ("SBC continues to improve the economics of DSL. Acquisition costs have declined by more than 25 percent since the fourth quarter of 2000 due to modem cost reductions and operational improvements." http://www.sbc.com/Investor/Financial/Earning_Info/docs/2Q_IB_FINAL_Color.pdf (viewed March 1, 2002)).

[98] *Allegiance Telecom Announces Continued Growth in First Quarter*, Press Release (April 30, 2002), http://biz.yahoo.com/prnews/020430/cgtu058_1.html.

[99] Letter from William J. Baumol et al. to Honorable Donald L. Evans et al., dated December 11, 2001, at 3.

The *NPRM* fails to acknowledge that it is competition, not deregulation, that best motivates ILECs to invest in broadband and that it is access to incumbent networks on a common carrier, unbundled basis that permits CLECs to offer services that can compete with ILECs. Accordingly, the Commission should conclude that requiring ILECs to continue to make broadband transmission facilities available to CLECs pursuant to Title II is crucial to the preservation of the intramodal competition that will encourage ILECs to build broadband networks and offer innovative broadband solutions to end users.

C. Congress Did Not Intend for Network Upgrades to Erode Section 251(c)(3) Unbundling Obligations

Even if the Commission classifies wireline broadband Internet access service as an information service, it should continue to require LECs to offer the transmission component of such services as telecommunications services. As demonstrated above, this transmission component has all of the indicia of a telecommunication service and should be made available to other carriers on a common carrier basis.[100] A critical factor underlying a common carrier classification of these transmission services is the need to preserve the Section 251(c)(3) unbundling requirements, which were mandated by Congress to promote competition.[101]

Section 251(c)(3) requires ILECs to provide telecommunications carriers with non-discriminatory access to unbundled network elements "***for the provision of a telecommunications service***."[102] Section 153(29) defines a "network element" as "a facility or equipment ***used in the provision of telecommunications services***."[103] The *NPRM* asks:

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100 *See supra* Sections III & IV.

101 47 U.S.C. § 251(c)(3).

102 47 U.S.C. § 251(c)(3) (emphasis added).

103 47 U.S.C. § 153(29) (emphasis added).

> How could an incumbent LEC provider of wireline broadband Internet access service over its own facilities be required to provide access to those facilities as "network elements" if those facilities are used by the incumbent LEC exclusively to provide information services? . . . If an incumbent LEC . . . uses certain facilities to provide both information services and telecommunications services, to what extent would the LEC be required to provide access to such shared-use facilities as "network elements?"[104]

Nothing in the definition of network element, however, requires that the ***ILEC*** use the element to provide a telecommunications service. In fact, reading the definition of network element in conjunction with Section 251(c)(3) shows that Congress focused on the ***requesting carrier's*** use of the network element. Further, as the Commission notes throughout the *NPRM*, wireline broadband Internet access is ***provided over the traditional telephone network***.[105] Therefore, the Commission is wrong to suggest that an ILEC using network elements to provide an information service would not be required to unbundle those elements under Section 251(c)(3).

If the Commission defines the transmission component of broadband access services as "telecommunications," rather than "telecommunications services," it will discriminate against requesting carriers by limiting their ability to provide broadband transmission services in competition with ILECs. If neither broadband transmission nor broadband Internet access includes the provision of a telecommunications service, requesting carriers will not be able to use UNEs to provide only these services. Because wireline competitors, with very rare exception, do not have access to cable facilities, and because the economics do not support deploying duplicative last mile facilities to residential and SME customers, such a determination could effectively end intramodal competition by CLECs in these markets.[106]

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[104] *NPRM* at ¶ 61.

[105] *See, e.g., NPRM* at ¶¶ 9, 12.

[106] One could argue that ending intramodal competition in the broadband market is precisely what the Commission intends. *See* Powell Letter, 3 ("The Commission will, of course, implement and enforce the law,

If, contrary to the plain text of the statute, the Commission finds that an ILEC's unbundling obligation depends upon what type of service the ILEC uses the network element for, the Commission could bring even voice telephony competition to a screeching halt. Implicit in the *NPRM's* UNE questions is an assumption that carriers and regulators will be able to distinguish between facilities that underlie telecommunications services (and thus are subject to unbundling requirements) and facilities that underlie information services or telecommunications (and thus are not subject to unbundling requirements). This assumption is wholly unrealistic and contrary to Congressional intent. Although carriers typically introduce new technologies to the PSTN gradually, these new technologies are replacements for existing technologies. As the *NPRM* recognizes:

> Traditional telephone providers and new entrants made improvements to their networks that *built upon and leveraged existing public switched telephone network infrastructure*. Our most recent data show that this *incremental network buildout* enabled large increases in high-speed Internet access subscribership.[107]

In other words, carriers do not build a separate network solely for new technologies and retain the old network for POTS. To the contrary:

> [t]he logical technological evolution of the network is the complete or near-complete replacement of copper lines with end-to-end fiber optic transmission facilities. Given the expense of deploying end-to-end fiber, however, facilities-based providers are engaged in incremental infrastructure investment that builds on existing technology.[108]

Conditioning the determination of whether a facility must be unbundled upon how the ILEC uses the specific facility at the time the request for the element is made would make the Act's unbundling requirement impossible to administer. First, it would foreclose use of the

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including unbundling of the local loop for ***telephone service***, regardless of its ultimate conclusion with respect to the classification of wireline broadband Internet access service.") (emphasis added).

[107] *NPRM* at ¶ 11 (footnotes omitted, emphasis added).

ILEC's network unless a particular facility was currently being used by the ILEC to provide a telecommunications service to a particular customer. Second, it would grant the ILEC enormous leverage to disadvantage its competitors, since only the ILEC would have the information necessary to make such a determination. In attempting to determine which prospective customers it should target in its marketing efforts, a CLEC would constantly be guessing which customers it could serve through unbundled network elements leased from the ILEC, and which it could not.

ILECs have nevertheless been trying to move the Commission in the direction of such detailed case-by-case unbundling determinations since the 1996 Act was adopted. ILECs initially opposed national unbundling rules[109] and later advocated a market-by-market unbundling test to implement the necessary and impair standard on remand.[110] The ILECs' goal is clear – to bog down requesting carriers in endless litigation over whether a particular network element, in a particular market, is or is not subject to unbundling. In their never-ending attempt to escape their obligations under Section 251(c)(3), ILECs now advocate classifying their broadband services as anything other than telecommunications services and denying their competitors access to the telephone networks over which broadband services are provided. If the ILECs succeed in this effort, the worst nightmares of state regulators and competing carriers will be realized. ILECs will force litigation of the unbundling obligations not on a state-by-state or market-by-market basis, but on a customer-by-customer and facility-by-facility basis. The Commission has in the past rejected such ILEC efforts to stymie local competition and it should do so again here. As the Commission previously determined when it rejected the ILECs'

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108 *NPRM* at ¶ 12.

109 *See, e.g., Local Competition Order* at ¶¶ 236, 239.

market-by-market unbundling test: "We do not believe that Congress or the Supreme Court had in mind the adoption of a procedure that would impose such an undue – and unworkable – administrative burden on the Commission, the states, or the industry."[111]

Because ILECs have not built, and will not build, broadband networks that are used solely to provide information services, adopting the Commission's tentative conclusions in this proceeding would not only violate the plain text of the Act, but also make the unbundling obligations of Section 251(c)(3) impossible to administer. In effect, classifying broadband services as information services or telecommunications could undo ILECs' Section 251(c)(3) obligations altogether. In order to preserve the unbundling requirements and intramodal competition prescribed by Congress, the Commission must find that network elements must be unbundled if the requesting carrier seeks to use the element to provide a telecommunications service. Further, the Commission must reject its tentative conclusion and find that broadband transmission provided by a facilities-based provider is a telecommunications service regardless of whether it is provided on a stand-alone basis or bundled with Internet access.

D. The Definition of Network Element Requires That All of the Features and Capabilities of the Network Element Be Made Available

If the Commission determines, as Allegiance argues it must, that a telecommunications service underlies broadband Internet access service and that ILECs may not refuse to unbundle their networks based upon the specific use of a requested facility, the Commission must retain its rules that require ILECs to provide all of the features and capabilities of the network elements that make up that telecommunications service. These features and capabilities include the UNEs' capability to support broadband services.

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[110] *See, e.g., UNE Remand Order* at ¶ 142.

The Supreme Court previously has determined that "it is impossible to credit the incumbents' argument that a 'network element' must be part of the physical facilities and equipment used to provide local phone service."[112] The Supreme Court rejected the ILEC argument because the Act defines "network element" as "[a] facility or equipment used in the provision of a telecommunications service. Such term also includes *features, functions, and capabilities that are provided by means of such facility* or equipment. . ."[113] What this means the Commission has found is that the ILEC must provide requesting carriers with conditioned loops capable of supporting broadband services: "Because competitors cannot access the loop with all its native 'features, functions, and capabilities' unless it has been stripped of accreted devices, we conclude that loop conditioning falls within the definition of the loop network element. . ." [114] The *NPRM* offers no reasoned basis for the Commission to reconsider its existing requirement that ILECs provide requesting carriers with access to the broadband capabilities of network elements.

E. The Commission May Not Prohibit Requesting Carriers From Using UNEs to Provide Both Telecommunications Services and Information Services

The Commission has already determined that requesting carriers may use network elements to provide information services as well as telecommunications services. As the Commission correctly found, "Section 251(c)(3) does not impose any service-related restrictions or requirements on requesting carriers in connection with the use of unbundled elements."[115] Consistent with this reading of the statute, the Commission adopted Rule 51.100(b), which

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111 *UNE Remand Order* at ¶ 142.

112 *AT&T Corp. v Iowa Utils. Bd. et al.*, 525 U.S 366, 734 (1999).

113 47 U.S.C. § 153(29).

114 *UNE Remand Order* at ¶ 173.

115 *Local Competition Order* at ¶ 264.

provides that: "A telecommunications carrier that has interconnected or gained access under sections 251(a)(1), 251(c)(2), or 251(c)(3) of the Act, may offer information service through the same arrangement, so long as it is offering telecommunications services through the same arrangement as well."[116] The Commission explained its rationale for adopting this Rule as follows:

> Under a contrary conclusion, a competitor would be precluded from offering information services in competition with the incumbent LEC under the same arrangement, thus increasing the transaction cost for the competitor. We find this to be contrary to the pro-competitive spirit of the 1996 Act. By rejecting this outcome we provide competitors the opportunity to compete effectively with the incumbent by offering a full range of services to end users without having to provide some services inefficiently through distinct facilities or agreements.[117]

Completely ignoring this precedent, the *NPRM* asks whether Section 251(c)(3) prohibits a provider from using UNEs to provide wireline broadband Internet access service.[118] Such a determination would substantially alter the economics of CLECs' integrated access products as they would be forced to purchase the broadband-capable facility from ILECs at special access rates, rather than at cost-based rates, as required by the 1996 Act. Even worse, if the Commission reverses its classification of broadband transmission services and finds that they are private carrier offerings, ILECs could refuse to provide such facilities to CLECs altogether. The Commission cannot rationally limit the ability of competing carriers to achieve economies in the provision of telecommunications services and information services at the same time it is considering reducing regulation of ILECs to permit the ILECs to achieve such economies.[119] Because the Commission has provided absolutely no reason for gutting Rule 51.100(b), or its

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116 47 C.F.R. § 51.100(b).

117 *Local Competition Order* at ¶ 995.

118 *NPRM* at ¶ 61.

119 *See, e.g., ILEC Broadband NPRM* at ¶ 46.

prior interpretation of the statute, the Commission must conclude that requesting carriers may continue to use the features and capabilities of network elements and to use UNEs in the provision of both telecommunications services and information services.

F. Sections 201 and 202 Ensure That Access to Underlying Transmission Capacity for Information Services Is Provided Under Just and Reasonable Rates and on a Non-Discriminatory Basis

In addition to the inability to access critical network elements, there would be other negative consequences if the Commission were to classify the transmission component of broadband Internet access services as merely "telecommunications." If the transmission services are not regulated as telecommunications services under Title II of the Act, competing providers of broadband Internet access services would lose the critical protections of Sections 201 and 202. As the Commission states in the *NPRM*, information service providers currently purchase the transmission needed for their Internet access services from tariffs.[120] Similarly, because some ILECs refuse to comply with their unbundling obligations, CLECs are also sometimes forced to purchase broadband facilities from ILEC special access tariffs. The terms and conditions of these tariffed services are governed by the just, reasonable and non-discriminatory mandates of Sections 201 and 202 of the Act. If the transport services necessary to provide broadband Internet access services are no longer subject to these Title II requirements, then dominant carriers that provide competing broadband Internet access services will be free to discriminate against their Internet access competitors by virtue of their monopoly control of the transmission capacity those competitors need to serve their customers.

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[120] *NPRM* at ¶ 50.

Section 201(b) requires that the rates, terms, and conditions in providing common carrier services be just and reasonable.[121] Section 202(a) of the Act makes it unlawful for any common carrier to impose unjust or unreasonable discrimination for rates, terms, conditions, facilities or services in connection with like communication services.[122] Sections 201(b) and 202 have been cited by the Commission in the *Computer Inquiry* proceedings as primary safeguards for ensuring that Internet service providers obtain transmission services on nondiscriminatory terms and conditions. Specifically, the Commission emphasized that both dominant and non-dominant carriers have a "firm obligation under section 202 of the Act to not discriminate in their provision of transmission service to competitive Internet or other enhanced service providers."[123] The Commission also noted that Section 201(b) prohibits discrimination in rates, terms or conditions that would favor the carrier, itself, over a competing enhanced service provider.[124] If the underlying transport for broadband access services is not regulated as a Title II common carrier service, these protections against discrimination will disappear. Accordingly, it is essential that the Commission maintain its classification of the underlying transmission component of broadband Internet access services as a telecommunications service subject to Title II common carrier regulation.

G. Intermodal Competition Does Not Obviate the Need for ILEC Safeguards

While some ***end-user residential customers*** may have access to alternative platforms for receiving broadband services, including cable modem service, ***SMEs*** do not, and ***CLECs and information service providers*** do not have ready access to such platforms for the provision of

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121 47 U.S.C. § 201(b).

122 47 U.S.C. § 202(a).

123 *CPE/Bundling Order* at ¶ 46.

124 *Id.*

their services to their customers. Because cable companies are regulated under Title VI, not Title II of the Act, they are not required to provide access to their underlying transmission facilities to competing providers. Indeed, with respect to cable modem services, the Commission recently confirmed that cable modem service does not include an offering of telecommunications services to the public.[125] The Commission also found that the *Computer II* requirements governing the unbundling of transmission facilities do not apply to cable operators providing cable modem services, and even if they did, the Commission waived the requirements on its own motion.[126] Even though a few cable operators are providing transmission services to unaffiliated information service providers by choice[127] or pursuant to a government decree,[128] this access is extremely limited and only available to a handful of ISPs. Very few cable providers have upgraded their plant to provide voice services. As a result, even if CLECs had access to this platform, they would not be able to provide the integrated voice and data solutions that offer SMEs an alternative to the ILEC's service. Moreover, differences between the customer bases render cable modem services, which focus primarily on residential customers, an inadequate substitute for competing providers targeting business customers.

The wireless and satellite platforms are not only still in their infancy, but, like cable, they are not regulated as Title II common carriers. Thus, access to these transmission services also are not readily available to competing providers. If unbundling and *Computer Inquiry* safeguards are not in place, ILECs will not be required to provide competing providers with the transmission

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125 *See Cable Modem Declaratory Ruling at* ¶¶ 45-47, 95.

126 *Id.* at ¶¶ 43-45.

127 *See Comcast Corp, Comcast and United Online to Offer NetZero and Juno High-Speed Internet Service,* Press Release (Feb. 26, 2002).

128 *See FTC AOL Time Warner Merger Order*, Federal Trade Commission, Docket No. C-3989, File No. 001 0105, §§ II, III (Dec. 14, 2000).

capacity needed to provide broadband Internet access services to their customers. Moreover, even if the ILECs were to provide such services voluntarily there would be no assurances that such services would be provided on a non-discriminatory basis and under the same terms and conditions that the ILECs provide their own information services operations. As a result, CLECs and unaffiliated ISPs would effectively be cut off from providing competitive wireline broadband Internet access services. Accordingly, the existence of nascent intermodal competition does not reduce the need for application of Title II safeguards to ILECs.

VII. TITLE II REGULATION OF THE TRANSMISSION COMPONENT OF WIRELINE BROADBAND INTERNET ACCESS IS IN THE PUBLIC INTEREST

A. Characterization of the Transmission Component of Wireline Broadband Internet Access As a Telecommunications Service Is Essential to the Long Term Viability of Universal Service Funding

As explained in Section IX, *infra,* the Act imposes universal service obligations on carriers that provide interstate telecommunications service. Therefore, the Commission's tentative conclusion in the *NPRM* that wireline broadband Internet access providers are providing an information service, and only ***using*** telecommunications, threatens the long-term viability of universal service funding. This is especially true given that the public switched network will, over time, become integrated with, and inseparable from, the Internet. The Commission should therefore conclude that broadband wireline Internet access is comprised in part of an offering of telecommunications service.

B. Characterization of the Transmission Component of Wireline Broadband Internet Access As a Telecommunications Service Is Essential to Implementation of National Security, Privacy, and Consumer Protection Statutes

The Commission seeks comment on how its tentative conclusion that broadband Internet access service is an information service with a telecommunications component would affect obligations of telecommunications service providers concerning national security, network

reliability, and consumer protection.[129] As discussed below, adopting this conclusion would thwart achievement of important national security, network reliability, and consumer protection goals.[130]

1. CALEA

CALEA requires that all telecommunications carriers' equipment, facilities, or services that provide a customer or subscriber with the ability to originate, terminate, or direct communications be capable of meeting specific law enforcement assistance capability requirements.[131] CALEA defines telecommunications carriers as "person[s] or entit[ies] engaged in the transmission or switching of wire or electronic communications as a common carrier for hire."[132] The definition of telecommunications carrier under CALEA does not include "persons or entities insofar as they are engaged in providing information services. . . ."[133] If the Commission were to determine that the provision of broadband Internet access service is an "information service" as opposed to a telecommunications service, CALEA would not apply to the provision of such service by telecommunications service providers. Therefore, categorizing broadband Internet access as an information service threatens to undermine CALEA and will undoubtedly complicate CALEA compliance.

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129 *See NPRM* at ¶ 54.

130 *See also* Letter from Michael J. Copps, Commissioner, Federal Communications Commission, to the Honorable Ernest F. Hollings, Chairman, Senate Committee on Commerce, Science, and Transportation, 4 (March 5, 2002) ("Taken to its logical end, [the NPRM's] reading of the statute appears to lead to the strange conclusion that Congress intended to remove [broadband Internet access and broadband transmission] from numerous competition, consumer protection, and universal service provisions that Congress imposed on those providing telecommunications services.").

131 *See generally*, 47 U.S.C. §§ 1001-1010.

132 47 U.S.C. § 1001(8).

133 *See* 47 U.S.C. § 1002(b)(2)(A).

Moreover, it is highly unlikely that Congress intended the broadband capability of the telephone network to be categorically excluded from CALEA. The Commission should therefore determine that wireline broadband Internet access is in part a telecommunications service in order to assure that the goals of CALEA are met and that law enforcement agencies have the necessary tools as the public switched network evolves towards a more complete broadband capability.

2. Network Reliability and Interconnectivity

Section 256 of the Act provides that the Commission "shall establish procedures for . . . oversight of coordinated network planning by telecommunications carriers and other *providers of telecommunications services* for the effective and efficient interconnection of public telecommunications networks used to *provide telecommunications services*."[134] In enacting Section 256, Congress intended to preserve interconnectivity of the public telecommunications network. The Commission's authority to oversee and coordinate network planning is, however, limited in Section 256 to telecommunications carriers and other providers of telecommunications services.[135] Therefore, if the Commission adopts rules allowing all services to migrate to unregulated broadband information services, the Commission would not be able to coordinate network planning and interconnectivity with respect to the traditional telephone network. Congress could not have intended for Section 256 to only apply to narrowband networks. Accordingly, the Commission should maintain the classification of the transmission component of wireline broadband Internet access as a telecommunications service in order to permit the Commission to oversee broadband interconnectivity.

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134 47 U.S.C. § 256(b) (emphasis added).

135 *See* 47 U.S.C. § 256(b).

3. Discontinuance of Service

Classifying wireline broadband Internet access as an information service with a telecommunications component subject only to Title I would also negatively impact various consumer protection requirements. Section 214 of the Communications Act limits the ability of telecommunications carriers to discontinue services unilaterally. If the Commission were to find that wireline broadband Internet access is an information service, providers would be able to discontinue service without regard to Section 214 even when they are providing an integrated voice and Internet access product. While the Commission notes that discontinuance applications are routinely granted,[136] the Commission's rules concerning discontinuance require prior customer notice and provide the Commission discretion to prohibit discontinuance if customers would be unable to receive service, or a reasonable substitute from another carrier, or if discontinuance is otherwise inconsistent with the public interest. If, however, broadband transmission services when combined with Internet access are not subject to Section 214, service providers could cut off such services without prior notice to customers. As it is well known, the Commission has recently heightened its oversight of discontinuance applications, in part because of the potential adverse effect on end users.[137] The increasing importance of broadband Internet connectivity to consumers and businesses, and the evolution of the network toward integration with the Internet, mandates that the Commission maintain its regulatory oversight over the transmission component of wireline broadband Internet access service. Accordingly, the Commission should determine that the telecommunications component of broadband Internet

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[136] *See NPRM* at ¶ 57, n.99.

[137] *See Reminder to Common Carriers Regarding Discontinuance of Domestic Service Under Section 214 of the Communications Act*, Public Notice, DA 01-1173 (rel. May 8, 2001).

access service is an offering of telecommunications service subject to Title II obligations in order to assure that discontinuances of service do not unduly harm the public interest.

4. Customer Proprietary Network Information

In order to safeguard consumers' privacy, the Act limits telecommunications carriers' use and dissemination of customer proprietary network information ("CPNI") derived from the provision of telecommunications services.[138] Section 222(c)(1) specifies that the privacy protection requirements apply to CPNI gained by a carrier "by virtue of its provision of a telecommunications service …"[139] Therefore, if the Commission classifies wireline broadband Internet access service as an information service, CPNI gained by virtue of provision of the service will not be subject to the protections of Section 222. Accordingly, the Commission should classify the provision of wireline broadband Internet access services as in part a telecommunications service in order to protect CPNI as intended by Section 222.

5. Access by Persons with Disabilities

Classifying wireline broadband Internet access as an information service would also eliminate the protections contained in the Act aimed at ensuring that services are accessible and usable by individuals with disabilities. Section 255 of the Act requires that "*a provider of telecommunications service* shall ensure that the service is accessible to and usable by individuals with disabilities, if readily achievable."[140] Classifying wireline broadband Internet access service as exclusively an information service would therefore mean that Section 255 protections would

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138 *See* 47 U.S.C. § 222(a).

139 *See* 47 U.S.C. § 222(a) (emphasis added); *See Telecommunications Carriers' Use of Customer Proprietary Network Information and Other Customer Information and Implementation of the Non-Accounting Safeguards of Sections 271 and 272 of the Communications Act of 1934, as amended*, CC Docket Nos. 96-115 and 96-149, Order and Further Notice of Proposed Rulemaking, 13 FCC Rcd. 8061, ¶ 3 (1998) ("*CPNI Order*").

140 47 U.S.C. § 255 (c) (emphasis added).

no longer apply to persons with disabilities seeking wireline broadband Internet access services. Classifying wireline broadband Internet access services as an information service thus threatens to undermine yet another key consumer protection provision. Congress could not have intended this result. Therefore, the Commission should define wireline broadband Internet access as being comprised in part of a telecommunications service in order to preserve access by persons with disabilities to the Internet.

6. Intermodal Competition Will Not Adequately Safeguard Consumers

The Commission seeks comment on whether the consumer protections of the 1996 Act are necessary in light of the differences in the market structure between analog voice services and broadband Internet access services.[141] Specifically, the Commission refers to the fact that intermodal competition among multiple broadband platforms may eliminate the need for consumer protection regulations in the broadband Internet access services marketplace. Allegiance submits that it is far too soon to know whether and to what extent intermodal competition will develop ubiquitously in the broadband Internet access services marketplace, such that all consumers will have a choice of provider. Only 11 percent of U.S. households had subscribed to broadband Internet access as of mid-2001.[142] The penetration rate of broadband Internet access services is too low to extrapolate any useful data about what the larger market will eventually look like. Currently, the market in any given location is not populated by many competitors, but dominated by two: cable and ILEC DSL providers. In many geographic areas, one provider of broadband Internet access will probably be dominant for the foreseeable future as a result of the tremendous economic advantages that the "first mover" has in the deployment of

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141 *See NPRM* at ¶ 60.

142 *See Cable Modem Declaratory Ruling* at ¶ 9 & n.24.

facilities that support such services. Furthermore, while cable and wireline providers compete in some residential markets, there is no such intermodal competition in business markets, and adoption of the Commission's tentative conclusions threatens to eliminate what little intramodal competition exists in the SME market today. There is therefore no basis for the Commission to conclude that intermodal competition has obviated the need for consumer protection provisions that would be undermined as explained above by determining that wireline broadband Internet access is exclusively an information service.

C. State Authority Could Be Adversely Impacted

In the *NPRM*, the Commission seeks comment on how classification of wireline broadband Internet access services as exclusively an information service would impact the balance of federal and state responsibilities, particularly in light of the fact that the Commission has found that DSL transmission used to provide Internet access services are subject to Commission jurisdiction.[143] A pronouncement by the Commission that the transmission component of ILEC broadband Internet access service is not, in fact, subject to common carrier regulation because it is used exclusively to provide an information service could have profound impacts on the ability of states to regulate broadband services.

Under the Act, states exercise authority over intrastate telecommunications service, which they regulate as common carriage. States also have concurrent jurisdiction over the provision of xDSL services used to provide Internet access services. They therefore play an important role in the regulation of wireline broadband Internet access and protection of consumer interests, and have been active in assuring nondiscriminatory access to ILEC broadband facilities. For example, the Illinois Commerce Commission ("ICC") has taken significant steps to promote

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[143] *See NPRM* at ¶ 62.

competition in the provision of broadband Internet access facilities. In October 1999, SBC announced its $6 billion Project Pronto initiative to extend new fiber-fed loop facilities to millions of end-users. In February 2001, the ICC became the first state commission to order the unbundling of the fiber-fed loop architecture. The Illinois decision established four new UNEs.[144] In the course of the ICC's deliberations, Ed Whitacre, Chairman and CEO of SBC, wrote in a letter to Speaker Hastert and other legislators that the Illinois decision would make it "economically impossible" for SBC to deploy Project Pronto in the state.[145] The letter warned that, because of SBC's decision to halt Project Pronto in Illinois, the affected consumers "cannot now, and may never, have access to DSL service."[146] SBC's dire warning is likely to materialize if the Commission declines to exercise Title II jurisdiction over DSL and other broadband Internet access services such that CLECs are unable to obtain the UNEs they need to offer competitive broadband Internet access services. As Commissioner Harvill of the ICC poignantly noted, the very fact that SBC's threatened halt to Project Pronto could mean that some consumers would never have access to DSL demonstrated SBC's dominance of the market and why it was therefore important for the ICC to take aggressive steps to enforce SBC's unbundling obligations.[147]

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[144] The ICC established four separate UNEs: (1) the subloop from the customer to the line card; (2) the line card itself; (3) the subloop from the line card to the OCD, and; (4) a port on the OCD. The decision also guarantees the right of CLECs to collocate their own line cards in SWBT's channel bank at the remote terminal. *See Illinois Bell Telephone Company Proposed Implementation of High Frequency Portion of Loop (HFPL)/Line Sharing Service*, Docket 00-0393, Order (Ill. CC March 14, 2001).

[145] Letter from Edward E. Whitacre, Jr., Chairman and Chief Executive Officer, SBC Communications, Inc. to the Honorable J. Denis Hastert, Speaker, U.S. House of Representatives (March 14, 2001).

[146] *Id*.

[147] *See Familiar Ring: How Effort to Open Local Phone Markets Helped the Baby Bells --- An Aggressive SBC Thrives Under New Regulations; A Trend to Oligopolies --- Slowing Rollout of Broadband*, Wall Street Journal, A1 (Feb. 11, 2002).

More recently, SBC partially reversed course and announced that it would begin a limited deployment of Project Pronto facilities in Illinois reserving its right "not to complete its deployment" pending the outcome of various state and federal regulatory proceedings.[148] SBC is obviously moving forward with Project Pronto in Illinois because it makes good business sense to do so. Like the Illinois Commission, the Commission should not succumb to threats from the ILECs that without deregulation, consumers will be denied access to broadband and other advanced services.

Many companies and institutions implement wireline broadband Internet access services on an intrastate basis. For example, some companies and institutions use the technology for intra-company purposes such as linking offices located in different parts of the same state. If the Commission were to classify all wireline broadband Internet access services as information services, state commissions would lose jurisdiction over such purely intrastate service offerings.

The Act provides that "nothing in this Act shall be construed to apply or give the Commission jurisdiction with respect to (1) charges, classifications, practices services, facilities, or regulations for or in connection with intrastate communication service . . . ."[149] In order to displace state regulation, congressional intent must be "clear and manifest."[150] Similarly, federal preemption of state regulation "must be clear and occurs only in limited circumstances."[151] Under Section 2(b) of the Act, Congress left the states with substantial authority so long as state regulation does not conflict with the Act. The Commission should therefore maintain the

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148 SBC Ameritech Accessible Letter, Notification of Limited Deployment of Broadband Offering – IL, CLECAM02-149 (April 19, 2002).

149 47 U.S.C. § 152(2)(b).

150 *See Jones v. Rath Packing*, 430 U.S. 519, 525 (1977).

151 *See Communications Systems Int'l v. the Cal. Pub. Utils. Comm'n*, 196 F.3d 1011, 1017 (9th Cir. 1999).

classification of the transmission component of wireline broadband Internet access service as a telecommunications service to preserve state authority over ILEC intrastate broadband services.

VIII. DEREGULATION OF ILEC BROADBAND WIRELINE INTERNET ACCESS SERVICE IS NOT NECESSARY TO PROMOTE THE AVAILABILITY OF BROADBAND SERVICES

A. ILECs Are Already Deploying Broadband Services

ILECs have already widely deployed broadband services, and are rapidly installing an even more robust broadband capability in their existing networks. For example, the following facts demonstrate that the ILECs are increasing the deployment of broadband services notwithstanding Title II and other regulatory obligations imposed on them:

- BellSouth announced 25% growth in data revenues and a 189% increase in DSL subscribers in 2001, which BellSouth noted was "the fastest growth of any DSL or cable provider in the country."[152]

- BellSouth claimed that it had "the most aggressive DSL deployment strategy in the industry" and that it had increased its DSL coverage from 45% to 70% of households in 2001. [153]

- In its fourth quarter, year-end 2001 results report, Qwest stated that "DSL, wireless and Internet services continue to be key growth products."[154]

- Qwest's DSL customers at the end of 2001 represented a 74% increase from the end of 2000.[155]

- By year-end 2001, Qwest had increased by 15% over year-end 2000 the number of its central offices equipped for DSL.[156]

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[152] BellSouth investor news, "BellSouth Reports Fourth Quarter Earnings," http://www.bellsouth.com/investor/pdf/4q01p_news.pdf (Jan. 22, 2002).

[153] Newsroom, "BellSouth Captures 620,500 DSL Customers and Deploys Broadband Capabilities to More than 15.5 Million Lines," http://bellsouthcorp.com/proactive/newsroom/release (Jan. 3, 2002).

[154] "Qwest Communications Reports Fourth Quarter, Year-End 2001 Results," http://media.corporate-ir.net/media_files/NYS/q/q_1_28_02earnrel.htm (Jan. 29, 2002).

[155] *Id.*

[156] "Qwest Communications Reports Fourth Quarter, Year-End 2001 Results," http://media.corporate-ir.net/media_files/NYS/q/q_1_28_02earnrel.htm (Jan. 29, 2002).

- In 1999, SBC launched "Project Pronto," a $5 billion investment in high-speed broadband services to residential consumers.[157]

- Last year SBC also continued expansion of its broadband network capabilities, with 25 million DSL-capable customer locations at year's end.[158]

- In a January 24, 2002, "Investor Briefing" SBC announced that it had expanded its DSL-capable footprint by 37% in 2001 and that it had the "industry's largest DSL Internet customer base."[159]

- SBC announced growth in data services of between 14.4% and 27.9% in 2001 and growth of 16.9% in the fourth quarter of 2001 for high-speed data transport services.[160]

- Verizon reported a 122% increase in DSL subscribers and a 21.2% increase in data transport revenues in 2001.[161]

- In June 2001, Verizon informed the New York Public Service Commission that the "unprecedented" demand for high-speed data circuits required increased capital spending and the deployment of new technologies.[162]

- Verizon also announced that it had deployed DSL to central offices serving 79% of Verizon's local access lines and that its total number of data circuits in service had increased 53% from 2000.[163]

Obviously, these ILECs have deployed, and are continuing to deploy, broadband facilities, including fiber in the loop, and broadband services. This deployment is occurring in spite of the Commission's regulation of DSL and other broadband services as

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157 *Third Section 706 Report* at ¶ 70.

158 SBC-Investor Relations-Investor Briefings, "Revenue and Expense trends," http://www.sbc.com/investor_relations/financial_and_growth_profile/investor_briefings (March 20, 2002).

159 SBC Investor Briefing No. 228, http://www.sbc.com/investor_relations/financial_and_growth_profile /investor_briefings /1,5869,253,00.html, at 2 and 5 (Jan. 24, 2002) ("SBC Fourth Quarter Briefing").

160 SBC Second Quarter Briefing, at 4; SBC Third Quarter Briefing, at 4; SBC Fourth Quarter Briefing, at 4.

161 "Verizon Communications Reports Solid Results For Fourth Quarter, Provides Outlook for 2002," http://investor.verizon.com/news/VZ/2002-01-31_X263602.html (Jan. 31, 2002).

162 *See Opinion and Order Modifying Special Services Guidelines for Verizon New York Inc., Conforming Tariff, and Requiring Additional Performance Reporting*, Cases 00-C-2051 and 92-C-0665, Opinion No. 01-1, 10 (NYPSC, June 15, 2001).

163 News Release, "Verizon Communications Second Quarter Earnings Highlighted by Strong Long-Distance and Wireless Sales," http://newscenter.verizon.com/proactive/newsroom/release.vtml?id=59168 (July 31, 2001).

telecommunications services subject to Title II[164] and its determination that advanced networks are fully subject to Section 251(c)(3) unbundling obligations.[165] Therefore, regardless of the selected pronouncements from the ILECs' spokespersons, their actions reveal that regulatory obligations have not inhibited their investment in broadband infrastructure and deployment of broadband services.

B. Factors Other Than Regulation Fully Account for the Pace of Broadband Deployment

If broadband is not being deployed quickly enough, which is not the case according to the Commission's *Section 706 Reports*, it is attributable to factors other than common carrier regulation of broadband services. First, there are no services for which wireline broadband networks more advanced than those already in place are necessary. This phenomenon is referred to as the lack of a "killer application." Video programming is available from several sources including over-the-air broadcast, cable, satellite, videocassettes and DVDs. High speed web browsing is already available through DSL and cable modem service, although these services are not necessarily substitutes for each other. Businesses have been able for years to obtain the high-speed services they need from ILECs in the form of DS-1 and higher speed services. In short, the reason that futuristic ubiquitous wireline broadband networks have not been built is that there is insufficient demand for them.

In a refreshing change from ILEC and some other government views, it was recently reported that the Administration has recognized that demand, not supply, is limiting the growth of broadband networks (again, assuming that they are not being deployed fast enough, which is

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164 *Advanced Services Order* at ¶ 36.

165 *Deployment of Wireline Service Offering Advanced Telecommunication Capability,* 13 FCC Rcd. 24011 (1998).

not the case).[166] Glenn Hubbard, Chairman of the President's Council of Economic Advisors stated:

> "Many consumers don't yet see the value of broadband," he said, pointing to the fact that in Atlanta, [a] price point of zero still wasn't sufficient motivation for half of consumers. As far as Bush Administration is concerned, he said, policy decisions can have "bigger impact on the demand side …"[167]

The Commission similarly recognized this phenomena in its *Cable Modem Declaratory Ruling* in which it noted that although high-speed Internet access service is available to approximately 75-80% of all the homes in the United States, only 11% of all households subscribe to these services today.[168]

Second, ubiquitous advanced broadband networks have not been built because the technical solutions that might make them affordable have not yet been invented. Recent studies show that most consumers are unwilling to pay more than $25.00 per month for high speed Internet access and that this explains why only 11% of U.S. households subscribe to it.[169] As demonstrated in Section VI.B., *supra*, it is intramodal competition, rather than monopoly or duopoly, that has proven to be the best engine for introducing new products to the market and driving prices down to a level at which consumers are willing to purchase a product. The ILECs have dangled the prospect of a kind of super-broadband "passive optical network," bringing fiber optics as close to consumers as possible.[170] But given that the ILECs' own funded studies

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166 "Bush Administration Focuses on Increasing Demand for Broadband," Communications Daily, March 6, 2002, p. 3.

167 *Id.*

168 *Cable Modem Declaratory Ruling* at ¶ 9.

169 "Broadband Success Requires More than Regulatory Clearance, Says Research," CLEC News, February 21, 2002, http://www.clec-planet.com/news/02feb2002/18broadband.html.

170 Communications Daily, February 26, 2002, at 4-5, describing *Building a Nationwide Broadband Network: Speeding Job Growth*, Telenomic Research, February 25, 2002.

estimate that the cost of deploying such gold-plated networks nationwide would be $270 billion to $416 billion,[171] it is clear that this type of network is not currently economically feasible. Accordingly, even if the Commission were to deregulate ILECs' participation in the broadband marketplace in a comprehensive manner, there is no reason to believe that this would result in widespread deployment of more advanced broadband networks, simply because the costs thereof are more than consumers are willing to pay. In fact, ILECs will not build these futuristic networks unless costs drop dramatically or they are permitted to compel all ratepayers to pay for them through cross-subsidies and general rate increases. Without the benefit of common carrier regulation, however, ILECs will not be able to force consumers to fund broadband deployment as customers funded deployment of the existing PSTN.

In fact, the Commission itself has provided an explanation for the recent slowdown in the pace of increased investment in broadband networks:

> [I]ndustry investment in infrastructure to support high-speed and advanced services has increased dramatically since 1996. Analysts forecasted at that time that this upward trend would continue, spurred by the introduction of competition into the market. Although analysts still generally expect this trend to continue, they observe that there has been a recent slowdown in investment caused by the economic downturn generally and, more particularly, over-building by carriers, over-manufacturing by vendors, over-capitalization by financial markets, coupled with unrealistic market expectations by investors.[172]

There is therefore no basis for the Commission to conclude in this proceeding that removal of common carrier regulation from ILEC broadband capability would promote increased deployment of broadband.

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171 *Id.*

172 *Third Section 706 Report* at ¶ 62 (footnotes omitted).

IX. UNIVERSAL SERVICE ISSUES

A. The Act and Public Interest Require That the Commission Adopt Non-discriminatory Universal Service Contribution Obligations

1. The Act Limits the Commission's Authority to Impose Universal Service Contribution Obligations

Section 254 of the Act both defines and limits the Commission's authority to require contributions to universal service. Section 254(d) provides that:

> Every telecommunications carrier that provides interstate telecommunications services shall contribute, on an equitable and nondiscriminatory basis, to the specific, predictable, and sufficient mechanisms established by the Commission to preserve and advance universal service. The Commission may exempt a carrier or class of carriers from this requirement if the carrier's telecommunications activities are limited to such an extent that the level of such carriers' contribution to the preservation of and advancement of universal service would be de minimis. Any other provider of interstate telecommunications may be required to contribute to the preservation and advancement of universal service if the public interest so requires.[173]

As the Commission has previously determined, Section 254(d) sets forth two classes of contributors.[174] Telecommunications carriers that provide interstate "telecommunications services" are mandatory contributors unless the Commission finds that a particular telecommunications carrier or class of telecommunications carriers may be exempted under the *de minimis* exception of Section 254(d). Providers of interstate "telecommunications," on the other hand, are "permissive" contributors and the Commission may only require contributions from providers of interstate telecommunications if the public interest so requires.

Because wireline carriers provide a telecommunications service when they provide either broadband Internet access service or purely broadband services (*see* Sections III & IV, *supra*),

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[173] 47 U.S.C. § 254(d).

[174] *Federal-State Joint Board on Universal Service,* CC Docket No. 96-45, Report and Order, 12 FCC Rcd 8776, ¶ 786 (1997) ("*Universal Service Order*") (subsequent history omitted).

the Commission must require these carriers to contribute to universal service under the plain language of Section 254(d).[175] There is no way the Commission can escape this conclusion. Under the Act, the Commission's ability to impose contribution obligations on a broadband service provider, or service, turns not only on the statutory classification the Commission assigns to each service provider or service, but also the distinction between "use" and "provide." The Commission has historically recognized that non-facilities-based providers of information services ***use*** common carrier transmission facilities as an input in their service offering.[176] The mere use of telecommunications or a telecommunications service does not, however, trigger universal service contribution obligations. In order to assess a particular entity for the support of universal service, the Commission must first determine that such entity ***provides*** either interstate telecommunications services or interstate telecommunications. Absent such a finding, Section 254(d) does not permit the Commission to impose universal service contribution obligations on a service or service provider.

Although the Act defines "telecommunications," "telecommunications service," and "telecommunications carrier," it does not define "use" or "provide." In its *Cable Modem Declaratory Ruling* and the *NPRM*, the Commission is so intent on fitting the respective broadband services into the defined statutory classifications that it ignores the distinction between "use" and "provide" that is critical to assessing universal service obligations under Section 254. For example, although the Commission classified cable modem service as an

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[175] Even if the Commission finds that wireline broadband Internet access providers only provide telecommunications, as shown in Section IX.A.2, the Commission should exercise its permissive authority to require universal service contributions.

[176] *Report to Congress* at ¶ 39 ("[W]hen an entity offers transmission incorporating the 'capability for generating, acquiring, storing, transforming, processing, retrieving, utilizing, or making available information,' it does not offer telecommunications. Rather, it offers an 'information service' even though it uses telecommunications to do so.").

information service with a telecommunications component,[177] it never clearly stated whether providers of cable modem service "use" or "provide" telecommunications. Instead, it made conflicting statements with regard to this very important distinction. First, the Commission stated that:

> [c]onsistent with the statutory definition of information service, cable modem service *provides* the capabilities described above "via telecommunications." . . . As *provided* to the end user the telecommunications is part and parcel of cable modem service and is integral to its other capabilities.[178]

The Commission also stated, however, that:

> The cable operator providing cable modem service over its own facilities, as described in the record, is not offering telecommunications service to the end user, but rather is merely *using* telecommunications to provide end users with cable modem service.[179]

Because the distinction between "use" and "provide" could have an enormous impact on the sufficiency of federal universal service support (*see* Section IX.B.1), Allegiance submits that the Commission must find that facilities-based wireline broadband Internet access includes the provision of a telecommunications service or, at the very least, the provision of telecommunications. And, before it may determine whether non-wireline broadband Internet access providers must contribution to universal service, the Commission must first determine whether such entities use or provide telecommunications as part of their broadband Internet access offering.

2. *The Bundled Telecommunications Service or Telecommunications Component of Broadband Internet Service Offerings Should Be Subject to Universal Service Obligations*

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177 *Cable Modem Declaratory Ruling* at ¶ 39.

178 *Cable Modem Declaratory Ruling* at ¶ 39 (emphasis added).

179 *Cable Modem Declaratory Ruling* at ¶ 41 (emphasis added).

The Commission asks "whether broadband Internet access providers that supply last-mile connectivity over their own facilities should be required to contribute to universal service based upon their self-provisioning of telecommunications."[180] As noted above, Allegiance submits that the Commission has failed to ask the necessary prerequisite question: whether non-wireline, facilities-based broadband Internet access providers are ***providing*** telecommunications or telecommunications services. Assuming, however, that the question had been asked and answered in the affirmative, Allegiance submits that the public interest requires imposition of universal service contribution obligations on all broadband service providers, regardless of technology.

As an initial matter, if broadband Internet access providers are providing telecommunications *services*, Section 254(d) requires that they contribute to support universal service. Similarly, the public interest requires that the Commission impose universal service obligations on broadband Internet access providers even if they only provide telecommunications, as opposed to telecommunications services. As the Commission has previously found, because private carriers benefit from the universal connectivity that the PSTN provides and because they compete with carriers that support universal service, private carriers should support universal service.[181] Broadband Internet access and broadband transmission providers not only benefit from the universal connectivity of the PSTN and compete with carriers that support universal service, but also potentially benefit from explicit universal service support. Both the schools and libraries and the rural health care program provide explicit funding for

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180 *NPRM* at ¶ 74.

181 *Universal Service Order* at ¶ 796.

broadband Internet access services and broadband transmission services, respectively.[182] Together, the indirect and direct benefits broadband providers reap from universal service weighs in favor of imposing contribution requirements on them.

The Commission's goal of competitive neutrality[183] is another factor that weighs in favor of imposing universal service contribution obligations on all broadband service providers, regardless of underlying technology. The Commission has previously determined that defining the contribution base broadly reduces the burden and possible impact on individual carrier's prices and also reduces the possibility that providers with universal service obligations will compete directly with providers that do not bear such obligations.[184] In order to achieve the same goal with respect to broadband service providers, the Commission must impose contribution obligations on all such providers,[185] regardless of the technology that underlies the broadband service.

B. The Commission Must Carefully Consider the Impact of Its Broadband Service Classifications on the Sufficiency and Predictability of Universal Service Support

1. The Proposed Regulatory Classifications Could Reduce the Contribution Base

While Allegiance agrees that the Commission must take into account the impact on universal service of any determinations made in this proceeding, the myriad of potential outcomes makes it difficult, if not impossible, to make such an assessment. The Commission has

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182 47 U.S.C. § 254(h); 47 C.F.R. §§ 54.503, 54.601(c), 54.621.

183 *Universal Service Order* at ¶ 47. The Commission has defined the principle of competitive neutrality to mean that "universal service support mechanisms and rules [should] neither unfairly advantage nor disadvantage one provider over another, and neither unfairly favor nor disfavor one technology over another." *Id.*

184 *Universal Service Order* at ¶ 783.

185 Allegiance notes that the Commission's goal of competitive neutrality also supports a uniform determination on the use/provide question, regardless of the business model employed by or the underlying technology used by facilities-based providers of broadband Internet access services.

essentially asked parties to evaluate the impact of any combination of the following potential determinations on both its existing revenue-based assessment and its proposed connection-based assessment:

- Cable modem providers provide (or use) telecommunications.
- Wireline broadband Internet access providers provide (or use) telecommunications (or telecommunications services).
- Satellite broadband Internet access providers provide (or use) telecommunications (or telecommunications services).
- Wireless broadband Internet access providers provide (or use) telecommunications (or telecommunications services).

The Commission has, however, clearly excluded any consideration of the regulatory classification of non-wireline broadband Internet access services from this proceeding,[186] making it impossible to estimate the impact of any such classifications on the sufficiency of universal service. And even assuming one could construct an argument that addressed each combination of these variables, it is likely that the data necessary to evaluate the actual impact on the sufficiency of the fund would not be available. For instance, under the current Form 499A, the Commission does not require providers to report separately revenue from high-speed services. Nor does the Commission's broadband reporting mechanism require carriers to divide their high-capacity connections into the graduated bandwidths the Commission proposes to use in its connection-based methodology.[187] In short, there is likely not enough information available to calculate the impact on the sufficiency of universal service.

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186 *NPRM* at ¶ 79.

187 *Federal-State Joint Board on Universal Service*, CC Docket No. 96-45 et al., Further Notice of Proposed Rulemaking and Report and Order, FCC No. 02-43, ¶ 52 (rel. Feb. 26, 2002) ("*USF FNPRM*"). Under the proposal, multi-line business connections would be divided into three groups: (1) speeds less than 1.544 Mbps; (2) speeds equal to or greater than 1.544 Mbps but less than 45 Mbps; and (3) speeds equal to or greater than 45 Mbps.

The impact of one determination could, however, substantially undermine the universal service contribution base. If the Commission determines that broadband Internet access providers use, rather than provide, telecommunications or telecommunications services, it ***may not impose universal service contribution obligations on such services*** and the contribution base for universal service would be dramatically limited. As of June, 2001, Commission data shows that 4,432,200 ADSL, other wireline, satellite, and wireless connections qualified as high-speed.[188] Adding cable high-speed connections, which are not currently subject to universal service contribution obligations but would be under the proposal in the *USF FNPRM*, results in a total of 9,616,341 high-speed connections available to support universal service.[189] If these 9,616,341 connections, or the revenue earned from providing such connections, were not included in the universal service contribution base, however, it would substantially increase the contribution burden on the remaining, narrowband connections/services. If, contrary to Allegiance's recommendation, the Commission finds in this proceeding that wireline broadband Internet access providers ***use*** telecommunications,[190] it may not impose contribution obligations on such services under Section 254(d). Because ILECs currently contribute to universal service on the basis of their bundled DSL revenues,[191] such a finding could substantially impact the sufficiency of the fund and increase the contribution obligation on other services and service providers.

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188 *Third Section 706 Report* at Table 1.

189 *Id.*

190 *See NPRM* at ¶ 25.

191 As Commissioner Abernathy recognized, under the Commission's current rules, the "only information service providers that contribute directly to federal universal service support mechanisms are those owned and operated by incumbent LECs."). Letter from Kathleen Q. Abernathy, Commissioner, Federal Communications Commission, to Senator Ernest F. Hollings, Chairman, Senate Committee on Commerce, Science, and Transportation, 6 (March 5, 2002).

It also stands to reason that if service providers are able to migrate their services, and therefore their revenues and/or connections, to the category of unregulated broadband services, the sufficiency of the fund will be severely compromised unless broadband services bear universal service contribution obligations. For example, if an ILEC provides broadband Internet access services and voice service over the same connection and classifies the entire service as an information service that uses telecommunications, those revenues and that connection would be immune from universal service contributions. The Commission's connection-based contribution proposal already contemplates exempting an entire category of interstate services, which make up 63% of current contributions, from USF contribution requirements. Removing broadband services, in addition to interstate long distance services, from the contribution base will only further increase the contribution burden on local exchange carriers that provide end users narrowband access to the PSTN and their customers. The potential impact on the sufficiency of universal service is one more reason the Commission should be wary of creating a slippery slope to deregulation by loosely defining "broadband" services and/or finding that broadband Internet access services do not include the offering of a telecommunications service or telecommunications.

2. The Commission Should Request Comment from USAC and Input from the Federal-State Joint Board

In its universal service NPRMs, the Commission typically requests comment from USAC.[192] Before making major changes to the contribution methodology, it also requests input from the Federal-State Joint Board.[193] Because the universal service questions posed in this

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[192] *See, e.g., Federal-State Joint Board on Universal Service*, CC Docket No. 96-45, Notice of Proposed Rulemaking, FCC 01-145, ¶ 40 (rel. May 8, 2001) ("In particular, we ask USAC to quantify the administrative burdens associated with the above-described proposals.").

[193] *Id.* at ¶ 30.

NPRM could have as much, if not more, of an impact on the sufficiency and administration of the universal service fund, Allegiance urges the Commission to issue an express request for comment from USAC and input from the Joint Board on the universal service issues raised in this *NPRM* as well.

The Commission's proposals could place USAC in the unenviable position of trying to police the revenues and/or connections reported by providers of broadband Internet access services. For example, as Allegiance argues in Section V.C., *supra*, the rules the Commission adopts in this proceeding could lead to a slippery slope which permits providers to classify services as information services not subject to contribution. As the administrator of the universal service mechanisms, USAC could be forced to determine whether a reporting entity properly distinguished information from telecommunications services revenues. If the Commission adopts a connection-based methodology that imposes contributions on the facility, the Commission would also have to establish a rule for USAC to apply when the facility is used to provide both an information service and a telecommunications service. Would the capacity of the facility be allocated between the two services such that only that portion of the capacity used for telecommunications services would be subject to contribution? How could USAC apply such a rule if the customer determines, and the provider cannot monitor, the amount of bandwidth that is allocated to telecommunications (or telecommunications service) as opposed to information services?

Ultimately, if these classifications rise to the level of a "policy" decision, the Commission could become embroiled in the detail of determining whether a carrier is correctly reporting on

Form 499A or its successor the revenue or connections for a specific customer.[194] It is therefore imperative that the Commission request comment from USAC in this proceeding on the administrative practicality of implementing its various proposed rule changes and on the impact those rule changes would have on the sufficiency of the fund.

X. CONCLUSION

In its zeal to promote the widespread availability of broadband Internet access services through intermodal competition, the Commission must be careful not to destroy the very intramodal competition responsible for bringing DSL and other broadband services to both residential and SME consumers. For the reasons stated herein, the Commission should conclude this proceeding consistent with Allegiance's recommendations.

Respectfully submitted,

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Andrew D. Lipman
Eric J. Branfman
Tamar E. Finn
Swidler Berlin Shereff Friedman, LLP
3000 K Street, N.W., Suite 300
Washington, D.C. 20007
(202) 424-7500 (Telephone)
(202) 424-7645 (Facsimile)

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[194] 47 C.F.R. § 54.702(c).