

BEFORE THE  
Federal Communications Commission  
WASHINGTON, D.C.

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

**COMMENTS OF TIME WARNER TELECOM**

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**COMMENTS OF TIME WARNER TELECOM**

Time Warner Telecom Corporation ("TWTC"), by its attorneys, hereby submits these comments in response to the Notice of Proposed Rulemaking<sup>1</sup> in the above-referenced proceeding.

**I. INTRODUCTION AND SUMMARY**

The NPRM that has initiated this proceeding should never have been released. It would have been more than sufficient for the Commission to release a Declaratory Ruling in which it clarified the regulatory status of Internet access provided by ILECs. The Commission could have said, consistent with past precedent, that this service is an information service that is not subject to Title II regulation as offered to the purchaser of the Internet access itself. It should

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<sup>1</sup> See *Appropriate Framework for Broadband Access to the Internet over Wireline Facilities*, Notice of Proposed Rulemaking, 17 FCC Rcd 3019 (2002) ("NPRM").

have then further clarified that wireline carriers like the ILECs are subject to *Computer II*, under which they must separately offer the telecommunications component of an information service as a telecommunications service. Thus, when an ILEC provides Internet access over its own facilities, the ILEC provides a telecommunications service to its information service division or affiliate. The latter then uses the telecommunications service to offer information service. These conclusions follow from past Commission rulings, and the Commission need not have done anything more in this proceeding than describe them.

Instead, the Commission tentatively concluded that broadband Internet access is an information service, but it did *not* reach any tentative conclusion regarding the more important fact that the underlying transmission is a telecommunications service provided by the carrier to itself. Just to add to the uncertainty created by this omission, the Commission went on to ask pages and pages of questions regarding whether the *Computer II* regime should be eliminated. The Commission indicated that it believes that regime may now be unnecessary and, by changing the regulatory classification of the transmission used in the provision of broadband Internet access from telecommunications service to telecommunications, it can lay the foundation for increased investment in broadband.

But such a change is unlikely to spur broadband deployment, would be affirmatively harmful to competition, would undermine important statutory requirements, and is an inappropriate (indeed probably unlawful) means of tailoring regulation to market conditions. First, regulation is not the central reason why ILECs have failed to sell more broadband than has been the case so far. The ILECs have invested heavily in their broadband networks where it is efficient for them to do so. Sales penetration within the many areas passed by ILEC broadband facilities has not been greater and deployment of higher capacity circuits has not been more

extensive because the demand simply is not sufficient at this time. In any event, as several analysts have recognized, major regulatory initiatives such as the one contemplated here inevitably lead to years of litigation and uncertainty that themselves chill investment.

Second, reclassifying the transmission used by ILECs to provide broadband service as telecommunications would affirmatively harm competition in the provision of telecommunications services *as well as* broadband Internet access by creating opportunities for ILECs to engage in anticompetitive behavior. For example, in the case of broadband telecommunications services provided to businesses, the ILECs would be able to exploit their control over high-capacity loops to deny, delay, degrade, and overprice access to those facilities in the absence of Title II regulation. Regulators and competitors would be all but helpless to prevent the ILECs from engaging in this kind of behavior.

Third, reclassifying transmission as telecommunications not subject to Title II would create numerous daunting practical and legal problems for the Commission. For example, the Commission would need to conduct a cost allocation proceeding to separate the costs of high-capacity loops, central office equipment and transport associated with regulated telecommunications services from the costs of those facilities associated with unregulated telecommunications. Since these two services would share the same underlying facilities, the costs of those facilities are considered common, and there is simply no principled way for regulators to allocate common costs among different services. Moreover, many bedrock regulatory requirements are triggered only by the provision of telecommunications service. Most obviously, only telecommunications services can be supported by federal universal service high cost and low income funds. It is entirely possible that the transmission component of broadband Internet access will become a service of such fundamental importance that the Commission and

the Federal-State Joint Board will decide that it must be subject to federal support. That would be possible if the telecommunications service classification were retained. It would be impossible under the statute if that classification were changed. In addition, eliminating the telecommunications service classification would prevent the Commission from applying CALEA to broadband Internet access, and it would make it all but impossible to implement other important statutory mandates.

Fourth, any needed adjustments to the regulatory regime going-forward can be fully accomplished by retaining the telecommunications service classification and by assessing the need for specific aspects of the regulatory regime applicable to such services in the *Non-Dominance*<sup>2</sup> and the *Triennial Review*<sup>3</sup> proceedings. The Commission has a great deal of flexibility to forbear from Title II regulation and to eliminate unbundling requirements where appropriate. Moreover, using these mechanisms for tailoring regulation allows the Commission to carve out only those regulatory requirements that are unnecessary or harmful. A change in definitions is a much cruder instrument for deregulation, and it is much more difficult to contain the consequences of such a change. Most importantly, the *Non-Dominance* proceeding can be used as the basis for distinguishing between mass market broadband offerings, such as cable modem and ADSL, in which there is some intermodal competition in the provision of end-user connections on the one hand, and medium and large business broadband offerings, for which there are essentially no intermodal alternatives to the high-capacity end-user connections

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<sup>2</sup> See *Review of Regulatory Requirements for Incumbent LEC Broadband Telecommunications Services*, Notice of Proposed Rulemaking, FCC 01-360 (rel. Dec. 20, 2001) (“*Non-Dominance*”).

<sup>3</sup> See *Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers; Implementation of the Local Competition Provisions of the Telecommunications Act of 1996; Deployment of Wireline Services Offering Advanced Telecommunications Capability*, Notice of Proposed Rulemaking, FCC 01-361 (rel. Dec. 20, 2001) (“*Triennial Review*”).

controlled by the ILECs on the other hand. A simple change in definitions would not reflect this important distinction.

**II. ILEC INVESTMENT IN BROADBAND DEPLOYMENT IS VERY SUBSTANTIAL AND DEREGULATION OF ILEC BROADBAND SERVICE IS UNLIKELY TO HAVE A SIGNIFICANT EFFECT ON ILEC INVESTMENT DECISIONS.**

This proceeding seems to have been in significant part prompted by the goal of increasing investment in and provision of broadband. The Commission seems to have been persuaded by ILECs that the elimination of unbundling, interconnection, and resale obligations will lead to more deployment. But of course the ILECs' goals are likely to be almost completely at odds with the Commission's. The ILECs want the elimination of regulation so that they can exercise market power by restricting output. The Commission seeks increased output. It is just bizarre to expect that the elimination of regulations designed to promote competition would promote the Commission's goal rather than the ILECs'. The ILECs are merely seeking help from the regulators, as regulated firms have so often done in the past, to protect them from competition. Indeed, the ILECs' overstated rhetoric notwithstanding, regulation has not held broadband back in any significant way. It has almost certainly spurred ILEC investment in broadband by forcing ILECs to respond to competitive entry. There is therefore no basis for sweeping definitional changes in the regulatory status of the transmission needed to provide broadband Internet access.

In fact, ILECs continue to deploy DSL aggressively. While ILECs complain to regulators that burdensome regulation is smothering broadband deployment, they brag to Wall Street that their broadband deployment is accelerating. Each of the BOCs has recently posted financial results that highlight strong growth in their DSL products in spite of the weak

economy.<sup>4</sup> Indeed, DSL is already widely available in urban markets, where it is most economically attractive to deploy.<sup>5</sup> Industry analysts estimate that DSL is available to up to 60 percent of U.S. households. *See id.* at 2. Moreover, the Commission's recent *Broadband Report* concluded that "advanced telecommunications is being deployed to all Americans in a reasonable and timely manner."<sup>6</sup> In the report, the Commission noted that "DSL deployment closely mirrors reported DSL subscribership," which continues to grow by all accounts.

*Broadband Report* ¶ 51.

To the extent that ILECs have slowed the growth rate of ongoing DSL deployment, this has been caused by a variety of factors other than regulation. As noted, DSL has largely been deployed in areas where population density (as well as affluence) indicate that the ILECs can recover their sunk costs and make a profit. As a Banc of America analyst recently concluded, deregulation of ILEC broadband "will do little to change population density." *Broadband Brief* at 3. In addition, inherent technical limitations make further provisioning of DSL difficult and

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<sup>4</sup> See Qwest Communications, Press Release, *Qwest Communications Reports Fourth Quarter, Year-End 2001 Results* (Jan. 29, 2002) ("DSL, wireless and Internet services continue to be key growth products."); SBC Communications, Press Release, *SBC First-Quarter Earnings of \$0.51 Per Diluted Share at Top End of Target Range Provided by Company in January* (Apr. 18, 2002) ("We accelerated progress in key growth drivers, particularly in DSL Internet service and long distance...."); Verizon Communications, News Release, *Verizon Reports Solid First-Quarter Adjusted EPS of 72 Cents in Challenging Economic Environment -- 2002 Outlook Updated* (Apr. 23, 2002) ("Verizon Communications Inc. today reported adjusted diluted earnings per share of 72 cents for the first quarter 2002, as long-distance and DSL customer growth, increased profitability in wireless and continued excellent cost controls combined to help mitigate the effects of the economic downturn."); BellSouth Corp., News Release, *BellSouth Reports First Quarter Earnings* (Apr. 19, 2002) ("Boosted by continued growth in Broadband DSL Internet access for residential customers, Communications Group data service revenues [experienced] a year-over-year growth rate of nearly 15 percent.").

<sup>5</sup> See Douglas S. Shapiro, *Broadband Brief: What Does Telecom Deregulation Mean for Cable?*, Banc of America Securities at 2 (Mar. 13, 2002) ("*Broadband Brief*") ("Has regulation really hampered deployment and will a lighter burden really make the BOCs more competitive? We think the answer is: not really. In our opinion, the BOCs' track records so far strongly suggest that deregulation won't have much impact because their primary problems aren't regulatory.").

<sup>6</sup> *Inquiry Concerning the Deployment of Advanced Telecommunications Capability to All Americans in a Reasonable And Timely Fashion, and Possible Steps To Accelerate Such Deployment Pursuant to Section 706 of the Telecommunications Act of 1996*, Third Report, 17 FCC Rcd 2844, ¶ 1 (2002) ("*Broadband Report*").

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costly. *See id.* at 4. Perhaps most importantly, well-known technical limitations of DSL preclude entirely its use in less densely populated areas and even some suburban areas where customers are far from central offices.<sup>7</sup> Moreover, ILEC corporate culture and ILEC shareholder inflexibility have also limited the pace of deployment. ILECs do not have “good track records pursuing new businesses,” nor do they encourage that type of risk-taking. *Broadband Brief* at 5. Furthermore, ILEC dividend-addicted shareholders resist business opportunities that risk interfering with earnings growth and dividend distributions. *See id.* Importantly, ILECs are also under less competitive pressure now to roll out DSL, since most of their competitors in the provision of that service have either exited the market or substantially scaled back operations. Absent such competition, ILECs have fewer incentives to deploy and market broadband aggressively.<sup>8</sup>

What is more, any major shift in regulation is likely to create further uncertainty and to chill investment incentives for competitors and ILECs alike. Analysts have expressed this view strongly with regard to the Tauzin-Dingell Bill, and there is no reason to think of the proposals discussed in this proceeding in different terms. For example, a recent Yankee Group report observed that “[t]he regulatory uncertainty created by the Tauzin-Dingell Bill contributed greatly -- although not solely -- to the drying up of the capital markets for competitive providers, and also caused many CLECs to postpone investments.”<sup>9</sup> Regardless of whether such proposals are

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<sup>7</sup> See Mike Lauricella, *DSL + POT Lines and Integrated TIs: Understanding Their Place in the SMB Market*, The Yankee Group at 2 (Nov. 2001) (describing “the infamous distance and *technical* limitations of DSL”) (emphasis in original).

<sup>8</sup> See Patrick S. Brogan, *Broadband: Best Hope for Telecom Growth, but No Return to Bubble*, Precursor Group at 1 (Mar. 28, 2002) (“*Best Hope for Telecom*”) (“A slew of shutdowns has whittled supply and the competitive impetus to deploy.”).

<sup>9</sup> Courtney Quinn *et al.*, *Putting the Past Behind: The CLEC Outlook for 2002 and Beyond*, The Yankee Group at 12 (Mar. 2002).

actually implemented, “the mere proposal has caused significant harm to competition.” *Id.* But the effect of major new initiatives is not limited to competitors. Speaking broadly about telecommunications firms, including apparently ILECs, one analyst recently testified before Congress that “[m]ajor initiatives lead to the inevitable legal challenges in federal court and the results are unpredictable. . . . The resulting uncertainty can actually discourage capital investment.”<sup>10</sup>

But of course the supply side of the equation is only one, and possibly the less important, aspect of this issue. Market evidence shows that there are significant limits on consumer demand for broadband services. According to a recent market study, a full “76 percent of households were either neutral to the notion of paying for a higher speed Internet connection or were decidedly uninterested.”<sup>11</sup> As the Precursor Group recently concluded, consumer demand for broadband is limited in part because “compelling applications have yet to emerge.” *See Best Hope for Telecom* at 1. In addition, demand for broadband, and Internet access in general, continues to be limited by household computer penetration rates. Only 57 percent of households currently have computers, with the growth rate slowing in recent years. *See id.* Many end users have no interest in obtaining broadband at any price. For example, in La Grange, Georgia, 13,000 households were recently offered the opportunity to subscribe to broadband free of charge for a year. Half declined.<sup>12</sup> Government intervention (except in the form of intellectual property reform) can do little to change matters. As one analyst recently explained, “[I]legislative and regulatory actions cannot force changes in human behavior. \* \* \* What is the value

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<sup>10</sup> Howard Baskirk, *Analysts: Wrong Legislation May Worsen Telecom’s Woes*, Telecommunications Reports at 22 (Apr. 22, 2002) (“*Wrong Legislation May Worsen Telecom’s Woes*”).

<sup>11</sup> *See Reuters, Broadband Converts Growing, But Slowly*, CNET.com (Apr. 23, 2002).

<sup>12</sup> *See Jonathan Krim, Does Fast Internet Need a Push?*, Washington Post at A10 (Jan. 15, 2002).

proposition for these services? We don't need 100 [megabits per second] for e-mail. . . .

Consumers and business are struggling with this question today. We must be realistic in our expectations of what government policy will accomplish." See *Wrong Legislation May Worsen Telecom's Woes*. It is these factors that have caused ILECs to scale back their future deployment plans, rather than the regulation that is designed to open markets and prevent abuses of market power. The Commission should remain mindful of these facts as it considers the issues raised in the NPRM.

**III. UNDER CURRENT LAW, WHEN PROVIDING BROADBAND INTERNET ACCESS OVER THEIR OWN FACILITIES, ILECS PROVIDE A TELECOMMUNICATIONS SERVICE TO THEMSELVES AND THEN USE THAT SERVICE TO PROVIDE AN INFORMATION SERVICE TO THEIR CUSTOMERS.**

As far as they go, the tentative conclusions reached in the NPRM regarding the legal classification of broadband Internet access service are uncontroversial. That service can fairly be characterized as an information service under existing precedent. But the Commission failed to recognize in its tentative conclusions that, also under current law, ILECs provide a telecommunications service to themselves before they use that transmission as part of the unregulated offering to end-user customers.

In the *Computer II* proceeding, the Commission established the regulatory regime that currently applies to information services (then referred to as enhanced services).<sup>13</sup> The Commission in that proceeding distinguished between enhanced services that were subject to competition and "basic" transmission services over which carriers possessed substantial and persisting market power. The Commission imposed Title II common carrier regulation on basic

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<sup>13</sup> See *Amendment of Section 64.702 of the Commission's Rules and Regulations (Second Computer Inquiry)*, Final Decision, 77 FCC 2d 384 (1980) (subsequent history omitted) ("*Computer II Final Decision*").

transmission services while it left enhanced services provided over the basic services unregulated. Thus, the underlying basic service used by a facilities-based carrier was and is treated as a common carrier service. As the Commission explained it,

an essential thrust of this proceeding has been to provide a mechanism whereby non-discriminatory access can be had to basic transmission services by all enhanced service providers. Because enhanced services are dependent upon the common carrier offering of basic service, a basic service is the building block upon which enhanced services are offered.

*Computer II Final Decision* ¶ 231. In fact, the Commission adopted a definition of enhanced service that required that an information service be provided over a “common carrier” transmission facility. *See* 47 C.F.R. § 64.702(a).

It was later confirmed that, where a facilities-based carrier provides an enhanced/information service over its own facilities as part of a bundled offering, the underlying transmission continues to be treated as a Title II common carrier service. Thus, in the *Frame Relay Order*, the Common Carrier Bureau rejected the application of the so-called “contamination theory” to AT&T’s Frame Relay service.<sup>14</sup> Under the contamination theory, the Commission had exempted from common carrier regulation those enhanced/information service providers that did not own their own facilities. As the Bureau explained, application of the contamination theory to a facilities-based carrier such as AT&T would allow AT&T “to avoid *Computer II* and *Computer III* unbundling and tariffing requirements for any basic service that it could combine with an enhanced service. This is obviously an undesirable and unintended result.” *Frame Relay Order* ¶ 44. Accordingly, the Bureau applied those unbundling and

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<sup>14</sup> *See Independent Data Communications Manufacturers Association, Inc. Petition for Declaratory Ruling that AT&T’s InterSpan Frame Relay Service is a Basic Service; and American Telephone and Telegraph Co. Petition for Declaratory Ruling that All IXCs be Subject to the Commission’s Decision on the IDCMA Petition*, Memorandum Opinion and Order, 10 FCC Rcd 13717 (CCB 1995) (“*Frame Relay Order*”).

tariffing requirements, and held that “all facilities-based common carriers providing enhanced services in conjunction with basic frame relay service must file tariffs for the underlying frame relay service.” *Id.* ¶ 59.

The logic of the *Frame Relay Order* and the *Computer II* framework in general indicates that a combined offering of a basic and enhanced service by a facilities-based carrier consists of two separate services: an enhanced and a basic service. If this were not the case, there would not have been the need to reject the application of the contamination theory when applied to facilities-based carrier provision of enhanced services. As the Commission found, any other conclusion would allow a facilities-based carrier to avoid Title II regulation of a service simply by combining it with an enhanced service. This still leaves open the question of whether the Title II service is actually provided to the purchaser of the combined service or is provided by the carrier to itself and then used in the provision of the combined product (a subject discussed further below). Either way, a Title II service is provided at some point (either to the end user or to the carrier itself).

In the 1996 amendments to the Communications Act, Congress added new definitions for “telecommunications,” “telecommunications service,” and “information service.” Telecommunications is defined as “the transmission, between or among points specified by the user, of information of the user’s choosing, without change in the form or content of the information as sent or received.” 47 U.S.C. § 153(43) Telecommunications service is the “offering of telecommunications for a fee directly to the public or to such classes of users as to be effectively available directly to the public.” *Id.* § 153(46). Telecommunications service is therefore a subset of telecommunications. The Commission has determined that a provider of

telecommunications service (a “telecommunications carrier”) is a common carrier.<sup>15</sup> Finally, information service is defined as the provision of enhancements “via telecommunications.” 47 U.S.C. § 153(20).

As the Commission has concluded, the legislative history of the 1996 amendments demonstrates that “Congress intended these new terms to build upon frameworks established prior to the passage of the 1996 Act.”<sup>16</sup> Specifically, the Commission has concluded that “Congress intended the categories of ‘telecommunications service’ and ‘information service’ to parallel the definitions of ‘basic service’ and ‘enhanced service’ developed [in the] *Computer II* proceeding.” *Report to Congress* ¶ 21.

In the *Report to Congress*, the Commission applied these definitions to the provision of Internet access service. The Commission first concluded that information service providers use telecommunications, they do not provide them. *See id.* ¶ 39. The Commission further reiterated its prior rulings that information services and telecommunications services are mutually exclusive categories -- a specific service could not include both an information service and a telecommunications service component. *See id.* ¶ 43. By this, the Commission appears to have meant that, regardless of whether a firm provides Internet access via its own transmission facilities, the service purchased by the end user is an unregulated information service. As the

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<sup>15</sup> See 47 U.S.C. § 153(44); see also *AT&T Submarine Systems, Inc. Application for a License to Land and Operate a Digital Submarine Cable System Between St. Thomas and St. Croix in the U.S. Virgin Islands*, Memorandum Opinion and Order, 13 FCC Rcd 21585, ¶ 6 (1998) (“[T]he term ‘telecommunications carrier’ means essentially the same as common carrier.”), *aff’d Virgin Islands Tel. Corp. v. FCC*, 198 F.3d 921 (D.C. Cir. 1999); *Cable & Wireless, PLC Application for a License to Land and Operate in the United States a Private Submarine Fiber Optic Cable Extending Between the United States and the United Kingdom*, Cable Landing License, 12 FCC Rcd 8516, ¶ 13 (1997) (“The legislative history of the 1996 Act indicates that the definition of telecommunications services is intended to clarify that telecommunications services are common carrier services.”).

<sup>16</sup> *Federal-State Joint Board on Universal Service*, Report To Congress, 13 FCC Rcd 11501, ¶ 21 (1998) (“*Report to Congress*”).

Commission explained, “[a]n offering that constitutes a single service from the end user’s standpoint is not subject to carrier regulation simply by virtue of the fact that it involves telecommunications components.” *Id.* ¶ 58. Stated slightly differently, in reviewing the classification as either a telecommunications service or an information service, the question is “whether, functionally, the consumer is receiving two separate and distinct services.”<sup>17</sup>

Although this is as far as the Commission takes the analysis in the NPRM (at least in terms of its tentative conclusions), there is one more critical step. As explained, Congress expected that the regulatory framework that predated the 1996 Act would inform the application of the 1996 Act definitions. As also explained, under the *Computer II* framework and under the *Frame Relay Order*, it is clear that the underlying transmission used by a facilities-based carrier to provide an information service is subject to regulation under Title II, that is, as a telecommunications service. As also mentioned, the *Frame Relay Order* left open the question of whether that telecommunications service is actually provided to the purchaser of the information service or whether it is provided by the carrier to itself and then used for the provision of an information service. The *Report to Congress* seems merely to have clarified that the Commission understands that the latter explanation is more accurate. The *Report to Congress* stated that a non-carrier ISP that provides information service over its own facilities uses telecommunications and does not provide telecommunications to purchasers of its information services. *See id.* ¶ 69. It went on to state that such a firm is arguably “furnishing raw transmission capacity to itself.” *See id.* and n.138. The Commission has also separately

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<sup>17</sup> *Report to Congress* ¶ 60 and n.122 (quoting *Federal-State Joint Board on Universal Service; Access Charge Reform, Price Cap Performance Review for Local Exchange Carriers, Transport Rate Structure and Pricing, End User Common Line Charge*, Fourth Order on Reconsideration in CC Docket No. 96-45; Report and Order in CC Docket Nos. 96-45, 96-262, 94-1, 91-213, 95-72, 13 FCC Rcd 5318, ¶ 282 (1997)).

ruled that a telecommunications carrier provides telecommunications service when it provides transmission service to unaffiliated ISPs.<sup>18</sup> In light of these decisions, it seems therefore that the Commission must reach the conclusion that a carrier subject to *Computer II* uses telecommunications service when providing information service over its own facilities to an end user and provides telecommunications service to itself.

More recently, in the *CPE/Enhanced Services Bundling Order*, the Commission recognized that there is a telecommunications service component in an information service provided by a carrier over its own facilities.<sup>19</sup> In that order, the Commission acknowledged that facilities-based carriers bundle xDSL and enhanced/information services, as would be the case where an ILEC provides broadband Internet access. *See id.* ¶ 17. The Commission observed further that its rules require entities with interstate end-user telecommunications revenues to contribute to universal service, but that no contribution was required for end-user information service revenue. *See id.* ¶ 47. The Commission then established certain safe harbor rules for determining the extent to which the end-user revenues from such bundled offerings are

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<sup>18</sup> *See Deployment of Wireline Services Offering Advanced Telecommunications Capability*, Second Report and Order, 14 FCC Rcd 19237, ¶ 21 (1999) (“*AOL Bulk Services Order*”) (“bulk DSL services sold to Internet Service Providers ... are telecommunications services, and as such, incumbent LECs must continue to comply with their basic common carrier obligations with respect to these services.”).

In the NPRM, the Commission seeks comment on whether it should continue to classify the provision of broadband on a stand-alone basis as a telecommunications service. NPRM ¶ 26. The Commission has the authority to impose common carrier obligations on the provision of transmission service where appropriate. *See Computer II Final Decision* ¶ 122 (concluding that a determination of a service is a common carrier service cannot be “dependent entirely on the intentions of a service provider,” but instead “as the Court’s opinion in *NARUC I* acknowledges, an element which must also be considered is any agency determination to impose a legal compulsion to serve indifferently”). Given the anticompetitive concerns discussed herein, there is no question that the Commission must exercise this authority with regard to broadband service, regardless of the manner in which ILECs would like to offer that service.

<sup>19</sup> *See Policy and Rules Concerning the Interstate, Interexchange Marketplace; Implementation of Section 254(g) of the Communications Act of 1934, as amended; 1998 Biennial Regulatory Review -- Review of Customer Premises Equipment and Enhanced Services Unbundling Rules in the Interexchange, Exchange Access and Local Exchange Markets*, Report and Order, 16 FCC Rcd 7418 (2001) (“*CPE/Enhanced Services Bundling Order*”).

attributable to telecommunications service. *See id.* ¶¶ 48-51. In so doing, “the Commission implicitly assumed that the carrier would be subject to the Commission’s mandatory contribution authority by virtue of the existence of a telecommunications service [the underlying transmission].” NPRM n.130. As it recognizes in the NPRM, the Commission thus determined that “if a wireline telecommunications carrier offers wireline broadband Internet access to end users for a single price [i.e., bundles information and telecommunications services], it must also contribute to universal service.”<sup>20</sup>

Nor is this conclusion in any way in conflict with the Commission’s recent Declaratory Ruling regarding the regulatory status of cable modem service. In that order, the Commission concluded that cable modem service providers provide an information service to end users over their own facilities.<sup>21</sup> The Commission then determined that *Computer II* requirements do not currently apply to cable modem service providers. *See id.* ¶¶ 43-45. On this basis as well as the nature of cable modem service providers’ offerings to unaffiliated ISPs, the Commission concluded that at most cable modem service included the provision of telecommunications on a private carriage and not a common carriage basis to ISPs. *Id.* ¶ 54. Thus, the *Cable Modem Order* addressed a completely different legal context than is the case with ILECs subject to *Computer II* obligations. As to the going-forward status of the transmission used to provide

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<sup>20</sup> *Id.* ¶ 72. The *CPE/Enhanced Services Bundling Order* and the discussion of that order in the NPRM imply that the information service offered to end users by a facilities-based carrier includes a telecommunications service component. If one were to consider only the *Computer II* and *Frame Relay* decisions, this would be a plausible approach. Indeed, (as discussed below) it may well be that the Commission should adopt this construction in the future, since it will make it possible to enforce many of the more important requirements of the 1996 Act. Nonetheless, this approach appears to run counter to the Commission’s decisions interpreting the definitions of the 1996 amendments described above.

<sup>21</sup> *See Inquiry Concerning High-Speed Access to the Internet Over Cable and Other Facilities; Internet Over Cable Declaratory Ruling; Appropriate Regulatory Treatment for Broadband Access to the Internet Over Cable Facilities*, Declaratory Ruling and Notice of Proposed Rulemaking, 17 FCC Rcd 4798, ¶ 39 (2002) (“*Cable Modem Order*”).

cable modem service, the Commission is currently reviewing the extent to which cable operators should be required to provide that transmission as a separate Title II offering or pursuant to some other regulatory regime (such as the one imposed on AOL-Time Warner as a condition of FTC merger approval).<sup>22</sup>

In sum, there should be no dispute that under current law, ILECs provide a fully regulated, tariffed telecommunications service to themselves when they provide broadband Internet access via their own transmission facilities subject to *Computer II* requirements. Any legal conclusions reached in this proceeding must reflect this fact.

**IV. RETAINING THE TELECOMMUNICATIONS SERVICE CLASSIFICATION OF THE TRANSMISSION COMPONENT OF BROADBAND INTERNET ACCESS AVOIDS FUNDAMENTAL PROBLEMS ASSOCIATED WITH THE ALTERNATIVES WITHOUT SACRIFICING REGULATORY FLEXIBILITY.**

There are powerful reasons why the Commission must continue to require the ILECs to provide the telecommunications component of information services provided over their own facilities as stand-alone telecommunications services. The fact that the ILECs continue to have market power because of their control over bottleneck end-user facilities has been exhaustively documented in the *Non-Dominance* proceeding.<sup>23</sup> The market power considerations (including those related to discrimination and cross-subsidy) that caused the Commission initially to impose the *Computer II* obligations thus remain and are unquestionably a sufficient basis for retaining the *Computer II* requirements. The problems associated with ILEC market power are even more acute now than at the time of the Commission's *Computer II* decisions because competitors in the provision of telecommunications service can be harmed in addition to unaffiliated

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<sup>22</sup> See *Cable Modem Order* ¶ 95; *In re America Online, Inc. and Time Warner Inc.*, FTC Docket No. C-3989, Agreement Containing Consent Orders, Decision and Order, 2000 WL 1843019 (FTC) (Dec. 14, 2000).

<sup>23</sup> See, e.g., Time Warner Telecom Comments, CC Dkt No. 01-337 (filed Mar. 1, 2002); AT&T Corp. Comments, CC Dkt No. 01-337 (filed Mar. 1, 2002); WorldCom, CC Dkt No. 01-337 (filed Mar. 1, 2002).

information service providers. Furthermore, critically important regulatory requirements embedded in the 1996 amendments that are unrelated to limiting the ILECs' exercise of market power, most importantly universal service and CALEA, are triggered only by the provision of a telecommunications service and can only be implemented if a telecommunications service is offered on a stand-alone basis. Moreover, the Commission has full flexibility to tailor regulation as needed if it retains the telecommunications service classification. Indeed, the broader context of the Communications Act reveals that the only appropriate (probably the only lawful) means of tailoring regulation to market conditions is to exercise forbearance while retaining the telecommunications service classification.

**A. Classifying Broadband Internet Access Service Provided By ILECs As An Information Service Without A Telecommunications Service Component Would Create Very Serious Practical, Policy, And Legal Problems.**

There are three broad categories of difficult issues that the Commission would be forced to address if it were to eliminate the telecommunications service classification of the transmission used by ILECs to provide Internet access service. *First*, the ILECs continue to have market power over end-user connection facilities used to provide the transmission for broadband Internet access. Even in the broadband product markets where there is some intermodal competition, that competition exists in strikingly few geographic areas. For example, the Precursor Group recently explained that

[t]he cable and DSL footprints overlap in only a quarter to a half of the U.S. Five percent of that footprint overlaps with overbuilders. Another 10%-20% of the U.S. is served only by satellite, which hypothetically competes nationwide, but which currently has a capacity limitation of 1-2m broadband customers and a huge cost differential that limits it to a rural niche. The remainder of the U.S. gets either DSL or cable modem, but not both. In short, there is a lack of nationwide facilities -based competition and choice. Since broadband suppliers faltered and prices rose last year, growth has slowed.

*Best Hope for Telecom* at 1. In other product markets, such as the broadband services demanded by medium and large businesses, there are no viable intermodal alternatives and the ILECs are again often the only source of end-user connections. (See Section V below) Removing those facilities from Title II regulation would harm competitors in the provision of *telecommunications service* as well as Internet access. For example, TWTC often relies on ILEC high-capacity loops and loop-transport combinations to provide competitive voice and data (including Internet access) services. If broadband transmission were removed from Title II regulation, the ILECs would be far more able to deny, delay, degrade, and overprice TWTC's access to these facilities than is currently the case.<sup>24</sup> In so doing, the ILECs are likely to exploit both their superior access to information about their networks as well as any ambiguity in the law to their maximum advantage. Many, even all, of the arguments the ILECs make in support of denying inputs

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<sup>24</sup> The Commission has repeatedly recognized that control over bottleneck facilities gives ILECs the incentive and opportunity to engage in anticompetitive behavior. See *Applications of Ameritech Corp. and SBC Communications, Inc. for Consent to Transfer Control of Corporations Holding Commission Licenses and Lines Pursuant to Sections 214 and 310(d) of the Communications Act and Parts 5, 22, 24, 25, 63, 90, 95, and 101 of the Commission's Rules*, Memorandum Opinion and Order, 14 FCC Rcd 14712, ¶ 190 (1999), *vacated on other grounds, Ass'n of Communications Enterprises v. FCC*, 235 F.3d 662 (D.C. Cir. 2001); *Application of GTE Corp. and Bell Atlantic Corp. for Consent to Transfer Control of Domestic and International Sections 214 and 310 Authorizations and Application to Transfer Control of a Submarine Cable Landing License*, Memorandum Opinion and Order, 15 FCC Rcd 14032, ¶ 176 (2000); *Implementation of the Non-Accounting Safeguards of Sections 271 and 272 of the Communications Act of 1934, as amended*, First Report and Order and Further Notice of Proposed Rulemaking, 11 FCC Rcd 21905, ¶¶ 135-141 (1996) ("*Non-Accounting Safeguards Order*"), *remanded, Bell Atlantic Tel. Co. v. FCC*, No. 97-1067 (D.C. Cir. 1997), *vacated on other grounds, U.S. West, Inc. v. FCC*, 182 F.3d 1224 (10th Cir. 1999); *Regulatory Treatment of LEC Provision of Interexchange Services Originating in the LEC's Local Exchange Area; Policy and Rules Concerning the Interstate, Interexchange Marketplace*, Second Report and Order in CC Docket No. 96-149 and Third Report and Order in CC Docket No. 96-61, 12 FCC Rcd 15756, ¶ 98 (1997) ("*ILEC Classification Order*"); see also *Motion of AT&T Corp. to be Reclassified as a Non-Dominant Carrier*, Order, 11 FCC Rcd 3271, ¶¶ 69-70 (1995) (emphasizing the significance to a market power analysis of the fact that AT&T did not control bottleneck facilities after the divestiture); Comments of TWTC & XO, CC Dkt. No. 01-321, at 7-8 (filed Jan. 22, 2002); Comments of AT&T, CC Dkt. No. 01-321, at 7 (filed Jan. 22, 2002); Comments of WorldCom, CC Dkt. No. 01-321, at 19-20 (filed Jan. 22, 2002) (describing states that have reviewed competitiveness of special access); *State of New York Public Service Commission, Opinion and Order Modifying Special Services Guidelines for Verizon New York Inc., Conforming Tariff, and Requiring Additional Performance Measurement Reporting*, Case 00-C-2051, Case 92-C-0665, Opinion No. 01-1, at 9 (rel. June 15, 2001) ("*NYPSC Order*") (noting that Verizon's control of facilities, particularly the local loop, "represents a bottleneck to the development of a healthy, competitive market" for special access services).

needed by competitors may well be ultimately rejected by regulators and the courts. But this is beside the point. The ILECs' objective is to raise their rivals' costs and to slow their entry. This they can accomplish by pressing even unsound legal arguments and claims of technical infeasibility.

The Commission suggests in the NPRM that differences between broadband and narrowband information services make the common carrier classification of underlying transmission less necessary. *See* NPRM ¶¶ 15, 49. When it comes to end-user connections, there is simply no basis for such a conclusion. The high-capacity loops needed to provide broadband can just as easily be used in anticompetitive discrimination as narrowband loops. As the Commission observed in *Computer II*, “[t]he importance of the control of local facilities as well as their location and number, cannot be overstate[d].” *Computer II Final Decision* ¶ 219. So long as competitors in the provision of telecommunications services and information services must obtain access to such facilities to provide service, Title II duties to deal must be imposed. The fact that such competitors need these facilities to provide higher capacity services than has been the case is utterly irrelevant.

While there is no way to predict the many ways in which the ILECs would use the unregulated status of broadband transmission to deny, delay, or degrade competitors' access to the inputs they need, some hypothetical examples are nonetheless worth discussing.<sup>25</sup> Consider

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<sup>25</sup> The courts have recognized that discrimination continues to be a serious risk to competitors. In *Computer II*, the Commission applied a separate affiliate requirement for enhanced services to prevent discrimination. Although the Commission attempted to replace the separate affiliate requirement in *Computer III*, the Ninth Circuit overturned the Commission's reasoning because the Commission had not adequately explained how the *Computer III* requirements would limit opportunities for discrimination. Since that time, the Commission has never justified elimination of the *Computer II* structural separation requirements in light of Ninth Circuit's decision. *See Amendment of Sections 64.702 of the Commission's Rules and Regulations (Third Computer Inquiry): and Policy and Rules Concerning Rates for Competitive Common Carrier Services and Facilities Authorizations Thereof; Communications Protocols under Section 64.702 of the Commission's Rules and Regulations*, Report and Order, Comments of Time Warner Telecom CC Docket Nos. 02-33, 95-20, 98-10 May 3, 2002

for example an ILEC that is building a high-capacity loop connection to an office building. The purpose of that high-capacity loop is to provide broadband Internet access to the businesses in the building. Assume that a CLEC like TWTC seeks to purchase excess capacity on that building connection as special access to also serve businesses in the building. If broadband transmission were not subject to Title II, the ILEC would likely argue that its competitors are not permitted to purchase capacity on the high-capacity circuit under the ILECs' special access tariff (Title II offering) for any purpose. If the CLEC then sought to purchase access to the circuit as a UNE, the ILEC would likely argue that this too is not possible because the facility is not "used [by the ILEC] in the transmission, routing, or other provision of a telecommunications service." 47 U.S.C. § 153(29). In fact, the ILEC could argue that, given the absence of any Title II duty to deal with the CLEC, it is under no obligation to sell access to the end-user circuit under any circumstances. Even if the ILEC were to offer its competitor access to the circuit on a private carriage basis, the terms of such an offering would likely be so onerous as to make competitive entry impractical.

Consider next an ILEC with a high-capacity loop to a particular business end-user location. The loop has been used in the past for the provision of telecommunications service by the ILEC. Assume that a CLEC now seeks to obtain the loop as a UNE for the purpose of providing broadband Internet access. The ILEC could assert that the requesting carrier may not use the loop for this purpose. In support of its position, the ILEC could argue that UNEs should only be available to requesting carriers "for the provision of a telecommunications service." *Id.* § 251(c)(3). Given that there would be no telecommunications service provided (even to the

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104 FCC 2d 958, ¶ 3 (1986) ("*Computer III*") (subsequent history omitted); *California v. FCC*, 39 F.3d 919, 933 (9th Cir. 1994) ("[The] FCC has failed to explain or justify its change in policy regarding nonstructural safeguards against access discrimination. For this reason, ... that portion of [the] order is arbitrary and capricious.").

CLEC ISP division by the CLEC carrier division), the ILEC would argue that the CLEC fails the test.

Now consider a situation in which the ILEC provides a bundled service offering to businesses that includes both broadband Internet access and pure data and voice transmission services. In this offering, the customer can change the allocation of the bandwidth so that the amount of capacity used for broadband Internet access and to provide Title II services varies from month to month. Assume further that this is a popular business offering and that CLECs offer a similar product in competition with the ILEC using high-capacity end-user circuits leased from the ILEC. In these circumstances, ILECs will have the incentive to provide maintenance and repair service to their own customers on terms and conditions that are superior to those provided to competitors. When the competitors complain about this discrimination, the ILECs could respond that they are under no obligation to provide non-discriminatory repair and maintenance for non-Title II services. When CLECs then seek to obtain repair and maintenance performance data for the regulated services alone, the ILECs could respond that such information is unavailable because they use the same employees to perform these functions for both the regulated and unregulated services, often a single problem with a circuit will affect both the regulated and unregulated service, and in any event the changing nature of the offering would require a month-by-month assessment of how the end-user customer allocates the services provided over the circuit, which would be overly burdensome. This is the kind of argument in which ILECs have access to all of the relevant information and which regulators and competitors are virtually powerless to refute.

TWTC does not agree with the hypothetical legal arguments described herein, but each argument is at least a gray area today, and there is no way to predict how many new gray areas

might become apparent in the future. Every such ambiguity is an opportunity for ILECs to slow roll and frustrate competitors. Yet the longer term picture is even grimmer. Over time, the ILECs would have the incentive to integrate the switching/routing and multiplexing equipment used for regulated and unregulated services. This will give them more opportunities to claim that a particular piece of equipment or a functionality is not subject to regulation and therefore unavailable to competitors who need it. If all services become digital as a result of convergence, drawing lines between regulated and unregulated services will be simply arbitrary and, ironically, will force regulators to play a highly intrusive role in determining what functions and services and equipment should be subject to Title II and what should not. Again, given their unique access to information about their networks, the ILECs would have a tremendous advantage over regulators and competitors in disputes concerning the line between regulated and unregulated facilities.

Non-price anticompetitive discrimination is a serious potential problem, but it is by no means the end of the story. If Title II regulation were eliminated for the underlying transmission used in the provision of broadband Internet access, ILECs would also likely be able to engage in price squeezes. That is, the ILECs could sell broadband transmission facilities to CLECs at a high price and then set the ILEC end-user service price low enough to prevent the CLECs from competing. Absent the Title II requirement that prices for interstate service be just and reasonable, ILECs would be barred only by antitrust laws from engaging in this kind of behavior.

*Second*, eliminating Title II regulation of transport used for broadband Internet access would also embroil the Commission in difficult and ultimately arbitrary cost allocation proceedings. Under the Commission's rules, costs incurred by ILECs are classified in cost categories under the Commission's Part 32 rules. *See* 47 C.F.R. §§ 32.5999-32.6790. Those

costs must then be allocated between regulated and unregulated accounts pursuant to section 64.901 of the Commission's rules. 47 C.F.R. § 64.901. If the Commission were to eliminate Title II regulation for the transmission underlying broadband Internet access, Section 64.901 methodology would apply. Under that rule, central office and outside plant equipment must be allocated based on the "relative use" of the facilities for the provision of regulated and unregulated services. *Id.* § 64.901(b)(4). This approach was designed for a network that is used on a per minute basis for both regulated or unregulated service. But of course broadband usage cannot be quantified on the basis of per minute usage. The Commission would therefore need to devise a new way of allocating the costs for this purpose.

Any such allocation methodology would be arbitrary because the costs of facilities like high-capacity loop connections used for both regulated and unregulated service are common costs. As the Commission has recognized, there are "inherent difficulties in allocating joint and common costs...." *Computer II Final Decision* ¶ 238. There is no principled basis for determining how to allocate common costs to one service or another. A high-capacity loop could be used one month exclusively or predominantly for regulated voice connections and another month exclusively or predominantly for unregulated Internet access. Again, this problem would become even more acute if all of the signals carried over a facility are digital – simply ones and zeros routed dynamically over the circuit.

Of course, the ILECs also continue to have the incentive to cross-subsidize unregulated services offered over facilities that are also used to provide services subject to rate regulation. This would be precisely the case here. ILECs would provide broadband Internet access over the same end user (and possibly also central office and transport) facilities used to provide such services as POTS. Most states have now followed the Commission's lead to replace rate of

return regulation of voice service with price caps, but this has reduced but not eliminated the incentive to cross-subsidize. A regulated firm has the incentive to cross-subsidize an unregulated service where it can misallocate the costs of such service to the regulated side and be assured that it can raise prices on regulated services and earn a profit on the misallocated costs.<sup>26</sup> Although price caps sever the immediate connection between costs and prices, they do not eliminate the connection.<sup>27</sup> Rather, the inevitable periodic review of the reasonableness of price cap levels (such as the recent CALLS proceeding) causes regulators to review the rate of return an ILEC earns on investments. A high rate of return leads to the conclusion that prices are unreasonably high and must be reduced (exactly what occurred in CALLS).<sup>28</sup> Thus, even under price caps, ILECs have the incentive to pad the rate base with artificial increases in costs to make it look as though they earn only a reasonable profit on regulated service. The result is that regulated ratepayers pay inefficiently high rates for their service and competition in the provision of unregulated service is distorted because the regulated firm has artificially low costs and can charge low prices regardless of whether its true costs would allow it to do so.

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<sup>26</sup> See *ILEC Classification Order* ¶ 103, n.276; *Non-Accounting Safeguards Order* ¶ 180. Moreover, this practice not only harms ratepayers but also harms competition in general by giving the incumbent an unfair advantage over its competitors. See *ILEC Classification Order* ¶ 103; Reply Comments of U.S. Dept. of Justice, CC Dkt. Nos. 96-149, 96-61 at 23-26 (filed Aug. 30, 1996).

<sup>27</sup> See Marius Schwartz, *The Economic Logic for Conditioning Bell Entry into Long Distance on the Prior Opening of Local Markets*, 18 *Journal of Regulatory Economics* 247, 263-64 (Nov. 2000); *ILEC Classification Order* n.289.

<sup>28</sup> See *Access Charge Reform; Price Cap Performance Review for Local Exchange Carriers, Low-Volume Long Distance Users, Federal-State Joint Board on Universal Service*, Sixth Report and Order in CC Docket Nos. 96-262 and 94-1; Report and Order in CC Docket No. 99-249; Eleventh Report and Order in CC Docket No. 96-45, 15 FCC Rcd 12962 (2000) (“CALLS”) (subsequent history omitted). Importantly, the ILECs have for years argued that states must rebalance local rates so that residential rates are increased to a level that recovers the true cost of providing such service. See, e.g., SBC Comments, CC Dkt No. 01-92, at 9-11 (Aug. 21, 2001). Such rate rebalancing would almost certainly cause state commissions to review the costs allocated to residential service. This fact again illustrates the immediate relevance of the incentive to misallocate costs to regulated services.

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*Finally*, eliminating the telecommunications service classification of the transmission used by ILECs to provide broadband Internet access service would prevent the Commission from enforcing some of the most central requirements of the 1996 Act. For example, the Commission would encounter serious problems in implementing its universal service regime. The most obvious problem would be encountered if the Commission were ever to seek to provide federal support for broadband. This is not implausible. Broadband Internet access is arguably evolving into a service of such fundamental importance that the Commission could reasonably conclude in the future that it should be subject to universal service support.<sup>29</sup> But, classifying broadband Internet access as an information service without a telecommunications service component would preclude the Commission from providing universal service support for the transmission component of broadband Internet access.

Section 254 defines universal service as “an evolving level of telecommunications services that the Commission shall establish periodically under this section, taking into account advances in telecommunications and information technologies and services.” 47 U.S.C. § 254(c)(1). The Commission, with recommendations by the Joint Board, may modify the “evolving” definition of services that can be supported. *See* 47 U.S.C. § 254(c)(2). However, Section 254 limits support to telecommunications services. As the Commission explained in the *Universal Service First Report & Order*,

We agree with the Joint Board’s determination that Internet access consists of more than one component. Specifically, we recognize that Internet access includes a network transmission component, which is the connection over a LEC network from a subscriber to an Internet Service Provider, in addition to the underlying information service.

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<sup>29</sup> *See* The Consumer Energy Council of America, *Universal Service: Policy Issue for the 21st Century* at 43-51 (Mar. 2001) (filed Apr. 10, 2001 in CC Docket No. 96-45) (discussing the merits of expanding universal service support to advanced services and recommending a task force to examine the issue).

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We conclude that the information service component of Internet access cannot be supported under section 254(c)(1), which describes universal service as “an evolving level of telecommunications services.”<sup>30</sup>

Although the Commission properly concluded that support for broadband was not warranted based on the record at that time, it left the possibility of support for the telecommunications service component open for future consideration. Section 254 all but requires the Commission to include in the list of supported services any service that (1) is “essential to education, public health, or public safety”; (2) is subscribed to by a substantial majority of residential customers; (3) is widely deployed in public telecommunications networks; and (4) for which support would be consistent with the public interest, convenience, and necessity. *See* 47 U.S.C. § 254(c)(1)(A)-(D). A decision here to classify broadband Internet access as an information service without a telecommunications service component would prevent the Commission from including the transmission component of broadband Internet access in the list of subsidized services.<sup>31</sup> In so doing, it would artificially exclude a service of fundamental importance to society in direct conflict with the universal service policy goals of the Act.

But the Commission would also encounter problems in assessing appropriate universal service contribution obligations on the telecommunications portion of broadband Internet access provided by ILECs. To begin with, under the existing end-user telecommunications revenue regime, the Commission would need to try to assess the revenues associated with the provision

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<sup>30</sup> *See Federal-State Joint Board on Universal Service, Report and Order, 12 FCC Rcd 8776, ¶ 83 (1997) (“Universal Service First Report & Order”)* (subsequent history omitted) (citations omitted).

<sup>31</sup> To the extent that the Commission could find any rational basis for supporting broadband Internet access in light of an information service classification with no telecommunications service component, administration of this support would present insurmountable practical problems. Distinguishing costs for the supported telecommunications service from the costs of the information service when the telecommunications service component is not offered on a stand-alone basis would likely be an impossible undertaking.

of telecommunications by ILECs to their ISP operations. But if such telecommunications were not offered on a stand-alone basis, as is required under *Computer II*, the Commission would be required to engage in some form of accounting of the value of the telecommunications. Such an accounting approach would be necessarily arbitrary and would give carriers obvious opportunities to understate the amount of revenue that is subject to the contribution obligation.<sup>32</sup>

Even if the Commission were to adopt a connections-based approach to universal service contributions, as it is currently contemplating, it is not at all clear that these problems would be avoided. As TWTC explained in its comments addressing a connections-based approach, any such approach must ensure that contribution obligations are distributed among providers of interstate telecommunications service and telecommunications on an “equitable and nondiscriminatory basis.”<sup>33</sup> Under a connections-based approach, the requirements of Section 254(d) could still force the Commission to determine the total, industry-wide interstate telecommunications service revenues and telecommunications revenues, and then allocate connections-based contribution obligations among the recipients of these revenues in an equitable and nondiscriminatory manner. This would again cause the Commission to engage in some valuation of the telecommunications component of broadband Internet access service.

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<sup>32</sup> The Commission has recognized the substantial administrative obstacles associated with determining the value of the telecommunications component of an information service provided by a facilities-based information service provider not subject to *Computer II* obligations. In the *Report to Congress*, for example, it stated that “[a]s a theoretical matter, it may be advisable to exercise our discretion under the statute to require such providers that use their own transmission facilities to contribute to universal service. . . . We recognize, however, that there are significant operational difficulties associated with determining the amount of such an Internet service provider’s revenues to be assessed for universal service purposes and with enforcing such requirements.” *Report to Congress* ¶ 69.

<sup>33</sup> 47 U.S.C. § 254(d); see Comments of Time Warner Telecom, XO Communications, and Allegiance Telecom, CC Dkt. No. 96-45 (filed Apr. 22, 2002).

Absent a requirement that such service be provided separate and apart from the information service component, any valuation would be arbitrary and subject to ILEC gamesmanship.

Moreover, classifying broadband Internet access as an information service without a telecommunications service component would prevent the Commission from implementing the important law enforcement provisions of CALEA. The Commission's implementation of CALEA is among its most critical responsibilities. CALEA applies by its terms to "telecommunications carriers" and not to "persons or entities insofar as they are engaged in providing information services."<sup>34</sup> The statute expressly excludes information services from its assistance capability requirements. *See id.* § 1002(b)(2)(A). Nor does it apply to the provision of transmission on a private carriage basis. If the Commission concludes that broadband Internet access is an information service with no telecommunications service component, the transmission services associated with that information service would no longer be subject to CALEA's requirements. This is but a single example that illustrates the need for the Commission to carefully consider the collateral effects on the public interest of its effort to deregulate through reclassification.

Finally, the Commission's classification of broadband Internet access as an information service with no telecommunications component would limit the Commission's ability to implement and enforce a variety of other statutory priorities, including network reliability and consumer protection provisions. For example, the Commission has charged the Network Reliability and Interoperability Council with making recommendations regarding network reliability and interconnectivity under Section 256 of the Act. *See* 47 U.S.C. § 256. Ensuring

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<sup>34</sup> 47 U.S.C. §§ 1002(a), 1001(8). Although CALEA's definitions differ slightly from those in Section 3 of the Act, 47 U.S.C. § 153, it is clear that Congress intended the definitions of "telecommunications carriers" and "information services" to apply in the same way under both statutes.

that carriers maintain the integrity of the network is a key responsibility of the Commission. Yet, the mandate of Section 256 is limited to telecommunications service. Furthermore, important consumer protections apply only to telecommunications services. For example, the Act's protections of customer proprietary network information apply only to telecommunications services. *See* 47 U.S.C. § 222. If the Commission adopts a classification that does not include a telecommunications service component, it would be unable to enforce these important provisions, among others, with respect to broadband Internet access services.<sup>35</sup>

**B. Requiring The ILECs To Provide The Underlying Transmission For Internet Access As A Telecommunications Service Would Avoid These Problems While Permitting The Commission The Flexibility To Tailor Regulation As Intended by Congress.**

Title II provides ample flexibility to tailor regulations applicable to telecommunications services, where appropriate, in accordance with market conditions. Thus, the Commission should not and indeed may not become entangled in the problems described above in order to diminish the level of regulation on broadband transmission. Indeed, the Commission probably does not have the authority to address the issue of broadband deployment by changing the regulatory classification of that service. First, the Act, in Section 10, grants the Commission for the first time sweeping forbearance authority to scale back Title II requirements that have outlived their usefulness. Under Section 10, the Commission may -- indeed *shall* -- forbear from applying any regulation or any provision of the Act to a telecommunications carrier or telecommunications service if the Commission determines that (1) enforcement is not necessary to ensure charges and practices that are just and reasonable and are not unjustly or unreasonably

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<sup>35</sup> It should be noted that several of these requirements (such as CPNI) are only meaningful if they can be applied to end users. This should cause the Commission to re-think its current view that information services never include a telecommunications service component.

discriminatory; (2) enforcement is not necessary for consumer protection; and (3) forbearance is consistent with the public interest. *See* 47 U.S.C. § 160(a). Although Section 10 does not allow the Commission to forbear from enforcing Section 271 and 251(c) initially, even these provisions are subject to forbearance once they are “fully implemented.” *See id.* § 160(d).

In any event, the manner in which Section 271 applies to information services provided by BOCs has already been settled by the Commission. *See* 47 U.S.C. § 271. The Commission recently held that BOC in-region interLATA information services constitute “interLATA services” subject to the Section 271 line of business restriction. After careful analysis of the statutory classifications, the Commission concluded that “[a] BOC ... may provide interLATA information services only in accordance with the provisions of section 271.”<sup>36</sup> Thus, in-region interLATA broadband Internet access provided by BOCs will be subject to Section 271 regardless of what the Commission decides in this proceeding.

Moreover, the Section 251(c) requirement that has been the source of the greatest concern regarding broadband is unbundling. *See* 47 U.S.C. § 251(c). Yet the Commission has the authority, where appropriate, to eliminate unbundling obligations under Section 251(d)(2) prior to reaching any conclusion that Section 251(c) has been “fully implemented.”<sup>37</sup> Under Section 251(d)(2), the Commission may remove unbundling obligations when competitive conditions warrant by finding that “the failure to provide access to such network elements would [not] impair the ability of the telecommunications carrier seeking access to provide the services that it seeks to offer” with respect to non-proprietary elements. *Id.* § 251(d)(2)(B). Indeed, the

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<sup>36</sup> *See Implementation of the Non-Accounting Safeguards of Section 271 and 272 of the Communications Act of 1934, as amended*, Order on Remand, 16 FCC Rcd 9751, ¶ 2 (2001).

<sup>37</sup> *See id.* § 251(d)(2). To the extent that broadband transmission is classified as a telecommunications service, the ILEC facilities used to provide that service would be subject to Section 251(c) requirements. *See WorldCom, Inc. v. FCC*, 246 F.3d 690, 694-695 (D.C. Cir. 2001).

Commission has committed to review the unbundling obligations every three years. Again, this demonstrates that the requirement that ILECs provide the transmission underlying a broadband Internet access service as a telecommunications service does not limit the Commission's authority to tailor regulations of broadband as is appropriate for market conditions.

In addition, Congress directed the Commission to review its regulations biennially to determine whether they are "no longer necessary in the public interest as a result of meaningful economic competition...." *Id.* § 161(a)(2). Together, Sections 10 and 11 (as well as Section 251(d)(2)) provide the Commission unprecedented authority to reduce regulation where appropriate. The emphasis of these provisions is unquestionably on competition. They make clear that deregulation is appropriate only where competition can be relied upon to replace regulation to discipline competitors. When competitive conditions warrant, the Commission will have authority to appropriately tailor regulations of carriers and services within the Title II framework.

The extensive regulatory flexibility granted the Commission under the 1996 amendments reflects Congress' intent that the Commission would adjust regulations applicable to broadband telecommunications services by retaining the telecommunications service classification and exercising its powers of regulatory forbearance. The broader structure and context of the 1996 amendments support this conclusion. In adopting the 1996 Act, Congress clearly recognized the deployment of broadband as an important policy goal, as is demonstrated by Section 706. Congress also was well aware that ILEC broadband transmission services used in the provision of information services were classified as telecommunications services by the Commission, and, as discussed, Congress clearly indicated that it expected the definitions in the Act to be applied in a manner that is consistent with the *Computer II* framework. Finally, Congress made it clear

that many critically important regulations in the 1996 Act, most especially universal service, would only apply to telecommunications services. Given broadband's recognized importance, it strains credulity to assert that Congress expected that such services would have been exempt from universal service and other important requirements such as CALEA. All of this shows that the Commission must pursue its regulatory agenda for broadband within the Title II framework supplied by Congress; it may not pursue that agenda outside of that framework.<sup>38</sup>

**V. IN ALL EVENTS, THE COMMISSION MUST ENSURE THAT ILECS PROVIDE THE TRANSMISSION COMPONENT OF BROADBAND INTERNET ACCESS AS A TELECOMMUNICATIONS SERVICE WHERE ILECS HAVE MARKET POWER IN THE PROVISION OF SUCH TRANSMISSION.**

Regardless of its determinations with regard to mass market broadband services, the Commission can come to no other conclusion than that the only competitors in the provision of broadband service to medium and large businesses are intramodal and that ILECs continue to control high-capacity end-user connections used by those intramodal competitors.<sup>39</sup> Thus, whatever else the Commission may do, it must continue to treat as telecommunications services subject to dominant carrier regulation the transmission over end-user connections (including loop-transport combinations) that ILECs provide to themselves and then use to provide broadband Internet access.

The Commission's recent *Broadband Report* confirms that broadband services purchased by medium and large businesses deliver greater bandwidth at a significantly higher total cost than broadband services demanded by mass market customers. Only traditional wireline services

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<sup>38</sup> See *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 133 (2000) (quoting *Davis v. Michigan Dept. of Treasury*, 489 U.S. 803, 809 (1989)) (“[it is a] fundamental canon of statutory construction that the words of a statute must be read in their context and with a view to their place in the overall statutory scheme.”); see also *Nat'l Rifle Ass'n v. Reno*, 216 F.3d 122, 127 (D.C. Cir. 2000).

<sup>39</sup> See TWTC Comments, CC Docket No. 01-337 (filed Mar. 1, 2002) (providing detailed analysis of ILEC dominance of high-capacity end-user connections).

of DS1 level capacity and above as well as HDSL and HDSL2 services and fiber provide the consistently high speeds and advanced features required by medium and large businesses.<sup>40</sup> Moreover, there is credible evidence suggesting that there is a lack of competitive performance with respect to broadband services purchased by medium sized and large business customers. This is primarily because the ILECs continue to control bottleneck end-user connections for a significant percentage of such customers.

Not surprisingly, the statistics on availability of last mile connections in the Commission's *Broadband Report* and *Local Competition Report*<sup>41</sup> demonstrate that traditional wireline and fiber connections (both overwhelmingly provided by ILECs) are used in the vast majority of cases to serve medium and large business customers. For example, TWTC serves its medium and large business customers using either ILEC special access end-user connections or fiber end-user connections TWTC builds. Moreover, as CLECs that entered the market to serve the largest, highest margin customers gradually move their marketing efforts down to more medium sized businesses and out to geographic areas that are adjacent to the CLECs' network footprints, it is likely that they will become more, rather than less, reliant on ILEC end-user connections. This is because medium sized customers often need only DS1 level connections, which TWTC and other CLECs often cannot efficiently self-deploy (to say nothing of whether building access and other practical problems prevent them from doing so as a practical matter). Significantly, those ILEC end-user connections are almost always provided in the form of special

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<sup>40</sup> Nor do other kinds of service providers, such as cable, satellite, and fixed wireless, offer alternatives to the ILEC end-user connections for the medium and large business market.

<sup>41</sup> See *Local Telephone Competition: Status as of June 30, 2001*, Industry Analysis Division, Common Carrier Bureau (Feb. 2002) ("*Local Competition Report*").

access service. This is in significant part due to the ILECs' refusal to construct end-user connections in the form of UNEs.

Given their control over bottleneck facilities in the provision of these services, the ILECs' dominant market share,<sup>42</sup> and the high entry barriers (especially with regard to obtaining access to buildings) associated with competing in the provision of special access,<sup>43</sup> the ILECs clearly have market power in the provision of special access. But the critical point is that the same control over bottleneck facilities that gives the ILECs market power in the provision of special access for voice services also gives ILECs the incentive and opportunity to engage in anticompetitive conduct in the provision of broadband services to medium and large business customers in the future. The same special access end-user connections are used for all of these services.

It follows that if the ILECs are able to shelter high-capacity end-user connections from regulation, they will be free to engage in the kind of discrimination described above. This cannot be what the Commission intends. But this distinction shows that the only places for analyzing

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<sup>42</sup> See, e.g., *NYPSC Order* at 7 (concluding that Verizon's market share data shows its dominance in all geographic areas of New York); Reply Comments of AT&T Corp. on Use of Unbundled Network Elements to Provide Exchange Access Services, CC Docket No. 96-98, at 19 (filed Apr. 30, 2001) (stating that, at most, CLECs have 21.8 percent of the market share for special access facilities and this number includes resale revenues, which understates the ILECs' control of the underlying facilities); *Access Charge Reform, Price Cap Performance Review for Local Exchange Carriers, Interexchange Carrier Purchases of Switched Access Services Offered by Competitive Local Exchange Carriers*; *Petition of US West Communications, Inc. for Forbearance from Regulation as a Dominant Carrier in the Phoenix, Arizona MSA*, Fifth Report and Order and Further Notice of Proposed Rulemaking, 14 FCC Rcd 14221, ¶ 79 (1999), *aff'd*, *WorldCom, Inc. v. FCC*, 238 F.3d 449 (D.C. Cir. 2001) (finding that because of the potential for ILECs to abuse their dominant market power, they must maintain existing tariffed rates); *ILEC Forbearance Order* ¶ 29 (stating that US West reported that as of August 1998, it had a market share of over 77 percent of the special access and high-capacity dedicated transport market in Phoenix, and over 73 percent of this market in Seattle).

<sup>43</sup> See *Southwestern Bell Telephone Company Tariff F.C.C. No. 73*, Order Concluding Investigation and Denying Application for Review, 12 FCC Rcd 19311, ¶ 49 (1997) (explaining that "[n]ew entrants must make large upfront investments before they can even begin to offer [competitive transport or special access] service. For example, a new entrant planning to offer direct-trunked transport and special access would have to invest in transmission equipment, fiber, and a variety of other equipment to connect access customers with interexchange carriers (IXCs).").

the broader question of the regulatory treatment of broadband transmission beyond its classification under existing law are the *Non-Dominance* and *Triennial Review* proceedings. It is in those proceedings that the Commission can wield the precise scalpel of forbearance instead of the blunt instrument of definitional change proposed in the instant proceeding.

## VI. CONCLUSION

The Commission should adopt legal conclusions consistent with the discussion herein, and it should address the regulatory treatment of the telecommunications service component of broadband Internet access in the *Non-Dominance* and *Triennial Review* proceedings.

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