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 Dockets Nos. 95-20, 98-10

COMMENTS OF BELLSOUTH CORPORATION

BELLSOUTH CORPORATION

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TABLE OF CONTENTS

I. Introduction and Summary 1

II. The Commission Should Adopt its Conclusion that Broadband Internet Access Services are Information Services 10

III. The Competitive Environment Requires the Commission to Rid ILECs' Broadband Services of All Title II Regulations 12

A. The Commission Should Eliminate the Computer Inquiry Requirements to Ensure ILECs Receive Provider Parity with Other Broadband Service Providers, Not Merely Service Parity 12

1. The Commission Should Institute Provider Parity, Not Service Parity, Between ILECs and Cable Modem Providers 13
2. The Dramatic Changes in the Market and Regulatory Landscape Justifies Elimination of the Computer Inquiry Obligations on ILECs 15
   a. Intermodal Competition 16
   b. Intramodal Competition 17
   c. Rate Regulation 18
3. Computer Inquiry Requirements are Anticompetitive 19

B. ILECs Should be Allowed to Offer Stand-Alone Broadband Transmission Services as Private Carriage and Not Common Carriage 20

IV. The Commission Should Preempt State Regulation Over Broadband Services 24

V. Other Issues 26

A. The Commission Must Relieve ILECs of Part 64 Cost Allocation Obligations Associated with Broadband Services 26

B. Universal Service 29

1. ISPs Should Contribute to the Universal Service Fund 29
2. Section 254(k) 32

VI. Conclusion 34

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BellSouth Corporation, for itself and its wholly owned affiliated companies (collectively "BellSouth"), submits the following comments in response to the Common Carrier Bureau's recent *Notice of Proposed Rulemaking* in the above referenced proceeding.[1]

I. Introduction and Summary

The significance of the broadband market is abundantly clear. Numerous company leaders and analysts have stressed the importance of deployment of broadband facilities to the

[1] *In the Matter of Appropriate Framework for Broadband Access to the Internet over Wireline Facilities*; *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. 02-33, 95-20 and 98-10, FCC 02-42 (rel. Feb. 15, 2002) ("*Notice*").

mass market. Indeed, the current Presidential Administration,[2] Congress,[3] and even this Commission[4] recognize the possibilities that broadband can have on both the economy and on individual lives. Given broadband's importance, the Commission is in the process of analyzing policies that affect the delivery of broadband services. Many of these policies, as they relate to incumbent local exchange carriers ("ILEC"), are there by default and not by good analytical design. These policies were spawned in a voice world and have been forced on broadband services offered by ILECs simply because of the ILECs' position as local exchange providers in the pre-Telecommunications Act of 1996 ("1996 Act") environment. Technology and the 1996 Act, however, have changed everything. Not only are local exchange services now competitive pursuant to the market opening provisions of the 1996 Act but also numerous providers are delivering broadband services to consumers over facilities other than the ILECs' copper loop.

Indeed, competition is more than existent; it is thriving. Multiple forms of competition exist in broadband. Cable modems, wireless, both fixed and satellite, and phone lines are all used by competing service providers to bring broadband to the consumer. BellSouth, as well as other ILECs, fully documented the level of competition in the broadband market in the

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[2] *Deployment of Broadband Networks and Advanced Telecommunications,* Docket No. 011109273-1273-01, National Telecommunications and Information Administration.

[3] *See, e.g.*, Internet Freedom and Broadband Deployment Act of 2001, H.R. 1542, 107th Cong. (2d Sess. 2001); Broadband Regulatory Parity Act of 2002, S. ___, 107th Cong. (2d Sess. 2002) (intr. Apr. 29, 2002).

[4] *Notice*, ¶ 1 ("The widespread deployment of broadband infrastructure has become the central communications policy objective of the day. It is widely believed that ubiquitous broadband deployment will bring valuable new services to consumers, stimulate economic activity, improve national productivity, and advance economic opportunity for the American public.").

Broadband Non-Dominant proceeding.[5] Highlighting this evidence was the Commission's own recently released *Third Report* on advanced services.[6] In that report the Commission not only recognized that numerous carriers are providing broadband over various modes, but that one provider, cable modem providers, doubles its next closest competitor in market share.[7] Additionally, the report discusses many developing technologies that "have significant potential for expanding the availability of advanced telecommunications to more Americans."[8] The report goes on to find that "emerging technologies continue to stimulate competition and create new alternatives and choices for consumers."[9] Regulation is needed only as a surrogate for competition. As the Commission has acknowledged, when significant competition exists, regulators should take a hands-off approach to the market. In fact, the Commission has taken a very de-regulatory course for most broadband competitors.

Unfortunately, for no apparent reason other than their status as an ILEC, the Commission regulates but one type of broadband service provider – ILECs. With the documented amount of empirical evidence regarding competition, the Commission cannot in good faith continue to regulate the ILECs, and only the ILECs, with a heavy hand while all other providers operate with

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5 *In the Matter of Review of Review of Regulatory Requirements for Incumbent LEC Broadband Telecommunications Services*, CC Docket No. 01-337 ("*Broadband Non-Dominant Proceeding*"); *See* Comments of Verizon and Broadband Fact Report submitted therewith, CC Docket No. 01-337 (filed Mar. 1, 2002).

6 *In the Matter of 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 98-146, *Third Report*, FCC 02-33 (rel. Feb. 6, 2002) ("*Third Report*").

7 *Third Report*, ¶¶ 44, 49. Cable modem providers have 5.2 million high speed lines while DSL providers have only 2.7 million lines.

8 *Id.*, ¶ 79.

9 *Id.*, ¶ 89.

complete regulatory freedom. Asymmetrical regulation is seriously impairing the broadband market and the chance for rapid service deployment to all Americans. Additionally, the threat of future regulation causes uncertainty and further undermines investment decisions.[10] Regulations and regulatory uncertainty not only stifle investment by the ILECs but also distort investment decisions across all technologies and firms to the detriment of consumers.[11]

Limited deployment will occur across the entire broadband market unless the Commission reverses the past course of asymmetric regulation. Clearly, this limited deployment will and has happened for DSL services. Rules such as line sharing and, under certain conditions,[12] packet switch unbundling are examples of unnecessary regulations that hamper ILEC broadband deployment. Moreover, several pending proceedings threaten to place even more onerous regulations on ILECs. For example, the Commission sought comments about whether ILECs should be required to unbundle the spectrum that flows over fiber optic cables. In addition, comments were requested on whether ILECs should be required to provide a combination platform of UNEs for data similar to the UNE-P for voice.[13] If either of these

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[10] *See The Disincentives for Broadband Deployment Afforded by the FCC's Unbundling Policies*, April 22, 2002, John Haring and Jeffery H. Rohlfs.

[11] *See generally*, Declaration of Alfred E. Kahn and Timothy J. Tardiff, December 18, 2001, Section III filed as Exhibit C to Verizon's comments in Broadband Non-Dominant Proceeding, March 1, 2002.

[12] The Commission established certain circumstances when an ILEC must unbundle its packet switching network elements including the digital subscriber line access multiplexer ("DSLAM"). The test to determine when unbundling must occur is set forth in paragraph 313 of the *UNE Remand Order*. *See In the Matter of Implementation of the Local Competition Provisions of the Telecommunications Act of 1996,* CC Docket No. 96-98, *Third Report and Order and Fourth Further Notice of Proposed Rulemaking,* 15 FCC Rcd 3696, 3838-39 (1999) ("*UNE Remand Order*").

[13] *See In the Matter of Deployment of Wireline Services Offering Advanced Telecommunications Capability and Implementation of the Local Competition Provisions of the*

proposals were adopted, broadband deployment would be more severely hampered than it already is.[14] Unless ILECs can earn an adequate return, they simply cannot make the investment necessary to deploy broadband facilities.[15] This limitation is increasingly magnified when considering deployment of next generation technology.

Unbundling of ILEC facilities and giving them away at TELRIC-based prices without any profit incentive will assure very limited deployment by both ILECs (because they will not take on the investment risk for themselves when they will have to share any upside potential with their competition) and CLECs (because they will not expend the capital but instead will wait until an ILEC deploys and shares its network). Consequently, consumers will have less choice in the broadband market. The only broadband providers will be those entities that can invest in

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Telecommunications Act of 1996, CC Docket Nos. 98-147 and 96-98, *Third Report and Order on Reconsideration in CC Docket No. 98-147, Fourth Report and Order on Reconsideration in CC Docket No. 96-98, Third Further Notice of Proposed Ruling in CC Docket No. 98-147 and Sixth Further Notice of Proposed Rulemaking in CC Docket No. 96-98*, 16 FCC Rcd 2101 (2001); *In re the Matters of Deployment of Wireline Services Offering Advanced Telecommunications Capability and Implementation of the Local Competition Provisions of the Telecommunications Act of 1996*, CC Docket Nos. 98-147 and 96-98, *Order on Reconsideration and Second Further Notice of Proposed Rulemaking in CC Docket No. 98-147 and Fifth Further Notice of Proposed Rulemaking in CC Docket No. 96-98*, 15 FCC Rcd 17806 (2000).

[14] *See* Professor Robert G. Harris, "Deployment of Broadband Networks and Advanced Telecommunications" (Dec. 19 2001), filed April 22, 2002 as Exhibit 1 to BellSouth Reply Comments in *Broadband Non-Dominant Proceeding* ("Harris Paper").

[15] *See* PLI Conference Remarks of Commissioner Kathleen Q. Abernathy (Dec. 13, 2001) ("Incumbents have little incentive to deploy new fiber to the curb, for example, if they will have to turn around and hand that fiber to their competitors at TELRIC rates. And CLECs will have little incentive to deploy their own networks when they can get access to incumbents' facilities at cost-based rates."); Commissioner Kevin J. Martin, Remarks at the National Summit on Broadband Deployment (Oct. 26, 2001) (Excessive unbundling at super-efficient prices "creates significant disincentives for the deployment of new facilities that could be used to provide broadband. Under such a regime, new entrants have little incentive to build their own facilities, since they can use the incumbents' cheaper and more quickly. And incumbents have some disincentive to build new facilities, since they must share them with all their competitors.").

facilities without the market-distorting burdens of regulation – cable modem companies and wireless companies whose investment risk is offset by the opportunity of reaping an economic profit for success in the market place.[16]

For these reasons, consistent with the four principles and policy goals established in the *Notice*,[17] the Commission must develop policies that create incentives for broadband investment. This *Notice* is one of four proceedings that the Commission has initiated to address broadband issues.[18] Each of these proceedings must be considered as part of the whole and not as individual pieces. The findings in each of these proceedings will be as pebbles thrown into a pond. The Commission must therefore coordinate each finding to avoid overlapping and unwanted ripples. Indeed, the Commission has already thrown its first rock with the *Cable Modem Declaratory Ruling*. In that proceeding, the Commission found cable modem service to be an information service. It further found that the transmission component is not an offering of a telecommunications service but instead is the use of telecommunications to provide the information service to the subscriber. The Commission specifically denied application of any Title II common carriage obligations on cable modem service.[19]

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16 With little or no competition from ILECs, these providers will be slower to deploy services and will have fewer concerns about their pricing. Thus, not only does regulation limit consumer choices, it make the fewer choices they have worse.

17 *Notice*, ¶¶ 3-6.

18 *In the Matter of Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers, et al.*, CC Docket No. 01-338, *et al.* ("*UNE Triennial Review*"); *In the Matter of Inquiry Concerning High-Speed Access to the Internet Over Cable and Other Facilities, et al,* GN Docket No. 00-185 and CS Docket No. 02-52, *Declaratory Ruling and Notice of Proposed Rulemaking,* FCC 02-77 (rel. Mar. 15, 2002) ("*Cable Modem Declaratory Ruling*"); *Broadband Non-Dominant Proceeding.*

19 *Cable Modem Declaratory Ruling*, ¶¶ 54-55.

In the current proceeding, the Commission tentatively concluded that "broadband Internet access service" is an "information service" and that the transmission component of such access provided over an entity's own facilities is "telecommunications" and not a "telecommunications service."[20] The Commission left open for question whether Title II common carriage obligations should be retained for a stand-alone broadband transmission service that ILECs currently provide to Internet service providers ("ISP") and whether the existing *Computer Inquiry*[21] regulations should be modified or eliminated.

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[20] *Notice*, ¶ 17.

[21] *Regulatory & Policy Problems Presented by the Interdependence of Computer & Communications Services & Facilities*, 28 FCC2d 291 (1970) ("*Computer I Tentative Decision*"); 28 FCC2d 267 (1971) ("*Computer I Final Decision*"), *aff'd in part sub nom. GTE Service Corp. v. FCC*, 474 F.2d 724 (2d Cir. 1973), *decision on remand*, 40 FCC2d 293 (1973). *Amendment of Section 64.702 of the Commission's Rules and Regulations* (*Computer II*), 77 FCC2d 384 (1980) ("*Computer II Final Decision*"), *recon.*, 84 FCC2d 50 (1980) ("*Computer II Reconsideration Order*"), *further recon.*, 88 FCC2d 512 (1981) ("*Computer II Further Reconsideration Order*"), *affirmed sub nom., Computer and Communications Industry Ass'n v. FCC*, 693 F.2d 198 (D.C. Cir. 1982), *cert. denied*, 461 U.S. 938 (1983); *Amendment of Section 64.702 of the Commission's Rules and Regulations* (*Computer III*), CC Docket No. 85-229, Phase I, 104 FCC2d 958 (1986) ("*Computer III Phase I Order*"), *recon.*, 2 FCC Rcd 3035 (1987) ("*Computer III Phase I Reconsideration Order*"), *further recon.*, 3 FCC Rcd 1135 (1988) ("*Computer III Phase I Further Reconsideration Order*"), *second further recon.*, 4 FCC Rcd 5927 (1989) ("*Computer III Phase I Second Further Reconsideration Order*") (*Computer III Phase I Order and Computer III Phase I Reconsideration Order vacated California v. FCC*, 905 F.2d 1217 (9th Cir. 1990) ("*California I*")); Phase II, 2 FCC Rcd 3072 (1987) ("*Computer III Phase II Order*"), *recon.*, 3 FCC Rcd 1150 (1988) ("*Computer III Phase II Reconsideration Order*") *further recon.*, 4 FCC Rcd 5927 (1989) ("*Computer III Phase II Further Reconsideration Order*") (*Computer III Phase II Order vacated California I*, 905 F.2d 1217 (9th Cir. 1990)); *Computer III Remand Proceeding*, 5 FCC Rcd 7719 (1990) ("*ONA Remand Order*"), *recon.*, 7 FCC Rcd 909 (1992), *pets. for review denied, California v. FCC*, 4 F.3d 1505 (9th Cir. 1993) ("*California II*"); *Computer III Remand Proceedings: Bell Operating Company Safeguards and Tier 1 Local Exchange Company Safeguards*, 6 FCC Rcd 7571 (1991) ("*BOC Safeguards Order*"), *BOC Safeguards Order vacated in part and remanded, California v. FCC*, 39 F.3d 919 (9th Cir. 1994) ("*California III*"), *cert. denied*, 514 U.S. 1050 (1995). *See also Bell Operating Companies' Joint Petition for Waiver of Computer II Rules*, 10 FCC Rcd 1724 (1995); *Computer III Further Remand Proceedings: Bell Operating Company Provision of*

BellSouth fully supports the Commission's conclusion that ILECs' broadband Internet access is an information service. The Commission should adopt this proposal. The Commission must, however, follow its own lead in the *Cable Modem Declaratory Ruling* and relieve ILECs of all Title II regulations that apply to ILECs' broadband services. Simply declaring broadband Internet access to be an information service without also declaring the transmission component to be private carriage, free of common carriage obligations including the *Computer Inquiry* obligations, effectively perpetuates the existing problems and will actually slow ILEC deployment of broadband further. Under this scenario, the ILECs are in the exact same position they have always been. Regulation over the telecommunications component of broadband access to the Internet continues unabated.

BellSouth is pleased to see that the intent of this proceeding, and the apparent intent of the Commission in developing regulatory policy for broadband services, is to create, through a de-regulatory framework, parity among all broadband providers, regardless of the platform or mode used to provide the services.[22] Simply finding that specific services offered by different providers should be regulated similarly will not, however, meet these goals. Only by placing

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Enhanced Services, 10 FCC Rcd 8360 (1995); *Computer III Further Remand Proceedings: Bell Operating Company Provision of Enhanced Services; 1998 Biennial Review – Review of Computer III and ONA Safeguards and Requirements*, CC Docket Nos 95-20, 98-10; *Further Notice of Proposed Rulemaking, Report and Order*, 13 FCC Rcd 6040 (1998) ("*Computer Inquiry Further Notice*"), *Report and Order*, 14 FCC Rcd 4289 (1999), *on reconsideration*, Order, 14 FCC Rcd 21628 (1999) ("*Computer III Further Remand Proceeding*").

[22] This is evident by the four principles and policy goals the Commission identified that will guide it in establishing regulatory policy over broadband services. The third principle and policy goal is that "broadband services should exist in a minimal regulatory environment that promotes investment and innovation in a competitive market" while the fourth is to "strive to develop an analytical framework that is consistent, to the extent possible, across multiple platforms." *Notice*, ¶¶ 5-6.

ILECs on completely equal regulatory footing with other broadband providers, including cable modem providers, will the public interest be served.

By now, the issue of regulatory parity is not new to the Commission. BellSouth, as well as other ILECs, have documented in other proceedings the close similarity between the broadband services provided by ILECs and other broadband services providers, specifically cable modem companies, contrasted with the asymmetrical regulation that is applied only to ILECs.[23] This asymmetry has penalized the ILECs at the expense of cable modem providers. Market share numbers bear this out.[24] More importantly, however, is the negative effect disparity has had, and continues to have, on the public interest. As discussed above, strangled by regulation, ILECs' ability to compete has been significantly hindered. Moreover, regulation, and the threat of additional regulation, has restrained ILEC broadband deployment. As a result, fewer facilities and less competition exist in the broadband market, which has direct negative impact on the consumers.

In summary, the Commission must use this proceeding as an opportunity to rid ILECs of unnecessary regulation over broadband services that slows deployment, and in the end harms consumers. The Commission's goal must be to develop a broadband policy that will incent deployment of broadband facilities on a widespread basis. This requires a fresh approach to the subject. The Commission cannot keep forcing antiquated regulatory policies on new technology. Facilities-based competition will produce the greatest benefits to consumers. Such facilities-

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23 *See* BellSouth Comments in *Broadband Non-Dominant Proceeding* (filed Mar. 1, 2002).

24 *Cable Modem Declaratory Ruling,* ¶ 9 ("Throughout the brief history of the residential broadband business, cable modem service has been the most widely subscribed to technology, with industry analysts estimating that approximately 68% of residential broadband subscribers today use cable modem service.").

based competition will be limited under the current regulatory environment forced only on the ILECs.

The Commission must therefore remove the regulatory restraints on ILECs and allow competition, not regulation, to control the broadband market by placing ILECs at regulatory parity with other broadband providers by: (1) eliminating the *Computer Inquiry* obligations on broadband services; (2) allowing ILECs to offer stand-alone broadband transmission components on a private carriage basis; and (3) removing other regulatory requirements not placed on other broadband service providers, including Part 64 cost allocation.[25]

II. The Commission Should Adopt its Conclusion that Broadband Internet Access Services are Information Services

BellSouth supports the Commission's tentative conclusion that broadband Internet access services are an information service. The offering of broadband Internet access service contemplates much more than pure transmission of information. As the Commission discussed in the *Notice*, "an end-user must have the capability to interact with information stored on the facilities of the provider of the wireline broadband Internet access service"[26] when he or she downloads files from the web. "Furthermore, to the extent to which a provider offers end-users the capability to store files on service provider computers to establish 'home pages' on the World Wide Web, the consumer is utilizing a "capability for ... storing ... or making available information" to others."[27] These functions clearly bring broadband Internet access services

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[25] The Commission should also use this proceeding as the paradigm for all future broadband technology, not just Internet access. All future advanced services should receive the same de-regulatory treatment.

[26] *Notice*, ¶ 21.

[27] *Id.*

within the rubic of information services. The Commission is correct in its analysis and has properly classified the service pursuant to the definitions set forth in the 1996 Act.

Moreover, this finding is consistent with the *Cable Modem Declaratory Ruling*. There is no discernable distinction between broadband Internet access service provided by an ILEC and cable modem service other than the facilities used. The Commission, however, specifically stated in its analysis of cable modem services that "[n]one of the . . . statutory definitions [information services,[28] telecommunications services,[29] and telecommunications[30]] rests on the particular types of facilities used. Rather, each rests on the function that is made available."[31] Accordingly, the Commission cannot possibly justify supporting differing regulatory definitions for broadband Internet access service and cable modem service. Because the Commission has ruled that cable modem service is an information service, it must adopt its tentative conclusion and find broadband Internet access service to be an information service.

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[28] The 1996 Act defines information services as "the offering of a capability for generating, acquiring, storing, transforming, processing, retrieving, utilizing, or making available information via telecommunications" 47 U.S.C. § 153(20).

[29] The 1996 Act defines telecommunications service as "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, regardless of the facilities used" 47 U.S.C. § 153(46).

[30] The 1996 Act defines telecommunications as "the transmission, between or among points specified by the users, of information of the user's choosing, without change in the form or content of the information as sent and received" 47 U.S.C. § 153(43).

[31] *Cable Modem Declaratory Ruling*, ¶ 35.

III. The Competitive Environment Requires the Commission to Rid ILECs' Broadband Services of All Title II Regulations

Just as the Commission determined that cable modem service providers may offer a stand alone transmission service to ISPs under private carriage,[32] all broadband service providers, including ILECs, must be afforded the same opportunity. Consistent with treating competitors with regulatory parity, competition eliminates the need for regulations that were implemented to prevent unfair treatment of consumers by a dominant service provider. All economic regulation exists only as surrogates for natural competitive forces. When consumers have the opportunity to select from various service providers, Title II type regulations become obsolete. Accordingly, the Commission must accomplish two objectives in this proceeding. First, it must eliminate the *Computer Inquiry* requirements from ILEC[33] broadband information service offerings. Second, it must permit ILECs to offer stand-alone broadband transmission capabilities on a private carriage basis.

A. The Commission Should Eliminate the Computer Inquiry Requirements to Ensure ILECs Receive Provider Parity with Other Broadband Service Providers, Not Merely Service Parity

On the surface, the parallel findings for cable modem service in the *Cable Modem Declaratory Ruling* and broadband Internet access service in the *Notice* may appear to place ILECs and cable modem providers at regulatory parity. A cursory review of the regulations for an ILEC that lie beneath the information service veneer quickly reveal that while each of the

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32 *Cable Modem Declaratory Ruling*, ¶ 54.

33 Currently, the only ILECs that are subject to *Computer Inquiry* requirements are the Bell Operating Companies ("BOC"). BellSouth uses the term ILEC generically throughout these comments; however, in the discussion related to *Computer Inquiry* obligations, its use of the term ILEC denotes only those ILECs – BOCs – that are subject to those requirements.

services may be defined as an information service, the two providers are not close to achieving regulatory equal footing. Without addressing these other regulations, the Commission should not fool itself into thinking that it has done anything to lessen the regulatory chasm that exists between two equally situated competitors.[34]

Any illusion that cable modem service and an ILEC's broadband Internet access service would operate equally as an information service is shattered by the *Computer Inquiry* requirements. Pursuant to these requirements ILECs, and only ILECs, must comply with numerous regulations that include either structural separation requirements (*Computer Inquiry II* rules) or non-structural separation requirements (*Computer Inquiry III* rules) that include Open Network Architecture ("ONA") and the filing of a Comparably Efficient Interconnection ("CEI") plan before offering integrated information services.[35]

The Commission should remove ILECs from these requirements. First, applying such rules only to ILECs does not promote the Commission's goals of "a minimal regulatory environment" or "a consistent analytical framework across multiple platforms." Second, the *Computer Inquiry* requirements are no longer necessary in the current competitive and regulatory environment. Third, applying the requirements to only one provider is anti-competitive.

1. The Commission Should Institute Provider Parity, Not Service Parity, Between ILECs and Cable Modem Providers

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[34] Equally situated from a product offering standpoint but far from equal in regulatory treatment and market share.

[35] In the *Notice* the Commission recognized that the current proceeding overlaps with the pending *Computer III Further Remand* proceeding and incorporated that proceeding by reference. BellSouth addressed at length why the Computer II and Computer III requirements should be eliminated completely. In these comments, BellSouth limits its arguments to elimination of these requirements as applied to broadband services.

In its wisdom, the Commission considered, but specifically refused to make cable modem providers subject to the *Computer Inquiry* requirements.[36] BellSouth agrees with this finding. BellSouth contends that adding regulation is not the answer to any broadband question. It is important for the Commission to understand, however, that continued asymmetric application of the *Computer Inquiry* rules to ILECs only, renders any discussion of parity meaningless. If the Commission does not eliminate *Computer Inquiry* obligations from the ILECs, ILECs will continue to operate at a severe regulatory disadvantage to cable modem providers. For example, pursuant to *Computer Inquiry* obligations, ILECs must develop and maintain a CEI plan prior to offering any new enhanced/information service. ILECs must prepare and file a tariff for all network capabilities that will be used in connection with the provision of any enhanced/information service that the ILEC offers. ILECs must maintain ONA and file annual ONA reports and quarterly ONA Installation and Maintenance Nondiscrimination reports. These are only a few of the many *Computer Inquiry* requirements with which ILECs must comply, but cable modem providers do not.

The Commission cannot find cable modem service free of *Computer Inquiry* obligations but at the same time continue to impose such obligations on the ILECs. Indeed, in finding cable modem service and ILECs' broadband Internet access service to both be information services, the Commission has acknowledged the services to be functionally equivalent. When two entities provide equivalent services and the Commission has identified each as having the same statutory definition, the regulations for each should not differ. There is simply no justification for subjecting ILECs to any set of rules more stringent than those imposed on cable modem

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36 *Cable Modem Declaratory Ruling*, ¶¶ 42-47.

providers. The Commission should simply eliminate all ILEC-specific regulation of enhanced/information services, whether derived from *Computer II*, *Computer III*, or ONA, and treat the ILECs as it does cable modem providers and other providers of broadband service.

Conversely, unless those regulatory burdens are lifted from ILECs, cable modem providers, as well as other broadband providers, should share the same burdens. Because the Commission has found the cable modem and broadband Internet access services to be equivalent, it must treat the providers of those alike. It cannot favor one over the other. The Commission must enact provider parity, not merely service parity. Accordingly, if ILECs must continue to operate under *Computer Inquiry* requirements, so to should cable modem providers.

2. The Dramatic Changes in the Market and Regulatory Landscape Justifies Elimination of the Computer Inquiry Obligations on ILECs

Any conceivable rationale for *Computer Inquiry* safeguards over information service is no longer valid. The basis for the rules necessarily would derive from the ILECs' positions as major providers of local exchange service within their service areas. As the Commission stated "the core assumption underlying the *Computer Inquires* was that the telephone network is the primary, if not exclusive, means through which information service providers can gain access to customers."[37] Thus, when the *Computer Inquiry* requirements were established the operative presumption was that regulation in the form of safeguards was necessary to fill a void created by the absence of competition in access facilities to the customer. Market conditions have changed dramatically since then. ILECs are no longer the only means of obtaining access to customers for the provision of information services. Based on the marketshare statistics for cable modem

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[37] *Notice*, ¶ 36; *Cable Modem Declaratory Ruling*, ¶ 44.

providers, the telephone network is no longer the "primary" means through which ISPs access their customers. As noted previously, consumers have a choice of entities from which to obtain broadband services. Burgeoning competition in the broadband market is well documented. Moreover, changes in how ILECs' rates are regulated further prevent any concerns of cost misallocation. These changes have obviated the need for surrogate regulation and leave the *Computer Inquiry* rules unnecessary.

a. Intermodal Competition

As discussed previously, the passage of the 1996 Act brought along market opening conditions that have made not only the broadband services market but also the local exchange market competitive. Competition in the broadband market has been recognized in numerous proceedings. In the *Broadband Non-Dominant Proceeding*, BellSouth cited numerous reports, including the Commission's own *Third Report*, that documented the extent of competition in the broadband services market. These competitive providers are facilities-based and do not depend on ILEC facilities to provide services to the customer.

b. Intramodal Competition

In addition to the multiple entities providing access to customers over facilities other than the ILECs', CLECs also compete in the provision of services to both customers and ISPs. The 1996 Act establishes the framework and the opportunity for ISPs to select from an array of competing providers of local exchange services to obtain interconnection to, and other features from, the local exchange network. Indeed, the benefits of this framework manifest themselves to ISPs in two ways. First, the 1996 Act ensures that an ISP that desires to obtain certain unbundled features or services for its service offering, may seek them from a CLEC who has specific rights under Section 251. Second, because of the presence of CLECs, ILECs have the specific incentive to try to accommodate the ISP's needs rather than risk losing that ISP to a competitor.[38]

This does not mean that CLECs should continue to have access to elements used only for the provision of broadband services. Indeed, they would be prohibited from obtaining such UNEs pursuant to statute. The 1996 Act defined a network element as "a facility or equipment used in the provision of a telecommunications service."[39] Moreover, Section 251(c)(3) states that ILECs shall provide unbundled network elements ("UNE") "to any requesting telecommunications carrier for the provision of a telecommunications service."[40] Pursuant to the classification of broadband services as an information service, and not a telecommunications

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[38] The sheer size of many of the well-established participants in the information services market and the concomitant revenues to be derived from retaining them as customers provides a considerable check on incentives an ILEC might otherwise be perceived to have to discriminate against those giants in favor of its own relatively inchoate broadband service operations.

[39] 47 U.S.C. § 153(29).

[40] 47 U.S.C. § 251(c)(3).

service, the statute would not allow CLECs access to facilities strictly for the provision of a broadband Internet access service.

CLECs would not be locked out of the information service market, however. Where the Commission deems the lack of any network facility would impair a CLEC from offering the telecommunications service it seeks to offer, then the CLEC will be able to purchase that facility from an ILEC. Accordingly, a CLEC will be able to obtain a loop, as long as loops continue to meet the impairment test, in order to provide telecommunications services. Once the CLEC has access to the loop it could use it to provide telecommunications as well as information services.[41]

c. Rate Regulation

One of the reasons the Commission cited for establishing the *Computer Inquiry* requirements was the concern that ILECs could misallocate costs between regulated operations and non-regulated operations.[42] Improper cost allocation issues, however, are no longer a concern since ILECs have moved from rate-of-return rate regulation to price cap regulation. Price cap regulation is incentive based and not cost plus as is rate-of-return regulation.

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[41] In the *UNE Triennial Review*, BellSouth advocated the elimination of all existing, and opposed the creation of any new, UNEs related to broadband services. These UNEs, specifically line sharing, are not necessary and lack of ability to obtain these UNEs does not impair a CLEC in offering broadband services. Moreover, as AT&T acknowledged in its reply comments filed in the *Broadband Non-Dominant Proceeding* on April 22, 2002, the economics of the market indicate that offering multiple services over a loop is a better business plan than only one service such as voice alone or DSL alone. The use of the loop to provide multiple services allow the CLEC to achieve economies of scope that are not available by offering only a single service. Under this theory, as advocated by AT&T, line sharing is moot because the CLEC would control the entire loop.

[42] *See Computer Inquiry Further Notice*, 13 FCC Rcd at 6048, ¶ 9 ("One of the Commission's main objectives in the *Computer III* and ONA proceedings [was] to permit the BOCs to compete in unregulated enhanced services markets while preventing the BOCs from using their local exchange market power to engage in improper cost allocation and unlawful discrimination against ESPs.").

Accordingly, costs do not have a direct link to prices. Therefore, there is no need to retain *Computer Inquiry* requirements for cost misallocation purposes.[43]

3. Computer Inquiry Requirements are Anticompetitive

The *Computer Inquiry* obligations when applied to only one broadband provider, are anti-competitive and discriminatory. For BellSouth to offer new and innovative broadband internet applications, BellSouth must separate the telecommunications component and offer the component on a common carrier basis. Therefore, it must undertake the regulatory, administrative, and operational cost and delay to meet a requirement that is unrelated to the offering of the information service. More importantly, no broadband competitor is confronted by the same type of arcane regulation.

Congress specifically charged the Commission to "encourage the deployment on a reasonable and timely basis of advanced telecommunications capability to all Americans . . . ." [44] Investors have and continue to recognize that past regulatory policies are dragging deployment. Only recently the Wall Street Journal Editorial page stated, "Washington's broadband regulation, we pointed out here 15 months ago, was the biggest threat to economic recovery. It still is. Rube Goldberg schemes to make the Bells subsidize the rollout of DSL by novice competitors proved a formula for stalling DSL."[45] Deployment, as Congress envisioned, will occur only when providers are allowed to compete on a level playing field in a de-regulatory environment.

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[43] *See* further discussion of price regulation and cost allocation issues in Part 64 *infra* Section V.A.

[44] Section 706(a) of the *Telecommunications Act of 1996*, Pub. L. 104-104, 110 STAT. 56 (1996), reproduced in the notes under 47 U.S.C. § 157.

[45] *Spitzer's Telecom Meltdown*, Editorial, Wall St. J., Apr. 29, 2002 at A18.

The above discussion demonstrates why the *Computer Inquiry* requirements only perpetuate the "Rube Goldberg" regulatory policies and should be eliminated for ILECs in the provision of broadband services. The Commission clearly has the authority to provide ILECs this freedom pursuant to its forbearance authority in Section 10 or through its regulatory reform requirements in Section 11 of the 1996 Act. Accordingly, the Commission should remove these rules form the ILECs broadband information services.

B. ILECs Should be Allowed to Offer Stand-Alone Broadband Transmission Services as Private Carriage and Not Common Carriage

Just as the Commission should eliminate all *Computer Inquiry* requirements for ILECs' broadband services, it should likewise find that an ILEC's stand-alone offering of broadband transmission components used by others is a private carriage offering and not a common carriage offering. The Commission undoubtedly applied the proper regulatory treatment to cable modem services in making that exact finding.[46] It would be arbitrary and irrational for the Commission to conclude that stand-alone transmission services provided by cable are private carriage services, while simultaneously concluding that such stand-alone services offered by ILECs must remain subject to common carrier regulation. That conclusion would clearly create irreconcilable positions that could not withstand judicial review.

As they rolled out broadband Internet access service, ILECs have been required to tariff the underlying transmission services as a common carrier service simply because of their position as an ILEC and the Commission's *Computer Inquiry* rules.[47] Those rules are outdated;

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[46] *Cable Modem Declaratory Ruling*, ¶ 54 (an offering of stand-alone services is a telecommunications offering as a private carrier service and not a common carrier service).

[47] *See, e.g.*, *In the Matter of Deployment of Wireline Services Offering Advanced Telecommunications Capability, et al.*, CC Docket No. 98-147, et al, *Memorandum Opinion and*

it is also irreconcilable with the different approach that the Commission applied to cable modem services.

With the Commission's finding that cable modem providers are not subject to common carrier obligations for the underlying telecommunications component, incentives are in place to create competition in the stand-alone transmission services market. Indeed, ILECs have great economic incentives to provide such services. Cable modem companies, as well as other broadband providers share those economic incentives. Such incentives will benefit public interest through the promotion of a competitive market but only if providers are allowed to compete through commercial terms and conditions.

In the *Cable Modem Declaratory Ruling*, the Commission discussed how cable companies were offering independent ISPs access to the cable companies' network for the purpose of providing Internet access service to the subscriber. The Commission noted that some cable companies had initially been required to provide open access to ISPs for wholesale services

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Order, and Notice of Proposed Rulemaking, 13 FCC Rcd 24011, 24030-31, ¶ 37(1998) ("*Advanced Services Memorandum Opinion and Order*"), ("We note that BOCs offering information services to end users of their advanced service offerings, such as xDSL, are under a continuing obligation to offer competing ISPs nondiscriminatory access to the telecommunications services utilized by the BOC information services."); *see also In the Matter of GTE Telephone Operating Cos., GTOC Tariff No. 1, GTOC Transmittal No. 1148*, CC Docket No. 98-79, Memorandum Opinion and Order, 13 FCC Rcd 22466, 22474-83, ¶¶ 16-32 (1998) ("*GTE ADSL Tariff Order*") (assuming that ADSL is a common carrier service subject to tariff, and examining its jurisdictional nature to determine whether it should be tariffed at the federal level).

as a condition to a merger agreement,[48] but that more and more of the companies were allowing it as a commercial venture.[49]

This hands-off approach to open access should also apply to ILECs' provision of wholesale services. Indeed, with cable companies providing wholesale services to ISPs, allowing ILECs to also offer wholesale services on a commercial basis will create a facilities-based competitive market for wholesale services. Network efficiencies as well as market economics bear this out.

A network is a very expensive asset to build and maintain. Networks are designed to handle various capacity levels, usually in excess of current expected demand, *i.e.*, it is cheaper to build a network with excess capacity and allow subscribers to grow to fit the network as opposed to expanding the network capacity every time a subscriber is added.[50] In fact, since most network equipment is purchased in discrete sizes or lumps, adding capacity to the network one subscriber at a time is not possible. Thus, economics of the network favor recovering the cost of the network over as many customers as possible. This allows the carrier to achieve positive margins faster as the cost per customer is lowered. Both wholesale and retail customers add

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48 This was a condition of the AOL – Time Warner merger. *Cable Modem Declaratory Ruling*, ¶ 26.

49 *Cable Modem Declaratory Ruling*, n.123. ("AT&T has stated that [it has constructed a network that as] designed [will] enable multiple ISP service and that it is capable of doing so on a commercial basis once enhancements are added.")

50 This is in terms of backbone type functions such as packet switching and transport elements for an ILEC or a headend and a cable modem termination system ("CMTS") for a cable company. As new subscribers are added, both ILECs and cable companies must incur the expense of connecting the subscriber to the network with a copper pair for the ILEC and coaxial cable for the cable company.

demand to the network. Thus, network costs are assigned to all offerings. Consequently, a carrier achieves greater economic benefit by obtaining more customers to share the fixed costs of the network, regardless of whether the customers are buying wholesale or retail services.

As this analysis demonstrates, ILECs and cable companies therefore have great economic incentives to pursue wholesale customers for their networks. Added to this incentive is the fact that there are a significant number of wholesale customers – ISPs – that have a significant number of subscribers. As the Commission acknowledged in the *Cable Modem Declaratory Ruling*, cable companies are offering wholesale services on a commercial basis to ISPs.[51] These commercial offers will be increased only if ILECs are likewise allowed to offer their wholesale services to ISPs on a commercial basis rather than subject to the regulatory requirements currently required by dominant carrier regulation.

Allowing cable companies regulatory freedom while requiring regulation on ILECs will distort the market in two ways. First, it favors specific competitors over competition, which is a result that is precisely the exact opposite of long-standing Commission policy. Second, it chills innovation and choice. If the Commission mandates regulation of one provider while allowing the other provider operational freedom, the Commission is essentially taking away from the ILEC the ability to compete in the same way that cable modem providers are addressing market demand. Further, if the Commission, in trying to protect ISPs by requiring only one competitor to maintain open access, "gets it wrong," which is a highly likely regulatory outcome, it can

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[51] *Cable Modem Declaratory Ruling*, ¶ 26.

undermine the broadband market by distorting the two key characteristics upon which competitors compete—price and quality.

The Commission certainly has the authority to give phone companies that option.[52] If cable, the dominant provider of broadband transport, is to be deregulated on the ground that it faces lots of actual or potential competition, then telephone, the nondominant competitor, cannot simultaneously remain regulated on the ground that it possesses, in the same market, an exclusive bottleneck.[53]

IV. The Commission Should Preempt State Regulation Over Broadband Services

The *Notice* seeks comments on the states' role in the offering of broadband services. The answer, stated simply, is that the Commission should preempt the states. Just as the Commission found Internet access services to be an interstate service and under federal jurisdiction, the Commission should also find broadband Internet access service and any stand-alone transmission

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[52] *See In the Matter of 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*, File No. S-C-L-94-006, *Cable Landing License,* 11 FCC Rcd 14885, 14886, ¶ 2 (1996) (the Commission may "change the regulatory status" of a common carrier service based on market conditions.); *see also Computer and Communications Indus. Ass'n v. FCC*, 693 F.2d 198 (D.C. Cir. 1982) (upholding *Computer II* decision to detariff service elements that had been treated as common carrier offerings; further investigation had revealed them not to be common carriage communications offerings within the meaning of the Act); *Wold Communication v. FCC*, 735 F.2d 1465, 1468 (D.C. Cir. 1984) 1468 (upholding FCC decision to allow the outright sale of satellite transponders that had been used to provide common carriage; FCC made a "modest adjustment" to changed market circumstances).

[53] *See ALLTEL Corp. v. FCC*, 838 F.2d 551, 561 (D.C. Cir. 1988) ("[A] regulation perfectly reasonable and appropriate in the face of a given problem may be highly capricious if that problem does not exist.") (internal quotation marks omitted); *see also Computer II Final Decision*, 77 F.C.C.2d at 434, ¶ 129 (Commission's "rulemaking power is expressly confined to promulgation of regulations that serve the public interest," and a regulation "depending for its validity upon a premise extant at the time of enactment may become invalid if subsequently that predicate disappears.") (internal quotation marks omitted).

service offered by an ILEC to be jurisdictionally interstate subject only to federal jurisdiction. Indeed, the same analysis applies.

There is no doubt that broadband demands a national cohesive policy. Regulatory uncertainty already is causing investment to lag. If investors must face fifty potential different policies, the impact would be devastating. State regulators have already shown a propensity for policy decisions that differ from the Commission's.[54] Unless the Commission preempts the states, providers will face differing policies and procedures in each state in which it operates.

The Commission clearly has authority to preempt the states in developing a broadband policy. The Commission "has jurisdiction over, and regulates charges for, the local network when it used in conjunction with origination and termination of interstate calls."[55] In the *GTE ADSL Tariff Order*, the Commission found Internet traffic to be interstate in nature and subject to

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[54] *See, e.g., California ISP Association, Inc., Complainant, v. Pacific Bell Telephone Company (U-1001-C); SBC Advanced Solutions, Inc. (U-6346-C) and Does 1-20, Defendants,* Cal. Pub. Serv. Comm'n, Case 01-07-027 (Filed July 26, 2001), *Assigned Commissioner's and Administrative Law Judge's Ruling Denying Defendants' Motion to Dismiss* (Mar. 28, 2002) (finding that state PSC has concurrent jurisdiction with the Commission over DSL transport services); *cf. GTE ADSL Tariff Order* (finding DSL service to be an interstate service).

[55] *In the Matter of Petition for Emergency Relief and Declaratory Ruling Filed by the BellSouth Corporation*, 38321, *Memorandum Opinion and* Order, 7 FCC Rcd 1619, 1621 (1992) ("*BellSouth Declaratory Ruling Order*") *aff'd* 5 F.3d 1499 (11th Cir. 1993). Further, the Commission has jurisdiction over an interstate communication irrespective of whether the interstate network used to transmit the communications is a common carrier network or a non-common carrier network. Pursuant to Commission precedents, as confirmed by the courts, the Commission's jurisdiction applies on an end-to-end basis, from the point of origin of the communication to the point of completion. *See In the Matter of Southern Pacific Communications Company Tariff F.C.C. No. 4,* Transmittal No. 65, *Memorandum Opinion and Order*, 61 FCC 2d 144, 146 (1976) citing *United States v. AT&T*, 57 F. Supp. 451 (S.D.N.Y. 1944) (Commission's jurisdiction "over interstate communications does not end at the local switchboard, it continues to the transmission's ultimate destination").

Federal jurisdiction.[56] Moreover, the Commission has concluded that broadband Internet access service to be an information service and not a telecommunications service. Pursuant to this conclusion, such services are not subject to the unbundling or resale obligations of Section 251. Further, by definition, broadband Internet access is jurisdictionally interstate in nature. Accordingly, the Commission has authority to and should preempt any state regulation of broadband Internet access services and any stand-alone transmission components that the ILECs may offer. This is not only necessary for development of a unified national broadband policy but also is consistent with Commission precedent.

V. Other Issues

The *Notice* identified other issues that could impact broadband services offered by ILECs. BellSouth addresses Part 64 accounting issues and Universal service issues below.

A. The Commission Must Relieve ILECs of Part 64 Cost Allocation Obligations Associated with Broadband Services

As discussed in Section III above, unless ILECs are relived from all unnecessary regulation the Commission's goal of provider parity[57] will not be realized among broadband providers. Just as with the *Computer Inquiry* requirements, Part 64[58] rules poses the same sort of regulatory burdens that will significantly diminish any regulatory relief offered by the Commission. As BellSouth has discussed, the Commission's goal should be to implement

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[56] *GTE ADSL Tariff Order,* 13 FCC Rcd 22466 (1998). *See also Louisiana Public Service Commission v. FCC*, 476 U.S. 355 (1986); *see also BellSouth Declaratory Ruling Order,* 7 FCC Rcd at 1623, ¶ 22 ("given the practical jurisdictional inseverability of BellSouth's voice mail service for purposes of implementing the state action here at issue, we preempt the Georgia PSC's 'freeze' of BellSouth's offering of voice mail service").

[57] *Notice,* ¶ 6 (Commission's principle and policy goal to develop a consistent analytical framework across multiple platforms).

[58] 47 C.F.R. § 64.900 et seq.

provider parity not merely service parity. If the Commission required ILECs to allocate costs pursuant to Part 64 for broadband information services as well as the provision of stand-alone transmission services under private carriage, it would place ILECs at very burdensome regulatory odds with cable modem providers.

Part 64 was an outgrowth of the *Computer Inquiry* proceedings. If a company elected to provide enhanced services through an integrated operation, as opposed to a separate affiliate, the Commission believed there was a potential risk that the ILEC could subsidize the non-regulated operations with the regulated operations. This risk, however, was identified at a time when ILECs were subject to rate-of-return (also referred to as cost-plus) regulation for customer rates. The identified risk was the concern that costs from the non-regulated operations would be included as costs for the regulated operations thereby having a twofold effect. First, the regulated ratepayers rates potentially could be improperly increased because they could include some non-regulated service costs. Second, non-regulated services, which are competitive, could receive a subsidy by having part of their costs passed on to regulated services. The Commission feared that if this occurred, ILECs would be able to offer their non-regulated services at below cost because part of the cost would be picked up by the non-competitive regulated services.[59]

To alleviate this problem, the Commission promulgated Part 64.900 cost allocation requirements. These rules essentially require ILECs to allocate costs between regulated operations and non-regulated operations on the basis of direct assignment when possible. All

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[59] *In the Matter of Separation of costs of regulated telephone service from costs of nonregulated activities; Amendment of Part 31, the Uniform System of Accounts for Class A and Class B Telephone Companies to provide for nonregulated activities and to provide for transactions between telephone companies and their affiliates,* CC Docket No. 86-111, *Report and Order*, 2 FCC Rcd 1298 (1987).

costs that cannot be directly assigned to regulated or non-regulated activities are to be grouped into pools and allocated pursuant to a hierarchy or allocation methods. Thus, Part 64 places an extraordinary burden on ILECs to maintain extensive and tedious accounting records. In addition, an independent accountant must audit Part 64 records every two years with the report covering the entire two-year period.

Part 64 should not apply to facilities used to provide broadband information services. First, Part 64 is a relic of the past. Every ILEC subject to Part 64 is no longer under rate-of-return regulation for federal ratemaking purposes. In 1990, the Commission adopted incentive, or price cap, regulation for ILECs.[60] Unlike rate of return regulation, under price cap regulation there is no link between cost and price. Indeed, the purpose of price cap regulation was to adopt an incentive-based pricing theory that promoted ILEC efficiencies as opposed to cost-plus pricing. For price cap ILECs, rates are driven by changes in the price cap formula, which incorporates changes in inflation and other non-accounting factors, such as demand changes. The price cap system was intentionally designed to prevent cross-subsidy between services. Thus, price cap regulation obviates the need for Part 64 cost allocation and it should be eliminated.

BellSouth recognizes that elimination of Part 64 is outside the scope of this proceeding. In considering any potential impact of Part 64 on ILECs' broadband services in this proceeding, however, the Commission should recognize that Part 64 has out-lived its usefulness and is obsolete in the current regulatory environment. Indeed, all of the concerns that prompted the

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60 *In the Matter of Policy and Rules Concerning Rates for Dominant Carriers*, CC Docket No. 87-313, *Second Report and Order*, 5 FCC Rcd 6786 (1990).

Commission to implement Part 64 have been obviated by price cap regulation. Accordingly, the Commission need not require ILECs to allocate the costs for broadband information services, such as loops and packet switches, between regulated and non-regulated operations.

Moreover, the Commission's goal of applying regulatory parity requires that ILECS be free of the archaic accounting rules in the provision of broadband services. Indeed, cable modem providers do not have to engage in the cost allocation of their networks between cable services and broadband services. This time-consuming and tedious process should therefore not be required of ILECs, especially considering that the need for such accounting is no longer necessary.[61] The Commission should, therefore, free ILECs from Part 64 allocation obligations for broadband information services.

B. Universal Service

1. ISPs Should Contribute to the Universal Service Fund

The *Notice* explores questions regarding the nature of the universal service obligations that providers of broadband Internet access should have and how such obligations should be administered in an equitable and non-discriminatory manner. In considering these questions, the starting point must be the Communications Act and the current universal service contribution mechanism.

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[61] If the Commission believed that cost allocation remained necessary for determination of UNE prices, the Commission could implement a less burdensome method to capture the appropriate data. The Commission implemented Part 64 long before the idea of UNEs was a thought in anyone's mind. Clearly, it cannot be argued that it is the only viable means of obtaining data for UNE price calculations.

Under the Act, all carriers that provide interstate telecommunications services must contribute to the universal service fund on an equitable and nondiscriminatory basis.[62] The Commission is also authorized to require other providers of interstate telecommunications to contribute to the universal service fund.[63] Currently, carriers fund the universal service mechanism exclusively with each carrier's contributions based on interstate telecommunications service retail revenues.

Concurrent with the instant proceeding, the Commission has commenced a review of the existing universal service contribution methodology.[64] In the *USF Contribution Methodology* proceeding, the Commission is considering alternative mechanisms for assessing universal service contributions. Recent market changes have caused the Commission to question the efficacy of the current revenue-based contribution mechanism. For example, interstate revenues have recently declined for interexchange carriers and a continuation of that trend could erode the contribution base over time. If that were to occur, it would be necessary to increase the universal service contribution factor just to maintain existing levels of support.[65]

The reduction in interstate interexchange revenues is one of many market changes that have caused the Commission to question stability and sustainability of a revenues based contribution mechanism. In its comments, BellSouth noted that the continuing evolution of the telecommunications market makes the revenue-based mechanism problematic. As a result of the

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62 47 U.S.C. § 254(d).

63 *Id.*

64 *In the Matter of Federal-State Joint Board On Universal Service et. al.*, CC Docket Nos. 96-45, *et al., Further Notice of Proposed Rulemaking and Report and Order*, FCC 02-43 (rel. Feb. 26, 2002) ("*USF Contribution Methodology*").

65 *See USF Contribution Methodology,* ¶¶ 7, 8.

market changes, interstate revenues become masked and less discretely identifiable. Contributing to this trend is the fact that the current mechanism allows for interstate communications to shift to Internet-based offerings provided by ISPs and thus, escape assessment for universal service purposes.

Whatever the mechanism ultimately adopted by the Commission in the *USF Contribution Methodology* proceeding, the Commission must avoid the pitfall embedded in the current mechanism that permits avoidance of universal service contribution obligations by disguising the way in which service is provided. Regardless of the assessment mechanism, if it contains exceptions and loopholes, providers will gravitate toward such exceptions in order to avoid universal service assessments. In essence, such exceptions instill instability in the assessment mechanism, and it does not matter whether the mechanism continues to be revenue-based or whether the Commission adopts a flat-rate mechanism. Accordingly, the Commission should exercise its authority to require ISPs, who by definition are providers of interstate telecommunications, to contribute to the universal service fund regardless of the broadband platform that the ISP may use.

In its comments in the *USF Contribution Methodology* proceeding, BellSouth endorsed a connections-based contribution mechanism that it developed jointly with SBC. The approach recommended by BellSouth and SBCn is equitable, nondiscriminatory and competitively neutral because the mechanism recognizes that every provider of interstate telecommunications that sells service to an end user has an interstate connection that should be counted and such provider should contribute to the universal service fund. This mechanism includes ISPs. Looking at connections in this manner enables the Commission to adopt a mechanism that not only fulfills

the statutory mandate that all interstate carriers contribute to the fund but also encompasses the full range of interstate telecommunications providers. A broadened view of connections forms the foundation of a contribution mechanism that is fair and equitable among all providers and, equally important, minimizes the opportunity for manipulation or avoidance of the contribution obligation through the way services are packaged or classified.

Further, the connections-based contribution mechanism endorsed by BellSouth is competitively neutral because no provider of interstate telecommunications would gain an advantage vis à vis a competitor simply by the way it chooses to offer service. Competitive neutrality is a particularly important component of a connections-based mechanism in an environment that continues to be characterized by disparate regulatory regimes. Ensuring that all providers of interstate telecommunications contribute to universal service fund will bring the stability to the fund that the Commission seeks.

2. Section 254(k)

Section 254(k) of the Communications Act prohibits a telecommunications carrier from using services that are not competitive to subsidize services subject to competition. In addition, this provision of the Act requires the state commission for intrastate services and this Commission for interstate services to ensure that services included within the definition of universal service do not bear more than a reasonable share of joint and common costs. In the *Notice*, the Commission suggested that if wireline broadband Internet access were classified as an information service, it would be necessary to allocate the costs of network facilities between

Title II and Title I information services to comply with the statute's requirements.[66] The Commission's presumption regarding cost allocation is incorrect.

As an initial matter, broadband Internet access is an interstate information service. Every interstate service is competitive. While some may argue that the level of competition varies among services, every interstate service is subject to competition. Thus, there is no issue of subsidization of competitive services by non-competitive services. Even if some party disputes the competitiveness of some interstate services, a cost allocation scheme is unnecessary to address potential cross-subsidization issues. The Commission's price regulation rules cap the prices that LECs can charge for their regulated services. Thus, the Commission's price cap rules effectively prevent LECs from increasing regulated charges to subsidize non-regulated charges.[67] With regard to the requirement that services included within the definition of universal services should bear no more than a reasonable share of joint and common costs, the requirement is a ratemaking question, which, for the most part, falls within the jurisdiction of the state commissions. For BellSouth, its intrastate services are, like its interstate services, subject to price regulation. Thus, the classification of broadband Internet services as interstate information services has absolutely no effect on the prices of intrastate services (or for that matter interstate

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[66] The *Notice* appears to believe that the only concern raised by section 254 is with wireline carriers. To the extent that the Commission concluded cost allocation were required to meet Section 254 requirements, which BellSouth does not believe is correct, such conclusion would extend to all telecommunications carriers regardless of the technology in which they provide service, *i.e.*, wireline, wireless, cable etc.

[67] The only circumstances in which the Commission's price cap rules do not apply is where the Commission has found the presence of sufficient competition so as to afford a price cap carrier with some pricing flexibility. Such pricing flexibility is implemented on an MSA by MSA basis and in all such cases it is conclusively determined that the services for which pricing flexibility was granted are competitive.

services) that fall within the definition of universal service. Accordingly, there is no need for the Commission to devise a cost allocation mechanism to separate costs between broadband Internet services and other network services.

VI. Conclusion

The Commission should adopt its tentative conclusion that broadband Internet access service is an information service provided via telecommunications and is not a telecommunications service. Moreover, pursuant to the principle and policy goals set forth in the *Notice*, the Commission should apply regulatory parity between ILECs and cable modem providers. This means more than merely declaring broadband Internet access service and cable modem service to both be an information service. It means the Commission should also remove underlying regulations that apply only to ILECs in the provision of information services such as, but not limited to, *Computer Inquiry* requirements and Part 64 cost allocation requirements. Finally, the Commission should allow ILECs, just as it allows cable modem providers, to offer the stand-alone component of broadband information services as private carriage. If the Commission does not remove these regulations from the ILECs broadband information service, it should add them to other broadband providers, including cable modem providers. Parity for

these regulations is necessary to ensure competitors are able to compete in the market without improper regulatory disadvantages.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I do hereby certify that I have this 3rd day of May 2001 served the parties of record to this action with a copy of the foregoing **COMMENTS OF BELLSOUTH** , addressed to the parties listed below via electronic mail:

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