

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

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

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EXECUTIVE SUMMARY

The *Notice* in this proceeding seeks comment on the most recent – and the most obviously lawless and anticompetitive – of the many Bell proposals to evade their obligations to provide prospective competitors with the “broadband” and other transmission facilities that are generally required to offer competing telecommunications and information services. The Bells seek to prevent competitive LECs from using the high frequency portion of loops to offer second and third voice lines as well as data transmission services. That would assure that there would be a single provider of DSL-based services in each area and would derail competitive LECs’ efforts to create local telephone choice. The Bells’ proposal is also designed to pull the plug on independent broadband ISPs that must today rely upon the Bells’ DSL-based services. The consequence would thus be not only to block the emerging local competition for voice and data services, but also to cripple intramodal competition in the provision of broadband Internet access services, consigning businesses and many residential customers to monopoly suppliers.

The Bells’ proposal (set forth in a letter from Verizon to Chairman Powell) depends on each of two separate – but equally unlawful – premises. First, Verizon asserts that the Commission should allow the Bells to determine whether broadband transmission services will continue to be offered as common carrier “telecommunications services” or will be available only as unregulated “private” carriage. Second, Verizon contends that the Commission should exempt the Bells’ broadband services from existing *Computer Inquiries* unbundling and nondiscrimination safeguards. Endorsing those premises, the Bells contend, would eliminate competitive LECs’ rights to use the Bells’ broadband-capable loops and other facilities to offer competing broadband services. The terms of the Act and the uniform decisions of the Commission and the courts foreclose both the intermediate and ultimate rulings that the Bells seek and, indeed, quite clearly

mandate that competitive LECs will continue to have statutory rights to use network elements to provide standalone broadband (and other) telecommunications services as well as combinations of information and telecommunications services.

Verizon contends that the Commission can simply declare that the Bells' existing standalone broadband transmission services, which have always been provided on a common carrier basis, are "private" carriage. Verizon understands that effecting this reclassification would require that the Commission both: (1) reclassify core common carrier telecommunications services, for which there is strong general demand, as private carriage, and (2) exempt wireline broadband services from the *Computer Inquiries* rules, which require that the underlying transmission component of the Bells' information services be provided to all information service providers on a common carrier basis. Neither is permissible.

A service is a common carrier "telecommunications service" if it provides transmission and is offered indiscriminately to the eligible public or is of such a nature that it *should* be offered to members of the eligible public on a common carrier basis. Unlike cable operators, the Bells have always provided standalone broadband transmission services on a common carrier basis. And, as the Commission's decisions uniformly make clear, an existing common carrier telecommunications service can be reclassified as private carriage and exempted from Title II only if it does not, in fact, constitute telecommunications (*e.g.*, billing services) or if the nature of and demand for the service is so limited and specialized that the public interest would not be harmed if it is available only on individually established rates, terms, and conditions. The standalone broadband transmission services that incumbent LECs provide to ISPs and other customers today meet neither of these standards, because they provide transmission, are demanded by broad classes of customers who generally have no alternative suppliers, and readily can be – and have

been – offered generally to the eligible public. The terms and structure of the Communications Act prohibit the reclassification of such non-specialized, generally available communications services as “private” carriage.

But even if there were broadband transmission services that otherwise could be provided on a private carrier basis, Verizon’s other premise fails. The Commission’s *Computer Inquiries* safeguards *require* the Bells, if they provide broadband information services (as they all do), to make the underlying transmission components available to all information service providers. There is no rational basis to exempt broadband wireline Internet access services from this requirement. The basis for the rules was not the “speed” of the underlying transmission facilities, but the fact that the Bells’ control over local telephone facilities that ISPs need gives the Bells market power over information services and the ability and incentive to use that power to thwart competition. That rationale is fully applicable to broadband wireline Internet access services; indeed, it is indisputable that ISPs seeking to offer broadband services today have no meaningful alternatives to the Bells’ loops. For that reason, no broadband exemption from the *Computer Inquiries* safeguards could be sustained; indeed, the courts have repeatedly vacated prior Commission orders that sought to scale back those safeguards in far less radical ways.

In all events, even if the Commission were to endorse Verizon’s unlawful premises, that would have no implications for the rights of competitive LECs under section 251(c)(3) of the Act. Even if the Commission could allow incumbent LECs to provide all of their standalone broadband transmission exclusively on a private carriage basis, a competitive LEC would still be entitled to obtain unbundled loops and other network facilities whenever *it* will offer telecommunications services to the public at large on a common carrier basis. As the Commission has held many times, the Act’s plain terms foreclose any notion that the ability of a competitive LEC to access

particular network facilities or their capabilities depends in any way, shape, or form on whether the incumbent is currently providing a telecommunications service over them. And so long as the *competitive* LEC is using one of a network element's capabilities (*e.g.* the low-frequency part of a loop) to provide a telecommunications service, it can use both that capability and any others (*e.g.*, the high-frequency portion of the loop) to provide information services as well.

In other words, if the object of Verizon's proposed reclassification is to eliminate the Act's unbundling obligations, the proposal is frivolous, for it is foreclosed by the Act's text and structure and the Commission's prior decisions alike. Torturing the law and the facts to endorse Verizon's equally misguided "private" carriage and *Computer Inquiries* premises would thus be entirely pointless in addition to directly harming ISPs and consumers.

Indeed, the answers to the questions raised in the *Notice* are so straightforward that there is only one explanation for the attention and controversy generated by the *Notice*: concern that the Bells' battle cry of "regulatory parity" will here, as elsewhere, drown out the voices of law, economics, and facts. That will not occur if the Commission heeds the *Notice*'s recognition that regulatory parity is a question of *process*, not outcome. The Commission has *always* applied an "analytical framework that is consistent, to the extent possible, across multiple platforms," *Notice* ¶ 6 – imposing only regulations that are clearly necessary to protect consumers and competition from the exercise of market power – and it is only in that sense that what is good for the goose is good for the gander. That has not always led to identical outcomes, but that is to be expected – "legal, market, or technological distinctions may require different regulatory requirements between platforms." *Notice* ¶ 7. And, as AT&T will demonstrate in this and other proceedings, it is clear that the Bells' unbundling and nondiscrimination obligations are warranted for reasons that simply have no analog in the cable, satellite, or wireless environments.

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COMMENTS OF AT&T CORP.

Pursuant to Section 1.2 of the Commission’s Rules, 47 C.F.R. § 1.2, the Commission’s Notice of Proposed Rulemaking of February 15, 2002, in the above matters,¹ and the Commission’s Public Notice of February 28, 2002 (DA 02-485), AT&T Corp. (“AT&T”) submits these comments.

INTRODUCTION

No one disputes that broadband capabilities hold great promise and that the Commission should avoid unnecessary regulation that would hinder reasonable and timely deployment of broadband services. The Commission has long followed that path, consistently refusing to regulate broadband facilities and services except where necessary to protect consumers and competition from the exercise of market power. By all accounts, that policy has been a great success. Broadband capabilities continue to be “deployed to all Americans in a reasonable and

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

timely manner.”² “Investment in infrastructure for advanced telecommunications remains strong” across wireline, cable and other broadband platforms, as does growth in subscribership.³

There is, of course, “no reason to rest on . . . [one’s] laurels,”⁴ and the Commission should continue to identify and clear any broadband-related “regulatory underbrush”⁵ that no longer serves the public interest. But there is also no reason abruptly to alter course, untether regulatory policy from statutory requirements and sound economics, and discard critically important consumer protections at the first mention of “broadband” and without regard to obvious anticompetitive consequences. And that is exactly what the Regional Bell Operating Companies (“Bells”) would have the Commission do in this and related proceedings. The Bells have made radical proposals that the Commission authorize them to transform their “broadband” telecommunications services into “private carriage” subject only to Title I of the Act and relieve them of their obligations under the *Computer Inquiries* regulations to provide the transmission components of their information services on nondiscriminatory terms. The Bells also make the untenable claim that adoption of these proposals would eliminate competitors’ rights to use network elements to provide both broadband telecommunications and information services.

The Commission should reject these proposals. As detailed below, they are flatly inconsistent with the indisputable nature of the services at issue, the plain language of the Act, and the most basic and established economic principles and Commission policies, including even the primary goal here of accelerating the availability of broadband services. But even if the

² *Deployment of Adv. Telecomm. Capability to All Americans In a Reasonable & Timely Fashion*, Third Report, 17 FCC Rcd. 2844, ¶ 1 (2002) (“*Third Section 706 Report*”).

³ *Id.*

⁴ *Third Section 706 Report* (concurring statement of Commissioner Abernathy).

⁵ *Third Section 706 Report* (concurring statement of Commissioner Martin).

Commission were to excuse the Bells from the requirement that broadband transmission be provided to ISPs on a nondiscriminatory basis as a telecommunications service, that would have no effect on the right of competitive LECs to use unbundled elements to provide broadband transmission as a telecommunications service or to offer combinations of information and telecommunications services over unbundled loops.

At the outset, it is important to have a clear understanding of the ruinous real-world consequences of endorsing the Bells' proposals. Broadband-focused competitive local exchange carriers ("LECs") generally have no alternative suppliers of broadband-capable loops. Thus, the Bells' unbundling proposals would likely drive them out of business, completing what the Bells have been working for years to accomplish through their well-documented campaigns of discrimination. Internet service providers ("ISPs") also today rarely have alternative broadband suppliers and would be at the mercy of their Bell competitors. Few could be expected to survive in the long term. And *all* competitive LECs would be placed at a debilitating competitive disadvantage, for incumbent LECs would be able to cover their loop costs with both voice and data revenues – but competitive LECs would not.

The bottom line for consumers would be a single DSL provider – the incumbent LEC. For most businesses and the many residential consumers that have no cable modem service alternative, that would mean a single *broadband* provider. Most other residential consumers would have a choice only between the incumbent LEC and the incumbent cable company.

Matters would be even worse on the voice side. Although it will be years before cable telephony is broadly available, the *intramodal* wireline competition that the Bells have successfully resisted for years is finally beginning to take root and deliver the 1996 Act's promise of local

telephone choice. But if the Bells are able to insulate the high frequency portion of their bottleneck loops from competition, that would close off many of the most promising facilities-based competitive LEC entry strategies. AT&T, for example, plans to launch a UNE-based voice/data offer that allows consumers to obtain several voice lines and high-speed data service over a *single* loop. Such offers provide obvious and enormous benefits to consumers and could, for the first time, put real competitive pressure on the Bells' enduring local monopolies. But the high-speed data service and the additional "derived" voice lines require use of the high frequency portion of the loop that the incumbents would deny their competitors. In short, the Bells' broadband proposals would guarantee less competition, fewer choices, and higher prices for information services, standalone broadband services, and narrowband voice telecommunications services.

The Bells will undoubtedly push their anticompetitive broadband agenda here using the same approach that they have employed in other fora: superficial appeals to "regulatory parity," disingenuous threats to withhold "broadband investment," and "fact" reports that are anything but that – all designed to draw attention away from legal and economic arguments that strain credulity. That approach has been remarkably successful in fora where "sound bites" and superficial analysis often reign, but it has no place here. The service classification and regulatory implication questions raised in the *Notice* are legal questions with potentially far-reaching consequences that can only be rationally resolved through a thorough, thoughtful, and open-minded analysis of the governing statutes and the relevant marketplace realities.⁶ Approached in

⁶ See *Notice* ¶ 2 ("the Commission's broadband policy will first and foremost be guided by, and grounded in, the Communications Act").

this manner, the answers to the questions raised in the *Notice* are clear and straightforward – and flatly inconsistent with the Bells’ anticompetitive proposals.

First, wireline broadband Internet access services are information services where – as is the case with cable modem services – the carrier provides a single, integrated service that bundles both a broadband transmission component via facilities that provide last mile connections and the Internet access services that provide the capability to retrieve, store, process, and interact with information.⁷

Second, as the Commission has correctly held twice in the past, the standalone broadband transmission services that incumbent LECs provide today are common carriage and thus are “telecommunications services.”⁸ There is no room for debate: “xDSL and packet-switching are simply transmission technologies”⁹ that, like the narrowband transmission technologies used to provide other basic telecommunications services over the same wires, involve no net change in either content or protocol.

The Bells suggest that their broadband transmission services might qualify as “private carriage” if they discontinue their current common carrier offerings and begin to provide broadband transmission only to ISPs with whom they choose to deal and only under individually established rates, terms, and conditions. But the Bells neither have been nor lawfully could be

⁷ See *High-Speed Access To The Internet Over Cable And Other Facilities*, Declaratory Ruling, 17 FCC Rcd. 4798, ¶ 38 (2002) (“*Cable Modem Declaratory Ruling*”).

⁸ *Deployment of Wireline Servs. Offering Adv. Telecomm. Capability*, Second Report & Order, 14 FCC Rcd. 19237, ¶ 21 (1999) (“*AOL Bulk Services Order*”) (“although bulk DSL services sold to Internet Service Providers are not retail services subject to section 251(c)(4), these services are telecommunications services, and as such, incumbent LECs must continue to comply with their basic common carrier obligations with respect to these services”).

⁹ *Deployment of Wireline Servs. Offering Adv. Telecomm. Capability*, Mem. Op. & Order, 13 FCC Rcd. 24012, ¶ 35 (1998) (“*Advanced Services Order*”).

granted authority to do that. As an initial matter, the Bells' proposal is foreclosed by the Commission's *Computer Inquiries* safeguards whenever the Bells, as they do today, use broadband transmission facilities to provide their own information services, and there is no sustainable ground for any "broadband" exemption from those rules. But more fundamentally, the terms and structure of the Communications Act prohibit such reclassification of non-specialized, generally available communications services as "private" carriage. Indeed, any such approach would make the Act's core consumer protections entirely discretionary. The Bells' standalone broadband transmission services are, and must remain, telecommunications services.

The *Notice* seeks comment on the "regulatory implications" of these broadband service classifications, particularly with respect to the Bells' unbundling and nondiscrimination obligations under both Section 251(c)(3) of the Act and the *Computer Inquiries* rules. The short answer is that there are none – the Bells' unbundling and nondiscrimination obligations rest on statutory and market power foundations that are entirely independent of the classification of the Bells' own broadband services.

Regulatory classifications certainly have no impact on the Bells' obligations under section 251(c)(3). A competitive LEC that leases a loop (or other network element) may always use it to provide any telecommunications service, including standalone broadband transmission service, regardless whether the incumbent LEC offers that service. That is clear from the Act's definition of "network element" (47 U.S.C. § 153(29)), from the terms of section 251(c)(3) itself, and from the Commission's uniform prior decisions. Even if the Bells ceased offering telecommunications services over particular elements, a competitive LEC could unquestionably use network elements to provide a common carrier broadband transmission service either directly to consumers (who

would then supply their own ISP) or to its own affiliate or division, which could, in turn, provide a single, integrated broadband Internet access service to consumers.

Further, as the Commission has squarely held, a competitive LEC may also provide *any* narrowband or broadband information services over a loop or other network element as long as it provides *some* telecommunications services over that network element.¹⁰ As the Commission also held, any other rule would blatantly discriminate in favor of the incumbent LEC in violation of section 251(c)(3).

For these reasons, there is no possible basis for the sweeping broadband exemptions that the Bells would carve out of their section 251 unbundling obligations. Regardless of the regulatory classification of the Bells' own broadband services, the Bells and other incumbent LECs must continue to make all network elements available to competitive LECs for use in the provision of both narrowband and broadband telecommunications and information services.

It should be equally clear that the classification of the Bells' wireline broadband services has no impact on their existing obligations under the Commission's *Computer Inquiries* rules, which require them to offer separately and on nondiscriminatory terms the broadband transport and other "basic service" building blocks that are critical inputs to competitors' information services. Indeed, the fact that the Bells' Internet access services are information services that compete with the information services of unaffiliated ISPs who must use the Bells' key

¹⁰ See *Implementation of the Local Competition Provisions of the Telecomm. Act of 1996*, First Report & Order, 11 FCC Rcd. 15499, ¶ 995 (1996) ("telecommunications carriers that have interconnected or gained access under sections 251(a)(1), 251(c)(2), or 251(c)(3), may offer information services through the same arrangement, so long as they are offering telecommunications through the same arrangement as well") ("*Local Competition Order*"), *aff'd in part & vacated in part, sub nom Iowa Utils. Bd. v. FCC*, 120 F.3d 753 (8th Cir. 1997), *aff'd in part & rev'd in part, sub nom AT&T Corp. v. Iowa Utils. Bd.*, 119 S. Ct. 721 (1999).

transmission inputs is the very reason for the core *Computer Inquiries* unbundling and nondiscrimination obligations.

The *Notice* suggests that the *Computer Inquiries* rules are products of a different era and inquires whether they should be applied to DSL-based (and future wireline) broadband services in light of marketplace, technological, and legal differences between those services and the older-generation services that produced the *Computer Inquiries* rules. Again, the answer is clear: there are no relevant differences, and thus, no rational basis for limiting the *Computer Inquiries* safeguards to narrowband services.

The *Computer Inquiries* rules are based upon the unassailable economic understanding that “a carrier with market power and control over communications facilities essential to the provision of enhanced services could distort the competitive evolution of the enhanced services markets at the expense of the communications ratepayer.”¹¹ As exciting as they may be, broadband services are not exempt from fundamental economic principles. Thus, absent a clear showing that the Bells no longer have market power and control over key facilities that unaffiliated broadband ISPs need, there is no rational basis for a broadband exemption from the core *Computer Inquiries* unbundling and nondiscrimination obligations. No such showing has been, or could be, made, because the Bells remain virtually the *only* suppliers of broadband (and narrowband) transport.

To be sure, there are signs that this may not continue indefinitely. Cable companies and ISPs are exploring commercially, in a few areas, new multiple-ISP arrangements that may prove

¹¹ *Amendment of Section 64.702 of the Commission’s Rules and Regulations (Second Computer Inquiry)*, Final Decision, 77 FCC 2d 384, ¶ 210 (1980) (“*Computer IP*”), *recon.*, 84 FCC 2d 50 (1980), *recon.*, 88 FCC 2d 512 (1981), *aff’d sub nom.*, *Computer & Communications Indus. Ass’n v. FCC*, 693 F.2d 198 (D.C. Cir. 1982).

sustainable and become ubiquitous. But, as the Commission and the courts have consistently cautioned, decisions to terminate or to weaken core regulatory safeguards must be based on present facts, not speculation about what may come. The stark contrast between satellite and wireless providers' broadband predictions and their faltering broadband efforts confirms the continuing necessity of that approach. The Bells' local facilities quite clearly are – and will remain for some time – essential inputs to unaffiliated ISPs' provision of broadband information services. That is not a theoretical concern, but a proven fact – the record in the pending *ILEC Broadband Dominance* proceeding (CC Docket No. 01-337) confirms that the Bells' market power remains difficult to cabin even *with* the *Computer Inquiries* rules and dominant carrier regulations in place.

Supposed “technology” differences between xDSL transmission and previous transmission technologies add nothing to the required analysis – market power is an *economic* fact that flows from the control of transmission wires that are critical inputs to unaffiliated ISPs' information services. Market power does not turn upon the types or sophistication of the electronics that the Bells happen to employ on those wires at any point in time. In any event, neither DSL-based nor “fiber-to-the-curb” transmission technologies are in any relevant sense different from the T1 and other digital transmission technologies that existed when the *Computer Inquiries* rules were promulgated. All of these services are digital services enabled by modems and other electronics located at either end of copper/fiber wires. There has simply been steady progress in the performance of these modems that provides a greater ability to distinguish the signal from line noise and thus, as a consequence of basic physics, allows more effective use of the copper-wire bandwidth.

Nor does the 1996 Act's general support for the promotion of advanced services availability provide any basis to exempt the Bells' broadband services from the core *Computer Inquiries* unbundling and nondiscrimination requirements. Even if further deregulation of the Bells could be expected to accelerate their own broadband investment and deployment, it could only do so at the extraordinary cost of decreased *competition*, which would contravene Congress's expressly stated goal of promoting competition. *See Notice* ¶ 2 ("we recognize that the statutory objectives to promote competition . . . have not changed").

But the great irony here is that the gerrymandering that the Bells urge would *not* serve to accelerate broadband investment, and, in fact, could only be expected to have the opposite effect. The one clear lesson from the first "broadband" decade is that the Bells are not leaders, but followers – and reluctant ones at that – in the deployment of new services. That is because newer, faster services "cannibalize" the Bells' lucrative older, slower services. Thus, the Bells' decisions to invest in new services are not made to maximize the profits associated with those new services, but to maximize the Bells' profits for *all* of their services. That is why the Bells left DSL technology on their shelves for years and why, in the wake of waning intramodal DSL competition, they raised their DSL prices substantially. Although those decisions cost the Bells some broadband subscribers (in the areas where they actually face cable competition), both decisions meant more second-line sales and more overall profits.

There is no reason to expect the Bell decisional process to change in the future, and thus no basis to speculate that freeing the Bells from unbundling regulations – which, if properly enforced, provide for full compensation at risk-adjusted, competitive market levels – will have any material impact on the pace or scope of their network upgrades. To the contrary, history has

proven that it takes both intermodal and intramodal competition to overcome the Bells' skewed investment incentives. But the Bells' proposals would have one clear impact on broadband investment – they would put an end to competitive LECs' multi-billion dollar investments in broadband-enabling electronics, switches and other equipment that have undeniably accelerated the availability of broadband services.

In sum, close attention to the relevant statutory requirements, economic principles, and marketplace facts makes decisions regarding the appropriate regulatory framework for the Bells and their wireline broadband services both obvious and uncontroversial. If the Commission wants to accelerate the availability of competitively-priced broadband services to all Americans – and not simply to create a more profitable environment for the Bells – it must reject the Bells' proposals to relax their unbundling and nondiscrimination obligations and should take immediate action to close off the many existing loopholes and ambiguities that the Bells are today using to evade those obligations and to impede both narrowband and broadband competition.

ARGUMENT

I. BROADBAND WIRELINE INTERNET ACCESS SERVICES ARE “INFORMATION SERVICES” AND STANDALONE BROADBAND TRANSMISSION SERVICES ARE “TELECOMMUNICATIONS SERVICES.”

The *Notice* seeks comment on the proper regulatory classification of “wireline broadband Internet access services” and of “standalone” broadband transmission services. In each instance, the Commission is revisiting questions that it has previously addressed and that are quite straightforward. First, the Commission’s 1998 *Universal Service Report* to Congress correctly concluded that Internet access services that bundle information and transmission “are appropriately classed as information, rather than telecommunications, services”¹² and as the *Notice* tentatively concludes, it makes no difference if the provider owns the underlying transmission facilities. Second, numerous prior Commission orders have held that incumbent LECs’ existing standalone broadband transmission services are “telecommunications services.” Because these services indisputably are, and must be, provided on a common carrier basis, those holdings are clearly correct.

The *Notice* also seeks comment on Verizon’s request that the Commission transform existing standalone Title II broadband transmission services into “private carriage” offerings that would be subject only to the Commission’s “ancillary” jurisdiction under Title I. In order to do so, the Commission would have to authorize the Bells and other incumbent LECs to abandon their existing, generally available, tariffed standalone broadband transmission services that are now provided on a common carrier basis and to begin providing the very same broadband transmission functionality only to those ISPs with whom the Bells choose to deal, and only under

¹² *Federal-State Joint Board on Universal Service*, Report to Congress, 13 FCC Rcd. 11501, ¶ 73 (1998) (“*Universal Service Report*”).

the individually established rates, terms, and conditions that the Bells choose to offer particular ISPs. Any effort to do so would be unlawful. Verizon's request is not only foreclosed by the *Computer Inquiries* safeguards in those instances where the Bells use broadband transmission facilities to provide information services (*see* Part III, *infra*), but by the terms and structure of the Act, which also prohibit the reclassification of generally available telecommunications services as "private" carriage.

A. Services That Bundle Internet Access And Broadband Transmission Are Information Services, And Standalone Broadband Transmission Services Are Telecommunications Services.

The Act defines "information service" as "the offering of a capability for generating, acquiring, storing, transforming, processing, retrieving, utilizing, or making available information via telecommunications."¹³ "Telecommunications," in turn, 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 and received."¹⁴ Finally, "[t]elecommunications service" is "the offering of telecommunications for a fee directly to the public, or to such classes of users as to be effectively available to the public, regardless of the facilities used,"¹⁵ and thus constitutes the offering to the public of standalone telecommunications (*i.e.*, the transmission of information without change in form or content).¹⁶ These definitions compel the affirmation of the Commission's prior, correct holdings that broadband Internet access

¹³ 47 U.S.C. § 153(20).

¹⁴ *Id.* § 153(43).

¹⁵ *Id.* § 153(46).

¹⁶ *Universal Service Report* ¶¶ 39-40.

services are information services and that standalone broadband transmission services are telecommunications services.

Internet Access. The Commission previously held that even Internet access services that customers reach on a “dial up” basis through separately obtained local telephone service are information services, and not “telecommunications services.”¹⁷ These ISPs do not offer their customers pure transmission, but rather the capability to acquire, store, retrieve, use, and make available information in myriad ways. Further, even when customers separately obtain their own last-mile connections, the ISP’s service is offered “via telecommunications,” because ISPs use telecommunications transmission facilities to connect their nodes and other centrally-located computer facilities to the public Internet. As the *Notice* correctly states, Internet access service is no less an information service when the ISP owns the telecommunication facilities that connect the end user to the ISP’s nodes and provides this capability as a bundled feature of the Internet access service itself.¹⁸ In both cases, the service provides the capability to retrieve, store, and interact with information via telecommunications.

Standalone Broadband Transmission. The Commission has also previously held that the Bells and other entities provide “telecommunications services” when they offer ISPs or other members of the public high-speed (broadband) transmission on a stand-alone basis, without a “bundled” Internet access or other information service component. These conclusions are unassailable. These standalone “broadband” transmission services are telecommunications services for the same reasons that “exchange access” and the incumbent LECs’ other “narrowband” services are telecommunications services.

¹⁷ *Id.* ¶¶ 79-81.

¹⁸ *Notice* ¶¶ 17, 24.

Preliminarily, there are a wide variety of “standalone” high-speed transmission services that are currently provided by competitive and incumbent LECs alike under generally available tariffs and that would satisfy the (quite arbitrary) definitions of broadband that have been used in other proceedings (*e.g.*, services with transmission speeds of 200 kbps and higher). These standalone broadband services have a wide range of applications that today include, but are by no means limited to, use in obtaining or providing “wireline broadband Internet access services.” For example, higher volume customers have long subscribed to high-speed transmission services to use for voice and point-to-point data communications. In addition to services provided over high capacity all-fiber loops, these customers use T1.5 and HDSL-based services that are provided over loops that are entirely or largely comprised of copper, that deliver signals at a 1.544 Mbp or higher levels of bandwidth, and that can be used to derive 24 or more voice equivalent channels and to provide both voice and data transmission.¹⁹

ADSL technology allows the high-frequency portion of loops to be used to receive information at these or higher speeds while the low-frequency portion is used for voice-grade communications. ADSL-based services have a range of potential applications, including the provision of private network services to business customers and the provision of second and third “derived” voice lines over the high-frequency portion of loops.²⁰ ADSL-based services are predominantly used by ISPs as inputs in the bundled internet access services they offer to business and residential customers,²¹ and any ISP can today purchase ADSL service from incumbent LEC

¹⁹ See Declaration of Richard A. Chandler, ¶¶ 24, 32 (attached as Ex. A).

²⁰ See *id.* ¶¶ 33-34.

²¹ See generally *AOL Bulk Services Order* ¶ 6.

tariffs. ADSL services are also sometimes subscribed to by end user customers who use them to reach the facilities of the ISP of their choice.

T1.5, HDSL, ADSL, and the earlier ISDN-based services are all services that exploit evolving “pair gain” technologies and electronics to obtain increasingly greater amounts of usable bandwidth from existing copper loops. There is no “substantial technical difference” between an ISDN-based service providing transmission at speeds of 160 kbps – which would not be regarded as “broadband” under some of the arbitrary definitions that have been used – and a T1.5, HDSL-based, and other DSL-based service providing transmission at higher speeds.²²

Whether purchased by end users or ISPs and whether provided by incumbent or competitive LECs, today’s stand-alone broadband transmission services are “telecommunications services.” The legislative history provides, and the Commission²³ and the D.C. Circuit²⁴ have held, that the 1996 Act adopted the definition of “telecommunications service” to codify the judicial and regulatory definitions of “common” and “private” carriage that had been developed under the original Communications Act of 1934 and its statutory predecessors. These decisions establish a two-prong test to determine if a service is common carriage that is subject to regulation under Title II of the Act, rather than private carriage. The first is whether the service at issue is telecommunications, which, as the Commission has held, excludes activities and

²² See Chandler Dec. ¶ 23; see also *id.* ¶ 31 (“As was the case with ISDN, current DSL technologies, such as ADSL, HDSL, and others are designed to use the inherent capacity of the existing loop plant by applying increasingly sophisticated signal processing techniques to the equipment sending and receiving signals over the loop.”).

²³ *Implementation of the Non-Accounting Safeguards of Sections 271 and 272 of the Comm. Act of 1934*, 11 FCC Rcd. 21905, ¶ 265 (1996) (definition was adopted to distinguish common and private carriage); *Cable & Wireless, PLC*, Cable Landing License, 12 FCC Rcd. 8516, ¶ 13 (1997); *Virgin Islands Tel. Co. v. FCC*, 198 F.3d 921, 929-30 & n.8 (D.C. Cir. 1999).

²⁴ *Virgin Islands Tel.*, 198 F.3d at 926-928, 929-30 & n.8.

equipment that merely use telecommunications (*e.g.*, information, or “enhanced,” services)²⁵ or that are merely incidental to the use of telecommunications (*e.g.*, billing and collection and customers premises equipment).²⁶ The second is whether the service is one that the carrier offers, or should offer, indifferently to the public at large on standard terms. This latter prong is satisfied automatically if the carrier offers the service indifferently to the public at large. But even if it does not, the service will be common carriage if there is “any legal compulsion to serve the public indifferently” or if “there are reasons implicit in the nature of the operations to expect an indifferent holding out to the eligible user public.”²⁷

There is no question that standalone broadband transmission services provide “telecommunications” because they provide only “transmission . . . without change in the form or content.”²⁸ Indeed, the Commission has recognized that “xDSL and packet-switching are transmission technologies.”²⁹ When an incumbent LEC sells DSL service to an ISP, the incumbent transports traffic packets sent from the customer’s computer through the Network Interface Device on its premises over the incumbent’s network to the ISP’s router. During that transmission, there is no net change in either content or protocol: the customer’s DSL modem transmits information that it receives from the customer’s computer (in Internet Protocol) in ATM protocol over the incumbent LEC’s network to the ISP’s router. That transmission is delivered

²⁵ See, *e.g.*, *Computer II* ¶ 97.

²⁶ See, *e.g.*, *Detariffing of Billing and Collection*, Report & Order, 102 FCC 2d 1150, ¶¶ 32-34 (1986) (billing and collection); *Computer II* ¶ 98 (billing), 174 (customer premises equipment).

²⁷ *Virgin Islands Tel.*, 198 F.3d at 924 (brackets omitted) (*quoting National Assoc. of Regulatory Utility Commissioners v. FCC*, 525 F.2d 630, 642 (D.C. Cir. 1976) (“*NARUC I*”)).

²⁸ 47 U.S.C. § 153(43).

²⁹ *Advanced Services Order* ¶ 35.

by the incumbent LEC to the ISP while still in ATM format. It is the ISP's router that converts the transmission back to Internet Protocol for further processing.³⁰

The *Notice* focuses on the second prong of the statutory definition: *i.e.*, that telecommunications must be offered “for a fee directly to the public, or to such classes of users as to be effectively available to the public.” The *Notice* recognizes, as it must, that standalone broadband services are now being generally offered and thus satisfy the requirement that the offering be indifferent to the eligible public. Nevertheless, the *Notice* (§ 26) seeks comment on whether the service is being offered “directly to the public” if DSL-based services are being purchased “on a wholesale basis as an input to ISPs’ information services.”³¹ The answer here is clear as well. The fact that ISPs obtain service at “wholesale” simply is not pertinent to the question of whether incumbent (and competitive) LECs are providing the standalone broadband transmission service directly to the public as common carriers.

ISPs are as much members of the public as any other purchasers, and an ISP's use of the service as an input for its Internet access service does not alter the fact that it orders and receives the standalone broadband transmission service “directly” and as a member of the “public.” Beyond that, services that the Bells have targeted at ISPs must be available to “end users” and other members of the public even if ISPs were the only actual purchasers, for sections 201(b) and 202(a) of the Act and the Commission's resale and other regulations prohibit incumbent LECs from expressly limiting the class of eligible purchasers of such tariffed services.³²

³⁰ See Chandler Decl. ¶¶ 37-38.

³¹ See also *id.* ¶ 26 (asking whether ISPs “as a class” might be “interpreted” as the “public”).

³² See, e.g., 47 C.F.R. § 51.603(a) (“A LEC shall make its telecommunications services available for resale to requesting telecommunications carriers on terms and conditions that are reasonable and non-discriminatory.”). Moreover, the Commission's access charge regulations have always

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And even if incumbent LECs could lawfully prohibit any members of the public except ISPs from purchasing their standalone broadband transmission services, those services would still be offered directly to the public under the interpretations of common carriage that are codified in the Act's definition of telecommunications service. For example, the Supreme Court has held that a firm is operating as a common carrier if it has generally offered service on standard terms to even a small and narrowly-defined subclass of customers: there, guests at a single hotel.³³ Similarly, the D.C. Circuit has stated that "[o]ne may be a common carrier though the nature of the service rendered is sufficiently specialized as to be of possible use to only a fraction of the total population" when the service has been generally and indiscriminately offered to these customers.³⁴ The fundamental concept of a communications common carrier is that such a carrier makes a public offering to provide, for hire, facilities by wire or radio whereby all members of the eligible public who choose to employ such facilities may communicate or transmit intelligence of their own design and choosing. Any service that indiscriminately allows any and all ISPs to obtain

(. . . continued)

treated ISPs as "end users." See, e.g., *Access Charge Reform*, First Report & Order, 12 FCC Rcd. 2631, ¶ 430 (1997), *aff'd Southwestern Bell Tel. Co. v. FCC*, 153 F.3d 523, 541-44 (8th Cir. 1998) (reaffirming "ESP exemption" from access charges); *MTS and WATS Market Structure*, Mem. Op. & Order, 97 FCC 2d 682, ¶ 83 (1983) (instituting ESP exemption).

³³ *Terminal Taxicab Company v. Kutz*, 241 U.S. 252, 255 (1916) (Holmes, J.) (holding that a taxicab company that provided service only to guests of particular hotels was a common carrier, noting that "the public does not mean everybody all the time"); *Independent Data Communications Mfrs. Assoc.*, Mem. Op. & Order, 10 FCC Rcd. 13717, ¶¶ 50-54 (1995) (frame-relay services are common carriage even though they are provided only to large data-users) ("*AT&T Frame Relay Order*"); cf. *Virgin Islands Tel.*, 198 F.3d at 926 (concluding that service was not common carriage where the carrier did not provide the service indiscriminately but making clear "that 'carriers need not serve the whole public' to be classified as common carriers") (quoting *National Assoc. of Regulatory Utility Comm'rs v. FCC*, 525 F.2d 630, 642 (D.C. Cir. 1976) ("*NARUC I*")).

³⁴ *NARUC I*, 525 F.2d at 641.

ADSL and other standalone broadband transmission services and to use them to provide Internet access services – as the Bells’ tariffed services do today – is therefore offered “directly to the public” and is a “telecommunications service” that is subject to regulation under sections 201-205 of the Act.

That is why the Commission has twice held that that the DSL-based and other standalone broadband services that ISPs obtain at “wholesale” are “telecommunications services” under the 1996 Act. The *Advanced Services Order* noted that incumbent LECs offer a variety of services that use xDSL technology and packet-switching to provide “members of the public with a transparent, unenhanced, transmission path” and that neither the incumbents nor anyone else “disagree with our conclusion that a carrier offering such a service is offering a ‘telecommunications service.’”³⁵ The Commission held that it is irrelevant that the incumbent LEC is providing only a “wholesale” transmission service that is used by ISPs as an “input” into the retail services that they provide. The Commission stated that “in such a case . . . we treat the two services separately: the first service is a telecommunications service (*e.g.*, the DSL-enabled transmission path), and the second service is an information service, in this case Internet access.”³⁶ Similarly, in its subsequent *AOL Bulk Services Order*, the Commission held that “although bulk DSL services sold to Internet Service Providers are not retail services subject to section 251(c)(4), these services are telecommunications services, and, as such, incumbent LECs must continue to comply with their basic common carrier obligations with respect to such services.”³⁷

³⁵ *Advanced Services Order* ¶ 36; *see also AOL Bulk Services Order* ¶ 10 (“The record reflects, and the parties agree, that advanced services are telecommunications services that predominantly are offered to residential and business end-users and to Internet Service Providers”).

³⁶ *Advanced Services Order* ¶ 36.

³⁷ *AOL Bulk Services Order* ¶ 21.

These holdings merely followed the determinations that the Commission had made in other indistinguishable contexts. Most prominently, the Commission has required incumbent LECs to provide indiscriminately by tariff to any requesting carrier switched exchange access services, which can be used only by interexchange carriers and are wholesale inputs into their services. On two separate occasions, the Commission has held that these wholesale services are “telecommunications services” within the meaning of the Act. In the *Local Competition Order*, for example the Commission noted that “exchange access services” are “non-retail services” that are “sold to IXCs as an input component to the IXC’s own retail services,”³⁸ but expressly held that exchange access service is a telecommunications service that competitive LECs can provide using unbundled network elements.³⁹ Similarly, in the *Non-Accounting Safeguards Order*, the Commission rejected the Bells’ claims that exchange access services are not telecommunications services, reiterating that “exchange access service” is a “telecommunications service” even if it is provided only at wholesale and only to a subset of all users of telecommunications services.⁴⁰

For these reasons, the Bells appear to be seeking, not a declaration that their existing tariffed services are not “telecommunications services,” but rather the authorization to abandon their existing tariffed services and to begin serving ISPs only on a private carriage basis. As explained in the next section, that would be unlawful.

³⁸ *Local Competition Order* ¶ 874.

³⁹ *Id.* ¶ 356.

⁴⁰ *Non-Accounting Safeguards Order* ¶¶ 263-64.

B. The Act's Terms, Structure, And Purposes Foreclose The Bells' Proposal To Abandon Their Existing Tariffed Standalone Broadband Transmission Services And To Commence Serving ISPs Only As "Private Carriers" That Are Exempt From The Requirements Of Sections 201 and 202.

Broadband telecommunications services, like other common carrier telecommunications services, are subject to Title II regulation in accord with sections 201-205 of the Communications Act. As such, the services are subject to several requirements. They must be provided on reasonable request to any customer (§ 201(a)). The incumbent LECs' rates, terms, and conditions must be "just and reasonable," and the incumbents cannot impose restrictions that unreasonably prevent the service from being used for a beneficial purpose (§ 201(b)). The incumbent LECs are prohibited from unreasonably discriminating among customers in the provision of these services and any "like" telecommunications services (§ 202(a)). And because the Bells and other incumbent LECs are properly classified as "dominant carriers," they are required to provide the services pursuant to filed tariffs (§ 203).

If the Bells were to be successful in the pending proceeding in which they seek to have their broadband services reclassified as "nondominant" – and, as AT&T and others have demonstrated in that proceeding, there is no rational basis to grant them the relief they seek – they would be excused only from the requirement that they file tariffs for their broadband transmission services. Those services would continue to be subject to the substantive requirements of sections 201 and 202 and, in particular, to the requirement that all customers receive service on nondiscriminatory rates, terms, and conditions.

The *Notice* seeks comment on a far more radical proposal which Verizon advanced in a recent letter to Chairman Powell.⁴¹ Verizon contends that the Commission can and should exempt its standalone broadband transmission services from *all* of the Title II requirements and should subject those services to regulation, if at all, only under the Commission's ancillary Title I jurisdiction. Verizon notes correctly that past decisions have held that incumbent LECs can operate as private carriers with respect to incidental activities that are not themselves telecommunications and with respect to telecommunications services that meet unique, specialized needs of individual customers (and for which there is no general demand). But it leaps from these unremarkable holdings to the quite remarkable contention that the Commission has authority to exempt broad categories of services from Title II regulation even though they are generally demanded and used by large classes of customers, have no generally available substitutes, are used in substantial part to compete with incumbent LECs' information services, have a range of other potential applications, and have always been generally offered on a common carrier basis. Verizon claims that the Commission has discretion simply to "declare" that such existing services can be offered on a "private carrier" basis so that incumbent LECs may deal with only the customers whom they choose to serve and only on individually established rates, terms, and conditions. This contention is baseless.

Verizon's contention is facially meritless insofar as it would apply to broadband transmission capabilities that the incumbent LECs use today – or will use in the future – to provide their own Internet access and other information services. As explained more fully in Part

⁴¹ See, e.g., Letter of William P. Barr to the Hon. Michael Powell, Chairman, at 1 (Jan. 9, 2002) ("Barr Letter") (acknowledging that incumbent LECs currently provide broadband services subject to "common carrier regulations").

III below, the Commission's core *Computer Inquiries* unbundling and nondiscrimination safeguards require (i) that incumbent LECs provide the underlying transmission components of their information services to actual or prospective competitors under tariff and (ii) that the incumbent LECs' information services affiliates or divisions obtain such transport at the same rates, terms, and conditions. These rules apply whether or not the transmission services are currently generally offered to the public or otherwise satisfy the requirements of common carriage. And, as explained in Part III, there is no basis to craft a "broadband" exemption from these bedrock *Computer Inquiries* requirements.

Quite apart from the *Computer Inquiries* rules, however, Verizon's proposal is patently unlawful. Verizon's proposal, by its terms, would apply to *any* present or future transmission services that satisfy the definition of broadband (whatever that may be),⁴² whether or not they are being used to provide ISP services. It would, for example, apply to the T1.5 and HDSL services that larger volume customers use for voice and point-to-point data transmission, and it would also apply to ADSL services when they are used not for Internet access, but to provide private network services or derived second or third voice lines. These epitomize services that constitute common carriage, and there is no possible basis for allowing Verizon (or any other incumbent LEC) to discriminate in the provision of those services.

But limiting the Verizon proposal to DSL-based (or any other subset of) broadband services could not save it. The Commission simply has no authority to exempt the Bell's common carrier broadband services from Title II regulation by declaring them to be "private" carriage.

⁴² Indeed, SBC claims that a service providing transmission speeds of 56 kbps or higher constitutes a "broadband service." See SBC Petition for Expedited Ruling that it is Non-Dominant in Its Provision of Advanced Services and for Forbearance from Dominant Carrier Regulation of those Services, CC Docket No. 01-337, at 30 (filed Oct. 3, 2001).

Unlike cable operators, the Bells have always provided standalone broadband transmission services on a common carrier basis, and thus, the Bells' proposal would require that their services be *reclassified* if they are to be deemed private carriage.⁴³ But there are only two circumstances in which the Commission has excluded – or even considered excluding – existing incumbent LEC offerings from the category of common carriage, and neither is applicable to the incumbent LECs' standalone broadband transmission services. The first is where the service did not itself comprise or provide telecommunications. Contrary to Verizon's suggestion, that is the basis on which the Commission eliminated Title II regulation of customer premises equipment and enhanced services; it is also the basis on which the Commission eliminated Title II regulation of billing and collection services.⁴⁴ Those offerings involved features or facilities that *use* telecommunications or that are incidental to telecommunications but that do not themselves provide telecommunications. Standalone broadband transmission services, by contrast, plainly do constitute the provision of telecommunications.

The second circumstance in which the Commission has authorized incumbent LECs to provide private carriage involve "individual case basis" ("ICB") offerings that were allowed

⁴³ *Compare with Cable Modem Declaratory Ruling* ¶ 55 ("The record indicates that AOL Time Warner is determining on an individual basis whether to deal with particular ISPs and is in each case deciding the terms on which it will deal with any particular ISP. To the extent that AOL Time Warner is making an offering of pure telecommunications to ISPs, it is dealing with each ISP on an individualized basis and is not offering any transmission service indiscriminately to all ISPs. Thus, such an offering would be a private carrier service, not a 'telecommunications service.'").

⁴⁴ *Detariffing of Billing and Collection*, Report & Order, 102 FCC 2d 1150, ¶¶ 32-34 (1986). See also *Policy and Rules Concerning Rules for Dominant Carrier Regulation*, Second Report & Order, 5 FCC Rcd. 6786, ¶ 193 (1990) ("*Second Dominant Carrier Order*"); *In re Special Construction Of Lines and Special Service Arrangements Provided By Common Carriers*, Notice of Proposed Rulemaking, 97 F.C.C. 978, 978-81 (1984); *Competition in the Interstate Interexchange Marketplace*, Notice of Proposed Rulemaking, 5 FCC Rcd. 2627, ¶¶ 141-52 (1990) ("*Interexchange Competition NPRM*").

because the services in question were unique to individual customers and because there was no (or little) general demand for those services. In some applications, “ICB service features new technology for which little demand exists;” such services will not evolve into generally available offerings until demand grows.⁴⁵ “In other applications, ICB offerings are simply unique service arrangements to meet the needs of specific customers that will never evolve into generally available offerings.” *Id.*⁴⁶ Plainly, standalone broadband transmission services fall into neither category.⁴⁷

Indeed, because there is such broad-based existing demand from ISPs and others for the incumbent LECs’ standalone broadband transmission services, the *Notice* specifically asks (§§ 50-51) how any regime of Title I regulation could assure that ISPs receive service at reasonable and nondiscriminatory rates. The simple answer is that it could not, unless it looked exactly like the Title II regulation that now applies to such services. And the very existence of the Commission’s concern underscores that the nature of standalone broadband transmission services requires that they should be generally available, and not subject to the Bells’ discretion as to whom they will serve and on what individually established terms. In order to prevent the Bells and other

⁴⁵ *Second Dominant Carrier Order* ¶ 193.

⁴⁶ When the Commission proposed relaxing the regulation of the then-dominant AT&T to enable it to compete more effectively in the long distance market in 1990, it initially proposed private carriage arrangements only for “specialized telecommunications needs that cannot be optimally met through generalized tariffed offerings.” *Interexchange Competition NPRM* ¶ 151. The Commission ultimately did not adopt even this proposal, but instead simply authorized AT&T to provide service through contract tariffs.

⁴⁷ Verizon’s letter misstates the D.C. Circuit’s holding in *Southwestern Bell v. FCC*, 19 F.3d 1475 (D.C. Cir. 1994). The Court did not hold that incumbent LECs have the right to provide dark fiber on a private carriage basis. Rather, it held that the sole ground on which the Commission had asserted common carrier jurisdiction – the fact that the rates and terms of the service had been filed in accord with the Commission’s regulations – could not itself establish that the service
(continued . . .)

incumbents from using such discretion to the detriment of their information service competitors, any effective Title I regime by necessity would require the incumbent LECs to, in effect, provide service on a nondiscriminatory basis and to act as common carriers that would be subject, for that reason alone, to Title II of the Act.

Other provisions of the Act confirm that the Commission has no authority to exempt a broad category of generally available services from Title II regulations simply by declaring them to be “private” carriage. Section 10 allows the Commission to exempt carriers from particular provisions of the Act only upon a finding that competitive conditions will assure that the broadband transmission service is available on rates, terms, and conditions that are just, reasonable, and nondiscriminatory and that forbearance will satisfy the public interest. 47 U.S.C. § 160.⁴⁸ This provision would be meaningless and its standards could be evaded at will if the

(. . . continued)

was provided as common carriage and not private carriage. *Id.* at 1483. The Court left open the possibility that there were other bases for subjecting these services to Title II regulation.

⁴⁸ Section 160(a) states:

Notwithstanding section 332(c)(1)(A) of this title, the Commission shall forbear from applying any regulation or any provision of this chapter to a telecommunications carrier or telecommunications service, or class of telecommunications carriers or telecommunications services, in any or some of its or their geographic markets, if the Commission determines that –

- (1) enforcement of such regulation or provision is not necessary to ensure that the charges, practices, classifications, or regulations by, for, or in connection with that telecommunications carrier or telecommunications service are just and reasonable and are not unjustly or unreasonably discriminatory;
- (2) enforcement of such regulation or provision is not necessary for the protection of consumers; and
- (3) forbearance from applying such provision or regulation is consistent with the public interest.

Commission could exempt services from all of Title II merely by declaring that they hereafter may be provided on a private carriage basis.⁴⁹

Moreover, section 214(a) of the Act prohibits carriers from withdrawing common carrier services unless the Commission first finds that the withdrawal would not adversely affect the present public convenience and necessity. Thus, incumbent LECs could not begin providing their existing standalone broadband transmission services on a private carrier basis unless and until they received section 214 authority to withdraw the underlying facilities from common carriage, and such authority could not be granted unless the Commission found that “needed common carrier service will remain available” and that “withdrawal will not have a significant detrimental effect upon common carrier service.”⁵⁰

This showing could not be made. As noted, there are no generally available substitutes for the incumbent LECs’ standalone broadband transmission services. Cable, satellite and wireless operators generally do not provide standalone broadband transmission services, and competitive LECs are not remotely able to provide alternatives to incumbent LEC standalone broadband transport services in sufficient volumes to meet the public demand.

Finally, the Commission asks whether, “to the extent that a carrier continued to offer xDSL transmission under tariff, would *all* xDSL transmission services offered by that carrier be deemed ‘telecommunications services,’ or could certain xDSL services be concurrently offered through individually negotiated contracts as private carriage.” *Notice* ¶ 26. The answers to those questions are yes and no, respectively. Tariffed DSL-based transmission services are

⁴⁹ *Cf. ASCENT. v. FCC*, 235 F.3d 662, 666, 668 (D.C. Cir. 2001) (vacating portion of Commission order exempting incumbent LECs’ affiliates from the Act’s restrictions without making necessary forbearance findings).

⁵⁰ *Interexchange Competition NPRM* ¶142.

telecommunications services. Thus, although individually negotiated contracts could be permissible if they were filed as tariffs or contract tariffs, those arrangements would have to satisfy the substantive requirements of Title II to be lawful. *See* 47 U.S.C. §§ 201-03. An incumbent LEC cannot “vitate its common carrier status merely by entering into private contractual relationships with its customers.” *Southwestern Bell v. FCC*, 19 F.3d 1475, 1481 (D.C. Cir. 1994).

II. THE CLASSIFICATIONS OF WIRELINE BROADBAND SERVICES HAVE NO EFFECT ON COMPETITIVE LECs’ RIGHTS TO OBTAIN AND USE UNBUNDLED LOOPS AND OTHER NETWORK ELEMENTS TO PROVIDE, AMONG OTHER THINGS, BOTH STAND-ALONE BROADBAND TRANSMISSION SERVICES AND COMBINATIONS OF NARROWBAND AND BROADBAND TELECOMMUNICATIONS AND INFORMATION SERVICES.

The *Notice* (¶ 61) seeks comment on any “implications” the classifications of incumbent LECs’ wireline broadband services have for competitive LECs’ use of unbundled network elements. There are none. The manner in which an incumbent LEC chooses to use its facilities is simply irrelevant to competitive LECs’ rights under section 251(c)(3). The Act defines “network element” to include facilities used in the provision of a telecommunications service, as well as the capabilities of these facilities, and section 251(c)(3) gives competitive LECs the right to access loops and other unbundled network elements whenever *they* will use those network elements to provide a telecommunications service. Thus, even if an incumbent could lawfully cease providing telecommunications services over these facilities and began using them “exclusively to provide information services,” *Notice* ¶ 61, competitive LECs may still use those same network elements to offer any telecommunications services, including standalone broadband transmission services. Competitive LECs would also retain their rights to use unbundled loops and other network elements to offer combinations of narrowband or broadband telecommunications services and

information services. As the Commission's prior orders expressly hold, these are the unambiguous requirements of the Act.

A. A Competitive LEC May Obtain A Network Element And Use It To Provide Any Telecommunications Service, Including Standalone Broadband Transmission, Regardless How The Incumbent LEC Uses That Element.

Section 251(c)(3) gives competitive LECs the right to obtain “nondiscriminatory access to network elements” from the incumbent LEC “for the provision of a telecommunications service.” The plain meaning of this statutory language is clear: a competitive LEC is entitled to use network elements so long as that *competitive LEC* provides a telecommunications service over those network elements, no matter what services the incumbent LEC chooses (or is required) to offer over those elements.

The Commission expressly so held in the *Local Competition Order*, where it repeatedly stated that the Act allows new entrants to “offer services that differ from those offered by an incumbent” over leased network elements.⁵¹ The Commission gave numerous illustrative examples. For example, it held that new entrants can use network elements to provide Centrex even though incumbents “do not use [the network capability] to offer [Centrex] services to consumers.”⁵² More pertinently, the Commission made this point with respect to the use of the local loop to provide the xDSL-based services that incumbent LECs were not then offering. In noting that incumbent LECs had to perform technically feasible conditioning of the local loop to permit a competitive LEC to provide these standalone broadband transmission services, the

⁵¹ *Local Competition Order* ¶ 333; see also *id.* ¶ 314.

⁵² *Id.* ¶ 333.

Commission stated that “section 251(c)(3) does not limit the types of telecommunications services that competitors may provide to those offered by the incumbent LEC.”⁵³

The *Notice* refers to the fact that the Act defines network element, in part, as “a facility or equipment used in the provision of a telecommunications service,” and inquires whether this language could be read to limit competitive LEC access to particular facilities or features if the incumbent chose not to use them for the provision of a telecommunications service. It could not. The Commission has expressly held that the network element definition is not limited to facilities and equipment that the incumbent is *currently* using to provide telecommunications services.

In the *UNE Remand Order*, the Commission expressly rejected the Bells’ “arguments that because dark fiber is transport that is not currently ‘used’ in the provision of a telecommunications service, . . . it does not meet the statutory definition of a network element.”⁵⁴ The Commission concluded that network facilities are “‘used in the provision of telecommunications service’ in section 153(29)” if they have been or are “customarily employed” for the purpose of providing a telecommunications service.⁵⁵ In short, the Act and the Commission’s existing regulations unambiguously require network element access “that allows the requesting telecommunications carrier to provide any telecommunications service that can be offered by means of that network element” – narrowband or broadband – regardless whether the incumbent LEC itself chooses to offer that service using the requested element.⁵⁶

⁵³ *Id.* ¶ 381.

⁵⁴ *Implementation of the Local Competition Provisions of the Telecomm. Act of 1996*, Third Report & Order, 15 FCC Rcd. 3696, ¶ 327 (1999) (“*UNE Remand Order*”).

⁵⁵ *Id.*

⁵⁶ 47 C.F.R. § 51.307(c).

Thus, even if incumbent LECs could discontinue offering standalone broadband transmission as a telecommunications service – and, as explained above, that would be unlawful – competitive LECs may still provide this broadband telecommunications service over unbundled loops. Competitive LECs may offer telecommunications services in which the entire loop is used for broadband transmission (as in an HDSL-based service) or in which broadband transmission (and, at the competitive LEC’s election, derived voice service as well) is provided over only the high-frequency portion of the loop (as in an ADSL-based service). Whatever the nature of the broadband transmission, competitive LECs may use unbundled loops to provide that telecommunications service to any customer. A competitive LEC may offer this telecommunications service to ISPs, to end user customers who contract separately with an unaffiliated ISP, and to end user customers that separately purchase the competitive LEC’s own ISP service (just as many competitive LECs today separately provide dial-up access to customers who use their ISP services). Further, competitive LECs are free also to provide their broadband telecommunications service to their own division or affiliate, which could, in turn, add ISP functionality and then offer end users an integrated broadband Internet access service that includes last mile broadband transmission as a bundled component of the service. In each case, the competitive LEC would be using the leased loop “for the provision of a telecommunications service” – *i.e.*, standalone broadband transmission.

B. A Competitive LEC Has A Statutory Right To Use Network Elements To Offer Combinations Of Telecommunications Services And Information Services.

The *Notice* (§ 61) also seeks comment on whether competitive LECs can themselves use “network elements pursuant to section 251 to provide wireline broadband Internet access service”

to end users. Competitive LECs have clear statutory rights under section 251(c)(3) to do so, and those rights, too, are unaffected by the regulatory classification determinations that will be made in this proceeding. Indeed, the Commission has already held that a competitive LEC may use the unbundled network elements that it leases to provide *any* information service so long as the competitive LEC also is using those elements to provide a telecommunications service.

This is because section 251(c)(3) does not say that a network element must be used *exclusively* to provide a telecommunications service. If a competitive LEC has leased a loop from the incumbent and uses the loop to provide local voice services (transmitted over the low- or high-frequency portion of the loop), the competitive LEC may also use that same loop to provide broadband Internet access service or other information service to the customer over the high-frequency portion of the loop. Competitive LECs may do so irrespective of whether incumbents provide similar combinations of services. As the Commission held in the *Local Competition Order* (§ 995):

We conclude that, if a company provides both telecommunications and information services, it must be classified as a telecommunications carrier for purposes of section 251 We also conclude that telecommunications carriers that have interconnected or gained access under sections 251(a)(1), 251(c)(2), or 251(c)(3), may offer information services through the same arrangement, so long as they are offering telecommunications through the same arrangement as well.

Because incumbent LECs themselves use their loops to provide these combinations of services, any effort to prevent a competitive LEC from using the loop it has leased to provide both broadband Internet service and voice service would also violate section 251(c)(3)'s

requirement that network element access be provided on “nondiscriminatory” terms,⁵⁷ as the Commission also held in the *Local Competition Order* (¶ 995):

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

Moreover, the right to offer information services is necessarily implied by the nature of the access that a competitive LEC receives when it purchases the local loop network element under section 251(c)(3). Under section 251(c)(3), “a telecommunications carrier purchasing access to an unbundled network facility is entitled to exclusive use of that facility for a period of time,” whereas a carrier “purchasing access to a feature, function, or capability of a facility . . . is entitled to use of that feature, function, or capability for a period of time.”⁵⁸ The local loop is a network facility, and thus a carrier requesting the local loop receives exclusive control of that facility and the right to provide services over it.⁵⁹ The Commission has correctly held that this fosters competition: “Giving competing providers exclusive control over network facilities dedicated to particular end users provides such carriers the maximum flexibility to offer new services to such

⁵⁷ See also 47 C.F.R. §§ 51.307(a) (obligation to provide unbundled network elements on nondiscriminatory terms); 51.301(c) (network elements are to be provided with all of their features, functions and capabilities in a manner that allows the requesting carrier to provide any telecommunications service that can be offered using that network element); 51.309(a) (forbidding use restrictions); 51.311(b) (the quality of a network element shall be the same as for the ILEC); 51.313(b) (nondiscriminatory terms for access to a network element).

⁵⁸ *UNE Remand Order* ¶ 268.

⁵⁹ See Joint Explanatory Statement at 116 (identifying “local loops” as “facilities” within the definition of “network element”).

end users.”⁶⁰ In this regard, the competitive LEC pays a price that must cover the cost of providing the entire loop and be nondiscriminatory.⁶¹ But it would be discriminatory and unlawful to provide the entire loop at its economic cost to a competitive LEC, but impose use or other restrictions that prevent competitive LECs from offering the same range of telecommunications and information services over that loop.⁶² Accordingly, once a carrier has lawfully obtained a local loop to provide a telecommunications service (e.g., voice or standalone broadband transmission), it has exclusive control of that loop and is free to offer other narrowband and broadband services over that facility, whether or not the additional services also constitute telecommunications services.

The Supreme Court recently made this point in an analogous context. In affirming the Commission and rejecting the claim that section 224 of the Act bars a cable operator that exercises its cable-based right to secure utility pole attachments from diversifying into Internet access services, the Court rejected the utility respondents’ view that “if a cable company attempts to innovate at all and provide anything other than pure television, it loses the protection of the

⁶⁰ *UNE Remand Order* ¶ 385.

⁶¹ 47 U.S.C. § 252(d)(1).

⁶² The only way that the Commission could eliminate the discrimination that violates Section 252(d)(1) would be by conducting proceedings to allocate the costs of ADSL loops between the various uses that could be made of the low-frequency and high-frequency portions of the loops – which would be exceedingly complex because virtually all the costs of the loop (trenching, conduit, and the copper and fiber media themselves) would be common to both the low- and high-frequency portions, and because the high-frequency portion can itself support multiple services, some of which are telecommunications services (e.g., derived voice lines and standalone broadband transports) and others of which are information services. Absent economically reasonable allocations of joint and common costs among these uses, any restriction on a competitive LEC’s use of the loop would be discriminatory in violation of section 252(d)(1). However, the fundamental point is that, even if this section 252(d)(1) violation could be cured through such complex allocations and rate regulations, attempts to restrict a competitive LEC’s use of unbundled loops would violate section 251(c)(3) and other provisions of the Act.

Pole Attachments Act and subjects itself to monopoly pricing.”⁶³ The Court found that such an interpretation “would defeat Congress’ general instruction to the FCC to encourage the deployment of broadband Internet capability and, if necessary, to accelerate deployment of such capability by removing barriers to infrastructure investment.” Thus, it held that “providing commingled services” did not cost the cable system the access rights secured to it by the Act through its provision of cable services.⁶⁴ Similarly, competitive LECs’ access rights under section 251(c)(3) depend on the requesting carrier’s use of the element to provide telecommunications service, but they are not prevented from providing combinations of telecommunications and information services.

Indeed, a contrary rule would wholly defeat the Act’s competitive purposes. It would be competitively harmful to allow incumbent LECs to bundle Internet access services and broadband last-mile connections to the ISP node, but to forbid competitive LECs from providing that bundled offering. In short, the Act, the Commission’s regulations, and the imperatives of competition all permit a competitive LEC to provide information services over the local loop (and other network elements) that it obtains under section 251(c)(3), so long as it also uses that loop to provide a telecommunications service.⁶⁵

⁶³ *National Cable Television Ass’n v. Gulf Power, Inc.*, — U.S. —, —, 122 S. Ct. 782, 789 (2002).

⁶⁴ *Id.* (citing Pub. L. 104-104, VII, 706(a), (b), and (c)(1), 110 Stat. 153, codified as 47 U.S.C. 157 (1994 ed., Supp. V)).

⁶⁵ Section 706(a) of the Act directs the Commission (and state commissions) to “encourage the deployment on a reasonable and timely basis of advanced telecommunications capability to all Americans.” The *Notice* (§ 29) seeks comment on whether the term “advanced telecommunications capability” includes Internet access services, and what relevance section 706 has to this inquiry. The statutory term “advanced telecommunications capability” should not be read to encompass Internet access services. The Act defines the term “as high speed, broadband telecommunications *capability* that enable users to originate and receive high-quality voice, data,

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C. The Line Splitting And Line Sharing Rules Are Unaffected By The Regulatory Classification Of Wireline Broadband Services.

The Notice also asks (¶ 61) whether the regulatory classifications of wireline broadband services would have any effect on the Commission's line splitting or line sharing rules. Here, too, the answer is that they would not.

Line Splitting. The "line splitting" rules provide that competitive LECs are "'entitled,' at their option, to [obtain] the entire unbundled loop facility" and to use one of its capabilities (the low-frequency portion) to provide voice service and another (the high-frequency portion) to provide broadband services.⁶⁶ The rights of competitive LECs would not be altered in the slightest if incumbent LECs ceased providing standalone broadband transmission as a telecommunications service and began using the high-frequency portion of ADSL loops (or the entire capacity of ADSL or other loops) exclusively to provide information services. As explained above, regardless of the services that the incumbent offers over a facility or its individual capabilities, a competitive LEC may use the element if it is going to provide any broadband or other telecommunications service over it – and may use the element to provide information services if it also uses the element to provide at least one telecommunications service.

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graphics, and video telecommunications using any technology." 47 U.S.C. § 706(c)(1). Congress' use of the term "telecommunications capability" clearly refers to the telecommunications building blocks by which information services are provided, and not to the information services themselves. In this regard, "telecommunications capability" must be given a meaning separate from the term "advanced telecommunications and information services," which is otherwise used in the Act. *See id.* § 254(b)(2). Section 706 is nonetheless highly relevant to the Commission's inquiry, for it confirms the importance of maintaining rules that will increase the deployment of advanced telecommunications capability – here, the *Computer Inquiries* rules and the rules implementing section 251(c)(3).

⁶⁶ *See Deployment of Wireline Services Offering Advanced Telecommunications Capability*, Report & Order, 14 FCC Rcd. 20912, ¶ 17 (1999) ("*Line Sharing Order*").

Line Sharing. The Commission's line sharing rules permit a competitive LEC to purchase the high frequency portion of the loop as a separate network element,⁶⁷ and they are also unaffected by regulatory classifications. The high-frequency portion of the loop obviously meets the network element definition because it has been used by the Bells and by competitive LECs to provide standalone broadband transmission, a telecommunications service, to both ISPs and retail customers. Even if the Bells could lawfully discontinue these telecommunications services, their past behavior and competitive LECs' past and current offerings establish that the high-frequency portion of loops is used in the provision of a telecommunications service. In any event, incumbent LECs themselves now use the high-frequency portion of their loops to provide second (and third, fourth, fifth, and sixth) *voice* lines to customers served by a single copper pair – which are telecommunications services.⁶⁸ And, for the reasons stated above, a competitive LEC that leases the high-frequency portion of a loop as a network element may, like the Bell, use that element to provide combinations of telecommunications and information services (*e.g.*, derived voice lines plus broadband internet access service).

Moreover, competitive LECs' line sharing rights would be unaffected even if (contrary to fact) the incumbent LECs had never used the high frequency portion of their loops to provide telecommunications services. The line sharing rules do not rest on the first sentence of the network element definition – “a facility or equipment used in the provision of telecommunications service.”⁶⁹ Rather, they rest on the second sentence, which applies to “features, functions, and

⁶⁷ See 47 C.F.R. §§ 51.319(h)(1)-(5).

⁶⁸ See, *e.g.*, Chandler Dec. ¶ 34.

⁶⁹ 47 U.S.C. § 153(29).

capabilities that are provided by means of such facility or equipment.”⁷⁰ In making the “high frequency portion of the loop” a network element, the Commission noted that it is not a separate facility or equipment, but is instead one of the “features, functions, and capabilities” of the local loop: namely, “the frequency range above the voice band on a copper loop facility that is being used to carry analog circuit-switched voiceband transmissions.”⁷¹ The Commission expressly relied on the fact that “the frequencies above those used for analog voice services on any loop are a capability of that loop.”⁷²

The second sentence of the network element definition makes clear that so long as the loop facility as a whole has been or is now used in the provision of a telecommunications service (e.g., to provide ordinary narrowband voice service – a mandatory requirement of line sharing), a particular “feature[], function[], or capabilit[y]” of that loop (e.g., the high-frequency portion of the loop) may be a network element. The statutory definition provides in its entirety that:

[t]he term “network element” means a *facility or equipment* used in the provision of a telecommunications service. Such term *also includes features, functions, and capabilities* that are provided by means of such facility or equipment, including subscriber numbers, databases, signaling systems, and information sufficient for billing and collection or used in the transmission, routing, or other provision of a telecommunications service. 47 U.S.C. § 153(29) (*emphasis added*).

The statutory phrase “used in the provision of a telecommunications service” in the first sentence of the definition modifies only “facility or equipment.” Thus, so long as a loop is used to provide a telecommunications service, the definition of network element extends to all “features, functions, and capabilities that are provided by means of such facility or equipment.”

⁷⁰ *Id.*

⁷¹ 47 C.F.R. § 51.319(h)(1) (*emphasis added*).

⁷² *Line Sharing Order* ¶ 17.

Every local loop used in a line-sharing arrangement is unquestionably used by incumbent LECs in the provision of telecommunications services – *i.e.*, basic narrowband voice service. Accordingly, all of its “features, functions, and capabilities,” qualify as network elements under the Act, regardless of the use to which they are put by the incumbent.⁷³

III. THERE IS NO BASIS FOR CREATING A BROADBAND EXEMPTION FROM THE BELLS’ CORE *COMPUTER INQUIRIES* UNBUNDLING AND NON-DISCRIMINATION OBLIGATIONS.

There is no material difference in the “technology and market characteristics” of wireline broadband Internet access services that could justify the creation of a “broadband” exemption to existing *Computer Inquiries* requirements. Thus, incumbent LECs that provide information services must continue to (i) “offer the transmission component of the information service separately pursuant to tariff,” and (ii) “acquire such transmission for their own information service offerings pursuant to their tariff,”⁷⁴ without regard to broadband or narrowband labels.

The core *Computer Inquiries* unbundling and nondiscrimination requirements flow from the Commission’s recognition that, without such requirements, incumbent LECs that provide information services have both the incentive and the ability to use their control over bottleneck transmission facilities to distort information services competition. Although the precise contours

⁷³ Also, because the prices that competitive LECs pay for those loops include all of the costs of providing the entire loop functionality, including both low-frequency and high-frequency functionalities, permitting the Bells to place use restrictions on their loops and to prohibit competitive LECs from providing broadband services over those loops would force the Commission to enter into a pricing quagmire. This is because the Act and the Commission’s TELRIC rules would require the price for such partially-disabled loops to be substantially below that of fully functional loops. *See* 47 U.S.C. § 252(d)(1) (requiring prices for UNEs to be “based on cost”); *id.* § 251(c)(2)(D) (requiring that incumbents charge “nondiscriminatory” prices for UNEs); *id.* § 251(d)(a)(A)(ii) (same). The economic cost of a loop stripped of its broadband functionalities (or, equivalently, accompanied by legal conditions barring the purchaser of the loop from using those functionalities) is considerably lower than that of a fully functional loop.

⁷⁴ Notice ¶¶ 42-43.

of the specific regulations implementing the unbundling and nondiscrimination requirements have evolved, the Commission has consistently required incumbent LECs that choose to provide information services to make the telecommunications transport services used to provide those information services available to competing ISPs, separately from the information services themselves, and on the same terms and conditions that the incumbent provides those services to its affiliates or to itself.

The unassailable economic logic that justifies and necessitates these unbundling and nondiscrimination requirements applies equally to broadband wireline internet access services. The reality is that ISPs seeking to provide broadband Internet access generally have no choice but to purchase the high-speed transmission building blocks of their broadband information services from the incumbent LECs. Thus, if the Commission weakened the incumbent LECs' obligation to provide unbundled broadband transmission on a non-discriminatory basis, ISPs would be wholly at the mercy of Bell competitors who have both the incentive and ability to abuse market power – the very anticompetitive outcome that the core *Computer Inquiries* rules were designed to prevent.

Nor is there any significant “technological” difference between xDSL transmission and previous generation technologies – let alone one that could justify weakening the *Computer Inquiries* unbundling and nondiscrimination obligations. Market power is an *economic* fact that flows from the incumbent LECs' control over loops and other high-speed transmission facilities that ISPs need to compete; it does not depend on the types of electronics that an incumbent happens to deploy on those transmission facilities. In this regard, it is the sheerest historical revisionism for the Bells to assert that the *Computer Inquiries* addressed the use of analog lines to

reach voice mail and are inapposite to the digital transmission at issue here. The Commission's First and Second Computer Inquiries were initiated to address services that allowed customers to use remote computer terminals to access centrally-located main frame and other computers over digital transmission lines and that were precursors to today's Internet access and other similarly-constituted information services. Although today's electronics allow higher-speed transmission than was generally available in 1980, there is no relevant difference between DSL-based transmission and other types of technologies (such as T1) that have been used for decades to provide high-bandwidth transmission over copper loops and other media.

There is thus no rational basis for creating a "broadband wireline Internet access services" exception from the core *Computer Inquiries* unbundling and nondiscrimination obligations. Moreover, none of the alternative regulatory approaches identified in the *Notice* – and certainly no approach that purports to rely upon market forces which simply do not yet exist – could prevent the abuse of market power. Indeed, as detailed below, the existing record here and in the ongoing *ILEC Broadband Dominance* proceeding confirm that the *Computer Inquiries* regulations should, if anything, be strengthened to close existing loopholes.

A. The *Computer Inquiries* Obligations Reflect The Fundamental Economic Reality That Unbundling and Nondiscrimination Rules Are Necessary To Prevent Incumbent LECs From Exploiting Market Power Over Basic Transport To Distort Information Services Competition.

The Commission recognizes that "the fundamental postulate underlying modern U.S. telecommunications law" is that because of their "monopoly control over key inputs that rivals need in order to offer retail services," "[i]ncumbent LECs in general have both the incentive and

ability to discriminate against competitors in incumbent LECs' retail markets."⁷⁵ Because incumbent LECs possess monopoly control over "key inputs" that rival ISPs need to offer their retail information services, especially "last mile" transport, they "have both the incentive and ability to discriminate against rival ISPs and to impede information services competition," unless they are subject to appropriate regulation.⁷⁶

As the Commission properly concluded in its *Computer II* order, "a carrier with market power and control over communications facilities essential to the provision of enhanced services could distort the competitive evolution of the enhanced services markets."⁷⁷ If an incumbent LEC could "den[y] access" to "basic transmission facilities" it could "create a bottleneck in the supply of enhanced services" that "could produce a tendency to monopoly by forcing competitors of the carrier's [ISP] affiliate to leave the market or by persuading potential entrants that the extraneous risks of participation are too great."⁷⁸ As the Commission prophetically observed, "[t]he importance of control of local facilities, as well as their location and number, cannot be overstated. As we evolve into more of an information society, the access/bottleneck nature of the telephone local loop will take on greater significance."⁷⁹

In order to guard against the risk that carriers with "bottleneck" control over the "telephone local loop" would leverage that control into the market for enhanced services, the Commission in *Computer II* adopted two main regulatory mechanisms. First, the Commission

⁷⁵ *Applications of Ameritech Corp., Transferor, and SBC Communications Inc. Transferee*, Mem. Op. & Order, 14 FCC Rcd. 14712, ¶ 190 (1999) ("*SBC-Ameritech Merger Order*").

⁷⁶ See Willig Dec. ¶ 50.

⁷⁷ *Computer II* ¶ 210.

⁷⁸ *Id.* ¶ 208.

⁷⁹ *Id.* ¶ 219.

recognized the need for “a mechanism whereby non-discriminatory access can be had to basic transmission services by all enhanced service providers.”⁸⁰ Accordingly, the Commission mandated that “common carriers owning transmission facilities and providing enhanced services must unbundle their basic from enhanced services and offer transmission capacity to other enhanced service providers under the same tariffed terms and conditions under which they provide such services to their own enhanced service operations.”⁸¹ Second, the Commission required the large incumbent local carriers (the Bell System and GTE) to provide their information services through affiliates that were structurally separate from the entity providing basic common carriage services.⁸²

In its *Computer III* decision, the Commission, recognizing the continuing risk of market power abuse by LECs that control key transmission facilities, reaffirmed the core unbundling and tariffed resale requirements.⁸³ The Commission, however, replaced the *Computer II* structural separation requirements with new non-structural safeguards.⁸⁴ Specifically, the Commission adopted Open Network Architecture (“ONA”) and Comparably Efficient Interconnection (“CEI”) requirements, which were “designed to give [ISPs] equal and efficient access to those basic services that the BOCs use to provide their own enhanced services.”⁸⁵ The Commission

⁸⁰ *Id.* ¶ 231.

⁸¹ *Notice* ¶ 42.

⁸² *Computer II* ¶¶ 219, 229.

⁸³ *Amendment of Section 64.702 of the Commission’s Rules and Regulations (Third Computer Inquiry) – Phase I*, Report & Order, 104 FCC Rcd. 958, ¶ 159 (1986) (“*Computer III*”), *recon.*, 2 FCC Rcd. 3035 (1987) (“*Phase I Recon. Order*”), *recon.*, 3 FCC Rcd. 1135 (1988), *recon.*, 4 FCC Rcd. 5927 (1989), *vacated sub nom.*, *California v. FCC*, 905 F.2d 1217 (9th Cir. 1990).

⁸⁴ *Id.* ¶ 100.

⁸⁵ *Bell Atlantic Tel. Cos. Offer of Comparably Efficient Interconnection to Provider of Internet Access Services*, Order, 11 FCC Rcd. 6919, ¶ 12 (1996) (“*Bell Atlantic CEI Order*”). “ONA is

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“remained concerned . . . about the potential ability of [the Bells], absent structural separation, to engage in cross-subsidization and discrimination,”⁸⁶ but concluded that the core unbundling requirement, in conjunction with the ONA and CEI nonstructural safeguards, would be sufficient to prevent market power abuses. On appeal, the United States Court of Appeals for the Ninth Circuit held that the Commission had not supported the latter conclusion, *i.e.*, that nonstructural safeguards would suffice. The proceeding to respond to that remand has remained open for seven years.⁸⁷

The Commission’s more recent *Computer Inquiries* orders reiterate that application of the core unbundling and nondiscrimination requirements to the incumbent LECs remains essential to

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the overall design of a carrier’s basic network services to permit all users of the basic network, including the information services operations of the carrier and its competitors, to interconnect to specific basic network functions and interfaces on an unbundled and ‘equal access’ basis.” *Computer III Further Remand Proceedings: Bell Operating Company Provision of Enhanced Services*, Further Notice of Proposed Rulemaking, 13 FCC Rcd. 6040, ¶ 79 (1998) (“*BOC Enhanced Services FNPRM*”). The nine CEI requirements are (1) unbundling of basic services for sale to ISPs; (2) interface functionality; (3) resale of basic services via tariff to affiliated ISPs; (4) equal technical characteristics for basic services sold to affiliated and non-affiliated ISPs; (5) equal installation, maintenance, and repair provision; (6) equal end user access for information services regardless of whether the end user goes through an affiliated or non-affiliated ISP; (7) full CEI availability to non-affiliated ISPs on the same date that the BOC offers to the public a given information service based on that CEI; (8) minimization of transport costs; and (9) barring carriers “from restricting the availability of the CEI offering to any particular class of customers or enhanced service competitor.” See *Bell Atlantic CEI Order* ¶¶ 13-27.

⁸⁶ *Amendment to Sections 64.702 of the Commission’s Rules & Regulations (Third Computer Inquiry)*, Order on Recon., 2 FCC Rcd. 3072, ¶ 72 (1987) (“*Phase II Reconsideration Order*”).

⁸⁷ See *California v. FCC*, 39 F.3d 919, 929-30 (9th Cir. 1994) (“*California III*”). Having already struck down *Computer III*’s initial attempt to abandon structural separation as arbitrary and capricious, see *California v. FCC*, 905 F.2d 1217 (9th Cir. 1990) (“*California I*”), the Ninth Circuit concluded that the Commission, acting on remand from *California I*, again “failed to provide support or explanation for some of its material conclusions regarding prevention of access discrimination.” *California III*, 39 F.3d at 930 (because the *Computer III* nonstructural safeguards cannot provide “fundamental unbundling,” which is a “key safeguard against access discrimination,” the decision to lift structural separation was arbitrary and capricious).

protect vibrant and vigorous information services competition. Three years ago, the Commission concluded that the Bells “remain the dominant providers of local exchange and exchange access services in their in-region states, and thus continue to have the ability to engage in anticompetitive behavior against competing ISPs.”⁸⁸ And only last year, the Commission’s *Enhanced Services Bundling Order* again reaffirmed the continuing need for the core *Computer Inquiries* unbundling and nondiscrimination obligations.⁸⁹ Despite the fact that the “1996 Act eliminated barriers for carriers seeking to enter,” the Commission explicitly found that “incumbent LECs have market power,” and that allowing them to offer information services bundled with basic transmission services would, absent existing regulation, enable them to act “anticompetitively.”⁹⁰ For this reason, the Commission expressly rested its decision to allow the Bells and other dominant carriers to offer retail bundles of information services and basic transmission services on the continued applicability of the core *Computer Inquiries* wholesale unbundling and nondiscrimination obligations, stating that:

we emphasize that we are not eliminating at this time the fundamental provisions contained in our *Computer II* and *Computer III* proceedings that facilities-based carriers continue to offer the underlying transmission service on nondiscriminatory terms, and that competitive enhanced services providers therefore continue to have access to this critical input. *Id.*

In short, the Commission has consistently and repeatedly recognized that the Bells and other incumbent LECs possess market power over transmission facilities that are a “critical input” to the provision of information services and that they therefore would have both the incentive and ability

⁸⁸ *Computer III Further Remand Proceedings: Bell Operating Company Provision of Enhanced Services*, Report & Order, 14 FCC Rcd. 4289, ¶ 9 (1999) (“*BOC Enhanced Services Order*”).

⁸⁹ *1998 Biennial Regulatory Review – Review of Customer Premises Equipment and Enhanced Services Unbundling Rules in the Interexchange, Exchange Access and Local Exchange Markets*, Report & Order, 16 FCC Rcd. 7418 (2001) (“*Enhanced Services Unbundling Order*”).

to discriminate against competing ISPs if the core *Computer Inquiries* obligations were removed or weakened.

B. There Is No Rational Basis For A “Broadband” Exemption From The *Computer Inquiries* Unbundling And Nondiscrimination Requirements.

The *Notice* (§ 11) recognizes the continuing importance of the core *Computer Inquiries* rules, which have fostered an environment in which “applications proliferated and demand for Internet access services grew.” Thus, it does not even seek comment on the Bells’ facially absurd proposals for across-the-board elimination of those requirements. Rather, the *Notice* asks (§ 43) whether there is something different about broadband transmission used in Internet access that could justify selective reduction or elimination of those requirements with respect to “wireline broadband internet access” services. The answer is a flat no. There is no rational basis for creating *any* broadband exemption from the core *Computer Inquiries* unbundling and nondiscrimination obligations, much less one that would apply to the transmission functionality only when it is used to support broadband Internet access service.

As an initial matter, it is difficult to conceive how the Commission could either craft or enforce such an exemption even if it could be shown to be appropriate. Broadband transmission facilities are used to provide services other than Internet access. Further, broadband and narrowband internet access services are themselves provided over the same facilities; the facilities that the *Computer Inquiries* unbundling rules require the Bells to provide to ISPs can be used to provide either broadband or narrowband services, depending on the type of modem used and other factors. A broadband/narrowband distinction could therefore only be enforced through

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⁹⁰ *Id.* §§ 11, 12.

some form of “use” restrictions – ISPs would continue to have access to the Bells’ loops and other facilities, but would be prohibited from using those facilities to provide “broadband” Internet access information services. But there is no obvious metric against which the Commission could judge compliance. The *Notice* does not identify any particular “speed” above which services cease to be narrowband, and any such line would be entirely arbitrary. Nor could the distinction turn on the presence or absence of voice capabilities, because voice communications can be provided over both the low- and high-frequency spectrum of ADSL loops, and HDSL and other broadband transmission facilities are used for information and telecommunications services alike.

But even if a meaningful line between narrowband and broadband wireline Internet access services could somehow be drawn, there is no reason to draw it here. As demonstrated below, there is no market, technological, or legal basis to apply different rules to broadband and narrowband services.

Economics. As noted above, the *Computer Inquiries* unbundling and nondiscrimination obligations are premised on a simple, fundamental, economic principle: because the Bells (and other incumbent LECs) provide information services and also control access to the transmission facilities that unaffiliated ISPs need to provide competing information services, unbundling and nondiscrimination obligations are necessary to prevent the Bells from acting on their natural incentives to discriminate against their information service competitors. A careful examination of the relevant broadband “market characteristics” confirms that this economic principle applies with full force in the broadband context.

At the outset, it is important to recognize that the continuing need for the core *Computer Inquiries* rules does not turn on the existence or level of *retail* competition; rather, it turns on the *wholesale* alternatives available to ISPs. There has been vigorous competition in the provision of retail narrowband Internet access services for many years now, but the Commission has consistently recognized that vigorous retail competition may exist only *because* of the *Computer Inquiries* rules and the competitive opportunities that they create. Thus, in recently rejecting the Bells' claims that developments since *Computer II* and *Computer III*, such as "the effect of the 1996 Act," had "rendered the CEI plans superfluous,"⁹¹ the Commission stressed that "although many ISPs compete against one another, each ISP must obtain the underlying basic service from the incumbent local exchange carrier, often still a BOC, to reach its customers."⁹²

The same is undeniably true in the broadband context today. In the vast majority of cases, independent ISPs simply do not have any way of providing integrated broadband Internet access services without access to the Bells' last mile facilities. ISPs rarely have a wireline choice. Although a few competitive data LECs continue to weather Bell discrimination, the reality is that these competitive LECs are themselves almost entirely dependent upon incumbent LEC facilities. And, in all events, they collectively provide less than 7 percent of DSL service arrangements today, virtually all of which are for services provided to businesses.⁹³

ISPs also cannot turn to the owners of satellite or wireless broadband facilities. Both were the subject of much broadband hype; neither has yet delivered.⁹⁴ Broadband wireless services are

⁹¹ *BOC Enhanced Services Order* ¶ 11.

⁹² *Id.* ¶ 16.

⁹³ See Willig Triennial UNE Review Dec. ¶ 50; *Third Section 706 Report* ¶ 51 & App. C.

⁹⁴ See, e.g., Andy Pasztor, *EchoStar Will No Longer Offer Web Via Satellite*, *The Wall Street Journal*, at B5 (Apr. 5, 2002) (addressing EchoStar shift from satellite-based broadband service to

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today available in only very limited areas, and several leading providers have recently scaled back their efforts.⁹⁵ And the large satellite providers have had so little broadband success that both have recently found it necessary to partner with the Bells.⁹⁶ In any event, neither satellite nor wireless providers generally even offer unbundled broadband transport services to independent ISPs.

Independent ISPs are beginning to explore alternative arrangements with AT&T and other cable companies. As AT&T has detailed elsewhere, much progress has been made (albeit at great expense) in developing technological, operational, and business solutions that will allow multiple ISP access over cable networks that were not engineered for, and are not compatible with, the telephone network common carrier model.⁹⁷ And AT&T and other cable companies – which,

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DSL-based broadband service); Jim Barthold, *Restarting Fixed Wireless: We Are Still Waiting*, Telephony (Feb. 11, 2002) (addressing Sprint and WorldCom fixed wireless service rollbacks) (“*Barthold Telephony*”). See also Declaration of Robert D. Willig ¶¶ 28-29 (“Willig Dec.”) (attached as Ex. B).

⁹⁵ See, e.g., *Barthold Telephony* (noting that Sprint and WorldCom were rolling back their service); New Paradigm Resources Group, *CLEC Report 2002*, Ch. 2, page 10 (2002) (noting that XO Communications has entered bankruptcy) .

⁹⁶ See Margaret Kane, *SBC Connects With DSL Subscribers*, CNET News.com (Apr. 18, 2002) (discussing EchoStar partnership with SBC); DIRECTV Broadband, Inc., ILEC Broadband Dominance Comments, CC Docket No. 01-337, at 1-2 (filed Mar 1, 2002) (“DIRECTV Broadband provides service by means of its own nationwide broadband network combined with last-mile wholesale xDSL connectivity and transport . . . purchased from ILECs, including BellSouth, SBC, Qwest and Verizon, and, where possible, from CLECs. . . .”); DIRECTV Broadband, Inc., ILEC Broadband Dominance Reply Comments, CC Docket No. 01-337, at 1 (“[T]he ILECs remain completely dominant as suppliers to most broadband services providers, including DIRECTV Broadband.”).

⁹⁷ See Comments of AT&T Corp., *Inquiry Concerning High-Speed Access to the Internet Over Cable and Other Facilities*, GN Docket No. 00-185, at 49-66 (filed Dec. 1, 2000); *Applications for Consent to the Transfer of Control of Licenses Comcast Corporation and AT&T Corp., Transferors, To AT&T Comcast Corporation, Transferee, Applications & Public Interest Statement*, at 5, 92-95 (filed Feb. 28, 2002).

unlike the Bells have no narrowband monopolies to protect and thus have no interest in slow-rolling broadband acceptance – have every incentive to continue to collaborate with independent ISPs to provide consumers with desirable Internet alternatives.

Nonetheless, the reality today is that multiple ISP access over cable remains in its infancy and is available only in very limited areas and under terms and conditions that both cable companies and ISPs recognize may need to change given uncertainty and lack of experience with such arrangements. As Professor Willig concludes (§ 55), “[f]or these reasons, independent ISPs and enhanced services providers remain critically dependent upon incumbent LECs and their last mile high-speed transport facilities to provide high-speed Internet access.” At least for now, the Bells retain market power over broadband ISPs and will continue to do so for some time.

Moreover, there is at least one “market characteristic” of the Bells’ wireline broadband service offerings that makes their *Computer Inquiries* obligations even more important in the broadband than the narrowband context. As the Commission explained in permitting the Bells and other dominant carriers to provide bundled packages of local exchange and information services, an important “safeguard[] that currently exist[s]” in the narrowband context is the fact that “incumbent LECs will, under state law, offer local exchange service separately on a unbundled tariffed basis” directly to retail customers. *Enhanced Services Bundling Order* ¶ 12. In other words, a Bell customer that wishes to obtain dial-up Internet service from an independent ISP can directly purchase a phone line from the Bell and then separately contract with the ISP of his or her choice. By contrast, the Bells have, for the most part, now withdrawn their federally-tariffed retail offers of broadband transmission (*i.e.*, DSL transmission unbundled from the Bells’ ISP services), and they take the position that any such services would be interstate services, and

that the states have no authority to require the Bells to tariff retail broadband transmission services at the state level. Thus, one of the important safeguards on which the Commission has relied to curb the Bells' market power in the narrowband context does not even exist in the broadband context.

In short, there is no conceivable economic basis for any broadband exemption from the Bells' core *Computer Inquiries* unbundling and nondiscrimination obligations.

Technology. The *Notice* suggests (§ 47) that the *Computer Inquiries* regulations were designed to address "analog" and other services that "were more akin to voicemail and other narrowband applications, rather than to broadband Internet access," *id.* § 31. That is simply wrong. The *Computer Inquiries* obligations were a response to services that allowed remote computer terminals to access centrally located computers over *digital* services (such as T1-based services) that do not differ in any relevant technological respect from the digital DSL-based services that the Bells and other incumbent LECs offer over their copper loops today. Any suggestion that the "technical characteristics" of current DSL-based services – or even future fiber-to-the-curb services – might justify exempting such services from the *Computer Inquiries* obligations is fundamentally mistaken.

To begin with, even if the electronic equipment used by the Bells to provide DSL-based services represented a radical break from prior technologies – and it does not – that would be irrelevant. The Bells possess market power, and thus the ability to discriminate against unaffiliated ISPs, by virtue of their control over key broadband transmission facilities, particularly loops. The types of electronic equipment that the Bells attach to those loops in no way

undermines the Bells' control or market power over those loops, and it is that control which necessitates retention of the *Computer Inquiries* unbundling and nondiscrimination obligations.

Moreover, contrary to the suggestion in the *Notice*, there are, in fact, no material technical differences between current (and future) generation wireline broadband technologies and older technologies, such as T1.5 transport, that carriers have used for decades to provide high-speed transmission services over copper loops.⁹⁸ In fact, both the First and Second Computer inquiries were precipitated by the fact that carriers were providing data processing and other services by connecting "smart" terminals to centrally-located computers over high-speed digital private lines. In particular, just like current DSL-based services, the T1 services that were specifically at issue in the *Computer Inquiries* line of orders⁹⁹ are provided by attaching multiplexers and other electronics to loops in order to increase the bandwidth of copper lines and to transmit digital signals over those facilities at high speeds (over 1 megabit a second). The Bells have used T1 service to provide interoffice transport for over forty years, and began using it to provide last-mile high-speed digital copper-based transmission services in the 1970s on a special assembly basis and in 1980 on a generally available tariffed basis.¹⁰⁰

The various types of DSL service that are the transmission components of today's "wireline broadband information services" merely use more advanced versions of multiplexers and modems to increase the bandwidth provided by copper local loops.¹⁰¹ The electronics attached to the loops may be more advanced, but DSL-based services use the same basic means to create the

⁹⁸ See Chandler Dec. ¶¶ 23, 31.

⁹⁹ See, e.g., *Bell Atlantic Tel. Cos.: Offer of Comparably Efficient Interconnection to Providers of Protocol Conversion Servs.*, Mem. Op. & Order, 4 FCC Rcd. 2744, ¶¶ 17-18 (1989)

¹⁰⁰ See Chandler Dec. ¶¶ 7, 24-25.

¹⁰¹ *Advanced Services Order* ¶ 29.

same basic result: higher bandwidth over Bell-controlled copper wires.¹⁰² Thus, although DSL technology permits digital high-bandwidth services to be offered more effectively than yesterday's T1 services, there is simply no significant technological difference between current broadband transmission vehicles and services that carriers have provided for years over copper loops – let alone one that could justify different regulatory treatment.

Law. Finally, there is no basis for any suggestion that provisions of the 1996 Act somehow justify abolishing *Computer Inquiries* unbundling obligations with respect to broadband wireline internet access services. In fact, quite the opposite is true. The terms of the 1996 Act expressly require the Commission to “identify[]” and “eliminate[]” “market entry barriers for entrepreneurs and other small businesses in the provision and ownership of . . . information services.”¹⁰³ In “carrying out” this mandate, Congress directed the Commission to “promote the policies and purposes of [the 1996] Act favoring diversity of media voices.”¹⁰⁴ And Congress further confirmed that it is the policy of the United States to “preserve the vibrant and competitive free market that presently exists for the Internet and other interactive computer services.”¹⁰⁵

Crafting a broadband exemption that is unwarranted by either economics or technology would be plainly inconsistent with each of these statutory provisions. Independent ISPs are critically dependent on access to the Bells' broadband facilities to provide their services. Thus, elimination of the core *Computer Inquiries* requirements would create incentives and opportunities for the Bells to wield their indisputable market power and thus raise, rather than

¹⁰² See Chandler Dec. ¶¶ 29-31.

¹⁰³ 47 U.S.C. § 257(a).

¹⁰⁴ *Id.* § 257(b).

¹⁰⁵ *Id.* § 230(b)(2).

lower, barriers to entry by small independent ISPs. It would likewise reduce, rather than promote, the “diversity of media voices” that such independent ISPs bring and undermine, rather than preserve, the “vibrant and competitive free market that presently exists.”

Nor does section 706 of the 1996 Act support a broadband exemption. Section 706 directs the Commission to “encourage the deployment on a reasonable and timely basis of advanced communications capability to all Americans . . . by utilizing, in a manner consistent with the public interest, convenience, and necessity, price cap regulation, regulatory forbearance, measures that promote competition in the local telecommunications market, or other regulating methods that remove barriers to infrastructure investment.”¹⁰⁶ By fostering information services competition, the Bells’ *Computer Inquiries* unbundling and nondiscrimination obligations encourage infrastructure investment and innovation in at least two critical respects. First, as the Commission stated in *Computer II* (§ 209), “an active and healthy enhanced services market should stimulate demand for underlying facilities owned by the parent corporation.” Second, by ensuring the existence of competitive ISPs, the unbundling and nondiscrimination obligations give Bell-affiliated ISPs a powerful incentive to innovate – which should further spur infrastructure investment.¹⁰⁷

Finally, given the marketplace and technical realities, there is an additional statutory requirement that precludes a broadband carve-out – the Administrative Procedure Act prohibition

¹⁰⁶ Pub. L. 104-104, Title VII, § 706, 110 Stat. 153 (1996) (reprinted in 47 U.S.C. § 157, historical and statutory notes).

¹⁰⁷ See EarthLink Computer III Refreshing Comments at 2-3 (“Access to critical transmission inputs and related features on nondiscriminatory terms for competitive ISPs promotes competition, fosters innovation, creates diversity and enhances choice”).

against arbitrary and capricious decisionmaking.¹⁰⁸ The Ninth Circuit has already twice (in *California I* and again in *California III*) reversed Commission efforts to relax the *Computer Inquiries* safeguards.¹⁰⁹ The *California III* remand has been pending for more than seven years, and the Commission could hardly expect a warm welcome in a court of appeals for an order that removed the unbundling and nondiscrimination safeguards altogether with respect to broadband services, despite the Bells' continuing market power.

C. "Market-Based" And Other Proposed Alternatives To The *Computer Inquiries* Safeguards Are Unworkable, But Certain Reform Of The *Computer Inquiries* Rules Is Warranted.

The *Notice* recognizes that regulation clearly remains necessary to curb the Bells' continuing ability to exploit control over broadband transmission facilities that unaffiliated ISPs cannot do without, but suggests that some form of "market-based" regulation might be sufficient.¹¹⁰ Because there simply are no generally available alternatives to the incumbent LECs' standalone broadband transmission services today, the "market based" alternatives suggested in the *Notice* are plainly unworkable. As the Commission correctly found in the *Local Competition Order* (§ 15), where an incumbent LEC has market power, and thus "superior bargaining power," and a potential competitor "comes to the table with little or nothing the incumbent LEC needs or wants," the resulting "agreements," if any, "would be quite different from typical commercial negotiations." Incumbent LECs "have strong incentives to resist" arrangements that would assist

¹⁰⁸ 5 U.S.C. § 706(2)(A).

¹⁰⁹ See *California III*, 39 F.3d at 930 (because the *Computer III* nonstructural safeguards cannot provide "fundamental unbundling," which is a "key safeguard against access discrimination," the decision to lift structural separation was arbitrary and capricious).

¹¹⁰ See *Notice* ¶ 52 (seeking comment on "unregulated contractual arrangements or other market-based solutions"); *id.* ¶ 50 (asking whether incumbent LECs should "be required to do no more than make transmission available to competitors at market-based prices").

their competitors, and the “inequality of bargaining power . . . militates in favor of rules,” such as the *Computer Inquiries* unbundling and nondiscrimination safeguards, “that have the effect of equalizing bargaining power.”¹¹¹ So long as ISPs have no broadly available alternatives to the Bells’ standalone broadband transport services, “market solutions” would only free the Bells to abuse their market power to insist on anticompetitive access terms (or to deny carriage altogether).¹¹²

The “trigger-based” alternatives identified in the *Notice* are equally flawed. Any suggestion that unbundling and nondiscrimination obligations could be lifted with respect to broadband services “to the extent a BOC is achieving certain performance levels in the delivery of non-broadband services”¹¹³ is a *non sequitur*. The entire point of the *Computer Inquiries* safeguards is to ensure that ISPs obtain transmission on the same terms as the incumbent. A narrowband-focused trigger would, on its face, allow the Bells to discriminate at will with regard to wireline broadband information services – and thereby to insulate their DSL-based and other broadband information services from wireline competition – so long as they provided adequate narrowband transmission (*i.e.*, transmission that the Bells contend is no substitute for broadband). Any such triggers would thus be irrational.

Nor could section 271 authority serve as a rational trigger for the removal of unbundling and nondiscrimination safeguards relating to broadband services. The Commission rests its

¹¹¹ *Id.* ¶ 55. See also *Access Charge Reform*, Seventh Report & Order, 16 FCC Rcd. 9923, ¶ 42 (2001) (observing that given LECs market power in terminating and originating traffic, negotiations between even competitive LECs and IXCs will result in “unreasonable access rates” and therefore, that “some action is necessary to prevent CLECs from exploiting the market power in the rates that they tariff for switched access services”) (“*CLEC Access Charge Order*”).

¹¹² See Willig Dec. ¶¶ 56-57.

¹¹³ *Notice* ¶ 48.

section 271 authorizations upon findings that a Bell's local markets are merely *open* to competition, and the Commission has repeatedly held that no particular level of actual competition is required and, indeed, has erroneously approved applications in states in which competition is virtually nonexistent.¹¹⁴ Critically, the Commission has recognized that even after full implementation of section 271's competitive checklist, local markets generally will not quickly become robustly competitive, so that absent appropriate regulation, the Bell will therefore still retain both the incentive and the ability to exercise market power.¹¹⁵ In any event, the Commission has never required, as a precondition to section 271 approval, that a Bell demonstrate that wholesale alternatives to its standalone broadband transmission services are broadly available. But, as Professor Willig explains (§ 59, quoting *Notice* § 48), "that is the critical issue for determining whether competing information service providers [can] obtain the necessary inputs for delivery of their high-speed services."

Although the Commission must therefore retain, in some form, the core *Computer Inquiries* unbundling and non-discrimination safeguards with respect to the Bells' (and other incumbent LECs') broadband services to ensure the "availability of high-speed transmission to non-facilities-based ISPs,"¹¹⁶ it is entirely appropriate for the Commission to inquire whether specific provisions of the *Computer Inquiries* rules can be improved in any way, including the

¹¹⁴ See, e.g., *Application by Verizon New England, Inc. et al, for Authorization Pursuant to Section 271 of the Telecomm. Act of 1996 to Provide In-Region, InterLATA Services in Vermont*, Mem. Op. & Order, FCC 02-118, 2002 WL 575615, § 12 (rel. Apr. 17, 2002); *Joint Application by SBC Communications, Inc., et al, for Authorization Pursuant to Section 271 of the Telecomm. Act of 1996 to Provide In-Region, InterLATA Services in Arkansas & Missouri*, Mem. Op. & Order, 16 FCC Rcd. 20719, § 126 (2001).

¹¹⁵ See, e.g., *Non-Accounting Safeguards Order* § 9.

¹¹⁶ *Notice* § 52.

elimination or modification of ancillary requirements that are unnecessarily burdensome or fail to achieve their stated purpose.

Moreover, the Commission should close loopholes in its existing rules that permit incumbent LECs effectively to deny ISPs non-discriminatory access. For example, although the Commission has held that the rates charged for wholesale broadband transport must be based on efficient, forward-looking costs,¹¹⁷ it has yet to promulgate any specific pricing standards to implement that decision. And there is considerable evidence that in the absence of such guidance the Bells have charged rates that are grossly excessive and far exceed their actual forward-looking costs. For example, Qwest offers “unbundled” basic DSL service for \$21.95 per month (256 kbps downstream and up to 256 kbps upstream) or \$31.95 per month (up to 640 kbps downstream) but has proposed a wholesale rate of \$45.48 per month.¹¹⁸ That wholesale rate is more than *quadruple* the efficient forward-looking costs of providing this service.¹¹⁹ To discourage such abuses and encourage pricing that “best replicates, to the extent possible, the conditions of a competitive market,”¹²⁰ the Commission should promulgate rules that provide guidance as to how broadband transport (and other CEI/ONA services) must be priced (*e.g.*, rules analogous to the Commission’s TELRIC rules for network elements).¹²¹

¹¹⁷ See *Open Network Architecture Tariffs of Bell Operating Cos.*, Order, 9 FCC Rcd. 440, ¶¶ 21, 36 (1993) (rates for access should be based on “forward-looking” costs and based on the efficient “replacement costs” of the BOCs’ facilities: that is, the “inputs [the BOC] would purchase today at the price it would have to pay to purchase those inputs today”).

¹¹⁸ Chandler Dec. ¶ 43.

¹¹⁹ *Id.* ¶ 44.

¹²⁰ *Local Competition Order* ¶ 679

¹²¹ See Willig Dec. ¶¶ 75-81.

The Commission should also take steps to address ongoing non-price discrimination. Independent ISPs report that they have been subject to significant non-price discrimination by incumbent LECs.¹²² The Commission should consider modifying the *Computer Inquiries* rules in two ways to combat this blatant and anticompetitive discrimination. First, the Commission could adopt performance standards to govern wholesale broadband access. Absent strict performance standards, the technical and dynamic nature of modern telecommunications networks affords the Bells substantial ability to provide inferior access to competitors.¹²³ Performance standards comparable to those being considered in the special access and other related contexts would help ensure that the Bells provision unaffiliated ISPs' orders in equivalent times and at equivalent quality to that which the Bells provide for their own or their affiliates' use.

¹²² According to the these ISPs, the incumbent LECs have, among other things, (1) failed to provide "the network 'building blocks' required to provide DSL-based-high speed Internet access service – such as a DSL-conditioned loops, central-office-based digital subscriber loop access multiplexers . . . or other functionality," ITAA *Computer III* Refreshing Comments at 15-16; (2) "favor[ed] their affiliated ISPs in DSLAM port provisioning," Ad Hoc Telecommunications Users Committee *Computer III* Refreshing Reply Comments at 7-8, while "providing CLECs . . . extraordinarily slow DSL-line provisioning, resulting in an inability to serve their ISP customers," ITAA *Computer III* Refreshing Comments at 9; (3) "provid[ed] advance information regarding their DSL infrastructure, including the location of new DSLAM facilities, to their affiliated ISPs," Ad Hoc Telecommunications Users Committee *Computer III* Refreshing Reply Comments at 7-8; (4) used "the loop conditioning process to steer customers towards their affiliated ISPs and provide their affiliated ISPs with faster access to conditioned loops," *id.*; (5) forced "unaffiliated ISPs to accept unreasonable provisions in DSL contracts, including provisions that allow the BOC to sell other services (*e.g.*, video on demand) over the DSL," *id.*; (6) "misled users or ISPs and users about available services to connect to unaffiliated ISP enhanced services," Texas Internet Service Providers Assoc. *Computer III* Refreshing Reply Comments at 28-29; (7) "misappropriat[ed] CPNI from competing ISPs (*e.g.*, information regarding cancelled orders due to the lack of DSLAM ports) and shar[ed] the information with affiliated ISPs," Ad Hoc Telecommunications Users Committee *Computer III* Refreshing Reply Comments at 7-8; and (8) "requir[ed] customers to remove and re-order DSL service when switching to a competing ISP, rather than simply updating router tables," *id.*

¹²³ See generally AT&T UNE Performance Standards Comments, CC Docket 01-318 (filed Jan. 22, 2002).

Second, the Commission could simply re-impose the structural safeguards lifted by *Computer III*. “[T]here is nothing novel about . . . separate subsidiary requirements.”¹²⁴ The Commission has found structural separation requirements to be a useful tool for preventing cross-subsidization and protecting against monopoly power abuses in a number of contexts.¹²⁵ And by forcing the incumbent LECs’ retail and wholesale units to deal at arm’s length, structural separation would greatly assist both ISPs and the Commission in detecting (and deterring) discrimination. Here, it is important to note that the Commission has twice been reversed for removing the *Computer II* structural safeguards and has a longstanding obligation to revisit that question. As the Commission acknowledged in 1995, *California III* “requires [the Commission] to reexamine the public interest benefits and the risk of access discrimination that result from totally lifting structural separation requirements, given the current level of network unbundling.”¹²⁶

IV. THE BELLS’ “BROADBAND INVESTMENT” AND “REGULATORY PARITY” ARGUMENTS ARE BOTH IRRELEVANT AND BASELESS.

The regulatory classification issues raised in this proceeding are legal questions with clear answers. The same is true of the Bells’ obligations to make their facilities and services available to competitive LECs and ISPs that seek to compete with the Bells. Those questions, too, must be

¹²⁴ *GTE Midwest, Inc. v. FCC*, 233 F.3d 341, 345 (6th Cir. 2000).

¹²⁵ See, e.g., *id.* at 348 (6th Cir. 2000) (affirming Commission rules requiring structural separation of LECs’ CMRS offerings); *Illinois Bell Tel. Co. v. FCC*, 740 F.2d 465, 472 (7th Cir. 1984) (affirming Commission regulation requiring structural separation of BOCs’ consumer premises equipment services). See also AT&T ILEC Broadband Dominance Comments at 57-59 & accompanying notes.

¹²⁶ *Computer III Further Remand Proceedings: Bell Operating Co. Provision of Enhanced Servs.*, NPRM, 10 FCC Rcd. 8360, ¶ 12 (1995); *ITAA Computer III Refreshing Comments*, at i (“the effect of *California III* was to return the Commission to the *Computer II* structural
(continued . . .)

answered by reference to the governing statutes and rules and the undisputed marketplace facts. As a result, the “broadband investment” and “regulatory parity” policy themes that the Bells feature in any proceeding with the slightest broadband connection are quite irrelevant here.

But even if the Commission had unbounded discretion to decide the issues in this proceeding without regard to the law and the indisputable facts, the Bells’ policy arguments are deeply flawed. Notwithstanding the overwhelming evidence to the contrary, the Bells argue that obligations that require them to “share” their networks sap their incentives to upgrade their networks. And, notwithstanding that “regulatory parity” has always been understood as a right to equal *process*, not to equal *outcomes*, the Bells argue that they must, at all costs, be treated the same as cable, without regard to critical economic, technical, and legal differences. Neither contention withstands review.

A. The Bells’ Investment Arguments Are Baseless.

The Bells’ investment argument suffers from two independent fallacies. The first is one of commission. The Bells claim that there are circumstances in which modifying loop infrastructure – *e.g.*, installing fiber feeder and digital loop carrier (“DLC”) upgrades – allow broadband service to be provided more effectively or efficiently, but that the obligation to provide competitors unbundled access at TELRIC-based rates adversely affects their incentives to make these investments. This claim ignores established economic understanding of the effects of long run incremental cost-based prices on investment incentives, the overriding economic incentives created by the Bells’ unique market position, and actual experience under unbundling rules.¹²⁷

(. . . continued)

separation regime. The question before the Commission, therefore, is whether current regulatory and market conditions justify *lifting* the structural separation requirement”).

¹²⁷ See Willig Dec. ¶ 75.

The Bells, of course, are not required to provide unbundled access for free. To the extent that competitive LECs obtain unbundled loops to provide DSL-based services (and that ISPs purchase access to unbundled broadband transmission under the *Computer Inquiries* safeguards), the Bells are entitled to charge rates that reflect their forward-looking costs (including return on investment). Thus, at bottom, the Bells' position must be that forward-looking rates do not reflect the full economic costs of the loop upgrades. However, as Professor Willig demonstrates (¶¶ 76-78), TELRIC and other forward-looking approaches are perfectly capable of incorporating even the largest investments and the highest risk, and fundamental economic principles dictate that properly set TELRIC-based rates will not discourage *any* efficient investments.

TELRIC fully accounts for risks that the Bells incur to upgrade facilities to enable them to provide "new services that may have uncertain demand and that will be offered in more competitive environments."¹²⁸ However, because the Bells are upgrading their networks to more efficiently provide their existing services – and the costs of those upgrades will be recovered through maintenance and other savings, *see, infra*, ¶ 64 – there appears to be little risk associated with these investments. Nevertheless, "[t]o the extent that investments in new broadband infrastructure result in higher costs, either because the investments are riskier or to the extent that new equipment can be expected to become obsolete more quickly today than in the past, a straightforward application of TELRIC" would produce rates for competitors using these advanced capabilities that "reflect higher rates of return (reflected in the cost of capital component of the cost estimate) and higher depreciation rates."¹²⁹

¹²⁸ *Id.* ¶ 78.

¹²⁹ *Id.* ¶ 80.

But even if one were to conclude that TELRIC-based unbundling would materially affect the expected profitability of the Bells' broadband services, one could not conclude that TELRIC-based unbundling would materially affect the pace or scope of their investments. The reality is that the Bells' decisions regarding whether to invest in or to market a new service do not turn on the profits that they expect from that service alone, but rather on their expected overall profits from all of the services that they offer.¹³⁰ All of the Bells' services are provided over the same facilities, a fact that has two very important impacts on their decision-making.

Many investments in loop infrastructure produce cost savings (*e.g.*, in lower maintenance expenses) that improve the profitability of all services, not just the feasibility (or profitability) of providing a new or improved broadband service. Indeed, there is substantial evidence that this will usually be the case and that, “[w]ith rare and trivial exceptions, . . . the loop investments needed to enable both current and next-generation broadband services are independently justified by the cost savings that the incumbent LECs will realize in providing voice and other narrowband services.”¹³¹ For example, in announcing Project Pronto, SBC stated this “network architecture is designed to be optimum from both a voice and data perspective,” and the “capital and expense savings,” which will total \$1.5 billion “annual[ly]” by 2004, will by themselves “pay for the entire initiative on NPV [net present value] basis” – *i.e.*, irrespective of opportunities for increased DSL revenues.¹³² Where infrastructure investments are independently justified solely by the resulting savings in provision of existing voice and other services, there is not even a colorable claim that

¹³⁰ *Id.* ¶ 85.

¹³¹ *Id.* ¶ 87.

¹³² SBC Investor Briefing, *SBC Announced Sweeping Broadband Initiative*, at 2 (Oct. 18, 1999) (emphasis added).

the Commission need afford the Bells an opportunity for an unbounded return from DSL-based (or other broadband) services to provide “incentives” to make these investments.¹³³

The Bells do not, in any event, have incentives to invest in broadband whenever and wherever they could expect to earn revenues from a broadband-specific investment that provide a market return on that investment.¹³⁴ To the contrary, they have incentives to limit deployment of broadband when it risks impacting other existing, higher revenue services. As monopoly providers, the Bells earn substantial premiums on many existing services.¹³⁵ As one analyst recently pointed out: “Residential second lines are a financial bonanza for local phone companies. Most homes are already wired for additional connections, which makes turning on new service as simple and cheap as typing a few keystrokes. Incremental profit margins often exceed 70%.”¹³⁶

But broadband customers often cancel these lucrative second lines. Indeed, Verizon just last month acknowledged that the company’s 2% drop in access lines last year was an indication of that trend and that DSL sales did not offset this loss.¹³⁷ Thus, when the Bells deploy broadband, there can be a “ripple effect” – customers cancel second lines and diminish overall profits.¹³⁸

¹³³ See Willig Dec. ¶ 89.

¹³⁴ *Id.* ¶ 85.

¹³⁵ *Id.* ¶ 33.

¹³⁶ Robertson Stephens, *DSL Market: Demand Doesn't Seem To Be An Issue, But Carrier Deployment Execution Does* (January 3, 2001).

¹³⁷ *Communications Daily* (March 13, 2002).

¹³⁸ *Communications Daily* at 2 (Feb. 21, 2000) (quoting Robert Pepper, chief of Commission Office of Plans and Policy).

For these reasons, “even where the Bells face cable competition, that does not mean that they have the incentive to deploy broadband optimally or to set competitive prices.”¹³⁹ Irrespective of whether the Bells can earn broadband revenues that will justify incremental broadband investments, they will not make such investments if they would “cannibalize” their existing services and reduce their overall profits.¹⁴⁰ Likewise, when setting the price for DSL, the Bells know that, although higher DSL prices may cause some customers to leave for cable, other will switch back to using narrowband second-line access and many existing second-line customers will continue to use narrowband service.¹⁴¹

The Bells’ conduct to date vividly illustrates that they have strong incentives to limit the availability of DSL and/or to maintain high DSL prices and that existing intermodal competition is inadequate to constrain such anticompetitive incentives. Although DSL technology could have

¹³⁹ See Willig Dec. ¶ 101; *see also id.* ¶¶ 30-38.

¹⁴⁰ *Id.* ¶ 101.

¹⁴¹ See Willig ILEC Broadband Dominance Dec. ¶¶ 111-12 (mathematically quantifying the impact of these incentives). The incumbent LEC economists’ attempts to undermine this analysis fail because they ignore both basic facts and basic economics. First, unlike with satellite services, incumbent LEC pricing is local – not national. Declaration of Robert Harris, CC Docket No. 01-337, ¶ 6 (filed Apr. 22, 2002) (attached to Reply Comments of BellSouth) (“The geographic scope of the market for broadband access is local.”); Willig Dec. ¶ 31 n.11. Second, the incumbent LEC economists ignore the fact that cable competition is not ubiquitous and that, even where cable modem service is available, some consumers will use narrowband – and not cable modem service – as a substitute for unreasonably priced DSL broadband service. Willig Dec. ¶ 36. Third, the fact that the Verizon lowered the prices for its fastest DSL services, *see* Reply Declaration of Dennis Carlton, Hal Sider and Gustavo Bamberger, CC Docket No. 01-337, ¶ 21 (filed Apr. 22, 2002) (attached to Reply Comments of Verizon) “shows that the incumbent LECs raised prices for those lower-bandwidth DSL services that are most likely to attract current narrowband users (*i.e.*, the most likely substitutes for narrowband), but lowered the price for users for users who highly value speed and who would be most likely to be attracted to the relatively high-speed, moderately priced service offered by the cable companies,” Willig Dec. ¶ 38 n.14. Finally, the fact that intramodal competition has not yet had an effect on the Bells’ DSL pricing does not change the fact that, pursuant to basic economic principles, intramodal
(continued . . .)

been commercially deployed much earlier, the Bells introduced DSL technology only after cable operators began operating their high speed cable modem services – and also after the so-called “data LECs” began offering “intramodal” DSL-based services.¹⁴² The Bells did not offer DSL earlier “for concern that it would negatively impact their other lines of business,”¹⁴³ and then did so only reluctantly in “reaction to other companies’ entry into broadband.”¹⁴⁴

Similarly, after falling behind cable operators and data LECs, the Bells priced their lowest-speed DSL-based service so that ISP services that used DSL had costs comparable to cable modem service.¹⁴⁵ Competition began to ebb as data LECs increasingly became subject to practical, economic, and in some cases Commission-imposed legal limits on their ability to provide DSL-based services. By 2001, the industry collapsed, with two of the three major data LECs (Rhythm and NorthPoint) going out of business altogether, and the third (Covad) emerging from bankruptcy with SBC holding a substantial ownership interest. As a result, the Bells gained a dominant position in the provision of DSL-based services.¹⁴⁶

(. . . continued)

competition, if permitted to grow, “would place significant pressure on the prices that incumbent LECs charge for their DSL-based services.” *Id.* ¶ 40.

¹⁴² *Id.* ¶ 35.

¹⁴³ Cable Services Bureau, *Broadband Today*, Report No. CS 99-14, at 27 (Oct. 1999).

¹⁴⁴ *Applications for Consent to the Transfer of Control of Licenses and Section 214 Authorizations by Time Warner Inc. & America Online, Inc., Transferors, to AOL Time Warner Inc., Transferee*, Mem. Op. & Order, 16 FCC Rcd 6547, ¶ 113 (2001) (“*AOL-Time Warner Merger Order*”).

¹⁴⁵ See Willig Dec. ¶ 37. The Bells priced higher speeds of DSL – *i.e.*, those comparable to speeds typically offered by cable modem services – substantially above cable modem service prices. *Id.*

¹⁴⁶ *Third Section 706 Report* ¶ 51 (the Bells “serve approximately 93 percent of ADSL subscribers, while competitive LECs serve about 7 percent,” and the Bells are “add[ing] customers at a faster rate than competitive LECs”).

The Bells responded by raising their prices substantially.¹⁴⁷ They also ended their prior practice in which their retail services that used the lowest-speed Internet access service had been priced at the same level as cable modem services.¹⁴⁸ And the Bells foisted these non-cost-based price increases on customers at the same time that prices for DSL-based services in other countries were falling.¹⁴⁹

As this marketplace evidence makes clear, it would be naïve simply to assume that further deregulation of the Bells would speed the Bells' deployment of broadband services. Moreover, an ounce of history is worth a pound of Bell theory. There is overwhelming evidence that Bell unbundling obligations required by law and economics have not, in fact, discouraged Bell investment. The evidence shows that notwithstanding their unbundling obligations, the Bells have made significant investments to respond to their cable competitors (and, when they were in existence, data LECs).¹⁵⁰

For example, the Commission has stated that “[i]n 2000, [ILECs] invested almost \$29.4 billion in infrastructure,” and that a “substantial portion” of the investment was to allow “high speed or advanced data services” to be offered more broadly.¹⁵¹ As a consequence of these investments, the Bells have vastly expanded the reach of their “broadband” networks. Verizon and BellSouth report that high-speed service can be offered on 79 percent and 76 percent of their

¹⁴⁷ See Willig Dec. ¶ 38.

¹⁴⁸ *Id.*

¹⁴⁹ See Willig ILEC Broadband Dominance Dec. ¶¶ 107-08.

¹⁵⁰ Willig Dec. ¶ 93.

¹⁵¹ *Third Section 706 Report* ¶ 69.

access lines respectively.¹⁵² The other mega-RBOC, SBC, is not far behind. Driven by Project Pronto, SBC's DSL-capable footprint now comprises 62% of its households.¹⁵³

The steady base of incumbent investment in broadband is reflected directly in the growth rates for DSL-based services. "The proliferation of DSL in the telecom industry has seen one of the fastest technology adoption rates ever recorded."¹⁵⁴ Whereas there were only 50,000 DSL subscribers in the U.S. in 1998, there were over 3.5 million by the end of 2001.¹⁵⁵ DSL-based services posted record gains in 2001,¹⁵⁶ despite the Bells' price increases. Verizon reports that its DSL subscriptions increased 122% in 2001 and that the company expected another 50-75% increase in 2002. Similarly, Qwest announced a 77% increase in DSL customers in 2001, and SBC announced a 69% increase.¹⁵⁷ Overall, "U.S. DSL lines totaled 4.4 million at end of year [2001]."¹⁵⁸ And the growth continues. For the first quarter of 2002, SBC added 183,000

¹⁵² See News Release, *Verizon Communications Reports Solid Results for Fourth Quarter, Provides Outlook for 2002* (Jan. 31, 2002); News Release, *Bell South Captures 620,500 DSL Customers and Deploys Broadband Capabilities to More Than 15.5 Million Lines* (Jan 3, 2002).

¹⁵³ *SBC: 4Q Beat EPS Expectations*, Salomon Smith Barney Research Report (Jan. 24, 2002) (available at http://www.salomonsmithbarney.com/cgi-bin/quote/gw.cgi/cgi-bin/bench/idd_permit?symbol).

¹⁵⁴ Robertson Stephens, *DSL Market: Demand Doesn't Seem To Be An Issue, But Carrier Deployment Execution Does* (January 3, 2001).

¹⁵⁵ See Morgan Stanley, *Residential Broadband Update*, at 33 (Dec. 28 2001); see also *Press Release, Federal Communications Commission Releases Data on High-Speed Services for Internet Access*, at 2 (Aug. 9, 2001) (noting that the number of DSL lines grew 435% to two million lines in 2000); *Third Section 706 NOI* ¶ 16 ("[T]he number of ADSL subscribers is growing faster than the number of cable subscribers."); *id.* ¶ 20 ("[T]he data also show continued rapid growth by all technologies, with ASDL gaining significantly on cable's lead.").

¹⁵⁶ *DSL Posts Record Gains During Q4, Broadband Daily* (Feb. 4, 2002).

¹⁵⁷ See News Release, *Qwest Communications Reports Fourth Quarter, Year End 2001 Results* (Jan. 29, 2002); News Release, *SBC Reports Fourth-Quarter Earnings* (Jan. 24, 2002).

¹⁵⁸ *Communications Daily* (Feb. 13, 2002)

subscribers (for a total of 1.5 million) and analysts expect Verizon to add 150,000 subscribers (for a total of 1.35 million) and BellSouth to add 125,000 (for a total of 746,000).¹⁵⁹

If such rapid consumer acceptance could in any way be considered inadequate – and that is difficult to reconcile with the Commission’s conclusion that “advanced telecommunications is being deployed to all Americans in a reasonable and timely manner,”¹⁶⁰ – the “problem” would appear to be lack of demand, not lack of investment or supply. According to a recent report by the Administration, the reason that acceptance rates for broadband services are not higher appears to be due to lack of compelling broadband content.¹⁶¹ Content limitations, of course, have nothing do with the Bells’ unbundling obligations under the 1996 Act; rather, they are driven by other issues (such as copyright and intellectual property laws).¹⁶² As a Verizon official recently explained its unwillingness to provide higher bandwidth speeds for its DSL-based services: “giving customers [higher speeds] might even be a waste of bandwidth, or transmission capacity, since few uses of the Internet can fully exploit [them].”¹⁶³

The second fatal error in the Bells’ investment theory is one of omission. In arguing that broadband investment will be reduced by network “sharing,” the Bells only consider the impact of these rules on their *own* incentives to upgrade loops. But the Bells’ investment is just one of several categories of investment necessary to bring advanced services to consumers.¹⁶⁴ And the

¹⁵⁹ See Margaret Kane, *SBC Connects With DSL Subscribers*, CNET News.com (Apr. 18, 2002).

¹⁶⁰ *Third Section 706 Report* ¶ 1.

¹⁶¹ See *Bush Administration Officials Detail Broadband Challenges*, Tech Daily (March 5, 2002).

¹⁶² *Id.*

¹⁶³ Akweli Parker, *Verizon Backs Out of Promises in Pennsylvania, Official Charges*, The Philadelphia Inquirer (March 29, 2002).

¹⁶⁴ See Willig Dec. ¶¶ 69-70.

Bells' unlawful proposals in this proceeding could be expected to dramatically reduce the *overall* level of investment in facilities, equipment, and processes used to provide broadband services.¹⁶⁵

Finished broadband service requires more than simple dumb pipes. Rather, the provision of a broadband service to a customer requires the attachment of electronic equipment (*e.g.*, DSLAMs) and packet switches to broadband-capable loops and, with narrow exceptions, the Commission's rules require that competitive LECs self-provision this electronics equipment. As Professor Willig explains (§ 70), unbundling obligations "promote investment in the electronic equipment and associated facilities required to transform voice-grade loops into broadband, for it allows these investments to be made by competitive LECs as well as incumbent LECs." Moreover, the Commission has recognized that competition in this "unshared" part of the network permits competitive LECs to "differentiate" themselves from both incumbent LECs and one another and can provide substantial consumer benefits. AT&T's combined offering of a traditional voice line, additional derived voice lines, and high-speed Internet service over a single loop provides a vivid example of the enormous consumer benefits that can flow from intramodal DSL competition through investment in next-generation electronics.¹⁶⁶

Finished Internet access services likewise require development and management of the actual "information" that flows over the incumbent LEC-provided loops. Here too, the Bells have followed the lead of others. ISPs, not the Bells, utilized the phone network to "offer an amazing array of Internet services . . . to virtually all Americans."¹⁶⁷ And it was the ISPs, not the Bells, that developed and popularized "[t]he Internet's 'killer apps,' email and the World Wide Web,

¹⁶⁵ *Id.* § 70.

¹⁶⁶ *See* Declaration of Stephen Huels, CC Docket No. 96-98, § 64 & n.18 (filed Apr. 5, 2002).

[which] developed and flourished by using our nation's phone lines.”¹⁶⁸ And although limited by inferior access to the Bells' standalone broadband transmission, ISPs have also been among the leaders in developing innovative broadband services and content.¹⁶⁹

In sum, the Bells' broadband investment claims are unsupported and unsupportable. Eliminating critical consumer protection regulation of the Bells would do nothing to accelerate the pace of broadband deployment and would affirmatively harm consumers, by making it easier for the Bells to exercise their market power.

B. The Bells' Regulatory Parity Arguments Are Also Baseless.

Given that the answers to the questions raised in the *Notice* are so straightforward, one might ask why this proceeding has generated so much attention and controversy. One answer is concern that the Bells' battle cry of “regulatory parity” will here, as elsewhere, drown out the voices of law, economics, and facts. That should not occur if the Commission heeds the *Notice*'s recognition that regulatory parity is a question of process, not outcome. Regulatory parity has never meant, and rationally could not mean, more than an “analytical framework that is consistent, to the extent possible, across multiple platforms,”¹⁷⁰ and it is only in that sense that what is good for the goose is good for the gander.

(. . . continued)

¹⁶⁷ Jason Oxman, *The FCC and the Unregulation of the Internet*, OPP Working Paper No. 31, at 5 (1999).

¹⁶⁸ *Id.* See also *AOL-Time Warner Merger Order* ¶ 137 (2001) (“Following AOL's pioneering efforts, IM became a mass market product in the late 1990s. In the short time since then, IM has mushroomed into a highly popular service, with an estimated 150 million users worldwide on AOL's IM services alone”).

¹⁶⁹ Willig Dec. ¶ 74.

¹⁷⁰ *Notice* ¶ 6.

The Commission has *always* applied the same analytical framework across broadband platforms – *i.e.*, imposing only those regulations that are clearly necessary to protect consumers and competition from the exercise of acknowledged market power. That has not always led to identical outcomes, but that is to be expected. As the *Notice* recognizes (§ 7, emphasis added), “legal, market, or technological distinctions may *require* different regulatory requirements between platforms.”

As demonstrated below, it is clear that the Bells’ unbundling and nondiscrimination obligations are warranted for reasons that simply have no analogue in the cable, satellite, or wireless environments. Moreover, as shown above, there can be no serious claim that differing regulatory requirements have prevented the Bells from competing effectively with their cable competitors.

The Bells’ claim that they are not, but should be, treated the same as cable rests on two premises, neither of which is true. First, the Bells simply assert that they bear more regulatory costs than their cable competitors. But they can do so only by ignoring the many regulatory burdens on cable. Cable companies must comply with local franchising requirements and pay billions of dollars in annual franchise fees.¹⁷¹ They must build and donate “institutional networks” to franchising authorities. They are subject to “must-carry,” PEG, and other regulations that require them to share their networks – and, unlike the Bells’ network sharing obligations, these cable sharing obligations are uncompensated.¹⁷² The Bells face no similar requirements, and

¹⁷¹ See Roll Call, July 23, 2001 (statement of Rep. John Conyers and Chris Cannon); see also Comments of AT&T, *Request for Comments Deployment of Broadband Networks and Advanced Telecommunications*, Docket No. 011109273-1273-01 (National Telecommunications and Information Administration, Department of Commerce) (Dec. 19, 2001).

¹⁷² See 47 U.S.C. §§ 531-32, 534-36.

therefore, notwithstanding their refusal even to acknowledge the cable regulations from which they are exempt, have no basis to claim that they are on the short end of the regulatory stick.

Second, there is absolutely no basis for the Bells' contention that law, economics, or some common sense notion of "fair play" demands that all cable and wireline competitors be subject to exactly the same regulations, regardless of critical market power differences. Indeed, that approach is antithetical to precedent, sound economics, and common sense. As the *Notice* recognizes (§ 7), "regulatory parity" can *only* mean the application of a consistent economic framework to all platforms – not equality of results regardless of relevant differences between those platforms.¹⁷³

As Professor Willig explains, there is a well-established economic framework that can be (and has been) applied consistently to the various broadband platforms. That framework begins with the proposition, endorsed in the *Notice* (§ 5) and Commission precedent, that the Commission should strive for a "minimal regulatory environment that promotes investment and innovation in a competitive market." "Where markets are effectively competitive, unnecessary regulation will almost inevitably lead to results that are less favorable to the public interest than those reached through private market transactions. In particular, unnecessary regulation can discourage investment and, therefore, the production of goods and services at socially optimal levels."¹⁷⁴

However, targeted regulation is not only appropriate, but necessary, where a carrier controls facilities that give it the opportunity to restrict output or raise rivals' costs in

¹⁷³ See Willig Dec. § 100.

¹⁷⁴ *Id.* § 9.

anticompetitive ways.¹⁷⁵ In these instances, regulation is often needed “to permit markets to function properly and to ensure that resources are allocated in a socially beneficial manner and to consumers are protected from exploitation.”¹⁷⁶ Thus, the Commission has repeatedly held that, despite its “costs,” “regulation” is “appropriate” to prevent the exercise of “market power in [a] relevant market.”¹⁷⁷

Here, unbundling regulation of the Bells’ “broadband” facilities is appropriate for at least two independent reasons that have no cable analog. First, as explained above, the Bells’ (and other incumbent LECs’) unique position as the dominant providers of the local telephone facilities used to provision narrowband internet access services gives them anticompetitive incentives to resist the deployment of cost-based broadband services.

For that reason, intramodal competition is critical if DSL-based services are to be rolled out as quickly as possible and at competitive prices. The evidence demonstrates that retaining and strictly enforcing unbundling requirements will therefore yield important consumer benefits in the provision of broadband services. Analysts widely agree that it was the recent, precipitous decline in intramodal competition – caused by the Bells’ well-documented campaigns of delay, discrimination, and outright refusals to comply with unbundling obligations – that permitted the

¹⁷⁵ *Id.*

¹⁷⁶ *Id.*

¹⁷⁷ *Motion of AT & T Corp. to be Reclassified as a Non-Dominant Carrier*, Order, 11 FCC Rcd. 3271, ¶ 27 (1995). See also *Rules & Policies on Foreign Participation In the U.S. Telecomm. Market*, Report & Order, 12 FCC Rcd. 23891, ¶ 149 (1997) (“We conclude, however, that the competitive safeguards we adopt here are necessary to restrain the leveraging of foreign market power into the U.S. market and that they will do so without imposing overly burdensome regulation.”); *Computer III* ¶ 102 (“the market power of the offeror of a service and the economic characteristics of the market in which that service is offered [are] the key determinants for developing the most appropriate form of regulation for that service. We have applied these (continued . . .)

Bells to raise prices for their high-speed Internet access services.¹⁷⁸ Vibrant intramodal DSL-based competition can check the Bells' market power by giving consumers voice/DSL alternatives from multiple carriers that would not have to match the Bells' price increases.

In stark contrast, cable modem services are cable's first Internet foray. As a result, increasing broadband deployment and revenues is unambiguously positive for cable operators. Cable operators therefore have every incentive to deploy broadband services broadly and to price them competitively in order to attract customers away from the Bell-provisioned services.¹⁷⁹

"This also means that cable operators have market incentives that the Bells lack to negotiate reasonable carriage agreements with independent ISPs."¹⁸⁰ Having invested billions of dollars in upgrading their systems, cable companies seek "to gain market share and attract substantial numbers of new customers to [their] cable-based services, such as high speed Internet

(. . . continued)

principles in determining appropriate forms of common carrier regulation for carriers with various degrees of market power in our Competitive Carrier decisions.").

¹⁷⁸ See *Broadband Intelligence Report* at 1 ("[T]he first half of this year witnessed a major shakeout among DSL wholesalers and independent ISPs. In its wake came a reversal of last year's downward pricing pressure."); *RHK Broadband Access Report* at 1 ("Competition for DSL subscribers in the telecom market is non-existent as more CLECs and DLECs become insolvent."); IDC, *US DSL Market Shares by Vendor, IH01*, at 2 (Aug. 2001) ("Now that upstart competitors, such as defunct NorthPoint Communications, no longer threaten the ILECs, the race for DSL subscribers has slowed . . . The ILECs now dominate the US DSL market, and with a dearth of competition, the ILECs no longer have an incentive to aggressively market and deploy DSL service."); Salomon Smith Barney, *Communications Components*, at 2 (Nov. 23, 2001) ("Perhaps most importantly, the fall of the competitive local exchange carriers (CLECs) has given the ILECs room to retire to 'Bell Standard Time' after years of trying to move in sync with 'Internet Time'. The result has been lower than expected DSL rollout rates in the US. In contrast, the worldwide ADSL sky has not fallen. Deployment has gone much more smoothly in several regions such as South Korea, Japan, and most of Europe.").

¹⁷⁹ Willig Dec. ¶ 102.

¹⁸⁰ See *id.* ¶ 103.

access” by offering consumers more ISP choices.¹⁸¹ As such, cable operators clearly have an unambiguous incentive to offer consumers choice in order to recover their massive upgrade investments.¹⁸²

The real-world situation reflects these differing incentives. Cable operators have led in deployment of broadband networks and “have moved forward in opening up their systems to multiple ISPs. Because of the ‘shared’ nature of cable systems, cable operators faced significant technical difficulties in creating an ‘open access’ environment.”¹⁸³ After years of considerable effort and expense, however, cable operators are now beginning to voluntarily offer consumers choice of multiple ISPs.¹⁸⁴ Statements made to Wall Street show that cable operators have given consumers choice in order to be able to compete and to earn greater revenues.¹⁸⁵

In stark contrast, the Bells have moved in the opposite direction. Although they initially offered standalone DSL-based services that would permit customers to buy DSL transport and then select from one of several independent ISPs, the Bells, for the most part, have withdrawn those offers and now only market at retail integrated DSL-based internet access services.¹⁸⁶ And although the Bells continue to publish tariffs that allow ISPs to purchase last mile broadband

¹⁸¹ *Id.*

¹⁸² *Id.* ¶ 102.

¹⁸³ *Id.* ¶ 104.

¹⁸⁴ *Id.* See also *Cable Modem Declaratory Order* ¶ 83.

¹⁸⁵ See, e.g., Press Release, *Comcast and United Online to Offer NetZero and Juno High-Speed Internet Service* (Feb. 26, 2002).

¹⁸⁶ See SBC Arkansas/Missouri Section 271 Brief, CC Docket No. 01-194 at 51-52 (filed Aug. 20, 2001) (“SBC has “decided to discontinue selling the DSL transport service to residential customers”); EarthLink LEC Non-Dominance Comments at 8 (“to EarthLink’s knowledge, the Incumbent LECs sell almost no broadband transport at all to retail customers”) (emphasis omitted).

transport, as required by the *Computer Inquiries* rules, the evidence discussed above demonstrates that they have sought to impose patently unreasonable terms and conditions for such access.

The contrast between the actions of the Bells and of cable operators vividly highlights the differing incentives under which each operates. While the Bells' network architecture was designed as an "open access" environment, the Bells have acted to eliminate customers' ability to use an unaffiliated ISP, whereas cable operators have heavily invested in changing their networks in order to provide more open access – and customer choice.

Second, unbundled access to Bell facilities at cost-based rates – and the ability to use those leased facilities to provide both narrowband and broadband services – is necessary to break the Bells' enduring voice monopolies. There is little intermodal telephony competition today, and thus, the Act's promise of local telephone choice remains vitally dependent upon intramodal competition. Recent efforts by AT&T, WorldCom, and others confirm that if the Bells' unbundling obligations are strictly enforced, the intramodal competition and local choice promised by the Act may finally become a reality.

Competitive LECs would be at a huge competitive disadvantage, however, if they could not provide voice and data services over a single line. As Professor Willig explains, combined voice/data services are becoming increasingly common because "using bundles [allows carriers] to expand control over the communications value chain and capture share of the higher value customers" and reduces churn.¹⁸⁷ Further, given the high cost of using the Bells' bottleneck

¹⁸⁷ The Yankee Group, *Assessing the U.S. Residential Community Landscape: New Strategies, New Opportunities*, at 3 (Nov. 14, 2001); see also Willig Dec. ¶ 47.

facilities, local entry may not be viable at all in some areas unless entrants have the same ability as the incumbents to offer both voice and data services over a single line.¹⁸⁸

Denying competitive LECs access to the high-frequency portion of the loops they lease would also directly impede voice competition, because voice services can be provided over the high frequency portion of the loop.¹⁸⁹ The availability of such “derived” voice lines represents one of the greatest competitive threats to the Bells’ continuing local dominance and thus could generate great public interest benefits. The need to break the Bells’ monopolies in their core telephony markets provides another powerful economic justification for the Bells’ unbundling rules and their continued application to broadband services.

Again, the cable situation is entirely different. Cable’s core video services are subject to substantial competition from DBS and other competitors that have no need for access to cable facilities and that are outpacing cable without viable broadband Internet offerings. Driven by DBS, non-cable MVPDs already serve approximately 23% of multichannel video (“MVPD”) customers nationwide, and the non-cable share of the MVPD business continues to experience an annual growth rate of nearly 20%.¹⁹⁰ Most of this growth has come from luring away existing cable subscribers.¹⁹¹

Further, this competition is ubiquitous. The driving force behind this growth has been the phenomenal success of DBS. There are two facilities-based DBS providers that have the ability

¹⁸⁸ See Willig Dec. ¶ 43.

¹⁸⁹ See *id.* ¶ 45.

¹⁹⁰ See Paul Kagan Assocs., *Media Index Database*, Kagan Media Money, at 11 (June 26, 2001) (“*Kagan Media Database*”).

¹⁹¹ See J.D. Power & Assocs., *2001 Syndicated Cable/Satellite TV Customer Satisfaction Study* (Sept. 2001); Declaration of Robert Willig, CS Docket No. 01-348, ¶ 11 (filed December 3, 2001) (citing evidence).

and capacity to serve virtually each and every cable subscriber in the United States. Thus, in every local market, cable operators face at least two facilities-based competitors, and in many markets they face several additional competitors as well, including C-Band, MMDS, and SMATV operators, broadband overbuilders such as RCN and Knology, incumbent LECs, and leading electric and gas utilities.

In sum, the Bells already receive all of the “regulatory parity” that the law and marketplace circumstances warrant.¹⁹²

CONCLUSION

For the foregoing reasons, the Commission should confirm that standalone broadband transmission services are common carrier telecommunications services (and the incumbent LECs may not cease providing those services); that broadband Internet access services are information services; and that the Bells must comply with the unbundling and nondiscrimination obligations under both section 251(c)(3) and the *Computer Inquiries* rules without regard to broadband and narrowband labels.

¹⁹² The Commission is considering fundamental reform of its universal service assessment and recovery mechanism in a companion proceeding to “ensure the long-term stability, fairness, and efficiency of the universal service contribution system in a dynamic telecommunications marketplace.” See *Federal-State Joint Board on Universal Service*, Further Notice of Proposed Rulemaking and Report & Order, 17 FCC Rcd. 3752, ¶ 2 (2002) (“*USF Contribution FNPRM*”). Universal service reform is imperative given the many flaws with the existing historical revenue-based assessment mechanism. However, although overall reform is critical, it may be helpful for the Commission to decide the issues in the *USF Contribution FNPRM* first and then proceed to consider how broadband providers fit into the new scheme. See Comments of Coalition for Sustainable Universal Service, CC Docket No. 96-45, at 41 (filed April 22, 2002).

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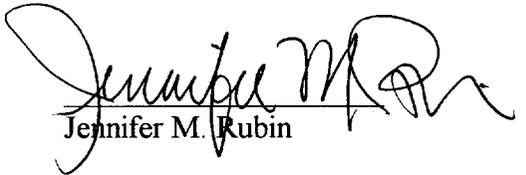
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The undersigned hereby certifies that a copy of the foregoing Comments of AT&T Corp. was served, by the noted methods, the 3rd day of May, 2002, on the following:

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