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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Dated: May 3, 2002

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Cbeyond Communications, LLC, El Paso Networks, LLC, Focal Communications Corporation, New Edge Network, Inc., and Pac-West Telecomm, Inc. (together, "Commenters") submit these comments in response to the above-captioned notice of proposed rulemaking examining the appropriate regulatory framework for broadband access to the Internet over wireline facilities.[1]

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

I. INTRODUCTION AND SUMMARY

In the *NPRM*, the Commission seeks comment on the extent to which broadband wireline Internet access services should be regulated by the Commission. Commenters are concerned that the Commission may in this proceeding erroneously and unlawfully remove key Title II and *Computer Inquiry* obligations from ILECs in the misguided view that this would promote its goal of provision of broadband services to all Americans. In fact, the possibility encompassed within the *NPRM* that some or all broadband transmission capability deployed by the ILECs would not be subject to Title II, or available to competing broadband access providers, would not promote the provision of broadband services to all Americans. For the reasons stated in these comments, deregulation of ILEC broadband capability would merely enhance the ILECs' ability to thwart intramodal competition and afford them greater flexibility to delay introduction of network improvements that they would otherwise be compelled to make in response to competition.

Commenters cannot stress strongly enough that the Commission's tentative conclusions in the *NPRM* governing the classification of wireline broadband internet access services, if implemented, would not result in a competitive broadband market, but, rather, will allow ILECs to continue their dominant control over the broadband market and essential facilities, unrestricted by regulatory protections necessary to curb monopolistic abuses. tThe Commission has recognized that ILECs continue to exercise dominant control over the local exchange and exchange access market. Based on all the evidence submitted in the *Non-Dom Proceeding*, the Commission must conclude that ILECs are dominant in provision of broadband services. Therefore, as monopolists, deregulation of ILECs will result in no more than ILECs behaving like monopolists. They will raise prices and disadvantage competitors, effectively thwarting the pro-competitive and consumer wellfare goals of the 1996 Act.

In order to promote its broadband goals, the Commission should reaffirm that the ILECs' broadband capability is, and will be, subject to Title II, all of the pro-competitive obligations of the 1996 Act, and *Computer Inquiry* unbundling obligations. The broadband competition that these regulatory requirements make possible will itself help meet the Commission's broadband goals and also is the best way to encourage ILECs to deploy an advanced broadband capability.

The *NPRM* fails to recognize that the Commission has already addressed and established a regulatory framework governing wireline broadband Internet access service. Under that framework, ILECs may provide Internet access service using their own facilities only as a customer of their own nondiscriminatory telecommunication service offering. This framework is consistent with the statutory definitions of "telecommunications," "telecommunications service," and "information service." Therefore, the Commission's apparent assumption in the *NPRM* that it must change the current framework governing wireline broadband Internet access service based on those statutory definitions is false and adoption of any of the radical deregulatory measures envisioned in the *NPRM* based on that assumption would be unlawful.

The Commission should determine that facilities-based wireline broadband Internet access service is a bundled offering of a telecommunications service (subject to Title II) and information service. Facilities-based wireline broadband Internet access service is such a bundled offering because this service in large part provides to the customer no more than a transparent transmission path to third party content providers in the same way that the voice network provides a pathway for end users to obtain various third party-provided audiotext information sources including stock quotes and banking information. In fact, end users demand and expect that the service provider will not change the format or content of information received from third party sources. In other instances, wireline broadband Internet access service

providers use telecommunications to provide an information service, such as access to email stored on the providers server. Wireline broadband Internet access is not a seamless information service because the transparent transmission path is functionally separate from information services and is perceived as such by end users.

The fact that the Commission for the last 25 years has asserted Title II jurisdiction over the transmission component of ILEC networks that they use to provide information services by itself demonstrates that this transmission component is subject to Title II. Thus, under the *Computer Inquiry* requirements, which the *NPRM* correctly declares apply to ILECs, ILECs may use their own DSL services to offer high speed Internet access services, but, pursuant to Title II, are required to make DSL services available to other broadband access providers on a nondiscriminatory basis.

Moreover, applicable case law defining common carriage as well as all of the policy and public interest considerations underpinning common carrier designation require that this capability be subject to Title II and unbundling obligations. Under *NARUC I* and *II*, and cases cited therein, ILECs are making an offer to the public at large to provide telecommunications for a fee sufficient to trigger common carrier status for the transmission component of wireline broadband Internet access service. Further, ILECs own and control the quintessential bottleneck facilities – the local loop – that compels common carrier status under the Act and common law. And, it is hard to imagine a more compelling public interest justification for application of Title II obligations to ILEC broadband capability. Thus, the ability of independent broadband access providers to obtain basic network functions on a nondiscriminatory basis has been the foundation for the growth and success of the Internet and its attendant public interest benefits. Conversely, permitting ILECs to discriminate in favor of their own ISP operations to any significant extent

would be a perfect opportunity for ILECs to extend their monopoly control of the loop to the unregulated information services marketplace, a control the Commission has sought to avoid for over 25 years.

There are many public interest benefits to preserving the Title II obligation that ILECs offer as a telecommunications service to competitors the broadband capability that they use for their own Internet access service. One overwhelming benefit is that this would help preserve eligibility under Section 251(c) for unbundled access by competitive carriers to broadband network elements. Another benefit would be to assure the long term viability of universal funding which is applicable to entities that "provide" telecommunications or telecommunications service. Requiring ILECs to offer broadband capability as a telecommunications service would also preserve other important requirements that apply to provision of telecommunications service including CALEA, CPNI requirements, and access to telecommunications services by persons with disabilities.

Application of Title II to ILEC broadband capability is the best alternative to achieve the Act's goal of a deregulatory framework for provision of telecommunications. The Commission may exercise its forbearance authority under section 10 and deregulate under Title II when it is appropriate to do so. On the other hand, the Commission has no experience fashioning safeguards under Title I and the scope of the Commission's authority under Title I is unformed and untested. Accordingly, the Commission should fashion a deregulatory framework for broadband by retaining Title II authority and deregulating as appropriate, rather than attempting to do so by sweeping all of broadband into Title I. This approach also permits establishment of an intermodal level playing field by applying Title II to all broadband platforms and forbearing or waiving rules where appropriate.

Elimination of Title II regulation of ILEC broadband capability is not necessary in order to permit ILECs to compete intermodally. ILECs are currently permitted to compete and provide broadband information services as customers of their own tariffed broadband telecommunications services. Under that framework, ILECs have succeeded spectacularly, experiencing record breaking growth in DSL subscribership.

The Commission should retain and strengthen *Computer III* safeguards against discrimination. The *Computer III* regulatory framework has been the foundation for the growth and success of the Internet. The *NPRM* does not make a compelling case that marketplace conditions have changed sufficiently, or at all, to permit elimination of *Computer III* safeguards. The *NPRM's* statements that those safeguards were somehow limited to the voice network are incorrect. The Commission in *Computer III* stated that it intended to, and did, fashion a framework that could accommodate the evolution of the network to a more advanced capability. Thus, key *Computer III* safeguards are not technology-specific. Instead, they are broad anti-discrimination requirements that can be, and are, equally applied in a narrowband or broadband environment. In particular, the requirement that ILECs provide Internet access as customers of their own tariffed services is fully at home and necessary in a broadband wireline environment.

In evaluating the issues in this and other broadband proceedings the Commission should keep in mind that the only new aspect of "broadband" is for the most part packetized switching and transmission techniques. The Commission has already determined that packet switching is not subject to unbundling, and the upgrades of network transmission capacity over which packetized broadband information will flow are no more than routine upgrades that ILECs will install in order to obtain efficiencies in provision of existing services. Thus, SBC's installation of fiber digital loop carrier systems, which it labeled as "Project Pronto" was entirely justified on

the basis of more efficient provision of voice service. SBC's characterization of this as primarily a broadband initiative and its claims that unbundled access would inhibit its investment in "Project Pronto" are misrepresentations of routine network upgrades aimed at manipulating policy makers.

The Commission should, therefore, conclude this proceeding by reaffirming that ILECs' broadband capability is fully subject to Title II and *Computer Inquiry* safeguards.

II. DEREGULATION OF ILEC BROADBAND WIRELINE INTERNET ACCESS SERVICE WOULD NOT PROMOTE THE AVAILABILITY OF BROADBAND SERVICES

A. ILECs' Are Already Deploying a Broadband Capability

ILECs have already widely deployed a broadband capability, and are rapidly installing an even more robust broadband capability in their existing networks. For example, the following facts, most of which come from the ILECs themselves, show that they are increasing the deployment of a broadband capability notwithstanding Title II and other regulatory obligations:

- BellSouth announced 25% growth in data revenues and a 189% increase in DSL subscribers in 2001, which BellSouth noted was "the fastest growth of any DSL or cable provider in the country."[2]

- BellSouth claimed that it had "the most aggressive DSL deployment strategy in the industry" and that it had increased its DSL coverage from 45% to 70% of households in 2001. [3]

- In its fourth quarter, year-end 2001 results report, Qwest stated that "DSL, wireless and Internet services continue to be key growth products."[4]

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

[3] *BellSouth Captures 620,500 DSL Customers and Deploys Broadband Capabilities to More than 15.5 Million Lines*, *available at* http://bellsouthcorp.com/investor/archive.vtml (Jan. 3, 2002).

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

- Qwest's DSL customers at the end of 2001 represented a 74% increase from the end of 2000.[5]

- In a January 24, 2002, "Investor Briefing" SBC announced that it had expanded its DSL-capable footprint by 37% in 2001 and that it had the "industry's largest DSL Internet customer base."[6]

- SBC announced growth in its data services of between 14.4% and 27.9% in 2001 and 16.9% in the fourth quarter of 2001 for high-speed data transport services.[7]

- Verizon reported a 122% increase in DSL subscribers and a 21.2% increase in data transport revenues in 2001.[8]

- By year-end 2001, Qwest had increased by 15% over year-end 2000 the number of its central offices equipped for DSL.[9]

- In 1999, SBC launched "Project Pronto," a $5 billion investment in high-speed broadband services to residential consumers.[10]

- SBC also continued expansion of its broadband network capabilities, with 25 million DSL-capable customer locations at year's end. In 2001, SBC's DSL-capable footprint expanded by more than 6.7 million customer locations, or 37 percent.[11]

- In June 2001, Verizon informed the New York Public Service Commission that the "unprecedented and unpredictable demand" for high-speed data circuits required increased capital spending and the deployment of new technologies.[12]

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[5] *Id.*

[6] SBC Investor Briefing No. 228, at 2, 5, *available at* http://www.sbc.com/investor_relations/financial_and_growth_profile /investor_briefings (Jan. 24, 2002) ("SBC Fourth Quarter Briefing").

[7] SBC Investor Briefing No. 226, at 4, *available at* http:\\www.sbc.com/investor_relations/financial_and_growth_profile/investor_briefings (July 25, 2001) ("SBC Second Quarter Briefing"); SBC Investor Briefing No. 227, at 4, *available at* http:\\www.sbc.com/investor_relations/financial_and_growth_profile investor_briefings (Oct. 22, 2001) ("SBC Third Quarter Briefing"); SBC Fourth Quarter Briefing, *supra,* at 4.

[8] *Verizon Communications Reports Solid Results For Fourth Quarter, Provides Outlook for 2002*, *available at* http://investor.verizon.com/news/VZ/2002-01-31_X263602.html (Jan. 31, 2002).

[9] Qwest Fourth Quarter Announcement, *supra,* at 2.

[10] *Inquiry Concerning the Deployment of Advanced Telecommunications Capability to All Americans in a Reasonable and Timely Fashion, and Possible Steps to Accelerate Such Deployment Pursuant to Section 706 of the Telecommunications Act of 1996*, Third Report, 17 FCC Rcd. 2844, at ¶ 70 (2002) ("*Third Section 706 Report*").

[11] SBC Fourth Quarter Briefing, *supra,* at 2.

- Verizon also announced that it had deployed DSL to central offices serving 79% of Verizon's local access lines and that its total number of data circuits in service had increased 53% from 2000.[13]

Obviously, these ILECs have deployed, and are continuing to deploy, broadband facilities, including fiber in the loop. This deployment is occurring in spite of the Commission's determination that DSL and other broadband services are telecommunications services subject to common carrier regulation[14] and that advanced networks are fully subject to Section 251(c)(3) unbundling obligations.[15] Therefore, regardless of selected pronouncements from ILECs' regulatory spokespersons, their actions reveal that regulatory obligations have not inhibited their investment in broadband infrastructure and deployment of broadband services.

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

To the extent broadband is not being deployed quickly enough, which is not the case according to the Commission's *Advanced Services Reports*, this is attributable to factors other than common carrier regulation of broadband services. First, there are no services for which wireline broadband networks more advanced than those already in place are necessary. This phenomenon is referred to as the lack of a "killer application." Video programming is available

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

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

[14] *Deployment of Wireline Service Offering Advanced Telecommunication Capability,* Memorandum Opinion and Order and Notice of Proposed Rulemaking, 13 FCC Rcd 24011, at ¶ 32 (1998).

[15] *Id. at* ¶¶ 46-49.

from several sources including over-the-air broadcast, cable, satellite, videocassettes and DVDs. High speed web browsing is already available through DSL and cable modem service, although these services are not necessarily substitutes for each other. Businesses have been able for years to obtain the high-speed services they need from ILECs in the form of DS-1 and higher speed services. In short, futuristic ubiquitous wireline broadband networks have not been built because there is insufficient demand for them.

In a refreshing change from ILEC and other government views, it was recently reported that the Administration has recognized that demand, not supply, is limiting the growth of broadband networks (again, assuming that they are not being deployed fast enough, which is not the case).[16] Glenn Hubbard, Chairman of the President's Council of Economic Advisors stated:

> "Many consumers don't yet see the value of broadband," he said, pointing to the fact that in Atlanta, [a] price point of zero still wasn't sufficient motivation for half of consumers. As far as Bush Administration is concerned, he said, policy decisions can have "bigger impact on the demand side …"[17]

Second, ubiquitous advanced broadband networks have not been built because the technical solutions that might make them affordable have not yet been invented. Recent studies show that consumers are unwilling to pay more than $25.00/month for high speed access and that this explains why less than 5% of U.S. households subscribe to it.[18] The ILECs have dangled the prospect of a kind of super-broadband "passive optical network," bringing fiber optics as close to

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[16] *Bush Administration Focuses on Increasing Demand for Broadband*, Comm. Daily, Mar. 6, 2002, at 3.

[17] *Id.*

[18] *Broadband Success Requires More than Regulatory Clearance, Says Research*, CLEC News (Feb. 18, 2002), *at* http:\\www.isp-planet.com/cplanet/news/index.html.

consumers as possible.[19] But given that the ILECs' own funded studies estimate that the cost of deploying such gold-plated networks nationwide would be $270 billion to $416 billion,[20] it is clear that this type of network currently is not economically feasible.

Accordingly, even if the Commission were to comprehensively deregulate ILECs' participation in the broadband marketplace, there is no reason to believe that this would result in widespread deployment of more advanced broadband networks, simply because the costs thereof are more than consumers are willing to pay. In fact, ILECs will not build these futuristic networks unless costs drop dramatically or they are permitted to compel all ratepayers to pay for them through cross-subsidies and general rate increases.

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

> " [I]ndustry investment in infrastructure to support high-speed and advanced services has increased dramatically since 1996. Analysts forecasted at that time that this upward trend would continue, spurred by the introduction of competition into the market. Although analysts still generally expect this trend to continue, they observe that there has been a recent slowdown in investment caused by the economic downturn generally and, more particularly, over-building by carriers, over-manufacturing by vendors, over-capitalization by financial markets, coupled with unrealistic market expectations by investors.[21]

Therefore, there is no basis for the Commission to conclude in this proceeding that removal of common carrier regulation from ILEC broadband capability would promote its broadband goals.

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[19] Comm. Daily, Feb. 26, 2002, at 4-5 (describing *Building a Nationwide Broadband Network: Speeding Job Growth*, Telenomic Research, Feb. 25, 2002).

[20] *Id.*

[21] *Third Section 706 Report* at ¶ 62 (footnotes omitted).

C. ILECs Have Strong Incentives Not to Offer Lower Price Broadband Options

Although only ILECs possess ubiquitous networks that can be used to provide services to consumers and businesses, they are not the best source of innovation in provision of services over those networks. In fact, ILECs are slow to roll out new services, and have strong incentives not to deploy, new, efficient services that will compete with, and cannibalize, existing services. Thus, CLECs, in contrast to ILECs, worked cooperatively with their ISP customers to serve ISP needs, who, in turn, have been a key driver in the development and deployment of new advanced services. ISPs have pioneered a myriad of advanced services, such as Internet telephony, unified messaging, and MP3 technology, that promise to revolutionize the telecommunications industry.

The ILECs' pattern of deployment of DSL capable networks perfectly illustrates that ILECs are not sources of innovation and prefer to maintain revenues from existing services. In a nutshell, ILECs ignored DSL until CLECs began to deploy it. As President Clinton's Council of Economic Advisers stated in early 1999:

> Although DSL technology has been available since the 1980s, only recently did [the ILECs] begin to offer DSL service to businesses and consumers seeking low-cost options for high-speed telecommunications. The incumbents' decision finally to offer DSL service followed closely the emergence of competitive pressure from … the entry of new direct competitors attempting to use the local-competition provisions of the Telecommunications Act of 1996 to provide DSL over the incumbents' facilities.[22]

[22] David A. Wolcott, *An ALTS Analysis: Local Competition Policy & The New Economy,* at 4*, available at* www.alts.org/resources.html (Feb. 2, 2001) (citing Council of Economic Advisers, *Economic Report of the President*, at 187-188, *available at* http://w3.access.gpo.gov/usbudget/fy2000/pdf/erp.pdf) (Feb. 1999).

Or, as stated more succinctly by James Glassman, the ILECs "kept cheaper DSL on the shelf for a decade" to protect their higher revenue services.[23] That decision is unsurprising and perhaps even economically rational from the ILECs' point of view, but consumers and businesses were required to bear the higher costs and poorer quality of the ILECs' earlier "high speed" services.

Moreover, it is not coincidental that after two of the "big three" CLEC DSL providers terminated operations and the third filed for bankruptcy, some ILECs announced they were scaling back DSL investment somewhat – although even this maneuver did not prevent them from achieving the record-breaking growth discussed above, so that they now control over 90% of DSL customers.[24] For example, in October 2001, SBC scaled back its original deployment plan for Project Pronto and reduced capital spending by 20% in 2002.[25] In short, to the extent any diagnosis other than the general recession is needed to explain these modest scalebacks, it is apparent that ILECs no longer feel the need to invest quite so rapidly in light of the diminished threat of competition from CLECs. It is also worth noting that some ILECs substantially raised prices for DSL service, which never would have happened in a competitive market. To name only one, in October 2001, SBC raised its wholesale prices for DSL services by approximately 15% (while admitting that its cost to provide DSL was declining).[26]

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[23] James Glassman, *Best Remedy for Recession? Break Up the Bells*, Address before the Michigan Alliance for Competitive Telecommunications *available at* http:\\www.techcentralstation.com\1051\techwrapper.isp?PID=1051-250&CID=1051-121001A) (Dec. 10, 2001).

[24] Katie Hafner, Digital Disenfranchised; Bell Companies Are Blamed for the Slow Start at Fast Internet Service, N.Y. Times, Aug. 6, 2001, at C1.

[25] SBC Advanced Solutions, Inc., Tariff FCC No. 1, at 60-69 (eff. Sept. 10, 2001); SBC Second Quarter Briefing, *supra,* at 5.

[26] SBC Second Quarter Briefing, *supra,* at 5 ("SBC continues to improve the economics of DSL. Acquisition costs have declined by more than 25 percent since the fourth quarter of 2000 due to modem cost reductions and operational improvements.").

As a group of distinguished economists explained in a December 2001 letter to Commerce Secretary Donald Evans: "both history and economic theory have taught us [that] deregulating a monopoly without genuine prospects for competition does not induce it to deploy more infrastructure, only to exploit more severely the infrastructure that it has already in place by limiting its use and raising its price."[27] In a perfect illustration of this point, SBC reduced investment and raised prices as soon as the threat of broadband competition diminished.

The *NPRM* fails to acknowledge that it is competition, not deregulation, that best motivates ILECs to invest in broadband and that it is the availability of incumbent unbundled basis to CLECs that permits them to provide services that can compete with ILECs. Accordingly, the Commission should conclude that requiring ILECs to provide broadband facilities to CLECs will help achieve the competition that can best encourage ILECs to build broadband networks.

III. THE COMMISSION'S RULES REQUIRE THAT WIRELINE BROADBAND INTERNET ACCESS SERVICE BE PROVIDED BY ILECS AS CUSTOMERS OF "TELECOMMUNICATIONS SERVICE"

In the *NPRM*, the Commission seeks to consider the application of the statutory definitions of "telecommunications" and "telecommunications service" to provision by ILECs of broadband Internet access service over their own facilities. The *NPRM* tentatively concludes that the transmission component of wireline broadband Internet access service is "telecommunications" rather than "telecommunications service."[28] However, the Commission has already addressed and established a regulatory framework governing provision of broadband

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[27] Letter from William J. Baumol *et al*. to Honorable Donald L. Evans *et al.*, at 3 (Dec. 11, 2001) .

[28] *NPRM* at ¶ 25.

Internet access service by ILECs over their own facilities.[29] Under that framework, ILECs may provide information services, including broadband Internet access service, only as customers of their own telecommunications service.[30] ILECs would violate the Commission's safeguards against discrimination if they were to use their own facilities to provide Internet access service on terms other than what they offer independent ISPs, including price. ILECs obtain and use their own telecommunications capability and pay the same price that they charge other ISPs. Because "telecommunications service "is defined under the Act as essentially an offering of telecommunications for a fee and since ILECs are required under the current regulatory framework to provide Internet access service as customers of their own public offering of telecommunications, including for the same fee, the underlying transmission component of wireline broadband Internet access service is "telecommunications service" under the current regulatory framework.

The *NPRM* fails to recognize that the Commission's own rules prohibit ILECs from providing broadband Internet access on some sort of "integrated" basis as a user of "telecommunications" rather than as customers of a nondiscriminatory offering of "telecommunication service." Further, the *NPRM* fails to recognize that under the statutory definitions "telecommunications" is always a component of "telecommunications service."

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[29] *Policy and Rules Concerning the Interstate, Interchange Marketplace Implementation at Section 254(g) of the Communications Act of 1934, as amended, 1998 Biennial, Regulatory Review, Review of Customer Premises Equipment and Enhanced Services Unbundling Rules in the Interexchange, Exchange Access and Local Exchange Markets,* 16 FCC Rcd. 7418, 7421, at ¶ 4 ("*CPE/Enhanced Services Unbundling Order").* In the *CPE/Enhanced Service Unbundling Order*, the Commission reiterated that "carriers that own common carrier transmission facilities and provide enhanced services must unbundle basic from enhanced services and offer transmission capacity to other enhanced service providers under the same tariffed terms and conditions under which they provide such services to their own enhanced service operations." *Id.* at 7421, at ¶ 4 (*citing Independent Data Communications Manufacturers Association, Inc. Petition for Declaratory Ruling and American Telephone and Telegraph Company Petition for Declaratory Ruling,* Memorandum Opinion and Order, 10 FCC Rcd. 13717, 13719 (1995) ("*Frame Relay Order*")).

Therefore, when, as required under current rules, ILECs provide wireline broadband Internet access service as customers of their own public offering of telecommunications service, they are providing information service via telecommunications service but also via telecommunications. Therefore, the current regulatory framework governing wireline broadband Internet access service is fully consistent with the statutory definition of "information service" which states that it is provided "via telecommunications."

For these reasons, the examination undertaken in the *NPRM* of the application of the statutory definitions of "telecommunications," "telecommunications service," and "information service" to wireline broadband Internet access service is deeply irrational. The Commission's own rules prohibit facilities-based carriers from providing broadband Internet access service other than as customers of their own telecommunications service and this is consistent with all of the foregoing statutory definitions. The apparent assumption of the *NPRM* that the Commission must change the established framework and safeguards governing wireline broadband Internet access service based on these statutory definitions is false. Adoption of any of the radical deregulatory outcomes envisioned in the *NPRM* based on the view that this is required by the statutory definitions would be unlawful. As discussed below, moreover, the Commission may not permit ILECs to offer wireline broadband Internet access service on an "integrated" basis free from Title II, and even if permissible, this service would then need to be considered as comprised of in part a separate telecommunications service.

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[30] *Id*.

IV. WIRELINE BROADBAND INTERNET ACCESS SERVICE IS BOTH AN INFORMATION SERVICE AND A TELECOMMUNICATIONS SERVICE

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

Assuming ILECs were permitted to offer it on an integrated basis rather than as a customer of their own telecommunications service, which would not be lawful under the Act, self-provisioned wireline broadband Internet access would be a bundled offering of a telecommunications service and information services because sometimes the provider is providing telecommunications in that it provides no more than a transparent transmission path, and sometimes it is merely using telecommunications to provide an information service. This conclusion is derived from the Commission's statements in the *NPRM* in which the Commission stated that:

> an entity provides 'telecommunications' (as opposed to merely using telecommunications) when it both provides a transparent transmission path and it does not change the form or content of the information.[31]

And,

> it seems as if a provider offering the [broadband wireline Internet access] service over its own facilities does not offer 'telecommunications' to anyone, it merely uses telecommunications to provide end-users with wireline broadband Internet access service.[32]

In fact, in most instances the customer of Internet access service is using, and the provider provides, no more than a transparent transmission path. While the users in many applications have the capability to change the appearance and format of content they receive or send, these capabilities are not provided by the wireline provider but by software in the end users

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31 *NPRM* at ¶ 25.

32 *Id.*

computer and/or the information content provider to which the end user chooses to connect. Thus, in Web access, changes in the appearance of information on the user's screen are controlled and determined by either software resident on the computer of the end user or the content provider. Moreover, the IP protocol starts on the end user's computer and is transmitted unchanged by the ISP. The user also controls the points on the Internet to which he is connected. Thus, to a large extent, Internet access service involves no more than provision of a transparent transmission path. As some telecommunications experts have observed:

> And any service provider whose core business is to transmit TCP/IP-encoded traffic is – as a matter of pure technological definition – providing pure carriage. As described above, TCP/IP places *complete* control over routing, addressing, origin, destination, and content itself in the hands of the originating computer. Any forced bundling in this environment has to be contrived, concocted and clumsily grafted onto the underlying carriage. TCP/IP is the universal protocol of *unbundled, equal access* carriage – a protocol that is content-neutral, network-neutral, medium-neutral. It is, in short, the purest form of "common carriage."[33]

Moreover, the fact that the user is using the transmission path provided by the wireline provider to connect to content providers does not render the transmission service an information service. The traditional telephone network has always provided users the ability to retrieve information. Users are able to use the voice network to connect to numerous sources of stored information such as banking information, stock quotes, news, entertainment information, horoscope, weather, and time of day. This use of the voice network by the end user is conceptually identical to use of Internet access to retrieved information on the Web.

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[33] Peter W. Huber, Michael Kellogg, & John Thorne, *Federal Telecommunications Law*, § 11.8.1 (2d ed. 1999).

Further, there is a charge associated with provision of the pure transmission path which is part of the total charge for wireline broadband Internet access. The ILECs will attempt to argue that the term "for a fee" in the definition of "telecommunications services" requires the assessment of a separate fee for a separate transmission service in order to classify it as a common carrier service. The statutory definition of telecommunications services, however, does not require a separate fee in order to render a service a telecommunications service.[34] The ILECs offer broadband services to the public for a fee, which includes the transmission services and associated charges. Moreover, the ILECs make a profit from these charges. Therefore, the Commission may, and should, conclude that the self-provisioned transmission function of wireline broadband Internet access is a telecommunications service when provided to, and used as such by, the end user.

On the other hand, there are instances where the wireline provider is <u>using</u> the pure transmission path to provide information services functions, rather than <u>providing</u> telecommunications. Thus, when the user connects to stored information provided by the wireline provider such as the end user's personal web page[35] or stored email it is using telecommunications to provide an information service.

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

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[34] 47 U.S.C. § 153(46).

[35] All ISPs permit users to change the default opening Web page. Thus, the user in Web browsing may never connect to content provided by the ISP.

B. Wireline Broadband Internet Access Is Two Functionally Separate and Distinct Services

The Commission has recognized that merely combining an enhanced service with an information service offering for a single price does not always constitute a single enhanced service offering. In determining whether the offering is a single information service or a bundled offering of information service and telecommunications service for one price, the "issue is whether, functionally, the consumer is receiving two separate and distinct services."[36] Previously, the Commission has concluded that Internet access should be classified as a single information service because it offers end users information service capabilities inextricably intertwined with data transport.[37]

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

It is possible that the "functionally separate" test previously enunciated by the Commission is intended to be resolved at least in part by reference to customer

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[36] *Federal-State Joint Board on Universal Service, Access Charge Reform, Price Cap Performance Review for Local Exchange Carriers, Transport Rate Structure and Pricing, End User Common Line Charge,* Fourth Order on Reconsideration, FCC 97-420, 13 FCC Rcd 5318, 5474-75, at ¶ 282 (1997).

[37] *Id.* at ¶ 80.

perception. Yet here too it would seem obvious that customers know when they are receiving a pure transmission path and when the provider is manipulating the content. In fact, consumers demand and expect that when they use Internet access to access Websites that the ISP will not change the form or content of the information provided by the third party content provider. Therefore, they correctly perceive that provision of access to Websites is provision of a pure transmission path. Accordingly, under the "functionally separate" test wireline broadband Internet access is provision of both a telecommunications service and an information service.

A meaningful application of the functionally separate test should rest at least in part on an empirical or factual examination of functionalities and/or customer perceptions. However, the *NPRM* provides no such empirical or factual analysis or studies that could support the conclusion that the transmission component of wireline broadband Internet access is functionally "inextricably" intertwined with information service functions, much of the latter of which are in any event provided by the user's software or third party content providers. Therefore, the *NPRM* does not provide a basis for concluding that facilities-based wireline broadband Internet access is a unitary information service offering. Again, facilities-based wireline broadband Internet access providers offer a separate telecommunications service because they provide the facilities that constitute the transparent transmission path.

C. The Transmission Component Should Be Classified As A Telecommunications Service in Light of Industry Trends

It has been predicted by expert industry observers that the circuit switched network will soon be replaced by a network providing all services as applications

traveling over digital packet-switched facilities using IP protocol.[38] In fact, some CLECs are already doing so, which enables them to provide more service for less than what ILECs charge.[39] In this environment, all services, including voice, will be merely different software defined applications traveling over digital packetized transmission services. Moreover, there will in this environment be no meaningful distinction between the network and the Internet. Rather, the Internet will be the network. In short, the classification of all facilities-based uses of Internet access service as one seamless information service is untenable. Instead, provision of only a pure transmission path for a bundled fee is a telecommunications service. This will provide a consistent approach for establishing an appropriate deregulatory framework for provision of telecommuni-cations services going forward. As noted elsewhere in these comments, Title II in no way precludes deregulation where this is appropriate such as where the carrier lacks market power.

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

In its previous analyses and application of the statutory definitions of telecommunications and information services, and before that, of the definitions of enhanced and basic services, the Commission resolved issues in light of its policy goals and objectives. The Commission established its definitions of basic and enhanced services in order to assure that information services providers would not be unnecessarily regulated as common carriers while assuring that

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[38] *See* Lawrence K. Vanston, Ph.D., *The Local Exchange Network in 2015*, Tech. Futures, Inc.

[39] *See* Comments of Association of Local Telecommunications Services, et al., CC Docket No. 01-338, at 14 (Apr. 5, 2002).

telephone companies are not able to leverage control of the local network into control of the information services market as well.

As explained above, broadband wireline Internet access consists in part of a telecommunications service when the facilities-based provider provides a pure transmission path to the Internet. To the extent the Commission perceives any doubt on this issue, however, it should resolve the statutory classification issues raised in this proceeding in light of the serious policy issues and consequences of some possible outcomes of this proceeding.

As widely reported in press reports and elsewhere, an apparent possible outcome of this proceeding is that ILEC broadband capability would be deregulated by defining it as an information service, and removing it from Title II oversight. At the same time, the Commission might also eliminate *Computer Inquiry* unbundling obligations and other safeguards against discrimination.

Removal of Title II regulation and other safeguards against discrimination would permit ILECs to further extend their dominance in wireline broadband Internet access beyond the 93% of customers they already possess. Removal or weakening of safeguards against discrimination would remove the foundation for the growth and success of the Internet. Nor would these deregulatory steps promote broadband deployment. Reclassification of wireline broadband Internet access would also threaten the long term viability of universal service programs because under the Act only <u>providers</u> of telecommunications or telecommunications service fall squarely under the statutory obligation to contribute to universal service funding. Any of these considerations alone would warrant maintaining a framework in which ILEC broadband capability continues to be categorized as telecommunications service. Together, they present on overwhelming case that the Commission should promptly determine that it will continue to

define ILECs' participation in broadband as one of common carriage subject to existing, or even strengthened, Title II safeguards against discrimination.

V. THE COMMON CARRIER OFFERING OF THE TRANSMISSION COMPONENT SUPPORTS SECTION 251(c)(3) UNBUNDLING OBLIGATIONS

Even if the Commission classifies wireline broadband internet access service as an information service, it should continue to require local exchange carriers to offer the transmission component of such services as telecommunications services. As discussed in these comments, this transmission component has all of the indicia of a telecommunication service and should be made available on a common carrier basis.[40] A critical factor underlying a common carrier classification of these transmission services is the need to preserve section 251(c)(3) unbundling requirements. [41] Classifying such services as telecommunications services will help assure eligibility of competing broadband access providers for unbundled access to network elements necessary to provide competing services under statutory standards. [42]

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[40] *See supra* pp. 27-30.

[41] 47 U.S.C. § 251(c)(3).

[42] Section 251(d)(2) sets forth a "necessary" and "impair" test that applies to proprietary and non-proprietary network elements, respectively, to determine whether an element must be made available to competing carriers. 47 U.S.C. § 251(d)(2). Based on these tests, the Commission has identified several key network elements that must be made available to competing carriers, including loops and interoffice transmission facilities. The loop UNE includes high-capacity lines, dark fiber, line conditioning, and some inside wire. The interoffice transmission facilities include dedicated transport from DS1 to OC96 and higher capacity levels. Loop and interoffice transmission facilities, as well as other UNEs, are key network components used to provide the transmission path that is necessary for competing telecommunications carriers and ISPs to offer their information services. *See Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers,* Notice of Proposed Rulemaking, 16 FCC Rcd. 22,781, at ¶ 10 (2001) ("*Triennial UNE Review*") (citing *Implementation of the Local Competition Provisions of the Telecommunications Act of 1996*, Third Report and Order and Fourth Further Notice of Proposed Rulemaking, 15 FCC Rcd. 3696, 3771-3890, at ¶¶ 162, 437 (1999) ("*UNE Remand Order*") *and Deployment of Wireline Service Offrering Advanced Telecommunications Capability and Implementation of the Local Competition Provisions of the Telecommunications Act of 1996,* Third Report and Order in CC Docket No. 98-147 and Fourth Report and Order in CC Docket No. 96-98, 14 FCC Rcd. 70912 (1999) *("Line Sharing Order").*

Section 251(c)(3) requires ILECs to provide telecommunications carriers with non-discriminatory access to unbundled network elements "*for the provision of a telecommunications service*."[43] Section 153(29) defines a "network element" as "a facility or equipment *used in the provision of telecommunications services*."[44] Absent a clear "telecommunications service" classification, the ILECs will have an incentive to designate separate facilities as facilities used for broadband services, effectively cutting off access to these bottleneck facilities that are otherwise subject only to unbundling under section 251(c)(3). ILECs will seek to establish a regulatory loophole by which they can disguise their services and facilities as broadband, thereby avoiding the anticompetitive regulations necessary to control the ILECs market power. Such a result not only jeopardizes competition in the broadband access market, but also threatens competition in the local exchange market.

In the *NPRM*, the FCC appears to suggest that access to network elements under section 251(c)(3) may not apply to the provision of broadband services if the network elements are used by the ILECs to provide only information services.[45] Contrary to the FCC's suggestion and any ILEC arguments in support, Section 251(c)(3) unbundling requirements are triggered by the CLEC's use of such network elements to provide telecommunications services. Nowhere in the language of the statute does it state that the ILECs must be using these elements to provide telecommunications services before they have to be made available to the CLECs. The

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43 47 C.F.R. § 251(c)(3) (emphasis added).

44 47 U.S.C. § 153(29) (emphasis added).

45 *NPRM* at ¶.61.

Commission has addressed and accepted this interpretation in other proceedings.[46] Moreover, the Commission has already determined that a CLEC may obtain unbundled access to a network element if it will be used to provide an information service in addition to a telecommunications service.[47] Thus, reclassification of wireline broadband Internet access as an information service, although erroneous, would not affect the CLECs' ability to obtain joint-use network elements. It should not change course here.

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

A. The Transmission Component Is Already Subject to Title II

The possibility apparently envisioned in the *NPRM* that the transmission component of wireline broadband Internet access service could be subject only to Title I is erroneous, if for no other reason, because it is already subject to Title II. While the *NPRM* purports to determine the appropriate framework for broadband wireline Internet access, the Commission already has such a framework pursuant to which LECs may offer, and are offering, broadband Internet access over their own facilities. Thus, under long standing *Computer II* rules adopted pursuant to the Commission's authority under Title II, "carriers that own common carrier transmission facilities and provide enhanced services must unbundle basic from enhanced services and offer transmission capacity to other enhanced service providers under the same tariffed terms and

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[46] *See Deployment of Wireline Services Offering Advanced Telecommunications Capability,* Memorandum Opinion and Order and Notice of Proposed Rulemaking, 13 FCC Rcd. 24012 (1998).

[47] *Implementation of the Local Competition Provisions of the Telecommunications Act of 1996*, First Report and Order, 11 FCC Rcd. 15,499, at ¶ 995 ("*Local Competition Order*").

conditions under which they provide such services to their own enhanced service operations."[48] In short, the Commission has already asserted Title II authority over the transmission component of wireline broadband Internet access. This by itself refutes any view that the transmission component of wireline broadband Internet access is subject only to Title I.

B. The Telecommunications Component is Common Carriage Under *NARUC I* and *II.*

Apart from the fact that the transmission component of wireline broadband Internet access is already subject to Title II, the traditional test for common carriage also requires that it be, and remain, subject to common carrier regulation.

The Act defines a common carrier as "any person engaged as a common carrier for hire, in interstate or foreign communication by wire or radio . . . ."[49] The Commission's regulations define common carrier as "a person engaged in rendering communications service for hire to the public."[50] The U.S. Court of Appeals for the D.C. Circuit in *NARUC I* and *II* [51] found these rules less than fully illuminative and established a test for determining whether an activity constitutes communications common carriage. The D.C. Circuit deemed that the "critical point" is the "quasi-public character of the activity involved," *i.e.*, "that the carrier undertakes to carry for all people indifferently."[52] The key is not how large a clientele the carrier serves, but the "holding

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[48] CPE Enhanced Services Unbundling Order, 16 FCC Rcd 7418, 7421, at ¶ 4 (*citing Frame Relay Order*, 10 FCC Rcd. 13717, 13719 (1995).

[49] 47 U.S.C. § 153(10).

[50] 47 C.F.R. § 51.5.

[51] *Nat'l Assoc. of Regulatory Util. Comm'rs v. FCC*, 525 F.2d 630 (D.C. Cir. 1976) ("*NARUC I*"); *Nat'l Assoc. of Regulatory Util. Comm'rs v. FCC*, 533 F.2d 601 (D.C. Cir. 1976) ("*NARUC II*").

[52] *NARUC I,* 525 F.2d at 641.

oneself out to serve the public indiscriminately."[53] This quasi-public character will either arise out of a legal compulsion to serve the public indifferently or reasons implicit in the nature of the operations to expect an indifferent holding out to the eligible user public.[54] Common carrier service is contrasted with private carriage which is "set aside for the use of particular customers, so as to not be generally available to the public."[55] Private carriage is characterized by a "clientele that might remain relatively stable, with terminations and new clients, the exception rather than the rule."[56] The carrier would desire and expect to negotiate with and select future clients on an individualized basis.[57]

The Court in *NARUC II* added a second prong to the test for common carriage, *i.e*. that customers "transmit intelligence of their own design or choosing."[58] The key consideration is whether the content of the transmission may be under the customer's control. This "control" can be as simple as the decision whether to transmit information or not.[59] Post-*NARUC I* and *II,* the Supreme Court adopted a definition of communications common carrier that adopted the D.C. Circuit's approach. The Supreme Court defined a communications common carrier as a carrier "that makes a public offering to provide [communications facilities] whereby all members of the

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53 *Id.* at 642.

54 *Id.* at 641-642.

55 *Id* at 642.

56 *Id.* at 643.

57 *Id.*

58 *NARUC II,* 533 F.2d at 609.

59 *Id.* at 610.

public who choose to employ such facilities may communicate or transmit intelligence of their own design and choosing."[60]

Applying these principles to the transmission component of facilities-based wireline broadband Internet access service leads to the inescapable conclusion that such a service is a common carrier offering subject to Title II, which, as noted, is already the case in any event. The legal compulsion to serve part of the *NARUC I* test is met by the current regulatory requirement that LECs may provide information services, including Internet access, as customers of their own tariffed offering of the transmission service.

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

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

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

> Further, we reject those parts of the Orders which imply an unfettered discretion in the Commission to confer or not confer common carrier status on a given entity, depending upon the regulatory goals it seeks to achieve. The common law definition of common carrier is sufficiently definite as not to admit of agency discretion in the classification of operating communications entities. A particular system is a common carrier by virtue of its functions, rather than because it is declared to be so. Thus, we affirm the Commission's classification not because it has any significant discretion in determining who is a common carrier, but because we find nothing in the record or the common carrier definition to cast doubt on its conclusions that SMRS are not common carriers.[61]

Thus, the Commission may not, for example, refrain from applying Title II based on the misguided view that this would promote deployment of broadband.[62] Rather, the transmission component of wireline broadband Internet access is fully subject to regulation as common carriage under *NARUC I*.

C. The ILECs' Dominance in the Wireline Broadband Marketplace Requires Application of Title II

The dominant carrier status of the ILECs fully justifies assertion of Title II jurisdiction over the ILECs' wireline broadband Internet access services. As will be established in the *Non-Dom Proceeding*,[63] ILECs are dominant in provision of wireline broadband common carriage. This dominance is attributable to the fact that only ILECs possess the ubiquitous loops and transport facilities necessary to reach consumers and businesses. This gives them the ability,

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61 *NARUC I,* 525 F.2d at 644.

62 The Court did intimate, however, that while the Commission has little discretion in defining what should be a common carrier service as a non-common carrier service it may have some discretion to refuse to exercise its common carrier regulatory powers. *NARUC II,* 533 F.2d at 620. Thus, as discussed elsewhere in these comments insofar as the Commission chooses to deregulate ILEC provision of broadband, it may do so under Title II.

63 *Review of Regulatory Requirements for Incumbent LEC Broadband Telecommunications Services,* Notice of Proposed Rulemaking, 16 FCC Rcd. 22,745 (2001) ("*ILEC Broadband NPRM").*

absent regulatory safeguards, to leverage control of these bottleneck facilities into control of the information services marketplace, as the Commission has long recognized. Thus, absent regulation, ILECs can engage in systematic discrimination against CLECs.

The Commission in its proceeding addressing the proper regulatory treatment of ILEC broadband services has recognized that ILECs continue to have market power with respect to basic local exchange service and that broadband services are provided over the same local exchange and exchange access facilities.[64] Thus, the ILECs' demonstrated ability to provide a broadband capability stems in part from their ability to piggy-back the construction of broadband facilities upon the core voice telephone network.[65] This gives the ILECs a significant economic advantage of integration that is unavailable to competing, non-integrated providers. Inevitably, they will be able to leverage this integration in a manner that effectively excludes competing broadband access providers from significant segments of the market, and they are doing so today. As economists Robert Hall and William Lehr argue:

> But the on-ramps to the information highway remain in the hands of the monopolists. The last mile of the telecom network lacks the competition that has invigorated the rest of the network. The last mile remains in the hands of the traditional phone companies, the Bells. Bell control of the last mile means that continuing regulation is essential. Because homeowners and small businesses rarely have ways to gain access to the telecom network apart from the Bells' last mile connections, the Bells could extract full monopoly value of the network if they were not regulated. As competitive service providers add value to telecom products, the Bells would absorb that value through higher prices for the last mile, and consumers would be denied the benefit of added value.[66]

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[64] *Id.* at ¶ 6. As Chairman Powell notes in his separate statement, the ILECs remain "clearly dominant" in local exchange service. Separate Statement of Chairman Michael K. Powell, CC Docket No. 01-337, at 1 (rel. Dec. 10, 2001).

[65] For instance, Project Pronto, which SBC is using to spur deployment of broadband services, is an overlay of the existing SBC voice network meaning it will not displace existing network facilities.

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

ILEC's overwhelming share of the wireline broadband market is shown by the fact that out of the 2.7 million high-speed DSL lines, about 93% of these lines were reported by incumbent local exchange carriers (ILECs); about 86% of these lines were reported by the Regional Bell Operating Companies (RBOCs); and about 7% of these lines were reported by non-ILECs.[67] ILEC DSL customer growth rates are now fast outstripping CLEC customer growth rates.[68] If ILECs are freed from their common carrier obligations to provide service on demand,[69]at tariffed rates that are just and reasonable,[70] without unreasonable discrimination,[71] and if ILECs are freed from their interconnection and unbundling obligations in regard to facilities used to provide information services,[72] then the ILECs will be able to achieve their objective of driving competitors that rely on their facilities out of the market. Accordingly, the ILECs' dominance in the wireline broadband marketplace fully justifies the continuation of Title II authority over the transmission capability of facilities-based broadband wireline Internet access.

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

The Commission when formulating its *Computer II* and *III* rules rejected the application of the "contamination doctrine" to basic and enhanced services provided by facilities-based dominant carriers such as the RBOCs. Under that doctrine, a combination of basic and enhanced

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67 *FCC Releases Report on the Availability of High Speed and Advanced Telecommunications Capability* (CC Docket No. 146), FCC New Release, Feb. 6, 2002, at 2.

68 *Inquiry Concerning the Deployment of Advanced Telecommunications Capability to All Americans in a Reasonable and Timely Fashion, and Possible Steps to Accelerate Such Deployment Pursuant to Section 706 of the Telecommunications Act of 1996,* Third Report, 17 FCC Rcd. 2844, at ¶ 51 (2002).

69 47 U.S.C. § 201(a).

70 47 U.S.C. §§ 203, 201(b).

71 47 U.S.C. § 202.

72 47 U.S.C. §§ 251, 252.

service could be treated in its entirety as a unitary unregulated enhanced service.[73] Under a contamination theory, when a common carrier transmission service is combined with an information service and provided to an end user as a single information service, the information service "contaminates" the communication service and removes it from common carrier regulation.[74] The Commission recognized that if it applied this doctrine to facilities-based carriers, at some point conventional exchange service also would become unregulated because it would be contaminated by enhanced services provided by the carrier over its own facilities.[75] The Commission noted that this would be an "improper policy result if exchange service remains, as it is now, a near monopoly otherwise warranting regulation."[76] The Commission noted that applying the contamination doctrine to carriers that lacked market power, did not have underlying facilities, and purchased transmission capacity from other parties via tariff would be sensible since no policy goal is served by regulating any aspect of these entities' offerings.[77] For carriers with market power, the Commission noted:

> Conversely, the offerings of dominant carriers are often monopoly or near-monopoly ones. Such offerings are needed and used by competitors and can be manipulated anticompetitively. Ensuring that such offerings continue to be made subject to the common carrier duties of reasonableness and avoidance of unreasonable discrimination serves important policy goals. We propose below to develop policies that apply such a dominant/non-dominant entity split.[78]

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[73] *Amendment of Section 64.702 of the Commission's Rules and Regulations (Third Computer Inquiry)*, Notice of Proposed Rulemaking, CC Docket No. 85-229, 50 Fed. Reg. 33,581, at ¶ 32 (Aug. 20, 1985).

[74] Reply Comments of EarthLink, Inc., GN Docket No. 00-185, at 31 (Jan. 10. 2001) (*citing Frame Relay Order*, 10 FCC Rcd. at 13719.

[75] *Third Computer Inquiry,* 50 Fed. Reg. at ¶ 32.

[76] *Id.*

[77] *Id.* at ¶ 46, n.34.

[78] *Id.*

Since ILECs remain dominant in provision of wireline broadband and competitors remain virtually exclusively reliant on ILECs for transmission capacity, the Commission should continue to reject the application of the contamination doctrine to ILECs and to separately regulate the transmission component of Internet access service that ILECs provide over their own facilities.

On its website, SBC states that it is working on enabling access for consumers to an "integrated package of broadband access, premium data and Internet services and telephony."[79] Under the contamination doctrine, the telephony aspect would escape regulation because it would be bundled with the information service offerings. SBC also notes that it will "Network your PCs and Internet devices using existing telephone wires - no new wiring required."[80] To avoid prematurely deregulating ILECs, the Commission should, therefore, continue to decline to apply the doctrine to facility-based LECs with market power.

E. ILECS May Compete Intermodally As Common Carriers Subject to Title II

ILECs have recently conducted public policy initiatives before Congress and this Commission attempting to persuade policymakers that they must be relieved of all obligations to permit access by intramodal competitors to the broadband capability of their networks because of intermodal competition from cable operators. Thus, preceding the *NPRM,* ILECs urged the Commission to define their broadband network capability as subject only to Title I and will undoubtedly do so in this proceeding.[81]

The Commission should reject this argument because ILECs are fully able to compete intermodally as common carriers subject to Title II. Under the current regulatory regime, ILECs

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79 *See SBC Data capabilities, at* http://www.sbc.com/data_capabilities/0,5931,1,00.html.

80 *SBC Internet Services, at* http://www.swbell.com/content/0,3854,7,00.html.

are able to provide Internet access and other information services including video programming as customers of their own common carrier services. Thus, they are not precluded from competing under current rules. In fact, as noted herein, ILECs have been spectacularly successful in rolling out DSL service. ILECs provide 93% of intramodal broadband Internet access and nearly half of intermodal broadband Internet access. These facts by themselves completely refute ILEC claims that they are hindered by Title II regulation in competing intermodally in the broadband marketplace. Therefore, ILEC arguments that they should be relieved of Title II unbundling and other obligations in order to permit intermodal competition is no more than an attempt to manipulate policy makers to grant the ILECs' long cherished goal of being able to engage in systematic discrimination against their competitors.

VII. TITLE II PERMITS DEREGULATION WHERE APPROPRIATE WHILE MAINTAINING NECESSARY SAFEGUARDS

A. The Commission May Not Have Adequate Authority Under Title I, Or Over "Private Carriage," To Establish Adequate Safeguards for ILEC Participation in the Broadband Information Services Market

The Commission seeks comment on the possibility of applying a "minimal regulatory Title I regime" to wireline broadband Internet access services and on the implications for nondiscriminatory access objectives.[82] For the reasons stated in these comments the Commission should retain Title II jurisdiction over the transmission component of wireline broadband Internet access service. However, if the Commission should pursue Title I regulation, adequate safeguards would be essential, and, it is highly questionable whether the Commission would have sufficient authority under Title I to fashion such adequate safeguards.

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[81] *NPRM* at n. 61 (*citing* Letter from William Barr, Verizon, to Michael K. Powell, Chairman, FCC (Jan. 9, 2002)).

Title I identifies the various subject matters over which the Commission may exercise authority pursuant to other Titles in the Act.[83] In assessing the extent of the Commission's authority under Title I, the courts have held:

> Title I is not an independent source of regulatory authority; rather, it confers on the FCC only such power as is ancillary to the Commission's specific statutory responsibilities. *See United States v. Southwestern Cable Co.,* 392 U.S. 157, 178, 88 S.Ct. 1994, 2005, 20 L.Ed.2d 1001 (1968) (FCC's Title I power "restricted to that reasonably ancillary to the effective performance of the Commission's various responsibilities"). In the case of enhanced services, the specific responsibility to which the Commission's Title I authority is ancillary to its Title II authority is over common carrier services. *See CCIA v. FCC,* 693 F.2d 198, 213 (D.C.Cir.1982) (upholding FCC regulation of enhanced services as ancillary to Commission's authority over interstate basic telephone services); *GTE Serv. Corp. v. FCC,* 474 F.2d 724, 731 (2d Cir.1973) (same).[84]

Obviously, ancillary authority under Title I does not provide the same degree of authority as direct authority under Title II. Moreover, for the Commission to exercise Title I jurisdiction over Internet access it would need to be ancillary to its Title II jurisdiction over common carrier services. If, however, the Commission finds no common carrier component to the Internet access service, it may undercut the basis of its ancillary jurisdiction. Therefore, it is not clear on

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82 *NPRM* at ¶¶ 16, 50.

83 The Commission has stated:

> Section 1 of the Communications Act established the Commission "[f]or the purpose of regulating interstate and foreign commerce in communication by wire and radio so as to make available so far as possible, to all the people of the United States ... adequate facilities at reasonable charges ...." Similarly, Section 2 gives us jurisdiction over "all interstate and foreign communication by wire or radio" and all persons engaged within the United States in such communication …." Finally, Section 3 defines "communication by wire" and "communication by radio" as including "the transmission ... of writing, signs, signals, pictures and sounds of all kinds ... including all instrumentalities, facilities, apparatus, and services (among other things, the receipt, forwarding, and delivery of communications) incidental to such transmission."

Applications for Consent to the Transfer of Control of Licenses and Section 214 Authorizations By Time Warner Inc. and America Online, Inc., Time Warner Inc., Memorandum Opinion and Order, FCC 01-12, 16 FCC Rcd. 6547, at ¶148 (2001).

84 *California v. FCC*, 905 F.2d 1217, 1240 (9th Cir. 1990) ("*California I*").

its face to what extent the Commission could exercise any affirmative authority over wireline broadband Internet access under Title I.

Further , the Commission has not heretofore established a comprehensive scheme of regulation under Title I. Thus, to date, the Commission has not chosen to impose any regulation of information services under Title I. ILECs are currently free to discriminate in provision of services subject only to Title I such as billing and collection services[85] and voice mail service. In fact, the Commission's affirmative exercise of Title I jurisdiction has mainly been limited to preempting state regulation. For instance, when the Commission detariffed ILEC provisioning of inside wiring, it used its Title I jurisdiction to preempt states from tariffing the service.[86]

As noted above, the Commission describes Title I as a "minimal . . . regulatory regime." Indeed, the Commission has recognized the limitations of its Title I jurisdiction by noting in regard to ILEC validation and screening services for calling cards that "regulation of these services under Title I ancillary jurisdiction, as suggested by some of the LECs, might not be adequate to ensure provision of these services on a non-discriminatory basis, under just, reasonable and non-discriminatory terms and conditions."[87] Accordingly, the Commission opted for Title II regulation of those services.[88]

For these reasons, Commenters question whether the Commission could fashion under Title I the adequate safeguards it may be contemplating. The Commission asks that if it requires

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85 *Detariffing of Billing and Collection Services*, Report and Order, 102 F.C.C.2d 1150 (1986).

86 *Promotion of Competitive Networks In Local Telecommunications Markets*, Notice of Proposed Rulemaking and Notice of Inquiry in WT Docket No. 99-217 and Third Further Notice of Proposed Rulemaking in CC Docket No. 96-98, 14 FCC Rcd. 12673, at ¶ 56 (1999).

87 *Policies and Rules Concerning Local Exchange Carrier Validation and Billing Information for Joint Use Calling Cards*, Report and Order and Request for Supplemental Comment, 7 FCC Rcd. 3528, at ¶ 25 (1992).

88 *Id.*

access to ILEC transmission services for Internet access how such access should be priced.[89] There is nothing in the Commission's current Title I precedent that would clearly support such pricing standards.

Accordingly, the Commission should retain Title II regulation over the transmission component of wireline broadband Internet access in order to be assured that it will have adequate authority to maintain necessary safeguards against discrimination.

B. The Commission May Deregulate Under Title II

While Title II provides adequate authority for safeguards, it is also permits deregulation where appropriate. Title II sets forth a full spectrum of powers and authority for the Commission, but there is nothing that requires the Commission to apply the full scope of its authority under Title II. Thus, as is well known "non-dominant" carriers are subject to Title II but subject only to minimal specific requirements, while "dominant" carriers appropriately remain subject to more extensive oversight.[90] To name only one specific example of deregulation under Title II, the Commission has allowed television licensees to broadcast electronic newspapers, data, computer software, and paging services transmitted in the interstices of television bands without being subject to traditional Title II requirements even though it deemed such services to be common carrier services.[91] Section 160 of the Act has given the Commission even more flexibility by allowing it to forbear from applying provisions of the

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[89] *NPRM* at ¶ 50.

[90] Peter W. Huber, John Thorne, & Michael K. Kellogg, *Federal Telecommunications Law* § 3.11 (2d ed. 1999). This is not to say that the solution is to classify the ILECs as non-dominant in the provision of broadband services. The record in CC Docket No. 01-337 demonstrates that such a reclassification is not warranted at this time. When conditions in the marketplace change such that ILECs are "non-dominant" then the Commission can adjust Title II obligations as warranted.

Communications Act, save for interconnection and Section 271 provisions, if certain conditions are met.[92] Therefore, the Commission has ample flexibility under Title II to respond to marketplace conditions. There is no need to apply Title I regulation in order to do so.

C. "Private Carriage" Does Not Provide An Adequate Basis for Regulation

The Commission also seeks comment on possible regulation of facilities-based wireline broadband Internet access as private carriage or by oversight of contracts. This is inappropriate first of all because wireline broadband Internet access does not constitute private carriage. As noted, ILECs offer service to end users and to the thousands of ISPs in their regions on a public offering basis, and this is the only practical way for them to do so. ILECs do not determine with each customer on an individual basis on what terms to provide service, nor would they even if completely deregulated. Therefore, the Commission must reject the private carriage approach to regulation of broadband wireline Internet access.

Nor would an effort to regulate individual contracts be feasible. ILECs are not able to offer service on an individualized basis to millions of consumers or thousands of ISPs. And, the contract approach would also be particularly cumbersome for the Commission and all concerned even if ILECs were likely to use individual contracts. Under the *Sierra Mobile* doctrine, an agency may modify a private contract that may "cast upon other consumers an excessive burden," but the contract modification can only follow investigation and a determination that the

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[91] *Amendment of Parts 2, 73 and 76 of the Commission's Rules to Authorize the Offering of Data Transmission Services on the Vertical Blanking Interval by TV Stations,* Report and Order, 101 F.C.C.2d 973, at ¶¶ 13-21 (1984).

[92] 47 U.S.C. § 160.

contract was unjust, unreasonable, unduly discriminatory or preferential.[93] Thus, unlike under Section 204(a) where the Commission can suspend a tariff and investigate, the private contract would continue in force until the Commission concluded its investigation. Moreover, the Commission may only modify the contract, when the contract's terms "adversely affect the public interest."[94] As the Commission has noted:

> The threshold for demonstrating sufficient harm to the public interest to warrant contract reformation under the Sierra-Mobile doctrine is much higher than the threshold for demonstrating unreasonable conduct under sections 201(b) and 202(a) of the Act. Thus, a carrier cannot obtain the remedy of contract reformation by showing only that the contract requires it to pay an unduly high price for communications services. Such private economic harm, standing alone, lacks the substantial and clear detriment to the public interest required by the Sierra-Mobile doctrine.

Accordingly, a private carriage or contract approach to regulation of the transmission component of broadband wireline Internet access service would be unsatisfactory because it would impose undue burdens on regulators and, in any event, provides insufficient assurance of reasonable terms and conditions of service.

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

A. Non Discrimination Safeguards Have Been the Foundation for the Growth and Success of the Information Service Marketplace.

As discussed in these comments, the *Computer II* regulatory framework was designed to promote and achieve a deregulated information services marketplace. That framework has succeeded in spectacular fashion so that the Internet and the associated increase in demand for

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[93] *See FPC v. Sierra Pacific Power Co.,* 350 U.S. 348 (1956); *United Gas Pipe Line Co. v. Mobile Gas Service Corp.*, 350 U.S. 332 (1956). The doctrine has been applied to the FCC. *See Bell Tel. Co. of Pa. v. FCC*, 503 F.2d 1250, 1275-1282 (3d Cir. 1974).

[94] *IDB Mobile Communications, Inc. v. Comsat Corporation*, Memorandum Opinion and Order, 16 FCC Rcd. 11,474, at ¶ 15 (2001).

telecommunications services has been a key growth factor for the United States economy and made the United States the world leader in telecommunications technology. However, this growth and success would not have occurred if safeguards, including the *Computer II* unbundling obligations, had not been in place to assure that BOCs could not leverage their control of the local network into control of the information services marketplace. In short, the Commission's assertion of Title II authority and imposition of appropriate safeguards has strongly served the public interest and should remain in place.

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

As explained in Section IX, *infra,* universal service obligations will most clearly fall within the limits of the contribution liability specified in the Act insofar as obligations are imposed to the extent a carrier provides interstate telecommunications service. Therefore, the Commission's tentative conclusion in the *NPRM* that wireline broadband Internet access providers are providing only an information service threatens the long term viability of universal service funding. This is especially true given that the public switched network will overtime become integrated with, and inseparable from, the Internet. Therefore, the Commission should conclude that broadband wireline Internet access is comprised in part of an offering of telecommunications service.

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

The Commission seeks comment on how its tentative conclusion that broadband Internet access service is an information service with a telecommunications component would affect

obligations of telecommunications service providers concerning national security, network reliability, and consumer protection.[95] As discussed below, this tentative conclusion would thwart achievement of important national security, network reliability, and consumer protection goals.

1. CALEA

CALEA requires that all telecommunications carriers' equipment, facilities, or services that provide a customer or subscriber with the ability to originate, terminate, or direct communications be capable of meeting specific law enforcement assistance capability requirements.[96] CALEA defines telecommunications carriers as "person[s] or entit[ies] engaged in the transmission or switching of wire or electronic communications as a common carrier for hire."[97] The definition of telecommunications carrier under CALEA excludes "persons or entities insofar as they are engaged in providing information services. . . ."[98] The Commission has determined that where facilities are used solely to provide an information service, whether offered by an exclusive information service provider or by a common carrier that has established a dedicated information system apart from its telecommunications systems, such facilities are not subject to CALEA.[99] If the Commission were to determine that the provision of broadband Internet access service is an "information service" as opposed to a telecommunications service, CALEA would not apply to the provision of such service by telecommunications service providers. It is not realistic to expect that ILECs will build separate Internet access facilities.

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95 *See NPRM* at ¶ 54.

96 *See generally* 47 U.S.C. § 1001 *et. seq.*

97 47 U.S.C. § 1001(8).

98 *See* 47 U.S.C. § 1002(b)(2)(A).

Nonetheless, categorizing broadband Internet access as an information service to this extent threatens to undermine CALEA and will undoubtedly complicate CALEA compliance. Moreover, it is highly unlikely that Congress intended the broadband capability of the telephone network to be categorically excluded from CALEA. Therefore, the Commission should determine that wireline broadband Internet access is in part a telecommunications service in order to assure that the goals of CALEA are met and that law enforcement agencies have the necessary law enforcement tools as the public switched network evolves towards a more advanced broadband capability.

2. Network Reliability and Interconnectivity

Section 256 of the Act provides that the Commission "shall establish procedures for . . . oversight of coordinated network planning by telecommunications carriers and other *providers of telecommunications services* for the effective and efficient interconnection of public telecommunications networks used to *provide telecommunications services*."[100] In enacting Section 256, Congress intended to preserve interconnectivity of the public telecommunications network. However, the Commission's authority to oversee and coordinate network planning is limited in Section 256 to telecommunications carriers and other providers of telecommunications services.[101] Therefore, if the Commission were to determine that broadband Internet access services are information services, the Commission would not be able to coordinate network planning and interconnectivity with respect to these services. Congress could not have intended for Section 256 to only apply to the provision of narrowband telephone service. Accordingly, the

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[99] *See Communications Assistance for Law Enforcement Act*, Further Notice of Proposed Rule Making, 13 FCC Rcd. 22632, at ¶ 68 (1998).

[100] 47 U.S.C. § 256 (b) (emphasis added).

Commission should classify the transmission component of wireline broadband Internet access in order to permit the Commission to oversee broadband interconnectivity as Congress intended.

3. Discontinuance of Service

Section 214 of the Communications Act limits the ability of telecommunications carriers to unilaterally discontinue telecommunications service. If the Commission were to find that facilities-based wireline broadband Internet access is exclusively an information service, providers would be able to discontinue service without regard to section 214. While the Commission notes that discontinuance applications are routinely granted,[102] the Commission's rules contain important consumer protection requirements requiring customer notice and allowing users to appeal to the Commission if the discontinuance will cause unanticipated harm to their business or the customers they serve. Moreover, as it is well known, the Commission has recently started heightened oversight of discontinuance applications.[103] The increasing importance of broadband Internet connectivity to consumers and businesses, and the evolution of the network toward integration with the Internet, mandates that the Commission maintain its regulatory oversight over the transmission component of wireline broadband Internet access service. Accordingly, the Commission should determine that the telecommunications component of broadband Internet access service is an offering of telecommunications service subject to Title II obligations in order to assure that discontinuances of service do not unduly harm the public interest.

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[101] *See* 47 U.S.C. § 256(b).

[102] *See NPRM* at ¶ 57, n.99.

[103] *Reminder to Common Carriers Regarding Discontinuance of Domestic Service Under Section 214 of the Communications Act,* FCC Public Notice, May 8, 2001, at 1.

4. Customer Proprietary Network Information

In order to safeguard consumer's privacy, the Act limits telecommunications carriers' dissemination of customer proprietary network information ("CPNI") derived from the provision of telecommunications services.[104] Thus, section 222(c)(1) specifies that the privacy protection requirements of that section apply to CPNI gained by a carrier "by virtue of its provision of a telecommunications service …"[105] [106] Therefore, if the Commission classifies wireline broadband Internet access service exclusively as an information service, CPNI gained by virtue of provision of wireline broadband Internet access will not be subject to the protections of Section 222. Congress could not have intended this result because under the current regulatory framework ILECs provide Internet access service as customers of their own tariffed telecommunications services and thus are subject to Section 222 with respect to the information services they provide using those tariffed services. Accordingly, the Commission should classify the provision of wireline broadband Internet access services as in part a telecommunications service in order to protect consumers' privacy rights as intended by Section 222.

5. Access by Persons with Disabilities

Classifying wireline broadband Internet access as an information service would also eliminate the protections contained in the Act aimed at ensuring that telecommunications services are accessible and usable by persons with disabilities. Section 255 of the Act provides that " *a provider of telecommunications service* shall ensure that the service is accessible to and

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[104] *See* 47 U.S.C. § 222(a).

[105] *See* 47 U.S.C. § 222(a) (emphasis added).

[106] *See Telecommunications Carriers' Use of Customer Proprietary Network Information and Other Customer Information and Implementation of the Non-Accounting Safeguards of Sections 271 and 272 of the Communications Act of 1934, as amended*, Order and Further Notice of Proposed Rulemaking, 13 FCC Rcd 8061 (1998), at ¶ 3 ("*CPNI Order*").

usable by individuals with disabilities, if readily achievable."[107] Classifying wireline broadband Internet access service as exclusively an information service would therefore exclude persons with disabilities from section 255 protections for wireline broadband Internet access services. Again, classifying wireline broadband Internet access services as information services threatens to undermine yet another key consumer protection provision. Congress could not have intended this result. Therefore, the Commission should define wireline broadband Internet access as being comprised in part of an Internet access service in order to preserve access by persons with disabilities to the Internet.

6. Intermodal Competition Will Not Adequately Safeguard Consumers

The Commission also seeks comment generally on whether the consumer protections of the Act are necessary in light of the differences in the market structure between analog voice services and broadband Internet access services.[108] Specifically, the Commission refers to the fact that intermodal competition among multiple broadband platforms may eliminate the need for consumer protection regulations in the broadband Internet access services marketplace. The Joint Commenters submit that it is far too soon to know whether, and how, intermodal competition will develop in the broadband Internet access services marketplace. Only 4.4 percent of U.S. households had subscribed to broadband Internet access service as of August 2000.[109] The penetration rate of broadband Internet access services is too low to extrapolate any useful data about what the larger market will eventually look like. Currently, the market is not dominated by many competitors, but by two: cable and DSL providers, both of which have been

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[107] 47 U.S.C. § 255(c) (emphasis added).

[108] *See NPRM* at ¶ 60.

increasing prices. In many geographic areas, broadband Internet access will probably be dominated by one provider for the foreseeable future due to the tremendous economic advantages that the "first mover" has in the deployment of facilities that support such services. Therefore, there is no basis for the Commission to conclude that intermodal competition has obviated the need for consumer protection provisions that would be undermined as explained above by determining that wireline broadband Internet access is exclusively an information service.

D. ILECs Can Contribute Most to the Public Interest By Participating in the Broadband Marketplace As Common Carriers

Classifying some or all of the broadband capability that ILECs use to provide Internet access as only subject to Title I would mean, of course, that this capability is not subject to common carrier obligations. However, it is the unique status of ILECs as common carriers that enables them to best contribute to the public interest. Competing broadband access providers do not have open access to other platforms providing broadband services. The platforms over which cable modem services and satellite and wireless broadband access services are provided are not generally commercially accessible to unaffiliated broadband access providers. Nor is there currently any regulatory mandate that requires these providers to open up their platforms to competing ISPs. ILECs participation in the broadband marketplace as common carriers promotes access by consumers and businesses to a wide range of information sources. Accordingly, the Commission should require that ILECs offer broadband capability subject to common carrier obligations.

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[109] *See Falling Through the Net: Toward Digital Inclusion*, National Telecommunications and Information Administration, at 101 (Oct. 2000).

E. State Authority Could be Adversely Impacted

In the *NPRM*, the Commission seeks comment on how classification of wireline broadband Internet access services as exclusively an information service would impact the balance of federal and state responsibilities over the network, particularly in light of the fact that the Commission has found that DSL transmission used to provide Internet access services are subject to Commission jurisdiction.[110]

Under the Act, states exercise authority over intrastate telecommunications service which they regulate as common carriage. The Act provides that "nothing in this Act shall be construed to apply or give the Commission jurisdiction with respect to (1) charges, classifications, practices services, facilities, or regulations for or in connection with intrastate communication service . . . ."[111] A pronouncement by the Commission that ILEC broadband capability is, in fact, not subject to common carrier regulation because it is used exclusively to provide an information service could have a profound impact on the ability of states to regulate broadband services.

States play an important role in the regulation of wireline broadband Internet access and protecting consumer interests. Several states, including California[112] and Illinois have been active in assuring nondiscriminatory access to ILEC broadband capability. For example, the Illinois Commerce Commission ("ICC") has ensured competition in the provision of broadband Internet access facilities. In October 1999, SBC announced its $6 billion Project Pronto initiative to extend new fiber-fed loop facilities to millions of end-users. In February 2001, the Illinois Commerce Commission became the first state commission to order the unbundling of the fiber-

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110 *See NPRM* at ¶ 62.

111 47 U.S.C. § 152(2)(b).

fed loop architecture.[113] In the course of its deliberations, Ed Whitacre, Chairman and CEO of SBC, wrote in a letter to Speaker Hastert and other legislators that the Illinois decision would make it "economically impossible" for SBC to deploy Project Pronto in the state. The letter warned that, because of SBC's decision to halt Project Pronto in Illinois, the affected consumers "cannot now, and may never, have access to DSL."[114] Commissioner Harvill poignantly noted that the very fact that SBC's threatened halt to Project Pronto could mean that some consumers would never have access to DSL demonstrated precisely SBC's dominance of the market and therefore why it was important for the ICC to enforce aggressively SBC's unbundling obligations.

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

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[112] *See California ISP Ass'n. v. Pacific Bell Tel. Co. and SBC Advanced Solutions, Inc.*, Case 01-07-027, (CAPUC July 26, 2001) ("*CISPA Complaint*").

[113] *See Petition for Arbitration Pursuant to Section 252(b) of the Telecommunications Act of 1996 to Establish an Amendment for Line Sharing to the Interconnection Agreement with Illinois Bell Telephone Company d/b/a Ameritech Illinois, and for an Expedited Arbitration Award on Certain Core Issues, et al.,* Docket Nos. 00-0312 and 00-0315, Arbitration Decision on Rehearing, (ILCC Feb. 15, 2001) and Order (ILCC Mar. 14, 2001); *see also Generic Docket to Establish UNE Prices for Line Sharing Per FCC 99-355, and Riser Cable and Terminating Wire as Ordered in TRA Docket 98-00123,* First Initial Order, Docket No. 00-00544 (TNRA Apr. 3, 2002); *Investigation into Ameritech Wisconsin's Unbundled Network Elements,* Docket No. 6720-TI-161 (WIPSC Mar. 22, 2002).

[114] Letter from Ed Whitacre, Chairman and Chief Executive Officer, SBC Communications, Inc., to the Honorable J. Dennis Hastert, U.S. House of Representatives, at 1 (Mar. 14, 2001), *available at* http://www.icc.state.il.us/icc/tc/cond29.asp.

Contrary to the *GTE Order,*[115] states have concurrent jurisdiction over the provision of DSL services used to provide Internet access services. In order to displace state regulation, congressional intent must be "clear and manifest."[116] Similarly, federal preemption of state regulation "must be clear and occurs only in limited circumstances."[117] Under Section 2(b) of the Act Congress left the states with substantial authority so long as state regulation does not conflict with the Commission's authority over interstate communications. Therefore, the Commission should define wireline broadband Internet access service as a telecommunications service to preserve state authority over ILEC intrastate broadband services.

IX. THE COMMISSION SHOULD RETAIN *COMPUTER III* SAFEGUARDS INCLUDING THE REQUIREMENT THAT LECS OFFER SEPARATELY THE TRANSMISSION COMPONENT OF WIRELINE BROADBAND INTERNET ACCESS SERVICE

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

In the *NPRM*, the Commission seeks comment on whether the *Computer Inquiry* requirements should be modified or eliminated for facilities-based wireline broadband internet access services.[118] The Commission suggests that these requirements may not apply to broadband access services because the restrictions imposed in the *Computer Inquiry* proceedings were initiated "at a time when very different legal, technological and market circumstances presented themselves to the Commission" and addressed services "more akin to voice mail and

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115 *See GTE Telephone Operating Cos.*, Memorandum Opinion and Order, 13 FCC Rcd. 22,466 (1998) ("*GTE Order"*).

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

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

118 *NPRM* at ¶ 43.

other narrowband applications," rather than broadband services.[119] Contrary to the Commission's suggestion, however, the safeguards established in the *Computer Inquiry* proceedings are equally applicable to, and necessary for, broadband Internet access services. The information services market has evolved tremendously since the creation of the basic/enhanced services dichotomy, but as is evident in the Commission's *Computer Inquiry* proceedings, the *Computer Inquiry* safeguards were designed to accommodate new and emerging technologies, including broadband services. Moreover, the legal, technological and market factors underlying the fundamental principles of the *Computer Inquiry* proceedings, upon which the safeguards are based, are equally valid today in the broadband services market. Thus, at a minimum, the existing *Computer Inquiry* safeguards must remain in place for broadband access services.

In its *NPRM*, the Commission suggests that because the technological characteristics of broadband internet access services did not exist at the time of the initial *Computer Inquiry* proceedings, the policies and requirements implemented in those proceedings may not apply to broadband internet access services. Rather, the Commission indicates that such safeguards should be limited to narrowband technologies.[120] While it is true that there have been tremendous technological advances associated with the provision of enhanced services, the Commission recognized and took into consideration future technological advances for both basic and enhanced services when it established its basic and enhanced regulatory regime and corresponding safeguards.[121]

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119 *Id.* at ¶¶ 31, 35.

120 *NPRM* at ¶¶ 36-37.

121 *See Regulatory and Policy Problems Presented by the Interdependence of Computer and Communication Services and Facilities,* Final Decision and Order, 28 F.C.C.2d, 268-69 (1971) *("Computer I")* (finding that data

The Commission's initiation of the *Computer Inquiry* proceedings arose from the realization that the traditional telephone network was no longer limited to providing plain old telephone services and that technological evolution allowed the provision of computer and data processing (enhanced) services over these networks.[122] The Commission's *Computer Inquiry* proceedings focused on the degree of regulation that should apply to enhanced services and the basic services used to transmit them. The result was the creation of a basic/enhanced services dichotomy, in which the Commission separated the basic common carrier transmission services from the rapidly evolving enhanced services;[123] finding separate regulatory schemes for these services necessary to address the functional and competitive differences between them.[124]

The Commission's establishment of the basic/enhanced dichotomy evolved from advances in microprocessor technology that permitted data to be processed outside of a central location and at intermediate locations or even within customer premises equipment ("CPE").[125]

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processing will be a major force in the economy "in both absolute and relative terms in the years ahead"); *see also See Amendment of Section 64.702 of the Commission's Rules and Regulations,* Final Decision*,* 77 F.C.C.2d 384, 425 (1980) ("*Computer II*") (where the Commission refused to classify different categories of enhanced services because in "a market as vibrant as enhanced services" such a distinction "may miss important new developments").

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

123 The Commission defined basic service as "the common carrier offering of transmission capacity for the movement of information," including, analog or digital transport of voice, data and video. *Id.* at 419. The Commission held that basic services provide "pure transmission capability over a communications path that is virtually transparent in terms of its interaction with customer-supplied information." *Id.* at 420. The Commission defined "enhanced service" as a service that "combines basic service with computer processing applications that act on the format, content, code, protocol or similar aspects of the subscriber's transmitted information or provide the subscriber additional, different, or restructured information, or involve subscriber interaction with stored information." *Id.* at 387; *see also* 47 C.F.R. § 64.702(a). Following the passage of the 1996 Act, the Commission found that Congress intended to maintain the basic/enhanced distinction in its definitions of "telecommunications services" and "information services" and that "enhanced services" and "information services" were synonymous. *See Federal State Joint Board on Universal Service,* Report to Congress, 13 FCC Rcd 111501, 11516-17, 11520, 11524 (1998).

124 *Computer II,* 77 F.C.C.2d 384.

125 *Id.* at 391-93.

Such distributed processing of data utilizes the telecommunications network and is the fundamental basis for the establishment of the basic transmission service classification in *Computer II*. In that proceeding, the Commission made it clear that its basic service classification was not meant to restrict "a carrier's ability to take advantage of advances in technology in designing its telecommunications network."[126] The Commission recognized that basic service can be offered utilizing different bandwidths, as well as different analog and digital capabilities.[127] The Commission also stated that "[u]se internal to the carrier's facility of communications techniques, bandwidth compression techniques, circuit switching, message or packet switching, error control techniques, etc. *that facilitate economical, reliable movement of information does not alter the nature of the basic services*."[128] Thus, the Commission's establishment of the basic services classification and associated regulation took into account the future technological potential of such services. Indeed "distributed processing" directly foreshadowed the Internet.

The Commission also took into consideration the future potential of enhanced services. Indeed, the rapid evolution of technology in the enhanced services market served as a key factor in the Commission's establishment of the basic/enhanced services dichotomy.[129] Finding that the market for enhanced services was effectively competitive and seeking to promote and foster this competition, the Commission held that enhanced services should not to be subject to Title II

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126 *Id.* at 420.

127 *Id.* at 419.

128 *Id.* at 420.

129 *Id.* at 433.

common carrier regulation.[130] The Commission found that such services would "flourish best" in a competitive market and would provide the public with "a wider range of existing and new data processing services."[131] The Commission found that its decision in *Computer I* to forgo regulation of data processing was "largely accurate" and "[i]f anything, it was overly conservative as to the extent to which market applications of computer processing technology would evolve."[132] The Commission confirmed its finding that "regulation of enhanced communications services would limit the kinds of services an unregulated vendor could offer, restricting this fast-moving, competitive market."[133] The Commission also noted that "the pressure on a set of administrative rules which fail to recognize the growth in operational sophistication demanded by our nation's economy will be inexorable."[134] Thus, it is clear that when the Commission established the basic/enhanced services distinction consideration of future technologies and services was a key component to its analysis.

Moreover, the key C*omputer Inquiry* safeguards, such as the unbundled offering of basic service, are not technology specific. They can, and do currently, apply equally to narrowband and broadband services. There is nothing in the key *Computer III* safeguards of framework that suggests they were intended only for the narrowband network.

Accordingly, the policies and safeguards established in the basic/enhanced services regulatory regime also apply to future technologies and services. Throughout the history of the

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130 *Id.* at 423-33.

131 *Id.* at 433.

132 *Id.*

133 *Id.* at 434.

134 *Id.* at 422.

Computer Inquiry proceedings, the primary purpose of this dichotomy and the need for the safeguards has been to address the reliance of the enhanced services on basic transmission services.[135] The Commission found that "enhanced services are dependent upon the common carrier offering of basic services and that a basic service is the 'building block' upon which enhanced services are offered."[136] The Commission consistently has determined that dominant facilities-based carriers providing both basic and enhanced services have an incentive to discriminate against competing enhanced service providers that seek to purchase the underlying transmission capacity from the dominant carriers.[137] Thus, to protect the competitive nature of enhanced services, the Commission retained Title II common carrier regulation of the basic transmission services used to provide these services.[138]

Based on these fundamental principles, the Commission has placed restrictions on facilities-based carriers providing both basic and enhanced services. Specifically, the Commission requires carriers that "'own common carrier transmission facilities and provide enhanced services [to] unbundle basic from enhanced services and offer transmission capacity to other enhanced service providers under the same tariffed terms and conditions under which they provide such services to their own enhanced service operations.''[139] The Commission also has imposed additional safeguards on the BOCs, including the Comparably Efficient Interconnection

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

136 *Id.*

137 *See CPE/Enhanced Services Unbundling Order,* 16 FCC Rcd. 7418, 7420 (2001).

138 *Id.* at 428.

(CEI), Open Network Architecture (ONA), cost allocation and network disclosure requirements.[140]

Changes in technology may have improved transmission speeds and allowed the transfer and use of more sophisticated data and broadband services, but broadband providers still rely on basic transmission services interconnected with the telecommunications network to provide these broadband services. Indeed, the Commission has continued to apply the *Computer Inquiry* safeguards to new technologies, including high-speed, packet-switching services.[141] As the Commission found in its *Frame Relay Order*, treating the high-speed, packet-switching frame relay service as a basic service "provides competitive access to the underlying basic service of facilities-based carriers who are often better able to implement new communications technologies. This access allows competing enhanced service providers to more easily enter and compete in the market for such technologies."[142] Although during the course of the Commission's *Computer Inquiry* proceedings the Commission has modified the level of restrictions governing the provision of basic and enhanced services,[143] it has not eliminated the

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139 *CPE/Enhanced Services Unbundling Order*, 16 FCC Rcd. at 7421 (*citing* 10 FCC Rcd. 13717, 13719 (1995); *Competition in the Interstate Interexchange Marketplace*, Memorandum Opinion and Order on Reconsideration, 10 FCC Rcd. 4562, 4580 (1995).

140 Finding that the section 251(c)(5) network disclosure rules of the 1996 Act were as comprehensive, if not more so, than the *Computer III* disclosure rules, the Commission eliminated the latter rules. *Computer III Further Reward Proceedings: Bell Operating Company Provisions of Enhance of Services*, Report and Order, 14 FCC Rcd. 4289, 4316-17 (*"Computer III Further Remand Order")*. The BOCs also are subject to the Commission's cost-accounting rules to prevent cross-subsidization between the regulated transmission services and the unregulated enhanced services. *See* 47 C.F.R. Parts 31, 43, 67 and 69.

141 *See Frame Relay Order*, 10 FCC Rcd. 13,717.

142 *Id.* at 13722.

143 In its *Computer II* proceeding, the Commission required the dominant Bell Operating Companies to establish a separate subsidiary for the provision of enhanced services, which was required to purchase its transmission capacity from the parent company's tariff. *Computer II*, 77 F.C.C.2d 384. In its *Computer III* proceeding, the Commission eliminated the separate subsidiary requirement and replaced it with non-structural safeguards including the Comparably Efficient Interconnection (CEI) and Open Network Architecture (ONA)

requirement that the basic transmission component be separated from the enhanced service. In addition, after over 30 years of addressing this issue, and even more significantly, post-1996 Act, the Commission, in a decision released only a year ago, found that the underlying transmission service used to provide information services is still a critical input for enhanced service providers,[144] and currently is applying these safeguards to the BOCs' provision of broadband services.[145]

The Commission's own *Computer Inquiry* policies recognize that technological distinctions in services are irrelevant to basic/enhanced services regulation if dominant control over the facilities essential to provide these services still exists. As discussed herein, the BOCs still are dominant in the local exchange market and still control essential bottleneck facilities used to provide broadband services. Thus, the fundamental principles of dominant control over transmission facilities and the potential for discrimination that served as the basis for the establishment of the *Computer Inquiry* policies and safeguards[146]still apply today and require that these anti-discrimination safeguards remain in place for broadband access services.

The *NPRM* also cites the pro-competitive and deregulatory policies of the 1996 Act that are aimed at the development of the Internet and deployment of advanced services, suggesting that the statutory mandates may be different than those considered in the *Computer Inquiry*

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requirements. *Computer III Phase I Order*, 104 F.C.C.2d 958. Currently the BOC are permitted to provide bundled basic and enhanced services, but only subject to the restrictions and safeguards associated with providing these services, including non-discriminatory access to the underlying transmission services.

[144] *Id.* So much so, that the Commission imposes the same separation requirements on non-dominant carriers. *Id.* at 7442-43.

[145] *CPE/Enhanced Services Unbundling Order*, 16 FCC Rcd. at 7425.

proceedings.[147] Contrary to the Commission's suggestion, however, the statutory mandate underlying the *Computer Inquiry* policies is consistent with the statutory mandate governing broadband access services. As the basis for its *Computer Inquiry* rules, the Commission cites to its mandate pursuant to section 151 of the Act "to make available 'to all the people of the United States a rapid, efficient, Nation-wide and world-wide wire and radio communications service with adequate facilities at reasonable charges . . . .'"[148] In its *NPRM*, the Commission cites to the statutory mandate of section 706 to encourage "'the deployment on a reasonable and timely basis of advanced telecommunications capability to all Americans . . .'" as the basis for its regulation of broadband access services.[149] As is evident in the language of both of these provisions, the Commission's goal under both statutory provisions is similar—to establish rules and policies that will make communications and advanced telecommunications available to all Americans. Thus, it follows that the Commission's pro-competitive policies governing enhanced services in the *Computer Inquiry* proceedings are consistent with the pro-competitive policies set forth in the 1996 Act. Indeed, nearly 30 years ago, the Commission found the enhanced services market truly competitive, stating that "regulation of enhanced communications services would limit the kinds of services an unregulated vendor could offer, restricting this fast-moving, competitive market."[150] At the same time, however, the Commission recognized that the transmission component underlying the provision of enhanced services was owned and controlled by

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146 *See Computer II*, 77 F.C.C.2d at 422 (noting that as "the market applications of computer technology increase, communications capacity has become the necessary link allowing the technology to function more efficiently and more productively").

147 *NPRM* ¶ 35, n. 69.

148 *Computer I*, 28 F.C.C.2d at 268 (*citing* 47 U.S.C. § 151).

149 *NPRM* at n.69 (*citing* 47 U.S.C. § 157).

150 *Computer II*, 77 F.C.C.2d at 433-34.

dominant carriers seeking to compete directly with the enhanced service providers—a critical factor that had the potential to threaten this competitive market.[151] As is evident herein, this same concern exists in the broadband access services market today, and thus, the same policies must apply.

Throughout the history of the *Computer Inquiry* proceedings, the Commission has adapted its regulations to the changes in the enhanced services market and modified its restrictions and safeguards accordingly. But, the Commission has always found, even as recent as a year ago, that the continued dominance of the ILECs in the local market warrants the retention of the *Computer Inquiry* safeguards. The status of market conditions for broadband internet access services has not changed so dramatically in the last year to justify such a radical departure in the Commission's regulations aimed at protecting ISPs from discrimination. It is significant to note, in assessing the impact of the pro-competitive requirements of the 1996 Act on the *Computer Inquiry* safeguards, the Commission stated that

> "[a]lthough many ISPs compete against one another, each ISP must obtain the underlying basic services from the incumbent local exchange carrier, often still a BOC, to reach its customers. Although . . . under the 1996 Act, the BOCs are subject to additional statutory requirements, such as the section 251 unbundling and the network information disclosure requirements . . . we cannot yet conclude that the pro-competitive goals of the 1996 Act have been fully reached."[152]

In sum, there is nothing about wireline broadband Internet access services that justifies exempting these services from the fundamental principles governing common carrier regulation and protection against discrimination and anticompetitive behavior that lay at the heart of the

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151 *Id.* at 475.

152 *See Computer III Further Remand Order* , 14 FCC Rcd. 4289, 4301 (1999) (refusing to remove the safeguards established to protect ISPs from discriminatory treatment).

Computer Inquiry policies and safeguards. Indeed, as demonstrated herein, these principles are critical to promoting competition in the broadband access market. Information service providers must compete with dominant ILECs in the provision of broadband internet access services. The ILECs still are dominant carriers in the local exchange and exchange access markets and have an incentive to discriminate against their competitors in the provision of broadband access services. Non-facilities-based ISPs still rely on the ILECs for the transmission capacity used to transmit their broadband access services to their customers and this transmission capacity remains the critical input for the provision of these services. Thus, there is no legal, regulatory, or market distinction that supports the elimination of the *Computer Inquiry* safeguards with respect to broadband access services.

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

If the transmission component of wireline broadband Internet access is not regulated as a telecommunications service under Title II of the Act, providers of broadband access services will lose the critical protections of sections 201 and 202. As the Commission notes in its *NPRM*, ISPs and others purchasing from tariffs high speed transmission services for their broadband services.[153] The terms and conditions of these tariffed services are governed by the just and reasonable and non-discriminatory mandates of sections 201 and 202 of the Act. If the provision of transport services necessary to provide broadband access services are no longer subject to these Title II requirements, then dominant carriers that provide competing broadband access

[153] *NPRM* at ¶ 50.

services, while also controlling the underlying transmission capacity, will be free to discriminate against their broadband access competitors.

Section 201(b) requires that the rates, terms, and conditions in providing such services be just and reasonable.[154] In addition, Section 202(a) of the Act, makes it unlawful for any common carrier to impose unjust or unreasonable discrimination for rates, terms, conditions, facilities or services in connection with like communication services.[155] Sections 201(b) and 202 were cited by the Commission in its *Computer Inquiry* proceedings as primary safeguards for ensuring that ISPs obtain transmission services on nondiscriminatory terms and conditions. Specifically, the Commission emphasized that all carriers, including dominant and non-dominant carriers have a "firm obligation under section 202 of the Act to not discriminate in their provision of transmission service to competitive Internet or other enhanced service providers."[156] The Commission also noted that section 201(b) prohibits discrimination in rates, terms or conditions that would favor the carrier itself, over a competing enhanced service provider.[157] If the underlying transport for broadband access services is not regulated as a Title II common carrier service, these protections against discrimination will disappear. As explained above, the concerns underlying the Commission's findings in the *Computer Inquiry* proceedings have not changed and are equally valid today. Accordingly, it is essential that the underlying transmission component of broadband access services be classified as telecommunications services and be subject to Title II common carrier regulation.

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154 47 U.S.C. § 201(b).

155 47 U.S.C. § 202(a).

156 *CPE/Enhanced Services Unbundling Order,* 16 FCC Rcd. at ¶ 46.

157 *Id.*

C. *Computer Inquiry* Safeguards Are Necessary for Deployment of Broadband

In its *NPRM*, the Commission seeks comment on the impact of the *Computer Inquiry* requirements on the deployment of broadband internet access services.[158] As explained below, it is not necessary for the Commission to remove these safeguards in order to encourage further deployment of these broadband services. To the contrary, if the Commission were to eliminate these safeguards, it would have a detrimental impact on the deployment of broadband services.

As the Commission recently found, the deployment of advanced services to all Americans is proceeding in a "timely and reasonable manner," and the advanced services market "continues to grow."[159] This growth is occurring even with the current *Computer Inquiry* safeguards in place. Facilities-based CLECs entering the market are investing in, and constructing, fiber optic networks designed to meet the high-speed data needs of today's consumers. In response to this competitive challenge, the ILECs also have been investing in and upgrading their networks for the provision of advanced high-speed services despite the common carrier regulations imposed on the provision of their services.[160]

It is competition that creates the incentive to invest in and deploy advanced technologies. In its reports on the status of the deployment of advanced telecommunications the Commission has stated, "'competition, not regulation, holds the key to stimulating further deployment.'"[161]

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158 *NPRM* at ¶ 52.

159 *See Third Section 706 Report,* 17 FCC Rcd. 2844 (2002).

160 *See supra* at pp. 7-9.

161 *Third Section 706 Report*, at ¶ 133 (*citing Inquiry concerning Deployment of Advanced Telecommunications Capability to all Americans in a Reasonable and Timely Fashion and Possible Steps to Accelerate Such Deployment Pursuant to Section 706 of the Telecommunications Act of 1996,* Second Report, 15 FCC Rcd. 20, 913, 21,004 (2000) (*"Second Section 706 Report"*).

The Commission also recognized that "there may be important legal, policy, technological, or other differences among classes of providers that require disparate regulatory treatment of such providers."[162] And, thus, it is regulatory requirements, such as the *Computer Inquiry* safeguards, that protect and promote this competition, recognizing that the dominant position of the ILECs requires special regulatory treatment. Without these safeguards, competition in the broadband market will be stymied and the ILECs will no longer have an incentive to invest in these advanced technologies. Indeed, in its *Frame Relay Order*, the Commission found that "under the *Computer II* and *Computer III* decisions, competitive access has promoted the public interest by accelerating the deployment of emerging technologies such as frame relay."[163] For these reasons, the *Computer Inquiry* safeguards create the correct incentive to promote competition in the broadband internet access services market, and thereby, continued deployment of wireline broadband capability.

D. Performance Standards and Section 271 Compliance Are Not Adequate Substitutes for *Computer Inquiry* Safeguards

In its *NPRM*, the Commission seeks comment on whether the assessment of certain performance standards on the BOCs' provision of narrowband services would be sufficient to forgo the imposition of the *Computer Inquiry* safeguards on the BOCs' provision of broadband services.[164] The Commission also seeks comment on whether section 271 compliance for entry into the long distance market would be an adequate substitute for the *Computer Inquiry*

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162 *Id.*

163 *Frame Relay Order*, 10 FCC Rcd. 13,717, 13722 (1995).

164 *NPRM* at ¶ 48.

safeguards in the BOCs' provision of broadband services.[165] Neither the imposition of performance standards, nor compliance with the section 271 requirements is a sufficient substitute for the *Computer Inquiry* safeguards, which are necessary to prevent discrimination by the BOCs in the provision of broadband access services.

The Commission's suggestion that the *Computer Inquiry* requirements may be unnecessary for the BOCs' broadband services if the BOCs are achieving certain performance levels with respect to its narrowband services, starts with the erroneous presumption that there should or could be disparate regulatory treatment for BOCs' narrowband and broadband services. As explained herein, there is no legal, technical or market-related distinction that would warrant the elimination of the *Computer Inquiry* safeguards with respect to the BOCs' provision of wireline broadband Internet access services.[166] Moreover, assessing the BOCs' performance levels in the delivery of non-broadband services is irrelevant to whether the safeguards are necessary to protect the broadband ISPs from discrimination with respect to the BOCs' delivery of competing broadband services over bottleneck facilities. Simply because a BOC is meeting minimum performance standards in its provision of narrowband services does not mean that the BOC is not engaging in systematic discrimination against competitors in the provision of broadband services. This is especially true if there are no safeguards in place to protect competing broadband providers against discrimination from BOCs that control facilities used to provide competing broadband services. However, broadband performance standards

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165 *Id.*

166 *See supra* pp. 35-38.

could usefully supplement existing C*omputer III* safeguards, and the Commission should consider adopting them.

Section 271 requirements also are not an adequate substitute for *Computer Inquiry* safeguards because they do not address the specific concerns underlying the need for the safeguards. They are also only applicable to BOCs that choose to provide long distance service. Moreover, the Section 271 14-point competitive checklist focuses on interconnection and access to the BOC's network facilities, including access to UNEs and unbundled local loops by CLECs.[167] Thus, Section 271 requirements fail to ensure that purchasers of ILEC tariffed access services will be granted non-discriminatory access to the basic transmission services necessary to provide their broadband services.[168] In particular, Section 271 does not specifically require the BOCs providing bundled basic and information services to separate the basic transmission services underlying the provision of broadband services and to make this transmission service available to competing broadband service providers. Applying the *Computer Inquiry* safeguards to broadband internet access services, however, would ensure such non-discriminatory access.

Moreover, under Section 271 the BOCs need only meet a minimum level of performance and that performance is assessed on the "totality of the circumstances."[169] Such an assessment provides no guarantee that a BOC has met the required performance level with respect to all competitive carriers seeking access to its network facilities or even with respect to each element

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[167] *Id.*

[168] As noted above, *supra* p. 59, in a recent *Computer Inquiry* decision, the Commission found that notwithstanding the additional regulatory protections put in place by the 1996 Act, the *Computer Inquiry* safeguards were still necessary to protect enhanced service providers from discrimination.

on the 14-point checklist. Moreover, there is no guarantee that a BOC will maintain those performance levels after a BOC's section 271 application is approved. Indeed, Verizon paid $3.5 million in Performance Assurance Plan penalties for December 2000 and $3.8 million for January 2001 for failure to meet post-review performance standards.[170] Thus, BOC compliance with the section 271 requirements is an inadequate substitute for the *Computer Inquiry* safeguards.

E. Intermodal Competition Is Irrelevant to the Need for *Computer Inquiry Safeguards*

In *NPRM*, the Commission states that the "core assumption underlying the *Computer Inquiries* was that the telephone network is the primary, if not exclusive, means through which ISPs can obtain access to customers."[171] The Commission suggests that the *Computer Inquiry* safeguards may no longer be necessary to protect ISPs from discrimination because there are other network platforms, such as cable, wireless and satellite, over which customers can access broadband services.[172] Contrary to the Commission's suggestion, however, intermodal competition, such as it is, does not obviate the need for *Computer Inquiry* safeguards.

While *end-user customers* may have access to a variety of different platforms for receiving broadband services, including cable modem service, ISPs and CLECs do not have ready access to such platforms for the provision of their services to their customers. First, cable

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169 *See Joint Application of SBC Communications, Inc., Southwestern Bell Telephone Company, and Southwestern Bell Long Distance for the Provision of In-Region, InterATA Services in Kansas and Oklahoma,* 16 FCC Rcd. 6237, at ¶ 29 (2001).

170 *See* Verizon New York PAP/CCAP Market Adjustment Summary, *available at* http://238.11.40.241/east/wholesale/resources/res_ny_perf_assur_plan_results.htm files 1OZNVB_PubIn101.xls (Dec. 2000 and Jan. 2001).

171 *NPRM* at ¶ 36.

companies are regulated under Title VI, not Title II of the Act, and thus are not required to open their underlying transmission facilities to ISPs insofar as they are providing cable service. Indeed, with respect to cable modem services, the Commission recently found that cable modem service does not include an offering of telecommunications services to the public.[173] The Commission also found that the *Computer II* requirements governing the unbundling of transmission facilities do not apply to cable operators providing cable modem services, and even if they did, the Commission waived the requirements on their own motion.[174] Even though a few cable operators are providing transmission services to unaffiliated ISPs by choice[175] or pursuant to a government decree,[176] this access is extremely limited and only available to a few ISPs or CLECs. Moreover, differences between their respective customer bases render cable modem services, which focuses primarily on residential customers, an inadequate substitute for broadband access providers targeting business customers.

In addition, the other platforms, wireless and satellite, are not only still in their infancy, but, like cable, are not regulated as Title II common carriers. Thus, access to these transmission services also are not readily available to broadband access providers. Thus, as explained herein, the transmission facilities of dominant facilities-based common carriers still are the primary, if

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172 *Id.*

173 *See Inquiry Concerning High-Speed Access to the Internet Over Cable and Other Facilities,* Declaratory Ruling and Notice of Proposed Rulemaking, GN Docket No. 00-185, FCC 02-77, at ¶¶ 45-47, 95 (rel. Mar. 15, 2002).

174 *Id.* at ¶¶ 43-45.

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

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

not exclusive, means through which CLECs can obtain access to customers. Accordingly, intermodal competition does not reduce the need for application of Title II safeguards to LECs.

F. *Computer Inquiry* Safeguards Should Be Preserved and Expanded

At a minimum, for the reasons stated above, the Commission should continue to apply the existing *Computer Inquiry* safeguards to the BOCs with respect to their provision of broadband Internet access services. However, as documented in comments filed in the Commission's *Computer III Further Remand FNPRM* , and incorporated by the NPRM into this proceeding, the BOCs have engaged in systematic anti-competitive and discriminatory behavior in the broadband services market despite the existing safeguards.[177] Accordingly, the Commission should strengthen the safeguards.

As suggested by commenters in response to the Commission's *Computer III Further Remand FNPRM*, the Commission should consider modifying existing safeguards and/or imposing additional requirements on the BOCs in the provision of broadband internet access services. Some suggested changes may include the following:[178]

- Require complete structural separation between BOC wholesale and retail operations;
- Make all agreements between the BOCs and their affiliated ISPs available to the public;
- Impose reporting requirements to monitor BOC compliance, including performance metrics regarding installation intervals;
- Enforce existing joint marketing safeguards and implement additional safeguards for ensuring equitable marketing opportunities; and,

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[177] *See* Initial Comments of the California ISP Association, Inc., CC Docket Nos. 95-20 and 98-10 (Apr. 16, 2001).

[178] *Id.* at 30-35.

- Require non-discriminatory access to BOC ordering and billing systems.

The BOCs have demonstrated that they are able and willing to discriminate and engage in anti-competitive behavior in the provision of broadband access services. It is essential that the Commission maintain, at a minimum, the existing *Computer Inquiry* safeguards, but it also should consider modifying or establishing additional safeguards to protect competitors from such anti-competitive behavior and to ensure that competing ISPs have access to essential bottleneck transmission facilities and services on non-discriminatory terms and conditions.

X. UNIVERSAL SERVICE ISSUES

A. Facilities-Based Wireline Broadband Internet Access Providers Are Subject to Universal Service Contribution Obligations Only to the Extent They Provide Telecommunications or Telecommunications Service

Section 254 of the Act requires carriers that provide interstate telecommunications services to contribute to universal service programs and permits the Commission to require any provider of interstate telecommunications to contribute if the public interest requires. Section 254(d) provides that:

> Every telecommunications carrier that provides interstate telecommunications services shall contribute, on an equitable and nondiscriminatory basis, to the specific, predictable, and sufficient mechanisms established by the Commission to preserve and advance universal service. The Commission may exempt a carrier or class of carriers from this requirement if the carrier's telecommunications activities are limited to such an extent that the level of such carriers' contribution to the preservation of and advancement of universal service would be de minimis. Any other provider of interstate telecommunications may be required to contribute to the preservation and advancement of universal service if the public interest so requires.[179]

[179] 47 U.S.C. § 254(d).

Although the statute on its face seems to identify only the carriers that must contribute, the recent 5th *Circuit Universal Service Remand* calls into question the Commission's authority to impose assessments on a carriers' provision of service other than interstate telecommunications.[180] Therefore, the Commission will be best able to assess universal service contributions on facilities-based broadband Internet access service providers if it concludes in this proceeding that wireline broadband Internet access service includes a separate offering of telecommunications service.

The *NPRM*, however, tentatively concludes that wireline broadband Internet access service is provision only of an information service. Thus, the Commission stated that the provider is not offering or providing telecommunications to anyone, rather the provider uses telecommunications to provide only Internet access service. For all the reasons stated elsewhere in these comments, the Commission should conclude that wireline broadband Internet access service includes a bundled offering of telecommunications service. As also noted, the network is rapidly moving toward a fully packetized network using IP so that the Internet will be the network. Accordingly, the Commission should determine in this proceeding that that wireline broadband Internet access service includes a bundled offering of telecommunications service for the additional reason that this will help assure the long term viability of universal service funding.

[180] *Tex. Office of Public Util. Counsel v. FCC*, 183 F.3d 393 (5th Cir. 1999).

XI. CONCLUSION

For the reasons stated herein, the Commission should conclude this proceeding consistent with Commenters' recommendations.

Respectfully submitted,

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Dated: May 3, 2002