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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

May 3, 2002

VIA COURIER

Marlene H. Dortch, Secretary
Federal Communications Commission
236 Massachusetts Avenue, NE – Suite 110
Washington, D.C. 20002

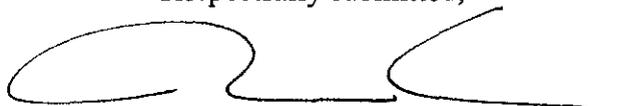
**Re: Comments of Charter Communications, Inc.
Notice of Proposed Rulemaking
CC Docket No. 02-33, CC Dockets Nos. 95-20, 98-10**

Dear Ms. Dortch:

On behalf of Charter Communications, Inc. enclosed for filing please find an original and four copies and a stamp and return copy of Comments on the Notice of Proposed Rulemaking in the above-referenced dockets.

If there are any questions concerning this filing, please contact the undersigned.

Respectfully submitted,



Paul Glist

Enclosure

cc: Qualex International (via e-mail at qualexint@aol.com and 1 diskette by Courier)
Janice Myles, Wireline Competition Bureau (1 diskette & 5 copies by Courier, via e-mail at jmyles@fcc.gov)

Before the
Federal Communications Commission
Washington, D.C. 20554

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

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

COMMENTS OF CHARTER COMMUNICATIONS, INC.

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Summary

At its inception, universal service was a “deal” struck between the regulated monopolist telephone companies and the regulators: regulators allowed the telephone company to over-charge for non-basic services¹ if the telephone company agreed to serve high cost rural areas and low income customers. While ensuring that all Americans have affordable access to telephone service is certainly a worthy goal, expanding the universal service program to the cable industry would do more harm than good for several reasons.

First, assessing cable modem service would impede cable operators’ continued investment in developing facilities-based, competitive telephony, as well as the rapid deployment of broadband facilities—both of which are fundamental goals of this proceeding and the Telecommunications Act of 1996 (“1996 Act”).² The Commission should not levy an assessment on one of the few in the industry to invest in infrastructure for offering a competitive choice in basic telephony. Cable has taken the risk, made significant investment in upgrading its networks, and launched broadband services, while local telephone companies have collectively dragged their feet in deploying broadband services, waiting for a regulatory grant. Universal service fund (“USF”) assessments on cable modem service would reallocate funds from market innovators to market laggards.

Second, cable operators have already built out to high cost areas, paying up front with risk capital. In fact, the genesis of cable television specifically was to provide television to remote, rural areas long before it was clear that there would be a sufficient subscriber base to justify such an investment. Today, moreover, cable operators are

¹ These services include long distance, local business services, or even extra “features” for some residential customers.

² Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56 (1996) (“1996 Act”).

formally required to build out to underserved populations under franchise agreements with local governments. Cable plant now passes 90 percent of American homes. Indirectly, therefore, cable subscribers have already paid for line extensions to underserved areas and upgrades to provide broadband and advanced services—in the absence of any federal USF “deal” with the industry. Cable subscribers should not have to pay again to fund deployment of these services.

Third, history demonstrates that new, intermodal competitors have flourished when regulators have refrained from regulating new competitors under a regulatory regime created to control an incumbent industry. Cable operators currently represent the most promising facilities-based competitor to the incumbent local exchange carriers (“ILECs”). As a result, they should be free from regulations that were conceived for an industry with a very different history, and one that still retains a more-than-100-year-old monopoly power over the local telecommunications infrastructure.

Finally, there is no legal or policy reason why there must be “regulatory parity” between cable modem service and telco-delivered Internet access for USF purposes. Congress itself recognized in Section 254(d) that regulatory parity alone is an insufficient reason to extend USF to cable modem service or to other telecommunications providers, since it placed “telecommunications services” providers and “other provider[s]” in very different statutory classifications. Congress expressly declined to require USF contributions from cable modem service providers in Section 254(d), and mandated that the Commission find it is “require[d]” in the public interest prior to extending USF obligations to this “other provider.” As a policy matter, therefore, Congress was manifestly prepared to accept very different treatment of cable-delivered broadband

services from telco-delivered broadband services for universal service purposes. If the Commission finds, nevertheless, that ILECs must have a “level playing field” on this issue, the solution is not to go through the extensive and complex cost allocation proceedings that would be necessary to apportion out the assessable “telecommunications” component from non-assessable portions of cable modem service. The administrative burden associated with such proceedings would scarcely be worth the meager amount of revenues conceivably generated by the transport component of cable modem service when compared to the existing USF assessment base. The solution to any regulatory parity “problem” is not to assess the new competitor, as this would be inconsistent with Congress’ intent in the 1996 Act that the universal service program should evolve in harmony with the developing competitive market. Rather, the solution is to remove contribution requirements from the ILECs and allow market forces to bring competition and better services to consumers in the broadband and advanced services market.

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

COMMENTS OF CHARTER COMMUNICATIONS, INC.

Charter Communications, Inc. (“Charter”), respectfully submits the following comments in response to the *Notice of Proposed Rulemaking* in the above-captioned proceeding.³ Specifically, these comments address the Commission’s inquiry whether it should assess universal service contributions on the providers of broadband Internet access services.

I. History Of The Universal Service Program.

Traditionally, the concept of “universal service” has meant that all or most residential customers had an affordable “basic” local telephone service available, including a dial tone line and some usage. Affordability was assured through a system of

³ *Appropriate Framework for Broadband Access to the Internet over Wireline Facilities, Universal Service Obligations of Broadband Providers, Computer III Further Remand Proceedings: Bell Operating Company Provision of Enhanced Service; 1998 Biennial Regulatory Review – Review of Computer III and ONA Safeguards and Requirements*, Notice of Proposed Rulemaking, FCC 02-42 (FCC Feb. 15, 2002) (“*Wireline NPRM*”).

explicit and implicit subsidies.⁴ For customers in high cost areas (*i.e.*, low population density and distant from the central office), this meant that the monthly rate for service had to be below the reasonable cost of the facilities used to serve the customers.⁵ Low income customers also were ensured affordable local telephone service through universal service subsidies.⁶

For several decades, there was no formal universal service “funding mechanism.” Instead, since AT&T was a monopoly, it was free to overprice some of its services (including services to business customers and even urban and suburban residential customers near central offices) in order to subsidize service to costly or low income customers. In addition, technical advances since the 1950s steadily reduced the economic costs of providing long distance service, although the Bell System did not proportionately decrease nominal long distance rates to keep pace.⁷ Accordingly, inflated long distance rates permitted interstate long distance services to subsidize intrastate services.

⁴ *Federal-State Joint Board on Universal Service*, Report to Congress, 13 F.C.C.R. 11501, ¶¶ 6-7 (FCC 1998) (“*Report to Congress*”). In 1997, the Commission designated nine “core” services as being eligible for universal service support: single-party service, voice grade access to the public switched network, Dual Tone Multifrequency signaling (or its functional equivalent), access to emergency services, access to operator services, access to interexchange service, access to directory assistance, and toll limitation services for qualifying consumers. *Federal-State Joint Board on Universal Service*, Report and Order, 12 F.C.C.R. 8776, ¶ 56 (FCC 1997) (subsequent history omitted).

⁵ *Federal-State Joint Board on Universal Service*, 12 F.C.C.R. 8776 at ¶ 10 & n.15.

⁶ *Id.*; *Report to Congress* at ¶ 6.

⁷ See GERALD W. BROCK, *THE TELECOMMUNICATIONS INDUSTRY: THE DYNAMICS OF MARKET STRUCTURE* 200-201 (Harvard University Press 1982) (1981) (noting that in 1956 “the overall rate level for long-distance services was above the competitive level . . . Because of rapid technological progress, [AT&T] was able to avoid requesting rate increases and voluntarily make some reductions. Consequently, there was no pressure on the FCC to investigate how the rates compared to the competitive level. The rate was above the level necessary to attract entry, given the assumption that only economies of scale were the relevant barriers to entry.”); *Where Have All the Numbers Gone? (Second Edition) Rescuing the North American Numbering Plan from Mismanagement and Premature Exhaust*, Economics and Technology Inc. at 9 (June 2000) (finding that presently, “the distance-sensitive cost per minute of network transport varies by well under a penny as between the shortest distance calls (such as to an adjacent exchange) and coast-to-coast connections.”).

During the 1980s, the FCC began to undo, to some extent, the economic inefficiencies promulgated in the name of “universal service,” of implicit cross-subsidies from some services to others. It did this by establishing the “subscriber line charge,” a flat-rated charge on the interstate use of dial tone lines, and by lowering per-minute access charges.⁸ However, there were severe limits to how much economic rationality this process could achieve, in part because many implicit cross-subsidies occurred entirely within the intrastate jurisdiction.⁹

In addition, as competition in various market segments (long distance, central-office-based switching and features for large retail customers, and, to some extent, access) developed in the late 1970s through the early 1990s, it became increasingly difficult to sustain the monopoly pricing of business and other services needed to effectively maintain cross-subsidies as a universal service funding mechanism.

The 1996 Act changed this entire approach. In Section 254, as well as Section 214(e),¹⁰ the 1996 Act effectively declared that universal service should be funded by an open, equitable, competitively neutral method that accommodates, rather than suppresses, competition in the marketplace. Section 254(d)¹¹ requires that all “telecommunications

⁸ *MTS and WATS Market Structure*, Third Report and Order, 93 FCC 2d 241, ¶ 3 (1983), *modified on recon.*, 97 FCC 2d 682 (1983), *modified on further recon.*, 97 FCC 2d 834 (1984), *aff'd and remanded in part sub nom.*, *National Ass'n of Regulatory Util. Comm'rs v. FCC*, 737 F.2d 1095 (D.C. Cir. 1984).

⁹ *Federal-State Joint Board on Universal Service*, 12 F.C.C.R. 8776 at ¶ 10 & n.15.

¹⁰ Subsection (e) of Section 214 provides that all carriers, including new competitive carriers, may receive universal service funds if they provide the “core” services of the universal service program. For a more detailed discussion of this provision, see Section II.C *infra*.

¹¹ Section 254(d) provides:

[e]very 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 carrier's

carriers”¹² providing interstate “telecommunications services”¹³ contribute to such a funding mechanism. If the public interest so requires, the Commission also may, but need not, impose a contribution requirement on “other provider[s]” of interstate “telecommunications.”¹⁴ At issue in this proceeding is whether the Commission should exercise its authority to impose a payment obligation on cable operators providing broadband Internet access,¹⁵ in light of the Commission’s determination in a companion proceeding that such service contains a “telecommunications” component.¹⁶

II. Extending A USF Obligation To Cable Modem Service Is Not in the Public Interest Because It Would Hinder Facilities-Based Competition In Telephony And Broadband Deployment.

While universal service is an important goal of the 1996 Act, extending a USF obligation to cable modem service would hinder two equally important goals: the development of robust facilities-based competition in telephony, and the rapid deployment of broadband facilities and services.¹⁷

contribution to the preservation 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.*

47 U.S.C. § 254(d) (emphasis added).

¹² Section 3 of the 1996 Act defines a telecommunications carrier as “any provider of telecommunications services . . .” 47 U.S.C. § 153(44).

¹³ Section 3 of the 1996 Act defines a telecommunications service as the “offering of telecommunications for a fee directly to the public, or to such classes of users as to be effectively available directly to the public, regardless of the facilities used.” 47 U.S.C. § 153 (46).

¹⁴ Telecommunications is defined in Section 3 of the 1996 Act as “the transmission, between or among points specified by the user, of information of the user’s choosing without change in the form or content of the information as sent and received.” 47 U.S.C. § 153(43).

¹⁵ See *Wireline NPRM* at ¶¶ 79-80.

¹⁶ *Inquiry Concerning High-Speed Access to the Internet Over Cable and Other Facilities, Internet Over Cable Declaratory Ruling and Appropriate Regulatory Treatment for Broadband Access to the Internet Over Cable Facilities*, Declaratory Ruling and Notice of Proposed Rulemaking, CS Docket No. 02-52, GN Docket No. 00-185, at ¶ 39 (FCC Mar. 15, 2002) (“*Cable Modem Order*”).

¹⁷ See 47 U.S.C. §§ 157nt., 251, 252; *Wireline NPRM* at ¶¶ 1, 3 (“The widespread deployment of broadband infrastructure has become the central communications policy objective of the day.”).

A. USF Assessment on Cable Modem Services Will Discourage Development of the Local Telecommunications and Advanced Services Markets.

One of the fundamental goals of the 1996 Act is to encourage facilities-based competition in telephony.¹⁸ Chairman Powell has emphasized that facilities-based competition, especially in local telephone service, is the 1996 Act's ultimate objective.¹⁹ The associated docket dealing with the regulatory consequences of the classification of cable modem service also states that one of the key goals of the 1996 Act is competition in local telephone service.²⁰

Currently, cable operators represent the most viable facilities-based competitor to ILECs in the provision of local telephony service.²¹ Cable operators are developing

¹⁸ See *AT&T Corp. v. Iowa Utilities Board*, 525 U.S. 366, 371 (1999) (stating the 1996 Act fundamentally restructures local telephone markets for competitive entry and that "foremost" among the duties of incumbent local exchange carriers is the obligation to share its network with competitors); see also 47 U.S.C. §§ 251-53.

¹⁹ See *Digital Broadband Migration Part II*, Remarks of Michael K. Powell, Chairman, Federal Communications Commission, Oct. 23, 2001 (as prepared for delivery) ("I believe that other methods of entry are useful interim steps to competing for *local service*, but Commission policy should provide incentives for competitors to ultimately offer more of their own facilities. This would decrease reliance on incumbent networks, provide the means for truly differentiated choice for consumers, and provide the nation with redundant communications infrastructure. Competition in the digital broadband world should come from many platforms.") (*emphasis added*).

²⁰ See *Cable Modem Order* at ¶ 47.

²¹ See e.g., *id.* (finding that cable operators are an integral part of the "long-delayed hope of creating facilities-based competition in the telephony marketplace" that the Commission would not want to undermine); *Application by Verizon New England Inc., Bell Atlantic Communications, Inc. (d/b/a Verizon Long Distance), NYNEX Long Distance Company (d/b/a Verizon Enterprise Solutions), Verizon Global Networks Inc., and Verizon Select Services Inc., for Authorization To Provide In-Region, InterLATA Services in Rhode Island*, FCC 02-63, CC Docket No. 01-324 ¶ 105 (FCC Feb. 22, 2002) (stating that Cox is currently a viable competitor to Verizon in Rhode Island); *Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming*, Eighth Annual Report, 17 F.C.C.R. 1244 ¶ 10 (FCC Jan. 14, 2002) ("*Eighth Annual Report*") (finding several cable operators are providing circuit switched telephony and other operators are developing the IP telephony market); Tom Nolle, *Are Cable Companies the Key to Local Access*, NETWORK MAGAZINE, (April 5, 2002) (finding that the basic problem with local access competition is that it costs a lot to run wires to every home and business, and cable has already done most of this work and therefore, is the best poised competitor to the ILECs for local service) available at www.networkmagazine.com/article/NMG2002040150006.

technology²² to provide voice services over cable plant.²³ Imposing USF obligations on cable operators would interfere with the development of robust facilities-based competition in telephony by effectively “taxing”²⁴ the group of entities most likely — after wireless — to function as a full-bore “intermodal” competitor to the ILECs’ basic phone offerings. This position is supported by the legislative history of Section 271, where Congress recognized that cable operator entry into the local telecommunications market holds the promise of providing the sort of “local residential competition that has consistently been contemplated.” S. Conf. Rep. No. 104-230 at 148 (1996).²⁵

The imposition of USF obligations on cable operators would interfere with the development of broadband by effectively assessing the present market leader in

²² Jeff Baumgartner, *Comcast Wraps Up Detroit VoIP Trial*, MULTICHANNEL NEWS (April 10, 2002) (stating that Comcast has completed a trial of telephony service in Detroit) at <http://www.tvinsite.com/multichannelnews/index.asp?layout=story&articleId=CA210852&...>; Mike Farrell, *MSOs Differ on Strategies to Drive Cash-Flow*, MULTICHANNEL NEWS (Dec. 10, 2001) (examining the different business strategies of cable operators including the provision of telephony service) at <http://www.tvinsite.com/multichannelnews/index.asp?layout=story&articleID=CA185595&>; *Eighth Annual Report* at ¶ 10.

²³ It does not make sense at this stage of cable modem deployment to target cable modems for the extension of universal service when this deployment is the driving force creating ubiquitous deployment of the broadband plant that will eventually compete with ILECs. Furthermore, the Commission has yet to impose any Title II regulatory requirements on providers of voice over IP (“VoIP”) platforms, and seems to have concluded that in at least some configurations, VoIP is an information service. *Report to Congress* ¶¶ 83-93. When confronted with an opportunity to rule on the regulatory status of VoIP, the Commission demurred, preferring to await a fuller record and, at least implicitly, industry and technological developments. *Id.* at ¶ 83. The clearest situation the Commission addressed is one in which the VoIP capability is bundled with other information services (such as Internet access) by an ISP. Given this precedent, and given the Commission’s desire to minimize regulation, particularly on new entrants, to the extent the Commission in the future chooses to establish a firm regulatory classification for VoIP services that cable operators might offer in connection with cable modem services, it should classify this service as an information service, not subject to universal service assessments. *Id.* at ¶ 87. A possible alternative regulatory framework for VoIP over cable networks might be to treat such services with preemptive streamlined rules, more like competitive facility-based wireless telephony providers than ILECs.

²⁴ From a purely economic view, the assessment of USF obligations is a tax because it transfers a payment from cable operators to ILECs who receive USF funds to deploy advanced services to rural and high cost areas. See 47 U.S.C. § 254(e) (wherein USF providers may draw upon USF funds for the deployment of advanced services, a goal of the universal service program).

²⁵ See also *Eighth Annual Report* at ¶ 10 (stating that under the 1996 Act, cable operators were to enter the telephone market to provide competition against ILECs).

deploying consumer-level broadband services for the benefit of the industry laggards. Cable operators launched broadband cable modem services as early as 1997, invested significantly in their network to provide broadband services,²⁶ and have aggressively priced their offerings.²⁷ The number of subscribers to high-speed Internet service via cable rose more than 12 percent to 7.2 million in the fourth quarter of 2001.²⁸

Conversely, ILECs have delayed their roll out of broadband services,²⁹ have been outpaced by cable operators in the broadband market, and due to worries about “cannibalization of profitable, traditional access services,” have declined to promote inexpensive DSL service to business customers.³⁰ Local telephone companies have signed up about half the number of cable modem subscribers for their competing residential DSL service.³¹ It is believed that the lack of DSL deployment is due to the ILECs’ continued dominance in the local telephony market which allowed the ILECs to

²⁶ *Wireline NPRM* at ¶ 12; *Eighth Annual Report* at ¶ 32 (stating that cable operators spent \$15.5 billion on construction of new plant, upgrades, rebuilds, new equipment and maintenance of new and existing equipment in 2000).

²⁷ See Sim Hall, *Winning the Broadband Race, Internet Access Spurs Demand*, OUTSIDE PLANT MAGAZINE, (August 2000) available at http://ww.ospmag.com/features/2000/winning_the_broadband_race.htm. Cable modem service averages \$44.22 per month and consumer DSL averages \$51.67 per month. Rachael Konrad, *Survey: Broadband Goes Mainstream*, CNET News.com (March 5, 2002), at <http://news.com.com/2100-1033-852084.html>.

²⁸ Tech News, *AT&T, Comcast to offer choice of ISP*, CNET.com (April 1, 2002), at <http://news.com.com/2100-1033-872505.html>.

²⁹ Even in 2000, DSL players were criticized for their failure to bring broadband DSL services to consumers. See Jesse Berst, Editorial Director, *Don't Get Trapped in DSL Hell*, ZDNET.com (May 24, 2000), at <http://www.zdnet.com/anchordesk/stories/story10,10738,2574527,00.html>. See also James Glassman, American Enterprise Institute, *How to Solve the Broadband Crisis*, at http://www.internetindustry.com/mag/01_03fa/03how/index.shtml (stating that “[the] Tauzin-Dingell [bill] . . . asks us to trust the monopolist to roll out new technology, but monopolists do as little investing as they can. The Bells had fast DSL technology for 10 years before they started to deploy it. That deployment came only after cable companies began to compete with their own broadband technology. . .”) (visited April 28, 2002).

³⁰ See Sim Hall, *Winning the Broadband Race, Internet Access Spurs Demand*, OUTSIDE PLANT MAGAZINE (August 2000), available at http://ww.ospmag.com/features/2000/winning_the_broadband_race.htm.

³¹ *FCC Challenged on High-Speed ISP*, CNET.com (March 25, 2002) at <http://news.com.com/2100-1033-868329.html>.

control the DSL market, as most smaller competitors went out of business, and to pull back DSL development.³² ILECs also receive USF funds to provide, maintain and upgrade facilities that supply advanced information services such as broadband services to rural and other high cost areas. *See* 47 U.S.C. 254(e). By imposing new assessments on the current leaders in deploying consumer-level broadband, the FCC would reward the industry idlers for their inaction in broadband deployment. The FCC would be taking funds from an assertive broadband competitor and providing such funds to its own ineffective competitor for that ineffective competitor's use in the broadband market, creating disincentives to the aggressive deployment of broadband services.

Indeed, the Commission should be loathe to implement any regulatory policy that entails assessing new, innovative providers (such as cable) in the broadband market for the benefit of the incumbents. Such a result would seem impossible to square with the pro-competitive directives in the statute. Congress and the FCC have repeatedly stressed the importance of deploying broadband facilities on sound economic and market-based decisions.³³ Section 706 states that the Commission "shall encourage the deployment on a reasonable and timely basis ...advanced telecommunications capability to all Americans... by utilizing, in a manner consistent with the public interest, convenience, and necessity, price cap regulation, regulatory forbearance, measures that promote

³² Dick Kelsey, *DSL Growth IN US Falls Behind Asia-Pacific, Europe*, NEWSBYTES (April 18, 2002), at <http://www.newsbytes.com/news/02/175983.html>.

³³ *See* 47 U.S.C 157 nt (Section 706 of the Act stating measures to promote competition and investment in the market are primary goals); 47 U.S.C. § 230(b)(2) (stating that it is the policy of the U.S. "to preserve the vibrant and competitive free market that presently exists for the Internet and other interactive computer services, unfettered by Federal or State regulation"); *Wireline NPRM* at ¶ 5 (stating that a minimal regulatory environment that promotes investment and innovation in a competitive market is a goal); *Cable Modem Order* at ¶5; *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, FCC 02-33, 2002 FCC LEXIS 655 at ¶¶ 5, 13 (FCC Feb. 6, 2002) ("*Third Report on 706*").

competition in the local telecommunications market, or other regulating methods that remove barriers to infrastructure investment.” When interpreting this provision, the Commission has found that robust competition, minimal regulations, and regulatory certainty create the best environment to encourage competitors to invest in and provide advanced telecommunications services to consumers.³⁴

It would be contrary to the encouragement of investment and to the goal of a stable, deregulatory, market incentive policy to create an additional governmental assessment on broadband providers. Such assessment would create a disincentive to entry into the broadband market by creating general regulatory uncertainty regarding agency treatment of broadband service. In addition, it would detrimentally affect investment in broadband services because new governmental assessments are seen as a deterrent to business investment.³⁵ Assessment of broadband providers results in policy contrary to the pro-competitive, de-regulatory goals of the statute, and is a benefit to the incumbents who have not made an aggressive entry into the broadband market.

B. In Contrast To ILECs, Cable Deployment To Rural Areas Has Been One Of The Cable Industry’s Success Stories.

The federal universal service program was created to extend basic service to high cost areas and low income persons through a ubiquitous telephone network because previously, the monopoly providers of telecommunications services had little incentive to offer service to these underserved groups.³⁶ The telephone network only became

³⁴ See *Third Report on 706* at ¶¶ 133-35.

³⁵ See George Bittlingmayer, *Regulatory Uncertainty and Investment: Evidence from Antitrust Enforcement*, CATO JOURNAL, Vol. 20, No. 3 (Winter 2001) (stating that regulatory uncertainty and taxation policies affect business investment).

³⁶ *Report to Congress* at ¶¶ 6-7.

ubiquitous through fits and spurts over more than 100 years, while the dominant telephone company focused on urban areas and left rural markets to small independents, or simply left them unserved.³⁷ In fact, that economic dynamic, *i.e.*, that building out to rural areas is uneconomical for the ILECs, is evident today as rural areas still have difficulty attracting ILEC investment. For example, Qwest, one of the largest providers of telecommunications service, is currently seeking to sell off its rural networks.³⁸

In contrast, cable operators historically built out to high cost areas as a business choice and under the requirements of franchise agreements with local governments. TV servicemen in small towns and rural areas invented and developed cable television in places where topography or lack of investment by broadcasters made reception poor or non-existent or where few over-the-air channels existed.³⁹ Cable plant now passes

³⁷ See BROCK, *THE TELECOMMUNICATIONS INDUSTRY: THE DYNAMICS OF MARKET STRUCTURE* at 100-111 (discussing the failure, historically, of the Bell monopoly to serve rural America).

³⁸ See Communications Workers of America, *Selling Rural Exchanges*, (noting that “[l]ocal telephone companies have accelerated the pace of selling off less-lucrative rural exchanges. GTE (Verizon), Ameritech, and Qwest (formerly US WEST) in particular have been shedding rural exchanges over the past five years.”) at <http://www.cwa-legis-pol.org/activist%20tools/telecom%20principles-web.htm> (visited April 24, 2002); see also Newsbytes, *Short-Term Lenders Cut Off Qwest's Cash*, (Feb. 15, 2002) (reporting that Qwest is considering selling more of its rural telephone networks) at <http://www.newsbytes.com/news/02/174530.html>.

³⁹ Broadcasters were not required by the FCC to set up relay systems to provide adequate TV service to the substantial portion of the nation because the commercial interests of the broadcast industry were not served by such a requirement. RALPH LEE SMITH, *THE WIRED NATION, CABLE TV: THE ELECTRONIC COMMUNICATIONS HIGHWAY 3* (1972).

around 90 percent of Americans homes.⁴⁰ This plant deployment is a result of cable's origins, and franchise requirements imposed by local franchising authorities.⁴¹

In the vast majority of local cable franchises, cable operators are required to build plant to any area that has a minimum density of a certain number of homes per mile.⁴² In addition, the operator must build to any customer in the franchise area upon request, but where the density minimum is not met, the customer absorbs some of the plant build-out costs. Most of the costs associated with these cable franchise requirements are passed on to the cable customer. Therefore, cable customers have already paid for line extensions to underserved areas, and for the ubiquity of enhanced plant. It makes no sense to assess

⁴⁰ This number was created by taking the total number of homes passed by cable, 104,000,000 in June of 2001, and dividing it by the total number of housing units in the United States, 115,904,641, taken from the 2000 census (the number of households in the U.S. is 105,480,101). *But see Eighth Annual Report* at ¶ 17 (placing the percentage of homes passed that own a television set at 97.1%); ROBERT W. CRANDALL & HAROLD FURCHTGOTT-ROTH, *CABLE TV, REGULATION OR COMPETITION* 18 (1996) (finding the percentage of homes passed by cable at over 95%). 94.5 percent of all U.S. households have a telephone. *See* "FCC Releases Supplemental Telephone Penetration Report," FCC News, April 23, 2002.

⁴¹ The imposition of an additional federal assessment on cable modem service also would further the current jurisdictional quagmire surrounding cable modem service. Local authorities continue to insist that they have jurisdiction over information services provided by cable operators, and seek to include revenues from these services in the calculation of cable service franchise fees. Charter opposes this view. However, until the Commission resolves this issue in the *Cable Modem Order* further notice of proposed rulemaking, this jurisdictional issue will continue to exist regarding whether local governments have jurisdiction to regulate an interstate information service under Title VI. *See Cable Modem Order* at ¶¶ 101-08. The imposition of an additional federal USF assessment on cable modem service exacerbates the jurisdictional issues involved in the provision of cable modem service by imposing a federal assessment for the provision of telecommunications, a non-Title VI service.

⁴² *See* Council City, Idaho, Ordinance No. 244, § 9 (Feb. 5, 1985) (requiring the franchisee to install service everywhere there is at least 10 subscribers within 5280 (1 mile) cable feet of the aerial trunk or at least 15 subscribers within 5280 cable feet of the underground trunk cable, and requiring service to be provided to any other person in the service area on an installation cost basis); Rockville, Utah, Ordinance No. 90-1219-1, § 15 (Dec. 19, 1990) (requiring the grantee to extend its system at its own cost where the grantee receives a request for service from at least 10 subscribers within 1320 cable feet of its trunk cable and in places where such density does not exist, the grantee must build plant to a subscriber on the basis of cost); Cameron Township, Wis., Consent Resolution Authorizing the Transfer of the Cable Television Franchise, Exhibit A (Aug. 15, 1997) (requiring installation of cable service at the grantee's cost in all areas where there is a density of 25 homes per aerial mile or 40 homes per underground mile and requiring construction to any other area not meeting the density requirement on a cost-sharing basis between the grantee and the subscriber).

such consumers *again* to fund deployment of a competing LEC facility to high cost areas, especially where the cable operator already has deployed ubiquitous upgraded plant.⁴³

C. The 1996 Act Demonstrates Congress' Intent That Universal Service And Competition Can And Must Co-Exist.

In the 1996 Act, Congress clearly demonstrated an intent to cultivate universal service in a competitive marketplace. In Section 706, Congress commands the FCC to encourage broadband deployment by, among other things, removing barriers to infrastructure development.⁴⁴ Congress added subsection (e) to Section 214 to ensure that universal service funds were available to all carriers, including new entrants, which undertook to offer the services that constitute "universal service."⁴⁵ Section 214(e), therefore, is part of Congress' effort to eliminate the traditional anticompetitive method of funding universal service -- implicit subsidies that can only be sustained in a monopoly environment -- and replace it with a system in which competition and universal service objectives work in harmony. Section 214(e) also establishes rules for the relinquishment

⁴³ Equity concerns also exist because the cable operator has installed plant in rural areas without the support of universal service. According to a recent Morgan Stanley Dean Witter report, nearly 95.1 million U.S. homes (or nearly 90% of homes passed by cable) should have access to cable broadband by year-end 2002. See "*Industry Overview: Broadband Cable Second Quarter Review*," Morgan Stanley Dean Witter, August 29, 2001 at 10. In contrast, ILECs, who receive USF funds to eventually deploy advanced plant in rural and high cost areas, have not committed to the deployment of such plant and have actually cut back programs to provide services to rural areas. See *Rural Areas Lag Behind Cities in Gaining Broadband Access*, NTIA (April 2000) ("Cable operators promise to serve smaller rural towns, and small independent telecommunications companies and competitive providers [not the ILECs] may soon be able to offer DSL to remote rural customers on a broader scale.") available at <http://usinfo.state.gov/topical/global/ecom/00050401.htm>; Rachel Konrad, John Borland and Dawn Kawamoto, *Broadband Troubles Broadside Consumers*, CNET NEWS.COM, (Feb. 28, 2002) ("few households outside of urban centers have DSL as an option over cable") at <http://news.com.com/2100-1033-847111.html>. Qwest has given up on DSL entirely by selling off its high-speed business to Microsoft Network, and SBC has practically abandoned Project Pronto, their plan to provide DSL to 80 percent of their customers. See Loring Wirbel, *SBC Shifts Focus from DSL to Passive Optical Nets*, EE TIMES (Jan. 4, 2002) (stating that both SBC and Qwest have "back pedaled from aggressive DSL plans in recent months") at <http://www.eetimes.com/story/OEG2001112750066>.

⁴⁴ See 47 U.S.C. § 157 nt; Section 706(a).

⁴⁵ S. Conf. Rep. No. 104-230 at 141-42 (1996).

of USF funds and associated obligations by a carrier, and other provisions to ensure that at least one carrier will provide universal services using USF funds in high cost areas.⁴⁶ With these two provisions, Congress tried to expand the number of competitors in the telecommunications markets either through market-based investment or with the appropriate use of USF funds.

To make certain that USF obligations did not hamper investment or competition in the telecommunications and information markets, Section 254(d) leaves it within the discretion of the FCC to decline to impose universal service fund obligations on “telecommunications” providers if such obligation is not in the public interest.⁴⁷

Furthermore, in the Senate Bill that was amended and became the Telecommunications Act, the Senate Committee expressed an initial view that information services would not be subject to universal service contribution requirements.⁴⁸ However, 253(f) empowers states to condition entry into rural markets upon qualifying under Section 214(e) and providing the basic services that are subject to universal service requirements.⁴⁹

Therefore, although competitive entry in certain markets is conditioned upon providing universal service in that market, entrants in such rural markets may draw on USF funds. Other providers of new telecommunications offerings are not assessed when competing in new telecommunications markets, encouraging investment in telecommunications competition. Working together, these provisions ensure that competition and universal service concurrently exist.

⁴⁶ *Id.*

⁴⁷ *See supra* n.14.

⁴⁸ *See* S. Rep. No. 104-23, at 28 (1995) (discussing section 253(c) of the Bill which is embodied in Section 254(d) of the 1996 Act).

⁴⁹ *See* 47 U.S.C. § 253(f).

D. Cable Providers Represent A Viable Participant in Intermodal Facilities-Based Competition with the ILECs.

Given the disappointing status of competition between competitive local exchange carriers (“CLECs”) and ILECs,⁵⁰ the FCC has recognized that *intermodal* competition is now key to achieving facilities-based competition.⁵¹ Cable networks represent the most viable option for a new platform for the delivery of competitive local telephone service.

1. To Facilitate Intermodal Competition, the FCC Should Not Impose An Incumbent Regulatory Regime on Broadband Market Entrants .

History demonstrates that facilities-based intermodal competition has been enhanced by regulatory restraint. Direct Broadcast Satellite service (“DBS”) was not originally regulated by federal and state governments as a common carrier, or by other legacy regulatory schemes such as cable service regulation.⁵² Unfettered by regulatory impositions, DBS built systems, launched satellites, and engaged in heated competition for multi-channel video subscribers.⁵³ In its direct competition with cable television, DBS now holds an 18.2 percent share of the national multi-channel video programming distributors (“MVPD”) service market.⁵⁴

⁵⁰ See Section II.D.1. *infra*.

⁵¹ *Wireline NPRM* at ¶ 4, n.8.

⁵² *National Ass'n of Broadcasters v. FCC*, 740 F.2d 1190 (D.C. Cir. 1984) (affirming FCC rejection of calls to impose common carrier or other legacy regulatory schemes on DBS).

⁵³ DBS gave away home satellite dishes to court customers away from cable services as cable operators offered to buy back such dishes for the return of customers.

⁵⁴ See *Eighth Annual Report* at ¶ 13.

In cable television's developmental years, the FCC declined to regulate cable television as a broadcast service with the associated broadcast rule obligations.⁵⁵ The cable television industry developed as a facilities-based service, and currently is a true competitor in television programming with broadcast programming providers. Recently and for the first time during the official television season, basic cable viewership surpassed the 50-prime-time-market share.⁵⁶

In other industries outside the communications sector, intermodal, facilities-based competition has been vigorous when regulators have refrained from imposing the legacy regulatory regime of the incumbent industry. For example, after the railroads built out their facilities and essentially maintained a monopoly in the freight carrying business, the trucking industry used the national highways to become a competitive force with the railroads. In the early years of the trucking industry, the government did not regulate the trucking industry in the same manner as the railroads.⁵⁷ Today, trucks and railroads robustly compete in the freight transportation market, and in 1999, trucks hauled the majority of the total volume of goods.⁵⁸ These experiences demonstrate that regulators

⁵⁵ See *CATV and TV Repeater Services*, 26 F.C.C. 403, 426-31 (1959) (declining to find that cable operators are broadcasters and subject to broadcast rules and regulations, and also finding that CATV systems are not common carriers and do not come within the provision of Title II applicable to carriers).

⁵⁶ See *Basic Tops Half-Century Mark*, MULTICHANNEL NEWS, (April 17, 2002), at http://www.tvinsite.com/index.asp?layout=story&doc_id=81711&display=breakingNews.

⁵⁷ See Matthew Lee, *A Brief and Selective History of U.S. Regulation*, Inner City Public Interest Law Center (stating that in the 1930s the railroads lobbied for and got regulation of the trucking industry, "not rationalized in terms of any natural monopoly or market failure, but simply a tit-for-tat") at <http://www.innecitypress.org/reghist.html> (visited April 26, 2002); *Railroads: A Historical Perspective*, Association of American Railroads (stating that in 1887, Congress passed the Interstate Commerce Act regulating the railroads, and that the regulatory regime grew to comprehensive federal economic regulation), at http://www.aar.org/ViewContent.asp?Content_ID=270&ViewCode=HR (visited April 24, 2002).

⁵⁸ This majority market share was reached over 70 years after trucks were invented and entered the freight transportation market, and 70 years after they were first minimally regulated. See *The Industrial College of*

can facilitate intermodal competition by not subjecting the new entrant to incumbent regulatory assessments and rules.

Conversely, *intramodal* competition generally has not been as successful. This is particularly true when in a facilities-based service market, the new entrant is subjected to the regulatory regime of the incumbent. According to federal rules regarding pricing and access in the telecommunications service market, CLECs have tried to compete with ILECs by using the ILECs' infrastructure. CLECs are subject to Title II, the regulatory regime that regulates ILECs, and generally have not been successful in the telecommunications service market. Numerous companies have filed bankruptcy reorganization papers⁵⁹ and the stock market has lost interest in these ventures.⁶⁰ CLECs have a market share of 5.5 percent in the residential and small business market, and reported providing only about one-third of those switched access lines over their own local loop facilities, compared to 44 percent over acquired unbundled network element

the Armed Forces, *Industry Studies 2000, Transportation*, at <http://www.ndu.edu/ndu/ica/industry/transportation/transportation.html> (visited April 25, 2002).

⁵⁹ See Clayton Bellamy, *Williams Communications Files for Chapter 11 Bankruptcy*, Washingtonpost.com (April 22, 2002), at <http://www.washingtonpost.com/wp-dyn/articles/A31524-2002Apr22.html>; Jen Muehlbauer, *One Covad On the Rocks, With a Twist*, The Industry Standard (Aug 8, 2001) (discussing Covad's bankruptcy filing) at <http://www.thestandard.com/article/0,1902,28547,00.html>; Jim Thompson, *NorthPoint Puts On A Happy Face*, ISP PLANET (examining NorthPoint's bankruptcy filing), at <http://www.isp-planet.com/technology/dsl/thompson/northpoint.html> (visited April 24, 2002).

⁶⁰ See *Third Report on 706* at ¶ 69 (wherein one analyst noted that with stock prices of CLECs down 90 percent or more from their all-time highs, the industry has lost an estimated \$100 billion in equity capitalization); Carl Weinschenk, *Cable Makes Advances Into CLECs' Wake*, MULTICHANNEL NEWS (Dec. 3, 2001) (finding that CLECs have suffered from the "bad economy, bad business plans and a reliance on regional Bell operating companies for connections to their customers"), at <http://www.tvinsite.com/multichannelnews/index.asp?layout=story&articleID=CA184593&...>; Martha Buyer, *CLECs in Trouble*, (April 5, 2001) (suggesting that part of the competitive problem is that CLECs must wean themselves off of using the ILECs' network), at <http://www.cconvergence.com/article/CTM20010330S0002>.

loops and 23 percent by means of resold ILEC services.⁶¹ The lesson learned from this experience is that, in order to promote facilities-based competition in advanced services, the Commission should refrain from imposing similar regulatory assessments on cable operators who are the new entrants in the information services market.

2. There Is No Reasonable Justification To Single Out Cable Modem Service For A USF Assessment.

It would be particularly incongruous to single out cable modem service for USF assessments when cable is not the only industry with an embedded telecommunications component. Every city that has an INET⁶² is utilizing the “telecommunications” component of the underlying network when it connects a high school to the administration building. Electric utilities connect substations to one another through fiber optical ground wire embedded in the transmission grid; their transmission of this data without change in content or form between and among points of the utility’s choosing necessarily implicates an embedded “telecommunications” component.

Broadcasters transmitting electromagnetic signals through the airwaves over a wide area, as in television or radio, or “narrowcasters” transmitting signals from point-to-point, as in microwave transmission, are transmitting information without change in form or content of the information as sent and received between pre-determined points. This also involves a “telecommunications” component over which the Commission could extend its discretionary Section 254(d) authority. Finally, network-based ISPs, such as

⁶¹ See “Federal Communications Commission Releases Data on Local Telephone Competition,” FCC News, (Feb. 27, 2002).

⁶² “INET” is the acronym for “institutional network,” which is a network “[g]enerally dedicated to linking government and other public buildings for such uses as training, meetings, data and voice.” NEWTON’S TELECOM DICTIONARY 348 (17th ed. 2001). INETs are often built by cable TV operators for local governments’ public, educational and governmental uses.

MSN, AOL, and UUNet, are obviously using an embedded “telecommunications” component to transmit data over their networks, which also falls within the ambit of the Commission’s discretionary authority over “other” providers of telecommunications. There is no technological, legal, policy or economic justification to single out cable services from among the many users of “telecommunications.” Quite to the contrary, there is a very persuasive reason to *refrain* from assessing cable modem service, which is to preserve and promote cable as the most viable intermodal facilities-based competitor to the incumbents in the current communications landscape.

III. “Regulatory Parity” Does Not Support Subjecting Cable Modem Service To Universal Service Assessments.

A. The Histories of the Cable and Telephony Industries Dictate that Regulatory Parity for USF Obligations Is Not Appropriate.

It is sometimes suggested that the telecommunications component involved in cable modem service should be subject to universal service assessments in order to ensure some sort of “regulatory parity” with the fact that regulated DSL service is subject to such assessments. This suggestion, however, ignores the vast differences between the cable and telephone industries and the purpose of universal service funding, prior to and after the 1996 Act. The notion that cable modem service should be subject to USF financial obligations in order to “level the field” with telephone companies is misguided and should be rejected.

1. History Of The Telephone Industry.

Since the early 20th Century, telephone service was regulated nationwide as a monopoly public utility service. The need to regulate telephone monopolies was obvious and real. Problems involving abuse of the telephone industry’s monopoly power led to

antitrust enforcement activity against the industry in the 1910's, 1950's, and then again in the 1970s and 80s, leading to a major restructuring of the industry in the "modification of final judgment," or "MFJ," of the early 1980s.⁶³ The MFJ decree split "local" from "long distance" telephony, and banned the local monopolists from participating in the design or manufacture of telecommunications equipment which was an integrated part of the Bell system, or from having any part in the then-nascent market for "information services." A further settlement with the Department of Justice (and some further litigation) led to a lifting of the "information services" restriction in 1989.⁶⁴ Most recently, the 1996 Act formally terminated the MFJ, but simultaneously enacted a host of new, specific duties that ILECs must meet in order to prevent them from using their more-than-100-year-old monopoly power over the local telecommunications infrastructure to stifle competitors. See 47 U.S.C. § 251(b), (c).

Today, six years after the passage of the 1996 Act for the purpose of *opening up* local markets to competition, the ILEC monopolists remain far and away the predominant providers of facilities-based local telephone service, with a greater than 90% market share.⁶⁵ Moreover, virtually all of their competitors actually "compete" by using the

⁶³ *United States v. American Tel. & Tel. Co.*, 552 F. Supp. 131 (D.D.C. 1982), *aff'd sub nom. Maryland v. United States*, 460 U.S. 1001 (1983). The MFJ was agreed to by the parties to the government's lawsuit and approved by Judge Greene in 1982, *id.*, and formally took effect on January 1, 1984.

⁶⁴ See *United States v. Western Elec. Co.*, 900 F.2d 283, 308 (D.C. Cir.), *cert. denied*, 498 U.S. 911 (1990). The newly-freed RBOCs, however, didn't make any serious efforts to enter the market in a significant way until much later. See *supra*, note 30.

⁶⁵ At the end of June 2001, CLECs reported only 9% of the switched access lines nationwide. *Local Telephone Competition: Status as of June 30, 2001*, Industry Analysis Division Common Carrier Bureau (Feb. 2002) available at http://www.fcc.gov/Bureaus/Common_Carrier/Reports/FCC-State_Link/IAD/lcom0202.pdf. Despite their overwhelming market share, the ILECs continue to leverage their monopoly position in the market. See *Charter Communications, Inc. v. Southwestern Bell Telephone Co.*, 2001 U.S. Dist. LEXIS 23093 (E.D. Mo. Oct. 16, 2001), *aff'd*, 2002 U.S. App. LEXIS 1035 (8th Cir. Jan. 24, 2002) (*per curiam*) (granting a preliminary injunction against SBC because, among other reasons, its ad campaign falsely claimed that cable modems could significantly slow down during peak usage times

ILECs' predominant monopoly asset: the local copper loops running from the end user to the telephone company central office.⁶⁶

2. History Of The Cable Industry.

Cable television was initially "community antenna TV." Entrepreneurs in somewhat isolated communities unable to receive good-quality, over-the-air TV signals using normal, individual antennae on TV sets, established one big antenna on a nearby hill or mountain that *could* receive good-quality signals, and ran cable from that antenna to subscribers' homes. Because cable used the public rights-of-way, cable was and has been subject to significant regulation by local municipal governments. Whereas pretty much every business and most residences unquestionably wanted to have telephone service, it was far from a sure thing in the early days of cable whether enough people would want cable service to justify the investment needed to provide it.

In the 1970s, cable began to evolve significantly with the beginning of satellite networks. For the first time, cable operators were not merely seeking to sell a higher-quality version of what was already available for free, over-the-air broadcasting, but could actually offer new and improved entertainment services to subscribers. Operators began to replace the "community antenna" with a "headend" at which satellite signals were fed into the cable network. Moreover, by the mid- to late-1980s, it became clear that the capabilities of digital computer technology and the information-carrying capacity of optical fiber would be applicable to cable systems. As a result, cable entrepreneurs

and that the slowdown was significant enough to make the cable modem service less desirable than DSL to the consumer).

⁶⁶ See "Federal Communications Commission Releases Date on Local Telephone Competition," News Release (FCC Feb. 27, 2002) (finding that 67 percent of the time, CLECs use the ILEC network to provide competitive telephony services).

began planning for and then executing a transformation of their analog distribution systems to optical fiber systems capable of carrying digital signals.

3. Cable's Position In The Telecommunications Market Is Very Different Than That Of The ILECs.

While telephone service was effectively a complete, integrated monopoly for essentially all of the 20th Century, cable's situation in the market has always been quite different. Cable equipment manufacturers have always been separate from cable operators themselves. Moreover, except in remote areas, cable *per se* was never the only source of television entertainment; free over-the-air broadcasting was always available. In addition, unlike telephone service, which can literally be a matter of life or death, cable has never been an "essential" service in that same way. Accordingly, while nationwide telephone penetration has long exceeded 90%, and while nationwide penetration of television *sets* has long exceeded 90%, the cable industry's share of all television households has never exceeded 67.3%.⁶⁷

In addition, the same underlying digital revolution that enabled cable operators to offer more and better-quality programming also enabled the development of a critical competing technology, affordable direct-to-the-home satellite services. Nationwide, cable's market share of the MVPD market fell to 82% by 1999.⁶⁸ Moreover, in 1996, Congress found that rate regulation of many cable services was becoming unnecessary.⁶⁹

⁶⁷ *Eighth Annual Report* at ¶ 18. This is the highest penetration statistic regarding TV household subscribership to cable the Commission has reported since its first annual report on video marketplace competition in 1993.

⁶⁸ *Annual Assessment of the Status of Competition in Markets for the Delivery of Video Programming*, Sixth Report and Order, 15 F.C.C.R. 978 (FCC 2000) (finding in 1999, cable operator market share fell to 82% of the MVPD market from 85% in 1998).

⁶⁹ 47 U.S.C. § 543(c)(4). In 1992, Congress had re-regulated cable rates. See Cable Television Consumer Protection and Competition Act of 1992, Pub. L. No. 1021, 106 Stat. 1460 (1992). However, it also

For these reasons, cable has never been a “monopoly” in the way that the telephone industry has been.

B. “Regulatory Parity” Was Not Expressly Required By Congress And Is Unnecessary In The Context Of Universal Service.

With this backdrop of monopolistic behavior on the ILECs’ part, Congress sought to rectify the anti-competitive effects of the pre-1996 universal service program in Sections 254 and 214(e) of the 1996 Act.⁷⁰ The policy import of these provisions is that Congress would like to use the forces of competition among providers *of* “universal services” to ensure their availability to the maximum extent possible. Although Congress could have chosen to broaden the USF assessment base to all providers of telecommunications, it expressly declined to adopt such a course. Instead, it mandated assessments on all providers of *telecommunications services*, but expressly left to the Commission’s discretion when and whether to establish assessments on providers of “telecommunications” alone.⁷¹ It follows that the difference in assessment status between a telco-delivered high-bandwidth service (which has an express “telecommunications service” component) and cable-delivered high bandwidth service (in which the “telecommunications” is implicit), is plainly a difference in treatment that Congress was prepared to accept by placing the two modes of delivery in different statutory situations.

simultaneously provided that rate regulation would cease when cable’s share of the MVPD market in a particular community declined below 85%. *See* 47 U.S.C. §§ 543(a)(2), 1(1)(B)(ii) (stating a preference for marketplace competition, providing that cable rates shall only be regulated if the operator is not subject to effective competition, and defining effective competition to include where the operator’s competitors serve 15 percent or more of the households in the community).

⁷⁰ Universal service subsidies are no longer to be “implicit” within the hodge-podge of monopolists’ pricing arrangements for their services; they are now to be “explicitly” obtained from all providers of telecommunications services, and available to all providers of those services that we want to have “universally” available. *See* 47 U.S.C. §§ 214(e); 254(d)-(e).

⁷¹ 47 U.S.C. § 254(d).

As a result of the statutory treatment of the two industries, other considerations must, necessarily, inform any Commission decision to actually extend USF assessments to cable modem service. The logic of Section 254 is to make explicit the long-standing implicit subsidy that funded universal service in a purely monopolistic environment; some telecommunications services are overpriced in order to allow others to be underpriced in service of the broader social goal of universal service. This new arrangement works in a competitive environment in at least three ways.

First, to the extent that competing telephone companies grow in the market, they have to contribute to the subsidies. This prevents the achievement of one key policy goal, the growth of competition in the historically monopolized local exchange, from hindering the achievement of another, universal service. Second, competing telephone companies that *provide* universal service are, under Section 214(e), entitled to *receive* the same subsidies that the monopolist receives, thereby achieving both goals simultaneously. Third, by mandating that *all* “telecommunications services” providers be subject to assessment, Congress ensured that as the overall “telecommunications services” market grew, the universal service “tax base” would grow along with it.⁷² In other words, as new “telecommunications services” were developed and marketed, Congress mandated that they, too, would help support universal service.

One such new “telecommunications service” is DSL. This service is provided using the ILECs’ traditional monopoly loop assets in a new way. By selling DSL

⁷² In practical effect, if not in literal legal terms, USF assessments on telecommunications entities are a form of tax. Like any tax system, a broader tax base yields a lower tax rate, so in the abstract there is some logic to expanding the universal service assessment base as broadly as possible simply to produce a lower rate. However, Congress expressly declined to mandatorily expand the USF base to all providers of telecommunications.

services to end users and/or wholesalers (*i.e.*, ISPs who use the DSL service as an input to an integrated high-speed Internet access service), the ILECs are not doing anything fundamentally different than they have done when they added services like Caller*ID or Touch*Tone to their traditional monopoly copper loops. They have simply found a new way to extract value from that protean asset.⁷³ In other words, DSL is just another telecommunications service.⁷⁴

Furthermore, ILECs have never previously contended that differential USF assessments between DSL and cable modem service is a competitive hardship. For example, in two recent proceedings reviewing universal service methodology and the definition of universal service, the ILECs submitted comments arguing that all other broadband providers should pay universal service, but never claimed that their universal service obligations on Internet access services have hampered DSL deployment (assuming that they are properly paying USF assessments on DSL services).⁷⁵ Nor is

⁷³ To continue the analogy, note that when they were introduced, both Touch*Tone and Caller*ID required the telephone company to modify its central office equipment and simultaneously required the end user to use different CPE — a touch-tone phone and a Caller*ID display device, respectively. DSL is essentially similar: it requires a DSLAM at the central office and new CPE at the consumer end.

⁷⁴ Like most telecommunications services, DSL can be used as an input to provide a variety of other products and services — including high-speed Internet access. That fact alone, however, does not warrant imposing universal service assessments on providers of those “downstream” services, using other technologies. Such a result would amount to extending an assessment onto new and innovative technologies that grew up separate and apart from the traditional monopoly telephone network in order to “protect” that network from competition from new technologies. It is impossible to find any justification for such a result in Section 254, in Section 706 of the 1996 Act, or in any other congressional pronouncement on this topic.

⁷⁵ Charter notes that in comments filed by ILECs in response to a pending FCC proceeding to reform the USF contribution methodology, nowhere did the ILECs blame universal service obligations for commercially hindering ILECs’ broadband offerings. *See Federal-State Joint Board on Universal Service*, CC Docket Nos. 96-45, 98-171, 90-571, 92-237, 99-200, 95-116, *Further Notice of Proposed Rulemaking and Report and Order*, FCC 02-43 (rel. Feb. 26, 2002) (“*Methodology FNPRM*”); Comments of SBC Communications Inc. to *Methodology FNPRM* (filed April 22, 2002) (declining to cite universal service obligations as a reason for poor penetration in the broadband market even though it stated that “the universal service mechanism is a financial burden that affects [telecommunications providers’] overall business and . . . relationship with individual customers”); Comments of BellSouth Corporation on

there any evidence suggesting that this is one of the reasons they have been so slow in deploying broadband services. Rather, press reports suggest that it has always been due to the ILECs' failure to adequately invest in and market their broadband services, not universal service obligations, that accords for the low DSL market penetration rate.⁷⁶

The extraordinary differences in technological, market and regulatory history of the telephone and cable industries outlined above strongly suggest that no sound basis for such an extension exists, and demonstrate that concerns that the "playing field" is not "level" as between ILECs and cable operators are misplaced.⁷⁷

Methodology FNPRM (filed April 22, 2002) (omitting any discussion of why the ILECs' broadband market share is so low); Comments of Verizon telephone companies on *Methodology FNPRM* (filed April 22, 2002).

Nor did the ILECs blame universal service obligations in comments filed in a proceeding to review the definition of universal service and to review Lifeline and Link Up services, *See Federal-State Joint Board on Universal Service Seeks Comment on Review of the Definition of Universal Service*, CC Docket 96-45, Public Notice (DA 01-J-1, rel. Aug. 21, 2001) ("*Universal Service Definition PN*"); Comments on *Universal Service Definition PN* of SBC Communications Inc.; BellSouth Corporation; BellSouth Corporation; and Verizon (Filed Nov. 5, 2001); *see also* Reply Comments of SBC Communications Inc.; BellSouth Corporation; and Verizon (Filed Jan. 4, 2002).

⁷⁶ National Cable & Telecommunications Association, *Current Issues Affecting Cable/Telecommunications: Forced Access*, (May 2, 2002) (noting that telephone companies were slow after the passage of the 1996 Act to invest in broadband Internet access and only began investing in DSL technologies after cable modem service gained popularity) at <http://www.ncta.com/docs/ci.cfm?ciId=3&showArticles=ok>; Patrick Flanagan, *DSL and the Access Race*, Telecommunications Online, (May 1999) (citing "[c]onfusing specifications, . . . [s]low rollout, . . . [c]omplex end user installation, . . . [n]on-competitive pricing, . . . [and] [p]oor marketing" as the responsible factors for the low market penetration of DSL in 1999) at <http://telecomsmag.com/default.asp?journalid=2&func=articles&page=dsl&year=1999&month=5>; Cable Datacom News, *Handicapping the Cable-DSL Horse Race* (Dec. 4, 2000) (noting that although cable operators began deploying cable modem service in 1997, "[b]y comparison ILECs stalled on residential broadband, worrying that DSL would cannibalize their lucrative T-1 and leased line businesses.) at <http://www.cabledatcomnews.com/dec00/dec00-1.html>; *supra* note 30.

⁷⁷ This is not to say that the Commission should be utterly unconcerned about factors within its control that might affect the pace of development of "advanced telecommunications capabilities." It is to say, however, that if "level playing field" concerns appear to the Commission to be significant in this regard, the appropriate solution is not to extend a telecommunications-service assessment to innovative new technologies like cable modem service; it is to remove from the assessment the telecommunications component of integrated DSL-plus-Internet-access services. Otherwise, the Commission will have created a peculiar situation in which innovative, historically non-regulated entities such as cable operators — which are already subject to substantial and increasing competition in their core markets — will be assessed to support the traditional, non-innovative services of the ILECs, who remain without question the dominant monopolists in their core markets.

C. The FCC Has Previously Concluded That As A Policy Matter, New Services Should Be Freed From Legacy Regulation.

Previously, the FCC rightly has resisted calls to regulate other *new* technologies including wireless providers, SMATV, cable television, FM subcarriers, television Vertical Blanking Intervals, telephone “dark fiber,” electric utility fiber, “enhanced services” and DBS, citing numerous reasons, including market dynamics and the promotion of rapid investment and deployment.⁷⁸ However, the Commission may not always have the authority under Title II to deregulate new technological offerings provided by incumbent telephony carriers.⁷⁹ In the case of cable modem service, there is

⁷⁸ See, e.g., *Implementation of Section 3(n) and 332 of the Communications Act: Regulatory Treatment of Mobile Services*, Memorandum Opinion and Order on Partial Reconsideration of Second Report and Order, 11 F.C.C.R. 19729 (FCC 1996) (declining to require a CMRS-to-CMRS interconnection policy); *Regulatory Treatment of Mobile Services*, Report and Order, 15 F.C.C.R. 9219 ¶ 22 (FCC 1999) (discussing the Commission’s goal of refraining from imposing regulations on wireless providers to allow the marketplace to enhance competition in the telephony market but finding it necessary to keep particular cross-ownership rules in the CMRS industry); *New York State Commission on Cable Television v. FCC*, 749 F.2d 804 (D.C. Cir. 1984) (preempting state and local regulation of SMATV and not imposing a comprehensive regulatory regime on SMATV); *Capital Cities Cable, Inc. v. Crisp*, 467 U.S. 691 (1984) (upholding the Commission’s preemption of local and state regulation of signals carried over cable television systems where the Commission did not regulate signal carriage either); 47 U.S.C. § 541(c) (“Any cable system shall not be subject to regulation as a common carrier or utility by reason of providing any cable service.”); *Amendments 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*, 57 RR 2d 832, ¶ 15 (FCC 1985); *Amendment of Parts 2 and 73 of the Commission’s Rules Concerning Use of Subsidiary Communications Authorizations* First Report and Order 48 Fed. Reg. 28445 (1983); see also *Southwestern Bell Tel. Co. v. Federal Communications Comm’n*, 19 F.3d 1475, 1484 (D.C. Cir. 1994) (reversing Commission determination that individual case basis (“ICB”) dark fiber offerings were common carriage); *Policy and Rules Concerning Rates for Dominant Carriers*, Second Report and Order 5 F.C.C.R. 6786, 6810 (FCC 1990) (recognizing that in some cases ICB services feature new technologies); *National Ass’n of Broadcasters v. FCC*, 740 F.2d 1190 (D.C. Cir. 1984) (affirming FCC rejection of calls to impose common carrier or other legacy regulatory schemes on DBS).

⁷⁹ See *Sprint Communications Co. v. FCC*, 274 F.3d 549 (D.C. Cir. 2001) (holding that the Commission could not allow SBC to enter into the interexchange business in its local exchange areas until the Commission considered pricing squeeze claims raised by its local competition competitors to determine if such entry by SBC would be in the public interest under Sections 251 and 271 of the 1996 Act). *But see RT Communications Inc., v. FCC*, 201 F.3d 1264 (10th Cir. 2000) (holding that the Commission could preempt state regulations that were contrary to the 1996 Act’s goals of competitive neutrality in the market for both new and incumbent entrants).

no constraint on such deregulation. Therefore, this deregulatory approach should be embraced.

IV. Any “Benefits” Of Extending Universal Service Obligations On Cable Modem Service Would Be Slight.

Expanding USF obligations to cable modem service would bring little additional funding to the USF program. The amount of revenue plausibly generated by the transmission portion of the service is likely to be quite small compared to the existing base of “telecommunications service” revenues already subject to assessment, and would hardly justify the complex and extensive cost allocation proceedings necessary to separate out the assessable portion of cable modem service revenues.⁸⁰

A. Cable Modem Transport Requires A Small Incremental Cost.

The only portion of cable modem Internet access offerings that could be subject to universal service obligations is the transmission component.⁸¹ The record developed in

⁸⁰ With the current USF assessment provisions in flux and the numerous other current proceedings surrounding the USF program, an extension of USF to cable modem service would only intensify the Commission’s obligation to engage in a lengthy proceeding to address the appropriate measure of USF contributions for cable modem service. *See Methodology FNPRM; Universal Service Definition PN; Schools and Libraries Universal Support Mechanism*, FCC 02-8, CC Docket No. 02-6, Notice of Proposed Rulemaking and Order (FCC Jan. 25, 2002); *Rural Health Care Support Mechanism*, FCC 02-122, WC Docket No. 02-60, Notice of Proposed Rulemaking (FCC April 19, 2002); *Commission Seeks Comment on AT&T Request to Contribute to Universal Service Based on Projected Revenues*, Public Notice (Feb. 26, 2002).

⁸¹ As an information service, cable modem service uses telecommunications. *See Cable Modem Order* at ¶ 39. Using its discretionary authority under Section 254(d), the Commission could (but should not) impose USF obligations on this element of the service. Currently, the transmission component of DSL is classified as a “telecommunications service” and thus, is subject to mandatory universal service contribution requirements. *See Wireline NPRM* at ¶¶ 26, 72 (noting that “[u]nder out existing rules and policies, telecommunications carriers providing telecommunications services, including broadband transmission services, are subject to [universal service] contribution requirements” and citing *Deployment of Wireline Services Offering Advanced Telecommunications Capability*, CC Docket No. 98-147, Memorandum Opinion and Order and Notice of Proposed Rulemaking, 13 F.C.C.R. 24012, 24029, ¶ 35 (FCC 1998)). In the present proceeding, the Commission may change this conclusion and find that the transmission component of providing broadband Internet access over an entity’s own wireline facilities should be reclassified as “telecommunications.” *See Wireline NPRM* at ¶ 17. Charter has no comment on this tentative conclusion regarding wholesale DSL services. However, should the Commission determine that

the FCC's *Line Sharing* proceeding⁸² demonstrates that the portion of broadband revenues attributable to the transmission component of cable modem service would likely be small or nonexistent. In that proceeding, the ILECs submitted data demonstrating that the costs associated with the transmission component of providing new xDSL services on an existing network adds little, if any, to the retail price of xDSL services. For example, the FCC found that ILECs deploying voice-compatible xDSL on their lines allocated "little or no incremental loop costs to the new resulting service" because ILECs already own the loops (unlike CLECs).⁸³ In fact, in the *Line Sharing Order* the FCC cited an earlier proceeding in which Bell Atlantic (now Verizon) asserted that "the cost of unbundled *loops and similar network elements* is not an incremental cost of ADSL service, because it does not reflect new costs incurred to offer that service; therefore, there are *no loop costs to be imputed to ADSL service*."⁸⁴

Similarly, cable operators' networks are already in place to provide video services (including digital video), making cable modem service and the associated transport function an incremental use that would not, logically, be allocated substantial costs. Incremental costs associated with transporting Internet access traffic over the cable plant

USF regulatory parity must be achieved between DSL services and cable modem services, the Commission should decline to assess either broadband service provider USF obligations on broadband transport to ensure that the broadband market continues to develop in a competitive and robust manner.

⁸² *Deployment of Wireline Services Offering 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, Fourth Report and Order in CC Docket No. 96-98, 14 F.C.C.R. 20912 (FCC 1999) ("*Line Sharing Order*").

⁸³ *Line Sharing Order* at ¶ 41 (finding that "[t]he record indicates that incumbent LECs generally allocate virtually all loop costs to their voice services, then deploy a voice-compatible xDSL service such as ADSL on the same loop, allocating little or no incremental loop costs to the new resulting service.") (footnotes omitted).

⁸⁴ *Id.* (citing *Bell Atlantic Telephone Cos.*, Memorandum Opinion and Order, 13 F.C.C.R. 23667, ¶ 11 (FCC 1998)).

likely would be similar to that of the ILECs, small to no additional cost. Assessing cable modem service, therefore, would add little to the USF fund. The negligible financial contribution resulting from assessing the cable modem industry would hardly merit sacrificing broadband competition and deployment.

B. Imposing USF Obligations On Cable Operators Providing Cable Modem Service Will Require A Complex And Extensive Cost Allocation Proceeding .

In order to separate out revenues attributable to providing transport for Internet access services from cable modem revenues, the Commission would have to engage in a lengthy cost proceeding. In the recent *Universal Service Contribution Methodology Further Notice of Proposed Rulemaking*, the Commission recognized the difficulties of separating the telecommunications revenues from bundled service offering revenues to determine USF contribution obligations.⁸⁵ Such a proceeding for cable modem services would be an administrative burden for the FCC, the industry and ultimately, on consumers.⁸⁶

⁸⁵ See *Methodology FNPRM* at ¶¶ 12-13 (recognizing that the bundling of packages of telecommunications and information services has compounded the inherent difficulties in assessing USF contributions).

⁸⁶ Historically, cost allocation proceedings have been extremely contentious. The Commission's methodology for pricing unbundled network elements has been before the U.S. Supreme Court twice. See *AT&T Corp. v. Iowa Utilities Board*, 525 U.S. 366 (1999), *on remand at Iowa Utilities Bd. v. FCC*, 219 F.3d 744 (8th Cir. 2000), *cert. Granted, FCC v. Iowa Utilities Bd.*, 531 U.S. 1124 (2001) (granting certiorari on the question of whether the FCC's pricing methodology was lawful). Determining the costs of line sharing similarly has been very contentious, demonstrating the difficulty of pricing an embedded element of a service or an element of a plant. See *Line Sharing Order* (discussing and rejecting several proposed cost allocations). In the transition from a monopoly provision of customer premises equipment ("CPE") to a competitive CPE market, the Commission was involved in 15 year proceeding to detariff the cost of the telephone inside wire because controversial proceedings regarding the recovery of cost of the wire persisted. In several related orders, the Commission determined that the installation and maintenance of inside wiring no longer constituted a common carrier offering under Title II of the Communications Act and therefore detariffed the installation and maintenance of inside wiring. See *Modifications to the Uniform System of Accounts for Class A and Class B Telephone Companies Required by Detariffing of Customer Premises Equipment and Proposed Detariffing of Customer Provided Cable Wiring*, CC Docket No. 82-681, Report and Order, 48 Fed. Reg. 50534 (1983); *Detariffing the Installation and Maintenance of Inside Wiring*, CC Docket No. 79-105, Second Report and Order, 51 Fed. Reg. 8498 (1986); *Detariffing the*

V. Conclusion.

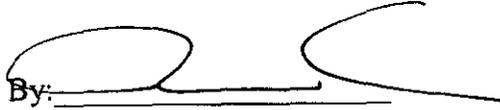
Based on the foregoing, Charter respectfully requests that the Commission adopt a policy of regulatory restraint, and under its discretionary Section 254(d) authority refrain from imposing USF contribution requirements on cable modem service. This policy would encourage further deployment of and competition in broadband services. It also would promote continued investment in the cable network such that cable operators may eventually become full-fledged intermodal competitors in the local telephony market.

Furthermore, there is no legal or policy reason why cable modem service must be treated exactly the same in the USF arena as ILEC-delivered Internet access service. This is particularly true in light of the cable industry's long-standing practice of investing in rural networks and its franchise obligations to bring advanced services to rural areas. Moreover, any trivial amount of possible USF contributions to be gained from a contrary policy is just not worth the burden on the Commission, the industry, and most importantly, broadband consumers.

Installation and Maintenance of Inside Wiring, CC Docket No. 79-105, Memorandum Opinion and Order, 1 F.C.C.R. 1190 (1986); further recon., Memorandum Opinion and Order, 3 F.C.C.R. 1719 (1988); see also Detariffing the Installation and Maintenance of Inside Wiring, CC Docket No. 79-105, Third Report and Order, 7 F.C.C.R. 1334 (1992). States also have grappled with cost allocation proceedings. See Case 98-C-1357 - Proceeding on Motion of the Commission to Examine New York Telephone Company's Rates for Unbundled Network Elements, Order on Unbundled Network Element Rates (NY PSC Jan. 28, 2002) (stating that since 1998, the state has undertaken an examination of Verizon's UNE prices and that the case has had a long and complex procedural history).

Respectfully Submitted,

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