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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

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MAY - 3 2002

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

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 QWEST COMMUNICATIONS INTERNATIONAL INC.

Jonathan E. Nuechterlein
Lynn R. Charytan
Jonathan H. Siegelbaum
WILMER, CUTLER & PICKERING
2445 M Street, N.W.
Washington, DC 20037
(202) 663-6000

Sharon J. Devine
Craig Brown
QWEST COMMUNICATIONS INTERNATIONAL INC.
1020 19th Street, N.W.
Washington, DC 20036
(303) 672-2799

Counsel for Qwest Communications International Inc.

May 3, 2002

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COMMENTS OF QWEST COMMUNICATIONS INTERNATIONAL INC.

Qwest Communications International Inc. ("Qwest") respectfully submits these comments in response to the Commission's *Notice of Proposed Rulemaking* ("*Notice*") in the above-referenced proceeding. Although the issues presented here are related to those raised in the *Triennial Review* and *Broadband Nondominance* proceedings,[1] this proceeding gives the Commission a signal opportunity to move toward a rational and balanced policy for broadband deployment. To that end, Qwest urges the Commission to:

- Reaffirm that, just like cable modem service, bundled DSL Internet access service is an "information service" with no "telecommunications service" component;
- Affirm that, just like cable modem providers, ILECs may choose to provide bulk broadband transport services to ISPs on a private carriage basis outside the scope of Title II; and

[1] *See* Notice of Proposed Rulemaking, *Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*, 16 FCC Rcd 22781 (2001) ("*Triennial Review Notice*"); Notice of Proposed Rulemaking, *Review of Regulatory Requirements for Incumbent LEC Broadband Services*, 16 FCC Rcd 22745 (2001) ("*Incumbent LEC Broadband Notice*").

- Determine that the *Computer II/III* rules have no valid application to the transmission component of bundled DSL Internet access, just as the Commission has found that they have no valid application in the cable modem context.

INTRODUCTION AND SUMMARY

This proceeding, like several others now pending at the Commission, addresses how to reconcile the *law* governing the electronic communications marketplace with the technological and commercial *realities* of that marketplace. Nowhere is the competitive nature of the communications environment so clear, and the mismatch of legacy regulation to developing technology and services so stark, as in the case of broadband services. In this market, wireline LECs, who are relative newcomers to the market and whose market share lags behind that of rival cable broadband providers, are subject to the greatest regulatory constraints. This asymmetry threatens the most perverse of regulatory consequences: a competitive end game in which wireline LECs — the best hope for competition in the residential broadband market — abandon plans to enter that market precisely because the regulatory status quo absurdly treats them as though they monopolized it.

The *Notice* seeks comment on several critical issues concerning wireline LECs' provision of broadband DSL services. First, and most fundamentally, the Commission has asked two related but distinct questions of "statutory characterization." First, does a LEC provide a "telecommunications service" subject to regulation under Title II of the Communications Act when it sells a bundled DSL and Internet access service to *end users*? Second, must a LEC *necessarily* provide a "telecommunications service" subject to Title II regulation when it sells bulk DSL transmission services to Internet Service Providers ("ISPs")? The answer in each case is no. As to the first, the LEC is providing an "information service" without any "telecommunications service" component. As to the second, the LEC should be *permitted* to

provide bulk services on a private carriage basis, and is *in fact* selling them on such a basis, if it contracts on a case-by-case basis with individual ISPs. The Commission recently reached conclusions identical to each of these propositions in the *Cable Modem Order*, and there is no principled or lawful basis for reaching a different result here.

These conclusions, so necessary to ensure regulatory rationality in this area, would not by themselves necessarily deprive CLECs of unbundling rights to which they are otherwise entitled. For purposes of 47 U.S.C. §§ 153(29) and 251(c)(3), the availability of facilities to CLECs as "network elements" turns not on the use that *ILECs* make of them, but on the use that the "requesting telecommunications carrier" *itself* plans to make of them. If that carrier wishes to use the facilities "for the provision of a telecommunications service" — in particular, for the provision of DSL transmission on a common carriage basis — the positions advocated here would not undermine those plans. At the same time, however, the "impairment" standard of section 251(d)(2) *independently* warrants significant and sensible limitations on the extent to which an ILEC should be required to make its own broadband investments available to others at rock-bottom regulated rates. Without those limitations, the broadband market would retain the core regulatory asymmetries that indefensibly favor cable modem providers (which are subject to no analogous obligations) over wireline LECs in the provision of broadband services. But that is a separate set of issues, which Qwest has addressed in its *Triennial Review* comments. *See infra* Part I.A.2.

The *Notice* further seeks comment on whether the *Computer II* and *Computer III* rules should apply to the transport portion of the DSL information service that LECs provide to their end user customers, and, if not, whether some other protective regulatory requirements should apply. As Qwest explains below, the answer in each case again is no. The broadband market is

sufficiently competitive that neither the *Computer II/III* requirements, nor any substitute, is necessary to protect consumers or ISPs. Indeed, any other conclusion would be inconsistent with the *Cable Modem Order*. The Commission should allow the marketplace to govern the provision of DSL, and it should impose no unique, additional regulatory burdens on LEC offerings of bundled DSL Internet access.

DISCUSSION

I. DSL TRANSMISSION SERVICES THAT A LEC PROVIDES TO END USERS AS AN INPUT TO BUNDLED INFORMATION SERVICES, OR TO ISPs ON A CASE-BY-CASE VOLUME BASIS, ARE NOT "TELECOMMUNICATIONS SERVICES" SUBJECT TO TITLE II OF THE COMMUNICATIONS ACT.

A. When A LEC Provides A *Bundled* DSL And Internet Access Service To *End Users*, It Is Providing An "Information Service" Without Any Accompanying "Telecommunications Service."

The Commission has tentatively concluded that "the provision of wireline broadband Internet access service" to end users is an "information service," subject to Title I (but not Title II) of the Communications Act, and does not include any accompanying "telecommunications service."[2] As the Commission has indicated, that conclusion is indeed compelled by the statutory language. Moreover, adherence to that statutory language, while necessary to protect robust *intermodal* broadband competition, would not itself eliminate opportunities for *intramodal* competition over ILEC facilities.

1. Bundled DSL/ISP retail services have no "telecommunications service" component subject to Title II regulation.

As a threshold matter, bundled ISP services are plainly "information services" under the statutory definition: "the offering of a capability for generating, acquiring, storing, transforming, processing, retrieving, utilizing, or making available information via telecommunications." 47

[2] *Notice* ¶ 17.

U.S.C. § 153(20).[3] Indeed, the Commission recognized this fact several years ago in its 1998 *Report to Congress*, where it determined that "Internet access services" — generically defined without reference to transmission medium — "are appropriately classed as information, rather than telecommunications, services."[4] This conclusion is consistent with those reached by the Commission in the past; since the MFJ, "the functions and services associated with Internet access [have been] classified as 'information services.'"[5]

The Commission appropriately reaffirmed that conclusion for bundled cable modem/ISP services in the *Cable Modem Order*. The Commission there noted that the end-user functions that cable modem service supports (such as e-mail, newsgroups, the ability to maintain personal Web sites, and the ability to search the Web using the domain name system) all "encompass the capability for 'generating, acquiring, storing, transforming, processing, retrieving, utilizing, or making available information via telecommunications,'" and therefore meet the statutory definition of an "information service."[6] In making this determination, the Commission noted

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[3] *Accord* 47 C.F.R. § 64.702(a) (defining "enhanced service" as any service "offered over common carrier transmission facilities . . . , which employ computer processing applications," and providing that such services "are not regulated under title II of the [Communications] Act"). The Commission has equated the terms "information service" and "enhanced service." First Report and Order and Further Notice of Proposed Rulemaking, *Implementation of the Non-Accounting Safeguards of Sections 271 and 272 of the Communications Act of 1934, as Amended*, 11 FCC Rcd 21905, 21955-56 ¶ 102 (1996) ("*Non-Accounting Safeguards Order*").

[4] *See* Report to Congress, *Federal-State Joint Board on Universal Service*, 13 FCC Rcd 11501, 11536 ¶ 73 (1998) ("*Report to Congress*").

[5] *Id.* at 11536-37 ¶ 75 (*citing United States v. W. Elec. Co.*, 714 F. Supp 1, 11, 19 n.73 (D.D.C. 1988), *rev'd in part on other grounds*, 900 F.2d 283 (D.C. Cir. 1990)).

[6] Declaratory Ruling and Notice of Proposed Rulemaking, *Inquiry Concerning High-Speed Access to the Internet over Cable and Other Facilities, Internet over Cable Declaratory Ruling, Appropriate Regulatory Treatment for Broadband Access to the Internet Over Cable Facilities*, GN Docket No. 00-185, CS Docket No. 02-52, FCC 02-77 ¶ 38 (rel. Mar. 15, 2002) ("*Cable Modem Order*").

that its statutory analysis did not rest "on the particular types of facilities used," but rather on "the function that is made available."[7]

The analysis employed in the *Cable Modem* proceeding applies with equal force to LEC-provided wireline broadband services — and would therefore bind the Commission in this proceeding even if the statutory definition did not. The functionalities constituting cable modem service — e-mail, Web browsing, newsgroups, and the like — are the same services offered by wireline providers of broadband Internet access. In the Commission's words, "providers of wireline broadband Internet access provide subscribers with the ability to run a variety of applications that fit under the characteristics stated in the information service definition."[8] This fact explains why providers of cable modem services and providers of DSL compete so intensely for end users; both offer end users a bundle of virtually identical services that are distinct primarily in their underlying transport platform.[9] Like cable modem service, wireline broadband Internet access should thus be characterized as a Title I "information service," as the Commission tentatively recognized in the *Notice*.

The only remaining question is whether, in providing these information services, wireline carriers simultaneously provide an associated "telecommunications service" subject to regulation under Title II.[10] As the Commission correctly observed in the *Cable Modem* proceeding, it would be inappropriate "to find a telecommunications service inside every information service,

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[7] *Id.* ¶ 35.

[8] *Notice* ¶ 20.

[9] *See, e.g., Cable Modem Order*, Separate Statement of Commissioner Abernathy, at 71 ("Cable modem and DSL providers appear to be competing in a converged broadband marketplace.").

[10] *Notice* ¶ 24.

extract it, and make it a stand-alone offering to be regulated under Title II of the Act."[11] There is no principled reason for failing to extend this reasoning to the wireline broadband context, particularly given that the end-user offering of bundled DSL/ISP service is, in all functional respects, indistinguishable from cable modem service.[12] Indeed, it would be the height of irrationality for this Commission (a) to conclude that finished cable modem services are an "information service," *see Cable Modem Order* ¶ 7, with no "telecommunications service" attached, but (b) to reach a contrary conclusion with respect to bundled DSL/ISP services.

The Commission is thus correct in tentatively concluding that the transmission component of bundled broadband Internet access, when offered by a traditional wireline carrier, is not a "telecommunications service."[13] Indeed, the plain language of the Act would compel that answer even if the Commission had not already effectively adopted it in the *Cable Modem Order*. In relevant part, "telecommunications service" is defined as "the offering of telecommunications for a fee directly to the public . . . regardless of the facilities used," and "telecommunications" in turn is defined as "the transmission . . . of information of the user's choosing, without change in the form or content of the information as sent and received."[14] By definition, end users that purchase an "information service" cannot simultaneously receive "transmission . . . *without* change in the form or content of the information as sent and received": if such transmission were what they received, they would not be receiving an "information service" in the first place. To be sure, an ILEC that sells end users a bundled DSL and Internet access service provides "telecommunications" *to itself* as an input to the finished information

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[11] *Cable Modem Order* ¶ 43; *see also id.* ¶¶ 39-41.

[12] *See supra* note 9 and accompanying text.

[13] *Notice* ¶ 21 (noting that definitions of information service and telecommunications service are "mutually exclusive").

[14] 47 U.S.C. §§ 153(43), (46) (emphasis added).

service.[15] But that input is not a "telecommunications *service*," because (by hypothesis) the ILEC provides it to itself, not "directly to the public."

Indeed, the Commission adopted the essence of this conclusion several years ago, well before it issued the *Cable Modem Order*. As the Commission first recognized in the 1997 *Universal Service Order*,[16] and reaffirmed in its 1998 *Report to Congress*,[17] the categories of "information service" and "telecommunications service" are "mutually exclusive." And, as the Commission has now confirmed, that is equally true whether the provider of an information service is a non-carrier entity that self-provisions the transmission component or, as here, a carrier using its own transmission service to provide a bundled information service offering to its customers.[18] In each case, the provider in question is "*using* telecommunications," not providing itself — much less anyone else — a "telecommunications service."[19]

2. Classifying bundled DSL/ISP services as "information services" would not itself eliminate opportunities for intramodal competition over ILEC facilities.

In light of its tentative conclusion that bundled DSL/ISP services are "information services," this Commission has asked for comment on the consequences of that determination for its existing regulations — particularly the unbundling requirement of section 251(c)(3), but also

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[15] *Report to Congress* at 11534-35 ¶ 69.

[16] *See* Report and Order, *Federal-State Joint Board on Universal Service*, 12 FCC Rcd 8776, 9179-81 ¶¶ 788-90 (1997) ("*Universal Service Order*") (stating that information services are not inherently telecommunications services simply because they are offered via telecommunications).

[17] *Report to Congress* at 11520 ¶ 39.

[18] *Notice* ¶ 25; *see Report to Congress* at 11521 ¶ 41; *see also id.* at 11533 ¶ 68 ("Internet access, like all information services, is provided 'via telecommunications.'").

[19] *Report to Congress* at 11521 ¶ 41. As noted, it is, however, providing itself "telecommunications." *Id.* at 11533 ¶ 69.

the resale provision of section 251(c)(4).[20] Notwithstanding the apocalyptic rhetoric of various CLECs,[21] a finding that wireline broadband Internet access is an "information service," without more, would have only a limited impact on existing opportunities for competitive use of ILEC facilities.

First, even before issuance of the *Notice*, the Commission had strongly indicated that CLECs have no right to obtain an ILEC's bundled DSL/ISP services for resale at the "retail minus avoided cost" standard of section 251(c)(4).[22] That outcome is plainly correct: The services available for resale under section 251(c)(4) are limited to an ILEC's own "telecommunications services." The Commission's tentative conclusion in this proceeding is consistent with its disposition of the issue in the *Missouri/Arkansas* proceeding, and it comes as no surprise to the industry. Significantly, CLECs would still have the right under 251(c)(4) to obtain the wholesale discount with respect to any *stand-alone* DSL transmission service that ILECs provide to end users. Unlike bundled information services, stand-alone DSL transmission services sold directly to end users are "telecommunications services" and sold "at retail."

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[20] *Notice* ¶ 61.

[21] *See, e.g.*, "Competitors Unite Over FCC Proposals," *Communications Today*, Apr. 4, 2002 (noting that ALTS and CompTel released joint statement indicating their belief that "the fate of the CLEC industry and fair competition are at risk" as a result of several FCC proceedings, including the Wireline Broadband proceeding).

[22] *See* Memorandum Opinion and Order, *Joint Application by SBC Communications Inc., Southwestern Bell Telephone Co., and Southwestern Bell Communications Services, Inc. d/b/a Southwestern Bell Long Distance Pursuant to Section 271 of the Telecommunications Act of 1996 To Provide In-Region, InterLATA Services in Arkansas and Missouri*, 16 FCC Rcd 20719, 20761 ¶ 84 (2001) ("*Missouri/Arkansas 271 Order*"); *see also id.* at 20888 (separate statement of Commissioner Kathleen Q. Abernathy) ("[I]t appears that . . . end-user DSL Internet access service is best characterized as an information service . . . . [I]f we were forced to resolve the classification issue . . . it would follow that this service is not covered by the resale requirement in section 251(c)(4).").

Second, characterizing a bundled DSL/ISP service as an "information service" with no "telecommunications service" attached would, standing alone, have little effect on the extent to which ILECs must provide CLECs with access to *network elements*, such as the high-frequency portion of the loop, for the provision of DSL transmission services to the CLECs' end user or ISP customers. Instead, the major focus of debate concerning broadband-related unbundling obligations appears in the *Triennial Review* proceeding, where the question is whether particular broadband-related facilities meet the "impairment" standard of section 251(d)(2). Qwest has there urged the Commission to trim back the unlimited UNE rights that undermine the incentives of ILECs and CLECs alike to make broadband-related investments. In particular, as Qwest argues, the Commission should exempt from an ILEC's unbundling obligations any "new" broadband facilities — facilities for which incumbent LECs must make massive investments in the near future, and which, because any carrier could build them itself, cannot meet the "impairment" test.[23] Without such limitations, any ILEC providing DSL services will continue to compete with cable modem providers (who face no analogous burden) with one hand tied behind its back.

Nonetheless, whatever residual rights to broadband-related facilities the Commission might recognize in the *Triennial Review* proceeding would not necessarily be inconsistent with the Commission's recognition in *this* proceeding that a bundled DSL Internet access service is an information service with no telecommunications service component. Section 251(c)(3) requires an ILEC to provide "network elements" to "any requesting telecommunications carrier *for the provision of a telecommunications service.*" (Emphasis added.) "Network element" is in turn defined, in relevant part, as "a facility . . . *used in the provision* of a telecommunications

[23] *See* Qwest Triennial Review Comments, filed in CC Docket No. 01-338 on Apr. 5, 2002, at 47-48.

service." 47 U.S.C. § 153(29) (emphasis added). Whether the *ILEC itself* uses a given type of facility for the provision of a "telecommunications service," or exclusively instead for the provision of an "information service," the facility nonetheless can be a "network element" so long as *the CLEC* seeks to "use[]" it for the provision of a "telecommunications service."[24] Although paragraph 61 of the *Notice* suggests uncertainty on this issue, the Commission already seems to have resolved it in the *UNE Remand Order*, where it "interpret[ed] the term 'used' in the definition of a network element to mean '*capable of being used*'" — rather than actually used by the ILEC — "in the provision of a telecommunications service."[25] Here, as noted, CLECs routinely use DSL-related facilities to offer telecommunications services: *e.g.*, the provision, to end users or independent ISPs, of broadband DSL transmission on a common carrier basis and without a bundled Internet access component.[26]

Of course, under section 251(c)(3) itself, a CLEC may obtain access to any facility, even if it otherwise qualifies as a UNE (because it is "capable of being used" in the provision of a telecommunications service), and even if it meets the "impairment" standard of section 251(d)(2), only if the CLEC *actually* seeks to use that facility "for the provision of a telecommunications service" and not *exclusively* for the provision of some other kind of service, such as an information service. If, on the other hand, a CLEC were to offer *only* information services to its own end users, it would occupy the same legal status for these purposes as an ISP

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[24] *See* 47 U.S.C. § 153(29) (defining "network element" as "a facility or equipment *used* in the provision of a telecommunications service") (emphasis added).

[25] *See* Third Report and Order and Fourth Further Notice of Proposed Rulemaking, *Implementation of the Local Competition Provisions of the Telecommunications Act of 1996*, 15 FCC Rcd 3696, 3846 ¶ 330 (1999) ("*UNE Remand Order*") (emphasis added). The Commission thus determined that dark fiber, which by definition is not "used" *by the ILEC* in the provision of any service, "falls within the dedicated transport network element's 'facilities, functions, and capabilities.'" *Id.*

[26] *See Notice* ¶ 26 & n.60.

— because, indeed, it would be acting as an ISP. In particular, it would have no right to UNEs under section 251(c)(3) unless and until it actually uses those UNEs, at least in part, to provide "telecommunications services." This is nothing new: the Commission noted in the *Non-Accounting Safeguards Order* that "the inclusion of information services in the definition of 'services' under section 251(c)(5) does not vest information service providers with substantive rights under other provisions of section 251, except to the extent that they are also operating as telecommunications carriers."[27]

B. A LEC's Provision Of *Bulk DSL Transmission Capacity To ISPs* Is A "Private Carriage" Service, Not A "Common Carriage" Service Or A "Telecommunications Service" Within The Scope Of Title II.

Quite apart from the status of bundled DSL Internet access services is a separate question concerning the appropriate regulatory classification of LECs' stand-alone provisioning of bulk, wholesale broadband transmission to ISPs. There is no dispute that the standard provision of DSL transmission services on a stand-alone basis to *individual end users* is, as the Commission has concluded, a telecommunications service subject to regulation under Title II.[28] Less justifiably, however, the Commission has also treated the provision of *bulk* DSL transmission to *ISPs* as though that too were a "telecommunications service" and should be regulated as such, even when the provisioning ILEC would prefer to sell such services, and the bulk ISP customers would like to purchase them, on a case-by-case, private carriage basis.[29]

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[27] *See, e.g., Non-Accounting Safeguards Order* at 22008-09 ¶ 220 (internal citations and quotation marks omitted).

[28] *See* Memorandum Opinion and Order and Notice of Proposed Rulemaking, *Deployment of Wireline Services Offering Advanced Telecommunications Capability*, 13 FCC Rcd 24011, 24029 ¶ 35 (1998).

[29] *Id.*

Paragraph 26 of the *Notice* opens that question up for reconsideration. Almost simultaneously, the Commission determined in the *Cable Modem Order* that, to the extent that cable operators provide broadband "telecommunications" to unaffiliated ISPs, they may do so as "private carrier[s]," not as "common carrier[s]" subject to regulation under Title II.[30] That determination was correct, and there would be no legally defensible basis for reaching a contrary result with respect to wireline LECs.

1. The Act requires giving ILECs the option of providing bulk DSL services to ISPs on a private carriage basis.

The provision of raw "telecommunications" (unbundled with any information service) to customers is a necessary, but not sufficient, condition for deeming a service a "telecommunications service" subject to Title II regulation. To qualify as a "telecommunications service," the service offering must also be provided "directly to *the public*, or to such classes of users as to be effectively available directly to the public."[31] As the Commission has found, the class of services encompassed in that statutory definition is coextensive with the traditional category of "common carrier" services subject to regulation under Title II.[32] For all present

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[30] *Cable Modem Order* ¶ 54.

[31] 47 U.S.C. § 153(46).

[32] *See, e.g.*, Cable Landing License, *Cable and Wireless, PLC, Application for a License to Land and Operate in the United States a Private Submarine Optic Cable Extending Between the United States and the United Kingdom*, 12 FCC Rcd 8516, 8521 ¶ 13 (1997) ("*Cable & Wireless*"); Memorandum Opinion and Order, *AT&T Submarine Systems, Inc.*, 13 FCC Rcd 21585, 21587-88 ¶ 6 & n.12 (1998), *aff'd, Virgin Islands Tel. Corp. v. FCC*, 198 F.3d 921 (D.C. Cir. 1999); *Universal Service Order* at 9177-78 ¶ 785; Declaratory Ruling, *Federal-State Joint Board on Universal Service*, 14 FCC Rcd 3040, 3042 ¶ 6 (1999), *remanded on other grounds, Iowa v. FCC*, 218 F.3d 756 (D.C. Cir. 2000); *see also* 47 U.S.C. § 201(a) (describing duty of "every common carrier" to furnish communications "in accordance with the orders of the Commission . . . to establish and provide facilities and regulations for operating through such routes"). Moreover, the D.C. Circuit has held that the FCC's interpretation of "telecommunications service" as common carrier service is reasonable and permissible. *Virgin Islands Tel. Corp.*, 198 F.3d at 926.

purposes, something cannot be a "telecommunications service" unless it is also a "common carrier service" — and vice versa.

A transmission service that is not offered on a "common carriage" basis is characterized as a "private carriage" service. As discussed below, the basic difference is that common carrier services are offered indiscriminately to the public (often, though not always, at tariff),[33] whereas private carrier services are offered to discrete (usually large and sophisticated) customers pursuant to individually negotiated terms.[34] As the Commission has long recognized, entities that provide common carriage in some contexts may also engage in private carriage arrangements in others. For example, WorldCom and Sprint are treated as common carriers with respect to their retail long-distance businesses but are *not* treated as common carriers with respect to their Internet backbone services — even though in many cases those two classes of services are provided over the same underlying facilities.[35] Similarly, ILECs have been treated as common carriers when they use their lines to provide basic telephone service but not when they use the same lines to provide bundled information services or video services.[36]

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[33] *See, e.g.*, *Nat'l Ass'n of Regulatory Utility Comm'rs v. FCC*, 525 F.2d 630, 641 (D.C. Cir. 1976) ("*NARUC I*") (holding that to be characterized as a common carrier, "one must hold oneself out indiscriminately to the clientele one is suited to serve").

[34] *See, e.g.*, Notice of Proposed Rulemaking, *Competition in the Interstate Interexchange Marketplace*, 5 FCC Rcd 2627, 2644 ¶ 143 (1990) (noting that private carriage is "conducted pursuant to individually negotiated contracts").

[35] Memorandum Opinion and Order, *Application of WorldCom, Inc. and MCI Communications Corp. for Transfer of Control of MCI Communications Corp. to WorldCom, Inc.*, 13 FCC Rcd 18025, 18116-17 ¶¶ 158-59 (1998) ("*MCI/WorldCom Merger Order*"); *see also* Second Report, *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*, 15 FCC Rcd 20913, 20992-93 ¶ 208 (2000) ("*Second Advanced Services Report*").

[36] *See Missouri/Arkansas 271 Order* at 20889 (separate statement of Commissioner Kathleen Q. Abernathy) ("It does not appear that the Commission has ever held that an incumbent LEC's information service is subject to [common carrier] regulation under Title II of

In considering whether a carrier *should be permitted* to provide private carriage, the Commission typically looks in part at whether the carrier is *in fact* operating as a private carrier.[37] Of course, the services as to which a carrier is most likely to seek "private carriage" status, and as to which the Commission is most likely to grant that status, are those that already bear the traditional hallmarks of a private carrier service. In those circumstances, the answer to the descriptive inquiry ("is this private carriage?") bears very strongly on the answer to the prescriptive one ("should this carrier be permitted to offer this service on a private carriage basis?"). Here, the question is whether ILECs *should be free* to provide bulk DSL sales to ISPs on a private carriage basis outside the scope of Title II,[38] and the answer to that question properly turns on the fact that ILECs already provide such services on a private carriage basis in everything but name.

In considering whether a carrier *should* be permitted to offer a service on a private carriage basis, the Commission has traditionally examined the following criteria:

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the Act . . . ."); Fourth Report and Order in Docket No. 94-1 and Second Report and Order in Docket No. 96-262, *Price Cap Performance Review for Local Exchange Carriers*, 12 FCC Rcd 16642, 16715 ¶ 182 (1997) ("LECs are now permitted to participate in video markets as cable operators, through provision of common carrier video services, or as operators of non-common carrier 'open video systems.'").

[37] Specifically, in considering whether an operation *should* be treated as common carriage, the Commission asks both 1) whether the carrier has a "legal compulsion ... to serve [the public] indifferently," — in other words, whether it *should* provide the service on a common carrier basis and 2) whether there are "reasons, implicit in the nature of . . . [the] operations to expect an indifferent holding out to the eligible user public" — in other words, whether the character of the existing offering has the indicia of common carriage. *Cable & Wireless* at 8522 ¶ 14 (*citing NARUC I*, 525 F.2d at 641). The distinction between "common carriage" and "private carriage" is sometimes muddled, because of the close relationship of these descriptive and prescriptive issues. *See Iowa v. FCC*, 218 F.3d 756, 760 (D.C. Cir. 2000).

[38] *Notice* ¶ 26 ("we seek comment on whether . . . the Commission might regulate incumbent LEC provision of broadband to third-party ISPs as private carriage").

1. Whether, if allowed to operate as a private carrier, the provider will engage in "individualized" negotiations resulting in contracts "tailored to the needs of particular customers";

2. Whether the customers purchasing the telecommunications products are "primarily . . . business entities and institutions with sufficient ability and interest to represent themselves adequately" in negotiations;

3. Whether the contracts at issue will be "medium-to-long range"; and

4. Whether the carrier possesses "market power" with respect to the services at issue.[39]

All four of these factors are satisfied here. Sales of bulk DSL capacity to ISPs are often "tailored to the needs of particular customers," the customers themselves are typically quite sophisticated, and the sales agreements are generally "medium-to-long range."[40] And as discussed below and in more detail in Qwest's and other parties' comments in the *Broadband Nondominance* proceeding,[41] the prevalence of intermodal *and* intramodal competition for the provision of broadband services precludes ILECs from exercising "market power" in any meaningful respect.

That last point, regarding "market power," warrants particular emphasis. ILECs are running a distant second to cable companies in the provision of broadband services, and they face existing and extensive competition from cable, wireless, and satellite providers in offering those services both to retail and wholesale customers. Given this competition, there is little basis

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[39] Declaratory Ruling, *NORLIGHT Request for a Declaratory Ruling*, 2 FCC Rcd 132, 134 ¶¶ 19-20 (1987); *see also NARUC I*, 525 F.2d at 641.

[40] For example, Qwest's ISP customers, which are sophisticated businesses with an intricate understanding of their DSL needs, have made clear that a generic one-size-fits-all service offering designed by the company is not sufficient to meet their needs. Instead, Qwest has worked closely with its ISP customers to develop four separate offerings that are designed to address the individualized needs of various ISPs. Changes in the ISP business models or markets likely would require the development of yet additional "tailored" offerings.

[41] *See, e.g., infra* Part II.A; Comments of Qwest Communications International, filed in CC Docket No. 01-337, Mar. 1, 2002, at 47-55 ("*Qwest Broadband Nondominance Comments*"); Comments of Verizon in CC Docket No. 01-337, at 8-24.

for concern that ILECs will discriminate against particular ISPs.[42] To the extent that consumers value a particular ISP, an ILEC would risk losing significant wholesale DSL business if it refused to deal fairly with that entity. This is especially so given the customer loyalty that many ISPs, such as AOL, EarthLink, MSN, and others, enjoy today.[43] Just as important, no matter how this proceeding is resolved, ILECs will be subject to the pressures of *intramodal* competition as well: ordinary two-wire loops will remain on the UNE list for the indefinite future, and, as discussed below, ISPs will remain free to purchase DSL services over such loops not just from ILECs, but from any CLEC that obtains access to the loop at cost-based rates for the provision of common carrier transmission services to ISPs.

The same conclusion — that ILECs may choose to offer bulk DSL transmission to ISPs on a private carriage basis outside the scope of Title II — follows as well if the question is framed instead as whether such offerings can fall outside the definition of "telecommunications services": *i.e.,* telecommunications "offer[ed] . . . directly to the public, or to such classes of users as to be effectively available directly to the public." As a matter of plain language, such services should *not* be so characterized, because broadband transmission services sold on a case-by-case basis to individual ISPs are, by hypothesis, sold "directly" to those ISPs alone, not "the public." What the "public" purchases in such cases is an "information service" from the ISPs, not a telecommunications service (or any other service) from the ILEC. This conclusion is

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[42] *See generally* Report and Order, *Amendment of Parts 0, 1, 2, and 95 of the Commission's Rules to Provide Interactive Video and Data Services*, 7 FCC Rcd 1630, 1637 ¶ 54 (1992) (finding that the possibility of two IVDS providers in one market, combined with the speculative possibility of intermodal competition for similar interactive services, justified characterizing IVDS as "private carriage").

[43] *See infra* notes 69-75 and accompanying text.

similar to, but distinct from, the Commission's prior conclusion that bulk DSL sales to ISPs are not offered "at retail" for purposes of the resale provisions of section 251(c)(4).[44]

This deregulatory approach would permit LECs to tailor offerings to their ISP customers without concern about tariffing or other common carrier requirements. LECs could and often would continue to offer stand-alone DSL as a common carrier offering as well (and, as discussed in Part II, would be *required* to do so unless the *Computer II/III* requirements are lifted with respect to LEC provision of broadband services). But the competitive, fast-paced market in which broadband transport is bought and sold today does not require the overlay of common carrier regulation; market forces should be trusted to produce pro-consumer results. More generally, only through such faith in the market can the Commission meet its statutory mandate to "encourage the deployment on a reasonable and timely basis of advanced telecommunications capability to all Americans . . . by utilizing . . . regulating methods that remove barriers to infrastructure investment."[45]

2. The *Cable Modem Order* independently requires giving ILECs the option of providing bulk DSL services to ISPs on a private carriage basis.

In the *Cable Modem Order*, the Commission answered a question that is substantively indistinguishable from the question posed here: how to characterize the broadband transmission services that a cable operator provides in the limited circumstances in which it is required (*e.g.*,

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[44] Second Report and Order, *Deployment of Wireline Services Offering Advanced Telecommunications Capability*, 14 FCC Rcd 19237, 19243 ¶ 12 (1999) ("*AOL Bulk Services Order*"), *aff'd*, *Ass'n of Communications Enters. v. FCC*, 253 F.3d 29 (D.C. Cir. 2001); *see also Report to Congress* at 11534-35 ¶ 69 ("where an Internet service provider owns transmission facilities, and engages in data transport over those facilities in order to provide an information service . . . [o]ne could argue that in such a case the Internet service provider is *furnishing raw transmission capacity to itself*") (emphasis added).

[45] Section 706(a), Telecommunications Act of 1996, Pub. L. 104-104, 110 Stat. 56, notes following 47 U.S.C. § 157.

by consent decree) to sell such services to unaffiliated ISPs. This Commission determined that, to the extent that cable operators provide "telecommunications" to ISPs in those circumstances, they provide such telecommunications on a "private carriage" basis, not on a "common carriage" basis, and therefore not as a "telecommunications service" subject to Title II.[46] The Commission reached this conclusion on the ground that the cable provider typically "is dealing with each ISP on an individualized basis and is not offering any transmission service indiscriminately to all ISPs."[47] The Commission's analysis leaves no room for doubt that the practice of providing a broadband transmission service to ISPs on an "individualized" basis is a *sufficient condition for treating that service as private carriage rather than common carriage.*

There can be no defensible basis for distinguishing, for these purposes, between cable companies and telephone companies in their provision of such services. Indeed, other than the legacy regulatory classification of the service provider, every single variable in these two contexts is the same. Just as a *cable* carrier's provision of broadband transport to unaffiliated ISPs is a private carriage service outside the scope of Title II, so too is a *local exchange* carrier's provision of the same product (broadband transmission) to the same purchasers (ISPs) as an input for the same class of finished retail services (broadband Internet access).[48]

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[46] *Cable Modem Order* ¶¶ 54-55.

[47] *Id.* ¶ 55.

[48] Bulk DSL services offered by ILECs are arguably also analogous to the Internet backbone services provided on the "other side" of ISPs. When a backbone provider sells raw transmission services to ISPs, it is not treated as a common carrier, and it is not subject to "common carrier" regulation under Title II. *See* Michael Kende, *The Digital Handshake* (FCC, Office of Plans & Policy, Working Paper No. 32 (Sept. 2000)). At the same time, however, the physical facilities used for Internet backbone services are often the *exact same facilities* used for conventional long-distance services. *Second Advanced Services Report* ¶ 208. Moreover, Internet backbone providers and conventional IXCs provide the basic category of service: the transport of bits over long distances. The principal reason that conventional IXCs are treated as "common carriers" under Title II, but Internet backbone providers are not, lies in the fact that the latter enter into individualized agreements with a finite number of ISPs and other sophisticated

It is no answer to say, as the cable companies and CLECs undoubtedly will, that incumbent LECs are different because they offer common carrier services in other contexts. When a carrier provides unbundled *retail* DSL transmission services *directly to large numbers of ordinary end users* — as Qwest now does under one of its tariff offerings — it is indisputably providing them as a "telecommunications service" subject to regulation under Title II. But that conclusion has no bearing on whether conventional legacy regulation under Title II is necessary to mediate a LEC's individualized relationships with ISPs and other sophisticated purchasers of bulk DSL services. In that context, there is no affirmative need for such regulation, and retaining it serves only to discourage LECs from making the further investments necessary to provide a robust intermodal challenge to cable modem providers, who are subject to no such regulation.

The distinction between "cable" carriers and "local exchange" carriers rests on decades-old legacy regulatory classifications that arose at a time when telephone companies and cable companies were both regulated monopolists that never competed against one another. Indeed, each was prohibited by statute from doing so. Now they obviously do compete against each other, especially in the residential broadband market, and cable modem providers have in fact pulled ahead of their telephone company competitors. If there is any fixed policy axiom underlying this Commission's recent decisions, it is competitive neutrality: in particular, the principle that legacy regulatory distinctions can and should be eliminated as quickly as they are overtaken by the dynamics of market convergence.[49] That moment arrived several years ago, and ILECs are still waiting for this Commission to treat like services alike.

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customers, whereas the former serve ordinary consumers on largely categorical terms. ILECs that wish to serve bulk DSL transmission services to ISPs occupy, for these purposes, the same role as Internet backbone providers.

[49] *See, e.g.*, *Notice* ¶ 6 ("The Commission will avoid simply extending existing rules that were crafted to govern legacy services provided over legacy networks.").

3. Classifying bulk DSL sales to ISPs as "private carriage" would not itself eliminate opportunities for intramodal competition over ILEC facilities.

As is the case with an ILEC's provision of bundled DSL/ISP services, entitling ILECs to provide bulk DSL services to ISPs on a "private carriage" basis would not, by itself, radically alter the rights of CLECs under sections 251 and 252. As an initial matter, the Commission has *already* ruled that bulk DSL sales to ISPs, whether or not they are "telecommunications services," are not made "at retail" — and that they thus lie outside the scope of the resale provisions of section 251(c)(4).[50]

With respect to UNE rights under section 251(c)(3), the question, again, is whether the *requesting party* is a "telecommunications carrier" and whether the service *it* wishes to provide using the UNE at issue is a "telecommunications service" — *i.e.,* a common carrier service. If the Commission were to permit ILECs to engage in "private carriage" arrangements in the provision of DSL services to ISPs, *CLECs* of course would be free to continue providing these services on a common carrier basis and, all other things remaining equal, would retain otherwise recognized rights to provide such "telecommunications services" by means of UNEs. Again, however, the Commission's proper focus in the UNE context should remain on narrowing its interpretation of the "impairment" standard of section 251(d)(2) to approach some semblance of regulatory balance between ILEC DSL providers and cable modem providers.

II. THE *COMPUTER II/III* RULES HAVE NO VALID APPLICATION TO THE TRANSMISSION COMPONENT OF BUNDLED DSL INTERNET SERVICE.

Apart from endeavoring to resolve the proper statutory classification of DSL offerings by LECs in this proceeding, this Commission also has sought comment on whether the legacy rules governing LEC provisioning of "enhanced services" — the so-called *Computer Inquiry* rules —

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[50] *See* 47 C.F.R. § 51.605(c); *AOL Bulk Services Order* at 19243 ¶ 12.

should remain in effect with respect to broadband transmission.[51] Those rules traditionally require any LEC that provides an enhanced service, or "information service,"[52] to unbundle and separately provision the transmission component of the service at tariff to end-users and competing information service providers (and to provide the transmission component to itself pursuant to that tariff).[53] Additional rules under *Computer III* require dominant carriers to comply with a variety of obligations designed to ensure that competing information service providers have nondiscriminatory access to transport functions useful in providing information services.[54]

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[51] *See Notice* n.68 for a complete history of the *Computer II/III* decisions.

[52] The *Computer II* unbundling rule applies to a LEC's provision of "enhanced services," *see, e.g.*, Notice of Proposed Rulemaking, *Implementation of the Telecommunications Act of 1996: Telemessaging, Electronic Publishing, and Alarm Monitoring Services*, 11 FCC Rcd 18959 18984 n.95 (1996). The Commission has confirmed that the terms "enhanced services" and "information services" should be interpreted to extend to the same functions. *See Non-Accounting Safeguards Order* at 21955-56 ¶ 102.

[53] Final Decision, *Amendment of Section 64.702 of the Commission's Rules and Regulations (Second Computer Inquiry)*, 77 F.C.C.2d 384, 474-75 ¶ 231 (1980) ("*Computer II*"); *see also* Report and Order, *1998 Biennal Review - Review of Customer Premises Equipment and Enhanced Services Unbundling Rules in the Interexchange, Exchange Access and Local Exchange Markets*, 16 FCC Rcd 7418, 7442 ¶ 40 (2001) ("*CPE Unbundling Order*") (noting *Computer II* requirement that all carriers not subject to the separate subsidiary requirement must "acquire transmission capacity pursuant to the same prices, terms, and conditions reflected in their tariffs when their own facilities are used").

[54] Under *Computer III*, the Commission established a series of Comparably Efficient Interconnection ("CEI") and Open Network Architecture ("ONA") requirements. Under the current requirements, dominant LECs must maintain on their Web sites their plans for compliance with nine distinct parameters: (1) interface functionality making available standardized hardware and software interfaces that are able to support transmission, switching, and signaling functions identical to those utilized in the enhanced service provided by the carrier; (2) unbundling of the LEC's basic service offering from the enhanced service offering; (3) nondiscriminatory provisioning of the basic service element; (4) disclosure of technical characteristics; (5) provisioning of nondiscriminatory installation, maintenance, and repair; (6) provisioning of end-user access to competitors' customers that is equivalent to the access offered to the LEC's own customers; (7) availability of CEI to competitors at the same time that the LEC's enhanced service offering is made available to the public; (8) provisioning to competitors of interconnection facilities that minimize transport costs; and (9) nondiscriminatory

If the Commission were to affirm, as it should, its tentative conclusion that a bundled DSL service is an information service, the result under the Commission's legacy approach would be that the *Computer II/III* rules would apply to the DSL transport component of the bundled service. That in turn would require LECs to provide DSL transport at tariff as well as various other service elements designed to ensure information service provider access to that service. As explained below, however, it is neither necessary nor appropriate to apply the burdensome panoply of *Computer II/III* requirements in the broadband context. Those requirements were designed for settings in which wireline LECs (and specifically ILECs) were the sole providers of the "basic transmission service" needed as a building block for an enhanced or information service. They have no place in the competitive broadband market, where several ISPs command more market power than the LECs themselves, and where ISPs can turn not only to ILECs, but to competing CLECs, cable modem providers, and satellite providers — and, no doubt in the future, wireless providers as well — to obtain the broadband transmission they need to offer broadband Internet access to their customers. The *Computer II/III* rules have never been applied to cable modem services, which enjoy a far larger market share than DSL services. Further, the

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provisioning of CEI to all competitors. *See, e.g.*, Report and Order, *Computer III Further Remand Proceedings: Bell Operating Company Provision of Enhanced Services, 1998 Biennial Regulatory Review - Review of Computer III and ONA Safeguards*, 14 FCC Rcd 4289, 4297–99 ¶ 13 (1999) ("*Computer III March 1999 Order*"). Under the ONA requirement, dominant LECs must, among other things, file plans in which they describe their procedure for (1) providing at tariff basic service elements (BSEs) and basic serving arrangements (BSAs); (2) providing complementary network services (CNSs), such as stutter dial tone, on a nondiscriminatory basis; (3) treating previously unregulated ancillary network services, such as billing services, as BSAs, BSEs, or CNSs; and (4) establishing procedures designed to ensure nondiscriminatory provisioning of ONA. *See, e.g.*, Further Notice of Proposed Rulemaking, *Computer III Further Remand Proceedings: Bell Operating Company Provision of Enhanced Services*, 13 FCC Rcd 6040, 6085-6089 ¶¶ 78-91 (1998) ("*Computer III Further Notice*"). They must also provide timely notice of new service deployments and alterations, and file annual and semiannual reports detailing ONA compliance. *Id.* at 6093-6114 ¶¶ 99-129.

Commission recently reaffirmed that these rules should *not* apply to cable modem service.[55] Although the Commission is tentatively considering whether to require some other type of access requirement for cable modem providers,[56] it has questioned whether there is a basis to conclude instead that "the market will provide consumers a choice of ISPs without government intervention."[57]

It certainly would make no sense to impose such requirements on LECs in the *absence* of an equivalent requirement on the more established cable modem providers. Such regulatory disparity would significantly skew the competitive environment to the detriment of broadband deployment and consumer welfare generally. The Commission should take this opportunity to establish a market-based access regime to govern the relationship between ISPs and *all* broadband transmission providers by determining that the *Computer II/III* rules do not apply to wireline DSL Internet services any more than they do to any broadband platform provider of any type.

A. The *Computer II* Unbundling Rule Is Designed To Prevent Abuse Of LEC "Market Power" In The Provision Of An Enhanced Service's Underlying Transmission Service — A Concern With No Place In The Competitive Broadband Market.

Computer II requires wireline carriers to offer the transmission component of any information service they provide as a stand-alone "basic service," tariffed and regulated under Title II, on the same terms on which the carrier uses that component in providing its own information service.[58] Put another way, *Computer II* requires an ILEC that chooses to offer a

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[55] *Cable Modem Order* ¶¶ 43-47.

[56] *Id.* ¶¶ 72-95.

[57] *Id.* ¶¶ 83-84.

[58] *Computer III March 1999 Order* at 4316 ¶ 41; *Notice* ¶ 42 (*citing CPE Unbundling Order* at 7442 ¶ 40). This requirement does not apply to an entity that is not a common carrier in

bundled information service also to offer the transmission component as an unbundled common carrier service, whether it would otherwise choose to or not, and to provide that transmission component to itself on the same terms that it offers to competing information service providers.[59]

As the Commission has observed, this *Computer II* unbundling rule was designed specifically to address the "service and market characteristics prevalent" in the local exchange market more than a decade ago.[60] Those market characteristics included complete or near-complete ILEC dominance of the only "basic transmission service" potentially available for the provision of enhanced services. In particular, the *Computer II* unbundling rule was designed to prevent carriers from using their "*market power* and control over the communications facilities *essential to the provision of enhanced services*" to discriminate against unaffiliated information service providers in order to obtain anticompetitive advantages in the information services market.[61] Indeed, ILECs were often then the *only* providers of the services that the information service provider required, and "nondiscriminatory access . . . to basic transmission services by all enhanced service providers" was necessary given that that enhanced services were at that time

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the first instance. Thus, if a non-common carrier self-provisions the telecommunications component of an information service that it offers, it is not required to offer the telecommunications component on an unbundled basis. *See, e.g.*, Memorandum Order and Opinion on Reconsideration, *Competition in the Interstate Interexchange Marketplace*, 10 FCC Rcd 4562, 4580 ¶ 40 (1995) ("*Interexchange Competition Recon. Order*") (noting that *Computer II* unbundling requirements "apply to all *carriers* offering enhanced services that own their own common carrier transmission facilities" (emphasis added)). Paragraph 42 of the *Notice* states that the *Computer II* unbundling rule currently applies to all LECs, whether dominant or not.

[59] *Notice* ¶ 42 (*citing CPE Unbundling Order* at 7442 ¶ 40).

[60] *Id.* ¶ 44.

[61] *Computer II* at 464 ¶ 210 (emphasis added); *Computer III March 1999 Order* at 4295-96 ¶ 9; *see also Interexchange Competition Recon. Order* at 4581 n.79 ("[T]he *Computer III* decision specifically stated that some of the requirements established there would no longer be necessary in the event we found that AT & T lacked market power in the affected services.").

"*dependent* upon the common carrier offering of basic services."[62] Put differently, competing information service providers could not survive unless consumers were able to use the LEC's transmission service to reach the independent information service. Thus, the *Computer II* unbundling requirement was designed specifically for a world in which information service providers could obtain transmission *only* from ILECs.

That rationale, of course, has no application in today's broadband marketplace, which is characterized by both intermodal and (under sections 251 and 252) intramodal competition. Consumers and ISPs may purchase broadband transmission services from facilities-based CLECs, from UNE-based CLECs, and from entirely distinct platform providers, including cable modem providers, satellite providers, and wireless providers. As Qwest and others observed in the *Broadband Nondominance* proceeding, all of these providers serve or can serve the same markets and the same ISPs, and ILECs accordingly are not dominant in *any* broadband market, no matter how defined.[63] Indeed, the Commission itself reaffirmed that the cable modem platform, not wireline DSL, is "the most widely subscribed to technology" for — and cable operators are the "leading providers of" — residential broadband services.[64] And the

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[62] *Computer II* at 474-75 ¶ 231 (emphasis added). For this reason, the Commission applied the unbundling requirement even to nondominant LECs, given that, in its view, LECs as a whole were the *only* source of the wireline input ISPs needed to offer enhanced services. *See CPE Unbundling Order* at 7442 ¶ 40 (noting *Computer II* determination that even carriers "that had no control over local bottleneck facilities, and therefore no market power," would nonetheless be subject to *Computer II* unbundling requirement).

[63] *See Qwest Broadband Nondominance* Comments at 21-22 & n.72 (describing cable and satellite offerings of bulk broadband transmission to ISPs and citing FCC orders regarding proper level of generality for defining "market" for purposes of nondominance analysis).

[64] *Cable Modem Order* ¶¶ 9, 85. The Commission's recently reported broadband subscriber numbers indicate that cable modem providers have approximately 64 percent of the residential and small business broadband market, while DSL providers in the aggregate have a share of approximately 34 percent. Third Report, *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*

Commission emphasized the increasing number of services that cable modem providers make available to ISPs.[65] In this *Notice*, accordingly, the Commission has recognized that intermodal broadband competition is sufficiently prevalent that the Commission *must* consider "what significance [it] should place on the extent to which broadband Internet access services can be or are provided over a variety of differentiated network platforms, such as cable, wireless, and satellite."[66]

The answer is that the *Computer II* unbundling rule is altogether unnecessary in this context.[67] "[C]ompetition is the best safeguard against anticompetitive behavior. BOCs are unable to engage successfully in discrimination and cost misallocation to the extent that competing ISPs have alternate sources of access."[68] Here, because other providers — including dominant cable modem providers — stand ready to serve ISPs and provide them with access to their end user customers, ILECs lack the incentive or the ability either to deny their own end user customers access to those ISPs or to refuse to do business with to the ISPs themselves.

Telecommunications Act of 1996, CC Docket No. 98-146, FCC 02-33, App. C, Table 4 (rel. Feb. 6, 2002).

[65] *Cable Modem Order* ¶¶ 20-29.

[66] *Notice* ¶ 44.

[67] As the Commission itself observed several years ago, the intramodal competition created by sections 251 and 252, *standing alone*, justifies significant relaxation of the *Computer III* CEI/ONA requirements. *Computer III Further Notice* at 6072 ¶ 51 ("the movement toward . . . competition should, over time, decrease and eventually eliminate the need for regulation of the BOCs" to prevent access discrimination).

[68] *Id.* at 6071-72 ¶ 49. Similarly, the Commission eliminated the CPE unbundling requirement for IXCs, noting that, in the current competitive long distance marketplace, alternative providers of CPE now proliferate and regulatory unbundling requirements no longer are necessary to ensure that carriers offer a variety of alternatives. As the Commission noted, "in a competitive market, carriers have an incentive" to offer all customers what they want. *CPE Unbundling Order* at 7433-34 ¶ 26.

This is especially the case given the prominence of many ISPs today and the consumer loyalty they command. Whereas the *Computer II/III* rules were adopted to protect the emerging ISP services at a time when "information services [were] fragile" and the "ability for abuse" of competing information service providers by BOCs was accordingly at its apex,[69] today many ISPs are national in scope, financially strong, and highly sophisticated. Even four years ago, the Commission observed that the increasingly competitive Internet access market, which featured players like EDS, AOL, IBM, Time Warner, MCI, and Viacom, "reduces the BOCs' ability to discriminate in providing access to their competitors."[70] Today, the ISP market has exploded, and several significant, strong market players have emerged. For example, the FCC has recognized "the value of AOL's large subscriber base," as well as its "ability to attract and hold its members to the services and information [it] provide[s]."[71]

Indeed, even where broadband providers have *sought* to limit their customers' access to any ISP other than the bundled ISP provided by the cable provider itself, consumers have found a way to continue to use the services of AOL: AOL's CEO, Robert Pittman, recently observed that many AOL subscribers switching to cable modem service offered by rival cable companies choose to pay AOL's $23.90 per month fee for AOL's ISP service on top of the $49.95 fee for finished cable modem service.[72] And Tom Andrus, EarthLink's Vice President of Products and Service has stated that his company was "focusing on getting loyal EarthLink (dial-up)

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[69] *United States v. W. Elec. Co.*, 673 F. Supp. 525, 566 (D.D.C. 1987), *rev'd in part on other grounds*, 900 F.2d 283 (D.C. Cir. 1990).

[70] *Computer III Further Notice* at 6063-64 ¶ 36.

[71] Memorandum Opinion and Order, *Applications for Consent to the Transfer of Control of Licenses and Section 214 Authorizations by Time Warner Inc. and America Online Inc., Transferors, to AOL Time Warner Inc., Transferee*, 16 FCC Rcd 6547, 6551 ¶ 8 (2001) ("*AOL-Time Warner Merger Order*").

[72] Julia Angwin & Martin Peers, "AOL Rethinks Its Game Plan on Internet Access," Wall St. J., Apr. 19, 2002, at A3.

customers to switch to high-speed."[73] And, while Excite@Home, the cable-owned ISP, is now defunct,[74] AOL, EarthLink, and other ISPs have survived and now offer services in conjunction with cable providers[75] — even absent any mandatory unbundling requirement for cable broadband. DSL providers, who must play catch-up to cable modem service providers, will have even stronger incentives to facilitate access to multiple ISPs.

Finally, there can be no logical or legal basis for applying the *Computer II* unbundling rule to wireline broadband services when it does not apply to the directly competitive offerings of cable operators. In the *Cable Modem Order*, the Commission refused the invitation "to find a telecommunications service inside every information service, extract it, and make it a stand-alone offering to be regulated under Title II of the Act."[76] There is absolutely no public interest justification for reaching a contrary result here. Indeed, such asymmetrical treatment would artificially reinforce the market lead of cable modem providers, making effective intermodal competition more difficult to achieve. Given the competitive broadband marketplace, the superior competitive position of cable modem providers in that marketplace, and the general absence of *any* regulatory mandate for intramodal *cable modem* competition, it would be arbitrary and capricious to apply this monopoly-era regulatory safeguard solely to DSL providers.

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[73] William LaRue, "More Ways to Link the Internet," *Syracuse Post-Standard*, Jan. 7, 2002, at 5.

[74] *See* E. Thomas Lowe, "Comcast Still Has Access to Internet," *Orlando Sentinel*, Feb. 28, 2002, at 4 (noting that, "as of today, Excite at Home is not available").

[75] *See Cable Modem Order* ¶ 83 & nn.306-11 (describing arrangements involving cable operators AOL Time Warner, Comcast, United Online, and AT&T and ISPs Juno, NetZero, and MSN).

[76] *Id.* ¶ 43.

B. Application Of The *Computer III* ONA And CEI Rules Would Make Little Sense In The Context Of Broadband Services.

It goes almost without saying that, if the Commission recognizes that the broadband market is sufficiently competitive that the *Computer II* unbundling rulers should not apply, the complex and burdensome *Computer III* requirements, applicable solely to BOCs, should not apply either. The *Computer III* rules, which impose "nonstructural safeguards" aimed at ensuring that LECs' provision of transport information service providers on a nondiscriminatory basis, have no place in a broadband world in which LECs must compete with dominant cable modem providers and others for the business of ISPs and for end-user subscribers. Qwest, which offers its end users access to over *400* independent ISPs over Qwest's host DSL service, can attest to the fact that offering customers a choice of ISPs by making the necessary service elements available to ISPs is a rational approach to doing business in the competitive broadband market — one that the market would drive on its own.

Indeed, in the face of competition in the long distance market, this Commission relieved AT&T of many of the *Computer III* requirements in 1987 — *eight years before declaring AT&T nondominant in that market.* The Commission explained that, "as interexchange and end-to-end basic service competition increases, the competitive market will provide all basic service customers, including enhanced service providers, with alternative sources for such basic services. As such competition develops, AT&T's ability to discriminate should decline, since enhanced service providers whose needs are not met by AT&T will be able to obtain service from its competitors."[77] The Commission there was examining a purely intramodal market, and one in

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[77] Memorandum Opinion and Order on Reconsideration, *Amendment of Section 64.702 of the Commission's Rules and Regulations (Third Computer Inquiry), and Policy and Rules Concerning Rates for Competitive Common Carrier Services and Facilities Authorization Thereof*, 2 FCC Rcd 3035, 3042 ¶ 46 (1987).

which AT&T retained "market power," with a market share of over 60 percent.[78] The same deregulatory conclusion follows *a fortiori* in the present context, in which ILECs face intermodal as well as intramodal competition and other providers have a significantly larger market share.

Finally, if the Commission concludes, as it should, that ILECs should be free to provide wholesale DSL services to ISPs on a non-tariffed private carriage basis, it would of course be inconsistent to maintain the contrary ONA/CEI requirements of *Computer III*, because those requirements would compel ILECs to tariff all components of the service that an ISP might want to use and, in effect, act as common carriers.

C. For The Same Reasons That The *Computer II/III* Rules Should Not Apply To Wireline Broadband Internet Services, The Commission Should Refrain From Imposing Any Comparable Obligations In Their Place.

The *Notice* asks whether the Commission, if it concludes that the *Computer II/III* requirements should not apply here, should impose substitute safeguards in their place.[79] For example, the Notice suggests that the Commission might rely on other forms of price regulation, such as "commercially reasonable" rates or "market based prices."[80] But the same considerations that counsel against application of the *Computer II/III* regime counsel against erecting new regulatory requirements in its place.

Indeed, given that LECs are the relative newcomers in the broadband market and must compete against dominant cable modem providers, it is particularly important that the

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[78] *Id.* Almost a decade later, when AT&T was deemed nondominant in the market for interexchange services, it still possessed a market share of approximately 60 percent in both domestic interexchange services and international services. *See* Order, *Motion of AT&T Corp. to be Reclassified as a Non-Dominant Carrier,* 11 FCC Rcd 3271, 3305 ¶ 62 (1995); Order, *Motion of AT&T Corp. to be Declared Non-Dominant for International Service*, 11 FCC Rcd 17963, 17969 ¶ 20 (1996).

[79] *Notice* ¶ 50.

[80] *Id.*

Commission not create a new overlay of regulations here, but instead move promptly and aggressively to *deregulate*. In a marketplace characterized by intermodal and intramodal competition, LECs should be free to offer broadband Internet services on business terms that make sense to them, just as their cable and other competitors do. If the Commission recognizes that market-based incentives obviate the old government-mandated unbundling and access requirements, it should not substitute a new access rule "just in case." Regulation should be adopted in *response* to a problem, not in anticipation of one. And unnecessary regulation creates its *own* problems.[81] As the Commission noted when it detariffed nondominant interexchange carriers, "market forces, as opposed to a tariffing regime, will ensure that carriers offer services at the prices and on the terms and conditions that consumers demand."[82]

Just as competition makes other kinds of access rules unnecessary, it eliminates the need for any kind of pricing regulation. A competitive market will drive fair and accurate pricing, because LECs that overcharge for DSL transport are unlikely to attract the business of the ISPs to which their end users would like to subscribe. Here, as elsewhere, "the price that buyers are presently willing to pay — and that sellers are willing to accept — . . . is usually the most accurate representation of . . . present value[.]"[83]

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[81] *See* 47 U.S.C. § 161(a)(2) (requiring Commission to determine every two years whether any regulation "is no longer necessary in the public interest as the result of meaningful economic competition between providers of such service"); Notice of Proposed Rulemaking, *1998 Biennal Regulatory Review - Spectrum Aggregation Limits for Wireless Telecommunications Carriers*, 13 FCC Rcd 25132, 25177 (1998) (separate statement of Commissioner Michael J. Powell) ("[I]n the 1996 Telecommunications Act, Congress explicitly and unabashedly directed the FCC to review our [rules] every two years and to repeal or modify any regulation that is "no longer in the public interest as a result as the result of meaningful economic competition.").

[82] *CPE Unbundling Order* at 7433-34 ¶ 26 (*citing* Second Report and Order, *Policy and Rules Concerning the Interstate, Interexchange Marketplace*, 11 FCC Rcd 20703, 20742-43 ¶ 21 (1996)).

[83] *In re Prince*, 85 F.3d 314, 320 (7th Cir. 1996).

CONCLUSION

For the reasons discussed, the Commission should (1) reaffirm that bundled DSL Internet access service is an "information service" with no "telecommunications service" component; (2) affirm that, like cable modem providers, ILECs may choose to provide bulk broadband transport services to ISPs on a private carriage basis outside the scope of Title II; and (3) determine that the *Computer II/III* rules have no valid application to the transmission component of bundled DSL Internet access.

Respectfully submitted,

Jonathan E. Nuechterlein
Lynn R. Charytan
Jonathan H. Siegelbaum
WILMER, CUTLER & PICKERING
2445 M Street, N.W.
Washington, DC 20037
(202) 663-6000

Sharon J. Devine
Craig Brown
QWEST COMMUNICATIONS INTERNATIONAL INC.
1020 19th Street, N.W.
Washington, DC 20036
(303) 672-2799

Counsel for Qwest Communications International Inc.

May 3, 2002

CERTIFICATE OF SERVICE

I, John Meehan, do hereby certify that on this 3rd day of May, 2002, I caused true and correct copies of the foregoing Comments of Qwest Communications International, Inc. to be served by messenger upon the following parties:

Chairman Michael K. Powell
Federal Communications Commission
445 12th Street, SW
Room 8-B201
Washington, DC 20554

Commissioner Kevin J. Martin
Federal Communications Commission
445 12th Street, SW
Room 8-C302
Washington, DC 20554

Commissioner Kathleen Q. Abernathy
Federal Communications Commission
445 12th Street, SW
Room 8-B115
Washington, DC 20554

Commissioner Michael J. Copps
Federal Communications Commission
445 12th Street, SW
Room 8-A302
Washington, DC 20554

Janice Myles (Diskette Copy)
Policy and Program Planning Division
Common Carrier Bureau
Federal Communications Commission
236 Massachusetts Avenue NE
Suite 110
Washington, DC 20002

Qualex International (Diskette Copy)
Portals II
445 12th Street, SW
Room CY-B402
Washington, DC 20554

John Meehan

John Meehan