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Before the
Federal Communications Commission
Washington, D.C. 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	)	CC Docket Nos. 95-20, 98-10

COMMENTS OF COX COMMUNICATIONS, INC.

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SUMMARY

The Commission should take two specific actions in this proceeding to protect competition in the high speed data and local telephone markets. First, it should prohibit ILECs from offering discounted bundles of DSL and like services with implicitly subsidized POTS. Second, it should determine that tying of DSL or like services with POTS is prohibited.

Offering customers the opportunity to purchase bundled services at prices lower than the retail prices of the services sold separately can be beneficial. When, however, one of the services is subject to an implicit subsidy that is unavailable to other competitors, competitive harm can occur. In that situation, the provider with access to the subsidy has a significant competitive advantage over its competitors for reasons unrelated to the underlying costs or quality of its service, and the bundling becomes anticompetitive. Further, a discounted bundle of a competitive service, such as DSL, with a noncompetitive service like ILEC POTS violates the prohibition on cross-subsidization in Section 254(k) of the Communications Act. Thus, the Commission should prohibit discounted bundling of ILEC DSL and POTS until such time as POTS subsidies are made explicit and portable.

Cox has experienced DSL tying across the country and in many of its service areas. Tying occurs when an ILEC refuses to sell its customers DSL unless they also buy POTS. DSL tying is competitively harmful because it makes it much more difficult for CLECs to obtain new customers and effectively cuts off an important segment of the potential market for CLEC POTS service. DSL tying also violates multiple provisions of the Communications Act. These provisions include the Section 201 obligation to serve and obligation to offer service on reasonable terms; the Section 202 prohibition on unreasonable discrimination; the Section 251(b)(2) requirement to provide number portability; and the Section 254(k) prohibition on

subsidization of competitive services by noncompetitive services. Consequently, the Commission should prohibit the tying of DSL or like services to POTS.

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Comments of Cox Communications, Inc.

Cox Communications, Inc. ("Cox"), by its attorneys, hereby submits its comments in the above-referenced proceeding.[1] Cox submits these comments to focus the Commission on two issues unique to ILEC provision of broadband Internet access services: (1) The impact of discounted bundling of these services with traditional ILEC local exchange services in the residential market; and (2) ILEC tying of their DSL offerings to POTS. As described below, Cox does not oppose bundling, but submits that the Commission should ensure that ILECs do not gain an undue competitive advantage from offering discounted bundles of unregulated services and subsidized local exchange services. The Commission also should prohibit the tying of DSL

[1] Appropriate Framework for Broadband Access to the Internet over Wireline Facilities; Universal Service Obligations of Broadband Providers; Computer III Further Remand Proceedings: Bell Operating Company Provision of Enhanced Services; 1998 Biennial Regulatory Review – Review of Computer III and ONA Safeguards, *Notice of Proposed Rulemaking,* CC Docket Nos. 02-33, 95-20, 98-10 (rel. Feb. 15, 2002) (the *"Notice"*). The comment deadline in this proceeding was extended to May 3, 2002. *See* Appropriate Framework for Broadband Access to the Internet over Wireline Facilities; Universal Service Obligations of Broadband Providers; Computer III Further Remand Proceedings: Bell Operating Company Provision of Enhanced Services; 1998 Biennial Regulatory Review – Review of Computer III and ONA Safeguards, *Order,* CC Docket Nos. 02-33, 95-20, 98-10 (rel. Mar. 22, 2002).

and POTS because it is anticompetitive and violates several provisions of the Communications Act.

I. Introduction

Cox, through its local operating companies, is one of the leading providers of facilities-based local exchange services to residential and business customers. Even before the 1996 Act was enacted, Cox began to spend billions of dollars to upgrade its cable plant to offer local telephone service, and it continues those upgrades today. Cox's residential telephony business provides more than 650,000 access lines to more than 500,000 customers, while it provides business service to the equivalent of over 1.8 million access lines in more than 11,000 buildings. All but a small fraction of Cox's service is provided using Cox's own facilities, including loops and switching.

Cox's experience in competing with incumbent local exchange carriers ("ILECs") has shown that ILECs will take any steps they deem necessary to prevent their competitors from succeeding. Some ILEC actions are normal behavior in competitive markets. In other cases, however, ILECs take advantage of their still-privileged regulatory status to stifle competition. These comments are intended to focus the Commission on preventing such abuses as it evaluates the proper regulatory framework for high-speed services offered by ILECs. As the *Notice* explains, decisions about that framework "could have far-reaching implications for a wide range of issues[,]" and "the statutory objectives to promote competition and universal service have not changed."[2]

Cox has identified two specific concerns that the Commission should address, both of which relate to the provision of DSL service in conjunction with POTS. First, any rules the

[2] *Notice*, ¶ ¶ 2, 16.

Commission adopts in this proceeding should specify that discounted bundling of DSL or like services with POTS is permitted only when any subsidies of the POTS are explicit and portable.[3] If such a requirement is not in place, ILECs will be given an unfair competitive advantage and will violate the prohibition on subsidization of competitive services by non-competitive services in Section 254(k) of the Communications Act. Second, the Commission should forbid ILECs from requiring customers to purchase POTS if they want to purchase DSL. This tying of DSL and POTS also is anticompetitive and violates multiple provisions of the Communications Act, including Sections 201, 202, 251(b)(2) and 254(k), as well as the Commission's rules.

II. The Commission Should Permit Discounted Bundling of Wireline Broadband Services and POTS Only When POTS Subsidies Are Explicit and Fully Portable.

The Commission specifically seeks comments on issues relating to bundling and high speed services in the context of universal service.[4] The first of Cox's concerns relates to both bundling and universal service, but not to the specific issues raised in the *Notice*. Rather, Cox is concerned that, following a Commission decision to alter the regulatory framework for DSL and like services, ILECs could engage in discounted bundling of high speed services with regulated services that are offered below cost as a result of continuing implicit subsidies for local exchange service. Cox does not oppose bundling in general; indeed, one of the benefits of the 1996 Act is that it allows consumers to benefit from one-stop shopping for a variety of services, and Cox offers bundles today. Rather, Cox is concerned only about the bundling where a provider has access to subsidies that are unavailable to its competitors. Discounted bundling in such circumstances would raise two specific issues.

[3] In this context, a discounted bundle is one that is offered below the combined retail prices of the services included in the bundle. Cox does not intend to address normal promotional offers for a single service, such as one month's free service or free installation, so long as the offers are not conditioned on the purchase of both an unregulated service and a subsidized service.

[4] *See id.*, ¶ 75

First, to the extent an ILEC offers a discounted bundle of high speed services and any service that is the subject of an implicit subsidy, competitive providers of similar services will be harmed. Today, Cox's local telephone service, which does not benefit from implicit subsidies, must compete against ILEC residential POTS that the ILECs claim is priced below cost and subsidized by other non-competitive services. Because such implicit subsidies are not available to Cox, the prices Cox can charge for its local telephone service (and the profit margins for that service) are lower than they would be otherwise. If, however, ILECs were permitted to offer discounted bundles of high-speed services and subsidized POTS, the competitive disadvantage for carriers that do not have access to those subsidies would affect competition not just for POTS, but also for high speed services.

The anticompetitive effects of ILECs offering discounted bundles of DSL and implicitly subsidized POTS are obvious. If one service provider must recover all of its costs from customer revenues while another can recover its costs from a combination of customer revenues and subsidies, then the subsidized provider will reap higher profits or be able to support a higher cost structure. In the case of POTS, this will reinforce the ILECs' monopoly. In the case of DSL and competing services, it will mean that ILECs will reap a higher market share and greater profits than they would if POTS were unsubsidized or if subsidies were truly portable. Conversely, a competing provider will suffer a competitive disadvantage even if its products are superior or its true costs are lower than those of the ILEC.

Further, permitting such bundling would be contrary to the requirements of Section 254(k) of the Communications Act. Section 254(k) prohibits carriers from using "services that are not competitive to subsidize services that are subject to competition."[5] This provision does

[5] 47 U.S.C. § 254(k). By its terms, Section 254(k) covers any "services" offered by a telecommunications carrier, whether or not those services are "telecommunications services."

not prevent a carrier from offering a noncompetitive service in conjunction with a competitive service. It does, however, prevent a dominant carrier from using revenues from a service like local exchange to support a competitive service such as DSL. In the case of a discounted bundle of POTS and DSL, that is exactly what would be happening, because the revenues from POTS would support the offering of DSL.[6] In practical terms, offering the bundle for a discounted price also increases the share of costs that must be allocated to POTS in the ILEC's accounting because the DSL service no longer covers the same percentage of costs as it would if offered on a standalone basis.[7] Thus, until the POTS market is fully competitive, any discounted bundle of ILEC POTS and DSL violates Section 254(k), regardless of the regulatory framework applicable to DSL service.

The solution to these problems is to forbid ILECs from offering bundles of DSL and POTS at discounted rates until such time as any federal or state subsidies for POTS (and particularly for residential POTS) are made explicit and fully portable to any competing provider. Once POTS subsidies are made explicit and other carriers can obtain them, ILECs no longer will have a competitive advantage conferred upon them by such subsidies, and they should be permitted to offer discounted bundles of DSL and POTS or any other services. Until then, the competitive risks are too great to permit ILECs to offer discounted bundles of POTS and DSL.

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[6] This provision does not apply when a CLEC offers a bundle of POTS and other services because the CLEC's POTS offering is a competitive service.

[7] As the Commission has explained, "Section 254(k) seeks to prevent incumbent local exchange carriers from attempting to gain an unfair advantage in competitive markets by allocating to their less competitive services, for which subscribers have few or no available alternatives, an excessive portion of the costs incurred by their competitive operations." Tennessee Cable Telecommunications Association and Cable Television Association of Georgia v. BellSouth Telecommunications, Inc., *Memorandum Opinion and Order*, 15 FCC Rcd 7513, 7516 (Enf. Bur. 2000) (footnote omitted).

III. The Commission Should Determine that ILECs Are Prohibited from Tying DSL to POTS.

The tying of DSL service to POTS has become a significant issue for Cox and other CLECs.[8] Early in the development of both CLEC service and DSL, this was not a concern, because relatively few prospective CLEC customers also had DSL service. As DSL has matured, however, Cox has discovered that ILEC policies requiring DSL subscribers to also subscribe to POTS are becoming a significant barrier to competition. There is no technical reason for DSL tying; rather, it is entirely a result of ILEC business decisions. Because the ILEC practice of tying DSL to POTS is anticompetitive and violates several distinct requirements of the Communications Act and the Commission's rules, the Commission should prohibit it entirely.

A. Cox Has Been Harmed by DSL Tying Across the Country.

Cox has encountered three different forms of DSL-POTS tying. In the first form, when Cox or a customer seeks to cancel POTS, the ILEC states that a POTS line is required if that customer wants to continue to receive DSL. In the second form, the ILEC does not provide any information to Cox or the customer, but simply cuts off DSL service when the POTS line is turned off. In this case, some customers also are assessed premature termination fees of as much as $200, even though they did not request termination of their DSL service. Finally, Cox also has had number porting requests refused because the customer has DSL service.

Cox has experienced DSL tying across the country and in markets served by each of the Bell companies.[9] Whenever an ILEC engages in DSL tying, at best Cox is subject to delays and additional costs for serving new customers, as it must go back to them and seek to convince them

[8] *See* "State Activities," COMM. DAILY, May 2, 2002, at 7.
[9] Cox also notes that BellSouth apparently is engaged in DSL tying in Georgia and Florida, states where Cox does not currently provide residential CLEC service. *See id.*

either to forego high speed Internet access or switch to Cox's cable modem service. In many cases, however, new customers decide not to switch their POTS to Cox. The result is that Cox loses customers not because of the price or quality of its service, but because of artificial restrictions imposed by ILECs on their service offerings.

Moreover, there can be no doubt that the restrictions imposed by ILECs *are* artificial. There are no technical barriers to providing DSL over a loop that is not being used to provide POTS. In fact, that was how DLECs provided DSL before the Commission instituted line sharing. There also are no legal barriers to providing only DSL over a loop, so there are no grounds for ILECs to argue that they are prohibited from doing so.[10]

In this context, it is important to recognize that Cox is not seeking to have the ILEC provide DSL over a loop while Cox provides voice service over the same loop. As noted above, Cox provides residential telephone service over its own loops, so the ILEC retains full control over the loop used to provide DSL. Thus, the rationale of the *Line Sharing Order* for permitting ILECs to deny requests for line sharing on unbundled loops does not apply to the situations faced by Cox.[11]

B. DSL Tying Should Be Prohibited Because It Is Anticompetitive and Violates the Communications Act.

There are two distinct reasons the Commission should bar ILECs from engaging in DSL tying. First, DSL tying is plainly anticompetitive, and contrary to the basic principles of the 1996 Act and should be prohibited as a matter of sound public policy. Second, ILEC DSL tying violates a series of provisions of the Communications Act, and therefore cannot be permitted.

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[10] Cox understands that some ILEC DSL tariffs contain terms that require the purchase of POTS as a condition of purchasing DSL, but this tariff language was created by the ILECs, not required by regulators.

[11] 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 and Fourth Report and Order,* 14 FCC Rcd 20912, 20947 (1999) (line sharing not required if ILEC is not voice carrier for a loop).

In the emerging competitive market for local telephone service, ILEC DSL tying creates substantial barriers to competition. These barriers are two-fold. First, and most important, DSL tying artificially discourages ILEC customers from switching carriers for POTS. DSL tying is particularly significant in this regard because the types of customers who purchase DSL are likely to be desirable customers who are willing to purchase larger quantities of telecommunications services. Moreover, the effects of DSL tying are reinforced because customers tend to blame the CLEC whenever there is any problem associated with their service. This is a particular concern when the ILEC's operations support systems do not reveal that the customer has DSL service and the ILEC cuts off DSL at the time of the POTS cutover.[12] In these cases, the customers are justifiably upset that they have lost DSL service without any warning and are extremely unlikely to continue to purchase service from Cox.

Second, DSL tying significantly reduces the CLEC's potential customer base and increases the costs of acquiring new customers. In many cases, when potential customers become aware that they will be required to give up their DSL service to obtain Cox's CLEC service, they decide to remain with the ILEC. Even when Cox can convince a customer to switch to Cox's CLEC service, the costs of customer acquisition are increased because Cox has to return to the customer and explain the problem. Moreover, where an ILEC engages in DSL tying, Cox has to check the records for every new customer to determine whether that customer purchases DSL service. As explained above, Cox incurs these costs solely because of the ILEC's business decision to engage in tying, not for any technical reason or because of any policy determination by the Commission.

[12] In some instances, this information is not readily available from the OSS and, in any event, data concerning customer DSL subscriptions is not always accurate.

Permitting ILECs to engage in DSL tying is therefore inconsistent with the basic mandate of the 1996 Act, which instructs the Commission to promote competition and to take steps to open markets.[13] The cumulative impact of effectively denying CLECs access to certain customers and of increasing the costs of acquiring customers is significant and, thus, DSL tying plainly harms the development of competition. Consequently, as a matter of the underlying policies of the 1996 Act, the Commission should prohibit DSL tying by ILECs.

Further, ILEC DSL tying violates several distinct provisions of the Communications Act. First, it violates Sections 201(a), 201(b) and 202(a). Section 201(a) requires carriers "to furnish [interstate] service upon reasonable request therefor."[14] Section 201(b), among other things, makes it unlawful for a carrier to engage in unreasonable practices in the provision of interstate communications service.[15] Section 202(a) prohibits "unjust or unreasonable discrimination" between a carrier's customers.[16] The Commission consistently has interpreted these provisions to protect customers from carrier practices that require the customer to buy one service to purchase an unrelated service, or even a related service that is available from third parties.[17]

Consistent with these precedents, tying DSL to voice service constitutes an unreasonable practice under Section 201(b) both because it deprives customers of the ability to choose a

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[13] Telecommunications Act of 1996, Pub. L. 104-104, preamble, Feb. 8, 1996, 110 Stat. 153; *see also Notice,* ¶2.
[14] 47 U.S.C. § 201(a).
[15] 47 U.S.C. § 201(b).
[16] 47 U.S.C. § 202(a).
[17] For instance, in a 1995 case involving AT&T, the Commission held that it was an unreasonable practice for AT&T to require customers of entrance facilities to purchase direct trunked transport from AT&T, when the transport service also was available from LECs. AT&T Communications Tariff FCC Nos. 9 and 11, *Memorandum Opinion and Order,* 10 FCC Rcd 4288, 4305 (1995) (holding that the tying of those services was unreasonable because the customers were denied the opportunity to purchase the service of their choice). The same order also held that it was unreasonable for AT&T to bundle an "access coordination function" with Feature Group A and B service because doing so deprived customers of the opportunity to purchase feature group service from LECs. *Id.* at 4302. Similarly, prior to the implementation of 800 number portability, the Commission also determined that AT&T would not be permitted to bundle certain services provided using customers' existing 800 numbers with other services because of the risk that AT&T would "leverage market power in 800 and inbound services." Competition in the Interstate Interexchange Marketplace, *Memorandum Opinion and Order on Reconsideration,* 7 FCC Rcd 2677, 2680 (1992).

provider for voice service and because the ILECs are "leveraging their market power" to prevent customers from switching service providers for voice service. Tying DSL to another service also violates Section 201(a) because the ILECs are refusing to provide a service (in fact, a service they already are providing) upon request. In addition, the practice violates Section 202(a) because customers are being discriminated against in the provision of DSL service on the basis of whether or not they subscribe to another, unrelated service. The lack of a relationship between DSL and voice service underscores the unreasonable, discriminatory nature of the ILECs' practices. In the AT&T tariff case, the tied services were related in that one was used in connection with the provision of the other. Here, the services are not related: voice service is not used to provide DSL or vice versa, so there is no reason at all to tie these two services.

In addition, when an ILEC refuses to port a number because the POTS line is associated with a DSL line, that ILEC violates its obligations to provide number portability under Section 251(b)(2) of the Communications Act and Part 52 of the Commission's rules. These provisions include no exceptions that allow a local exchange carrier to deny porting because of other services that a customer has purchased. The only exceptions to the statutory provision and the rules are for carriers that face specific technical barriers to providing number portability.[18] No such barriers exist here and, consequently, any ILEC's refusal to port a number because the customer also subscribes to DSL is a direct violation of the portability requirement.

Finally, DSL tying violates Section 254(k) of the Communications Act.[19] As described above, Section 254(k) prohibits the subsidization of a competitive service, such as DSL, by a noncompetitive service, such as ILEC-offered POTS. When an ILEC requires customers to

[18] *See* 47 U.S.C. 251(b)(2) (portability to be provided when "technically feasible"); *see also* 47 C.F.R. § 52.23(e) (requiring carriers seeking waivers of deployment deadlines to "demonstrate through substantial, credible evidence" that they cannot provide portability).
[19] 47 U.S.C. § 254(k).

purchase POTS before they can purchase DSL, the DSL is subsidized by POTS because the DSL service and POTS always share the cost of the loop. In contrast, when a DLEC purchases a loop to provide DSL, the DLEC may bear the entire cost of the loop, depending on whether POTS is provided over that loop or not. In other words, ILEC DSL tying creates a regime in which POTS either bears the entire cost of the loop or shares the cost with DSL, while ILEC DSL never bears the entire cost of any loop used to provide the service. This regime ensures that DSL can be offered at lower rates than otherwise would be possible.[20] This is precisely the kind of subsidy prohibited by Section 254(k).

Moreover, this subsidy harms competition because it allows DSL to be offered at lower prices than would be possible without the subsidy. The net effect is to give DSL an unmerited marketplace advantage that arises only because it is tied to POTS, a monopoly service. This is precisely the reason that Congress adopted Section 254(k) and would justify prohibiting ILEC DSL tying even if Section 254(k) did not exist.

[20] For instance, if the cost of a loop is $20 a month, those costs are split evenly when a loop is shared between POTS and DSL and it is assumed that 10 percent of DSL customers would purchase POTS from a CLEC if they were able to do so, DSL tying reduces the ILEC's per-customer loop costs for DSL from $11 to $10. Given that DSL customers are likely to be more sophisticated consumers of communications services, it is reasonable to conclude that a much higher proportion of DSL customers would be likely to purchase POTS from a CLEC if there were no tying, which would further increase the cost benefit to ILECs from tying. For instance, in the example above, if as many as 25 percent of ILEC DSL customers would purchase POTS from a CLEC, DSL tying would reduce the ILEC's per-customer loop costs for DSL from $12.50 to $10.

IV. Conclusion

For all these reasons, Cox requests that the Commission adopt rules in accordance with these comments.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Vicki Lynne Lyttle, a legal secretary at Dow, Lohnes & Albertson, PLLC do hereby certify that on this 3rd day of May, 2002, copies of the foregoing Comments of Cox Communications, Inc. were served by hand delivery on the following:

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