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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

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

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

COMMENTS OF COVAD COMMUNICATIONS COMPANY

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Dated: May 3, 2002

SUMMARY

In its Notice of Proposed Rulemaking, the Commission proposes a radical solution – the potential elimination of broadband competition over the telephone network – to the wrong problem – the ostensible "shortage" of broadband capacity. Instead of concentrating its efforts on the real problem (ILEC efforts to limit xDSL competition and deployment), in order to ensure that consumers can reap the benefits of the widespread competitive efforts that characterized the years 1996-2000, the Commission appears to be operating from a flawed line of reasoning that confuses the lack of broadband demand with a lack of supply.

The Commission seems to have concluded that the ideal configuration of the communications industry in the 21st Century is a limited contest among sector monopolies, at least for the most innovative and advanced services. Such a proposition is not only diametrically contrary to both the letter and the spirit of the Telecommunications Act and this Commission's longstanding precedent, but it would not pass the straight face test in any other sector of our economy. Even in the sometimes skewed context of the "parallel universe" in which telecommunications policy is frequently discussed, it represents a dramatic about face for the Commission to suddenly abandon all efforts to break open the last redoubt of telephone monopoly, and to describe that retreat as a victory for consumers.

The regulatory changes proposed in the Notice would defeat the expectations of entrepreneurs who relied on the Commission's pro-competitive rulings implementing the 1996 Act. These regulatory actions created an environment that encouraged entrepreneurs like Covad to invest in and develop competitive networks and innovative technologies such as DSL, spurring the development of a competitive wireline broadband market. Before the arrival of competition, the ILECs had failed to deploy innovative DSL facilities themselves, and had

fought the efforts of new entrants to fill the void they had left. After competitive entry finally forced the ILECs to provide more than their T-1 service, the ILECs continued to resist efforts by competitors to compete on a fair and equal footing. Against all this ILEC resistance, Covad and other CLECs relied on the Commission's market-opening regulations and continued their efforts to enter the market. Covad undertook a variety of costly actions to simultaneously defend itself in the regulatory arena and deploy its resources to compete. Through all this, Covad designed its business around the Commission's correct understanding and classification of DSL-based transport as telecommunications service, and the related regulatory requirements associated with that classification. Should the Commission alter the ILECs' obligations, Covad's ability to provide broadband service to consumers will be seriously disrupted. The Company's other recourse for vindicating its rights would be antitrust litigation, but during that litigation, Covad's business would suffer as it attempted to replicate the ILEC-supplied facilities that were once available under the Commission's rules. Such results clearly would defeat the statutory purpose to "promote competition in the telecommunications market."

The Commission's tentative conclusion that self-supplied telecommunications provided for wireline broadband Internet access service are not a telecommunications service would deter the development of local competition – the cornerstone of the 1996 Act – and stand the 1996 Act on its head. Before the enactment of the 1996 Act, national policy as seen through the actions of the Commission, the Department of Justice and the courts was moving with increasing speed from a regulated monopoly to a competitive paradigm. While considerable progress had occurred before 1996 in opening segments of the telecommunications services marketplace to competition – most notably, long distance services – the local telecommunications market remained monopolized.

Against this backdrop, Congress enacted the 1996 Act. This legislation was intended generally to promote competition in all telecommunications markets, and specifically to promote the development of local, including advanced services, telecommunications competition. The actions proposed in the Notice are inconsistent with this key purpose of the 1996 Act. If adopted, they would abandon the effort to promote competition in local telecommunications markets, and instead promote a new monopoly or, as the Commission would have it, a duopoly. In addition, the changes proposed in the Notice would reverse important Commission decisions concerning the regulatory status of advanced services. Accordingly, the Commission should recognize that its tentative conclusion and the policies offered to support it are fundamentally inconsistent with the basic policy of the 1996 Act – the promotion of local telecommunications services competition and advanced services – and with Commission decisions implementing that policy.

In any event, the agency cannot side-step the Congressional purpose and justify an attempt by the Commission to ignore its own precedents and rewrite the statute. Rather, as the Commission has recognized, it must adopt as its primary policy goal the objective of the statute: the opening of the local telecommunications services, including advanced services, to competition.

The 1996 Act explicitly contemplates that the Commission will promulgate rules to promote local telecommunications services competition, and that such competition must include advanced services. The Act moreover requires the Commission to promulgate regulations implementing its key provision for promoting local competition. In addition, Section 706 of the 1996 Act requires the Commission to encourage the development of advanced telecommunications capability by promoting "competition in the local telecommunications

market." Thus, under the statute the Commission is to engage in and implement pro-active regulatory intervention and oversight expressly designed to lead to competition in local telecommunications generally, and advanced telecommunications services in particular.

The Commission has consistently undertaken actions to implement this Congressional policy – including, among many others, the *Local Competition Order,* the *UNE Remand Order*, and the *Linesharing Order*. All of these actions embody a Commission policy, consistent with the Act's mandate, of promoting competition *within* the local telecommunications services market. Based on these policies, moreover, the Commission has a settled position that advanced services, including DSL-based transport services, are basic telecommunications services subject to Title II of the Act.

Now, six years after the enactment of the 1996 Act, the Commission is proposing an about-face. In the Notice, the Commission proposes an abrupt policy shift and a departure from its consistent position on advanced services. Suddenly, the Commission's "principles and policy goals" call for developing a regulatory paradigm based largely on inter-modal competition. Nowhere in laying out these "principles" or elsewhere does the Notice recognize the Congressional policy or its own decisions meant to develop competition in local telecommunications and advanced services.

The Notice gives short shrift to these aspects of the 1996 Act. Instead, it focuses on language in the Preamble to the Act that mentions a purpose to "reduce regulation." This focus is misplaced. This generalized statement of purpose cannot justify any decision by the Commission to turn its back on regulation that it has adopted as a matter of strong, consistent policy, and as required by the 1996 Act itself.

The key to the Notice is its tentative conclusion that "the transmission component of retail broadband Internet access services provided over an entity's own facilities is 'telecommunications' and not a 'telecommunications service.'" Whatever its precise meaning, the Commission purports to find statutory support for this tentative conclusion in the formulation that, because a LEC provides an information service "via telecommunications," the telecommunications component of that information service is necessarily not a "telecommunications service." This conclusion could be understood in a limited way, as a regulatory categorization of particular telecommunications facilities when they are offered as part of the information services that the LEC provides. In other words, it could mean that the bundled wireline broadband Internet service, including its telecommunications component, are not to be regulated as "telecommunications service." This interpretation amounts only to what existing precedent seems to dictate.

Other aspects of the Notice, however, indicate that the Commission has something far more sweeping in mind, and that its tentative conclusion would free from Title II regulation all telecommunications capabilities of a type that are used by LECs to provide broadband Internet access. The Notice suggests this by raising the possibility that its tentative conclusion might be broadened to exempt the telecommunications components of information services from Title II regulation whether they are self-supplied or not. The Commission also asks whether ILECs should continue to face any obligations under Section 251 to unbundle communications facilities that they use to provide broadband Internet access, a step that could only be taken if the Commission was proposing the deregulation of all telecommunications of the kind used for broadband Internet access. Indeed, the implications of this tentative conclusion are far broader than simple unbundling, extending to numerous statutory provisions that pertain specifically to

"telecommunications services," as that term has always been understood, including at the time of enactment. These provisions include the obligations to interconnect, collocate, protect consumer CPNI, contribute to universal service, permit access by persons with disabilities as well as rules against slamming and promoting rural rate averaging. If the Commission somehow declares DSL-based services to be information services, the Commission would have to reconcile that determination with its longstanding implementation of each of these statutory requirements.

Perhaps the most telling evidence that section 251 obligations apply to DSL-based transport services, is this Commission's staunch and – until now – consistent insistence that this is the case. In every order issued before this year regarding DSL-based transport services the Commission reached the same, unwavering, if more refined conclusion. To be sure, the incumbent providers have pursued every avenue to reach the conclusions that the Commission now proposes. And, at every turn – until now – they have met with resounding rejection by the Commission and frequently the courts.

Precedent compels the conclusion that a carrier cannot escape Title II obligations otherwise applicable to transmission capabilities used for broadband Internet access by self-supplying those capabilities for use in its broadband Internet access service. Congress effectively adopted the relevant aspects of that precedent, moreover, in the 1996 Act. As the Commission itself recognizes, the distinctions between "basic" and "enhanced" services under its pre-1996 precedents were carried over into the 1996 Act.

The Notice suggests an even more erroneous extension of its tentative conclusion, to include any transmission capability provided to a broadband Internet service provider. This far-reaching "suggestion" would further undo a settled understanding of the regulatory status of telecommunications services used for broadband Internet access. Exploration of this question,

moreover, goes well beyond the narrow issue that the Commission claims was left open in its 1998 Report to Congress. The Notice proposes a variety of questions that are said to bear on this radical proposition, but in the end they all come down to the notion that the provision of DSL transmission could be treated as "private carriage." The Commission asks whether ISPs should be deemed "the public" under the definition of "telecommunications service," but the law is clear that "the public" for this purpose means the class of users at which the service in question is directed. Clearly, ISPs, as a class of customers to whom DSL transport services are targeted, therefore constitute "the public" for these purposes, and the telecommunications transport constitutes a telecommunications service. Therefore, these services fall within the group of common carrier services encompassed by Title II.

No sustainable analysis can change the Act's requirements that ILECs must unbundle loops and linesharing to facilities-based DSL competitors. The Congressional intent is clear. ILECs fall within the statutory definition of those entities required to unbundle their networks. Loops and linesharing fall within the statutory definition of network elements that must be unbundled. And CLECs, including Covad, fall within the statutory parameters of those entitled to obtain and use those network elements to provide competing services. These fundamental conclusions have been the basis under which carriers, ILECs and CLECs have operated since 1996. Nothing has changed to warrant their reversal.

The right of facilities-based CLECs to use unbundled loops and linesharing to provide the telecommunications services of their choosing, including services using DSL technologies, is clearly mandated by Act and cannot be "interpreted away". When carriers, such as Covad, deploy DSL-based technologies, those transport capabilities constitute "telecommunications". When carriers, such as Covad, provide this telecommunications capability to ISPs or to end

users, they are providing a telecommunications service. Even ILECs have agreed that advanced services constitute telecommunications services. This conclusion does not vary if a CLEC is providing DSL-based telecommunications services to an affiliated ISP, or an ILEC is providing such services to an affiliated ISP. Accordingly, CLECs are "requesting carriers" under section 251(c)(3), using loops or the high frequency portion of the loop to provide "telecommunications *service*." There can be no justification for exempting CLECs' access to interconnection, collocation and unbundled elements under the clear language of the statute. Therefore, the Commission should reject the tentative conclusions in the Notice that seek to exempt basic telecommunications services from Title II regulation and clarify that the requirements of the 1996 Act apply with full force to ILECs providing advanced telecommunications services.

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COMMENTS OF COVAD COMMUNICATIONS COMPANY

Covad Communications Company ("Covad") submits these comments in response to the Commission's Notice of Proposed Rulemaking, FCC 02-42 (rel. Feb. 15, 2002) ("Notice") in the above-captioned proceedings. Covad is the leading national provider of high-speed telecommunications services utilizing Digital Subscriber Line (DSL) technology. Covad offers DSL, T-1, managed security, IP and dial-up services both directly, and via its wholesale channel to Internet service providers, value-added resellers, telecommunications carriers and affinity groups to small and medium-sized businesses and home users.[1] DSL is a broadband telecommunications service that offers consumers and small/medium sized businesses high-speed connectivity over unbundled loops and linesharing with data speeds that are at least twenty times faster than conventional dial-up modems. Covad purchases its own DSL transmission equipment and deploys it in ILEC central offices across the country, connecting to the end user

via unbundled loops, linesharing and unbundled interoffice transport. Thus, Covad is a facilities-based carrier. As Chairman Michael Powell has said, "facilities [-based] providers are the key to robust competition." [2]

CLECs' DSL-based services were built on a foundation that includes a long line of Commission decisions. Many of these decisions explicitly state or rely on the principle that DSL-based advanced services are telecommunications services:

- *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, CC Docket No. 96-98, First Report and Order (rel. August 8, 1996).
- *Deployment of Wireline Services Offering Advanced Telecommunications Capability*, CC Docket No. 98-147, Memorandum Opinion and Order and Notice of Proposed Rulemaking, 13 FCC Rcd 24012, 24029 (rel. August 7, 1998).
- *GTE Telephone Operating Cos., GTOC Tariff No. 1, GTOC Transmittal No. 1148*, Memorandum Opinion and Order, CC Docket No. 98-79, FCC 98-292 (rel. October 30, 1998).
- *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, CC Docket No. 96-98, Third Report and Order (rel. November 5, 1999).
- *Deployment of Wireline Services Offering Advanced Telecommunications Capability*, CC Docket No. 98-147, Second Report and Order (rel. November 9, 1999).
- *Deployment of Wireline Services Offering Advanced Telecommunications Capability*, CC Docket No. 98-147, Third Report and Order (rel. December 9, 1999).
- *Application by Bell Atlantic New York for Authorization Under Section 271 of the Communications Act to Provide In-Region, InterLATA Service in the State of New York*, CC Docket No. 99-295, Memorandum Opinion and Order, FCC 99-404 (rel. December 22, 1999).

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[1] Covad services are currently available across the United States in 94 of the top Metropolitan Statistical Areas ("MSAs"). Covad's network currently covers more than 40 million homes and business and reaches nearly 45 percent of all homes and businesses in the United States.

[2] Speech of Chairman Michael K. Powell at ALTS Conference, Crystal City, VA, November 30, 2001. http://www.fcc.gov/Speeches/Powell/2001/spmkp111.html.

- *Deployment of Wireline Services Offering Advanced Telecommunications Capability*, CC Docket No. 98-147, Order on Remand (rel. December 23, 1999).

- *Application by SBC Communications Inc., Southwestern Bell Telephone Company, 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 Texas*, CC Docket No. 00-65, Memorandum Opinion and Order (rel. June 30, 2000).

- *Deployment of Wireline Services Offering Advanced Telecommunications Capability and Implementation of the Local Competition Provisions of the Telecommunications Act of 1996*, CC Docket Nos. 98-147 and 96-98, Third Report and Order on Reconsideration in CC Docket No. 98-147, Fourth Report and Order on Reconsideration in CC Docket No. 96-98, Third Further Notice of Proposed Rulemaking in CC Docket No. 98-147, Sixth Further Notice of Proposed Rulemaking in CC Docket No. 96-98, FCC 01-26 (rel. Jan. 19, 2001).

- *Application of Verizon New England, Inc. Bell Atlantic Communications, Inc. (d/b/a Verizon Long Distance)NYNEX Long Distance Company (d/b/a Verizon Enterprise Solutions) And Verizon Global Networks Inc. for Authorization Under Section 271 of the Communications Act to Provide In-Region, InterLATA Service in Massachusetts,* CC Docket No. 01-9, Memorandum Opinion and Order, FCC 01-130 (rel. April 16, 2001).

- *Joint Application by SBC Communications Inc., Southwestern Bell Telephone Company, 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,* CC Docket No. 01-194, Memorandum Opinion and Order, 16 FCC Rcd 20719, 20759-60, (rel. August 20, 2001).

- *Joint Application by SBC Communications Inc., Southwestern Bell Telephone Company, and Southwestern Bell Communications Services, Inc. d/b/a Southwestern Bell Long Distance for Provision of In-Region, InterLATA Services in Kansas and Oklahoma*, CC Docket No. 00-217, Memorandum Opinion and Order (rel. January 22, 2001).

- *Application of Verizon New England, Inc. Bell Atlantic Communications, Inc. (d/b/a Verizon Long Distance)NYNEX Long Distance Company (d/b/a Verizon Enterprise Solutions) And Verizon Global Networks Inc. for Authorization to Provide In-Region, InterLATA Service in Vermont,* CC Docket No. 02-7, Memorandum Opinion and Order (rel. April 17, 2002).

- *Application of Verizon New England, Inc. Bell Atlantic Communications, Inc. (d/b/a Verizon Long Distance)NYNEX Long Distance Company (d/b/a Verizon Enterprise Solutions) And Verizon Global Networks Inc. for Authorization to Provide In-Region,*

InterLATA Service in Rhode Island, CC Docket No. 01-324, Memorandum Opinion and Order (rel. February 22, 2002).

- *Application of Verizon New England, Inc. Bell Atlantic Communications, Inc. (d/b/a Verizon Long Distance)NYNEX Long Distance Company (d/b/a Verizon Enterprise Solutions) And Verizon Global Networks Inc. for Authorization to Provide In-Region, InterLATA Service in Pennsylvania,* CC Docket No. 01-138, Memorandum Opinion and Order (rel. September 19, 2001).

- *Policy and Rules Concerning the Interstate, Interexchange Marketplace Implementation of Section 254(g) of the Communications Act of 1934, as amended 1998 Biennial Regulatory Review -- Review of Customer Premises Equipment And Enhanced Services Unbundling Rules In the Interexchange, Exchange Access And Local Exchange Markets,* CC Docket Nos. 96-61, 98-183, Report and Order (rel. March 30, 2001).

- *Application Of The Chesapeake And Potomac Telephone Company Of Virginia For Authority Pursuant To Section 214 Of The Communications Act Of 1934, As Amended, To Construct, Operate, Own, And Maintain, Facilities And Equipment To Test A New Technology For Use In Providing Video Dialtone Within A Geographically Defined Trial Area In Northern Virginia,* FCC 93-160 (rel.March 25, 1993).

- *Application Of New Jersey Bell Telephone Company For Authority pursuant to Section 214 of the Communications Act of 1934, as amended, to construct, operate, own, and maintain advanced fiber optic facilities and equipment to provide video dialtone service within a geographically defined area in Dover Township, Ocean County, New Jersey,* FCC 94-180 (released: July 18 1994).

- *C & P Tel. of Virginia, 8 FCC Rcd 2313 (1993); New York Telephone, 8 FCC Rcd 4325 (1993); Southern New England Telephone, 9 FCC Rcd 1019 (1993); US West Communications, Inc, 9 FCC Rcd 184 (1993); and Rochester Telephone Company, 9 FCC Rcd 2285 (1994).*

The above decisions build on Commission decisions before the passage of the 1996 Act that explicitly state or rely on the principle that the provision of unregulated enhanced services does not transform an underlying basic service into an unregulated service:

- *Amendment of Section 64.702 of the Commission's Rules and Regulations,* CC Docket No. 20828, Final Decision, 77 FCC2d 384 (1980) ("*Computer II*"), *recon.*, 84 FCC2d 50 (1980), *further recon.*, 88 FCC2d 512 (1981), *aff'd sub nom., Computer and Communications Indus. Ass'n v. FCC,* 693 F.2d 198 (D.C. Cir. 1982), *cert. Denied,* 461 U.S. 938 (1983).

- *Amendment of the Commission's Rules and Regulations*, 104 FCC 2d 958, CC Docket No. 85-229, Report and Order (1986), *recon.*, 2 FCC Rcd 3035 (1987), *further recon.*, 3 FCC Rcd 1136 (1988), *second further recon.*, 4 FCC Rcd 5927 (1989), *vacated, California v. FCC*, 905 F.2d 1217 (9th Cir. 1990), *Phase II*, 2 FCC Rcd 3072 (1987), *recon.*, 3 FCC Rcd 1150 (1988), *further recon.*, 4 FCC Rcd 5927 (1989), *vacated*, 905 F.2d 1217 (9th Cir. 1990); *Computer III Remand Proceedings*, 5 FCC Rcd 7719 (1990), *recon.*, 7 FCC Rcd 909 (1992), *pets. for review denied, California v. FCC*, 4 F.3d 1505 (9th Cir. 1993); *Computer III Remand Proceedings; Bell Operating Company Safeguards and Tier I Local Exchange Company Safeguards*, 6 FCC Rcd 7571 (1991), *recon. dismissed in part*, Order, CC Docket Nos. 90-623 and 92-256, 11 FCC Rcd 12513 (1996); *vacated in part and remanded, California v. FCC*, 39 F.3d 919 (9th Cir. 1994), *cert. denied*, 115 S.Ct. 1427 (1995); *Computer III Further Remand*, 13 FCC Rcd 6040, Report and Order, 14 FCC Rcd 4289, *recon.*, 14 FCC Rcd 21628 (1999).
- *Filing and Review of Open Network Architecture Plans*, Memorandum Opinion and Order 4 FCC Rcd 2449 (1988).
- *AT&T OEI Plan for Protocol Conversion and Storage Services with Packet Switching Services*, Memorandum Opinion and Order, 5 FCC Rcd 651 (1990).
- *Competition in the Interstate Interexchange Marketplace, Memorandum Opinion and Order on Recon.*, 6 FCC Rcd 5880 (1991).
- *Competition in the Interstate Interexchange Marketplace, Memorandum Opinion and Order on Recon.*, CC Docket No. 90-132 (rel. Feb. 17, 1995).
- *Independent Data Communications Manufacturers Assn.'s Petition for a Declaratory Ruling That AT&T's Interspan Frame Relay Service is a Basic Service*, Memorandum Opinion and Order, 10 FCC Rcd 13717 (rel. October 18, 1995).

To arrive at the various conclusions that the Commission proposes or suggests in this proceeding, it must abandon each and every one of these precedents, and provide a reasoned explanation for that radical policy reversal.

I. THE FCC'S BROADBAND NOTICE IS A RADICAL SOLUTION IN SEARCH OF THE WRONG PROBLEM

In its Notice of Proposed Rulemaking, the Commission proposes a radical solution – the potential elimination of broadband competition over the telephone network – to the wrong

problem – the ostensible "shortage" of broadband capacity.[3] The problem that has plagued the broadband industry since the earliest days of the 1996 Telecommunications Act is the enormous, and highly-successful, effort by the ILECs, individually and collectively, to retard the deployment of this classically "disruptive technology." The ILECs, motivated by their desire to avoid undercutting the high prices and price discrimination they have imposed for decades on the broadband market, avoided rolling out DSL service themselves, and have done everything they can to prevent competitors like Covad from rolling out their own higher quality and greater variety of competitive xDSL services. They have similarly worked hard over the past several years to create and reinforce marketing messages that operate to artificially depress demand for the service: that xDSL is very difficult to provision, that xDSL is sharply limited in its physical reach, that xDSL is only available as a highly-asymmetric service with relatively slow upstream speeds, that xDSL is a "consumer grade", lower quality, service, on which it is not possible to guarantee speed, latency, availability, or any other service parameter on which a serious user would depend.

Instead of concentrating its efforts on this real problem (ILEC efforts to limit xDSL competition and deployment) in order to ensure that consumers can reap the benefits of the

[3] In this sense, the Commission's overly broad inquiry in this proceeding is as unnecessary as its wide-sweeping examination of the market dominance of the incumbent phone companies in its *Review of Regulatory Requirements for Incumbent LEC Broadband Telecommunications Services*, CC Docket No. 01-337. In this earlier rulemaking, the Commission has undertaken a broad examination of market definitions with the ostensible goal of determining whether dominant carrier retail regulation of Bell company DSL services is necessary. Because the Commission has sufficient forbearance authority to grant the Bell companies the tariffing relief they seek in that proceeding, there is no reason for the Commission to undertake a complex market analysis. *See* Comments of Covad Communications Company, CC Docket No. 01-337. Of course, if the Commission adopts the tentative conclusion in the instant rulemaking that incumbent LEC broadband services are information services, one is left to wonder why the Commission bothered to open a separate rulemaking proceeding into the proper regulatory treatment of those same services -- which the Commission a few weeks earlier did not hesitate to classify as "incumbent LEC broadband telecommunications services."

widespread competitive efforts that characterized the years 1996-2000, the Commission appears to be operating from a line of reasoning roughly like this:

> *There is a "problem" in broadband today. The problem is that "too few" people subscribe to broadband services. Too few people subscribe to broadband services because those services are not available to enough people. Broadband services are not yet available to enough people because the incumbent telephone companies are subject to regulatory rules under the Telecommunications Act of 1996 that require the incumbents to make network functions and facilities available to non-affiliated companies to allow them to compete with the incumbents. If those regulatory requirements were removed, the incumbents would rush to make broadband available in places they otherwise would not make it available.*

The Commission's incorrect conclusions flow naturally, and erroneously, from its several false premises.

First, the Commission apparently confuses how many people have actually signed up for broadband service (the take rate) with how many people *could* have signed up for broadband service (the availability rate). Ironically, Chairman Powell himself has warned against exactly this error. [4] By most measures, as discussed below, roughly seven times as many people *could* now be broadband subscribers as in fact *are* broadband subscribers. That numerical relationship alone would tend to indicate that the number of current subscribers, or the percentage of the population that currently subscribes, is limited by depressed demand, not by a supply shortage.

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[4] Remarks of Chairman Michael K. Powell, at the National Summit on Broadband Deployment, Washington, DC, (Oct. 25, 2001). http://www.fcc.gov/Speeches/Powell/2001/spmkp110.html:

> As I have said, we all want some broadband. There also is some angst that it is not here, or that it is not coming fast enough. There is a feeling of disappointment and anxiety. Yet, before we argue for particular actions, especially government actions, we should have some common understanding of what to measure.
>
> I believe that the key measure is availability of the service, not adoption rates. I emphasize availability, because there are many questions that remain as to what services consumers will value, and to what degree they will be willing to subscribe. I am hesitant to let adoption rates drive government responses, for a developing market needs the cues provided by consumer free choice.

If greater demand existed and the problem were a supply constraint, presumably the take rate would approach the availability rate. This is not to say that broadband is already ubiquitously available, but rather that even where it is available, as it is to roughly 85% of the population,[5] nearly 6 out of 7 potential customers decline to take the service. [6] The Commission's understanding of these figures as a "supply" problem may be due to its perspective as a government agency, rather than as a private enterprise. No CEO of a private enterprise, observing that only 1 in 7 of her potential customers is buying the product, would conclude that the solution is to produce more of it.

Second, the premise that broadband is not widely available is belied by virtually every government study on the subject. The Commission itself, in fulfilling its statutory duty under Section 706 of the Act to report to Congress on the availability of "advanced telecommunications services" – which the Commission and every other observer has always understood to mean broadband services – recently reported that broadband service, that is, either cable modem service or ADSL/SDSL/IDSL service ("consumer and small business DSL service"), was available to approximately 85% of the population.[7] That is, according to the Commission's own

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[5] In fact, full T-1 service, at 1.544 Mbps is available, and has been available since the early 1990s, virtually ubiquitously (close to 100% of end users) in the nation from the ILECs using HDSL technology, over 4 wire copper loops. This service is available using HDSL repeaters, regardless of the end user's distance from the central office. The fact that the ILECs have chosen not to price, market and sell this service to residential consumers, small businesses or to work-at-home customers is simply a marketing choice and a faulty business decision on the part of the ILECs. Covad is now offering this unserved market segment access to T-1 services, using unbundled, two-twisted copper pair loops and is offering full T-1 service, along with ISP services, for a fraction of the price of BOC T-1 services.. The Bell company competitive response has been to petition the Commission to remove so-called "high capacity" loops from the list of UNEs so as to ensure that, once again, no consumer can access T-1s for less than the monopoly price that Bell companies choose to exact.

[6] Remarks of Chairman Michael K. Powell, at the National Summit on Broadband Deployment, Washington, DC, October 25, 2001. http://www.fcc.gov/Speeches/Powell/2001/spmkp110.html.

[7] Report to Congress Pursuant to Section 706, FCC 02-33, ¶ 28 (rel. Feb. 6, 2002); *see also Inquiry Concerning High-Speed Access to the Internet over cable and Other Facilities,* GN Docket No. 00-185, CS Docket No. 02-52, FCC 02-77, Declaratory Ruling and Notice of Proposed Rulemaking, at ¶ 9 (Mar. 15, 2002)

study, 85% of the nation's population could subscribe to broadband service [8] if they wanted to subscribe. Yet only 12% of the nation's population does subscribe to those services. [9] Since it cannot be doubted that the 12% that does subscribe falls within the 85% that could subscribe, it seems obvious that the other 6 out of 7 potential subscribers do not want to subscribe. That may be a "problem" – and it no doubt is for those of us who provide the service to the public – but it is not a problem of too little capacity; it is a problem of too little demand. And if it is a problem appropriately to be addressed by government intervention at all, it would seem that the most useful intervention would be intervention that drives up demand, not supply. This same observation was made by Chairman Powell little more than six months ago, in a speech at the National Summit on Broadband Deployment:

> By some measures, we have fairly wide deployment of broadband service. According to J.P. Morgan, 73% of households have cable modem service available, and 45% of households have access to DSL. Combined, broadband availability is estimated to be this year almost 85%. The intriguing statistic is that though this many households have availability, only 12% of these households have chosen to subscribe.
>
> There are many possible reasons for this demand gap. Consumers may not yet value the services at the prices they are being offered. That is, the prices may be too high, in the minds of consumers, for the value they get. This highlights the classic chicken and egg dilemma. Broadband applications that consumers value are not yet offered to justify broadband service, yet the lack of broadband subscribers inhibits subscription — similar problems exits in many network industries. . . . Broadband hungry applications are still trying to make their debut. . . .
>
> There are many things, other than availability, that can and should be measured.[10]

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[8] The 80% figure was correct at the time of the report. It is undoubtedly higher today.

[9] Remarks of Chairman Michael K. Powell, at the National Summit on Broadband Deployment, Washington, DC (Oct. 25, 2001), http://www.fcc.gov/Speeches/Powell/2001/spmkp110.html.

[10] *Id.*

Third, the Commission is apparently troubled that there are not more broadband subscribers. Once again, we in the industry would also prefer that there were more customers. But we in the industry, and most external observers, recognize that both the 85% availability figure (which is understated because it excludes full T-1 services which are almost ubiquitously available) and the 12% uptake figure are extraordinarily high in the context of the rollout of new technology and new technology-based services. Consumer and small business DSL services were not commercially available until the 1997-1998 timeframe and were initially available in only a limited number of exchanges. Cable modem service did not become widely available until about the same time frame. Thus, in only three to four years from "launch" broadband service has become available to 85% of the population, and 12% have subscribed. [11] Contrary to the tenor of the FCC's notice, that means that broadband's penetration rate currently equals or exceeds that of all services the Commission has previously identified as comparable.[12]

The economic history consistently shows that new technologies, with rare exception, demonstrate slow adoption rates in the first several years, until a critical adoption mass is reached, after which the adoption rate – and total uptake – increase dramatically. This has been described as a "hockey stick" adoption curve, the term deriving from graphing uptake over time, with the years of slow adoption resembling the blade of a hockey stick and the years of rapid adoption the shank. These deployment and subscription statistics are even more meaningful

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[11] *Id.*

[12] In the *1999 Advanced Services Report*, the Commission identified telephone service (which took 30 years from initial commercial availability to exceed 10% penetration), black-and-white television (six years to exceed 10% penetration), color television (14 years) and cellular service (10 years), as comparable services to residential broadband. *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*, Report, CC Docket 98-146, FCC No. 99-5 (rel. Feb. 2, 1999) ("*1999 Advanced Services Report*") ¶¶ 32-34, Chart 1.

against the backdrop in which they developed, namely the ILECs' efforts to retard broadband deployment, particularly by their direct competitors like Covad. The ILECs' assiduous efforts at creating barriers to competitive success, and the ILECs' success in creating the perception that xDSL is an inferior service – that it is difficult to deploy, is not capable of significant upstream rates, is inferior to T1 service, cannot provide quality guarantees on parameters such as speed, latency, and uptime – have all contributed to an artificial depression of demand for the service, as well as an artificial depression of the pace of deployment.

Fourth, the Commission appears to believe, at least implicitly, both (a) that the ILECs are not deploying broadband services because of the requirement that the ILECs comply with the obligations of the Telecommunications Act, and (b) that if the so-called regulatory "constraints" were removed, the ILECs would deploy broadband more rapidly. Both these premises, like all bad dreams, disappear entirely when exposed to the daylight of actual history.

As Covad and others pointed out several years ago – when the Commission first visited these issues while considering cross-petitions for intervention under Section 706 of the Telecommunications Act – in the earliest months after the Act was passed, three start-up companies began to build and sell consumer and small business DSL services on a nationwide basis as facilities-based carriers, and dozens of others were formed to do the same in more regional markets. At the time – 1996 and 1997 – no ILEC had announced any plans to offer DSL service. Indeed, most ILECs were still insisting (as they did to the Commission in their Section 706 filings) either that it would be dangerous to roll out consumer and small business DSL services in the telephone network, or that they needed considerably more "study" to

determine whether it would be safe to roll out DSL.[13] The ILECs (or their prior corporate parents) possessed DSL technology more than a decade before the Telecommunications Act was passed, yet they never rolled out the service to the public during that decade, when they faced no "regulatory constraints." Indeed, even in the face of expanding rollout of cable modem service, the ILECs did *not* respond by deploying consumer or small business DSL services.[14]

The history demonstrates that the ILECs rolled out ADSL service *only* when they faced direct competition, that is, companies like Covad rolling out the service over the telephone networks. The ILECs thereafter continued to expand the number of central offices in which the service was available as their competitors expanded into additional offices. Moreover, ILECs have met with great success in their ADSL deployment, expanding from zero to over four million customers in just three short years.[15] To conclude, as the FCC apparently has, that the ILECs will roll out service more rapidly if they were freed of wireline competition, is simply to

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[13] *See 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*, CC Docket No. 98-146, Comments of Ameritech (filed Sep. 14, 1998) at 7, nn. 9-10, claiming that xDSL will not work on 20% of its loops today and may never work on 20% of them. *See also 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*, CC Docket No. 98-146, Comments of Bell Atlantic (filed Sep. 14, 1998)at 12, claiming that "removal [of bridge taps and load coils] can create serious problems with the quality local loops if not undertaken carefully and sparingly."

[14] "The incumbents' decision finally to offer DSL service followed closely the emergence of competitive pressure from cable television networks delivering similar high-speed services, and the entry of new direct competitors attempting to use the local-competition provisions of the Telecommunications Act of 1996 to provide DSL over the incumbents' facilities." Economic Report of the President Transmitted to the Congress Together with the Annual Report of the Council of Economic Advisors , U.S. Govt. Printing Office, February 1999, at 187-88. (*"CEA Report")*

[15] *See, e.g.,* Verizon's press releases dated January 31, 2002 and April 23, 2002, proclaiming that it now serves 1.35 million DSL access lines, a year-to-year increase of 88%. *See also* BellSouth's press releases issued January 3, 2002 and April 19, 2002, claiming a 141 percent growth rate for DSL service in the most recent twelve-month period.

ignore the reality that the ILECs rolled out ADSL service not at all *until* they faced wireline competition, and at a pace designed to match or beat their competitors. [16]

A. The Commission's Apparent Goal of Speeding Broadband Deployment By Limiting Broadband Competition Is Contrary to the Public Interest

The Commission seems to have concluded that the ideal configuration of the communications industry in the 21st Century is a limited contest among sector monopolies, at least for the most innovative and advanced services. Thus, the Commission apparently believes it is acceptable for wireline services to be re-monopolized by the incumbents because their monopoly will compete with the cable monopolists. Aside from being diametrically contrary to both the letter and the spirit of the Telecommunications Act (as discussed in greater detail below), such a proposition would not pass the straight face test in any other sector of our economy. Even in the sometimes skewed "parallel universe" in which telecommunications policy is frequently discussed, it represents a dramatic about face for the Commission to suddenly abandon all efforts to break open the last redoubt of telephone monopoly, and to describe that retreat as a victory for consumers.

In pursuing this "dueling monopolies" policy, the Commission appears to have forgotten that monopoly is not in the public interest. While there is lively and intelligent debate about antitrust policy, none seriously doubt, even today, that monopolies harm consumer welfare, in numerous ways. Monopoly stifles innovation, particularly the disruptive innovation[17] that most advances consumer welfare, for the precise reason that consumer welfare is enhanced only at the

[16] Fortunately for their business plans, the ILECs were in the position to, and did, slow-roll their competitors' rollouts. The ILECs controlled the availability of central office ("CO") space for the CLECs, and also controlled the pace of building and provisioning for the CLECs in those COs. As a result, the ILEC was able to deploy "first" in a CO even where a CLEC had announced first, and sometimes by many, many months, that it would deploy in that CO.

expense of the monopoly. Thus, monopolists innovate to lower their costs; but absent the sharp spur of competition forcing the innovator to pass those benefits to the consumer, the result is not an increase in consumer welfare, but only an increase in monopoly profits. So, for example, the ILECs have long (at least since the early 1990s) used DSL to provision T1 service[18] but maintained T1 service prices at several multiples of the prices that would have been dictated by a competitive market.

The ILECs, classically executing from the monopolist playbook, have for a century respected their mutual non-aggression pact, studiously avoiding competing with each other. The sanctity of that strategy is illustrated by two recent examples. During the Government's review of the NYNEX-Bell Atlantic merger, the chief executives of both companies stated that they had no intention to compete with each other, and in fact had never considered it. Some critics have observed that, if this is true, such a failure to consider expanding a business into a target- and revenue-rich adjacent market might move a Board to fire a CEO or move shareholders to file suit. Similarly, despite its "promise" to the Commission in voluntary undertakings during the Commission's review of the SBC-Ameritech merger, SBC has obviously decided that it is more important to honor the mutual non-aggression pact than it is to honor its commitments to the Commission. SBC obviously regards the mutual non-aggression pact with its fellow monopolists as being in its economic interest, while it obviously regards honoring its commitment to the Commission as contrary to its economic interest.[19]

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[17] JOSEPH A. SCHUMPETER, THE THEORY OF ECONOMIC DEVELOPMENT (Oxford Univ. Press 1963) at 83.

[18] T1 is offered as 4-wire HDSL, with each of the two pair carrying 768 kbps symmetrical service, for a total of 1536 kbps or 1.5 Mbps in round numbers.

[19] SBC's out-of-region 5E switches stand as generally idle monuments to the ILECs' cowardly failure to compete with each other – and are but one example of the typical corporate waste that stems from a monopoly's access to virtually guaranteed cash-flows from captive ratepayers.

The Commission's "dueling monopolies" policy appears premised on the belief that a duopoly is appropriately described as a competitive market. It would be difficult to locate an antitrust professional, whether lawyer or economist, who would support the proposition that reducing the number of players in a market from several to two is a good idea. While there may be room for lively discussion about market structure and competitiveness (*e.g.*, in the merger context whether a "5 to 4" merger should be challenged), no one would argue (at least not in the privacy of her own mind) that a "10 to 1" or a "5 to 1" or even a "5 to 2" market restructuring should be forced by the government for the purpose of enhancing consumer welfare. And the Commission seems to at least overlook many of the reasons that a more competitive market structure enhances consumer welfare:

Competition provides consumers with more innovation, and more rapid innovation. In a competitive market innovation is not an option, it is a necessity. Entrants innovate in order to take market share from incumbents. Incumbents innovate in response to win back market share. The cycle continues, and the consumers benefit.

Competition drives down price. One company innovates to lower its cost of production, allowing it to lower prices (or, put alternatively, to offer a better ratio of features/quality to price, and thus a lower quality adjusted price). Other companies in the market must respond with lower prices (or increased features/quality), and *then* figure out how to lower their costs to allow them to provide the service profitably at the new market-determined price. The cycle continues, and the consumers benefit.

Competition drives the incumbents to roll out services that they would otherwise ignore, and to do so more aggressively. The entrepreneurs – not the incumbents – created the consumer and small business DSL industry, despite the ILECs' lead of more than a decade in having access

to the technology. This pattern was entirely predictable, because incumbent monopolists shun disruptive innovation, exactly because it disrupts their existing profit-maximizing array of products, services and prices. Only when faced with this competition within the loop plant did the ILECs respond by rolling out moderately priced ADSL service. Indeed this DSL competition was among the most aggressive and threatening of the new forms of competition that emerged in the early years after the passage of the 1996 Act. The ILECs responded to DSL competition as they had not responded to cable modem service because they had to meet the direct competition they faced from Covad and others.[20]

Competition provides consumers with significantly increased variety and therefore choice. ILECs offer "one size fits all" ADSL service as the only choice. And, at least for the first several years, they offered a significantly underwhelming form of ADSL, with severely limited upstream speeds.[21] This "one size fits all" offering is entirely consistent with monopolists' general view that they, not the customers, decide what services should be offered. And of course it is also consistent with monopolists' desire to avoid disruptive innovation: while they were forced to roll out DSL, the ILECs carefully positioned it to be as unthreatening as possible to the service array and price discrimination they had chosen in maximizing their monopoly profits.

By contrast, the entrepreneurs offered the full range of DSL technologies – ADSL, SDSL, HDSL, IDSL – at the full range of speeds of which the technology was capable. This greater range not only gave all DSL customers greater choice, but also it enabled the

[20] They responded with a dizzying array of anticompetitive activities available to them from their pre-existing monopoly.

entrepreneurs to offer DSL service to customer segments the ILECs refused to serve, either because ADSL could not serve the customers' loop lengths, or because ADSL did not serve the customers' needs. This "to each its own" approach was entirely consistent with the entrepreneurs' view that the customers would determine the "right" mix of services and features. This approach no doubt is a reason that current industry service quality reports conclude that Covad and Covad resellers are four of the top five retailers of DSL service.[22]

Competition also provides consumers with a superior array of product/service features. The entrepreneurs offered Quality of Service guarantees and Service Level Agreements covering such service parameters as network availability, latency, speed, and throughput. By contrast, ILEC DSL service is best described as "you'll get what you get." The fine print on the ILEC websites and in their service contracts says it all: no guarantee of speed – except that customers are likely to always get less than the advertised speed – no guarantee of service availability, no guarantee of network uptime, no guarantee of latency.[23] The ILEC service as the only choice would leave the consumer stuck with "one size fits all" that more closely resembles "one size fits none."

Competition also provides consumers with significant differentiation across all parameters of service. For example, a properly-configured DSL network offers a significantly better user experience than does cable modem service, because DSL dedicates bandwidth to each

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[21] *See, e.g.*, "Bell Atlantic DSL Stumbles," Boston Globe, August 19, 1999 at D4: "To avoid cannibalizing its own data services, however, Bell Atlantic has put an interesting restriction on the connection. Although download speeds can allegedly go as fast as 640 kbps, the upload rate is limited to 90 kbps."

[22] www.dslreports.com (visited Apr. 20, 2002).

[23] *See, e.g.*, http://www.verizon.net/pands/dsl (visited May 1, 2002): "Verizon Online cannot guarantee uninterrupted or error-free service, or the speed of your service. *See also* http://www.fastaccess.com/consumer/blsc_terms_conditions.jsp (visited May 1, 2002): "BellSouth FastAccess Internet Service is a best efforts service....The actual speed experienced by customers may vary....No minimum level of speed is guaranteed."

end user up to the provider's electronics (generally at the CO), while cable modem architecture typically imposes bandwidth sharing much closer to the end user. Even among DSL providers, the entrepreneurs typically build their networks for "carrier grade" service, with a low "oversubscription" rate (*i.e.*, a low ratio of end user bandwidth to network bandwidth), while the ILEC networks are designed with a very high oversubscription rate. This difference in fundamental network architecture accounts for much of the reason that the entrepreneurs can offer Service Level Agreements and Quality of Service guarantees, while the ILECs cannot.

II. THE NOTICE'S PROPOSED REVERSAL THREATENS TO UNDERMINE THE VERY COMPETITION THAT THE 1996 ACT INTENDED TO FOSTER AND STALL FUTURE BROADBAND DEPLOYMENT

The Commission's longstanding regulatory construct includes DSL-based transport in the definition of telecommunications service, thereby creating the opportunity for competitors to launch broadband over DSL – a technology that had existed at least a decade but had not been made available to consumers or small businesses. It was entrepreneurs, not ILECs, that first brought wireline broadband services to consumers and small businesses. These entrepreneurs did so once the Commission, over fierce ILEC objections, adopted its local competition rules—requiring ILECs to provide competitors with access to network elements, including xDSL capable loops, OSS, collocation and transport—and its advanced services rules that appropriately classified wireline broadband services as telecommunications services. Competitors have based their business strategy on the Commission's regulatory rubric classifying wireline broadband as a telecommunications service. Were the Commission to reverse its classification of these services, it could seriously undermine the few remaining competitors' ability to provide a competitive