III. THE COMMISSION'S NOTICE SEEKS AN UNACCEPTABLE DEPARTURE FROM ESTABLISHED LAW AND POLICY

The Commission's tentative conclusion that self-supplied telecommunications provided for wireline broadband Internet access service are not a telecommunications service[59] 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.[60]

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

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[59] Notice ¶¶ 16-17, 24-25, 27.

[60] *Infra* Section III.A.2.a.

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.

A. Development of Telecommunications Services Competition Is A Core Principle of National Telecommunications Policy And The 1996 Act

1. Telecommunications Policy Before the 1996 Act

Prior to the 1996 Act, the Commission, the Department of Justice (through parallel antitrust efforts) and the courts had gradually been moving from a policy of regulated monopoly and toward a policy of competition.

First, the D.C. Circuit, in its 1956 *Hush-A-Phone* decision, overturned an FCC decision that (1) would not allow a plastic, non-electronic device to be placed on the mouth-piece of a phone, but (2) instead agreed with AT&T that it was entitled to complete control of all aspects of the telephone network, including any attachments thereto.[61] The Commission began expanding on this pro-competitive approach in the 1960s. For example, in the 1967 *Carterfone* decision the Commission first permitted a customer to attach an electrical device to the telephone network.[62] Similarly, in 1969 the Commission first permitted Microwave Communications, Inc. to provide private line service between St. Louis and Chicago.[63]

From this starting point in the late 1960s, the Commission began to support a policy that sought to promote competition in the various sectors of the telecommunications marketplace,

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[61] *Hush-A-Phone v. U.S.*, 238 F.3d 266 (D.C. Cir. 1956).

[62] *Use of the Carterfone Device in Message Toll Telephone Service*, 13 FCC2d 430, Initial Decision of Hearing Examiner (1967), *recon. denied*, Mem. Op. and Order, 14 FCC2d 571 (1968).

[63] *Microwave Communications, Inc.*, 18 FCC2d 953 (1969), *recon. denied*, 21 FCC2d 190 (1970).

including (where possible) the local market. In the Computer Inquiries[64] – among the most resource-intensive rulemakings ever performed by the Commission – the Commission attempted, beginning in the 1970s, to open local telecommunications services markets to competition first by imposing structural safeguards (*Computer II*), and later by imposing non-structural safeguards and giving enhanced service providers access to network elements (*Computer III*). Further, the Commission sought to encourage the development of local competition by establishing rules that permitted competitive access providers ("CAPs"), essentially predecessors of today's CLECs, to provide local telecommunications services. For example, in the *Expanded Interconnection Order*, the Commission established initial collocation rules.[65]

Similarly, the Department of Justice actively moved segments of the telecommunications industry towards competition through antitrust enforcement. Most notably, after a year-long antitrust trial in which the Department demonstrated sweeping antitrust violations by the vertically integrated AT&T, the parties entered into the Modified Final Judgment ("MFJ") in

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[64] *Regulatory and Policy Problems Presented by the Interdependence of Computer & Communications Services and Facilities*, 28 FCC 2d 267 (1971), *aff'd in part sub nom. GTE Service Corp. v. FCC*, 474 F.2d 724 (2d Cir. 1973), decision on remand, 40 FCC2d 293 (1973); *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. enied*, 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), *Phase I Order and Phase I Recon. Orders 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), *Phase II Order vacated, California I*, 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) (collectively, "*Computer III*").

[65] *Expanded Interconnection with Local Telephone Company Facilities*, CC Docket No. 91-41, 7 FCC Rcd 7369, Report and Order and Notice of Proposed Rulemaking (1992), *recons.*, 8 FCC Rcd 127 (1992), *on further recons.*, 8 FCC Rcd 7341 (1993), *vacated in part and remanded sub nom., Bell Atlantic, Inc. v. FCC*, 24 F.3d 1441 (D.C. Cir. 1994), *on remand*, Mem. Op. and Order, 9 FCC Rcd 5154 (1994).

1982. The MFJ was a major factor in the development of the competitive long distance industry of the last two decades. The MFJ also imposed restrictions on certain lines of business for the then-newly created Bell Operating Companies ("BOCs"), restrictions that were designed to permit other companies to enter markets and make those markets competitive. In 1984, the Department of Justice entered into the *GTE Consent Order*[66], which imposed similar restrictions on GTE to further open communications markets to competition.[67]

Even with this gradual movement away from a paradigm of regulated monopolies and towards one of competition, the mid-1990s still saw only limited local telecommunications services competition.[68] Congress stepped into this situation with the Telecommunications Act of 1996.

2. Telecommunications Policy Under the 1996 Act

Congress enacted the 1996 Act to open local telecommunications markets, including the advanced services market, to competition.[69]

> After a century of monopoly in telephone regulation, practically everyone agrees that competition is sorely missing, and that competition and competition alone will make consumers better off by bringing innovative services and rates that are just, reasonable and affordable. *The Telecommunications Act of 1996 should*

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[66] *U.S. v. GTE Corp.*, 1985-1 Trade Cas. (CCH) 66,355 (1984).

[67] Private antitrust actions, such as that brought by MCI against AT&T, also moved segments of the telecommunications industry towards competition. *E.g., MCI Communications Corp. v. AT&T*, 708 F.2d 1081 (7th Cir. 1983).

[68] Early on, certain companies provided long-distance access services on a limited basis, although these carriers largely shifted their focus to the provision of point-to-point private line services.

[69] *See* Joint Statement of Managers, S. Conf. Rep. No. 104-230, 104th Cong. 2d Sess. 1 (1996) ("*Joint Explanatory Statement*"); 1996 Act, Preamble ("An Act to promote competition and reduce regulation in order to secure lower prices and higher quality services for American telecommunications consumers and encourage the rapid deployment of new telecommunications technologies.").

> *transform local American telecommunications markets from monopoly regulation to competition.*[70]

The 1996 Act added to the Communications Act of 1934 provisions that focus on opening local markets to competition. The Commission has repeatedly recognized this core purpose in its orders implementing the 1996 Act. In prescribing the initial regulations to implement the 1996 Act, the Commission found that the Act had a primary goal of "opening the local exchange and exchange access markets to competitive entry."[71] The Commission explained this purpose in its initial order examining the treatment of advanced telecommunications capabilities:

> At the core of the Act's market-opening provisions are sections 251 and 271. In section 251, Congress sought to open local telecommunications markets to competition by reducing inherent economic and operational advantages possessed by incumbents. Section 251 requires incumbent LECs to share their networks in a manner that enables competitors to choose among three methods of entry – the construction of new networks, the use of unbundled elements of the incumbent's network, and resale. . . . Together with the other pro-competitive provisions of the Act, section 251 provides new entrants with the ability to offer competitive telecommunications services.
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> . . . [T]hrough section 271, Congress requires BOCs to demonstrate that they have opened their local markets to competition before they are authorized to enter the in-region long distance market.[72]

In addition to this mandate to open the local telecommunications market to competition, Congress also required that the Commission

> encourage the deployment . . . of advanced telecommunications capability . . . by utilizing . . . price cap regulation, regulatory forbearance, *measures that promote*

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[70] *Hearing Before the Subcommittee on Telecommunications and Finance of the Committee on Commerce*, 104th Cong., 2d Sess., Serial No. 104-98 at 3 (Remarks of Rep. Thomas J. Bliley, Jr., Chairman, Committee on Commerce) (emphasis added); *see id* at 6 (Remarks of Rep. Edward J. Markey) ("most importantly [the 1996 Act] is designed to break down the last telecommunications monopoly, the local phone company").

[71] *Local Competition Order* ¶¶ 3, 6.

[72] *Advanced Services Order* ¶¶ 21-22 (citations omitted)

> *competition in the local telecommunications market*, or other regulating methods that remove barriers to infrastructure investment.[73]

Taken together, these and other provisions of the 1996 Act established a path toward a competitive market for local telecommunications services.

a. The 1996 Act Established a Path To Local Telecommunications Services Competition

The path to local competition cut by the 1996 Act expressly sought to develop competition within the local telecommunications services sector. The focal point of the 1996 Act is its detailed provisions designed to open the local telecommunications services market to competition.[74] These requirements are specifically designed to open local telecommunications markets to competition. Among the central regulatory mechanisms are provisions that place a variety of obligations on incumbent local exchange carriers. Under the Act ILECs must interconnect with the facilities of competing local exchange carriers, provide CLECs access to unbundled network elements, offer CLECs resale at wholesale rates of any telecommunications services that the ILECs offer to any non-carrier at retail and permit CLECs to place their own telecommunications equipment in ILEC central offices.[75] The Act establishes that rates for interconnection and access to network elements are to be cost-based and creates procedures by which CLECs and ILECs will negotiate or, if necessary, arbitrate the rates, terms and conditions of interconnection agreements.[76] Finally, but significantly, the Act provides that the BOCs will

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[73] 47 U.S.C.§ 157 nt. (emphasis added).

[74] *See, e.g.*, Harvey L. Zuckman, Robert L. Corn-Revere, Robert M. Frieden, Charles H. Kennedy, MODERN COMMUNICATIONS LAW at 700 (West Group 1999).

[75] 47 U.S.C. § 251.

[76] 47 U.S.C. § 252.

be permitted to enter the lucrative long distance market if they comply with specific local market opening requirements.[77]

Congress' adoption of these provisions clearly and forcefully establishes that the Act's primary goal is opening the local telecommunications services market to competition.

b. The 1996 Act's Local Market Opening Provisions Apply to Advanced Telecommunications Capability

These provisions designed to open the local telecommunications services market themselves apply to advanced services. In addition, the 1996 Act emphasizes the role of advanced services with Section 706, which is specifically designed to encourage the development of "advanced telecommunications capability" and requiring that the Commission encourage the deployment of that capability.[78] A crucial question in this proceeding is whether the Commission should – or, in fact, must – implement Section 706 and encourage the development of advanced telecommunications capability in a manner consistent with its obligation to promote the development of a competitive local telecommunications services marketplace, or whether the Commission can forsake these goals in favor of other objectives that are at war with this fundamental policy.

The language of the 1996 Act itself provides a clear answer – *the Commission must interpret Section 706 in a manner consistent with the other local market opening provisions of the statute*. The numerous additions to the Communications Act of 1934 contained in the 1996

[77] *Advanced Services Order* ¶¶ 21-22 (citations omitted); 141 Cong. Rec. S8057 (1995) (statement of Sen. Dorgan) ("[t]he Bell operating companies are not now free to go out and compete with the long distance companies because they have a monopoly in most places in local service. It is not fair for the Bell operating companies to have a monopoly in local service, retain that monopoly and get involved in competitive circumstances in long distance service.") (quoted in *Application of BellSouth Corporation, BellSouth Telecommunications, Inc., and BellSouth Long Distance, Inc. for Provision of In-Region, InterLATA Services in Louisiana*, 13 FCC Rcd 20599, CC Docket No. 98-121, FCC 98-271, Memorandum Opinion and Order ¶ 3 n. 6 (1998)).

[78] 47 U.S.C. § 157 nt.

Act were intended to open local markets to competition. While Section 706 does not limit itself to the local marketplace in its attempt to spur the deployment of advanced telecommunications capability, nothing in the statute (or in the *Joint Explanatory Statement*) provides any basis for the Commission to interpret Section 706 in any manner not fully consistent with the local market opening provisions in the 1996 Act.[79] Rather, Section 706 expressly contemplates that the Commission is to take proactive steps to "promote competition in the local telecommunications market."[80]

Even if the predicate for Commission action under Section 706(b) were satisfied, that would not mean that the action now under consideration would be justified. The notion that to satisfy Section 706, the Commission must (or would even be permitted to) eliminate the application of the core provisions of the Act is the equivalent of a plan to destroy the village in order to save it.

First, the statute requires the Commission to encourage the development of "advanced telecommunications capability." Specifically, Section 706 states, in pertinent part:

> (a) In General.—The Commission and each State Commission with regulatory jurisdiction over telecommunications services shall encourage the deployment on a reasonable and timely basis of *advanced telecommunications capability* to all Americans . . . by utilizing, in a manner consistent with the public interest, convenience, and necessity, price cap regulation, regulatory forbearance, *measures that promote competition in the local telecommunications market, or other regulating methods that remove barriers to infrastructure investment.*[81]

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[79] Perhaps this is why the Notice suggests, amazingly, that Section 706 may not even be relevant to this proceeding. Notice ¶ 29 ("We seek comment on the relevance, if any, that Section 706 has to the issues raised in this proceeding.") If Section 706 is not relevant, which aspects of the statute are?

[80] 47 U.S.C. § 157 nt.

[81] 47 U.S.C. § 157 nt. (emphasis added).

Three of the four methods by which the Commission may encourage the development of advanced telecommunications capability require the Commission to take pro-active regulatory steps. Moreover, one of these methods specifically contemplates that the Commission will affirmatively take "measures that promote competition in the *local telecommunications market*."[82] And another method expressly contemplates the Commission's use of "other regulating methods" to promote the deployment of advanced telecommunications capability. Yet, the Notice ignores these parts of the statute.

Instead, the Notice practices semantic sleight of hand by selectively and innaccurately quoting from Section 706 to support the thesis of the Notice, but not the statute's goals. The Notice finds that "it is the Commission's primary policy goal to encourage the ubiquitous availability of broadband to all Americans."[83] To support this goal, the Notice alters the statutory language:

> Notice ¶ 3: Congress has explicitly charged the Commission to "encourage the deployment on a reasonable and timely basis" of *broadband capabilities* to "all Americans." (emphasis added) (quoting 1996 Act § 706(a))
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> 1996 Act § 706(a): The Commission . . . shall encourage the deployment on a reasonable and timely basis of *advanced telecommunications capability* to all Americans. (emphasis added)

Similar sleight of hand occurs when the Notice boldly asserts that Congress "gave the Commission authority to 'take immediate action to accelerate deployment of such capability by removing barriers to infrastructure investment,' if necessary."[84] Yet, the Notice completely

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[82] 47 U.S.C. § 157 nt.(emphasis added).

[83] Notice ¶ 3.

[84] *Id.* (quoting 47 U.S.C. § 157 nt.).

ignores the condition precedent to this grant of authority. The pertinent part of Section 706 actually states:

> (b) Inquiry.—The Commission shall . . . initiate a notice of inquiry concerning the availability of advanced telecommunications capability to all Americans . . . In the inquiry, the Commission shall determine whether advanced telecommunications capability is being deployed to all Americans in a reasonable and timely fashion. *If the Commission's determination is negative*, it shall take immediate action to accelerate deployment of such capability by removing barriers to infrastructure investment and by promoting competition in the telecommunications market.[85]

Thus, the Commission is empowered to "take immediate action" to speed the deployment of advanced telecommunications capability *if* the Commission first determines that such capability is *not* being deployed in a reasonable and timely manner. Yet, a mere eight days before releasing the Notice, the Commission reported to Congress that advanced telecommunications capability, and the infrastructure investment for such capability, was being deployed in a reasonable and timely manner.[86] The Commission is under no statutory mandate to "take immediate action."

In any event, however lofty the goals stated in the Notice may sound, they cannot side-step the Congressional purpose and justify an attempt by the Commission to ignore its own precedents and rewrite the statute. Rather, the Commission must adopt as its primary policy goal the objective of the statute – the opening of the local telecommunications services, including

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[85] 47 U.S.C. § 157 nt. (emphasis added).

[86] *Inquiry Concerning the Deployment of Advanced Telecommunications Capability to All Americans in a Reasonable and Timely Fashion, and Possible Steps to Accelerate Such Deployment Pursuant to Section 706 of the Telecommunications Act of 1996*, Third Report, CC Docket 98-146, FCC No. 02-33 ¶ 1 (rel. Feb. 6, 2002).

> Overall, we find that advanced telecommunications is being deployed to all Americans in a reasonable and timely manner. We are encouraged that the advanced services market continues to grow, and that the availability of and subscribership to advanced telecommunications has increased significantly. We also conclude that although investment trends have slowed recently, investment in infrastructure for advanced telecommunications remains strong.

Id.

advanced services, to competition. This is the very conclusion that the Commission reached in 1998 when it held:

> we first conclude that the pro-competitive provisions of the 1996 Act apply equally to advanced services and to circuit-switched voice services.[87]

c. Commission Action Over the Previous Six Plus Years Implementing the 1996 Act Paved the Path to Local Telecommunications Services, Including Advanced Services

While the 1996 Act marked the path to local competition, the Act expressly intended that the Commission pave this path by promulgating appropriate rules. In particular, Section 251(d) requires the Commission "to complete all actions necessary to establish regulations to implement the requirements of this section," which include interconnection, access to UNEs, resale, collocation and other local market opening provisions.[88] Indeed, numerous members of Congress remarked on the "extraordinary task [Congress gave to the Commission] to implement the Telecommunications Act" in hearings held less than 6 months after the 1996 Act became effective.[89]

Moreover, the United States Supreme Court definitively affirmed the Commission's broad discretion to adopt rules to implement the 1996 Act. Specifically, the Court found the Commission's general authority in section 201(b) of the Communications Act of 1934 to "prescribe such rules and regulations as may be necessary in the public interest to carry out the

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[87] *Advanced Services Order* ¶ 11.

[88] 47 U.S.C. § 251(d); *Joint Explanatory Statement* at 122 ("New section 251(d) requires the Commission to adopt regulations to implement new section 251 . . .").

[89] *Hearing Before the Subcommittee on Telecommunications and Finance of the Committee on Commerce*, 104th Cong., 2d Sess., Serial No. 104-98 at 8 (remarks of Rep. Anna G. Eshoo). *See, e.g.*, *id* at 1 (remarks of Rep. Jack Fields, Chairman), 2 (remarks of Rep. Rick Boucher, "[w]e have given the Commission a great deal of responsibility"), 3-4 (remarks of Rep. Thomas J. Bliley, "Congress could have chosen to write all of the detailed rules in the statute. Instead, based on confidence in them, Congress chose to grant the FCC and States enormous responsibility in implementing this act.").

provisions of this Act,"[90] the Commission has the rulemaking authority to implement the local competition provisions of the 1996 Act.[91] In addition to the Commission's authority under Sections 201(b) and 251(d), Section 706 of the 1996 Act requires the Commission to encourage the deployment of advanced telecommunications services, which includes DSL-equipped loops and transport.[92]

Consistently, for at least the first four years after the enactment of the 1996 Act, the Commission's implementation of the Act recognized both that the Act's primary goal was opening the local telecommunications services marketplace to competition and that this objective extended to advanced telecommunications capability. For example, in the *Local Competition Order*, the Commission required ILECs to provide competitors with access to DSL-capable loops,[93] the very loops that the Notice finds to be the predominant means of providing wireline broadband services today.[94] The Commission further reiterated and clarified in the *UNE Remand Order* that ILECs must make DSL-capable loops available to CLECs as UNEs.[95]

Most importantly for present purposes, the Commission determined that advanced telecommunications capability is properly categorized as a telecommunications service, not an information service. Although Section 706 of the Telecommunications Act expressly calls for regulation of local telecommunications to promote advanced services, ILECs strenuously argued

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[90] 47 U.S.C. § 201(b).

[91] *AT&T Corp. v. Iowa Utils. Bd.*, 525 U.S. 366, 377-378 (1999). Because the Court found that the Commission had sweeping authority to implement the 1996 Act under section 201(b), the Court found it unnecessary to reach the issue of amount of authority granted the Commission by section 251(d). *Id.* at 382-383.

[92] 47 U.S.C. § 157 nt.

[93] *Local Competition Order* ¶¶ 381-385.

[94] Notice n. 1.

[95] *UNE Remand Order* ¶¶ 166, 172-173, 190-195; *see also* 47 C.F.R. § 51.319(a)(1, 3).

that they would deliver advanced services only if they were freed from application of those provisions of the Act. For example, the United States Telephone Association warned the Commission that regulation like that proposed in its *Advanced Services* proceedings "is inconsistent with the Commission's goals and will slow rollout to consumers – many of whom have little hope of securing access to advanced telecommunications services unless their ILEC is able to provide the service."[96] In keeping with this overall position, ILECs asserted that the Act should not be applied to new services, such as packet-switched data, but only to legacy services, and that it should not apply to broadband capabilities.[97]

The Commission rebuffed these backward-looking efforts by the ILECs to both stave off and control the future of telecommunications. In the *Advanced Services* proceeding, the Commission faced ILEC pleas that they be allowed to provide xDSL services free from regulation.[98] In an extensive examination of the Act's coverage, the Commission established that, "[T]he pro-competitive provisions of the 1996 Act apply equally to advanced services and to circuit-switched voice services...." The Commission ruled that ILECs are subject to the unbundling and interconnection requirements of Section 251 of the Act in their provision of

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[96] Ex Parte Submission of United States Telephone Association, FCC Dockets 98-146, 98-147 (August 12, 1998).

[97] *Petition of Bell Atlantic Corporation for Relief from Barriers to Deployment of Advanced Telecommunications Services*, CC Docket No. 98-11 (filed Jan. 26, 1998); *Petition of U S WEST Communications, Inc., for Relief from Barriers to Deployment of Advanced Telecommunications Services*, CC Docket No. 98-26 (filed Feb. 25, 1998); *Petition of Ameritech Corporation to Remove Barriers to Investment in Advanced Telecommunications Capability,* CC Docket No. 98-32 (filed Mar. 5, 1998); *Southwestern Bell Telephone Company, Pacific Bell, and Nevada Bell Petition for Relief from Regulation Pursuant to Section 706 of the Telecommunications Act of 1996 and 47 U.S.C. § 160 for ADSL Infrastructure and Service*, CC Docket No. 98-91 (filed June 9, 1998).

[98] *Advanced Services Order* ¶ 9.

advanced services, including DSL.[99] The Commission further held that a carrier offering advanced services:

> 'is offering a 'telecommunications service.' An end-user may utilize a telecommunications service together with an information service, as in the case of Internet access. In such a case, however, we treat the two services separately: the first is a telecommunications service (e.g., the xDSL-enabled transmission path), and the second service is an information service, in this case Internet access.[100]

The Commission demonstrated the consistency of this conclusion with precedent, noting its long history of classifying as "basic services" subject to regulation under Title II of the Act telecommunications transport services, even if such services are also the transport layer of an integrated enhanced service.[101]

This is a clear and strong Commission finding that advanced services, including DSL-based service, are "telecommunications services" under the 1996 Act. In the quoted language,

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[99] *Id.* ¶ 11. *See also WorldCom, Inc. v. FCC*, 246 F.3d 690, 694 (D.C. Cir. 2001), in which the Commission defended its application of Section 251(c) to DSL-based advanced services by arguing, among other things, that they are "telecommunications services."

[100] *Advanced Services Order* ¶ 36.

[101] *Id.* ¶ 35, citing *Amendment of Section 64.702 of the Commission's Rules and Regulations*, 77 FCC 2d 384, 419-20, ¶¶ 93, 96 (1980), *recon., 84 FCC 2d 50 (1980), further recon.*, 88 FCC 2d 512 (1981), *affirmed sub nom. Computer and Communications Industry Ass'n v. FCC*, 693 F.2d 198 (D.C. Cir. 1982), *cert. denied*, 461 U.S. 938 (1983); *Report to Congress on Universal Service*, ¶ 21; *Implementation of the Non-Accounting Safeguards of Sections 271 and 272 of the Communications Act of 1934, as amended*, CC Docket No. 96-149, First Report and Order and Further Notice of Proposed Rulemaking, 11 FCC Rcd 21905 (1996), Order on Reconsideration, 12 FCC Rcd 2297 (1997), *recon. pending, petition for summary review in part denied and motion for voluntary remand granted sub nom. Bell Atlantic v. FCC*, No. 97-1067 (D.C. Cir. filed Mar. 31, 1997), Second Order on Reconsideration, 12 FCC Rcd 8653 (1997), *aff'd sub nom. Bell Atlantic Telephone Cos. v. FCC*, 131 F.3d 1044 (D.C. Cir. 1997), Second Report and Order, 12 FCC Rcd 15756 (1997); *Amendment of Section 64.702 of the Commission's Rules and Regulations*, Report and Order, CC Docket No. 85-229, Phase I, 104 FCC 2d 958 (1986), *recon.*, 2 FCC Rcd 3035 (1987), *further recon.*, 3 FCC Rcd 1135 (1988), *second further recon.*, 4 FCC Rcd 5927 (1989), *Phase I Order and Phase I Recon. Order, 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), *Phase II Order vacated, California I*, 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 1 Local Exchange Company Safeguards*, 6 FCC Rcd 7571 (1991), *recon. dismissed in part*, Order, 11 FCC Rcd 12513 (1996); *BOC Safeguards Order 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 Proceedings, Bell Operating Company Provision of Enhanced Services, 1998*

moreover, the Commission expressly distinguishes its treatment of DSL transport capability, the wholesale basic telecommunications service, from the retail information service in which it is embedded by the provider of that information service. The Notice does not identify, nor has there been, any change that should alter the Commission's finding concerning the regulatory treatment of DSL services or its method of separately analyzing wholesale and retail services.

The FCC also determined that it should not forbear from regulating advanced services under Sections 251 and 271, despite ILEC calls for that action. The Commission found that Section 706 is not an independent source of forbearance authority, and that "Congress did not provide us with authority to forbear" as the incumbents requested until the requirements of Sections 251 and 271 had been "fully implemented."[102] The Commission made this decision against the backdrop of its earlier finding that the goals of Section 706 can best be achieved by promoting competition between ILECs and new entrants.[103]

Finally, in December 1999, the Commission released its *Linesharing Order*, which took "additional steps toward implementing Congress's goals for the deployment of competitive advanced services by instituting linesharing obligations for incumbent LECs."[104] The Commission found that requiring linesharing directly promoted the goals of Section 706. Specifically, the Commission determined that linesharing "is consistent with Congress's mandate

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Biennial Regulatory Review -- Review of Computer III and ONA Safeguards and Requirements, CC Docket Nos. 95-20 and 98-10, Further Notice of Proposed Rulemaking, 13 FCC Rcd 1640 (1998).

[102] *Advanced Services Order* ¶ 12.

[103] *1999 Advanced Services Report* ¶ 8.

[104] Notably, Chairman Powell, the only current Commissioner who was then at the Commission, voted in favor of this order.

that the Commission encourage the deployment of advanced telecommunications capability in section 706 of the 1996 Act."[105]

Despite these repeated precedents establishing that advanced services are to be promoted by encouraging competition in local telecommunications services, the Notice does not analyze or even account for them. Instead, the Notice erroneously asserts that the regulatory classification of advanced telecommunications capability was raised in only two other proceedings. According to the Notice, "the legal and policy issues associated with classifying Internet access service as either a telecommunications service or an information service under the [1996] Act have been raised previously, but not fully resolved, in two Commission proceedings" – the *1998 Universal Service Report to Congress*[106] and the *Missouri/Arkansas 271 Order*.[107] This is simply misleading. The *1998 Universal Service Report to Congress* has been superseded by many of the Commission's decisions discussed above that more directly addressed the regulatory classification of advanced services. Moreover, that report essentially restates long-standing Commission precedent that telecommunications services and information services are mutually exclusive categories.[108] In addition, the three paragraphs in *Missouri/Arkansas 271 Order* cited

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[105] *Linesharing Order* ¶ 54

[106] *Federal-State Joint Board on Universal Service*, 13 FCC Rcd 11501, CC Docket No. 96-45, Report to Congress ¶¶ 56-82 (1998) ("*1998 Universal Service Report to Congress*").

[107] *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*, 16 FCC Rcd 20719, CC Docket No. 01-194, Memorandum Opinion and Order ¶¶ 81-82 (2001 ("*Missouri/Arkansas 271 Order*").

[108] *1998 Universal Service Report to Congress* ¶¶ 39, 59.

in the Notice fail to even mention any of the above decisions, but rather foreshadow the issuance of the Notice.[109]

B. The Commission Is Not Free To Effectively Rewrite the Statute And To Ignore Its Prior Policy and Decisions

The 1996 Act, as shown above, explicitly contemplates that the Commission will promulgate rules to promote local telecommunications services competition, and that that competition must include advanced services.[110] The Act, moreover, requires the Commission to promulgate regulations implementing its key provision for promoting local competition.[111] Section 706 of the 1996 Act requires the Commission to encourage the development of advanced telecommunications capability by using, among other methods, "measures that promote competition in the local telecommunications market."[112] 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 services in particular.

The Commission, as also demonstrated above,[113] 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 these actions embody a

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[109] Notice ¶¶ 15-17. To pose another analogy, consider a hockey game. In issuing its prior decisions, it is as if the Commission marked up the ice during the first period, and scored a few goals. Then the Zamboni cleans up the ice between periods. The goals scored by the Commissions decisions remain on the scoreboard. The game would then resume. By ignoring prior Commission decisions, however, the Notice is effectively proposing that when the Zamboni cleans up the ice between periods, not only is the ice cleaned, but the goals – in this case the prior decisions – are erased, as well. Effectively, then, rather than beginning the second period, the first period would begin anew.

[110] *Supra* Section III.A

[111] *AT&T v. Iowa Utils. Bd.*, 525 U.S. at 384.

[112] 47 U.S.C. § 157 nt.; *supra* Section III.A.2.b.

[113] *Supra* Section III.A.2.c.

Commission policy 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 services, are basic or 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 on inter-modal competition.[114] Nowhere, in laying out these "principles" or elsewhere, does the Notice recognize the Congressional policy or the Commission's 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."[115] 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 Commission may not cavalierly reverse its field by announcing a policy at odds with the Act and regulatory moves that overturn its past rulings. It is longstanding law that an agency may not change course (or rescind a rule) without first supplying a well-reasoned analysis explaining the change.[116] The Notice provides no such analysis.[117] Rather, in the Notice the

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[114] Notice ¶¶ 3-6.

[115] *Id.* ¶ 5.

[116] *Motor Vehicle Mfrs. Assoc of the U.S. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 40-43, 48-49, 57 (1983) ("*State Farm*").

Commission simply ignores its own precedent when it is inconvenient to its present purpose.[118] A Commission decision based on that brand of – more accurately, lack of – reasoning cannot be sustained.

> [A]n agency changing its course must supply a reasoned analysis indicating that prior policies and standards are being deliberately changed, not casually ignored, and if an agency glosses over or swerves from prior precedents without discussion it may cross the line from the tolerably terse to the intolerably mute.[119]

Thus, just as the D.C. Circuit has previously rejected Commission action that departs from prior Commission policy without a reasoned explanation, any Commission attempt to reverse course here without addressing the voluminous contrary policy and precedent would not survive judicial scrutiny.[120]

The Supreme Court made clear the importance of this principle in *State Farm*:

> A "settled course of behavior embodies the agency's informed judgment that, by pursuing that course, it will carry out the policies committed to it by Congress. There is, then, at least a presumption that those policies will be carried out best if the settled rule is adhered to." *Atchison, T. & S. F. R. Co.* v. *Wichita Bd. of Trade, 412 U.S. 800, 807-808 (1973).* Accordingly, an agency changing its course by rescinding a rule is obligated to supply a reasoned analysis for the change beyond that which may be required when an agency does not act in the first instance.[121]

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[117] *Supra* Section III.A.2.c.

[118] *Id.*

[119] *Greater Boston Tel. Corp. v. FCC*, 444 F.2d 841, 852 (D.C.Cir. 1970); *see Comm. For Community Access v. FCC*, 737 F.2d 74, 77 (D.C. Cir. 1984) ("*Greater Boston Tel*") ("the agency cannot silently depart from previous policies or ignore precedent").

[120] *Greater Boston Tel*, 737 F.2d at 77-84; *AT&T Corp. v. FCC*, 236 F.3d 729, 736-737 (D.C. Cir. 2001) ("no matter how reasonable [the Commission's policy may be] . . . it is not reasonable for the Commission to announce such a policy without providing a satisfactory explanation for embarking on this course when it has not followed such a policy in the past. The FCC 'cannot silently depart from previous policies or ignore precedent' as it has done here." (citations omitted)); *see Fox Tel. Stations, Inc. v. FCC*, 250 F.3d 1027, 1044-1045 (D.C.Cir. 2002) (finding that the FCC's failure to address its 1984 order on the National Television Station Ownership Rule in its subsequent 1998 order on that rule rendered the 1998 order arbitrary and capricious).

[121] *State Farm* at 41-42. *See also State of California v. FCC*, 39 F.3d 919 (9th Cir. 1994)/

The Notice embodies precisely the sort of agency reversal rejected by the Supreme Court in *State Farm*. There, the automobile industry "waged the regulatory equivalent of war against the airbag and lost."[122] Having lost, the automobile industry then attempted to avoid the requirement that it install either airbags or automatic passive restraint seatbelts, by choosing to install only seatbelts, and to do so in a way that would effectively undermine the safety regulation at issue.[123] The Transportation Department then decided that, because the automobile industry intended to implement the regulation in a manner that would frustrate its purpose, the regulation no longer served a purpose and should be revoked.[124] The Supreme Court found such industry non-compliance an insufficient reason to support an agency rescinding a rule.[125]

The Notice foreshadows an attempt by the Commission to use the same rationale rejected by the Court in *State Farm* to justify its complete policy about-face. The ILECs have effectively been waging war on all fronts – at the Commission, state public utility commissions, Congress, the press and by implementing inefficient or obstructionist policies – to undermine the local market opening provisions of the 1996 Act and the Commission's rules and orders generally, and in particular the ILECs' obligations to provide access to UNEs, including linesharing. The ILECs lost the initial battles as shown by, *e.g.*, the *Local Competition Order*, the *UNE Remand Order*, the *Advanced Services Order*, the *Advanced Services Remand Orde*[126]*r* and the *Linesharing Order*, yet they continue to wage the war. That the ILECs' behavior has frustrated

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[122] *State Farm* at 49.

[123] *Id.* at 38-39, 49.

[124] *Id.* at 38-39, 49.

[125] *Id.* at 49.

[126] *Deployment of Wireline Services Offering Advanced Telecommunications Capability*, CC Docket Nos. 98-147, 98-11, 98-26, 98-32, 98-78, 98-91, Order on Remand (rel. Dec. 23, 1999) ("*Advanced Services Remand Order*").

the objectives of the 1996 Act and the Commission's regulations provides no more reason for the Commission to reverse course now, over six years into the process of implementing the 1996 Act, than did the automobile industry's steps to frustrate the automobile safety regulation provide the Transportation Department with a valid reason to rescind its earlier rule. Accordingly, the Notice's tentative conclusion should be rejected.

In this proceeding, therefore, the Commission may not blithely shift its policy to one of intermodal competition or rest on the notion that it suffices to label "deregulation" a startling policy change and an abandonment of settled rulings. Indeed, one obvious question raised by the tentative conclusions in the Notice is whether the Commission took stock of its other recent proceedings before arriving at those conclusions. For example, the Commission has undertaken a "Review of Regulatory Requirements for Incumbent LEC Broadband Telecommunications Services."[127] In that proceeding, the Commission is examining in whether it should regulate ILEC DSL services as "nondominant" common carrier offerings, rather than continue to regulate them as dominant common carrier offerings. If the Commission opened that inquiry into whether phone company DSL services should continue to be subject to dominant carrier regulation (which by definition applies only to telecommunications services), how can it tentatively conclude a few weeks later that such services are in fact information services, thus obviating the need for the entire earlier rulemaking proceeding? Moreover, could SBC (which filed the petition leading to the opening of the "*ILEC Broadband Regulation Proceeding*") concede in its petition that its DSL offerings are subject to Title II regulation, and then claim in

[127] *Review of Regulatory Requirements for Incumbent LEC Broadband Telecommunications Services*, CC Docket No. 01-337 ("*ILEC Broadband Regulation Proceeding*"), Notice of Proposed Rulemaking, 16 FCC Rcd. 22745 (rel. Dec. 20, 2001).

this proceeding a few weeks later that (it suddenly realized) its DSL offerings are actually not common carrier services after all?

In assessing its tentative conclusions and suggestions in this proceeding, the Commission must carefully distinguish what is deregulated and what is not. An ILEC retail "ISP" service is an information service that includes DSL transport and is a single unregulated "enhanced" service. An ILEC DSL transport service, when provided to an ISP, even an affiliated ISP, is a regulated "basic" service. As further discussed below, the failure to appreciate that distinction is a major flaw in the Commission's suggestion that the telecommunications component of broadband Internet access services should not be deemed a telecommunications service.[128] Under settled precedent, the regulatory classification of a retail service does not control the classification of its telecommunications component, nor does the circumstance that that component might be self-supplied by an ILEC or other retail service provider.[129] Moreover, even if that retail service faced competition, as the ILECs claim, the ILECs would still control bottleneck facilities that would enable them to insulate themselves from direct competition for their DSL based services. As established above, the Congressional policy under the 1996 Act is to promote intramodal competition, and the Commission has fully embraced that policy in previous actions.[130] The Commission must provide clear and specific bases for departing from these policies with the extreme actions it now proposes, and this it cannot do.

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[128] *Infra* Section IV.A.

[129] *Supra* Section III.A.2.c.; *infra* Section IV.A.

[130] *See* Section III.A., *supra*.

C. Congress Regulated Cable Companies And ILECs Differently Because They Deployed Different Networks, With Different Governing Statutes

In any discussion of the different regulatory regimes applied to cable and wireline providers, it is important to recognize that the Commission's recent ruling concerning the regulatory status of cable modem service does not point toward a particular result in this proceeding.[131] The Commission's conclusion that ISP services that incorporate cable modem transport are "information services" is consistent with existing regulation. As the Commission recognizes, none of this dictates the regulatory treatment of the underlying transport. This result is entirely analogous to the proper analysis in the wireline sphere. For instance, where AOL provides ISP services that bundle DSL transport with enhanced capabilities, that bundle is an information service. The underlying DSL transport remains a basic telecommunications service.

The differences in the regulatory treatment of cable and wireline providers is explained by the legal and commercial history of the two sectors. The telephone and cable industries developed at different points in time and have historically been subject to very different regulatory regimes, reflecting the wholly distinct statutory schemes that apply to each industry, as codified in Titles II and VI of the Communications Act of 1934. Specifically, the telephone industry has been regulated as common carriage under Title II of the Communications Act of 1934. Although telecommunications service regulation was substantially revised by the 1996 Act, the common carrier underpinnings in the statute were left intact. Nothing about the essential character of the services – common carriage – has been revisited by Congress. The Commission therefore cannot wholly abandon this statutory genesis in the name of creating consistent regulation for cable and telecommunications services.

In contrast, regulation of cable services arose from the tradition of broadcasting, regulated under Title III. During its formative decades, cable was regulated by the Commission under an assertion of jurisdiction ancillary to its broadcast jurisdiction. The cable industry was not expressly regulated by statute until Congress enacted the Cable Act of 1984. This legislation explicitly regulated cable services pursuant to new Title VI of the Communications Act of 1934. Cable regulation was then substantially altered eight years later with the passage of the 1992 Cable Act. The 1996 Act left in place (although amending some individual provisions) the dichotomy between Title II telecommunications services and Title VI cable services regulation.

The distinction between the telecommunications services and cable services industries goes beyond, but was influenced by, the disparate regulatory treatment of each industry. Telecommunications services, and in particular local telecommunications services, benefited from affirmative government sanction of its monopoly and from rate regulation effectively guaranteeing considerable profits (first rate of return, and more recently price cap). In light of this, consumers effectively funded both the building of the local telecommunications network and the substantial profits garnered by the ILECs (or their predecessors) during the decades it took to build the network. Cable systems, by contrast, had no such federally mandated monopoly market or guaranteed rates of return. Rather, cable networks were built with at-risk capital. Thus, cable faced very different risks that telecommunications service providers did.

As the Commission has examined the regulatory scheme for advanced telecommunications services, it has already considered and rejected the ILEC notion that it can or should deregulate advanced telecommunications services, including DSL-based services, to

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[131] *Inquiry Concerning High-Speed Access to the Internet Over Cable and Other Facilities*, GN Dkt. No. 00-185, Declaratory Ruling and Notice of Proposed Rulemaking (rel. Mar. 15, 2002).

mirror the regulatory environment for cable. The Commission concluded that "the Act explicitly makes distinctions based on a common carrier's prior monopoly status."[132] This distinctive regulatory regime led the Commission to conclude that "it is appropriate to unbundle access to the high frequency portion of the loop, regardless of the regulatory status of cable modem Internet access."[133] These statutory and historical differences, as well as differences in network architecture, ubiquity of facilities coverage, and divergent market coverage, fully explain the Congressional requirement that telecommunications and cable services be regulated differently from each other.

Even if the Commission's treatment of broadband cable were to converge on a single model, the only consistent way the Commission could rationalize the regulatory regimes for wireline Internet access service and cable modem Internet access service would be to recognize that while "cable modem Internet access service" is an unregulated information or "enhanced" service, broadband cable transport is a common carrier telecommunications service. If the Commission deemed it otherwise appropriate, it could then consider imposing regulation on cable modem offerings pursuant to section 251(h) of the 1996 Act. The ILECs have pointed the way toward such a result, repeatedly bemoaning the "dominance" of cable modem providers: "If any class of carriers is 'dominant' in [the mass] market, it is the cable modem providers -- not the ILECs."[134] "The dominant carrier -- by a margin of almost three to one -- is *cable*."[135] These

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[132] *Linesharing Order* ¶ 59 (citing the additional 251(c) obligations imposed on ILECs).

[133] *Id.* ¶ 59.

[134] *ILEC Broadband Regulation Proceeding*, Comments of Qwest Communications International, Inc. at 2.

[135] Speech of Thomas J. Tauke, Senior Vice President Public Policy and External Affairs Verizon Communications, Progress and Freedom Foundation, August 21, 2001. http://newscenter.verizon.com/proactive/newsroom/release.vtml?id=60328 (visited April 30, 2002)(emphasis in original).

claims are overblown, but the Commission does not lack a remedy, should the worst fears of the ILECs be realized. Despite the fact that cable operators has taken advantage of their early lead in the deployment of broadband services to residential subscribers, there is little danger that cable operators will, at any time in the foreseeable future, achieve the level of dominance that ILECs currently possess in the local exchange market. But even if they did, the Commission could, consistent with section 251(h), reclassify cable operators as ILECs.

As shown above, the Commission may not rewrite the law to accommodate a different vision than codified by the legislature in the Communications Act. The Commission's focus on inter-modal competition here ignores the statutory, historical, economic and technical distinctions between wireline and cable, instead focusing on the agency's current radical policy agenda, which reflects a stark reversal of its prior conclusion that "declining to unbundle loops in areas where cable telephone is available would be inconsistent with the Act's goal of encouraging entry by multiple providers."[136]

The Commission's video dialtone precedents provide important support for the longstanding principle that even if a Bell company offers "new" content over its bottleneck facilities –Internet web pages, for example -- that content does not magically eliminate the bottleneck. As early as 1993, the Commission recognized that simple fact by treating Bell Company provisioning of a transmission pathway for the delivery of video programming to be a common carrier service offering. Of particular note, that pathway was provided via DSL. Bell Atlantic sought approval from the Commission, pursuant to section 214 of the Act, for a "trial"

[136] *UNE Remand Order* ¶ 189.

of ADSL video-delivery capability.[137] The Commission's video dialtone rules required Bell Atlantic to provide, "on a non-discriminatory common carrier basis, a basic common carrier platform for the delivery of video programming and other services to end users."[138] That common carrier platform was ADSL – and even more incredibly, it was ADSL offered via *linesharing*. Indeed, Bell Atlantic represented to the Commission that "ADSL technology . . . permits a video signal to be delivered to residential subscribers along with basic telephone service over the same copper loop facilities."[139] Indeed, the Commission approved Bell Atlantic's DSL-based video dialtone service because it recognized the public interest benefits of Bell Atlantic's "investment in an advanced telecommunications infrastructure," accurately predicting the treatment accorded DSL transport in the 1996 Act, even down to the terminology later used in Section 706.[140]

In 1994, Bell Atlantic sought approval from the Commission for its "video dialtone" video programming offering in New Jersey, an effort to compete head on with the cable companies.[141] Again, the statutory manner in which Bell Atlantic sought that approval is telling: "On December 15, 1992, [Bell Atlantic-New Jersey] filed a Section 214 application to provide video dialtone service in Dover, New Jersey."[142] Why did Bell Atlantic file a section 214

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[137] *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).

[138] *Id* ¶ 10.

[139] *Id.* ¶ 2.

[140] *Id.* ¶ 9.

[141] *See 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 (rel. Jul. 18, 1994).

[142] *Id.* ¶ 3.

application? Because, as the Commission noted in its Order, "[Bell Atlantic] states that it will replace the copper- based facilities between its central offices and the curb with fiber optic cable over which it will provide, on an integrated basis, video dialtone, telephone exchange, and exchange access service."[143] In other words, just because Bell Atlantic would be offering video programming over its upgraded facilities, those facilities were still common carrier facilities, and the transport services offered were telecommunications services, even though the "network will transmit digital voice, data, and video signals over the same fiber cable."[144] The introduction of video over those facilities did not change the bottleneck nature of those facilities, nor did it change the fact that transport over those facilities is telecommunications service. Bell Atlantic recognized these simple facts when it sought section 214 authorization from the Commission. The Commission likewise concluded that Bell Atlantic's DSL-based video dialtone offering connoted a "a common carriage transmission service."[145] In approving Bell Atlantic's application, the Commission further cemented the notion that Bell Atlantic's video dialtone service was still a common carrier offering, concluding that Bell Atlantic's decision to build video dialtone into its network "clearly will produce new investment in an advanced telecommunications infrastructure."[146]

In short, eight years ago, in a series of decisions regarding DSL services offered by Bell companies for video content delivery, the Commission concluded unequivocally that such DSL

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[143] *Id.* ¶ 4.

[144] *Id.* ¶ 5.

[145] *Id.* ¶ 10 n.30.

[146] *Id.* ¶ 39.

transport services provided a common carrier transmission service.[147] It is impossible to comprehend how, in light of this clear precedent, the Commission could now conclude that the identical DSL transport/transmission service underlying content – whether Internet, video, or content not yet invented – could be anything other than a telecommunications service.

IV. THE TENTATIVE CONCLUSION THAT SELF-SUPPLIED TELECOMMUNICATIONS SERVICES USED TO PROVIDE BROADBAND INTERNET ACCESS SERVICE ARE NOT SUBJECT TO TITLE II REGULATION IS NOT SUSTAINABLE

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.'"[148] The Commission never explains the full significance of this conclusion. Does it mean that a LEC that self-supplies a telecommunications capability used in an information service thereby removes from Title II regulation any offering it makes of that capability? Or does it mean that such a LEC may escape Title II regulation by ceasing to offer that capability to others? The Notice provides no clear answers to questions like these, even on a tentative basis, although they are central to the policy issues that the Notice raises.

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."[149] This conclusion could be understood in a

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[147] *See, e.g.*, *C & P 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); *Rochester Telephone Company*, 9 FCC Rcd 2285 (1994).

[148] Notice ¶ 17.

[149] *Id.* ¶ 25.