

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

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

Reply Comments of Eliot Spitzer
Attorney General of the State of New York

Mary Ellen Burns
Assistant Attorney General in Charge
Telecommunications and Energy Bureau

Enver R. Acevedo
Keith H. Gordon
Assistant Attorneys General
of counsel

New York State Attorney General's Office
120 Broadway
New York, NY 10271
(212) 416-6343
FAX (212) 416-8877
E-mail: mary.burns@oag.state.ny.us
enver.acevedo@oag.state.ny.us
keith.gordon@oag.state.ny.us

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INTRODUCTION AND SUMMARY OF ARGUMENT

For many years, the Federal Communications Commission (“FCC” or “Commission”) has charted a steady course in its rulemakings and orders to spur the growth of competitive and innovative information services offered over wireline facilities. The Commission has consistently sought to ensure that such services, as they arise, will not die a slow death or become the captive offerings of the monopoly local telephone companies, whose wireline facilities must be used, but, rather, will be able to be developed freely and offered by many competing vendors, to the ultimate enhancement of consumer welfare and the economy. To make this a reality, the Commission recognized long ago that the underlying transmission facilities used to carry and connect so-called enhanced services or information services, when bundled by the incumbent local exchange carrier (“ILEC”), must be offered by their monopoly owners on an unbundled and nondiscriminatory basis, as common carriage under Title II of the Communications Act.¹

This policy, combining a deregulatory approach to the information service itself along with strict regulatory requirements for access to the underlying transmission capability, has been hugely successful in supporting the explosive growth in information services over wireline; today the number of such services is staggering, from data processing to voice mail to Internet access.

¹ See *In the Matter of Regulatory and Policy Problems Presented by the Interdependence of Computer and Communication Services and Facilities*, Docket No. 16979, Final Decision and Order, 28 FCC 2d 267 (1971) (“*Computer I*”); *In the Matter of Amendment of Section 64.702 of the Commission’s Rules and Regulations*, Docket No. 20828, Final Decision, 77 FCC 2d 384 (1980) (“*Computer II*”); *Computer III Further Remand*, Report and Order, 14 FCC Rcd 4289 (1999) (“*Computer III March 1999 Order*”).

As a result, enormous changes have been wrought in the efficiency, innovation, and productivity of American businesses and on the ability of the average American household to connect and communicate using the telephone network. Indeed, by facilitating widespread access to the Internet by businesses and households, this policy has encouraged and hastened the Internet's phenomenal growth. Large businesses already enjoy the benefits of high-speed Internet access using wireline telecommunications transmission capabilities. However, wireline broadband Internet access is only now becoming increasingly available, technologically and economically, to residential and small business users, primarily through the development of digital subscriber line ("xDSL") technology, which uses the copper telephone wire loop.²

In its February 14, 2002 Notice of Proposed Rulemaking ("*NPRM*"), the Commission seeks comment on the appropriate classification for wireline broadband Internet access services and the regulatory implications of that classification. This *NPRM* threatens to unravel the FCC's longstanding policy success, and to do so at the very moment when unbundled nondiscriminatory access to monopoly-owned transmission facilities is necessary to the continued growth and availability of high-speed Internet services using wireline facilities. Such a dramatic turnabout in regulatory policy is not consistent with the 1996 Telecommunications Act³

² As the Commission itself recognizes, xDSL is the predominant wireline platform over which broadband Internet access services are currently delivered. Notice of Proposed Rulemaking, *Appropriate Framework for Broadband Access to the Internet over Wireline Facilities*, CC Docket Nos. 02-33, 95-20, 98-10, FCC 02-42, ¶ 1, note 1 (rel. Feb. 15, 2002).

³ Telecommunications Act of 1996, Pub. L. No.104-104, 110 Stat. 56 (1996), codified as 47 U.S.C. § 151 *et seq.*

("the Act" or "the 1996 Act") or with longstanding FCC policy to promote competition in the provision of telecommunications. Moreover, the *NPRM*'s tentative conclusions, if adopted, could wreak havoc in other critical areas, including law enforcement investigations and access to telecommunications services by persons with disabilities.

THE NEW YORK STATE ATTORNEY GENERAL'S INTEREST

The New York State Attorney General ("NYSAG") enforces federal and state antitrust and consumer protection laws and is an advocate on behalf of New York consumers, especially residential and small business telecommunications customers, in federal and state regulatory proceedings and elsewhere. The NYSAG has participated in numerous significant proceedings before the New York State Public Service Commission ("NYSPSC") to develop and enforce policies and practices designed to open up New York markets to telecommunications competition and ultimately to transform the old regulated monopoly structure of this industry.⁴ The NYSAG has also filed numerous comments in FCC proceedings of importance to competition and consumer protection for New Yorkers.⁵

⁴ See, e.g., NYSAG June 18, 2001 *Brief On Exceptions to Recommended Decision*, (http://www.oag.state.ny.us/telecommunications/filings/psc_on_wholesale_une_rates.html), and July 12, 2001 *Exceptions Reply Brief*, (http://www.oag.state.NYS.us/telecommunications/filings/pricing_une.html), filed in NYSPSC Case 98-C-1357, *Proceeding on motion of the Commission to Examine New York Telephone Company's Rates for Unbundled Network Elements*; NYSAG August 15, 2000 *Brief on Issues Consolidated for Litigation Track*, (http://www.oag.state.ny.us/telecommunications/filings/brief_litigation_track.html), filed in NYSPSC Case 00-C-0127, *Proceeding on Motion of the Commission to Examine Issues Concerning the Provision of Digital Subscriber Line Services*.

⁵ See, e.g., NYSAG October 19, 1999 *Initial Comments*, (http://www.oag.state.ny.us/telecommunications/filings/bell_atlantic/comments/index.html), and November 8, 1999 *Reply*

New York is a national leader in promoting the growth of competitive telecommunications markets for all sorts of services and, as such, is the first state in which a regional Bell operating company (“RBOC”) won FCC approval under § 271 of the 1996 Act to enter long distance markets. Commission approval was based on the reduction of barriers to competitive entry into New York’s local markets, including competitive access to xDSL wireline broadband transmission facilities.⁶

The NYSAG is committed to ensuring that New York’s local telephone markets achieve the Act’s goal of robust competition. Speeding the transformation from monopoly to competitive markets is of vital importance to consumers, businesses, and the entire New York economy. As the premier telecommunications market in the world, New York depends on the innovations, efficiencies and range of choices accompanying competitive local service markets. Residential and small business customers are just beginning to see the fruits of federal and state policies to promote local competition, including in the provision of high-speed Internet access.

We file these comments to urge the Commission to reject the tentative conclusions set forth in its *NPRM* and, instead, to continue to uphold policies that promote and strengthen the development and availability of information services offered over wireline facilities, in keeping with its prior orders and with federal law.

Comments, (http://www.oag.state.ny.us/telecommunications/filings/bell_atlantic/reply/index.html), filed in CC Docket 99-295, 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.

⁶ CC Docket No. 99-295, *In the Matter of 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, Memorandum Opinion and Order*, adopted December 21, 1999.

ARGUMENT**I. THE *NPRM*'s TENTATIVE CONCLUSION TO RECLASSIFY THE TRANSMISSION COMPONENT OF BUNDLED WIRELINE INTERNET ACCESS SERVICES SO THAT IT NEED NO LONGER BE OFFERED TO COMPETITIVE PROVIDERS IS NOT SUPPORTED BY LAW AND CONTRADICTS LONGSTANDING FCC POLICY.**

In considering wireline broadband internet access services, the *NPRM* is determined to discount what the FCC has found to be plain in the past; namely, that such a service, when provided by an entity over its own transmission facilities, has two components: the internet access service itself and the underlying transmission capability which supports it. For thirty years, the Commission has made this distinction in considering a variety of technologies and circumstances. Thus, the Commission long ago distinguished so-called “basic” transmission services from the “enhanced services” which must use them.⁷ The Commission ruled that this “basic service” should be treated as common carriage, subject to the open access obligations of Title II of the Communications Act, while the enhanced service remained lightly regulated or unregulated.⁸ This separation of regulatory classifications was not done for abstract or semantic reasons, but rather to ensure that monopoly ownership of the bottleneck telephone platform, the “basic service,” would not lead to the monopolization and constrained growth of new, innovative services that made use of the platform.⁹ The result of the FCC’s rulemakings over the years is

⁷ *Computer II*, ¶ 5.

⁸ *Id.*, ¶ 114.

⁹ *Id.*, ¶ 116. According to the Commission, “[t]his [basic services v. enhanced services regulatory] structure enables us to direct our attention to the regulation of basic services *and to assuring nondiscriminatory access to common carrier telecommunications facilities by all providers of enhanced services.*” *Id.* (emphasis added). The Commission goes on to note in

robust and competitive markets for a multiplicity of “enhanced services” offered by competitors as well as by ILECs.

With the 1996 Act, Congress sought to “open the local services market to competition and ultimately to permit all carriers, including those that had previously enjoyed a monopoly or competitive advantage in a particular market, to provide a variety of telecommunications offerings.”¹⁰ The Act did not change the overall pro-competitive thrust of the FCC’s prior regulatory classifications of services. Thus, under the Act, “information services”¹¹ are distinguished from “telecommunication services,”¹² and the latter remain subject to the

Computer II that an “essential thrust” of that proceeding was to provide a mechanism whereby non-discriminatory access could be had to basic transmission services by all enhanced service providers. *Id.*, ¶ 231.

¹⁰ *In the Matter of the Application of BellSouth Corporation et al., for Provision of In-region, Inter LATA Services in Louisiana*, CC Docket No. 98-121, Memorandum Opinion and Order, 13 FCC Rcd 20599, ¶ 3 (October 13, 1998) (“*Louisiana II*”). The Supreme Court has recently noted that the goals of the 1996 Act are to “eliminate the monopolies enjoyed by the inheritors of AT&T’s local franchises” and ultimately to “boost[] competition in broader markets . . .” *Verizon v. FCC, et al.*, 535 U.S. ___, 2002 USLexis 3559, issued May 13, 2002.

¹¹ The Act defines “information service” as “the offering of a capability for generating, acquiring, storing, transforming, processing, retrieving, utilizing, or making available information via telecommunications, and includes electronic publishing, but does not include any use of any such capability for the management, control, or operation of a telecommunications system or the management of a telecommunications service.” 47 U.S.C. § 153 (20). The *Computer II* analogue, “enhanced services,” are defined as “applications that act on the format, content, code, protocol or similar aspects of the subscriber’s transmitted information, or provide the subscriber additional, different, or restructured information, or involve subscriber interaction with stored information. *Computer II*, ¶ 5.

¹² The Act defines “telecommunications service” as “the offering of telecommunications for a fee directly to the public, or to such classes of users as to be effectively available directly to the public, regardless of the facilities used.” 47 U.S.C. § 153 (43). The *Computer II* analogue, “basic services,” are defined as “limited to the common carrier offering of transmission capacity for the movement of information.” *Computer II*, ¶ 5.

nondiscrimination requirements of Title II.¹³ The Act adds many additional unbundling and interconnection requirements for ILECs, including particular obligations that attach to the progeny of the former AT&T monopoly phone company, the RBOCs, if they seek to offer long distance telephone services.¹⁴ Nothing in the 1996 Act indicates that when an owner of transmission capability offers its own enhanced or information service over that platform, its common carrier obligations to make the platform available to others seeking to provide the service vanish.

On the contrary, in decisions since the Act was enacted, the Commission has recognized that the 1996 Act complements rather than replaces the policies enunciated in the *Computer Inquiry* cases and other relevant Commission decisions.¹⁵ The Commission has consistently interpreted the Act to require nondiscriminatory unbundling of the transmission component from the information service offered over it and in doing so has specifically addressed the latest transmission platform to come along, xDSL services.¹⁶

¹³ See, e.g., 47 U.S.C. §§ 251 and 252.

¹⁴ 47 U.S.C. §§ 251, 252 and 271.

¹⁵ The statutory requirements of §§ 251, 252 and 271 of the Act “seek to address many of the same anti-competitive concerns as, but do not explicitly displace, the safeguards established by the Commission in the Computer II, Computer III, and ONA proceedings.” *Computer III Further NPRM*, ¶ 5.

¹⁶ See 47 C.F.R. § 51.319(h); see also *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 (1999) ¶¶ 316-336 (Commission recognizes that Bell Atlantic is obligated to provide access to unbundled loops capable of supporting DSL technologies); *Deployment of Wireline Services Offering Telecommunications Capability and Implementation of the Local Competition Provisions of the Telecommunications Act of 1996*, Third Report and Order in CC Docket No.

For the Commission to adopt the tentative conclusions set forth in the *NPRM*, is to discount longstanding, consistently applied Commission policy reflected in the 1996 Act itself and in subsequent Commission orders.¹⁷

II. THE COMMISSION CANNOT AND SHOULD NOT DISCARD THE UNBUNDLING AND INTERCONNECTION REQUIREMENTS OF SECTIONS 251 AND 252 OF THE ACT WITH RESPECT TO THE UNBUNDLING OF ILEC BROADBAND TRANSMISSION FACILITIES.

The *NPRM* specifically seeks comment on the impact its tentative conclusions would have on the ILECs' obligations to provide access to network elements under §§ 251 and 252 of

98-147, Fourth Report and Order in CC Docket No. 96-98 (1999) ("*Line Sharing Order*"), (requiring ILECs to provide unbundled access to the high frequency portion of the local loop so that CLECs can compete with ILECs to provide to consumers xDSL-based services through local telephone lines); *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, CC Docket No. 96-98, Third Report and Order and Fourth Notice of Proposed Rulemaking (1999) ("*UNE Remand Order*"), ¶¶ 165-166 and 190-195 (unbundling DSL-capable loops will foster investment, innovation, and competition in the local telecommunications marketplace); *Deployment of Wireline services Offering Advanced Telecommunications Capability*, CC Docket No. 98-147, Memorandum Opinion and Order and Notice of Proposed Rulemaking (1998) ("*Advanced Services Order*"), ¶ 1 and ¶¶ 36-37, (Commission recognizes that separate services are offered when an ILEC provides DSL: the first service is a telecommunications service (e.g., the xDSL-enabled transmission path), and the second service is an information service, in this case Internet access.)

¹⁷ The recent decision of the U.S. Court of Appeals for the District of Columbia, *USTA v. FCC*, 2002 U.S. App. Lexis 9834 (May 24, 2002), which remanded both the *Line Sharing Order* and *UNE Remand Order* consists of the court's substituting its judgment for that of the expert agency as to how to determine whether a telecommunications carrier is "impaired" under Section 251(c)(3) of the 1996 Act by an ILEC's failure to provide access to a network element. Additionally, the D.C. Circuit's decision is at odds with the Supreme Court's recent ruling in *Verizon v. FCC, et al.*, 535 U.S. ___, 2002 USLexis 3559, issued May 13, 2002. As such, the decision should be appealed by the Commission. If, instead, the Commission accepts the remand, its reconsideration of the issues raised by the decision should not result in the overturning of longstanding policy to make such access available, as required by law.

the Act.¹⁸ Because these obligations arise only when a “telecommunications service” is involved, the *NPRM*'s tentative conclusions threaten to extinguish competitive access to ILEC networks for the provision of xDSL and other wireline broadband Internet access services. As the *NPRM* notes, a “network element” is defined by the statute as a “facility or equipment used in the provision of a telecommunications service.”¹⁹ Additionally, § 251 (c)(3) allows a requesting carrier to seek access to network elements “for the provision of a telecommunications service.”²⁰ Reclassifying bundled wireline broadband Internet access services as “information services” rather than “telecommunications services” would eliminate the ILECs’ current unbundling obligations under §§ 251 and 252 with respect to these services and deny competitors access to ILEC bottleneck networks. Such a result would be inconsistent with the unambiguous language and goals of the 1996 Act and with prior Commission orders.²¹

The language requiring ILECs to provide unbundled access under § 251 of the Act is clear:

The duty to provide, to any requesting telecommunications carrier for the provision of a telecommunications service, nondiscriminatory access to network elements on an unbundled basis at any technically feasible point on rates, terms, and conditions that are just, reasonable, and nondiscriminatory in accordance with the terms and conditions of the agreement and the requirements of this section and section 252 of this title. An incumbent local exchange carrier shall provide such unbundled

¹⁸ *NPRM*, ¶ 61.

¹⁹ 47 U.S.C. § 153(29).

²⁰ 47 U.S.C. § 251(c)(3).

²¹ *See* footnote 16.

network elements in a manner that allows requesting carriers to combine such elements in order to provide such telecommunications service.²²

Additionally, before an ILEC can provide interLATA services, it must satisfy a checklist of requirements that demonstrates, *inter alia*, that the ILEC provides open, unbundled and nondiscriminatory access to its bottleneck transmission facilities in compliance with §§ 251 and 252.²³

As discussed in the preceding section, the Commission has interpreted the unbundling requirements under the Act to include access to the high-frequency portion of the local loop so that CLECs can compete with ILECs in the provision of wireline broadband Internet access services.²⁴

Reclassifying bundled wireline broadband Internet access services pursuant to the *NPRM*'s tentative conclusions could effectively remove the requirement that the transmission component of such services be unbundled and offered as a UNE under §§ 251, 251 and 271. This would be a result at odds with prior Commission policy and with the pro-competition interconnection requirements of the Act.²⁵

²² 47 U.S.C. § 251 (c)(3).

²³ 47 U.S.C. § 271 (c)(2)(B).

²⁴ *See* footnote 16.

²⁵ *USTA v. FCC* should not change this result. *See* footnote 19, *supra*.

III. THE CURRENT STATUS AND FUTURE PROSPECTS FOR BROADBAND INTERNET ACCESS DEPLOYMENT DO NOT REQUIRE THE *NPRM*'s PROPOSED CHANGE IN FCC POLICY.

The *NPRM* begins by restating the Commission's "primary policy goal to encourage the ubiquitous availability of broadband to all Americans."²⁶ The Commission's own recent survey of the state of deployment of broadband services as of June 2001 (already a year ago) suggests that, while such deployment is proceeding apace, the goal of ubiquitous access has not yet been met.²⁷ This is not surprising considering how recently such services and technologies have begun to be available.

The data in the Commission's *Third Report* suggests that the existing statutory and regulatory framework is promoting the increased availability of broadband Internet access in a "reasonable and timely" manner.²⁸ Combining its own data with public data obtained from broadband service providers, financial analysts and the Census Bureau, the Commission finds that the number of U.S. households having access to DSL service nearly doubled in the two years from 1999 to 2001. DSL service was available to approximately 45% of U.S. homes in 2001 compared to 25% of U.S. homes in 1999.²⁹ The Commission also found that as of June 2001

²⁶ *NPRM*, ¶ 3.

²⁷ *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, Third Report (rel. Feb. 6, 2002) ("*Third Report*").

²⁸ *Third Report*, ¶ 7.

²⁹ *Id.* ¶ 51.

cable modem service for high-speed Internet access was available to 70% of U.S. households.³⁰ Thus, as of June 2001, the FCC has found that high-speed Internet access was available, either through DSL or cable modem service, to between 75% and 80% of all U.S. households, up from 60% a year earlier.³¹ The FCC found that broadband service was available in all fifty states and the District of Columbia and in 78% of all zip codes in the U.S.³² While access is not yet ubiquitous, and while many households do not have a high-speed Internet access option available to them, clearly the trend is upward.³³

There is nothing in the current record on broadband deployment to require the *NPRM's* drastic proposals to change the policy course. Whatever steps, if any, should be taken by the FCC to increase the availability of broadband Internet access to households and small businesses, or to encourage higher "take rates" by potential subscribers, limiting competitive access to the bottleneck facilities needed for xDSL services is not one of them.

³⁰ *Id.* ¶ 46.

³¹ *Id.* ¶ 61.

³² *Id.* Appendix C, p. 1.

³³ It must be noted that availability of broadband access is not the same thing as actually subscribing to such access. Thus, the Commission found that as of June 2001, 7% of American households subscribe to high-speed services. *Third Report*, ¶ 119. By comparison, it is estimated that high-speed Internet access is available to 75 to 80% of U.S. households. *Id.* In addition to the technologies now in use, the Commission lists nine different technologies (*Third Report*, ¶¶ 80-88) currently under development which "appear to have significant potential for expanding the availability of advanced telecommunications to more Americans." (*Third Report*, ¶ 79).

IV. NEW YORK'S CONTINUED PROGRESS IN DEVELOPING COMPETITIVE TELECOMMUNICATIONS MARKETS WILL BE BEST SERVED IF THE FCC REJECTS THE *NPRM*'s TENTATIVE CONCLUSIONS.

In New York, implementation of existing federal law and policy requiring open, nondiscriminatory access to bottleneck facilities for the provision of both voice and data telecommunications services has led to one of the most competitive markets for local telecommunications services in the country. According to the NYPSC, “[a]s of January 1, 2002, there were approximately 3.3 million local access lines served by [CLECs] operating in Verizon’s territory . . . represent[ing] about 27% of Verizon’s local access line market.”³⁴

New York has also been at the forefront in developing competitive markets for the provision of wireline broadband Internet access.³⁵ New York has the second largest reported number of total high-speed lines in the nation.³⁶ As of June 30, 2001, New York had the third

³⁴ NYPSC Case 00-C-1945, *Proceeding on Motion of the Commission to Consider Cost Recovery by Verizon and to Investigate the Future Regulatory Framework*, February 2002 NYPSC Staff testimony, p. 14, lines 15-19. Verizon-New York, Inc. is the ILEC serving most of New York, while approximately 10% of the state’s access lines serve customers within the service territories of 44 smaller ILECs.

³⁵ NYPSC Case 00-C-0127, *Proceeding on Motion of the Commission to Examine Issues Concerning the Provision of Digital Subscriber Line Services*, Opinion and Order Concerning Verizon’s Wholesale Provision of DSL Capabilities, October 31, 2000; NYPSC Case 00-C-0127, *Proceeding on Motion of the Commission to Examine Issues Concerning the Provision of Digital Subscriber Line Services*, Order Granting Clarification, Granting Reconsideration in Part and Denying Reconsideration in Part and Adopting Schedule, January 29, 2001 (collectively “DSL Orders”).

³⁶ *Third Report*, Appendix C, p. 3. The *Third Report* defines services as “high-speed” that provide the subscriber with transmissions at a speed in excess of 200 kbps in at least one direction. *Id.*, p. 5.

highest number of DSL lines in the country.³⁷

While some consumers value the convenience of one-stop-shopping associated with bundled services, others value the flexibility of choosing different carriers for voice and data. The Commission should not adopt policies that impede either of these options for consumers.

The future development of New York's local telecommunications market may be impacted negatively if CLECs do not have access to ILEC networks in order to provide combined voice and high-speed Internet access services. Because some consumers value the convenience of bundled services, CLECs that are unable to provide bundled high-speed data and voice services or standalone high-speed data services may wind up at a competitive disadvantage to ILECs that can provide such services.

Similarly, further development of New York's local telecommunications market may suffer if CLECs do not have access to ILEC networks in order to provide either voice or high-speed Internet access services to consumers subscribing to both services over a single loop.³⁸ Some customers value the flexibility of being able to choose different carriers for their voice and data services. If the Commission adopts policies which preclude customers ability to choose such carriers, CLECS will be at a competitive disadvantage.

The Commission should not adopt policies that deny customers the choices and services

³⁷ *Id.* Appendix C, Table 7. California has 735,677 DSL lines, Texas has 197,668 DSL lines and New York has 197,135 DSL lines. *Id.*

³⁸ For example, under the *NPRM's* proposals, a data CLEC might not be able to provide xDSL service to ILEC voice customers and a voice CLEC might be unable to serve customers who wish to use ILEC data services. See NYSAG's Reply Comments in the *Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Companies*, CC Docket No. 01-338, due July 17, 2002.

regarding voice and data that best meet their needs. Such policies may wind up leading to an erosion of competitive gains not only in the data services market, but in the total market for bundled local, long distance and high-speed data services. As the NYSPSC points out, “the CLECs’ ability to access these essential facilities is critical to sustaining competition in the local *and* advanced services markets.”³⁹ Thus, if the Commission’s tentative conclusions are adopted, consumer choice could be curtailed and the CLECs’ ability to effectively compete in the local telecommunications market (for both data and voice) could be seriously diminished. The Commission cannot permit this result.

V. THE *NPRM*’s TINKERING WITH LONGSTANDING STATUTORY AND REGULATORY DEFINITIONS MAY HAVE DAMAGING CONSEQUENCES FOR LAW ENFORCEMENT CAPABILITIES.

The NYSAG notes with concern the questions raised in the comments of the U.S. Department of Justice (“DOJ”) and the Federal Bureau of Investigation (“FBI”)⁴⁰ regarding the potential impact on the Communications Assistance for Law Enforcement Act⁴¹ (“CALEA”) of the *NPRM*’s tentative conclusion to reclassify bundled wireline broadband access services. In particular, we are concerned about the effect on CALEA’s requirement that telecommunications carriers ensure as a technical matter the electronic surveillance capabilities of their facilities used to transmit or switch wire or electronic communications.

The NYSAG’s Statewide Organized Crime Task Force (“OCTF”) investigates and

³⁹ NYSPSC Initial Comments, p. 3.

⁴⁰ Initial Comments of the Department of Justice and Federal Bureau of Investigation.

⁴¹ 47 U.S.C. § 1001 et seq.

prosecutes multi-county, multi-state, and multi-national organized criminal activities occurring within New York State, including, *inter alia*, loan sharking, narcotics trafficking, racketeering, and money laundering. Electronic surveillance is an indispensable tool for investigating serious crimes. OCTF must be able to rely upon CALEA's requirements as to the obligation of telecommunications carriers to provide technological surveillance assistance to law enforcement, including with respect to newer technologies such as wireline broadband access transmission facilities. Indeed, the FCC's own orders have confirmed the applicability of CALEA to technologies such as xDSL.⁴²

As DOJ and the FBI urge, the Commission must make clear that the *NPRM's* tentative conclusions have no bearing on the requirement of CALEA with respect to xDSL and other wireline broadband access services. The best way to so clarify is to leave the regulatory classifications of such services unchanged.

VI. THE *NPRM's* TENTATIVE CONCLUSIONS COULD HAVE A DELETERIOUS EFFECT ON THE ENFORCEMENT OF CONSUMER PROTECTION LAWS BY THE COMMISSION.

The Commission also seeks comment on the effect of the *NPRM's* tentative conclusion on consumer protection statutes. As we have indicated above, we do not believe that the *NPRM's* tentative conclusions can be adopted in light of their conflict with the 1996 Act and with long-standing Commission policy. Furthermore, the current policy has been effective and has clearly benefitted residential and small business consumers by beginning to give them a choice of voice and data providers, as we have demonstrated above. The FCC now threatens to

⁴² In re Communications Assistance for Law Enforcement Act, Second Report and Order, 15 FCC Rcd 7105 (1999).

undo that policy, which will not enure to consumers' benefit.

Regardless of the Commission's decision, the NYSAG will continue to aggressively enforce all laws designed to protect New York's telecommunications consumers.

VII. THE *NPRM*'s TINKERING WITH LONGSTANDING STATUTORY AND REGULATORY DEFINITIONS MAY ADVERSELY AFFECT THE RIGHTS OF PERSONS WITH DISABILITIES TO ACCESS TELECOMMUNICATIONS.

The NYSAG is also concerned about the potential effect of reclassifying bundled wireline broadband Internet access services on the existing statutory obligation to make such services accessible to persons with disabilities. Section 255 (c) of the Act requires that “[a] provider of *telecommunications service* shall ensure that the service is accessible to and usable by individuals with disabilities, if readily achievable.”⁴³ Thus, if bundled wireline broadband Internet access services are reclassified as “information services,” providers of such services would presumably not be subject to the accessibility requirements under § 255. Such a result is unacceptable and conflicts with the clear intent of Congress in passing the Act.

The initial comments submitted by the American Foundation for the Blind (“AFB”) and Telecommunications for the Deaf, Inc. (“TDI”) establish the importance of access to broadband Internet services by disabled persons. The AFB and TDI comments also demonstrate that we cannot solely rely upon the competitive marketplace to ensure that disabled Americans will have access to broadband Internet services. Congress clearly recognized this fact when it included § 255 in the 1996 Act. We join with AFB and TDI in urging the Commission to continue requiring access for the disabled to wireline broadband Internet services pursuant to § 255.

⁴³ 47 U.S.C. 255(c) (emphasis added).

CONCLUSION

For all the reasons stated herein, the Commission should reject the tentative conclusions reached in the *NPRM* and reaffirm its longstanding policy permitting CLECs to have access to ILEC bottleneck facilities so that CLECs can compete against ILECs in the provision of wireline broadband Internet access services. To do otherwise would violate the clear terms of the 1996 Act, turn thirty years of consistent pro-competition Commission policy on its head, and quite possibly jeopardize the very broadband deployment the Commission seeks to encourage.

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Respectfully submitted,
ELIOT SPITZER
Attorney General of
The State of New York
By:

Enver R. Acevedo
Assistant Attorney General

Mary Ellen Burns
Assistant Attorney General in Charge
Telecommunications and Energy Bureau

Enver R. Acevedo
Keith H. Gordon
Assistant Attorneys General
Of counsel

Office of the New York State Attorney General
120 Broadway
New York, NY 10271
(212) 416-6343
FAX (212) 416-8877
E-mail: mary.burns@oag.state.ny.us
enver.acevedo@oag.state.ny.us
keith.gordon@oag.state.ny.us