

**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 Dockets 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 CHARTER COMMUNICATIONS, INC.**

Charter Communications, Inc. (“Charter”), respectfully submits the following Reply Comments in response to the *Notice of Proposed Rulemaking* in the above-captioned proceeding.<sup>1</sup> Specifically, these Reply Comments address the question of whether the Commission should assess universal service contributions on providers of broadband Internet access services, and respond to initial comments submitted by other participants.

**I. The ILECs Seek To Siphon Off A “Transfer Payment” From Cable Operators Or Seek A Double Contribution From Cable For Schools.**

The issue in this proceeding is not whether the FCC must “close a loophole” but whether it is in the public interest for the Commission to use its *discretionary* authority to expand the universal service program by imposing an assessment on cable modem

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<sup>1</sup> *Appropriate Framework for Broadband Access to the Internet over Wireline Facilities*, Notice of Proposed Rulemaking, FCC 02-42, 67 Fed. Reg. 9232 (Feb. 28, 2002) (“*Wireline NPRM*”).

service providers.<sup>2</sup> ILECs have essentially proposed that the Commission create a “transfer payment” from cable operators to the ILECs to fund the deployment of the ILECs’ networks. Some ILECs explicitly request that the industry innovator in broadband, cable modem service providers, be assessed with USF obligations knowing it is ILECs that draw well over 95% of the support for the high cost and low income programs.<sup>3</sup> BellSouth and SBC’s proposal for a capacity “tax” take this obligation a step further, and seek to turn cable’s principal asset—its high capacity networks—into a liability.<sup>4</sup>

Verizon’s proposal seeks to impose a “double contribution” requirement on cable operators for the subsidized services provided to schools. Verizon proposes that cable modem service providers be assessed for the schools and libraries program,<sup>5</sup> but these comments fail to bring to light the fact that the cable industry already contributes millions annually to schools through the Cable in the Classroom (“CIC”) program. The cable industry’s 13-year CIC initiative has brought educational programming and Internet

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<sup>2</sup> See 47 U.S.C. § 254(d) (requiring telecommunications carriers providing telecommunications services to contribute and giving the FCC discretion to determine whether providers of telecommunications should contribute to the USF). Because the statute creates different USF obligations, there are no “exceptions” or “loop holes” in the USF contribution program. Any loophole argument is basically rhetoric. Cf. BellSouth Comments at 31 (stating that the USF program should not have exceptions or loopholes).

<sup>3</sup> For the high cost program, the total monthly support projected for the third quarter of 2002 is \$231,642,591, of which competitive eligible communications carriers (“CETC”) are projected to receive \$3,240,392 each month. The remaining funds--98.6%--will go to ILECs. *Universal Service Administrative Company Federal Universal Service Support Mechanism Fund Size Projections, 3Q Projections and Appendices available at <http://www.universalservice.org/overview/filings> (“USAC Fund Projections”).* With respect to low income, the total annual support for 2001 was \$585,061,871 of which the CETC share was \$2,626,479. The remaining funds--99.55%--went to ILECs. *USAC Fund Projections.*

<sup>4</sup> BellSouth and SBC have proposed to base USF assessments on the capacity of the connection, which would increase as the level of capacity increases. SBC Comments at 45 (describing the joint SBC and BellSouth proposal increase the amount of universal service contributions as the capacity of the connection increases); BellSouth Comments at 31-32; SBC Comments submitted in *Federal-State Joint Board on Universal Service*, CC Docket Nos. 96-45, 98-171, 90-571, 92-237, 99-200, 95-116, *Further Notice of Proposed Rulemaking and Report and Order*, FCC 02-43 (rel. Feb. 26, 2002) (“*Methodology FNPRM*”), at 10-11 (explaining the joint proposal in more detail).

<sup>5</sup> Verizon Comments at 42-45.

access to 78% of the K-12 students in the United States.<sup>6</sup> The cable industry should not have to make the same contribution twice.

As discussed at length in Charter's initial Comments, it is inappropriate for the Commission to expand regulatory USF obligations onto competitive broadband players. Such an extension of USF would reward and subsidize the ILECs' voluntary decision to lag behind in broadband deployment, at the expense of one of the groups to have successfully brought broadband services to consumers.

## **II. USF Obligations Have Not Hindered DSL Deployment.**

As Charter predicted in its initial Comments,<sup>7</sup> the ILECs claimed (for the first time) in their initial comments to the *Wireline NPRM* that they unfairly pay a USF "surcharge" that puts them at a competitive disadvantage in the broadband services market. For example, Verizon argues that if the Commission does not expand the universal service program to all providers of broadband services, "then telephone companies will bear an additional expense that will be passed on to their customers. . . [and] carriers with universal service contributions should not be put at a competitive disadvantage."<sup>8</sup> Similarly, SBC asserts that DSL service is assessed a USF "surcharge" that competing broadband services do not pay.<sup>9</sup>

Although other providers have surpassed the ILECs' poor penetration in the broadband market since the late 1990s,<sup>10</sup> the ILECs have never before blamed their USF

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<sup>6</sup> Cable in the Classroom, All About CIC, *available at* <http://www.ciconline.com/section.cfm/2> (visited May 24, 2002).

<sup>7</sup> Charter Comments at 24-25.

<sup>8</sup> Verizon Comments at 42-43.

<sup>9</sup> SBC Comments at 43.

<sup>10</sup> Scott Moritz, *Rapid Internet Access Arriving at a Crawl; Bell Atlantic Dragging Feet, Critics Say*, THE RECORD (Bergen County, NJ), Mar. 3, 1999, at B1 ("DSL was created by the telephone industry to counter the high-speed Internet service developed by the cable industry . . . In 1998, 25,000 homes had DSL

obligations as a reason why they have lagged so far behind in broadband deployment, not even in the pending proceeding to modify the USF contribution methodology.<sup>11</sup> The ILECs' delay in rolling out broadband services<sup>12</sup> has nothing to do with USF. The delay results from an ILEC reluctance to finance broadband deployment with risk capital, an exercise to which they are not accustomed. ILECs also have not wanted to compete with their own T-1 business. "Although DSL was invented in the 1980s . . . [t]he Bell companies felt no need to cannibalize their Internet service business for T1 lines – priced at *\$1,500 per line per month* – to provide DSL service at *similar speeds for one-tenth* the price."<sup>13</sup> Nor do the ILECs wish to reduce demand for second lines, which had been fueling much of their profits, with a technology that eliminates the need for second lines.<sup>14</sup> Accordingly, it has been the cable industry's introduction of cable modem

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connections whereas 425,000 homes had cable modem service; that is, one DSL home for every 17 cable modem homes, according to the Federal Communications Commission.”)

<sup>11</sup> *Methodology FNPRM*; Comments of SBC Communications Inc. to *Methodology FNPRM* (filed April 22, 2002) (declining to cite universal service obligations as a competitive hardship in broadband even though it stated that “the universal service mechanism is a financial burden that affects [telecommunications providers'] overall business and . . . relationship with individual customers); Comments of BellSouth Corporation to *Methodology FNPRM* (filed Apr. 22, 2002) (omitting any discussion of why the ILECs' broadband market share is so low); Comments of Verizon telephone companies on *Methodology FNPRM* (filed Apr. 22, 2002) (omitting any discussion of the relationship between Verizon's USF obligations and its poor penetration in the broadband market).

Nor did the ILECs blame universal service obligations in comments filed in a proceeding to review the definition of universal service. See *Federal-State Joint Board on Universal Service Seeks Comment on Review of the Definition of Universal Service*, CC Docket 96-45, Public Notice (DA 01-J-1, rel. Aug. 21, 2001) (“*Universal Service Definition PN*”); Comments on *Universal Service Definition PN* of SBC Communications Inc.; BellSouth Corporation; and Verizon (Filed Nov. 5, 2001); see also Reply Comments of SBC Communications Inc.; BellSouth Corporation; and Verizon (Filed Jan. 4, 2002).

<sup>12</sup> Even in 2000, DSL players were criticized for their failure to bring broadband DSL services to consumers. See Jesse Berst, Editorial Director, *Don't Get Trapped in DSL Hell*, ZDNET.com (May 24, 2000), at <http://www.zdnet.com/anchordesk/stories/story10,10738,2574527,00.html>. Qwest has given up on DSL entirely by selling off its high-speed business to Microsoft Network, and SBC has practically abandoned Project Pronto, their plan to provide DSL to 80 percent of their customers. See Loring Wirbel, *SBC Shifts Focus from DSL to Passive Optical Nets*, EE TIMES (Jan. 4, 2002) (stating that both SBC and Qwest have “back pedaled from aggressive DSL plans in recent months”) at <http://www.eetimes.com/story/OEG2001112750066>.

<sup>13</sup> George A. Chidi, Jr., *A Perfect Storm of Telecom Regulation On Horizon*, INFOWORLD DAILY NEWS, Feb. 25, 2002 (emphasis added).

service that has compelled the ILECs to respond competitively.<sup>15</sup> As analysts put it, the ILECs “need to be truly compelled to cannibalize their traditional voice business to offer next-gen[eration] [voice over DSL] service.”<sup>16</sup> Therefore, the presence of USF obligations has nothing to do with the pace of DSL deployment.

### III. “Regulatory Parity” Arguments Do Not Reflect Market Realities.

The ILECs argue that they are handicapped in DSL deployment by the absence of regulatory parity among providers of “functionally equivalent” broadband services.<sup>17</sup>

However, as Senator Hollings has stated, “There is not now, and there never has been,

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<sup>14</sup> See *SBC Annual Report Form 10-K, For Fiscal Year Ended Dec. 31, 1998* (reporting that that 40% and 31% of access line growth in 1998 and 1997 was due to sales of additional access lines to existing residential customers) available at

[http://www.sbc.com/investor\\_relations/company\\_reports\\_and\\_sec\\_filings/0,5931,93,00.html](http://www.sbc.com/investor_relations/company_reports_and_sec_filings/0,5931,93,00.html) under “SEC Filings 1999.” Similarly, US West reported an 18% growth in residential second lines in 1998, reaching 15.9% penetration rate. *US West Reports Modest Growth*, COMMUNICATIONS TODAY, Jan. 25, 1999.

<sup>15</sup> *In the Matter of 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*, 14 F.C.C.R. 2398 n.84 (rel. Feb. 2, 1999) (stating that “[I]t is widely believed that incumbent LECs’ recent moves to offer broadband to residential customers are primarily a reaction to other companies’ entry into broadband.”); James Glassman, American Enterprise Institute, *How to Solve the Broadband Crisis*, at

[http://www.internetindustry.com/mag/01\\_03fa/03how/index.shtml](http://www.internetindustry.com/mag/01_03fa/03how/index.shtml) (stating that “The Bells had fast DSL technology for 10 years before they started to deploy it. That deployment came only after cable companies began to compete with their own broadband technology. . .”) (visited Apr. 28, 2002).

<sup>16</sup> Duffy Hayes, *Walking The Dog That Is VoDSL*, CED, InDepth p. 16, May 1, 2002 (“Analysts concur that all of the major ILECs have been kicking the tires of VoDSL in lab trials and small field tests, but with so much voice business currently riding on the analog POTS (plain old telephone service) lines, they’ll need to be truly compelled to cannibalize their traditional voice business to offer next-gen VoDSL service.”); see *Voice Over DSL? Is There A Future?*, BROADBAND NETWORKING NEWS, Vol. 12, No. 8 (Apr. 23, 2002) (“The real use of VoDSL was to simulate the appearance of multiple voice lines . . . This meant little to the ILECs because they already had plenty of standard voice circuits.”)

<sup>17</sup> See Bellsouth Comments at 14-15 (contending that “provider parity” is necessary between providers of services that have “the same regulatory definition”); Verizon Comments at 24, 43 (arguing that regulatory parity is appropriate when services compete head-to-head and consumers perceive them to be equivalent services, and that the imposition of USF obligations puts ILECs at a competitive disadvantage in the broadband arena); SBC Comments at 5-6, 41 (stating that broadband rules must apply equally to all broadband providers for the development of the service and calling for the imposition of USF obligations on the allegedly “functionally identical” services of DSL and cable modem service). Verizon’s comments also appear to make no distinction between their wholesale DSL transmission services and their integrated retail DSL services. However, the ILEC wholesale transport service is offered on a common carrier basis, a critical regulatory distinction between it and cable modem service.

any prohibition on the Bells offering their customers broadband.”<sup>18</sup> Indeed, the ILECs have fought hard to maintain the advantages of their own unique regulatory position. They have resisted local franchising when they deliver video over trunks leased from themselves,<sup>19</sup> via VDSL,<sup>20</sup> or via a combination of DBS and DSL.<sup>21</sup> They clearly do not believe in parity for video services when it would subject themselves to the franchise fees and regulations of 30,000 local franchising authorities crafted for the cable industry. They also have fallen silent when asked to defend their preferential access to rights-of-way<sup>22</sup> and have fought to retain more favorable pricing structures than those available to CLECs.<sup>23</sup>

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<sup>18</sup> Paige Albiniak, *Hollings Stays Strong in Bell Opposition*, TVINSITE, May 3, 2002 at [http://www.tvinsite.com/broadcastingcable/index.asp?layout=story&doc\\_id=84435&display...](http://www.tvinsite.com/broadcastingcable/index.asp?layout=story&doc_id=84435&display...)

<sup>19</sup> See *City of Austin v. Southwestern Bell Video Services, Inc.*, 193 F.3d 309 (5th Cir. 1999)(wherein a subsidiary of SBC fought municipal efforts to franchise its video service provided over lines leased from SBC).

<sup>20</sup> DAVID ILER, *Telco Group Pushes VDSL Spec*, MULTICHANNEL NEWS, June 4, 2001 available at <http://www.tvinsite.com/multichannelnews/index.asp?layout=story&articleID=CA84563&p...> (describing Qwest’s entry into the video services market and the technology used to provide these services).

<sup>21</sup> *SBC, Echostar Announce Strategic Marketing Alliance*, DIGITAL TELEVISION .COM, Apr. 22, 2002 at [http://www.digitaltelevision.com/2002/april/news0422\\_4.shtml](http://www.digitaltelevision.com/2002/april/news0422_4.shtml) (stating that SBC and Echostar were combining SBC’s DSL service and Echostar’s digital satellite television offerings to provide an alternative to cable). In this particular proceeding, Verizon also raises the possibility of competing in video services but makes no offer to be subject to the cable franchise obligations. See Verizon Comments at 25 (stating that local telephone companies have an incentive to see broadband flourish because it affords local telephone companies an opportunity to compete in the video services market). In addition, Verizon asserts that “at the extreme, a difference in treatment [between ILECs and other broadband providers such as cable operators] would violate . . . the First Amendment.” See Verizon Comments at 27, 43. Carrying forward a carrier’s traditional common carrier duties is not a First Amendment violation. If it were, every regulation that makes the Public Switched Telephone Network work would be unconstitutional. See *BellSouth Corp v. FCC*, 144 F.3d 58, 69 (D.C. Cir. 1998)(finding no First Amendment violation where there was no indication that the statute was limited to BOCs because of any concern about the content of their speech and where the statute was aimed at solving a problem unrelated to the speech at issue). Courts routinely acknowledge that distinctions among technologies do not automatically rise to a First Amendment violation. See *Leathers v. Medlock*, 111 S. Ct. 1438 (1991)(holding that imposing a fee upon cable operators and not on satellite providers alone did not impede cable’s free speech ability, nor did it target a small group of speakers or discriminate on content).

<sup>22</sup> See *Agencies*, WASHINGTON INTERNET DAILY, Vol. 3, No. 84 May 1, 2002 (wherein SBC avoided answering questions from the CLEC community regarding CLEC disparity with the ILECs in terms of rights-of-way regulation).

<sup>23</sup> See “*Texas Makes Way for Line Sharing*,” BROADBAND NETWORKING NEWS, June 20, 2000 (wherein, although “each and every ILEC has done everything possible to protect its monopoly,” CLECs obtained a

“Parity” of USF assessments is not necessary to achieve broadband deployment.

In fact, extending USF assessments to cable modem service would actually undermine broadband development by using one facilities-based competitor to subsidize the other.<sup>24</sup>

#### **IV. Conclusion.**

Various proposals made by the ILECs in their comments are nothing more than thinly-veiled efforts to create a burden on cable modem service providers and to frustrate broadband competitors to the ILECs. The Commission should not expand USF obligations to cable modem service.

**Respectfully Submitted,**

**CHARTER COMMUNICATIONS, INC.**

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major victor for loop pricing at the Texas PUC to achieve parity with the ILECs for offering advanced broadband services).

<sup>24</sup> To the extent there is any lingering concern over “parity” in USF assessments, Charter reiterates that the Commission should not “level” the playing field by assessing a charge on innovative technologies like cable modem service. Rather, the Commission should remove the ILECs’ USF obligations. Charter Comments at n.77.