

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

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

**REPLY COMMENTS OF THE AD HOC
TELECOMMUNICATIONS USERS COMMITTEE**

Lee L. Selwyn
Helen E. Golding
Economics and Technology, Inc.
Two Center Plaza, Suite 400
Boston, MA 02108-1906
617-227-0900

Economic Consultants

Colleen Boothby
Levine, Blaszak, Block & Boothby, LLP
2001 L Street, N.W., Suite 900
Washington, D.C. 20036
202-857-2550

Counsel for
Ad Hoc Telecommunications
Users Committee

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SUMMARY

When ILECs combine broadband telecommunications service with Internet access service and offer “wireline broadband Internet access,” they are indisputably offering “information service” as defined by the Communications Act. But the FCC’s proposal to classify “wireline broadband Internet access” as an information service is incidental to the key policy (and the only new) question raised by the service, namely, whether the FCC should continue its requirement that ILECs provide the same broadband telecommunications service to their ISP competitors that they provide to their affiliated ISPs or whether, instead, the FCC can declare local telecommunications markets competitive and allow the ILECs to restrict access to their broadband services.

As large consumers of the ILECs’ telecommunications services, Ad Hoc members urge the Commission to follow the statute and sound economic policy by continuing to require non-discriminatory access to the basic transmission services provided by the ILECs, and used by their affiliates and competitors as inputs for competing services.

The Commission’s focus in the *Notice* on whether to eliminate Title II regulation for broadband transmission services is apparently based upon the unsupported, and fundamentally false, premise that competition for the “last mile” telecommunications connection between the ISP and end user has developed to the point where ILECs no longer possess market power with respect to these services. In fact, and as other parties have demonstrated in their opening comments, ILECs still maintain extensive and pervasive market power over “last

mile” facilities. If ILECs are permitted to offer broadband transmission services using these facilities but only on a bundled basis and without a prohibition on unreasonably discriminatory practices, the ILECs will have little difficulty in leveraging their “last mile” dominance to ultimately dominate and monopolize access to the Internet itself.

As substantial, geographically-diverse purchasers of telecommunications service nation-wide, Ad Hoc members are uniquely qualified to give the Commission an unbiased but informed point of view of the state of competition in the telecommunications marketplace. Indeed, as high-volume purchasers of telecommunications services, Ad Hoc members would likely be the first beneficiaries of any de-regulatory regime for the ILECs, and would therefore be the first to urge de-regulation, if ILEC markets were competitive.

But the local services market for the large business consumer is not yet sufficiently competitive for the FCC to summarily deregulate broadband. And the notion that de-regulation will somehow stimulate additional deployment of facilities is a patently insufficient rationale, particularly when there is no apparent under-deployment of broadband transmission facilities to begin with. (As Ad Hoc emphasized in its comments in Docket 01-337, the problem is not deployment but *competitive* deployment.) The Commission must instead adapt its regulatory regime to the competitive realities of the broadband business service market and protect the interests of consumers.

The Commission's narrow focus on broadband when it is used to access the Internet is seriously misplaced. Low-cost, mass market broadband connectivity, such as that provided by ADSL and other DSL protocols, can support numerous end user data applications that have no particular relationship to the Internet. Proposals that would permit ILECs to bundle DSL and similar services with Internet access, and concurrently deny access to the underlying broadband telecommunications service to end users for applications not involving the Internet, force potential users either to use far more costly (and currently also monopolized) services such as ISDN, or forego the applications altogether. There is no valid reason why such a "refusal to deal" should be condoned, let alone affirmatively endorsed in the Commission's rules, or why the use of broadband telecommunications services should be tied – in both the colloquial and antitrust sense – to Internet access.

Ad Hoc members are among the nation's largest corporate users of telecommunications services. Long before mass-market commercial use of the Internet had developed, Ad Hoc members had each created extensive voice and data communications networks, often linking tens of thousands of individual locations and providing divisions, affiliates, distribution channels, suppliers, and, in many cases, customers with on-line access to data bases and any number of data base-oriented applications. Accordingly, Ad Hoc is submitting these reply comments to remind the Commission that, in the end, it is not the carrier or the ISP but *the end user* who is ultimately affected by decisions that materially shape

the future structure of the telecommunications and information technology industries.

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**Before the
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In the Matter of

Review of Regulatory Requirements for)	
Incumbent LEC Broadband)	CC Docket No. 01-337
Telecommunications Services)	

**REPLY COMMENTS OF AD HOC
TELECOMMUNICATIONS USERS COMMITTEE**

The Ad Hoc Telecommunications Users Committee (the “Ad Hoc Committee”) submits these Reply Comments pursuant to the Notice of Proposed Rulemaking (“*Notice*” or “*NPRM*”) in the above-referenced docket.

INTRODUCTION

The Commission should conclude that wireline broadband Internet access consists of two entirely separate and distinct elements – (1) the underlying broadband telecommunications service interconnecting the end user with his or her provider of Internet access service; and (2) the provision of Internet access service via a combination of servers, packet switching facilities, and “backbone” high-capacity transmission facilities that interconnect the Internet Service Provider (“ISP”) with the Internet and World Wide Web.

Ad Hoc does not dispute that the resulting combination of these two elements into “wireline broadband Internet access” constitutes an “information service” as defined by the Communications Act¹ but the FCC’s proposal to so

¹ 47 U.S.C. § 153(46).

classify the combination is only incidental to the key policy (and the only new) question raised by the incumbent local exchange carriers' ("ILECs") current offering of broadband Internet access services, namely, whether the ILECs should continue to be required to provide on a non-discriminatory basis to unaffiliated entities any broadband telecommunications services the ILECs provide to their affiliated ISPs.

As large consumers of the ILECs' telecommunications services, both as direct customers and as indirect customers when interexchange carriers purchase access services on an end user's behalf, Ad Hoc members urge the Commission to follow the statute and sound economic policy by continuing the requirement of non-discriminatory access to the basic transmission services provided by the ILECs and used by their affiliates and competitors as inputs for information services like Internet access.

The Commission's focus in the *Notice* on whether to eliminate Title II regulation for broadband transmission services, and particularly the requirement that ILECs provide unaffiliated ISPs with non-discriminatory access to the broadband services they provide to their affiliated ISPs, is apparently founded upon the unsupported, and fundamentally false, premise that competition for "last mile" wireline broadband telecommunications services has developed to the point where ILECs no longer possess market power with respect to these services, such that it is no longer necessary to regulate competitive access to the underlying "last mile" telecommunications connection between the ISP and end

user. Under this mistaken view of local exchange markets, ILECs should not only be permitted to bundle broadband transmission services with Internet access and offer the resulting information service to customers on an unregulated basis, they should also no longer be required to unbundle and separately offer as a stand-alone service element the underlying “broadband” transmission link itself.

In fact, and as other parties have demonstrated in their opening comments,² ILECs still maintain extensive and pervasive market power over “last mile” facilities. If ILECs are permitted to offer broadband transmission services using these facilities – but only on a bundled basis as part of a nonregulated “broadband Internet access” offering, while simultaneously escaping any requirement that the underlying telecommunications service be provided to competing ISPs or directly to end users – the ILECs will have little difficulty in leveraging their “last mile” dominance to ultimately dominate and monopolize access to the Internet itself.

With no competitive or self-serving axe to grind, Ad Hoc is one of the very few (and may be the only) party to this proceeding with extensive market experience (as substantial, geographically-diverse purchasers of telecommunications service nation-wide) and an unbiased point of view regarding any competitive advantages and disadvantages in the

² See, e.g., Worldcom/Comptel/ALTS at 32-39; AT&T, Affidavit of Robert D. Willig, §III; Oregon PUC at 1-2.

telecommunications marketplace. Indeed, as high-volume purchasers of telecommunications services, Ad Hoc members would likely be the first beneficiaries of any de-regulatory regime for the ILECs, and would therefore be the first to urge de-regulation, if ILEC markets were competitive.

But the local services market for the large business consumer is not yet sufficiently competitive for market forces to discipline prices and stimulate demand-responsive innovation. Accordingly, the FCC must not abdicate its responsibility to protect end-users and consumers from supracompetitive prices and sluggish carrier performance by summarily deregulating broadband business services on the notion that this will somehow stimulate additional deployment of facilities, particularly when there is no apparent under-deployment of broadband transmission facilities to begin with. (As Ad Hoc emphasized in its comments in Docket 01-337, the problem is not deployment but *competitive* deployment.³) The Commission must instead adapt its regulatory regime to the competitive realities of the broadband business service market and protect the interests of consumers.

The Committee also believes that the Commission's narrow focus on broadband transmission facilities used to access the Internet is seriously misplaced. Low-cost, mass market broadband connectivity, such as that

³ Comments of Ad Hoc Telecommunications Users Committee in *Review of Regulatory Requirements for Incumbent LEC Broadband Services; SBC Petition for Expedited Ruling That It Is Non-Dominant in its Provision of Advanced Services and for Forbearance From Dominant Carrier Regulation of These Services*, CC Docket No. 01-337, Notice of Proposed Rulemaking, FCC 01-360, 16 FCC Rcd 22745 (2001) ("*ILEC Broadband Regulation*"), filed April 22, 2002, at

provided by ADSL and other DSL protocols, can support numerous end user data applications that have no particular relationship to the Internet. Proposals that would permit ILECs to bundle DSL and similar services with Internet access, and concurrently deny the underlying broadband telecommunications service on a stand-alone basis to end users for applications not involving the Internet, force potential users of such services either to use far more costly (and currently also monopolized) services such as ISDN, or forego the application altogether. The ILEC commenters have advanced no valid reason why such a “refusal to deal” should be condoned, let alone affirmatively endorsed in the Commission’s rules, or why the use of broadband telecommunications services should be tied – in both the colloquial and antitrust sense – to Internet access.

DISCUSSION

I. Competition in the Local Services Market Does Not Warrant Regulatory Flexibility for ILECs At This Time.

A. There Is No Record Evidence Of Competition In The Market For Broadband Services.

The record in this docket and the Commission’s other broadband rulemaking dockets,⁴ demonstrates that the present state of competition in the local services market does not warrant the adoption and implementation of

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⁴ *ILEC Broadband Regulation*, *supra*, note 3; *Performance Measurements and Standards for Interstate Special Access Services*, CC Docket Nos. 01-321, 00-51, 98-147, 96-98, 98-141, 96-149, 00-229, Notice of Proposed Rulemaking, 16 FCC Rcd 20896 (2001) (“*Performance Standards Rulemaking*”); *Inquiry Concerning High-Speed Access to the Internet Over Cable and*

regulatory flexibility at this time. No parties, including the ILECs, have been able to present current empirical evidence to support their claims of vigorous market competition, despite repeated opportunities to do so. Indeed, the preponderance of the evidence on the subject serves only to confirm the utter lack of competition in the local services market::

- As discussed in Ad Hoc's comments in the Commission's *Performance Standards and ILEC Broadband Regulation* proceedings, the ILECs have used the pricing flexibility granted to them for special access services (which include, or are equivalent to, the broadband business services that the Commission has targeted in this proceeding) to *increase* prices, actions that have contributed to the record earnings levels being realized by the ILECs. The ability of ILECs to increase prices and earn supra-competitive profits for what purports to be a "competitive" service is fundamentally inconsistent with a competitive market outcome. The persistence and magnitude of these price increases serves to confirm and to validate Ad Hoc's position that premature deregulation of any service or service sector will serve only to encourage and enable ILECs to engage in anticompetitive and supracompetitive pricing, imposing costs that are ultimately borne by the end-user customer.⁵
- Notwithstanding the fact that Ad Hoc's members are among the largest corporate telecommunications consumers in the nation and despite their ongoing efforts at affirmatively seeking out competitive offerings, these companies' experience confirms the utter dearth of serious and viable competitive alternatives to ILEC-provisioned services. To gauge the level of competition being experienced by its member, Ad Hoc conducted a survey in which its members were first asked to categorize their need for broadband services, then to provide estimates of the percentage of locations by category for which they were aware of viable competitive alternatives to ILEC services. Finally, the percentages of locations in which competitive alternatives are used to meet their service requirements were calculated by category. In total, approximately 30,000 locations were included in the survey. The

Other Facilities, Notice of Inquiry, 15 FCC Rcd 19287 (2000) ("*Cable Modem Notice*").

⁵ See Comments of Ad Hoc in *Performance Standards Rulemaking*, filed January 22, 2002, at 3-6; Comments of Ad Hoc in *ILEC Broadband Regulation* at 11-14.

results of the survey illustrate that viable competitive alternatives to ILEC-provisioned services are not frequently available, particularly with respect to the smaller business service locations for which non-traditional broadband services like DSL would be suitable.⁶

- Although ILECs cite cable modem-provisioned broadband services as being the dominant player and the fiercest source of competition to ILEC-provided DSL services in the market, in fact such “intermodal competition” via cable modem service is not a viable choice for large business users due to its serious security and reliability shortcomings. Even if these problems were not present, the extremely limited deployment of cable infrastructure in business areas makes cable-based broadband unsuitable as a source of alternative service for large business users.⁷

Contrary to ILECs’ claims of a competitive marketplace, HAI Consulting, Inc. demonstrates in its report for WorldCom that local exchange markets are, in fact, decidedly *not* competitive.⁸ Specifically, HAI concludes that “[a]t the end of 2001, competitors who owned facilities that connect to end-user consumers controlled only about three percent of lines, and many of those competitors are facing a daunting economic future.”⁹ Indeed, the financial perils of the CLECs have severely restricted their ability to remain in the market and to expand their existing service capabilities. Any optimism regarding the immediate emergence

⁶ See Comments of Ad Hoc Telecommunications Users Committee in *ILEC Broadband Regulation*, filed March 1, 2002, at 14 - 17 for complete discussion of survey results.

⁷ *Id.* at 17 – 19.

⁸ *The Technology and Economics Of Cross-Platform Competition In Local Telecommunications Markets*, Richard A. Chandler, A. Daniel Kelley, and David M. Nugent, HAI Consulting, Inc., April 4, 2002, as submitted on behalf of WorldCom et al, as an attachment to its Comments in this docket..

⁹ *Id.* at 2-3.

of competition in local exchange markets has necessarily faded as the number of competitive providers has dwindled and their financial prospects have dimmed.

Specifically with respect to the high-speed Internet access market, ILECs claim to hold only a minority share, and offer data purporting to confirm that contention. The Commission should not be misled by these raw statistics. ILECs were – and still are – slow to deploy ADSL, and ILECs expended a great deal of effort to deter competitors from offering such services utilizing ILEC facilities. As a result, many cable systems captured the lead in “high-speed Internet access.” Even so, the overall penetration rate for “high-speed” Internet services among residential consumers is still well below 10% nationally,¹⁰ and consists largely of “early adopters” who likely subscribed to the first such offering that became available at their address before any actual “choice” among “competing” ILEC and cable system providers was available. This market is simply too young and too underdeveloped for “early adopter” penetration and share statistics to provide any meaningful indication as to the extent or presence of actual competition in this market. Moreover, even if the preliminary ILEC and cable provider market shares, which are approaching equality, could be used as valid indicators of “end game” market division, what this data demonstrates is that the residential market is supporting at best a duopoly. Those same “early

¹⁰ Verizon Comments in CC Docket No. 01-337, Exhibit A, “Broadband Fact Report,” March 1, 2002, at 19, *citing* Telechoice and Morgan Stanley reports; DirecTV Comments in CC Docket No. 01-337, *citing* “Broadband Success Requires More than Regulatory Clearance, Says Research,” CLEC News, February 21, 2002, available at <http://www.isp-planet.com/cplanet/news/02feb2002/18broadband.html> (accessed April 16, 2002).

adopter” share statistics also confirm what consumers have already experienced: that other forms of “intermodal” competition – satellite and wireless – are not significant players in this segment at this time.¹¹

These current characteristics of the local services market demonstrate that the market is not sufficiently competitive to justify the relaxation of the Commission’s existing regulatory policies. Furthermore, premature elimination or reduction of regulation for the “last mile” broadband link will almost certainly diminish the small amount of competition that does exist at the present time.

B. Reduced Regulation Is Irrelevant to Increased ILEC Deployment of Broadband Facilities

ILECs persist in their claim that deregulation of broadband will provide them with an “incentive” for increased deployment of, and technological innovation in, broadband services. Their unspoken implication – that absent such “incentives,” ILECs are not investing in broadband; and absent ILEC investment, rapid deployment is not taking place – is simply not supported by the market facts.

To the extent that investment in transmission facilities for broadband Internet access may have lagged behind the Commission’s expectations, the problem is one of demand, not supply. The Oregon PUC makes this point quite

¹¹ The Commission itself has pointed out that “radio-based” technologies are used by only 3% of broadband subscribers who themselves comprise only 11% of U.S. households, despite the availability of service to approximately 75-80% of all the homes in the U.S. See *Cable Modem Notice*, *supra* note 4, at para. 9.

effectively in its initial comments in this docket.¹² Fundamentally, there remains a shortage of applications that would provide an incentive for residential customers to purchase the higher-speed, higher-cost broadband services. Regulatory incentives to invest where no demand exists are futile at best and bad policy at worst since, whatever they may promise in order to gain de-regulation now, ILECs will not expand supply in the absence of demand, nor should they.

By the same token, if demand does begin to expand, the ILECs need no further incentives from regulators to prompt them to make the necessary investments. In the statement submitted by Kahn and Tardiff on behalf of Verizon in Verizon's comments in this docket, the authors claim that "[t]he current asymmetrical regulation of broadband services inhibits innovation and harms consumers."¹³ Incredibly, Kahn and Tardiff offer no quantitative evidence to support this summary assertion. On the contrary, the ILECs have themselves acknowledged that "[u]ltimately, innovation is the pulse of any technology-driven industry"¹⁴ and have continually reminded their shareholders and the public generally of their large-scale capital investment programs. Despite the ILECs' complaints regarding supposed regulatory disincentives, rapid deployment of

¹² The Oregon PUC states that "[t]he larger problem for widespread deployment seems to be that consumers generally do not subscribe to broadband services even when they are available." The PUC continues, "A focus on the major problem – lack of subscribership where broadband services are available – might yield a better approach." Oregon PUC Comments at 1, 3.

¹³ Declaration of Alfred E. Kahn and Timothy J. Tardiff, December 18, 2001, Attachment B to Comments of Verizon, Inc. at 12.

¹⁴ *2001 Annual Report*, Verizon, at 8.

broadband facilities is occurring under the current regulatory framework. Indeed, as touted by the ILECs themselves in their quarterly investor briefings and annual reports, broadband deployment has already resulted in substantial infrastructure roll-out, increased acquisition of new customers, and new product diversification.¹⁵

Moreover, increased ILEC deployment does not *per se* produce increased demand for broadband services by consumers, and could actually result in *less* consumer acceptance, if due to the lack of actual and effective competition the ILECs raise prices for their broadband offerings, as they have begun to do already. According to press reports, Verizon Communications Inc.'s vice chairman and president Lawrence T. Babbio Jr. in a June 4, 2002 speech has publicly called for precisely the kind of price increases that artificially suppress demand and would not be sustainable in a truly competitive market, claiming that

... the fall in phone and Internet service prices during the last few years has been so steep it's jeopardizing the financial viability of many telecommunications companies. According to Babbio, low cellular, long-distance and high-speed Internet prices have been a boon for consumers but have eroded profit margins and accelerated the industry's downturn. "We need to restore profitability to this industry," Mr. Babbio said during a speech at the Supercomm trade show in Atlanta. "Everyone wants every service

¹⁵ See, e.g., Qwest Communications Reports Fourth Quarter (article), Year-End 2001Results, Qwest, January 29, 2002, http://media.corporate-ir.net/media_files/NYS/Q/q_1_28_02earnrel.htm (last viewed July 1, 2002), at 1-2; Investor Quarterly, Fourth Quarter 2001, Verizon, January 31, 2002, <http://investor.verizon.com/annual/VZ/4Q2001/4Q01Bulletin.pdf> (last viewed July 1, 2002), at 4; Investor Briefing, Fourth Quarter 2001, No. 228, SBC Communications, Inc., January 24, 2002, http://www.sbc.com/Investor/Financial/Earning_Info/docs/4Q_IB_FINAL_COLOR.pdf (last viewed July 1, 2002), at 2-5; BellSouth Investor News, Fourth Quarter 2001, BellSouth, January 22, 2002, http://www.bellsouth.com/investor/pdf/4q01p_news.pdf (last viewed July 1, 2002), at 1-4.

to every home or business at ever-decreasing prices." Digital subscriber lines, which cost about \$50 a month today, should be 40 percent to 50 percent more expensive, Mr. Babbio told reporters at a news conference. He stressed New York-based Verizon wasn't planning to raise rates. "The industry started out too low," he said. "It will take longer to make money in this industry than we thought. I think a lot of companies suffered for it." Most local-phone companies increased DSL prices to \$50 a month from \$40 a month in early 2001. Comparable cable modem service typically runs about \$45 a month.¹⁶

Mr. Babbio's remarks are a telling reminder that the current broadband business services market is not competitive enough to produce the technological innovation, cost management, service quality, provisioning standards, downward pricing pressure, and other widely recognized benefits associated with competitive deployment.

Finally, the experience of other regulatory agencies demonstrates that decreased regulation does *not* stimulate investment, however plausible the ILECs' representation to the contrary may appear at first blush. Over the past decade, the ILECs have repeatedly asserted that deregulation or regulatory flexibility of various sorts is the necessary *sine qua non* for them to increase deployment and technological innovation – and they have repeatedly failed to honour their commitments for such deployment. In any number of state-level "alternative regulation" proceedings, ILECs have "promised" massive investments in network infrastructure and network modernization in exchange for pricing flexibility, incentive regulation, deregulation of putatively "competitive"

¹⁶ Vikas Bajaj, "Phone, broadband prices too low, Verizon Exec Says," The Dallas Morning

services, elimination of earnings caps, and the like. Under the umbrella of such feel-good public relations slogans as “Customers First”¹⁷ and “Opportunity New Jersey,”¹⁸ ILECs – and BOCs in particular – have on numerous occasions made specific “investment-for-deregulation” commitments to state regulators and state legislators. For the most part, such “commitments” have proven impossible to enforce and are still largely unfulfilled.

In 1993, for example, the Pennsylvania General Assembly enacted legislation modifying its Public Utility Code (“Chapter 30”) to offer ILECs price cap regulation and other forms of regulatory relief in exchange for commitments to deploy broadband facilities statewide over a twenty-year period, with a specific schedule of deployment milestones.¹⁹ Although Bell Atlantic had at the time committed to provide 45 mbps (DS-3) bandwidth to each home throughout the state, the new “Chapter 30” required deployment at only the 1.544 mbps T-1 level. However, Bell Atlantic (now Verizon) has failed to meet even that substantially reduced “broadband” requirement. In March 2002, the Pennsylvania PUC adopted an Order finding specifically that Verizon had failed

News, June 5, 2002.

¹⁷ Ameritech “Customers First Plan” was filed with both the Illinois Commerce Commission and the FCC in February 1994. Ameritech's Customers First Plan in Illinois, 94-0096, ILLINOIS COMMERCE COMMISSION, 1994 Ill. PUC LEXIS 205, *, March 9, 1994.; *Pleading Cycle Established For Comments On Ameritech's Petition For Declaratory Ruling And Related Waivers To Establish A New Regulatory Model For The Ameritech Region*, 8 FCC Rcd 2964; 1993 FCC LEXIS 2664, *, DA 93-481, rel. April 27, 1993.

¹⁸ Application of New Jersey Bell Telephone Company for Approval of its Plan for an Alternative Form of Regulation, *Decision and Order*, NJ BPU Docket No. TO92030358 143 PUR4th (May 6, 1993).

¹⁹ Chapter 30 of the Pennsylvania Public Utility Code, *codified at* 66 Pa. C.S. §§ 3001-09.

to satisfy its state statutory broadband deployment requirements,²⁰ and the General Assembly recently held hearings on this subject as part of its Chapter 30 “sunset” considerations.²¹

II. The Commission Should Retain The *Computer Inquiry* Framework To Protect the Interests of End Users

The Ad Hoc Committee is particularly alarmed by the Commission’s proposal to attempt to carve out a technology-based exception to the unbundling and non-discrimination obligations that apply to incumbent LECs under the Commission’s *Computer Inquiry* rules.²² An entire information services industry has been built on the robust and de-regulatory *Computer Inquiry* framework. More importantly, large and small users alike have benefited greatly from the competition and innovation in the information services industry (including myriad “in-house” information processing applications) over the past two decades resulting from the *Computer Inquiry* regime. These and future gains will be put in jeopardy if the Commission adopts its proposal to create an exception to the *Computer Inquiry* framework for broadband transmission services used for Internet access.

²⁰ *Verizon Pennsylvania, Inc. Plan for Alternative Form of Regulation Under Chapter 30 – 2000 Biennial Update to Network Modernization Plan*, P-00930715, Order (adopted March 28, 2002; entered May 15, 2002) at 12-22.

²¹ The Pennsylvania Senate’s Communications and High Technology Committee held hearings on June 17, 2002 concerning Verizon’s failure to live up to its broadband deployment commitments.

²² See *NPRM* at note 68.

The *Computer Inquiry* framework has been among the most successful regulatory structures adopted by the Commission in the past two decades, precisely because it proceeded from a broad and technology-neutral perspective. The comprehensive scope embraced by the Commission in its various *Computer Inquiry* orders and rulemaking opinions stands in stark contrast to the position espoused by Verizon, SBC, and other ILECs in their comments in this docket, namely, that the *Computer Inquiry* rules were prompted by or limited to narrowband transmission or to the particular enhanced service applications (e.g., voice mail) that were referenced for discussion purposes in those orders.²³

In their initial comments, virtually all of the non-ILEC parties squarely reject this portrayal of the *Computer Inquiry* framework, supplying detailed and cogent explanations for their conclusions. As these other parties have suggested, the *Computer Inquiry* decisions affirmatively recognize (and support) the evolution of both basic and enhanced services.²⁴ The definition of basic service adopted in *Computer Inquiry II* was intentionally broad and technology-neutral and was in no way limited to analog or low-speed digital transmission capabilities. The Commission wisely defined “basic transmission service” in the simplest and most general terms as “one that is limited to the common carrier offering of transmission capacity for the movement of information.”²⁵ The

²³ Comments of Verizon at 34; Comments of SBC at 20.

²⁴ See, e.g., AT&T Comments at 39-49; Worldcom/Comptel/ALTS Comments at 47-52.

²⁵ *Amendment of Section 64.702 of the Commission's Rules and Regulations (Computer Inquiry II)* 77 F.C.C.2d 384, 419; 1980 FCC LEXIS 188,**82 (1980) at para. 93.

Commission expressly recognized that “[d]ifferent types of basic services are offered by carriers depending on a) the bandwidth desired, b) the analog and/or digital capabilities of the transmission medium, c) the fidelity, distortion, or other conditioning parameters of the communications channel to achieve a specified transmission quality, and d) the amount of transmission delay acceptable to the user.”²⁶ Broadband fits logically and unambiguously within this expansive definition.²⁷

The Commission’s proposal to carve out an exception for broadband telecommunications services when they are used to provide internet access is fundamentally inconsistent with a core tenet of *Computer Inquiry II*: that basic telecommunications service should be “de-linked” from any particular application. In *Computer Inquiry II*, the Commission made this point very effectively, stating:

in providing a communications service, *carriers no longer control the use to which the transmission medium is put*. More and more, the thrust is for carriers to provide bandwidth or data rate capacity adequate to accommodate a subscriber's communications needs, regardless of whether subscribers use it for voice, data, video, facsimile, or other forms of transmission.²⁸

Accessing the Internet is simply another “use” to which broadband transmission is put, which hardly justifies elimination of the pro-competitive framework adopted in the *Computer Inquiry* proceedings.

²⁶ Computer Inquiry II, 77 F.C.C.2d at 419; 1980 FCC LEXIS at **83 at para. 93.

²⁷ As AT&T points out in its comments in this docket, it is also factually inaccurate to suggest that today’s DSL-based transmission differs fundamentally from other types of technology (e.g., T-1) that the ILECs have used for decades to provide high-bandwidth transmission over their copper loops. Comments filed by AT&T at 42, 52-54.

Ad Hoc also strongly disagrees with the BOCs' claim that the incumbent ILECs' bottleneck control of local exchange facilities has nothing to do with broadband transmission services. Verizon, for example, argues that "the Bell companies have no bottleneck control over the networks used to deliver broadband access, and ISPs need not 'obtain basic services from BOCs' to reach their customers."²⁹ This is simply not true, as virtually any user of business services can confirm. When the ILECs provide residential DSL service, they use *exactly the same* ubiquitous copper loops that they use for other (voice and narrowband) basic services. Indeed, in the case of business services, the ILECs can use the same physical facility to provide either individual voice channels or a T-1 PBX trunk.

In addition, the ISPs that submitted comments in this proceeding have clearly indicated that they are dependent on the ILECs' DSL services when those ISPs offer Internet access to their customers: 93% of all DSL lines are provided by ILECs and that share is, if anything, rising relative to non-ILEC provided DSL.³⁰ As demonstrated in Ad Hoc's earlier comments in the *Performance Standards Rulemaking* and *ILEC Broadband Regulation Proceeding*, and again in these reply comments, the almost insignificant level of intermodal competition

²⁸ Computer Inquiry II, 77 F.C.C.2d at 419; 1980 FCC LEXIS at **84 (¶ 95).

²⁹ Comments of Verizon at 34-35.

³⁰ California Internet Service Providers Association at 19-20.

that exists for DSL and other broadband transmission services does not justify the deregulation that the ILECs demand.

More importantly from Ad Hoc's perspective, however, is the *Notice's* apparent disregard for the interests of end users. The Commission's *Computer Inquiry* rules do more than protect ISPs from ILEC incentives to discriminate in favor of the ILEC's ISP affiliate by extending preferential treatment to the affiliate. The *Computer Inquiry* rules also protect the ability of end users to select any customer premises equipment ("CPE") and/or information service to use in conjunction with the basic telecommunications services the end user may obtain from the ILEC. By requiring ILECs to make the telecommunications component of an information service available on a stand-alone basis to unaffiliated ISPs and end users, the Commission's *Computer Inquiry* rules protect end users' existing freedom to make equipment and information service purchases based on the merits of the equipment or information service product, which not only creates opportunities for new and innovative applications for telecommunications services but enhances competition in both the equipment and information services markets.

III. Broadband Transmission, And xDSL In Particular, Must Be Offered On a Retail Basis Directly To End Users

The fundamentally non-competitive nature of "last mile" broadband transmission services, and wireline ILEC xDSL services in particular, is exemplified by the fact that ILECs only offer these services bundled with Internet access service and have thus far failed to market them directly to end users on a

stand-alone basis, despite significant demand for the service in the business community. As described in Ad Hoc's *ILEC Broadband Regulation* comments, business subscribers can use even low-volume broadband services like xDSL in a variety of settings.³¹ Because of the ILECs' failure to offer xDSL as a stand-alone retail service, business customers who could use "raw" xDSL transmission services are forced to use far more expensive and far less suitable serving arrangements, such as analog private lines, ISDN, and dedicated digital channels with bandwidths of T-1 or greater. The ILECs' refusal to offer xDSL and similar broadband telecommunications service as retail offerings also denies end users at low-volume locations the benefits of state-of-the-art CPE or local network capabilities that require a broadband connection.

The ILECs' intentions are easily traced. Under Section 251(c)(4) of the Act, the ILECs cannot offer xDSL as a retail service to end users without triggering the resale and wholesale discount obligations in Sections 251(c)(4) and 252(d)(3). While the Commission acquiesced in the ILECs' view that their existing xDSL offerings to ISPs do not constitute retail offerings which would trigger those statutory sections,³² the Commission has not had an occasion to address a different issue: whether ILECs must make the stand alone xDSL

³¹ Comments of Ad Hoc in *ILEC Broadband Regulation* at 6-8, 17-19.

³² See *Deployment of Wireline Services Offering Advanced Telecommunications Capability*, 14 FCC Rcd 19237(1999); *aff'd sub nom. Association of Communications Enterprises v. FCC*, 253 F. 3d 29 (2001).

offerings in their interstate access tariffs available on a retail basis directly to end users.

So long as xDSL was a nascent service of perceived value only as an Internet access service, requiring coordinated installation with an Internet service provider, the Commission's inattention to end users' interest in receiving service directly was perhaps understandable, if not excusable. As applications for, and consumer interest in, the service have grown, however, the Commission must address the availability of such services, or lack thereof, as retail offerings to consumers.

The Commission has previously described the principles that govern this issue as "clear and well-established."³³ Under long-standing precedent,³⁴ the Commission will not permit carriers to establish "tariff restrictions on service availability based on user or service classification." Thus, for example, the Commission previously required carriers to make available to end users "without discrimination" the Basic Service Elements designed for ISPs and tariffed in the interstate access tariffs. The Commission concluded that "the direct availability [to end users] of such basic services will promote economic and network efficiency by providing end users with the flexibility to design their own services

³³ *First Data Resources, Inc.*, Memorandum Opinion and Order, Mimeo No. 4732, released May 28, 1986, 1986 LEXIS 3347.

³⁴ *Amendment of Sections 64.702 of the Commission's Rules and Regulations, Policy and Rules Concerning Rates for Competitive Common Carrier Service and Facilities Authorizations Thereof, Communications Protocols under Sections 64.702 of the Commission's Rules and Regulations (Third Computer Inquiry)*, Memorandum Opinion And Order On Reconsideration, 2 FCC Rcd 3035 (1987), citing *First Data Resources, Inc.*, *id.*

that best respond to their needs.”³⁵ Similarly, the Commission should require the ILECs who have chosen to establish xDSL services in their interstate access tariffs to make those services directly available to end users. Access to xDSL services will give users the “flexibility to design broadband connections that best respond to their needs” which, in many cases, do *not* include the Internet access that ILECs currently insist on bundling with their only retail offering of xDSL services.

CONCLUSION

Ad Hoc members are among the nation’s largest corporate users of telecommunications services. Long before mass-market commercial use of the Internet had developed, members of the Ad Hoc Committee had each created extensive voice and data communications networks, often linking tens of thousands of individual locations and providing divisions, affiliates, distribution channels, suppliers, and, in many cases, customers with on-line access to data bases and any number of data base-oriented applications. Accordingly, Ad Hoc is submitting these reply comments to remind the Commission that, in the end, it is not the carrier or the ISP but *the end user* who is ultimately affected by decisions that materially shape the future structure of the telecommunications and information technology industries.

Respectfully submitted,

³⁵ *Third Computer Inquiry, id.* at para. 109.

AD HOC TELECOMMUNICATIONS USERS
COMMITTEE

Colleen Boothby

By: _____

Lee L. Selwyn
Helen E. Golding
Economics and Technology, Inc.
Two Center Plaza, Suite 400
Boston, MA 02108-1906
617-227-0900

Economic Consultants

Colleen Boothby
Levine, Blaszak, Block & Boothby, LLP
2001 L Street, N.W., Suite 900
Washington, D.C. 20036
202-857-2550

Counsel for
Ad Hoc Telecommunications
Users Committee

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Certificate of Service

I, Michaeleen I. Williams, hereby certify that true and correct copies of the preceding Comments of Ad Hoc Telecommunications Users Committee were served this 1st day of July, 2002 via the FCC's ECFS system, and by first class mail upon the following:

Qualex International
Portals II
445 12th Street, NW
CY-B402
Washington, D.C. 20554



Michaeleen I. Williams
Legal Assistant

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