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

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

REPLY COMMENTS OF
DIRECTV BROADBAND, INC.

Patrick J. Donovan
Paul B. Hudson
Swidler Berlin Shereff Friedman, LLP
3000 K Street N.W., Suite 300
Washington, D.C. 20007
Tel. (202) 424-7500
Fax. (202) 424-7645

Counsel for DIRECTV Broadband, Inc.

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SUMMARY

The RBOCs have failed to demonstrate that the elimination of the long-standing *Computer Inquiry* rules would serve the public interest in safeguarding competition and consumer choice in the broadband information services market. The elimination of these regulations would jeopardize broadband adoption by suppressing price competition and innovation.

The public interest analysis underlying the decision whether to maintain the *Computer Inquiry* access rules should drive, and not be driven by, the application of the statutory definitions of information and telecommunications services. Once the Commission affirms that preservation of the *Computer Inquiry* access requirements is in the public interest, the product that LECs must sell in order to continue to comply with these rules is undisputedly a basic telecommunications service subject to Title II regulation. This does not mean that cable companies and LECs must be regulated differently in perpetuity; it simply means that the Commission's determination whether to require nondiscriminatory access for each type of service must be the driving force behind, and not a consequence of, the definitional debate.

The elimination of the *Computer Inquiry* rules would leave most BSPs without meaningful access to most consumers. Given the discrimination faced by BSPs even under an open access regime, and the RBOCs' strong incentive to discriminate in favor of their affiliates, the Commission cannot rely on the RBOCs' vague promises of voluntary reasonable access. Meanwhile, click-through access over BSP websites is not a sufficient substitute for many emerging services that require certain network architecture, equipment or policies.

There is no compelling evidence that the *Computer Inquiry* rules deter investment in broadband transport facilities. Meanwhile, the elimination of access rules would suppress investment in innovative and diverse advanced *services,* which are ultimately the products that will drive broadband adoption.

Finally, the comments of numerous parties evidencing ongoing discrimination by the RBOCs demonstrate that stronger enforcement is needed to safeguard competition and consumer choice. The

Commission must stop its recent practice of allowing RBOC DSL tariff filings to be adopted without cost support or meaningful notice. The Commission should require ILECs to offer efficient aggregated transport for wholesale DSL services at reasonable rates and on reasonable terms, and it should adopt performance metrics for the ILECs' provisioning xDSL access services to BSPs.

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REPLY COMMENTS OF
DIRECTV BROADBAND, INC.

DIRECTV Broadband, Inc. ("DIRECTV Broadband") submits these reply comments pursuant to the notice of proposed rulemaking issued in the above-captioned proceedings examining the appropriate regulatory framework for broadband access over wireline facilities.

The central and decisive issue in this proceeding is whether the *public interest* would be served if the Commission accepts RBOC-proposed rule changes that would eliminate the long-standing *Computer Inquiry* rules that require facilities-based carriers to provide nondiscriminatory access to independent broadband service providers ("BSPs").[1] The RBOC comments avoid analyzing the real-world public interest impact of the elimination of these rules, which have served as the cornerstone of the nation's policy favoring open and vibrant access to the Internet and information services for two decades. No party has offered any persuasive evidence that abandoning this foundational policy would produce the ultimate consumer benefits of lower prices or more compelling broadband services, which are widely recognized

[1] The elimination of the *Computer Inquiry* rules sought by the RBOC comments would give them the unfettered ability to discriminate against ISPs or deny service altogether. *See* SBC Comments at 4-7, 18-30; Verizon Comments at 34-36; BellSouth Comments at 12-24; Qwest Comments at 12-33.

as two of the most important factors that will encourage broadband adoption in the United States. The Commission has in the past found that these public interest objectives are best served by regulatory policies that safeguard competition and consumer choice, and it should reaffirm those principles in this proceeding.

The existence of competition and open access ultimately represents DSL's greatest advantage over the cable platform in driving demand for broadband, despite cable's early numeric lead in subscribers and the RBOCs' resistance to accepting independent BSPs as their most effective channel for subscriber growth in broadband rather than as regulatory burdens.[2] New broadband applications delivered via DSL will become more and more compelling as the companies delivering retail services in competition with RBOCs continue to better address consumer needs beyond high-speed Internet access. However, this promise of new consumer broadband services and price competition will be undermined if the Commission heeds shortsighted appeals to abandon its commitment to promote competition and consumer choice, and thereby resigns consumers to a future in which many consumers will realistically be left dependent on incumbent providers for all of their wireline broadband needs. It is in this public interest context that the Commission should begin its evaluation of the issues in this proceeding.

I. THE APPLICABILITY OF OPEN ACCESS REGULATION DRIVES, AND IS NOT DRIVEN BY, THE DEFINITION OF THE LOCAL EXCHANGE CARRIERS' WHOLESALE BROADBAND ACCESS SERVICES.

The RBOC comments in this proceeding devote considerable attention to technical definitions, without a proper analysis of the impact that a definitional change that would reduce competition will have on the public. Based upon the *Cable Modem Order*,[3] the RBOCs attempt to redefine their stand-alone DSL telecommunications services as private carriage, rather than a telecommunications service sold to the

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[2] In DSL, subscriber growth rates among independent BSPs significantly outpace growth among the RBOC-affiliated BSPs.

[3] *Inquiry Concerning High-Speed Access to the Internet Over Cable and Other Facilities, et al.*, GN Docket 00-185 and CS Docket No. 02-52, Declaratory Ruling and Notice of Proposed Rulemaking, FCC 02-77 (rel. March 15, 2002) ("*Cable Modem Order*").

public, because of their desire to be treated as private carriers in the same manner that incumbent cable modem providers have sought in the *Cable Modem* proceeding.

This argument places the cart before the horse; the Commission must first determine whether its obligations to promote and protect the public interest warrant the continuation of the *Computer Inquiry* nondiscriminatory access requirements. Under well-established precedent, the first inquiry in determining whether a service provider is a common carrier is not the wishes of the carrier but whether the carrier has or should have a legal compulsion to serve indifferently.[4] Moreover, the Commission's ability to maintain or establish nondiscriminatory access rules does not depend on whether a telecommunications "service" is presently offered; indeed, the very purpose of such regulation is intended to compel a facilities-based carrier to offer the telecommunications as a service on a reasonable and nondiscriminatory basis even when it may prefer not to do so, so that the public is not deprived of the many benefits of competition in the broadband services market.

The *Cable Modem Order* is inapposite because the starting point of its legal analysis is necessarily different, even if the Commission ultimately envisions the same finish line. It is not surprising or remarkable that the Commission found that the cable modem service now sold by most cable companies is an integrated information service, since the Commission has not heretofore required cable companies to offer the underlying broadband connectivity as a separate telecommunications service. The Commission's observation was based upon the fact that under the existing regulatory regime cable

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[4] See *Amendment of Section 64.702 of the Commission's Rules and Regulations (Computer II),* 77 FCC2d 384 (1980) ("*Computer II Order*") at 122 ("we recognize certain inadequacies of any definition of common carriage which is dependent entirely on the intentions of a service provider. Instead, as the Court's opinion in *NARUC I* acknowledges, an element which must also be considered is any agency determination to impose a legal compulsion to serve indifferently." (citing and quoting *National Association of Regulatory Utility Commissioners v. FCC*, 525 F.2d 630, 642 (D.C. Cir. 1976) (*NARUC I*) ("It is not an obstacle to common carrier status that SMRS offer a service that may be of practical use to only a fraction of the population. ... The key factor is that the operator offer indiscriminate service to whatever public its service may legally and practically be of use. In making this determination, we must inquire, first, whether there will be any legal compulsion thus to serve indifferently, and if not, second, whether there are reasons implicit in the nature of SMRS operations to expect an indifferent holding out to the eligible user public."))

operators do not offer stand-alone transmission directly to the public (i.e., any interested BSP) on a nondiscriminatory basis.[5]

By contrast, under existing *Computer Inquiry* rules every local exchange carrier that offers broadband information services may only do so by offering the stand-alone transmission directly to the public, including to its own information services operations, on nondiscriminatory terms. Verizon's comments recognize this difference, explaining that "[u]nlike the *Cable Modem Classification* proceeding . . . the decisive question in these proceedings cannot be whether the transmission is in fact offered indiscriminately to all comers [but is instead] whether there is any justification for requiring that the transmission must continue to be so offered."[6] Whatever merit there may be to the "integrated service" classification of retail broadband information services that are not subject to unbundling under *Computer Inquiry* rules, the concept of an "integrated" LEC broadband service cannot exist today under existing law. Therefore, different definitions may apply to the retail broadband services sold by facilities-based providers depending on whether they sell, or are required to sell, stand-alone transport on a nondiscriminatory basis. This does not mean that cable companies and LECs must be regulated differently in perpetuity; it simply means that the Commission's determination of whether to require nondiscriminatory access for each type of service must be the driving force, and not a consequence, of the definitional debate.

The Commission should as a first step, rather than a last step, consider whether the public interest demands that the *Computer Inquiry* regulations be modified or maintained. Section II of these reply comments demonstrates that, notwithstanding the RBOCs' flawed and incomplete legal analysis, the elimination of the *Computer Inquiry* access rules would greatly harm consumers and the national interest by suppressing price competition and innovation in the broadband market. Section III of these comments

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[5] *Cable Modem Order* at ¶ 40.

[6] Verizon Comments at 10. Despite this recognition, Verizon still proceeds to analyze these issues backwards, first addressing the definition of broadband services and then concluding that on the basis of its proposed definition that *Computer Inquiry* rules must be eliminated. As discussed herein, the statutory definitions are consistent with existing regulations and do not provide any basis for modification of the *Computer Inquiry* safeguards.

explains that once the Commission affirms that preservation of the existing *Computer Inquiry* access requirements is in the public interest, the question of the appropriate treatment of LEC broadband services is quickly answered. As long as nondiscriminatory access rules continue to serve the public interest, the LECs' broadband services would remain, by definition, common carrier services offered on nondiscriminatory terms and conditions to any requesting information service provider.

Because the RBOC comments fail to demonstrate that the elimination or weakening of the *Computer Inquiry* rules would safeguard competition, benefit consumer choice, lead to more affordable services, or promote innovation in broadband, the entire foundation of RBOC attempts to re-classify broadband access necessarily falters by failing to address the most fundamental issues in the Commission's inquiry.

II. THE RBOCs' COMMENTS FAIL TO JUSTIFY THE ELIMINATION OF THE *COMPUTER INQUIRY* ACCESS RULES

A. THE RBOCs' RELIANCE ON THE *CABLE MODEM ORDER* IS PREMATURE AND MISPLACED

The RBOCs argue that the *Computer Inquiry* requirements must be eliminated immediately as a matter of regulatory parity with cable broadband providers.[7] Whether or not the Commission ultimately decides to standardize regulations applicable to cable modem and DSL connectivity, the RBOCs' self-serving argument to abandon immediately the open, nondiscriminatory environment that has served as the cornerstone of the nation's Internet access policy for two decades is premature and misplaced. In particular, the RBOCs' comments ignore the fact that Commission has reserved the option of requiring cable operators to provide access to independent BSPs, once it has completed a thorough evaluation of the unique facts of the cable market. The RBOCs jump the gun in suggesting that the Commission has already determined conclusively that the public interest underpinnings of the *Computer Inquiry* rules, as opposed to the rules themselves, are not applicable in the cable modem service market. Therefore, the RBOCs' oversimplified arguments that the Commission may abandon the *Computer Inquiry* rules on the

[7] BellSouth Comments at 20, 23-24; SBC Comments at 18-19; Verizon Comments at 30; Qwest Comments at 29.

basis of the *Cable Modem Order*, with no further public interest analysis, is fundamentally deficient and should be rejected.

In the *Cable Modem Order,* the Commission's determination that *Computer II* rules do not apply to broadband connectivity provided by cable companies was based primarily on its finding that "the Commission has applied these obligations only to traditional wireline services and facilities, and has never applied them to information services provided over cable facilities." Thus, the *Cable Modem Order* did not deregulate cable modem services; it merely preserved the *status quo*, at least for the time being, and then solicited public comment on whether the *status quo* should continue. The waiver of application of *Computer II* to cable operators cited so frequently in the RBOC comments was not a permanent disposition of the cable access issue, but instead a direct response to a proposal to impose *Computer II* access obligations *in toto* immediately on cable companies that also provide cable telephony service. The Commission has not determined that cable broadband services will never be subject to wholesale access obligations in the future; indeed, the *Cable Modem Order* sought comment on this issue, and Commissioner Abernathy has explained that "the Commission should not yet dismiss proposals to impose some kind of access requirement without better evidence that robust competition among broadband ISPs will develop on its own."[8]

The Commission clearly has recognized and reserved its right to impose open access obligations on cable operators. The private nature of *existing* relationships does not preclude the Commission from considering whether to require cable operators to provide open access in the future. As Commissioner Abernathy explained, "If the Commission decides to maintain some form of access obligation at the conclusion of the *Wireline Broadband* proceeding, we would need to develop a compelling rationale if we were to refrain from imposing an analogous requirement on cable operators."[9]

Parity is only one of many possible considerations in establishing broadband policy; however, it is not the only objective nor is it the paramount objective. The Commission's first responsibility is to

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[8] *Cable Modem Order*, Separate Statement of Commissioner Kathleen Q. Abernathy at 1-2 (March 15, 2002).

promote and protect the public interest. Disparate regulation may sometimes be appropriate, especially in the short-term, to advance these ultimate objectives.[10] The Commission explained in *Computer II* that "[n]umerous regulatory agencies have imposed differing regulations on their regulatees, and that our broad discretion in choosing how to regulate includes discretion to select different schemes for different regulatees."[11] Whether or not disparate regulation of broadband remains warranted in the future, an interest in parity should not override the Commission's fundamental responsibility to advance Congress' intent to promote the availability of competitive, innovative and affordable wireline-based broadband services to all Americans. Commissioner Abernathy explained on the initiation of this proceeding:

> [O]ur *Computer II/III* rules played a key role in fostering a robustly competitive ISP market in which consumers can choose from a wide range of providers. Thus, while I intend to examine the record with an eye toward streamlining wholesale regulations where possible, I am committed to preserving regulations to the extent necessary to safeguard competition and consumer choice.[12]

Despite this fundamental policy objective, the RBOCs' calls in their comments for immediate elimination of the *Computer Inquiry* rules simply on the basis of the Commission's preliminary decisions in the *Cable Modem Order* are not only premature but also contrary to the public interest, as explained below. Rather than reflexive application of the least common denominator regulatory approach advocated by the RBOCs, the Commission should only modify the *Computer Inquiry* rules if such changes are warranted for the purpose of safeguarding competition, reducing prices and increasing consumer choice. As demonstrated below, the public interest still requires application of the nondiscriminatory access rules established by the *Computer Inquiry* proceedings to wireline broadband connectivity provided by the LECs.

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[9] *Id.* at 2.

[10] In addition, the RBOCs' oversimplified arguments for parity are disingenuous. The telecommunications system in the United States remains unique among broadband delivery media, in that it reaches nearly 100% of American homes, schools, hospitals and businesses, making it a unique national resource. The ubiquity of the nation's telecommunications system is the direct result of the enormous public capital investment borne by ratepayers and universal service programs over the last century, specifically aimed at increasing the coverage of the public network and made in exchange for open access across the public network. The RBOCs are pressing to eliminate the cornerstone open access obligations without suggesting they will return the public's investment.

[11] *Computer II Order* at 263 (citing cases).

[12] *Broadband NPRM*, Separate Statement of Commissioner Kathleen Q. Abernathy (February 14, 2002).

B. *COMPUTER INQUIRY* ACCESS REQUIREMENTS REMAIN ESSENTIAL TO SAFEGUARD COMPETITION AND CONSUMER CHOICE

RBOC comments offer scant analysis of the *real-world impact* on competition and consumer choice that would result from the elimination of the *Computer Inquiry* rules. The RBOCs' only substantive arguments against retention of open and non-discriminatory access regulations, other than cursory appeals for parity with cable operators, are that (1) regulation is no longer needed to guarantee competitive access because information services providers now (allegedly) have multiple options from which to choose, including cable companies and "click-through access;"[13] (2) the risk of price discrimination is reduced because price cap regulation prevents RBOCs from subsidizing their information services with revenues from basic services;[14] and (3) section 706 of the 1996 Act compels the elimination of the *Computer Inquiry* rules because the provision of nondiscriminatory access impedes broadband investment by artificially increasing costs while constraining RBOC broadband service flexibility.[15] On these three bases, the RBOCs argue that information services providers no longer need to depend on the *Computer Inquiry* regulations to guarantee their reasonable access to consumers, and that the Commission can be assured that healthy consumer choice and continued innovation would be preserved even in the absence of regulation. For the reasons set forth below, the RBOCs' theories are based upon inaccurate assumptions and are clearly erroneous.

1. BSPs Do Not Have Viable Alternatives to LEC Access in Most Cases

The RBOCs argue that the elimination of the *Computer Inquiry* rules would not diminish the accessibility of independent BSPs and consumers to each other, because they claim that access can also be accomplished over cable facilities or via click-through access over an already-established Internet connection. However, these comments ignore the realities of the broadband marketplace. The record clearly demonstrates that in most cases BSPs do not have viable alternatives to the RBOCs for last-mile

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[13] BellSouth Comments at 20-23 (BellSouth does not assert that options now exist, but only that incumbent cable operators and LECs have an "incentive" to offer access in the future); SBC Comments at 20-22, 28; Verizon Comments at 35; Qwest Comments at 28.

[14] BellSouth Comments at 18; SBC Comments at 21-22.

broadband access, that many communities are served only by DSL, and that the RBOCs remain able to leverage their market power in the wholesale broadband market to discriminate against independent BSPs in favor of their own ISP operations. Therefore, neither of these alternatives will assure that information services providers have access to consumers on equal footing with the information service offerings of the facilities-based carriers.

a. Cable Access is Not Available to Most BSPs

The RBOCs argue that BSPs will remain able to access consumers because they can turn to cable operators if LECs refuse to provide last mile broadband connectivity on reasonable terms and conditions. Qwest asserts that "cable modem providers stand ready to serve ISPs,"[16] a statement which obviously overstates not only the facts but even Qwest's own recent characterization in the Commission's *Dominant Carrier* proceeding that cable companies are only "reluctantly coming [a]round to offering or agreeing to offer some degree of access to unaffiliated ISPs."[17] The Commission is well aware that most incumbent cable operators severely restrict the number of independent BSPs, if any, that can obtain broadband access, and the very limited access that is available today to cable transmission is largely because of regulatory requirements, not market forces. Access to consumers via cable is an option completely foreclosed to most BSPs in most markets. Moreover, even in the limited areas where BSPs have obtained broadband access from cable operators, they are completely at the mercy of whatever rates, terms and conditions the cable operator as a private carrier wants to impose, no matter how discriminatory or unreasonable.

Furthermore, even if cable operators were eager to provide nondiscriminatory access on reasonable rates and terms, LECs are still the exclusive wireline broadband providers capable of serving millions of Americans and in some cases entire communities. If unchecked by regulation, the LECs would have unilateral power to determine which competitive BSPs, if any, would be allowed to access

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[15] SBC Comments at 24-26; BellSouth Comments at 5-6.

[16] Qwest Comments at 27.

these consumers on any terms. Chairman Lynch of the California Public Utilities Commission recently testified before Congress that only 15% of Californians have a choice between DSL and cable,[18] and the CPUC's comments in this proceeding indicate that 45% of consumers in SBC territory who have access to DSL or cable broadband have DSL as their only wireline broadband choice.[19]

Contrary to the RBOCs' portrayal, the wholesale broadband market is not competitive. If the RBOCs' contentions of a competitive wholesale market were accurate, information service providers would be enjoying the benefits of a buyers' market, in which they could expect ever-improving service from their wholesale transport suppliers.[20] Unfortunately, the wholesale market is anything but a buyers' market for independent BSPs, as evidenced by their increasing number of protests of the anticompetitive rates, terms and practices forced upon them by the RBOCs, which in the majority of cases are their only possible provider of broadband access to consumers.[21] Wholesale DSL rates are not falling but rising, speeds are not improving but declining, and RBOCs are making unreasonable demands to usurp CPNI to compete unfairly over DSL connections established by independent BSPs, degrading the connectivity provided to BSPs without permission or compensation.[22] The impact of eliminating nondiscriminatory access rules and oversight, leaving BSPs to "negotiate" private carriage agreements, would leave BSPs in

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[17] *Review of Regulatory Requirements for Incumbent LEC Broadband Telecommunications Services*, CC Docket 01-337, Comments of Qwest Communications International, Inc. at 21 (March 1, 2002).

[18] *See* Communications Daily, Vol. 22, No. 100 at 5 (May 23, 2002).

[19] California Public Utilities Commission Comments at 1.

[20] While there are some instances in which certain ILECs appear to be genuinely interested in promoting the availability of consumer BSP choice for their telephone customers, these instances do not overcome the evidence of significant discrimination that continues to occur, and the potential for even more damaging discrimination or outright exclusion that would occur in the absence of nondiscriminatory access requirements.

[21] DIRECTV Broadband again directs the Commission to the example of SBC's anticompetitive and discriminatory conduct to independent BSPs, documented in numerous regulatory complaints. See *Review of Regulatory Requirements for Incumbent LEC Broadband Telecommunications Services*, CC Docket 01-337, Comments of DIRECTV Broadband, Inc. at 7-12 (March 1, 2002) (describing numerous instances of discrimination, and citing complaints by other ISPs); see also *Computer III Remand Proceedings: Bell Operating Company Provision of Enhanced Services,* CC Docket No. 95-20 and 1998 Biennial Regulatory Review – Review of Computer III and ONA Safeguards and Requirements, CC Docket No. 98-10, Initial Comments of the California ISP Association, Inc. (April 16, 2001) at 6-30 (detailing numerous examples of BOCs providing preferential treatment to their affiliated ISPs); *see also Petition and Application of the Texas Internet Service Provider Association* (filed September 13, 2001) (seeking investigation, suspension and rejection of SBC Advanced Solutions, Inc. Tariff F.C.C. No. 1).

[22] *Id.*

most cases with a "choice" of two closed doors, and consumers with a choice between, at most, two broadband services providers.

b. Meaningful Consumer Choice Cannot Be Assured By "Click-Through Access"

Qwest suggests that consumer choice would not be affected by the elimination of *Computer Inquiry* access rules because consumers who desire alternative broadband services can simply access the BSP of their choice by connecting to independent websites over the already-established Internet connection provided by the incumbent LEC or cable operator.[23] The Commission described this indirect connection in the *Cable Modem Order* as "click-through access," and queried whether such "access" could be relied upon to assure competition and consumer choice in place of *Computer Inquiry* obligations.[24] Notwithstanding Qwest's assertion, limiting consumers to "click-through access" would deprive them of numerous services and would suppress innovation and competition.

As an initial matter, this "alternative" would place independent BSPs at a tremendous competitive disadvantage, because they would only be able to attract customers willing to spend even more than the incumbents' already high retail broadband prices. Studies indicate that consumer demand for broadband in the United States is suppressed already by high retail prices for DSL and cable modem services, the rates of which are driven by the incumbents' wholesale prices for last mile broadband connectivity. While, as Qwest notes, some consumers have been willing to pay *two* BSPs for service, clearly, even BSPs with unique and compelling services would face a formidable if not impossible burden in attracting large customer bases or sufficient revenues under this limitation, and would never be able to compete with the incumbent's services on equal footing.

Moreover, some services could not be accessed through "click-through access" at any price, because their availability is conclusively determined by the network architecture, equipment and policies chosen by the underlying Internet access provider. Some broadband services cannot be delivered over the

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[23] Qwest Comments at 28.

[24] *Cable Modem Order* at ¶¶ 25, 86.

World Wide Web or an Internet connection alone, and instead require specialized modems and other equipment, the current neutral transmission architecture, and/or support systems in order to function. For example, services that include unprompted inbound communications, such as inbound voice-over-IP service, and services that interact with other household electronics and appliances, cannot depend on the subscriber "clicking through" to access the service in anticipation of inbound communications, but instead require a constant available network presence in which the network makes contact with the customer, rather than the customer contacting the network. An inbound voice-over-IP call from a friend cannot remain on hold for hours until the customer thinks to log-in to the VoIP service provider's website to see if anyone is calling; an intruder in the home will not log-in on the computer and click through to the security company's website to inform them of his presence. These and many other services require an always-on connection to the service provider, and sometimes a static IP address, neither of which is possible with the session-based architecture proposed by some incumbents. Static IP addressing is also important to some consumers and providers because it maintains a dependable identifier for that consumer within an IP environment, which is necessary for many important broadband applications and services and will increase in importance as technology and the market matures.

As another example, click-through access does not help a consumer whose incumbent ISP imposes policy restrictions that conflict with a particular customer's needs. For example, some ISPs prohibit their customers from using Virtual Private Networks, which facilitate telecommuting, or from operating their own email server or web service.[25] Some ISP services do not support or allow the customer to use Linux operating software. Many of the choices made by BSPs in this regard will, in a competitive market, ultimately come to define a broadband experience more comprehensive than basic Internet access. Leaving the choice to one or two BSPs in a market would eliminate the market pressures that promote deployment and support for innovative new services – which many observers expect to serve as the cornerstone economic stimulus to be derived through broadband.

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[25] *See e.g.*, Comcast's Acceptable Use Policy for its retail cable modem service, http://comcast.comcastonline.com/memberservices/aup/default.asp (viewed June 24, 2002).

LECs often decide not to support or even allow these innovative new services for a variety of reasons, in some cases including the protection of their own entrenched services. However, thanks to *Computer II* access requirements, competing BSPs are able to offer innovative services by connecting their own facilities to the incumbent's neutral underlying transport facilities, both at the customers' premises and on the network side of the LEC's handoff point. For example, DIRECTV Broadband installs specialized gateway equipment at the customers' premises, which already includes the technology necessary to support IP voice, home management and security, telecommuter applications and other always-on services that could not be offered via click-through access to a DIRECTV website over a session-based connection.

While some might argue that these and other innovative new applications are demanded today only by a minority of sophisticated business and residential customers, the value of encouraging the development and provisioning of services beyond high-speed Internet access should not be discounted. First, many new services are designed for mainstream consumers, not just technical and network enthusiasts.[26] Home security and management applications and telecommuter services are likely to be broadband staples in the future. Diverse consumer needs and interests are far more likely to be served by the presence of numerous and diverse service providers, including companies that specialize and emphasize the development of new consumer products rather than devoting substantial energy and resources to the maintenance of incumbent local distribution networks and the protection of existing markets.[27] Therefore, competitive access will better foster development of new products and services that

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[26] Already one in five new DIRECTV Broadband customers elects to purchase as an additional service a bundled firewall, virus protection and multiple computer support service called Connect & Protect™ that requires specialized premises equipment and could not be offered over click-through access. Even under existing open access requirements, some RBOCs have attempted to impose unnecessary restrictions on the types of equipment that can be used by BSPs. The Commission should guard against such unreasonable limitations, which would undermine potential new services and could be misused to protect incumbent services, such as by the exclusion of CPE that included a phone jack for IP telephony, which holds unique promise for competing on price, quality, flexibility and feature sets with the incumbents' analog voice services.

[27] *See, e.g.*, Earthlink Comments at 24-26 (describing widely diverse consumer interests served by different BSPs); AT&T Comments at 71-72 (suggesting that ISPs, rather than the ILECs, have been major source of innovation); AOL Time Warner Comments at 22-23 (explaining that consumer choice and diversity drive broadband demand and innovation).

Americans want, designed by companies that are focused on developing innovative consumer and/or commercial products, including services that cannot be delivered simply via click-through access to a website.

Second, even for specialized services geared toward small market segments, services that today are demanded only by the most sophisticated users often become part of the core of tomorrow's market, as is often the case with innovation in a competitive market. Personal computers, e-mail, and websites were all once obscure products demanded by small, devoted constituencies and shunned by the dominant players in the traditional markets until pioneered by others. Unlike the mass-market incumbents, some independent BSPs, *if they are still able to access consumers* over a robust, neutral and open platform, will develop products to serve these niche constituencies. In recent years, numerous innovations in DSL have been developed by competitive providers and only later adopted by LECs, including plug and play installation without a truck roll or dismantling the consumer's computer, multiple-PC support, firewalls, spam protection, and virus protection. If the Commission permits the LECs to close their networks to their retail broadband competitors as they see fit, and access to consumers is thereby left to a small number of incumbent suppliers often more adept at protecting entrenched services than developing new ones, investment in the development of innovative retail broadband applications will be stifled, and services that require more sophisticated customer premises equipment, or always-on connections between the customer and provider, will be reserved to the exclusive domain of the incumbents and may never be deployed.

For these reasons, "click-through access" would not, especially in the long run, produce value that would be even remotely comparable to the value assured by nondiscriminatory access to the last-mile broadband connections that the LECs use to deliver their own information services. Broadband deployment is not an end in and of itself, but is instead one of the many necessary ingredients for the realization of the potential benefits of diverse and innovative broadband *services*, many of which cannot be delivered via "click-through access." Therefore, the Commission should reject the RBOCs' contention

that the elimination of the *Computer Inquiry* rules would not adversely affect innovation and consumer choice.

c. Under Current Market Conditions, the RBOCs Cannot be Relied Upon to Voluntarily Continue to Offer Access on Viable Rates and Terms

The RBOCs try to assure the Commission that they will not engage in unreasonable discrimination by suggesting that they will continue to provide access to BSPs even in the absence of a requirement to do so.[28] SBC asserts that it "has no desire to discontinue [its] business relationships" with BSPs and that it has "every incentive to maximize the sale of its broadband services and the use of its network through relationships with unaffiliated information services providers."[29] However, because SBC knows that it is often a BSP's only supplier, its view of a "business" relationship does not resemble the behavior that would be expected from a supplier seeking to satisfy its wholesale customers in a competitive market. SBC discriminates against its BSP customers, subjecting them to price squeezes, discriminatory provisioning and operational support, and unnecessary and inefficient interconnection requirements.[30] Last year, SBC even attempted to force BSPs to allow SBC to use a BSP's confidential customer information in order to market SBC's services to the BSP's customers, including services that would degrade the connectivity provided to the BSP.[31] SBC's conduct reflects its confidence that it can dictate unreasonable rates and terms to its captive Broadband Services Provider customers. Therefore, the Commission cannot accord any weight to SBC's "Memorandum of Understanding" with the USIIA,[32] which "commits" only to a vague single sentence statement that "commercial agreements for broadband Internet access will be available." The MOU does not specify to which BSPs such agreements would be

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[28] Qwest Comments at 30; SBC Comments at 5; BellSouth Comments at 20-23 (suggesting that LECs will have an "incentive" to offer access in the future).

[29] SBC Comments at 5, 28.

[30] *See Review of Regulatory Requirements for Incumbent LEC Broadband Telecommunications Services*, CC Docket 01-337, Comments of DIRECTV Broadband, Inc. at 7-12 (March 1, 2002) (describing

[31] *See id.* at 11.

[32] The USIIA's position in favor of elimination of the *Computer Inquiry* rules clearly do not reflect the views espoused by the numerous information service providers and their associations that have filed comments in this proceeding.

available, or on what rates, terms and conditions. The commitment also does not address nondiscriminatory and reasonable access to transport used to provide additional broadband services other than basic Internet access, or preclude terms and conditions that will set up a price squeeze that eliminates competition. Nor does the MOU specify any standards of good faith, reasonableness, nondiscrimination, standards of review, dispute resolution, or open network architecture. SBC could meet this "commitment" on paper but effectively exclude independent BSPs from the market by offering only rates and terms that are even more discriminatory and unreasonable than those it subjects independent BSPs to today.

Therefore, even if some RBOCs continue to offer access to a handful of independent BSPs, if the RBOC can unilaterally dictate unreasonable rates and terms, it could limit the ability of BSPs to offer rates or services that could attract customers away from the incumbent's broadband and core services. In the absence of regulation and oversight of their pricing and terms, RBOCs could set their wholesale DSL connectivity rates too high to allow independent BSPs to permit any sustained retail price competition, and BSPs would lack bargaining power to negotiate reasonable contract terms or technical parameters that may be needed to support their intended services. Given the discrimination and ordeals that BSPs have endured in obtaining stable, reasonable access even when these standards have been supposedly guaranteed and subject to regulatory oversight,[33] and the LECs' strong incentive to discriminate in favor of their affiliates, it would not be rational for independent BSPs or policymakers to rely on vague RBOC promises of access or reasonable terms and conditions of access if existing anti-discrimination rules are eliminated.[34]

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[33] As DIRECTV Broadband has previously explained, the Commission has in some cases failed to enforce its existing regulations and has thereby threatened to undermine the essential purposes of the *Computer Inquiry* and Title II regulation to ensure reasonable and nondiscriminatory access to independent information services providers. *See Review of Regulatory Requirements for Incumbent LEC Broadband Telecommunications Services*, CC Docket 01-337, Comments of DIRECTV Broadband, Inc. at 16-18 (March 1, 2002).

[34] Some elements within the RBOCs may be genuinely committed to promoting the use of their networks by independent BSPs as a win-win-win arrangement for BSPs, the RBOC, and consumers. However, this sentiment does not yet appear to be a consensus view within any of the RBOCs. While DIRECTV Broadband supports any reasonable RBOC effort to make the independent BSP channel more effective, it is evident from the RBOC comments that open access on reasonable rates and terms is not supported by regulatory policy of these companies,

2. RBOC Price Inflation and Discrimination Already Impede Broadband Adoption, and Would Worsen Without *Computer Inquiry* Safeguards

BellSouth and SBC argue that the *Computer Inquiry* rules are no longer needed because price cap regulation prevents ILECs from cross-subsidizing their broadband services.[35] However, even if their argument had any merit, price-cap regulation does not guarantee that RBOCs cannot achieve the same effect as discrimination by implementing a price squeeze on independent BSPs. In fact, the RBOCs' rates for their wholesale broadband transport service have risen to levels well in excess of cost and in excess of what might be the market rate if there were a competitive wholesale market. The RBOC wholesale rates not only in some cases squeeze out competition, but in all cases prevent BSPs from engaging in significant price competition that would allow DSL rates in the United States to decrease to natural, competitive-market levels. As a result, price competition within DSL is suppressed, and the resulting high $50/month rate for consumer broadband is one of the most significant factors that is discouraging widespread adoption of broadband among American consumers.[36] By contrast, in countries where broadband rates are significantly lower, broadband penetration rates are often significantly higher than in the United States.[37] Thus, contrary to the RBOC comments, the public interest demands more oversight of RBOC wholesale broadband rates, not less. The Commission should not abdicate its responsibility to assure the reasonableness of these rates by removing them from Title II jurisdiction or continuing to accept RBOC price increases without cost justification or public comment.

The existing price squeeze in the broadband market is evidenced by the narrow difference between the RBOCs' retail and wholesale rates, which defies any rational nondiscriminatory

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which apparently treats broadband as a zero-sum game in which the requirement to provide access to independent BSPs is simply "burdensome and costly regulation[]". Verizon Comments at 35.

[35] BellSouth Comments at 18; SBC Comments at 21-22.

[36] *See, e.g.,* Remarks of Chairman Powell, October 25, 2001 ("the intriguing statistic is that though [85%] of households have [broadband] availability, only 12% of these households have chosen to subscribe. There are many possible reasons for the demand gap. Consumers may not yet value the services at the prices they are being offered."), http://www.fcc.gov/Speeches/Powell/2001/spmkp110.html.

[37] *See, e.g., DSL Worldwide Directory, Edition 5, April 2002,* www.point-topic.com (illustrating that broadband adoption rates are significantly higher in South Korea and Canada, where typical retail DSL rates are approximately $30.)

explanation.[38] The RBOCs' broadband services affiliate might on paper "lose" money due to the artificially high wholesale rate that it pays to its parent company for last-mile connectivity and transport, but this paper transaction is no consequence to the parent company or its shareholders. Price cap regulation has no bearing on the RBOCs' ability to succeed with a strategy to discriminate against independent BSPs. Therefore, price cap regulation in no way supports the elimination of the *Computer Inquiry* regulations.

The RBOCs appear content to enjoy duopoly profits with cable operators, declining to engage in price competition with cable modem service. When asked to justify the tremendous RBOC price increases in DSL rates that have quickened as DSL CLECs have faltered, Qwest responded that "cable still costs more money – it's as simple as that."[39] The RBOCs have repeatedly failed to provide any cost information that might support this claim. In any case, price competition between cable and RBOC DSL is not a significant motivating factor for either side since most Americans do not have the luxury of choosing between cable modem and DSL service (in California, only 15% have such a choice[40]).

By drawing attention to wholesale transport pricing, the RBOC comments not only fail to support their argument for elimination of *Computer Inquiry* regulation, but undermine it. If RBOCs were no longer required to tariff a nondiscriminatory transport service at reasonable rates, they could legitimize,

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[38] For example, SBC-ASI recently modified its tariff to increase the rate that it charges to BSPs for wholesale 1.5 MB DSL transport to $50.00 per month. *See* ASI FCC Tariff No. 1 at § 6.6. However, SBC continues to sell retail bundled 1.5 MB DSL Internet access service to the public for $49.95, and even offers a discounted rate of $29.95 for introductory periods. See http://www.pacbell.com/affinity/san/1,,24,00.html (viewed July 1, 2002). The basic wholesale rate charged to BSPs does not include numerous costs that the BSP must bear separately, including Internet access services (which RBOCs sell separately for approximately $20); backhaul transport that can cost a BSP, on average, an additional $5-10 or more per customer; and retail costs such as customer acquisition, customer service, billing, and other support and administrative costs. In other past instances, when SBC's retail rate was $39.95, the wholesale rate charged to BSPs, exclusive of the additional costs described above, was $39.00. SBC has engaged in these anticompetitive pricing schemes even under the auspices of *Computer Inquiry* regulations. Clearly, if their wholesale rates were freed from all regulation, LECs would be able to engage in price squeeze behavior to the point of excluding outright the ability of any competitor to use wholesale transport service as a means of viable access to consumers.

[39] "Big Pipe Dreams: There's a problem with high-speed Web service: a lack of customers," *U.S. News and Word Report* (May 13, 2002) at 36 (quoting Steven Starliper, Qwest vice president for DSL services).

[40] *See Communications Daily*, Vol. 22, No. 100 at 5 (May 23, 2002).

and tighten, their stranglehold on the pricing flexibility of DSL-based BSPs.[41] Whether or not the RBOCs would use the freedom of deregulation to exclude competing BSPs altogether, it is clear that they would have the ability to suppress all price competition from the BSP users of its wholesale service and to eliminate all margin in retail broadband services by driving transport costs higher and improperly subsidizing their affiliated ISPs. Given that high DSL and cable modem rates caused by the absence of price competition may be the most significant hurdle to broadband adoption in the United States, the Commission should retain jurisdiction over LEC wholesale transport rates by continuing to require LECs to offer transport on a common carrier basis and file cost justification for their rates.[42] Therefore, the RBOC arguments that price-cap regulation prevents cross-subsidization are irrelevant.

3. Open Access Promotes Investment

The RBOCs argue that the existing *Computer Inquiry* rules deter broadband deployment because the forced provision of nondiscriminatory access renders investment uneconomical. However, the RBOCs have not presented any compelling evidence specific to wireline technology that *Computer Inquiry* rules have deterred specific investments by incumbent or competitive local exchange carriers that would otherwise have been made.[43] As DIRECTV Broadband explained in its initial comments, the weight of evidence demonstrates that the ILECs have invested billions of dollars in broadband under the existing regulatory scheme and have succeeded in capturing over 80% of the DSL-based retail market through their affiliated ISPs. Recent downward trends in investment have more to do with a slumping economy and the decline of competition than with the impact of regulation.[44] In rejecting similar RBOC

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[41] *See. e.g., Review of Regulatory Requirements for Incumbent LEC Broadband Telecommunications Services*, CC Docket 01-337, Comments of DIRECTV Broadband, Inc. at 8-10 (March 1, 2002).

[42] Unfortunately, to date, the Commission has made challenges to these RBOC rates even more difficult by allowing SBC-ASI to file its new rates without any cost support, as is plainly required by Commission rules, and then by ignoring repeated protests from SBC's customers regarding SBC's tariff filings and the manner in which they have been allowed to become effective. See Section IV below.

[43] Numerous commenters demonstrate that the *Computer Inquiry* rules have not deterred investment. *See, e.g.,* AT&T Comments at 55, Sprint Comments at 10, WorldCom Comments at 39-42. Other commenters explain that there is no evidence that the elimination of the *Computer Inquiry* rules would promote investment in transmission facilities. *See, e.g.,* AOL Time Warner Comments at 23, n. 80.

[44] DIRECTV Broadband Comments at 70-72.

contentions, the Supreme Court recently observed that "so long as [there is] some competition, the incumbents will continue to have incentives to improve their services to hold on to their existing customer base."[45] If the provision of unbundled access to individual network elements at TELRIC rates does not deter investment, the simple requirement to sell the DSL connectivity and transport that underlies retail broadband services at a reasonable rate would have an even lesser impact on the RBOCs' investment decisions.

The RBOCs' peculiar argument that Section 706 compels the elimination of the *Computer Inquiry* rules twists both public policy and the terms of the Act. Far from prescribing their elimination, of the 1996 Act in Section 251(g) codified the obligation of LECs to provide equal and nondiscriminatory access to information services providers. Congress adopted the 1996 Act with the knowledge that the Act would require the ILECs to open their networks and access services to competitors. Whatever limited effect this access has on the RBOCs' investment strategies, it is an effect that Congress found to be in the public interest.

The RBOC emphasis on encouraging deployment of transport facilities diverts focus from the ultimate pubic interest objective of the Communications Act, which is the availability of innovative and reasonably priced retail broadband *services* to consumers. Numerous commenters have demonstrated that the low penetration rate for broadband is largely a result of consumer demand, not supply.[46] Additional consumer adoption of broadband will be generated by better, more compelling services and lower prices, not by permitting the largest wholesale transport providers to exclude from the public wireline telecommunications network the competition that would otherwise promote new services and lower

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[45] *Verizon v. FCC*, slip op. at 46, n. 33.

[46] *See* Florida Public Service Commission Comments at 5; Oregon Public Utility Commission Comments at 1-3; Public Utilities Commission of Ohio Comments at 33; Wisconsin Public Service Commission Comments at 2; Arizona Consumer Council et al. Comments at 12; AOL Time Warner Comments at 23; AT&T Comments at 70; Big Planet, Inc. Comments at 60-61; Business Telecom, Inc. et al. Comments at 58-59; Cbeyond Communications, LLC et al. at 9-10; Covad Comments at 7-10; DSLnet Communications, LLC Comments at 10; Earthlink, Inc. Comments at 20-21; McLeodUSA Telecommunications Services, Inc. Comments at 4-5; Mpower Communications Corp. Comments at 6; Sprint Comments at 7; TDS Telecommunications Corporation Comments at 8; Time Warner Telecom Comments at 8-9; US LEC Comments at 54-56; WorldCom et al. Comments at 30.

prices.[47] Thus, for transport facilities that are already widely available, investment should not be measured alone by dollars spent on additional raw transmission facilities. A critical measure of the development of broadband is the total investment in innovative and diverse advanced *services*. DIRECTV Broadband, Earthlink, AOL and other information services providers presently invest millions of dollars in research, development and deployment of new consumer services, which they have consistently deployed before the LECs, and would likely spend even more if the cloud of uncertainty generated by recent Commission proceedings were lifted.

III. BROADBAND CONNECTIVITY AND TRANSPORT OFFERED PURSUANT TO AN OPEN ACCESS MANDATE IS A COMMON CARRIER TELECOMMUNICATIONS SERVICE

If LECs remain obligated to provide wholesale DSL connectivity and transport to all information services providers on a non-discriminatory basis, as they must today, then there is no doubt that by definition they would be acting as common carriers pursuant to the terms of the Act. Under *Computer Inquiry* or similar open access rules, LECs may provide retail information services over their own facilities only as customers of their own underlying wholesale telecommunications services offered on nondiscriminatory rates and terms to all requesting customers. These stand-alone broadband connectivity and transport services would therefore continue to be within the Act's definition of telecommunications services and would therefore remain subject to regulation under Title II.[48] Verizon's Comments recognize that application of *Computer Inquiry* access rules renders, "in effect, the creation of new, tariffed Title II services."[49] Even SBC describes the service that BSPs purchase from ILECs today as "telecommunications services."[50] BellSouth recently explained to the Florida Public Service Commission

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[47] *See, e.g.,* AOL Time Warner Comments at 22-23 (demonstrating that consumer choice and diversity of service providers will drive broadband demand and innovation).

[48] Thus, if any form of nondiscriminatory access regulation is preserved, the Commission need not consider whether it could impose new regulations under Title I because the resulting access service offered by LECs would *ipso facto* remain subject to Title II regulation.

[49] Verizon Comments at 32.

[50] SBC Comments at 42.

that its tariffed DSL transport service "is a regulated telecommunications service offering."[51] The RBOCs' argument that their existing relationships with BSPs share some characteristics of private carriage[52] cannot overcome the plain fact that these services offered pursuant to *Computer Inquiry* regulations are and will continue to be "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."[53]

Application of Title II regulation to these unbundled telecommunications services would be, as it has been for two decades, completely consistent with the statutory definitions of "information service," "telecommunications," and "telecommunications service." Information services providers that do not utilize their own last-mile transmission service are offering integrated information services over telecommunications obtained from another provider. However, as explained in DIRECTV Broadband's initial comments, when these underlying telecommunications are, or must be, offered to any requesting member of the public, the telecommunications *must* be classified as common carrier services pursuant to the Act, as interpreted by the *NARUC I* and *II* decisions. This regulatory framework has served as the cornerstone of the nation's policy to foster the development of the information services market, and was endorsed by Congress in Section 251(g) of the 1996 Act. Therefore, there is no basis for a determination that the definitions in the Communications Act compel a complete overhaul of long-standing Commission rules and national policy.

Moreover, it would be illogical for the Commission to determine that the public interest demands that LECs continue to be required to offer broadband transport on reasonable and nondiscriminatory terms pursuant to *Computer III*, but to abdicate the tools and safeguards under Title II that would be needed to ensure that this public interest objective could be accomplished. Therefore, if the Commission preserves

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[51] *In Re: Petition of Florida Digital Network, Inc. for Arbitration of Certain Terms and Conditions of Proposed Interconnection and Resale Agreement with BellSouth Telecommunications, Inc. Under the Telecommunications Act of 1996*, Docket No. 010098-TP, BellSouth Petition for Reconsideration (June 20, 2002) at 3, 6.

[52] Verizon Comments at 9-10.

[53] 47 U.S.C. § 153(46) (prescribing definition of "telecommunications service").

any form of mandatory nondiscriminatory access for LEC broadband access services, Title II regulation must continue to apply to these services.[54]

IV. STRONGER ENFORCEMENT IS NEEDED TO SAFEGUARD COMPETITION AND CONSUMER CHOICE

DIRECTV Broadband agrees with the comments of AOL, Earthlink and others that, in order to ensure that competitive BSPs have meaningful access to consumers, it is essential that the Commission retain – and, when appropriate, exercise – processes that enforce nondiscriminatory access regulations, including the requirement that access is offered on reasonable and nondiscriminatory rates and terms.[55] Whatever regulations are maintained or adopted by the Commission, it is imperative that the RBOCs comply with such rules and that the Commission enforce them swiftly and resolutely when they do not.

In recent months, the FCC has not addressed the mounting evidence that the RBOCs are engaging in substantial discrimination against independent BSPs.[56] SBC has sought – and, inexplicably, has received – special permission for each and every one of its broadband tariff filings submitted since August 2001, without an opportunity for comment and without any cost support.[57] As DIRECTV Broadband has explained on past occasions, any nondiscriminatory access regime that relies on the availability of a tariffed wholesale offering will be undermined if the Commission continues to allow the regulated carriers to routinely obtain waivers of these regulations for every tariff revision, even for rate increases and substantial changes to the terms and quality of service.[58] As described above, in this permissive environment, the RBOCs have been able to discriminate against independent BSPs and build an overwhelming market advantage for their affiliates, which in some cases now control more than 80%

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[54] If the market develops in the future such that the Commission determined that nondiscriminatory access requirements were no longer needed, LECs would be free to offer broadband transport services as private carriage outside the scope of Title II, or to continue to offer the transport on a common carrier basis.

[55] See AOL Time Warner Comments at 31-32.

[56] *See* footnote 21.

[57] See DIRECTV Broadband Comments at 69. *See also Review of Regulatory Requirements for Incumbent LEC Broadband Telecommunications Services*, CC Docket 01-337, Comments of DIRECTV Broadband, Inc. at 16-18 (March 1, 2002).

[58] *See* DIRECTV Broadband Comments at 17-19.

of the DSL-based information services market.[59] To restore a competitive playing field in which consumers are able to access competing information service providers on an equal footing, DIRECTV Broadband supports the strengthening of the *Computer Inquiry* rules as set forth below.

Earthlink's and AOL's comments support the establishment of performance metrics for the RBOCs' wholesale broadband access service in order to streamline and enforce nondiscriminatory access requirements.[60] DIRECTV Broadband proposed the creation of specific metrics in its comments to the Commission in Docket 01-321. Specific metrics for broadband access would clarify standards of reasonableness and nondiscrimination and would facilitate the Commission's effective implementation of its rules with the lowest possible degree of uncertainty. DIRECTV Broadband therefore agrees with AOL's comments that performance metrics with a system of automatic penalties for non-compliance would strengthen and simplify the enforcement of streamlined access requirements.

Earthlink and AOL proposed that the Commission update its rules requiring RBOCs to provide fully mechanized OSS systems to support their wholesale broadband services.[61] DIRECTV Broadband agrees that regulations should be streamlined and updated so that they are properly tailored to the realities of the current broadband market. Access to OSS is essential to ensuring that LECs' compliance with *Computer Inquiry* access obligations is performed in a manner that permits access on reasonable and accessible terms. DIRECTV Broadband has proposed specific metrics for OSS availability in its comments in Docket 01-321.

Stronger enforcement measures are also needed to ensure that independent BSPs have access to aggregated transport for wholesale DSL services on reasonable rates and terms.[62] All of the RBOC DSL tariffs force BSPs to purchase an egress circuit, such as a DS1 or DS3, in every LATA where the BSP

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[59] SBC Investor Briefing, "Strong Growth in Data, Wireless and Long-Distance Highlights SBC's First-Quarter Results (April 23, 2001), at 4) (indicating that "more than 80% of [SBC's DSL] customer base obtains Internet access service directly from an SBC or affiliate), http://www.sbc.com (available in Press Room, Archived Press Releases for 2001, April 23, 2001) (viewed June 27, 2002).

[60] Earthlink Comments at 32, AOL Time Warner Comments at 32-34.

[61] Earthlink Comments at 32, AOL Time Warner Comments at 29.

[62] DIRECTV Broadband Comments at 14-16.

wishes to obtain even a single customer. This requirement is completely unnecessary in states where the RBOC has authority to provide interLATA services, but the RBOCs with interLATA authority have perpetuated these onerous interconnection requirements as a means to maintain an edge for their affiliates who enjoy better economies of scale, thereby significantly increasing the relative costs to independent BSPs of providing competitive DSL service. Although DIRECTV Broadband reported some initial progress on this issue in its comments, no productive final resolution that would eliminate this unnecessary burden has been reached, leaving competing BSPs to suffer higher costs of serving customers than the large RBOC affiliates. If the Commission abdicates its authority to regulate the terms of the RBOC DSL offerings, the RBOCs may continue to inflate the cost of DSL by maintaining these inefficient and unnecessary interconnection requirements.

Finally, AOL proposes that the Commission establish mediation procedures to resolve disputes between BSPs and LECs.[63] The option of formal mediation could be useful as a *supplemental* safeguard to existing regulations, in order to address technical issues or possible changes to a LECs' tariff. However, without further details, followed by public comment and deliberation, AOL's proposal cannot for now serve as a viable *replacement* for existing dominant-carrier tariffing regulation and nondiscriminatory open access rules that are essential to safeguard the public interest.

V. CONCLUSION: OPEN ACCESS TO BROADBAND CONNECTIVITY PROVIDED BY LOCAL EXCHANGE CARRIERS REMAINS NECESSARY TO SAFEGUARD COMPETITION AND CONSUMER CHOICE

In support of its argument to eliminate *Computer Inquiry* nondiscriminatory access rules, SBC cites the Commission's reference to Section 230(b)(2) of the Act, which states that it is national policy "to preserve the vibrant and competitive free market that presently exists for the Internet and other interactive computer services, unfettered by Federal or State regulation."[64] Although taken out of context,[65] it is ironic that SBC believes it can draw support from this provision to argue that the vibrant and competitive

[63] AOL Comments at 31-32.

[64] SBC Comments at 27-28.

[65] Section 230 of the Act relates only to private blocking and screening of offensive material.

free market that presently exists for the Internet and other interactive computer services should not be preserved. The policy of *preservation* of the *competitive* market that now exists requires the Commission to maintain nondiscriminatory access requirements, which have served as the cornerstone policy that enabled the Internet to emerge in a free and open market.

The weight of real-world evidence demonstrates convincingly that *Computer Inquiry* nondiscriminatory access rules not only are still necessary and relevant, but in fact should be strengthened in order to adequately safeguard competition and consumer choice. It is unfathomable that the Commission could view the substantial evidence that BSPs are suffering from discrimination and determine not only that no regulatory oversight is needed but that the market is so open and competitive that existing safeguards can be eliminated or weakened, thereby ensuring even fewer choices for consumers. Accordingly, the Commission should continue to require facilities-based local exchange carriers to provide stand-alone broadband transmission services to information services providers on a nondiscriminatory basis subject to Commission oversight and the *Computer Inquiry* regulations and safeguards.

Respectfully submitted,

Patrick J. Donovan
Paul B. Hudson
Swidler Berlin Shereff Friedman, LLP
3000 K Street N.W., Suite 300
Washington, D.C. 20007
Tel. (202) 424-7500
Fax. (202) 424-7645

Counsel for DIRECTV Broadband, Inc.

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