access to the Internet via a broadband facility/line, such as digital subscriber lines, instead of the *(sic)* dial-up connections."[53]

In the past several years, state legislatures and regulatory bodies have also significantly relied upon the FCC's existing regulations by linking their state statutes and regulations to the current federal scheme. The Texas Public Utility Commission, for example, cautions that the proposals set out in the NPRM, if implemented, would necessitate a "substantial re-write" of state law and urges the FCC to "consider the substantial evidentiary record being developed by states before making final" the tentative conclusions in the NPRM.[54] The Florida PSC, emphasizing "the impact on the marketplace that uncertainty brings to bear," requests that the FCC let the states finish the action undertaken pursuant to the existing federal regulatory scheme prior to "altering the regulatory landscape."[55]

B. The Commission Must Consider the Impact the ILECs' Proposals Would Have on the Public Interest.

Although the FCC must take the above-described reliance into account, there is no explanation in the record as to how the transition to any new regulations would proceed. What would happen to the thousands of ISP customers who currently rely on DSL service provided by ILECs? Would the ILECs continue to provide those service arrangements, and if so, for how long? How much would the price paid by independent ISPs go up? Would customers of ISPs affiliated with the ILECs receive better service or rates than customers of independent ISPs? Would ILECs be free to discontinue service

[53] Department of Justice and Federal Bureau of Investigation Comments at 9 n.9, 12.

[54] Texas Public Utility Commission Comments at 2 and 7.

[55] Florida Public Service Commission Comments at 9.

without obtaining an FCC certification under Section 214 of the Act that such discontinuance of the common carrier service would meet the "public interest"?[56]

In partial answer to these questions, the ILECs offer a "Memorandum of Understanding" between SBC and the U.S. Internet Industry Association ("USIIA") in which SBC "commits" that if the FCC deregulates the "broadband market," "commercial agreements for high-speed Internet access will be available and negotiated between SBC and ISPs."[57] Unfortunately, the USIIA is a BOC-supported organization that does not represent the interests of independent ISPs. The BOCs have in this instance thus made what amounts to an agreement with themselves. Rather than ease concern about the risks of deregulation of incumbent telecommunications networks, this commitment underscores those risks by studiously failing to address them. For example, SBC not only avoids any commitment not to discriminate in favor of its own affiliated ISPs—indeed, it likely would be poor business *not* to—but it also pointedly does not say that SBC will offer *all* ISPs such agreements or that the "negotiated" agreements will be even remotely

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[56] Section 214 of the Act recognizes the importance of protecting consumers' reliance interest, requiring carriers to obtain a prior FCC certification that discontinuation of service would not harm the public interest. 47 U.S.C. § 214(a). Reclassifying wireline broadband transmission service so that it no longer falls under Title II does violence to this principle of Section 214 and to the reliance interests it is designed to protect.

[57] USIIA and SBC Joint Submission (May 3, 2002), Attachment at 2. The description of USIIA as "a trade association representing nearly 300 diverse members of the Internet industry" should not be read to suggest that the organization represents the interests of independent ISPs in any way. The views expressed in the "Memorandum of Understanding," which are essentially those set forth in SBC's comments, are not shared by the ISPs, CLECs, state regulatory agencies, or public interest groups that filed comments in this proceeding. Moreover, USIIA has not presented the ISP position on this issue, and its membership does not represent the diverse or majority interests of ISPs today. Rather, from its public materials, USIIA appears to cater to BOC-owned ISPs. *See*, http://www.usiia.org/members/corplist.html.

palatable to the ISPs.[58] As for pricing, the document states that the terms will be "market-driven."[59] Given that the ILEC owns virtually every local loop necessary to provide DSL to ISP customers in its service area and very few ISPs have access to any cable modem service at all,[60] ISPs can have little faith that negotiating with a BOC under such circumstances would yield anything but "monopoly driven" prices, terms and conditions.

The Commission should determine that the risk of damage to competition and broadband deployment in this country, and the potential public backlash such damage may entail, is not worth the implementation of a deregulation plan that is unlikely to achieve its goal of speeding broadband deployment.[61] Broadband deployment is proceeding at an impressive pace under current regulation,[62] and competition is only beginning to take root.[63] The FCC should adopt a moderate approach and avoid significantl changes to the regulatory landscape at this time.

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[58] The promise that if the FCC declares the ILEC to be a *private* carrier, then it will behave like a *common* carrier by offering services to any and all comers must fail because, as the D.C. Circuit held in *NARUC I*, "A particular system is a common carrier by virtue of its functions, rather than because it is declared to be so." *NARUC v. FCC*, 525 F.2d 630, 644 (D.C. Cir. 1976).

[59] USIIA and SBC Joint Submission (May 3, 2002), Attachment at 1.

[60] *See, e.g.,* AT&T Comments, Declaration of Robert D. Willig, ¶¶ 24-25, 31; Reply Comments of the People of the State of California and the California Public Utilities Commission, CC Docket 01-337 (April 22, 2002) at 14 and Appendix A (45% of Californians in cities with DSL and/or cable modem access can get only DSL).

[61] *See, e.g.,* AT&T Comments, Declaration of Robert D. Willig, ¶¶ 85-98; Covad Comments at 32-36.

[62] *See* EarthLink Comments at 20-21; *see also* Remarks of FCC Chairman Michael K. Powell at the National Summit on Broadband Deployment (Oct. 25, 2001) ("[B]roadband availability is estimated to be this year almost 85%" of U.S. households).

[63] *See* EarthLink Comments at 18-19.

III. PRINCIPLED REGULATION OF THE ILECs IS NEEDED TO PRESERVE COMPETITION AND CONSUMER CHOICE IN BROADBAND SERVICES.

A. Common Carriage Demands Open ILEC Networks.

Critically, the regulatory "reform" that the BOCs advocate fails to recognize that intramodal competition is the very foundation of the 1996 Act and is a logical outgrowth of the common carrier framework, which has traditionally and properly been the relevant regulatory regime for wireline carriers. The "broadband services" at issue, such as DSL and related technologies, utilize the very infrastructure that the Supreme Court has just noted is a bottleneck (i.e., the local loop).[64] Indeed, the bedrock principle underlying common carrier precedent, the FCC's *Computer Inquiry* decisions and the 1996 Act is indiscriminate and open access to this vital wireline infrastructure, to facilitate public access and competition in telecommunications and information services. In fact, as commenting parties have emphasized, *Computer II/III* is predicated on the notion that if there is open and nondiscriminatory access to critical wireline bottleneck facilities and services, the public interest is served by allowing the BOCs to participate in markets from which they were previously barred.[65]

While some ILECs, especially the BOCs, urge that new infrastructure investment and innovation will be dampened unless the FCC reclassifies today's telecommunications services as information services, the services about which they are primarily complaining – DSL services – are provided to ISPs on the very loop facilities that give the ILECs "an

[64] *Verizon Communications Inc.*, 122 S. Ct. at 1672.

[65] *Computer III*, 104 F.C.C. at 964 (¶ 3).

almost insurmountable competitive advantage."[66] The reason for these conclusions supporting unbundling and access is clear; the ILECs still unquestionably control the local loop, and the vast majority of access lines.[67]

Nor does the conclusion change when considering new technologies and architectures that might be made available for "broadband information services" such as SBC's Broadband Passive Optical Networking ("BPON"), or a network configuration that replaces today's copper plant with fiber or other facilities. While the BOCs posit a scenario whereby they offer *only* information services, somehow declaring that they have freely decided not to offer any separate transmission component, even the statutory definition of "information service" plainly contemplates that information services are provided *via telecommunications.*[68] As such, the question for the FCC, according to *NARUC I* precedent, is whether there *should be* a legal compulsion for the ILECs to offer the telecommunications on any new network architecture on an open common carrier basis (i.e., that the transmission services are common carrier telecommunications services). As discussed above, the public interest clearly favors the continued offering of BOC telecommunications as common carriage, since the record amply demonstrates that this framework has redounded to the enormous benefit of the American public.

In this sense, while the Commission has acted on the bedrock legal tenets of common carriage in its *Computer II* unbundling decisions, such as by establishing

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[66] *Verizon Communications Inc.*, 122 S. Ct. at 1662.

[67] *See, e.g.,* AT&T Comments, Declaration of Robert D. Willig, ¶¶ 24-25, 31; "Local Telephone Competition: Status as of June 30, 2001," FCC, Industry Analysis Div., Common Carrier Bureau, at Table 1 (rel. Feb. 27, 2002) (ILECs held 91% of the end user switched access lines reported).

[68] 47 U.S.C. § 153(20).

particular requirements for tariffing, the FCC must understand that it may not simply regulate away this common carrier requirement but rather it must engage in the statutory analysis dictated by *NARUC I* and its progeny. This is precisely why the BOCs may not slap a new label on their services – whether based upon today's copper or tomorrow's fiber or other technology – and thereby escape the relevant legal inquiry into the proper regulatory treatment for these services.

B. The Premises for *Computer III* Remain Vital Today.

The FCC's *Computer III* precedent is likewise grounded in common carriage and the principle that competitors should be able to count on access to the BOCs' networks and non-discriminatory treatment vis-à-vis the BOCs' affiliates. Thus, when it permitted the BOCs to offer information services, the FCC instituted requirements to ensure that the BOCs continued to make available their services and infrastructure openly and without discrimination as they also entered into the newly emerging enhanced services market.[69] These requirements were driven by the need to resolve conflicting incentives due to BOC entry and participation in competitive enhanced services businesses.[70] Given that they were created to ensure that Title II common carriage is effective, the FCC cannot simply define away the need to impose such requirements. While the particular *Computer III* iteration is certainly within the FCC's reasonable discretion, the bedrock common carriage essence endures. As such, if there are specific provisions that are unduly

[69] *Computer III*, 104 F.C.C. 2d at 1011-1012 (¶¶ 98-99).

[70] *Id.*, at 964 (¶3) (*Computer III* safeguards designed to "limit[] the ability of . . . the BOCs to make unfair use of their regulated operations for the benefit of their unregulated, enhanced services activities."); *id.*, at 1012 (¶99) (*Computer III* allows joint marketing of basic and enhanced services by addressing anticompetitive concerns).

burdensome, the ILECs should demonstrate that and the provisions should be changed without reducing the network-opening, competition fostering effects of those decisions.

The premises underlying *Computer III* regulation of BOCs – to ensure nondiscriminatory and efficient access for all information service competitors – have not changed. BOCs continue to own and control the infrastructure used by ISPs in the "upstream" enhanced services market. Indeed, while the Commission applied *Computer III* obligations only to the BOCs and GTE due to their size and ability to practice pervasive discrimination (and not to independent incumbent LECs),[71] the BOCs have only grown bigger in the past few years through industry consolidations such as the Bell Atlantic-GTE merger and the SBC-Ameritech-Pacific Bell-SNET mergers. Moreover, the Commission recognized that the BOCs' control over essential local access facilities provided them with the ability to deny access to competitors in the enhanced services market, which remained a viable threat to the public interest in "the full benefits of competition in this area."[72]

Another underlying premise of *Computer III* – that the public network represents a unique resource to be open for all – has certainly not changed, either. Thus, as the FCC stated in *Computer III*, "[w]e have long recognized that the basic network is a unique resource, and our policies have been designed to promote nondiscriminatory utilization of that resource's capabilities."[73] Beyond nondiscrimination, "ONA should not only ensure equal treatment of ESPs: it should promote efficient use of the network, both by the

[71] *Computer III*, 104 F.C.C. 2d at 1027-1028 (¶ 132).

[72] *Computer III*, 104 F.C.C. 2d at 1026 (¶¶ 128-129).

[73] *Computer III*, 104 F.C.C. 2d at 1036 (¶ 148).

BOCs themselves and by unaffiliated ESPs. This is, of course, one of the primary goals of the Communications Act."[74] Until robust competition develops, general principles of efficient connectivity for all ISPs remain as significant statutory and regulatory goals as at the inception of *Computer III*.

The recent D.C. Circuit decision in *USTA v. FCC*[75] confirms that incumbent LECs should be regulated in a manner that responds effectively to the circumstances of their unique market power. Thus, while the court noted the importance of examining "market-specific variations" in competition,[76] the BOCs in this proceeding have failed to provide a market-specific analysis of the level of competition necessary to justify a change in *Computer III* regulation. Further, while the court cited to the FCC's *Third Report* on cable's retail lead in the high-speed Internet access market, the FCC's court briefs articulated the more salient points for purposes of this proceeding. The Commission noted, for example, that cable, wireless and satellite systems are not available alternatives to CLECs because the owners of such alternative facilities "are under no express statutory obligation to share their facilities with CLECs."[77] With regard to the state of the broadband market, the Commission noted that the market was too nascent to be deemed to have reached a competitive "end-state" and that many consumers have access to not even a single broadband facilities provider.[78] The same is true for ISP

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[74] *In the Matter of Filing and Review of Open Network Architecture Plans*, Memorandum Opinion and Order, 4 FCC Rcd. 1, 16 (1988).

[75] *USTA v. FCC,* 290 F. 3d 415 (D.C. Cir. 2002).

[76] *Id.*

[77] FCC Brief at 20, *USTA v. FCC* (filed August 1, 2001).

[78] *Id.* at 21.

competition: ISPs, just like CLECs, currently do not enjoy effective access to cable, wireless and satellite, and thus openness of the BOCs' networks, as spelled out by *Computer III*, is essential.

Conclusion

The Commission should maintain the common carriage elements of the incumbent LEC broadband services offerings and should retain, strengthen, and clarify its *Computer Inquiry* decisions, in order that the American public has competitive ISP services to choose from and has unfettered access to information services.

Respectfully Submitted,

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