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July 3, 2002

Electronic Filing

Marlene H. Dortch
Secretary
Federal Communications Commission
445 12th Street, S.W.
Washington, DC 20554

Re: CC Docket Nos. 95-20, 98-10, 02-33

Dear Ms. Dortch:

Attached is a corrected version of reply comments of ASCENT *et al* filed in the *Wireline Broadband Proceeding* on July 1, 2002. The only change is to reflect that US LEC Corp., which was inadvertantly omitted from the filing, is a party to the reply comments.

Please contact the undersigned if you have any questions.

Sincerely,

Patrick J. Donovan

406295v1

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

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BUSINESS TELECOM, INC.
CBEYOND COMMUNICATIONS, LLC
CTC COMMUNICATIONS CORP.
DSLNET COMMUNICATIONS, LLC
EL PASO NETWORKS, LLC
FOCAL COMMUNICATIONS CORPORATION
FLORIDA DIGITAL NETWORK
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Dated: July 1, 2002

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The Association of Communications Enterprises ("ASCENT"), Big Planet, Inc., Cbeyond Communications, LLC, CTC Communications Corp., DSLnet Communications, LLC, El Paso Networks, LLC, Focal Communications Corporation, Florida Digital Network, New Edge Networks, Inc., PacWest Telecom, Inc., RCN Telecom Services, Inc., and US LEC Corp., (collectively "Commenters") submit these reply comments in the above-captioned proceeding

examining the appropriate regulatory framework to govern broadband access to the Internet over wireline facilities.[1]

I. INTRODUCTION AND SUMMARY

In the initial round of comments in this proceeding, only the BOCs support the view that the broadband transmission services that they are currently required to provide to unaffiliated ISPs on a nondiscriminatory basis pursuant to Title II of the Act should, or could, be converted from common carriage to private carriage. State commissions, the Secretary of Defense, consumer groups, the entire competitive industry, ISPs, and even other ILECs oppose the BOCs' deregulatory proposal floated by the Commission in the *NPRM*. The fact that, in a time of war, the Secretary of Defense opposes the BOCs' proposal is sufficient reason by itself to reject this approach.

Moreover, the record in this and other proceedings demonstrates that conversion of ILEC broadband services to private carriage would not achieve the Commission's broadband goals. Rather than promoting broadband, this would reduce ILEC incentives to construct broadband networks, harm the ability of the competitive industry to construct and build out their own networks, and of ISPs to provide innovative services. In this connection, the recent decision of the Supreme Court definitively invalidated the core of the BOCs broadband public policy initiative when it carefully explained why ILEC obligations to provide unbundled network elements at TELRIC prices does not discourage facilities-based investment by either ILECs or the competitive industry. That decision applied to provision of network elements to the ILECs' telecommunications service competitors. There is even less reason to accept the ILECs'

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[1] *Appropriate Framework for Broadband Access to the Internet over Wireline Facilities*, Notice of Proposed

broadband arguments with respect to their obligation to provide ISPs with nondiscriminatory access to basic telecommunications transmission services. The Commission should use this proceeding to similarly reject BOCs' broadband arguments, which are no more in any event than the latest manifestation of the traditional BOC argument to the effect that if regulators permit them to thwart competition they will provide new services to consumers.

The Commission should also reject arguments that their broadband capability is a separate network justifying different rules. In fact, broadband capability is no more than an incremental improvement to the existing network that the ILECs themselves say can be justified on the basis of efficiencies in provision of current services. The Commission should similarly reject BOCs' self-serving overly broad definitions of "broadband" because they are designed to achieve complete deregulation of all services as the network becomes an integrated end-to-end packet-switched network.

Initial comments also reveal in a striking fashion the error of the definitional approach to deregulation of broadband apparently contemplated in the *NPRM*. The *NPRM* tentatively concluded that wireline broadband Internet access service is an information service provided via "telecommunications" but not via "telecommunications service." The *NPRM* failed to recognize, as admitted by the BOCs in their initial comments, that in fact wireline broadband Internet access service is offered via telecommunications service because the Commission's own rules compel facilities-based carriers to provide information services as customers of their own tariffed telecommunications services. Thus, the transmission component that BOCs incorporate into their own broadband information services is a telecommunications service. Therefore, the

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Rulemaking, CC Docket No. 02-33, FCC 02-42, released February 15, 2002 ("*NPRM*").

Commission erred in concluding that information services provided by a carrier over its own facilities is not provided via telecommunications service. As explained in these comments, BOCs are urging the Commission to erroneously conclude that their broadband transmission services should be defined as information services merely because BOCs may provide information services over them.

Moreover, application of Title II and unbundling requirements to the transmission component of wireline broadband Internet access service is nonetheless consistent with the statutory definitions of "information service." Under the statutory definition, an information service is provided "via telecommunications." However, "telecommunications service" necessarily contains "telecommunications." Therefore, the requirement that BOCs provide information service as customers of their own tariffed telecommunications service means that the information service is also provided "via telecommunications" notwithstanding that it is also provided by means of "telecommunications service." Therefore, the apparent supposition of the *NPRM* that the Commission ought to, or must, abolish Title II regulation and *Computer II/III* safeguards because of the statutory definition of information service is incorrect and it would be unlawful for the Commission to take those radical deregulatory steps based on that supposition.

Nor is there any other reason or lawful basis for the Commission to abolish Title II regulation of ILEC broadband services, or *Computer II/III* safeguards. As explained herein, the Commission does not have the authority to convert ILEC broadband services to private carriage, and even if it could do so, it should not, because of the strongest possible public interest considerations including prevention of the ILECs' ability to systematically discriminate against independent ISPs in order to leverage control of basic transmission services into control of the broadband information services marketplace. Even assuming the existence of substantial

intermodal competition from cable operators in most residential markets, which is not the case, removal of Title II and *Computer II/III* safeguards from LECs and cable operators would merely permit the establishment of an undesirable duopoly in the residential broadband information services marketplace rather than a fully competitive market. Of course, the business market for such services, which the BOCs actively market and serve with DSL, would not even have duopoly competition. Thus, at most, BOC arguments concerning intermodal competition show a possible duopoly in provision of consumer Internet access service and virtually no competition in broadband business services.

The *Cable Modem Declaratory Ruling* does not provide any basis for regulation of the transmission component of wireline broadband Internet access service as private carriage. At a minimum, the Commission erred in that decision in determining that cable operators that provide telecommunications services, such as voice telephone service, are not already subject to Title II and *Computer II/III* unbundling obligations. This is because the Commission's existing rules require all facilities-based carriers to provide information services as customers of their own nondiscriminatory unbundled offering of underlying transmission service. Thus, because cable operators are carriers by virtue of providing voice telecommunications, they are subject to Title II and unbundling obligations, just like ILECs. Although the Commission's waiver of *Computer II/III* unbundling obligations was also erroneous because the Commission did not obtain a record for a waiver, or address its own standards for waiver under *WAIT Radio*, the waiver at least was correctly premised on the view that Title II and *Computer II/III* were applicable to cable operators.

Moreover, with respect to cable operators that do not provide telephone service, even assuming that the Commission's application of the statutory definitions to them is correct, they

are distinguishable from wireline providers because the latter are already subject to Title II. As stated above and explained further in these comments, the latter are required under the Act and the Commission's rules to unbundle transmission services from their information service offerings and the Commission may not under the Act remove that requirement on the basis of the statutory definitions. Therefore, the *Cable Modem Declaratory Ruling*, contrary to BOC arguments, does not provide any guidance for issues raised in this proceeding.

The Commission should also reject BOC arguments that a consistent regulatory approach to broadband requires that the transmission component of wireline broadband Internet access service be shifted to Title I regulation. While the unfortunate and erroneous *Cable Modem Declaratory Ruling* must be rescinded, the Commission may create a consistent regulatory framework by maintaining its requirement that all facilities-based carriers, including those also providing video programming subject to Title VI, are subject to Title II and *Computer II/III* unbundling obligations. This would not preclude creation of a suitably deregulatory approach to telecommunications, or necessarily require that all carriers bear equal regulatory burdens, because the Commission may forbear from application of Title II obligations as appropriate.

For these reasons, the Commission should affirm continued application of Title II and *Computer II/III* safeguards to the transmission component of wireline broadband Internet access service.

II. THE COMMISSION SHOULD REJECT BOC EFFORTS TO OBTAIN COMPLETE DEREGULATION THROUGH OVERLY BROAD DEFINITIONS OF BROADBAND

For all the reasons stated in these reply comments, there is no basis for concluding that deregulation would promote provision of "broadband." In fact, the freedom to discriminate against competitors that would be accorded to BOCs in any substantial deregulation would slow

broadband development by both BOCs and competitors because BOCs could thwart competition instead of appropriately responding to it by reducing prices and providing more service options, and because competitors would be denied essential access to BOC bottleneck facilities. Because there is no reason to deregulate "broadband," there is little point in debating in this proceeding an appropriate definition of it.

However, it is worth observing that BOCs urge the Commission to accept definitions and approaches to broadband that would virtually guarantee that BOCs would be completely deregulated in short order given industry trends. Thus, SBC contends that "the *Computer Inquiry* service-unbundling requirements are unnecessary not only for broadband Internet access, but also for any packetized broadband information service."[2] Similarly, Verizon urges that:

> "The Commission should expand its definition to cover these new services in order to eliminate regulatory obstacles to the development and deployment of such new technologies. ... A broadband service is either a service that uses a packet-switched or successor technology, *or* a service that includes the capability of transmitting information that is generally not less than 200 kbps in both directions."[3]

In short, it appears that the BOCs would like the Commission to adopt a new definition of broadband, packetized networks and services that would escape Title II regulation regardless of their classification as telecommunications services. Important business services encompassed in this definition include ATM, Frame Relay, gigabit Ethernet, and other like services. The majority of U.S. businesses would then have only one vendor for these services, if the BOC proposed monopoly is enforced.

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2 SBC Comments at 23.

3 Verizon Comments at 5-6.

Moreover, as pointed out in initial comments, basing deregulation on the speed of a digital service, especially at the low speeds suggested by BOCs, would mean that BOCs could obtain deregulation of all services merely by providing them on a digital basis or over high speed digital networks. Because BOCs can justify increasing use of packet switching technology merely on the basis of cost savings in providing existing services (although they will not want to lower prices), using the BOCs' suggested definitions of broadband as the basis for deregulation would virtually guarantee complete deregulation of all BOC services, including voice. For example, SBC recently announced that it is rolling out an IP Centrex service.[4] Although Centrex is currently a telecommunications service subject to regulation, the BOCs overly broad definition of broadband might well convert this to an unregulated offering. Similarly, based on a recent Verizon CLEC Industry Letter, it appears that Verizon is integrating a packet switched network into the circuit switched network.[5]

As pointed out in initial comments, industry observers have predicted that the circuit switched network will soon be replaced by a network providing all services as applications traveling over digital packet-switched facilities using IP protocol.[6] In fact, some CLECs are already doing so, which enables them to provide more service for less than what ILECs charge.[7] In this environment, all services, including voice, will be merely different software-defined applications traveling over digital packetized transmission services. Moreover, there will be in this environment no meaningful distinction between the all digital packet switched network and

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4 *SBC to Take Centrex Into the Wide World of IP*, TELEPHONY, June 3, 2002.

5 Verizon, CLEC Industry Letter, May 28, 2002.

6 Lawrence K. Vanston, Ph.D., *The Local Exchange Network in 2015,* TECH. FUTURES, INC., 2001.

the Internet, and, thus, no meaningful distinction between voice and data services transmitted over this network. Rather, the Internet will be the network, but the end product is still a telecommunications service. As technologies are converging over a common transport technology such as IP, the distinction of broadband and narrowband ceases to exist since all applications share bandwidth with applications such as voice, video and file transfer prioritized across the access and core networks based on the performance requirements established by each application.

However, if the Commission were to accept the BOCs' definitions of broadband, it would result in deregulating not only broadband Internet access services, but voice services as well. Such a result is contrary to the purpose and need for Title II common carrier regulation of telecommunication services. Accordingly, the Commission should reject the BOCs' self-serving definitions of "broadband" as having any utility in this proceeding.

III. "BROADBAND" IS NOT A SEPARATE NETWORK FROM THE BOCs' EXISTING WIRELINE NETWORK (a/k/a FIBER IS FIBER)

The Commission should reject as false the BOCs' contention that their broadband transmission capability is a separate network from the BOCs' existing wireline network that, therefore, may, or should be, free from Title II regulation. While BOCs suggest in this proceeding that their broadband capability is separate from the existing network, this is contradicted by the BOCs' own statements. Verizon states that "most local wireline network facilities are used to provide telecommunications services as well as information services."[8] And BellSouth boasts that it is "systematically transforming [its] core network from narrowband

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[7] *See* Comments of Association of Local Telecommunications Services, *et al.*, CC Docket No. 01-338, filed April 5, 2002, at 14.

[8] Verizon Comments at 41.

analog voice to broadband digital data ... through a disciplined strategy that targets investment and leverages capital into next-generation technologies and assets..."[9] The Florida Commission agreed, arguing that the "local exchange market and the broadband market is inextricably joined."[10] Further, in describing its advanced data and e-business services, SBC states that it is "adding capabilities to its copper and fiber metropolitan networks to deliver powerful IP and data transport options and advanced solution sets for voice, data and Internet services."[11] In other words, fiber optics are fiber optics. Moreover, both copper and fiber transmission facilities are used to provide "broadband." It is electronics and switching that represent the heart of BOCs new investment in broadband.

Another clear example of this integration is SBC's Project Pronto--SBC's initiative to deploy advanced services. SBC has admitted in recent arbitration proceedings before the Texas PUC that fiber is being installed in an integrated fashion in the existing network in connection with Project Pronto.[12] As stated recently by Wayne Masters, SBC's senior vice president-network services, Project Pronto "was to improve our voice network, our special services and our regular DS1, DS3, OCN services, and to put a lot of fiber in the network and take care of the DSL needs along the way."[13]

Moreover, BOC broadband facilities travel through the same wire centers and offices as the existing network, use the same rights of way and conduit, and are serviced and managed by the same personnel. In addition, contrary to the BOCs' arguments, ILECs are not "relative

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9 BellSouth 2001 Report to Shareholders at 6.

10 Florida PSC Comments at 6.

11 <<www.sbc.com/data>>.

12 Petition of El Paso Networks, LLC For Arbitration of an Interconnection Agreement with Southwestern Bell Telephone Company filed December 20, 2001, Docket 25188, Deposition of Sally Rossman at 104.

13 *With Fiber on the Horizon, SBC Seeks New Approach to Policy,* TELECOM. REPORTS, Feb. 11, 2002, at W-1.

newcomers in the broadband market."[14] BOCs' networks have contained a "broadband" capability for years in the form of special access and other high-speed services. ILEC's recent broadband investments are no more than the current phase of on-going upgrades to the existing network.

Thus, contrary to the BOCs' suggestion, "broadband networks" are not separate and distinct from the existing wireline bottleneck facilities that the BOCs control today. Rather, the BOCs' "broadband networks" are simply upgrades and improvements to the existing wireline networks. More importantly, these upgrades do not alleviate the bottleneck control the BOCs' have over these facilities. Accordingly, the Commission should reject the BOCs' view that deregulation of broadband is appropriate because it is a separate or new capability.

IV. "PRIVATE CARRIAGE" WOULD NOT PROMOTE BROADBAND GOALS

A. Left to Their Own Devices, ILECs Would Delay Introduction of Broadband Services

As noted by the Commenters in their initial comments, ILECs have strong incentives not to deploy new, broadband services because new more efficient services would cannibalize legacy services and revenue streams.[15] For example, DSL service threatens revenues associated with the more costly alternative of a second residential line where incremental profit margins exceed 70%.[16] Since, in most instances, subscribers who receive DSL service cancel their existing second line, DSL technology threatens the low cost and high profit margins associated with second residential lines. For this reason, BOCs delayed introduction of DSL service until

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[14] Qwest Comments at 31.

[15] Comments of Cbeyond Communications, Inc., DSLnet Communications, Inc., El Paso Networks, LLC, Focal Communications, Inc., and Pac-West Telecom, Inc. ("Cbeyond et al. Comments") CC Docket Nos. 02-33, 95-20 and 98-10, filed May 3, 2002, at 12-13.

[16] *See* AT&T Comments at 65.

competition from CLECs forced BOCs to introduce it. Further, it is because of the BOCs' decision to voluntarily delay introducing DSL service, not because of unbundling obligations, that cable operators got a head start in provision of Internet access service to consumers.

More broadly, apart from the very illustrative example of ILECs sitting on DSL technology until competition required them to offer it, ILECs do not welcome the trend toward packet-switched networks using IP to deliver all services. In that environment, it will be increasingly difficult for ILECs to charge current premium prices for voice and access services that are possible with the legacy circuit switched network. This is because it is possible to provide more services for a reduced price on packet-switched networks using IP. Innovative CLECs are already doing so. CLEC customers and partners in turn, are able to provide new and improved services to retail customers.[17] This would not be possible without CLEC unbundled access to dark fiber and broadband network elements.[18]

In fact, ILECs may well face a less than bright financial future, as some observers have suggested, because of the inevitable undermining of existing revenue streams caused by the deployment of more efficient technologies. BOCs are experiencing negative line growth in part because digital technology reduces the need for circuit switched lines.[19] CLECs in contrast do not face this issue because they can deploy the most efficient technology initially.

However, ILECs can avoid the erosion of current revenues if they can forestall the competition that would require them to deploy new, more efficient technologies. In this

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[17] *See* Letter from Sumner Chase, III, President, Softswitch Technologies to Marlene H. Dortch, FCC Secretary, CC Docket No. 02-33, July 1, 2002.

[18] *Id.*

[19] According to Verizon, ILECs have experienced negative line growth since 2001. Letter from Dee May, Verizon to Marlene H. Dortch, FCC Secretary, CC Docket No. 02-33, June 24, 2002.

connection, the strategy of ILECs in this and other proceedings in seeking to immunize broadband from any unbundling obligations is clear. If ILECs can prevent CLECs from being able to use broadband network elements more efficiently than do ILECs themselves, ILECs can preserve existing revenues. Obviously, however, this is not a sufficient reason for granting the ILECs' request. Instead, the Commission should promote unbundling in order to permit CLECs to provide more and better services to consumers and businesses at more affordable prices.

B. ILECs are Rapidly Deploying Broadband Infrastructure

In their initial comments, the Commenters emphasized that the ILECs had already widely deployed broadband capability and planned to continue to install even more robust broadband capability in their networks.[20] The Joint Commenters highlighted that the financial and network data released by the ILECs demonstrated that the ILECs have deployed and are continuing to deploy broadband facilities, including fiber in the loop. The FCC's *Third Report on the Availability of High-Speed Advanced Telecommunications Services* lends additional support to this view in concluding that overall, the deployment of advanced telecommunications capability to all Americans is reasonable and timely and that the trend of investment in broadband facilities is expected to continue.[21] The vast majority of commenters, including state regulatory commissions, competitive local exchange carriers and Internet service providers, agree that there is no problem with the pace of ILEC broadband deployment.[22]

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[20] Cbeyond et al. Comments at 7-9.

[21] *See Deployment of Advanced Telecommunications Capability to All Americans in a Reasonable and Timely Fashion*, CC Docket No. 98-146, Report, FCC 02-33 (2002) ("*Third Report*").

[22] *See* AOL Time Warner Comments at 23; AT&T Comments at 70; Arizona Consumer Council et al. Comments at 12; Big Planet, Inc. Comments at 60-61; Business Telecom, Inc. et al Comments at 58-59; Cbeyond et al. Comments at 9-10; Covad Comments at 7-10; DSL.net Comments at 10; Earthlink Comments at 20-21; Florida Public Service Commission Comments at 5; McLeodUSA Comments at 4-5; Mpower Comments at 6; Public

Moreover, ILECs continue to announce enormous growth in both broadband deployment and subscribers. For example, in responding to questions concerning the impact of the recent Supreme Court decision in *Verizon v. FCC*,[23] Ron Dykes, BellSouth Corp.'s Chief Financial Officer, said that BellSouth expects to have 1.1 million DSL customers by the end of 2002. This would represent an increase of 480,000 DSL customers as compared to the end of 2001.[24] These figures demonstrate that BellSouth is forecasting a growth rate of greater than 74% in its broadband customer base.

In addition, SBC touts itself as the "nation's leading DSL provider" and "one of the top five ISPs."[25] SBC describes its Internet network as one of the industry's largest, covering "virtually all of North America" and operating at "99.9 percent availability."[26] In addressing SBC's future plans for its broadband networks, Ross Ireland, chief technical officer of SBC, stated that SBC expects to spend $8 to $9 billion on capital expenditures this year.[27] SBC recently reported that in the first quarter of 2002, it enjoyed its strongest quarter growth in DSL in twelve months, adding 183,000 subscribers and bringing its total DSL Internet subscriber base to more than 1.5 million subscribers.[28] SBC receives several thousand orders daily.[29]

Utilities Commission of Ohio Comments at 33; Oregon Public Utility Commission Comments at 1,3; Sprint Comments at 7; TDS Comments at 8; Time Warner Telecom Comments at 8-9; US LEC Comments at 54-56; Wisconsin Public Service Commission Comments at 2; WorldCom et al. Comments at 30.

23 *Verizon Communications, Inc., et al. v. FCC*, 535 U.S. _____ (2002).

24 Hollister H. Hovey, *BellSouth CFO Still Sees 1.1M DSL Customers by 2002 End,* DOW JONES NEWS SERV., May 15, 2002. BellSouth had 620,000 DSL customers at the end of 2001. *See id.*

25 SBC Yahoo! Alliance At-A-Glance. <<www.sbc_com/press_room/press_kit/0,5931,80,00.html>>.

26 *Id.*

27 *SBC's Ireland: Rules of Road Will Shape Broadband's Future,* TELECOMM. REPORTS, June 17, 2002, at W-1.

28 SBC DSL Internet Update, May 2002.

29 *Id.*

Moreover, despite the lagging economy, market analysts predict an increase in the growth of broadband access services, especially DSL technologies. Specifically, analysts expect global broadband access revenues to grow from $93.4 billion in the year 2002 to $229.7 billion in the year 2008; an increase of nearly 69 percent.[30]

Thus, the Commission should not place great weight on the ILECs' claim that the existing regulatory regime is acting to restrict their deployment of broadband services when their own data and press releases conflict with this position. Since ILECs are rapidly deploying broadband infrastructure there is no basis for concluding that "private carriage" regulation is necessary to promote investment.

C. The Supreme Court Has Recently Dispelled Any Notion That Regulation Has Disincentivized Broadband Facilities Investment

In light of the recent Supreme Court decision in *Verizon v. FCC*, the Commission can, and must, reject ILEC arguments that Title II regulation and unbundling obligations discourage investment in broadband facilities.[31] The Supreme Court recognized that the regulatory framework established in the 1996 Act and implemented by the Commission has resulted in extraordinary investment in telecommunications facilities. Since the passage of the 1996 Act, ILECs have invested over $100 billion and competitive carriers have invested over $55 billion.[32] The Commission should adopt the perspective of the Supreme Court that "a regulatory scheme that can boast such substantial competitive spending over a 4-year period is not easily described

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30 *Pioneer Consulting Predicts Market Opportunity for Global Broadband Access: Service Revenues to Reach $229.7 Billion (USD) by 2008)*, June 18, 2002, <<http://www.pioneerconsulting.com/pressrelease.php3?report=41>>.

31 *See Verizon v. FCC*, 535 U.S. _____ , at 32.

32 *See id.* at 46 n.33, 45.

as an unreasonable way to promote competitive investment in facilities."[33] Accordingly, there is no basis for accepting ILEC generalized arguments that eliminating broadband unbundling obligations would promote broadband.

Moreover, the Supreme Court directly addressed whether the provision of unbundled network elements to CLECs discourages broadband investment. CLECs use UNEs to compete with ILECs in the provision of basic telecommunications services. In contrast, the *Computer II/III* unbundling obligations do not establish rights to use ILEC facilities to compete in the market for local telecommunications services, but instead to assure that ILECs are unable to leverage their control over the local network into control of the information services marketplace. Thus, the Commission permits ILECs to provide information services, including wireline broadband Internet access services, only as customers of their own tariffed telecommunications service offerings. Therefore, assuming *arguendo* that Section 251(c)(3) unbundling obligations discouraged broadband telecommunications infrastructure investment by ILECs and/or CLECs, which is not the case, there is no reason to believe that requiring ILECs to provide information services as customers of their own tariffed transmission services discourages investment in broadband telecommunications infrastructure because the *Computer II/III* unbundling obligations, unlike Section 251(c)(3) obligations, are intended primarily to assure competition in the information services market, not the telecommunications services market. In any event, a benefit of competition in the information services marketplace is that it also promotes demand for use of ILEC broadband transmission services. Therefore, application of Title II and

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[33] *Id.* at 46.

Computer II/III safeguards to ILEC broadband transmission services promotes, rather than inhibits, broadband investment.

D. Demand for Broadband Services, Rather Than Supply, Governs the Pace of Broadband Deployment

If the Commission nonetheless concludes erroneously that further steps are necessary to stimulate the pace of broadband deployment, the Commission should focus on issues relating to the demand for broadband services. As set out in the Commenters' initial comments, there is broad agreement throughout the industry that any issues associated with the pace of broadband deployment are attributable to the demand for broadband services.[34] Thus, most consumers are unwilling to pay the current price for broadband connections to the home.[35] The overwhelming majority of the commenters, including state regulatory agencies, consumer groups, competitive local exchange carriers, and ISPs, take the same point of view in their comments.[36] These commenters question why there is a need to dismantle the existing regulatory structure in order to create incentives for ILEC broadband deployment when all indications suggest that the pace of deployment is and will continue to be timely. Accordingly, initial comments show that if the Commission wishes to speed the deployment of affordable, high quality, broadband services to American consumers it should not deregulate ILEC provisioned broadband services, but instead permit marketplace demand to govern the pace of deployment.

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[34] Cbeyond et al. Comments at 9-11.

[35] *Tiered DSL Service May Be The Next Option*, DALLAS MORNING NEWS, June 24, 2002.

[36] *See* AOL Time Warner Comments at 23; AT&T Comments at 70; Arizona Consumer Council et al. Comments at 12; Big Planet, Inc. Comments at 60-61; Business Telecom, Inc. et al. Comments at 58-59; Cbeyond et al. Comments at 9-10; Covad Comments at 7-10; DSL.net Comments at 10; Earthlink Comments at 20-21; Florida Public Service Commission Comments at 5; McLeodUSA Comments at 4-5; Mpower Comments at 6; Public Utilities Commission of Ohio Comments at 33; Oregon Public Utility Commission Comments at 1,3; Sprint

V. THE COMMISSION MUST REJECT THE BOCs' EFFORTS TO CLASSIFY ALL BROADBAND AS AN INFORMATION SERVICE

The Commission should reject the BOCs' efforts in this proceeding to classify all "broadband" as an information service for at least three reasons, among others: (1) the physical infrastructure and transport technology such as DSL is independent from the information that is carried or services that are offered; (2) ILECs' networks provide connectivity to a network that provides access to information sources not information itself; and (3) a packet switching technology such as Internet Protocol (IP) is not information but a transport mechanism to provide end-users connectivity to voice and information sources.

DSL is a transmission technology that allows a copper loop to share a low frequency range that is used to carry voice content, and the high frequency range that is used to carry digital content. This technology allows for content to be carried over the copper loop at higher speeds than dial-up technologies which use the same frequency range as used to carry voice content. While DSL can be used to access the Internet, which is itself no more than a transparent communications network, DSL is not information, but merely a connectivity technology. The purpose of telecommunications services such as voice lines, DSL, DS-1, DS-3, OC-N, Ethernet etc... is to provide an open interface that can be used to access information or content, and the devices used to provide these telecommunication services provide connectivity not content or information.

DSL and other technologies are telecommunications services that provide connectivity and transport between information pools. The ILEC provides end-users with a connection that

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Comments at 7; TDS Comments at 8; Time Warner Telecom Comments at 8-9; US LEC Comments at 54-56; Wisconsin Public Service Commission Comments at 2; WorldCom et al. Comments at 30.

can be ordered at different speeds that provide connectivity to a variety of networks such as the Internet or a corporate network. Technologies such as DSL are transparent to the information that they carry.

Similarly, packet switching is a technology that is used to encapsulate information for transport across an ILEC network. The end-user will take the information and encapsulate the information into a packet that conforms to a standard such as IP. The packet is then forwarded to the ILEC network for transport based on a destination address. The ILEC network transports the packet to its destination based on the destination address information. The ILEC network does not process the information that is contained in the payload of the packet, it only transports the entire packet to the final destination. Telecommunications services are based on the transport of entire packets, frames or cells with technologies such as DS0, DSL, T1, T3, SONET, IP, Frame Relay and ATM, and the information contained within the packet can be real time encoded voice speech, video content or data files processed by a web browser. Moreover, the Commission has already classified data services as telecommunications services.[37] In fact, SBC has acknowledged that the only DSL service it provides to ISPs is a transport service.[38]

Commenters urge the Commission to retain the clear distinction between the transmission path and content established in the current regulatory framework governing BOC participation in the information services marketplace. Contrary to BOC suggestions, the fact that BOCs may in

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[37] *Deployment of Wireline Service Offering Advanced Telecommunication Capability*, Memorandum Opinion and Order and Notice of Proposed Rulemaking, 13 FCC Rcd. 24011 (1998) ("*Advanced Services Order*"); *Independent Data Communications Mfrs. Assoc., Inc. Petition for Declaratory Ruling and AT&T Petition for Declaratory Ruling,* Memorandum Opinion and order, 10 FCC Rcd. 13717 (1995) ("*Frame Relay Order*").

[38] SBC Advanced Solutions, Inc., Initial Response to Questions Regarding the Data Requirements for the 2003 Scope of Competition Report, Project No. 24727, Texas Public Utility Commission, May 29, 2002.

some cases provide content by means of their own transmission service capabilities does not convert the transmission service to an information service.

VI. THE COMMISSION ERRED IN THE *NPRM* IN TENTATIVELY CONCLUDING THAT THE TRANSMISSION COMPONENT OF WIRELINE BROADBAND INTERNET ACCESS SERVICE IS NOT TELECOMMUNICATIONS SERVICE

A. The Commission's Rules Compel ILECs to Provide Wireline Broadband Internet Access Via Telecommunications Service

The *NPRM* fails to recognize that the Commission has already addressed the terms and conditions under which facilities-based common carriers may provide information services over their own facilities, and that the Commission has required these carriers to provide information services, including Internet access service, as customers of their own tariffed telecommunications services. Thus, the Commission requires carriers that "own common carrier transmission facilities and provide enhanced services [to] unbundle basic from enhanced services and offer transmission capacity to other enhanced service providers under the same tariffed terms and conditions under which they provide such services to their own enhanced service operations."[39] A carrier would violate the Commission's rules if it attempted to provide wireline broadband information service over its own facilities other than as a customer of its transmission capability offered on a nondiscriminatory tariffed basis over its own facilities. The BOCs in their initial comments acknowledge that the transmission component of wireline broadband Internet access service is a "telecommunications service" by virtue of the Commission's rules.[40] Accordingly, the tentative conclusion in the *NPRM* that the transmission component of wireline

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[39] *CPE/Enhanced Services Unbundling Order*, 16 FCC Rcd. at 7421, citing *Frame Relay Order*, 10 FCC Rcd. at 13719 and *Competition in the Interstate Interexchange Marketplace*, CC Docket No. 90-132, Memorandum Opinion and Order on Reconsideration, 10 FCC Rcd. 4562, 4580 (1995).

[40] SBC Comments at 6.

broadband Internet access service is not a telecommunications service, but is only telecommunications, is erroneous by virtue of the Commission's own rules that require ILECs to provide broadband information services as customers of their own common carrier transmission services. The *NPRM*'s failure to recognize this requirement renders its application of the statutory definitions of "information service" to wireline broadband Internet access service nonsensical and arbitrary. Accordingly, the Commission should not adopt its tentative conclusion that the transmission component of wireline broadband Internet access service is only "telecommunications" and not "telecommunications service."

B. The Current Regulatory Framework Is Consistent With Statutory Definitions

The Commission's requirement that carriers offer information service over their own facilities as customers of their own tariffed telecommunications services is consistent with the statutory definition of "information service." That term is defined in the Act as "the offering of a capability for generating, acquiring, storing, transforming, processing, retrieving, utilizing, or making information available via telecommunications . . . "[41] "Telecommunications service" is defined in the Act as "the offering of telecommunications for a fee directly to the public. . .."[42] The *NPRM* reasoned that when a carrier provides broadband Internet access service over its own facilities, it is using telecommunications, but not offering it to anyone, and that, therefore, the transmission component of wireline broadband Internet access is a telecommunications service. As discussed, however, by operation of the Commission's own rules, carriers offering broadband Internet access service over their own facilities do so as customers of their own tariffed

[41] 47 U.S.C. Section 3(20).

[42] 47 U.S.C. Section 3(46).

telecommunications service. Further, because "telecommunications service" by definition encompasses "telecommunications," wireline broadband Internet access service under the Commission's rules is offered via telecommunications as well as by means of a telecommunications service. Therefore, the current regulatory framework is completely consistent with the statutory definitions of "information service," "telecommunications," and "telecommunications service."

The *NPRM*, therefore, seriously errs to the extent it assumes that the Commission must change the current regulatory framework governing wireline broadband Internet access service based on the statutory definition of "information service," "telecommunications service," and/or "telecommunications." Accordingly, these statutory definitions provide no basis for altering to any extent the current application of Title II and *Computer II/III* safeguards to wireline broadband Internet access service. It would be arbitrary and unlawful for the Commission to change the current regulatory framework governing wireline broadband Internet access service based on the view that this is required on the basis of the foregoing statutory definitions.

VII. "INTEGRATED" WIRELINE BROADBAND INTERNET ACCESS SERVICE IS A FICTION

BOCs urge the Commission in initial comments to accept the ridiculous and self-serving characterization of wireline broadband Internet access service as a "naturally" "integrated" service.[43] SBC states that wireline providers should not be required to "artificially structure any of its broadband information services to create a separate telecommunications service offering."[44]

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[43] SBC Comments at 2, 15, 17.

[44] *Id.*

Commenters emphasize that because of Computer III requirements, BOCs are required to make a separate offering of the broadband capability they use for their own information services. Thus, "integrated" provision of wireline broadband Internet access service is prohibited under current rules. Therefore, whatever merit the Commission's tentative conclusions in the *NPRM,* they are of no current consequence because the Commission's rules appropriately foreclose integrated provision of wireline broadband Internet access service. The Commission should continue to prohibit this "integrated" provision of wireline broadband Internet access service because the "integrated" provision of wireline broadband Internet access service is no more than another way of saying that ILECs should be free from fundamental common carrier obligations. The BOCs' characterization of "integrated" wireline broadband Internet access service as "natural" is no more than another way of obscuring their request for permission to exit the business of being broadband common carriers and to be permitted to discriminate in the provision of basic telecommunications services.

While BOCs may experience safeguards as an unnatural constraint on their incentive and ability to discriminate, this, obviously, does not justify the sweeping deregulation BOCs seek in this proceeding. Instead, for all the reasons stated in these and other reply comments, the Commission may not, and should not, eliminate ILECs' status as broadband common carriers subject to *Computer III* and other safeguards against discrimination. While BOCs would like the ability to systematically discriminate as would be permitted under "private carriage," the Commission for all the reasons stated herein should not permit them to do so.

VIII. THE *CABLE MODEM DECLARATORY RULING* DOES NOT PROVIDE GUIDANCE FOR THIS PROCEEDING

A. Existing Discriminatory Practices Do Not Justify "Private Carriage"

The BOCs' principal argument in their initial comments is that the *Cable Modem Declaratory Ruling*[45] requires that the Commission determine in this proceeding that current Title II regulation of the transmission component of wireline broadband Internet access service be converted to "private carriage."[46] In the *Cable Modem Declaratory Ruling*, the Commission determined that cable modem service is a single offering of an information service without a separate offering of a telecommunications service based on a careful factual examination of cable operators current practices. The Commission stated that "[w]e are not aware of any cable modem service provider that has made a stand-alone offering of transmission for a fee directly to the public, or to such classes of users as to be effectively available directly to the public."[47] On the other hand, cable operators did provide "open access" to some ISPs, but declined to do so for others. Therefore, the Commission concluded that cable operators do not make a common carrier offering of broadband transmission services but instead at most engaged in "private carriage." Further, the Commission concluded on this basis that cable operators were not required to make a nondiscriminatory offering of their broadband telecommunications capability because they were only engaged in private carriage.[48]

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45 *Inquiry Concerning High- Speed Access to the Internet Over Cable and Other Facilities, Internet Over Cable Declaratory Ruling,* Declaratory Ruling and Notice of Proposed Rulemaking, FCC 02-77, GN Dkt. No. 00-185, CS Dkt. No. 02-52, at ¶40 (rel. Mar. 15, 2002), *Cable Modem Declaratory Ruling.*

46 SBC Comments at 16-17; BellSouth Comments at 11-12; Verizon Comments at 4.

47 *Id.* at ¶40.

48 *Id.*

This approach to determining whether cable operators should be required to offer their broadband transmission capability on a common carrier basis provides no guidance for evaluation of wireline broadband Internet access, and was erroneous as applied to cable operators, because it permits the regulated entity to self-select its own mode of regulation simply by acting in its preferred way. In essence, the Commission concluded in the *Cable Modem Declaratory Ruling* that cable operators should continue to be free to discriminate against small ISPs by denying them access, and among other ISPs by dealing with them on different terms and conditions, because this is what cable operators were currently doing. Totally missing from the Commission's evaluation is a recognition that the Commission is charged with responsibility for regulating in the public interest and may compel cable operators to make a nondiscriminatory offering of their broadband telecommunications offering.[49] Because the Commission failed to perform any serious public interest evaluation of whether cable operators should be subject to nondiscrimination obligations, instead limiting itself to the role of passive observer of cable operators current discriminatory practices, the *Cable Modem Declaratory Ruling* was arbitrary and unlawful. This by itself is sufficient reason to reject the *Cable Modem Declaratory Ruling* as providing any guidance for this proceeding.

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[49] As the Commission recently recognized in a different decision, "There are two ways to determine that a communications service qualifies as a common carrier service. A communications service will be considered a common carrier service if: (1) a common carrier holds out the service to the general public on a common carrier basis or (2) the Commission finds that it is "necessary or desirable in the public interest" for the service to be provided on a common carrier basis. *See NARUC v. FCC*, 525 F.2d 630, 641, 644 n.76 (D.C. Cir. 1976) (*NARUC I*); *see also NARUC v. FCC*, 533 F.2d 601, 608-9 (D.C. Cir. 1976) *(NARUC II)* (binding requirement by agency that company provide service on indifferent basis is adequate to confer common carrier status)." *Deployment of Wireline Services Offering Advanced Telecommunications Capability,* 16 FCC Rcd 15435 at para. 71, n.179 (2001), *aff'd, Verizon Tel. Cos. v. FCC,* No. 01-1371 (D.C. Cir. June 18, 2002). The *Cable Modem* ruling erroneously relied solely on the first prong of the *NARUC I* test and failed to consider the second. The Commission should not compound this error by repeating it in this proceeding.

B. Imposition of Nondiscrimination Safeguards Under Title I Is An Oxymoron

In the *Cable Modem Declaratory Ruling*, the Commission determined that cable broadband transmission service was subject to Title I but nonetheless called for comment on whether it should impose nondiscrimination obligations under Title I. However, it is the very nature of "private carriage," as described by the Commission, that the carrier may choose whether, and on what terms, to deal with customers on an individual basis. On the other hand, common carriage subject to Title II is characterized by the offering of service on nondiscriminatory terms and conditions. In short, if the Commission were to impose an obligation on cable operators to provide broadband transmission services on a nondiscriminatory basis, which it should do, this would convert the offering to common carriage subject to Title II. Nondiscrimination safeguards for access to the transmission component of wireline broadband Internet access must, and should be, imposed under Title II.

C. Wireline Broadband Internet Access Service Is Already Subject to Title II

As discussed, the Commission has permitted cable operators to discriminate in provision of broadband access service and has determined erroneously that they are not subject to Title II. On the other hand, every facilities-based telephone company that offers wireline broadband Internet access service does so as a customer of its own offering of transmission service for a fee. As discussed, the Commission's rules require this result. Similarly, "integrated" wireline broadband Internet access service does not exist by operation of the Commission's rules. Therefore, wireline broadband Internet access service is completely distinguishable from cable modem service because it is provided by means of a separate offering of telecommunications service. Whatever merit the Commission's conclusion may have in the *Cable Modem Declaratory Ruling* that cable modem service is a single "integrated" offering of an information

service, it provides no guidance for wireline broadband Internet access service, because telephone companies are not permitted to provide the latter service on an integrated basis free from the obligation to provide a separate telecommunications service offering. For this reason as well, the *Cable Modem Declaratory Ruling* provides no guidance for this proceeding.

IX. THE COMMISSION MAY NOT RECLASSIFY THE TRANSMISSION COMPONENT OF WIRELINE BROADBAND INTERNET ACCESS SERVICES AS PRIVATE CARRIAGE

As discussed in Commenters initial comments[50] the statutory definitions of "telecommunications service" and "information service" do not provide any basis for converting the transmission component of wireline broadband Internet access service to "private carriage" because current rules requiring that it be offered as a telecommunications service subject to Title II are consistent with the statutory definitions. The *Cable Modem Declaratory Ruling*, even assuming it is correct, does not determine the issues in this proceeding because the transmission component of cable modem service has not been subject to Title II (again assuming that the Commission's determination to that effect in the *Cable Modem Declaratory Ruling* was correct). Further, as explained in Commenters' initial comments, and not disputed by the BOCs in their initial comments, the ILECs' offering of the transmission component of wireline broadband Internet access service meets all of the criteria of common carriage under *NARUC I* and *NARUC II*.[51] For these reasons, the Commission may not simply grant the BOCs' request for permission

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[50] Cbeyond et al. Comments at 14-16.

[51] *Nat'l Assoc. of Regulatory Util. Comm'rs v. FCC*, 525 F.2d 630, 644 (D.C. Cir. 1976) ("*NARUC I*"); *Nat'l Assoc. of Regulatory Util. Comm'rs v. FCC*, 533 F.2d 601 (D.C. Cir. 1976) ("*NARUC II*"). "A particular system is a common carrier by virtue of its functions, rather than because it is declared to be so." *NARUC I*, 525 F.2d at 644. Even if the Commission were to base its decision solely on the goals of Section 706, it would find that Title II regulation of the broadband transmission services is necessary to promote competition and to encourage further deployment of advanced services to all Americans.

to discriminate against ISP competitors by redefining the transmission component of wireline broadband Internet access service as "private carriage."

That the Commission lacks authority to take this radical step is clear for other reasons as well. As explained in these reply comments, permitting ILECs to engage in the systematic discrimination against competing information service providers that would be permitted under "private carriage" would not serve the public interest. Therefore, the Commission could not possibly justify this step on the basis that it is a good idea, although that would not be sufficient under the Act in any event.

Moreover, Congress premised the 1996 Act, including the various statutory definitions at issue in this proceeding, on the definitions of basic and enhanced services, and the regulatory framework governing those services, established in *Computer II* and *Computer III.* [52] Therefore, Congress assumed that BOCs would be subject to the fundamental nondiscrimination safeguard of providing information services only as customers of their own tariffed transmission services.

Further, Congress could not have intended that the deregulatory goals of the Act be achieved by the blunt and inflexible definitional approach to deregulation apparently selected by the Commission in the *Cable Modem Declaratory Ruling* because Congress specifically established a mechanism for deregulating under Title II – forbearance. Section 10 of the Act permits the Commission to forbear from imposing certain regulations on telecommunications carriers and telecommunications services if such regulation is not necessary to ensure non-discriminatory and just and reasonable rates, terms and conditions, is not necessary to protect

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[52] AT&T Comments at 16 (citations omitted).

consumers, and is in the public interest.[53] However, as demonstrated above and in this proceeding, the ILECs' provision of broadband transmission services fails to meet the Section 10 requirements for regulatory forbearance.[54] Title II regulation and the *Computer Inquiry* requirements are necessary to ensure non-discriminatory and just and reasonable rates, terms and conditions for broadband transmission services; is necessary to protect consumers, who otherwise will be negatively impacted by the ILECs' monopoly on this market; and thus, is in the public interest. Second, the purpose of Section 10 would be rendered meaningless if the Commission is permitted to simply reclassify certain ILEC services as private carriage rather than common carriage. Congress could not have intended this result. Rather, Congress recognized that such services should be deregulated through forbearance when appropriate, not reclassified.

As the California Commission warned:

> There is no evidence that Congress intended that the FCC could achieve the same [deregulatory] result prematurely by unilaterally redefining fundamental terms in the Act, and effectively nullifying section [10]. The FCC cannot accomplish by regulatory fiat what Congress alone has the authority to change.[55]

Congress did not adopt Section 10 only to have the Commission search for another means to deregulate regulated services on its own terms. Rather, Congress recognized that regulated services should be deregulated through forbearance, when appropriate, if the standards of Section 10 are met. As the United Church of Christ, *et al.* states, defining broadband services as information services would unlawfully remove these services from the scope of Section 251

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53 47 U.S.C. § 160.

54 *See* AT&T Comments at 27-28.

55 California PUC Comments at 15.

and 252 because this would amount to *de facto* forbearance in violation of the standards of Section 10.[56]

In addition, as shown in the *NonDom Proceeding*,[57] the BOCs continue to possess market power in the provision of wireline transmission facilities used to provide broadband services,[58] and, as explained below, ISPs' options for broadband Internet access are virtually non-existent. The BOCs' continued dominance and market power over key broadband facilities and services require that such services be regulated as common carriage under Title II. Contrary to Qwest's claims,[59] the BOCs' provision of wireline broadband transmission services by itself precludes private carriage and Title I "regulation" given their market power over these services. And, as noted by Congressman Markey (D-MA), "the '96 act was not a deregulation bill. It was a de-monopolization bill."[60]

In their comments, BOCs erroneously presume that the Commission has unlimited discretion to simply reclassify the provision of broadband transmission services as private carriage. Instead, for the foregoing reasons, the Commission may not deregulate broadband simply by decreeing that the transmission component of wireline broadband internet access is no longer common carriage but "private carriage" instead. Accordingly, the Commission should emphatically reject that approach to broadband deregulation.

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56 United Church of Christ *et al.* Comments at 14.

57 *In the Matter of Review of Regulatory Requirements for Incumbent LEC Broadband Telecommunications Services*, Notice of Proposed Rulemaking, 16 FCC Rcd. 22,745 (2001).

58 Cbeyond, et al. Comments at 31; AT&T Comments at 46-47.

59 Qwest Comments at 16.

60 *Telecommunications Competition and Broadband Deployment: Hearing of the Senate Commerce, Science and Transportation Committee*, May 22, 2002 (statement of Rep. Markey (D-MA).

X. INTERMODAL COMPETITION DOES NOT WARRANT PRIVATE CARRIAGE TREATMENT OF THE TRANSMISSION COMPONENT OF BOC'S WIRELINE BROADBAND INTERNET ACCESS

The Commission should reject BOC arguments that intermodal competition justifies elimination of their obligation to provide nondiscriminatory access to unbundled network elements or to broadband transmission services they use to provide their own broadband information services. First, even if it were true that BOCs face significant intermodal competition in broadband, this would mean at most that there is an undesirable duopoly between BOCs and cable operators. Other technologies such as fixed wireless or satellite technologies provide an inferior service to consumers.[61] Thus, this leaves the wireline facilities owned by the BOCs and the cable operators.

The Commission has never determined, however, that a duopoly is a sufficient reason to eliminate or reduce common carrier obligations. The fact that BOCs and cable operators have been raising prices demonstrates that there is no genuine competition for broadband Internet access services. [62]

Moreover, one SBC sales representative in a recent arbitration has made the remarkable admission that he has not once in 12 years faced a situation in which SBC faced competition in seeking to provide broadband special access services.[63] It is also worth noting that BOCs are affiliated with, or have significant marketing arrangements, with some of the companies with

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[61] Satellite technologies are limited to line of sight and are susceptible to weather interference and in many cases require a dial-up uplink. Fixed wireless technologies are also susceptible to weather interference.

[62] Sam Ames, *Look out! Broadband prices rising,* May 30, 2002, <<http://zdnet.com.com/2100-1105-928512.html>> (citing record cable and DSL price increases).

[63] "I have not done any competitive bids to my knowledge." Petition of El Paso Networks, LLC For Arbitration of an Interconnection Agreement with Southwestern Bell Telephone Company, Docket 25188, [direct/rebuttal testimony of [Cunningham], (TX PUC [Insert date of filing]).

whom they allegedly compete. For example, SBC has formed an alliance with Yahoo! to provide DSL services,[64] and Verizon Wireless has partnered with Microsoft's MSN to provide advanced data services.[65] Such alliances permit the respective companies to exclusively market co-branded DSL and Internet services to each other's extensive customer base, and, as Yahoo! notes, better position the companies to "take market share from competitors."

Second, BOCs have failed to submit any information concerning intermodal competition other than for the consumer market for Internet access service. And, even that information shows little intermodal competition for residential customers.[66] Because cable modem service is not marketed as a business product, U.S. businesses have virtually no other options but DSL. Thus, the BOCs so-called "Fact Report" addresses competition in only the "mass market" (their term for residential consumers) and the large business market for broadband services, but virtually all of the cited competition for the business market is from other common carriers, *i.e.* it is not intermodal competition.

Further, even with respect to the mass market, the "Fact Report" admits that only one-third of households currently have access to both cable modem and DSL service[67] and that "[i]n many markets in the U.S. today, only one or two of the four possible broadband alternatives is currently available."[68] As other parties have demonstrated, however, even this evidence of duopoly can be misleading. The California Public Utilities Commission emphasized that SBC is the dominant provider of broadband services to residential and small commercial customers in its

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64 <<www.sbc.com/Products_Services/data_sheet_08.pdf>>

65 <<http://www.atnewyork.com/news/article.php/8471_1143711>>.

66 Verizon has recently reported that only 33% of subscribers have a choice between DSL and cable. Letter from Dee May, Verizon to Marlene H. Dortch, FCC Secretary, CC Docket No. 02-33, June 24, 2002.

67 Verizon Attachment 1, Broadband Fact Report at 1.

68 Verizon Attachment 1, Broadband Fact Report at 12.

service territory.[69] Specifically, the California Commission stated that 45% of Californians who live in areas with broadband capability have only DSL, not cable modem service, available. And even in areas where cable modem service is available, the physical plants generally do not overlap to give a *particular household* an actual choice between DSL and cable.[70] As consumer advocates have shown, cable dominates the residential broadband market (with a 75% market share) and DSL[71] dominates the non-residential market (with an 89% market share).[72]

Finally, as the Florida Commission argued, because different broadband platforms have different availability and performance criteria, these platforms are not perfect substitutes for one another. To the contrary, "consumers in markets with only one provider per technology platform for broadband service may really be faced with no choice at all, depending on their specific needs."[73] For example, the overall network design of the cable television system results in a fast downlink but a very slow uplink. When the Internet is utilized for business needs, the uplink becomes as critical as the downlink. Business users tend to send files, spreadsheets, presentations and working documents between users that can be very large in size. The slow uplink of the cable modem Internet access defeats the purpose of a high-speed broadband link with the potential of speeds as slow as dial up access. This problem is further exacerbated by the fact that cable modem users share the same bandwidth and the more people that are on the Internet at the same time the slower the speed for each user. When this technology is deployed in the business environment where the business users are on line potentially at the same time the use of the Internet by all could result in very slow speeds.

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69 California PUC Comments at 34-37.

70 California PUC Comments at 35-36.

71 The DSL market is clearly dominated by the BOCs. *See High Speed Services for Internet Access: Subscribership as of June 30, 2001*, Industry analysis Div., CCB, Feb. 2002, Table 5 (reporting that RBOCs provide 86.4% of ADSL technologies).

72 Arizona Consumer Council *et al.* Comments at 59.

73 Florida PSC Comments at 4.

Accordingly, there is no basis in the current record for the Commission to accept the BOCs sweeping assertions that they face significant intermodal competition warranting deregulation. In reality, BOCs are seeking to use vague, exaggerated assertions of intermodal competition to justify permission to thwart intramodal competition. Accordingly, the Commission should reject BOC arguments on this issue.

XI. WHOLESALE BROADBAND SERVICES ARE TELECOMMUNICATIONS SERVICES

Qwest argues that the ISPs purchasing broadband transmission services from the ILECs are not the "public" for purposes of the common carrier classification.[74] This simply is incorrect. The term "public" for purposes of the common carrier classification is not limited to the public as a whole. The definition of telecommunications services specifically states that these services can be offered to "such classes of users as to be effectively available to the public."[75] Not surprisingly, it is common knowledge that ISP's, almost without exception, market their services to the public. Moreover, the Supreme Court has recognized that such a general offering to the public can even involve a small and narrowly defined class of users,[76] leaving no doubt that ISPs are members of the public for purposes of this classification.[77] Accordingly, wholesale broadband services offered to ISPs are offered to the "public," and, therefore, are telecommunications services under the Act.

XII. THE COMMISSION MUST MAINTAIN TITLE II REGULATION OF THE TRANSMISSION COMPONENT OF WIRELINE BROADBAND INTERNET ACCESS SERVICE IN ORDER TO MEET NATIONAL SECURITY, NETWORK

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74 Qwest Comments at 17.

75 47 U.S.C. § 153(46).

76 *See* AT&T Comments at 19 (citing *Terminal Taxicab Co. v. Kutz*, 241 U.S. 252, 255 (1916)).

77 NewSouth Comments at 12-13.

RELIABILITY, AND CONSUMER PROTECTION GOALS AND REQUIREMENTS

As set out in the initial comments of the Commenters, classifying wireline broadband Internet access services as an information service with a telecommunications component would adversely affect the obligations of telecommunications service providers concerning national security, network reliability and consumer protection.[78] Aside from the BOCs, all parties that submitted comments on this subject agreed that such a classification would undermine important national security, network reliability, and consumer protection goals.

A. National Security

Comments submitted by the Secretary of Defense highlight the adverse impact that classifying wireline broadband Internet access services will have on national security and emergency preparedness. The Secretary of Defense makes clear that national security and emergency preparedness communications functions will be best served if the provisioning of wireline broadband Internet access remains classified as a telecommunications service that can be regulated by the FCC under Title II of the Act.[79] The Secretary of Defense cautions that any other classification will require the adoption of new rules to ensure continued function of the national security and emergency preparedness in the wireline broadband Internet access service context.[80] Therefore, the Commission should abandon the approach to broadband set forth in the *NPRM* in order to assure national security and emergency preparedness.

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78 Cbeyond, et al. Comments at 41-47.

79 *See* Secretary of Defense Comments at 2-3.

80 *Id.*

The majority of parties raise similar concerns relating to CALEA that arise in the context of national security and emergency preparedness. The Department of Justice and the Federal Bureau of Investigation ("DOJ/FBI"), along with numerous competitive carriers and Internet service providers, comment that CALEA extends only to telecommunications carriers.[81] As noted in the DOJ/FBI comments, classifying wireline broadband Internet access as an information service with a telecommunications component threatens to deny law enforcement a lawfully mandated point of access for conducting interception of communications and related information using this technology.[82] Exempting wireline broadband Internet access service providers from CALEA would be "contrary to the Commission's prior holding and to law."[83] The DOJ/FBI and the competitive carriers highlight the fact that the statutory and legislative history of CALEA make clear that Congress did not intend for the exemption pertaining to "information services" in CALEA to result in exempting wireline broadband transmission networks from its ambit.[84] The DOJ/FBI emphasizes that the intent of CALEA was to make it applicable to equipment used to connect to the Internet, regardless as to whether a person used a dial-up or broadband connection to gain access.[85] Classifying wireline broadband Internet access as an information service with a telecommunications component would result in the illogical conclusion that dial-up Internet access is subject to CALEA, while wireline broadband Internet

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81 *See* Big Planet Comments at 47-48; Business Telecom, Inc. et al. Comments at 28-29; Department of Justice and Federal Bureau of Investigation Comments at 1; DirecTV Broadband, Inc. Comments at 37-38; Time Warner Telecom Comments at 28.

82 *See* Department of Justice and Federal Bureau of Investigation Comments at 6.

83 *Id.*

84 *See* Big Planet Comments at 47-48; Business Telecom, Inc. et al. Comments at 28-29; DirecTV Comments at 37-38.

85 *See* Department of Justice and Federal Bureau of Investigation Comments at 12.

access to CALEA is not. Furthermore, if the Commission adopted the BOCs definitional approach that packet networks are exempt from Title II, and the BOCs replace their circuit switches with packet switches, the BOCs would have no requirement to comply with CALEA.

Even though SBC and Verizon agree that classifying wireline broadband Internet access services as an information service with a telecommunications component would exempt such services from CALEA,[86] each attempts to minimize the issue by stating that facilities used to provide both broadband and traditional voice services are subject to CALEA.[87] However, this argument ignores the fact that technological convergence will make it much more difficult to distinguish between voice and data. In the not so distant future, the Internet will be the network which could threaten to completely undo CALEA requirements under the definitional approach to deregulation set forth in the *NPRM*.[88] Verizon alludes to this problem by recognizing that classifying wireline broadband Internet access services as an information service with a telecommunications component could lead to exempting DSL service from CALEA.[89] In light of the fact that classifying wireline broadband Internet access service as an information service with a telecommunications component threatens to undermine Congress' intent when it enacted CALEA, the Commission should refrain from removing wireline broadband Internet access from Title II requirements.

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[86] *See* SBC Comments at 38; Verizon Comments at 41.

[87] *See* Verizon Comments at 41.

[88] *See* Big Planet Comments at 48; Business Telecom, Inc. et al. Comments at 28-29; DirecTV Broadband, Inc. Comments at 37-38; Mpower Communications Comments at 12; Time Warner Telecom Comments at 28.

[89] *See* Verizon Comments at 41.

B. Network Reliability

For the same reasons detailed above, network reliability and interconnectivity concerns will be better served if wireline broadband Internet access service is subject to Title II of the Act. Network reliability and interconnectivity regulations are limited to "telecommunications services." If the Commission were to classify wireline broadband Internet access service as an information service with a telecommunications component, none of the rules that address network reliability and interconnectivity would be applicable to wireline broadband Internet access services.[90]

Moreover, as pointed out by the Secretary of Defense, Title II common carriers play a key role in maintaining and providing priority communications for national security and emergency preparedness communications, as well as restoring disrupted facilities and services.[91] These requirements are critical to the network infrastructure and reliability and are especially important in light of tragedy of September 11 and the ongoing threat of terrorist attacks. If the FCC deregulates wireline broadband Internet access services, which play a key role in priority communications, then existing Title II rules governing protection of the National Communications Systems would not apply to these services. Such a result is contrary to the public interest.

C. Consumer Protection

There is universal agreement among the state commissions, consumer advocates, competitive carriers and Internet service providers that classifying wireline broadband Internet

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[90] *See* Big Planet Comments at 48; Business Telecom, Inc. et al. Comments at 30; DirecTV Broadband, Inc. Comments at 39-40; Time Warner Telecom Comments at 28-29.

[91] Secretary of Defense Comments at 2-4.

access services as an information service with a telecommunications component will adversely impact consumer protection regulations.[92] Regulations concerning discontinuance of service, restrictions applicable to customer proprietary network information, rules relating to truth-in-billing, and safeguards against slamming would cease to apply to wireline broadband Internet access services. All of these protections apply based on the offering of a telecommunications service by a common carrier. The *NPRM* threatens to eviscerate all of these important consumer protections.

BOCs attempt to minimize the negative impact that classifying wireline broadband Internet access services as an information service with a telecommunications component would have on consumer protection regulations. SBC and Verizon dismiss such concerns by stating that since carriers will continue to provide voice or other telecommunications services to most of their customers, the Title II customer protections will continue to apply.[93] However, as emphasized in Section II, *supra*, the technological convergence from the traditional voice networks to broadband networks will provide an excuse for BOCs to claim that even voice should be deregulated. As noted by one state commission, it is a safe assumption that the ILECs will argue that the provision of any service, even traditional voice, over broadband facilities is

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[92] *See* Alliance for Public Technology Comments at 6-7; Big Planet Comments at 48-51; Business Telecom, Inc. et al. Comments at 30-33; Calif. Pub. Utils. Comms'n Comments at 42; Covad Comments at 77; DirecTV Comments at 39-41; Minn. Dept. of Commerce Comments at 7; Penn. Consumer Advocates, et al. Comments at 23; Rehabilitation Engineering Research Center on Telecommunications Access Comments at 2,4-5; Texas Attorney General Comments at 5; Texas Pub. Util. Comm'n Comments at 2,4; Time Warner Telecom Comments at 28-29; Vermont Pub. Serv. Board at 6.

[93] *See* SBC Comments at 40-41; Verizon Comments at 42.

removed from all state consumer protection requirements.[94] There is no reason to believe that the same argument could not be leveled at federal consumer protection requirements as well.

The protections afforded by section 255 of the 1996 Act to ensure access for persons with disabilities would also become inapplicable if the Commission classified broadband Internet access as an information service with a telecommunications component. Numerous advocacy groups, competitive carriers and ISPs recognized that classifying wireline broadband Internet access services as an information service with a telecommunications component would eliminate important protections contained in Title II of the Act.[95] While Verizon does not directly address the concerns associated with eliminating protections for persons with disabilities, their comments seem to suggest that the Commission could simply adopt new regulations through its ancillary jurisdiction under Title I of the 1996 Act.[96] However, it is unclear whether the Commission could assert its jurisdiction under Title I to impose such regulations. The Commission's ancillary jurisdiction under Title I is undefined and there is nothing in the 1996 Act to suggest that Congress meant to leave the Commission plenary power to regulate whatever it sees fit through such ancillary jurisdiction. It is equally unclear how the Commission would simply assert Title I ancillary authority to extend basic consumer protections applicable to Title II services to Title I services.[97] Protections for persons with disabilities should not be dismissed as resolvable

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94 *See* Minn. Dept. of Commerce Comments at 7.

95 *See* Alliance for Public Technology Comments at 6-7; Big Planet Comments at 48-51; Business Telecom, Inc. et al. Comments at 30-33; Covad Comments at 77; DirecTV Comments at 39-41; National Association of the Deaf Comments at 2; Penn. Consumer Advocates, et al. Comments at 23; Rehabilitation Engineering Research Center on Telecommunications Access Comments at 2,4-5; Rehabilitation Engineering Research Center on Telecommunications Access Comments at 4-5; Telecommunications for the Deaf, Inc. Comments at 8-9; Time Warner Telecom Comments at 28-29.

96 *See* Verizon Comments at 42.

97 Calif. Pub. Utils. Comms'n Comments at 43

through a statutory provision that is ambiguous as to the extent of the authority it actually provides the Commission. Perhaps one commenting party summed up the situation best by stating that the impact on consumer protection of classifying wireline broadband Internet access services as an information service with a telecommunications component is "just a shot in the dark."[98]

D. Intermodal Competition Will Not Sufficiently Protect Consumers

Aside from the BOCs, every party that commented on the ability of intermodal competition to achieve consumer protection agreed that intermodal competition would not be sufficient to protect consumers, nor would it result in the deployment of quality and affordable broadband services to American consumers.[99] Aside from the flaws associated with the imperfect substitution of broadband services between platforms, there are many other characteristics of the broadband services marketplace indicating that intermodal competition will not be effective in curbing monopoly abuses.

The ILECs attempt to argue that intermodal competition will act as a counterbalance to discriminatory behavior by any one-platform provider of broadband services. Central to the ILEC argument is the allegation that cable operators provide more high speed access lines and are therefore dominant in the provision of broadband services. The ILECs claim that since the cable operators serve more lines, ILEC-provisioned broadband services should be deregulated.[100]

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[98] Covad Comments at 77.

[99] *See* Business Telecom, Inc. et al. Comments at 33-34; Calif. Internet Service Providers Assoc. at 26-27; Calif. Pub. Utils. Comms'n Comments at 41; DirecTV Comments at 33-34; Earthlink Comments at 29; KMC and NuVox Comments at 23; Minn. Dept. of Commerce Comments at 7; New Hampshire ISP Assoc. Comments at 8; Texas Attorney General Comments at 5; Texas Pub. Util. Comms'n Comments at 2,4; Vermont Pub. Serv. Board at 12-13; WorldCom Inc., et al. at 25.

[100] *See* BellSouth Comments at 16; Qwest Comments at 26; SBC Comments at 13; Verizon Comments at 12.

The central fallacy of this argument is that the degree of intermodal competition cannot be evaluated by simply looking at the numbers of consumers that receive cable modem as compared to those that receive DSL service. While this analytical structure in and of itself suggests that intermodal competition actually consists of only two players, it suffers from a larger problem in that it masks the larger reality that at the local level there is only one provider of broadband services. This fact is alluded to in *Bringing Home the Bits* "[O]verall availability masks considerable variability in competition at the local level – by state, by community, or even by household."[101] Comments filed by the state regulatory commissions indicate that the marketplace for broadband services is highly stratified between cable operators and ILECs, with very little competition between the two platform providers. A number of state regulatory commissions question whether intermodal competition will act as a restraint on the price for DSL service since cable operators and ILECs are rarely competing for the same customers and other platform providers of broadband services are non-existent.[102] State regulatory commissions have not provided any information in this proceeding showing a vibrant competitive marketplace for broadband services. [103] On the contrary, the California Public Utilities Commission emphasized that SBC is the dominant provider of broadband services to residential and small commercial customers in its service territory. Further, SBC is virtually the only DSL provider throughout its service territory and its share of the broadband services marketplace continues to grow.[104]

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[101] COMPUTER SCIENCE AND TELECOMMUNICATIONS BOARD, NATIONAL RESOURCE COUNCIL, BROADBAND: BRINGING HOME THE BITS, at p.188.

[102] *See* Florida Pub. Serv. Comm'n Comments at 4; Illinois Commerce Comm'n Comments at 24; Oregon Public Util. Comm'n Comments at 2.

[103] *See* California Public Utils. Comm'n Comments at 35-36; Florida Public Serv. Comm'n Comments at 4; Illinois Commerce Comm'n Comments at 24; Public Utils. Comm'n of Ohio Comments at 33.

[104] *See* California Public Utils. Comm'n Comments at 34.

Moreover, BOCs are behind cable in broadband roll-out only because they delayed introduction of DSL in order to avoid cannibalizing other revenue streams. In light of these facts, all of the state regulatory commissions agree that ILECs should continue to be regulated in their provision of broadband services.[105]

XIII. COMPUTER INQUIRY SAFEGUARDS REMAIN NECESSARY TO PREVENT DISCRIMINATION BY ILECS

The *Computer Inquiry* requirements were established specifically to address the discrimination and anticompetitive concerns surrounding the ILECs' control over bottleneck transmission facilities that are essential to the development of a competitive information services market. Because the Commission has specifically found that such concerns still exist in the information services market, it has imposed the *Computer Inquiry* requirements on advanced services, including high-speed transmission services.[106] Contrary to the BOCs' arguments, there have been no dramatic changes in the market or regulatory landscape that would warrant removal of these *Computer Inquiry* safeguards.[107] Nor are there technological distinctions with broadband services that would justify a different regulatory regime.[108] Indeed, the *Computer Inquiry* decisions were crafted purposely to take into account advanced and future information services. Thus, the requirement that the ILECs unbundle the underlying transmission component from the information services and offer transmission capacity to unaffiliated ISPs under the same

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105 *See* California Public Utilities Commission Comments at 36; Michigan Public Service Commission Comments at 2; Minnesota Department of Commerce Comments at 7; New York State Dept. of Pub. Serv. Comments at 2-3; Oregon Public Utility Commission Comments at 2-3; Public Utilities Commission of Ohio Comments at 33; Texas Attorney General's Office Comments at 4; Vermont Public Service Commission Comments at 6-9; Wisconsin Public Service Commission Comments at 2.

106 *Frame Relay Order*, 10 FCC Rcd. at 13719; *CPE/Enhanced Services Unbundling Order*, 16 FCC Rcd. at 7421.

107 *See* Cbeyond, et. al. Comments at 50-60; AT&T Comments at 40-42.

tariffed terms and conditions under which they provide such services to their own ISPs, applies to broadband services as well.

The BOCs argue that intermodal and intramodal competition justify elimination of the *Computer Inquiry* safeguards.[109] This argument, however, is misplaced.[110] The *Computer Inquiry* safeguards were implemented to protect ISPs from discriminatory rates, terms, and conditions governing access to the underlying transmission capacity upon which the ISPs are dependent to provide their information services. Contrary to Qwest's statement,[111] ISPs cannot simply turn to competing CLECs, cable modem providers and satellite providers for the broadband transmission needed for their Internet access services. The CLECs have faced formidable barriers to entry in building their networks and have nowhere near the extensive ubiquitous network, especially the critical "last mile," that the ILECs possess. Moreover, the cable operators and satellite providers are not required to provide ISPs access to their transmission facilities.[112] Thus, the ILECs' network continue to be "the primary, if not

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108 *Id.*

109 BellSouth Comments at 16; Qwest Comments at 26.

110 As demonstrated in the majority of the comments filed in this proceeding, intermodal and intramodal competition does not exist on a level sufficient to alleviate the anticompetitive and discriminatory concerns underlying the *Computer Inquiry* requirements. Despite the BOCs' claims, intramodal competition is scant at best. As of June 30, 2001, competing local exchange carriers only provided 7% of the ADSL high speed lines, while the BOCs provided nearly 87%. *See High-Speed Services for Internet Access: Subscribership as of June 30, 2001*, Industry Analysis Division, CCB, Feb. 2002, Table 5. As for intermodal competition, ISPs simply do not have access to the facilities of other broadband providers, such as cable, satellite and wireless.

111 Qwest Comments at 23.

112 While a few cable operators may be offering one or two ISPs access to their cable transmission facilities, this is a far cry from the hundreds of ISPs that have access to their customers through the ILECs' common carrier transmission facilities. *See* Qwest Comments at 30 (offering consumers access to over 400 independent ISPs).

exclusive, means through which information service providers can gain access to customers."[113] This core assumption underlying the *Computer Inquiry* requirements remains valid today.

BellSouth also argues that applying the *Computer Inquiry* rules to only one broadband provider is anticompetitive and discriminatory.[114] BellSouth argues that no other broadband providers are subject to the unbundling requirement in the provision of broadband services and that deployment of broadband will only occur if there is a "level playing field in a de-regulatory environment.[115] On the latter point, it already has been amply demonstrated that broadband deployment is occurring in a "reasonable and timely fashion" despite the *Computer Inquiry* requirements and Title II regulation. As for the former point, it is widely recognized that different service providers may be subject to varying regulations in order to recognize the differences between them and that different regulatory regimes may be necessary to promote competition.[116] Even assuming that the Commission's decision in its *Cable Modem Declaratory Ruling* was correct, the need for common carrier regulation of the ILECs' dominant services and facilities remains. Unless significant changes have occurred in the ILECs' control over wireline transmission facilities, which is not the case, then the ILECs must continue to be regulated as the monopolists they are.

In its comments, Qwest makes the following statement:

> As the Commission has observed, [the] *Computer II* unbundling rule was designed specifically to address the 'service and market characteristics prevalent' in the local exchange market more than a decade ago. Those market characteristics included complete or near-complete ILEC dominance of the only 'basic transmission service'

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113 *NPRM* at ¶ 36.

114 BellSouth Comments at 19.

115 *Id.*

116 *Third Section 706 Report*, 17 FCC Rcd. at ¶133.

> potentially available for the provision of enhanced services. In particular, the *Computer II* unbundling rule was designed to prevent carriers from using their '*market power* and control over the communications facilities *essential to the provision of enhanced services*' to discriminate against unaffiliated information service providers in order to obtain anticompetitive advantages in the information services market. Indeed, ILECs were often then the *only* providers of the services that the information service provider required, and 'nondiscriminatory access . . . to basic transmission services by all enhanced service providers' was necessary given that that [sic] enhanced services were at that time '*dependent* upon the common carrier offering of basic services.'[117]

Although Qwest does go on to argue that the ILEC monopoly conditions it describes above do not exist in today's broadband market and that the *Computer Inquiry* rules are unnecessary, Qwest is wrong. Rather, Qwest's description of the justification for the *Computer Inquiry* rules summarizes quite nicely the current market conditions and the need for retention of those rules. Contrary to the BOCs' claims,[118] they do have bottleneck control over networks used to deliver broadband access. As the Commission itself recognizes and as demonstrated in this proceeding, the ILECs are still dominant in the local exchange market and exchange access market and broadband services are provided over these same local exchange and exchange access facilities.[119] Moreover, ISPs do not have ready access to other facilities in the provision of their Internet access services and are still dependent upon these essential ILEC bottleneck facilities to provide their services.[120] These assessments were made recently by the Commission, not just a decade ago. Without regulatory safeguards, such as the *Computer Inquiry* rules and Title II, the

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117 Qwest Comments at 25-26 (citations omitted).

118 SBC Comments at 24; Qwest Comments at 34-35.

119 Cbeyond, et al. Comments at 31 (citing Separate Statement of Chairman Michael K. Power, CC Docket No. 01-337, at 1 (rel. Dec. 10, 2001)).

120 As pointed out in the comments, technological differences between narrowband and broadband do not serve as the basis for the *Computer Inquiry* rules. Rather, ILEC control over the local loops and high speed transmission facilities is the key factor; control which still exists today. Moreover, much of the ILECs' broadband

BOCs will use their "*market power* and control over the communications facilities *essential to the provision of enhanced services*' to discriminate against unaffiliated information service providers in order to obtain anticompetitive advantages in the information services market."[121]

Given that the Commission and the industry have fought for decades to introduce competition in the local exchange market, it is hard to believe that somehow, miraculously, in the last six months that the ILECs have relinquished control over their bottleneck transmission facilities. The bottom line is that the core assumptions underlying the reasons for implementation of the *Computer Inquiry* rules still apply today and, thus, retention of the *Computer Inquiry* safeguards are critical to the future of the broadband information services market.

The BOCs argue that they have an incentive to offer consumers a choice of ISPs and to make the necessary service elements available to them.[122] The BOCs argue that customer loyalty to their ISP of choice will drive this incentive. If this were true, however, then why are there not more ISPs gaining access to their customers over cable systems? A very limited number of ISPs have such access and not all cable companies are providing this access, given that they operate under a regulatory regime that does not required such access. Indeed, the cable companies have only provided access to independent ISPs under extreme pressure from regulators and consumer groups. Moreover, as the experience with the cable companies demonstrates, only the few largest of ISPs will have the bargaining power to enter into reasonable and non-discriminatory

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networks consist of routine upgrades, and are not, as the ILECs suggest, completely separate and new network facilities designed solely for broadband services.

121 Qwest Comments at 25.

122 *Id.* at 27-28, 30.

arrangements with the dominant ILECs, if at all. Clearly, the ILECs have countervailing incentives as monopolists to discriminate against competitors in the information services marketplace by denying access or condition access on unreasonable prices, terms and conditions. It is a virtual certainty that, absent regulation, Qwest, for example, will not be offering its transmission services on non-discriminatory terms and conditions to over 400 independent ISPs like it does now as a common carrier.[123] And, for those few ISPs that are able to obtain such access, it certainly will not be under the same terms and conditions that the ILEC-affiliated ISPs enjoys. Indeed, as noted above SBC and Yahoo! have formed an alliance to provide co-branded ("SBC Yahoo!") DSL and Internet services. It would be disingenuous to think that SBC will treat competing ISP's on a parity basis with SBC Yahoo. Thus, without the *Computer Inquiry* safeguards, the Commission will see a dramatic change in the information services landscape. The innovative, vibrant and extremely competitive information services market will shrivel to a few large ISPs lucky enough to gain access to ILEC bottleneck facilities. The ILECs, with a demonstrated history of little action in innovation and deployment of new technologies and services unless subject to competition, will control this market.

Finally, other parties in this proceeding have recommended that the Commission revise and/or impose stricter enforcement on the *Computer Inquiry* requirements.[124] Commenters support stricter requirements for the BOCs under the *Computer Inquiry* rules that would make the BOCs more accountable for their obligations to provide the underlying transport of bundled transmission and information services to competing ISPs on non-discriminatory terms and

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123 *Id.* at 30.

124 Earthlink Comments at 31-35; AT&T Comments at 56-61.

conditions. Commenters support suggestions for performance metrics, audits and enforcement penalties to ensure that the BOCs comply with the *Computer Inquiry* rules.

XIV. THE IMPACT OF THE COMMISSION'S PROPOSALS ON USF FURTHER EXPOSE THEIR INCONSISTENCY WITH THE STATUTE

A. The BOCs' USF Arguments Expose the Stark Self-Interest of Their Proposal To Reclassify ILEC Broadband Services From Telecommunications Services To Information Services

BellSouth and SBC each unabashedly take highly inconsistent positions in their comments concerning the regulatory classification of broadband services. When it comes to the broadband transmission services they provide to ISPs and end users, in order to escape regulation they argue that broadband services are neither telecommunications services nor telecommunications. Yet when it comes to which providers should support universal service, subsidies which go predominantly to ILECs, they reverse course and argue that cable modem and ISP broadband providers should be considered providers of telecommunications that must contribute to USF. For example, at the same time that BellSouth argues its broadband Internet access service is an information service, it claims that the ISPs who offer this service to their customers are "by definition ... providers of interstate telecommunications."[125] This exposes the absurdity of BellSouth's self-serving position on the statutory classification issue. How can a BOC providing broadband Internet access provide only an information service but an ISP providing broadband Internet access provide telecommunications? The BOCs cannot have it

[125] *Cf.* BellSouth Comments at 10-11, 31. *See also* SBC Comments at 45 ("all providers of telecommunications, including . . . ISPs and other content providers" should contribute to USF) and at 17 ("For the same reasons as in the cable modem context, wireline broadband Internet access services *uses* 'telecommunications'") (emphasis in original).

both ways. Wireline broadband Internet access either includes the provision of telecommunications (or a telecommunications service) or it does not.

As Commenters and others have shown, ILEC wireline broadband Internet access does in fact include the provision of a telecommunications service, or, at the very least, the provision of telecommunications. The BOCs' self-serving attempt to broaden the USF contribution base by capturing previously unregulated services at the same time they seek inconsistently complete deregulation of their own offerings only proves the absurdity of their argument that the Commission may reclassify wireline broadband Internet access service as a unitary information service. For all of the reasons specified in the initial comments, and in order to ensure the sufficiency of USF, the Commission should reject its tentative conclusions in the *NPRM* and determine that the ILECs' provision of wireline broadband Internet access includes the provision of a telecommunications service that is subject to Section 251, the *Computer Inquiry* requirements, and USF contribution obligations.

B. The Commission May Not Use This Proceeding to Determine that IP Telephony or VOIP Is a Telecommunications Service that Is Subject to Universal Service Contribution Obligations

In Section IV of the *NPRM*, the Commission seeks comment on "what universal service contribution obligations such providers of broadband Internet access should have as the telecommunications market evolves, and how any such obligations can be administered in an equitable and non-discriminatory manner."[126] It also asks whether commenters expect voice traffic to migrate to broadband Internet platforms and if so, what the impact of such migration would be on the Commission's ability to support USF.[127] Not surprisingly, certain ILEC

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126 *NPRM* at ¶ 66.

127 *NPRM* at ¶ 82.

interests are attempting to use this proceeding to sweep IP telephony and Voice over Internet Protocol ("VOIP") into the category of a regulated telecommunications service and to subject such services to USF contribution obligations.[128] The Commission has rejected such efforts before and it must do so again in this proceeding.

The Commission did not seek comment on whether IP telephony or VOIP is a telecommunications service or information service. As the Commission has previously determined, it should not and will not classify such services as telecommunication services unless and until it has a complete record on which to evaluate the nature of the services.[129] Any characterization of an evolving IP service for regulatory purposes without a detailed analysis would be futile and prejudicial. As the Commission previously found:

> [w]e defer a more definitive resolution of these issues pending the development of a more fully-developed record because we recognize the need, when dealing with emerging services and technologies in environments as dynamic as today's Internet and telecommunications markets, to have as complete information and input as possible.[130]

The Commission has also addressed ILECs' attempts at back-door regulation of IP telephony and VOIP in the context of a universal service proceeding:

> [T]his Commission in its *April 10, 1998 Report to Congress* considered the question of contributions to universal service support mechanisms based on revenues from Internet and Internet Protocol (IP) telephony services. We note that the Commission, in the Report to Congress, specifically decided to defer making pronouncements about the regulatory status of various forms of IP telephony until the Commission develops a more complete record on individual service offerings. We, accordingly, delete language from the instructions that

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128 *See* NECA Comments at 4-5, FW&A Comments at 22-23.

129 *Federal-State Joint Board on Universal Service,* Report to Congress, 13 FCC Rcd. 111501, ¶ 90 (1998).

130 *Id.*

> might appear to affect the Commission's existing treatment of Internet and IP telephony.[131]

The record in this proceeding focuses on what USF obligations should be imposed on providers of wireline broadband Internet access services. The record necessary to define IP telephony and VOIP,[132] and to determine whether such services are telecommunications services that should be subject to a host of regulatory requirements, did not exist in the *Report to Congress* or the *Telecommunications Reporting Worksheet* proceeding and does not exist in this proceeding. A hasty and uniformed decision in this proceeding could negatively impact a number of other important policy objectives. For instance, it could undermine the United States' position that IP telephony should not be subject to international regulation or the international settlements regime.[133] Because the implications of determining that IP telephony or VOIP are telecommunications services subject to USF obligations would extend far beyond this proceeding, the Commission should affirm its prior findings that such a determination will not be made unless and until a more complete record is developed on individual service offerings.

XV. A REGULATORY SCHEME OF BIFURCATED LOOPS SHOULD BE REJECTED

In the *NPRM*, the Commission asks "[i]f an incumbent LEC provider of wireline broadband Internet access service over its own facilities uses certain facilities to provide both information services and telecommunications services, to what extent would the incumbent LEC be required to provide both information services and telecommunications services, and to what

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131 *1998 Biennial Regulatory Review – Streamlined Contributor Reporting Requirements Associated with Administration of Telecommunications Relay Service, North American numbering Plan, Local Number Portability, and Universal Service Support Mechanisms*, CC Docket No. 98-171, Report and Order, ¶22 (rel. July 14, 1999) (footnotes omitted).

132 As the Commission has previously recognized, these broad service categories may include many different types of services, including computer-to-computer, computer-to-phone, and phone-to-phone.

133 *See, e.g.*, *Federal-State Joint Board on Universal Service*, CC Docket No. 96-45, Report to Congress, FCC 98-67, ¶ 93 (rel. April 10, 1998) ("*Report to Congress*").

extent would the LEC be required to provide access to such shared-use facilities as 'network elements?'"[134] The apparent scenario envisioned in this question is that an ILEC facility, perhaps the loop, would be used both to provide telecommunication service and an integrated information service. As already discussed, however, the Commission's rules already require that an ILEC provide wireline broadband Internet access service over its facilities only as a customer of its own tariffed telecommunications services. Thus, under current rules, the loop is used only to provide telecommunications services although the ILEC is a customer of those services when it provides an information service over its own facilities. Nor could the Commission lawfully abolish current Title II jurisdiction over the ILEC network and make it subject in whole or in part subject to Title I for all the reasons explained herein.

Moreover, assuming it were permissible, the Commission should not create a regulatory bifurcation of the loop or other key facilities in which part is used for "integrated" wireline broadband Internet access service and considered subject to Title I and part used to provide common carrier telecommunications services. First, ILECs would attempt to exploit and manipulate this regulatory approach by assigning desirable broadband capacity to their own Internet access services while withholding it from common carrier offering or offering it to competitors on less favorable terms and conditions. While the Commission could, and should, under such an approach require ILECs to make a nondiscriminatory common carrier offering of the broadband telecommunications capacity they use in their integrated wireline broadband Internet access service, this is more simply and effectively achieved under current rules by simply requiring ILECs to participate in the unregulated information services marketplace as

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[134] *NPRM* at ¶ 61.

customers of their own common carrier services. In contrast, a regulatory bifurcation of the loop between Title I and Title II would, in order to prevent discrimination, require intrusive examination and regulation of the broadband telecommunications service used by the ILEC for its Internet access service and of the common carrier offering to assure that there is no discrimination. Difficult, unprecedented cost allocations of digital, packet switched networks would need to be fashioned, which would likely be arbitrary. In this connection, the Commission has recently claimed that it is unable to accurately make cost allocations in competitively sensitive areas.[135] Moreover, the Commission would need, in order to prevent discrimination, to closely supervise ILECs deployment of new capacity and capabilities in the network, as in connection with SBC's Project Pronto, to prevent technical manipulations designed to harm competitors. Thus, even though fiber and optical wave division multiplexing techniques can be used to provide essentially unlimited capacity to a multiplicity of providers, ILECs under a bifurcated regulatory approach to the loop would undoubtedly seek to artificially constrain capacity so that multiple providers could not be supported and essentially only their own Title I broadband applications would be supported. Accordingly, the Commission should reject any BOC requests for bifurcation of the loop along these lines.

With respect to the specific question asked in the *NPRM*, assuming that the Commission were to implement a bifurcated approach, which it should not, CLECs would nonetheless be entitled to unbundled access to the network elements the ILECs use for their Title I service because, under the statute, CLECs are eligible for unbundled access if they will use the network element to provide an information service, as explained in commenters initial comments.

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[135] *See Developing a Unified Intercarrier Compensation Regime*, 16 FCC Rcd. 9610 (2001) ("*Intercarrier*

XVI. THE COMMISSION SHOULD ESTABLISH A REQUIREMENT FOR COMPETITIVELY NEUTRAL PROVISIONING BY ILECS INCLUDING UNFILTERED ACCESS TO BOC DATABASES

As noted by commenters in a number of proceedings, ILECs have the incentive and ability to discriminate against CLECs in provisioning of unbundled network elements, interconnection, and other services in comparison to provisioning in connection with their own retail services. The reality of ILEC's providing better service and provisioning to their own retail operations in contrast to CLECs has recently been vividly displayed by ILECs, again as shown in a recent arbitration in Texas between El Paso and SBC. There, SBC representatives testified that they verify facilities for retail customers and provide retail customers all relevant information on a specific address, including the closest available fiber.[136] SBC design engineers know, most of the time, without even looking up information on a specific address, what level of bandwidth can be provided today, what facilities are available, are planned, pending or partially completed to a specific address. SBC sales personnel have direct, unfiltered access to facility inventory databases like TIRKS. In other testimony, SBC representatives stated that SBC personnel have direct access to TIRKS.[137] This gives SBC sales personnel direct, unfiltered access to all information on every facility. Yet when CLECs, who have the right to request TIRKS reports from SBC, requests information, SBC attempts to limit the information on the report so that it has little if any utility. This testimony is illustrative and symptomatic of the fact

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Compensation NPRM").

[136] Petition of El Paso Networks, LLC For Arbitration of an Interconnection Agreement with Southwestern Bell Telephone Company, filed December 20, 2001, Texas Public Utility Commission, Docket 25188, Deposition of Wayne Cunningham at 54.

[137] *Id.*

that the BOCs entire provisioning system is designed to prevent CLECs from competing effectively.

Further, SBC network employees have testified that when they check to see if facilities are available for use, they know when they are checking for SBC retail sales and when they are checking for a CLEC. They admitted that SBC created a coding system that flags the request as a CLEC request. This employee did not know why SBC went out of its way to create a special code for CLEC's. It is clear, however, that CLEC's have been flagged in the system, obviously not for parity treatment. The FCC must examine measures that would make the system use neutral, so that CLEC's can get nondiscriminatory treatment.

Commenters are aware that the Commission has not previously embraced wholesale/retail separation as a remedy for ILEC incentives to discriminate in favor of their own retail operations.[138] Commenters request that the Commission consider in this proceeding whether wholesale/retail separation of BOC operations is necessary to safeguard against ILEC discrimination and initiate proceedings to establish that requirement.

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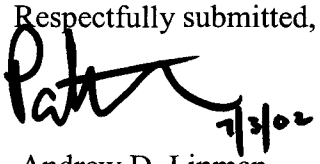
[138] *In the Matter of Petition of LCI International Telecom Corp. for Declaratory Ruling Concerning Bell Operating Company Entry Into In-region Long Distance Markets* Order, CC Docket No. 89-5, FCC 99-164, released July 9, 1999.

XVII. CONCLUSION

For the reasons stated herein, the Commission should conclude this proceeding consistent with Commenters' recommendations.

Respectfully submitted,



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