To fully implement the local competition provisions of the 1996 Act, the Commission must act on Section 706's mandate to promote the deployment of advanced services, and do in a manner consistent with its obligation to promote the development of competition in the local telecommunications sector. The Commission has recognized this requirement, finding that "the pro-competitive provisions of the 1996 Act apply equally to advanced services and to circuit-switched voice services."[92] Nothing in the language or spirit of Section 706 allows the Commission to ignore the legislative mandate that it "take proactive steps to 'promote competition in the local telecommunications market.'"[93]

The Supreme Court's recent decision in *Verizon v. FCC* upholding the Commission's TELRIC rules[94] establishes beyond question the preeminence of wireline competition as a goal of the 1996 Act. There the Court meticulously traced the origins and purpose of the 1996 Act and found that with the Act Congress intended to promote competition in the telephone business controlled by the Bells. In particular, the Court found that Congress directed that the aim of the Act was to:

> reorganize markets by rendering regulated utilities' monopolies vulnerable to interlopers, even if that meant swallowing the traditional federal reluctance to intrude into local telephone markets.[95]

The Commission is not free to reject this bedrock principal of promoting wireline competition for the Bells, and replace it with a quest for "intermodal competition." As we demonstrate below, moreover, "intermodal competition" is an ill-formed concept devoid of

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[92] *Advanced Services Order* ¶ 11.

[93] 47 U.S.C. § 157 nt.

[94] *Verizon Communications, Inc. v. FCC*, 122 S.Ct. 1646 (2002).

meaningful economic content. It will simply not bear the weight of justifying the Bells' radical proposals.

C. The Proponents of Deregulation Do Not Demonstrate that the Bell Companies Lack Market Power in Well Defined Economic Markets

The Bells' Comments cite supposed competition from cable modem service as a virtually complete justification for their request to escape the requirements of the 1996 Act.[96] This invocation of intermodal competition relies on broad-brush references to the shares alternative technologies have gained in what the Bells call the "mass market broadband" and "large business broadband" markets.[97] The Bells' position is flawed because it rests on an incomplete, erroneous definition of the markets in which those shares are measured and a flawed analysis of market power.

In examining and predicting competitive conditions, the Commission must do more than adopt the sloganeering approach of the Bells. The concept of "intermodal competition" without more cannot support the drastic regulatory change the Bells propose. As one state commission put it, the Commission cannot rely on intermodal competition to "ensure robust competition in the broadband marketplace," because it is not a desirable alternative "when compared to the level of competition and market penetration that could be realized through the continuation of policies promoting intramodal competition (or competition among various competing local exchange providers.)"[98]

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[95] *Id.* at 1661.

[96] *See, e.g.*, Bell South Comments at 2, 12-15; SBC Comments at 9-10, 16-18; Verizon Comments at 18-21; Qwest Comments at 16-17.

[97] *E.g.*, Verizon Comments at 15.

[98] Ohio Commission Comments at 33. The D.C. Circuit's recent decision remanding the Commission's *Line Sharing Order, United States Telecom Association, et al., v. FCC*, No. 00-1012 (D. C. Cir. May 24, 2002), does

Whatever the Commission does in this proceeding must be supported by a careful analysis that looks to the ultimate question in any competitive analysis: whether and how an action will benefit consumers. This imperative to carefully consider the rights of consumers carries with it a need to rigorously define markets and measure market power. In this proceeding, therefore, the Commission must be rigorous in its assessment of market conditions and not rest on unsupportable generalizations where specific market analysis is called for. As discussed below, the deregulation that the Bells propose would largely ignore the rights of consumers who would be left with no competitive alternative as DSL competition continued to fade away.

A carefully considered approach is essential when it comes to market definition. The purported markets that are crucial to the Bells' request for deregulation have scant support and are contradicted by other evidence. The Bells rely heavily on the "Broadband Fact Report" that Verizon commissioned, a Report that measures broadband penetration in what it calls the "mass market" and "large business market."[99] The Bells offer a superficial and incomplete analysis, however, of whether these broad purported "market definitions" have any basis in economic reality or accepted economic analysis. To justify dividing the broadband world between mass market and large business services, that Report cites similarities between various broadband technologies. The Report's authors, however, never pause to consider the ultimate question in any market analysis – whether and how consumers are affected by the level of competition. In

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not support the Bells' exclusive focus on intermodal competition. ALTS regards that decision as fundamentally wrong in (among other things) its decision to override the Commission's economic analysis with economic theories that the court's panel preferred. Putting that aside, the court's opinion that the Commission should have considered intermodal competition in reaching its linesharing decision gives no indication that the Commission should focus on that aspect of competition to the exclusion of all others.

particular, the Report ignores the fact that cable service, which is said to dominate the "mass market," is not a competitive alternative for the vast majority of the small business customers that that putative "market" includes.[100] As competitive carrier Cbeyond explains, "competition in the small and medium sized business market is almost exclusively between ILECs and CLECs."[101] Likewise, according to NuVox, "high speed cable modem service is not available as a competitive alternative for small/medium-sized business customers in most of NuVox's 30 city markets."[102]

The Bells' Report similarly glosses over the indisputable proposition that cable does not serve subscribers in many areas, so that for those consumers wireline broadband is the only alternative.[103] The Commission cannot discharge its obligation of bringing advanced services competition to all consumers by adopting an analysis that simply ignores broad classes of consumers and leaves them to rely on the kindness of the Bell Companies.

In addition, even if the Commission identified valid economic markets in which consumers have some choice, the analysis would not be defensible if it merely assumed that "competition" between cable and wireline services would deprive the Bells of market power. This assumption is largely unsupported in this record, but under accepted approaches to assessing market power, in particular the Merger Guidelines that the Bell witnesses cite in the

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[99] Verizon Comment, Exhibit A ("Broadband Fact Report").

[100] AT&T Comments, Declaration of Robert D. Willig ("Willig Dec.") ¶ 24.

[101] Declaration of Richard Batelaan, Vice President—Operations, Cbeyond Communications LLC (Attachment 1) ¶ 8.

[102] Declaration of Edward J. Cadieux, Vice President of Regulatory and Public Affairs, NuVox, Inc. (Attachment 2) ¶ 9.

[103] Willig Dec. ¶ 31.

Broadband Fact Report,[104] a market with only two players is far above the level of concentration that leads to competitive concern.[105]

In evaluating competition between cable and wireline providers, moreover, the Commission must avoid an error that recurs in the Bells' submissions: the unexamined assumption that retail competition would suffice to create competition in the wholesale markets in which competitive wireline carriers must procure inputs. There is no basis for believing that the presence of cable competition for broadband consumers will somehow loosen the Bells' stranglehold on the network elements that competitive telecommunications providers need to do business. The Commission's conclusions in this proceeding must be supported by a meaningful, defensible analysis of the interplay between the wholesale and retail markets that are at play in the provision of wireline broadband services. The relation between those two market tiers is fundamental to the goals of the 1996 Act and the competitive questions that must be answered when enforcing the Act.

Thus, even if the Bell's focus on intermodal competition were appropriate, which under the 1996 Act it is not, the Commission must engage in a complete, rigorous competitive analysis before using presumed intermodal competition as a justification for reversing the current regulatory construct.

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[104] Broadband Fact Report n. 27.

[105] The Department of Justice and the Federal Trade Commission Horizontal Merger Guidelines ("Merger Guidelines") use the Herfindahl-Hirschman Index ("HHI") as a measure of market power. In a market served by two firms, the HHI is at least 5,000. *See* Merger Guidelines § 1.5. The Merger Guidelines treat any market with an HHI greater than 1,800 as "highly concentrated," *id.* § 1.51(c), and regard concentration as an indication of the presence of market power and a source of competitive concern, *id.* § 1.52.

D. The Commission May Not Treat the Bells as Private Carriers in the Provision of DSL Transport

The lack of a proper market analysis in the Bells' presentations is reason enough to reject their request that they be allowed to act as private carriers in providing DSL transport. Recognizing that they now provide DSL transport services as common carriers, the Bells recognize that the Commission must alter their current regulatory status if they are to lawfully act as private carriers.[106] The incumbents' principal argument for this change in regulation is the claim that they lack market power,[107] but, as discussed above, that proposition is both ill defined and unsupported by the record.

If the Commission wishes to deregulate these important services, it must shoulder a heavy burden. The "private carrier" designation is not a matter of Commission discretion to be invoked in support of the regulatory theology *du jour*:

> [W]e reject those parts of the Orders which imply an unfettered discretion in the Commission to confer or not confer common carrier status on a given entity, depending on the regulatory goals it seeks to achieve.[108]

Of equal importance, when the Commission changes a regulatory policy, it must do so on the basis of a record that supports a "reasoned analysis for the change beyond that which may be required" were the Commission writing on a clean slate.[109] Neither the facts nor the market analysis offered in the Notice or any of the Comments, however, meets this elevated burden.

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[106] *E.g.*, Qwest Comments at 15; Verizon Comments at 15; BellSouth Comments at 24. *See Southwestern Bell Tele. Co. v. FCC*, 19 F.3d 1475, 1481 (D.C. Cir. 1994) ("[A] carrier cannot vitiate its common carrier status merely by entering into private contractual arrangements with its customers.")

[107] Verizon Comments at 12; Qwest Comments at 16.

[108] *National Assn. of Regulatory Utility Commissioners v. FCC*, 630 F.2d at 644.

[109] *State Farm*, 463 U.S. at 41-42.

The Commission cannot lawfully relieve the Bell Companies of their regulatory responsibilities by declaring them private carriers in their offering of DSL transport.

VI. CONCLUSION

For the reasons stated above, the Association for Local Telecommunications Services respectfully urges the Commission to reject the suggestion in the Notice that the provision of DSL transport is no longer a telecommunications service.

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Counsel to the Association for Local Telecommunications Services

Dated: July 1, 2002

ATTACHMENT 1

Declaration of Richard Batelaan
Vice President—Operations
Cbeyond Communications LLC

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

In the Matter of	)	
	)	
Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers	)	CC Docket No. 01-338
	)	
Implementation of the Local Competition Provisions of the Telecommunications Act of 1996	)	CC Docket No. 96-98
	)	
Deployment of Wireline Services Offering Advanced Telecommunications Capability	)	CC Docket No. 98-147

DECLARATION OF RICHARD BATELAAN

1. My name is Richard Batelaan. My business address is 320 Interstate North Parkway, Suite 300, Atlanta, Georgia, 30339.

2. I am employed as Vice President—Operations by Cbeyond Communications, LLC ("Cbeyond"). In that capacity I am responsible for all Network Operations, Field Operations, Provisioning, Service Activation, Network Planning, Customer Care, and ILEC Relations for Cbeyond. Prior to joining Cbeyond, I served as Chief Operating Officer (COO) at BroadRiver Communications where I led the Operations and Engineering teams in the launch of Voice, Internet, and Virtual Private Network services. Before joining BroadRiver, I spent twelve years at BellSouth Corporation where I

held various positions within BellSouth Telecommunications, BellSouth Business Systems, and BellSouth.net, including the positions of Chief Operations Officer and VP Operations for BellSouth.net, Director of Operations for Broadband Services deployment, and Director of Engineering for BellSouth's Internet Services deployment. I have also worked at Cisco Systems as an engineer.

3. Cbeyond is a facilities-based competitive local exchange carrier (CLEC), focusing on "bridging the digital divide", using Internet Protocol (IP) architecture to bring all the communication services that a small business needs at affordable prices typically only available to large enterprises. Cbeyond provides an integrated product of local, long distance, Internet access and Internet-based applications such as Unified Messaging, Email, E-Commerce and Web Hosting. The business strategy is to facilitate the movement of business processes via Internet access, making possible electronic communication, collaboration and e-commerce opportunities that will drive the customer's competitive strength and efficiency. Cbeyond uses an integrated IP-based architecture and delivers converged voice, data and integrated network applications over a single platform with seamless integration and delivery.

OVERVIEW AND PURPOSE OF THE DECLARATION

4. The purpose of my Declaration is to provide information regarding my company's experience in and perspective of the deployment of broadband in the marketplace.

5. The Federal Communications Commission ("FCC") has initiated several rulemaking proceedings pertaining to broadband deployment. However, from my perspective the FCC's tentative conclusions are based on faulty assumptions. If adopted, the FCC's tentative conclusions would serve no purpose but to undermine the Commission's long standing goals of promoting competition, would decimate the CLEC and ISP industries, and would leave the small and medium sized business customers that Cbeyond serves without a competitive alternative -- no doubt stifling innovation and raising their rates.

6. Cbeyond uses DS-1 unbundled loops to deliver an integrated offering of narrowband voice and high-speed broadband Internet access over the same loop to customers with four to twenty-five voice lines. The innovative technology that enables such an integrated narrowband/broadband offering is the customer premise equipment and soft switches that Cbeyond has developed with Cisco Systems, Inc. ("Cisco") along with innovative Quality of Service (QoS) techniques that allow us to prioritize voice and data traffic on a managed network.

7. Importantly, many of the small and medium sized business customers that Cbeyond is serving did not have broadband service until obtaining service from Cbeyond. The primary reason why these small and medium sized

business customers did not have broadband was because there was not a cost-effective broadband product available to them.

8. Having said this, it is critical to understand that competition in the small and medium sized business market is almost exclusively between ILECs and CLECs. In fact, Cbeyond has not encountered any intermodal competition in the small business markets it serves from cable, wireless or satellite companies. While cable, wireless and satellite companies may provide broadband services to small and medium sized business customers on a very limited basis in certain markets, these offerings are not a reality for most small and medium sized business customers, and certainly not for the customers in Cbeyond's targeted markets.

9. Without a commercial intermodal broadband alternative, small and medium sized business customers are dependent upon intramodal competition for innovative and cost-effective broadband offerings.

10. Therefore, the Commission should adopt policies that will foster, rather than limit or restrict, access to the ILECs loop and transport network on an unbundled basis at TELRIC prices. To do otherwise would ignore the market realities and would be detrimental to the very sector of the market that drives much of the United States economy.

11. Finally, as recognized by the FCC, broadband is being deployed to all Americans in a timely manner. Cbeyond, as well as ILECs and other CLECs, are responding to market forces and are deploying broadband. In fact, every small and medium sized business customer that Cbeyond installs is provided

with a high-speed broadband service. Intramodal competition, which is almost exclusively the only competition in the small and medium sized business markets, will continue to bring the benefits of lower prices and innovative service offerings so long as access to the ILECs' high capacity loops and transport (e.g., DS1 loops, DS1 and DS3 transport) are made available to CLECs as unbundled network elements subject to TELRIC pricing.

12. This concludes my Declaration.

13. *Pursuant to 47 C.F.R. § 1.16, I declare under penalty of perjury that the foregoing is true and correct. Executed on: June 25, 2002.*

Richard Batelaan, PE

ATTACHMENT 2

Declaration of Edward J. Cadieux
Vice President of Regulatory and Public Affairs
NuVox, Inc.

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

DECLARATION OF EDWARD J. CADIEUX

I, Edward J. Cadieux, pursuant to 28 U.S.C. Sec. 1746, do hereby declare, under Penalty of Perjury, that the following is true and correct:

1. I am employed as Vice President of Regulatory and Public Affairs by NuVox, Inc. ("NuVox"). I have more than 20 years of regulatory, legal and public policy experience in the telecommunications industry.
2. My business address is 16090 Swingley Ridge Road, Suite 500, Chesterfield, Missouri 63017.
3. NuVox is facilities-based competitive local exchange carrier ("CLEC") and integrated communications services provider. NuVox offers voice, data and ancillary services to small and medium-sized business customers in 30 city markets across 13 Southeastern and Midwestern states. (A list of the markets served by NuVox is attached hereto as Schedule A.) Specifically, NuVox offers local voice and data services, dedicated high speed internet access,

domestic and international long distance services, and a variety of complimentary services including unified voice, e-mail and fax messaging, local area and wide area network management, virtual private networks, website design, web page hosting, audio conferencing and a comprehensive set of web-based applications.

4. NuVox has deployed its own switching and collocation-based transmission equipment, along with thousands of integrated access devices (i.e., specialized, customer premises equipment which permits bundled provision of voice and dedicated high speed internet access services over T-1 channels). NuVox has installed 30 ATM data switches and 14 Class-5 digital voice switches, and has 205 equipped and fully operational collocations in Bell Company central offices.

5. The vast majority of NuVox's customers subscribe to a bundled set of services which includes local and long distance voice services and dedicated high speed internet access services. NuVox provisions bundled voice and dedicated high speed internet access services via leased integrated T-1 facilities which connect with NuVox-owned integrated access devices (at the customer's location) and to NuVox's ATM data and digital voice switching equipment at its switching hubs.

6. By combining its own facilities with T-1 facilities leased from the serving ILEC, NuVox provides bundled voice and dedicated high speed internet access services over separate channels of an integrated T-1. Use of traditional T-1 facilities in this manner is efficient and economical, and allows NuVox to

offer customers the convenience of one-stop shopping for combined voice and high-speed internet access services. The efficiency of this configuration allows NuVox to bring both voice services and dedicated high speed internet access service "down-market" – i.e., by combining voice and internet access over an integrated T-1, NuVox is able to offer these services to business customers with as few as five voice lines. The small/medium-sized business market is a market segment that traditionally has been neglected by the serving ILEC. These customers frequently have few, if any, alternatives for high speed internet access.

7. NuVox has expanded its offering of integrated voice and dedicated high speed internet access services beyond its collocation "foot-print" by use of leased, ILEC-combined loop and transport T-1 facilities. Use of ILEC-combined loop/transport T-1 facilities allows NuVox to expand the geographic availability of its bundled voice/dedicated high speed internet access services to those small and medium-sized business customers that are located in central offices where collocation is not feasible. Generally these tend to be the central offices with relatively low business customer density. In these areas small/medium-sized business customers have limited (if any) alternatives to the serving ILEC for voice and high speed internet services. NuVox's use of ILEC-combined loop/transport T-1 facilities allows it to reach these customers and offer them competitively-priced voice and dedicated high speed internet access services.

8. NuVox's ability to bring competitively-priced bundled voice and dedicated high speed internet access service to the small/medium-sized business customer segment is highly dependent on its ability to obtain leased T-1 loops and -- for customers located outside of NuVox's collocation footprint -- ILEC-combined T-1 loop/transport combinations, at cost-based prices. To the extent ILECs are permitted to engage in policies that deny the availability of these facilities as UNEs and instead force NuVox to use tariffed T-1 special access service, the NuVox cost of providing integrated T-1 service is increased to unsustainable levels because ILEC special access services are price substantially in excess of the economically efficient (i.e., incremental) cost of the facilities.

9. High speed cable modem service is not available as a competitive alternative for small/medium-sized business customers for high speed internet access service in most of NuVox's 30 city markets. Where the serving cable company has upgraded its cable plant and is offering high speed cable modem service, in most instances the service is offered predominantly (if not exclusively) to residential customers. In the limited number of markets where the serving cable company has begun to offer high-speed cable modem service to business customers, the geographic scope of that offering is frequently limited and is significantly smaller than broadband service area offered by the ILEC or by NuVox or other non-cable broadband carriers. As a result, the vast majority of small/medium-sized business customers in

NuVox's 30 market service area have only wireline options (ILEC DSL or CLEC integrated T-1 or DSL services) for broadband service.

10. This concludes my declaration.

June 27, 2002

Edward J. Cadieux

Edward J. Cadieux

Schedule A

NuVox Markets

- St. Louis, Missouri (and adjoining Illinois portion of metro area)
- Springfield, Missouri
- Kansas City, Missouri (and adjoining Kansas portion of metro area)
- Wichita, Kansas
- Little Rock, Arkansas
- Tulsa, Oklahoma
- Oklahoma City, Oklahoma
- Greenville, South Carolina
- Spartanburg, South Carolina
- Atlanta, Georgia
- Greensboro, North Carolina
- Burlington, North Carolina
- Winston-Salem, North Carolina
- Indianapolis, Indiana
- Akron, Ohio
- Wilmington, North Carolina
- Cincinnati, Ohio
- Columbus, Ohio
- Dayton, Ohio
- Lexington, Kentucky
- Miami, Florida
- Ft. Lauderdale, Florida
- Charlotte, North Carolina
- Raleigh, North Carolina
- Columbia, South Carolina
- Jacksonville, Florida
- Louisville, Kentucky
- Nashville, Tennessee
- Knoxville, Tennessee
- Charleston, South Carolina

CERTIFICATE OF SERVICE

I, Leslie LaRose, hereby certify that on this 1st day of July, 2002, I have served a copy of the foregoing document via hand delivery or U.S. Mail, postage pre-paid, to the following:

Leslie LaRose

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Washington, D.C. 20554

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