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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

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

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

REPLY COMMENTS OF THE ASSOCIATION FOR LOCAL TELECOMMUNICATIONS SERVICES

Jonathan Askin (jaskin@alts.org)
General Counsel
Association for Local Telecommunications Services
888 17th Street, N.W., Suite 900
Washington, D.C. 20006
Telephone: (202) 969-2587

Attorney for the Association for Local Telecommunications Services

Jeffrey Blumenfeld (jblumenfeld@graycary.com)
Christy C. Kunin (ckunin@graycary.com)
Michael D. McNeely (mmcneely@graycary.com)
Larry Blosser (lblosser@graycary.com)
GRAY CARY WARE & FREIDENRICH, LLP
1625 Massachusetts Avenue, NW, Suite 300
Washington, D.C. 20036
Tel: 202-238-7700
Fax: 203-238-7701

Counsel to the Association for Local Telecommunications Services

SUMMARY

The Commission's analysis of the Bell Companies' proposal to abandon the regulation of telecommunications facilities used to deliver Internet access services is confused, erroneous and crucially dependent on the false premise that treating the provision of DSL transport as a telecommunications service is unsettled as a matter of precedent. Numerous Commission precedents establish that telecommunications used in information services are telecommunications services regulated under Title II of the Telecommunications Act.

The Commission may not simply announce a policy at odds with these past interpretations of the statute and adopt dramatic new regulatory measures without first supplying a well-reasoned analysis that justifies the change, and yet no supporter of that change explains how or why those precedents should suddenly lose their force. In addition, the Commission cannot suddenly change these fundamental regulatory classifications without considering and resolving the disruption that that change would threaten for numerous related regulatory mechanisms, including the allocation of state and federal authority; CALEA and the USA PATRIOT Act of 2001; consumer protection, CPNI and related issues; and, importantly, universal service funding.

Despite the Bells' consistent refrain, the Commission's recent Cable Modem Decision does not control the result in this proceeding. Choosing that course would substitute vague and misguided notions of "regulatory parity" for careful competitive analysis of wireline broadband services. In addition, the notion of "regulatory parity" overlooks the significant differences between cable and wireline services. Finally, the Commission may resolve this proceeding in a way that is fully consistent with its findings in the Cable Modem Decision.

If the Commission adopts a proper focus and analyzes the competitive issues this proceeding raises, it will find that the record does not support the deregulation of DSL transport services. This deregulation would lead to the denial of critical facilities to the Bell Companies' competitors, and in turn severely cripple and perhaps eliminate those competitors. The result of all this could well be to establish the Bells as the sole providers of DSL-based services. The Bell Companies' answer to this possibility is "intermodal competition," primarily from cable modem service providers, but reliance on this trumped-up notion of competition would be doubly flawed. First, as a matter of law, the 1996 Act imposes on the Commission the obligation to promote wireline competition. Second, as a matter of fact and sound economics, "intermodal competition" will not deprive the Bells of the market power they now wield in broadband markets. Supposed competition between the Bells and cable modem service providers will leave many consumers – including small and medium-sized businesses and all consumers not served by cable – facing a monopolist. Even where this "intermodal" competition exists, moreover, the Bell Companies will retain a high degree of market power as part of a duopoly. Given this likelihood of continued and increasing Bell Company monopoly power, their plea to be deregulated and treated as "private carriers" in providing broadband transport services must be denied.

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REPLY COMMENTS OF THE
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I. INTRODUCTION

In this proceeding, the Bell Companies propose abandoning the regulation of telecommunications facilities used to deliver Internet access services. The Bells support this effort in part by introducing confusion in their choice of terminology, referring broadly to the deregulation of "broadband" or "enhanced services." If one sorts out the distinct but related issues at play, however, it becomes clear that the Bells contemplate a startling and unjustified departure from settled regulatory principles and rules.

The Commission's analysis of the issues raised by this request is ill-conceived and erroneous. It begins with the proposition that wireline broadband Internet access service is not a "telecommunications service" regulated under Title II of the Telecommunications Act, but an

"information service."[1] That proposition is fully consistent with Commission precedent and proper analysis. Likewise, the Commission is on solid ground when it observes that the transport that underlies wireline broadband Internet access service is "telecommunications" under the Act.[2]

The Commission goes on to suggest, however, that the provision of this underlying transport (today most often using DSL facilities) is not a telecommunications service regulated under Title II.[3] Emblematic of the confusion that pervades the Commission's analysis is the Commission's question whether under the Act the provision of DSL transport is "telecommunications" or "telecommunications service," as if it could not be both. "Telecommunications" and "telecommunications service" are not alternative regulatory treatments carrying inconsistent regulatory consequences. Rather, "telecommunications" is a specific technological capability,[4] while "telecommunications service" is the offering of "telecommunications" for a fee to the public.[5] Any thought that an offering of "telecommunications" underlying an Internet access service cannot be a "telecommunications service" would be the product of confusion induced by the Commission's strange question and flatly inconsistent with the statutory definitions.

The Commission builds on this confusion with the declaration that the treatment of the provision of DSL transport as a telecommunications service is unsettled as a matter of

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[1] *Appropriate Framework for Broadband Access to the Internet Over Wireline Facilities*, Notice of Proposed Rulemaking, 17 F.C.C.R. 3019, ¶ 5 (2002) ("Notice") ¶ 24.

[2] *Id.* ¶ 25.

[3] *Id.* ¶ 26.

[4] 47 U.S.C. § 153(43).

[5] 47 U.S.C. § 153(46).

precedent,[6] but that is plainly not the case. Adopting the Commission's suggestion that providing the broadband transport underlying Internet access service is not a telecommunications service would reverse numerous Commission decisions under the 1996 Act, as well as an equally strong and consistent string of pre-1996 Act decisions reaching the analytically equivalent conclusion that telecommunications underlying an enhanced service is a basic service regulated under Title II of the Act.[7]

In light of these precedents, as a matter of law the Commission has two choices. It must adopt only its tentative conclusion that the provision of wireline broadband Internet access service is an information service. Or, it must acknowledge that any attempt to deregulate the separate offering of the transport that underlies ILEC-offered ISP services is contrary to well-settled law, and therefore faces a difficult burden. In addition, the Commission must take into account the fact that pursuing the course it appears to have chosen will suddenly, unfairly and disastrously defeat the expectations of numerous competitors and investors that have relied on the decisions that the Commission now proposes to overturn.

In ALTS' view, this regulatory renege, accomplished by abandoning clear, strong precedent, cannot be justified. Certainly the present record and the rationale offered by the Bells fall far short of what would be required to support the Commission's radical proposals. When the Bells purport to provide a competitive justification for the results they seek, they conjure up a foggy state of "intermodal" competition. But they never come to grips with the mandate of the 1996 Act to promote *wireline* competition for ILECs. Equally importantly, the Bells never

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[6] Notice ¶ 14.

[7] Comments of Covad Communications Company ("Covad Comments") at 2-5.

adequately define the markets in which the effects of "intermodal competition" will supposedly be felt or properly assess the market power they will retain if their wishes come true. This failure to conduct a proper competitive analysis is not surprising, because it is clear that the actions the Bells have in mind will leave them with market power in all markets and clear monopoly status with respect to significant classes of consumers.

II. THE RECORD PROVIDES NO BASIS FOR THE RADICAL DEPARTURE FROM PRECEDENT THAT THE BELL COMPANIES PROPOSE

A. Numerous Commission Decisions Establish that Telecommunications used in Enhanced or Information Services are Telecommunications Services Regulated Under Title II

Nearly all parties commenting on the issue disagree with the Commission's contention that its prior decisions

> left open significant questions regarding the treatment of...service providers that own transmission facilities and that engage in data transport over those facilities to provide an information service.[8]

As California correctly observes:

> For over two decades, the FCC has consistently stated that information or enhanced services ride atop basic transmission service, and has treated the two services separately [and] the FCC has always asserted jurisdiction under Title II to regulate the transmission component of such services when offered by traditional facilities-based common carriers, like the incumbent LECs.[9]

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[8] Notice ¶ 14.

[9] Comments of the People of the State of California and the California Public Utilities Commission ("California Comments") at 26. *See also* Comments of AT&T Corp. ("AT&T Comments") at 20; Joint Comments of WorldCom, Inc., the Competitive Telecommunications Association and the Association for Local Telecommunications Services ("Joint Comments") at 58-61; Comments of Time Warner Telecom ("TWT Comments") at 9-16; Comments of Z-Tel Communications, Inc. at 3-6; Comments of the Public Utilities Commission of Ohio ("Ohio Commission Comments") at 9-15.

Covad's comments include a detailed list of Commission decisions, beginning with the 1980 Decision in the *Computer II* proceeding, extending through the *Competitive Carrier*, *Computer III*, and *CEI/ONA* proceedings, to the *Frame Relay Order*, in which the Commission has either explicitly stated or relied upon the principle that the provision of unregulated enhanced services does not transform a basic Title II telecommunications service into an unregulated service.[10]

Both prior to the passage of the 1996 Act and in the six years since, the Commission has, on at least two dozen separate occasions, addressed the regulatory classification of DSL-based advanced services and has consistently ruled that those services are "telecommunications services."[11] On at least three occasions, the Commission has told the United States Court of Appeals for the D.C. Circuit that advanced services are telecommunications services subject to Title II.[12]

The Commission cannot simply walk away from the 20-year body of precedent it has created, and upon which the courts, competitors and Congress have relied. If the Commission is now to adopt the contrary position – that the transmission component of a facilities-based carrier's retail wireline broadband Internet access service is not a "telecommunications service"[13] – it must abandon each and every one of these precedents and provide a reasoned explanation for its radical policy reversal.

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[10] Covad Comments at 4-5. *See also* AT&T Comments at 43-47, Comments of Cbeyond, El Paso, Focal, New Edge and Pac-West ("Cbeyond Comments") at 26-30; Comments of DIRECTV Broadband ("DIRECTV Comments") at 27-30.

[11] Covad Comments at 2-4. *See also* AT&T Comments at 20-21; Joint Comments of KMC Telecom and NuVox Communications at 4-8.

[12] California Comments at 19. *See also* AT&T Comments at 16; TWT Comments at 11-16.

[13] Notice ¶ 17.

B. The Commission Bears a Heavy Burden To Justify Its Proposed Abandonment of Precedent and Disruption of Existing Regulation

As explained in Section II.A., the Commission has consistently and repeatedly concluded that an ILEC retail "ISP" service is an information service that includes transport and is a single unregulated "enhanced" service, and that an ILEC transport service, when provided to an ISP, even an affiliated ISP, is a regulated "basic" service. Additionally, as explained in Section III, many other regulatory mechanisms, ranging from support for universal service through cooperation with law enforcement and defense agencies to consumer protection safeguards, depend to a substantial degree on the same fundamental and well-settled concept, that transport service is a telecommunications service subject to Title II regulation, regardless of whether the transport service is offered to an end user, an unaffiliated ISP or an ILEC-affiliated ISP.[14]

The Commission may not simply announce a policy at odds with the Act and its own past interpretation of the statute and proceed to adopt dramatic new regulatory measures without first supplying a well-reasoned analysis that justifies the change.[15] The Commission may not, as it did in the Notice, simply ignore its own precedent when it is inconvenient to its present purpose and expect that its decision will be sustained. As the Ohio Commission observed:

[14] *See* Comments of the Minnesota Department of Commerce at 4, explaining that a single consumer DSL line can be used both to access the Internet and access a workplace location via a VPN. The DSL line, when used for Internet access, allows the customer to reach an information service, but the same DSL line, when used via a VPN to access a workplace, functions as a broadband telecommunications service.

[15] Covad Comments at 53-58, *citing Motor Vehicle Mfrs. Assoc of the U.S. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 40-43, 48-49, 57 (1983) ("*State Farm*").

> By not addressing its own line of decisions and implicitly failing to explain the drastic departure proposed in the NPRM, the FCC dooms its decision to failure under the legal standard required when it decides to change its past decisions.[16]

C. The Proponents of the Commission's Radical Approach Do Not Explain How the Commission Could Abandon Its Precedents

Not surprisingly, all four Bells express support for the Commission's suggestion that the transport underlying broadband Internet access service be deregulated.[17] Nearly all of their supporting arguments and those of their supporting trade association are based on broad policy themes. Those themes include "regulatory parity,"[18] the "need to provide investment incentives" to spur broadband deployment,[19] and the "elimination of unnecessary regulation."[20] Verizon alone further asserts that continued Title II regulation of ILECs' broadband services and facilities raises "serious First Amendment concerns."[21]

However attractive those policy arguments might be, they are altogether unavailing. They provide no justification for the Commission to ignore the language, structure and purpose of the 1996 Act or its own prior classification of ILEC broadband transport service as a common carrier service.[22] It is well settled that no matter how desirable the Commission's policy goal, the

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[16] Ohio Commission Comments at 5-6, *citing Cox Television Stations, Inc. v. FCC,* 280 F.3d 1027, 1043 (D.C. Cir. 2002); *AT&T Corp. v. FCC,* 236 F.3d 729, 736 (D.C. Cir. 2001); *Southwestern Bell Tel. v. FCC,* 153 F.3d 523, 544 (8th Cir. 1998); *Radio Television S.A. de C.V. v. FCC,* 130 F.3d 1078, 1083 (D.C. Cir. 1997).

[17] Comments of Verizon ("Verizon Comments") at 4, 24; Comments of BellSouth Corp. ("BellSouth Comments") at 7-89; Comments of Qwest Communications International, Inc. ("Qwest Comments") at 5-6; Comments of SBC Communications Inc. ("SBC Comments") at 4, 16-17.

[18] *See, e.g.,* BellSouth Comments at 23-24; USTA Comments at 3; Verizon Comments at 3, 8-9, 36; Qwest Comments at 16, 29.

[19] *See, e.g,* SBC Comments at 3; USTA Comments at 4; Verizon Comments at 24.

[20] *See, e.g.,* Verizon Comments at 25; USTA Comments at 9; SBC Comments at 27.

[21] Verizon Comments at 27-30; *but see id.* at 30, n. 70 (acknowledging that the Commission lacks authority to pass on the constitutionality of the statutes it is charged with administering).

[22] California Comments at 31.

Commission does not have unfettered discretion to confer or withdraw common carrier status or to alter the meaning of the Act.[23]

III. THE COMMISSION CANNOT IGNORE THE DISRUPTION OF NUMEROUS REGULATORY MECHANISMS THAT THE BELL PROPOSAL THREATENS

When Congress adopted the Telecommunications Act of 1996, it set forth a number of objectives. One provision, section 706, assigned responsibility to the FCC and "to each state Commission with regulatory jurisdiction over telecommunications services" to "encourage" the "reasonable and timely" deployment of "advanced telecommunications capability to all Americans." Inexplicably, the Commission has elevated this one statutory objective above all others, describing "the Commission's primary policy goal to encourage the ubiquitous availability of broadband to all Americans."[24] Even if the Bells' proposals would achieve this objective (which they would not), the Commission cannot ignore the express language of the statute delegating authority jointly to the FCC and the state commissions and must give adequate consideration to the potential impact that its proposals would have on many other laws and regulations at both the state and federal level.

A. Preemption of State Regulation

The Bells generally urge the Commission to preempt all state regulation of broadband Internet access service.[25] BellSouth asserts that the Commission should go even further and expand the scope of its preemption beyond broadband Internet access to declare "any stand-alone

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[23] California Comments at 31-32, *citing Nat'l Ass'n of Regulatory Util. Comm'rs. v. FCC,* 525 F.2d 630, 643 (D.C. Cir), cert. denied, 425 U.S. 992 (1976); *MCI Telecomm. Corp. v. AT&T,* 512 U.S. 218, 234 (1994).

[24] Notice ¶ 4.

[25] BellSouth Comments at 24-26; SBC Comments at 32-37; Verizon Comments at 36-39; Comments of the United States Telecom Association ("USTA Comments") at 3 (but with a permissive exception to allow carriers

transmission service offered by an ILEC to be jurisdictionally interstate subject only to federal jurisdiction."[26] The Bells offer no legal analysis in support of such a sweeping assertion of preemptive authority. On the other hand, NARUC and the regulatory commissions of several states provide detailed legal analyses explaining that the Commission's proposed reclassification of ILEC Internet access service as an information service is inconsistent with the Act, its legislative history, the Commission's own precedent, court decisions and even the policy goals the Notice seeks to achieve.[27] The state commissions urge the FCC to proceed with caution in adopting a new regulatory framework. In the words of one state commission:

> [W]e strongly encourage the Commission to avoid adopting a rule that diminishes the state's authority to encourage advanced services deployment to implement its own legislatively-enacted policies and that affects the state's traditional role in overseeing customer protection and service quality standards.[28]

If past is prologue, the Commission appears to be headed for yet another jurisdictional confrontation with at least one major state. On the one hand, the Commission refers to a 1994 decision of the Ninth Circuit Court of Appeals that "affirmed the Commission's authority to preempt state regulation of jurisdictionally mixed enhanced services."[29] On the other, California cites another decision by the same court holding that the Communications Act does not bar states from regulating the intrastate services, including information services, offered by a telephone

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eligible for participation in NECA pooling arrangements to continue to have their broadband services treated as Title II services).

[26] BellSouth Comments at 24-25.

[27] Initial Comments of the National Association of Regulatory Utility Commissioners at 5-6. *See also* Comments of the New York State Department of Public Service ("New York PSC Comments") at 3-4.

[28] Comments of the Public Utility Commission of Texas ("Texas PUC Comments") at 4.

[29] Notice ¶ 62.

carrier.[30] California asserts that even if the FCC classifies certain services as information services for federal purposes, states would continue to have authority to regulate all aspects of a telephone carrier's provision of intrastate information and transmission services.[31]

If there is a solution to the federal-state jurisdictional conflict, it clearly does not lie where the Bells suggest -- in a Commission assertion of the primacy of a "uniform national broadband policy" and a unilateral prohibition on state and local attempts to regulate broadband services directly or indirectly.[32] Rather, any significant change in the regulation of wireline broadband Internet access service must recognize and observe the Congressionally ordained division of responsibility between federal and state telecommunications regulators.

B. CALEA and the USA PATRIOT Act of 2001

In paragraph 55 of the Notice, the Commission asked commenters to discuss how the tentative conclusion that wireline broadband Internet access service is an information service would affect the scope of the CALEA assistance capabilities that telecommunications carriers must provide to law enforcement authorities. The Department of Justice and the Federal Bureau of Investigation concede that "[t]he precise effect on CALEA of the Commission's tentative conclusions is not wholly clear"[33] and therefore request that the Commission rule that "DSL and other forms of wireline broadband Internet access are and will remain subject to the requirements

[30] California Comments at 44-45.

[31] *Id.* at 45.

[32] Verizon Comments, at 36-37.

[33] Comments of the Department of Justice and Federal Bureau of Investigation ("DOJ/FBI Comments") at 2. *See also* SBC Comments at 39 (conceding that "CALEA may not apply to data" if the Commission's tentative conclusion is affirmed); Verizon Comments at 41 ("reclassification of DSL as a non-common carrier service" might result in Commission reexamination of the applicability of CALEA).

of CALEA."[34] However, as other commenters have noted, the scope of CALEA is expressly limited to "telecommunications carriers"[35] and the definition of "telecommunications carriers" expressly excludes "persons or entities insofar as they are engaged in providing information services...."[36] Moreover, as noted by Time Warner Telecom, CALEA does not apply to the provision of transmission on a private carrier basis.[37] The Commission may not extend CALEA obligations to entities other than "telecommunications carriers" unless it finds that the "switching or transmission service" those parties provide is "a substantial replacement for the local telephone exchange service" and that coverage under CALEA is in the public interest.[38] Such a finding would bring the services within the definition of telecommunications services under the Telecommunications Act.[39] Given the plain language of the statute, if the Commission reaffirms its tentative conclusion that providers of wireline broadband Internet access services are not telecommunications carriers, there is a substantial risk that any effort to impose CALEA obligations on the providers of those services would be rejected on appeal.

Neither the DOJ/FBI nor the Department of Defense responded directly to the Commission's request for comment on the impact that reclassification of wireline broadband Internet access service would have on the USA PATRIOT Act of 2001. However, the Secretary of Defense did express the view that the National Security/Emergency Preparedness

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[34] *Id.* at 3.

[35] DIRECTV Comments at 37, citing 47 U.S.C. §1001(8).

[36] *Id.* citing 47 U.S.C. §1002(b)(2)(A). *See also* Comments of Big Planet, at 47-48; Comments of Business Telecom Inc. at 28-29; DIRECTV Comments at 27-38; Comments of Mpower Communications at 12.

[37] TWT Comments at 28.

[38] DOJ/FBI Comments at 9, citing 47 U.S.C. §1001(8)(B)(ii).

[39] See 47 U.S.C. § 153(47)(B) (defining "comparable services" as "telephone exchange service").

telecommunications needs of the federal government would be best served if the Commission did not reclassify broadband wireline Internet access as an "information service."[40]

C. Consumer Protection, CPNI and Related Issues

The Vermont Public Service Board identified a number of important consumer protection measures that would be sacrificed by the Commission's proposed reclassification:

- Section 222 safeguards for customer proprietary network information received by a "telecommunications carrier" "by virtue of its provision of a telecommunications service";
- Section 223 limitations on obscene or harassing telephone calls, at least as to calls completed over a non-telecommunications broadband service;
- Section 225 telecommunications relay services for hearing-impaired and speech-impaired individuals, which are obligations of common carriers, but not of information service providers;
- Section 227 protections against unwanted "telephone" solicitations; and
- Section 228 regulations on "pay-per-call" services, applicable to common carriers.[41]

Other state commissions, joined by consumer advocates,[42] identify a number of consumer protection and competitive safeguards that may be at risk if a new regulatory framework is adopted,[43] and urge the Commission to ensure that the measures that have been carefully developed over the years[44] are not effectively extinguished.[45]

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[40] Comments of the Secretary of Defense at 8.

[41] Comments of Vermont Public Service Board, at 32-35.

[42] Comments of the Pennsylvania Office of Consumer Advocate, the Maine Public Advocate, the Maryland Office of People's Counsel, the Ohio Consumers' Counsel, the Utility Reform Network, the California Office of Ratepayer Advocates, the Connecticut Office of Consumer Counsel and the New Hampshire Office of Consumer Advocate ("State Consumer Advocates Comments")

[43] *See, e.g.*, Texas PUC Comments at 5-7, raising questions regarding: performance measures, regulatory oversight over the basic local service and long-distance market, state oversight of xDSL rates, terms and provisioning conditions, and line sharing.

[44] These include protections regarding privacy, service quality, unauthorized switching of service providers ("slamming"), truth-in-billing and service termination. *See* State Consumer Advocates Comments at 23.

[45] *See, e.g.*, New York PSC Comments at 5, urging the Commission "to maintain its ONA rules to ensure that competition in the local and advanced services markets is not eliminated."

D. Universal Service

Commenters are in virtually unanimous agreement that the Commission's tentative conclusions would, if implemented, have a substantial impact on universal service. However, there was a wide divergence of views on how to address that impact.

SBC,[46] BellSouth[47] and USTA[48] assert that all providers of broadband Internet access services should be required to contribute to the Universal Service Fund. Verizon asks the Commission to require providers of broadband Internet access services to contribute, but only to the schools and libraries program.[49] Rural ILECs generally support the extension of universal service funding obligations to broadband Internet access providers;[50] NECA supports broadening the contribution base even further by assessing contributions on VoIP providers.[51]

Some state commissions and consumer advocates support broadening the contribution base for the Universal Service Fund.[52] Some raise related concerns, including the potential for unnecessarily complicating the cost allocation process and the potential for over-allocation of common costs to services supported by USF.[53]

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[46] SBC Comments at 41-46.

[47] BellSouth Comments at 31.

[48] USTA Comments at 13.

[49] Verizon Comments at 42-45.

[50] Comments of the National Telephone Cooperative Association at 5-7; Comments of the Organization for the Preservation and Advancement of Small Telephone Companies at 2-10; Comments of the National Rural Telecom Association at 19-25.

[51] Comments of the National Exchange Carrier Association, Inc. ("NECA Comments") at 4-5.

[52] *See, e.g.*, California Comments at 46; State Consumer Advocates Comments at 62-64. *But see* Comments of the Public Service Commission of Wisconsin at 11 (FCC's tentative conclusion would exclude ILEC providers of broadband services from USF contribution obligations).

[53] *See, e.g.*, California Comments at 47-48.

A number of parties, including some state Commissions, some IXCs and some CLECs, express concern that the sufficiency of the USF fund might be jeopardized if the Commission reclassifies wireline broadband Internet access as an information service and allows providers of wireline broadband Internet access to avoid payment obligations.[54] ISPs generally oppose the extension of universal service fund contribution requirements to ISPs that are not also telecommunications carriers.[55]

The Commission acknowledged in the Notice that the scope of universal service contribution obligations of providers of broadband Internet access services is intertwined with another proceeding in which the Commission is considering reform of the existing methodology for assessing universal service contributions.[56] But it is not just intertwined with one other proceeding: as NCTA notes, there are at least four other active proceedings in which the Commission is considering various aspects of universal service reform.[57] It is likely, as Allegiance observes, that there is not enough information available to assess the potential impact of any change in universal service contribution obligations on the sufficiency of universal service.[58]

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[54] *See, e.g., id.* at 47, Joint Comments at 84-85; Comments of Allegiance Telecom, Inc. ("Allegiance Comments") at 69-70.

[55] *See, e.g.,* Comments of the Information Technology Association of America at 40.

[56] Notice ¶ 67.

[57] Comments of the National Cable & Telecommunications Association at 3.

[58] Allegiance Comments at 70.

IV. THE COMMISSION'S CABLE MODEM DECISION DOES NOT DICTATE THE RESULT IN THIS PROCEEDING

The Bells argue that the Cable Modem Decision[59] dictates the definitional issue before the Commission in this proceeding.[60] According to the incumbents, "regulatory parity" *requires* the Commission to "adhere to its conclusion in the *Cable Broadband Declaratory Ruling*."[61] Under this argument, the Commission has no discretion in this proceeding, but is bound by its prior ruling relating to cable operators.

Contrary to these assertions, the Commission has not only the discretion, but the responsibility, to issue a thoughtful and reasoned decision on the issues in this proceeding. As explained below, the Commission should not, under trumped-up notions of regulatory parity, shirk from conducting a proper analysis of the competitive impact of deregulating DSL transport. Even if the Cable Modem Decision had the significance that the Bell Companies assign to it, there are compelling reasons for maintaining the traditional separate treatment of cable and wireline systems. Finally, if the Commission is committed to achieving regulatory parity between these two technologies, it may achieve this goal by deregulating DSL based Internet access without deregulating the underlying DSL transport.

A. "Regulatory Parity" is a Slogan that Cannot Substitute for Careful Competitive Analysis

Under the incumbents' argument, there is no need for the Commission to engage in any thoughtful analysis in this proceeding, since, according the Bells, the Commission has already

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[59] *Inquiry Concerning High-Speed Access to the Internet Over Cable and Other* Facilities, GN Docket No. 00-185, CS Docket No. 02-52, Declaratory Ruling and Notice of Proposed Rulemaking ("Cable Modem Decision").

[60] SBC Comments at 16-17; Verizon Comments at 4; BellSouth Comments at 11-12.

[61] SBC Comments at 4, 16-17; *see also* Verizon Comments at 4. (The Cable Modem Decision is "of decisive importance in these proceedings . . ..")

determined the issue of whether wireline broadband access should be deregulated in the Cable Modem Decision.[62] The cornerstone of this argument is the Bells' assertion of a need for regulatory parity between cable and wireline broadband providers. The incumbents' comments reveal that under their theory the achievement of regulatory parity justifies any means necessary, even the elimination of competition in the wireline market.

The Commission should not and cannot endorse a sweeping reversal of precedent and policy in the name of regulatory parity without any substantive competitive analysis of the effect of such a move on wireline broadband competition. The Bells would have regulatory parity take precedence over the devastating competitive effects that deregulation would bring. As explained throughout these comments, the Commission has a legal and policy mandate, at a minimum, to review and rationalize why regulatory parity justifies crippling wireline competition, the very competition that Congress mandated and this Commission has worked hard to develop.

The Bells choose to ignore the fact that the cable and wireline broadband serve different consumers. Cable primarily serves residential customers and wireline serves small and large businesses. Regulatory treatment of one should not drive the other. In fact, the Cable Modem Decision explicitly chose not to address the role of cable-based broadband services in business markets[63] – the market largely served by wireline providers. Thus, by its own terms, the Commission's decision in the Cable Modem proceeding addressed an entirely different market with its own unique characteristics. To apply the Commission's reasoning in that proceeding to a different market would be nonsensical and irresponsible.

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[62] SBC Comments at 16-17; Verizon Comments at 4; BellSouth Comments at 11-12.

[63] Cable Modem Decision ¶ 1, n. 5.

B. Even if the Cable Modem Decision Had the Significance That the Bells Assign to it, there are Compelling Reasons for Treating Cable and Wireline Differently

In their argument that the Cable Modem Decision should influence the outcome of this proceeding, the Bells fail to acknowledge the regulatory and historical distinctions between cable and wireline services. Indeed, Congress and the Commission have always classified the two systems differently and the Cable Modem Decision should not undermine these differences. Wireline and cable systems developed at different points in time and have always been subject to distinct regulatory regimes based on the disparate statutory schemes governing the two systems. The provision of wireline telephone service has always been classified as common carriage under Title II of the Communications Act of 1934, while regulation of cable services began under the broadcasting umbrella of Title III, and was codified in the Cable Act of 1984 under Title VI of the Communications Act. When Congress overhauled the telecommunications industry in 1996, it did nothing to revise these classifications. As Covad explained, the "Commission therefore cannot wholly abandon this statutory genesis in the name of creating consistent regulation for cable and telecommunications services."[64]

Moreover, the commercial differences between cable and wireline require different regulatory treatment. As the record demonstrates, the telephone network was funded by ratepayer dollars under a governmentally sanctioned monopoly, while the cable broadband network was largely built on at risk capital.[65] Thus, Covad is correct that cable faced very "different risks than telecommunications service providers did."[66] Moreover, statutory and

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[64] Covad Comments at 59.

[65] *Id* at 60.

[66] *Id.*

historical differences, as well as differences in network architecture, ubiquity of facilities coverage and market coverage, fully explain the Congressional requirement that telecommunications and cable services be differently regulated.

Thus, a long history and a reasoned basis support differing regulatory treatment of cable and wireline systems, and nothing in the record demonstrates any legitimate justification for the Commission to converge these regulatory structures.

C. The Commission May Achieve "Regulatory Parity" by Finding that DSL-Based Internet Access is an Unregulated Service Without Deregulating the Underlying DSL Transport

As explained above, the Commission's ruling on the regulatory status of cable modem access does not dictate a particular result in this proceeding. Indeed, the classification of ISP services over cable modem transport as "information services" was consistent with existing regulations. ALTS has always acknowledged and agreed that Internet access service providers provide "information services."[67] Moreover, this classification remains correct regardless of whether the Internet access service provider is using its own facilities or purchasing facilities from a third party.[68] "Nothing about the ultimate source of the transmission facilities changes the nature of the information services provided to the end user."[69] Thus, there is no dispute that the access service piece of the equation should be classified as unregulated information services.

The Cable Modem Decision, however, does not establish the regulatory treatment of the underlying transport that is at issue in this proceeding. The Commission has spoken to ISP services in the Cable Modem Decision, and its analysis is consistent with the proper analysis in

[67] Joint Comments at 57

[68] *Id.* at 58.

the wireline sphere. When an ISP provides Internet access service that bundles DSL transport with enhanced capabilities, that *bundle* is an information service. The DSL transport underlying that service, however, remains a basic telecommunications service.[70] This principle is consistent with the numerous decisions consistently affirming that when a carrier provides broadband transmission on a stand-alone basis, without a broadband Internet access service, it is providing a telecommunications service, and it should affirm that decision here.[71]

Thus, the Commission may achieve regulatory parity between the cable modem and wireline broadband regulator structures. Just as the Commission found in the Cable Modem decision that cable modem Internet access is an unregulated Information Service, the Commission may determine that DSL-Based Internet Access is similarly unregulated. The Commission may achieve this regulatory parity without changing the regulatory treatment of the underlying DSL transport as regulated telecommunications under Title II. Nothing in the Cable Modem Decision requires the Commission to radically shift its regulatory treatment of the transport supporting wireline broadband service. If the Commission is driven by the notion of regulatory parity, it may, and should, accomplish this objective without radically changing the telecommunications industry by deregulating the underlying DSL based transport.

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[69] *Id.*

[70] Covad Comments at 59.

[71] Joint Comments at 58, n. 168.

V. THE RECORD DOES NOT DEMONSTRATE THAT DEREGULATING DSL TRANSPORT SERVICES WOULD PROMOTE COMPETITION

One of the Commission's stated goals in this proceeding is encouraging the ubiquitous availability of broadband to all Americans.[72] Purporting to promote this goal, the Bells ignore the impact of their proposals on wireline competition and focus instead on "intermodal competition." According to the Bells, the Commission's regulatory structure should be driven by pre-selecting them as winners of the wireline broadband competition and allowing them to compete with the cable broadband providers.

As explained below, the evidence demonstrates that the Commission's proposal to deregulate the facilities used to provide wireline broadband access would not promote the availability of broadband, and in fact would seriously threaten the fragile state of competition to provide DSL-based services. As Allegiance Telecom explained, the "Commission would act erroneously and unlawfully if it were to reduce or eliminate regulation of broadband services in the misguided view that this is necessary to promote the availability [of] broadband services to all Americans."[73]

By deregulating wireline broadband services, the Commission would effectively deny competitors nondiscriminatory access to unbundled network elements that are crucial to their continued viability. This could well be fatal for smaller concerns struggling to compete against the incumbents and would threaten to leave the Bells the sole providers of suddenly unregulated DSL-based services. This result would be squarely inconsistent with Congressional mandate that the Commission promote local telecommunications competition, including competition in the

[72] Notice ¶ 3.

[73] Allegiance Comments at 6.

advanced services market. Moreover, the Commission cannot justify dismantling the regulatory structure that has been created to pursue this statutory objective by broad reference to notions of "intermodal competition." That approach lacks the rigorous market analysis – including careful measurement of market power in properly defined markets – necessary to justify the radical regulatory retrenchment that the Bells contemplate. For these reasons, the Commission should reject its proposed and suggested conclusions and affirm its long-standing regulatory framework governing ILECs' obligations.

A. Deregulating Wireline Broadband Facilities Would Effectively Deny Competitors Access to Network Elements that are Critical to the Provision of DSL Service

1. The Bell Companies Envision a Regime in Which They Could Deny Competitors Non-discriminatory Access to DSL Transport and Loops

The Bell comments clearly evidence their intent to escape both their Computer Inquiry and 1996 Act unbundling obligations. According to the incumbents, the advent of cable Internet access has eliminated the "local bottleneck for broadband Internet access," which was the "core basis on which the Computer Inquiry service unbundling requirements were premised."[74] Under this argument, since consumers can use cable internet access as an alternative to DSL, there is no reason to require the Bells to unbundle telecommunications facilities used for broadband as the Commission required in the Computer Inquiry.

The Bells seek to evade their unbundling obligations under the 1996 Act by arguing that when broadband Internet access is classified as an information service rather than a telecommunications service, incumbents will no longer be required to unbundle the network elements used for the provision of wireline broadband because the statute limits the unbundling

[74] SBC Comments at 21; *see also* Verizon Comments at 10-17; BellSouth Comments at 15-18.

obligations to facilities used in the provision of a "telecommunications service."[75] In short, the Bells intend to deny competitors access to UNEs "for the sole purpose of providing a broadband information service."[76] As explained more fully below, those intentions must not be realized

2. Denial of Access to Telecommunications Facilities for Wireline Broadband Would Deal a Severe, Perhaps Fatal, Blow to Competitors That are Already Struggling

Competitors and state regulators have predicated their actions on the Commission's current regulatory framework classifying telecommunications used to provide wireline broadband access as a telecommunications service.[77] If the Commission deregulates the provision of wireline broadband facilities, it would seriously threaten the ability of the few remaining competitors to access the network elements essential to providing a competitive advanced services alternative to the incumbent telephone companies.[78]

The Commission's classification of advanced services as telecommunications services is the key to rules that established ILECs' unbundling, collocation and interconnection obligations. Broadband competitors attracted capital and built their businesses around the concept that wireline competition would be permitted, indeed, encouraged, by the Commission's rules. A key element of these competitors' business plans was the Commission's finding that the telecommunications facilities used for the provision of wireline broadband services are telecommunications services governed by the 1996 Act and the Commission's regulations.

Covad explained the situation that CLECs face:

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[75] SBC Comments at 32, *citing* 47 U.S.C. § 153(29).

[76] *Id.* at 32; *see also* Verizon Comments at 32-33.

[77] *E.g.*, Joint Comments at 28-29; Covad Comments at 18; Ohio Commission Comments at 15.

[78] *See e.g.*, Covad Comments at 18.

> Covad designed its entire business, which currently installs over 15,000 new DSL lines for consumers and businesses every month, around the Commission's existing classification of DSL-based transport as telecommunications service, and the related regulatory requirements associated with that classification.
>
> If the Commission reverses its position on the regulatory classification of DSL transport, it will undermine the competitive regulatory framework that the Commission has created for broadband service. This abrupt about-face will unfairly jeopardize the remaining competitors that have relied on the Commission's longstanding rules implementing the 1996 Act's pro-competitive requirements.[79]

Such a drastic regulatory shift would also seriously undermine the investment community's confidence in the stability of telecommunications regulation, further discouraging investment in this sector.

3. The Commission's Proposed Reversal of Precedent Would, by Regulatory Fiat, Establish the Bells as the Sole Providers of DSL-based Broadband Services.

The Commission's proposed reclassification of wireline broadband services as information services would give Bells the tools to even further dominate the provision of advanced services. The net effect would be a "limited contest among sector monopolies, at least for the most innovative and advanced services."[80] This dueling monopolies approach is diametrically contrary to the letter and spirit of the 1996 Act and will cause a serious blow to consumer welfare.

There is no doubt that monopolies harm consumer welfare. Monopoly stifles innovation, particularly the disruptive innovation that most advances consumer welfare, for the precise reason that consumer welfare is enhanced only at the expense of the monopoly. Competition, on

[79] *Id.* at 24-25.

the other hand, provides consumers with more and rapid innovation coupled with downward pressure on prices.

> Multiple firms trying different strategies are far more likely than a monopoly to produce innovative products. A fundamental underpinning of the 1996 Act is that competition among service providers is the surest means of ensuring the availability to consumers of an array of telecommunications services at reasonable prices. The ILECs' assertion that access to its bottleneck facilities will discourage innovation and deployment has a long pedigree, but it is as unfounded now as it was a twenty years ago.[81]

The record is clear that the Bell Companies currently dominate the provision of wireline advanced service. Indeed, the Commission's own report to Congress concludes that Bells control a staggering 93% of DSL lines in service. Their consistent disregard for Commission regulations requiring them to open the local network to competition, evidenced through numerous forfeiture orders,[82] has only secured their market control. The Bells' history demonstrates that now is not the time to relax regulations. "If this is how the ILECs operate with regulations in place, they will have virtually no incentive to promote competition if they are deregulated through the reclassification of advanced services."[83]

For these reasons, wireline competition is critical if DSL-based services are to be rolled out as efficiently and economically as possible. As AT&T explained, the "evidence

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[80] *Id.* at 13.

[81] Joint Comments at 30 (citation omitted).

[82] Covad Comments at 26-30.

[83] *Id.* at 30.

demonstrates that retaining and strictly enforcing unbundling requirements will therefore yield important consumer benefits in the provision of broadband services."[84]

Rather than examining the market consequences of extinguishing DSL competition, however, the Bells assume it away by citing "intermodal competition." According to the Bells, disparate regulatory treatment of cable and wireline broadband distorts supposed competition between the retail providers of cable and wireline broadband and provides sufficient justification for deregulation.[85] This simplistic and erroneous analysis, however, would ignore the devastating impact of the Commission's proposals on wireline broadband competition, competition that Congress specifically and pointedly directed the Commission to promote.

B. Under the 1996 Act, the Commission Must Promote Wireline Competition

The 1996 Act's primary goal was to replace the local telephone monopoly with robust competition. At the core of this endeavor were the Act's pricing and unbundling requirements in Sections 251 and 252. As the Commission recognized, by opening markets to competitive entry, Congress sought to reduce "inherent economic and operational advantages possessed by incumbents."[86] Furthermore, Congress required that the Commission:

> Encourage the deployment . . . of advanced telecommunications capability . . . by utilizing . . . price cap regulation, regulatory forbearance, *measures that promote competition in the local telecommunications market*, or other regulatory methods that remove barriers to infrastructure investment.[87]

Thus, according to the plain language of the 1996 Act, the Commission must promote wireline competition. Paradoxically, the Bells rely on the policy of Section 706 to promote advanced

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[84] AT&T Comments at 75.

[85] Verizon Comments at 19.

[86] *Advanced Services Order* ¶¶ 21-22.

services competition, but ignore that Section's focus on wireline competition, leaping instead to the notion that "intermodal competition" should be the policy focus.

The evidence of the last ten years demonstrates the link between the Commission's classification of DSL-based transport as a telecommunications service – and the unbundling obligations for these services – and competitive broadband deployment. The emergence of DSL-based broadband, and in particular the Bell Companies' belated deployment of DSL, are direct results of the competitive pressure that entrepreneurs put on the incumbent telephone companies.[88] The Bells had DSL technology for decades but chose not to deploy it until competitors, operating under the Commission's local competition rules, forced them to start providing DSL-based service as an alternative to the more expensive T-1 option. Once they began to deploy DSL facilities, the Bells used their control over the local network to virtually corner the market despite the Commission's unbundling, collocation and interconnection rules.[89] As Cbeyond explained,

> Regardless of selected pronouncements from ILECs' regulatory spokespersons, their actions reveal that regulatory obligations have not inhibited their investment in broadband infrastructure and deployment of broadband services.[90]

Thus, through the deregulation they now propose the Bells seek not to deploy DSL facilities – they have already done that – but to eliminate whatever DSL-based competition remains to challenge them.[91]

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[87] 47 U.S.C. § 157 nt. (emphasis added).

[88] Covad Comments at 5-6, 14-16.

[89] Cbeyond Comments at 9.

[90] *Id.* at 9.

[91] *See* Covad Comments at 36.

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