

**BEFORE THE  
FEDERAL COMMUNICATIONS COMMISSION  
WASHINGTON, D.C. 20554**

In the Matter of	)	
	)	
BellSouth Telecommunications, Inc. Request for	)	
Declaratory Ruling that State Commissions	)	
May Not Regulate Broadband Internet Access	)	WC Docket No. 03-251
Services by Requiring BellSouth To Provide	)	
Wholesale or Retail Broadband Services to CLEC	)	
UNE Voice Customers	)	

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## INTRODUCTION AND SUMMARY

The Commission should act promptly to declare all state commission rulings that require ILECs to provide DSL service – either broadband transmission service or high-speed Internet access – to CLEC voice customers preempted by the Commission’s *Triennial Review Order*<sup>1</sup> and beyond the scope of state commission jurisdiction.

I. The Commission has the authority (and the obligation), under the 1996 Act, to determine the scope of incumbent LECs’ obligations to provide unbundled network elements to competitors. In making those judgments, *limitations* on ILECs’ unbundling obligations are just as important as the affirmative obligations themselves; excessive sharing between rivals can deaden competition and impair investment incentives. For this reason, the Commission has explicitly affirmed that a state commission rule that requires unbundling of an element that the Commission has determined should not be unbundled will almost inevitably “conflict with and ‘substantially prevent’ implementation of the federal regime” and therefore be preempted. *Triennial Review Order*, 18 FCC Rcd at 17101, ¶ 195.

More broadly, under ordinary conflict preemption principles – which remain applicable under the saving clause in section 251(d)(3) – any state commission requirement that would stand as an obstacle to the accomplishment of federal policy must give way.

A. Requiring an ILEC to provide service over a loop that a CLEC has leased is directly in conflict with the FCC’s unanimous determination that ILECs would *not* be required to provide the low frequency portion of the loop as a separate UNE. *See Triennial Review Order*, 18 FCC Rcd at 17141, ¶ 270. Indeed, the parties that urged the Commission to adopt such a

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<sup>1</sup> Report and Order and Order on Remand and Further Notice of Proposed Rulemaking, *Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*, 18 FCC Rcd 16978 (2003) (“*Triennial Review Order*”) (subsequent history omitted).

requirement did so expressly on the theory that ILECs would, as a result, be required to provide DSL on the same line that CLECs used to provide voice service. The Commission squarely rejected their argument. By requiring an ILEC to continue to provide DSL service over an unbundled loop that has been leased to a CLEC, state commissions effectively impose the same unbundling obligation that the Commission specifically rejected in the *Triennial Review Order*.

**B.** The state commission rulings at issue conflict with the Commission’s determination that imposing a duty on ILECs to provide services in conjunction with a CLEC is *harmful* to competition. Before the Commission, CLECs argued – just as the state commissions found here – that they were placed at a disadvantage because ILECs “tied” their voice service to DSL service. They argued that, if ILECs were required to unbundle the low frequency portion of the loop alone, ILECs could thereby be required to continue to provide DSL service to CLEC voice customers.

The Commission flatly rejected that argument. It specifically held that ILECs have no unfair advantage over CLEC competitors, since CLECs are able “to take full advantage of an unbundled loop’s capabilities” by providing broadband service independently or “by partnering with a second competitive LEC that will offer [DSL] service.” *Id.* Moreover, in a closely related context, the Commission refused to reimpose its prior requirement that ILECs engage in line-sharing – that is, an arrangement in which a competitive provider of broadband service is able to gain unbundled access to the *high* frequency portion of a loop over which the ILEC provides voice service. The Commission found that imposing such an obligation would harm competition and consumers because it would discourage CLECs from developing their own “bundled voice and [DSL] service offering” to compete with ILECs’ offerings. *Id.* at 17135, ¶ 261. This in turn would “discourage innovative arrangements between voice and data competitive LECs and

greater product differentiation between the incumbent LECs' and the competitive LECs' offerings. *We find that such results would run counter to the statute's express goal of encouraging competition and innovation in all telecommunications markets.*" *Id.* (emphasis added).

That conclusion applies here *a fortiori*, because the duty that state commissions have imposed eliminates incentives for voice providers to develop competing alternatives to ILEC broadband service. Moreover, requiring ILECs to share their ability to provide DSL service with rivals dampens ILECs' incentives to deploy those services more broadly. These policies are thus inconsistent not only with the terms of the *Triennial Review Order* but also with the fundamental federal policy reflected in section 706.

**II.** In addition to the fact that the state commission rulings here are in conflict with federal law, the state commissions would have no authority to regulate the terms and conditions under which ILECs provide interstate DSL service. State commissions have no power under state law to regulate the provision of a jurisdictionally interstate service. Moreover, BellSouth provides DSL transmission service to ISPs under a federal tariff that restricts provision of service to telephone lines over which BellSouth provides voice service. States have no power to vary the terms of a federal tariff.

## **DISCUSSION**

In its Emergency Request for Declaratory Ruling, BellSouth offers three reasons that state commission rulings requiring it to provide DSL service to CLEC voice customers are contrary to federal law. First, those rulings are preempted by the *Triennial Review Order*. Second, to the extent these rulings require BellSouth to provide its broadband Internet access service – as opposed to broadband transmission service alone – to CLEC voice customers, they

constitute regulation of enhanced services in violation of federal law. Third, state commissions lack authority to regulate the terms and conditions under which carriers provide interstate services. Verizon agrees with each of these points. These comments focus on the first and third.

Verizon urges the Commission to act with all possible speed on BellSouth's petition. Verizon itself provides service as an ILEC to millions of customers in Florida, and may be required to litigate this issue before the Florida PSC. CLECs in other states where Verizon provides service – including Maryland – have raised this issue in arbitration proceedings before state commissions that have not yet ruled. Any uncertainty about the preemptive effect of the Commission's rules in this area encourages litigation and undermines investment incentives for the entire industry. More broadly, as explained below, the state commission rulings at issue present a conflict with the rules and policy judgments in the *Triennial Review Order*. By acting quickly in this context, the Commission can reaffirm the supremacy of the federal rules it has adopted and help to forestall efforts outside of this specific context to undermine the pro-competitive and pro-investment, binding *limitations* on mandatory unbundling obligations that the Commission has adopted.

Fast action is especially critical because the state commission decisions at issue strike at the heart of the Commission's policy in favor of promoting investment in broadband facilities by ILECs and CLECs alike. As described below, state commissions seem to believe that by saddling ILEC providers of broadband service with additional regulatory obligations, they may be able to assist voice-only CLECs. Even if this were true – and the Commission has determined that it is not – it is a policy preference that stands in direct conflict with the Commission's judgment: by leaving broadband service free of sharing obligation, the Commission helps to promote investment and competition. The states must not be permitted to undermine that policy.

**I. THE TRIENNIAL REVIEW ORDER PREEMPTS STATE REQUIREMENTS THAT FORCE ILECS TO PROVIDE DSL SERVICE TO CLEC VOICE CUSTOMERS**

Under section 251(d)(2) of the Act, Congress has delegated to the Commission responsibility for “determining which network elements should be made available” to competing carriers under section 251(c)(3). In doing so, the Commission is required to determine whether lack of access to any such elements would impair the ability of competing telecommunications carriers to provide the services that they seek to offer. As the D.C. Circuit has explained, because unbundling rules impose significant costs on society, Congress did not authorize the Commission simply to assume that “more unbundling is better.” *United States Telecom Ass’n v. FCC*, 290 F.3d 415, 425 (D.C. Cir. 2002) (“*USTA*”), *cert. denied*, 123 S. Ct. 1571 (2003); *see also id.* at 429. Rather, the Commission was required to recognize that “[e]ach unbundling of an element imposes costs of its own, spreading the disincentive to invest in innovation and creating complex issues of managing shared facilities.” *Id.* at 427. Imposition of excessive duties of cooperation that would “undermine the incentives of both incumbent LECs and new entrants to invest in new facilities and deploy new technology.” *Triennial Review Order*, 18 FCC Rcd at 16984, ¶ 3. Or, as the Supreme Court recently put it, “[c]ompelling . . . firms to share the source of their advantage . . . may lessen the incentive for the monopolist, the rival, or both to invest in those economically beneficial facilities.” *Verizon Communications Inc. v. Law Offices of Curtis V. Trinko, LLP*, No. 02-682, 2004 WL 51011, at \*6 (U.S. Jan. 13, 2004).

For this reason, *limitations* on ILECs’ unbundling obligations are just as critical to the promotion of the 1996 Act’s purposes as the affirmative unbundling obligations themselves. The Commission has therefore made clear that, in circumstances where the Commission has ruled that a particular element should not be unbundled, a state commission decision ordering unbundling under state law would almost invariably “conflict with and ‘substantially prevent’

implementation of the federal regime” and therefore be preempted under the express terms of section 251(d)(3)(C). *Triennial Review Order*, 18 FCC Rcd at 17101, ¶ 195.

More broadly, as a matter of general preemption principle, whenever a state requirement would stand “as an obstacle to the accomplishment and execution of” . . . federal objectives,” that state-law requirement is preempted. *Geier v. American Honda Motor Co.*, 529 U.S. 861, 881-82 (2000) (quoting *Hines v. Davidowitz*, 312 U.S. 52, 67 (1941)). This conflict preemption analysis applies to Commission regulations just as it does to statutory provisions. *See City of New York v. FCC*, 486 U.S. 57, 64 (1988) (“The statutorily authorized regulations of [a federal] agency will pre-empt any state or local law that conflicts with such regulations or frustrates the purposes thereof.”). And the analysis applies in the presence of a statutory saving clause, such as section 251(d)(3). *See Geier*, 529 U.S. at 869 (despite statutory saving clause, Court would apply “ordinary pre-emption principles insofar as those principles instruct us to read statutes as pre-empting state laws . . . that ‘actually conflict’ with the statute or federal standards promulgated thereunder”); *see also* 47 U.S.C. § 251(d)(3) (state rules are preserved only where they are “consistent with the requirements” of section 251 and would not “substantially prevent implementation of the requirements of this section and the purposes of this part”). Accordingly, where a state order rests on a rationale that is inconsistent with the Commission’s judgment concerning the best way to regulate competition in local telecommunications markets, the state requirement is preempted.

**A. Requiring an ILEC To Provide DSL Service Over Unbundled Loops Conflicts with the Commission’s Rule Rejecting Unbundling of the Low Frequency Portion of the Loop**

In the *Triennial Review Order*, the Commission specifically rejected the argument, made by CompTel, that the Commission “should separately unbundle the low frequency portion of the loop, which is the portion of the copper local loop used to transmit voice signals.” *Triennial*

*Review Order*, 18 FCC Rcd at 17141, ¶ 270. CompTel complained that incumbents “have tied their local voice services with their []DSL products. As a result, a customer that wishes to obtain []DSL service from the ILEC while obtaining local voice service from a competing carrier often is rejected by the ILEC.” Comments of the Competitive Telecommunications Association, *Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*, CC Docket Nos. 01-338, *et al.*, at 43 (FCC filed Apr. 5, 2002). CompTel therefore argued that, in addition to unbundling the entire copper loop, ILECs should be required to unbundle “the low frequency portion of the loop” (*id.* at 44) – *i.e.*, provide access only to that portion of the frequency spectrum required for the provision of voice service. In this way, CompTel argued, the FCC could require “the ILEC to continue providing []DSL services over the upper frequency portion of the loop” that a CLEC leased to provide voice service. *Id.* In other words, the explicit purpose of the rule that CompTel proposed was to require ILECs to provide DSL service over CLEC’s leased loops.

The Commission rejected this approach. Instead, under the Commission’s rules, any carrier that wishes to provide voice service over an unbundled loop (whether provided on a stand-alone basis or as part of a UNE platform) gains access to the entire loop, and is then free to provide whatever services it chooses to provide.<sup>2</sup> To the extent that a state commission requires

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<sup>2</sup> Indeed, this rule has been in place since the Commission compiled its first list of unbundled network elements. *See* First Report and Order, *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, 11 FCC Rcd 15499, 15689, ¶ 377, 15691, ¶ 380 (1996) (“*Local Competition Order*”). The Commission specifically defined the local loop element as the *actual copper wire*, not some part or all of the usable bandwidth within it. *Id.* at 15693, ¶ 385. A CLEC that leases a local loop acquires “exclusive control over network facilities dedicated to particular end users.” The FCC adopted this rule to “provide[] such carriers the maximum flexibility to offer new services to such end users.” *Id.*; *see also id.* at 15635-36, ¶ 268 (“a telecommunications carrier purchasing access to an unbundled network facility is entitled to exclusive use of that facility”); 47 C.F.R. § 51.319(a)(1) (FCC regulation

an incumbent LEC to provide DSL service over a loop that has been provided to a CLEC on an unbundled basis – and at least three of the four decisions at issue here appear to do so<sup>3</sup> – they require exactly what the Commission declined to require and therefore conflict directly with the Commission’s rule. In this regard, it makes no difference whether state commissions describe their decisions as involving unbundling of the low frequency portion of the loop or requiring ILECs to continue to provide DSL service over an unbundled loop. Regardless of the nomenclature, the result is the same – the ILEC is forced to provide its DSL service on a CLEC UNE loop, which is precisely what CompTel asked for and the Commission rejected. Thus, that result is contrary to the Commission’s rules, which make the CLEC responsible for “tak[ing] full advantage of an unbundled loop’s capabilities.” *Triennial Review Order*, 18 FCC Rcd at 17141, ¶ 270. Because the obligation imposed by the state commissions is directly at odds with the Commission’s unbundling regime, it is preempted.

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providing that “[t]he local loop network element includes all features, functions, and capabilities of such transmission facility”).

<sup>3</sup> See Order, *Petition of Cinergy Communications Company for Arbitration of an Interconnection Agreement with BellSouth Telecommunications, Inc. Pursuant to U.S.C. Section 252*, Case No. 2001-00432, at 4 (Ky. P.S.C. Oct. 15, 2002) (requiring BellSouth to provide DSL service over UNE loop); Order on Complaint, *Petition of MCI Metro Access Transmission Services, LLC and MCI WorldCom Communications, Inc. for Arbitration of Certain Terms and Conditions of Proposed Agreement with BellSouth Telecommunications, Inc. Concerning Interconnection and Resale Under the Telecommunications Act of 1996*, Docket No. 11901-U, at 1, 19 (Ga. P.S.C. Oct. 21, 2003) (“*Georgia Order*”) (same); Clarification Order R-26173-A, *BellSouth’s Provision of ADSL Service to End-Users Over CLEC Loops – Pursuant to the Commission’s Directive in Order U-22252-E*, Docket R-26173, at 16 (La. P.S.C. Apr. 4, 2003) . The Florida Commission has apparently not resolved the question whether BellSouth can be required to provide DSL service over an unbundled local loop. See Order Resolving Parties’ Disputed Language, *Petition by Florida Digital Network, Inc. for Arbitration of Certain Terms and Conditions of Proposed Interconnection and Resale Agreement with BellSouth Telecommunications, Inc. Under the Telecommunications Act of 1996*, Docket No. 010098-TP, Order No. PSC-03-0395-FOF-TP, at 15 (Fla. P.S.C. Mar. 21, 2003).

**B. Requiring ILECs To Provide DSL Service to CLEC Voice Customers Conflicts with the Commission’s Competition Policy Judgment and Would Frustrate the Federal Scheme**

The type of affirmative obligation that all of the state commissions have imposed in the orders at issue is at odds with the Commission’s policy judgment that requiring ILECs to provide service to CLEC customers – whether over the same line or not – harms rather than benefits, competition.

As an initial matter, there can be no dispute that each of the state commission decisions at issue squarely rests on the faulty premise that CLECs are placed at a disadvantage in the local *voice* market because they have not developed the same capability as BellSouth to offer *broadband* service to mass market customers. Thus, the Georgia PSC presumed that it “would inhibit local voice competition for BellSouth to gain advantage over its current competitors in the local voice market” simply because it “lead[s] the pack in investment in a DSL network.” *Georgia Order* at 18. The Florida PSC opined that BellSouth’s policy of offering DSL service only over loops that it also uses to provide its own voice service “raises a competitive barrier in the *voice* market for carriers that are *unable to provide DSL service*.”<sup>4</sup> The Louisiana Commission likewise claimed that “BellSouth’s policy of refusing to provide its DSL service over CLEC voice loops is clearly at odds with the [Louisiana] Commission’s policy to encourage competition.”<sup>5</sup> And the Kentucky PSC premised its ruling on a similar assumption.<sup>6</sup> Moreover,

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<sup>4</sup> See Final Order on Arbitration, *Petition by Florida Digital Network, Inc. for Arbitration of Certain Terms and Conditions of Proposed Interconnection and Resale Agreement with BellSouth Telecommunications, Inc. Under the Telecommunications Act of 1996*, Docket No. 010098-TP, Order No. PSC-02-0765-FOF-TP, at 9 (Fla. P.S.C. June 5, 2002) (emphasis added).

<sup>5</sup> Order R-26173, *BellSouth’s Provision of ADSL Service to End-Users Over CLEC Loops – Pursuant to the Commission’s Directive in Order U-22252-E*, Docket R-26173, at 5 (La. P.S.C. Jan. 24, 2003) (“*Louisiana Order R-26173*”).

<sup>6</sup> Order, *Petition of Cinergy Communications Company for Arbitration of an Interconnection Agreement with BellSouth Telecommunications, Inc. Pursuant to U.S.C. Section 252*, Case No.

the commissions rejected the economic principle that requiring BellSouth to provide DSL service to CLEC voice customers would impede competition in the DSL market.<sup>7</sup>

The Commission has reached opposite conclusions. As noted above, in the *Triennial Review Order* proceeding, CompTel directly asked the Commission to require ILECs to unbundle the low-frequency portion of the copper loop to permit CLECs to provide only voice service over a local loop, with the ILEC required to continue to offer DSL service over the same loop. See CompTel Comments at 43; see also *Triennial Review Order*, 18 FCC Rcd at 17134, ¶ 259 (noting that “some [I]LECs have . . . refused to provide [D]DSL service to customers that obtain voice service from a competitive LEC”). The Commission rejected CompTel’s request, concluding that “unbundling the low frequency portion of the loop *is not necessary*” to promote competition. *Id.* at 17141, ¶ 270 (emphasis added). It explained that there is no impediment to competition once competitors have the ability, as they do, to lease the entire loop and make both voice and DSL service available over that loop, either alone or in combination with another firm: they can “take full advantage of an unbundled loop’s capabilities by partnering with a second competitive LEC that will offer [D]DSL service.” *Id.* Notably, one competitive provider of broadband service has announced numerous business deals to provide DSL service over CLECs’ leased loops.<sup>8</sup> Moreover, there is no reason that CLECs cannot enter into partnerships with *other* providers of broadband service – most obviously, cable modem providers – to offer a bundle of

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2001-00432, at 8 (July 12, 2002) (BellSouth’s policy would “result in fewer viable CLECs, and thus fewer customer options” in the voice market).

<sup>7</sup> See, e.g., *Georgia Order* at 19; *Louisiana Order R-26173*, at 5.

<sup>8</sup> See *Triennial Review Order*, 18 FCC Rcd at 17134, ¶ 259; Paul Davidson, *AT&T Will Bundle Broadband with Phone Service Plan to Rival Regional Bells*, USA Today, July 30, 2003, at B3 (quoting Covad CEO Charles Hoffman); Reuters, *MCI and Covad Sign Voice/Data Bundling Deal*, Sept. 2, 2003; Press Release, Covad, *VarTec and Excel Select Covad DSL for Their Local/Long Distance Voice and Data Bundles*, Aug. 28, 2003; Kevin Fitchard, *Covad Signs Line-Splitting Deal with Z-Tel*, TelephonyOnline.com, Aug. 7, 2003.

voice and data services in competition with the ILEC. Accordingly, the Commission correctly rejected the claim that voice CLECs are impaired without the ability to offer their service in conjunction with ILEC DSL service. *See id.*

Moreover, the Commission explained that imposition of the type of obligation that the state commissions have embraced here would undermine development of local competition and therefore frustrate federal policy. The FCC held that requiring ILECs to continue to provide voice service in conjunction with a competitors DSL service “may skew competitive LECs’ incentives” and thus discourage development of “bundled voice and [D]DSL service offering[s].” *Triennial Review Order*, 18 FCC Rcd at 17135, ¶ 261. “[S]uch results would run counter to the . . . goal of encouraging competition and innovation.” *Id.*; *see also USTA*, 290 F.3d at 424-25 (noting disincentives to investment from forced sharing).

That analysis applies no matter which half of the loop a CLEC wants in isolation: the DSL half (for “line sharing”) or the voice half (as here). Once the entire loop is available for the CLEC to use, by itself or in conjunction with another provider, any right to lease only half the loop harms competition by relieving the CLEC of the incentive to develop voice and DSL arrangements that compete in *both* respects with the incumbent.<sup>9</sup> Giving CLECs the benefit of ILEC DSL capabilities “could have the unintended effect of blunting innovation because such an approach would largely lock [CLECs] to the technological choices of the incumbent LECs.” *Triennial Review Order*, 18 FCC Rcd at 17153, ¶ 295. By contrast, refusing to impose such unbundling would unleash a “race to build next generation networks” leading to “increased competition in the delivery of broadband services” from which “consumers will benefit.” *Id.* at

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<sup>9</sup> In this regard, the Commission also reaffirmed that incumbent LECs must “facilitate line splitting” – that is, must make it possible for two competitive carriers voluntarily to share the same line, with one carrier providing voice service and the other providing data service. *Triennial Review Order*, 18 FCC Rcd at 17130-31, ¶ 252; *see also id.* at 17134, ¶ 259.

17141-42, ¶ 272. In forcing BellSouth to provide DSL service in conjunction with a CLEC's voice service – whether over the same loop or not – state commissions discourage CLECs from developing alternatives to BellSouth's DSL service.<sup>10</sup>

The Commission has determined as well that “[t]he effect of unbundling on investment incentives is *particularly critical in the area of broadband deployment*” in light of “the goals of, and our obligations under, section 706 of the 1996 Act.” *Id.* at 16984, ¶ 3 (emphasis added), 17125-26, ¶ 242. “[T]he upgrade to the transmission path (the loop)” to give the loop broadband capabilities is a “costly, complex, and risky endeavor.” *Id.* at 17126, ¶ 243. “[ILECs] are unlikely to make the enormous investment required if their competitors can share in the benefits of these facilities without participating in the risk.” *Id.* at 16984, ¶ 3. That conclusion applies in this context. By forcing an ILEC to offer its DSL service in conjunction with a CLEC's voice service, state commissions discourage ILECs from deploying DSL service more broadly, knowing that whatever benefit they may earn from their investment will have to be shared with competitors.

In sum, (1) *CLECs are able to provide DSL service* independently or in conjunction with a willing partner (which means they could not be impaired in their ability to provide voice service without access to ILEC DSL); (2) requiring ILECs to provide DSL service in conjunction with CLEC voice service *discourages CLECs from developing competitive alternatives* to ILEC

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<sup>10</sup> It is true that two Commissioners dissented from the determination to phase out line sharing. But state commission determinations at issue here are just as inconsistent with the dissenters' reasoning. The dissenters suggested that continuation of line sharing would promote development of competitive DSL services that would help to push *ILECs* to deploy more advanced facilities that they would not have to share. *See* Separate Statement of Chairman Michael K. Powell Dissenting in Part, at 2, *Triennial Review Order*; Separate Statement of Commissioner Kathleen Q. Abernathy Dissenting in Part, at 9, *Triennial Review Order* (disagreeing with decision to eliminate line sharing but calling it “a close call”). No Commissioner expressed any concern that refusing to force incumbents *to provide DSL service to CLEC voice customers* would impair competition in the market for voice service.

DSL service; and (3) requiring ILECs to provide DSL service in conjunction with CLEC voice service *undermines ILECs' incentives to invest in widespread deployment of broadband service*. The state commission determinations at issue here, therefore, are squarely at odds with this Commission's policy determinations and therefore undermine clearly articulated federal policy and frustrate the federal scheme. They are preempted.

## II. STATE COMMISSIONS LACK JURISDICTION TO REGULATE INTERSTATE SERVICES

The Commission need not consider any additional issues regarding the scope of state commission *jurisdiction* over DSL service (transmission services or Internet access services). Nevertheless, if the Commission does go further, it should grant BellSouth relief on the ground that state commissions have no power under state law to regulate jurisdictionally interstate services, particularly when such services are already subject to a tariff filed with the Commission.

The Commission has squarely held – in a case that involved Verizon's interstate tariff – that the services at issue here are interstate. In its *GTE Tariff Order*,<sup>11</sup> the Commission concluded that Internet communications are predominantly interstate. 13 FCC Rcd at 22476, ¶ 19. Accordingly, the FCC concluded that DSL transmission for Internet access is an interstate service subject to “*federal regulation*.” 13 FCC Rcd at 22480, ¶ 25 (emphasis added).

Because this service is interstate, it is not subject to regulation by state commissions at all. Indeed, the Commission has consistently recognized that the Communications Act grants it *exclusive* jurisdiction to regulate interstate communications services. See Memorandum Opinion and Order on Reconsideration, *Chesapeake and Potomac Tel. Co.*, 2 FCC Rcd 3528, 3530, ¶ 21

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<sup>11</sup> Memorandum Opinion and Order, *GTE Telephone Operating Cos.; GTOC Tariff No. 1; GTOC Transmittal No. 1148*, 13 FCC Rcd 22466 (1998) (“*GTE Tariff Order*”).

(1987) (“The Communications Act occupies the field of interstate communications rate regulation.”), *vacated as moot on other grounds*, 3 FCC Rcd 748 (1988); Memorandum Opinion and Order, *Petitions of MCI Telecomms. & GTE Sprint*, 1 FCC Rcd 270, 275, ¶ 23 (1986) (noting the FCC’s “exclusive jurisdiction over interstate communications”). For the states to regulate the interstate services at issue here is not merely in conflict with existing federal rules; it is simply beyond the states’ power. *See also Schneidewind v. ANR Pipeline Co.*, 485 U.S. 293, 306 (1988) (state regulation of issuance of securities by natural gas companies “is a regulation of the rates and facilities . . . used in transportation and sale for resale of natural gas in interstate commerce” and therefore preempted).

The Commission’s view on this matter is correct. Indeed, the proposition that the several states lack authority to regulate interstate services was established by *Wabash, St. Louis & Pacific Railway v. Illinois*, 118 U.S. 557 (1886), and has never been questioned. In *Smith v. Illinois Bell Tel. Co.*, 282 U.S. 133 (1930), where the Supreme Court ruled that intrastate rates must be based exclusively on the value of property employed in the intrastate business, it predicated its holding on the proposition that “interstate tolls are the rates applicable to interstate commerce, and neither these interstate rates nor the division of the revenue arising from interstate rates [is] a matter for the determination . . . of the [states].” *Id.* at 148. That limitation on state authority “is essential to the appropriate recognition of the competent governmental authority in each field of regulation.” *National Ass’n of Regulatory Util. Comm’rs v. FCC*, 737 F.2d 1095, 1111 (D.C. Cir. 1984) (quoting *Smith*, 282 U.S. at 148) (emphasis omitted). *See also Crockett Tel. Co. v. FCC*, 963 F.2d 1564, 1566 (D.C. Cir. 1992) (“The FCC has exclusive jurisdiction to regulate interstate common carrier services.”); *New England Tel. & Tel. Co. v. AT&T Communications, Inc.*, 623 F. Supp. 1231, 1234 (D. Me. 1985) (“It is well settled that the

FCC has exclusive jurisdiction over rates and charges for interstate service.”); *United States v. Public Utils. Comm’n*, 345 U.S. 295, 303 (1953) (“[T]he Commerce Clause forb[ids] state regulation of some utility rates.”).<sup>12</sup>

## CONCLUSION

The Commission should declare that state commission decisions requiring ILECs to provide DSL service to CLEC voice customers are preempted and beyond state commission jurisdiction.

Respectfully submitted,



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<sup>12</sup> The application of that principle here is particularly clear because the underlying DSL transmission services at issue are provided under federal tariff. As is the case with BellSouth, the terms and conditions of Verizon’s provision of DSL transmission service are set out in Verizon’s federal tariff. Accordingly, Verizon cannot provide service (and cannot be ordered to provide service) except in accordance with the tariff. *See Telecom Int’l Am. Ltd. v. AT&T Corp.*, 280 F.3d 175, 193 (2d Cir. 2001) (quoting *Arkansas La. Gas Co. v. Hall*, 453 U.S. 571, 577 (1981)). The binding terms of the tariff “include both monetary and non-monetary terms . . . , including the quality and the type of services.” *Id.* at 195 (citing *AT&T Co. v. Central Office Tel., Inc.*, 524 U.S. 214, 224 (1998)). State commissions simply lack the authority to add any requirements for the provision of an interstate service that are not contained in an interstate tariff. That is particularly clear here, because, among other terms and conditions, Verizon’s DSL transmission tariff specifies that Verizon provides that service only in conjunction with Verizon’s own voice service. *See Communications Services Tariff, Verizon Telephone Companies*, Tariff FCC No. 20, § 5.1.2.D, F, at 5-690, 5-691.