

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

In the Matter of	)	
	)	
IP – Enabled Services	)	WC Docket No. 04-36
	)	
Petition of SBC Communications Inc. For Forbearance	)	WC Docket No. 04-29
_____	)	

**REPLY COMMENTS OF THE UNITED STATES TELECOM ASSOCIATION**

UNITED STATES TELECOM ASSOCIATION

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**TABLE OF CONTENTS**

SUMMARY ..... i

DISCUSSION..... 1

I. ILECS ARE NOT DOMINANT PROVIDERS OF BROADBAND OR IP-ENABLED SERVICES AND DO NOT HAVE MARKET POWER FOR THESE SERVICES..... 1

    A. Cable Modem Providers Are the Leaders in Providing Broadband Access, Having Captured Well Over Half of High-Speed Access Customers. .... 2

    B. Intermodal Competition for Broadband Access Services Exists and Is Growing. .... 4

    C. There Is No Dominant Provider of IP-Enabled Services, Including VoIP, and There Is Rapidly Expanding Competition for IP-Enabled Services, Supplied By a Plethora of Companies. .... 7

II. WITHOUT DOMINANCE IN BROADBAND ACCESS OR IP-ENABLED SERVICES, THERE IS NO NEED TO REGULATE ILECS, OR ANYONE ELSE, ON AN ECONOMIC BASIS..... 10

    A. Economic Regulations and Unbundling Obligations Are Not Necessary. ... 10

    B. ILECs Do Not Hinder Customers From Using Their Broadband Networks To Access Competitive IP-Enabled Services, Including VoIP..... 12

III. IP-ENABLED SERVICES AND BROADBAND ACCESS ARE INTERSTATE IN NATURE. .... 14

IV. UNTIL THE CURRENT INTERCARRIER COMPENSATION REGIME IS REVISED OTHERWISE, ACCESS CHARGES MUST APPLY WHEN TRAFFIC TOUCHES THE PSTN. .... 15

CONCLUSION..... 16

## SUMMARY

The purpose of this proceeding is for the Commission to evaluate whether and how it should regulate the IP-enabled services, including voice services, that ride over an IP network. USTA urges the Commission to refrain from imposing any regulations, other than the important social obligations – maintaining universal service, ensuring law enforcement authorities can meet public safety needs, providing all Americans with access to 911 services, facilitating for disabled citizens the opportunity to use communications networks, and complying with other consumer protection measures – discussed in its earlier comments, on IP-enabled services.

There is robust and growing competition for IP-enabled services. Such competition warrants against economic regulation of these services. Despite claims by several commenters that regulation is necessary because there is a lack of competition in the underlying broadband facilities over which such services ride, this is simply not the case. Not only is there significant intermodal competition for broadband access services, but ILECs are not dominant providers of broadband access services and do not have the ability to leverage their provision of broadband access into market power over IP-enabled services. Further, it is clear that a provider of IP-enabled services need not also provide the underlying broadband access in order to be competitive. While there is no reason to impose economic regulation on IP-enabled services or on broadband access services, there are important reasons to refrain from such regulation. The “hands-off” regulatory approach adopted to date has led to rapid technological and commercial development of this nation. Recognizing the competitive status of the IP-enabled services and broadband access services and allowing providers of such services to operate under market rules, rather than subjecting them to economic regulation as if competition does not exist, will foster

economic growth and job creation, both of which are vital factors in the continuing advance of the American economy.

Finally, USTA reiterates its previous comments that the Commission should find that IP-enabled and broadband access services are interstate in nature and that access charges should continue to apply to any voice over Internet Protocol traffic that touches the public switched telephone network.

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The United States Telecom Association (USTA)<sup>1</sup> submits its reply comments through the undersigned and pursuant to the Federal Communications Commission’s (FCC’s or Commission’s) Notice of Proposed Rulemaking (NPRM) and SBC Communications Inc.’s Forbearance Petition (SBC Petition) in the above-referenced dockets.

**DISCUSSION**

**I. ILECS ARE NOT DOMINANT PROVIDERS OF BROADBAND OR IP-ENABLED SERVICES AND DO NOT HAVE MARKET POWER FOR THESE SERVICES.**

The majority of commenters in this proceeding do not advocate regulation of providers of Internet Protocol (IP)-enabled services, or even continued economic regulation of incumbent local exchange carriers (ILECs) when they are providing IP-enabled services, recognizing that there is no dominant provider of IP-enabled services, including VoIP services, and that there is intense competition for IP-enabled services. However, a few commenters – notably AT&T and MCI – disagree. They claim that ILECs providing VoIP and other IP-enabled services should

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<sup>1</sup> USTA is the nation’s oldest trade organization for the local exchange carrier industry. USTA’s carrier members provide a full array of voice, data, and video services over wireline and wireless networks.

continue to be regulated, arguing that there is a lack of competition in the physical transmission layer of the broadband communications network and that ILECs have market power in that layer.<sup>2</sup> AT&T and MCI's conclusions about their layering approach, particularly their conclusions about the physical transmission layer,<sup>3</sup> are simply incorrect.

**A. Cable Modem Providers Are the Leaders in Providing Broadband Access, Having Captured Well Over Half of High-Speed Access Customers.**

Even though the primary focus of this proceeding is about the competitive status of IP-enabled services, such as VoIP, several commenters have focused their attention on the broadband facilities over which IP-enabled and VoIP services ride. Accordingly, it is important for the Commission to recognize for purposes here – and also when considering the *Wireline Broadband* and *Broadband Non-Dominance* dockets<sup>4</sup> – that broadband access services are competitive and that ILECs are not the dominant providers of broadband access services. The Commission's December 2003 High-Speed Services Report makes clear that cable modem

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<sup>2</sup> See MCI Comments at 11-13 and AT&T Comments at 16-17, 53.

<sup>3</sup> See also *IP-Enabled Services; Appropriate Framework for Broadband Access to the Internet over Wireline Facilities; Review of Regulatory Requirements for Incumbent LEC Broadband Telecommunications Services; Developing a Unified Intercarrier Compensation Regime; Federal-State Joint Board on Universal Service*, MCI Written Ex Parte Presentation "Adapting FCC Policymaking to the Network Layers Model: A Roadmap for FCC Action," (Mar. 29, 2004). MCI claims that in "an IP-based environment, the proliferation and survival of innovative applications, services, and content depend on the ability of those providers to obtain access to lower layers, including the physical and logical layers." *Id.*, p.7. However, they inaccurately maintain that "certain firms continue to exercise bottleneck control over the last-mile physical and logical links needed for access to end-user customers." *Id.*, p.6.

<sup>4</sup> See *Appropriate Framework for Broadband Access to the Internet over Wireline Facilities; 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*, Notice of Proposed Rulemaking, CC Docket Nos. 02-33, 95-20, 98-10 (rel. Feb. 15, 2002) (*Wireline Broadband*) and *Review of Regulatory Requirements for Incumbent LEC Broadband Telecommunications Services*, Notice of Proposed Rulemaking, CC Docket No. 01-337 (rel. Dec. 20, 2001) (*Broadband Non-Dominance*).

providers are the leaders in providing broadband access with 16.4 million cable connections, while wireline ILECs have only 9.5 million ADSL connections.<sup>5</sup>

With a margin approaching almost two to one as the leading provider of broadband access,<sup>6</sup> even cable modem providers are not economically regulated. Yet MCI and AT&T focus their attention on purported ILEC market power and the alleged need to regulate ILEC broadband offerings with scant attention to the cable operators that have almost twice as many subscribers as ILECs. Importantly, if cable modem providers of broadband services are not regulated – and USTA does not advocate that they should be – then neither should ILECs be regulated for their provision of wireline DSL. Neither MCI nor AT&T makes any attempt to justify more stringent regulatory treatment for providers of broadband access services that have a significantly smaller share of the market (*i.e.*, ILECs) than do cable operators. USTA reiterates its previous comments in this proceeding that the Commission should take prompt action “to erase the unfair disadvantages that wireline broadband providers face when they compete with cable modem providers”<sup>7</sup> by eliminating economic regulations on ILECs’ broadband access services.<sup>8</sup> The Commission should recognize that, as non-dominant providers of broadband

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<sup>5</sup> See *High-Speed Services for Internet Access: Status as of December 31, 2003*, Industry Analysis and Technology Division, Wireline Competition Bureau, Federal Communications Commission (rel. June 2004), available at [www.fcc.gov/wcb/stats](http://www.fcc.gov/wcb/stats) (December 2003 High-Speed Services Report) at 2.

<sup>6</sup> The Court of Appeals for the District of Columbia also cites to evidence that cable modem providers maintain a share of the broadband market on the order of 60%. See *United States Telecom Ass’n v. FCC*, 359 F.3d, 554, 582 (D.C. Cir. 2004).

<sup>7</sup> USTA Comments at 11.

<sup>8</sup> However, ILEC providers of broadband services should retain the option to continue offering broadband access services on a common carrier basis, which would require them to make such services available to all customers in a service area on an indiscriminate basis, but would allow them to preserve their ability to offer broadband transport as a tariffed common carrier transport service both in and outside of the NECA pool. As USTA noted in its Comments, ILECs should

access services, ILECs are simply not able to leverage their non-dominant position as providers of such services into a position of market power for any IP-enabled service, including VoIP, even ignoring the vigorous competition for such services and the fact that such competition does not depend on the service provider also providing the broadband connection. VoIP and other IP-enabled service customers can obtain their broadband connection from a competitive cable provider and increasingly are able to obtain such a connection from wireless, satellite, and power line providers.

**B. Intermodal Competition for Broadband Access Services Exists and Is Growing.**

In addition to cable modem and wireline DSL, there are numerous other ways that customers today can obtain broadband access services.<sup>9</sup> As explained further below, the currently viable alternatives include fixed wireless, fiber optics, and satellite – and there are emerging alternatives through broadband over power lines and mobile wireless broadband connections. The Commission’s December 2003 High-Speed Services Report confirms the

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be afforded the regulatory flexibility of choosing whether or not to offer broadband services on a private or common carriage-basis. *See* USTA Comments at 31.

<sup>9</sup> Importantly, the Commission has already recognized that there are numerous new platforms and technologies entering the market, such as 3G wireless, satellite, power lines, and others, and that the “preconditions for monopoly appear absent.” *Inquiry Concerning the Deployment of Advanced Telecommunications Capability to All Americans in a Reasonable and Timely Fashion, and Possible Steps to Accelerate Such Deployment Pursuant to Section 706 of the Telecommunications Act of 1996*, Third Report, CC Docket No. 98-146, ¶¶79-88 (rel. Feb. 6, 2002) (Third Report 706 Advanced Services). *See also* *Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers; Implementation of the Local Competition Provisions of the Telecommunications Act of 1996; Deployment of Wireline Services Offering Advanced Telecommunications Capability*, Report and Order and Order on Remand and Further Notice of Proposed Rulemaking, CC Docket Nos. 01-338, 96-98, 98-147, FCC 03-36, ¶263 (rel. Aug. 21, 2003) (*citing* Third Report 706 Advanced Services, ¶¶79-88) ([T]he Commission also has acknowledged the important broadband potential of other platforms and technologies, such as third generation wireless, satellite, and power lines.”)

existence of the current competitive alternatives for obtaining broadband access services and highlights the continuing growth of these alternatives. In the Commission's *Section 706 NOI* proceeding,<sup>10</sup> USTA's Comments cited data from the first half of 2003 showing that there were 13.7 million cable modem connections, 7.7 million ADSL connections, and 0.9 million combined satellite, fixed wireless and fiber optic connections.<sup>11</sup> The Commission now reports that by the end of 2003 there were 16.4 million cable modem connections, an increase of 20% since June 2003; 9.5 million ADSL connections, an increase of 24%; and 1.0 million satellite, fixed wireless,<sup>12</sup> and fiber optic connections, which includes a 19% increase for satellite and fixed wireless.<sup>13</sup> In addition to these existing alternatives, the newest competitors providing

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<sup>10</sup> *Inquiry Concerning the Deployment of Advanced Telecommunications Capability to All Americans in a Reasonable and Timely Fashion, and Possible Steps to Accelerate Such Deployment Pursuant to Section 706 of the Telecommunications Act of 1996*, Fourth Notice of Inquiry, GN Docket No. 04-54, FCC 04-55 (rel. March 17, 2004) (*Section 706 NOI*).

<sup>11</sup> See *Inquiry Concerning the Deployment of Advanced Telecommunications Capability to All Americans in a Reasonable and Timely Fashion, and Possible Steps to Accelerate Such Deployment Pursuant to Section 706 of the Telecommunications Act of 1996*, USTA Comments at 4 (filed May 10, 2004), citing to *High-Speed Services for Internet Access: Status as of June 30, 2003*, Industry Analysis and Technology Division, Wireline Competition Bureau, Federal Communications Commission (rel. Dec. 2004) at 2, available at [www.fcc.gov/wcb/stats](http://www.fcc.gov/wcb/stats) (June 2003 High-Speed Services Report).

<sup>12</sup> One example of the growth of fixed wireless broadband services is the new service to be offered by Craig McCaw. "Wireless entrepreneur Craig McCaw is expected to announce . . . that he is launching a national wireless broadband service to compete with the high-speed Internet access offered by cable operators and telephone companies." Jesse Drucker, "McCaw Is Expected to Launch Wireless Broadband Service," *The Wall Street Journal* (June 21, 2004). His company, Clearwire, plans to offer service at speeds ranging from 1.5 to two megabytes per second, which is faster than DSL, cable modem, and other wireless services being offered by Verizon Wireless and Sprint PCS. The company plans to serve over 20 markets in the next year, starting with Jacksonville, Florida, and St. Cloud, Minnesota this summer. *Id.*

<sup>13</sup> See December 2003 High-Speed Services Report at 2. With regard to wireless broadband services, Chairman Powell has previously noted the growth in this sector: "2002 saw the proliferation of wireless broadband services, most notably Wi-Fi, demonstrating the promise of a third significant broadband platform into the home." Michael Powell, Chairman, Federal

broadband service include electric power line companies, which may well be the third ubiquitous provider (like cable and wireline ADSL) of broadband pipes to the home, and providers of mobile wireless services,<sup>14</sup> which allow customers to connect to the Internet at broadband speeds when they install a software program and a wireless modem into the PC card of a laptop computer.<sup>15</sup> This intermodal competition in the broadband market was a key factor in the Commission's determination that there should be no unbundling of broadband elements under section 251 of the Telecommunications Act of 1996, which determination was affirmed by the Court of Appeals for the D.C. Circuit<sup>16</sup> and became effective by the Court's mandate in June 2004. Importantly, such competition also allowed the Commission to deregulate DSL services while DSL prices actually decreased.<sup>17</sup> Because of this competitive access, a VoIP provider that

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Communications Commission, Statement before the Senate Committee on Commerce, Science, and Transportation (Jan. 14, 2003).

<sup>14</sup> Sprint and Cingular Wireless have announced plans "to speed rollouts of broadband services for mobile phones and laptops" next year, using EV-DO and UMTS standards. Paul Davidson, "Wireless race for speed intensifies: Sprint, Cingular push up plans for laptop, cellphone broadband services," USA Today (June 23, 2004).

<sup>15</sup> See *Section 706 NOI*, USTA Comments at 5.

<sup>16</sup> The Court has found on both occasions that the matter of unbundling of network elements has been before it that there is robust competition in the broadband market. See *United States Telecom Ass'n v. FCC*, 290 F.3d 415, 428 (D.C. Cir. 2002) and *United States Telecom Ass'n v. FCC*, 359 F.3d 554, 582 (D.C. Cir. 2004).

<sup>17</sup> "[T]he growth of cable broadband and DSL lines has resulted in fierce competition between these services, with cable still significantly ahead of its telco competitor. In each quarter for the last 4 years, 2/3 of new subscribers have gone to cable broadband. Cable currently has 65% of broadband subscribers. *This vibrant competition is what enabled the Commission to deregulate the provision of DSL without risking an increase in DSL prices. Last year, when we deregulated Broadband and eliminated Line-Sharing many here and some at the Commission argued that DSL prices would rise. But, since February of 2002, prices of DSL have dropped about 40%... The 1996 Act has been successful in many areas. We have learned that where competition is vibrant, regulation is not necessary. This is why we have been able to deregulate broadband and still enjoy better service at lower rates.*" Kevin Martin, Commissioner, Federal Communications

does not also provide the underlying broadband access is not hindered from competing with a VoIP provider that does provide the underlying broadband access.

**C. There Is No Dominant Provider of IP-Enabled Services, Including VoIP, and There Is Rapidly Expanding Competition for IP-Enabled Services, Supplied By a Plethora of Companies.**

The primary issue in this proceeding is whether and how the Commission should regulate the IP-enabled *services*, including voice services, that ride over an IP network. In making this determination it is appropriate for the Commission to assess the status of competition for IP-enabled *services*.

Although still a nascent business, there is already explosive competition for IP-enabled services, including VoIP services.<sup>18</sup> Even though “no static market-share analysis can capture the true competitive impact of this new technology or the speed at which it is taking hold”,<sup>19</sup> just a little research reveals the wide-spread availability of VoIP<sup>20</sup> and other IP-enabled services,

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Commission, Remarks before the NARUC Conference, Committee on Telecommunications, Washington, D.C. (Mar. 8, 2004) (emphasis added).

<sup>18</sup> Even two years ago this competition was recognized at the Commission. “The competition-enhancing portions of the 1996 Act have led to undoubted progress in deploying broadband. We are now seeing competition not only within delivery platforms, but also among delivery platforms. Indeed, we are seeing convergence of industries, convergence of services, and convergence of markets. It is clear that companies are actively deploying advanced technologies in response to competition from other broadband providers. The competition resulting from the 1996 Act unleashed an unprecedented investment in communications infrastructure in many areas of the country.” Third Report 706 Advanced Services, Separate Statement of Commissioner Michael Copps.

<sup>19</sup> See Peter W. Huber and Evan T. Leo, *Competition in the Provision of Voice Over IP and Other IP-Enabled Services* at 2 (prepared for and submitted by BellSouth, Qwest, SBC, and Verizon for the FCC proceeding *IP-Enabled Services*, WC Docket No. 04-36, FCC 04-28 (rel. Mar. 10, 2004)) (May 28, 2004) (VoIP Fact Report).

<sup>20</sup> In fact, AT&T recently announced that it was expanding its coast-to-coast rollout of its VoIP phone service known as CallVantage to 10 additional states and the District of Columbia. AT&T stated that these recent market entries placed it in 22 states and 72 major markets since it introduced VoIP service just 14 weeks ago. AT&T added that it had attained 72 percent of its

demonstrating that there are no barriers to entry for VoIP applications and other IP-enabled services and that new and innovative VoIP and other IP-enabled services are being developed at breakneck speed.<sup>21</sup> Today, consumers with access to a broadband connection can choose from a variety of providers – cable operators,<sup>22</sup> traditional CLECs and IXC's,<sup>23</sup> Bell companies, and new VoIP-based providers – for VoIP services. In fact, beyond the IP-enabled services provided by ILECs and cable companies, more than 40 other IP-enabled service providers already exist today and this number is growing rapidly.<sup>24</sup>

In addition to providing VoIP services, a company may also provide its end user customer with the broadband connection over which the VoIP services ride, as do cable operators, ILECs, and some CLECs and IXC's. However, as alluded to previously, a VoIP

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goal to reach 100 markets by the end of September 2004. *See* AT&T News Release, “AT&T Continues National Deployment of AT&T CallVantage Service,” (June 30, 2004), <http://www.att.com/news/item/0,1847,13127,00.html>. Less than two weeks later, AT&T announced the availability of its CallVantage service in 28 more markets and seven additional states, achieving its goal of entering 100 major markets just 16 weeks after it introduced the service. AT&T is offering an introductory rate of \$19.99 per month for its CallVantage service and has reduced the full retail price to \$34.99 per month. AT&T Press Release, “AT&T CallVantage Service Now Available in 100 Major Markets,” [http://biz.yahoo.com/prnews/040712/nym108\\_1.html](http://biz.yahoo.com/prnews/040712/nym108_1.html) (July 12, 2004). Another company focusing on expansion of its VoIP offering is Cablevision, which recently announced that it will offer local and long distance phone calls over the Internet when customers purchase digital cable television and high-speed Internet access for \$90 a month. Cablevision began offering its VoIP service last year and has already acquired more than 100,000 customers. *See* Ken Brown, “Cablevision to Offer Internet Phone-Call Bundle,” *The Wall Street Journal* (June 21, 2004).

<sup>21</sup> As USTA noted in its Comments, “all the evidence shows that the market for IP-enabled services is highly competitive with low barriers to entry and no ‘bottleneck’ that could even arguably warrant economic regulation.” USTA Comments at 6 (emphasis added).

<sup>22</sup> “[E]ach of the six major cable operators . . . has either begun commercial deployment of IP telephony service, or has announced plans to do so imminently. (citation omitted) Many smaller cable operators have done so as well.” VoIP Fact Report at 5.

<sup>23</sup> AT&T, MCI, Z-Tel, Level 3, Net2Phone and other CLECs and IXC's have launched or have plans to launch retail, mass-market or wholesale VoIP services. *See* VoIP Fact Report at 8-9.

<sup>24</sup> *See* VoIP Fact Report at 4, 5, and C-1.

provider does not have to provide the underlying broadband facilities to its customer in order to be a competitive provider of VoIP services. In fact, the VoIP Fact Report cites to more than 20 new VoIP-based providers, some of which operate their own backbone network facilities and others of which rely on the public Internet, but none of which provide the broadband connection to their customer.<sup>25</sup> The number of VoIP providers that are already offering VoIP services without also offering underlying broadband access affirms, contrary to the claims of MCI,<sup>26</sup> that economic regulation of broadband access is not necessary to ensure that companies do not leverage their provision of broadband access (*i.e.*, the physical network layer) into market power in the application layers. USTA has already demonstrated that there is robust competition for the underlying broadband facilities over which IP-enabled services ride.<sup>27</sup> Accordingly, there is no threat of market power abuse by ILECs as non-dominant providers of broadband access, which could be transferred to their provision of IP-enabled services.<sup>28</sup> Moreover, the fact that there are already so many competitive providers of IP-enabled services disproves the claims of MCI and AT&T that ILECs have market power in broadband access services and could exercise it to usurp control in the provision of IP-enabled services. Obviously these IP-enabled service providers would not exist if broadband access providers – both ILECs and cable companies – were exercising market power over their provision of broadband access services to achieve control over their provision of IP-enabled services. Clearly, there is simply nothing to hold back

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<sup>25</sup> See VoIP Fact Report at 5, 9-10, and C-1.

<sup>26</sup> See MCI Comments at 13.

<sup>27</sup> See *infra*. USTA Reply Comments, Sections I.A. and I.B.

<sup>28</sup> See USTA Comments at 1 (“traditional wireline ILECs do not even arguably have ‘bottleneck’ control over the facilities used to provide these services. Rather, IP-enabled services can be provided over a wide variety of broadband transmission facilities – including cable, wireline, wireless, and, soon, power lines . . .”).

a company from competing to provide VoIP services, or other IP-enabled services, but the development or acquisition of an appropriate IP application and a good business plan.

**II. WITHOUT DOMINANCE IN BROADBAND ACCESS OR IP-ENABLED SERVICES, THERE IS NO NEED TO REGULATE ILECS, OR ANYONE ELSE, ON AN ECONOMIC BASIS.**

**A. Economic Regulations and Unbundling Obligations Are Not Necessary.**

As discussed previously, IP-enabled services are increasingly available in the United States, with no dominant provider of these services, including VoIP services.<sup>29</sup> This rapid deployment and the continuing innovation of IP-enabled services have been spurred by the regulatory freedom granted to IP-enabled services. Only continued freedom from economic regulation will foster competition for and further advancement of IP-enabled services. In fact, imposing economic regulation on IP-enabled services – services that are already fully competitive – would be contrary to the intent of the 1996 Act, which is “to promote competition and reduce regulation . . . and encourage the rapid deployment of new telecommunications technologies.”<sup>30</sup> Competition should lead to less regulation, not more. Accordingly, the Commission should refrain from imposing economic regulation on any IP-enabled services.

Like IP-enabled services, the broadband facilities over which IP-enabled services ride are also fully competitive.<sup>31</sup> However, with regard to broadband facilities, the Commission must actually take action to eliminate the economic regulation that continues to exist for ILECs providing these facilities. USTA agrees with Verizon that “economic regulation of these services – whether through price controls, tariff requirements, or entry and exit restrictions –

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<sup>29</sup> See *infra*. pp. 7-10.

<sup>30</sup> Preamble to The Telecommunications Act of 1996.

<sup>31</sup> See *infra*. pp. 4-7.

would not only be unnecessary but affirmatively harmful.”<sup>32</sup> Again, competition should lead to less regulation, not more.

As noted previously, intermodal competition was a significant factor leading the Commission to eliminate section 251 unbundling requirements for broadband facilities.<sup>33</sup> Even though ILECs are not subject to section 251 unbundling with regard to broadband facilities, ILECs are still subject to unbundling obligations for these same facilities based on the requirements of the *Computer Inquiries*.

MCI argues that there has been no material change in the reason the Commission imposed the *Computer II*<sup>34</sup> rules – market power control over the physical layer – and that those rules should be retained.<sup>35</sup> This position reflects MCI’s (and AT&T’s) resolute and laser-like focus on a past that has ceased to exist, and an equally tenacious determination to ignore the mushroom-like growth of broadband competition. Again, as stated previously, and as recognized by the Commission when it eliminated section 251 unbundling obligations for broadband facilities, there is significant intermodal competition for broadband facilities. Moreover, ILECs are not dominant in their provision of broadband access. Rather, cable modem providers are the leaders in that market.<sup>36</sup> Equally important, the Commission has already concluded that the duties required by the *Computer Inquiries* should not apply to cable modem providers, realizing that the imposition of the *Computer II* unbundling requirements on cable

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<sup>32</sup> Verizon Comments at 5.

<sup>33</sup> See *infra* p. 6.

<sup>34</sup> *Amendment of Section 64.702 of the Commission’s Rules and Regulations (Second Computer Inquiry)*, Final Decision, 77 F.C.C.2d 384 (1980) (*Computer II*).

<sup>35</sup> See MCI Comments at 17-18.

<sup>36</sup> See *infra*. pp. 2-4.

modem service providers would inhibit facilities-based competition.<sup>37</sup> Interestingly, neither MCI nor AT&T argue that the *Computer II* unbundling requirements should apply to cable modem service providers, the undisputed leading providers of such broadband access services. While USTA is not favoring imposition of such requirements on cable companies, the Commission should evaluate the inconsistency in MCI and AT&T's positions with regard to regulation of ILECs and cable companies. Their disingenuous inconsistency would result in continued discriminatory treatment between rival IP platforms. The Commission should recognize this special pleading for what it is and find now that ILECs should no longer be subject to the unbundling rules of the *Computer Inquiries*. To do otherwise would be contrary to the Commission's intent in eliminating the section 251 unbundling requirements for broadband services as well as contrary to regulatory treatment applied to cable modem providers for similar broadband access services.

**B. ILECs Do Not Hinder Customers From Using Their Broadband Networks To Access Competitive IP-Enabled Services, Including VoIP.**

AT&T asks the Commission to adopt regulations that “ensure that retail customers of the broadband transmission and ISP services of any provider should be free to access any web site for any purpose of the customer's choosing – including to access other providers of VoIP and other IP-enabled application platforms – without interference or other influence of the broadband services provider.”<sup>38</sup> More specifically, AT&T wants the Commission to “forbid any entity

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<sup>37</sup> *Inquiry Concerning High-Speed Access to the Internet Over Cable and Other Facilities; Internet Over Cable Declaratory Ruling; Appropriate Regulatory Treatment for Broadband Access to the Internet Over Cable Facilities*, Declaratory Ruling and Notice of Proposed Rulemaking, GN Docket No. 00-185 and CS Docket No. 02-52, 17 FCC Rcd 4798 at 4826, ¶¶ 46-47 (2002) (*Cable Modem Declaratory Ruling*).

<sup>38</sup> AT&T Comments at 53.

providing broadband access from impeding access to the Internet content of another applications provider . . . [and to] forbid broadband transport providers not only from blocking outright access to particular IP applications, but also from giving any kind of preferential access to their own IP applications or degrading access to rival IP applications.”<sup>39</sup> However, AT&T states no motivating need for such requested regulation; it does not claim that the activity it seeks to prohibit has already occurred and it does not suggest that such activity is likely to occur. In fact, cable modem providers, which are currently not regulated, apparently have not taken advantage of their unregulated status to prevent their broadband access customers from accessing competitive IP applications, including VoIP providers, or to otherwise discriminate against such applications and services.<sup>40</sup> It is presumably not out of an excess of goodwill that cable modem providers do not act in such a manner; rather it is because it would not make good business sense to do so. Attempts by cable modem providers to prevent their customers from accessing other providers of IP-enabled services would likely cause such customers to seek alternative providers of broadband access, resulting in loss of business for cable companies. Similarly, there is even less reason to think that ILEC providers of broadband access would prevent their customers from accessing competitive IP applications or otherwise discriminate against such applications

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<sup>39</sup> *Id.* at 54.

<sup>40</sup> Notably, the President of the National Cable & Telecommunications Association, Robert Sachs, stated last year that the “cable industry wouldn’t stand in the way of Vonage’s riding aboard cable modem lines to provide voice-over-Internet protocol (VoIP) service to cable’s high-speed Internet customers.” “NCTA Canvassing Members to Formulate Industry Position on VoIP,” *Communications Daily* (Dec. 19, 2003). In response to questions about “whether the cable industry might seek to strip the voice bits out of a Vonage-type service,” Sachs explained that “there’s no evidence cable companies restrict what cable modem customers download.” *Id.* Sachs specifically stated that “[a] cable broadband customer is free to access any Internet content or use any Internet application and attach any DOCSIS-certified modem device to use with its broadband service . . . .” *Id.*

because ILECs have a smaller share of the broadband access services than do cable operators. Regulators should always be cautious about imposing regulation on new service offerings, particularly where there is no evidence of any competitive problem. Here, AT&T advances only speculation, not tied to *any* factual showing of harm. In light of their lack of evidence, the Commission should refrain from adopting the regulations AT&T requests because they are unnecessary.

### **III. IP-ENABLED SERVICES AND BROADBAND ACCESS ARE INTERSTATE IN NATURE.**

USTA agrees with the majority of commenters in this proceeding that IP-enabled services are interstate in nature and should be regulated at the federal level. However, USTA disagrees with AT&T's peculiar assertion that the "considerations favoring exclusive federal jurisdiction over IP-enabled applications do not apply at the network level and indeed favor a robust ongoing state role in addressing market power abuses."<sup>41</sup> As USTA previously noted in its comments, the Commission has already asserted interstate jurisdiction over DSL services – the transmission portion of the network over which IP-enabled services ride – in the *GTE Tariff Order* because they are "a form of special access, and, as with other special access services over which more than 10% of the traffic is interstate, . . . [fall] within the Commission's *exclusive* jurisdiction under the 'mixed use' doctrine."<sup>42</sup> Moreover, the premise upon which AT&T bases its assertion is simply inaccurate. AT&T fails to acknowledge the competitive reality of broadband service offerings; as the Commission has correctly recognized, there is significant competition for both

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<sup>41</sup> *AT&T comments at 45, n.37.*

<sup>42</sup> USTA Comments at 35-36 (emphasis in original), *citing to GTE Telephone Operating Cos., GTE Tariff No. 1, GTOC Transmittal No. 1148, CC Docket No. 98-79, Memorandum Opinion and Order, 13 FCC Rcd 22466, ¶19 (1998) (GTE Tariff Order).*

IP-enabled services and broadband access facilities. To invite state regulation of broadband services and facilities would fly in the face of the inherently interstate nature of broadband, and would invite a chaotic patchwork of regulation over a competitive section of the economy, with a resultant drag on growth and innovation. There simply is no need to increase regulation of this already competitive segment of the telecommunications industry.

**IV. UNTIL THE CURRENT INTERCARRIER COMPENSATION REGIME IS REVISED OTHERWISE, ACCESS CHARGES MUST APPLY WHEN TRAFFIC TOUCHES THE PSTN.**

Several commenters stated, with regard to the Commission's questions about the application of access charges to VoIP traffic, that the current intercarrier compensation regime should be reformed, while others, notably MCI and AT&T, added that access charges should be eliminated or at least should not apply to IP calls that terminate on the public switched telephone network (PSTN).<sup>43</sup> Both MCI and AT&T make general complaints about the access charge system as their basic argument against the application of access charges to VoIP traffic, regardless of whether such traffic touches the PSTN.<sup>44</sup> They also maintain that VoIP is an information service and for that reason it should not be subject to access charges even when a VoIP call touches the PSTN.<sup>45</sup>

Although MCI, AT&T, and others complain about the access charge regime generally, it would not be appropriate for the Commission to make changes in this docket regarding the intercarrier compensation obligations that apply to VoIP services, or other IP-enabled services, outside of the Commission's general docket to review and reform intercarrier compensation. In

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<sup>43</sup> See MCI Comments at 44-48 and AT&T Comments at 16-28.

<sup>44</sup> See MCI Comments at 45 and AT&T Comments at 22.

<sup>45</sup> See MCI Comments at 47 and AT&T Comments at 22-23.

fact, the Commission has promised, and USTA understands that the Commission is moving forward with its plans, to review the broad intercarrier compensation regime, including access charges. With regard to MCI and AT&T's argument that VoIP calls are information services and thus not subject to payment of access charges, reliance on such a regulatory classification is misplaced and not relevant under the current intercarrier compensation regime. Customers of VoIP services are making voice calls that often, in fact usually, terminate on the PSTN. When this happens, these customers are using the PSTN and, as the Commission has recognized, should bear the cost of using the PSTN.<sup>46</sup> MCI and AT&T have failed to explain why a voice call that originates on an IP network but that ultimately terminates on the PSTN should be treated differently from any other voice call that is not a VoIP-originated call but one that similarly touches and uses the PSTN and why such VoIP-originated calls should not be subject to the same access charges as other voice calls that touch and use the PSTN. USTA reiterates its position that the Commission should require that "all IP-enabled service providers that use local networks to originate or terminate interexchange voice calls should pay the same access charges" as those paid by providers of analogous interexchange services.<sup>47</sup>

### CONCLUSION

The evidence of rampant competition for IP-enabled services, including VoIP, as well as the strong and growing intermodal competition for broadband access services, makes clear that the bottlenecks for these services, as alleged by MCI and AT&T, do not exist. More importantly, this evidence invalidates the conclusions drawn by MCI and AT&T in their layering theories –

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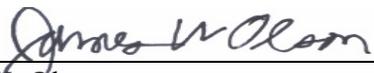
<sup>46</sup> See *IP-Enabled Services*, Notice of Proposed Rulemaking, WC Docket No. 04-36, FCC 04-28, ¶61 (rel. March 10, 2004).

<sup>47</sup> USTA Comments at 31-32.

*i.e.*, that a purported lack of competition in the physical layer (*i.e.*, broadband access facilities) necessitates that ILECs be regulated not only in the physical layer, but also in the applications layer (*i.e.*, IP-enabled services). Their complete disregard for the highly competitive nature of both IP-enabled services and broadband access services and the logical corollary that competition should lead to less regulation, not more or even continuation of the same, reveals a thinly veiled attempt to continue the same old economic regulation of ILECs. The Commission should not listen to their broken record. Rather, it should find that the innovative and competitive future of IP-enabled services and broadband access services is best advanced by allowing providers to offer these services free of economic regulation. All providers of IP-enabled services and broadband access services should operate under market forces, subject only to regulations that address certain social responsibilities.

Respectfully submitted,

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July 14, 2004

**CERTIFICATE OF SERVICE**

I, Meena Joshi, do certify that on July 14, 2004, the aforementioned Reply Comments of The United States Telecom Association were electronically filed with the Commission through its Electronic Comment Filing System and were electronically mailed to the following:

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