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

In the Matter of IP-Enabled Services	WC Docket No. 04-36

Reply Comments of the Information Technology Association of America

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SUMMARY

The Commission Should Not Extend Carrier Access Charges to ISPs

The Incumbent Local Exchange Carriers ("ILECs") seek to use this docket to achieve one of their long-standing policy objectives: extension of the carrier access charge regime to information service providers ("ISPs"). Several of the Bell Operating Companies ("BOCs") go further, arguing that – under *existing* law – ISPs that use the Public Switched Telephone Network ("PSTN") to provide voice applications are currently subject to carrier access charges. This is plainly incorrect.

The Commission's carrier access charge rules make no mention of enhanced service providers ("ESPs") – much less purport to "exempt" ESPs from paying carrier access charges. Rather, the Commission's Rules divide users of the PSTN into two categories: interexchange carriers and end users. From the beginning, the Commission has repeatedly and consistently concluded that enhanced/information service providers are *users* of telecommunications services – not carriers. Contrary to the BOCs' suggestions, the Commission has never held that an ISP may only purchase state-tariffed business line services in order to receive calls from their customers. Rather, like any other business users, ISPs may obtain state-tariffed business lines to provide any non-regulated service. So long as the ISP does not provide a *telecommunications service,* it does not have to pay carrier access charges.

In any case, the Commission should not extend above-cost, per-minute access charges to IP-enabled services. Imposition of such charges on IP-enabled services would deprive consumers of the efficiency resulting from packet switching. Rather, the Commission should fix intercarrier compensation. Once the Commission has established an efficient cost-based regime, it should apply to all entities that use the PSTN to provide telecommunications services.

The Commission Cannot – and Should Not – Require ISPs to Make Payments to the Universal Service Fund

Three of the BOCs – Verizon, SBC, and BellSouth – also ask the Commission to require certain ISPs that provide IP-enabled information services to make direct payments to the Universal Service Fund ("USF"). However, as the fourth BOC – Qwest – recognizes, Congress has not given the Commission legal authority to require ISPs to make USF payments. Rather, Congress gave the Commission only limited "permissive" authority to require providers of "interstate telecommunications" to make payments to the USF. Therefore, as Qwest correctly observes, "absent changes to the contribution rules, any VoIP service that constitutes an information service would be exempt from universal [service] contribution obligations." Instead, "[l]ike other providers of information services," ISPs that provide voice applications "contribute to universal service indirectly when they purchase transmission services and capacity from telecommunications carriers."

The Commission Should Reject the ILECs' Attempts to Dismantle the Existing Pro-Competitive Regulatory Regime

At the same time that they ask the Commission to impose burdensome new regulatory obligations on ISPs, the ILECs ask the Commission to eliminate the pro-competitive safeguards that have limited their ability to act anti-competitively. In particular, the ILECs ask the Commission to eliminate the *Computer II* unbundling requirement and declare the ILECs non-dominant in the market for all IP-enabled services. There is no justification for doing so.

As an initial matter, the Commission does not have the legal authority to eliminate the ILECs' obligation to unbundle, and make available to competitors, the underlying telecommunications facilities that the ILECs use to provide IP-enabled information services. Section 202(a) of the Communications Act prohibits carriers – whether dominant or non-dominant – from engaging in "unjust or unreasonable discrimination" in the provision of a telecommunications service. The Commission has held repeatedly that this provision imposes an independent obligation, separate from the one contained in the *Computer II* rules, that requires any facilities-based carrier that provides information services to unbundle the transmission capacity underlying its information services and make that capacity available to competing ISPs on a non-discriminatory basis.

Even if the Commission had the legal authority to do so, eliminating the requirement that the ILECs unbundle the telecommunications functionality that they use to provide IP-enabled information services, and make that service available at just, reasonable, and non-discriminatory prices, terms, and conditions, would be unwise policy. Contrary to the ILECs' assertions, despite the introduction of Competitive Local Exchange Carrier ("CLEC") competition and the ability of *end users* to obtain IP-enabled services from cable and wireless providers, ILECs retain market power in the provision of wholesale broadband transmission services, such as Digital Subscriber Line ("DSL") services, which non-affiliated ISPs need to provide IP-enabled information services.

The ILECs' ability to act anti-competitively is not constrained by "intra-modal" competition. At present, less than ten percent of all DSL lines are provided by CLECs. The Commission's decision to eliminate line sharing could well result in a decrease in the CLECs' market share. Neither is the ILECs' market power constrained by "inter-modal" competition. Cable systems are under no legal obligation to – and, in practice, generally do not – provide wholesale broadband transport services to non-affiliated ISPs. Other delivery platforms, such as satellite and wireless, are still in the early stages of deployment. Thus, without appropriate regulatory safeguards, there is a real danger that ILECs could either eliminate the ability of non-affiliated providers of IP-enabled information services to access broadband transmission facilities or artificially drive up the costs of non-affiliated providers of IP-enabled information services and, ultimately, drive them from the market.

Dual Federal-State Regulation of IP-Enabled Services is Not Feasible

In order to prevent federal preemption, the states must show that it is feasible to identify a discrete category of intrastate IP-enabled services, and to impose regulation that differs from the rules adopted by the Commission for interstate IP-enabled services. None of the state commenters has been able to do so. For example, there does not appear to be any sensible way for the Commission and a state utility commission to "share" jurisdiction over an on-line session in which a customer uses IP-enabled services to place a computer-to-telephone voice call to a neighbor, send a "mass e-mail" to recipients both within and outside his state, and access a website in a foreign country. For a wide range of regulatory issues – from whether to impose rate regulation to whether to mandate procedures to facilitate access by law enforcement – there must a be single policy. Therefore, while the Commission should consult with the states, and provide a meaningful implementation role, the Commission should use its authority to adopt a comprehensive federal regime applicable to IP-enabled services.

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REPLY COMMENTS OF THE INFORMATION TECHNOLOGY ASSOCIATION OF AMERICA

The Information Technology Association of America ("ITAA") hereby replies to the comments filed in response to the Commission's Notice of Proposed Rulemaking in the above-captioned proceeding.[1]

INTRODUCTION

The vast majority of commenters agree that the Commission should adopt a regulatory regime for IP-enabled services that imposes regulation only when necessary to prevent the abuse of market power and to promote important social policy objectives. Most commenters also recognize that, in developing this regime, the Commission should build on its existing regulatory regime – which has made possible today's vibrant, competitive information services market.

By contrast, the incumbent local exchange carriers ("ILECs") seek to use this proceeding as a vehicle to turn the Commission's existing regulatory regime on its head. First, the ILECs ask the Commission to impose significant regulatory obligations – such as the duty to pay carrier access charges and make direct payments to the Universal Service Fund ("USF") – on

[1] *IP-Enabled Services,* Notice of Proposed Rulemaking, 19 FCC Rcd 4863 (2004).

information service providers ("ISPs"), which the Commission has never regulated. Second, the ILECs ask the Commission to remove virtually all of the pro-competitive regulatory obligations to which they long have been subject – such as the duty to unbundle the basic transmission services that they use to provide information services, and the duty to provide telecommunications services on just, reasonable, and non-discriminatory prices, terms, and conditions. As it has in the past, the Commission should reject these proposals.

STATEMENT OF INTEREST

ITAA is the principal trade association of the computer software and services industry. ITAA has 500 member companies located throughout the United States, ranging from major multinational corporations to small, locally based enterprises. ITAA's members include a significant number of ISPs, which use regulated telecommunications services to provide a wide range of applications to government, business, and residential consumers. ITAA (and its predecessor, ADAPSO) has participated actively in a wide range of related proceedings – including all three of the Commission's *Computer Inquiries* and the *Access Charge, Intercarrier Compensation, Universal Service,* and *Wireline Broadband ISP* dockets. ITAA also filed comments in the initial phase of this proceeding.

I. THE COMMISSION SHOULD REJECT THE ILECs' PROPOSALS TO IMPOSE BURDENSOME REGULATORY OBLIGATIONS ON ISPs.

In their comments, the ILECs ask the Commission to require providers of IP-enabled information services to pay carrier access charges and make direct payments to the USF. The Commission should decline to do so.

A. The Commission Should Not Extend Carrier Access Charges to ISPs

The ILECs seek to use this docket to achieve one of their long-standing policy objectives: extension of the carrier access charge regime to ISPs.[2] Several of the Bell Operating Companies ("BOCs") go further, arguing that – under existing law – ISPs that use the PSTN to provide voice applications are currently subject to carrier access charges. For example, SBC asserts that:

> [A]ny providers that use ILEC local exchange switching facilities, including information service providers, are subject to the baseline obligation to pay access charges unless specifically exempted. The sole exemption the Commission has created is a narrow one that exempts an information service provider from access charges only with respect to the connection between it and its own customer."[3]

Verizon makes the same assertion, insisting that the Commission's "exemption" from carrier access charges was "designed for ISPs who use the telephone network in the same manner as other businesses use it – to allow their customers to reach them so they can sell their products," but that the "exemption" does not apply to "providers of a VoIP service that allows a caller on the PSTN to speak with someone else." In such cases, Verizon concludes, "the ISP is using the PSTN to allow end users either to make or to receive an ordinary telephone call" in the same manner as an interexchange carrier ("IXC") and, therefore, is subject to carrier access charges.[4]

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[2] *See, e.g.,* USTA Comments at 32 ("[T]he Commission must establish that access charges apply to all interstate IP-enabled calls that are originated and terminated on the PSTN, *regardless of whether the particular IP-enabled service is an information service or a telecommunication service*." (emphasis added)); *see also* BellSouth Comments at 24-25 ("[T]he appropriate policy framework for IP-enabled services should be predicated on the assumptions that, *irrespective of any application's legacy classification as a* '*telecommunications*' *or* '*information*' *service* . . . all categories of IP-enabled services should pay carrier access charges for use of the PSTN." (emphasis added)).

[3] SBC Comments at 66-67.

[4] Verizon Comments at 46-47; *see also* BellSouth Comments at 47 (Where IP-enabled service providers use the PSTN in the same manner as IXCs, "the Commission's legal duty" is to require them to pay carrier access charges).

The BOCs' claims that certain ISPs are *already* subject to the Commission's carrier access charge regime because their offerings are not covered by the Commission's so-called "ESP exemption" are patently incorrect. The BOCs' arguments are based on the faulty premise that the Commission adopted a generally-applicable federal access regime, and then granted a narrow "exemption" to enhanced service providers ("ESPs") (as ISPs were then known). This is simply not what happened.

The Commission adopted the carrier access charge regime in 1983, on the eve of the break-up of Bell System monopoly. Prior to divestiture, AT&T, which was the dominant provider of long-distance telephone service, provided a massive subsidy to the BOCs in order to keep local telephone service rates low. The Commission adopted the access charge regime in order to ensure that new entrants into the long-distance market – such as MCI and Sprint – would contribute to this subsidy.

The Commission's carrier access charge rules make *no mention* of ESPs – much less purport to "exempt" ESPs from paying carrier access charges.[5] Rather, the Commission's Rules divide users of the PSTN into two categories: long-distance carriers ("IXCs") and end users.[6] Only IXCs must pay carrier access charges. End users, by contrast, compensate local exchange carriers ("LECs") for their use of the PSTN by paying a mix of flat-rate federal end user charges and state-tariffed business line charges. From the beginning, the Commission has repeatedly and consistently concluded that enhanced/information service providers are *users* of

[5] *See* 47 C.F.R. § 69.5(b) ("Carrier's carrier charges shall be computed and assessed upon all interexchange carriers that use local exchange switching facilities for the provision of interstate or foreign telecommunications services"); *id.* § 69.2(m) (defining an "end user" as "any customer of an interstate or foreign telecommunication service that is not a carrier.").

[6] *See MTS and WATS Market Structure,* Third Report and Order, 93 F.C.C.2d 241, 243 (1983), *aff'd sub nom. NARUC v. FCC*, 737 F.2d 1095 (D.C. Cir. 1984).

telecommunications services – not carriers.[7] Therefore, like other end users, ISPs may purchase the ILECs' state-tariffed business line services, rather than having to subsidize local telephone service by paying above-cost carrier access charges.

Contrary to the BOCs' suggestions, the Commission has never held that an ISP may only purchase state-tariffed business line services in order to receive calls from their customers. Rather, like any other business users, ISPs may obtain state-tariffed business lines to provide any non-regulated service. So long as the ISP does not provide a *telecommunications service,* it does not have to pay carrier access charges.

The fact that the ISP enables its customers to send information to, and receive information from, third parties does not transform the ISP into a telecommunications carrier. For example, an ISP can provide an e-mail service that enables its customers to send information to, and receive information from, persons who are not customers of the ISP. Because e-mail service is an information service, the ISP can provide this service over state-tariffed business lines; it is not required to pay carrier access charges. Similarly, an ISP can provide an IP-enabled voice application that allows its customers to send information to, and receive information from, persons who are not customers of the ISP. So long as the application constitutes an information service, the ISP is not obligated to pay carrier access charges.

In any case, regardless of whether a particular offering is classified as a telecommunications or an information service, the Commission should not extend the carrier access charge regime to IP-enabled services. The Commission itself has repeatedly recognized that "the existing access charge system includes non-cost-based rates and inefficient rate

[7] *See MTS and WATS Market Structure,* Memorandum Opinion and Order, 97 F.C.C.2d 682, 711-22 (1983).

structures" that were designed for a circuit switched network.[8] In particular, the carrier access regime continues to include above-cost, per-minute charges. Imposition of these charges on IP-enabled services would deprive consumers of the efficiency resulting from packet switching. Unlike a circuit switched telephone call, IP-enabled services do not require the establishment of a temporary dedicated connection between the originating and receiving parties. As a result, the distance and duration of the call has virtually no impact on cost. The benefit of this efficiency will be entirely lost, however, if providers of IP-enabled services must pay above-cost, per-minute charges for access to the ILECs' "last mile" facilities.

In light of the above, "[t]he Commission should not extend the current bloated and irrational access charge system to voice applications or to any other nascent IP-based services."[9] Rather, the proper solution is for the Commission to "fix intercarrier compensation."[10] Once the Commission has established a cost-based regime, it should apply to all entities that use the PSTN to provide telecommunications services.

B. The Commission Cannot – and Should Not – Require ISPs to Make Payments to the Universal Service Fund

Three of the BOCs – Verizon, SBC, and BellSouth – also ask the Commission to require certain ISPs that provide IP-enabled information services to make direct payments to the USF.[11] However, as the fourth BOC – Qwest – recognizes, Congress has not given the Commission

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[8] *Access Change Reform*, First Report and Order, 12 FCC Rcd 15982, 16132-33 (1997).

[9] MCI Comments at 45.

[10] AT&T Comments at 25.

[11] *See, e.g.,* Verizon Comments at 60 ("The Commission should impose the same universal service obligations on VoIP providers, whether or not those services are classified as telecommunications services or information services.").

legal authority to require ISPs to make USF payments.[12] Rather, Congress has given the Commission only limited "permissive" authority to require providers of "interstate telecommunications" to make payments to the USF.[13] Therefore, as Qwest correctly observes, "absent changes to the contribution rules, any VoIP service that constitutes an information service would be exempt from universal [service] contribution obligations."[14] Instead, "[l]ike other providers of information services," ISPs that provide voice applications "contribute to universal service indirectly when they purchase transmission services and capacity from telecommunications carriers."[15]

Verizon, SBC, and BellSouth have advanced a number of theories to try to justify imposition of USF payment obligations on ISPs that provide IP-enabled services. None of these theories is legally sound.

Verizon asserts that all "VoIP providers that allow their customers to connect with the PSTN are providing telecommunications – transmission, between or among points specified by the user, of information of the user's choosing, without change in the form or content of the information as sent and received."[16] Therefore, Verizon insists, all VoIP providers – even those whose services are classified as information services – "fall within the class of entities that may be required" to make USF payments.[17] This is plainly incorrect. Many Voice over Internet

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[12] *See* Qwest Comments at 18.

[13] 47 U.S.C. § 254(d).

[14] Qwest Comments at 47.

[15] *Id.*

[16] Verizon Comments at 61.

[17] *Id.*

Protocol ("VoIP") services involve protocol conversion and/or access to stored information. Such services indisputably constitute information services – not telecommunications.[18] Entities that provide such services are users – not providers – of telecommunications services and, consequently, they cannot be required to make direct payments to the USF.

BellSouth takes a different approach, arguing that "[b]ecause 'information services' are, by statutory definition, provided 'via telecommunications,' underlying every interstate information service is an interstate 'telecommunications' sufficient to trigger [the Commission's permissive authority under] section 254(d)."[19] The Commission has previously considered – and correctly rejected – the notion that ISPs are providers of telecommunications. BellSouth has given no basis for the Commission to revisit this determination.

The Telecommunications Act makes clear that an entity that provides an information service is "offering . . . a capability for generating, acquiring, storing, transforming, processing, retrieving, utilizing, or making available information."[20] While that capability is made available "via telecommunications,"[21] this does not make an ISP a telecommunications provider. As the Senate Committee Report that accompanied the Telecommunications Act explained, "Information Service Providers do not 'provide' telecommunications services; they are users of

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[18] *See generally Federal-State Joint Board on Universal Service,* Report to Congress, 13 FCC Rcd 11501, 11541-43 (1998) ("*Report to Congress on Universal Service*") (describing variants of VoIP that constitute information services).

[19] BellSouth Comments at 48-49.

[20] 47 U.S.C. § 153(20).

[21] *Id*.

telecommunications services."[22] Consistent with this view, the Commission observed in the *Report to Congress on Universal Service* that:

> Under *Computer II*, and our understanding of the 1996 Act, we do not treat an information service provider as providing a telecommunications service to its subscribers. The service it provides to its subscribers is not subject to Title II, and is categorized as an information service. The information service provider, indeed, is itself a user of telecommunications."[23]

SBC advances yet another theory as to why the Commission can and should require certain ISPs to make payments to the USF. SBC asks the Commission to require ISPs that provide IP-enabled voice services over their own transmission facilities to make USF payments – apparently on the theory that these providers are providing telecommunications to themselves.[24] The possibility that an ISP may deploy its own "last mile" wireline transmission facilities does not transform the ISP into a telecommunications provider. As the Commission has recognized, an ISP "offering . . . service over its own facilities does not offer 'telecommunications' to anyone, it merely uses telecommunications to provide end users with wireline broadband Internet access services." [25] Because "facilities-based ISPs" do not *provide* telecommunications, the Commission lacks authority to require them to make direct payments to the USF.

SBC goes even further, contending that the "Commission also has the authority to require universal service contributions from IP-enabled service providers whose services do not contain a discrete telecommunications component – albeit pursuant to its Title I authority, not its direct

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[22] S. Rpt. 104-23, 104th Cong., 1st Sess., at 28 (1995).

[23] *Report to Congress on Universal Service*, 13 FCC Rcd at 11534 n.138.

[24] *See* SBC Comments at 113-14.

[25] *Appropriate Framework for Broadband Access to the Internet Over Wireline Facilities,* Notice of Proposed Rulemaking, 17 FCC Rcd 3019, 3033 (2002).

section 254 authority."[26] SBC reasons that, "[i]n creating section 254, Congress acted to formalize and expand the Commission's Title I universal service authority, not limit it."[27]

SBC's contention is completely untenable. In adopting Section 254, Congress carefully crafted a comprehensive Universal Service regime. As part of that regime, Congress specifically authorized the Commission to require providers of "telecommunications" and "telecommunications services" to make contributions to the USF. Congress was well aware of the existence of ISPs and the growth of the Internet.[28] Had Congress wanted to give the Commission authority to require ISPs to make USF payments, it could easily have done so.

The Commission cannot use its Title I authority to adopt a regime that Congress declined to impose.[29] Title I is not a general grant of authority to craft whatever regulatory regime the Commission believes is appropriate. Rather, Title I is a limited grant of "ancillary authority." As the U.S. Court of Appeals for the Ninth Circuit has made clear, "Title I . . . confers on the FCC only such power as is ancillary to the Commission's specific statutory responsibilities . . . . In the case of enhanced services, the specific responsibility to which the Commission's Title I authority is ancillary to [is] its Title II authority . . . over common carrier services."[30] Thus, while Title I allows the Commission to adopt rules governing common carriers' participation in

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[26] SBC Comments at 114.

[27] *Id.* at 115.

[28] *See, e.g.* 47 U.S.C. § 153 (20) (defining "information services"); *id.* at § 230 (policy of promoting Internet growth).

[29] *See Motion Picture Association of America, Inc. v. FCC,* 309 F.3d 796, 805-06 (D.C. Cir. 2002) (rejecting as "untenable" the claim that the Commission can use its Title I authority to adopt rules "because Congress did not expressly foreclose the possibility.").

[30] *California v. FCC,* 905 F.2d 1217, 1241 n. 35 (9th Cir. 1990), *cert. denied,* 514 U.S. 1050 (1995).

the information services market, it does not provide the Commission with general authority to impose regulations on ISPs.[31] Because Congress did not authorize the Commission to require ISPs to make USF payments, the Commission may not use its Title I authority to require them to do so.

II. THE COMMISSION SHOULD REJECT THE ILECs' ATTEMPTS TO DISMANTLE THE EXISTING PRO-COMPETITIVE REGULATORY REGIME.

At the same time that they ask the Commission to impose burdensome new regulatory obligations on ISPs, the ILECs ask the Commission to eliminate the pro-competitive safeguards that have limited their ability to act anti-competitively. In particular, the ILECs ask the Commission to eliminate the *Computer II* unbundling requirement and declare the ILECs non-dominant in the market for all IP-enabled services. There is no justification for doing do.

In *Computer II,* the Commission made clear that any facilities-based carrier that provides an information (enhanced) service must unbundle the underlying telecommunications service and make it available to non-affiliated ISPs on the same prices, terms, and conditions as the carrier provides the service to itself.[32] To the extent that the carrier has market power, the prices, terms, and conditions of these telecommunications services must be embodied in filed tariffs. The Commission's rules have made it possible for non-carrier-affiliated ISPs to offer a wide range of innovative services.

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[31] *See* Microsoft Comments at 9 ("[T]he Commission's so-called 'ancillary jurisdiction' under Title I is limited to that consistent with the Act's other provisions and *necessary* to the accomplishment of a *specific statutory responsibility* under the Act." (emphasis in original)).

[32] *Amendment of Section 64.702 of the Commission's Rules and Regulations* (*Second Computer Inquiry*), Final Decision, 77 F.C.C.2d 384, 434 (1980), *on recon*., 84 F.C.C.2d 50, 53 (1980), *further recon*., 88 F.C.C.2d 512 (1981), *aff'd sub nom. Computer & Communications Indus. Ass'n v. FCC*, 693 F.2d 198, 205 n.18 (D.C. Cir. 1982), *cert. denied sub nom. Louisiana Pub. Serv. Comm'n v. FCC*, 461 U.S. 938 (1983).

The ILECs argue that, with the growth of "intra-modal" competition from CLECs and "inter-modal" competition from satellite and other broadband platform providers, retention of the unbundling requirement is no longer necessary.[33] The ILECs also claim that they should be considered non-dominant in all IP-enabled telecommunications services.[34] If the Commission grants the ILECs' request, an ILEC would be able to refuse to provide to non-affiliated ISPs the telecommunications services that the ILEC uses to provide IP-enabled information services. Moreover, if the ILEC chooses to offer these services to non-affiliated ISPs, it could do so on unreasonable and/or discriminatory prices, terms, and conditions. The Commission should decline to eliminate these core competitive safeguards.

As an initial matter, the Commission does not have legal authority to eliminate the ILECs' obligation to unbundle, and make available to competitors, the underlying telecommunications facilities that the ILECs use to provide IP-enabled information services. Section 202(a) of the Communications Act prohibits carriers – whether dominant or non-dominant – from engaging in "unjust or unreasonable discrimination" in the provision of a telecommunications service.[35] The Commission has held repeatedly that this provision imposes an independent obligation, separate from the one contained in the *Computer II* rules, that requires any facilities-based carrier that provides information services to unbundle the transmission

[33] *See, e.g.,* USTA Comments at 29 ("In an earlier era when information services were provided over a single wire, it arguably made sense to impose the sorts of nondiscrimination and network sharing requirements that the *Computer* decisions establish. But in the context of broadband today, that core assumption of the *Computer* decisions no longer exists.").

[34] *See, e.g., id.* at 27 ("ILECs lack any appreciable market power in the . . . market for IP-enabled services" at either the wholesale or retail level.).

[35] 47 U.S.C. § 202(a).

capacity underlying its information services and make that capacity available to competing ISPs on a non-discriminatory basis.[36]

Consistent with this principle, in the *Interexchange Marketplace Reconsideration Order,* adopted in 1995, the Commission observed that – in addition to the *Computer II* unbundling requirement – "section 202 of the Act prohibits [facilities-based carriers] from discriminating unreasonably in [the] provision of basic services" to non-affiliated ISPs.[37] Similarly, in the *Frame Relay Order,* which held that the *Computer II* rules required AT&T to unbundle its basic frame relay service, the Commission noted that "Section 202 of the Act *also* prohibits a carrier from discriminating unreasonably in its provision of basic services."[38] More recently, in the 2001 *CPE/Enhanced Service Bundling Order,* the Commission reiterated that "all carriers have a firm obligation under section 202 of the Act to not discriminate in their provision of transmission service to competitive internet or other enhanced service providers."[39] The Commission further observed that "discrimination . . . that favor[s] one competitive enhanced service provider over another or the carrier, itself, [is also] an unreasonable practice under section 201(b) of the Act."[40]

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[36] *See, e.g., Policy and Rules Concerning the Interstate, Interexchange Marketplace,* Report and Order, 16 FCC Rcd 7418, 7445 (2001) ("*CPE/Enhanced Service Bundling Order*").

[37] *Competition in the Interstate Interexchange Marketplace,* Memorandum Opinion and Order on Reconsideration, 10 FCC Rcd 4562, 4580 & n.72 (1995).

[38] *Independent Data Communications Manufacturers Ass'n, Inc. Petition for Declaratory Ruling that AT&T's InterSpan Frame Relay Service Is a Basic Service*, Memorandum Opinion and Order, 10 FCC Rcd 13717, 13719 (1995) (emphasis added) ("*Frame Relay Order*").

[39] *CPE/Enhanced Service Bundling Order,* 16 FCC Rcd at 7445.

[40] *Id.* at 7445-46. The Commission cannot eliminate this statutory obligation through the use of its forbearance power. Section 10 of the Communications Act, which is the Commission's sole source of forbearance authority, does not allow the Commission to forebear from imposing any statutory provision necessary to ensure that a carrier's charges or practices are not "unreasonably discriminatory." 47 U.S.C. § 160(a)(1).

Even if the Commission had the legal authority to do so, eliminating the requirement that the ILECs unbundle the telecommunications functionality that they use to provide IP-enabled information services and make that service available at just, reasonable, and non-discriminatory prices, terms, and conditions, would be unwise policy. Contrary to the ILECs' assertions, despite the introduction of CLEC competition and the ability of *end users* to obtain IP-enabled services from cable and wireless providers, ILECs retain market power in the provision of wholesale broadband transmission services, such as DSL, which non-affiliated ISPs need to provide IP-enabled information services. Because the ILECs are increasingly active participants in the information services market, they have both the ability and the incentive to refuse to provide telecommunications services to non-affiliated providers of IP-enabled information services. Alternatively, if they choose to provide services, the ILECs have the ability and incentive to do so on unreasonable and discriminatory prices, terms, and conditions, thereby subjecting non-affiliated providers of IP-enabled information services to a classic "price squeeze."

The ILECs' ability to act anti-competitively is not constrained by "intra-modal" competition. At present, less than ten percent of all DSL lines are provided by CLECs. The Commission's decision to eliminate line sharing could well result in a decrease in the CLECs' market share. Neither is the ILECs' market power constrained by "inter-modal" competition. Cable systems are under no legal obligation to – and, in practice, generally do not – provide wholesale broadband transport services to non-affiliated ISPs. Other delivery platforms, such as satellite and wireless, are still in the early stages of deployment. Thus, without appropriate regulatory safeguards, there is a real danger that ILECs could either eliminate the ability of non-affiliated providers of IP-enabled information services to access broadband transmission facilities or artificially drive up the costs of non-affiliated providers of IP-enabled information services and, ultimately, drive them from the market. As AT&T correctly observes, "[t]he *Computer Inquiries* regime was enacted precisely to protect rival information service providers from anti-competitive conduct by entities that control last mile facilities necessary to provide information services."[41] By preserving those rules, "the Commission can ensure a vibrant market for IP applications" provided over broadband facilities.[42]

III. THE COMMENTS DEMONSTRATE THAT DUAL FEDERAL-STATE REGULATION OF IP-ENABLED SERVICES IS NOT FEASIBLE.

Finally, the comments reveal a broad consensus that only a unified federal regime can adequately address the wide range of economic and social issues raised by the growth of IP-enabled services. The state utility commissions, not surprisingly, did not agree. However, in order to prevent federal preemption, the states must show that it is feasible to identify a discrete category of intrastate IP-enabled services, and to impose regulation that differs from the rules adopted by the Commission for interstate IP-enabled services. None of the state utility commission commenters has been able to do so.

Some state utility commissions have suggested the use of technology that can track the location from which a packet was sent and to which it was delivered.[43] Other states suggest that "proxies" be used to estimate the percentage of IP-enabled services that are provided on an interstate basis.[44] While these approaches might work in certain limited cases, they plainly do

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[41] AT&T Comments at 63.

[42] *Id.*

[43] *See, e.g.,* California Public Utilities Commission Comments at 37.

[44] *See, e.g.,* Minnesota Public Utilities Commission Comments at 11.

not provide a feasible means to apply a "dual regulatory regime" to most IP-enabled services. For example, there does not appear to be any sensible way for the Commission and a state utility commission to "share" jurisdiction over an on-line session, in which a customer uses IP-enabled services to place a computer-to-telephone voice call to a neighbor, send a "mass e-mail" to recipients both within and outside his state, and access a website in a foreign country. For a wide range of regulatory issues – from whether to impose rate regulation to whether to mandate procedures to facilitate access by law enforcement – there must a be single policy.[45] While the Commission should consult with the states and provide a meaningful implementation role, the Commission should use its authority to adopt a comprehensive federal regime applicable to IP-enabled services.

CONCLUSION

The Commission should seek to promote further innovation by adopting a clear and consistent regulatory regime for IP-enabled services, which imposes regulation only where necessary to prevent the abuse of market power or to achieve critical social policy objectives. To do so, the Commission should build on its established regulatory regime, which clearly distinguishes between telecommunications services – which, in appropriate cases, may be subject to regulation – and information services – which are not subject to regulation.

In particular, the Commission should decline the ILECs' invitations to use this proceeding to impose burdensome regulations – such as the duty to pay carrier access charges and make payments to the USF – on currently unregulated ISPs. At the same time, the

[45] *See* Timer Warner, Inc. Comments at 26 ("[R]egulation must be predictable and nationally uniform.").

Commission should preserve necessary and effective competitive safeguards designed to prevent the ILECs from using their still-considerable market power to impede competition in the market for IP-enabled information services.

Respectfully submitted,

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