

EX PARTE OR LATE FILED

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

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In the Matter of)
)
IP-Enabled Services)
)
Petition of SBC Communications Inc)
For Forbearance from the Application of)
Title II Common Carrier Regulation to)
IP Platform Services)

ORIGINAL

WC Docket No. 04-36

WC Docket No. 04-29

REPLY COMMENTS

BELLSOUTH CORPORATION

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Dated: July 14, 2004

BellSouth's Reply Comments
WC Docket Nos. 04-36 and 04-29
July 14, 2004

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TABLE OF CONTENTS

I. INTRODUCTION AND SUMMARY..... 1

II. THE COMMISSION SHOULD ASSUME A LEADERSHIP ROLE IN ENCOURAGING THE WIDESPREAD DEPLOYMENT OF IP-ENABLED SERVICES..... 3

III. THE COMMISSION SHOULD REJECT DEMANDS TO PERPETUATE ASYMMETRICAL ECONOMIC REGULATION IN THE COMPETITIVE AND INNOVATIVE BROADBAND AND IP-ENABLED SERVICES MARKETS IN THE GUISE OF THE MCI “LAYERS” OR NCTA MODELS 8

IV. REGARDLESS OF REGULATORY CLASSIFICATION, ALL IP-ENABLED SERVICES SHOULD BE ALLOWED TO DEVELOP WITHOUT ECONOMIC REGULATION 15

A. The Commission Should Establish a Unified Inter-carrier Compensation Mechanism That Will Apply to All IP-Enabled Services That Use The PSTN .. 19

1. The Commission should also allow for fraud prevention 23

2. In the meantime, the Commission should enforce its existing rules..... 23

B. All IP-Enabled Service Providers Should Have Identical Universal Service Funding Obligations 25

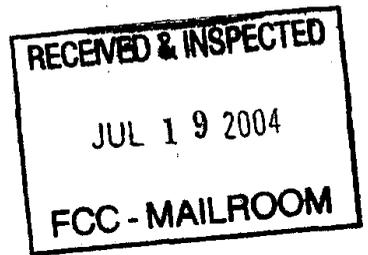
V. COMPUTER INQUIRY RULES MUST NOT APPLY TO THE PROVISION OF IP-ENABLED SERVICES..... 26

VI. MINIMALLY INTRUSIVE CALEA, E911, DISABILITIES ACCESS, CONSUMER PROTECTION, AND TRS OBLIGATIONS SHOULD APPLY TO VOIP SERVICES..... 30

VII. THE COMMISSION SHOULD BE ESPECIALLY VIGILANT OF NETWORK SECURITY ISSUES AND ALLOW THE INDUSTRY TO CONTINUE TO REACH DEFINITIVE CONCLUSIONS ON INDUSTRY-WIDE SECURITY STANDARDS 33

VIII. CONCLUSION 34

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REPLY COMMENTS

BellSouth Corporation, on behalf of itself and its wholly owned subsidiaries ("BellSouth"), replies to the comments filed in this proceeding.

I. INTRODUCTION AND SUMMARY

The comments show widespread agreement on the enormous potential of IP-enabled services to bring new, valuable, and efficient services to consumers, and on the need for a single, unified federal approach in order to sustain their continuing deployment. There is also widespread agreement that economic regulation is generally inappropriate for these new services, which are offered by numerous competitors over a host of intermodal platforms.¹ The dispute is really about whether a subset of IP providers – those that own broadband facilities – should be saddled with legacy economic regulation, even as they attempt to offer services in competition with the larger subset of IP providers who, the argument goes, should be free from all such regulatory oversight while at the same time receiving government mandated access to their

¹ See, e.g., Verizon Comments at 5-29; AT&T Comments at 15; CTIA – The Wireless Association™ ("CTIA") Comments at 8-9; Level 3 Communications LLC ("Level 3") Comments at 25-27; New Jersey Division of the Ratepayer Advocate ("NJRA") Comments at 8; Arizona Corporation Commission ("ACC") Comments at 12-13; United States Telecom Association ("USTA") Comments at 22-25; BellSouth Comments at 14-23.

competitors' facilities. The parties that argue for such market-distorting regulation – as exemplified by MCI's "layers" model – ignore this Commission's repeated findings that broadband transmission is competitive now, and likely to get even more competitive in the future.

In light of this competition, the Commission should assume its proper leadership role and reject demands to perpetuate or impose new economic regulation on providers of IP-enabled services at any level. In order to create a level playing field for all these providers, the Commission should use the "host of statutory tools" provided by Congress to structure a unified approach to IP-enabled services, which the Commission should define to include "any voice, data, video or other form of communication service provided by any type of communications provider (including telephone companies, cable companies, wireless providers, satellite companies, power line companies, ISPs, or any other type of entity) whereby some part of such service is originated or terminated by the customer in the Internet protocol and transported over an IP platform."² This unified approach should ensure that all providers of similar IP-enabled services would be treated alike regardless of who provides those services and whether the services qualify as information services or telecommunications services.

In light of proliferating applications, increased demand for Internet access, and augmented network capacity deployed across multiple broadband services platforms, including those of LECs, cable operators, direct broadcast satellite providers ("DBS"), video programming providers, wireless (including WiFi and CMRS) providers, and electric companies using power

² BellSouth Comments at 7.

lines, the Commission should decline to impose economic regulation on these services and further declare BOCs to be non-dominant in the provision of these services.

On the other hand, the Commission can and should take appropriate action to ensure that Congress's public interest objectives, including the availability of prompt emergency service to the public through the 911 system, access to communications by law enforcement officers acting under warrant, and maintenance of universal service, be maintained.

II. THE COMMISSION SHOULD ASSUME A LEADERSHIP ROLE IN ENCOURAGING THE WIDESPREAD DEPLOYMENT OF IP-ENABLED SERVICES

A wide cross-section of commenters – including insurgent VoIP providers,³ cable companies,⁴ equipment manufacturers,⁵ wireless providers,⁶ traditional CLECs,⁷ and incumbent LECs⁸ – agree on a fundamental point: a single federal regime for the regulation (and, more to the point, non-regulation) of IP-enabled services is a basic prerequisite to IP technology bringing

³ See, e.g., Vonage Comments at 14 (“The Commission needs to declare that IP-enabled services are interstate and subject to its jurisdiction before the states create a patchwork of conflicting common carrier regulation that stifles nascent IP-enabled services.”).

⁴ See, e.g., Time Warner Inc. Comments at 26 (“For VoIP to prosper, regulation must be predictable and nationally uniform.”).

⁵ See, e.g., Nortel Networks Comments at 13 (“Because VoIP has no geographic boundaries, the current interstate vs. intrastate structure does not work with VoIP. The current structure is creating jurisdictional conflicts that are slowing down the delivery of rich, new services that consumers will value and that will further reinvigorate the telecom sector.”); Lucent Technologies Inc. Comments at 6 (“Lucent feels strongly that there should be a single, national regulatory regime.”).

⁶ See, e.g., Virgin Mobile USA, LLC (“Virgin Mobile”) Comments at 1 (“Virgin Mobile requests that the Commission . . . preempt state regulation . . .”).

⁷ See, e.g., Pac-West Telecomm, Inc. (“Pac-West”) Comments at 14 (“Congress has given this Commission a specific mandate that effectively requires preemption of restrictive and inefficient state regulation.”).

⁸ See, e.g., SBC Comments at 43 (“[T]he Commission should affirmatively preempt any state-level counterparts to [Title II common-carrier regulation] as irreconcilable with federal policy in this area, and should likewise make clear that any other state regulations that undermine the congressionally mandated policy of unregulation will be preempted.”).

the full measure of potential benefit to consumers. These commenters recognize that only the certainty and predictability created by a single national regulatory regime will permit IP-enabled services to flourish.

Even a coalition of state regulators from nine different states has filed comments urging that “[s]ound public policy argues strongly that any regulation of IP-enabled services such as VoIP occur uniformly.”⁹ These state regulators forthrightly acknowledge that “IP-enabled services are typically ‘borderless’ and, thus, necessarily interstate in nature” and that “uniform national regulation over IP-enabled services would provide greater regulatory certainty than would a patchwork of fifty different state policies.”¹⁰ In sum, in the words of these state officials, “VoIP, a technology that promises competitive alternatives for our consumers, should not be subject to political whim across numerous states and communities. A national policy – one that is deregulatory in nature and sends an unambiguous signal to the market that the U.S. is receptive to emerging communications technologies – is the best protection against inconsistent and burdensome state regulation.”¹¹ BellSouth agrees fully with this analysis, and applauds these state commissioners for advocating this legally sustainable and economically rational result.

Other state commission commenters, however, take a different position, and seek to preserve crazy-quilt state regulation of IP-enabled services. NARUC argues, for instance, that Congress has expressed an intent to preserve state regulation in this area, and that any attempt to preempt state authority would conflict with federal-court precedent.¹² These claims are

⁹ Federation for Economically Rational Utility Policy (“FERUP”) Comments at 7.

¹⁰ *Id.* at 7-8.

¹¹ *Id.* at 8.

¹² NARUC Comments at 10-12.

incorrect. First, far from preserving state regulation in this context, Congress has expressly established its policy to “preserve the vibrant and competitive free market that presently exists for the Internet and other interactive computer services, unfettered by Federal or State regulation.”¹³

More generally, established principles from cases decided both before and after the passage of the 1996 Act make clear that this Commission has the authority to preempt state regulation in cases such as this one. Just this year, the Commission explained that state commissions lacked authority to regulate one IP-enabled service, Pulver.com’s Free World Dial-Up. The Commission established there that, where the Commission determines that a service with interstate components should be free of economic regulation, all state attempts to impose such regulation were preempted: “Any state attempt to impose economic or other regulations that treat FWD like a telecommunications service would impermissibly interfere with the Commission’s valid interest in encouraging the further development of Internet applications such as these, unfettered by Federal or state regulations, and thus would be preempted.”¹⁴

More generally, the Commission explained there that Commission authority is *exclusive* unless that service is (1) “purely intrastate” or (2) it is “practically and economically possible to separate interstate and intrastate components of a jurisdictionally mixed information service without negating federal objectives for the interstate component.”¹⁵ The fundamental problem for the commenters that support state regulation – a problem that they never come to grips with – is that IP-enabled technologies are neither purely intrastate nor can they be practically separated

¹³ 47 U.S.C. § 230(b)(2) (emphasis added).

¹⁴ *Petition for Declaratory Ruling that pulver.com’s Free World Dialup is Neither Telecommunications Nor a Telecommunications Service*, WC Docket No. 03-45, *Memorandum Opinion and Order*, 19 FCC Rcd 3307, 3320, n.70 (2004) (emphasis added) (“*Pulver Declaratory Ruling*”).

¹⁵ *Id.* ¶ 20.

into interstate and intrastate components. Thus, for instance, in arguing for preserving state regulation of IP-enabled services, the New York State Department of Public Service (“NYDPS”) can only assert that it would be “premature” to conclude that it would be impossible for state regulation to coexist with a federal policy of deregulation of IP-enabled services.¹⁶ But there is nothing premature about it. As the Commission stated in the *NPRM*, Internet communications “defy jurisdictional boundaries” because packets are “routed across a global network with multiple access points.”¹⁷ Moreover, as BellSouth and other commenters have explained,¹⁸ because IP-enabled services are geographically portable, it is often not possible to know the geographic end-points of a particular communication. Even beyond this, it is not feasible to market separate intrastate and interstate IP-enabled services, because no consumer would be interested in such products.¹⁹ In such a context, any state attempt to regulate IP-enabled services would *necessarily* negate the federal policy of deregulation of those services. Contrary to NARUC’s argument, consistent federal-court precedent supports the conclusion that, in such circumstances, this Commission’s statutory authority over interstate services supports its decision to preempt contrary state regulations – such as regulations imposing economic regulation in a sphere that the Commission has determined should be free of such regulations.²⁰

¹⁶ NYDPS Comments at 9.

¹⁷ *IP-Enabled Services*, WC Docket No. 04-36, *Notice of Proposed Rulemaking*, 19 FCC Rcd 4863, 4867, ¶ 4 (2004) (“*NPRM*”).

¹⁸ BellSouth Comments at 34-35; SBC Comments at 32-33.

¹⁹ See *Computer III Remand Proceedings: Bell Operating Company Safeguards and Tier 1 Local Exchange Company Safeguards*, CC Docket No. 90-623, *Report and Order*, 6 FCC Rcd 7571, 7633-34, ¶ 126 (finding that exclusive federal authority is appropriate in such circumstances) (“*Computer III Remand Order*”).

²⁰ See, e.g., *Louisiana Pub. Serv. Comm’n v. FCC*, 476 U.S. 355, 375 n.4 (1986); *Southwestern Bell Tel. Co. v. FCC*, 153 F.3d 523 (8th Cir. 1998); *California v. FCC*, 905 F.2d 1217 (9th Cir. 1990); *Illinois Bell Tel. Co. v. FCC*, 883 F.2d 104 (D.C. Cir. 1989).

For these reasons, even where a particular IP-enabled service is not portable, Commission precedent establishes that exclusive federal authority is appropriate. In particular, in the *GTE Tariff Order*, the Commission determined that the same broadband transmission that supports IP-enabled services is subject to exclusive federal authority under the “mixed use” doctrine applicable where more than 10% of the traffic on a facility is interstate.²¹ As the Commission explained, because these services were subject to exclusive federal authority under the mixed use doctrine, it was unnecessary to determine whether state regulation was also preempted on other grounds: “In light of our finding that GTE’s ADSL service is subject to federal jurisdiction under the Commission’s mixed use facilities rule and properly tariffed as an interstate service, we need not reach the question of whether the inseverability doctrine applies.”²² This mixed-use rule is established commission precedent, and there is no reason not to apply it here to the same broadband transmission at issue in the *GTE Tariff Order* as well as to applications that are bundled with such transmission, particularly in light of the extremely deleterious policy consequences of imposing 51 different regulatory regimes on competitive IP-enabled services.

In this regard, contrary to some commenters’ arguments,²³ it is not relevant whether some IP-enabled services are properly understood to be telecommunications services. States have no guarantee of jurisdiction over all telecommunications services. For instance, the special access services at issue in the *GTE Tariff Order* are telecommunications services, but the Commission properly applied its “mixed use” doctrine to determine that they are subject to federal, not state, authority.

²¹ *GTE Telephone Operating Cos.; GTOC Tariff No. 1; GTOC Transmittal No. 1148*, CC Docket No. 98-79, *Memorandum Opinion and Order*, 13 FCC Rcd 22466, 22479-80, ¶¶ 23-26 (1998) (“*GTE Tariff Order*”).

²² *Id.* at 22481, ¶ 28.

²³ See Ohio Public Utilities Commission (“Ohio PUC”) Comments at 15-16.

In sum, both established precedent and sound policy compel the Commission to establish its exclusive jurisdiction over IP-enabled services.

III. THE COMMISSION SHOULD REJECT DEMANDS TO PERPETUATE ASYMMETRICAL ECONOMIC REGULATION IN THE COMPETITIVE AND INNOVATIVE BROADBAND AND IP-ENABLED SERVICES MARKETS IN THE GUISE OF THE MCI "LAYERS" OR NCTA MODELS

IP-enabled services and networks constitute a significant challenge to regulatory approaches that were developed long before the 1996 overhaul of the Communications Act of 1934. They challenge the traditional regulatory "silos" that reflect the service-specific chapters of the Communications Act as it was revised in the years leading up to 1996. Many commenters argue that the existence of this disruptive technology that can be provided over a variety of facilities platforms argues for a new paradigm of regulatory oversight. There are two distinct camps, however. First, there are those commenters who demonstrate, on a demonstrated record of robust inter-modal competition and growth in broadband and IP-enabled services and markets, that the same deregulatory rules should apply to all providers of IP-enabled services.²⁴ Second, there are those who eschew fact and contend, based on nothing more than tired rhetoric, that their facilities-based competitors should be saddled with legacy economic regulation developed when AT&T owned a monolithic local and long distance telephone and telegraph network empire and there were relatively few entrants in the market for enhanced services.²⁵ In accord with congressional intent, the Commission must reject attempts to perpetuate or impose unwarranted asymmetrical regulation on facilities-based providers (the so-called "physical" layer).²⁶

²⁴ See, e.g., BellSouth Comments at 10-25; Avaya Inc. Comments at 10-12; USTA Comments at 21-33.

²⁵ See, e.g., CompTel/ASCENT Comments at 13-15, 17; Cbeyond Communications, LLC, et al. ("Cbeyond") Comments at 13.

²⁶ See, e.g., MCI Comments at 13-20; Association for Local Telecommunications Services ("ALTS") Comments at 2-4; Dialpad Communications, Inc. et al. ("Dialpad") Comments at 17.

In this regard, the Fact Report submitted in this proceeding²⁷ supports Commissioner Martin's conclusions and observations with respect to the competitive nature of the facilities that are used to provision IP-enabled services:

[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.²⁸

Indeed, the record compiled in the *Triennial Review* proceeding compelled the Circuit Court of Appeals to observe:

[W]e agree with the Commission that robust intermodal competition from cable providers – the existence of which is supported by very strong record evidence, including cable's maintenance of a broadband market share on the order of 60%, see *Order P-292* – means that even if all CLECs were driven from the broadband market, mass market consumers will still have the benefits of competition between cable providers and ILECs.²⁹

Broadband services are, of course, being offered by more than just cable companies and telephone companies. As the Commission has previously observed:

²⁷ Peter W. Huber & Evan Leo, *Competition in the Provision of Voice Over IP and Other IP-Enabled Services*, Prepared for and Submitted by BellSouth, Qwest, SBC, and Verizon, WC Docket No. 04-36, May 28, 2004 ("Fact Report").

²⁸ Kevin J. Martin, Commissioner, Federal Communications Commission, remarks before the NARUC Conference, Committee on Telecommunications, Washington, D.C. (Mar. 8, 2004).

²⁹ *United States Telecom Ass'n v. FCC*, 359 F 3d 554, 582 (D.C. Cir. 2004) ("*USTA IP*").

An increasing number of broadband firms and technologies are providing growing competition to incumbent LECs and incumbent cable companies, apparently limiting the threat that they will be able to preclude competition in the provision of broadband services.³⁰

This prompted the Commission to conclude that:

The record before us, which shows a continuing increase in consumer broadband choices within and among the various delivery technologies – xDSL, cable modems, satellite, fixed wireless, and mobile wireless, suggests that no group of firms or technology will likely be able to dominate the provision of broadband services.³¹

The comments and Fact Report demonstrate that the Commission’s conclusion remains correct. At least eight fixed wireless providers as well as the nation’s largest electric utilities and satellite providers are providing broadband communications services to consumers and small businesses at competitive prices, and there is widespread broadband competition in the large business enterprise market.³² The Wireless Internet Service Providers Association states that “[w]ireless ISPs have rolled out broadband service in virtually every state of the union – and in hundreds of rural and metropolitan markets *Wireless has boldly become the nation’s third pipe for last-mile access.*”³³ There is also yet another “pipe,” for broadband transmission, for, according to Chairman Powell, “Broadband over Power Line [BPL] has the potential to provide

³⁰ *Rulemaking to Amend Parts 1, 2, 21, and 25 of the Commission’s Rules to Redesignate the 27.5-29.5 GHz Frequency Band, to Reallocate the 29.5-30.0 GHz Frequency Band, to Establish Rules and Policies for Local Multipoint Distribution Service and for Fixed Satellite Services*, CC Docket No. 92-297, *Third Report and Order and Memorandum Opinion and Order*, 15 FCC Rcd 11857, 11864, ¶ 18 (2000). The abundance of intermodal competition will spur even greater competition in the broadband market as the emergence of new technologies increases, which will enable multiple competitors to use the same general technology to provide services.

³¹ *Id.* at 11865, ¶ 19.

³² BellSouth Comments at 20-23.

³³ Fact Report at A-10 (emphasis added). See pages A9-13 of the Fact Report for a detailed account of current fixed wireless broadband service offerings.

consumers with a ubiquitous third broadband pipe to the home.”³⁴ With one third of electric utility companies considering or already using BPL, with BPL reaching approximately one million customers by this year’s end, with BPL encompassing six million power lines and generating potentially \$3.5 billion in revenues, and with BPL speed comparable to or faster than cable or DSL and prices comparable to or lower than cable or DSL,³⁵ it is clear that BPL represents a formidable fourth pipe alternative, while satellite and third generation (3-G) wireless networks represent yet additional “pipes.”³⁶

Thus, the Commission should reject calls for economic regulation based on ill-founded notions of broadband bottlenecks. In the first case, the market leaders in broadband access, cable companies, are in fierce competition with telephone companies. As BellSouth demonstrated in its comments, and setting any competitive offerings from fixed wireless, BPL, satellite or 3-G wireless aside, cable modem broadband Internet access service is offered by one or more of at least nine different cable providers in 60 out of 64 of BellSouth’s MSAs.³⁷ And this state of competition is not confined to the southeastern markets; according to the latest FCC High Speed Report, 92% of zip codes in California have two or more high-speed providers.³⁸ JP Morgan has estimated that, as of December 2003, 75% of all U.S. households were able to choose between

³⁴ *Id.* at A-13. *See id.* at A13-16 for a detailed account of current BPL service offerings.

³⁵ *Id.* at A14-16.

³⁶ *Id.* at A16-19.

³⁷ BellSouth Comments at 20, n.73.

³⁸ Ind. Anal. & Tech. Div., Wireline Competition Bureau, FCC, *High-Speed Services for Internet Access: Status as of December 31, 2003* at Table 13 (June 2004). In some cases one of the two providers is a CLEC, Covad Communications.

cable modem and DSL service, and only 5% of all U.S. households were able to receive DSL but not cable modem service.³⁹

Thus, there is simply no justification in fact or law to impose economic regulation on the “physical layer” as MCI and other advocates of that particular model advocate.⁴⁰ The MCI model simply seeks to impose old regulation in a new, competitive market, and therefore will discourage innovation and investment, a reality confirmed by the comments of equipment manufacturers: “The application of traditional voice regulations to VoIP – and IP-enabled services – would stifle innovation and restrict economic growth.”⁴¹ As the Computing Technology Industry Association (“CompTIA”) notes, the economy will be favorably impacted by VoIP, which will (as the Commission itself noted in its *NPRM*) provide consumers with incentives to subscribe to broadband services.⁴² The comments of communications and computing equipment manufacturers relative to the economic consequences of legacy economic regulation are especially pertinent and reliable, because “[f]irms that sell goods and services that are *inputs* to the production and use” of new services “stand to gain an expanding market . . . and

³⁹ J. Bazinet, *et al.*, JP Morgan, *Broadband 2003* at Figure 9 (Dec. 5, 2002). See also Kevin J. Martin, Commissioner, FCC, *FCC: Looking Forward*, presentation before the NARUC Telecommunications Committee at 11 (July 28, 2003) (citing JP Morgan). There are no true broadband monopolies or duopolies. And even if, for the sake of argument, there was at one time a true broadband duopoly, it has been eroded by fixed wireless, BPL, satellite and 3-G wireless competitors. At one time the wireless market itself was characterized as a duopoly, yet the industry’s relative scant federal regulation, freedom from state pricing and entry regulation, and eventual explosion of spectrum availability has resulted in widespread competition, falling prices and ever-increasing substitution for POTS. See *Implementation of Section 6002(b) of the Omnibus Budget Reconciliation Act of 1993; Annual Report and Analysis of Competitive Market Conditions With Respect to Commercial Mobile Services*, WT Docket No. 02-379, *Eighth Report*, 18 FCC Rcd 14783 (2003).

⁴⁰ If market power exists at all in MCI’s model, as Verizon points out, it is at the level of the Internet backbone, “where well-entrenched companies, including MCI, manage a vast network of transmission facilities facing little or no competition.” Verizon Comments at 20.

⁴¹ Nortel Networks Comments at 9; see also Alcatel North America (“Alcatel”) Comments at 20-21; 23.

⁴² CompTIA Comments at 17-18.

have the incentive to make a completely unbiased judgment on the matter.”⁴³ The economy will suffer under the MCI layers/competitive bias approach, because it is simply a wolf in sheep’s clothing.

“Up, down, across,” observes Dr. Brough, “[the MCI Layers model] is still regulation.”⁴⁴ As the authors of a recent NMRC analysis point out, MCI’s “layers” approach is a “seductive analytical tool that “is burdened with the same regulatory traps of current law.”⁴⁵ The most egregious deficiencies in the MCI model are summarized by the NMRC:

- (1) the model simplifies complex network interconnections;
- (2) the model transfers the current regulatory model for traditional telecom networks to future broadband networks;
- (3) the model does not work economically and discourages technological innovation and network investment; and
- (4) the model ignores the benefits that vertical integration can provide for the industry and consumers.⁴⁶

MCI’s model is being used to rationalize in theory the perpetuation of discredited, outdated, unnecessary and inefficient economic regulation on Bell Operating Company (“BOC”) ILECs in particular, and on all facilities-based providers in general. Facilities owners, particularly “last mile” providers, alone would be required to pay into the universal service fund, would not be able to charge for access to their facilities, and would be subject to *Computer*

⁴³ *United States v. Western Elec. Co.*, 993 F.2d 1572, 1582 (D.C. Cir. 1993).

⁴⁴ Wayne T. Brough, “Up, Down, Across – It’s Still Regulation,” in *Free Ride: Deficiencies of the MCI “Layers” Policy Model and the Need for Principles that Encourage Competition in the New IP World*, New Millennium Research Council (“NMRC”) (July 2004) at 4, available at www.newmillenniumresearch.org/news/071304_report.pdf.

⁴⁵ *Id.* at vi.

⁴⁶ *Id.* at vii.

Inquiry unbundling requirements. Such a result would tilt the playing field upward in favor of the entities operating in the low cost, low risk, and highly profitable “applications layer,” and against those entities in a position to create new and innovative advanced networks capable of facilitating even greater communications capabilities.

While clearly aimed at BOCs, nothing limits this approach from being applied to other non-BOC ILECs, to power companies with broadband transmission lines, to cable companies, and to wireless companies in light of spectrum scarcity. This is precisely the wrong approach to take in the current competitive state of the broadband and IP-enabled services markets. For all these reasons, BellSouth agrees with Verizon and others that the so-called “physical layer” should be just as free of economic regulation as the “application” or “content” layers.⁴⁷

The model advocated by NCTA contains similar flaws as it advocates freedom from legacy regulation for all but incumbent LECs.⁴⁸ It makes no sense to perpetuate legacy economic regulation on the non-dominant provider of broadband services, especially in favor of the dominant provider of those services. Further, it is not clear what corresponding obligations VoIP service providers would have in connection with the “rights” that NCTA proposes that they have. While BellSouth agrees generally with NCTA that the particular path taken with respect to VoIP is not as important as reaching the correct end result, it isn’t clear to BellSouth that NCTA’s end goal is true deregulatory parity, in that it appears once again that one subset of IP-enabled service providers would have more regulatory obligations than others. In this regard, certain rights reserved by statute to telecommunications service providers, which are balanced by corresponding obligations, need not necessarily be extended to IP-enabled information service

⁴⁷ Verizon Comments at 21.

⁴⁸ National Cable & Telecommunications Association (“NCTA”) Comments at 20 (freedom from legacy regulation limited to VoIP service provided in competition with incumbent utility phone service).

providers. These providers can seek to become certified local exchange carriers, or partner or team with another certified LEC, in order to obtain interconnection, telephone numbers and other inputs they might desire. To be sure, the Commission has a long established set of procedures that all entities must follow in order to access the PSTN and provide telecommunications services to end users. The Commission should not create new category rules or procedures for IP enabled information service providers.

IV. REGARDLESS OF REGULATORY CLASSIFICATION, ALL IP-ENABLED SERVICES SHOULD BE ALLOWED TO DEVELOP WITHOUT ECONOMIC REGULATION

The 1996 Act mandates a federal, deregulatory approach to all interstate telecommunications regulation and further clarifies that all information services have a telecommunications component. Thus, whether the provision of an IP-enabled service is a “telecommunications service” under current regulatory classifications, as BellSouth contends some may be,⁴⁹ and as some commenters insist all VoIP services are,⁵⁰ or whether it is an “information service,” as BellSouth maintains most IP-enabled services are, and as others insist all IP-enabled services of any stripe are,⁵¹ Congress has instructed the FCC to rely upon the power of the market, not regulatory fiat, in order to encourage the growth and deployment of new and advanced services to all Americans.⁵²

⁴⁹ See also USTA Comments at 19-21.

⁵⁰ See, e.g., City and County of San Francisco Comments at 3; Inclusive Technologies Comments at 2-3; Interstate Telcom Consulting, Inc. Comments at 2-3; Communications Workers of America (“CWA”) Comments at 6-10; National Association of State Utility Consumer Advocates (“NASUCA”) Comments at 57.

⁵¹ See, e.g., MCI Comments at 21-23; Qwest Comments at 14-19; SBC Comments at 33-36.

⁵² See § 706 of the Telecommunications Act of 1996, Pub. L. 104-104, Title VII, Feb. 8, 1996, 110 Stat. 153, reproduced in the notes under 47 USC § 157 (the Commission “shall encourage the deployment on a reasonable and timely basis of advanced telecommunications capability to all Americans”); 47 U.S.C. § 230(b) (it is the policy of the United States “to preserve the vibrant and competitive free market that presently exists for the Internet and other

The fundamental point is that the regulatory classification of IP-enabled services as information services or telecommunications services shouldn't matter – competing IP-enabled services should be treated the same, with no economic regulation.⁵³ Alcatel correctly urges the FCC to eliminate disparities between IP-enabled services based on legacy rules or the specific platforms used to provide IP-enabled services.⁵⁴ As USTA explains:

The Commission should ensure that all providers of IP-enabled services have the same regulatory obligation, regardless of the technology or transmission media they use.

....

...[T]he FCC itself has recently recognized the anti-competitive effects of such asymmetrical regulation, and in particular how such rules encourage companies to compete not on the merits, but through arbitrage and regulatory gamesmanship.

....

All these precedents establish that competition on the merits is best served, and arbitrage best avoided, when the FCC adopts even-handed rules that treat like services alike regardless of transmission media or legacy regulation.⁵⁵

Certain categories of IP-enabled services, especially voice over Internet protocol (“VoIP”) or similar services using or terminating voice traffic to North American Numbering Plan (“NANP”)/PSTN telephone numbers, should not only be treated as interstate in nature and subject to the Commission’s exclusive jurisdiction, but also subject to universal service fund funding obligations without double taxation or assessment at the facility level; appropriate E911

interactive computer services, unfettered by Federal or State regulation”); 47 U.S.C. § 160(a), (b).

⁵³ This should be true even if the service is used as a substitute for POTS. If a service meets the definition of an IP-enabled telecommunication or information service, it should not be saddled with Title II regulation simply because it acts as a substitute for traditional POTS.

⁵⁴ Alcatel North America Comments at 20-22; *see also* America’s Rural Consortium Comments at 4-5.

⁵⁵ USTA Comments at 10-14.

and disabilities access obligations; and CALEA-like accommodations where shown by industry collaborations to be technically and economically reasonably achievable.⁵⁶

Because the Commission has the authority to establish a rational, even-handed regulatory scheme regardless of whether particular IP-enabled services are telecommunications services or information services,⁵⁷ it should make clear that regardless of regulatory classification, the proper pro-competitive result will follow. Such a result will provide regulatory clarity and prevent the Commission from becoming bogged down in a pragmatically pointless discussion of appropriate regulatory classifications.

The fundamental point is that this new generation of advanced communications services and the broadband networks associated with them should be free from economic regulation, regardless of what kind of entity provides them. The Commission has the legal authority to create such a deregulatory scheme for all IP-enabled services. To the extent that Title II/common carrier based economic regulation may otherwise attach to IP-enabled services, the Commission must exercise its forbearance and waiver authority to prevent these services from being subjected to economic regulation.

By the same token, because the Commission has ample legal authority to require that all similarly situated carriers pay the same access charges and universal service fees,⁵⁸ the Commission has no valid reason not to do so. In particular, equitable PSTN compensation and universal service funding solutions should be achieved that will eliminate current distortions and

⁵⁶ See, e.g., CWA Comments at 16-24; GVNW Consulting, Inc. ("GVNW") Comments at 7-9; NASUCA Comments at 47-57, 63-67; NCTA Comments at 16-19; Time Warner Inc. Comments at 11-16.

⁵⁷ BellSouth Comments at 25-36; Time Warner Inc. Comments at 21-25; NCTA Comments at 45.

⁵⁸ BellSouth Comments at 44-49.

opportunities for arbitrage and significantly reduce, if not eliminate, incentives for arbitrage in the future.

Commenters such as MCI contend that the Commission's Title I authority is not sufficient to authorize the imposition of access charge (and universal service) obligations on information services that compete with telecommunications services.⁵⁹ That is incorrect. The Commission's long-standing assertion of jurisdiction over information services has been affirmed by the D.C. Circuit as "reasonably ancillary" to the Commission's responsibility to "assure a nationwide system of wire communications services at reasonable prices."⁶⁰ Indeed, the Commission's decision to exempt information services from access charges necessarily indicates that it would have the authority to impose those obligations where appropriate.⁶¹ Moreover, contrary to MCI's argument, the fact that Congress did nothing to undermine the Commission's assertion of authority over information services when it passed the 1996 Act confirms that the Commission's decisions accord with statutory principles.

Even more to the point for present purposes, the Supreme Court has made plain that Title I is appropriately used to ensure even-handed treatment of new services with services that fall within the Commission's traditional regulatory authority.⁶² And it cannot seriously be disputed that regulation to ensure that a subset of competing users of the PSTN (telecommunications carriers) do not bear a disproportionate share of the costs of maintaining that network is thus reasonably ancillary to the Commission's duty to ensure "rapid, efficient, Nation-wide and

⁵⁹ See MCI Comments at 24.

⁶⁰ *Computer & Communications Indus. Ass'n v. FCC*, 693 F.2d 198, 213 (D.C. Cir. 1982).

⁶¹ See, e.g., *Access Charge Reform, et al.*, CC Docket Nos. 96-262, et al., *First Report and Order*, 12 FCC Rcd 15982, 16132-33, ¶ 343 (1997) ("*Access Charge Reform Order*").

⁶² *United States v. Southwestern Cable Co.*, 392 U.S. 157, 178 (1968).

world-wide wire and radio communications service *with adequate facilities at reasonable charges.*⁶³

In this regard, BellSouth is not arguing that the Commission could impose any regulation it desires on any information service regardless of whether that is ancillary to a statutory purpose.⁶⁴ That is not the issue. The real question is whether the Commission has authority to impose the same compensation rules (and other requirements such as 911) on IP-enabled services that compete with telecommunications services providers and use the PSTN in an analogous manner. Under the federal court decisions that BellSouth discussed above and in BellSouth's opening comments (at 29-32, 45-46), it assuredly does have the authority. Indeed, even MCI concedes that "[t]o the extent that some [IP-enabled] voice applications have begun to compete directly with traditional telephone service, so that users of those voice applications may use those applications and not traditional telephone service, the Commission may have the authority to impose E911 requirements."⁶⁵ By the same reasoning, when IP-enabled services use the PSTN in the same way as traditional IXCs, the Commission has authority to impose access charges (and universal service obligations) on those carriers just as it does on other providers in order to further established statutory goals.

A. The Commission Should Establish a Unified Intercarrier Compensation Mechanism That Will Apply to All IP-Enabled Services That Use the PSTN

There is widespread support for the Commission's observation that: "As a policy matter, we believe that any service provider that sends traffic to the PSTN should be subject to similar compensation obligations, irrespective of whether the traffic originates on the PSTN, on an IP network, or on a cable network. We maintain that the cost of the PSTN should be borne

⁶³ 47 U.S.C. § 151 (emphasis added).

⁶⁴ See MCI Comments at 33.

⁶⁵ *Id.* at 34-35.

equitably among those that use it in similar ways.”⁶⁶ A large number of commenters agree that if IP-enabled services use the PSTN and require a LEC to use its switches and other facilities to terminate a call that starts on an IP network (or to originate a call that is then handed over to an IP network), the LEC should be compensated through access charges (or any future mechanism) just as it is compensated for performing the same functions to originate or terminate other interstate communications.⁶⁷ Any government mandate or policy that allows some carriers to avoid access charges because of the technology they use would therefore deprive LECs of the use of, and appropriate compensation for, their property.

Indeed, even AT&T itself acknowledges that the “Commission should not pick winners and losers” by applying different regulatory rules to competing entities.⁶⁸ Contrary to AT&T’s understanding, however, that fundamental insight compels the conclusion that *all* providers that use the PSTN to originate or terminate calls should be subject to the same intercarrier compensation obligations, regardless of whether they use IP technology or circuit-switched technology. VoIP providers are providers of interstate communications services, and, to the extent they use the PSTN to terminate or originate communications, they should have the same obligations as other interstate interexchange carriers, in order to avoid arbitrage and artificial advantages.

AT&T is wrong when it states that such a policy of regulatory parity will create disincentives for investment in IP-enabled services; to the contrary, such even-handed treatment

⁶⁶ *NPRM* ¶ 61.

⁶⁷ *See, e.g.*, Time Warner Inc. Comments at 15-16; CWA Comments at 18-19; DJE Teleconsulting, LLC (“DJE”) Comments at 5; General Communication, Inc. (“GCI”) Comments at 15; Independent Telephone & Telecommunications Alliance (“ITTA”) Comments at 6-7; NASUCA Comments at 70-73; Organization for the Promotion and Advancement of Small Telecommunications Companies (“OPASTCO”) Comments 2-6; Ohio PUC Comments at 34-35.

⁶⁸ AT&T Comments at 24.

simply removes an artificial, regulatory incentive to invest in a particular technology, a result AT&T itself claims should be avoided.⁶⁹ Any other result would lead to providers using IP technology not because it is more efficient or offers more value to customers but simply because, by using that particular technology, they could avoid paying for the costs they impose on the PSTN.

As the Commission explained in a related context, there is no sound policy reason to create such a regime. The Commission would merely be creating “artificial incentives for carriers to convert to IP networks. Rather than converting at a pace commensurate with the capability to provide enhanced functionality, carriers would convert to IP networks merely to take advantage of the cost advantage [of avoiding access charges] IP technology should be deployed based on its potential to create new services and network efficiencies, not solely as a means to avoid paying access charges.”⁷⁰ BellSouth fully agrees with that analysis, which applies equally here. It is no answer to simply allege that current access charges are “bloated” or “distorted” or that VoIP providers may purchase business lines or pay reciprocal compensation and so therefore don’t get an entirely “free ride.”⁷¹ In the first place, AT&T’s charges are incorrect. This Commission has worked long and hard on, and the industry itself has participated in, significant efforts to streamline and improve the interstate access charge regime.⁷² As the Commission noted in adopting the *CALLS Order*:

⁶⁹ *Id.*

⁷⁰ *Petition for Declaratory Ruling that AT&T’s Phone-to-Phone IP Telephony Services are Exempt from Access Charges*, WC Docket No. 02-361, *Order*, 19 FCC Rcd 7457, 7469, ¶ 18 (2004).

⁷¹ AT&T Comments at 22-28.

⁷² See Access Charge Reform; Price Cap Performance Review for Local Exchange Carriers; Low-Volume Long Distance Users; Federal-State Joint Board On Universal Service, CC Docket Nos. 96-262, 94-1, 99-249 & 96-45, Sixth Report and Order in CC Docket Nos. 96-262 and 94-
BellSouth’s Reply Comments
WC Docket Nos. 04-36 and 04-29
July 14, 2004

We adopt the CALLS Proposal as it relates to local switching, trunking, and special access. We believe the proposal is in the public interest because it provides an immediate reduction in switched access rates that will result in lower long-distance charges for consumers, while also simplifying the current price cap access charge regime. Adoption of the CALLS Proposal will result in an immediate \$2.1 billion reduction in switched access usage charges. All price cap LECs will make the CALLS Proposal's switched access usage charge reductions on July 1, 2000.⁷³

Second, even if AT&T were correct, the proper way to address this issue is not by the Commission creating an arbitrage opportunity for VoIP providers, but by the Commission completing overall intercarrier compensation reform and rate restructuring in a rational way that applies to them and all other providers of equivalent interstate services. The Commission should continue its efforts to reform the current system. In this regard, the Commission should reject arguments imposing reciprocal compensation as an appropriate compensation mechanism prior to resolving the pending intercarrier compensation proceeding for all types of interstate communications.⁷⁴ As the National Exchange Carrier Association ("NECA") explains, reciprocal compensation rates currently encourage uneconomic arbitrage.⁷⁵ The Commission clearly has the authority to impose an alternative, even-handed regime, and sound public policy compels it to do so now.

1, Report and Order in CC Docket No. 99-249, Eleventh Report and Order in CC Docket No. 96-45, 15 FCC Rcd 12962 (2000) ("CALLS Order").

⁷³ *Id.* at 13025, ¶ 151.

⁷⁴ *Developing a Unified Intercarrier Compensation Regime*, CC Docket No. 01-92.

⁷⁵ NECA Comments at 9-13.

1. The Commission should also allow for fraud prevention

BellSouth agrees with SBC that the Commission should permit carriers to adopt effective mechanisms for preventing fraud in the implementation of a declaration that interstate access charges are currently applicable to IP-enabled services that originate or terminate in circuit-switched format on the PSTN.⁷⁶ A mere declaration, without clarification of authorized fraud prevention measures, allocation of the burden of proof, and a commitment to enforce its rules, will not prevent providers from engaging in unlawful access charge avoidance schemes.⁷⁷ It is imperative that as part of the unified intercarrier compensation regime that takes into account traffic delivered from or to the PSTN by IP-enabled services providers, the Commission establishes appropriate and effective fraud prevention mechanisms.

2. In the meantime, the Commission should enforce its existing rules

AT&T and others continue to misconstrue the scope of the ESP exemption to the current access charge regime.⁷⁸ This Commission's decisions that provided ESPs with a limited exemption from the ordinary forms of access charges that would otherwise apply to them when calls are originated on the PSTN demonstrate fundamentally that Commission has the authority to require information service providers to pay access charges.⁷⁹ The Commission subsequently decided to provide a limited exemption to those providers from some access charges, thus

⁷⁶ SBC Comments at 80.

⁷⁷ *Id.*

⁷⁸ AT&T Comments at 22-23; Qwest Comments at 41-42.

⁷⁹ The Commission's decisions make plain that "enhanced service providers" are among the users of "access services." *MTS and WATS Market Structure*, CC Docket No. 78-72 Phase I, *Memorandum Opinion and Order*, 97 F.C.C.2d 682, 711, ¶ 78 (1983). *See Level 3 Communications LLC Petition for Forbearance Under 47 U.S.C. § 160(c) from Enforcement of 47 U.S.C. § 251(g), Rule 51.701(b)(1), and Rule 69.5(b)*, WC Docket No. 03-266, BellSouth Reply at 3-8, Reply Comments of SBC Communications at 4-13, Reply Comments of the Verizon Telephone Companies at 4-7 (filed Mar. 31, 2004).

waiving rules that would otherwise apply and therefore demonstrating that the Commission was and is empowered to require these providers to pay these charges.⁸⁰ Indeed, the Commission has made plain that it was continuing this narrow exemption because it believed that ESPs were using the PSTN in a manner different than IXCs, the traditional payers of access charges, and in fact were more like business users of the telephone network.⁸¹ The Eighth Circuit agreed with that analysis, and expressly based its affirmance of the Commission on the conclusion that ISPs “do not utilize LEC services and facilities in the same way or for the same purposes as other customers who are assessed per-minute interstate access charges.”⁸² But as the *NPRM* itself explains, that logic does not apply in circumstances where IP-enabled service providers do use local circuit-switched networks in precisely the same way as traditional IXCs do. In those circumstances, the “cost of the PSTN should be borne equitably among those that use it in similar ways.”⁸³

As SBC explains, the original ESP exemption did not convert information service providers from being among the variety of users of access service into true “end users”; rather, they were merely treated as end users for pricing purposes.⁸⁴ And as Verizon points out, the Commission never intended the exemption to apply to the situation where a caller, whether or not a VoIP subscriber, uses an ordinary telephone to call a VoIP subscriber or where a VoIP subscriber uses an IP telephone to reach a called party on the PSTN.⁸⁵ The PSTN end user in this example is not a customer of the ISP and is not receiving an information service; therefore

⁸⁰ See, e.g., *Access Charge Reform Order*, 12 FCC Rcd at 16132-33, ¶ 343.

⁸¹ See *id.* at 16133, ¶ 345.

⁸² *Southwestern Bell Tel Co. v. FCC*, 153 F.3d 523, 542 (8th Cir. 1998).

⁸³ *NPRM* ¶ 61.

⁸⁴ SBC Comments at 69-70.

⁸⁵ Verizon at Comments at 46-47.

the information service provider should have the same obligation to pay access charges on the PSTN leg of the call as any other user of a LEC's local switching facilities.⁸⁶ Both law and policy require that all users of the PSTN pay the same interstate rates when they use the PSTN for the same interstate services, regardless of service technology.⁸⁷

The Commission should therefore reject the arguments of commenters who state that IP-enabled services that are information services are not subject to access charges today, and should not be required to compensate LECs for their use of the PSTN in connection with IP-enabled services in the future.

B. All IP-Enabled Service Providers Should Have Identical Universal Service Funding Obligations

As the Commission has explained, contribution policies should “reduce[] the possibility that carriers with universal service obligations will compete directly with carriers without such obligations.”⁸⁸ In the Commission's words, “the public interest *requires* that, to the extent possible, carriers with universal service contribution obligations should not be at a competitive disadvantage in relation to [other] providers on the basis that they do not have such obligations.”⁸⁹ The Commission must apply the same universal service duties to IP-based services that use the PSTN as it imposes on their competitors that use more traditional technologies. Any other result would disadvantage one set of providers because of the technology they use and reduce support for universal service as more and more consumers

⁸⁶ SBC Comments at 70-71.

⁸⁷ *Id.* at 68-81; BellSouth Comments at 43-48.

⁸⁸ *Federal-State Joint Board on Universal Service*, CC Docket No. 96-45, 12 FCC Rcd 8776, 9183-84, ¶ 795 (1997) (“*First Universal Service Order*”).

⁸⁹ *Federal-State Joint Board on Universal Service*, CC Docket No. 96-45, *Report to Congress*, 13 FCC Rcd 11501, 11565, ¶ 133 (1998) (emphasis added) (“*Report to Congress*”).

switch to IP-based services. The Commission should reject, and repudiate, efforts by carriers to foist the burden solely on so-called providers of "last mile" PSTN facilities.⁹⁰

Those results are contrary to the Communications Act, which requires "sufficient," "predictable," and "nondiscriminatory" mechanisms to support universal service.⁹¹ They are equally inconsistent with the Commission's own prior determinations that universal service mechanisms should be technologically neutral, in order to allow the "marketplace to direct the advancement of technology and all citizens to benefit from such development."⁹²

The Commission has explicit statutory authority to extend universal service obligations to IP-enabled information services. Section 254(d) authorizes the Commission to require all providers of interstate "telecommunications" to "contribute to the preservation and advancement of universal service" if the "public interest so requires." Because "information services" are, by statutory definition, provided "via telecommunications,"⁹³ underlying every interstate information service is an interstate "telecommunications" component sufficient to trigger section 254(d). The Commission should therefore require IP-enabled information service providers, as well as IP-enabled telecommunications services providers, to contribute to the Universal Service Fund when their service originates or terminates calls on the PSTN.

V. COMPUTER INQUIRY RULES MUST NOT APPLY TO THE PROVISION OF IP-ENABLED SERVICES

As BellSouth urged in its comments, and as Verizon correctly states, the Commission must refrain from imposing any of the *Computer Inquiry* rules on providers of IP-enabled

⁹⁰ See, e.g., MCI Comments at 48-49.

⁹¹ 47 U.S.C. § 254(b)(5), (d).

⁹² *First Universal Service Order*, 12 FCC Rcd at 8802, ¶ 49.

⁹³ 47 U.S.C. § 153(20). See Comcast Comments at 11-13; CompTel/ASCENT Comments at 6, n.11; Earthlink Comments at 15.

services.⁹⁴ Verizon observes correctly that these rules were predicated on the belief that, at the time, a single firm controlled access to all transmission services. They are thus totally inappropriate in the current communications environment in general, and in the broadband and IP-enabled services context in particular.⁹⁵ There is no evidence in this or any other administrative record compiled by the Commission that any LEC has inhibited the development of enhanced or information or IP-enabled service markets, or of competition within those markets. To the contrary, the application of regulatory constraints on BOC participation in enhanced service markets, and their continued application to BOC participation in information and IP-enabled services markets, have hindered and will continue to stymie the development of innovative services, thus making them more costly or leaving them undeveloped. There is simply no need to retain any vestige of the Commission's pre-1996 efforts to establish artificial market controls in order to encourage the development of IP-enabled services markets when the market is thriving, especially since this regulation has been overtaken by SIP technology that enables emerging inter-modal facilities competition from cable operators, power companies, wireless, and wireless broadband providers, and software providers who can offer voice services.⁹⁶

As BellSouth explained in its comments and has reiterated above, ILECs are minority providers of the broadband transmission necessary to support IP-enabled information services, and the Commission has already determined that it would waive these requirements as to broadband-based information services offered by cable providers, the market leaders.⁹⁷ If these

⁹⁴ Verizon Comments at 21-24.

⁹⁵ *Id.*

⁹⁶ Scott Cleland, *Bell Legal Victory: Winning the Battle but Losing the War*, Precursor, June 18, 2004.

⁹⁷ BellSouth Comments at 14-23.