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

In the Matter of	)	
	)	
Review of Regulatory Requirements for	)	CC Docket No. 01-337
Incumbent LEC Broadband	)	
Telecommunications Services	)	

NOTICE OF PROPOSED RULEMAKING

Adopted: December 12, 2001 **Released: December 20, 2001**

Comment Date: 45 Days After Publication in the Federal Register
Reply Date: 30 Days After Comment Date

By the Commission: Chairman Powell and Commissioner Copps issuing separate statements.

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I. INTRODUCTION

1. In this proceeding, we initiate an examination of the appropriate regulatory requirements for the incumbent local exchange carriers' (LECs') provision of domestic broadband telecommunications services ("broadband services"). Here, we focus on traditional Title II common carrier regulation, historically arising largely out of sections 201 and 202 of the Communications Act of 1934, as amended,[1] as applied to incumbent LEC provision of broadband services.[2] In particular, we seek comment on what regulatory safeguards and carrier obligations, if any, should apply when a carrier that is dominant in the provision of traditional local exchange and exchange access services provides broadband service. This is one of several proceedings addressing issues raised by changes in the marketplace for broadband services and related information services.

2. Three of these proceedings, including this one, focus, among other things, on regulatory treatment under Title II of broadband services and the facilities over which they are provided. More specifically, in the Title II proceedings, we are initiating a broad review of our competition policies in light of our experience since first implementing the market opening provisions of the Act and developments in the marketplace such as the birth of broadband services. In addition to the present proceeding, we initiate a related Title II proceeding today in a companion Notice of Proposed Rulemaking (NPRM) in the *Triennial UNE Review* proceeding. That proceeding addresses, among other things, incumbent LECs' wholesale obligations under section 251 to make their facilities available as unbundled network elements (UNEs) to competitive carriers for the provision of broadband services.[3] The Commission recently released two additional NPRMs that address national performance measurements and standards.[4]

3. The fourth proceeding, to be initiated by the Commission in the near future, will address the basic question of how broadband services offered by wireline telecommunications providers should be classified under the Communications Act when bundled with information

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[1] 47 U.S.C. §§ 201 & 202 (1996). We refer to the Communications Act of 1934, as amended by the Telecommunications Act of 1996, as the "Communications Act" or the "Act."

[2] For purposes of this proceeding, unless otherwise indicated, we use the term "broadband telecommunications service" or "broadband service" in a very general sense to describe a broad array of high-speed telecommunications services. *See* note 37, *infra*, for further discussion of this point.

[3] *Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*, CC Docket No. 01-338, *Implementation of the Local Competition Provisions of the Telecommunications Act of 1996*, CC Docket No. 96-98, *Deployment of Wireline Services Offering Advanced Telecommunications Capability*, CC Docket No. 98-147, Notice of Proposed Rulemaking, FCC 01-361 (adopted Dec. 12, 2001).

[4] *Performance Measurements and Standards for Unbundled Network Elements and Interconnection, et al.*, CC Docket No. 01-318, Notice of Proposed Rulemaking, FCC 01-331 (rel. Nov. 19, 2001) (*UNE Measurements and Standards Notice*); *Performance Measurements and Standards for Interstate Special Access Services, et al.*, CC Docket No. 01-321, Notice of Proposed Rulemaking, FCC No. 01-339 (rel. Nov. 19, 2001) (*Special Access Measurements and Standards Notice*).

services, in particular whether such bundled offerings should be classified as Title I services.[5] The present proceeding does not seek to answer these definitional questions with respect to bundled offerings, but instead focuses on the appropriate regulation of broadband offerings that are regulated under Title II of the Act.[6]

4. The world of telecommunications is changing dramatically, with broadband services assuming an increasingly critical role in our economy and our everyday lives. The basic elements of the existing regulatory requirements for the provision of broadband services by incumbent LECs were initially developed in a prior era of circuit-switched, analog voice services characterized by a one-wire world for access to communications. Historically, consumers have only been able to access telecommunications services through the wireline facilities installed by their local telephone company. Today, the services provided by different communications networks are converging, as cable providers, satellite providers, and terrestrial wireless network providers develop new services that are becoming increasingly substitutable for the broadband services provided over the traditional telephone network.[7] At the same time, the provision of broadband services to residential customers is a nascent market, and enormous new investment and innovation will be required if we are to realize the full promise of broadband deployment. As such, much is unknown about consumer demand for services such as DSL and the incentive and ability of dominant carriers to exercise market power in the broadband market. Thus, we initiate this proceeding to consider what changes, if any, we should make in our traditional regulatory requirements to reflect the relevant competitive landscape and create the right incentives for broadband services growth and investment.

5. As discussed in more detail below, under existing domestic common carrier regulation, incumbent local exchange carriers are generally treated as dominant carriers, absent a specific finding to the contrary for a particular market.[8] As dominant domestic carriers,

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[5] The question of how cable modem service should be classified is the subject of a separate on-going proceeding and will not be considered in this forthcoming proceeding. *See Inquiry Concerning High-Speed Access to the Internet over Cable and Other Facilities*, GN Docket No. 00-185, Notice of Inquiry, 15 FCC Rcd 19287 (2000) (*Cable Access Notice*).

[6] Accordingly, interested parties need not comment on the appropriate statutory classification of bundled broadband/information services in this proceeding. Those issues will be considered in the separate proceeding described above.

[7] *Inquiry Concerning the Deployment of Advanced Telecommunications Services to All Americans in a Reasonable and Timely Fashion, and Possible Steps to Accelerate Such Deployment Pursuant to Section 706 of the Telecommunications Act of 1996*, Second Report, 15 FCC Rcd 20913, 20928-30, 20932-38, 20952-54 & 20958-61. (2000) (*Second Section 706 Report*).

[8] Our use of the term "dominant" here is limited to the provision of domestic telecommunications services, and is not intended to encompass findings of dominance related to foreign carrier affiliation. The regulatory safeguards applicable to carriers that are treated as dominant on particular international routes because of an affiliation or alliance with a foreign carrier with market power are set forth in section 63.10 of the Commission's rules, 47 C.F.R. § 63.10. These safeguards differ from those the Commission has imposed on carrier found to be dominant for other reasons.

incumbent LECs are subject to tariff filing, tariff support and pricing requirements.[9] The present broadband services market differs from the historic market for the provision of analog voice services in which traditional common carrier regulation arose. In particular, the one-wire world for customer access appears to no longer be the norm in broadband services markets as the result of the development of intermodal competition among multiple platforms, including DSL, cable modem service, satellite broadband service, and terrestrial and mobile wireless services.

6. The Commission has addressed the role of continued regulation as competition develops in other contexts, such as traditional long distance service. The issues presented in this proceeding are different and more challenging than those in the prior Commission proceedings, however. This is due to the fact that the incumbent LEC local exchange plant is used to provide services with very different competitive characteristics. For example, broadband services are often provided over certain of the same facilities as other local exchange and exchange access services. At the same time, residential broadband services, such as DSL, while still a nascent market, generally appear to be subject to significant intermodal competition, while traditional access services that may be provided over these same facilities are generally subject to much less competition.

7. In this proceeding, we seek comment on the nature and scope of the market for domestic broadband services.[10] We also seek comment on the relevant market dynamics – including intermodal competition and the nascent stage of market development for residential broadband services – affecting the provision of domestic broadband services. Finally, we request comment on the appropriate regulatory requirements under Title II of the Act for the provision of broadband services by incumbent LECs given current market conditions. In particular, we ask interested parties to address how the Commission can best balance the goals of encouraging broadband investment and deployment, fostering competition in the provision of broadband services, promoting innovation, and eliminating unnecessary regulation. As part of this proceeding, we also invite comment on the Petition filed by SBC Communications on October 3, 2001, requesting an expedited ruling that it is non-dominant in the provision of broadband services, and asking the Commission to forbear from dominant carrier regulation of those services.[11]

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[9] The BOCs are also subject to certain *Computer II/III* obligations generally designed to ensure that competitive information service providers (ISPs) have nondiscriminatory access to the basic underlying services used in the provision of information services. The continued need for these requirements is currently being examined in a separate proceeding. *Computer III Further Remand Proceedings: Bell Operating Company Provision of Enhanced Services; 1998 Biennial Review – Review of Computer III and ONA Safeguards and Requirements*, CC Docket Nos. 95-20 & 98-10, Further Notice of Proposed Rulemaking, 13 FCC Rcd 6040 (1998); *Further Comment Requested to Update and Refresh Record on Computer III Requirements*, CC Docket Nos. 95-20 & 98-10, Public Notice, 16 FCC Rcd 5363 (2001).

[10] This proceeding is not intended to address the international services market.

[11] SBC Petition For Expedited Ruling That It Is Non-Dominant In Its Provision Of Advanced Services And For Forbearance From Dominant Carrier Regulation Of Those Services, filed Oct. 3, 2001.

II. BACKGROUND

8. For most of the twentieth century, telephony was viewed as a natural monopoly that required regulation. The primary concern of regulators at that time was to prevent incumbent monopolists from exploiting their market power at the expense of regulated ratepayers.[12] As competition was introduced into former monopoly markets, it was recognized that regulation would need to be modified to account for this introduction of competition. Thus, the Commission initiated a series of proceedings to streamline the regulation of carriers that lacked market power, and for whom monopoly regulation was unnecessary. While the Commission initially focused its streamlining efforts on new entrants that lacked individual market power, it later moved to reduce regulation of former monopoly carriers as competition eroded their market power. At the same time that the Commission was reducing certain forms of regulation that competition rendered unnecessary, it also recognized the need to prevent incumbent carriers possessing market power in one market from leveraging that market power into a related, competitive or potentially competitive market. Accordingly, the Commission adopted a variety of competitive safeguards that were intended to prevent such leveraging. We summarize the various regulatory requirements the Commission has developed in the past below. As discussed more fully in Section IV, we ask parties to comment on whether any of the regulatory tools developed in these proceedings has relevance for the Commission's regulatory approach to incumbent LEC-provided broadband services.

A. Streamlining Regulation of Firms in Increasingly Competitive Markets

9. Between 1979 and 1985, the Commission conducted the *Competitive Carrier* proceeding,[13] which examined how Commission regulations should be adapted for new firms

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[12] Economists have recognized different ways to exercise market power by distinguishing between "Stiglerian" market power, which is the ability of a firm profitably to raise and sustain its price significantly above the competitive level by restricting its own output, and "Bainian" market power, which is the ability of a firm profitably to raise and sustain its price significantly above the competitive level by raising its rivals' costs and thereby causing the rivals to restrain their output. *See Regulatory Treatment of LEC Provision of Interexchange Services Originating in the LEC's Local Exchange Area*, 12 FCC Rcd 15756, 15803, n.214 (1997) (*LEC Classification Order*).

[13] *Policy and Rules Concerning Rates for Competitive Common Carrier Services and Facilities Authorizations Therefor*, Notice of Proposed Rulemaking, 77 FCC 2d 308 (1979) (*Competitive Carrier Notice*); First Report and Order, 85 FCC 2d 1 (1980) (*Competitive Carrier First Report and Order*); Further Notice of Proposed Rulemaking, 84 FCC 2d 445 (1981); Second Further Notice of Proposed Rulemaking, 47 Red. Reg. 17,308 (1982); Second Report and Order, 91 FCC 2d 59 (1982), *recon. denied*, 93 FCC 2d 54 (1983); Third Further Notice of Proposed Rulemaking, 48 Fed. Reg. 28,292 (1983); Third Report and Order, 48 Fed. Reg. 46,791 (1983); Fourth Report and Order, 95 FCC 2d 554 (1983) (*Competitive Carrier Fourth Report and Order*), *vacated AT&T v. FCC*, F.2d 727 (D.C. Cir. 1992), *cert. denied, MCI Telecommunications Corp. v. AT&T*, 113 S. Ct. 3020 (1993); Fourth Further Notice of Proposed Rulemaking, 96 FCC 2d 1191 (1984); Fifth Report and Order, 98 FCC 2d 1191 (1984); Sixth Report and Order, 99 FCC 2d 1020 (1985), *vacated MCI Telecommunications Corp. v. FCC*, 765 F.2d 1186 (D.C. Cir. 1985) (collectively referred to as the *Competitive Carrier* proceeding).

entering formerly monopolistic markets.[14] In a series of orders, the Commission distinguished two kinds of carriers – those with market power (dominant carriers) and those without market power (non-dominant carriers).[15] The Commission sought to reduce regulation of new competitive entrants, which it had classified as non-dominant, on the ground that, because they lacked market power, they could not impose the kinds of harms much of existing regulation was intended to prevent. Thus, the Commission eliminated rate regulation of non-dominant carriers, reduced existing tariff filing requirements, and lightened the section 214 obligations imposed on non-dominant carriers.[16] In addition, it found that it was unnecessary to subject non-dominant carriers to the same accounting regulations that applied to dominant carriers.

10. As competition developed in the interstate, interexchange market, the Commission initiated the *Interstate Interexchange* proceeding to consider whether it was in the public interest to streamline the regulation of the sole dominant interexchange carrier, AT&T.[17] Based on its review, the Commission found that certain services provided by AT&T had become "substantially competitive."[18] Accordingly, it streamlined the regulation of those services provided by AT&T.

11. Despite this streamlining, AT&T remained classified as a dominant carrier with respect to the interstate interexchange market and continued to be subject to price cap regulation for certain services, including those provided to residential customers. Consequently, AT&T in 1993 filed a motion seeking to be re-classified as a non-dominant carrier in the interstate, domestic, interexchange market and to be regulated in the same manner as its competitors.[19] In

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[14] The primary focus of this proceeding was on the so-called specialized common carriers, domestic satellite carriers, resale (including value-added) carriers, and miscellaneous common carriers. *See Competitive Carrier Notice*, 77 FCC 2d at 309, para. 1.

[15] In the *Competitive Carrier Fourth Report and Order*, the Commission defined market power as "the ability to raise prices by restricting output," and as "the ability to raise and maintain prices above the competitive level without driving away so many customers as to make the increase unprofitable." *See Competitive Carrier Fourth Report and Order*, 95 FCC 2d at 558, para. 7.

[16] *See Competitive Carrier* proceeding.

[17] *Competition in the Interstate Interexchange Marketplace*, Notice of Proposed Rulemaking, 5 FCC Rcd 2627 (1990); Report and Order, 6 FCC Rcd 5880 (1991) (*First Interexchange Competition Order*); Order, 6 FCC Rcd 7255 (1991); Memorandum Opinion and Order, 6 FCC Rcd 7569 (1991); Memorandum Opinion and Order, 7 FCC Rcd 2677 (1992); Memorandum Opinion and Order on Reconsideration, 8 FCC Rcd 2659 (1993); Second Report and Order, 8 FCC Rcd 3668 (1993) (*Second Interexchange Competition Order*); Memorandum Opinion and Order, 8 FCC Rcd 5046 (1993); Memorandum Opinion and Order on Reconsideration, 10 FCC Rcd 4562 (1995) (collectively referred to as the *Interexchange Competition* proceeding).

[18] *First Interexchange Competition Order*, 6 FCC Rcd at 5911, para. 188 (finding that services in AT&T's Basket 3 under price cap regulation, other than analog private line services, and services outside of price cap regulation, including Tariff 12, were "substantially" competitive); *see also Second Interexchange Competition Order*, 8 FCC Rcd at 3668, para. 1 (replacing price cap regulation with further streamlined regulation for all of AT&T's Basket 2 services, except for 800 directory assistance).

[19] *Motion of AT&T Corp. to be Reclassified as a Non-Dominant Carrier*, Order, 11 FCC Rcd 3271, 3283, para. 14 (1995) (*AT&T Reclassification Order*).

the *AT&T Reclassification Order*, the Commission found that AT&T no longer possessed individual market power in the interstate, interexchange market, and it accordingly reclassified AT&T as non-dominant.[20] Significantly, the Commission also found that continued dominant carrier regulation stifled AT&T's ability to compete, which in turn could inhibit the growth of competition in the interstate, interexchange market.[21]

12. More recently, as competition in the provision of interstate access services increased, the Commission recognized that many incumbent LECs remained subject to significant regulatory constraints. Accordingly, the Commission's *Pricing Flexibility Order*[22] granted pricing flexibility to incumbent LECs subject to price cap regulation, once certain competitive thresholds were met, to increase their ability to respond to competition in this market.[23] The *Pricing Flexibility Order* designed a framework to provide greater flexibility to incumbent LECs and to facilitate the removal of services from price cap regulation as competition developed in the exchange access market, while ensuring that these LECs could not use this flexibility to engage in anticompetitive behavior.[24] The Commission also established a framework for granting incumbent LECs subject to price cap regulation greater flexibility in the pricing of all interstate access services once they satisfied certain competitive criteria.[25]

B. Competitive Safeguards to Ensure Competition in Related Markets

13. With the introduction of competition into former monopoly markets, the Commission recognized the benefits of streamlining regulation of carriers that lacked individual market power. The Commission also recognized the need to introduce new regulations to prevent carriers possessing market power in one market from leveraging that power into a second competitive market. In a series of proceedings, the Commission considered and adopted a variety of these competitive safeguards, including various structural safeguards (such as the separate subsidiary requirements of *Computer II* and those imposed on independent LECs' provision of interexchange services), non-structural safeguards (such as those imposed in *Computer III*), accounting safeguards (including Part 64 rules and the affiliate transaction rules), and various

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[20] *Id*. at 3347, para. 140.

[21] *Id*. at 3288**,** para. 27.

[22] *Access Charge Reform, Price Cap Performance Review for Local Exchange Carriers, Interexchange Carrier Purchases of Switched Access Services Offered by Competitive Local Exchange Carriers, Petition of U.S. West Communications, Inc. for Forbearance from Regulation as a Dominant Carrier in the Phoenix, Arizona MSA*, 14 FCC Rcd 14221 (1999) (*Pricing Flexibility Order*).

[23] *Id*. at 14232-33, para. 19. In addition, this order granted immediate pricing flexibility to price cap LECs in the form of streamlined introduction of new services, geographic deaveraging of rates for services in the trunking basket, and the removal, upon implementation of toll dialing parity, of certain interstate interexchange services from price cap regulation. *See id*. at 14225, para. 4.

[24] *Id*. at para. 3.

[25] *Id*. at para. 4.

reporting and performance requirements (such as certain access service reports required under ARMIS). These safeguards also had the effect of allowing carriers possessing market power to compete in related competitive markets rather than being banned from these markets altogether.

14. One of the earliest instances where the Commission considered the need for competitive safeguards was in the *Computer Inquiries*.[26] At that time, the Commission attempted to balance the benefits of having AT&T and its Bell Operating Companies (BOCs) participate in the emerging market for enhanced services with the desire to protect new competitors from possible cross-subsidization or anti-competitive behavior by the incumbents using their control over bottleneck facilities. The *Computer II* and *III* proceedings sought to ensure that the BOCs could not use their control over bottleneck local exchange facilities to discriminate against independent information service providers (ISPs). Initially, as a result of the *Computer II* proceeding, the Commission subjected BOC entry into the information service market to strict separate affiliate requirements.[27] In *Computer III*, however, the Commission offered an alternative set of safeguards to the separate affiliate requirements of *Computer II*. The *Computer III* requirements included Open Network Architecture (ONA) and Comparably Efficient Interconnection (CEI) requirements. The Commission determined that the costs of structural separation outweighed the benefits, and that nonstructural safeguards could protect competitive ISPs from anticompetitive behavior by the BOCs while avoiding the inefficiencies associated with structural safeguards.[28] The Commission also required the BOCs to comply with

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[26] *See, e.g., Regulatory and Policy Problems Presented by the Interdependence of Computer and Communication Services and Facilities* (*Computer I*), 28 FCC 2d 291 (1970) (Tentative Decision); 28 FCC 2d 267 (1971) (Final Decision).

[27] *Amendment of Section 64.702 of the Commission's Rules and Regulations* (*Computer II*), 77 FCC 2d 384 (1980) (*Computer II Final Decision*), *recon*., 84 FCC 2d 50 (1980) (*Computer II Reconsideration Order), further recon*., 88 FCC 2d 512 (1981) (*Computer II Further Reconsideration Order), affirmed sub nom. Computer and Communications Industry Ass'n v. FCC*, 693 F.2d 198 (D.C. Cir. 1982), *cert. denied*, 461 U.S. 938 (1983). Initially, the separate affiliate requirement applied to the then-integrated Bell System. However, following divestiture of AT&T in 1984, the Commission extended the structural separation requirements of *Computer II* to the BOCs. *See United States v. AT&T*, 552 F. Supp. 131 (D.D.C. 1982), *aff'd sub nom. Maryland v. United States*, 460 U.S. 1001 (1983); *Policy and Rules Concerning the Furnishing of Customer Premises Equipment, Enhanced Services and Cellular Communications Services by the Bell Operating Companies North American Telephone Association Petition for Declaratory Ruling on the Requirement for Sale of Customer Premises Equipment by the Bell Operating Companies*, CC Docket No. 83-115, ENF 83-5, Report And Order, 95 FCC 2d 1117 (1983).

[28] *Computer III Further Remand Proceedings: Bell Operating Company Provision of Enhanced Services and 1998 Biennial Regulatory Review – Review of Computer III and ONA Safeguards and Requirements*, Report and Order, 14 FCC Rcd 4289, 4293-94, at para. 7 (1999) (*Computer III Report and Order*). The Commission initially applied the Computer III and ONA rules to both AT&T and the BOCs. *Computer III Phase I Order*, 104 FCC 2d 958 (1986). In subsequent orders, the Commission first modified, and then relieved, AT&T of most Computer III and ONA requirements. *See, e.g., Computer III Phase I Reconsideration Order*, 2 FCC Rcd 3035 (1987); *Competition in the Interstate Interexchange Marketplace*, Memorandum Opinion and Order on Reconsideration, 10 FCC Rcd 4562 (1995); *see also Computer III Report and Order*, 14 FCC Rcd at 4294-95, para. 8. ONA is the overall design of a carrier's basic network services to permit all users of the basic network, including the information services operations of the carrier and its competitors, to interconnect to specific basic network functions and interfaces on an unbundled and equal-access basis. The BOCs and GTE through ONA must unbundle key components, or elements, of their basic services and make them available under tariff, regardless of (continued….)

other nonstructural safeguards regarding network disclosure and quality, installation, and maintenance reporting.[29] The related market, information services, was and continues to be unregulated, although the Commission retains jurisdiction over information services through Title I of the Act.

15. Then, in 1998, in response to passage of the 1996 Act and BOC entry into the interLATA information services market, the Commission issued the *Computer III Further Notice* to address issues raised by the interplay between the safeguards and terminology established in the 1996 Act and the *Computer III* regime.[30] In the *Computer III Further Notice*, the Commission observed that BOCs remain the dominant providers of local exchange and exchange access services in their in-region states, and thus continue to have the ability to engage in anticompetitive behavior against competitive ISPs.[31] The Commission noted, however, that the movement toward local exchange and exchange access competition should gradually decrease and eventually eliminate the need for regulation of the BOCs to ensure that they do not discriminate against competitive ISPs.[32] In the *1999 Computer III Report and Order*, the Commission concluded that in today's telecommunications market, given the protection afforded by the ONA requirements and the 1996 Act, it should eliminate the requirement that BOCs file CEI plans and obtain Commission approval for those plans prior to providing new information services.[33]

16. Separate from the *Computer II* and *III* line of orders, in 1996, the Commission initiated a proceeding to examine how its regulations should be adapted to acknowledge the potential entry of BOCs and incumbent LECs into the long distance telecommunications market. Specifically, in the *LEC Classification Order*, the Commission determined whether the BOCs and independent incumbent LECs should be treated as dominant or non-dominant carriers in their provision of long distance services.[34] The Commission analyzed whether the BOCs' and other

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whether their information services operations utilize the unbundled components. *See Computer III Report and Order*, 14 FCC Rcd at 4294-95, para 8, n.17. The Commission has never imposed CEI requirements on GTE or any other independent LEC. A remand from the Court of Appeals for the Ninth Circuit regarding the sufficiency of ONA unbundling as a condition of lifting structural separation is pending. *Computer III Further Remand Proceedings: Bell Operating Company Provision of Enhanced Services; 1998 Biennial Regulatory Review – Review of Computer III and ONA Safeguards and Requirements*, Further Notice of Proposed Rulemaking, 13 FCC Rcd 6040, 6051-52, paras. 15-16 (1998) (*Computer III Further Notice*).

[29] *Computer III Phase I Order*, 104 FCC 2d at 1080-86, 1089-91, paras. 246-55, 260-65; *Computer III Phase II Order*, 2 FCC Rcd at 3084-86, paras. 88-98.

[30] *Computer III Report and Order*, 14 FCC Rcd at 4291, para. 3, n.5.

[31] *Computer III Further Notice*, 13 FCC Rcd at 6072, para. 51.

[32] *Id.*

[33] *Computer III Report and Order*, 14 FCC Rcd at 4292, para. 4 (BOCs are now only required to post their CEI plans and plan amendments on their Internet sites, and to notify the Commission upon posting); *see also Computer III Further Notice*, 13 FCC Rcd at 6077-78, para. 61-62.

[34] *LEC Classification Order*, 12 FCC Rcd 15756 (1997). In particular, the 1996 Act significantly altered the legal and regulatory requirements governing the local exchange marketplace. Among other things, the 1996 Act (continued….)

incumbent LECs' monopoly positions in the local exchange and exchange access markets, along with their control of bottleneck facilities, should subject them to dominant carrier regulation in the related long distance market, which was competitive and substantially deregulated. After engaging in a market power analysis, the Commission concluded that, upon entry, the BOCs and other incumbent LECs would be unlikely to have sufficient market shares to allow them to profitably raise and maintain prices above competitive levels in the long distance market. The Commission further concluded that the competitive safeguards imposed on the BOCs and other incumbent LECs, including separate affiliate requirements,[35] made it unlikely that the BOCs and other incumbent LECs could engage in anti-competitive behavior to such an extent that they could gain individual market power in the interexchange market. Therefore, the Commission determined that BOC affiliates and independent incumbent LEC affiliates should be classified as non-dominant in the provision of in-region, interstate, domestic, long distance services.[36]

III. IDENTIFICATION OF INCUMBENT LEC-PROVIDED BROADBAND SERVICES MARKETS

17. The first step in assessing what regulatory requirements are appropriate for incumbent LEC-provided broadband services is to define and analyze the relevant markets in which incumbent LECs provide these services.[37] Consistent with Commission precedent, our regulatory response should be guided by a full understanding of the existing market dynamics for broadband services.[38] We begin our analysis by asking questions about the relevant product and

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allowed the BOCs, under certain conditions, to enter markets from which they previously were restricted, including the interLATA telecommunications and interLATA information services markets. However, the services offered in these markets relied on incumbent-controlled facilities where the incumbent had, or may have had, market power, and the potential for leveraging this market power was of concern.

[35] *See* 47 U.S.C. 272; 47 C.F.R. § 64.1903. The Commission recently sought comment on whether the separate affiliate requirements for incumbent LECs continue to serve the public interest. *See 2000 Biennial Regulatory Review Separate Affiliate Requirements of Section 64.1903 of the Commission's Rules*, CC Docket No. 00-175, Notice of Proposed Rulemaking, FCC No. 01-261, 16 FCC Rcd __, 2001 WL 1078734, at para. 8. (rel. Jul. 14, 2001).

[36] *LEC Classification Order*, 12 FCC Rcd at 15762-63, paras. 6-7.

[37] Although we are cognizant that the term "broadband services" has been used in common parlance to identify, rather than precisely define, those services that at their most basic level allow users to send and receive large amounts of information, we purposely use the term here to avoid pre-judging which services belong in the same product markets. By using the term broadband services, we intend to avoid addressing statutory-based definitional issues and instead focus on addressing the relevant markets in which these services participate. We will be addressing the definitional issues in the forthcoming Title I broadband proceeding, described at para. 3, above.

[38] As competition develops, the Commission has moved from adopting prescriptive regulations to relying on market forces to promote the public interest. *See, e.g., Multi-Association Group (MAG) Plan For Regulation Of Interstate Services Of Non-Price Cap Incumbent Local Exchange Carriers and Interexchange Carriers*, Second Report and Order and Further Notice of Proposed Rulemaking in CC Docket No. 00-256, Fifteenth Report and Order in CC Docket No. 96-45, and Report and Order in CC Docket Nos. 98-77 and 98-166, 16 FCC Rcd __, 2001 WL 1381097, para. 187 (rel. Nov. 8, 2001) (*MAG Plan Order*) (noting the Commission's policy of progressively deregulating interexchange carriers when they lack market power and concluding that, rather than adopt new regulatory measures, the Commission "should rely on competition to ensure that consumers realize benefits from (continued….)

geographic markets for incumbent LEC-provided broadband services.[39] We then analyze what, if any, market power the incumbent LECs may possess in the relevant markets for broadband services.[40]

A. Relevant Product Market

18. We initially ask parties to identify the relevant product markets that include incumbent LEC-provided broadband services.[41] While we recognize that parties' identification of the relevant product markets may vary depending on the definition of "broadband services," our goal is to rigorously define the relevant markets so as to include all reasonably substitutable services. In proposing relevant product markets, we ask parties to identify not only which services to include within a particular product market, but also which customer classes to include within a

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the access charge reforms we adopt in this Order"); *Reform of Access Charges Imposed by Competitive Local Exchange Carriers*, Seventh Report and Order and Further Notice of Proposed Rulemaking, CC Docket No. 96-262, 16 FCC Rcd. 9923, 9926-30, paras. 8-18 (2001) (noting that one of the Commission's "overarching goals" in access charge reform includes implementing "deregulation as competition develops" and discussing relevant decisions) (citations omitted); *Pricing Flexibility Order*, 14 FCC Rcd at 14243-44, para. 45 (deregulating the price cap LECs' corridor and interstate intraLATA toll services after finding that full implementation of inter-and intraLATA toll dialing parity would generate sufficient competition to "preclude the price cap LECs from exploiting over a sustained period any individual market power they may have with respect to these services"); *Policy and Rules Concerning The Interstate, Interexchange Marketplace*, Second Report and Order, 11 FCC Rcd 20730, 20733, para. 4 (1996) (detariffing long distance services based on the principle that market forces will generally ensure that rates remain reasonable and that carriers have the same incentives and rewards that firms in other competitive markets confront); *see also* Preamble of Telecommunications Act of 1996, Pub. L. 104-104, 110 Stat. 56 (1996) (directing Commission ". . . to promote competition and reduce regulation in order to secure lower prices and higher quality services for American telecommunications consumers and encourage the rapid deployment of new telecommunications technologies").

[39] *See, e.g., LEC Classification Order*, 12 FCC Rcd at 15768-69, para. 16 ("In order to determine that a particular carrier or group of carriers possesses market power, it is first necessary to define the relevant product and geographic markets"); *AT&T Reclassification Order*, 11 FCC Rcd at 3285, para. 19 (to determine whether a carrier has market power one must first "identify the relevant product and geographic markets").

[40] *See, e.g., LEC Classification Order*, 12 FCC Rcd at 15802, para. 82 ("In order to reclassify the BOC interLATA affiliates as non-dominant, our rules require us to conclude that they will not possess market power in the provision of those interLATA services in the relevant product and geographic markets."); *AT&T Reclassification Order*, 11 FCC Rcd at 3285, para. 19 (to reclassify AT&T as non-dominant, one must first "assess whether AT&T has market power" in the relevant markets).

[41] *See generally LEC Classification Order*, 12 FCC Rcd at 15768-15801, paras. 16-80.

relevant product market.[42] We ask the parties to support their proposed relevant product definitions with reliable empirical data.[43]

19. In discussing the relevant product markets for broadband services, we ask commenters to consider not only broadband services provided over local telephone networks, but also broadband services offered over other platforms, such as cable, wireless, and satellite. Specifically, we seek comment on the willingness and ability of end users to purchase other broadband services as substitutes for an incumbent LEC's broadband services.[44] In this regard, we also ask parties to discuss whether significant price differentials between services imply that the services are in different product markets.

20. Traditionally, the Commission has identified two broad categories of markets for telecommunications services: (1) the mass market, comprised primarily of residential users; and (2) the larger business market, comprised of medium and large business users.[45] In identifying these markets, the Commission has distinguished mass-market consumers from larger business customers because the services offered to one group may not be adequate or feasible substitutes for services offered to the other.[46] We seek comment concerning whether these two broad market

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[42] For example, in analyzing the relevant product markets for long-distance services, the Commission has identified separate product markets for mass-market consumers and for medium and large business customers. *See Application of WorldCom, Inc. and MCI Communications Corp. for Transfer of Control of MCI Communications Corp. to WorldCom, Inc.*, 13 FCC Rcd 18025, 18040-18042, paras. 24-29 (1998) (*WorldCom/MCI Merger Order*).

[43] Such data may include econometric estimates of cross elasticity of demand or marketing studies that show consumer substitutability of demand for competing services.

[44] *LEC Classification Order*, 12 FCC Rcd at 15782, para. 41 n.119 ("[I]n defining the relevant product market, one must examine whether a 'small but significant and non-transitory' increase in the price of the relevant product would cause enough buyers to shift their purchases to a second product, so as to make the price increase unprofitable. If so, the two products should be considered in the same product market") (citation omitted); *id.* at 15782, para. 41 ("our new approach will rely exclusively on demand considerations to define the relevant product market, rather than supply substitutability"); *see also, e.g., AT&T Reclassification Order*, 11 FCC Rcd at 3274, para. 5 (listing various factors relevant to market power, including "the number size and distribution of competing firms, the nature of barriers to entry, [ ] the availability of reasonably substitutable services, and whether the firm controlled bottleneck facilities") (citations and internal quotations omitted); *Competitive Carrier First Report and Order*, 85 FCC 2d at 21, paras. 56-57 ("we define a dominant carrier as a carrier that possesses market power," which "refers to the control a firm can exercise in setting the price of its output").

[45] *See, e.g., WorldCom/MCI Merger Order*, 13 FCC Rcd at 18040-41, paras. 26-27 (identifying the mass market and the larger business market as the two relevant product markets for long distance services and determining that no additional relevant product markets existed because the record contained insufficient information on cross-elasticities of demand and, more importantly, because "owners of transmission capacity provide all the same services, and production substitution among these services is nearly universal.") (citations and internal quotations omitted).

[46] *See Application of GTE Corp., Transferor, and Bell Atlantic Corp., Transferee, For Consent to Transfer Control*, CC Docket No. 98-184, Memorandum Opinion and Order, 15 FCC Rcd 14032, 14088-89, para. 102 & n.253 (*Bell Atlantic/GTE Merger Order*) (*citing Application of Ameritech Corp. and SBC Communications, Inc. for Transfer of Control of Corporations Holding Commission Licenses and Lines*, CC Docket No. 98-141, (continued….)

categories are appropriate for incumbent LEC-provided broadband services.[47] Commenters should provide any relevant data to demonstrate the existence of a separate mass market and larger business product market.

21. We note that SBC contends in its petition that two separate relevant product markets for broadband services exist – one for mass-market customers and another for larger business users. SBC further contends that four different service platforms exhibit sufficient substitutability to be included within the mass market for broadband services – xDSL, cable modem, satellite and fixed wireless services.[48] We seek comment on SBC's proposal, and on the extent to which any other platform, such as mobile wireless services, should also be considered an actual or potential source of intermodal competition. To the extent that parties identify a separate product market for mass-market broadband services, moreover, we seek comment on the degree of substitution among these platforms and on SBC's conclusion that "broadband services for the mass market represent a discrete product market and . . . DSL and cable modem services are both part of the same product market."[49]

22. Similarly, we seek comment on whether there is a larger business market for broadband services in which the following services all fall within the same product market: Frame Relay;[50] Asynchronous Transfer Mode (ATM);[51] Gigabit Ethernet (GigE);[52] Switched

(Continued from previous page)
Memorandum Opinion and Order, 14 FCC Rcd 14712, 14746, para 68 and n.146 (*SBC/Ameritech Merger Order*); *WorldCom/MCI Order*, 13 FCC Rcd at 18119, para. 164; *Application of NYNEX Corp., Transferor, and Bell Atlantic Corp., Transferee, For Consent to Transfer Control of NYNEX Corp. and its Subsidiaries*, Memorandum Opinion and Order, 12 FCC Rcd 19985, 20016, para. 53 (1997) (*Bell Atlantic/NYNEX Merger Order*)).

47 SBC Petition at 19, 28, and 34.

48 *Id*. at 21.

49 *Id*. at 22-23 (citations omitted).

50 Frame Relay is a "high-speed packet-switched technology used to communicate digital data between, among other things, geographically dispersed local area networks." *Independent Data Communications Manufacturers Association, Inc*., Memorandum Opinion and Order, 10 FCC Rcd 13717, 13720, para. 6 (1995) (*Frame Relay Order*). For a discussion of frame-relay technology, *see id.* at 13720-21, paras. 6-8.

51 ATM is a "high bandwidth, low-delay, connection-oriented packet-like switching and multiplexing technique" in which "[u]sable capacity is segmented into 53-byte fixed-sized cells, consisting of header and information fields [and] allocated to services on demand." *See* Harry Newton, *Newton's Telecom Dictionary: The Official Dictionary of Telecommunications and the Internet* 63 (17th ed. 2001) (*Newton's Telecom Dictionary*).

52 Ethernet is a collection of standards for exchanging information over computer networks. Of the three basic functional layers of data transmission, Ethernet defines the physical and datalink layers and works with other standards, such as Internet protocol (IP), to transmit data from sender to recipient. A relatively new, high-speed version of Ethernet, GigE, supports data rates up to 1 gigabit per second (Gbps), which is equivalent to 1000 megabits per second (Mbps)). *See* J.P. Morgan Securities, Inc. & McKinsey & Company, Inc., *Broadband 2001: A Comprehensive Analysis of Demand, Supply, Economics, and Industry Dynamics in the U.S. Broadband Market* 123 (April 2, 2001) (*Broadband Analysis*).

Multimegabit Data Service (SMDS);[53] and Remote Local Area Network (RLAN) service.[54] According to SBC, customers and service providers view these services in this proposed market as interchangeable, and services are generally priced at similar levels.[55] We seek comment on SBC's proposed identification of a larger business market for broadband services. We note that we are *not* considering whether traditional special access services belong in the larger-business market for advanced services as these services are governed by the Commission's pricing flexibility regime.[56]

23. We also seek comment on whether separate product markets for mass-market customers and larger business customers are overly broad and should be segmented further. We seek comment on whether the broadband services that are marketed to small and medium enterprises (SMEs)[57] and to small or home offices (SOHOs)[58] constitute separate product markets that should not be aggregated into the same grouping as the mass-market or larger business market. We seek comment on the peculiar customer needs and carrier limitations that might make the SME or SOHO markets distinct from other relevant product markets. Consistent with the analysis the Commission has applied in prior orders, parties recommending that particular services be grouped in one of many narrower relevant product markets should substantiate this contention with reliable empirical evidence.[59]

24. We also seek comment on whether, within the general product markets for large and medium business customers, on the one hand, and mass-market customers, on the other, we should distinguish between retail markets and wholesale markets. That is, should broadband

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[53] SMDS is a "connectionless high-speed data transmission service intended for application in a Metropolitan Area Network" that comprises "a public network designed for LAN-to-LAN interconnection." *See, e.g., Newton's Telecom Dictionary* 632.

[54] RLAN is an xDSL offering designed for business customers that allows a remotely located employee to access a corporate local area network (LAN). *See* SBC Petition at 29 n.73.

[55] *Id*. at 31-34.

[56] *See generally Pricing Flexibility Order*, 14 FCC Rcd 14221.

[57] SMEs are typically defined as having between one and 500 employees and encompass a heterogeneous group of small entrepreneurs, such as florists, dry cleaners and gas stations, to multi-location enterprises that employ hundreds of people. *See, e.g., Broadband Analysis* at 89.

[58] SOHOs are typically defined as businesses with fewer than five employees. *See Small Business Administration, Small Business Expansions in Electronic Commerce: A Look at How Small Firms Are Helping Shape the Fastest Growing Segments of E-Commerce* (June 2000), available at http://www.sba.gov/ADVO/stats/e_comm2.pdf.

[59] *See Implementation of the Non-Accounting Safeguards of Sections 271 and 272 of the Communications Act of 1934, as amended; and Regulatory Treatment of LEC Provision of Interexchange Services Originating in the LEC's Local Exchange Area*, Notice of Proposed Rulemaking, CC Docket No. 96-149, 11 FCC Rcd 18877, 18934-35, para. 119 (1996) (*Non-Accounting Safeguards Notice*); *see also, e.g., LEC Classification Order*, 12 FCC Rcd at 15784, para. 44 (noting that "credible evidence" should include information sufficient to identify services that are likely substitutes and the carrier or group of carriers that allegedly possesses market power).

services that are sold directly to end-user customers be considered separate relevant products from broadband services that are sold as inputs to other firms that offer services to end-user customers? In addition, with respect to retail services sold to mass-market end-user customers, we seek comment on whether we should separately define relevant product markets for broadband services sold on a stand-alone basis and for those sold as part of bundled service packages. For example, should xDSL-based telecommunications services that are sold on a stand-alone basis be placed in a separate relevant product market from a bundled service package that includes xDSL, internet access, and possibly customer premises equipment (such as an xDSL modem)?

25. When commenting on the appropriate product markets for broadband services, parties should address not only those services that are provided over telephone networks, but also any intermodal competition for broadband services.[60] Commenters should address the extent to which different intermodal competitors compete in each identified product market. To what extent do these intermodal competitors share common ownership with incumbent LECs, and what effect should this have on our analysis?

26. In addition, parties should consider the extent to which residential customers might view narrowband services as a substitute for broadband services and the extent to which residential customers might substitute lower-speed, circuit-switched services as substitutes for higher-speed broadband services. We seek comment on whether the relevant product market, from the consumer's perspective, is actually broader than our definition of broadband services. Specifically, we seek comment on whether the cross-elasticity of demand between narrowband and broadband services for residential consumers is sufficiently high that narrowband services will constrain any supra-competitive pricing by broadband service providers. We note that the Commission has previously identified the high-speed access product market as separate from the low-speed market.[61] Thus, we seek comment on whether we should reconsider this conclusion for purposes of this proceeding. In addition, we seek comment on the operational, functional and other differences that might prevent low-speed access from acting as a substitute for high-speed access, and on the degree of interchangeability that we should consider relevant to establishing separate product markets. Alternatively, if the broadband services provided by an incumbent LEC are sold solely in conjunction with the LEC's traditional voice service offering, would this inhibit our ability to define a discrete broadband services product market?

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[60] In this context, we refer to "intramodal competitors" as those competitive providers whose services are either delivered partially or wholly over incumbent LEC facilities, or over platforms using the same or similar technology that the incumbent LEC has deployed. "Intermodal competitors" are competitive providers that rely exclusively on alternative technological platforms than those deployed by incumbent LECs to deliver similar services.

[61] *See Applications for Consent to the Transfer of Control of Licenses and Section 214 Authorizations by Time Warner Inc. and America Online, Inc., Transferors, to AOL Time Warner Inc., Transferee,* CS Docket 00-30, Memorandum Opinion & Order, 16 FCC Rcd 6547, 6568-78 paras. 53-74 (*AOL-Time Warner Merger Order*).

B. Relevant Geographic Market

27. We seek comment on the appropriate geographic market for each of the relevant product markets for broadband services. We note that the Commission has previously identified the geographic scope of the relevant market for some broadband services as local.[62] SBC, in contrast, claims that the relevant geographic market for broadband services is the incumbent LEC's service area.[63] We further note that, in the *WorldCom/MCI Merger Order*, the Commission stated that it would include within the same relevant geographic market all customers facing similar competitive choices.[64] We ask whether it would be appropriate to use the latter (customer aggregation) market definition in this proceeding. To the extent commenters contend that using the customer aggregation definition is appropriate, we ask parties to comment on the alternative geographic market definitions discussed above, or to propose alternative geographic markets. Commenters should specifically address the degree of geographic overlap that might exist among all intramodal and intermodal competitors.

C. Market Power Analysis

28. Within each relevant product and geographic market, we seek comment on whether the incumbent LECs possess individual market power and are likely to be able to exercise such power. We note that the Commission has recognized that a carrier can profitably raise and sustain prices above competitive levels and thereby exercise market power in two ways.[65] First, a carrier may be able to raise prices by restricting its own output, which usually requires a large market share.[66] Second, a carrier may be able to raise prices by increasing its rivals' costs or by restricting its rivals' output through the carrier's control of an essential input, such as access to bottleneck facilities, that its rivals need to offer their services.[67] In assessing the first type of market power, the Commission traditionally has focused on certain well-established market features, including market share, supply and demand substitutability, the cost structure, size, and

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[62] *Id*. at 6578, para. 74.

[63] SBC Petition at 34.

[64] *WorldCom/MCI Merger Order*, 13 FCC Rcd at 18042-43, paras. 30-31; *see also, e.g., LEC Classification Order*, 12 FCC Rcd at 15793-94, paras. 65-66 (finding point-to-point geographic markets for interstate long-distance calling, but treating the point-to-point markets as a single national geographic market "unless there is credible evidence indicating that there is or could be a lack of competition in a particular point-to-point market, and there is a showing that geographic rate averaging will not sufficiently mitigate the exercise of market power").

[65] As in previous orders, we refer in the following discussion to a carrier's ability to engage in such a strategy generally as the ability to "raise prices." *See, e.g., LEC Classification Order*, 12 FCC Rcd at 15803, n.213.

[66] *Id. a*t 15802-03, para. 83. The Commission has termed this type of market power "Stiglerian" market power. *See id*. at n.214 (citation omitted).

[67] *Id*. at 15802-03, para. 83. The Commission has termed this type of market power "Bainian" market power. *See id.* at n.214 (citation omitted).

resources of the firm.[68] We ask commenters to analyze the incumbent LECs' market position in each relevant broadband services market according to these indicia.[69]

29. With respect to the second type of market power, the Commission has focused on the incumbent LEC's ability to exercise market power through its control of local bottleneck facilities. Accordingly, we seek comment on the extent to which an incumbent LEC could leverage market power from the local exchange and exchange access markets into the markets for broadband services. High initial investment, economies of scale, access to customers, and the monopoly legacy of the telecommunications networks all contribute to incumbent LEC market power in the local exchange and exchange access market. The Commission previously has found that an incumbent LEC might improperly exercise its existing market power through cross-subsidization, raising its rivals costs, or improper discrimination.[70] In this proceeding, we seek comment on the extent to which incumbent LECs have the ability and incentive to use their market power in the local exchange and exchange access markets to unfairly disadvantage rival suppliers of broadband services in any way, including charging higher prices to rivals for essential inputs, providing rivals with poorer quality interconnection, imposing unnecessary delays, or discriminating against rivals inappropriately in other ways.[71] More specifically, we seek comment on whether incumbent LECs possess market power with respect to certain inputs, such as special

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[68] *AT&T Reclassification Order*, 11 FCC Rcd at 3293-94, para. 38; *Competitive Carrier First Report and Order*, 85 FCC 2d at 21, para. 57.

[69] Commenters should use prior Commission orders as their guides for relevant factors in our analysis. In determining whether a firm possesses market power, the Commission previously has focused on factors such as market share, supply and demand elasticity, entry barriers, potential competition, the cost structure, size, or resources of the firm, and control of bottleneck facilities. *See AT&T Reclassification Order*, 11 FCC Rcd at 3346-47, para. 139 (concluding that AT&T lacked market power after examining factors such as supply elasticity, demand elasticity, market share, trends in market share and other indicia of market conduct and performance, including price levels and trends in prices over time); *Competitive Carrier First Report and Order*, 85 FCC 2d at 21, para. 57.

[70] *See, e.g., SBC/Ameritech Merger Order*, 14 FCC Rcd at 14795-14825, paras. 186-254 (describing the incentives, ability and means for an incumbent LEC to engage in price and non-price discrimination); *Non-Accounting Safeguards Notice*, 11 FCC Rcd at 18886, para. 14 ("If an incumbent LEC charges its competitors prices for inputs that are higher than the output prices charged, then the incumbent LEC can create a price squeeze. The incumbent LEC could lower its retail price to reflect its unfair cost advantage, and competing providers would be forced either to match the price reduction and absorb profit margin reductions or maintain their retail prices at existing levels and accept reductions in their market shares. If the price squeeze were severe enough and continued long enough, the incumbent LEC's market share could become so large, and the competitors so weakened, that the incumbent LEC could unilaterally raise and sustain a price above competitive levels by restricting its output. Alternatively, the incumbent LEC affiliate could simply match its competitors' prices and extract supra-competitive profits.") (citations and internal quotations omitted).

[71] *See, e.g., SBC/Ameritech Merger Order*, 14 FCC Rcd at 14763-64, para. 107 (finding that an incumbent "LEC has an incentive to: (1) delay interconnection negotiations and resolution of interconnection disputes; (2) limit both the methods and points of interconnection and the facilities and services to which entrants are provided access; (3) raise entrants' costs by charging high prices for interconnection, network elements and services, and by delaying the provisioning of, and degrading the quality of, the interconnection, services, and elements it provides").

access services, which they could use to raise rivals' costs in certain broadband service markets where these inputs are critical to a firm's ability to provision the particular broadband service to end user customers.

30. The Commission has recognized how intermodal competition can reduce the likelihood of anti-competitive behavior.[72] The Commission also has recognized that different companies use different technologies, each with distinct advantages and disadvantages, to bring broadband services to end users.[73] And while the Commission has concluded that "[a]nti-competitive coordination among competitors is difficult" in markets with vigorous intermodal competition, the interplay between competitors that use different delivery platforms in the context of broadband services merits closer examination.[74] Therefore, we ask that commenters identify actual and potential competitors in each relevant product market regardless of the platform used to deliver broadband services and provide any relevant evidence concerning these competitors' ability to prevent incumbent LECs from raising prices above competitive levels and engaging in anti-competitive behavior.

31. In other words, commenters should specifically address the role of both intermodal and intramodal competition in assessing an incumbent LEC's ability to leverage power into the markets for broadband services. For example, does the existence of actual or potential intermodal competition constrain an incumbent LEC's ability or incentive to discriminate? Should our analysis of market power distinguish between markets with extensive intramodal competition and those with extensive intermodal competition, which does not rely on the incumbent's facilities? To the extent a particular geographic market does not currently exhibit extensive intermodal competition, we seek comment on whether we should consider the likelihood that intermodal competition will appear in the future. If future intermodal competition is relevant, we ask commenters to identify and support a reasonable time frame within which intermodal competition for broadband services would have to emerge for such potential competition to affect our analysis of the incumbent LECs' market power. In addition, commenters should address the extent to which the nascent nature of competition in a particular market should inform our analysis of market power.

32. We also ask that commenters explore the extent to which current statutory and regulatory requirements, including any competitive safeguards, limit the market power of

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[72] *See, e.g., Comsat Corporation, Petition Pursuant to Section 10(c) of the Communications Act of 1934, as amended, for Forbearance from Dominant Carrier Regulation and for Reclassification as a Non-Dominant Carrier*, Order and Notice of Proposed Rulemaking, 13 FCC Rcd 14083, 14122-23, para. 76 (1998) ("Intermodal competition leads us to believe that fiber-optic cables represent a substitute for satellites in the transmission of switched voice service.").

[73] *Inquiry Concerning the Deployment of Advanced Telecommunications Services to All Americans in a Reasonable and Timely Fashion, and Possible Steps to Accelerate Such Deployment Pursuant to Section 706 of the Telecommunications Act of 1996*, First Report, 14 FCC Rcd 2398, 2423-24, at para. 48 (*First Section 706 Report*).

[74] *Id.*

incumbent LECs. For example, how should the presence of "wholesale" regulations, such as those contained in section 251(c) of the Communications Act, affect our analysis of the level of competition present at the "retail" level? Finally, commenters should identify any other relevant market characteristics in the broadband services markets that may affect our analysis of market power.

IV. APPROPRIATE REGULATORY REQUIREMENTS

A. Overview

33. Once we have defined the relevant product and geographic markets for broadband services, we can use this information to determine what regulatory requirements, if any, should govern the provision of broadband services. We begin by briefly describing relevant portions of the existing regulatory structure for broadband services provided by incumbent LECs. Then we invite interested parties to propose alternative requirements for these broadband services in light of existing market and technological developments. We encourage interested parties to develop proposals for new or modified regulatory requirements for broadband services.

34. At the outset, we ask interested parties to consider the potential for deregulation or reduced regulation to foster increased broadband deployment and competition among providers of broadband services. We also ask that interested parties address how their proposals would serve the Act's mandate to foster the deployment of broadband services and the facilities used in the provision of broadband services. In addition, we invite interested parties to address the effect of the statutory requirements in the 1996 Act on these proposals, as the Act's existing statutory safeguards may reduce the need for other forms of regulation. Moreover, we ask interested parties to address the development of intermodal as well as intramodal competition in the provision of broadband services, and the existence of new technologies for the distribution of broadband services, such as fixed wireless and satellite, that have the potential to further increase competition. In addition, our existing and historical regulatory requirements have not necessarily differentiated bottleneck facilities from the services that are provided using those facilities, as such differentiation was not necessary under the public switched telephone network paradigm. Accordingly, we ask commenters to address the complexity added by the fact that incumbent LEC facilities – previously used to provide simple one-wire voice services – are now being used to provide a variety of different services, many of which are at different stages of market development.

B. Existing Regulatory Structure

35. As previously discussed, the Commission historically has distinguished between dominant carriers, which possess individual market power, and non-dominant carriers, which lack individual market power.[75] Non-dominant carriers have been subject to significantly reduced regulation. In contrast, dominant carriers are subject to a broad range of regulatory requirements, that are generally intended to protect consumers from unjust and unreasonable rates, terms and

[75] *See* Section II, *supra*.

conditions and unreasonable discrimination in the provision of communications services.[76] The Commission has streamlined dominant carrier regulation, however, to reflect the development of competition as exemplified in the *Pricing Flexibility Order*.

36. The Commission's dominant carrier regulation includes rate regulation and tariff filing requirements.[77] For example, as provided in section 204(a)(3) of the Act, incumbent LECs may file tariff revisions on either seven days' or fifteen days' notice.[78] The Commission's rules also require supporting information, which in some cases includes detailed cost data, be filed by dominant carriers with their tariff filings.[79]

37. Incumbent LECs are subject to rate level regulation in the provision of their interstate access services.[80] The BOCs and GTE are subject to mandatory price cap regulation, and several other incumbent LECs have entered price caps on an elective basis.[81] Smaller incumbent LECs are regulated under rate-of-return regulation.[82] As described above, however, the Commission has taken a number of steps to provide price cap incumbent LECs with increased

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[76] 47 U.S.C. §§ 201 & 202. Many of these regulatory requirements are also intended to discourage potential anti-competitive behavior by incumbent LECs.

[77] Section 203(a) of the Act generally requires common carriers to file tariffs governing the provision of their basic communications services, although section 203(b)(2) gives the Commission broad authority to modify requirements made pursuant to this authority. 47 U.S.C. § 203 (a) & (b)(2) (1996).

[78] 47 C.F.R. § 61.58(a)(2)(i) (1999). The Commission's rules also specify different notice periods for a variety of other tariff filings by dominant carriers, including incumbent LECs. 47 C.F.R. § 61.58(a)(2)(ii)-(e)(iii)(4) (1999). SBC and, until recently, Verizon, provide advanced services through separate subsidiaries that were treated as non-dominant, pursuant to Commission merger orders. *See Bell Atlantic/GTE Merger Order*, 15 FCC Rcd 14032; *SBC/Ameritech Merger Order*, 14 FCC Rcd 14712. These subsidiaries had been deemed non-dominant in their provision of broadband services. However, in January 2001, the United States Court of Appeals for the District of Columbia Circuit held, in *ASCENT v. FCC*, that data affiliates of incumbent LECs are subject to all obligations of section 251(c) of the Act. Specifically, the *ASCENT* decision overturned the Commission's determination in the *SBC/Ameritech Merger Order* that, because the separate advanced services affiliate was not a successor or assign of the BOC, the separate advanced services affiliate was not subject to the resale obligations of section 251(c)(4). *Association of Communications Enterprises* v. *FCC*, 235 F.3d 662 (D.C. Cir. 2001); s*ee also SBC/Ameritech Merger Order*, 14 FCC Rcd 14712. Because the Commission incorporated by reference the successor or assign analysis of the *SBC/Ameritech Merger Order* into the *Bell Atlantic/GTE Merger Order*, the D.C. Circuit's decision also impacts the Commission's conclusion in the *Bell Atlantic/GTE Merger Order*.

[79] 47 C.F.R. § 61.38-39 (1999). Non-dominant IXCs are prohibited from filing tariffs except for the limited purposes contained in 61.19(b) and (c). Non-dominant (competitive) LECs are permitted to tariff access charges within the limits set in the *CLEC Access Charge Order*, but may not tariff charges above those benchmarks.

[80] 47 C.F.R. §§ 61.41-49 (price cap rules) & 65.1-65.830 (rate of return rules).

[81] *See generally MAG Plan Order*, 16 FCC Rcd __, 2001 WL 1381097.

[82] *Id.*

pricing flexibility for interstate access services as wireline competition develops.[83] In addition, in markets where carriers may have the incentive and ability to leverage control over bottleneck facilities to disadvantage competitors in related markets, the Commission has developed various safeguards to limit that ability.[84]

C. Alternative Requirements

38. The basic elements of the current regulatory requirements for the provision of broadband services by incumbent LECs were largely in place well before the development of competition between providers of broadband services. In addition, the requirements were primarily developed to address problems created in a one-wire, analog, circuit-switched world. As a result, the existing regulatory requirements may be poorly suited to achieving the Act's goals of promoting infrastructure investment, innovation, and the "deployment of advanced services to all Americans."[85] In particular, should the Commission consider streamlined regulatory requirements for incumbent LEC provision of some, or all, broadband services, and, if so, what regulatory safeguards might be necessary?

39. Even in situations where a fully competitive market has not yet been realized, deregulation or reduced regulation may lower administrative costs, encourage investment and innovation, reduce prices and offer consumers greater choice. The Commission previously has recognized that,

> while the regulatory tools are able to prevent dominant firms from fully exercising their market power, use of these tools also imposes costs beyond the obvious administrative costs of enforcement and compliance to regulatory agency and regulated companies respectively. In some circumstances, these costs can have profound negative implications for consumer welfare. Thus, as a matter of policy it is clear it is desirable to adjust regulatory methods in particular circumstances to the extent the law permits.[86]

Accordingly, we ask whether reduced regulation of services provided by incumbent LECs, regardless of the extent of existing competition, may foster competition and the deployment of broadband facilities used in the provision of many of these services. Interested parties are encouraged to address the costs and benefits of regulation in this context.

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[83] *See generally* Section II, *supra*; *LEC Pricing Flexibility Order*, 14 FCC Rcd 14221 (1999). The price cap incumbent LECs have taken advantage of this pricing flexibility to offer a variety of advanced trunking and special access services outside of price cap regulation.

[84] *See generally* forthcoming Title I broadband proceeding, described at para. 3, above.

[85] Section 706 of the Telecommunications Act of 1996, Pub. L. 104-104, 110 Stat. 56 (1996), reproduced in the notes under 47 U.S.C. § 157.

[86] *Competitive Carrier Proceeding*, Further Notice of Proposed Rulemaking, 84 FCC 2d at 449, para 12.

40. In particular, we seek comment on whether such an approach would further the Commission's ongoing efforts to fulfill the goals of section 706 of the Act, which directs the Commission to "encourage the deployment on a reasonable and timely basis of advanced telecommunications capability to all Americans." The Act specifically suggests consideration of regulatory forbearance or other approaches that remove barriers to infrastructure investment.[87] We seek comment on what additional steps we can take in the context of this proceeding to fulfill our Congressional mandate under section 706.

41. As discussed above, incumbent LECs currently are classified as dominant in the provision of broadband services.[88] We seek comment on what relevance, if any, these types of regulations have for broadband services provided by incumbent LECs. We seek comment on whether it would be appropriate to streamline the traditional dominant carrier regulation of incumbent LECs' provision of broadband services, and if so, how such dominant carrier regulation should be reduced. For example, interested parties may believe that a streamlined version of the existing regulatory structure should be applied to some, or all, incumbent LEC broadband services. In particular, we ask for specific proposals as to which existing regulations might be removed or streamlined in their application to broadband services. We urge parties supporting such an approach to identify the elements of the existing regulations that they believe should be retained and address in a comprehensive manner both the costs and benefits of those regulatory requirements. We also ask parties to address the public interest benefits of declaring an incumbent LEC non-dominant or of streamlining regulations, including the impact of any proposed regulatory structure on service quality, prices, and the availability of competitive alternatives.

42. We also ask parties to comment on whether incumbent LECs should be reclassified as non-dominant in the provision of broadband services.[89] Those that support classifying incumbent LECs as non-dominant in the provision of broadband services should explain whether, under *Competitive Carrier* precedent, it is possible to classify a carrier as non-dominant with

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[87] The Commission has initiated a number of proceedings to ensure that the goals of Section 706 are met. *See First Section 706 Report*, 14 FCC Rcd 2398; *Second Section 706 Report*, 15 FCC Rcd 20913. Specifically, the Commission has sought "to remove any barriers to deployment; to remove any barriers to investment in technologies that can deliver advanced services; and to vigorously promote a competitive marketplace." *Inquiry Concerning the Deployment of Advanced Telecommunications Services to All Americans in a Reasonable and Timely Fashion, and Possible Steps to Accelerate Such Deployment Pursuant to Section 706 of the Telecommunications Act of 1996*, Third Notice of Inquiry, 16 FCC Rcd at 15515, para. 1.

[88] *See* Sections I and II, *supra*. As part of this proceeding, we also invite comment on the SBC Petition requesting an expedited ruling that it is non-dominant in the provision of advanced services and asking the Commission to forbear from dominant carrier regulations of those services. Commenters should address elements of the statutory forbearance analysis under Section 10 of the Telecommunications Act with specificity. 47 U.S.C. § 160 (1996).

[89] *See* SBC Petition at 1-2.

respect to certain services when it remains dominant with respect to others, and in particular, should we do so when the services utilize certain of the same facilities?[90]

43. As noted above, in different situations, the Commission has used a variety of safeguards to protect against an incumbent's ability to leverage market power arising from its control of bottleneck facilities into related markets. We seek comment on whether any of our existing safeguards would be an appropriate model for safeguards applied to incumbent LEC provision of broadband services.[91] We note that some incumbent LECs have provided broadband services through a separate affiliate.[92] Should an incumbent LEC's corporate structure be a relevant consideration for our analysis here?[93] We invite parties to suggest alternative competitive safeguards that could deter discrimination or make attempted discrimination easier to detect, but could achieve this goal at a reduced regulatory cost.[94] We ask parties proposing alternative safeguards to discuss whether their proposal better reflects new broadband service markets characterized by multiple competing platforms providing data-centric, digital, packet-switched services. We seek comment on what safeguards should remain, if any, if we declare an incumbent LEC non-dominant? For example, we seek comment on the impact of a declaration of non-dominance should have on a carrier's obligations under *Computer II/III*.[95]

44. We also ask interested parties to comment on whether the statutory requirements applicable to incumbent LECs under section 251 of the Act reduce the need for dominant carrier regulations or existing competitive safeguards. In particular, section 251 establishes extensive regulatory requirements applicable to incumbent LECs, including collocation, unbundling and resale obligations.[96] We also ask commenters to address whether the nondiscrimination requirements related to collocation, unbundling and resale in section 251 of the Act -- and the

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[90] *See Competitive Carrier First Report and Order*, 85 FCC 2d at 1, n.55.

[91] Comments on the applicability of *Computer II/III* safeguards to incumbent LEC broadband services, or regarding modifications to those safeguards, should be addressed in the Commission's forthcoming Broadband Proceeding.

[92] *See, e.g., SBC/Ameritech Merger Order*, 14 FCC Rcd 14712.

[93] *See* SBC Petition at 10 ("As for the larger business context, SBC has been competing in that market since the early-to-mid 1990s, but its market share within its region has remained static at approximately 12 percent; that in itself is proof that SBC could not possibly quickly gain market power in this market through illegal conduct"). *See also Advanced Services Order & NPRM* (Aug. 99).

[94] We note that Verizon has proposed that incumbent LECs might be required to make bandwidth available to competitors at "commercially reasonable rates." Verizon suggests that this approach could further Congress' section 706 mandate by reducing regulatory burdens on incumbent LECs, while ensuring ubiquitous availability of broadband services to both competitors and consumers. *Laying the Last Mile*, Tom Tauke Remarks to Progress and Freedom and Foundation Conference, August 21, 2001.

[95] We note that the applicability of *Computer II/III* to broadband services is being directly addressed in the forthcoming Broadband NPRM.

[96] Section 251(c) of the Communications Act, 46 U.S.C. § 251(c) (1996).

extent of incumbent LEC compliance with such requirements -- reduce the need for other forms of regulation, including dominant carrier regulation and competitive safeguards. As noted above, the Commission will be examining its Section 251 unbundling rules as part of its triennial review.[97] We ask parties to comment on how possible changes to those rules might affect the continuing need for dominant carrier regulation or various competitive safeguards.

45. We ask commenting parties to take a number of issues into account in commenting on or developing proposals for a new or modified regulatory framework for the provision of broadband services. We invite comment on whether deregulation or reduced regulation would foster the deployment of broadband services and the facilities used in the provision of many such services as contemplated in section 706 of the Act, and would facilitate increased competition in the provision of such services. Alternatively, others suggest that ensuring intramodal competitive pressure will spur broadband deployment.[98] We seek comment on this contention. In addition, interested parties should discuss the extent to which different categories of broadband services face different levels of competition, warranting different regulatory treatment. We also ask interested parties to address the extent to which the markets for different broadband services are at different stages in their development and whether markets at different stages of development warrant different regulatory treatment.

46. We note that in other, innovative, competitive industries, such as the computer industry, competitors, producing software, hardware, and microprocessors, constantly pursue innovation and implement price reductions. We ask whether such dynamic and innovative competition is either likely or a reasonable goal for the provision of broadband services and those services that are dependent on broadband services. Assuming that it is, we seek comment on the best means to promote that goal. We ask what forms of regulation or de-regulation would best spur deployment of alternative technologies and facilities by existing and potential competitors. We note the substantial investment needed to build broadband networks, and ask what costs our current regulations impose on providers, and seek input as to the burden of those regulations. More generally, we seek comment on whether existing regulation inhibits or stimulates the deployment of broadband services. Specifically, we seek comment on whether reductions in existing regulation would allow incumbent LECs to compete more effectively on an intermodal basis and thus would stimulate competitive responses by companies using alternative technologies such as cable, wireless, and satellite. If this is the case, exactly what reductions in existing regulation are warranted? We note that these alternative technologies are not subject to the same regulations as incumbent wireline competitors in the broadband services market. Would removal of regulations applicable to incumbent wireline providers spur innovation and competitive responses by providers using other technologies? Alternatively, does regulation of the wireline market serve the public interest by providing benefits to consumers in the alternative technology markets?

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97 *See* Section I, *supra*.

98 *See, e.g.*, WorldCom Opposition, CC Docket 98-147 (Oct. 2, 1998); AT&T Comments, CC Docket No. 95-20 (Apr. 16, 2001).

47. In a similar vein, we ask interested parties to consider whether the development of various broadband service categories are at different stages of evolution and thus should be treated differently. For example, the provision of broadband services to residential end-users is arguably still in the early stages of its development, and thus it may not be appropriate to rely on current market share data to evaluate whether any particular market participant has or would likely have a dominant position in the provision of these services due to the nascency of the market. However, the provision of broadband services to large business and institutional users may be a more mature market and therefore current market share data may be a more reliable indicator of market power. Are there meaningful differences in the stage of market development for different broadband services? Would any such differences warrant different regulatory treatment?

48. We also ask commenters to address the implications of their proposals as broadband services evolve in the future. For example, the services we evaluate in this proceeding may ultimately be replaced in the future by other services using different technologies. We ask parties to comment on how such potential changes should impact our decision to choose an appropriate regulatory framework. Finally, we ask interested parties to comment on whether there are other regulatory requirements that we should consider modifying or eliminating in the context of this proceeding. Perhaps some new regulations would be needed as others are modified or eliminated? We ask parties proposing consideration of additional regulatory requirements to provide a full analysis of the costs and benefits of those requirements consistent with the issues discussed above.

V. PROCEDURAL MATTERS

A. *Ex Parte* Presentations

49. These matters shall be treated as a "permit-but-disclose" proceeding in accordance with the Commission's *ex parte* rules.[99] Persons making oral *ex parte* presentations are reminded that memoranda summarizing the presentations must contain summaries of the substance of the presentations and not merely a listing of the subjects discussed. More than a one or two sentence description of the views and arguments presented in generally required.[100] Other requirements pertaining to oral and written presentations are set forth in section 1.1206(b) of the Commission's rules.

B. Comment Filing Procedures

50. Pursuant to sections 1.415 and 1.419 of the Commission's rules,[101] interested parties may file comments within 45 days after publication of this Notice in the Federal Register and may file reply comments within 30 days after the date for filing comments. All filings should

[99] 47 C.F.R. §§ 1.1200-1.1216.

[100] *See* 47 C.F.R. § 1.1206(b)(2).

[101] 47 C.F.R. §§ 1.415, 1.419.

refer to CC Docket No. 01-337. Comments may be filed using the Commission's Electronic Comment Filing System (ECFS) or by filing paper copies.[102] Comments filed through ECFS can be sent as an electronic file via the Internet to <http://www.fcc.gov/e-file/ecfs.html>. Generally, only one copy of an electronic submission must be filed. In completing the transmittal screen, commenters should include their full name, postal service mailing address, and the applicable docket numbers, which in this instance is CC Docket No. 01-337. Parties may also submit an electronic comment by Internet e-mail. To get filing instructions for e-mail comments, commenters should send an e-mail to ecfs@fcc.gov, and should include the following words in the body of the message: "get form<your e-mail address." A sample form and directions will be sent in reply.

51. Parties that choose to file by paper must file an original and four copies of each, and are hereby notified that effective December 18, 2001, the Commission's contractor, Vistronix, Inc., will receive hand-delivered or messenger-delivered paper filings for the Commission's Secretary at a new location in downtown Washington, DC. The address is 236 Massachusetts Avenue, N.E., Suite 110, Washington, DC 20002. The filing hours at this location will be 8:00 a.m. to 7:00 p.m. All hand deliveries must be held together with rubber bands or fasteners. Any envelopes must be disposed of before entering the building. This facility is the only location where hand-delivered or messenger-delivered paper filings for the Commission's Secretary will be accepted. Accordingly, the Commission will no longer accept these filings at 9300 East Hampton Drive, Capitol Heights, MD 20743. In addition, this is a reminder that, effective October 18, 2001, the Commission discontinued receiving hand-delivered or messenger-delivered filings for the Secretary at its headquarters location at 445 12th Street, SW, Washington, DC 20554.

52. Other messenger-delivered documents, including documents sent by overnight mail (other than United States Postal Service (USPS) Express Mail and Priority Mail), must be addressed to 9300 East Hampton Drive, Capitol Heights, MD 20743. This location will be open 8:00 a.m. to 5:30 p.m. The USPS first-class mail, Express Mail, and Priority Mail should continue to be addressed to the Commission's headquarters at 445 12th Street, SW, Washington, DC 20554. The USPS mail addressed to the Commission's headquarters actually goes to our Capitol Heights facility for screening prior to delivery at the Commission.

If you are sending this type of document or using this delivery method…	**It should be addressed for delivery to…**
Hand-delivered or messenger-delivered paper filings for the Commission's Secretary	236 Massachusetts Avenue, NE, Suite 110, Washington, DC 20002 (8:00 to 7:00 p.m.
Other messenger-delivered documents, including documents sent by overnight mail (other than United States Postal	9300 East Hampton Drive, Capitol Heights, MD 20743 (8:00 a.m. to 5:30 p.m.)

[102] *See Electronic Filing of Documents in Rulemaking Proceedings*, 63 Fed. Reg. 24121 (1998).

Service Express Mail and Priority Mail)	
United States Postal Service first-class mail, Express Mail, and Priority Mail	445 12th Street, SW Washington, DC 20554

Parties who choose to file by paper should also submit their comments on diskette. These diskettes should be submitted to Janice Myles, Policy & Program Planning Division, Common Carrier Bureau, Federal Communications Commission, 236 Massachusetts Avenue, N.E., Suite 110, Washington, DC 20002. Such a submission should be on a 3.5 inch diskette formatted in an IBM compatible format using Microsoft Word or compatible software. The diskette should be accompanied by a cover letter and should be submitted in "read only" mode. The diskette should be clearly labeled with the commenter's name, proceeding (including the docket number, in this case, CC Docket No. 01-337), type of pleading (comment or reply comment), date of submission, and the name of the electronic file on the diskette. The label should also include the following phrase: "Disk Copy -- Not an Original." Each diskette should contain only one party's pleading, preferably in a single electronic file. In addition, commenters must send diskette copies to the Commission's copy contractor, Qualex International, Portals II, 445 12th Street S.W., CY-B402, Washington, D.C. 20554.

53. Regardless of whether parties choose to file electronically or by paper, parties should also file one copy of any documents filed in this docket with the Commission's copy contractor, Qualex International, Portals II, 445 12th Street S.W., CY-B402, Washington, D.C. 20554 (telephone 202-863-2893; facsimile 202-863-2898) or via e-mail at qualexint@aol.com.

54. Comments and reply comments must include a short and concise summary of the substantive arguments raised in the pleading. Comments and reply comments must also comply with section 1.48 and all other applicable sections of the Commission's rules.[103] We direct all interested parties to include the name of the filing party and the date of the filing on each page of their comments and reply comments. All parties are encouraged to utilize a table of contents, regardless of the length of their submission. We also strongly encourage that parties track the organization set forth in the Notice in order to facilitate our internal review process.

C. Initial Regulatory Flexibility Analysis

55. As required by the Regulatory Flexibility Act of 1980, as amended (RFA),[104] the Commission has prepared the present Initial Regulatory Flexibility Analysis (IRFA) of the possible significant economic impact on a substantial number of small entities by the policies and rules proposed in this Notice. Written public comments are requested on this IRFA. Comments must be identified as responses to the IRFA and must be filed by the deadlines for comments on the Notice provided above in Section V.B. The Commission will send a copy of the Notice, including

[103] *See* 47 C.F.R. § 1.48.

[104] *See* 5 U.S.C. § 603. The RFA, *see* 5 U.S.C. § 601 *et. seq.*, has been amended by the Small Business Regulatory Enforcement Fairness Act of 1996 (SBREFA), Pub. L. No. 104-121, 110 Stat. 857 (1996).

this IRFA, to the Chief Counsel for Advocacy of the Small Business Administration.[105] In addition, the Notice and IRFA (or summaries thereof) will be published in the Federal Register.[106]

1. Need for, and Objectives of, the Proposed Rules

56. In this proceeding, we seek comment on: (1) the nature and scope of the market for domestic broadband services; (2) the relevant market dynamics affecting the provision of domestic broadband services; and (3) the appropriate regulatory requirements for the provision of broadband services by incumbent LECs, given current market conditions. The basic elements of the existing regulatory requirements for incumbent LEC-provided broadband services were initially developed in an era of circuit-switched, analog voice services, and may no longer serve the public interest. Thus, we ask interested parties to address how the Commission can best balance the goals of encouraging advanced telecommunications investment and deployment, fostering competition in the provision of broadband services, promoting innovation, and eliminating unnecessary regulation. This proceeding also invites comment on the Petition filed by SBC Communications on October 3, 2001, requesting an expedited ruling that it is non-dominant in the provision of advanced services, and asking the Commission to forebear from dominant carrier regulation of those services.

2. Legal Basis

57. The legal basis for any action that may be taken pursuant to the Notice is contained in sections 4, 10, 201-202, 214, 303 and 403 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154, 160, 201-204, 214, 303, and 403, section 706 of the Telecommunications Act of 1996, and sections 1.1, 1.48, 1.411, 1.412, 1.415, 1.419, and 1.1200-1.1216, of the Commission's rules, 47 C.F.R. §§ 1.1, 1.48, 1.411, 1.412, 1.415, 1.419, and 1.1200-1.1216.

3. Description and Estimate of the Number of Small Entities to Which the Proposed Rules will Apply

58. The RFA directs agencies to provide a description of and, where feasible, an estimate of the number of small entities that will be affected by the proposed rules.[107] The RFA generally defines the term "small entity" as having the same meaning as the terms "small business," "small organization," and "small governmental jurisdiction."[108] In addition, the term "small business" has the same meaning as the term "small business concern" under the Small

[105] *See* 5 U.S.C. § 603(a).

[106] *See id.*

[107] 5 U.S.C. §§ 603(b)(3), 604(a)(3).

[108] *Id.* § 601(6).

Business Act.[109] A small business concern is one which: (1) is independently owned and operated; (2) is not dominant in its field of operation; and (3) satisfies any additional criteria established by the Small Business Administration (SBA).[110]

59. We have included small incumbent LECs in this present RFA analysis. As noted above, a "small business" under the RFA is one that, *inter alia*, meets the pertinent small business size standard (e.g., a telephone communications business having 1,500 or fewer employees), and "is not dominant in its field of operation."[111] The SBA's Office of Advocacy contends that, for RFA purposes, small incumbent LECs are not dominant in their field of operation because any such dominance is not "national" in scope.[112] We have therefore included small incumbent LECs in this RFA analysis, although we emphasize that this RFA action has no effect on FCC analyses and determinations in other, non-RFA contexts.

60. *Local Exchange Carriers*. Neither the Commission nor the SBA has developed a definition for small local exchange carriers. The closest applicable definitions for this type of carrier under SBA rules is for telephone communications companies other than radiotelephone (wireless) companies.[113] The most reliable source of information regarding the number of LECs nationwide appears to be the data that we collect annually in connection with the Telecommunications Relay Service (TRS).[114] According to our most recent data, there are 1,335 incumbent LECs.[115] Although some of these carriers may not be independently owned and operated, or have more than 1,500 employees, we are unable at this time to estimate with greater precision the number of LECs that would qualify as small business concerns under the SBA's

[109] *Id.* § 601(3) (incorporating by reference the definition of "small business concern" in the Small Business Act, 15 U.S.C. § 632). Pursuant to 5 U.S.C. § 601(3), the statutory definition of a small business applies "unless an agency, after consultation with the Office of Advocacy of the Small Business Administration and after opportunity for public comment, establishes one or more definitions of such terms which are appropriate to the activities of the agency and publishes such definitions(s) in the Federal Register."

[110] 5 U.S.C. § 632.

[111] *Id.*

[112] Letter from Jere W. Glover, Chief Counsel for Advocacy, SBA, to William E. Kennard, Chairman, FCC (May 27, 1999). The Small Business Act contains a definition of "small business concern," which the RFA incorporates into its own definition of "small business." *See* 15 U.S.C. § 632(a) (Small Business Act); 5 U.S.C. § 601(3) (RFA). SBA regulations interpret "small business concern" to include the concept of dominance on a national basis. 13 C.F.R. § 121.102(b). Since 1996, out of an abundance of caution, the Commission has included small incumbent LECs in its regulatory flexibility analyses. *See, e.g., Implementation of the Local Competition Provisions of the Telecommunications Act of 1996*, CC Docket 96-98, First Report and Order, 11 FCC Rcd 15499, 16144-45 (1996).

[113] 13 C.F.R. § 121.201, NAICS codes 51331, 51333, and 51334.

[114] 47 C.F.R. § 64.601 *et seq.*; Carrier Locator: Interstate Service Providers, FCC Common Carrier Bureau, Industry Analysis Division (rel. Oct. 2000) (Carrier Locator).

[115] Carrier Locator at Table 1. The total for competitive LECs includes competitive access providers and competitive LECs.

definition. Consequently, we estimate that there are no more than 1,335 small entity incumbent LECs that may be affected by the proposals in the NPRM.

4. Description of Projected Reporting, Recordkeeping and Other Compliance Requirements

61. We expect that any proposal we may adopt pursuant this Notice will decrease existing reporting, recordkeeping or other compliance requirements. As noted above, dominant carriers are currently subject to a broad range of regulatory requirements that are generally intended to protect consumers from unjust and unreasonable rates, terms, and conditions and unreasonable discrimination in the provision of communications services.[116] The Commission's dominant carrier regulation includes rate regulation and tariff filing requirements,[117] and also requires supporting information, which in some cases includes detailed cost data, to be filed by dominant carriers with their tariff filings.[118] Incumbent LECs are subject to rate level regulation in the provision of their interstate access services.[119] The BOCs and GTE are subject to mandatory price cap regulation, and several other incumbent LECs have entered price caps on an elective basis, while smaller incumbent LECs are regulated under rate-of-return regulation.[120] In addition, in markets where carriers may have the incentive and ability to leverage control over bottleneck facilities to disadvantage competitors in related markets, the Commission has developed various safeguards to neutralize that ability. This Notice seeks comment on what relevance, if any, these types of regulations have for broadband services provided by incumbent LECs, and asks whether it would be appropriate to streamline the traditional dominant carrier regulations of incumbent LECs' provision of broadband services.

5. Steps Taken to Minimize Significant Economic Impact on Small Entities, and Significant Alternatives Considered

62. The RFA requires an agency to describe any significant, specifically small business, alternatives that it has considered in reaching its proposed approach, which may include the following four alternatives (among others): (1) the establishment of differing compliance or reporting requirements or timetables that take into account the resources available to small entities; (2) the clarification, consolidation, or simplification of compliance or reporting requirements under the rule for small entities; (3) the use of performance, rather than design,

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[116] *See* Section IV, above.

[117] Section 203(a) of the Communications Act generally requires common carriers to file tariffs governing the provision of their basic communications services, although section 203(b)(2) gives the Commission broad authority to modify requirements made pursuant to this authority. 47 U.S.C. § 203 (a) & (b)(2) (1996).

[118] 47 C.F.R. § 61.38-39 (1999). Non-dominant IXCs are prohibited from filing tariffs except for the limited purposes contained in 61.19(b) and (c). Non-dominant (competitive) LECs are permitted to tariff access charges within the limits set in the *CLEC Access Charge Order*, but may not tariff charges above those benchmarks.

[119] *See* 47 C.F.R. §§ 61.41-49 (price cap rules) & 65.1-65.830 (rate of return rules).

[120] *See generally MAG Plan Order*, 16 FCC Rcd __, 2001 WL 1381097.

standards; and (4) an exemption from coverage of the rule, or any part thereof, for small entities.[121]

63. The overall objective of this proceeding is to reduce existing regulatory burdens on incumbent LECs to the extent consistent with the public interest. The Notice seeks specific proposals as to which existing regulations might be removed or streamlined in their application to broadband services, and asks parties to comment on whether incumbent LECs should be reclassified as non-dominant in the provision of broadband services.[122] The Notice further asks parties to discuss the extent to which different categories of broadband services face different levels of competition, warranting different regulatory treatment, and to address the extent to which the markets for different broadband services are at different stages in their development and thus should be treated differently for regulatory purposes. It asks what forms of regulation or de-regulation would best spur deployment of alternative technologies and facilities by existing and potential competitors, and seeks comment on whether existing regulation inhibits or stimulates the deployment of broadband services.

6. Federal Rules that May Duplicate, Overlap, or Conflict with the Proposed Rules

64. None.

VI. ORDERING CLAUSES

65. Accordingly, IT IS ORDERED that, pursuant to the authority contained in sections 2, 4(i)-4(j), 201, and 303(r) of the Communications Act of 1934, as amended, 47 U.S.C. §§ 152, 154(i)-4(j), 201, 303(r), this Notice IS ADOPTED.

[121] 5 U.S.C. § 603(c).

[122] *See* Section IV, above.

66. IT IS FURTHER ORDERED that the Commission's Consumer Information Bureau, Reference Information Center, SHALL SEND a copy of this Notice, including the Initial Regulatory Flexibility Analysis, to the Chief Counsel for Advocacy of the Small Business Administration.

FEDERAL COMMUNICATIONS COMMISSION

Magalie Roman Salas
Secretary

SEPARATE STATEMENT OF CHAIRMAN MICHAEL K. POWELL

Re: Review of Regulatory Requirements for Incumbent LEC Broadband Telecommunications Services et al., CC Docket No. 01-337 et al.

Re: Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers et al., CC Docket Nos. 01-338 et al.

In this combined statement, I write separately to underscore my support for these two *Notices of Proposed Rulemaking*, which comprise the second and third in a series of notices the Commission recently announced that will begin Phase II of our local competition implementation and enforcement efforts under the 1996 Act.[1]

Review of Regulatory Requirements for Incumbent LEC Broadband Telecommunications Services

I vigorously support the *Notice* we hereby adopt that initiates a review of the regulatory requirements applicable to incumbent LEC provision of high-speed telecommunications services. In this proceeding, the Commission will ask whether potentially robust competition among multiple types of broadband service providers suggests that we should avoid subjecting incumbents to the same regulatory burdens that we impose on these carriers with respect to their provision of local telephone service. That is, we ask whether incumbent LECs, which are so clearly dominant in the provision of local phone service, must also be treated as dominant as they use DSL and other technologies to provide high-speed telecommunications services in competition with cable modem service providers and other types of platforms. I would point out that this item focuses on traditional Title II common carrier regulation, historically arising out of the section 201 and 202 of the Communications Act of 1934, as applied to incumbent LEC provision of high-speed *telecommunications services.* In contrast, the aforementioned proceeding regarding regulation of incumbent LEC broadband information services will address the question whether Title I should apply when incumbent LECs provide a bundled high-speed *information service* offering.

I would emphasize that our initiation of this proceeding should not suggest a grand departure from our ongoing efforts to implement unbundling, collocation and other market-opening requirements with respect to incumbent LECs pursuant to section 251(c)(3) of the Act.

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[1] The first of these items was the *Notice of Proposed Rulemaking* regarding performance requirements for UNE provisioning that we adopted at the November agenda meeting. *Performance Measurements and Standards for Unbundled Network Elements and Interconnection, et al.*, CC Docket No. 01-318, Notice of Proposed Rulemaking, FCC 01-331 (rel. Nov. 19, 2001). In addition to that *Notice* and the two items captioned above, we will in the coming weeks seek comment on the appropriate regulatory framework for incumbent LEC provision of broadband information services.

These other requirements are intended to allow competing carriers, particularly facilities-based carriers, to provide new and innovative telecommunications services. By the express terms of the statute, the Commission is duty-bound to continue our implementation and enforcement of these provisions, and we will.

Rather, this *Notice of Proposed Rulemaking* is intended to develop further one more avenue of thinking about how regulation can serve to help (or hinder) broadband deployment. It is, in that sense, not a signpost heralding a new direction but an attempt to add yet another arrow to the regulatory quiver we will use to attack and, in conjunction with other forces outside our purview, eventually subdue the broadband beast.

Notwithstanding my enthusiasm for our decision to initiate this inquiry, I for one have an open mind as to how these questions should be answered. For example, it may prove too unwieldy for both carriers and the Commission to treat incumbents as dominant for their provision of traditional local service but non-dominant for their provision of high-speed telecommunications services. I also acknowledge that declaring incumbent LEC provision of broadband telecommunications services non-dominant could have consequences in other areas of regulation that the Commission has not yet fully anticipated. Yet the importance of broadband deployment to the public interest and welfare is too great to disregard any potential method of facilitating that deployment. In sum, we must ensure that we leave no stone unturned in our pursuit of this important goal.

Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers

I similarly and wholeheartedly support the *Notice* we adopt here that initiates our scheduled triennial review of UNE obligations imposed on incumbent LECs pursuant to sections 251(c)(3) and 251(d)(2). Taking our cues from the Supreme Court in its opinion remanding to the Commission the task of giving meaningful effect to these provisions, my former colleagues and I determined that the agency would, in three years, revisit its decisions regarding the availability of UNEs.[2] The purpose of this triennial review would be to keep those decisions current with ongoing market and regulatory developments. That was in 1999, and now the year 2002 fast approaches.

Not surprisingly, however, I support this item for reasons other than the fact that it will put the Commission in a position to deliver on the commitment it made in 1999. First, it underscores the Commission's ongoing commitment to the promotion of facilities-based competition, which was pronounced most clearly by my former colleagues and I in the 1999 *UNE Remand Order*.[3] I believe this commitment should focus, in particular, on both so-called "full

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[2] *Implementation of the Local Competition Provisions of the Telecommunications Act of 1996,* Third Report and Order and Fourth Further Notice of Proposed Rulemaking, 15 FCC Rcd 3696 (1999) ("*UNE Remand Order*"), ¶ 151.

[3] *UNE Remand Order*, ¶ 14.

facilities-based" competition and competition from newer entrants who supplement their own facilities with network elements leased from the incumbent. As I have demonstrated in my decisions and public statements over my four years at the Commission, I fully support the use of facilities and individual UNEs as means to promote local competition while simultaneously furthering the related goals of encouraging deregulation and innovation. The 1996 Act and our experience since its passage demand no less.

Second, I support this item because it emphasizes further an area of inquiry begun in the *UNE Remand Order*. Specifically, in that *Order*, we considered how the Act's goals of encouraging broadband deployment and investment in competing facilities should shape unbundling policy.[4] I support our decision here to continue and to expand this area of inquiry.

Third, I support the Commission's decision, in seeking comment here on whether to unbundle aspects of the incumbent's network, to ask whether and the extent to which we should take note of the availability of technologies other than circuit-switched telephony provided by traditional common carriers. In particular, this *Notice* expressly focuses on the roles that cable and wireless companies have begun and will continue to play in the market for telephony and broadband telecommunications services. This emphasis may also be viewed as expansion of an avenue of inquiry begun by the previous Commission. Specifically, in the *UNE Remand Order*, my former colleagues and I appropriately followed the Supreme Court's demand that we not blind ourselves to the availability of self-provisioned or other alternative facilities in determining whether to unbundle elements of the incumbent LEC's network.[5]

To my mind, it seems premature to suggest that the availability of such technologies should be fully dispositive of the question whether to require the availability of specific UNEs. Yet it does stand to reason that such availability may give us some indication of the alternative tools newer entrants could use to serve customers if the Commission were to decline to unbundle any particular element of the network. I encourage parties to provide detailed and well-supported comments in order to help us determine whether this line of reasoning is, in fact, sound.

As this *Notice* itself reminds us, the Commission now has the benefit of two years of experience with the current unbundling rules and almost six years of experience with promoting competition since the 1996 Act was passed. These are no doubt merely the opening chapters of a regulatory epic that will take many years to rewrite a near century-long history of legally sanctioned monopoly in the telephone market. But I believe it is critical that we take stock of the lessons we have learned so far and make any changes that may be necessary to ensure that our rules remain faithful to the statute and its goals of promoting competition, deregulation and innovation in telecommunications markets.

* * *

[4] *UNE Remand Order*, ¶¶ 107-113.

[5] *UNE Remand Order*, ¶ 8.

I thank the Common Carrier Bureau staff and my colleagues for their enormous work on these *Notices* and look forward to working with them, as well as my state commission colleagues, in carrying out both of these important "Phase II" proceedings.

SEPARATE STATEMENT OF
COMMISSIONER MICHAEL J. COPPS

Re: Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers, Notice of Proposed Rulemaking; and Review of Regulatory Requirements for Incumbent LEC Broadband Telecommunications Services, Notice of Proposed Rulemaking.

I will vote to approve these Notices of Proposed Rulemaking because I think they have been significantly improved, and given more balance, during the discussions preceding today's meeting. These Notices recognize the importance of competition and, importantly, do not reach tentative conclusions. Nevertheless, I do not vote for these Notices without some concern for the competition framework laid out by Congress in the 1996 Act.

I understand the need to ask questions. In particular, the Commission indicated in 1999 that it would reexamine every three years the list of network elements that need to be unbundled pursuant to section 251(c)(3). I generally do not mind asking questions, but we must be sensitive to the larger context.

This is a time of great uncertainty in the economy, for the telecommunications industry, and for competition for both telecommunications and Internet services. The years since passage of the Act have seen high-flying expectations, and lately, descent into worry and trepidation. I hear from competitors and incumbents alike the desire for certainty and stability in the regulatory environment. I fear that these broad Notices may not be meeting this need.

Some parties may read these Notices and conclude that the Commission has a predetermined agenda to remake the competition framework. Whether accurate or not, this perception, coupled with the uncertainty created by these broad Notices, can damage competition as surely as any final rules adopted by this Commission.

We must recognize that setting competition policy is the exclusive jurisdiction of Congress. I approach these proceedings optimistic that the Commission will show proper restraint and will not presume to question the statutory competitive framework. Instead, the Commission should use these proceedings to understand the marketplace better in our role as policy implementers and not policy makers. And we should not create concern, even unwittingly, that our zeal to deregulate before meaningful competition develops might cripple the very competition that Congress sought to engender.

Let the record show, however, that if our proceedings should ever turn into an attempt to undermine the competitive framework that Congress adopted in the 1996 Act, I will – without hesitation – oppose such overreaching.