ORIGINAL

BEFORE THE ARIZONA CORPORATION COMMISSION

COMMISSIONERS

JEFF HATCH-MILLER, Chairman
WILLIAM A. MUNDELL
MARC SPITZER
MIKE GLEASON
KRISTIN K. MAYES

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AZ CORP COMMISSION
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IN THE MATTER OF THE APPLICATION OF DIECA COMMUNICAITONS, INC. dba COVAD COMMUNICAITONS COMPANY FOR ARBITRATION OF AN INTERCONNECTION AGREEMENT WITH QWEST CORPORATION	DOCKET NO. T-03632A-04-0425 T-01051B-04-0425 **STAFF REQUEST FOR A PROCEDURAL ORDER**

On August 12, 2005, the Commission issued a Procedural Order requiring Staff, DIECA Communications, Inc., dba Covad Communications Company ("Covad") and Qwest Corporation ("Qwest") to file a statement by August 26, 2005 regarding the impact, if any, of the FCC's Decision in Docket No. 05-150 on this proceeding. Because the FCC Order had not been released by that date, Staff filed a request for an extension of time, which was granted by a Procedural Order dated August 30, 2005.

On September 23, 2005, the FCC released its Report and Order and Notice of Proposed Rulemaking in *In the Matter of Appropriate Framework for Broadband Access to the Internet over Wireline Facilities,* CC Docket No. 02-33 et al. (Released: September 23, 2005). Staff, therefore, requests that the Hearing Division issue a Procedural Order allowing Staff, Covad and Qwest approximately two (2) weeks to comment on the impact of the FCC's Order on the issues raised in this proceeding. A copy of the FCC's Order is attached.

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WHEREFORE, the Staff respectfully requests that the Commission issue a procedural order giving Staff, Covad and Qwest two (2) weeks to file comments on the FCC's Order attached to this Motion.

RESPECTFULLY SUBMITTED this 3rd day of November, 2005.

Maureen A. Scott
Attorney, Legal Division
Arizona Corporation Commission
1200 West Washington Street
Phoenix, Arizona 85007
(602) 542-3402

Original and Thirteen (13) Copies of the foregoing were filed this 3rd day of November, 2005, with:

Docket Control
Arizona Corporation Commission
1200 West Washington Street
Phoenix, Arizona 85007

Copy of the foregoing mailed this 3rd day of November, 2005, to:

Todd Lundy
Associate General Counsel
Qwest Corporation
1801 California Street, 47th Floor
Denver, Colorado 80202

Michael W. Patten
Roshka, DeWulf and Patten, P.L.C.
One Arizona Center
400 East Van Buren Street, Suite 800
Phoenix, Arizona 85004

Andrew R. Newell
Krys Boyle, P.C.
600 17th Street, Suite 2700
Denver, Colorado 80202

Karen Shoresman Frame
Covad Communications Company
7901 Lowry Boulevard
Denver, Colorado 80230

. . .

Timothy Berg
Theresa Dwyer
Fennemore Craig, P.C.
3003 North Central Avenue, Suite 2600
Phoenix, Arizona 85012

Winslow B. Waxter
Qwest Corporation
1005 17th Street, Suite 200
Denver, Colorado 80209

Norman G. Curtright
Qwest Corporation
4041 North Central Avenue, Suite 1100
Phoenix, Arizona 85012

John Devaney
Perkins Coie, LLP
607 Fourteenth Street NW, Suite 800
Washington, DC 20005

Karyn Christine

Karyn Christine, Executive Legal Assistant

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

In the Matters of	)	
	)	
Appropriate Framework for Broadband Access to the Internet over Wireline Facilities	)	CC Docket No. 02-33
	)	
Universal Service Obligations of Broadband Providers	)	
	)	
Review of Regulatory Requirements for Incumbent LEC Broadband Telecommunications Services	)	CC Docket No. 01-337
	)	
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	)	CC Docket Nos. 95-20, 98-10
	)	
Conditional Petition of the Verizon Telephone Companies for Forbearance Under 47 U.S.C. § 160(c) with Regard to Broadband Services Provided Via Fiber to the Premises; Petition of the Verizon Telephone Companies for Declaratory Ruling or, Alternatively, for Interim Waiver with Regard to Broadband Services Provided Via Fiber to the Premises	)	WC Docket No. 04-242
	)	
Consumer Protection in the Broadband Era	)	WC Docket No. 05-271

REPORT AND ORDER
AND
NOTICE OF PROPOSED RULEMAKING

Adopted: August 5, 2005 **Released: September 23, 2005**

Comment Date: (90 Days After Federal Register Publication of this Notice)
Reply Comment Date: (135 Days After Federal Register Publication of this Notice)

By the Commission: Chairman Martin and Commissioner Abernathy issuing separate statements; Commissioners Copps and Adelstein concurring and issuing separate statements.

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I. INTRODUCTION

1. In this Order, we establish a new regulatory framework for broadband Internet access services offered by wireline facilities-based providers. Our actions today are essential to attaining the goals set forth in the *Wireline Broadband* proceeding,[1] and are reinforced by and consistent with the Supreme Court's recent opinion in *NCTA v. Brand X*.[2] This framework establishes a minimal regulatory environment for wireline broadband Internet access services to benefit American consumers and promote innovative and efficient communications. First, this Order encourages the ubiquitous availability of broadband to all Americans by, among other things, removing outdated regulations. Those regulations were created over the past three decades under technological and market conditions that differed greatly from those of today. Second, the framework we adopt in this Order furthers the goal of developing a consistent regulatory framework across platforms by regulating like services in a similar functional manner, after a transitional period. Finally, the actions we take in this Order allow facilities-based wireline broadband Internet access service providers to respond to changing marketplace demands effectively and efficiently, spurring them to invest in and deploy innovative broadband capabilities that can benefit all Americans, consistent with the Communications Act of 1934, as amended (the Communications Act or Act).

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[1] *Appropriate Framework for Broadband Access to the Internet over Wireline Facilities, Universal Service Obligations of Broadband Providers*, CC Docket No. 02-33, Notice of Proposed Rulemaking, 17 FCC Rcd 3019 (2002) (*Wireline Broadband NPRM*).

[2] *National Cable & Telecommunications Ass'n v. Brand X Internet Services*, 125 S. Ct. 2688 (2005) (*NCTA v. Brand X*), *aff'g Inquiry Concerning High-Speed Access to the Internet Over Cable and Other Facilities, Internet Over Cable Declaratory Ruling, Appropriate Regulatory Treatment for Broadband Access to the Internet Over Cable Facilities*, GN Docket No. 00-185 & CS Docket No. 02-52, Declaratory Ruling and Notice of Proposed Rulemaking, 17 FCC Rcd 4798 (2002) (*Cable Modem Declaratory Ruling and NPRM*).

2. In this Order we reach a classification determination that is consistent with our decision in the *Cable Modem* proceeding, as affirmed by the Supreme Court. Unlike the *Cable Modem Declaratory Ruling*,[3] however, which addressed a service and its transmission component that had not previously been classified under the Act or subjected to any network access requirements, because facilities-based providers of wireline broadband Internet access service are subject to legacy regulation,[4] we must consider that legacy regulation in determining the appropriate regulatory framework for wireline broadband Internet access service providers.

3. Today, we decide that the appropriate framework for wireline broadband Internet access service, including its transmission component, is one that is eligible for a lighter regulatory touch.[5] In the past, the primary, if not sole, facilities-based platform available for the provision of "information services" to consumers was an incumbent local exchange carrier's (incumbent LEC's) telephone network.[6] By contrast, the record before us demonstrates that the broadband Internet access market today is characterized by several emerging platforms and providers, both intermodal and intramodal, in most areas of the country.[7] We are confident that the regulatory regime we adopt in this Order will promote the availability of competitive broadband Internet access services to consumers, via multiple platforms, while ensuring adequate incentives are in place to encourage the deployment and innovation of broadband platforms consistent with our obligations and mandates under the Act.[8]

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[3] *Cable Modem Declaratory Ruling*, 17 FCC Rcd at 4799-839, paras. 1-71.

[4] As the Supreme Court recently observed, the Commission has never applied its legacy-based network access regime to information services provided over cable facilities. *NCTA v. Brand X*, slip op. at 30; *see Cable Modem Declaratory Ruling*, 17 FCC Rcd at 4825, para. 43.

[5] Throughout this Order, we refer to the transmission underlying wireline broadband Internet access service as the "transmission component." We note that commenters use various terms to refer to this transmission component. *See, e.g.*, AT&T Comments at 17 ("standalone broadband transmission services"); Covad Comments at 65-66 ("telecommunications component"); BellSouth Reply at 12 (same).

[6] *See NCTA v. Brand X*, slip op. at 30. This network was optimized for narrowband voice and data applications, not high-speed Internet access capabilities that were not yet even commercially contemplated. *See Wireline Broadband NPRM*, 17 FCC Rcd at 3037, para. 136.

[7] *E.g.*, Alcatel Comments at 2-3; BellSouth Comments at 15-18; Qwest Comments at 26; SBC Comments at 20-24; Verizon Comments at 15; *see also NCTA v. Brand X*, slip op. at 2-3. We refer to "intramodal competitors" as those competitive providers, such as Covad, whose services are either delivered partially or wholly over incumbent LEC facilities, or over wireline platforms using technology identical or similar to those which incumbent LECs have deployed. "Intermodal competitors" are providers of services similar to those provided by incumbent LECs that rely exclusively on technological platforms other than wireline technologies. As we discuss in part V.B.1, below, intermodal competitors include, for example, cable modem service providers, wireless broadband Internet access service providers, satellite broadband Internet access service providers, and other broadband Internet access service providers such as broadband over power line providers. *Availability of Advanced Telecommunications Capability in the United States*, GN Docket No. 04-54, Fourth Report to Congress, FCC 04-208, at 18-23, 45 (rel. Sept. 9, 2004) (*Fourth Section 706 Report)* (describing wireless, satellite, and power line platforms). Twice a year, the Commission releases *High-Speed Services* reports that summarize the results of its Form 477 data collection under which all facilities-based providers of high-speed telecommunications capability must provide information regarding their operations. *See, e.g.*, Federal Communications Commission, Wireline Competition Bureau, Industry Analysis and Technology Division, *High-Speed Services for Internet Access as of December 31, 2004*, at Table 3, Chart 6 (rel. July 7, 2005) (*High-Speed Services July 2005 Report*).

[8] Specifically, Congress enacted the Telecommunications Act of 1996 (1996 Act) for the express purposes of promoting competition, reducing regulation, and encouraging the rapid deployment of new telecommunications (continued . . .)

4. In part II, below, we summarize the major actions we take in this Order. In part III, we provide important background information and define the scope of this Order. Then in part IV, we classify wireline broadband Internet access service as an information service under the statute. In part V, we develop our new regulatory framework for broadband Internet access services offered by wireline facilities-based providers. We begin this part by describing the current regulatory framework under the *Computer Inquiry* regime[9] and the technological attributes associated with broadband Internet access services that are relevant to our decision-making process. Next, we consider the appropriateness of maintaining the current access and related requirements that apply to facilities-based wireline broadband Internet access service providers under the *Computer Inquiry* rules. We conclude that continued application of the *Computer Inquiry* requirements is not appropriate, and we adopt a new framework for wireline broadband Internet access service providers. We then determine that, given this new framework, the transmission component of wireline broadband Internet access is not a telecommunications service. In part VI, we analyze the effect of our classification findings on universal service, national security, and other important consumer interests. Finally, consistent with our objective to create a broadband regulatory regime that is technology and competitively neutral, we adopt a Notice of Proposed

(continued from previous page)
technologies. *See* Preamble, Telecommunications Act of 1996, Pub. L. 104-104, 110 Stat. 56 (1996) (Preamble to 1996 Act). In section 706 of the 1996 Act, Congress directed the Commission to encourage, without regard to transmission media or technology, the deployment of advanced telecommunications capability to all Americans on a reasonable and timely basis through, among other things, removing barriers to infrastructure investment. Section 706 is reproduced in the notes to section 157 of the Act. *See* 47 U.S.C. § 157 nt.

[9] *See 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*), *aff'd sub nom. Computer and Communications Industry Ass'n v. FCC*, 693 F.2d 198 (D.C. Cir. 1982) (*CCIA v. FCC*), *cert. denied*, 461 U.S. 938 (1983) (collectively referred to as *Computer II*); *Amendment of Section 64.702 of the Commission's Rules and Regulations*, CC Docket No. 85-229, Phase I, 104 FCC 2d 958 (1986) (*Computer III Phase I Order*), *recon.*, 2 FCC Rcd 3035 (1987) (*Computer III Phase I Reconsideration Order*), *further recon.*, 3 FCC Rcd 1135 (1988) (*Computer III Phase I Further Reconsideration Order*), *second further recon.*, 4 FCC Rcd 5927 (1989) (*Computer III Phase I Second Further Reconsideration Order*); *Phase I Order and Phase I Recon. Order vacated sub nom. California v. FCC*, 905 F.2d 1217 (9th Cir. 1990) (*California I*); CC Docket No. 85-229, Phase II, 2 FCC Rcd 3072 (1987) (*Computer III Phase II Order*), *recon.*, 3 FCC Rcd 1150 (1988) (*Computer III Phase II Reconsideration Order*), *further recon.*, 4 FCC Rcd 5927 (1989) (*Phase II Further Reconsideration Order*); *Phase II Order vacated, California I*, 905 F.2d 1217 (9th Cir. 1990); *Computer III Remand Proceeding*, CC Docket No. 90-368, 5 FCC Rcd 7719 (1990) (*ONA Remand Order*), *recon.*, 7 FCC Rcd 909 (1992), *pets. for review denied sub nom. California v. FCC*, 4 F.3d 1505 (9th Cir. 1993) (*California II*); *Computer III Remand Proceedings: Bell Operating Company Safeguards and Tier 1 Local Exchange Company Safeguards*, CC Docket No. 90-623, 6 FCC Rcd 7571 (1991) (*BOC Safeguards Order*), *BOC Safeguards Order vacated in part and remanded sub nom. California v. FCC*, 39 F.3d 919 (9th Cir. 1994) (*California III*), *cert. denied*, 514 U.S. 1050 (1995); *Computer III Further Remand Proceedings: Bell Operating Company Provision of Enhanced Services*, CC Docket No. 95-20, Notice of Proposed Rulemaking, 10 FCC Rcd 8360 (1995) (*Computer III Further Remand Notice*), *Further Notice of Proposed Rulemaking*, 13 FCC Rcd 6040 (1998) (*Computer III Further Remand Further Notice*); Report and Order, 14 FCC Rcd 4289 (1999) (*Computer III Further Remand Order*), *recon.*, 14 FCC Rcd 21628 (1999) (*Computer III Further Remand Reconsideration Order*); *see also Further Comment Requested to Update and Refresh Record on Computer III Requirements*, CC Dockets Nos. 95-20 & 98-10, Public Notice, 16 FCC Rcd 5363 (2001) (asking whether, under the open network architecture (ONA) framework, information service providers can obtain the telecommunications inputs, including digital subscriber line (DSL) service, they require) (collectively referred to as *Computer III*). Together with *Computer I*, *see infra* note 49, *Computer II* and *Computer III* are referred to as the *Computer Inquiries*.

Rulemaking seeking comment on the need for any non-economic regulatory requirements necessary to ensure that consumer protection needs are met by all providers of broadband Internet access service, regardless of the underlying technology.

II. EXECUTIVE SUMMARY

5. In accordance with our responsibilities under the Act, and in light of the competitive and technical characteristics of the broadband Internet access market today, we take the following actions to establish a comprehensive regulatory framework for facilities-based providers of wireline broadband Internet access service:

- Consistent with the Supreme Court's opinion in *NCTA v. Brand X*, we determine that facilities-based wireline broadband Internet access service is an information service.

- Facilities-based wireline broadband Internet access service providers are no longer required to separate out and offer the wireline broadband transmission component (*i.e.*, transmission in excess of 200 kilobits per second (kbps) in at least one direction) of wireline broadband Internet access services as a stand-alone telecommunications service under Title II, subject to the transition explained below. In addition, the Bell Operating Companies (BOCs) are immediately relieved of all other *Computer Inquiry* requirements with respect to wireline broadband Internet access services.

- Facilities-based wireline carriers are permitted to offer broadband Internet access transmission arrangements for wireline broadband Internet access services on a common carrier basis or a non-common carrier basis.

- Facilities-based wireline Internet access service providers must continue to provide existing wireline broadband Internet access transmission offerings, on a grandfathered basis, to unaffiliated ISPs for a one-year transition period.

- We affirm that neither the statute nor relevant precedent mandates that broadband transmission be a telecommunications service when provided to an ISP, but the provider may choose to offer it as such. We determine that the use of the transmission component as part of a facilities-based provider's offering of wireline broadband Internet access service to end users using its own transmission facilities is "telecommunications" and not a "telecommunication service" under the Act.

6. We also address other important areas relating to the provision of broadband Internet access services including:

- We maintain the *status quo* for universal service during for a 270-day period pending resolution of the *USF Contribution Methodology* proceeding.

- We ensure no adverse impact on public safety through the continued requirement that voice over IP (VoIP) providers using wireline broadband Internet access facilities comply with E911 obligations.

- We confirm that this Order does not affect disability access obligations the Commission has adopted pursuant to its Title I ancillary jurisdiction, and we will continue to exercise our Title

I authority, as necessary, to give full effect to the accessibility policy embodied in section 255.

- Nothing in this Order changes requesting telecommunications carriers' rights to access unbundled network elements (UNEs) under section 251 and our related implementing rules.

7. Finally, we adopt a Notice of Proposed Rulemaking seeking comment on the need for any non-economic regulatory requirements necessary to ensure that consumer protection needs are met by all providers of broadband Internet access service, regardless of the underlying technology.

III. BACKGROUND AND SCOPE

8. As the Supreme Court held in *NCTA v. Brand X*, the Communications Act does not address directly how broadband Internet access service should be classified or regulated.[10] The Act does, however, provide the Commission express directives with respect to encouraging broadband deployment, generally, and promoting and preserving a freely competitive Internet market, specifically.[11] Consequently, the Commission initiated the *Wireline Broadband* proceeding to answer important questions about the appropriate legal and policy framework for wireline broadband Internet access service in furtherance of its obligations under the Act. In undertaking this review, the Commission recognized the differing market and technical characteristics unique to broadband Internet access services.[12] To that end, the *Wireline Broadband NPRM* sought detailed comment on the appropriate regulatory framework for wireline broadband Internet access service.[13] Since commencing this proceeding, the Commission has taken a number of important actions regarding broadband facilities and services.[14]

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[10] *NCTA v. Brand X*, slip op. at 17-25; *see Cable Modem Declaratory Ruling*, 17 FCC Rcd at 4819, para. 32.

[11] *See supra* n.8; *cf. United States Telecom Association v. FCC*, 359 F.3d 554, 580-82 (D.C. Cir. 2004) (*USTA II*), *cert. denied*, 125 S. Ct. 313, 316, 345 (2004) (holding that the Commission reasonably interpreted section 251(c)(3) of the Act as allowing it to withhold unbundling, even in the face of some impairment, where such unbundling would pose excessive impediments to infrastructure investment).

[12] *Wireline Broadband NPRM*, 17 FCC Rcd at 3027, para. 13.

[13] *Id.* at 3040-43, paras. 43-53.

[14] *See, e.g., Petition for Forbearance of the Verizon Telephone Companies Pursuant to 47 U.S.C. § 160(c); SBC Communications Inc.'s Petition for Forbearance Under 47 U.S.C. § 160(c); Qwest Communications International Inc. Petition for Forbearance Under 47 U.S.C. § 160(c); BellSouth Telecommunications, Inc. Petition for Forbearance Under 47 U.S.C. § 160(c)*, WC Docket Nos. 01-338, 03-235, 03-260, 04-48, Memorandum Opinion and Order, 19 FCC Rcd 21496 (2004) (*Broadband 271 Forbearance Order*); *Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers; Implementation of the Local Competition Provisions of the Telecommunications Act of 1996; Deployment of Wireline Services Offering Advanced Telecommunications Capability*, CC Docket Nos. 01-338, 96-98, 98-147, Order on Reconsideration, 19 FCC Rcd 20293 (2004) (*Fiber to the Curb Reconsideration Order*); *Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers; Implementation of the Local Competition Provisions of the Telecommunications Act of 1996; Deployment of Wireline Services Offering Advanced Telecommunications Capability*, CC Docket Nos. 01-338, 96-98, 98-147, Order on Reconsideration, 19 FCC Rcd 15856 (2004) (*Multiple Dwelling Unit Reconsideration Order*); *Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers, Implementation of the Local Competition Provisions of the Telecommunications Act of 1996, Deployment of Wireline Services Offering Advanced Telecommunications Capability*, CC Docket Nos. 01-338, 96-98, 98-147, Report and Order and Order on Remand and Further Notice of Proposed Rulemaking, 18 FCC Rcd 16978, 17141-53, paras. 272-95, & 17323, para. 541 2003 (*Triennial Review Order*), *aff'd in part, remanded in part, vacated in part, USTA II*, 359 F.3d at 564-93.

9. Wireline broadband Internet access service, for purposes of this proceeding, is a service that uses existing or future wireline facilities of the telephone network to provide subscribers with Internet access capabilities.[15] The term "Internet access service" refers to a service that always and necessarily combines computer processing, information provision, and computer interactivity with data transport, enabling end users to run a variety of applications such as e-mail, and access web pages and newsgroups.[16] Wireline broadband Internet access service, like cable modem service, is a functionally integrated, finished service that inextricably intertwines information-processing capabilities with data transmission such that the consumer always uses them as a unitary service.[17] For example, as we explained in the *Wireline Broadband NPRM*, where wireline broadband Internet access service enables an end user to retrieve files from the World Wide Web, the end user has the capability to interact with information stored on the service provider's facilities.[18] To the extent a provider offers end users a capability to store files on the service provider's computers to establish "home pages," the consumer is utilizing the "capability for . . . storing . . . or making available information."[19] In short, providers of wireline broadband Internet access service offer subscribers the ability to run a variety of applications that fit under the characteristics stated in the information service definition.[20] These characteristics distinguish wireline broadband Internet access service from other wireline broadband services, such as stand-alone ATM service, frame relay,

[15] We stress that our actions in this Order are limited to wireline broadband Internet access service and its underlying broadband transmission component, whether that component is provided over all copper loops, hybrid copper-fiber loops, a fiber-to-the-curb or fiber-to-the-premises (FTTP) network, or any other type of wireline facilities, and whether that component is provided using circuit-switched, packet-based, or any other technology. *See Wireline Broadband NPRM*, 17 FCC Rcd at 3020 n.1 & 3026, para. 12. As noted in the *Wireline Broadband NPRM*, some service providers deploying DSL and other wireline broadband technologies may utilize asynchronous transfer mode (ATM) or frame relay transport in their networks. *See Wireline Broadband NPRM*, 17 FCC Rcd at 3026 n.19. The use of ATM or frame relay transport in this context neither expands nor limits the scope of relief, which covers all wireline broadband Internet access services as discussed further below. This Order *does not* implicate the current rules or regulatory framework for the provision of access to narrowband transmission associated with dial-up Internet access services or other narrowband or broadband information services when provided by facilities-based wireline carriers. *See Wireline Broadband NPRM*, 17 FCC Rcd at 3025 n.18. For purposes of this proceeding, we define the line between broadband and narrowband consistent with the Commission's definition in other contexts (*i.e.*, services with over 200 kbps capability in at least one direction). *See, e.g.*, *Fourth Section 706 Report*, at 8, 10; *Local Telephone Competition and Broadband Reporting*, CC Docket No. 04-141, Report and Order, 19 FCC Rcd 22340, 22342, para. 3 (2004) (*Form 477 Data Collection Order*); *Communications Assistance for Law Enforcement Act and Broadband Access and Services*, ET Docket No. 04-295, RM 10865, Notice of Proposed Rulemaking and Declaratory Ruling, 19 FCC Rcd 15676, 15692, para. 35 (2004) (*CALEA NPRM*). Although this definition remains in effect today, the Commission has indicated that it may examine the definition and modify it for future purposes. *See Form 477 Data Collection Order*, 19 FCC Rcd at 22347-48, para. 14.

[16] *See Cable Modem Declaratory Ruling*, 17 FCC Rcd at 4821, para. 36; *Wireline Broadband NPRM*, 17 FCC Rcd at 3027 n.27 (*citing Federal-State Joint Board on Universal Service*, CC Docket No. 96-45, Report to Congress, 13 FCC Rcd 11501, 11516-17, para. 33 (1998) (*Report to Congress*) (Internet access services are services that "alter the format of information through computer processing applications such as protocol conversion and interaction with stored data.")); *see also* 47 U.S.C. § 231(e)(4); *Reno v. American Civil Liberties Union*, 521 U.S. 844, 851 (1997).

[17] *NCTA v. Brand X*, slip op. at 6 (citing *Cable Modem Declaratory Ruling*, 19 FCC Rcd at 4823, para. 38) & 18-19. That is, the transmission component of wireline broadband Internet access service is "'part and parcel' of [that service] and is integral to [that service's] other capabilities." *NCTA v. Brand X*, slip op. at 26 (quoting *Cable Modem Declaratory Ruling*, 19 FCC Rcd at 4823, para. 39).

[18] *Wireline Broadband NPRM*, 17 FCC Rcd at 3031, para. 21.

[19] *Id.*

[20] *Id.* at 3030, para. 20.

gigabit Ethernet service, and other high-capacity special access services, that carriers and end users have traditionally used for basic transmission purposes.[21] That is, these services lack the key characteristics of wireline broadband Internet access service – they do not inextricably intertwine transmission with information-processing capabilities.[22] Because carriers and end users typically use these services for basic transmission purposes, these services are telecommunications services under the statutory definitions.[23] These broadband telecommunications services remain subject to current Title II requirements.[24]

10. In the *Wireline Broadband NPRM*, the Commission tentatively concluded that wireline broadband Internet access service is an information service when provided over an entity's own facilities, and that the underlying transmission component of such service constituted "telecommunications" and not a "telecommunications service" under the Act.[25] The Commission invited comment on these tentative conclusions and its prior conclusion that "an entity is providing a 'telecommunications service' to the extent that such entity provides only broadband transmission service on a stand-alone basis, without a broadband Internet Access service."[26] Finally, the Commission sought comment on the extent to which any actions it might take in this proceeding would affect other regulatory obligations.[27]

11. In addressing the issues before us, we draw from the records of several proceedings, including the *Wireline Broadband* proceeding, where the Commission invited comment on technological and market-related issues pertaining to wireline broadband Internet access services,[28] and the *Incumbent LEC Broadband* proceeding, where the Commission invited comment on technological and market-related issues relating to our tariffing rules for incumbent LECs' broadband telecommunications services.[29]

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[21] *See* Petition of the Verizon Telephone Companies for Forbearance under 47 U.S.C. § 160(c) from Title II and *Computer Inquiry* Rules with Respect to Their Broadband Services, WC Docket No. 04-440, at 11-12 (filed Dec. 20, 2004). Similarly, this Order does not disturb incumbent LECs' unbundled network element (UNE) obligations or competitive carriers' rights to obtain UNEs. *See infra* Part VI.E.

[22] *NCTA v. Brand X*, slip op. at 26.

[23] *See* 47 U.S.C. § 153(43), (46); *NCTA v. Brand X*, slip op. at 26-27.

[24] We note that the Commission is currently considering changes to this framework in a number of related proceedings. *See, e.g., Review of Regulatory Requirements for Incumbent LEC Broadband Telecommunications Services*, CC. Docket No. 01-337, Notice of Proposed Rulemaking, 16 FCC Rcd 22745 (2001) (*Incumbent LEC Broadband NPRM*); *Computer III Further Remand Further Notice*, 13 FCC Rcd at 6046, para. 6 (inviting comment on whether the Commission should eliminate the ONA, CEI, and other *Computer III* requirements); *Special Access Rates for Price Cap Local Exchange Carriers; AT&T Corp. Petition for Rulemaking to Reform of Incumbent Local Exchange Carrier Rates for Interstate Special Access Services*, WC Docket No. 05-25, RM-10593, Order and Notice of Proposed Rulemaking, FCC 05-18 (rel. Jan. 31, 2005) (*Special Access NPRM*); *see also supra* note 15.

[25] *Wireline Broadband NPRM*, 17 FCC Rcd at 3032-33, paras. 24-25.

[26] *Id.* at 3033, para. 26 n.60 (citations omitted).

[27] *Id.* at 3043-47, paras. 54-61, & 3048-52, paras. 65-74.

[28] *Id.* at 3040-41, paras. 43-44; *see id.* at 3043-47, paras. 54-61, & 3048-52, paras. 65-74 (inviting comment on what effect classifying wireline broadband Internet access service as an information service would have on regulatory obligations other than those under the Commission's *Computer Inquiry* rules).

[29] *Incumbent LEC Broadband NPRM*, 16 FCC Rcd at 22748, para. 7. We also include the *Computer III Remand* proceeding to the extent it addresses wireline broadband Internet access service as well as the *Verizon Fiber-to-the-Premises* proceedings. *See, e.g., Computer III Further Remand Further Notice*, 13 FCC Rcd at 6040; *Conditional Petition of the Verizon Telephone Companies for Forbearance Under 47 U.S.C. § 160(c) with Regard to Broadband* (continued . . .)

Consistent with the scope of the *Wireline Broadband* proceeding, we restrict our decisions in this Order to only wireline broadband Internet access services and those wireline broadband technologies that have been utilized for such Internet access services.[30]

IV. CLASSIFICATION OF WIRELINE BROADBAND INTERNET ACCESS SERVICE

12. In this section, we affirm our tentative conclusion "that wireline broadband Internet access service provided over a provider's own facilities is an information service."[31] This classification is consistent both with the Commission's classification of cable modem service, as affirmed by the Supreme Court in *Brand X*, and with the Commission's earlier determination in its *Report to Congress* that Internet access service is an information service.[32]

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Services Provided Via Fiber to the Premises, WC Docket No. 04-242 (filed June 28, 2004) (*Verizon Fiber-to-the-Premises Forbearance Petition*); *Petition of the Verizon Telephone Companies for Declaratory Ruling or, Alternatively, for Interim Waiver with Regard to Broadband Services Provided Via Fiber to the Premises*, WC Docket No. 04-242 (filed June 28, 2004) (*Verizon Fiber-to-the-Premises Declaratory Ruling and Waiver Petition*). For clarity, we include the docket number in references to documents filed in proceedings other than the *Wireline Broadband* proceeding.

[30] *See supra* note 15. To be clear, this Order does not address classification issues of broadband Internet access services provided over cable, wireless (satellite, mobile, or fixed wireless), or power line (electric grid) networks. We will address, where appropriate, any regulatory treatment and other issues associated with such alternative platforms in separate proceedings in a manner not inconsistent with the analysis and conclusions in this Order. *See, e.g.*, *Amendment of Part 15 Regarding New Requirements And Measurement Guidelines For Access Broadband Over Power Line Systems*, Report and Order, ET Docket No. 04-37, 19 FCC Rcd 21265 (2004); *Cable Modem Declaratory Ruling*, 17 FCC Rcd at 4839-54, paras. 72-112 (notice of proposed rulemaking); *see also infra* Part VIII (initiating a rulemaking on consumer protection in the broadband era).

[31] *See Wireline Broadband NPRM*, 17 FCC Rcd at 3032-33, para. 24. As discussed more fully below, we disagree with those commenters that argue that wireline broadband Internet access service necessarily includes *both* an information service *and* a telecommunications service. *See, e.g.*, California Commission Comments at 10-14 (wireline broadband Internet access is in part a telecommunications service); Ohio Commission Comments at 14-15 (same); Illinois Commission Comments at 10 (distinct telecommunications service and information service); New York Commission Comments at 3-4 (same); Allegiance Reply at 28 (wireline broadband Internet access service involves both information service and telecommunications service); NRTA Reply at 2 (same). Those arguments are premised on an assumption, which this Order fundamentally alters, that the carrier continues to be under a Commission-imposed compulsion to offer the transmission underlying that service as a telecommunications service. *See, e.g.*, California Commission Comments at 13-14; Illinois Commission Comments at 9-11; New York Commission Comments at 4.

[32] *See NCTA v. Brand X*, slip op. at 13-14; *Cable Modem Declaratory Ruling*, 17 FCC Rcd at 4820-24, paras. 34-41; *Report to Congress*, 13 FCC Rcd at 11511, para. 21 (finding that "Congress intended to maintain a regime in which information service providers are not subject to regulation as common carriers merely because they provide their services 'via telecommunications'"); *see also* 47 U.S.C. § 231(e)(4) (excluding "telecommunications services" from the definition of "Internet access service"). Although the Commission has not been entirely consistent on this point, we agree for the wireline broadband Internet access described in this Order with the past Commission pronouncements that the categories of "information service" and "telecommunications service" are mutually exclusive. *Compare Cable Modem Declaratory Ruling*, 17 FCC Rcd at 4823, paras. 39-40, & *Report to Congress*, 13 FCC Rcd at 11516-26, paras. 33-48, & 11530, para. 59 *with Deployment of Wireline Services Offering Advanced Telecommunications Capability*, CC Docket No. 98-147, Memorandum Opinion and Order and Notice of Proposed Rulemaking, 13 FCC Rcd 24012, 24029, paras. 35-37 (1998) (*Advanced Services Order and NPRM*); *Deployment of Wireline Services Offering Advanced Telecommunications Capability*, CC Docket No. 98-147, Order on Remand, 15 (continued . . .)

13. The Act defines "information service" as

> the offering of a capability for generating, acquiring, storing, transforming, processing, retrieving, utilizing, or making available information via telecommunications, and includes electronic publishing, but does not include any use of any such capability for the management, control, or operation of a telecommunications system or the management of a telecommunications service.[33]

The Act also defines "telecommunications service" as "the offering of telecommunications for a fee directly to the public, or to such classes of users as to be effectively available directly to the public, regardless of the facilities used"[34] and "telecommunications" as "the transmission, between or among points specified by the user, of information of the user's choosing, without change in the form or content of the information as sent and received."[35]

14. Applying the definitions of "information service," "telecommunications," and "telecommunications service," we conclude that wireline broadband Internet access service provided over a provider's own facilities is appropriately classified as an information service because its providers offer a single, integrated service (*i.e.*, Internet access) to end users.[36] That is, like cable modem service (which is usually provided over the provider's own facilities), wireline broadband Internet access service combines computer processing, information provision, and computer interactivity with data transport, enabling end users to run a variety of applications (*e.g.*, e-mail, web pages, and newsgroups).[37] These applications encompass the capability for "generating, acquiring, storing, transforming, processing,

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FCC Rcd 385, 394-95, para. 21 (1999) (*Advanced Services Order on Remand*); *Communications Assistance for Law Enforcement Act*, CC Docket No. 97-213, Second Report and Order, 15 FCC Rcd 7105, 7120, para. 27 (1999) (*CALEA Second Report and Order*); *Policy and Rules Concerning the Interstate, Interexchange Marketplace; Implementation of Section 254(g) of the Communications Act of 1934, as amended; 1998 Biennial Regulatory Review – Review of Customer Premises Equipment and Enhanced Services Unbundling Rules in the Interexchange, Exchange Access and Local Exchange Markets*, CC Docket Nos. 96-61 & 98-183, Report and Order, 16 FCC Rcd 7418, 7447, paras. 49-50 (2001) (*CPE Bundling Order*); *see also* BellSouth Reply at 11; Covad Comments at 66; Qwest Comments at 8; Verizon Comments at 8. *But see* Allegiance Comments at 11-12 (arguing wireline broadband Internet access "bundle[s]" an information service and a telecommunications service).

[33] 47 U.S.C. § 153(20).

[34] 47 U.S.C. § 153(46).

[35] 47 U.S.C. § 153(43).

[36] Indeed, in *Brand X*, quoting from the *Report to Congress*, the Supreme Court stated that, from an end user's perspective, cable modem service does not provide a transparent ability to transmit information. *See NCTA v. Brand X*, slip op. at 26-29; *see also Report to Congress*, 13 FCC Rcd at 11529, para. 58 (stating that "[a]n offering that constitutes a single service from the end user's standpoint is not subject to common carrier regulation simply by virtue of the fact that it involves telecommunications components").

[37] *Cable Modem Declaratory Ruling*, 17 FCC Rcd at 4822, para. 38 (concluding that cable modem service combines "the transmission of data with computer processing, information provision, and computer interactivity, enabling end users to run a variety of applications," and is therefore an information service); *see also Report to Congress*, 13 FCC Rcd at 11536, para. 73.

retrieving, utilizing, or making available information via telecommunications," and taken together constitute an information service as defined by the Act.[38]

15. The capabilities of wireline broadband Internet access service demonstrate that this service, like cable modem service, provides end users more than pure transmission, "between or among points selected by the user, of information of the user's choosing, without change in the form or content of the information as sent and received."[39] Because wireline broadband Internet access service inextricably combines the offering of powerful computer capabilities with telecommunications, we conclude that it falls within the class of services identified in the Act as "information services."[40] The information service classification applies regardless of whether subscribers use all of the functions and capabilities provided as part of the service (*e.g.,* e-mail or web-hosting), and whether every wireline broadband Internet access service provider offers each function and capability that could be included in that service.[41] Indeed, as with cable modem service, an end user of wireline broadband Internet access service cannot reach a third party's web site without access to the Domain Naming Service (DNS) capability "which (among other things) matches the Web site address the end user types into his browser (or 'clicks' on with his mouse) with the IP address of the Web page's host server."[42] The end user therefore receives more than transparent transmission whenever he or she accesses the Internet.

16. There is no reason to classify wireline broadband Internet access services differently depending on who owns the transmission facilities.[43] From the end user's perspective, an information service is being offered regardless of whether a wireline broadband Internet access service provider self-provides the transmission component or provides the service over transmission facilities that it does not own. As the Commission indicated in its *Report to Congress*, what matters is the finished product made available through a service rather than the facilities used to provide it.[44] The end user of wireline broadband Internet access service receives an integrated package of transmission and information processing capabilities from the provider, and the identity of the owner of the transmission facilities does not affect

[38] *Cable Modem Declaratory Ruling*, 17 FCC Rcd at 4823-24, para. 41. In contrast, to the extent a service does not provide these capabilities, but merely provides transmission whether narrowband or broadband, it would not be an information service. *See supra* para. 9 (explaining the difference between wireline broadband Internet access service and other wireline broadband transmission services).

[39] 47 U.S.C. § 153(43) (defining "telecommunications"); *cf. NCTA v. Brand X*, slip op. at 27 (finding reasonable the Commission's conclusion that an end user of cable modem service "is equally using the information service provided by the cable company as when he accesses the company's own Web site, its e-mail service, or his personal Web page"); *see also supra* note 36.

[40] *Wireline Broadband NPRM*, 17 FCC Rcd at 3027, para. 13.

[41] *Cable Modem Declaratory Ruling*, at para. 38. This classification appears consistent with Congress's understanding of the nature of Internet access services. Specifically, in section 230(f)(2) of the Act, Congress defined the term "interactive computer service" to mean "any *information service*, . . . including specifically *a service or system that provides access to the Internet* . . . ." 47 U.S.C. § 230(f)(2) (emphasis added).

[42] *NCTA v. Brand X*, slip op. at 27 (citation omitted).

[43] *See Wireline Broadband NPRM*, 17 FCC Rcd at 3027-28, para. 14 (citing *Report to Congress*, 13 FCC Rcd at 11534, para. 69) (concluding that non-facilities-based ISPs are information service providers)).

[44] *Report to Congress*, 13 FCC Rcd at 11530, para. 59 (noting "Congress's direction that the classification of a provider should not depend on the type of facilities used . . . [but] rather on the nature of the service being offered to customers"); *see also Cable Modem Declaratory Ruling*, 17 FCC Rcd at 4821, para. 35; *Wireline Broadband NPRM*, 17 FCC Rcd at 3032-33, paras. 24-25, & 3052-53, para. 75.

the nature of the service to the end user.[45] Thus, in addition to affirming our tentative conclusion above "that wireline broadband Internet access service provided over a provider's own facilities is an information service,"[46] we also make clear that wireline broadband Internet access service is an information service when the provider of the retail service does not provide the service over its own transmission facilities.

17. Not only is the classification of wireline broadband Internet access service as an information service consistent with *Brand X*, but this classification, in our view, best facilitates the goals of the Act, including promoting the ubiquitous availability of broadband Internet access services to all Americans. Moreover, by classifying both wireline broadband Internet access service and cable modem service as information services, and by adopting the attached NPRM, we move closer to crafting an analytical framework that is consistent, to the extent possible, across multiple platforms that support competing services.[47]

V. REGULATION OF WIRELINE BROADBAND INTERNET ACCESS SERVICE PROVIDERS

18. The broadband Internet access services marketplace is vastly different from the marketplace of over three decades ago when access requirements to the transmission underlying wireline-based information services were first developed and the relative cost/benefit analysis rendered a different result.[48] We base our decision to eliminate these requirements on a number of factors.

19. First, broadband Internet access services in most parts of the country are offered by two established platform providers, which continue to expand rapidly, and by several existing and emerging platforms and providers, intermodal and intramodal alike. Second, the record shows that the existing regulations constrain technological advances and deter broadband infrastructure investment by creating disincentives to the deployment of facilities capable of providing innovative broadband Internet access services. Third, fast-paced technological changes and new consumer demands are causing a rapid evolution in the marketplace for these services. Wireline broadband carriers are constrained in their ability to respond to these changes in an efficient, effective, or timely manner as a result of the limitations imposed by these regulations. Fourth, the marketplace should create incentives for facilities-based wireline broadband providers to make broadband transmission available on a wholesale basis without these requirements. Finally, the directives of section 706 of the 1996 Act require that we ensure that our broadband policies promote infrastructure investment, consistent with our other obligations under the Act.

20. To provide a context for our decisions, we briefly describe the history of the *Computer Inquiry* regime and summarize its purposes and basic requirements. We explain how these requirements currently apply to facilities-based wireline broadband Internet access providers, and why these rules should no longer apply. Finally, we describe how our new framework will further the nation's broadband objectives.

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[45] *See, e.g.*, *NCTA v. Brand X*, slip op. at 24-25 (recognizing that the statutory definitions do not distinguish between facilities-based ISPs and other ISPs); *see also* Qwest Comments at 6-8; SBC Comments at 16-18; Verizon Reply at 6-7.

[46] *See supra* para. 12; *Wireline Broadband NPRM*, 17 FCC Rcd at 3032-33, para. 24.

[47] *See Wireline Broadband NPRM*, 17 FCC Rcd at 3021-23, paras. 3-7.

[48] *See NCTA v. Brand X*, slip op. at 30.

A. Computer Inquiry Regime

1. History of the *Computer Inquiry*

21. Wireline broadband Internet access services provided by facilities-based carriers are currently governed by rules established in the Commission's *Computer Inquiry* proceedings. The Commission first examined the relationship between communications and computer processing in *Computer I*,[49] a proceeding that began almost four decades ago in an era far different from today in terms of the technological, marketplace, and regulatory environment for telecommunications carriers.[50] In the *Notice of Inquiry* that opened that proceeding, the Commission explained that communications common carriers were rapidly becoming equipped to enter into the data processing field.[51] For example, the Commission described the activities of Western Union in establishing computer centers in key cities to provide a variety of data processing, storage, and retrieval services to the public.[52] While noting that the Bell System had not yet revealed any plan to provide data processing services similar to Western Union's, the Commission discussed technological steps the Bell System companies were taking that would permit them to do so, including converting all central offices to electronic switching.[53] Recognizing that common carriers were or would be offering services that were competitive with those sold by nonregulated entities (*e.g.*, computer manufacturers), and that such entities would be dependent upon common carriers for reasonably priced communication facilities and services, the Commission sought comment on the circumstances under which data processing, computer information, and message switching services were or should be subject to the provisions of the Communications Act.[54]

22. In *Computer I*, the Commission determined that the data processing industry was competitive[55] and, therefore, the Commission should not assert regulatory authority over it.[56] In refraining from

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[49] *See Regulatory and Policy Problems Presented by the Interdependence of Computer and Communication Services and Facilities*, Docket No. 16979, Notice of Inquiry, 7 FCC 2d 11 (1966) (*Computer I NOI*); *Regulatory and Policy Problems Presented by the Interdependence of Computer and Communication Services and Facilities*, Docket No. 16979, Final Decision and Order, 28 FCC 2d 267 (1971) (*Computer I Final Decision*), *aff'd in part sub nom. GTE Service Corp. v. FCC*, 474 F.2d 724 (2d Cir. 1973), *decision on remand*, 40 FCC 2d 293 (1973) (*Computer I*).

[50] *Wireline Broadband NPRM*, 17 FCC Rcd at 3038, para. 38; *see NCTA v. Brand X*, slip op. at 30 ("Unlike at the time of *Computer II*, substitute forms of Internet transmission exist today . . . .").

[51] *Computer I NOI*, 7 FCC 2d at 13-14, para. 10.

[52] *Id.* Western Union would also arrange to design, procure, and install all hardware necessary for a fully integrated data processing and communication system for individual customers, in addition to managing such a system for the customer. *Id.*

[53] *Id.* at 14, para. 11. The Commission also noted that there was evidence of a trend among several major domestic and international common carriers:

> to program their computers not only for switching services, but also for the storage, processing, and retrieval of various types of business and management data of entities desiring to subscribe therefor in lieu of such industries providing this service to themselves on an in-house basis or contracting with computer firms for the service.

Id.

[54] *Id.* at 15-16, paras. 15, 18; *see also Wireline Broadband NPRM*, 17 FCC Rcd at 3038, para. 38.

[55] The Commission defined "data processing" at that time as "use of a computer for the processing of information as distinguished from circuit or message-switching." *E.g.*, *Regulatory and Policy Problems Presented by the*
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regulating data processing services, however, the Commission distinguished them from regulated communications services. The Commission initially determined that services combining both communications and data processing functions (*i.e.*, "hybrid" services) would be classified on a case-by-case basis.[57] The Commission also permitted common carriers to furnish data processing services through a "maximum separation" policy to keep them from favoring their own data processing activities through anticompetitive activities.[58]

2. Current *Computer Inquiry* Requirements

a) *Computer II* Requirements

23. Even as the *Computer I* rules were being implemented, technological developments rendered them nearly obsolete as it became harder to distinguish communications from data processing or computing.[59] To respond to the confluence of technology in the offering of communications and data processing services and to give greater regulatory certainty than that afforded by a case-by-case review based on the nature of the processing performed, the Commission created a framework in *Computer II* that defined and distinguished between "basic services"[60] and "enhanced services."[61] It determined that

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Interdependence of Computer and Communications Services and Facilities, Tentative Decision of the Commission, 28 FCC 2d 291, 295, para. 15 (1970) (*Computer I Tentative Decision*).

[56] *Wireline Broadband NPRM*, 17 FCC Rcd at 3038, para. 38 (citing *Computer I Final Decision*, 28 FCC 2d at 270 para. 11).

[57] *Computer I Final Decision*, 28 FCC 2d at 276-79.

[58] *Wireline Broadband NPRM*, 17 FCC Rcd at 3038, para. 38 (quoting *Computer I Final Decision*, 28 FCC 2d at 270-71, para. 12). "Maximum separation" required a separate corporate entity with separate accounts, officers, personnel, equipment, and facilities. *See Computer II Final Decision*, 77 FCC 2d at 391 n.2 (noting that, in addition, these rules prohibited the carrier from promoting the data processing services offered by the separate subsidiary).

[59] *CCIA v. FCC*, 693 F.2d at 204. Specifically, the phenomenon of distributed processing allowed computers and terminals to perform both data processing and communications control applications within the network and at the customer's premises. *See Computer II Final Decision*, 77 FCC 2d at 391, para. 19.

[60] *See Computer II Final Decision*, 77 FCC 2d at 415-16, para. 83. Basic service is the offering of "a pure transmission capability over a communications path that is virtually transparent in terms of its interaction with customer supplied information." *Id.* at 420, para. 96.

[61] Enhanced service "combines basic service with computer processing applications that act on the format, content, code, protocol or similar aspects of the subscriber's transmitted information, or provide the subscriber additional, different, or restructured information, or involve subscriber interaction with stored information." *Id.* at 387, para. 5. In other words, an "enhanced service is any offering over the telecommunications network which is more than a basic transmission service." *Id.* at 420, para. 97. While the Commission used the term "enhanced service" in its *Computer Inquiry* decisions and the Telecommunications Act of 1996 (1996 Act) uses the term "information service," the Commission has determined that "Congress intended the categories of 'telecommunications service' and 'information service' to parallel the definitions of 'basic service' and 'enhanced service' developed in [the] *Computer II* proceeding . . . ." *NCTA v. Brand X*, slip op. at 21; *Report to Congress*, 13 FCC Rcd at 11511, para. 21. We will generally use the term "information service" in this Order except when providing historical context to previous Commission actions.

enhanced services were not within the scope of its Title II jurisdiction but rather were within its ancillary jurisdiction under Title I.[62]

24. Pursuant to its ancillary jurisdiction, the Commission required facilities-based common carriers to provide the basic transmission services underlying their enhanced services on a nondiscriminatory basis pursuant to tariffs governed by Title II of the Act.[63] These carriers thus offered the underlying basic service at the same prices, terms, and conditions, to all enhanced service providers, including their own enhanced services operations.[64]

25. For AT&T, which at the time owned the local BOCs, the Commission adopted additional measures. In particular, it determined that the same type of structural separation requirement imposed in *Computer I* (*i.e.,* the requirement to offer enhanced services only through a separate corporate entity) was necessary to protect the ratepayers against being charged rates for regulated services that cross subsidized the parent corporation's competitive enhanced services operations.[65] The Commission also determined that structural separation was necessary to protect the public against such anticompetitive activities as denial of access and predatory pricing by these "monopoly telephone companies exercising significant market power on a broad geographic basis."[66] It concluded that other facilities-based carriers should not be subject to this "maximum separation" requirement.[67] In addition, in its *Computer II Reconsideration*

[62] *See, e.g.*, *Computer II Final Decision*, 77 FCC 2d at 435, para. 132.

[63] *Id.* at 475, para. 231; *see id.* at 435, para. 132 (discussing jurisdictional basis for the Commission's *Computer II* actions); *see also CCIA v. FCC*, 693 F.3d at 211-14 (affirming the Commission's reliance on its ancillary jurisdiction in imposing structural safeguards on AT&T's provision of enhanced services); *NCTA v. Brand X*, slip op. at 13 (describing *Computer II* and stating that the Commission "remains free to impose special regulatory duties on facilities-based ISPs under its Title I ancillary jurisdiction").

[64] *See CCIA v. FCC*, 693 F.2d at 205; *see also Computer II Final Decision*, 77 FCC 2d at 474-75, para. 231. We note that the *Computer II* "unbundling" of basic services requirement is separate and distinct from the obligation created in section 251(c)(3) of the Communications Act, requiring incumbent LECs to provide access to UNEs. 47 U.S.C. § 251(c)(3). To avoid any confusion between these obligations, where possible, we use alternative phrases to describe *Computer II*'s "unbundling" requirement. Moreover, as we discuss in part VI.E, below, the decisions contained in this Order have no affect on section 251(c) obligations of incumbent LECs, including UNE availability issues as reflected in our *Triennial Review* proceeding. 47 U.S.C. § 251(c); *see also, e.g.*, *Triennial Review Order*, 18 FCC Rcd at 17019-21, paras. 58-60, & 17067-77, paras. 135-53.

[65] *Computer II Final Decision*, 77 FCC 2d at 467-68, para. 216.

[66] *Id.*, 77 FCC 2d at 463, para. 208, & 468, para. 220; *see also id.*, 77 FCC 2d at 486, para. 261 (stating that the Commission "essentially retained the degree of separation required in the current rules [*i.e.*, *Computer I*'s 'maximum separation']"). Among other things, *Computer II*'s structural separation requirements include separate books and officers as well as the use of separate operating, marketing, installation and maintenance personnel, and separate computer facilities in the provision of enhanced services. *Id.*, 77 FCC 2d at 486, para. 261.

[67] *See id.*, 77 FCC 2d at 435, para. 132. We note that the Commission initially imposed the separate subsidiary requirement on GTE, but on reconsideration of the *Computer II Final Decision*, the Commission decided to exempt GTE from that requirement. *Computer II Reconsideration Order*, 84 FCC 2d at 72-75, paras. 64-71. Today, this *Computer II* requirement applies only to the BOCs although, as explained in Part V.A.2.b, below, through the regime established in *Computer III*, BOCs may also provide enhanced services through their telephone operating companies.

Order, the Commission approved a process whereby parties could request waiver relief from the structural separation rules.[68]

b) *Computer III* Requirements

26. Years after the conclusion of the *Computer II* proceeding,[69] the Commission determined that the cost of decreased efficiency and innovation imposed by the structural safeguards of *Computer II* outweighed their benefits.[70] The Commission therefore replaced structural separation with a regime of nonstructural safeguards in its *Computer III* decisions. This framework maintained the existing basic and enhanced service categories and adopted comparably efficient interconnection (CEI) and ONA requirements as a replacement for the *Computer II* structural separation requirements for AT&T and the BOCs.[71] The CEI standards were intended to be an interim measure, necessary only until the BOCs had Commission-approved ONA plans in place.[72]

27. The CEI obligations require a BOC's enhanced services operations to take under tariff the basic services it uses in offering enhanced services.[73] These basic services must be available to other enhanced service providers and users under the same tariffs on an unbundled and functionally equal basis. In addition, the BOC may not discriminate in favor of its own enhanced services operations in providing CEI and must file reports to substantiate that nondiscrimination.[74] BOCs also must post service-specific CEI plans on the Internet[75] (*i.e.*, one CEI plan per service or group of services) that describe and

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[68] *Computer II Reconsideration Order*, 84 FCC 2d at 58, para. 21.

[69] Between the release of the *Computer II Final Decision* and the *Computer III Phase I Order*, the D.C. District Court approved the Modification of Final Judgment (MFJ), which required AT&T to divest itself of the BOCs and most of the assets held by the BOCs. *See United States v. American Tel. & Tel. Co.*, 552 F. Supp. 131 (D.D.C. 1982), *aff'd sub nom. Maryland v. United States*, 460 U.S. 1001 (1983). When the *Computer III* non-structural safeguards were initially adopted, they applied only to AT&T and the BOCs as they were the only carriers subject to *Computer II* structural separation requirements. *See supra* n.67. The Commission eliminated most of these requirements for AT&T when it declared AT&T non-dominant in 1995. *See infra* note 89.

[70] *See Computer III Phase I Order*, 104 FCC 2d at 964, para. 3.

[71] *Id.*, at 964, para. 4. The Commission also adopted rules relating to customer proprietary network information (CPNI), network disclosure, and cost allocation. *Id.* at 1077-92, paras. 241-65 (network disclosure and CPNI obligations); *Separation of Costs of Regulated Telephone Service from Costs of Nonregulated Activities*, CC Docket No. 86-111, Report and Order, 2 FCC Rcd 1298 (1986) (*Joint Cost Order*), *recon.* 2 FCC Rcd 6283, *further recon.* 3 FCC Rcd 6701 (1988), *aff'd sub nom. Southwestern Bell Corp. v. FCC*, 896 F.2d 1328 (D.C. Cir. 1990) (cost allocation rules). In a series of subsequent orders, the Commission eliminated or scaled back several of these requirements. *See, e.g.*, *Computer III Further Remand Order*, 14 FCC Rcd at 4318-23, paras. 44-53 (1999) (relieving carriers of their *Computer Inquiry* network information disclosure requirements except with respect to the customer premises equipment (CPE) disclosure obligation as applied to incumbent LECs).

[72] *Computer III Phase I Order*, 104 FCC 2d at 964, para. 4.

[73] *Computer III Further Remand Order*, 14 FCC Rcd at 4297-98, para. 13. We note that SBC's advanced services affiliate provides basic services under contracts posted on the Internet, rather than under tariffs, but these services are nevertheless made generally available to the public. *See Review of Regulatory Requirements for Incumbent LEC Broadband Telecommunications Services*, 17 FCC Rcd 27000 (2003) (*SBC Advanced Services Forbearance Order*).

[74] *Computer III Phase I Order*, 104 FCC 2d at 964, para. 4.

[75] *Computer III Further Remand Order*, 14 FCC Rcd at 4291, para. 4; *Computer III Further Remand Reconsideration Order*, 14 FCC Rcd at 21629, para. 6.

demonstrate how a BOC is providing unaffiliated enhanced service providers with equal access to its basic services by its compliance with nine CEI parameters.[76]

28. Unlike CEI plans, ONA plans apply to enhanced services generally and impose more specific and comprehensive unbundling requirements on the BOCs, not unlike section 251's unbundling obligations. Through ONA, BOCs must separate key components of their basic services into "basic service elements," and make those components, or building blocks, available to unaffiliated enhanced service providers to build new services regardless of whether the BOC's affiliated enhanced services operations use these unbundled components.[77] In refining its rules for filing ONA plans, the Commission subsequently categorized the BOCs' "basic service elements" into four groups, which the BOCs are required to make available to information services providers.[78] In a subsequent order, the Commission also determined that certain operations support systems (OSS) capabilities – namely service order entry and status; trouble reporting and status; diagnostics, monitoring, testing, and network reconfiguration; and traffic data collection – are ONA services under the Commission's ONA rules.[79] Finally, the ONA rules contain

[76] *Computer III Further Remand Order*, 14 FCC Rcd at 4291, para. 4; *Computer III Further Remand Reconsideration Order*, 14 FCC Rcd at 21629, para. 6; *see Computer III Phase I Order*, 104 FCC 2d at 1039-42, paras. 155-65. These nine CEI parameters are: (1) the "interface functionality" parameter (the BOC must make available standardized hardware and software interfaces that are able to support the transmission, switching, and signaling functions identical to those used in the BOC's enhanced service, as well as the information and technical specifications associated with these interfaces); (2) the "basic service unbundling" parameter (the BOC must separate the basic service functions that underlie its enhanced service offering from other basic service offerings and must assign a specific rate to them for tariffing purposes); (3) the "resale" parameter (the BOC must "take" basic services used in its enhanced service offerings at their unbundled tariffed rates); (4) the "technical characteristics" parameter (the BOC must provide basic services with technical characteristics that are equal to those used by the BOC in its enhanced service offering); (5) the installation, maintenance and repair parameter (the BOC must provide the same installation, maintenance, and repair intervals to unaffiliated enhanced service providers as it does to its own enhanced services operations, with associated reporting requirements); (6) the end-user access parameter (if a BOC offers its end users the ability to use abbreviated dialing or signaling to activate or access the BOC's enhanced offerings, it must provide the same capabilities to end users all of enhanced services that use the BOC's facilities); (7) the "CEI availability" parameter (the BOC's CEI plan must be available and fully operational the day that the BOC posts it on the Internet, and the BOC must give enhanced services competitors the opportunity to test the CEI facilities and services for their enhanced service offerings); (8) the transport costs minimization parameter (the BOC must provide competitors with interconnection facilities that minimize their transport costs); and (9) the "recipients of CEI" parameter (the BOC cannot restrict the availability of a CEI offering to any particular class of customer or enhanced service competitor). *Computer III Further Remand Order*, 14 FCC Rcd at 4297-99, para. 13.

[77] *Computer III Phase I Order*, 104 FCC 2d at 1064, para. 214.

[78] These four groups are: (1) basic serving arrangements (BSAs), which are fundamental tariffed switching and transport services that allow the ISP to communicate with its customers through the BOC network, *see Filing and Review of Open Network Architecture Plans*, 4 FCC Rcd 1, 36, para. 56 (1988) (*BOC ONA Order*) (noting that examples of BSAs include line-side and trunk-side circuit-switched service and line-side and trunk-side packet-switched service); (2) basic service elements (BSEs), which are optional unbundled features that an ISP may require or find useful in configuring an enhanced service, *see id.*, 4 FCC Rcd at 36, para. 57 (providing calling number identification as an example of a BSE); (3) complementary network services (CSAs), which are optional unbundled basic service features that an end user may obtain from a carrier in order to access or receive an enhanced service such as call waiting and call forwarding, *see id.* (stating that stutter dial tone is a CNS); and (4) ancillary network services (ANSs), which are non-common carrier services that an ISP might find useful such as billing and collection, and protocol conversion, *see id.*

[79] *Filing and Review of Open Network Architecture Plans*, 5 FCC Rcd 3084, 3087, para. 26 (1990) (*BOC ONA Reconsideration Order*).

certain procedural requirements governing the amendment of ONA plans. These procedures allow information service providers to request and receive new ONA services and impose various annual, semi-annual, and quarterly reporting requirements.[80]

29. When Congress enacted the 1996 Act, it created new statutory terms (*i.e.*, "information service" and "telecommunications service") that substantially incorporated the dichotomy between basic and enhanced services into the Communications Act.[81] As we noted above, although the 1996 Act uses "information service" and "telecommunications service" instead of "enhanced service" and "basic service," the Commission has previously determined that Congress intended the statutory categories to parallel the categories the Commission established in the *Computer Inquiry* proceeding.[82] More specifically, the Commission found that "all of the services that the Commission has previously considered to be 'enhanced services' are 'information services.'"[83]

c) Current Applicability of *Computer Inquiry* Rules to Wireline Broadband Internet Access Service Providers

30. As noted above, the Commission's structural separation, CEI, and ONA rules apply only to the BOCs. BOCs demonstrate their compliance with the CEI parameters through plans posted on their web sites, and changes to these plans may be made without Commission approval.[84] All BOCs have ONA

[80] *Computer III Phase I Order*, 104 FCC 2d at 1066, para. 218. In 1991, the Commission determined that the BOCs' ONA plans were a sufficient enough safeguard against discrimination to warrant elimination of the *Computer II* structural separation requirement for all enhanced services, notwithstanding their failure to comply fully with the *Computer III* rules. *BOC Safeguards Order*, 6 FCC Rcd at 7599-7601, paras. 62-64. In this same order, the Commission determined that its cost accounting safeguards, in addition to adoption of price cap regulation for the LECs, was a sufficient enough safeguard against cross subsidization to warrant elimination of structural separation. *Id.* at 7577-88, paras. 12-41. In 1994, the Ninth Circuit affirmed the cross subsidization determination in the *BOC Safeguards Order*, but vacated and remanded the portion addressing ONA plans because it found that the Commission had not sufficiently explained its conclusion that removing structural separation requirements was in the public interest, given that the ONA requirements the Commission implemented after *Computer III* did not require fundamental unbundling of the BOCs' networks. *See California III*, 39 F.3d at 927-30 (citing *BOC Safeguards Order*, 6 FCC Rcd at 7571). In 1995, the Commission clarified that the Ninth Circuit's partial vacatur of the *BOC Safeguards Order* reinstated the CEI plan requirements and that the BOCs were still required to comply with their ONA plans pending the Commission's review of the ONA regime. *Computer III Further Remand Notice*, 10 FCC Rcd at 8369, para. 11. The Commission also determined that the BOCs could continue to offer existing enhanced services pursuant to the ONA plans that the Commission had approved prior to the Ninth Circuit's decision in *California III*. *See Computer III Further Remand Notice*, 10 FCC Rcd at 8368-69, para. 10 (citing *Bell Operating Companies' Joint Petition for Waiver of Computer II Rules*, Memorandum Opinion and Order, DA 95-36 (Com. Car. Bur. Jan. 11, 1995) (*Interim Waiver Order*)).

[81] 47 U.S.C. 153(20), (46); *NCTA v. Brand X*, slip op. at 21.

[82] *See Report to Congress*, 13 FCC Rcd at 11511, para. 21; *see also NCTA v. Brand X*, slip op. at 21-23 (discussing *Report to Congress*).

[83] *See Petition for Declaratory Ruling that pulver.com's Free World Dialup is Neither Telecommunications Nor a Telecommunications Service*, WC Docket No. 03-45, Memorandum Opinion and Order, 19 FCC Rcd 3307, 3318 n.64 (2004) (*Pulver.com Declaratory Ruling*); *Non-Accounting Safeguards Order*, 11 FCC Rcd at 21955, para. 102 (1996).

[84] *See Computer III Further Remand Order*, 14 FCC Rcd at 4302, paras. 19-20. We note that these carriers are required to notify the Commission of any alteration to a CEI plan. *Id.* at 4302, para. 20 (notice to the Bureau must include the Internet address and path to the relevant CEI plan or amended plan).

plans on file with the Commission.[85] A BOC that seeks to offer an information service that would use a new BSE, or a new configuration of BSEs, must amend its ONA plan at least 90 days before it proposes to offer that information service and obtain Commission approval of the amendments prior to using the new BSE or BSE configuration for its information service.[86] Additionally, a BOC must consider and respond to an enhanced services provider's request for a new BSE within 120 days of receipt of that request.[87] In evaluating this request, the BOC must take into account market demand, utility to enhanced services providers, feasibility of offering the service based on its cost, and technical feasibility.[88] Last, as mentioned above, BOCs continue to be subject to ONA reporting requirements.[89]

31. All facilities-based wireline carriers that own common carrier transmission facilities and provide enhanced services must "acquire transmission capacity pursuant to the same prices, terms, and conditions reflected in their tariffs when their own facilities are utilized. Other offerors of enhanced services would likewise be able to use such a carrier's facilities under the same terms and conditions."[90] This *Computer II* obligation, however, has been applied exclusively to traditional wireline services and facilities to date.[91] By contrast, the *Computer II* obligations do not apply to cable modem service providers or to facilities-based enhanced services providers other than traditional wireline carriers.[92]

B. Elimination of the *Computer Inquiry* Requirements

1. Broadband Internet Access Service Technology

32. In this section, we describe the technological attributes applicable to broadband Internet access service that inform our decision-making in this Order. The technology used to build networks, and the purposes for which they are built, are fundamentally changing. These changes are rapidly breaking down the formerly rigid barriers that separated one network from another.

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[85] *See Computer III Further Remand Notice*, 10 FCC Rcd at 8366-67, para. 7 & nn.21, 22.

[86] *See Computer III Further Remand Further Notice*, 13 FCC Rcd at 6086, para. 81. We define BSE *supra* at paragraph 28 and note 78.

[87] *See, e.g., Computer III Further Remand Further Notice*, 13 FCC Rcd at 6087, paras. 83-84.

[88] *Id.*

[89] AT&T, while never subject to annual and biannual ONA reporting requirements, currently remains subject to a requirement that it submit annual affidavits affirming that it has followed installation procedures in its modified ONA Plan approved by the Commission in 1988. This requirement was never formally eliminated when AT&T was relieved of its other ONA and *Computer III* requirements. *See Computer III Further Remand Further Notice*, 13 FCC Rcd at 6040 n.4.

[90] *See Computer II Final Decision*, 77 FCC 2d at 475, para. 231.

[91] *Cable Modem Declaratory Ruling*, 17 FCC Rcd at 4825, paras. 43-44; *see also CPE/Enhanced Services Bundling Order*, 16 FCC Rcd at 7442, para. 40 (stating that this obligation applies to non-dominant facilities-based carriers); *Independent Data Communications Manufacturers Association, Inc. Petition for Declaratory Ruling that AT&T's Interspan Frame Relay Service Is a Basic Service; and American Telephone and Telegraph Company Petition for Declaratory Ruling that All IXCs Be Subject to the Commission's Decision on the IDCMA Petition*, 10 FCC Rcd 13717 (Com. Car. Bur. 1995) (*Frame Relay Order*).

[92] *NCTA v. Brand X*, slip op. at 9-14 (cable modem service); *see Cable Modem Declaratory Ruling*, 17 FCC Rcd at 4825, para. 43 (noting that the Commission has only applied the *Computer II* obligations to traditional wireline services and facilities).

33. There are numerous technologies and network designs that form, or potentially could form, part of the broadband telecommunications infrastructure of the 21st century. Cable operators have deployed cable modem technology.[93] Mobile wireless providers are increasingly offering high-speed Internet access using technologies like Evolution-Data Optimized (EV-DO) technology.[94] Satellite providers have deployed both Ku-band and even more advanced Ka-band technology that can offer high-speed Internet access service throughout the nation.[95] Fixed wireless operators are planning to use licensed and unlicensed spectrum to deliver broadband services, and are developing new technologies that promise ubiquitous service and greater bandwidth.[96] Other companies are exploring the use of power lines and cables placed in gas lines to provide broadband services.[97]

34. The nation's wireline infrastructure also is changing. As the Commission suggested in the *Wireline Broadband NPRM*, wireline technology formerly was limited to using circuit switches to move analog voice traffic over copper transmission facilities.[98] This required that the service provider establish and maintain for the duration of each call a physical connection (or circuit) between the calling and called parties. The wireline network was designed and built to transmit reliably and efficiently voice phone calls between end users. Technological developments, such as the introduction of electro-mechanical and electronic stored-program-controlled switches, improved voice service over time and introduced data services. However, these developments did not fundamentally change the capabilities of the wireline network. It remained largely a single-purpose platform, providing plain old telephone service (POTS).

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[93] *Fourth Section 706 Report*, at 14; *see also High-Speed Services July 2005 Report*, at 2, Table 1 (showing cable having a 56.4% market share of high-speed lines); *id.* at Tables 2-4.

[94] *Fourth Section 706 Report*, at 20; *see Applications of Nextel Communications, Inc. & Sprint Corp. for Consent to Transfer Control of Licenses and Authorizations*, WT Docket No. 05-63, Memorandum Opinion and Order, FCC 05-148, para. 8 (rel. Aug 8, 2005) (stating that Sprint has begun to roll out high-speed wireless data services using EV-DO technology).

[95] *Fourth Section 706 Report*, at 23, 46; *see also High-Speed Services July 2005 Report*, at 2, Table 1 (showing a combined satellite and wireless market share of 1.5% high-speed lines); *id.* at Tables 2-4; *Application of EchoStar Communications Corp., General Motors Corp., and Hughes Electronics Corp. (Transferors) and EchoStar Communications Corp. (Transferee)*, CS Docket No. 01-348, Hearing Designation Order, 17 FCC Rcd 20559, 20643, para. 225 (2002) (*EchoStar Hearing Designation Order*).

[96] *See, e.g.*, *Fourth Section 706 Report*, at 18-22, 31-32. The Commission has also adopted new licensing rules to respond to the need expressed by the growing number of wireless Internet service providers (WISPs) offering broadband service to consumers, particularly in rural areas. *Wireless Operations in the 3650-3700 MHZ Band*, ET Docket No. 04-151; *Rules for Wireless Broadband Services in the 3650-3700 MHZ*, ET Docket No. 05-96; *Additional Spectrum for Unlicensed Devices Below 900 MHZ and in the 3 GHZ Band*, ET Docket No. 02-380; *Amendment of the Commission's Rules with Regard to the 3650-3700 MHZ Government Transfer Band*, ET Docket No. 98-237, Report and Order and Memorandum Opinion and Order, 20 FCC Rcd 6502, 6503-04, para. 2, & 6506-07, para. 13 (2005) (finding that a growing number of WISPs are providing wireless broadband service in many areas where few alternatives are available).

[97] *Fourth Section 706 Report*, at 22; *see also Carrier Current Systems, including Broadband over Power Line Systems, Notice of Proposed Rulemaking*, ET Docket No. 03-104 (rel. Feb. 23, 2005); *see also High-Speed Services July 2005 Report*, at 2, Table 1 (showing combined powerline and fiber market share of 1.8 % high-speed lines); *id.* at Tables 2-4. While the Commission does not report individual market share data for all technologies, power line high-speed line market share appears to be less than 1%.

[98] *See Wireline Broadband NPRM*, 17 FCC Rcd at 3037, para. 36.

35. The advent of digital technology and mainframe computers began a fundamental change in wireline communications that is still ongoing. These advances made it possible to encode messages, including analog voice, in a digital form and transmit them in pieces (*i.e.*, packets). In its earliest form, packet switching technology had limited uses, such as providing remote access to mainframe computers. An end user sitting at a computer terminal would send a message to a "message concentrator" computer located near the end user's computer terminal. This computer would subdivide and reformat the message into short bursts of digital data called packets, store each packet until a transmission path became available on the network for that packet, and then forward the packet to a "message concentrator" computer at the message's destination. That computer would reassemble the individual packets, which may have transmitted at different times and over different network paths, into the original message and transmit it to the main frame computer, which would process and, where appropriate, reply to the end user's message using essentially the same processes.[99] Transmission speeds, of course, were extremely slow.[100]

36. Digital technology and its applications have come a long way since the introduction of packet switching during the early 1970s. As Intel co-founder Gordon Moore foresaw, the capacity of integrated circuits has roughly doubled every two years, rising from about 2,500 transistors per circuit during the early 1970s, to about 120,000 transistors per circuit in the early 1980s, to about 3,000,000 transistors per integrated circuit in the early 1990s, to over 42,000,000 transistors per circuit in 2003, and to nearly 1,000,000,000 transistors per circuit in today's most advanced computer processors.[101] Wireline providers have exploited this exponential growth in computing capacity by deploying digital switching and transmission technology of ever-growing capacity throughout their networks.[102] For more than 20 years, this deployment focused on improving transmission speeds between central offices and on providing limited additional functionalities beyond POTS, such as voice mail using the computing capability of digital switches.[103] These services generally were provided at the network's edge (*i.e.*, between an end office and the end users' premises) at relatively low speeds.[104]

37. Packet-based technology is now deployed throughout wireline networks and is used in many circumstances, including increasingly to perform the switching and routing functions associated with POTS and the processing functions that permit broadband Internet access service. Moreover, advances in optical transmission have allowed wireline providers to transmit digital signals efficiently and reliably over high-capacity transmission systems, and wireline providers have introduced such media into their

[99] *See, e.g.*, *Packet Communications, Inc.*, File No. P-C-8533, Memorandum Opinion, Order and Certificate, 43 FCC 2d 922, 922, para. 2 (1973).

[100] *See, e.g.*, *American Trucking Ass'n v. American Telephone and Telegraph Co.*, Docket No. 19746, & *Regulatory Policies Concerning Resale and Shared Use of Common Services and Facilities*, Docket No. 20097, Notice of Inquiry and Proposed Rulemaking, 47 FCC 2d 644, 646, para. 6 (1974) (addressing a proposed packet switching network that initially was to provide "one 50 Kilobit per second line linking each of a selected group of major population centers").

[101] Intel Research, *Silicon, Moore's Law*, found at "www.intel.com/research/silicon/mooreslaw.htm" (visited July 6, 2005).

[102] *See* Computer Science and Telecommunications Board, National Research Council, *Broadband, Bringing Home the Bits*, at 48 (2002).

[103] *Id.*

[104] *Id.*

networks. At the same time, personal computers have become pervasive in the nation's businesses and homes, as has a wide variety of arrangements for networking these computers.[105]

38. Reflecting these advances, manufacturers have developed powerful platforms that integrate traditionally separate computing and communications functions.[106] While DSL technology has existed for many years, only in recent years have carriers widely deployed that technology to transmit data at high speeds over copper loops and to use these same copper loops for the simultaneous provision of voice and data services. Wireline providers now routinely deploy facilities and equipment, such as ATM switches, digital subscriber line access multiplexers (DSLAMs), and fiber optics in the local loop, that have continued this network advancement.

39. Wireline networks are now using digital, packet-based technology to deliver a wider range of services. Many of these services are IP-based, which allows computers with differing hardware architectures and operating systems to communicate with each other. Functions can be dispersed throughout the network and performed at multiple points within the network. From the end user's perspective, the platforms that connect the end user to the ISP are largely interchangeable and functionally the same. That is, each platform provides the user with the ability to send and receive information at very high speed, and to access the applications and services available through the Internet. Although each platform relies on the same underlying protocol, because of that protocol's inherent flexibility, this reliance fosters, rather than prevents, increased service differentiation among platform providers that are competing for customers.

40. As the foregoing illustrates, the technology used to build networks, and the purposes for which they are built, are fundamentally changing, and will likely continue to do so for the foreseeable future. A wide variety of IP-based services can be provided regardless of the nature of the broadband platform used to connect the consumer and the ISP. Network platforms therefore will be multi-purpose in nature and more application-based, rather than existing for a single, unitary, technologically specific purpose. More generally, the erosion of barriers between various networks and the limitations inherent in those barriers will lead to greater capacity for innovation to offer new services and products. Both the providers of network platforms and those that utilize the platforms are in a position to capitalize on these changes. In addition, as with any evolving technology, new products and providers will continue to emerge to complement existing market offerings and participants; and these offerings will grow over time as consumers demand even more advanced services, with the result that technological growth and development continue on an upward spiral.

2. *Computer Inquiry* Requirements Are No Longer Appropriate

41. We decline to continue to impose any *Computer Inquiry* requirements on facilities-based carriers in their provision of wireline broadband Internet access service.[107] Consequently, BOCs are immediately

[105] *See Fourth Section 706 Report*, at 38 (stating that, as of June 2004, 71% of U.S. households had computers in the home); U.S. Dept. of Commerce, National Telecommunications and Information Administration, *A Nation Online: Entering the Broadband Age*, Sept. 2004, at 4-7 (*NTIA Broadband Report*) (reflecting data from the U.S. Census Bureau's survey of computer and Internet use).

[106] *See generally Deployment of Wireline Services Offering Advanced Telecommunications Capability*, CC Docket No. 98-147, Fourth Report and Order, 16 FCC Rcd 15435, 15452-56, paras. 32-41 (2001) (*Collocation Remand Order*), *aff'd sub nom. Verizon Telephone Cos. v. FCC*, 292 F.3d 903 (D.C. Cir. 2002) (*Verizon v. FCC*).

[107] As noted above, our actions in this Order are limited to the transmission component of wireline broadband Internet access service only. *See supra* n.15; *see also Wireline Broadband NPRM*, 17 FCC Rcd at 3025 n.18.

relieved of the separate subsidiary, CEI, and ONA obligations with respect to wireline broadband Internet access services. In addition, subject to a one-year transition period for existing wireline broadband transmission services, all wireline broadband Internet access service providers are no longer subject to the *Computer II* requirement to separate out the underlying transmission from wireline broadband Internet access service and offer it on a common carrier basis.[108]

42. We agree with those commenters that argue that the *Computer Inquiry* obligations are inappropriate and unnecessary for today's wireline broadband Internet access market.[109] As these parties observe, the *Computer Inquiry* rules were developed before separate and different broadband technologies began to emerge and compete for the same customers.[110] Further, these rules were adopted based on assumptions associated with narrowband services, single purpose network platforms, and circuit-switched technology.[111] Notably, even commenters that argue for a continued access requirement generally acknowledge that the current structural separation, CEI, and ONA requirements are outmoded and should be eliminated or replaced.[112] Indeed, the record provides little, if any, support for retaining the structural

[108] In the absence of an express statutory requirement that a particular service be offered on a common carrier basis, the Commission and the courts have interpreted whether the public interest requires a common carrier service based on a number of factors related to the service at issue. *See National Ass'n of Reg. Utils. Comm'rs v. FCC*, 525 F.2d 630, 642 (D.C. Cir. 1976), *cert. denied*, 425 U.S. 992 (1976) (*NARUC I*); *AT&T Submarine Systems, Inc. Application for a License to Land and Operate a Digital Submarine Cable System Between St. Thomas and St. Croix in the U.S. Virgin Islands*, File No. S-C-L-94-006, Memorandum Opinion and Order, 13 FCC Rcd 21585, 21589, para. 9 & nn. 23-24 (1998) (*AT&T SSI Order*), *aff'd sub nom. Virgin Islands Telephone Corp. v. FCC*, 198 F.3d 921 (D.C. Cir. 1999) (*Vitelco v. FCC*); *Applications of Hughes Communications, Inc., et al. for Modification of Domestic Fixed Satellite Space Station Authorizations to Permit Non Common Carrier Transponder Sales*, CC Docket No 82-45, Memorandum Opinion, Order and Authorization, 90 FCC 2d 1238, 1254-55, para. 39 (1982) (*Transponder Sales Order*), *aff'd sub nom. Wold Communications, Inc. v. FCC*, 735 F.2d 1465 (D.C. Cir 1984), *modified, Applications of Martin Marietta Communications Systems, Inc. For Authority to Construct, Launch and Operate Space Stations in the Domestic Fixed Satellite Service*, File Nos. 952/953-DSS-P/LA-84 954-DSS-P-84, 60 R.R.2d 779 (1986).

[109] *See, e.g.*, Alcatel Comments at 2-3; SureWest Comments at 5-6; HTBC Reply at 3 (but suggesting a "minimally regulated environment for broadband transmission"); Letter from Cronan O'Connell, Vice President-Federal Regulatory, Qwest, to Marlene H. Dortch, Secretary, FCC, CC Docket No. 02-33, Attach. (filed May 23, 2003) (Qwest May 23, 2003 *Ex Parte* Letter); Letter from Cronan O'Connell, Vice President-Federal Regulatory, Qwest, to Marlene H. Dortch, Secretary, FCC, CC Docket No. 02-33, Attach. (filed Apr. 10, 2003) (Qwest Apr. 10, 2003 *Ex Parte* Letter); Letter from Glenn Reynolds, Vice President-Federal Regulatory, BellSouth, to Marlene H. Dortch, Secretary, FCC, CC Docket Nos. 02-33 & 01-337, Attach. (filed Apr. 2, 2003) (BellSouth Apr. 2, 2003 *Ex Parte* Letter); Letter from Jeffry Brueggeman, General Attorney, SBC, to Marlene H. Dortch, Secretary, FCC, CC Docket No. 02-33, Attach. (filed Mar. 7, 2003) (SBC Mar. 7, 2003 *Ex Parte* Letter).

[110] *See, e.g.*, Alcatel Comments at 3; BellSouth Apr. 10, 2003 *Ex Parte* Letter, Attach. at 4; SBC Mar. 7, 2003 *Ex Parte* Letter, Attach. at 11; Letter from Ann D. Berkowitz, Project Manager-Federal Affairs, Verizon, to Marlene H. Dortch, Secretary, FCC, CC Docket No. 02-33, Attach. at 4 (filed Nov. 25, 2002) (Verizon Nov. 25, 2002 *Ex Parte* Letter).

[111] *See, e.g.*, SBC Mar. 7, 2003 *Ex Parte* Letter at 11; Verizon Nov. 25, 2002 *Ex Parte* Letter at 4; Letter from W. Scott Randolph, Director-Regulatory Affairs, Verizon, to Marlene H. Dortch, Secretary, FCC, CC Docket No. 02-33, Attach. at 2 (filed May 20, 2003) (Verizon May 20, 2003 *Ex Parte* Letter).

[112] *See, e.g.*, Letter from Donna N. Lampert on behalf of Earthlink, MCI and AOL Time Warner, to Marlene Dortch, Secretary, FCC, CC Docket Nos. 02-33, 95-20, & 98-10, Attach. (filed May 1, 2003) (*Earthlink et al. Streamlining Proposal*) (proposing that we replace the nine CEI parameters and procedural requirements, and the ONA unbundling obligations, reporting requirements, and tariffing requirements with streamlined and updated regulations for BOC broadband access services reflecting the core nondiscriminatory access to transmission principles of (continued . . .)

separation option of *Computer II* or for conditioning BOC structural relief on compliance with a detailed set of regulatory requirements such as the CEI or ONA requirements. Instead, commenters arguing for continued regulation of wireline broadband Internet access service providers focus primarily on the core nondiscriminatory access obligation of *Computer II*, urging that we, at a minimum, should retain a common carrier transmission access requirement in some form.[113] In evaluating these arguments, we are mindful that one of the Commission's most critical functions is to adapt regulation to changing technology and competitive conditions to accomplish its mandates under the Act.[114]

43. In determining whether to eliminate the *Computer Inquiry* requirements (*e.g.*, the separate subsidiary, nondiscriminatory access to transmission, CEI, and ONA obligations) for facilities-based providers of wireline broadband Internet access services,[115] we weigh the benefits of these requirements against their costs in accordance with our obligations under the Act. This determination is informed not only by our understanding of the current broadband Internet access market, but what our predictive judgment tells about how that market is likely to develop.[116] It is critical to factor in these future expectations because the broadband market is evolving rapidly. At the time the *Computer Inquiry* rules were adopted, there was an implicit, if not explicit, assumption that the incumbent LEC wireline platform would remain the only network platform available to enhanced services providers.[117] Regulated access to wireline transmission thus was essential for a competitive information services market to flourish.

44. As we discuss below, the characteristics of the broadband market, as well as evidence that facilities-based wireline carriers have incentives to make, and indeed already make, broadband transmission capacity available to ISPs, absent regulation, are factors that influence our analysis in determining whether such regulation is still necessary.[118] Moreover, this regulation can have a significant impact on the ability of wireline platform providers to develop and deploy innovative broadband capabilities that respond to market demands. The record shows that the additional costs of an access mandate diminish a carrier's incentive and ability to invest in and deploy broadband infrastructure

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Computer II; Letter from Mark Uncapher, ITAA, to Marlene Dortch, Secretary, FCC, CC Docket Nos. 02-33, 98-10, Attach. at 6 (filed Mar. 17, 2003) (ITAA Mar. 17, 2003 *Ex Parte* Letter) (proposing the elimination of ineffective CEI/ONA rules but retaining the nondiscriminatory access to transmission obligation until a competitive broadband market exists); Letter from Todd D. Daubert, Counsel for AISPA, to Marlene Dortch, Secretary, FCC, CC Docket Nos. 02-33, 95-20, & 98-10 (filed May 28, 2003) (AISPA May 28, 2003 *Ex Parte* Letter)(supporting the *Earthlink et al. Streamlining Proposal* as well as arguing for greater protection against anticompetitive pricing behavior and improved ability to monitor BOC compliance).

[113] *Id.*; *see also infra* para. 97.

[114] *See, e.g.*, *Wold Communications v. FCC*, 735 F.2d at 1476-77 (discussing the Commission's ability to modify regulations).

[115] As discussed above, we recognize that many of these requirements apply only to the BOCs.

[116] Courts have recognized that the Commission's decisions must sometimes rest on "judgment and prediction rather than pure factual determinations." *FCC v. WNCN Listeners Guild*, 450 U.S. 582, 594-95 (1981) (citations and internal quotation marks omitted); *see also Wold Communications*, 735 F.2d at 1479.

[117] *See NCTA v. Brand X*, slip op. at 30 (recognizing that the Commission's *Computer II* unbundling requirement was based on the belief that the telephone network was "the primary, if not exclusive, means through which information service providers can gain access to their customers") (citations and internal quotation marks omitted); *accord Cable Modem Declaratory Ruling*, 17 FCC Rcd at 4825, para. 44.

[118] *See infra* paras. 74-76 (explaining these business incentives).

investment.[119] We find this negative impact on deployment and innovation particularly troubling in view of Congress' clear and express policy goal of ensuring broadband deployment, and its directive that we remove barriers to that deployment, if possible, consistent with our other obligations under the Act. It is precisely this negative impact on broadband infrastructure that led the Commission to eliminate other broadband-related regulation over the past two years.[120] These factors, when weighed against the benefits of continuing these regulations, render a different policy result than the judgment reached at the time the *Computer Inquiry* rules were adopted.[121]

45. As outlined in the *Wireline Broadband NPRM*, we seek to adopt a comprehensive policy that ensures, consistent with the Act in general and section 706 specifically, that broadband Internet access services are available to all Americans and that undue regulation does not constrain incentives to invest in and deploy the infrastructure needed to deliver broadband Internet access services. As part of this policy, we believe that we should regulate like services in a similar manner so that all potential investors in broadband network platforms, and not just a particular group of investors, are able to make market-based, rather than regulatory-driven, investment and deployment decisions.

46. Finally, we note that our decision in this Order is consistent with the decision issued by the Ninth Circuit Court of Appeals in 1994. As discussed above,[122] in that decision the Ninth Circuit vacated part of the Commission's *Computer III Order on Remand* concerning implementation of the ONA rules.[123] According to the court, the Commission had failed to explain how its "diluted version of ONA," set forth in the *Order on Remand*, would prevent BOCs from "exploit[ing] their monopoly control over the local networks to frustrate regulators' attempts to prevent anticompetitive behavior."[124] For the reasons discussed herein, we determine that the competitive pressures and technological changes that have arisen since 1990 have reduced the BOCs' incentive and ability to discriminate against unaffiliated ISPs in their provision of broadband Internet access service to the point that structural separation for BOC broadband

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[119] *See infra* paras. 65-73; *see also* Catena Comments at 5-6; SureWest Comments at 14; Verizon Nov. 25, 2002 *Ex Parte* Letter at 4; Letter from W. Scott Randolph, Director-Federal Affairs, Verizon, to Marlene H. Dortch, Secretary, FCC, CC Docket No. 02-33, at 1-6 (filed June 26, 2003) (Verizon June 26, 2003 *Ex Parte* Letter); Letter from Lawrence E. Sarjeant, Vice President-Law and General Counsel, USTA, to Marlene H. Dortch, Secretary, FCC, CC Docket No. 02-33, Attach. at 2-3 (filed Apr. 2, 2003) (USTA Apr. 2, 2003 *Ex Parte* Letter).

[120] *See Triennial Review Order*, 18 FCC Rcd at 17141-54, paras. 272-97 (stating that refraining from imposing unbundling obligations on incumbent LEC next-generation networks will stimulate facilities-based deployment, particularly in light of a competitive landscape for broadband infrastructure). In reviewing the Commission's impairment analysis for UNEs under section 251 of the Act, the *USTA II* decision endorsed the importance of considering facilities-based competition and removing barriers to infrastructure investment. *USTA II*, 359 F.3d at 576, 579; *see Multiple Dwelling Unit Reconsideration Order*, 19 FCC Rcd at 15856, para. 1 (finding that fiber loops deployed at least to the minimum point of entry of multiple dwelling units that are predominantly residential should be treated as fiber-to-the-home loops and not be subject to section 251 unbundling obligations); *Broadband 271 Forbearance Order*, 19 FCC Rcd at 21508, para. 25; *Fiber to the Curb Reconsideration Order*, 19 FCC Rcd at 20293, para. 1.

[121] *See NCTA v. Brand X*, slip op. at 29 (noting that "the Commission is free within the limits of reasoned interpretation to change course if it adequately justifies the change").

[122] *See supra* note 80.

[123] *California III*, 39 F.3d at 933. In an earlier decision, the Ninth Circuit accepted the Commission's assessment that, because of ONA, which required fundamental unbundling, *Computer II*'s structural separation was no longer required to prevent access discrimination. *Id.* at 927-28 (citing *California I*, 905 F.2d at 1233).

[124] *Computer III*, 39 F.3d at 929.

Internet access service is no longer necessary. Specifically, we believe that the analysis in this Order that persuades us to eliminate not only the structural separation requirement, but all *Computer Inquiry* obligations, applicable to wireline broadband Internet access service provides the level of detail the Ninth Circuit found lacking in the Commission's prior decision eliminating that requirement.

a) The Wireline Broadband Internet Access Services Marketplace

47. The broadband marketplace before us today is an emerging and rapidly changing marketplace that is markedly different from the narrowband marketplace that the Commission considered in adopting the *Computer Inquiry* rules.[125] Indeed, the Supreme Court recently observed that the Commission's regulatory treatment of wireline broadband Internet access service "is based on history rather than on an analysis of contemporaneous market conditions."[126] Unlike narrowband services provided over traditional circuit-switched networks, broadband Internet access services have never been restricted to a single network platform provided by the incumbent LECs.[127] This is in stark contrast to the information services market at the time the *Computer Inquiry* obligations were adopted, when only a single platform capable of delivering such services was contemplated and only a single facilities-based provider of that platform was available to deliver them to any particular end user. As a consequence, many consumers have a competitive choice for broadband Internet access services today.[128]

48. As an initial matter, we note that the parties marshal sharply contrasting marketplace analyses in support of the positions they urge. On the one hand, the BOCs argue, with regard to the market position of the incumbent LECs, that the relevant product market is retail broadband Internet access service and the relevant geographic market is regional or national.[129] These parties contend that because cable providers currently have a larger share of the retail broadband Internet access service market both regionally and nationally, incumbent LECs must be deemed to lack market power in this market and therefore deregulation is appropriate.[130]

49. In contrast, certain competitive LECs and ISPs maintain that the relevant product market, for purposes of determining whether to deregulate, should be the wholesale market for the transmission component of broadband Internet access service.[131] As discussed above, the *Computer Inquiry* rules

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[125] *See High-Speed Services July 2005 Report*, at Table 3, Chart 6 (showing the growth of high-speed lines and the proportion of high-speed lines by technology from December 1999 to December 2004).

[126] *See NCTA v. Brand X*, slip op. at 30.

[127] Indeed, cable modem service encouraged incumbent LECs' deployment of DSL service. *See Fourth Section 706 Report*, at 14-16; *High-Speed Services July 2005 Report*, at 2, Table 3, Chart 6; Letter from Jonathan Banks, BellSouth, to Marlene H. Dortch, Secretary, FCC, CC Docket No. 02-33, at 22 (filed June 5, 2003) (BellSouth June 5, 2003 *Ex Parte* Letter) (citing independent reports and studies regarding the predominance of cable modem service over DSL service).

[128] BellSouth June 5, 2003 *Ex Parte* Letter at 13 (stating that the competitive nature of the broadband market, including new entrants using new technologies, is driving broadband providers to offer faster service at the same or even lower retail rates).

[129] *See, e.g.*, BellSouth 01-337 Comments at 30; Qwest 01-337 Comments at 15-23, 26-29; SBC 01-337 Comments at 19-28, 34-36.

[130] *See, e.g.*, Qwest 01-337 Comments at 36-43; Verizon Comments 01-337 at 17-19; BellSouth Reply, Harris Decl. at 4, 7-11; USTA 01-337 Reply at 5-6; Verizon Reply at 26-31; BellSouth June 5, 2003 *Ex Parte* Letter at 18-21.

[131] *See, e.g.*, ITAA 01-337 Comments at 3-5; MCI 01-337 Comments at 6-8; AT&T Reply at 12-13.

require that facilities-based carriers that provide broadband Internet access service directly or through an affiliate make the telecommunications transmission component available to unaffiliated ISPs as a common carrier service.[132] These parties argue that the incumbent LECs' intermodal competitors generally do not make the telecommunications component of their broadband Internet access services available to unaffiliated ISPs.[133] Certain competitive LECs and ISPs argue that it would be inappropriate to deregulate the incumbent LECs given the lack of availability of the telecommunications component from providers other than incumbent LECs.[134] They also argue that even if we treat broadband Internet access service as the relevant product, then for the relevant geographic market, we must consider each local market as a separate geographic market and evaluate the choices available in each.[135] They contend that incumbent LECs either are the single provider or one of two providers in virtually all of these relevant geographic markets.[136]

50. We find that the parties' competing analyses, though useful, fail to recognize all of the forces that influence broadband Internet access service deployment and competition, so we adopt neither. The parties' arguments are premised on data that are both limited and static. Most importantly, the competing analyses fail to recognize the dynamic nature of the marketplace forces.[137] We fully recognize that not all American households can choose between cable modem and DSL-based Internet access service today. But a wide variety of competitive and potentially competitive providers and offerings are emerging in this marketplace.[138] Cable modem and DSL providers are currently the market leaders for broadband Internet access service and have established rapidly expanding platforms. There are, however, other existing and developing platforms, such as satellite and wireless, and even broadband over power line in certain locations,[139] indicating that broadband Internet access services in the future will not be limited to cable

[132] *See supra* Part V.A.2.

[133] *See, e.g.*, ITAA 01-337 Comments at 13-15; MCI 01-337 Comments at 11-19; AT&T Reply at 14-15.

[134] *See, e.g.*, Arizona Consumer Council *et al.* Comments at 30-31; AT&T Comments, Willig Decl. at 29-39; DirectTV 01-337 Comments at 5-7; ITAA Comments at 15-18; MCI *et al.* Comments at 32-38; McLeod USA Comments at 2-3.

[135] *See, e.g.*, CompTel 01-337 Comments at 15-16; GCI Comments at 15-18; Wisconsin Commission Comments at 4; MCI 01-337 Comments at 10.

[136] *See, e.g.*, MCI *et al.* Comments at 37; Covad Reply at 11; *see also* AT&T Reply at 42-50.

[137] *See Broadband 271 Forbearance Order*, 19 FCC Rcd at 21505-12, paras. 21-35 (where the Commission concluded, in the context of granting the four BOCs forbearance relief from the requirements of section 271 with regard to broadband elements to the same extent that unbundling relief was granted under section 251, that there is competition from multiple sources and technologies in the rapidly changing broadband market).

[138] *See High-Speed Services July 2005 Report*, at 2-3; *Fourth Section 706 Report*, at 14-24, 45; *Broadband 271 Forbearance Order*, 19 FCC Rcd at 21505-08, paras. 22-26.

[139] *Fourth Section 706 Report*, at 22-23. The Commission noted that broadband over power lines, which uses existing electric power lines as a transmission medium to provide high-speed services, made its debut in 2003. *Id.* at 22. CURRENT Communications Group is an example of a provider that offers broadband over power line service through a joint venture with Cinergy Corp., an electric utility serving Cincinnati, Ohio, and has announced plans to expand its services. *See* CURRENT Communications Group Announces Strategic Investments to Catalyze Broadband over Power Line Deployments, available at http://www.currentgroup.com/news/releases/CURRENT%20Funding%207-07-05.pdf (visited on July 13, 2005); *supra* note 97 (noting recent reported broadband over power line market share statistics).

modem and DSL service.[140] Changes in technology are spurring innovation in the use of networks. As discussed below, there is increasing competition at the retail level for broadband Internet access service as well as growing competition at the wholesale level for network access provided by the wireline providers' intramodal and intermodal competitors.[141] We find that an emerging market, like the one for broadband Internet access, is more appropriately analyzed in view of larger trends in the marketplace, rather than exclusively through the snapshot data that may quickly and predictably be rendered obsolete as this market continues to evolve.

51. At the outset, we note that, while household computer penetration is growing, only 54.6 percent of U.S. households subscribe to either broadband or narrowband Internet access service.[142] We also note that roughly 20 percent of consumers with access to advanced telecommunications capability subscribe to services providing that capability.[143] Some industry analysts predict that over the next decade, nearly 90 percent of all Americans will go on line from home via broadband networks that are dramatically faster than today's broadband networks.[144] We recognize that cable modem service is the most widely used means by which residential and small business obtain broadband service today.[145] As of December 31, 2002, facilities-based providers were providing approximately 17.4 million high-speed lines to American consumers and small businesses.[146] Among these customers, 65 percent received cable modem service, while approximately 32 percent received DSL service and other broadband services provided by incumbent LECs and competitive LECs.[147] As of December 31, 2004, the number of high-speed lines had more than doubled with facilities-based providers providing approximately 35 million high-speed lines to American consumers and small businesses.[148]

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[140] *See, e.g., Fourth Section 706 Report*, at 16-23, 45 (describing broadband technologies generally). Based on the Commission's most recent broadband data report, the combined market share of high-speed lines via emerging broadband platforms is approximately 1.5% (not including new all fiber networks). *See High-Speed Services July 2005 Report*, at Table 1.

[141] *See infra* Part V.B.2.d (discussing various wholesale arrangements and incentives to make these available); *Broadband 271 Forbearance Order*, 19 FCC Rcd at 21508-09, para. 26.

[142] Federal Communications Commission, Wireline Comp. Bur., Industry Analysis & Technology Div., *Trends in Telephone Service*, at 2-10 (Apr. 2005) (*Trends in Telephone Service April 2005 Report*) (citing *NTIA Broadband Report*).

[143] *Fourth Section 706 Report*, at 10, 38 (describing advanced services lines as having transmission speeds of more than 200 kbps capability in the upstream (customer-to-provider) and downstream (provider-to-customer) directions, and high-speed lines as those having a transmission speed of more than 200 kbps capability in at least one direction). The Commission's data collection program requires service providers to identify each zip code in which a provider has at least one high-speed service subscriber (*i.e.*, a subscriber using a high-speed Internet access line). As of December 31, 2004, providers reported that they had subscribers to high-speed services in 95% of the nation's zip codes. In 83% of the nation's zip codes, more than one provider reported having subscribers. The Commission has stated that 99% of the country's population lives in 95% of the zip codes where a provider reports having at least one high-speed service subscriber. *High-Speed Services July 2005 Report*, at 4.

[144] PEW Internet & American Life, *The Future of the Internet*, at 41-42 (Jan. 9, 2005).

[145] *See High-Speed Services July 2005 Report*, at Table 3; *Triennial Review Order*, 18 FCC Rcd at 17135, para. 262 (citing *High-Speed Services December 2002 Report*, at Table 5).

[146] *High-Speed Services June 2003 Report*, at Table 3.

[147] *Id.*

[148] *High-Speed Services July 2005 Report*, at Table 3.

Among these customers, approximately 60.3 percent received cable modem service, while approximately 37.2 percent received DSL service and other broadband services provided by incumbent LECs and competitive LECs.[149]

52. While there is an increasing percentage of broadband users who receive DSL service, cable retains a relatively large share of the market. This reflects, in part, cable providers' substantial efforts to upgrade their individual networks to make them capable of providing cable modem service, among other services. Today, approximately 91 percent of the nation's cable systems have been upgraded to include the two-way digital capability that supports cable modem service.[150] As a result, the cable industry reports that more than 25 percent of cable households subscribe to cable modem service.[151]

53. Similarly, many incumbent LECs have upgraded, or are in the process of upgrading, their wireline networks to provide DSL broadband Internet access. In 2003, parties estimated that approximately 61 percent of the nation's households (66 million households) had access to DSL service, although only 6 percent of the nation's households subscribed to DSL-based Internet access services (6.2 million households).[152] As of December 31, 2004, the number of high-speed DSL lines in service had increased to approximately 13 million lines.[153] Further wireline network upgrades, including the deployment of hybrid fiber/copper loops and fiber to the home (FTTH), should provide additional households with access to wireline broadband service.[154]

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[149] *Id.* at Chart 6.

[150] *Fourth Section 706 Report* at 14; National Cable & Telecommunications Industry, *2004 Year-End Industry Overview* at 9 (*2004 Year-End Industry Overview*).

[151] *2004 Year-End Industry Overview* at 9. We note that the data available regarding cable modem service generally does not distinguish between residential and small business subscribers.

[152] *See* Letter from Ann D. Berkowitz, Project Manager-Federal Affairs, Verizon, to Marlene H. Dortch, Secretary, FCC, CC Docket No. 02-33, Attach. at 4 (filed Apr. 30, 2003) (Verizon Apr. 30, 2003 *Ex Parte* Letter); BellSouth June 5, 2003 *Ex Parte* Letter at 22; *see also High-Speed Services June 2003 Report*, Table 5. The approximately 6.2 million households include households that receive DSL service from competitive LECs as well as households that receive DSL service from incumbent LECs.

[153] *High-Speed Services July 2005 Report*, at Table 3.

[154] *Fourth Section 706 Report*, at 16-18 (describing new fiber technologies). A hybrid loop is a local loop composed of both fiber optic cable, usually in the feeder plant, and copper wire or cable, usually in the distribution plant. By "FTTH loop," we mean a local loop consisting entirely of fiber optic cable (and the attached electronics), whether lit or dark fiber, that connects a customer's premises with a wire center (*i.e.*, from the demarcation point at the customer's premises to the central office). *Triennial Review Order*, 18 FCC Rcd at 17475-17501, Appendix B (adopting section 51.319 of the Commission's rules). The deployment of hybrid loops allows an incumbent LEC to deploy DSLAMs in remote terminals and thus reduce the distance between a DSLAM and an end user's premises to one that can accommodate DSL service. *See, e.g.*, *Collocation Remand Order*, 16 FCC Rcd at 15460-61, para. 46 (recognizing that in order to provide DSL service, a LEC must deploy a DSLAM within a reasonable distance of the end user's premises). Incumbent LECs typically require a distance of no more than 18,000 feet. *Id.* Some competitive LECs will provide DSL service at greater distances. *See, e.g.*, *Petition of Cavalier Telephone LLC Pursuant to Section 252(e)(5) of the Communications Act for Preemption of the Jurisdiction of the Virginia State Corporation Commission Regarding Interconnection Disputes with Verizon Virginia, Inc. and for Arbitration*, WC Docket No. 02-359, Memorandum Opinion and Order, 18 FCC Rcd 25887, 25929-34, paras. 72-81 (2003).

54. Approximately 83.2 percent of DSL subscribers receive broadband service from the BOCs, with another 12.5 percent receiving broadband service from independent incumbent LECs.[155] Competitive LECs provide the remaining DSL subscribers with broadband service as intramodal competitors of the incumbent LECs.[156] Competitive LECs generally provide these services using their own facilities in combination with UNEs leased from incumbent LECs pursuant to section 251(c)(3) of the Act.[157] Some competitive LECs, however, provide DSL services using their own facilities exclusively.[158] Competitive LECs offer consumers broadband Internet access directly or enter into service arrangements with independent ISPs that offer competing broadband Internet access services.[159] Specifically, competitive LECs currently provide wireline broadband Internet access service to approximately 597,000 end-user lines.[160]

55. In sum, while cable modem and DSL clearly have exhibited significant growth over the last few years, market penetration for these two technologies still is far below the size of the potential market. The 20 percent cumulative penetration rate for broadband services stands in marked contrast to other, more mature markets the Commission has examined and regulated to varying degrees. When the Commission determined that AT&T was no longer dominant in the long distance service market, that market was mature. About 94 percent of American households had telephone voice service, and the vast majority of the telephones provided equal access to long distance service.[161] More generally, telephone voice service has had market penetration rates ranging from 91.4 percent to 95.5 percent of all American households over the past 20 plus years.[162] When compared to the market penetration rate for telephone voice service, which typifies a long-established, mature market for network-based services, the market penetration rate

[155] *High-Speed Services July 2005 Report*, Table 5.

[156] *Id.*

[157] The Commission's *Triennial Review Order* expressly reaffirmed the competitive LECs' right to obtain unbundled access to stand-alone copper loops in order to provide broadband transmission services. *See Triennial Review Order*, 18 FCC Rcd at 17128-32, paras. 248-54. In addition, we reaffirmed the incumbent LECs' obligation to provide competitive LECs with the ability to line split (*i.e.*, where one competitive LEC provides narrowband voice service over the same loop that a second competitive LEC uses to provide DSL service). *Id.* at 17130-31, paras. 251-52. In that order, the Commission also grandfathered existing line sharing customers and declined to reinstate the Commission's vacated line sharing rules. The Commission instead established a three-year transition after which any new customer must be served through a line splitting arrangement, through use of the stand-alone copper loop, or through an arrangement that a competitive LEC has negotiated with the incumbent LEC to replace line sharing. Line sharing allowed a competing carrier to provide DSL service over the high-frequency portion of the same loop that the incumbent LEC uses to provide voice service. *Id.* at 17132-41, paras. 255-69. The D.C. Circuit expressly upheld the Commission's decision not to require line sharing. *USTA II*, 359 F.3d at 585. As we discuss in part VI.D, below, the decisions contained in this Order have no affect on competitive LECs' ability to obtain UNEs, or on the section 251(c) obligations of incumbent LECs.

[158] *See* ALTS 01-337 Comments at 3 (stating that competitive LECs have invested over $56 billion to construct new broadband networks since the passage of the 1996 Act).

[159] *See* Qwest May 23, 2003 *Ex Parte* Letter, Attach at 4; SBC Mar. 7, 2003 *Ex Parte* Letter, Attach. at 12.

[160] *High-Speed Services July 2005 Report*, at Table 5.

[161] *Trends in Telephone Service April 2005 Report*, at Table 16; *see also Motion of AT&T Corp. to be Reclassified as a Non-Dominant Carrier*, Order, 11 FCC Rcd 3271 (1995).

[162] *Trends in Telephone Service April 2005 Report*, at Table 1.

for broadband Internet access services indicates that this emerging market has the potential to grow significantly in the years ahead.

56. Given recent trends, the market penetration of cable modem and DSL broadband Internet access services, in particular, could grow dramatically in the future.[163] We expect these two market leaders to continue to compete head-to-head in a way that could result in higher customer penetration rates for one or both services.[164] Cable modem service and DSL broadband Internet access services currently compete directly with each other in certain areas, are marketed against each other, are sold almost exclusively to residential and small business customers, and often may be perceived by consumers as close substitutes for each other.[165] Continuous change and development are likely to be the hallmark of the marketplace for broadband Internet access at both the retail and wholesale levels over the next several years.[166]

57. We expect providers of both platforms will continue to invest and extend the reach of their services. We anticipate that, as the availability of cable modem and DSL broadband Internet access services grows with the modernization of network infrastructure and increased service deployment, more households will have the option of choosing between the cable and DSL broadband options. Increased intermodal and intramodal competition will continue to encourage these two broadband providers to deploy broadband Internet access services throughout their respective service areas.[167] In addition, the threat of competition from other forms of broadband Internet access, whether satellite, fixed or mobile wireless, or a yet-to-be-realized alternative, will further stimulate deployment of broadband infrastructure, including more advanced infrastructure such as fiber to the home.

58. These emerging broadband platforms exert competitive pressure even though they currently have relatively few subscribers compared with cable modem service and DSL-based Internet access service.[168]

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[163] *See Fourth Section 706 Report*, at 13-16 (describing the technology and pricing that is driving the increasing demand for cable modem and DSL services).

[164] *Broadband 271 Forbearance Order*, 19 FCC Rcd at 21505-07, para. 22 (stating that cable providers have a significant role in encouraging the BOCs to provide competitive DSL services).

[165] *Id.* at 21505-07, para. 22; *see also NTIA Broadband Report*, at 7 (explaining generally the growth in market share for cable modem and DSL service); Robert W. Crandall, J. Gregory Sidak, & Hal J. Singer, *The Empirical Case Against Asymmetric Regulation of Broadband Internet Access*, 17 Berkeley Technology L.J. 953, 953-87 (2002). The authors develop an econometric model which estimates own price and cross price elasticities for cable modem and DSL. Based on this model, the authors conclude that price and cross-price elasticities are high, and that cable modem and DSL are substitutes when both are available to the mass market consumer. *Id.* at 957.

[166] *See, e.g.*, *High-Speed Services July 2005 Report*, at Tables 1-2, Charts 1-2 (showing growth of various broadband technologies over the past five years).

[167] *See Fourth Section 706 Report* at 14-16 (describing pricing for cable modem and DSL service). Verizon has recently decreased its prices, both retail and wholesale, for DSL service, http://www22.verizon.com/ForHomeDSL/channels/dsl/forhomedsl.asp?ID=Res announcing Verizon's limited time offer of $19.95 per month for DSL service for the first three months of a one-year commitment. In addition, SBC's retail Internet access rates are now set at an introductory rate of $14.95 per month for a one-year term. "SBC Communications Breaks New Ground for Consumers with Residential DSL for $14.95 When Ordered Online," http://www.sbc.com/gen/press-room?pid=4800&cdvn=news&newsarticleid=21690 announcing SBC's 13-state $14.95 price decrease for its DSL Express service. BellSouth has also lowered its retail DSL prices. Dionne Searcey, *BellSouth Shaves DSL Prices*, Wall St. J. (July 20, 2005) (describing BellSouth's permanent DSL price cut by $10.00 to $32.95 per month for customers who also buy its basic phone service).

[168] *See, e.g.*, BellSouth June 5, 2003 *Ex Parte* Letter at 11-12.

Ku-band satellite service is now available in most areas of the United States and is most attractive in areas that lack access to cable modem and DSL-based Internet access service, largely because this satellite service costs more than those alternatives.[169] Fixed wireless service is also available to provide high-speed Internet access in substantial areas of the nation.[170] By the end of 2002, satellite and fixed wireless providers reported about 257,000 high-speed Internet access service residential and small business subscribers.[171] Today, they report an increased subscriber base of approximately 422,000 lines in service.[172]

59. At the same time as cable modem and DSL broadband Internet access services are increasing market penetration, these other technology-based solutions could gain market share. In the near future, satellite and fixed wireless will likely continue to serve, at the very least, specialized geographic parts of the market not served by DSL or cable modems.[173] If more customers adopt satellite and fixed wireless solutions, the relative prices of those solutions could decline, which would make the services more competitive with cable modem and DSL broadband Internet access services. It is unclear in the current developing market which technology or technologies will serve the majority of customers when the market reaches greater maturity.

60. We recognize that the attributes of the available broadband platforms vary, particularly as to price, speed, and ubiquity. We expect that customers will weigh these attributes for each platform and make service-related decisions based on their specific needs. For example, a customer may select a broadband Internet access service with a somewhat slower speed than that associated with other service platforms in return for the lower price of the selected service.

61. As the Internet and related applications mature and continue to evolve, the demand for broadband Internet access services will likely grow. The presence of more content available through the Internet and the enhanced means of presenting the content, together with growth in broadband-related applications, such as streaming video, will lead more subscribers to seek broadband Internet access service. As the number of subscribers grows, so does the opportunity for alternative technologies and their respective providers. As any provider increases its market share or upgrades its broadband Internet access service, other providers are likely to mount competitive challenges, which likely will lead to wider deployment of broadband Internet access service, more choices, and better terms.[174]

62. We disagree with commenters that equate the ability of *ISPs* to obtain wireline broadband transmission services on a Title II basis with the ability of *consumers* to obtain facilities-based competitive broadband Internet access services.[175] A regulatory regime that promotes a competitive broadband Internet access services market where consumers have a choice of multiple providers is not

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[169] *Fourth Section 706 Report*, at 23. Satellite providers are in the process of increasing by a large multiple the amount of bandwidth they make available for broadband, with several launches of new satellites scheduled during the near future. *Id.* at 23, 46. *See supra* note 95. Satellite currently has just less than a 1% broadband market share.

[170] *Fourth Section 706 Report*, at 20-22.

[171] *High-Speed Services June 2003 Report*, at Table 3.

[172] *High-Speed Services July 2005 Report*, at Table 3.

[173] *See Fourth Section 706 Report*, at 18-23.

[174] *See id.* at 44-45 (describing the broadband trends).

[175] *See, e.g.*, AOL Comments at 21-23; EarthLink Comments at 16-27; MCI *et al.* Comments at 24-32; Ad Hoc Reply at 14-18.

necessarily the same as a regulatory regime that mandates that one particular type of broadband Internet access service transmission technology, and one alone, is available, on a nondiscriminatory basis, to any entity that desires to become an ISP.[176] Vigorous competition between different platform providers already exists in many areas and is spreading to additional areas.[177] While we recognize that broadband Internet access service is not ubiquitously available today, this market is rapidly changing and growing.[178] In addition, service providers tend to set prices on a national or regional basis regardless of whether there are multiple broadband providers serving local markets.[179]

63. It is difficult to make a meaningful assessment of the market for wholesale access to the transmission component of broadband Internet access service. Although we recognize that, in many areas, the incumbent LEC is currently the only wholesale provider of this transmission component, this observation, on its own, is not dispositive. At this time, facilities-based wireline carriers are the only providers of broadband Internet access services that are compelled by regulation to make such an offering available. As stated above, this compulsion is not the result of the Commission's analysis of broadband Internet access services specifically, but rather is the product of the application of legacy rules adopted decades ago.[180] Therefore, we cannot state unequivocally that incumbent LECs would not otherwise provide wholesale access, absent this compulsion. In fact, the record shows that incumbent LECs would and indeed already do provide such access, albeit through arrangements other than a mandatory tariff regime that requires a standardized general offering.[181] In addition, this regulatory compulsion of facilities-based wireline carriers may be impeding the development of competitive alternatives, most notably through entry by other broadband Internet access platform providers. Because our rules require a particular type of generalized wholesale offering, they may reduce incentives for ISPs to seek alternative arrangements from other broadband Internet access platform providers and for those other providers to offer such arrangements.[182]

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[176] The Commission concluded in the *Broadband 271 Forbearance Order* that competition from multiple sources and technologies in the retail broadband market, especially from cable modem providers, will encourage the BOCs to utilize wholesale customers to grow their share of the broadband markets and retain their business. *Broadband 271 Forbearance Order*, 19 FCC Rcd at 21508, para. 26.

[177] *See supra* Part V.B.2.a; *Broadband 271 Forbearance Order*, 19 FCC Rcd at 21505-10, paras. 22-29.

[178] *See supra* Part V.B.2.a.

[179] *See, e.g., supra* n.167 (describing the BOCs' regionwide DSL pricing offers).

[180] *See NCTA v. Brand X*, slip op. at 30.

[181] For example, BellSouth indicates that few unaffiliated ISPs continue to take its tariffed DSL transport service. Instead, many ISP competitors have entered into commercial contracts for broadband Internet access capability because it meets their demands better than the *Computer Inquiry* tariffed transmission-only component. *See* Letter from Glenn T. Reynolds, Vice President-Federal Regulatory, BellSouth, to Marlene H. Dortch, Secretary, FCC, CC Docket No. 02-33, Attach. at 8 (filed Apr. 25, 2005) (BellSouth Apr. 25, 2005 *Ex Parte* Letter) (noting that only one percent of the total broadband customers in BellSouth's nine-state region obtain service from ISPs using BellSouth's *Computer Inquiry*-required tariffed DSL transmission offering, but over 26% of the customers are served by ISPs using BellSouth's contract offering (*i.e.*, its regional broadband aggregation network (RBAN) offering).

[182] *See, e.g.*, BellSouth June 5, 2003 *Ex Parte* Letter at 18 ("BellSouth's ability to negotiate and enter into such tailored agreements [for ISPs] is frustrated immensely by the existing regulatory burdens of having to offer the underlying tariff components immediately to any other requesting carrier anywhere in BellSouth's region at tariffed rates.").

64. Based on the record before us, we expect that facilities-based wireline carriers will have business reasons to continue making broadband Internet access transmission services available to ISPs without regard to the *Computer Inquiry* requirements.[183] The record makes clear that such carriers have a business interest in maximizing the traffic on their networks, as this enables them to spread fixed costs over a greater number of revenue-generating customers.[184] For their part, cable operators, which have never been required to make Internet access transmission available to third parties on a wholesale basis,[185] have business incentives similar to those of incumbent LECs to make such transmission available to ISPs, and are continuing to do so pursuant to private carriage arrangements.[186] Given the Supreme Court's decision that cable operators can offer the transmission underlying cable modem service as a functionally integrated part of a finished information service without becoming subject to regulation under Title II,[187] we expect that these wholesale arrangements will continue to evolve. We believe that the convergence of these two factors – increasing competition among facilities-based broadband providers and the potential for competition in wholesale network access – will sustain and increase competitive choice among broadband providers and Internet access products.

b) Technological Innovation

65. We find that application of the *Computer Inquiry* requirements to wireline broadband Internet access services, and any alternative requirements that would guarantee ISPs access to the transmission component of that service, would impede the development and deployment of innovative wireline broadband Internet access technologies and services. As noted above, these requirements slow innovation because vendors do not create new technologies with the *Computer Inquiry* requirements in mind.[188] Deployment to consumers of these technologies then, at best, is delayed and, in many cases, may be avoided altogether. Broadband Internet access services are also not developing in ways that neatly fall within existing regulatory classifications or the current *Computer Inquiry* requirements (*i.e.*, they cannot be easily separated into discrete information service and telecommunications service components).[189] As

[183] *See infra* Part V.B.2.d.

[184] Letter from Jeffry Brueggeman, General Attorney, SBC, to Marlene H. Dortch, Secretary, FCC, CC Docket No. 02-33, Attach. at 8 (filed July 31, 2003) (SBC July 31, 2003 *Ex Parte* Letter); BellSouth June 5, 2003 *Ex Parte* Letter at 16-18; *Broadband 271 Forbearance Order*, 19 FCC Rcd at 21508-09, para. 26.

[185] *NCTA v. Brand X*, slip op. at 30; *Cable Modem Declaratory Ruling*, 17 FCC Rcd at 4823-25, paras. 39-43.

[186] *See, e.g.*, Comcast Corp., 2004 Form 10-K Annual Report filed with the Securities and Exchange Commission, at 7 (Feb. 23, 2005) (stating that Comcast and a number of cable operators have reached agreements to provide unaffiliated ISPs access to their cable systems in the absence of regulatory requirements). In addition, AOL Time Warner, as a result of a consent decree with the Federal Trade Commission, provides certain independent ISPs with access to its network of over 12 million subscribers. *Cable Modem Declaratory Ruling*, 17 FCC Rcd at 4828-29, para. 52 & n.196.

[187] *NCTA v. Brand X*, slip op. at 6-15.

[188] *See, e.g.*, Verizon June 26, 2003 *Ex Parte* Letter at 1-3; Letter from L. Barbee Ponder IV, Senior Regulatory Counsel-D.C., BellSouth, to Marlene H. Dortch, Secretary, FCC, CC Docket No. 02-33, Attach. at 5 (filed May 23, 2003) (BellSouth May 23, 2003 *Ex Parte* Letter) (stating that next generation broadband equipment does not provide demarcations for regulatory purposes, and that vendors have no incentives to create demarcations because only four entities need or want them).

[189] *See* Verizon June 26, 2003 *Ex Parte* Letter at 2 (noting that in past decades, "equipment manufacturers designed central office equipment based on the needs of the Bell companies' and that "[t]oday's manufacturers have broader markets and are designing the next generation of equipment for a broader base of IP network providers").

a result, unlike cable modem providers or other broadband Internet access service competitors, wireline carriers must make either of two less-than-optimal choices when they seek to deploy advanced network equipment: either they must decide not to use all the equipment's capabilities, thereby reducing their operational efficiency;[190] or they must defer deployment while the manufacturer re-engineers it to facilitate compliance with the *Computer Inquiry* rules, thereby creating unnecessary costs and service delays.[191]

66. Wireline commenters argue that their inability to integrate more efficient equipment into wireline networks in a timely and efficient manner limits their ability to offer innovative broadband Internet access services to customers.[192] They also contend that these constraints hinder their ability to respond to requests for new or modified innovative features or services.[193] For example, some commenters argue that manufacturers have little incentive to design next generation broadband equipment that facilitates compliance with the Computer *Inquiry* obligations as the majority of broadband platform providers neither need nor want this capability.[194] As a result, these carriers maintain that they are faced with a decision either to forgo the use of more efficient or innovative equipment or to incur substantial additional costs and development time to have the vendor "de-integrate" the more efficient, integrated equipment simply to comply with the *Computer Inquiry* requirements.[195] These increased costs and delays often deter a carrier from deploying new broadband technologies.[196]

67. Other commenters suggest that because of the BOCs' size and influence, they are well-positioned to demand that vendors meet their requirements that innovative broadband equipment and new functionalities comply with the *Computer Inquiry* obligations.[197] Assuming arguendo that this is true, to

[190] For example, SBC explains that, in order to comply with the *Computer Inquiry* rules, it often must disable or "turn off" protocol conversion functionality in its broadband Internet access equipment. *See* SBC July 31, 2003 *Ex Parte* Letter at 12.

[191] *See* Verizon June 26, 2003 *Ex Parte* Letter at 3.

[192] *See, e.g.*, SBC Mar. 7, 2003 *Ex Parte* Letter at 8 (arguing that *Computer II*'s stand-alone telecommunications service requirement "[r]estricts full utilization of technology integration in design and evolution of broadband networks" and in "developing broadband services," and, thus, limits SBC's "ability to offer new and innovative integrated broadband services to consumers"); *see also* Verizon May 20, 2003 *Ex Parte* Letter, Attach. at 9; Letter from Ann D. Berkowitz, Project Manager-Federal Affairs, Verizon, to Marlene H. Dortch, Secretary, FCC, CC Docket No. 02-33, Attach. at 10 (filed Mar. 17, 2003) (Verizon Mar. 17, 2003 *Ex Parte* Letter).

[193] *See, e.g.*, BellSouth June 5, 2003 *Ex Parte* Letter at 18. Non-carrier commenters have also argued that the *Computer Inquiry* regime is inappropriate for today's broadband market. *See, e.g.*, Alcatel Comments at 8 (contending that the Commission should seek to remove some of the network unbundling obligations placed on incumbent LECs); HTBC Reply at 3-8 (advocating a minimally regulatory environment for wireline broadband transmission but stating the Commission should require incumbent LECs to make any arrangements with their affiliated ISPs available to unaffiliated ISPs in a nondiscriminatory manner at least for the next two years).

[194] *See, e.g.*, BellSouth Apr. 25, 2005 *Ex Parte* Letter, Attach. at 8; BellSouth May 23, 2003 *Ex Parte* Letter, Attach. at 5; *see also* Catena Comments at 6 (noting that several telecommunications equipment manufacturers have halted or decreased their DSL technology activities as the current regulatory environment is retarding the investment in new technologies).

[195] *See, e.g.*, SBC July 31, 2003 *Ex Parte* Letter at 11-12; Verizon June 26, 2003 *Ex Parte* Letter at 3.

[196] *See, e.g.*, SBC Comments at 26; Verizon May 20, 2003 *Ex Parte* Letter, Attach. at 9-13 (outlining impediments to offering VoIP services).

[197] *See, e.g.*, Letter from Richard S. Whitt, Director-Federal Advocacy, MCI, to Marlene H. Dortch, Secretary, FCC, CC Docket No. 02-33, Attach. at 11 n.13 (filed Oct. 10, 2003) (MCI Oct. 10, 2003 *Ex Parte* Letter); Letter from (continued . . .)

some extent, the fact that BOCs can exert some influence does not necessarily make the *Computer Inquiry* obligations or a less onerous broadband Internet access transmission obligation desirable public policy, nor does it mean that the resulting equipment is as efficient or innovative as it could otherwise be. The issue is not whether the BOCs could have this "de-integrated" equipment produced, rather it is whether the production of this equipment would yield benefits that outweigh the obvious technological costs. These commenters fail to recognize that manufacturers develop broadband equipment that pushes technology in the direction they think will best respond to future consumer demands (which is currently toward equipment that integrates information service and transmission capabilities in a manner that allows functions to be performed at multiple points within a broadband network and closer to the end user than ever before).[198] Our rules should not force technological development in another, less efficient direction.

68. Some carriers argue that compliance with the *Computer Inquiry* obligations requires costly redundant systems and duplicative processes that result in operational inefficiencies.[199] For example, BellSouth states that it incurs significant costs solely to comply with those obligations. These costs are incurred, according to BellSouth, because it must: maintain separate customer service centers, systems, and processes for its telecommunications service and broadband Internet access service operations;[200] dispatch both telecommunications service and information service technicians to install DSL service or respond to customer-reported problems;[201] and incur additional transport costs to comply with the Commission's "two-mile" rule.[202] While other commenters maintain that these costs do not warrant elimination of the *Computer Inquiry* requirements,[203] we find that the costs on the record are sufficient to act as an investment disincentive. As explained below, consistent with our obligations under section 706, we must consider this impact in our overall analysis of the costs and benefits of retaining these rules.

(continued from previous page)
David L. Lawson, Counsel for AT&T, Sidley Austin Brown & Wood LLP, to Marlene H. Dortch, Secretary, FCC, CC Docket No. 02-33, at 5-6 (filed Aug. 14, 2003).

[198] *See supra* paras. 65-66.

[199] *See, e.g.*, Verizon June 26, 2003 *Ex Parte* Letter at 1-4; BellSouth Apr. 2, 2003 *Ex Parte* Letter, Attach. at 6-9.

[200] *See, e.g.*, BellSouth Apr. 2, 2003 *Ex Parte* Letter at 8 (an estimated cost of $13.5 million per year).

[201] *Id.* (costing approximately $6 million per year). BellSouth claims that it incurs these costs because it must treat its broadband Internet access service customer in the same manner as it would treat an independent ISP's customer. Thus, for example, if a BellSouth telephone service technician discovers a problem with a DSL connection, BellSouth must dispatch a different technician to correct that problem for the end-user consumer. *See also id.* at 9 (stating that it incurs approximately $9.5 million per year in other unnecessary system redundancy costs).

[202] *Id.* at 11. The two-mile rule requires BOCs to charge their "collocated enhanced service operations a rate for distance-sensitive transmission equal to a rate for transmission paid by non-collocated operations at a two mile distance from the [central office]." *See Filing and Review of Open Network Architecture Plans*, 5 FCC Rcd 3103, 3110, para. 66 & n.111 (1990). BellSouth maintains that this rule is administratively costly and archaic since all packet traffic is aggregated efficiently at the central office and because ISPs are able to collocate there pursuant to the expanded interconnection rules. BellSouth Apr. 2, 2003 *Ex Parte* Letter at 11.

[203] *See, e.g.*, Letter from Mark J. O'Connor, Counsel for EarthLink, Inc., Lampert & O'Connor, to Marlene H. Dortch, Secretary, FCC, CC Docket No. 02-33, Attach. at 3-7 (filed May 12, 2003) (EarthLink May 12, 2003 *Ex Parte* Letter); *see also* Letter from Kenneth R. Boley, Counsel for EarthLink, Inc., Lampert & O'Connor, to Marlene H. Dortch, Secretary, FCC, CC Docket No. 02-33, Attach. at 2-3 (filed Mar. 19, 2003) (EarthLink Mar. 19, 2003 *Ex Parte* Letter).

69. The fact that carriers incur costs, potentially even significant costs, to comply with our regulations is not, alone, a basis for eliminating such regulations. To the extent such costs are incurred to achieve statutory obligations or important policy objectives, they are a necessary component of operating in a regulated industry.[204] But when, as a relative matter, the regulations' costs outweigh their benefits, or are no longer necessary to achieve the desired objectives, we must evaluate whether our obligations and objectives can be met in a manner that reduces or eliminates such costs. This becomes even more critical if there is evidence that the regulation actually impedes or frustrates the accomplishment of important statutory goals.

70. At the time the *Computer Inquiry* rules were adopted (and even thereafter as they were being revised and refined to better balance costs and benefits), the public benefits with respect to narrowband network-based services justified the costs. For example, it was much clearer at that time that because computer processing occurred at the network's edge or outside the network, the major innovation would occur there too. The *Computer Inquiry* rules themselves reflect a fairly static picture of network development, and an assumption that a line could be drawn between the network functions and computer processing without impeding technological innovation. Today, this line is even more blurred than it was when the Commission adopted its *Computer II Final Decision*. Innovation can occur at all network points and at all network layers as well as in non-network applications and equipment. Continued application of the *Computer Inquiry* rules, however, would prevent much of this innovation from occurring.[205] This by-product of our current regulations is a persuasive factor for their removal.

c) New Services

71. One of the primary purposes of this technological innovation would be to let wireline broadband Internet access services providers, like their competitors, produce new or improved services in response to consumer demands.[206] Several parties argue that the *Computer Inquiry* requirements prevent them from altering business priorities in response to changing market demands, impede their ability to take advantage of business opportunities due to "time to market" issues, and provide competitors with advance notice of innovative service enhancements, thus eliminating any potential wireline broadband competitive advantage *vis-à-vis* cable modem or other platform providers.[207] For example, Qwest points to the inherent regulatory delay that occurs through the network change disclosure process, the web posting requirements, and tariffing requirements, which a BOC must comply with before making *any* change to its network that enhances or upgrades its Internet access services.[208] Verizon contends that before it can decide whether it will provide an ISP customer with a requested new Internet access service capability, it

[204] *See, e.g., IP-Enabled Services*, WC Docket No. 04-36; *E911 Requirements for IP-Enabled Service Providers*, WC Docket No. 05-196, First Report and Order and Notice of Proposed Rulemaking, FCC 05-116, at paras. 3-5, 36-53 (rel. June 3, 2005) (*VoIP E911 Order*), *petitions for review pending sub nom. Nuvio Corp. v. FCC*, D.C. Cir. No. 05-1248 (and consolidated cases) (filed July 11, 2005).

[205] *See, e.g.*, Catena Comments at 5-6; Verizon June 26, 2003 *Ex Parte* Letter at 3-6; BellSouth Apr. 2, 2003 *Ex Parte* Letter, Attach. at 5.

[206] *See Wold Communications*, 735 F.2d at 1475 (citing *Western Union Telegraph v. FCC*, 674 F.2d 160 (2d Cir. 1982) ("newly unleashed market forces" constitute a reasonable regulatory tool). Where technology is fast-moving and arcane, the D.C. Circuit gave the Commission "particular deference" in determining whether the treatment of a service as non-common carrier would bring sufficient public interest benefits. *Id.* at 1468.

[207] *See, e.g.*, Qwest Apr. 10, 2003 *Ex Parte* Letter, Attach. at 11.

[208] *Id.*

must analyze each function of the proposed capability to determine its classification under the *Computer Inquiry* regime[209] and then determine the associated requirements for compliance.[210] Verizon states that this compliance review often involves complex and lengthy new system development or modification to accommodate the *Computer Inquiry* access obligations without any knowledge or assurance that other ISPs will even want such access. As a result, Verizon states that it frequently must deny requests for new Internet access service capabilities because the process to accommodate them under existing *Computer Inquiry* regulations is prohibitively expensive.[211] We find that these costs, inefficiencies, and delays are significant and substantially impede network development. We therefore disagree with commenters that claim that the record contains no evidence that costs, inefficiencies, and investment delays have occurred that would justify the elimination of the *Computer Inquiry* requirements.[212]

72. Based on the record before us, we conclude that eliminating the *Computer Inquiry* rules at this time will make it more likely that wireline network operators will take more risks in investing in and deploying new technologies than they are willing and able to take under the existing regime.[213] Tailored private contractual agreements, in general, provide service providers more flexibility in developing a new technology and more incentives to do so.[214] As the Commission found in the *Transponder Sales Order,* a service provider is more likely to invest in technologies if the service provider is able to obtain assurances through private contracts that the technologies will be used.[215] Private commercial contracts likewise provide assurances to potential customers that capacity will be available.[216] Indeed, a number of carrier commenters indicate that their preferred means of offering wireline broadband transmission service is through customized arrangements tailored to the particular needs of requesting ISP customers.[217] They show, in particular, that through the ability to engage in these types of non-common carrier arrangements

[209] *See supra* n.78 (describing the four "basic service elements").

[210] *See, e.g.*, Verizon June 26, 2003 *Ex Parte* Letter at 4; Verizon May 20, 2003 *Ex Parte* Letter, Attach. at 11-13.

[211] *See, e.g.*, Verizon June 26, 2003 *Ex Parte* Letter at 4-6; Verizon May 20, 2003 *Ex Parte* Letter, Attach. at 11-13; *see also* Letter from L. Barbee Ponder IV, Senior Regulatory Counsel-D.C., BellSouth, to Marlene H. Dortch, Secretary, FCC, WC Docket No. 02-33, at 1-9 (filed July 10, 2003) (BellSouth July 10, 2003 *Ex Parte* Letter); BellSouth Apr. 25, 2005 *Ex Parte* Letter, Attach. at 7-10.

[212] *See, e.g.*, AT&T Comments at 62-72; GCI Comments at 23-27; Ohio ISP Assoc. *et al.* Comments at 56-58; MCI *et al.* Comments at 39-42; AT&T Reply at 35-42; AT&T Mar. 14, 2003 *Ex Parte* Letter at 15; *see also* Covad Comments at 32-36.

[213] *See, e.g.*, Verizon June 26, 2003 *Ex Parte* Letter at 4, 6.

[214] *See, e.g.*, *Transponder Sales Order*, 90 FCC 2d at 1250-52, paras. 31-34; *see also infra* at paras. 87-88 (discussing the benefits of non-common carriage contracts).

[215] *Transponder Sales Order*, 90 FCC 2d at 1250-52, paras. 31-34 (noting typical long lead time between inception of a technology and its deployment).

[216] *See id.*

[217] *See NARUC I*, 525 F.2d at 643 (the inquiry is whether there is reason to believe that the service provider will, in fact, serve the public indifferently even absent a regulatory compulsion to do so). Consequently, we disagree with EarthLink, which argues that the Commission's determination as to whether this service must be a common carrier service begins and ends with the recognition that incumbent LECs provide wholesale DSL transmission to ISPs on a tariffed (*i.e.*, indifferent) basis. EarthLink Apr. 29, 2003 *Ex Parte* Letter at 9-11.

(rather than "cookie-cutter" common carrier offerings available indiscriminately to all ISPs), they will be able to develop more technologically innovative broadband offerings to meet consumer needs.[218]

73. As discussed above, some commenters argue that the transmission component of wireline broadband Internet access service must continue to be regulated as a common carrier service because wireline carriers currently offer these transmission services on such a basis.[219] In doing so, however, these parties fail to recognize that a Commission determination regarding the regulatory status of a service depends on, among other things, what practice and experience indicate the likely character of the service offering would be, assuming the carrier could decide how it would offer the service.[220] Merely because facilities-based wireline carriers offer some common carrier services does not mean that all their services must be similarly offered.[221] The Commission, upheld by the courts, has provided carriers the flexibility to offer services that were previously regulated under Title II on a common carrier or non-common carrier basis.[222]

d) Wireline Broadband Internet Access Service Providers' Business Incentives

74. Given the nature and history of the broadband Internet access services industry, we expect that wireline broadband transmission will remain available to ISPs and others without any *Computer Inquiry* requirements. Incumbent LECs have represented that they not only intend to make broadband Internet

[218] *See, e.g.*, SBC July 31, 2003 *Ex Parte* Letter at 4-15; Verizon June 26, 2003 *Ex Parte* Letter at 4, 6; BellSouth June 5, 2003 *Ex Parte* Letter at 12 (noting that BellSouth negotiated a private agreement with an independent ISP because BellSouth's tariffed unbundled broadband transmission offering was "cumbersome, inefficient and not competitive"); Qwest May 23, 2003 *Ex Parte* Letter, Attach. at 17-18.

[219] *See infra* Part V.D.

[220] *See Vitelco v. FCC*, 198 F.3d at 924 (citing *NARUC I*, 525 F.2d at 642, for the proposition that the second prong of the *NARUC I* test examines whether there are reasons implicit in the nature of the offering to expect an indifferent holding out to the eligible user public); *see also NARUC I*, 525 F.2d at 643-44 (noting that the inquiry into whether specialized mobile radio service (SMRS) providers will hold themselves out indifferently absent a regulatory compulsion to do so is "highly speculative" because no operating SMRS providers were then in existence); *see also* BellSouth June 5, 2003 *Ex Parte* Letter at 21 (asserting that the previous regulatory compulsion cannot be used as a basis for claiming that carriers have chosen to provide broadband transmission on a common carrier basis).

[221] 47 U.S.C. § 153(10) (defining common carrier); *see, e.g.*, *Southwestern Bell*, 19 F.3d at 1482 (quoting *NARUC v. FCC*, 533 F.2d 601, 608 (D.C. Cir. 1976) (*NARUC II*) ("[I]t is at least logical to conclude that one can be a common carrier with regard to some activities but not others")).

[222] *See, e.g.*, *Vitelco v. FCC*, 198 F.3d at 925-30 (affirming the Commission's grant of a submarine cable operator's application for cable landing rights as a non-common carrier); *Computer and Communications Industry Ass'n v. FCC*, 693 F.2d at 207-14 (The court stated: "In designing the Communications Act, Congress sought to endow the Commission with sufficiently elastic powers such that it could readily accommodate dynamic new developments in the field of communications. Congress thus hoped to avoid the necessity of repetitive legislation. In *Computer II* the Commission took full advantage of its broad powers to serve the public interest by accommodating a new development in the communications industry, the confluence of communications and data processing. Because the Commission's judgment on how the public interest is best served is entitled to substantial judicial deference, the Commission's choice of regulatory tools in *Computer II* must be upheld unless arbitrary or capricious. Our review of the Commission's decision convinces us that the Commission acted reasonably in defining its jurisdiction over enhanced services and CPE. We therefore uphold the Computer II scheme.") (internal quotation marks omitted); *Wold Communications*, 735 F.2d at 1473-79 (affirming the decision in the *Transponder Sales Order* to allow sales of satellite transponder service on a non-common carrier basis); *see also infra* note 280.

access transmission offerings available to unaffiliated ISPs in a manner that meets ISPs' needs, but that they have business incentives to do so.[223] For example, Qwest offers a tariffed wireline broadband DSL service that enables hundreds of independent ISPs to serve end-user customers over Qwest's broadband facilities.[224] Regardless of the outcome of this proceeding, Qwest has stated it will continue to make available a DSL offering that will enable consumers to reach unaffiliated ISPs because consumers demand the choice, and meeting that demand makes its product more attractive.[225] SBC previously entered into a memorandum of understanding with a trade association representing nearly 300 members of the Internet industry, including many independent ISPs, committing to negotiate private commercial arrangements with unaffiliated ISPs for broadband Internet access.[226] Verizon has similarly indicated its intent to enter into commercially reasonable contracts with unaffiliated ISPs for broadband transmission services because it is in its best interest to do so.[227] Finally, BellSouth has also evidenced a willingness, desire, and incentive to deal with unaffiliated ISPs absent a Commission requirement that compels them to do so.[228] For example, BellSouth has indicated that it will benefit financially from providing DSL transmission to independent ISPs, as it has an economic incentive to spread the costs of its network over as much traffic and as many customers as possible regardless of whether such customers are wholesale or retail.[229]

75. We finds these incentives significant, and therefore disagree with the contention of some commenters that a mandatory common carrier broadband transmission requirement is essential for independent ISPs to obtain wireline broadband transmission that meets their needs at reasonable prices.[230] Based on the record before us, we expect that business incentives will compel wireline broadband carriers to offer broadband transmission on a commercially reasonable basis to independent ISPs and will

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[223] *See* SBC July 31, 2003 *Ex Parte* Letter at 8 ("SBC will continue to enter into ISP broadband access arrangements as a way of increasing subscriber growth and utilization of its broadband network regardless of any regulatory compulsion to do so."). Indeed, carriers voluntarily have entered into certain non-common carrier agreements already. *E.g.*, Letter from Edward Shakin, Vice President and Associate General Counsel, Verizon, to Marlene H. Dortch, Secretary, FCC, CC Docket No. 02-33, at 1-2 (filed July 29, 2004) (Verizon July 29, 2004 *Ex Parte* Letter) (describing Verizon's Fios services, which are high-speed Internet services provided over Verizon's fiber networks); BellSouth June 5, 2003 *Ex Parte* Letter at 12-13 (describing BellSouth's negotiated RBAN service arrangement with EarthLink).

[224] *See, e.g.*, Qwest Apr. 10, 2003 *Ex Parte* Letter, Attach. at 2 (noting Qwest's "DSL+" access offering to 400 ISPs); Qwest May 23, 2003 *Ex Parte* Letter, Attach. at 5 (describing this service).

[225] Qwest Apr. 10, 2003 *Ex Parte* Letter, Attach. at 2, 10.

[226] *See* Letter from Donald E. Cain, Vice President-Federal Regulatory, SBC, & David P. McClure, USIIA, to Marlene H. Dortch, Secretary, FCC, CC Docket No. 02-33, at 1-2 & Attach. at 2 (filed May 3, 2002) (SBC and USIIA May 3, 2002 *Ex Parte Letter*) (describing memorandum of understanding dated May 2, 2002). This memorandum of understanding has no expiration date. *See id.*, Attach. at 1-2.

[227] *See, e.g.*, Verizon Comments at 31 (explaining that the significant costs to upgrade its network can be recovered through use of its network by other broadband providers.)

[228] *See, e.g.*, BellSouth June 5, 2003 *Ex Parte* Letter at 16-18.

[229] *See id.*

[230] *See, e.g.*, Big Planet Comments at 16-17; EarthLink Comments at 19-20; ITAA Comments at 12-18; Ohio ISP Assoc. *et al.* Comments at 39-41; *Earthlink et al. Streamlining Proposal* at 6-7; Letter from Maura J. Colleton, The BroadNet Alliance, to Marlene H. Dortch, Secretary, FCC, CC Docket Nos. 02-33, 98-10, & 95-20, Attach. at 26-29 ("The Significant Role of Online Service Providers in the Development and Success of the Information Age") (filed July 1, 2002) (BroadNet Alliance July 1, 2002 *Ex Parte* Letter).

motivate wireline carriers to negotiate mutually acceptable rates, terms, and conditions with unaffiliated ISPs. We strongly encourage the parties to work together to develop individual contracts that are mutually beneficial to each party.

76. We also expect that the rapid growth and development of innovative broadband service offerings, including IP telephony, among the different broadband Internet access platform providers, particularly cable modem, will provide significant incentives to facilities-based wireline carriers to increase subscriber usage of wireline-based Internet access services *vis-à-vis* cable modem and other platform providers of broadband Internet access services.[231] That is, to the extent that IP telephony services provided via other broadband platforms erode revenues that the BOCs and other incumbent LECs derive from traditional voice services, these carriers will have incentives to mitigate this potential revenue loss by retaining customers on the wireline broadband platform to the maximum extent possible.[232] Providing wholesale wireline broadband transmission to independent ISPs, whether through partnering, stand-alone transmission agreements, or other types of commercial service arrangements, would ensure that the facilities-based carrier derives some financial benefit from that customer.

e) A Change of Course Is Justified

77. As we have noted above, the Act does not address directly how wireline broadband Internet access service should be classified or regulated.[233] Through section 706, however, it does provide the Commission with a specific mandate to encourage broadband deployment, generally, and to promote and preserve a freely competitive Internet market, specifically.[234] Indeed, Congress mandated that the Commission encourage broadband capability "without regard to any transmission media or technology" and "remove barriers to infrastructure investment."[235]

78. Because our decision necessarily relies, in part, on our predictive judgment regarding a rapidly changing, dynamic industry, we do not pretend that there is a single, clear-cut answer. [236] As with the Commission's previous decisions to adopt and then modify the *Computer Inquiry* requirements, the decision that we must make today – whether or not to retain the *Computer Inquiry* requirements in some form – at its core involves an assessment of the relative costs and benefits of the various alternatives. In making this assessment, we must consider the broadband objectives Congress established in section 706.[237] Those objectives make clear that the Commission must encourage the deployment of advanced

[231] *See, e.g.*, Verizon June 26, 2003 *Ex Parte* Letter at 3 (noting that VoIP is an example of a new and emerging service that incumbent LECs will need to provide to be competitive with cable and other broadband providers).

[232] *See* BellSouth June 5, 2003 *Ex Parte* Letter at 11-13.

[233] *See supra* para. 8.

[234] *See supra* paras. 3, 8.

[235] *See* 47 U.S.C. § 157 nt.

[236] *See Wold Communications*, 735 F.2d at 1475 (noting that the public interest is served if the Commission's powers remain sufficiently elastic to address dynamic developments in the communications field, especially when Congress had taken no "specific action geared to the industry"); *compare Transponder Sales Order*, 90 FCC 2d at 1248-49, para. 28 ("The Communications Act was adopted long before the advent of communications satellites, and therefore it nowhere mandates that domestic satellite operators be regulated as common carriers.").

[237] *See* 47 U.S.C. § 157 nt (§ 706 of the Act). In the *Fourth Section 706 Report*, the Commission concluded, as it did in the previous three section 706 reports, that the overall goal of section 706 is being met, and that advanced telecommunications capability is being deployed to all Americans in a reasonable and timely fashion. In this *Fourth* (continued . . .)

telecommunications capability to all Americans by removing barriers to infrastructure investment. The D.C. Circuit recently upheld a similar Commission balancing approach that considered section 706's goals of swift, ubiquitous broadband deployment in adopting unbundling rules for mass market next generation broadband-capable loops pursuant to section 251(c)(3) of the Act.[238] Therefore, in assessing the alternative regulatory frameworks for wireline broadband Internet access services, we must ensure that the balance struck provides adequate incentives for infrastructure investment.

79. The following factors guide us toward replacing the *Computer Inquiry* obligations for wireline broadband Internet access service providers with a less regulatory framework: the increasing integration of innovative broadband technology into the existing wireline platform; the growth and development of entirely new broadband platforms; the flexibility to respond more rapidly and effectively to new consumer demands; and our expectation of the availability of alternative competitive broadband transmission to the currently required wireline broadband common carrier offerings. We believe our actions today will enhance each of these factors. Fostering the ubiquitous availability of broadband Internet access to all Americans across multiple competitive broadband platforms is best accomplished by recalibrating regulation where it is appropriate to do so.[239] Fulfilling our statutory obligations and policy objectives to maximize the acceleration of all types of broadband infrastructure deployment no longer requires a Commission-mandated wholesale *wireline* broadband Internet access transmission market.[240] Requiring a single type of broadband platform provider (*i.e.*, wireline) to make available its transmission on a common carriage basis is neither necessary nor desirable to ensure that the statutory objectives are met.[241] Indeed, as the evidence demonstrates, continuing this requirement would contravene these objectives. Importantly, this does not mean that we sacrifice competitive ISP choice for greater deployment of broadband facilities. Rather, as we have explained above, our reasoned judgment tells us that sufficient marketplace incentives are in place to encourage arrangements with innovative ISPs. Indeed, the incentives are growing as cable modem and wireline providers compete head-to-head with

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Report, the Commission stated that to continue the further growth of broadband Internet access services, we will need to apply "[m]inimal regulation of advanced telecommunications networks and services." *Fourth Section 706 Report*, at 9.

[238] *USTA II*, 359 F.3d at 578-85; *see Triennial Review Order*, 18 FCC Rcd at 17121, para. 234. Considering these 706 objectives, the Commission imposed only limited unbundling obligations on incumbent LECs' mass market next-generation broadband loop architectures, yet ensured that access to unbundled narrowband facilities was available where appropriate. *Id.* at 17141-54, paras. 272-97.

[239] *See Wold Communications*, 735 F.2d at 1475 (citing *FCC v. WNCN Listeners Guild*, 450 U.S. at 595 (Congress gave the Commission "sweeping authority" over rapidly unfolding enterprises); *CCIA v. FCC*, 693 F.2d at 212; *NARUC I*, 525 F.2d at 645; & *Philadelphia Television Broadcasting Co. v. FCC*, 359 F.2d 282 (D.C. Cir. 1966)) (public interest touchstone permits Commission to substitute marketplace for direct Commission regulation); *see also NCTA v. Brand X*, slip op. at 30 (affirming the Commission's "fresh analysis" of regulations in the wake of changed market conditions).

[240] Our statutory obligations and policy objectives guide us in the direction that maximizes the acceleration of all types of broadband infrastructure deployment. Indeed, Congress specifically directed the Commission to encourage broadband capability "without regard to any transmission media or technology." *See* 47 U.S.C. § 157 nt.

[241] *See, e.g.*, *Wold Communications*, 735 F.2d at 1468 (citing *FCC v. WNCN Listeners Guild*, 450 U.S. at 595 (giving the Commission particular deference with respect to policy judgments and predictions of the direction in which the public interest lies in a "fast-moving field of technology")). Continued *Computer Inquiry* obligations could have a chilling impact not only on the continued deployment of wireline broadband infrastructure, but on other new and innovative technologies.

one another and other platform providers such that wireline platform providers will find it necessary and desirable to negotiate arrangements with unaffiliated ISPs for access to their broadband networks in order to grow the base of users of their broadband infrastructures.

80. Weighing all of these factors, we conclude that the elimination of our *Computer Inquiry* requirements for wireline broadband Internet access service providers, subject to the transitional mechanism described below, best facilitates the accomplishment of our broadband goals and objectives in light of the rapidly changing market conditions for broadband Internet access services.[242] We expect this new framework to enable consumers to reap the benefits of advanced wireline broadband Internet access services that incorporate the latest technologically advanced integrated equipment, on a more widely available and more timely basis than if we maintained the existing regime.

81. In taking this action, we note that some commenters argue that we must undertake a forbearance analysis pursuant to section 10 of the Act before we can remove our *Computer Inquiry* requirements.[243] We do not agree. The Commission is free to modify its own rules at any time to take into account changed circumstances. [244] The *Computer Inquiry* requirements are not mandated by statute but, rather, were adopted prior to the 1996 Act in the exercise of the Commission's policy judgment. Indeed, the Supreme Court affirmed the Commission's determination that the 1996 Act did not "unambiguously freeze[] in time the *Computer II* treatment of facilities based information service providers."[245] As such, in our discretion, subject to reasoned explanation, we are free to alter the policy judgment reflected in those requirements based on our assessment of their relevant costs and benefits in light of changed technological and market conditions.[246]

82. We also find that we need not retain the *Computer Inquiry* regime, or any of its individual requirements, to protect against improper cross-subsidization. When the Commission developed the *Computer Inquiry* rules, wireline carriers, including the BOCs, typically charged rates developed under rate base, cost-of-service regulation. The Commission was concerned that allowing wireline carriers to provide enhanced services would increase the rates captive ratepayers would have to pay for common carrier telecommunications services, as the carriers would have every incentive to include the costs of their enhanced services operations in their cost-of-service calculations for those services. The Commission therefore developed safeguards (*e.g.*, structural separation in *Computer II* and non-structural accounting safeguards in connection with *Computer III*) designed to reduce the potential for improper

[242] *See NCTA v. Brand X*, slip op. at 30 (noting the changed market conditions, *i.e.*, the existence of "substitute forms of Internet transmission").

[243] 47 U.S.C. § 160; Letter from Florence Grasso, Covad, to Marlene H. Dortch, Secretary, FCC, CC Docket No. 02-33, Attach. at 5 (filed Oct. 21, 2002). This situation is different than what the court examined in *Association of Communications Enterprises v. FCC*, 235 F.3d 662 (D.C. Cir. 2001) (*ASCENT v. FCC*), where the court held that the Commission could not relieve an entity of section 251 obligations without conducting a section 10 analysis.

[244] *NCTA v. Brand X*, slip op. at 9 (citing *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 863-64 (1984), for the propositions that an agency interpretation "'is not instantly carved in stone'" but rather the "'agency must consider varying interpretations and the wisdom of its policy on a continuing basis'").

[245] *NCTA v. Brand X*, slip op. at 24 (affirming that the Commission's *Computer II* rules were not a function of statutory definitions, "but instead of a choice by the Commission to regulate more stringently, in its discretion, certain entities that provided enhanced services").

[246] *See NCTA v. Brand X*, slip op. at 15 ("Nothing in the Communications Act or the Administrative Procedure Act makes unlawful the Commission's use of its expert policy judgment to resolve these difficult questions.").

cross-subsidization.[247] In 1994, the Ninth Circuit affirmed the Commission's judgment that the non-structural accounting safeguards had eliminated any need to retain structural separation as a safeguard against cross-subsidization.[248] The court stated, in particular, that price cap regulation had left the BOCs "with little incentive to shift costs" from their enhanced services operations to tariffed telecommunications services because they were not "able to increase regulated rates to recapture those costs."[249]

83. The Commission's ratemaking methods and those of our state counterparts have changed considerably since the Ninth Circuit addressed the need for structural separation as a safeguard against cross-subsidization in 1994.[250] We conclude that changes have further reduced the potential that the BOCs could increase rates for tariffed telecommunications services through cost shifting. Indeed, unlike the situation before the Ninth Circuit in 1994, the BOCs' costs are no longer used to determine the BOCs' price cap rates.[251] In view of this reduced potential, we find that there is no need to retain either the *Computer II* structural separation requirement or the *Computer III* nonstructural safeguards to keep the BOCs from cross-subsidizing their broadband Internet access service operations with revenues from the telecommunications services operations. The benefits we anticipate from the elimination of these structural and nonstructural safeguards, including the increased infrastructure investment that our new framework should generate, outweigh any protection against cross-subsidization that those safeguards provide.

84. Based on the record before us, it is not necessary to make a finding of market non-dominance as to the incumbent LECs in the provision of broadband Internet access transmission, as some parties have asked us to do, before we may eliminate the *Computer Inquiry* obligations. We decline to do so.[252] Nor

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[247] *See, e.g.*, *Computer II Final Decision*, 77 FCC 2d at 462, para. 205 (structural separation); *Joint Cost Order*, 2 FCC Rcd at 1310-34, paras. 94-289 (non-structural accounting safeguards).

[248] *California III*, 39 F.3d at 926-27; *see also supra* n.80.

[249] *California III*, 39 F.3d at 926.

[250] *See, e.g.*, *Multi-Association Group (MAG) Plan for Regulation of Interstate Services of Non-Price CAP Incumbent Local Exchange Carriers and Interexchange Carriers*, CC Docket No. 00-256, Report and Order and Second Further Notice of Proposed Rulemaking, 19 FCC Rcd 4122, 4153-55, paras. 70-72 (2004) (*MAG Order*) (tracing evolution of our ratemaking from cost-of-service ratemaking through price caps with sharing to the current Coalition for Affordable Local and Long Distance Service (CALLS) regime); Letter from Richard T. Ellis, Director-Federal Regulatory Advocacy, Verizon, to Marlene H. Dortch, Secretary, FCC, at 3 (filed Jan. 6, 2004) (Verizon Jan. 6, 2004 *Ex Parte* Letter) (pointing out that, in most states, cost allocation results do not affect rates for local telephone services).

[251] The price cap plan in place in 1994 contained two mechanisms – "sharing" (which required a price cap carrier to return to ratepayers a portion of earnings above a specified level) and low-end adjustments (which provided for increases in the price cap indices upon a showing that a price cap carrier had earned returns below a specified level in a given year – whose operation would have enabled a BOC to profit from shifting costs to tariffed interstate services. In 1997, the Commission eliminated the sharing mechanism. *See Price Cap Performance Review for Local Exchange Carriers*, CC Docket No. 94-1, Fourth Report and Order, CC Docket No. 96-262, Second Report and Order, 12 FCC Rcd 16642, 16700-03, paras. 148-55 (1997), *aff'd in part & rev'd in part sub nom. USTA v. FCC*, 188 F.3d 521 (D.C. Cir. 1999). In addition, each of BOCs has foregone its opportunity to seek low-end adjustments as a condition of using our pricing flexibility rules to price access services. *See generally MAG Order*, 19 FCC Rcd at 4154, para. 72.

[252] A determination to compel the provision of a service by regulation is not equivalent to a finding that the provider of the service is dominant in the market for that service. Each issue is the subject of a distinct inquiry. Therefore, it (continued . . .)

do we think it necessary or appropriate to make findings about dominance or non-dominance with respect to the retail market for broadband Internet access.[253] The Commission developed its distinction between dominant carriers, which possess individual market power, and non-dominant carriers, which lack individual market power, to enable it to develop a regulatory environment appropriate for a telecommunications industry that was in the early stages of evolving from one "where service was provided largely on a monopoly basis to one where a degree of competition [existed] for the provision of some communications services."[254] As discussed above,[255] this market environment differs markedly from the dynamic and evolving broadband Internet access marketplace before us today where the current market leaders, cable operators and wireline carriers, face competition not only from each other but also from other emerging broadband Internet access service providers. This rapidly changing market does not lend itself to the conclusions about market dominance the Commission typically makes to determine the degree of regulation to be applied to well-established, relatively stable telecommunications service markets.[256] On the contrary, any finding about dominance or non-dominance in this emerging broadband Internet access service market would be premature.

85. In addition, our long-standing *Computer Inquiry* regulations, which apply only to wireline facilities-based carriers, have required wireline carriers to provide wholesale transmission for Internet access, whether broadband or narrowband, since the genesis of the Internet. This mandated participation by these providers has affected the wholesale market for broadband Internet access transmission. Applying a traditional market dominance analysis to a situation where the facilities-based wireline carriers have been required to provide service on specified terms and conditions while the market was still relatively undefined (and remains dynamic and evolving even today) would lead to a result that would be misleading and could be self-fulfilling. Therefore, we believe that a conclusive finding about dominance or non-dominance of these carriers in this context is ill-suited and inappropriate. Instead, for an emerging market that cannot be characterized with certainty at this particular point in time, and will likely be subjected to rapid technological and competitive developments, we find that the public interest is best served if we permit competitive marketplace conditions to guide the evolution of broadband Internet access service.[257]

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is not necessary that we affirmatively find incumbent LECs to be non-dominant as a prerequisite to taking the steps set forth in this Order.

[253] Were we to do so, however, given the relative market share of cable modem service providers *vis-à-vis* wireline broadband Internet access service providers, we find it highly unlikely that wireline broadband Internet access service providers would be found to be dominant.

[254] *Policies and Rules Concerning Rates for Competitive Common Carrier Services and Facilities Authorizations Therefor*, CC Docket No. 79-252, Notice of Inquiry and Proposed Rulemaking, 77 FCC 2d 308, 309 (1979) (*Competitive Carrier NOI and NPRM*). Dominant carriers under Title II are 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 regulated services. In contrast, non-dominant carriers now are subject to significantly reduced regulation.

[255] *See supra* Part V.B.2.a.

[256] The analysis we conduct in this Order is different from the impairment analysis we relied upon in the *Triennial Review Order*, which also considered generally the potential market power of the incumbent LEC.

[257] *See, e.g.*, CompTel 01-337 Comments at 3 (maintaining that "[t]he broadband market is in a state of flux, and any market delineations that may tentatively exist today could be changed or eliminated tomorrow").

C. New Regulatory Framework for Wireline Broadband Internet Access Service Providers

86. We adapt our regulatory requirements, consistent with the Act, to correct for restrictions on wireline broadband Internet access service providers' ability to incorporate advanced integrated technology into their broadband offerings, impediments to responding rapidly and efficiently to changing broadband market demands due to outdated existing rules,[258] and constraints on broadband innovation and infrastructure investment.[259] We eliminate the *Computer Inquiry* obligations as applied to facilities-based providers of wireline broadband Internet access service, and, in particular, the obligation to offer the transmission component of wireline broadband Internet access service on a stand-alone common carrier basis. Facilities-based wireline broadband Internet access service providers, subject to a one-year transition period which we also adopt, may choose to offer the transmission component of wireline broadband Internet access services to both affiliated and unaffiliated ISPs or others on a non-common carrier basis or a common carrier basis.[260] We incorporate this flexibility into our new framework to account for the differing business issues affecting different wireline broadband Internet access service providers. For example, associations of rural incumbent LECs have indicated that their members may choose to offer broadband Internet access transmission service on a common carrier basis.[261] Thus, unlike previous Commission initiatives (*e.g.*, the deregulation of CPE),[262] we are not eliminating carriers' ability to offer wireline broadband transmission on a Title II basis. Indeed, as we discuss below, enabling carriers to offer broadband Internet access transmission in alternative ways furthers our policy objectives and is consistent with precedent.

1. Wireline Broadband Internet Access Service Providers May Offer Transmission Service on a Non-Common Carrier Basis or a Common Carrier Basis

a) Non-Common Carriage Arrangements

87. The record demonstrates that allowing non-common carriage arrangements for wireline broadband transmission will best enable facilities-based wireline broadband Internet access service providers, particularly incumbent LECs, to embrace a market-based approach to their business relationships with ISPs, providing the flexibility and freedom to enter into mutually beneficial commercial arrangements with particular ISPs.[263] Facilities-based wireline carriers as well as certain

[258] *See supra* Part V.B.2.b (discussing the current constraints on innovative integrated broadband offerings)

[259] *E.g.*, SBC Comments at 25 ("Not only do the existing requirements limit the way wireline broadband providers may design and engineer their facilities, they also constrain the way such providers structure their relationships with ISPs"); *see, e.g.*, BellSouth Comments at 19-20; Verizon Comments at 18-21; SBC Reply at 22-23; USTA Apr. 2, 2003 *Ex Parte* Letter at 3.

[260] As discussed in paragraphs 98-99 below, existing common carrier wireline broadband Internet access transmission service offerings provided to current ISP and other customers must continue to be made available to those customers during the one-year transition period.

[261] *See, e.g.*, Letter from L. Marie Guillory, NTCA, to Marlene H. Dortch, Secretary, FCC, CC Docket No. 02-33, Attach. at 1 (filed Mar. 7, 2003) (NTCA Mar. 7, 2003 *Ex Parte* Letter).

[262] *See Computer II Final Decision*, 77 FCC 2d at 438-47, paras. 140-60 (explaining that CPE must be de-tariffed because it is a commodity severable from the provision of transmission services and because the offering of CPE in conjunction with regulated services has a direct effect on rates charged for the services).

[263] *See, e.g.*, BellSouth Apr. 2, 2003 *Ex Parte* Letter, Attach. at 3 (stating that contract carriage increases the ability of customers to negotiate service arrangements that best address their particular needs); SBC Mar. 7, 2003 *Ex Parte* Letter at 9, 13; *see also supra* n.222.

portions of the ISP community and broadband equipment manufacturers agree that market-based commercial arrangements will better serve the interests of ISPs, broadband providers, and consumers.[264]

88. Non-common carriage contracts will permit ISPs to enter into various types of compensation arrangements for their wireline broadband Internet access transmission needs that may better accommodate their individual market circumstances.[265] For example, ISPs and facilities-based carriers could experiment with revenue-sharing arrangements or other types of compensation-based arrangements keyed to the ISPs' marketplace performance, enabling the ISPs to avoid a fixed monthly recurring charge (as is typical with tariffed offerings) for their transmission needs during start-up periods.[266] Non-common carriage also enables parties to a contract to modify their arrangement over time as their respective needs and requirements change without the inherent delay associated with a tariffed offering that must be made available to all ISPs.[267] Moreover, it encourages other types of commercial arrangements with ISPs, reflecting business models based on risk sharing such as joint ventures or partnership-type arrangements, where each party brings their added value, benefiting both the consumer (through the ability to obtain a new innovative service) and each party to the commercial arrangement.[268] Such arrangements may also encourage unaffiliated ISPs to develop innovative applications and services that differentiate them from other ISPs. The ability to deliver such innovative services over their platforms in order to attract customers will likely motivate wireline facilities-based broadband transmission providers to negotiate mutually beneficial arrangements that enable the wireline facilities-based broadband transmission provider to share the financial rewards of bringing the new Internet access applications or services to consumers.

b) Common Carriage Offerings

89. A number of parties have indicated that some carriers may nevertheless choose to offer the transmission component of broadband Internet access service as a common carrier service absent the *Computer Inquiry* requirements.[269] Other parties have indicated they would avail themselves of the

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[264] *See, e.g.*, Alcatel Comments at 10; SBC Reply (attaching memorandum of understanding between SBC and USIIA, dated May 2, 2002); *see also* BellSouth Comments at 20-22; HTBC Reply at 6-7.

[265] For example, certain unaffiliated ISP niche-market providers develop service applications tailored to particular customer market segments (*e.g.*, health care providers, the real estate industry, and corporate telecommuters) providing features such as enhanced security that can only occur on the ISP side of the Internet. We expect that non-common carrier arrangements will encourage the development of greater niche-market services as ISPs negotiate customized arrangements that pair their specialized niche offerings with the BOCs' transmission capabilities.

[266] *See, e.g.*, Verizon May 20, 2003 *Ex Parte* Letter, Attach. at 17; Verizon Nov. 25, 2002 *Ex Parte* Letter, Attach. at 5.

[267] Verizon May 20, 2003 *Ex Parte* Letter, Attach. at 17; *see also* BellSouth Apr. 2, 2003 *Ex Parte* Letter, Attach. at 3.

[268] *See, e.g.*, *Cable Modem Declaratory Ruling*, 17 FCC Rcd 4828-29, paras 52-53 (discussing various types of non-common carriage arrangements between cable modem broadband providers and unaffiliated ISPs); *see also* Verizon June 26, 2003 *Ex Parte* Letter at 4.

[269] *See, e.g.*, Letter from Richard A. Askoff, Executive Director, Regulatory and Government Relations, NECA, Dan Mitchell, Vice President, Legal and Industry, NTCA, Stuart Polikoff, Director of Government Relations, OPASTCO, David W. Zesiger, Executive Director, ITTA, James W. Olson, Vice President, Law & General Counsel, USTA, & Derrick Owens, Director of Government Affairs, Western Telecommunications Alliance, to Marlene H. Dortch, Secretary, FCC, CC Docket No. 02-33, Attach. at 1-2 (filed July 22, 2005) (NECA July 22, (continued . . .)

opportunity to offer certain types of broadband Internet access transmission on a common carrier basis and other types of broadband Internet access transmission on a non-common carrier basis.[270] Our primary goal in this proceeding is to facilitate broadband deployment in the manner that best promotes wireline broadband investment and innovation, and maximizes the incentives of all providers to deploy broadband. We find that we can best further this goal by providing all wireline broadband providers the flexibility to offer these services in the manner that makes the most sense as a business matter and best enables them to respond to the needs of consumers in their respective service areas.

90. We therefore conclude that providers of wireline broadband Internet access service that offer that transmission as a telecommunications service after the effective date of this Order may do so on a permissive detariffing basis.[271] Such providers thus may, in lieu of filing tariffs with the Commission setting forth the rates, terms, and conditions under which they will provide broadband Internet access transmission service, include those rates, terms, and conditions in generally available offerings posted on their websites.[272] Each such provider electing not to tariff the broadband Internet access transmission that it offers as a telecommunications service also must make physical copies of its offering reflecting the rates, terms and conditions available for public inspection at a minimum of one place of business.

91. While we do not believe that we need to perform a forbearance analysis under section 10 of the Act to allow permissive detariffing,[273] we find that each of the three forbearance criteria is nonetheless met. Specifically, the reasons that persuade us not to require that the transmission component of wireline broadband Internet access service be offered as a telecommunications service under Title II also persuade

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2005 *Ex Parte* Letter); NTCA Mar. 7, 2003 *Ex Parte* Letter at 2. These associations, which represent rural incumbent LECs, indicate that their members may choose to offer some wireline broadband transmission on a common carrier basis even if we eliminate the *Computer Inquiry* requirements. These associations also explain that their members' progress in deploying broadband in rural areas to date has been attributable to an ability to lower the costs of deployment through participation in the National Exchange Carrier Association, Inc. (NECA) pooling arrangements or other tariffed rate structures that reflect rate of return regulation. *See, e.g.*, NCTA Mar. 7, 2003 *Ex Parte* Letter at 2. To participate in a NECA pool, a carrier must offer an interstate telecommunications service pursuant to a federally filed, NECA tariff that contains the same rates, terms, and conditions of service for all participating carriers. The rates for these services are based on the pooled or averaged costs of each participating carrier. Without the ability to continue tariffing broadband transmission services, rural incumbent LECs explain that they would be unable to afford the investment necessary to deploy facilities necessary to provide broadband Internet access services.

[270] For example, Qwest has indicated it may continue offering a common carrier DSL transmission service to end users (*i.e.*, its current retail "DSL+" transmission service), while entering into individually tailored arrangements with ISPs for other types of broadband transmission. *See* Qwest May 23, 2003 *Ex Parte* Letter, Attach. at 3-5 (describing Qwest's "DSL+" access offering); *see also infra* para. 95 (specifying that a facilities-based wireline broadband Internet access provider may not simultaneously offer the same type of broadband Internet access transmission on both a common carrier and a non-common carrier basis).

[271] *See infra* paras. 98-101 (explaining the one-year transition and granting blanket certification to discontinue the provision of common carrier broadband Internet access transmission services to existing customers).

[272] Carriers electing to offer new transmission services on a permissive detariffing basis must comply with section 63.71 if they later decide to cease offering such service on a common carrier basis. By contrast, carriers electing permissive detariffing for existing transmission services during the transition period are covered by our blanket certification to discontinue the provision of those existing common carrier broadband Internet access transmission services. *See infra* para. 101.

[273] 47 U.S.C. § 160.

us that application of the tariffing provisions in Title II is "not necessary to ensure that the charges, practices, classifications, or regulations by, for, or in connection with that telecommunications carrier or telecommunications service are just and reasonable and are not unjustly or unreasonably discriminatory" within the meaning of section 10(a)(1).[274] In particular, competition from other broadband Internet access service providers, particularly cable modem service providers, will pressure wireline carriers that choose to provide broadband Internet access transmission as a common carrier service to offer their customers rates, terms, and conditions that are just, reasonable, and not unreasonably discriminatory. These carriers, like wireline carriers that offer broadband Internet access transmission on a non-common carrier basis, will have business incentives to attract both end user and ISP customers to their networks in order to spread network costs over as much traffic and as many customers as possible.[275] These incentives, in combination with the requirements that the carrier publish and make generally available any rates, terms, and conditions for broadband Internet access transmission offered on a common carrier basis,[276] should provide protection against unjust, unreasonable, and unjustly or unreasonably discriminatory rates, terms, and conditions comparable to that available under a tariffing regime.

92. The need to attract end user and ISP customers also makes clear that tariffing "is not necessary for the protection of consumers" within the meaning of section 10(a)(2).[277] On the contrary, permissive detariffing will enable broadband Internet access service providers to respond to changing consumer demands more quickly than would be possible under a tariffing regime. Thus, in comparison to a mandatory tariffing regime, permissive detariffing will benefit consumers by making it more likely that they will be offered innovative service arrangements responding to their changing needs.

93. Finally, the public interest considerations that persuade us not to mandate a telecommunications service offering in the first place also persuade us that a permissive tariffing regime for voluntary broadband Internet access telecommunications service offerings "is consistent with the public interest" within the meaning of section 10(a)(3).[278] In particular, we find that mandatory tariffing of these voluntary offerings would unnecessarily constrain how wireline carriers may offer broadband Internet access transmission as a telecommunications service. We also find that by removing this unnecessary constraint, permissively detariffing these telecommunications service offerings will promote competitive market conditions. Since we find that each of the statutory forbearance criteria is met, we forbear from application of these tariffing provisions in Title II to voluntary offerings of broadband Internet access transmission as a telecommunications service.[279]

94. Consequently, to enable facilities-based wireline Internet access providers to maximize their ability to deploy broadband Internet access services and facilities in competition with other platform providers, under a regulatory framework that provides all market participants with the flexibility to determine how best to structure their business operations, facilities-based carriers are able to choose whether to offer wireline broadband Internet access transmission as non-common carriage or common carriage. In addition, to the extent they choose to offer that transmission as common carriage, they may do so either under tariff or on a non-tariffed basis. The Commission, on numerous occasions, has

[274] 47 U.S.C. § 160(a)(1).

[275] *See supra* Part V.B.2.d.

[276] *See supra* para. 90.

[277] 47 U.S.C. § 160(a)(2).

[278] 47 U.S.C. § 160(a)(3).

[279] 47 U.S.C. §§ 203-05.

determined that a particular service can be offered on a non-common carrier or common carrier basis at the service provider's option.[280] Similarly, here, we conclude that it is appropriate to provide facilities-based wireline broadband Internet access service providers with freedom to determine how to provide the broadband transmission capabilities of such services.[281]

95. In order to ensure that this flexible approach is consistent with statutory requirements, efficient, and administrable, we specify that a facilities-based wireline broadband Internet access provider may not simultaneously offer the same type of broadband Internet access transmission on both a common carrier and non-common carrier basis. It may, however, choose to make available one type of broadband Internet access transmission on a common carrier basis and *another type of such transmission* on a non-common carrier basis. Of course, any transmission offering that a facilities-based wireline broadband Internet access provider makes available on a tariffed common carrier basis will be subject to the terms contained in its tariff and, consistent with Title II of the Act, the provider may charge customers for that service only at the rates contained in the tariff.[282]

[280] In several prior instances, the Commission has permitted carriers to decide how to offer a service (*i.e.*, as non-common or common carriage). *See, e.g.*, 47 C.F.R. §§ 27.10 (designated wireless communication services), 90.1309 (wireless broadband services); 101.533 (24 GHz fixed microwave services); 101.1017 (local multipoint distribution service). In an order concerning multichannel video and data distribution service, for example, the Commission found that "the option of choosing either common carrier and/or non-common carrier status will provide maximum flexibility and restrict unnecessary regulatory burden for this service." *See Amendment of Parts 2 and 25 of the Commission's Rules to Permit Operation of NGSO FSS Systems Co-Frequency with GSO and Terrestrial Systems in the Ku Band Frequency Range*, ET Docket No. 98-206, RM-9147, RM-9245, Memorandum Opinion and Order and Second Report and Order, 17 FCC Rcd 9614, 9676, para. 157 (2002). Similarly, with respect to wireless carriers, the Commission stated that it will "allow the service offering selected by a [wireless communications service] licensee to determine its regulatory status." *See Wireless Operations in the 3650-3700 MHZ Band*, ET Docket No. 04-151; *Rules for Wireless Broadband Services in the 3650-3700 MHZ Band*, ET Docket No. 05-96; *Additional Spectrum for Unlicensed Devices Below 900 MHZ and in the 3 GHZ Band*, ET Docket No. 02-380; *Amendment of the Commission's Rules with Regard to the 3650-3700 MHZ Government Transfer Band*, ET Docket No. 98-237, Report and Order and Memorandum Opinion and Order, 20 FCC Rcd 6502, paras. 35-36 (2005) (allowing providers to offer wireless broadband services on a common carrier or non-common carrier basis because such an approach will provide them with the greatest flexibility to use the spectrum for service applications that are best suited for their needs, and encourage multiple entrants and stimulate expansion of wireless broadband services); *Amendment of the Commission Rules to Establish Part 27, the Wireless Communications Service ("WCS")*, GN Docket No. 96-228, Report and Order, 12 FCC Rcd 10785, 10847-48, paras, 120 & 122 (1997); *see also Amendment to the Commission's Regulatory Policies Governing Domestic Fixed Satellites and Separate International Systems*, IB Docket No. 95-41, Report and Order, 11 FCC Rcd 2429, 2436, paras. 45-50 (1996) (giving fixed satellite service operators the choice of operating as common carriers or non-common carriers, and allowing the opportunity to elect their regulatory classifications in their applications). In this latter order, the Commission modified its policy set forth in the *Transponder Sales Order* by concluding that market forces had eliminated any need to require domestic satellite licensees to provide capacity on a common carrier basis. *Id.* at 2436, paras. 45-46 & 49 (citing *Transponder Sales Order*, 90 FCC 2d at 1252).

[281] *See infra* paras. 87-88.

[282] *See Orloff v. FCC*, 352 F3d 415, 418 (D.C. Cir. 2003) (*citing MCI Telecom. Corp. v. AT&T*, 512 U.S. 218, 220 (1994)).

c) Other Proposed Alternative Regulations for Wireline Broadband Internet Access Services

96. Some commenters request that we impose certain content-related requirements on wireline broadband Internet access service providers that would prohibit them from blocking or otherwise denying access to any lawful Internet content, applications, or services a consumer wishes to access.[283] While we agree that actively interfering with consumer access to any lawful Internet information, products, or services would be inconsistent with the statutory goals of encouraging broadband deployment and preserving and promoting the open and interconnected nature of the public Internet,[284] we do not find sufficient evidence in the record before us that such interference by facilities-based wireline broadband Internet access service providers or others is currently occurring. Nonetheless, we articulate principles recognizing the importance of consumer choice and competition in regard to accessing and using the Internet: the *Internet Policy Statement* that we adopt today adopts such principles.[285] We intend to incorporate these principles into our ongoing policymaking activities.[286] Should we see evidence that providers of telecommunications for Internet access or IP-enabled services are violating these principles, we will not hesitate to take action to address that conduct.[287]

97. Finally, as noted above, some commenters, in acknowledging that the current *Computer Inquiry* regime is outdated, propose more streamlined regulatory requirements for wireline broadband Internet access service.[288] They seek to retain the core Title II principle underlying the *Computer Inquiry* obligations (*i.e.*, the requirement to separate out and offer any broadband Internet access transmission capabilities and services on a nondiscriminatory basis to *all* ISPs).[289] As the record demonstrates,

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[283] *See, e.g.*, Letter from Gerard J. Waldron, Coalition of Broadband Users and Innovators, to Marlene H. Dortch, Secretary, FCC, CC Docket No. 02-33, at 1-2 (filed Aug. 27, 2003); Letter from Amy L. Levine, Counsel to Amazon.com, Covington & Burling, to Marlene H. Dortch, Secretary, FCC, CC Docket No. 02-33, at 1-2 (filed May 21, 2003).

[284] *See Appropriate Framework for Broadband Access to the Internet over Wireline Facilities*, CC Docket No. 02-33, Policy Statement, FCC 05-151 (rel. Sept. 23, 2005) (*Internet Policy Statement*).

[285] *Id.* at para. 5.

[286] *Id.* at para. 6.

[287] Federal courts have long recognized the Commission's authority to promulgate regulations to effectuate the goals and accompanying provisions of the Act in the absence of explicit regulatory authority, if the regulations are reasonably ancillary to the effective performance of the Commission's various responsibilities. *See United States v. Southwestern Cable Co.*, 392 U.S. 157, 178 (1968) (*Southwestern Cable*); *see also FCC v. Midwest Video Corp.*, 440 U.S. 689 (1979) (*Midwest Video II*); *United States v. Midwest Video Corp.*, 406 U.S. 649 (1972) (*Midwest Video I*); *Promotion of Competitive Networks in Local Telecommunications Markets, Wireless Commun. Ass'n Int'l, Inc., Petition to Amend Section 1.4000 of the Commission's Rules*, WT Docket No. 99-217, First Report and Order and Further Notice of Proposed Rulemaking, 15 FCC Rcd 22983, 23028-29, para. 101 & n.261 (2000) (*Competitive Networks*). In this regard, we note that the Enforcement Bureau recently entered into a consent decree to resolve an investigation with respect to the blocking of ports used for VoIP. *See Madison River LLC and Affiliated Companies*, File No. EB-05-IH-0110, Order, 20 FCC Rcd 4295 (Enf. Bur. 2005) (adopting a consent decree terminating an investigation into Madison River's compliance with section 201(b) regarding the unlawful blocking of ports used for VoIP applications).

[288] *See supra* para. 42.

[289] *Id.* The *Earthlink et al. Streamlining Proposal* would eliminate CEI's nine parameters and procedural requirements and ONA's unbundling obligations, reporting requirements, and BSE and BSA tariffing requirements. The underlying nondiscriminatory access obligations would be retained such that BOCs would be obligated to (continued . . .)

however, the inability to customize broadband service offerings inherent in the nondiscriminatory access requirement impedes deployment of innovative wireline broadband services taking into account technological advances and consumer demand.[290] Thus, continuing to impose such requirements would only perpetuate wireline broadband Internet access providers' inability to make better use of the latest integrated broadband equipment and would deprive consumers of more efficient and innovative enhanced services.[291] Similarly, a continued obligation to provide any new broadband transmission capability to all ISPs indiscriminately, and provide advance notice thereof, would reduce incentives to develop innovative wireline broadband capabilities and places wireline broadband at a substantial competitive disadvantage *vis-à-vis* cable modem and other broadband Internet access service providers.[292] Thus, we reject these proposals.

2. Current Title II Unbundled Wireline Broadband Internet Access Transmission Services Must Remain Available During a One-Year Transition Period

98. Although we determine above that immediate relief for wireline broadband Internet access transmission providers is warranted, we are nonetheless sensitive to the fact that the Commission's previous regulatory regime for these services has created reasonable reliance and expectation by unaffiliated ISPs on the availability of currently tariffed, broadband Internet access transmission offerings.[293] In addition, we are concerned that a flash-cut transition may unnecessarily disrupt customers' service due to a provider's inability to adapt its business practices so quickly. We therefore adopt a one-year transition period, which begins on the effective date of this Order, in order to give both ISPs and facilities-based wireline broadband Internet access transmission providers sufficient time to adjust to our new framework.[294] During the transition, facilities-based wireline broadband Internet access

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provide all of their broadband transmission services and capabilities to all ISPs on just, reasonable and nondiscriminatory rates, terms and conditions, including any offerings made pursuant to individual contracts with ISPs, as well as other access-related obligations such as access to electronic OSS, databases and other systems. In addition, BOCs would be required to develop new broadband transmission capabilities upon reasonable request by an ISP within 90 days. This proposal would, however, permit streamlined tariff or web posting requirements for transmission access services, but would still require advance notification of new or changed aspects of their transmission capabilities. *Earthlink et al. Streamlining Proposal, passim.*

[290] *See, e.g.*, Verizon June 26, 2003 *Ex Parte* Letter at 6-7 (noting that these proposed streamlined changes "do nothing to deal with the fundamental problems . . . that Verizon is unable to provide customers specially designed arrangements, specially designed terms and conditions or experimental offerings").

[291] *See id.* at 7; *see also supra* paras. 65-70 (discussing impact of unbundling obligation on ability to implement integrated equipment into offerings).

[292] *See, e.g.*, Verizon June 26, 2003 *Ex Parte* Letter at 6-7; *see also supra* para. 71 (discussing impact of nondiscrimination requirement on ability to respond to individualized requests.)

[293] *See, e.g.*, Big Planet Comments at 15; Covad Reply at 20-21; EarthLink Reply at 17-20, 22; *see also, e.g.*, *CompTel v. FCC*, 117 F.3d 1068 (8th Cir. 1997) (stating that although temporary agency rules are subject to judicial review notwithstanding their transitory nature, substantial deference by courts is accorded to an agency when the issue concerns interim relief); *CompTel v. FCC*, 87 F.3d 522, 531 (D.C. Cir. 1996); *MCI v. FCC*, 750 F.2d 135, 140 (D.C. Cir. 1984). We note, however, that some ISPs have already engaged in contractual arrangements with facilities-based wireline broadband providers that enable them to obtain not only broadband transmission but also other enhanced services associated therewith. *See supra* para. 74.

[294] *See, e.g.*, SBC and USIIA May 3, 2002 *Ex Parte* Letter, Attach. at 2 (SBC and USIIA memorandum of understanding providing that SBC is willing to grandfather existing agreements with ISPs for their remaining term or one year, at the choice of the ISP); *see also* HTBC Reply at 7 (proposing a two-year period of non-common (continued . . .)

transmission providers must continue to honor existing transmission arrangements with their current ISP or other customers, but they are not required to offer such arrangements to new customers or to existing customers at new locations. If these arrangements are provided pursuant to tariffs currently on file with the Commission, wireline broadband Internet access transmission providers may retain these tariffs during the one-year period, or, alternatively, they may cancel the tariffs pursuant to normal tariff cancellation procedures provided they honor existing wireline broadband Internet access transmission arrangements in another manner. To the extent facilities-based wireline broadband Internet access transmission providers have entered into any other common carrier transmission arrangements with ISP customers that are not subject to tariffing,[295] these arrangements must also be continued during the one-year transition unless, of course, they would otherwise expire during the transition period pursuant to their pre-existing terms. Upon the effective date of this Order, facilities-based wireline broadband Internet access providers, including the BOCs and their affiliates, are no longer required to continue taking the existing common carrier transmission arrangements that they provide to ISPs as an input to their self-provided wireline broadband Internet access service. To the extent facilities-based carriers offer new wireline broadband Internet access transmission arrangements after the effective date of this Order or provide such service to new customers, these arrangements may be made available on a common carrier basis or a non-common carrier basis as set forth above.[296]

99. This one-year period will allow ISPs to continue operating under their current arrangements while they negotiate non-common carrier agreements with providers of wireline broadband Internet access transmission. Based on the assurances made by facilities-based wireline broadband Internet access providers and their stated desire to ensure that their platform is competitive with other broadband platforms, we strongly encourage the parties to work together to develop individual contracts that are mutually beneficial to each party.[297] In the meantime, the ability to continue operating under existing

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carriage coupled with, *inter alia*, the requirement that incumbent LECs honor their existing transmission arrangements with unaffiliated ISPs).

[295] *See, e.g.*, *SBC Advanced Services Forbearance Order*, 17 FCC Rcd at 27008-16, paras. 13-28 (allowing SBC to provide advanced services on a detariffed basis to the extent SBC operates in accordance with a specified separate affiliate structure and other safeguards and commitments). SBC may already offer the transmission component of wireline broadband Internet access service on a detariffed basis. Any common carrier broadband Internet access transmission arrangements that an SBC affiliate has with an existing customer pursuant to the *SBC Advanced Services Forbearance Order* also are subject to this one-year transition.

[296] As defined in section 61.3(x) of our rules, a "new service offering" is one that "provides for a class or sub-class of service not previously offered by the carrier involved and that enlarges the range of service options available to ratepayers." 47 C.F.R. § 61.3(x). Consistent with this rule, we determine that an existing offering, for purposes of the transition, is one that was available, by tariff or by other similar means, to unaffiliated ISPs and other customers as of the date this Order is released. We note that we expect our actions in this Order to increase wireline providers' incentive and ability to deploy new broadband Internet access services. *See infra* Part V.B.2.c.

[297] *See supra* paras. 74-75; Letter from L. Barbee Ponder IV, Senior Regulatory Counsel-D.C., BellSouth, to Marlene H. Dortch, Secretary, FCC, WC Docket No. 02-33, at 3 (filed Apr. 20, 2004); SBC July 31, 2003 *Ex Parte* Letter at 7 ("The reason SBC has made an express commitment to continue offering independent ISPs commercial access arrangements in a deregulated environment is that SBC benefits from having independent ISPs as additional sales channels for its broadband services."); Verizon June 26, 2003 *Ex Parte* Letter at 3 ("Verizon recognizes the substantial value of providing wholesale broadband offerings to ISPs and intends to provide unaffiliated ISPs private carriage access to Verizon's network."); SBC and USIIA May 3, 2002 *Ex Parte* Letter at 1 & Attach. at 2 (SBC and USIIA memorandum of understanding dated May 2, 2003); *see also* Qwest May 23, 2003 *Ex Parte* Letter at 1, Attach. at 2 (indicating that consumers prefer having a choice of ISPs).

arrangements for an additional one-year period during new contract negotiations will avoid unnecessary customer disruption. Such a transition period is consistent with previous decisions in which the Commission modified the regulatory framework for certain services subject to a transition.[298] Indeed, several parties, including most BOCs, that urge elimination of the *Computer Inquiry* rules support a transition.[299] Here, as in these other proceedings, a transition period will allow sufficient time for all affected parties to adjust to the new framework without unnecessary disruption and without unduly extending the old framework.

3. Discontinuation of Service

100. Section 214(a) of the Act requires that, prior to discontinuing any interstate or foreign telecommunications service, a telecommunications carrier obtain from the Commission "a certification that neither the present nor future public convenience or necessity will be adversely affected thereby."[300] The reasons that persuade us not to require that the transmission component of wireline broadband Internet access service continue to be offered as a telecommunications service under Title II also persuade us that discontinuance of the provision of common carrier broadband Internet access transmission services to existing customers would not adversely affect the present or future public convenience or necessity. Instead, competition from other broadband Internet access service providers and the wireline providers' business incentives to attract ISP customers should ensure the continued availability of this transmission component, under reasonable rates, terms, and conditions.[301] Accordingly, we find that the circumstances here meet our test for determining whether a telecommunications service may be discontinued under section 214(a).[302]

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[298] *See, e.g.*, *Computer II Final Decision*, 77 FCC 2d at 488, para. 266 (establishing a two-year transition period for carriers to restructure manner in which they were providing existing services affected by the new resale structure); *see also Triennial Review Order*, 18 FCC Rcd at 17137-41, paras. 264-69 (finding that a transitional mechanism is an effective means to implement a new regulatory regime and that section 201(b) gives the Commission broad authority to adopt a three-year transition for line sharing); *id.* at 17312-13, para. 525, 528-32 (adopting a transition plan to migrate the existing unbundled local circuit switching customer base to alternative service arrangements when unbundled local circuit switching was no longer available); *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996; Intercarrier Compensation for ISP-Bound Traffic*, 16 FCC Rcd 9151, 9186-87, paras. 77-78 (2001) (establishing a three-year interim intercarrier compensation regime for ISP-bound traffic to avoid a "flash cut" to a new compensation regime).

[299] *See, e.g.*, HTBC Reply at 7-8; *see also* Letter from Robert T. Blau, Vice President-Executive and Federal Regulatory Affairs, BellSouth, to Marlene H. Dortch, Secretary, FCC, CC Docket No. 02-33, at 1-2 (filed Sept. 29, 2003); Letter from W. Scott Randolph, Director-Regulatory Affairs, Verizon, to Marlene H. Dortch, Secretary, FCC, CC Docket No. 02-33, Attach. at 1-2 (filed Sept. 29, 2003); Letter from James C. Smith, Senior Vice President, SBC, to Michael K. Powell, Chairman, FCC, CC Docket No. 02-33, at 1-2 (filed Sept. 29, 2003); Letter from Gary Lytle, Vice President-Federal Relations, Qwest, to Marlene H. Dortch, Secretary, FCC, CC Docket No. 02-33, at 1-3 (filed Sept. 30, 2003) (all supporting the HTBC proposed two-year transition plan).

[300] 47 U.S.C. § 214(a).

[301] *See supra* para. 91 (finding that mandatory tariffing of broadband Internet access telecommunications service offerings is not necessary to ensure that the rates, terms, and conditions for those offerings are just, reasonable, and not unjustly or unreasonably discriminatory).

[302] In evaluating discontinuance requests, the Commission considers a number of factors including: (1) the financial impact on the common carrier of continuing to provide the service; (2) the need for the service in general; (3) the need for the particular facilities in question; (4) the existence, availability, and adequacy of alternatives; and (5) increased charges for alternative services, although this factor may be outweighed by other considerations. *See* (continued . . .)

101. Therefore, pursuant to our rule for discontinuing domestic telecommunications services,[303] we grant facilities-based, wireline broadband Internet access transmission providers blanket certification to discontinue providing existing customers the common carrier broadband Internet access transmission services that are the subject of this Order,[304] subject to the following conditions.[305] First, to protect these customers against abrupt termination of service, we require that a carrier discontinuing common carrier broadband Internet access transmission service shall provide affected customers with advance notice of the discontinuance. Specifically, the carrier shall provide all affected customers with its name and address, the date of the planned discontinuance, the geographic areas where service will be discontinued, and a brief description of the service to be discontinued.[306] In addition, on or after the date it provides the advance notice to its customers and at least 30 days prior to the date on which service will be discontinued, the carrier must file with the Commission notice of its intent to discontinue service.[307] Carriers are not required to make any showing in this notice and do not need to obtain any additional permission from the Commission to cease service.[308] Upon notification of discontinuance, the Commission reserves the right to take actions where appropriate under the circumstances to protect the public interest.[309]

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Verizon Telephone Companies, Section 63.71 Application to Discontinue Expanded Interconnection Service Through Physical Collocation, WC Docket No. 02-237, Order, 18 FCC Rcd 22737, 22742, para. 8 (2003); *Application for Authority Pursuant to Section 214 of the Communications Act of 1934 to Cease Providing Dark Fiber Service*, File Nos. W-P-C-6670 and W-P-D-364, 8 FCC Rcd 2589, 2600, para. 54 (1993) (*Dark Fiber Order*), *remanded on other grounds*, *Southwestern Bell v. FCC*, 19 F.3d 1475 (D.C. Cir. 1994). Here, requiring that wireline carriers continue to provide existing customers with the transmission component of wireline broadband Internet access service as a telecommunications service would harm the public interest by impeding the deployment of innovative broadband infrastructure and services responsive to consumer demands. *See supra* paras. 79-80.

[303] 47 C.F.R. § 63.71(c).

[304] *See supra* para. 9 (describing the scope of this Order).

[305] This discontinuance could occur at the end of the transition period or, provided that all existing customers of the grandfathered wireline broadband transmission service at issue have transitioned to some other type of service arrangement, sometime during the transition period. *See supra* para. 98.

[306] *See* 47 C.F.R. § 63.71(a)(1)-(a)(4). While we note that the affected customers typically will be ISPs that use the common carrier broadband Internet access transmission service as an input for the broadband Internet access services they offer end users, carriers may have other customers that also use these existing services. *See, e.g.*, *supra* note 270 (describing Qwest's "DSL+" service).

[307] *See* 47 C.F.R. § 63.71(b). The carrier may provide this notice to the Commission at any time after the effective date of this Order. This notice shall be filed in CC Docket No. 02-33 and shall be captioned, "Notice of Discontinuance of Common Carrier Broadband Internet Access Transmission Service." The notice shall include, in addition to the information set forth in the notice provided affected customers, a brief description of the dates and methods of notice to those customers. *See* 47 C.F.R. § 63.71(b). The carrier shall submit copies of this notice to the state public utility commission and the Governor of each State in which service is to be discontinued as well as to the Special Assistant for Telecommunications at the Department of Defense. *See* 47 C.F.R. § 63.71(a).

[308] This Order provides carriers all necessary authority to cease providing to existing customers the common carrier broadband Internet access transmission services that are the subject of this Order.

[309] In the Notice of Proposed Rulemaking we adopt today, we seek comment on whether we should exercise our Title I authority to impose section 214-type requirements on providers of broadband Internet access service to protect end users from service discontinuance without notice. *See infra* Part VIII.E.

D. Classification of Wireline Broadband Internet Access Transmission Component

102. Above, we affirm that wireline broadband Internet access service is an information service, and decline to continue the reflexive application of the *Computer Inquiry* regime to facilities-based providers of such service. This is not, however, the end of our inquiry. The *Wireline Broadband NPRM* also sought comment on the legal classification of the transmission component underlying facilities-based wireline broadband Internet access service.[310] In contrast to the classification of wireline broadband Internet access service as an information service,[311] there is considerable disagreement in the record as to the appropriate classification of the transmission component of such Internet access service.[312] The legal classification of this transmission component has certain regulatory implications for its provider. Specifically, if the transmission component is a telecommunications service under the Act,[313] providers of that service are subject to common carrier regulation under Title II of the Act in their provision of that service.[314] Conversely, if the transmission component is not a telecommunications service under the Act, providers of that component are not subject to Title II requirements,[315] except to the extent the Commission imposes similar or identical obligations pursuant to its Title I ancillary jurisdiction.[316]

103. We address two circumstances under which the statutory classification of the transmission component arises: the provision of transmission as a wholesale input to ISPs (including affiliates) that provide wireline broadband Internet access service to end users, and the use of transmission as part and parcel of a facilities-based provider's offering of wireline broadband Internet access service using its own transmission facilities to end users. First, we address the wholesale input. Nothing in the Communications Act compels a facilities-based provider to offer the transmission component of wireline broadband Internet access service as a telecommunications service to anyone. Furthermore, consistent with the *NARUC* precedent,[317] the transmission component of wireline broadband Internet access service

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[310] *Wireline Broadband NPRM*, 17 FCC Rcd at 3029, para. 17, & 3033, para. 25.

[311] *See supra* Part IV.

[312] Several parties, including all of the BOCs, argue that wireline broadband Internet access service has a telecommunications component that does not fall under Title II. *See, e.g.*, Qwest Comments at 4; Verizon Comments at 9; NextLevel Reply at 7-10. Allegiance disputes this, arguing that "*self-provisioned* wireline broadband Internet access is a bundled offering of a telecommunications service *and* information service." Allegiance Comments at 12 (citing Joint Explanatory Statement of the Committee of Conference, S. Conf. Rep. No. 230, 104th Cong., 2d Sess. 1 (1996) (*Joint Explanatory Statement*) (emphasis added)).

[313] 47 U.S.C. § 153(46).

[314] We note that the Commission has authority under section 10 of the Act to forbear from applying Title II requirements. *See* 47 U.S.C. § 160; *see also NCTA v. Brand X*, slip op. at 3.

[315] *See NCTA v. Brand X*, slip op. at 3-4.

[316] Indeed, it was precisely the Commission's historic exercise of its Title I ancillary jurisdiction that resulted in the imposition of the *Computer Inquiry* obligations that we eliminate today for wireline broadband Internet access service providers. *See supra* Part V.B; *see also NCTA v. Brand X*, slip op. at 24-25. We further note that the *Computer Inquiry* rules did not require a Title II offering with respect to the end user of the information service for which the transmission is a component; rather, those rules required the offering of a Title II transmission component offering to competing information services providers.

[317] Under the so-called *NARUC I* decision, and other compelling precedent, the Commission and courts perform a two-step analysis to determine whether a communications service offering is subject to Title II. First, the Commission inquires whether there is a legal compulsion to serve the public indifferently. *NARUC I*, 525 F.2d at 642 ("we must inquire, first, whether there will be any legal compulsion . . . to serve [the public] indifferently"). (continued . . .)

is a telecommunications service only if one of two conditions is met: the entity that provides the transmission voluntarily undertakes to provide it as a telecommunications service; or the Commission mandates, in the exercise of our ancillary jurisdiction under Title I, that it be offered as a telecommunications service.[318] As to the first condition, we explain above that carriers may choose to offer this type of transmission as a common carrier service if they wish. In that circumstance, it is of course a telecommunications service. Otherwise, however, is it not, as we would not expect an "indifferent holding out" but a collection of individualized arrangements.[319] As to the second condition, based on the record, we decline to continue our reflexive application of the *Computer Inquiry* requirement, which compelled the offering of a telecommunications service to ISPs.[320] Thus, we affirm that neither the statute nor relevant precedent mandates that broadband transmission be a telecommunications service when provided to an ISP, but the provider may choose to offer it as such.

104. Second, we address the use of the transmission component as part of a facilities-based provider's offering of wireline broadband Internet access service to end users using its own transmission facilities. We conclude, consistent with *Brand X*, that such a transmission component is mere "telecommunications" and not a "telecommunications service."[321] As stated above, the Act defines telecommunications service as "the *offering* of telecommunications for a fee directly *to the public*, or to such classes of users as to be effectively available directly to the public, regardless of the facilities used."[322] Thus, whether a telecommunications service is being provided turns on what the entity is "offering . . . to the public," and customers' understanding of that service.[323] End users subscribing to wireline broadband Internet access service expect to receive (and pay for) a finished, functionally integrated service that provides access to the Internet. End users do not expect to receive (or pay for) two distinct services – both Internet access

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Second, if the Commission finds that neither the statute nor the public interest compel a common carriage offering of the service, the Commission then examines "whether there are reasons implicit in the nature of [the provider's] operations to expect an indifferent holding out to the eligible user public." *NARUC I*, 525 F.2d at 642; *see Vitelco v. FCC*, 198 F.3d at 924 (asking whether the service provider intends to "make capacity available to the public indifferently"). In the communications context, implicit in this prong is the notion that the carrier is providing a service whereby customers may "transmit intelligence of their own design and choosing." *See CCIA v. FCC*, 693 F.2d at 210 (citing *NARUC I*, 525 F.2d at 641 n.58 (quoting *Industrial Radiolocation Service*, 5 FCC 2d 197, 202 (1966))) (internal quotation marks omitted).

[318] *See Southwestern Bell Tel. Co. v. FCC*, 19 F.3d 1475, 1481 (D.C. Cir. 1994) (*Southwestern Bell*); *AT&T-SSI*, 13 FCC Rcd at 21588-89, paras. 8-9; *NORLIGHT Request for Declaratory Ruling*, 2 FCC Rcd 132, 133, para. 14 (1987); *NARUC II*, 533 F.2d at 608-09; *NARUC I*, 525 F.2d at 640. In 1998, the Commission found, and the court agreed, that the enactment of the 1996 Act did not disturb the *NARUC I* decision's common carriage test. *See Vitelco v. FCC*, 198 F.3d at 927 (holding that "the legislative history [of the 1996 Act] . . . can be reasonably construed as manifesting Congress' intention to maintain the public-private dichotomy of *NARUC I*").

[319] *NARUC I*, 525 F.2d at 642.

[320] *See supra* Part V.A.2

[321] *See NCTA v. Brand X*, slip op. at 14-31(affirming as a reasonable construction of the statute the Commission's conclusion that cable modem service does not include a telecommunications service).

[322] 47 U.S.C. § 153(46) (emphasis added).

[323] *See NCTA v. Brand X*, slip op. at 10 (discussing the word "offering" in the statutory definition of "telecommunications service").

service and a distinct *transmission* service, for example.[324] Thus, the transmission capability is part and parcel of, and integral to, the Internet access service capabilities.[325] Accordingly, we conclude that wireline broadband Internet access service does not include the provision of a telecommunications service to the end user irrespective of how the service provider may decide to offer the transmission component to other service providers.

105. In so concluding, we reject arguments that companies using their own facilities to provide wireline broadband Internet access service simultaneously provide a telecommunications service to their end user wireline broadband Internet access customers.[326] The record demonstrates that end users of wireline broadband Internet access service receive and pay for a single, functionally integrated service, not two distinct services.[327] This conclusion also is consistent with certain past Commission pronouncements that the categories of "information service" and "telecommunications service" are mutually exclusive.[328] Moreover, the fact that the Commission has, up to now, required facilities-based providers of wireline broadband Internet access service to separate out a telecommunications transmission service and make that service available *to competitors* on a common carrier basis under the *Computer Inquiry* regime has no bearing on the nature of the service wireline broadband Internet access service providers offer their *end user customers*.[329] We conclude now, based on the record before us, that wireline broadband Internet access service is, as discussed above, a functionally integrated, finished product, rather than both an information service and a telecommunications service.

106. Finally, some parties argue (without clearly distinguishing between the transmission component as a wholesale input and transmission used to provide the information service to the end user) that

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[324] *NCTA v. Brand X*, slip op. at 18 (stating that "[i]t is common usage to describe what a company 'offers' to a consumer as what the consumer perceives to be the integrated finished product, even to the exclusion of discrete components that compose the product").

[325] *NCTA v. Brand X*, slip op. at 18-19 (explaining the integrated nature of the transmission component in cable modem Internet access service); *Cable Modem Declaratory Ruling*, 17 FCC Rcd at 4823, paras. 39-40; SBC Comments at 17.

[326] *See, e.g.*, Allegiance Comments at 8-9 ("[T]hroughout the past 25 years, the Commission has consistently determined that facilities-based providers [of information service] provide two separate services – a telecommunications service and an information service."); *id.* at 10-11 (arguing that Commission has already imposed "two-service treatment for regulatory purposes" on incumbent LEC-provided broadband Internet access); McLeodUSA Comments at 9 ("The [1996 Act] definitions of the terms 'information service,' 'telecommunications service,' and 'telecommunications' were expressly intended to acknowledge the concept from the *Computer Inquiry* cases that *there is always a 'telecommunications service' underlying every 'information service.'*") (emphasis added); *id.* at 11-12 (since certain functions of wireline broadband Internet access service, such as e-mail, file transfer, and instant messaging, provide "raw transmission," that service is a telecommunications service, and therefore "the service offered to customers as 'broadband access' includes both information services and telecommunications services"); US LEC Comments at 2-3; ASCENT Reply at 3-4.

[327] *E.g.*, SBC Comments at 16-17; Qwest Reply at 4-8; Verizon Reply at 6-11.

[328] As explained above, although the Commission has not been entirely consistent on this point, we agree for the wireline broadband Internet access described in this Order with the past Commission pronouncements that the categories of "information service" and "telecommunications service" are mutually exclusive. *See supra* note 32.

[329] *See infra* Part V.A; *see also NCTA v. Brand X*, slip op. at 24-25 (observing that "[i]n the *Computer II* rules, the Commission subjected facilities-based providers to common carrier duties not because of the nature of the 'offering' made by those carriers, but rather because of the concern that local telephone companies would abuse the monopoly power they possessed by virtue of the 'bottleneck' local telephone facilities they owned").

Commission precedent mandates that we classify the transmission underlying wireline broadband Internet access as a telecommunications service.[330] We disagree. As an initial matter, as the Supreme Court held in relation to the transmission underlying cable modem service, "the Commission is free within the limits of reasoned interpretation to change course if it adequately justifies the change."[331] The Court acknowledged the Commission's ability to respond to changed circumstances and market conditions, factors which serve as the basis for the actions we take in this Order.[332] The previous orders upon which commenters rely assumed, correctly in each instance, that the offering of DSL transmission on a common carrier basis was a telecommunications service.[333] These decisions, however, did not address the important threshold public interest issue we address in this Order – whether this broadband transmission component must continue to be offered to competing providers of facilities-based wireline broadband Internet access service on a common carrier basis. And as we explain above, the current record does not support a finding or compulsion that the transmission component of wireline broadband Internet access service is a telecommunications service as to the end user.[334]

107. Now that we have concluded that a common carrier offering is no longer required, and have made the statutory classification findings, we address what impact these actions have on other regulatory obligations.[335]

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[330] *See, e.g.*, AOL Comments at 6-12; Covad Comments at 72-75; Time Warner Comments at 9-16; Vermont Commission Comments at 20-26; Letter from Ruth Milkman, Counsel to MCI, to Michelle Carey, Chief, Competition Policy Division, Wireline Competition Bureau, FCC, CC Docket Nos. 02-33 & 01-337, at 2 (filed June 23, 2003) (MCI June 23, 2003 *Ex Parte* Letter) (citing *Wireline Broadband NPRM*, 17 FCC Rcd at 3040, para. 42).

[331] *See NCTA v. Brand X*, slip op. at 14.

[332] *See id.*, slip op. at 15.

[333] For example, in its *AOL Bulk Services Order*, the Commission stated that although bulk DSL services sold to ISPs are not retail services subject to section 251(c)(4), "these services are telecommunications services. . . ." *Deployment of Wireline Services Offering Advanced Telecommunications Capability*, CC Docket No. 98-147, Second Report and Order, 14 FCC Rcd 19237, 19247, para. 21 (1999) (*AOL Bulk Services Order*). In that order, the Commission devoted its entire analysis to section 251(c)(4) and only in its "Conclusion" did it mention that incumbent LECs must continue to comply with their common carrier obligations. *Id.* Similarly, in its *GTE DSL Order*, the Commission found that GTE's asynchronous DSL (ADSL) service offering was interstate and appropriately tariffed with the Commission. *GTE Telephone Operating Cos. GTOC Tariff No. 1, GTOC Transmittal No. 1148*, 13 FCC Rcd 22466, para. 1 (1998) (*GTE DSL Order*), *recon.*, 17 FCC Rcd 27409 (1999) (*GTE DSL Reconsideration Order*). Again, its analysis concerned another issue – the jurisdiction of GTE's ADSL transmission for purposes of determining whether GTE should file an interstate, as opposed to intrastate, tariff. *Id.* at 22478-79, para. 22 (noting that this transmission "does in fact constitute an interstate telecommunication"). Similarly, in the *CPE/Enhanced Services Bundling Order*, the Commission assumed without analysis that the provision of DSL was a telecommunications service. *CPE/Enhanced Services Bundling Order*, 16 FCC Rcd at 7445-46, para. 46.

[334] To the extent *NARUC I* is relevant to this inquiry, our analysis accords with this precedent. There is no legal compulsion to serve the public indifferently. Nor is there anything implicit in the nature of wireline broadband Internet access service that makes it reasonable to expect that its telecommunications component would be offered to the public indifferently. Consequently, *NARUC I* provides no support for claims that the transmission component of facilities-based wireline broadband Internet access service is, or must be found to be, a telecommunications service.

[335] We find moot Verizon's pending petition for forbearance with regard to broadband services provided via FTTP, as well as its simultaneously filed petition for declaratory ruling or interim waiver with regard to the same services. Conditional Petition of the Verizon Telephone Companies for Forbearance Under 47 U.S.C. § 160(c) with Regard to Broadband Services Provided Via Fiber to the Premises, WC Docket No. 04-242 (filed June 28, 2004) (Verizon (continued . . .)

VI. EFFECT ON EXISTING OBLIGATIONS

108. The *Wireline Broadband NPRM* sought comment on what effect classifying wireline broadband Internet access service as an information service would have on other regulatory obligations. Title II obligations have never generally applied to information services, including Internet access services.[336] Instead, when the Commission has deemed it necessary to impose regulatory requirements on information services, it has done so pursuant to its Title I ancillary jurisdiction. Indeed, as noted above, the Commission imposed the *Computer Inquiry* obligations on facilities-based common carriers pursuant to its Title I ancillary jurisdiction.[337] Similarly, the Commission has exercised its ancillary jurisdiction under Title I to extend accessibility obligations that mirror those under section 255 to certain information services, *i.e.*, voicemail and interactive menu service.[338] The Commission's ancillary jurisdiction under Title I to impose regulatory obligations on broadband Internet access service providers was recently recognized by the Supreme Court.[339]

109. The Commission may exercise its ancillary jurisdiction when Title I of the Act gives the Commission subject matter jurisdiction over the service to be regulated[340] and the assertion of jurisdiction

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FTTP Forbearance Petition); Petition of the Verizon Telephone Companies for Declaratory Ruling or, Alternatively, for Interim Waiver with Regard to Broadband Services Provided Via Fiber to the Premises, WC Docket No. 04-242 (filed June 28, 2004) (Verizon FTTP Petition for Declaratory Ruling or Interim Waiver). In these two petitions, Verizon sought to ensure that it could "offer those of its broadband services that are provided via [FTTP] in the same manner that cable companies offer broadband services via cable modem." Verizon FTTP Forbearance Petition at 1. Verizon emphasized that the relief sought in its petitions would be temporary, necessary only "[u]ntil the Commission has determined an appropriate regulatory framework for broadband generally." *Id.*, Attach. at 12. Because this Order establishes a regulatory framework for wireline broadband Internet access service and eliminates disparities between the regulatory treatment of that broadband and cable modem service, Verizon's petitions are moot.

[336] *See Report to Congress*, 13 FCC Rcd at 11523-24, para. 44 (noting legislative history demonstrating a Congressional intent that information service providers not be deemed providers of telecommunications service); *Computer II Final Decision*, 77 FCC 2d at 428-35, paras. 114-132 (enhanced services are not subject to Title II obligations); *see also Cable Modem Declaratory Ruling*, 17 FCC Rcd at 4823, paras. 39-40.

[337] *See supra* para. 24.

[338] *See infra* para. 121.

[339] *See NCTA v. Brand X*, slip op. at 25 (stating that after designating cable modem service an information service, "the Commission remains free to impose special regulatory duties on facilities-based ISPs under its Title I ancillary jurisdiction").

[340] *See Southwestern Cable*, 392 U.S. at 177-78. *Southwestern Cable*, the lead case on the ancillary jurisdiction doctrine, upheld certain regulations applied to cable television systems at a time before the Commission had an express congressional grant of regulatory authority over that medium. *See id.* at 170-71. In *Midwest Video I*, the Supreme Court expanded upon its holding in *Southwestern Cable*. The plurality stated that "the critical question in this case is whether the Commission has reasonably determined that its origination rule will 'further the achievement of long-established regulatory goals in the field of television broadcasting by increasing the number of outlets for community self-expression and augmenting the public's choice of programs and types of services . . . .'" *Midwest Video I*, 406 U.S. at 667-68 (quoting *Amendment of Part 74, Subpart K, of the Commission's Rules and Regulations Relative to Community Antenna Television Systems; and Inquiry into the Development of Communications Technology and Services to Formulate Regulatory Policy and Rulemaking and/or Legislative Proposals*, Docket No. 18397, First Report and Order, 20 FCC 2d 201, 202 (1969) (*CATV First Report and Order*)). The Court later restricted the scope of *Midwest Video I* by finding that if the basis for jurisdiction over cable is that the authority is (continued . . .)

is "reasonably ancillary to the effective performance of [its] various responsibilities."[341] We recognize that both of the predicates for ancillary jurisdiction are likely satisfied for any consumer protection, network reliability, or national security obligation that we may subsequently decide to impose on wireline broadband Internet access service providers.[342]

110. First, we find that we have subject matter jurisdiction over providers of broadband Internet access services. These services are unquestionably "wire communication" as defined in section 3(52)[343] because they transmit signals by wire or cable, or they are "radio communication" as defined in section 3(33) if they transmit signals by radio.[344] The Act gives the Commission subject matter jurisdiction over "all interstate and foreign communications by wire or radio . . . and . . . all persons engaged within the United States in such communication" in section 2(a).[345] Second, with regard to consumer protection obligations, we find that regulations would be "reasonably ancillary" to the Commission's responsibility to implement sections 222 (customer privacy), 255 (disability access), and 258 (slamming and truth-in-billing), among other provisions, of the Act.[346] Similarly, network reliability, emergency preparedness, national security, and law enforcement requirements would each be reasonably ancillary to the Commission's obligation to make available "a rapid, *efficient*, Nation-wide, and world-wide wire and radio communication service . . . for the purpose of the *national defense* [and] for the purpose of *promoting safety of life and property* through the use of wire and radio communication."[347]

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ancillary to the regulation of broadcasting, the cable regulation cannot be antithetical to a basic regulatory parameter established for broadcast. *See Midwest Video II*, 440 U.S. at 700; *see also American Library Ass'n v. FCC*, 406 F.3d 689 (D.C. Cir. 2005) (holding that the Commission lacked authority to impose broadcast content redistribution rules on equipment manufacturers using ancillary jurisdiction because the equipment at issue was not subject to the Commission's subject matter jurisdiction over wire and radio communications).

[341] *Southwestern Cable*, 392 U.S. at 178; *see also VoIP E911 Order*, at paras. 26-35.

[342] To this end, we concurrently adopt a Notice of Proposed Rulemaking (Notice) to determine what specific duties are necessary for broadband Internet access service providers, regardless of the technology they employ, to ensure the Commission's ability to fulfill its statutory obligations in the important area of consumer protection. *See infra* Part VIII.

[343] Section 3(52) of the Act defines the term "wire communication" or "communication by wire" to mean "the transmission of writing, signs, signals, pictures, and sounds of all kinds by aid of wire, cable, or other like connection between the points of origin and reception of such transmission, including all instrumentalities, facilities, apparatus, and services (among other things, the receipt, forwarding, and delivery of communications) incidental to such transmission." 47 U.S.C. § 153(52). As the Commission recently found with respect to VoIP services, irrespective of whether such services are telecommunications services or information services, based on sections 1 and 2(a) of the Act, 47 U.S.C. §§ 151, 152(a), they are covered by the Commission's general jurisdictional grant. *See VoIP E911 Order* at paras. 26-35.

[344] 47 U.S.C. § 153(33) (defining "radio communication" as "the transmission by radio of writing, signs, signals, pictures, and sounds of all kinds, including all instrumentalities, facilities, apparatus, and services (among other things, the receipt, forwarding, and delivery of communications) incidental to such transmission").

[345] 47 U.S.C. § 152(a).

[346] As we have explained, the Commission's truth-in-billing rules derive from section 258 as well as section 201(b). *See infra* paras. 152-53.

[347] 47 U.S.C. § 151 (emphasis added); *see also VoIP E911 Order* at para. 29.

111. In the attached *Notice of Proposed Rulemaking* (*Notice*), we specifically seek comment on what obligations we should impose pursuant to our Title I authority to further consumer protection in the broadband age. We emphasize that we will not hesitate to adopt any non-economic regulatory obligations that are necessary to ensure consumer protection and network security and reliability in this dynamically changing broadband era.

A. Federal Universal Service Contribution Obligations

112. In section 254 of the Act, Congress codified our Federal universal service programs to ensure affordable telecommunications services to all Americans, including consumers living in high-cost areas, low income consumers, eligible schools and libraries, and rural health care providers. In this section, we address the universal service contribution obligations of providers of wireline broadband Internet access service. Section 254(d) of the Act states that "[e]very telecommunications carrier that provides interstate telecommunications services shall contribute" to universal service.[348] In the *Universal Service Order*, the Commission interpreted the first sentence of section 254(d) as imposing a mandatory contribution requirement on all telecommunications carriers that provide interstate telecommunications services.[349] In the *Wireline Broadband NPRM*, the Commission recognized that, under its existing rules and policies, telecommunications carriers providing telecommunications services, including broadband transmission services, are subject to universal service contribution requirements.[350] Under current law, the Commission has permissive authority to require "[a]ny other provider of interstate telecommunications to contribute to universal service if required by the public interest."[351] The question of "whether and under what circumstances the public interest would require us to exercise our permissive authority over wireline broadband Internet access providers" is pending before the Commission in this docket.[352] In addition, the question of "whether other facilities-based providers of broadband Internet access services may, as a legal matter, or should as a policy matter, be required to contribute" is also pending before us.[353] We expect to address these issues in a comprehensive fashion either in this docket or in the *Universal Service Contribution Methodology* proceeding now pending in Docket No. 96-45.[354]

113. Congress required in section 254 of the Act that "[t]here should be specific, predictable, and sufficient Federal and State mechanisms to preserve and advance universal service."[355] Accordingly, we conclude that facilities-based providers of wireline broadband Internet access services must continue to contribute to existing universal service support mechanisms based on the current level of reported revenue for the transmission component of their wireline broadband Internet access services for a 270-day period

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[348] 47 U.S.C. § 254(d).

[349] *Federal-State Joint Board on Universal Service*, CC Docket No. 96-45, Report and Order, 12 FCC Rcd 8776, 9173, para. 777 (1997) (*Universal Service Order*) (subsequent history omitted); *see also* 47 C.F.R. § 54.706.

[350] *Wireline Broadband NPRM*, 17 FCC Rcd at 3051, para. 72; *see also CPE/Enhanced Services Bundling Order*, 16 FCC Rcd at 7446-47, para. 48.

[351] 47 U.S.C. § 254(d).

[352] *Wireline Broadband NPRM*, 17 FCC Rcd at 3052, para. 74.

[353] *Id.* at 3054, para. 79.

[354] *E.g.*, *Federal-State Joint Board on Universal Service*, CC Docket No. 96-45, Report and Order and Second Further Notice of Proposed Rulemaking, 17 FCC Rcd 24952, 24983-97, paras. 66-100 (2002) (*Universal Service Contribution Methodology NPRM*).

[355] 47 U.S.C. § 254(b)(5).

after the effective date of this Order or until we adopt new contribution rules in the *Universal Service Contribution Methodology* proceeding,[356] whichever occurs earlier. That is, wireline broadband Internet access providers must maintain their current universal service contribution levels attributable to the provision of wireline broadband Internet access service for this 270-day period.[357] We take this action, as a matter of policy, to preserve existing levels of universal service funding, and prevent a precipitous drop in fund levels while we consider reform of the system of universal service in the *Universal Service Contribution Methodology* proceeding.[358] We are committed to ensuring that there continue to be specific, predictable, and sufficient Federal and State mechanisms to preserve and advance universal service. If we are unable to complete new contribution rules within the 270-day period of time, the Commission will take whatever action is necessary to preserve existing funding levels, including extending the 270-day period discussed above or expanding the contribution base. We have ample authority to take interim actions to preserve the *status quo*.[359]

B. Law Enforcement, National Security, and Emergency Preparedness

1. CALEA

114. The Communications Assistance for Law Enforcement Act (CALEA) requires telecommunications carriers to ensure that "equipment, facilities or services that provide a customer or subscriber with the ability to originate, terminate, or direct [communications]" are capable of providing authorized surveillance to law enforcement agencies.[360] In a separate order adopted today, we conclude that providers of facilities-based broadband Internet access service and interconnected VoIP service are subject to CALEA.[361] We therefore do not address CALEA issues in this Order.

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[356] *E.g.*, *Universal Service Contribution Methodology NPRM*, 17 FCC Rcd 24952, 24983-97, paras. 66-100.

[357] Of course, as we stated above, some providers of wireline broadband Internet access service may choose to offer a stand-alone broadband telecommunications service on a common carrier basis. To the extent that they do so, they must continue to contribute to universal service mechanisms on a permanent basis pursuant to section 254(d).

[358] *See Universal Service Contribution Methodology NPRM*, 17 FCC Rcd 24952, 24983-97, paras. 66-100.

[359] As the D.C. Circuit has held, "[a]voidance of market disruption pending broader reforms is, of course, a standard and accepted justification for a temporary rule." *Competitive Telecommunications Ass'n v. FCC*, 309 F.3d 8, 14 (D.C. Cir. 2002) (citing *MCI Telecommunications Corp. v. FCC*, 750 F.2d 135, 141 (D.C. Cir. 1984) (*MCI v. FCC*) & *ACS of Anchorage v. FCC*, 290 F.3d 403, 410 (D.C. Cir. 2002)). Indeed, "[s]ubstantial deference must be accorded an agency when it acts to maintain the *status quo* so that the objectives of [related proceedings] will not be frustrated." *MCI v. FCC*, 750 F.2d at 141. Similarly, we require facilities-based wireline broadband Internet access services providers that are subject to the actions we take today to continue contributing to the Telecommunications Relay Services (TRS) Fund and the North American Numbering Plan Administration (NANPA) cost recovery mechanisms during the transition. *See supra* para. 68 & *infra* note 390.

[360] *See* 47 U.S.C. § 1002(a). As noted by the Department of Justice and Federal Bureau of Investigation, "CALEA is intended to preserve the government's *technical* capability to conduct electronic surveillance that is otherwise allowed under the law." DOJ/FBI Comments at 4 (emphasis in original).

[361] *Communications Assistance for Law Enforcement Act and Broadband Access and Services*, ET Docket No. 04-295, First Report and Order and Further Notice of Proposed Rulemaking, FCC 05-153 (rel. Sept. 23, 2005) (determining that providers of facilities-based broadband Internet access service and interconnected VoIP service are subject to CALEA).

2. USA PATRIOT Act

115. We find that our actions in this Order will not affect the government's implementation or enforcement of the Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act of 2001 (USA PATRIOT Act).[362] This Act amended the federal criminal code to authorize the interception of *wire and electronic communications* for the production of evidence of terrorism offenses and computer fraud, and modified only one section of the Communications Act, section 631 of Title VI.[363] We conclude that the scope of activities covered under the definitions of wire communications and electronic communications is broad enough to encompass wireline broadband Internet access service regardless of the legal classification of this service, or its transmission component, under the Communications Act. Only one party submitted comments on the subject, agreeing that the legal classification of wireline broadband Internet access service as an information service will have no impact on the applicability of the USA PATRIOT Act.[364]

3. Emergency Preparedness and Response

116. We find that our classification of wireline broadband Internet access service as an information service, and the transmission input as telecommunications (except to the extent that the provider chooses to offer that transmission on a common carrier basis), will not affect the Commission's existing rules implementing the National Security Emergency Preparedness (NSEP) Telecommunications Service Priority (TSP) System.[365] But, we will nonetheless exercise our Title I authority, as necessary, to give full effect to the principles and purpose of the NSEP TSP System. The NSEP TSP System is set forth in appendix A to Part 64 of the rules and provides that the Commission has "authority over the assignment and approval of priorities for provisioning and restoration of common carrier-provided telecommunications services."[366] The facilities-based wireline broadband Internet access service providers that are the subject of our Order today are telecommunications carriers with respect to other services that they provide. Therefore, we find that these providers remain subject to the NSEP TSP.

117. The Secretary of Defense (Secretary), the only party to submit comments on this issue, expressed concern that the existing National Communications System programs will no longer apply to wireline broadband Internet access service if it is classified as an information service unless the Commission exercises its ancillary jurisdiction.[367] As the Secretary recognizes, NSEP communications are currently

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[362] P. L. No. 107-56, 115 Stat. 272 (2001) (codified in scattered sections of 18 U.S.C., 47 U.S.C., 50 U.S.C.).

[363] *See* § 211 of the USA PATRIOT Act (amending 47 U.S.C. § 631(c)(2) to permit specified disclosures to government entities, except for records revealing cable subscriber selection of video programming, for a cable operator).

[364] *See* SBC Reply at 52 (citing 18 U.S.C. §§ 2510(12), 2703).

[365] The NSEP TSP System enables telecommunications users with responsibility for national security and emergency preparedness to receive priority in the deployment of new telecommunications services and the restoration of existing telecommunications services vital to coordinating and responding to natural and man-made disasters. *See Welcome to the TSP Website!*, available at http://tsp.ncs.gov/ (visited July 28, 2005).

[366] 47 C.F.R. Pt. 64, App. A, at § 1.b.

[367] Secretary of Defense Comments at 4-5 (citing *Southwestern Cable*, 392 U.S. at 178 (holding that the Commission has ancillary jurisdiction where it has subject matter jurisdiction under Title I of the Act and the subject of the regulation is "reasonably ancillary to the effective performance of the Commission's various responsibilities")). Among other functions, the National Communications System helps coordinate the planning for and provision of national security and emergency preparedness communications for the Federal government during (continued . . .)

provided by carriers subject to Title II.[368] Information service providers, therefore, have not been subject to these rules unless those providers are also offering services as telecommunications carriers.[369] Since the actions we take in this Order affect only wireline carriers that provide the transmission component of wireline broadband Internet access service, we have no reason to expect that those actions will adversely affect emergency preparedness efforts. These service providers, for the most part, provide their wireline broadband Internet access services over the same facilities used to provide other telecommunications services and thus these facilities remain subject to Part 64 to the same extent as they have before. Moreover, we do agree with the Secretary's conclusion that, should the need arise, we do have the authority to regulate NSEP under Title I. We will closely monitor the development of wireline broadband Internet access service and its effect on the NSEP TSP System and, if needed, will expeditiously take all appropriate actions to promote the viability of that system.[370]

118. Moreover, lest there be any uncertainty, we state that our decision to classify wireline broadband Internet access service as an information service, and the transmission input as telecommunications (except when offered on a common carrier basis), has no effect whatsoever on our recently adopted E911 rules for interconnected VoIP providers.[371] In that order, we required providers of interconnected VoIP[372] to offer E911 service to their subscribers. Although interconnected VoIP is necessarily provided via broadband, nothing in the *VoIP E911 Order* in any way turns on the statutory classification of that broadband connection. Thus, we reaffirm that, after today's Order, interconnected VoIP providers must comply with the *VoIP E911 Order* regardless of how or by whom the underlying broadband connection is provided.

4. Network Reliability and Interoperability

119. We reject arguments that classifying wireline broadband Internet access service as an "information service" and its transmission component as "telecommunications" (except to the extent that the provider chooses to offer that transmission on a common carrier basis) requires that we obtain additional authorization from the Network Reliability and Interoperability Council (NRIC) at this time. NRIC, initially established by the Commission in 1992 as the Network Reliability Council, advises the Commission on recommendations to ensure optimal reliability and interoperability of the nation's

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crises and emergencies. National Communications System Mission Statement, available at http://www.ncs.gov/index.html (visited July 28, 2005).

[368] Secretary of Defense Comments at 2.

[369] A service provider may be a common carrier for some purposes and not for others. *NARUC II*, 533 F.2d at 608; *see* 47 U.S.C. 153(44) (specifying that a "telecommunications carrier shall be a common carrier under [the] Act only to the extent it is engaged in providing telecommunications services").

[370] We further note that the pending *IP-Enabled Services Proceeding* addresses issues relating to IP-enabled services (a category that may overlap with wireline broadband Internet access service) and critical infrastructure necessary to provide for homeland security and public safety. *See IP-Enabled Services*, WC Docket No. 04-36, Notice of Proposed Rulemaking, 19 FCC Rcd 4863, 4897-501, paras. 51-57 (2004) (*IP-Enabled Services NPRM*).

[371] *VoIP E911 Order*, at paras. 36-51.

[372] We defined interconnected VoIP as a service bearing the following characteristics: (1) the service enables real-time, two-way voice communications; (2) the service requires a broadband connection from the user's location; (3) the service requires IP-compatible CPE; and (4) the service offering permits users generally to receive calls that originate on the public switched telephone network (PSTN) *and* to terminate calls to the PSTN. *Id.* at para. 24.

communications networks.[373] Section 256 of the Act codifies the Commission's ability and obligation to oversee network planning and set standards to enable the Commission to carry out the objectives of this section as well as the Commission's prior practices in the area of network reliability and interoperability through the NRIC.[374] NRIC VI, the latest chartered council, significantly expanded its membership to include the Internet service industry[375] and included among its scope of activities numerous issues relating to the Internet and broadband deployment.[376]

120. Contrary to what some commenters suggest, we do not agree that classifying wireline broadband Internet access service as an information service would deny us the ability to oversee broadband interconnectivity.[377] Rather, we agree with the view that our actions in this proceeding will not constrain our ability to address network reliability and interoperability issues.[378] A purpose of section 256 is "to ensure the ability of users and information providers to seamlessly and transparently transmit and receive information between and across telecommunications networks."[379] This provision affords the Commission adequate authority to continue overseeing broadband interconnectivity and reliability issues, regardless of the legal classification of wireline broadband Internet access service. Moreover, NRIC's current charter directs it to make recommendations to increase the deployment and improve the security, reliability, and interoperability of "high-speed residential Internet access service,"[380] and we find that its activities in this regard are consistent with section 256.

C. Access by Persons with Disabilities

121. Section 255(c) of the Act requires that "a provider of telecommunications service shall ensure that the service is accessible to and usable by individuals with disabilities, if readily achievable."[381] Like the other Title II obligations discussed above, section 255 expressly applies to telecommunications services, not information services. Although the requirements contained in section 255 do not apply to information services, in the past the Commission has exercised its ancillary jurisdiction under Title I to extend accessibility obligations that mirror those under section 255 to two critically important information services, voicemail and interactive menu service.[382] This Order does not affect voicemail or interactive

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[373] *See, e.g.*, Charter of the Network Reliability and Interoperability Council - VII, at § B, *available at* http://www.nric.org/charter_vii/NRICVII_Charter_FINAL_Amended_2004_3_12_04.pdf) (visited July 21, 2005) (*NRIC VII Charter*).

[374] 47 U.S.C. § 256(b)(2), (c); *see, e.g.*, Network Reliability Performance Committee, Compendium of Technical Papers, § 2, *available at* http://www.nric.org/pubs/nric2/fg1/execsumm.pdf (visited July 21, 2005).

[375] *See* 47 U.S.C. § 256; *see also* NRIC Mission Statement, available at http://www.nric.org/ (visited July 11, 2005).

[376] *See, e.g.*, *NRIC VII Charter*, at § B.1.

[377] *See, e.g.*, Allegiance Comments at 53 (arguing that section 256(b) limits to telecommunications services the Commission's authority to oversee and coordinate network planning).

[378] SBC Comments at 41.

[379] 47 U.S.C. § 256(a)(2).

[380] *NRIC VII Charter*, at § B.4.

[381] 47 U.S.C. § 255(c).

[382] *See Implementation of Sections 255 and 251(a)(2) of the Communications Act of 1934, as Enacted by the Telecommunications Act of 1996, Access to Telecommunications Service, Telecommunications Equipment and Customer Premises Equipment by Persons with Disabilities*, WT Docket No. 96-198, Report and Order and Further Notice of Inquiry, 16 FCC Rcd 6417, 6455, para. 93 (1999) (*Section 255 Order*). The Commission declined at that (continued . . .)

menu service providers' obligations or other telecommunications service providers' obligations under section 255(c). We will continue to exercise our Title I authority, as necessary, to give full effect to the accessibility policy embodied in Section 255.

122. In addition, section 225(b) directs the Commission to ensure "telecommunications relay services" (TRS), a set of services that includes both video relay service (VRS) and IP relay, are available to individuals with hearing or speech impairments.[383] The Commission has previously determined that the statutory definition of TRS includes both information services and telecommunications services.[384] Nothing in this Order disturbs that earlier conclusion; consequently, this Order will not affect TRS requirements or the ability of TRS users to access VRS or IP relay.[385]

123. In addition, the Commission will remain vigilant in monitoring the development of wireline broadband Internet access service and its effects on the important policy goals of section 255.[386] As noted

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time, however, to extend accessibility obligations to other information services, such as e-mail, electronic information services, and web pages, that did not appear to have the potential to render telecommunications services inaccessible to persons with disabilities. *Id.* at 6461, para. 107. The Commission instituted a Further Notice of Inquiry at the same time to obtain additional information about Internet telephony and certain computer-based equipment that replicates current telecommunications functionality. The Commission stated that its goal was "to take full advantage of the promise of new technology, not only to ensure that advancements do not leave people with disabilities behind, but also to harness the power of innovation to break down the accessibility barriers we face today and prevent their emergence tomorrow." *See id.* at 6483, para. 175.

[383] 47 U.S.C. § 225(b); *Telecommunications Relay Services and Speech-to-Speech Services for Individuals with Hearing and Speech Disabilities*, CC Docket No. 98-67 & CG Docket No. 03-123, Order on Reconsideration, FCC 05-139, at paras. 6-7 (rel. July 19, 2005) (*IP Relay Reconsideration Order*). VRS is TRS that permits individuals with hearing or speech disabilities to communicate with voice telephone users through video equipment. *See* 47 C.F.R. § 64.601(17). IP Relay is TRS provided over the Internet. After a user establishes a local connection to an ISP and selects an Internet address of an IP Relay provider, the IP Relay provider will establish an Internet connection, via a toll-free number, to the relay center. This call is then routed to a communications assistant and the regular relay session is initiated. *IP Relay Reconsideration Order*, at n.6; *Provision of Improved Telecommunications Relay Services and Speech-to-Speech Services for Individuals with Hearing and Speech Disabilities*, CC Docket No. 98-67, Declaratory Ruling and Second Further Notice of Proposed Rulemaking, 17 FCC Rcd 7779 (2002) (*IP Relay Declaratory Ruling & FNPRM*).

[384] 47 U.S.C. § 225(a)(3); *Telecommunications Relay Services and Speech-to-Speech Services for Individuals with Hearing and Speech Disabilities*, CC Docket No. 98-67, Report and Order and Further Notice of Proposed Rulemaking, 15 FCC Rcd 5140, 5177-78, para. 88 (2000) (*Improved TRS Order & FNPRM*) (concluding that "section 225 does not limit relay services to telecommunications services, but . . . reaches enhanced or information services").

[385] We note that, as part of our efforts to help ensure that individuals with hearing or speech disabilities have access to communications technologies that is functionally equivalent to that available to people without these disabilities, we recently adopted new VRS rules that establish mandatory speed of answer requirements for VRS; require VRS to be offered 24 hours a day, seven days a week; and permit VRS providers to receive compensations from the interstate TRS fund for providing VRS mail and translation between American Sign Language and Spanish. *Telecommunications Relay Services and Speech-to-Speech Services for Individuals with Hearing and Speech Disabilities*, CC Docket No. 98-67 & CG Docket No. 03-123, Order, FCC 05-140 (rel. July 19, 2005); *IP Relay Reconsideration Order*, *supra* n.383.

[386] The Commission is currently reviewing the issue of disability access with respect to IP-enabled services. *IP-Enabled Services NPRM*, 19 FCC Rcd at 4897-501, paras. 58-60. In addition, the Commission has before it a number of other pending proceedings related to disability issues. *See, e.g.*, California Coalition of Agencies Serving (continued . . .)

above, we will exercise our Title I ancillary jurisdiction to ensure achievement of important policy goals of section 255 and also section 225 of the Act.[387]

124. Consistent with our decision today to require facilities-based wireline broadband Internet access service providers to continue to contribute to universal service support mechanisms for an additional 270-day period,[388] as a matter of policy, we also require such providers to report the revenue on Form 499-A[389]

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the Deaf and Hard of Hearing, Petition for Declaratory Ruling on Interoperability, CC Docket No. 98-67 & CG Docket No. 03-123 (filed Feb. 15, 2005) (seeking ruling that VRS providers cannot limit access of their equipment to one provider); *Telecommunications Relay Services and Speech-to-Speech Services for Individuals with Hearing and Speech Disabilities*, CC Docket Nos. 90-571 & 98-67, CG Docket No. 03-123, Report and Order, Order on Reconsideration, and Further Notice of Proposed Rulemaking, 19 FCC Rcd 12475 (June 30, 2004) (*2004 TRS Report & Order*) (issues raised in the FNPRM are pending); *Closed Captioning of Video Programming, Telecommunications for the Deaf, Inc. Petition for Rulemaking*, CG Docket No. 05-231, Notice of Proposed Rulemaking, FCC 05-142 (July 21, 2005); *Implementation of Sections 255 and 251(a)(2) of the Communications Act of 1934, as Enacted by the Telecommunications Act of 1996, Access to Telecommunications Service, Telecommunications Equipment and Consumer Premises Equipment by Persons with Disabilities*, WT Docket No. 96-198, Report and Order and Further Notice of Inquiry, 16 FCC Rcd 6417 (1999). Also pending are petitions for reconsideration of various aspects of the *2004 TRS Report & Order* filed by Communication Services for the Deaf, Inc. (CSD), the National Video Relay Service Coalition (NVRSC), Hands On Video Relay Services, Inc. (HOVRS), and Hamilton Relay, Inc. (Hamilton). Further, CSD, NVRSC, HOVRS, and Hamilton have filed applications for review of *Telecommunications Relay Services and Speech-to-Speech Services for Individuals with Hearing and Speech Disabilities*, CC Docket No. 98-67, Order, 19 FCC Rcd 12224 (Con. & Gov. Aff. Bur. 2004) (*2004 Bureau TRS Order*), *modified Telecommunications Relay Services and Speech-to-Speech Services for Individuals with Hearing and Speech Disabilities*, CC Docket No. 98-67, Order, 19 FCC Rcd 24981 (Con. & Gov. Aff. Bur. 2004) (*Modified 2004 Bureau TRS Order*). Finally, on July 26, 2004, Telco Group, Inc., filed a Petition for Declaratory Ruling, or in the Alternative, Petition for Waiver seeking a ruling excluding international revenues from the revenue base used to calculate contributions to the Interstate TRS Fund.

[387] We will take this commitment into account in all ongoing proceedings that affect access to services by people with disabilities. *See Implementation of Sections 255 and 251(a)(2) of the Communications Act of 1934, as amended by the Telecommunications Act of 1996, Access to Telecommunications Service, Telecommunications Equipment and Consumer Premises Equipment by Persons with Disabilities*, Report and Order and Further Notice of Inquiry, WT Docket No. 96-198 (Sept. 29, 1999); *Telecommunications Relay Services and Speech-to-Speech Services for Individuals with Hearing and Speech Disabilities*, CC Docket No. 90-571, Report and Order, Order on Reconsideration, and Further Notice of Proposed Rulemaking, 19 FCC Rcd 12475 (2004) (petitions for reconsideration filed by CSD, NVRSC, HOVRS, and Hamilton; Telco Group, Inc., Petition for Declaratory Ruling, or in the Alternative, Petition for Waiver (filed July 26, 2004) (seeking ruling excluding international revenues from the revenue base used to calculate contributions to the Interstate TRS Fund); California Coalition of Agencies Serving the Deaf and Hard of Hearing, Petition for Declaratory Ruling on Interoperability, CC Docket No. 98-67, CG Docket No. 03-123 (filed Feb. 15, 2005); *Modified 2004 Bureau TRS Order*, *supra* (applications for review filed by CSD, NVRSC, HOVRS, and Hamilton.

[388] *See supra* para. 113. Section 225(b)(1) of the Communications Act, which codifies Title IV of the Americans with Disabilities Act of 1990, directs the Commission to "ensure that interstate and intrastate telecommunications relay services are available, to the extent possible and in the most efficient manner, to hearing-impaired and speech-impaired individuals in the United States." 47 U.S.C. § 225(b)(1). To that end, the Commission established the TRS Fund to reimburse TRS providers for the costs of providing interstate telecommunications relay services. *See Telecommunications Relay Services and the Americans with Disabilities Act of 1990*, CC Docket No. 90-571, Third Report and Order, 8 FCC Rcd 5300, 5301, para. 7 (1993) ("*TRS III Order*"). NECA currently is responsible for administering the TRS Fund. Pursuant to section 64.604(c)(5)(iii)(A) of the Commission's rules, every carrier that provides interstate telecommunications services must contribute to the TRS Fund based upon its interstate end-user revenues. 47 C.F.R. § 64.604(c)(5)(iii)(A).

associated with the transmission component of their wireline broadband Internet access service as of the effective date of this Order for an additional 270-day period for purposes of contributing to the TRS fund for that same 270-day period.[390]

D. NANPA Funding

125. Pursuant to this same interim authority,[391] we require facilities-based wireline broadband Internet access service providers to continue to contribute to the cost of numbering administration through the NANPA funding mechanism established by the Commission pursuant to section 251(e) of the Act for the same 270-day period. We take this action to ensure that the funding for this critical function does not immediately decrease while the Commission examines what, if any funding related obligations should apply to facilities-based broadband Internet access service providers.[392] Section 251(e)(2) requires that "[t]he cost of establishing telecommunications numbering administration arrangements . . . be borne by all telecommunications carriers on a competitively neutral basis as determined by the Commission."[393] In carrying out this statutory directive, the Commission adopted section 52.17 of its rules, which requires, among other things, that all telecommunications carriers contribute toward the costs of numbering administration on the basis of their end-user telecommunications revenues for the prior calendar year.[394]

E. Obligations of Incumbent LECs Under Section 251

126. As noted, the *Wireline Broadband NPRM* sought comment on the relationship between a competitive LEC's rights under section 251 and the Commission's tentative conclusion that wireline broadband Internet access service is an information service with a telecommunications input.[395] Several competitive LECs, and one BOC, argue that regardless of how the Commission classifies wireline

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[389] The Commission requires telecommunications providers to submit financial information on Telecommunications Reporting Worksheets (FCC Form 499-A) to enable the Commission to determine and collect certain statutorily mandated assessments. In 1999, to streamline the administration of multiple federal funding programs and to ease the burden on regulatees, the Commission consolidated the information filing requirements for multiple telecommunications regulatory programs into the annual Telecommunications Reporting Worksheet. *See 1998 Biennial Regulatory Review – Streamlined Contributor Reporting Requirements Associated with Administration of Telecommunications Relay Services, North American Numbering Plan, Local Number Portability, and Universal Service Support Mechanisms*, CC Docket No. 98-171, Report and Order, 14 FCC Rcd 16602 (1999) (*Contributor Reporting Requirements Order*). The next year the Commission revised the Telecommunications Reporting Worksheet slightly to collect the additional information necessary to achieve its goal of establishing a central repository for interstate telecommunications providers by the least provider-burdensome method. *Implementation of the Subscriber Carrier Selection Provisions of the Telecommunications Act of 1996*, CC Docket No. 94-129, Third Report and Order and Second Order on Reconsideration, 15 FCC Rcd 15996, 16026, para. 63 (2000) (*Carrier Selection Order*). NECA, as the TRS Administrator, uses the prior year's revenue information provided on the Telecommunications Reporting Worksheet to determine amounts owed for the TRS. *See* 47 C.F.R. § 64.604(c).

[390] Our authority to take this interim action to preserve the *status quo* mirrors the authority upon which we require continued contribution for USF funding. *See supra* note 359.

[391] *See id.*

[392] 47 U.S.C. § 251(e).

[393] 47 U.S.C. § 251(e)(2).

[394] 47 C.F.R. § 52.17(a).

[395] *Wireline Broadband NPRM*, 17 FCC Rcd at 3047, para. 61.

broadband Internet access service, including its transmission component, competitive LECs should still be able to purchase UNEs, including UNE loops to provide stand-alone DSL telecommunications service, pursuant to section 251(c)(3) of the Act.[396] We agree.

127. Section 251(c)(3) and the Commission's rules look at what use a competitive LEC will make of a particular network element when obtaining that element pursuant to section 251(c)(3); the use to which the incumbent LEC puts the facility is not dispositive.[397] In this manner, even if an incumbent LEC is only providing an information service over a facility, we look to see whether the requesting carrier intends to provide a telecommunications service over that facility.[398] Thus, competitive LECs will continue to have the same access to UNEs, including DS0s and DS1s, to which they are otherwise entitled under our rules, regardless of the statutory classification of service the incumbent LECs provide over those facilities. So long as a competitive LEC is offering an "eligible" telecommunications service – *i.e.,* not exclusively long distance or mobile wireless services – it may obtain that element as a UNE.[399] Accordingly, nothing in this Order changes a requesting telecommunications carriers' UNE rights under section 251 and our implementing rules.[400]

[396] *See* Covad Comments at 84; MCI Comments at 73-76; Letter from Andrew D. Lipman, Richard M. Rindler, & Patrick J. Donovan, Counsel for McLeodUSA, to Chairman Kevin J. Martin, FCC, CC Docket No. 02-33, at 1-2 (filed Aug. 3, 2005) (McLeodUSA Aug. 3, 2005 *Ex Parte* Letter); Letter from Jason Oxman, Senior Vice President, Legal Affairs, CompTel/ALTS, to Marlene H. Dortch, Secretary, FCC, at 2 (filed July 12, 2005) (CompTel/ALTS July 12, 2005 *Ex Parte* Letter); *see also* Qwest Apr. 10, 2003 *Ex Parte* Letter, Attach. at 3 ("CLEC access to UNEs not at risk in this proceeding").

[397] A "network element" is an element that is "capable of being used by a requesting carrier in the provision of a telecommunications service," regardless of whether the element is "actually used by the incumbent LEC in the provision of a telecommunications service." *Triennial Review Order*, 18 FCC Rcd at 17020, para. 59 (emphasis omitted).

[398] In any event, section 251(h) of the Act defines incumbent LECs for purposes of section 251 of the Act, and nothing in this Order has any effect on such definition or the obligations associated therewith. 47 U.S.C. § 251(h); *cf. WorldCom v. FCC*, 246 F.3d. 690, 695 (D.C. Cir. 2001) ("[W]e find no error in the Commission's conclusion that it can apply the § 251(c) duties to a firm that met the § 251(h) criteria on February 8, 1996 and is still providing 'exchange access' or 'telephone exchange service.'") (emphasis omitted). An incumbent LEC's obligations under section 251(c) will remain until the incumbent LEC is either determined not to be an incumbent LEC under section 251(h), or the Commission forbears from section 251 obligations; we have not done either to date.

[399] *See, e.g.*, 47 C.F.R. § 51.309(b), (d) (allowing a requesting carrier to provide any telecommunications services over a UNE, provided that the UNE is not used exclusively for the provision of mobile wireless services or interexchange services); *USTA II*, 359 F.3d at 592 (affirming the need to analyze the services that a competing carrier seeks to provide using UNEs); *Triennial Review Remand Order*, 20 FCC Rcd at 2551-58, paras. 34-40 (evaluating the need for competitive LECs to obtain UNEs based on the services the competitive LECs seek to offer); *see also Triennial Review Order*, 18 FCC Rcd at 17350-66, paras. 590-619 (establishing criteria to limit access to enhanced extended links (EELs) to eligible services), *aff'd USTA II*, 359 F.3d at 592-93; McLeodUSA Aug. 3, 2005 *Ex Parte* Letter at 1 (stating that competitive LECs must continue to have access to UNEs regardless of the statutory classification of wireline broadband Internet access service).

[400] Similarly, our classification determinations in this Order have no effect whatsoever on the section 251 interconnection obligations of incumbent LECs or on competitive LECs' rights to obtain such interconnection. *See* 47 U.S.C. § 251(c)(2).

F. Cost Allocation

128. In this section, we address cost allocation issues raised by our decision to allow incumbent LECs to enter into non-common carriage arrangements with affiliated and unaffiliated ISPs for the provision of wireline broadband Internet access transmission using facilities that are also used for provision of regulated telecommunications services. Specifically, we address whether we should require incumbent LECs subject to our part 64 cost allocation rules to classify that activity as a regulated activity, as opposed to a nonregulated activity, under our part 64 cost allocation rules.[401] We conclude that incumbent LECs should classify this non-common carrier activity as a regulated activity under those rules and that this accounting treatment is consistent with section 254(k) of the Act.[402]

1. Relative Costs and Benefits

129. The part 64 cost allocation rules set forth a detailed methodology that incumbent LECs subject to those rules must follow in allocating the amounts recorded in their part 32 accounts between regulated and nonregulated activities.[403] Those rules also require some of these incumbent LECs to maintain cost allocation manuals setting forth how they will implement those principles.[404] The costs and revenues allocated to nonregulated activities are excluded from the jurisdictional separations process. In contrast, the costs and revenues allocated to regulated activities are apportioned between the state and interstate jurisdictions in accordance with the part 36 jurisdictional separations rules.[405] Each regulatory jurisdiction applies its own ratemaking processes to the amounts assigned to it by part 36. States, however, may add back costs that are identified as nonregulated under part 64, or remove additional costs that are identified as regulated under part 64.[406]

130. In this Order, we allow the non-common carrier provision of wireline broadband Internet access transmission that we previously have treated as regulated, interstate special access service,[407] but we do not preemptively deregulate any service currently regulated by any state.[408] Therefore, as specified in section 32.23 of our rules, the provision of this transmission is to be classified as a regulated activity under part 64 "until such time as the Commission decides otherwise."[409] We do not "decide otherwise" at this time because we find that the costs of changing the federal accounting classification of the costs

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[401] 47 C.F.R. § 64.901.

[402] 47 U.S.C. § 254(k).

[403] 47 C.F.R. § 64.901. Part 32 establishes a Uniform System of Accounts that certain incumbent LECs must use to record their historical costs and revenues. 47 C.F.R. Part 32.

[404] 47 C.F.R. § 64.903.

[405] 47 C.F.R. Part 36.

[406] *Joint Cost Order*, 2 FCC Rcd at 1310, paras. 88-90 (states not required to use joint cost rules for intrastate ratemaking); *see Detariffing the Installation and Maintenance of Inside Wiring*, Third Report and Order, CC Docket No. 79-105, 7 FCC Rcd 1334, 1339, paras. 41-42 (1992).

[407] *See GTE DSL Order*, 13 FCC Rcd at 22474-83, paras. 16-32 (finding that GTE's ADSL service is an interstate special access service that should be federally tariffed).

[408] *See GTE DSL Reconsideration Order*, 17 FCC Rcd at 27411-12, para. 9 (stating that, in some circumstances, ADSL services may be appropriately tariffed as interstate services).

[409] 47 C.F.R. § 32.23(a); *see Joint Cost Order*, 2 FCC Rcd at 1308-09, para. 79 (stating intent to address on a case-by-case basis the accounting treatment to be accorded activities deregulated only in the interstate jurisdiction).

underlying this transmission would outweigh any potential benefits and that section 254(k) of the Act does not mandate such a change.

131. Requiring that incumbent LECs classify the provision of broadband Internet access transmission provided on a non-common carrier basis as a nonregulated activity under part 64 would mean, among other matters, that incumbent LECs would have to develop, and we would have to review, methods for measuring the relative usage that this transmission and the incumbent LECs' traditional local services make of incumbent LECs' transmission facilities.[410] Incumbent LECs argue that they should not have to undertake this task because it would impose significant burdens on them with little discernible benefit.[411] We agree. The Commission adopted the part 64 cost allocation rules during the late 1980s as one element of the nonstructural safeguards that were to replace the *Computer II* regime.[412] The principal purpose of those rules was to ensure that telephone ratepayers would continue to receive reasonable protections against improper cross-subsidization in the event the BOCs provided enhanced services on an integrated basis, rather than through separate subsidiaries.[413] The Commission also sought to ensure that ratepayers would share in any savings achieved through the integrated provision of regulated and nonregulated activities and to improve the cost allocation procedures used by other LECs, which had been relieved of structural separation requirements in *Computer II*.[414]

132. When the Commission developed the part 64 cost allocation rules, the LECs' interstate rates and many of their intrastate rates were set under rate base, cost-of-service regulation. The Commission designed those rules "to make sure that all of the costs of nonregulated activities are removed from the rate base and allowable expenses for interstate regulated services."[415] The rules therefore are quite detailed: they require LECs to apportion, on an account-by-account basis, all of their costs between regulated and nonregulated activities using direct assignment wherever possible and a specific cost allocation hierarchy where direct assignment is not possible.[416] This level of detail paralleled the level of detail in the cost-of-service calculations that LECs performed to develop their rates for interstate access services. Although not required to do so, many state commissions followed these rules for intrastate ratemaking purposes.

133. During the period since the adoption of the part 64 cost allocation rules, our ratemaking methods and those of our state counterparts have evolved considerably.[417] This evolution has greatly reduced

[410] *See* 47 C.F.R. § 64.901(b)(4) (requiring that investment in central office equipment and outside plant be allocated between regulated and nonregulated activities based on peak relative regulated and nonregulated usage).

[411] *See, e.g.*, Letter from Stephen L. Ernest, Regulatory Counsel, BellSouth, to Marlene. H. Dortch, Secretary, FCC, at 8-9 (filed June 29, 2004) (BellSouth June 29, 2004 *Ex Parte* Letter); Verizon Jan. 6, 2004 *Ex Parte* Letter at 3; Letter from Stephen L. Ernest, Regulatory Counsel, BellSouth, to Marlene. H. Dortch, Secretary, FCC, at 3-6 (filed Aug. 26, 2003) (BellSouth Aug. 26, 2003 *Ex Parte* Letter).

[412] *Computer III Phase I Order*, 104 FCC Rcd at 1074-77, paras. 234-40.

[413] *See Joint Cost Order*, 2 FCC Rcd at 1303, para. 37; *see Joint Cost Reconsideration Order*, 2 FCC Rcd at 6283-84, paras. 1, 6.

[414] *See Joint Cost Order*, 2 FCC Rcd at 1304, para. 39; *Joint Cost Reconsideration Order*, 2 FCC Rcd at 6300, para. 156.

[415] *Joint Cost Order*, 2 FCC Rcd at 1304, para. 40.

[416] *See* 47 C.F.R. § 64.901.

[417] *See, e.g.*, *MAG Order*, 19 FCC Rcd at 4153-55, paras. 70-72; Verizon Jan. 6, 2004 *Ex Parte* Letter at 3 (pointing out that, in most states, cost allocation results do not affect rates for local telephone services).

incumbent LECs' incentives to overstate the costs of their tariffed telecommunications services.[418] Based on the current record, we find that this reduction in incentives diminishes the need for incumbent LECs to apply detailed and burdensome procedures to exclude the costs of providing broadband Internet access transmission from their regulated costs.[419] A nonregulated classification therefore would generate at most marginal benefits.[420]

134. Requiring that incumbent LECs classify their non-common carrier, broadband Internet access transmission activities as nonregulated activities under part 64 would impose significant burdens that outweigh these potential benefits.[421] In particular, the cost allocation principles set forth in our part 64 rules assume that meaningful measures of cost causality and usage will be available to help allocate a carrier's investments and expenses between regulated and nonregulated activities.[422] If we were to require that incumbent LECs classify their non-common carrier, broadband Internet access transmission activities as nonregulated activities under part 64, the extent of nonregulated usage of incumbent LECs' networks could increase dramatically. New measures of cost causality and usage would have to be developed to reflect this increased nonregulated usage.[423] These measures, moreover, would have to reflect the evolution of the incumbent LECs' networks from traditional circuit-switched networks into IP-based networks.[424] The proceedings to set these measures would be both resource-intensive and, given the changes in network technology from the time when the part 64 cost allocation rules were developed, likely to lead to arbitrary cost allocation results.

135. Because the costs of requiring that incumbent LECs classify their non-common carrier, broadband Internet access transmission operations as nonregulated activities under part 64 exceed the potential benefits, we decline to require such a classification. Classifying those operations as regulated under part 32 means that any necessary ratemaking adjustments, including any reallocations of costs, will be addressed in the ratemaking process in the relevant regulatory jurisdiction. In our case, that is the interstate jurisdiction. Currently, some price cap carriers treat broadband special access services as price cap services, while others treat these broadband services as services excluded from price caps. Price cap carriers that have tariffed these services under price caps, and that choose to replace these tariffed services with non-common carriage arrangements, will make the appropriate adjustments to the actual price index (API) and price cap index (PCI) for the special access basket. The ordinary application of the price cap rate formulas will ensure that other special access rates remain consistent with the price cap rules after deregulation of broadband transmission services. Carriers that have excluded broadband transmission services from price caps will not need to make these adjustments.

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[418] *See, e.g.*, BellSouth Aug. 26, 2003 *Ex Parte* Letter at 3-6.

[419] *See, e.g.*, BellSouth June 29, 2004 *Ex Parte* Letter at 3-7; BellSouth Aug. 26, 2003 *Ex Parte* Letter at 3-6; Verizon Jan. 6, 2004 *Ex Parte* Letter at 3.

[420] *See, e.g.*, BellSouth June 29, 2004 *Ex Parte* Letter at 3-7; BellSouth Aug. 26, 2003 *Ex Parte* Letter at 3-6; Verizon Jan. 6, 2004 *Ex Parte* Letter at 3.

[421] *E.g.*, BellSouth June 29, 2004 *Ex Parte* Letter at 8.

[422] *See* 47 C.F.R. § 64.901(b)(3), (4).

[423] *See, e.g.*, BellSouth June 29, 2004 *Ex Parte* Letter at 8-9.

[424] *See* Verizon June 26, 2003, *Ex Parte* Letter at 4 (asserting that it likely is not even possible to apply the part 64 cost allocation rules to wireline broadband Internet access services in any reasonable fashion because those rules require allocations based on usage, a concept applicable to circuit-switched services but almost-meaningless in the packet-switched world).

136. Our ruling here with respect to the accounting treatment of broadband Internet access transmission provided on a non-common carrier basis does not change the accounting treatment that applies to broadband Internet access service provided to end users. That is, and always has been, an information service. An incumbent LEC that offers this service must continue to account for it as a nonregulated activity.

137. We note that our decision to treat the non-common carrier provision of broadband Internet access transmission as a regulated activity under part 64 will affect the results of computations of the rate of return earned on interstate Title II services. This is not a matter of practical concern with respect to most incumbent LECs regulated under the *CALLS* plan or price caps, because earnings determinations are not used in determining their price cap rates.[425] In the event that an earnings determination is needed for some ratemaking purpose, the affected carrier will have to propose a way of removing the costs of any non-Title II services from the computation. Price cap carriers that have not taken advantage of pricing flexibility, and therefore are still able to take advantage of low-end adjustments to their price cap rates, will have to address this cost allocation issue if and when they seek a low-end adjustment.

138. Finally, all rate-of-return carriers that have participated in this proceeding have stated that they wish to continue offering broadband transmission as a Title II common carrier service.[426] We have provided them with this option. As such, we do not, at this time, address the treatment of private carriage arrangements by rate-of-return carriers because the issue is entirely hypothetical.

2. Section 254(k)

139. Section 254(k) of the Act states that a telecommunications carrier "may not use services that are not competitive to subsidize services that are subject to competition."[427] That section also requires the Commission to establish, with respect to interstate services, accounting and cost allocation rules that ensure that "services included in the definition of universal service bear no more than a reasonable share of the joint and common costs of facilities used to provide those services."[428] By continuing to treat the provision of wireline broadband transmission as a regulated activity under part 64, we do not change the regulatory cost allocation treatment and thus do not change their status under section 254(k). Our actions in this Order therefore do not create a violation of section 254(k).

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[425] The price cap plan no longer contains a sharing requirement, and most price cap carriers have foregone the possibility of obtaining an earnings-based low-end adjustment in order to take advantage of pricing flexibility. *See generally MAG Order*, 19 FCC Rcd at 4154-55, paras. 71-72; *Section 272(b)(1)'s "Operate Independently" Requirement for Section 272 Affiliates*, WC Docket No. 03- 228, Report and Order, 19 FCC Rcd 5102, 5115 n.72 (2003) (*Operate Independently Order*) (pointing out that because the BOCs have taken advantage of pricing flexibility, they cannot resort to the low-end adjustment).

[426] Letter from Daniel Mitchell, Vice President, Legal and Industry, NTCA, to Marlene H. Dortch, Secretary, FCC, CC Docket No. 02-33, at 1 (filed Aug. 2, 2005) (NTCA Aug. 2, 2005 *Ex Parte* Letter); Letter from Stuart Polikoff, Director of Government Relations, OPASTCO, to Marlene H. Dortch, Secretary, FCC, CC Docket No. 02-33, at 2 (filed July 12, 2005) (OPASTCO July 12, 2005 *Ex Parte* Letter) (stating that many rural incumbent LECs offer DSL transmission services under the NECA tariff and participate in associated revenue pools, and that the Commission must preserve this option for those carriers).

[427] 47 U.S.C. § 254(k).

[428] *Id.*

140. We reject NARUC's and the State Consumer Advocates' argument that we must, under section 254(k), require incumbent LECs to reallocate a portion of their joint and common loop costs from "universal services" as a group to wireline broadband Internet access transmission.[429] The State Consumer Advocates submit a cost allocation proposal (which it characterizes as "market-driven") that differs from the current part 64 rules.[430] BellSouth and SBC assert that cost allocations are not relevant under price cap regulation and that the Commission should reject the State Consumer Advocates' proposal.[431]

141. We find that section 254(k) of the Act does not mandate allocation of interstate loop costs to non-common carrier broadband Internet access transmission. Under the *CALLS* access charge plan, the interstate loop costs of price cap carriers are not assigned to the different services that subscribers may receive over the loop, but are recovered directly from end users through the subscriber line charge. The Commission explicitly found that section 254(k) did not prohibit this cost recovery mechanism,[432] and the Fifth Circuit upheld this finding.[433]

142. The subscriber line charge is not itself a "service included in the definition of universal service." The interstate loop costs recovered through the subscriber line charge represent the costs of all jurisdictionally interstate uses of the loop. Since 1998, those uses have included both services supported by universal service, such as access to interexchange service, and broadband special access services, which are not supported by universal service. Costs need not be reallocated at this time from the subscriber line charge to non-common carrier, broadband Internet access transmission in order to prevent imposition of an unreasonable level of joint and common costs on services included in the definition of universal services. This is not, as State Consumer Advocates claim, unreasonable. Rather, it is a reasonable and rational cost allocation approach.[434] We can take additional steps to address cost allocation issues in the future if the need arises.

143. We observe that NARUC and the State Consumer Advocates appear to assume that any reallocation of loop costs to broadband Internet access transmission would be given effect in the ratemaking process in such a way that consumers who do not receive wireline broadband Internet access service over their loops would have their tariffed rates reduced. This ratemaking approach would likely produce a relatively small per-line rate reduction for the large number of consumers who do not receive this broadband service, while leaving a larger per-line amount to be recovered from the smaller number of consumers who receive both narrowband and broadband services over their loops. This form of cost reallocation produces anomalous results, and we do not adopt it. It would cause a consumer who buys the

[429] NARUC Comments at 12-13; State Consumer Advocates Comments at 24-25.

[430] State Consumer Advocates Comments at 26. This proposal would require allocation to broadband Internet access of an amount of cost equal to the difference between the competitor's wholesale price and the incumbent LEC's incremental cost for broadband transmission service. *Id.* at 27.

[431] BellSouth Comments at 27-29; SBC Reply at 63-64.

[432] *See Access Charge Reform*, CC Docket Nos. 96-262 and 94-1, Sixth Report and Order, 15 FCC Rcd 12962, 12998-13001, paras. 91-97 (2000) (subsequent history omitted) (*CALLS Order*).

[433] *Texas Office of Public Utility Counsel v. FCC*, 265 F.3d 313, 323-324 (5th Cir. 2001).

[434] State Consumer Advocates argue that the need to assign costs among all services using the loop will become even more important as incumbent LEC networks are engineered to deliver a variety of integrated services. State Consumer Advocates Comments at 33-34. We conclude instead that as more services are offered over a single loop, cost allocations are likely to become more arbitrary and thus less reasonable.

two services over the same loop to pay much more for that facility than a consumer who buys only narrowband service, even though the cost of that facility is fixed and does not vary in proportion to usage. It would be possible to devise a scheme in which costs were reallocated only with respect to those loops on which both services are being provided, but this would seem to produce only a shifting of charges from one part of the customer's bill to another.

144. We note that the question whether there should be any changes to the jurisdictional allocation of loop costs in light of use of the loop for broadband services was referred to the Federal-State Joint Board on Separations in 1999.[435] Specifically, in the wake of the Commission's determination in its 1999 tariff investigation that GTE's ADSL service was an interstate special access service subject to federal tariffing, NARUC filed a petition for clarification regarding the proper allocation under Part 36 of the Commission's rules of loop costs associated with DSL services.[436] Noting that issues associated with how to allocate local loop plant between voice and data services for purposes of jurisdictional separations were beyond the scope of the limited investigation in the tariff proceeding, the Commission stated that it would address these important issues in conjunction with the Joint Board.[437] This issue remains pending. In any event, separations is now subject to a five-year freeze, and the Joint Board is working on the approach that should follow this freeze; the issues we describe in this Order already fall within this context.[438] After the Joint Board makes its recommendation, we can reexamine the question of how any additional costs that might be assigned to the interstate jurisdiction may be recovered by local exchange carriers.

VII. ENFORCEMENT

145. We intend to swiftly and vigorously enforce the terms of this Order. Significantly, through review of consumer complaints and other relevant information, we will monitor all consumer-related problems arising in this market and take appropriate enforcement action where necessary. Similarly, we will continue to monitor the interconnection[439] and interoperability practices[440] of all industry participants, including facilities-based Internet access providers, and reserve the ability to act under our ancillary authority in the event of a pattern of anti-competitive conduct.[441]

VIII. NOTICE OF PROPOSED RULEMAKING

146. The broadband marketplace before us today is an emerging and rapidly changing one. Nevertheless, consumer protection remains a priority for the Commission. We have a duty to ensure that consumer protection objectives in the Act are met as the industry shifts from narrowband to broadband services. Through this *Notice*, we thus seek to develop a framework for consumer protection in the broadband age – a framework that ensures that consumer protection needs are met by *all* providers of

[435] *GTE DSL Reconsideration Order*, 17 FCC Rcd at 27412, para. 9; *see also Jurisdictional Separations and Referred to the Federal-State Joint Board*, CC Docket No. 80-286, Report and Order, 16 FCC Rcd 11382, 11397-98, para. 31 (2001).

[436] *GTE DSL Reconsideration Order*, 17 FCC Rcd at 27411, para. 7.

[437] *Id.* at 27412, para. 9.

[438] *See Jurisdictional Separations and Referral to the Federal-State Joint Board*, CC Docket No. 80-286, Report and Order, 16 FCC Rcd 11382 (2001).

[439] 47 U.S.C. § 251(a).

[440] 47 U.S.C. § 256.

[441] *See supra* n.339 (*citing NCTA v. Brand X*, slip op. at 25, regarding the Commission's Title I authority).

broadband Internet access service, regardless of the underlying technology.[442] This framework necessarily will be built on our ancillary jurisdiction under Title I; as we explain in the Order,[443] this jurisdiction is ample to accomplish the consumer protection goals we identify below, and we will not hesitate to exercise it.[444]

147. For each of the specific areas of Commission regulation described below, we ask commenters to address whether the imposition of regulations pursuant to our ancillary jurisdiction, and the corresponding ability of consumers to take advantage of Commission avenues for resolution of consumer protection issues, is desirable and necessary as a matter of public policy, or whether we should rely on market forces to address some or all of the areas listed. Are these types of regulations more or less relevant in the context of broadband Internet access service than they are for traditional telephony services? We ask commenters to describe any technical, economic, or other impediments that may affect the ability of broadband Internet access service providers to comply with such regulations. Are there areas of consumer protection not listed above for which the Commission should impose regulations? If so, commenters should describe the nature of the concern and address the questions posed in this paragraph.

A. CPNI

148. Consumers' privacy needs are no less important when consumers communicate over and use broadband Internet access than when they rely on telecommunications services. For example, a consumer may have questions about whether a broadband Internet access service provider will treat his or her account and usage information as confidential, or whether the provider reserves the right to use account information for marketing and other purposes. Section 222 of the Act establishes the regulatory framework governing telecommunications carriers' use and disclosure of CPNI and other customer information obtained by those carriers in their "provision of a *telecommunications service*."[445] That section requires, in general, that telecommunications carriers use or disclose CPNI only in the provision of the telecommunications service from which the CPNI is derived, or in the provision of services necessary to, or used in, the provision of such telecommunications services.[446]

149. We seek comment on whether we should extend privacy requirements similar to the Act's CPNI requirements to providers of broadband Internet access services. For example, should we adopt rules under our Title I authority that forbid broadband Internet access providers from disclosing, without their

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[442] We note that questions regarding necessary regulatory obligations of cable modem providers have previously been raised in the *Cable Modem Declaratory Ruling and NPRM*, 17 FCC Rcd at 4848-54, paras. 96-112. To the extent that our inquiry here is duplicative of those questions, we ask commenters to refresh the record by filing comments in this instant proceeding in WC Docket No. 05-271.

[443] *See supra* paras. 108-111.

[444] Indeed, this Commission has already shown its willingness to rely on ancillary jurisdiction in the face of a demonstrated need. *See VoIP E911 Order* at paras. 26-32.

[445] 47 U.S.C. § 222(c)(1) (emphasis added). The Commission has adopted rules implementing section 222, including rules defining the scope of the phrase "telecommunications service" in section 222(c)(1)(A) as well as rules specifying which services are included in the phrase "services necessary to, or used in the provision of telecommunications service" in section 222(c)(1)(B). *See* 47 C.F.R. §§ 64.2001-64.2008; *see also Implementation of the Telecommunications Act of 1996: Telecommunications Carriers' Use of Customer Proprietary Network Information and Other Customer Information*, CC Docket No. 96-115, Third Report and Order and Third Further Notice of Proposed Rulemaking, 17 FCC Rcd 14860 (2002) (*CPNI Remand Order*).

[446] 47 U.S.C. § 222(c)(1).

customers' approval, information about their customers that they learn through the provision of their broadband Internet access service? We seek comment on what sort of customer proprietary information broadband Internet access providers possess, *e.g.*, information about consumers' service plans, installed equipment, or patterns of Internet access use. We note that long before Congress enacted section 222 of the Act, the Commission had recognized the need for privacy requirements associated with the provision of enhanced services and had adopted CPNI-related requirements in conjunction with other *Computer Inquiry* obligations.[447]

B. Slamming

150. Section 258 of the Act prohibits telecommunications carriers from submitting or executing an unauthorized change in a subscriber's selection of a provider of telephone exchange service or telephone toll service, a practice commonly known as "slamming."[448] In a series of orders, the Commission adopted various rules to implement section 258, and concluded that state authorities should have primary responsibility for administering the rules.[449] By providing for state administration of slamming rules, the

[447] *See Computer III Phase II Order*, 2 FCC Rcd at 3094-95, paras. 152-56 (1987). Specifically, in the *Computer III* proceeding, the Commission adopted a framework governing CPNI not only to protect independent enhanced service providers from anticompetitive use of customers' local and long distance services information gained by the dominant telephone service providers to advance their enhanced services provisioning, but also to protect legitimate customer expectations of confidentiality. Under the pre-1996 Act CPNI framework, which was eliminated in its entirety when the Commission implemented section 222, customer information derived from the provision of enhanced services was not subject to CPNI protections. *See Implementation of the Telecommunications Act of 1996: Telecommunications Carriers' Use of Customer Proprietary Network Information and Other Customer Information*, CC Docket No. 96-115, Second Report and Order and Further Notice of Proposed Rulemaking, 13 FCC Rcd 8061, 8184-93, paras. 176-89 (1998) (*CPNI Order*), *on recon.*, 14 FCC Rcd 14409 (1999) (*CPNI Reconsideration Order*), *vacated sub nom. U.S. West v. FCC*, 182 F.3d 1224 (10th Cir. 1999), *cert. denied*, 530 U.S. 1213 (2000).

[448] 47 U.S.C. § 258(a) (mandating that "[n]o telecommunications carrier shall submit or execute a change in a subscriber's selection of a provider of telephone exchange service or telephone toll service except in accordance with such verification procedures as the Commission shall prescribe"). Prior to the adoption of section 258 of the Act, the Commission had recognized that slamming was a significant problem, and had taken various steps to address the issue; the adoption of section 258 expanded the Commission's authority in this area. *See, e.g.*, *Policies and Rules Concerning Unauthorized Changes of Consumers' Long Distance Carriers*, CC Docket No. 94-129, Report and Order, 10 FCC Rcd 9560 (1995), *stayed in part*, 11 FCC Rcd 856 (1995); *Policies and Rules Concerning Changing Long Distance Carriers*, CC Docket No. 91-64, Report and Order, 7 FCC Rcd 1038 (1992), *recon. denied*, 8 FCC Rcd 3215 (1993); *Investigation of Access and Divestiture Related Tariffs*, CC Docket No. 83-1145, Phase I, Memorandum Opinion and Order, 101 FCC 2d 935, *recon.*, 102 FCC 2d 503 (1985); *see also, e.g.*, *Cherry Communications*, File No. ENF-93-045, Order, 9 FCC Rcd 2086 (1994) (adopting consent decree enforcing the Commission's anti-slamming rules).

[449] *Implementation of the Subscriber Carrier Selection Changes Provisions of the Telecommunications Act of 1996; Policies and Rules Concerning Unauthorized Changes of Consumers' Long Distance Carriers*, CC Docket No. 94-129, Second Report and Order and Further Notice of Proposed Rulemaking, 14 FCC Rcd 1508 (1998) (*Second Report and Order*), *stayed in part*, *MCI WorldCom v. FCC*, No. 99-1125 (D.C. Cir. May 18, 1999) (*Stay Order*), *motion to dissolve stay granted*, *MCI WorldCom v. FCC*, No. 99-1125 (D.C. Cir. June 27, 2000) (*Order Lifting Stay*); *Implementation of the Subscriber Carrier Selection Changes Provisions of the Telecommunications Act of 1996; Policies and Rules Concerning Unauthorized Changes of Consumers' Long Distance Carriers*, CC Docket No. 94-129, First Order on Reconsideration, 15 FCC Rcd 8158 (2000) (*First Reconsideration Order*); *Implementation of the Subscriber Carrier Selection Changes Provisions of the Telecommunications Act of 1996; Policies and Rules Concerning Unauthorized Changes of Consumers' Long Distance Carriers*, CC Docket No. 94-129, Third Report and Order and Second Order on Reconsideration, 15 FCC Rcd 15996 (2000) (*Third Report and Order*); Errata, DA 00-2163 (rel. Sept. 25, 2000); Erratum, DA 00-292 (rel. Oct. 4, 2000); *Implementation of the* (continued . . .)

Commission recognized that state authorities are particularly well-equipped to handle such complaints because states are close to consumers and are familiar with trends in their regions.[450] The Commission also recognized, however, that all states may not have the resources available to handle slamming complaints.[451] Accordingly, the Commission's rules allow consumers in states that do not "opt-in" to administer the slamming rules to file slamming complaints with the Commission.[452]

151. We seek comment on whether we should exercise our Title I authority to impose similar requirements on providers of broadband Internet access service. Commenters should explain in what circumstances subscribers to broadband Internet access could get "slammed."[453] Is the provisioning process for broadband Internet access service such that an unauthorized change in provider is more likely in situations where the provider relies on third-party broadband transmission facilities?

C. Truth-in-Billing

152. The Commission has adopted truth-in-billing rules to ensure that consumers receive accurate, meaningful information on their telecommunications bills that will allow consumers to better understand their bills, compare service offerings, and thereby promote a more efficient, competitive marketplace.[454] In general, the Commission's rules require that a telecommunication carrier's bill must: (1) be accompanied by a brief, clear, non-misleading, plain language description of the service or services rendered; (2) identify the service provider associated with each charge; (3) clearly and conspicuously identify any change in service provider; (4) identify those charges for which failure to pay will not result in disconnection of basic local service; and (5) provide a toll-free number for consumers to inquire or dispute any charges.[455] The Commission's rules on truth-in-billing are designed to reduce slamming,[456]

(continued from previous page)
Subscriber Carrier Selection Changes Provisions of the Telecommunications Act of 1996, Policies and Rules Concerning Unauthorized Changes of Consumers' Long Distance Carriers, CC Docket No. 94-129, Order, 16 FCC Rcd 4999 (2001); *Implementation of the Subscriber Carrier Selection Changes Provisions of the Telecommunications Act of 1996, Policies and Rules Concerning Unauthorized Changes of Consumers' Long Distance Carriers*, CC Docket No. 94-129, Third Order on Reconsideration and Second Further Notice of Proposed Rule Making, 18 FCC Rcd 5099 (2003) (*Third Reconsideration Order* and/or *Second FNPRM*). The rules adopted by the Commission to implement section 258 are codified in part 64. *See* 47 C.F.R. §§ 64.1100 *et seq*.

[450] *First Reconsideration Order*, 15 FCC Rcd at 8169-80, paras. 22-43.

[451] *Id.* at 8165-66, paras. 25-28.

[452] *Id.*

[453] Typically, in order to subscribe to broadband Internet access service, a consumer must install, or have installed, equipment (*i.e.*, a modem that the ISP provides to the consumer and that is specific to that ISP) that, along with a proprietary password, enables the consumer to utilize that particular ISP's Internet access service. We therefore seek comment on whether, given the manner in which broadband Internet access service is provisioned, slamming could actually occur from a technical perspective.

[454] *See* 47 C.F.R. §§ 64.2400-2401.

[455] 47 C.F.R. § 64.2401.

[456] *See supra* Part VIII.B.

cramming,[457] and other telecommunications fraud by setting standards for accuracy on bills for telecommunications service.[458]

153. We seek comment on whether we should exercise our Title I authority to impose requirements on broadband Internet access service providers that are similar to our truth-in-billing requirements or are otherwise geared toward reducing slamming, cramming, or other types of telecommunications-related fraud. For example, during 2005, the Commission's Consumer and Governmental Affairs Bureau has received complaints about the billing practices of broadband Internet access services providers, including complaints related to double billing, billing for unexplained charges, and billing for cancelled services.[459] Overall, parties should explain what problems customers of broadband Internet access service are likely to have with their bills and whether we should address these problems through truth-in-billing-type requirements.

D. Network Outage Reporting

154. The Commission requires certain communications providers to notify the Commission of outages of thirty or more minutes that affect a substantial number of customers or involve major airports, major military installations, key government facilities, nuclear power plants, or 911 facilities.[460] We seek comment on whether we should exercise our Title I authority to impose any similar requirements on broadband Internet access service providers. Do the purposes of our network outage reporting requirements apply to outages of broadband Internet access service? Should we adopt requirements that differ depending on the nature of the facility or the type of customer served?

E. Section 214 Discontinuance

155. Section 214 of the Act limits a telecommunications carrier's ability to discontinue unilaterally its service to customers.[461] The Commission's implementing rules generally require that domestic carriers wishing to "discontinue, reduce, or impair" services must first request authority to do so from the Commission[462] and must notify affected customers and others of their plans.[463]

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[457] "Cramming" is the practice of placing unauthorized, misleading, or deceptive charges on a telecommunications bill. Cramming is most likely to occur when a carrier does not clearly or accurately describe all of the relevant charges on the consumer's bill.

[458] *See* 47 C.F.R. § 64.2400(a).

[459] Operations Support for Complaint Analysis and Resolution (OSCAR) System, Consumer & Governmental Affairs Bureau (Aug. 4, 2005).

[460] 47 C.F.R. § 63.100(a)-(e); *see also New Part 4 of the Commission's Rules Concerning Disruptions to Communications*, ET Docket No. 04-35, Report and Order and Further Notice of Proposed Rulemaking, 19 FCC Rcd 16830, 16867, para. 65 (2004).

[461] 47 U.S.C. § 214(a). Part 63 of the Commission's rules implements this section of the Act, establishing comprehensive rules with which telecommunications carriers must comply in seeking to discontinue telecommunications services. These rules vary depending on whether the carrier in question is a dominant or non-dominant provider of the telecommunications services it is seeking to discontinue. *See* 47 C.F.R. §§ 63.60 *et seq.*

[462] 47 U.S.C. § 63.71.

[463] 47 U.S.C. § 63.71(a).

156. We seek comment on whether we should exercise our Title I authority to impose discontinuance-type requirements on providers of broadband Internet access service. As customers grow more dependent on broadband Internet access services, does the need for notice to customers grow stronger?[464] Or do the multiplicity and availability of broadband Internet access providers mitigate the need for such notice?

F. Section 254(g) Rate Averaging Requirements

157. Finally, we seek to ensure that our actions today do not jeopardize the policies of section 254(g). That section required the Commission to adopt rules "to require that the rates charged by providers of interexchange telecommunications services to subscribers in rural and high cost areas . . . be no higher than the rates charged by each such provider to its subscribers in urban areas."[465] The provision further required that the rules "require that a provider of interstate interexchange telecommunications services . . . provide such services to its subscribers in each State at rates no higher than the rates charged to its subscribers in any other State."[466] The Commission has forborne from the requirements of section 254(g) with regard to private line services, of which DSL is one.[467] Because the policies underlying section 254(g) remain important, however, we ask whether we should exercise our Title I authority to impose any similar requirements on providers of broadband Internet access services, particularly as consumers substitute broadband services and applications for narrowband services that were covered by section 254(g).

G. Federal and State Involvement

158. We recognize that the states play an important role in ensuring that public safety and consumer protection goals are met. The Commission has recently announced the creation of a federal-state task force on VoIP E911 enforcement,[468] and we believe that this *Notice* may give rise to additional areas in which cooperation between this Commission and the states can achieve the best results. We note in this regard that NARUC has recently advocated for a "functional" approach to questions of federal and state jurisdiction, particularly with respect to consumer protection issues.[469] For example, with respect to CPNI, NARUC recommends that the Commission be primarily responsible for establishing rules, while state or local authorities assume responsibility for enforcing those rules.[470] To the extent that the

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[464] For example, in 2001, a large provider of broadband Internet access services, @Home, sought bankruptcy court protection and announced plans to sell its high-speed network. Within a relatively brief period of time, the company requested and received permission from the United States Bankruptcy Court to shut down its network, causing its subscribers to switch to other providers. News reports described the many problems the subscribers encountered during the transition, including service outages, inadequate customer support, and loss of high-speed access. *See* Bill Bergstrom, *Comcast Fields Internet Complaints*, Tallahassee Democrat, Jan. 9, 2002; Bill Bergstrom, *Internet Switch Problems Annoy Comcast Customers*, Fort Wayne Journal-Gazette, Jan. 7, 2002.

[465] 47 U.S.C. § 254(g).

[466] *Id.*

[467] *See Policy and Rules Concerning the Interstate, Interexchange Marketplace*, Report and Order, 11 FCC Rcd 9564, 9577, para. 27 (1996) (forbearing from application of section 254(g) "to the extent necessary to permit carriers to depart from geographic rate averaging to offer . . . private line services").

[468] *See, e.g., FCC Announces Joint Federal/State VoIP Enhanced 911 Enforcement Task Force*, Press Release, 2005 Westlaw 1750445 (July 25, 2005).

[469] *See generally NARUC Legislative Task Force Report on Federalism and Telecom* (July 2005).

[470] *See id.* at 8.

Commission finds it necessary to impose consumer protection and related regulations on broadband Internet access service providers, we seek comment on how best to harmonize federal regulations with the states' efforts and expertise in these areas. Do commenters support NARUC's functional approach? In what other ways can the federal and state governments cooperate in order to ensure the best results for consumers?

H. Consumer Options for Enforcement

159. We note that consumers have various methods of pursuing complaints with the Commission against entities subject to our jurisdiction. In particular, the Commission's informal complaint process permits consumers to submit complaints to the Commission by any reasonable means, including by telephone, facsimile, postal mail, email and an Internet complaint form. Consumer Center representatives, known as Consumer Advocacy and Mediation Specialists or CAMSs, are available to assist consumers in filing complaints if needed. CAMSs staff review complaints for subject matter content and determine appropriate handling of the complaints.

IX. PROCEDURAL MATTERS

A. Final Paperwork Reduction Act Analysis

160. This Report and Order does not contain any information collection subject to the Paperwork Reduction Act of 1995 (PRA), Public Law 104-13. In addition, therefore, it does not contain any new or modified "information collection burden for small business concerns with fewer than 25 employees," pursuant to the Small Business Paperwork Relief Act of 2002, Public Law 107-198, *see* 44 U.S.C. § 3506(c)(4).

B. Regulatory Flexibility

161. As required by the Regulatory Flexibility Act, *see* 5 U.S.C. § 603, the Commission has prepared a Final Regulatory Flexibility Certification of the possible significant economic impact on small entities of the policies and rules addressed in this Report and Order. This certification is set forth in Appendix B.

162. As required by the Regulatory Flexibility Act, 5 U.S.C. § 603, the Commission has prepared an Initial Regulatory Flexibility Analysis (IRFA) of the possible significant economic impact on small entities of the policies and rules addressed in this Notice of Proposed Rulemaking. The IRFA is set forth in Appendix B. Written public comments are requested on the IRFA. These comments must be filed in accordance with the same filing deadlines as comments filed in response to this Notice of Proposed Rulemaking and must have a separate and distinct heading designating them as responses to the IRFA.

C. Other Procedural Matters

1. Ex Parte Presentations

163. The rulemaking this Notice initiates shall be treated as a "permit-but-disclose" proceeding in accordance with the Commission's *ex parte* rules.[471] 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

[471] 47 C.F.R. §§ 1.200 *et seq.*

description of the views and arguments presented is generally required.[472] Other requirements pertaining to oral and written presentations are set forth in section 1.1206(b) of the Commission's rules.

2. Comment Filing Procedures

164. Pursuant to sections 1.415 and 1.419 of the Commission's rules, 47 C.F.R §§ 1.415, 1.419, interested parties may file comments and reply comments regarding the Notice of Proposed Rulemaking on or before the dates indicated on the first page of this document. **All filings related to this Notice of Proposed Rulemaking should refer to WC Docket No. 05-271 and need not reference the other docket numbers appearing in the caption to this document.** Comments may be filed using: (1) the Commission's Electronic Comment Filing System (ECFS), (2) the Federal Government's eRulemaking Portal, or (3) by filing paper copies. *See* Electronic Filing of Documents in Rulemaking Proceedings, 63 FR 24121 (1998).

- Electronic Filers: Comments may be filed electronically using the Internet by accessing the ECFS: http://www.fcc.gov/cgb/ecfs/ or the Federal eRulemaking Portal: http://www.regulations.gov. Filers should follow the instructions provided on the website for submitting comments.
    - ECFS filers must transmit one electronic copy of the comments for WC Docket No. 05-271. In completing the transmittal screen, filers should include their full name, U.S. Postal Service mailing address, and the applicable docket number. Parties may also submit an electronic comment by Internet e-mail. To get filing instructions, filers should send an e-mail to ecfs@fcc.gov, and include the following words in the body of the message, "get form." A sample form and directions will be sent in response.
- Paper Filers: Parties who choose to file by paper must file an original and four copies of each filing. Filings can be sent by hand or messenger delivery, by commercial overnight courier, or by first-class or overnight U.S. Postal Service mail (although we continue to experience delays in receiving U.S. Postal Service mail). All filings must be addressed to the Commission's Secretary, Marlene H. Dortch, Office of the Secretary, Federal Communications Commission, 445 12th Street, S.W., Washington, D.C. 20554.
    - The Commission's contractor will receive hand-delivered or messenger-delivered paper filings for the Commission's Secretary at 236 Massachusetts Avenue, N.E., Suite 110, Washington, D.C. 20002. The filing hours at this location are 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.
    - Commercial overnight mail (other than U.S. Postal Service Express Mail and Priority Mail) must be sent to 9300 East Hampton Drive, Capitol Heights, Md. 20743.
    - U.S. Postal Service first-class, Express, and Priority mail should be addressed to 445 12th Street, S.W., Washington D.C. 20554.

165. Parties should send a copy of their filings to Janice Myles, Competition Policy Division, Wireline Competition Bureau, Federal Communications Commission, Room 5-C140, 445 12th Street, S.W.,

[472] *See* 47 C.F.R. § 1.1206(b)(2).

Washington, D.C. 20554, or by e-mail to janice.myles@fcc.gov. Parties shall also serve one copy with the Commission's copy contractor, Best Copy and Printing, Inc. (BCPI), Portals II, 445 12th Street, S.W., Room CY-B402, Washington, D.C. 20554, (202) 488-5300, or via e-mail to fcc@bcpiweb.com.

166. Documents in WC Docket No. 05-271 will be available for public inspection and copying during business hours at the FCC Reference Information Center, Portals II, 445 12th Street S.W., Room CY-A257, Washington, D.C. 20554. The documents may also be purchased from BCPI, telephone (202) 488-5300, facsimile (202) 488-5563, TTY (202) 488-5562, e-mail fcc@bcpiweb.com.

3. Accessible Formats

167. To request materials in accessible formats for people with disabilities (Braille, large print, electronic files, audio format), send an e-mail to fcc504@fcc.gov or call the Consumer & Governmental Affairs Bureau at 202-418-0530 (voice) or 202-418-0432 (TTY). Contact the FCC to request reasonable accommodations for filing comments (accessible format documents, sign language interpreters, CART, etc.) by e-mail: FCC504@fcc.gov; phone: 202-418-0530 or TTY: 202-418-0432.

X. ORDERING CLAUSES

168. Accordingly, IT IS ORDERED that, pursuant to Sections 1-4, 10, 201-205, 214, 222, 225, 251, 252, 254-256, 258, 303(r) of the Communications Act of 1934, as amended, 47 U.S.C. §§ 151-154, 160, 201-205, 214, 222, 225, 251, 252, 254-256, 258, 303(r), and Section 706 of the Telecommunications Act of 1996, 47 U.S.C. § 157 nt, the Report and Order and Notice of Proposed Rulemaking ARE ADOPTED.

169. IT IS FURTHER ORDERED, pursuant to Sections 1-4, 10, 201-205, 214, 222, 225, 251, 252, 254-256, 258, 303(r) of the Communications Act of 1934, as amended, 47 U.S.C. §§ 151-154, 160, 201-205, 214, 222, 225, 251, 252, 254-256, 258, 303(r), and Section 706 of the Telecommunications Act of 1996, 47 U.S.C. § 157 nt, that wireline broadband Internet access transmission providers ARE GRANTED blanket certification to discontinue the provision of common carrier broadband Internet access transmission services to existing customers as set forth and subject to the conditions stated in this Order.

170. IT IS FURTHER ORDERED, pursuant to Sections 1-4, 10, 201-205, 214, 222, 225, 251, 252, 254-256, 258, 303(r) of the Communications Act of 1934, as amended, 47 U.S.C. §§ 151-154, 160, 201-205, 214, 222, 225, 251, 252, 254-256, 258, 303(r), and Section 706 of the Telecommunications Act of 1996, 47 U.S.C. § 157 nt, that the Conditional Petition for Forbearance Under 47 U.S.C. § 160(c) filed by the Verizon Telephone Companies in WC Docket No. 04-242 on June 28, 2004, IS DENIED AS MOOT.

171. IT IS FURTHER ORDERED, pursuant to Sections 1-4, 10, 201-205, 214, 222, 225, 251, 252, 254-256, 258, 303(r) of the Communications Act of 1934, as amended, 47 U.S.C. §§ 151-154, 160, 201-205, 214, 222, 225, 251, 252, 254-256, 258, 303(r), and Section 706 of the Telecommunications Act of 1996, 47 U.S.C. § 157 nt, that the Petition for Declaratory Ruling or, Alternatively, for Interim Waiver filed in WC Docket No. 04-242 by the Verizon Telephone Companies on June 28, 2004, IS DISMISSED AS MOOT.

172. IT IS FURTHER ORDERED, pursuant to sections 1.103(a) and 1.427(b) of the Commission's rules, 47 C.F.R. §§ 1.103(a), 1.427(b), that this Report and Order SHALL BE EFFECTIVE 30 days after publication of the Report and Order in the FEDERAL REGISTER.

173. IT IS FURTHER ORDERED that the Commission's Consumer and Governmental Affairs Bureau, Reference Information Center, SHALL SEND a copy of this Order, including the Final

Regulatory Flexibility Certification, to the Chief Counsel for Advocacy of the Small Business Administration.

174. IT IS FURTHER ORDERED that the Commission's Consumer and Governmental Affairs Bureau, Reference Information Center, SHALL SEND a copy of this Notice of Proposed Rulemaking, including the Initial Regulatory Flexibility Analysis, to the Chief Counsel for Advocacy of the Small Business Administration.[473]

FEDERAL COMMUNICATIONS COMMISSION

Marlene H. Dortch
Secretary

[473] *See* 5 U.S.C. § 603(a).

APPENDIX A
LIST OF COMMENTERS

Commenters
WC Docket No. 02-33

Comments	Abbreviation
Alcatel USA, Inc.	Alcatel
Allegiance Telecom, Inc.	Allegiance
Alvarion, Inc.	Alvarion
American Foundation for the Blind	AFB
American ISP Association	AISPA
American Public Power Association	APPA
AOL Time Warner Inc.	AOL
Arizona Consumer Council, Center for Digital Democracy, Citizen Action of Illinois, Citizens Utility Board of Oregon, Consumer Action, the Consumer Federation of America, Consumers Union, Democratic Process Center, Florida Consumer Action Network, Illinois Pirg, Massachusetts Consumer Coalition, Media Access Project, New Jersey Citizen Action, Texas Consumer Association, Texas Office of Public Utility Counsel, USAction	Arizona Consumer Council *et al.*
Association of Communications Enterprises	ASCENT
AT&T Corporation	AT&T
Beacon Telecommunications Advisors, LLC	Beacon
BellSouth Corporation	BellSouth
Big Planet, Inc.	Big Planet
Business Telecom, Inc., CTC Communications Corp., Florida Digital Network, Inc., Globalcom, Inc., and RCN Telecom Services, Inc.	Business Telecom *et al.*
California Internet Service Providers Association	CISPA
Catena Networks, Inc.	Catena
Cbeyond Communications, LLC, EL Paso Networks, LLC, Focal Communications Corporation, New Edge Network, Inc., and Pac-West Telecomm, Inc.	Cbeyond *et al.*
Charter Communications, Inc.	Charter
Cinergy Communications Company	Cinergy
Covad Communications Company	Covad
Cox Communications, Inc.	Cox
David R. Hughes	David R. Hughes
DirectTV Broadband, Inc.	DirectTV
DSLnet Communications, LLC	DSLnet
EarthLink, Inc.	EarthLink
Federal Bureau of Investigation (FBI) and Department of Justice	DOJ/FBI
Florida Public Service Commission	Florida Commission
Fred Williamson and Associates, Inc.	FW&A
General Communication Inc.	GCI
GVNW Consulting, Inc.	GVNW
Hugh Carter Donahue	Donahue

Hughes Network Systems, Inc., Hughes Communications, Inc., and Hughes Communications Galaxy, Inc.	Hughes
Illinois Commerce Commission	Illinois Commission
Independent Telephone and Telecommunications Alliance	ITTA
Information Technology Association of America	ITAA
Kenneth Arrow *et al.*	Arrow *et al.*
JMC Telecom and NuVox Communications	JMC/NuVox
McLeodUSA Telecommunications Services, Inc.	McLeodUSA
Mescalero Apache Telecom, Inc.	MATI
Michigan Public Service Commission	Michigan Commission
Minnesota Department of Commerce	Minnesota Commerce Dept.
Monet Mobile Networks, Inc.	Monet
Mpower Communications Corp.	Mpower
Mutual Data Services, Inc.,	Mutual Data
National Association of Regulatory Utility Commissioners	NARUC
National Cable & Telecommunications Association	NCTA
National Exchange Carrier Association, Inc.	NECA
National Rural Telecom Association	NRTA
Nebraska Independent Companies	Nebraska Independents
New Hampshire ISP Association	New Hampshire ISPs
NewSouth Communications	NewSouth
New York State Department of Public Service	New York Commission
Office of the Attorney General of Texas, Consumer Protection Division	Texas Attorney General
Ohio Internet Service Providers Association, Texas Internet Services Providers Association, and Washington Association of Internet Service Providers	Ohio ISP Assoc. *et al.*
Oregon Public Utility Commission	Oregon Commission
Organization for the Promotion and Advancement of Small Telecommunications Companies	OPASTCO
Oregon Public Utility Commission	Oregon Commission
Part-15 Organization, Inc.	Part-15.Org
People of the State of California and the California Public Utilities Commission	California Commission
Pennsylvania Office of Consumer Advocate, Maine Public Advocate, Maryland Office of People's Counsel, Ohio Consumers' Counsel, Utility Reform Network, California Office of Ratepayer Advocates, Connecticut Office of Consumer Counsel, and New Hampshire Office of Consumer Advocate	Pennsylvania Consumer Advocate *et al.*
Public Service Commission of Wisconsin	Wisconsin Commission
Public Utilities Commission of Ohio	Ohio Commission
Public Utilities Commission of Texas	Texas Commission
Qwest Communications International Inc.	Qwest
Rehabilitation Engineering Research Center on Telecommunications Access	RERC-TA
Ruby Ranch Internet Cooperative Association	Ruby
SBC Communications Inc.	SBC
Secretary of Defense	Secretary of Defense

SES AMERICOM, Inc.	SES AMERICOM
Socket Holdings Corporation	Socket
Sprint Corporation	Sprint
State Members of the Federal-State Joint Board on Separations	Federal-State Joint Board
Statement of 43 Economists	Economists
SureWest Communications	SureWest
TDS Telecommunications Corporation, Madison River Communications, and North Pittsburgh Systems Inc.	TDS *et al.*
Telecommunications for The Deaf, Inc.	Telecom for the Deaf
TeleTruth	TeleTruth
Texas Office of Public Utility Counsel, Consumer Federation of America, Consumers Union, Media Access Project, and the Center for Digital Democracy	Texas Counsel *et al.*
Time Warner Telecom	Time Warner
Pennsylvania Office of Consumer Advocate, Maine Public Advocate, Maryland Office of People's Counsel, Ohio Consumers' Counsel, Utility Reform Network, California Office of Ratepayer Advocates, Connecticut Office of Consumer Counsel, and New Hampshire Office of Consumer Advocate	Pennsylvania Consumer Advocate *et al.*
United Church of Christ, Office of Communication,; Association of Independent Video and Filmmakers; National Association of Media Arts and Culture	United Church of Christ *et al.*
United States Internet Industry Association	USIIA
United States Telecom Association	USTA
US LEC Corp.	US LEC
Verizon telephone companies	Verizon
Verizon Wireless	Verizon Wireless
Vermont Public Service Board	Vermont Commission
WaveRider Communications Inc.	WaveRider
Western Alliance	Western Alliance
Whizwireless, LLC	Whizwireless
Wireless Communications Association International, Inc.	WCA
WorldCom, Inc., The Competitive Telecommunications Association, and the Association for Local Telecommunications Services	MCI *et al.*
Z-Tel Communications, Inc.	Z-Tel

Reply Commenters
WC Docket No. 02-33

Comments	**Abbreviation**
Ad Hoc Telecommunications Users Committee	Ad Hoc
Alaska Telephone Association	Alaska
Allegiance Telecom, Inc.	Allegiance
American Library Association	American Library
AOL Time Warner Inc.	AOL
Association for Local Telecommunication Services	ALTS

Association of Communications Enterprises, AT&T, Big Planet, Inc., Business Telecom, Inc., Cbeyond Communications, LLC, CTC Communications Corp., DSLNet Communications, LLC, El Paso Networks, LLC, Focal Communications Corporation, Florida Digital Network, New Edge Network, Inc., Pac-West Telecomm, Inc., RCN Telecom Services, Inc., and US LEC Corp.	ASCENT *et al.*
AT&T Corporation	AT&T
Attorney General to Texas, Consumer Protection Division	Texas Attorney General
Beacon Telecommunications Advisors, LLC	Beacon
BellSouth Corporation	BellSouth
Cablevision Systems Corporation	Cablevision
California Internet Service Providers Association	CISPA
Charter Communications, Inc.	Charter
City of Ketchikan d/b/a Ketchikan Public Utilities – Telephone Division	KPU
Comcast Corporation	Comcast
Communications Workers of America	CWA
Covad Communications Company	Covad
DirectTV Broadband, Inc.	DirectTV Broadband
DSLnet Communications, LLC	DSLnet
EarthLink, Inc.	EarthLink
Fred Williamson and Associates, Inc.	FW&A
General Communication Inc.	GCI
GVNW Consulting, Inc.	GVNW
High Tech Broadband Coalition	HTBC
Independent Telephone and Telecommunications Alliance	ITTA
Information Technology Association of America	ITAA
Kenneth Arrow *et al.*	Arrow *et al.*
KMC Telecom and NuVox Communications	KMC/NuVox
McLeodUSA Telecommunications Services, Inc.	McLeodUSA
Mescalero Apache Telecom, Inc.	MATI
National Association of Broadcasters	NAB
National Cable & Telecommunications Association	NCTA
National Rural Telecom Association	NRTA
National Telecommunications Cooperative Association	NTCA
Nebraska Independent Companies	Nebraska Independents
New York State Attorney General	New York Attorney General
New York State Department of Public Service	New York Commission
Next Level Communications	Next Level
Ohio Internet Service Providers Association, Texas Internet Services Providers Association, and Washington Association of Internet Service Providers	Ohio ISP Assoc. *et al.*
Organization for the Promotion and Advancement of Small Telecommunications Companies	OPASTCO
Pennsylvania Office of Consumer Advocate, Maine Public Advocate, Maryland Office of People's Counsel, Ohio Consumers' Counsel, Utility Reform Network, California Office of Ratepayer Advocates, and New Hampshire Office of Consumer Advocate	Pennsylvania Consumer Advocates *et al.*
Qwest Communications International Inc.	Qwest

Regulatory Commission of Alaska	Alaska Commission
SBC Communications Inc.	SBC
Satellite Industry Association	SIA
SES AMERICOM, Inc.	SES AMERICON
Sprint Corporation	Sprint
Time Warner Telecom	Time Warner
United States Internet Industry Association	USIIA
United States Telecom Association	USTA
Verizon telephone companies	Verizon
WorldCom, Inc., Competitive Telecommunications Association, and Association for Local Telecommunications Services	MCI *et al.*
XO Communications, Inc.	XO

APPENDIX B
REGULATORY FLEXIBILITY ANALYSES

I. FINAL REGULATORY FLEXIBILITY CERTIFICATION

1. The Regulatory Flexibility Act of 1980, as amended (RFA),[1] requires that a regulatory flexibility analysis be prepared for notice-and-comment rulemaking proceedings, unless the agency certifies that "the rule will not, if promulgated, have a significant economic impact on a substantial number of small entities."[2] The RFA generally defines the term "small entity" as having the same meaning as the terms "small business," "small organization," and "small governmental jurisdiction."[3] In addition, the term "small business" has the same meaning as the term "small business concern" under the Small Business Act.[4] 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).[5]

2. In the *Wireline Broadband NPRM*, the Commission sought comment generally on the appropriate statutory classification for wireline broadband Internet access service provided over a provider's own facilities, and on what regulatory requirements, if any, should be imposed on the telecommunications component of wireline broadband Internet access service.[6] Specifically, the Commission sought comment on whether the *Computer Inquiry* requirements should be modified or eliminated as applied to self-provisioned wireline broadband Internet access service, as well as how the Commission's tentative conclusion that wireline broadband Internet access service is an information service would affect the CALEA assistance capabilities, the USA PATRIOT Act, other national security or emergency preparedness obligations, network reliability and interoperability, and existing consumer protection requirements, such as section 214 of the Act, CPNI requirements under section 222 of the Act, and requirements for access to persons with disabilities under section 255 of the Act.[7] The Commission also sought comment on how to continue to meet the goals of universal service under section 254 of the Act in a marketplace where competing providers are deploying broadband Internet access, including how the regulatory status of wireline broadband Internet access could impact the system of assessments and contributions to universal service.[8] Finally, the *Wireline Broadband NPRM* also invited comment on the

[1] *See* 5 U.S.C. § 603. The RFA, *see* 5 U.S.C. §§ 601-12, has been amended by the Small Business Regulatory Enforcement Fairness Act of 1996 (SBREFA), Pub. L. No. 104-121, Title II, 110 Stat. 857 (1996).

[2] 5 U.S.C. § 605(b).

[3] 5 U.S.C. § 601(6).

[4] 5 U.S.C. § 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 term which are appropriate to the activities of the agency and publishes such definition(s) in the Federal Register."

[5] 15 U.S.C. § 632.

[6] *Wireline Broadband NPRM*, 17 FCC Rcd at 3029-48, paras. 17-64.

[7] *Id.* at 3035-47, paras. 30-61.

[8] *Id.* at 3043-54, paras. 54-78.

relationship between the statutory classification of wireline broadband Internet access service and an incumbent LEC's obligation to provide access to UNEs under sections 251 and 252.[9]

3. The Order eliminates the *Computer Inquiry* requirements on facilities-based carriers in their provision of wireline broadband Internet access service. Consequently, BOCs are immediately relieved of the separate subsidiary, CEI, and ONA obligations with respect to wireline broadband Internet access services. In addition, subject to a one-year transition period for existing wireline broadband transmission services, all wireline broadband Internet access service providers are no longer subject to the *Computer II* requirement to separate out the underlying transmission from wireline broadband Internet access service and offer it on a common carrier basis. We determine in this Order that wireline broadband Internet access service is an information service, as that term is defined in the statute. To the extent that the regulatory obligations discussed above apply to the transmission component of wireline broadband Internet access service when provided to ISPs or others on a stand-alone common carrier basis, these obligations will continue to apply when carriers offer broadband Internet access service transmission on a common carrier basis, both during the transition and thereafter.

4. The rule changes adopted in this Order apply, for the most part, only to BOCs (*Computer Inquiry* separate subsidiary, CEI, and ONA obligations with respect to wireline broadband Internet access services). In addition, all facilities-based wireline broadband Internet access service providers are no longer subject to the *Computer II* requirement to separate out the underlying transmission. Neither the Commission nor the SBA has developed a small business size standard specifically applicable to providers of incumbent local exchange service and interexchange services. The closest applicable size standard under the SBA rules is for Wired Telecommunications Carriers.[10] This provides that such a carrier is small entity if it employs no more than 1,500 employees.[11] None of the four BOCs that would be affected by amendment of these rules meets this standard. To the extent that any other wireline provider would be classified as a small entity, it would not be negatively affected by the regulatory relief we grant in this Order.

5. Therefore, we certify that the requirements of the Order will not have a significant economic impact on a substantial number of small entities. We note that one party, Teletruth, filed comments in response to the IFRAs in the *Wireline Broadband* and *Incumbent LEC Broadband* proceedings. Teletruth argues that that these IRFAs are deficient because they fail to assess the potential impact of the actions proposed in those proceedings on small ISPs and small competitive LECs and that our implementation of the RFA is otherwise deficient.[12] These arguments are identical to, and indeed filed as part of the same pleading as, arguments the Commission previously has rejected.[13] We therefore again reject these arguments for the reasons stated in our prior Orders responding to TeleTruth's comments.[14]

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[9] *Id.* at 3047, para. 61.

[10] 13 C.F.R. § 121.201, NAICS code 517110.

[11] *Id.*

[12] *See* TeleTruth Comments *passim.*

[13] *See* TeleTruth Comments *passim.*

[14] *See* TeleTruth Comments *passim.*

6. The Commission will send a copy of the Order, including a copy of this Final Regulatory Flexibility Certification, in a report to Congress pursuant to the Congressional Review Act.[15] In addition, the Order and this final certification will be sent to the Chief Counsel for Advocacy of the SBA, and a summary of the Order and final certification will be published in the Federal Register.[16]

II. INITIAL REGULATORY FLEXIBILITY ANALYSIS

7. As required by the Regulatory Flexibility Act of 1980, as amended (RFA),[17] the Commission has prepared the present Initial Regulatory Flexibility Analysis (IRFA) of the possible significant economic impact on small entities that might result from 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. The Commission will send a copy of the *Notice*, including this IRFA, to the Chief Counsel for Advocacy of the Small Business Administration.[18] In addition, the *Notice* and IRFA (or summaries thereof) will be published in the Federal Register.[19]

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

8. The broadband marketplace before us today is an emerging and rapidly changing one. Nevertheless, consumer protection remains a priority for the Commission. We initiate this rulemaking to ensure that consumer protection objectives in the Act are met as the industry shifts from narrowband to broadband services. Through this *Notice*, the Commission's objective is to develop a framework for consumer protection in the broadband age – a framework that ensures that consumer protection needs are met by all providers of broadband Internet access service, regardless of the underlying technology.[20] The *Notice* seeks comment on whether the Commission should impose, for example, privacy requirements similar to the Act's CPNI requirements, slamming, truth-in-billing, network outage reporting, section 214 discontinuance, or section 254(g) rate averaging requirements on providers of broadband Internet access service. We also seek comment on how best to harmonize federal regulations with the states' efforts and expertise in consumer protection issues.

B. Legal Basis

9. The legal basis for any action that may be taken pursuant to the *Notice* is contained in sections 1-4, 201-205, 251, 252, 254, 256, 303(r) of the Communications Act of 1934, as amended, 47 U.S.C. §§ 151-154, 201-205, 251, 252, 254, 256, 303(r), and Section 706 of the Telecommunications Act of 1996, 47 U.S.C. § 157 nt.

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[15] *See* 5 U.S.C. § 801(a)(1)(A).

[16] *See* 5 U.S.C. § 605(b).

[17] *See* 5 U.S.C. § 603. The RFA, *see* 5 U.S.C. §§ 601-12, has been amended by the Small Business Regulatory Enforcement Fairness Act of 1996 (SBREFA), Pub. L. No. 104-121, 110 Stat. 857 (1996).

[18] *See* 5 U.S.C. § 603(a).

[19] *See* 5 U.S.C. § 603(a).

[20] *See supra Notice* at para. 146.

C. Description and Estimate of the Number of Small Entities to Which the Proposed Rules May Apply

10. The RFA directs agencies to provide a description of and, where feasible, an estimate of the number of small entities that may be affected by the proposed rules.[21] The RFA generally defines the term "small entity" as having the same meaning as the terms "small business," "small organization," and "small governmental jurisdiction."[22] In addition, the term "small business" has the same meaning as the term "small business concern" under the Small Business Act.[23] 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).[24]

11. *Small Businesses.* Nationwide, there are a total of approximately 22.4 million small businesses, according to SBA data.[25]

12. *Small* Organizations. Nationwide, there are approximately 1.6 million small organizations.[26]

13. *Small Governmental Jurisdictions.* The term "small governmental jurisdiction" is defined as "governments of cities, towns, townships, villages, school districts, or special districts, with a population of less than fifty thousand."[27] As of 1997, there were approximately 87,453 governmental jurisdictions in the United States.[28] This number includes 39,044 county governments, municipalities, and townships, of which 37,546 (approximately 96.2%) have populations of fewer than 50,000, and of which 1,498 have populations of 50,000 or more. Thus, we estimate the number of small governmental jurisdictions overall to be 84,098 or fewer.

14. We note that the list of potentially affected entities below is perhaps more expansive than is necessary. We have, for instance, included services that are apparently currently not a part of the Internet industry, as well as manufacturers.

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[21] 5 U.S.C. §§ 603(b)(3), 604(a)(3).

[22] 5 U.S.C. § 601(6).

[23] 5 U.S.C. § 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."

[24] 15 U.S.C. § 632.

[25] *See* SBA, Programs and Services, SBA Pamphlet No. CO-0028, at page 40 (July 2002).

[26] Independent Sector, The New Nonprofit Almanac & Desk Reference (2002).

[27] 5 U.S.C. § 601(5).

[28] U.S. Census Bureau, Statistical Abstract of the United States: 2000, Section 9, pages 299-300, Tables 490 and 492.

1. Telecommunications Service Entities

a. Wireline Carriers and Service Providers

15. We have included small incumbent local exchange carriers 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."[29] The SBA's Office of Advocacy contends that, for RFA purposes, small incumbent local exchange carriers are not dominant in their field of operation because any such dominance is not "national" in scope.[30] We have therefore included small incumbent local exchange carriers in this RFA analysis, although we emphasize that this RFA action has no effect on Commission analyses and determinations in other, non-RFA contexts.

1. *Incumbent Local Exchange Carriers (LECs).* Neither the Commission nor the SBA has developed a small business size standard specifically for incumbent local exchange services. The appropriate size standard under SBA rules is for the category Wired Telecommunications Carriers. Under that size standard, such a business is small if it has 1,500 or fewer employees.[31] According to Commission data,[32] 1,303 carriers have reported that they are engaged in the provision of incumbent local exchange services. Of these 1,303 carriers, an estimated 1,020 have 1,500 or fewer employees and 283 have more than 1,500 employees. Consequently, the Commission estimates that most providers of incumbent local exchange service are small businesses that may be affected by our action. In addition, limited preliminary census data for 2002 indicate that the total number of wired communications carriers increased approximately 34 percent from 1997 to 2002.[33]

16. *Competitive Local Exchange Carriers, Competitive Access Providers (CAPs),* "Shared-Tenant Service Providers," and "Other Local Service Providers." Neither the Commission nor the SBA has developed a small business size standard specifically for these service providers. The appropriate size standard under SBA rules is for the category Wired Telecommunications Carriers. Under that size standard, such a business is small if it has 1,500 or fewer employees.[34] According to Commission data,[35]

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[29] 15 U.S.C. § 632.

[30] 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. *See* 13 C.F.R. § 121.102(b).

[31] 13 C.F.R. § 121.201, NAICS code 517110 (changed from 513310 in Oct. 2002).

[32] FCC, Wireline Competition Bureau, Industry Analysis and Technology Division, "Trends in Telephone Service" at Table 5.3, page 5-5 (June 2004) ("Trends in Telephone Service"). This source uses data that are current as of October 1, 2004.

[33] *See* U.S. Census Bureau, 2002 Economic Census, Industry Series: "Information," Table 2, Comparative Statistics for the United States (1997 NAICS Basis): 2002 and 1997, NAICS code 513310 (issued Nov. 2004). The preliminary data indicate that the total number of "establishments" increased from 20,815 to 27, 891. In this context, the number of establishments is a less helpful indicator of small business prevalence than is the number of "firms," because the latter number takes into account the concept of common ownership or control. The more helpful 2002 census data on firms, including employment and receipts numbers, will be issued in late 2005.

[34] 13 C.F.R. § 121.201, NAICS code 517110 (changed from 513310 in Oct. 2002).

769 carriers have reported that they are engaged in the provision of either competitive access provider services or competitive local exchange carrier services. Of these 769 carriers, an estimated 676 have 1,500 or fewer employees and 93 have more than 1,500 employees. In addition, 12 carriers have reported that they are "Shared-Tenant Service Providers," and all 12 are estimated to have 1,500 or fewer employees. In addition, 39 carriers have reported that they are "Other Local Service Providers." Of the 39, an estimated 38 have 1,500 or fewer employees and one has more than 1,500 employees. Consequently, the Commission estimates that most providers of competitive local exchange service, competitive access providers, "Shared-Tenant Service Providers," and "Other Local Service Providers" are small entities that may be affected by our action. In addition, limited preliminary census data for 2002 indicate that the total number of wired communications carriers increased approximately 34 percent from 1997 to 2002.[36]

17. *Local Resellers.* The SBA has developed a small business size standard for the category of Telecommunications Resellers. Under that size standard, such a business is small if it has 1,500 or fewer employees.[37] According to Commission data,[38] 143 carriers have reported that they are engaged in the provision of local resale services. Of these, an estimated 141 have 1,500 or fewer employees and two have more than 1,500 employees. Consequently, the Commission estimates that the majority of local resellers are small entities that may be affected by our action.

18. *Toll Resellers.* The SBA has developed a small business size standard for the category of Telecommunications Resellers. Under that size standard, such a business is small if it has 1,500 or fewer employees.[39] According to Commission data,[40] 770 carriers have reported that they are engaged in the provision of toll resale services. Of these, an estimated 747 have 1,500 or fewer employees and 23 have more than 1,500 employees. Consequently, the Commission estimates that the majority of toll resellers are small entities that may be affected by our action.

19. *Payphone Service Providers (PSPs).* Neither the Commission nor the SBA has developed a small business size standard specifically for payphone services providers. The appropriate size standard under SBA rules is for the category Wired Telecommunications Carriers. Under that size standard, such a business is small if it has 1,500 or fewer employees.[41] According to Commission data,[42] 654 carriers have reported that they are engaged in the provision of payphone services. Of these, an estimated 652 have 1,500 or fewer employees and two have more than 1,500 employees. Consequently, the Commission estimates that the majority of payphone service providers are small entities that may be affected by our

(continued from previous page)

[35] "Trends in Telephone Service" at Table 5.3.

[36] *See supra* note 33.

[37] 13 C.F.R. § 121.201, NAICS code 517310 (changed from 513330 in Oct. 2002).

[38] "Trends in Telephone Service" at Table 5.3.

[39] 13 C.F.R. § 121.201, NAICS code 517310 (changed from 513330 in Oct. 2002).

[40] "Trends in Telephone Service" at Table 5.3.

[41] 13 C.F.R. § 121.201, NAICS code 517110 (changed from 513310 in Oct. 2002).

[42] "Trends in Telephone Service" at Table 5.3.

action. In addition, limited preliminary census data for 2002 indicate that the total number of wired communications carriers increased approximately 34 percent from 1997 to 2002.[43]

20. *Interexchange Carriers (IXCs).* Neither the Commission nor the SBA has developed a small business size standard specifically for providers of interexchange services. The appropriate size standard under SBA rules is for the category Wired Telecommunications Carriers. Under that size standard, such a business is small if it has 1,500 or fewer employees.[44] According to Commission data,[45] 316 carriers have reported that they are engaged in the provision of interexchange service. Of these, an estimated 292 have 1,500 or fewer employees and 24 have more than 1,500 employees. Consequently, the Commission estimates that the majority of IXCs are small entities that may be affected by our action. In addition, limited preliminary census data for 2002 indicate that the total number of wired communications carriers increased approximately 34 percent from 1997 to 2002.[46]

21. *Operator Service Providers (OSPs).* Neither the Commission nor the SBA has developed a small business size standard specifically for operator service providers. The appropriate size standard under SBA rules is for the category Wired Telecommunications Carriers. Under that size standard, such a business is small if it has 1,500 or fewer employees.[47] According to Commission data,[48] 23 carriers have reported that they are engaged in the provision of operator services. Of these, an estimated 20 have 1,500 or fewer employees and three have more than 1,500 employees. Consequently, the Commission estimates that the majority of OSPs are small entities that may be affected by our action. In addition, limited preliminary census data for 2002 indicate that the total number of wired communications carriers increased approximately 34 percent from 1997 to 2002.[49]

22. *Prepaid Calling Card Providers.* Neither the Commission nor the SBA has developed a small business size standard specifically for prepaid calling card providers. The appropriate size standard under SBA rules is for the category Telecommunications Resellers. Under that size standard, such a business is small if it has 1,500 or fewer employees.[50] According to Commission data,[51] 89 carriers have reported that they are engaged in the provision of prepaid calling cards. Of these, 88 are estimated to have 1,500 or fewer employees and one has more than 1,500 employees. Consequently, the Commission estimates that all or the majority of prepaid calling card providers are small entities that may be affected by our action.

23. *800 and 800-Like Service Subscribers.*[52] Neither the Commission nor the SBA has developed a small business size standard specifically for 800 and 800-like service ("toll free") subscribers. The

[43] *See supra* note 33.

[44] 13 C.F.R. § 121.201, NAICS code 517110 (changed from 513310 in Oct. 2002).

[45] "Trends in Telephone Service" at Table 5.3.

[46] *See supra* note 33.

[47] 13 C.F.R. § 121.201, NAICS code 517110 (changed from 513310 in Oct. 2002).

[48] "Trends in Telephone Service" at Table 5.3.

[49] *See supra* note 33.

[50] 13 C.F.R. § 121.201, NAICS code 517310 (changed from 513330 in Oct. 2002).

[51] "Trends in Telephone Service" at Table 5.3.

[52] We include all toll-free number subscribers in this category, including those for 888 numbers.

appropriate size standard under SBA rules is for the category Telecommunications Resellers. Under that size standard, such a business is small if it has 1,500 or fewer employees.[53] The most reliable source of information regarding the number of these service subscribers appears to be data the Commission collects on the 800, 888, and 877 numbers in use.[54] According to our data, at the end of January, 1999, the number of 800 numbers assigned was 7,692,955; the number of 888 numbers assigned was 7,706,393; and the number of 877 numbers assigned was 1,946,538. We do not have data specifying the number of these subscribers that are not independently owned and operated or have more than 1,500 employees, and thus are unable at this time to estimate with greater precision the number of toll free subscribers that would qualify as small businesses under the SBA size standard. Consequently, we estimate that there are 7,692,955 or fewer small entity 800 subscribers; 7,706,393 or fewer small entity 888 subscribers; and 1,946,538 or fewer small entity 877 subscribers.

b. International Service Providers

24. The Commission has not developed a small business size standard specifically for providers of international service. The appropriate size standards under SBA rules are for the two broad categories of Satellite Telecommunications and Other Telecommunications. Under both categories, such a business is small if it has $12.5 million or less in average annual receipts.[55] For the first category of Satellite Telecommunications, Census Bureau data for 1997 show that there were a total of 324 firms that operated for the entire year.[56] Of this total, 273 firms had annual receipts of under $10 million, and an additional 24 firms had receipts of $10 million to $24,999,999. Thus, the majority of Satellite Telecommunications firms can be considered small.

25. The second category – Other Telecommunications – includes "establishments primarily engaged in . . . providing satellite terminal stations and associated facilities operationally connected with one or more terrestrial communications systems and capable of transmitting telecommunications to or receiving telecommunications from satellite systems."[57] According to Census Bureau data for 1997, there were 439 firms in this category that operated for the entire year.[58] Of this total, 424 firms had annual receipts of $5 million to $9,999,999 and an additional six firms had annual receipts of $10 million to $24,999,990. Thus, under this second size standard, the majority of firms can be considered small.

c. Wireless Telecommunications Service Providers

26. Below, for those services subject to auctions, we note that, as a general matter, the number of winning bidders that qualify as small businesses at the close of an auction does not necessarily represent the number of small businesses currently in service. Also, the Commission does not generally track

[53] 13 C.F.R. § 121.201, NAICS code 517310 (changed from 513330 in Oct. 2002).

[54] *See* FCC, Common Carrier Bureau, Industry Analysis Division, *Study on Telephone Trends*, Tables 21.2, 21.3, and 21.4 (Feb. 1999).

[55] 13 C.F.R. § 121.201, NAICS codes 517410 and 517910 (changed from 513340 and 513390 in Oct. 2002).

[56] U.S. Census Bureau, 1997 Economic Census, Subject Series: Information, "Establishment and Firm Size (Including Legal Form of Organization)," Table 4, NAICS code 513340 (issued Oct. 2000).

[57] Office of Management and Budget, North American Industry Classification System 513 (1997) (NAICS code 513390, changed to 517910 in Oct. 2002).

[58] U.S. Census Bureau, 1997 Economic Census, Subject Series: Information, "Establishment and Firm Size (Including Legal Form of Organization)," Table 4, NAICS code 513390 (issued Oct. 2000).

subsequent business size unless, in the context of assignments or transfers, unjust enrichment issues are implicated.

27. *Wireless Service Providers.* The SBA has developed a small business size standard for wireless firms within the two broad economic census categories of "Paging"[59] and "Cellular and Other Wireless Telecommunications."[60] Under both SBA categories, a wireless business is small if it has 1,500 or fewer employees. For the census category of Paging, Census Bureau data for 1997 show that there were 1,320 firms in this category, total, that operated for the entire year.[61] Of this total, 1,303 firms had employment of 999 or fewer employees, and an additional 17 firms had employment of 1,000 employees or more.[62] Thus, under this category and associated small business size standard, the majority of firms can be considered small. For the census category Cellular and Other Wireless Telecommunications, Census Bureau data for 1997 show that there were 977 firms in this category, total, that operated for the entire year.[63] Of this total, 965 firms had employment of 999 or fewer employees, and an additional 12 firms had employment of 1,000 employees or more.[64] Thus, under this second category and size standard, the majority of firms can, again, be considered small. In addition, limited preliminary census data for 2002 indicate that the total number of paging providers decreased approximately 51 percent from 1997 to 2002.[65] In addition, limited preliminary census data for 2002 indicate that the total number of cellular and other wireless telecommunications carriers increased approximately 321 percent from 1997 to 2002.[66]

28. *Cellular Licensees.* The SBA has developed a small business size standard for wireless firms within the broad economic census category "Cellular and Other Wireless Telecommunications."[67] Under this SBA category, a wireless business is small if it has 1,500 or fewer employees. For the census category Cellular and Other Wireless Telecommunications firms, Census Bureau data for 1997 show that

[59] 13 C.F.R. § 121.201, NAICS code 513321 (changed to 517211 in October 2002).

[60] 13 C.F.R. § 121.201, NAICS code 513322 (changed to 517212 in October 2002).

[61] U.S. Census Bureau, 1997 Economic Census, Subject Series: "Information," Table 5, Employment Size of Firms Subject to Federal Income Tax: 1997, NAICS code 513321 (issued October 2000).

[62] *Id.* The census data do not provide a more precise estimate of the number of firms that have employment of 1,500 or fewer employees; the largest category provided is "Firms with 1000 employees or more."

[63] U.S. Census Bureau, 1997 Economic Census, Subject Series: "Information," Table 5, Employment Size of Firms Subject to Federal Income Tax: 1997, NAICS code 513322 (issued October 2000).

[64] *Id.* The census data do not provide a more precise estimate of the number of firms that have employment of 1,500 or fewer employees; the largest category provided is "Firms with 1000 employees or more."

[65] *See* U.S. Census Bureau, 2002 Economic Census, Industry Series: "Information," Table 2, Comparative Statistics for the United States (1997 NAICS Basis): 2002 and 1997, NAICS code 513321 (issued Nov. 2004). The preliminary data indicate that the total number of "establishments" decreased from 3,427 to 1,664. In this context, the number of establishments is a less helpful indicator of small business prevalence than is the number of "firms," because the latter number takes into account the concept of common ownership or control. The more helpful 2002 census data on firms, including employment and receipts numbers, will be issued in late 2005.

[66] *See* U.S. Census Bureau, 2002 Economic Census, Industry Series: "Information," Table 2, Comparative Statistics for the United States (1997 NAICS Basis): 2002 and 1997, NAICS code 513322 (issued Nov. 2004). The preliminary data indicate that the total number of "establishments" increased from 2,959 to 9,511. In this context, the number of establishments is a less helpful indicator of small business prevalence than is the number of "firms," because the latter number takes into account the concept of common ownership or control. The more helpful 2002 census data on firms, including employment and receipts numbers, will be issued in late 2005.

[67] 13 C.F.R. § 121.201, NAICS code 513322 (changed to 517212 in October 2002).

there were 977 firms in this category, total, that operated for the entire year.[68] Of this total, 965 firms had employment of 999 or fewer employees, and an additional 12 firms had employment of 1,000 employees or more.[69] Thus, under this category and size standard, the great majority of firms can be considered small. Also, according to Commission data, 437 carriers reported that they were engaged in the provision of cellular service, Personal Communications Service (PCS), or Specialized Mobile Radio (SMR) Telephony services, which are placed together in the data.[70] We have estimated that 260 of these are small, under the SBA small business size standard.[71]

29. *Common Carrier Paging.* The SBA has developed a small business size standard for wireless firms within the broad economic census category, "Cellular and Other Wireless Telecommunications."[72] Under this SBA category, a wireless business is small if it has 1,500 or fewer employees. For the census category of Paging, Census Bureau data for 1997 show that there were 1,320 firms in this category, total, that operated for the entire year.[73] Of this total, 1,303 firms had employment of 999 or fewer employees, and an additional 17 firms had employment of 1,000 employees or more.[74] Thus, under this category and associated small business size standard, the majority of firms can be considered small. In the Paging *Third Report and Order*, we developed a small business size standard for "small businesses" and "very small businesses" for purposes of determining their eligibility for special provisions such as bidding credits and installment payments.[75] A "small business" is an entity that, together with its affiliates and controlling principals, has average gross revenues not exceeding $15 million for the preceding three years. Additionally, a "very small business" is an entity that, together with its affiliates and controlling principals, has average gross revenues that are not more than $3 million for the preceding three years.[76] The SBA has approved these small business size standards.[77] An auction of Metropolitan Economic Area licenses commenced on February 24, 2000, and closed on March 2, 2000.[78] Of the 985 licenses auctioned, 440 were sold. Fifty-seven companies claiming small business status won. Also, according to

[68] U.S. Census Bureau, 1997 Economic Census, Subject Series: "Information," Table 5, Employment Size of Firms Subject to Federal Income Tax: 1997, NAICS code 513322 (issued October 2000).

[69] *Id.* The census data do not provide a more precise estimate of the number of firms that have employment of 1,500 or fewer employees; the largest category provided is "Firms with 1000 employees or more."

[70] "Trends in Telephone Service" at Table 5.3.

[71] *Id.*

[72] 13 C.F.R. § 121.201, NAICS code 513322 (changed to 517212 in October 2002).

[73] U.S. Census Bureau, 1997 Economic Census, Subject Series: "Information," Table 5, Employment Size of Firms Subject to Federal Income Tax: 1997, NAICS code 513321 (issued October 2000).

[74] *Id.* The census data do not provide a more precise estimate of the number of firms that have employment of 1,500 or fewer employees; the largest category provided is "Firms with 1000 employees or more."

[75] *Amendment of Part 90 of the Commission's Rules to Provide for the Use of the 220-222 MHz Band by the Private Land Mobile Radio Service*, PR Docket No. 89-552, Third Report and Order and Fifth Notice of Proposed Rulemaking, 12 FCC Rcd 10943, 11068-70, paras. 291-295, 62 FR 16004 (Apr. 3, 1997).

[76] *See* Letter to Amy Zoslov, Chief, Auctions and Industry Analysis Division, Wireless Telecommunications Bureau, FCC, from A. Alvarez, Administrator, SBA (Dec. 2, 1998) (SBA Dec. 2, 1998 Letter).

[77] *Revision of Part 22 and Part 90 of the Commission's Rules to Facilitate Future Development of Paging Systems*, Memorandum Opinion and Order on Reconsideration and Third Report and Order, 14 FCC Rcd 10030, paras. 98-107 (1999).

[78] *Id.* at 10085, para. 98.

Commission data, 375 carriers reported that they were engaged in the provision of paging and messaging services.[79] Of those, we estimate that 370 are small, under the SBA-approved small business size standard.[80]

30. *Wireless Communications Services*. This service can be used for fixed, mobile, radiolocation, and digital audio broadcasting satellite uses. The Commission established small business size standards for the wireless communications services (WCS) auction.[81] A "small business" is an entity with average gross revenues of $40 million for each of the three preceding years, and a "very small business" is an entity with average gross revenues of $15 million for each of the three preceding years. The SBA has approved these small business size standards.[82] The Commission auctioned geographic area licenses in the WCS service. In the auction, there were seven winning bidders that qualified as "very small business" entities, and one that qualified as a "small business" entity.

31. *Wireless Telephony*. Wireless telephony includes cellular, personal communications services (PCS), and specialized mobile radio (SMR) telephony carriers. As noted earlier, the SBA has developed a small business size standard for "Cellular and Other Wireless Telecommunications" services.[83] Under that SBA small business size standard, a business is small if it has 1,500 or fewer employees.[84] According to Commission data, 445 carriers reported that they were engaged in the provision of wireless telephony.[85] We have estimated that 245 of these are small under the SBA small business size standard.

32. *Broadband Personal Communications Service*. The broadband Personal Communications Service (PCS) spectrum is divided into six frequency blocks designated A through F, and the Commission has held auctions for each block. The Commission defined "small entity" for Blocks C and F as an entity that has average gross revenues of $40 million or less in the three previous calendar years.[86] For Block F, an additional classification for "very small business" was added and is defined as an entity that, together with its affiliates, has average gross revenues of not more than $15 million for the preceding three calendar years."[87] These standards defining "small entity" in the context of broadband PCS auctions have been approved by the SBA.[88] No small businesses, within the SBA-approved small business size standards bid successfully for licenses in Blocks A and B. There were 90 winning bidders that qualified as small entities in the Block C auctions. A total of 93 small and very small business bidders won

[79] "Trends in Telephone Service" at Table 5.3.

[80] *Id.*

[81] Public Notice, "Auction of Wireless Communications Services, Auction Notes and Filing Requirements for 128 WCS Licenses Scheduled for April 15, 1997," DA 97-386, Feb. 21, 1997.

[82] SBA Dec. 2, 1998 Letter.

[83] 13 C.F.R. § 121.201, NAICS code 513322 (changed to 517212 in October 2002).

[84] *Id.*

[85] "Trends in Telephone Service" at Table 5.3.

[86] *See Amendment of Parts 20 and 24 of the Commission's Rules – Broadband PCS Competitive Bidding and the Commercial Mobile Radio Service Spectrum Cap*, WT Docket No. 96-59, Report and Order, 11 FCC Rcd 7824, 61 FR 33859 (July 1, 1996) (*PCS Order*); *see also* 47 C.F.R. § 24.720(b).

[87] *See PCS Order*, 11 FCC Rcd 7824.

[88] *See, e.g., Implementation of Section 309(j) of the Communications Act – Competitive Bidding*, PP Docket No. 93-253, Fifth Report and Order, 9 FCC Rcd 5332, 59 FR 37566 (July 22, 1994).

approximately 40 percent of the 1,479 licenses for Blocks D, E, and F.[89] On March 23, 1999, the Commission re-auctioned 347 C, D, E, and F Block licenses. There were 48 small business winning bidders. On January 26, 2001, the Commission completed the auction of 422 C and F Broadband PCS licenses in Auction No. 35. Of the 35 winning bidders in this auction, 29 qualified as "small" or "very small" businesses. Subsequent events, concerning Auction 35, including judicial and agency determinations, resulted in a total of 163 C and F Block licenses being available for grant.

33. *Narrowband Personal Communications Services.* To date, two auctions of narrowband personal communications services (PCS) licenses have been conducted. For purposes of the two auctions that have already been held, "small businesses" were entities with average gross revenues for the prior three calendar years of $40 million or less. Through these auctions, the Commission has awarded a total of 41 licenses, out of which 11 were obtained by small businesses. To ensure meaningful participation of small business entities in future auctions, the Commission has adopted a two-tiered small business size standard in the *Narrowband PCS Second Report and Order.*[90] A "small business" is an entity that, together with affiliates and controlling interests, has average gross revenues for the three preceding years of not more than $40 million. A "very small business" is an entity that, together with affiliates and controlling interests, has average gross revenues for the three preceding years of not more than $15 million. The SBA has approved these small business size standards.[91] In the future, the Commission will auction 459 licenses to serve Metropolitan Trading Areas (MTAs) and 408 response channel licenses. There is also one megahertz of narrowband PCS spectrum that has been held in reserve and that the Commission has not yet decided to release for licensing. The Commission cannot predict accurately the number of licenses that will be awarded to small entities in future auctions. However, four of the 16 winning bidders in the two previous narrowband PCS auctions were small businesses, as that term was defined. The Commission assumes, for purposes of this analysis that a large portion of the remaining narrowband PCS licenses will be awarded to small entities. The Commission also assumes that at least some small businesses will acquire narrowband PCS licenses by means of the Commission's partitioning and disaggregation rules.

34. *220 MHz Radio Service – Phase I Licensees.* The 220 MHz service has both Phase I and Phase II licenses. Phase I licensing was conducted by lotteries in 1992 and 1993. There are approximately 1,515 such non-nationwide licensees and four nationwide licensees currently authorized to operate in the 220 MHz band. The Commission has not developed a small business size standard for small entities specifically applicable to such incumbent 220 MHz Phase I licensees. To estimate the number of such licensees that are small businesses, we apply the small business size standard under the SBA rules applicable to "Cellular and Other Wireless Telecommunications" companies. This category provides that a small business is a wireless company employing no more than 1,500 persons.[92] For the census category Cellular and Other Wireless Telecommunications, Census Bureau data for 1997 show that there were 977

[89] FCC News, Broadband PCS, D, E and F Block Auction Closes, No. 71744 (rel. Jan. 14, 1997); *see also Amendment of the Commission's Rules Regarding Installment Payment Financing for Personal Communications Services (PCS) Licenses*, WT Docket No. 97-82, Second Report and Order, 12 FCC Rcd 16436, 62 FR 55348 (Oct. 24, 1997).

[90] *Amendment of the Commission's Rules to Establish New Personal Communications Services, Narrowband PCS*, Docket No. ET 92-100, Docket No. PP 93-253, Second Report and Order and Second Further Notice of Proposed Rulemaking, 15 FCC Rcd 10456, 65 FR 35875 (June 6, 2000).

[91] *See* SBA Dec. 2, 1998 Letter.

[92] 13 C.F.R. § 121.201, NAICS code 513322 (changed to 517212 in October 2002).

firms in this category, total, that operated for the entire year.[93] Of this total, 965 firms had employment of 999 or fewer employees, and an additional 12 firms had employment of 1,000 employees or more.[94] Thus, under this second category and size standard, the majority of firms can, again, be considered small. Assuming this general ratio continues in the context of Phase I 220 MHz licensees, the Commission estimates that nearly all such licensees are small businesses under the SBA's small business size standard. In addition, limited preliminary census data for 2002 indicate that the total number of cellular and other wireless telecommunications carriers increased approximately 321 percent from 1997 to 2002.[95]

35. *220 MHz Radio Service – Phase II Licensees.* The 220 MHz service has both Phase I and Phase II licenses. The Phase II 220 MHz service is a new service, and is subject to spectrum auctions. In the 220 MHz Third Report and Order, we adopted a small business size standard for "small" and "very small" businesses for purposes of determining their eligibility for special provisions such as bidding credits and installment payments.[96] This small business size standard indicates that a "small business" is an entity that, together with its affiliates and controlling principals, has average gross revenues not exceeding $15 million for the preceding three years.[97] A "very small business" is an entity that, together with its affiliates and controlling principals, has average gross revenues that do not exceed $3 million for the preceding three years. The SBA has approved these small business size standards.[98] Auctions of Phase II licenses commenced on September 15, 1998, and closed on October 22, 1998.[99] In the first auction, 908 licenses were auctioned in three different-sized geographic areas: three nationwide licenses, 30 Regional Economic Area Group (EAG) Licenses, and 875 Economic Area (EA) Licenses. Of the 908 licenses auctioned, 693 were sold.[100] Thirty-nine small businesses won licenses in the first 220 MHz auction. The second auction included 225 licenses: 216 EA licenses and 9 EAG licenses. Fourteen companies claiming small business status won 158 licenses.[101]

36. *800 MHz and 900 MHz Specialized Mobile Radio Licenses.* The Commission awards "small entity" and "very small entity" bidding credits in auctions for Specialized Mobile Radio (SMR) geographic area licenses in the 800 MHz and 900 MHz bands to firms that had revenues of no more than

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[93] U.S. Census Bureau, 1997 Economic Census, Subject Series: "Information," Table 5, Employment Size of Firms Subject to Federal Income Tax: 1997, NAICS code 513322 (issued October 2000).

[94] *Id.* The census data do not provide a more precise estimate of the number of firms that have employment of 1,500 or fewer employees; the largest category provided is "Firms with 1000 employees or more."

[95] *See* U.S. Census Bureau, 2002 Economic Census, Industry Series: "Information," Table 2, Comparative Statistics for the United States (1997 NAICS Basis): 2002 and 1997, NAICS code 513322 (issued Nov. 2004). The preliminary data indicate that the total number of "establishments" increased from 2,959 to 9,511. In this context, the number of establishments is a less helpful indicator of small business prevalence than is the number of "firms," because the latter number takes into account the concept of common ownership or control. The more helpful 2002 census data on firms, including employment and receipts numbers, will be issued in late 2005.

[96] *220 MHz Third Report and Order*, 12 FCC Rcd 10943, 11068-70, paras. 291-295 (1997).

[97] *Id.* at 11068, para. 291.

[98] *See* Letter to D. Phythyon, Chief, Wireless Telecommunications Bureau, Federal Communications Commission, from A. Alvarez, Administrator, Small Business Administration (Jan. 6, 1998).

[99] *See generally* Public Notice, "220 MHz Service Auction Closes," 14 FCC Rcd 605 (1998).

[100] *See, e.g.,* Public Notice, "FCC Announces It is Prepared to Grant 654 Phase II 220 MHz Licenses After Final Payment is Made," 14 FCC Rcd 1085 (1999).

[101] Public Notice, "Phase II 220 MHz Service Spectrum Auction Closes," 14 FCC Rcd 11218 (1999).

$15 million in each of the three previous calendar years, or that had revenues of no more than $3 million in each of the previous calendar years, respectively.[102] These bidding credits apply to SMR providers in the 800 MHz and 900 MHz bands that either hold geographic area licenses or have obtained extended implementation authorizations. The Commission does not know how many firms provide 800 MHz or 900 MHz geographic area SMR service pursuant to extended implementation authorizations, nor how many of these providers have annual revenues of no more than $15 million. One firm has over $15 million in revenues. The Commission assumes, for purposes here, that all of the remaining existing extended implementation authorizations are held by small entities, as that term is defined by the SBA. The Commission has held auctions for geographic area licenses in the 800 MHz and 900 MHz SMR bands. There were 60 winning bidders that qualified as small or very small entities in the 900 MHz SMR auctions. Of the 1,020 licenses won in the 900 MHz auction, bidders qualifying as small or very small entities won 263 licenses. In the 800 MHz auction, 38 of the 524 licenses won were won by small and very small entities.

37. *700 MHz Guard Band Licensees.* In the *700 MHz Guard Band Order*, we adopted a small business size standard for "small businesses" and "very small businesses" for purposes of determining their eligibility for special provisions such as bidding credits and installment payments.[103] A "small business" as an entity that, together with its affiliates and controlling principals, has average gross revenues not exceeding $15 million for the preceding three years. Additionally, a "very small business" is an entity that, together with its affiliates and controlling principals, has average gross revenues that are not more than $3 million for the preceding three years. An auction of 52 Major Economic Area (MEA) licenses commenced on September 6, 2000, and closed on September 21, 2000.[104] Of the 104 licenses auctioned, 96 licenses were sold to nine bidders. Five of these bidders were small businesses that won a total of 26 licenses. A second auction of 700 MHz Guard Band licenses commenced on February 13, 2001 and closed on February 21, 2001. All eight of the licenses auctioned were sold to three bidders. One of these bidders was a small business that won a total of two licenses.[105]

38. *Rural Radiotelephone Service.* The Commission has not adopted a size standard for small businesses specific to the Rural Radiotelephone Service.[106] A significant subset of the Rural Radiotelephone Service is the Basic Exchange Telephone Radio System (BETRS).[107] The Commission uses the SBA's small business size standard applicable to "Cellular and Other Wireless Telecommunications," *i.e.*, an entity employing no more than 1,500 persons.[108] There are approximately 1,000 licensees in the Rural Radiotelephone Service, and the Commission estimates that there are 1,000 or fewer small entity licensees in the Rural Radiotelephone Service that may be affected by the rules and policies adopted herein.

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[102] 47 C.F.R. § 90.814(b)(1).

[103] *See Service Rules for the 746-764 MHz Bands, and Revisions to part 27 of the Commission's Rules*, WT Docket No. 99-168, Second Report and Order, 65 FR 17599 (Apr. 4, 2000).

[104] *See generally* Public Notice, "220 MHz Service Auction Closes," Report No. WT 98-36 (Oct. 23, 1998).

[105] Public Notice, "700 MHz Guard Band Auction Closes," DA 01-478 (rel. Feb. 22, 2001).

[106] The service is defined in section 22.99 of the Commission's Rules, 47 C.F.R. § 22.99.

[107] BETRS is defined in sections 22.757 and 22.759 of the Commission's Rules, 47 C.F.R. §§ 22.757 and 22.759.

[108] 13 C.F.R. § 121.201, NAICS code 517212.

39. *Air-Ground Radiotelephone Service.* The Commission has not adopted a small business size standard specific to the Air-Ground Radiotelephone Service.[109] We will use SBA's small business size standard applicable to "Cellular and Other Wireless Telecommunications," *i.e.*, an entity employing no more than 1,500 persons.[110] There are approximately 100 licensees in the Air-Ground Radiotelephone Service, and we estimate that almost all of them qualify as small under the SBA small business size standard.

40. *Aviation and Marine Radio Services.* Small businesses in the aviation and marine radio services use a very high frequency (VHF) marine or aircraft radio and, as appropriate, an emergency position-indicating radio beacon (and/or radar) or an emergency locator transmitter. The Commission has not developed a small business size standard specifically applicable to these small businesses. For purposes of this analysis, the Commission uses the SBA small business size standard for the category "Cellular and Other Telecommunications," which is 1,500 or fewer employees.[111] Most applicants for recreational licenses are individuals. Approximately 581,000 ship station licensees and 131,000 aircraft station licensees operate domestically and are not subject to the radio carriage requirements of any statute or treaty. For purposes of our evaluations in this analysis, we estimate that there are up to approximately 712,000 licensees that are small businesses (or individuals) under the SBA standard. In addition, between December 3, 1998 and December 14, 1998, the Commission held an auction of 42 VHF Public Coast licenses in the 157.1875-157.4500 MHz (ship transmit) and 161.775-162.0125 MHz (coast transmit) bands. For purposes of the auction, the Commission defined a "small" business as an entity that, together with controlling interests and affiliates, has average gross revenues for the preceding three years not to exceed $15 million dollars. In addition, a "very small" business is one that, together with controlling interests and affiliates, has average gross revenues for the preceding three years not to exceed $3 million dollars.[112] There are approximately 10,672 licensees in the Marine Coast Service, and the Commission estimates that almost all of them qualify as "small" businesses under the above special small business size standards.

41. *Fixed Microwave Services.* Fixed microwave services include common carrier,[113] private operational-fixed,[114] and broadcast auxiliary radio services.[115] At present, there are approximately 22,015 common carrier fixed licensees and 61,670 private operational-fixed licensees and broadcast auxiliary

[109] The service is defined in section 22.99 of the Commission's Rules, 47 C.F.R. § 22.99.

[110] 13 C.F.R. § 121.201, NAICS codes 517212.

[111] 13 C.F.R. § 121.201, NAICS code 513322 (changed to 517212 in October 2002).

[112] *Amendment of the Commission's Rules Concerning Maritime Communications*, PR Docket No. 92-257, Third Report and Order and Memorandum Opinion and Order, 13 FCC Rcd 19853 (1998).

[113] *See* 47 C.F.R. §§ 101 *et seq.* (formerly, Part 21 of the Commission's Rules) for common carrier fixed microwave services (except Multipoint Distribution Service).

[114] Persons eligible under parts 80 and 90 of the Commission's Rules can use Private Operational-Fixed Microwave services. *See* 47 C.F.R. Parts 80 and 90. Stations in this service are called operational-fixed to distinguish them from common carrier and public fixed stations. Only the licensee may use the operational-fixed station, and only for communications related to the licensee's commercial, industrial, or safety operations.

[115] Auxiliary Microwave Service is governed by Part 74 of Title 47 of the Commission's rules. *See* 47 C.F.R. Part 74. This service is available to licensees of broadcast stations and to broadcast and cable network entities. Broadcast auxiliary microwave stations are used for relaying broadcast television signals from the studio to the transmitter, or between two points such as a main studio and an auxiliary studio. The service also includes mobile television pickups, which relay signals from a remote location back to the studio.

radio licensees in the microwave services. The Commission has not created a size standard for a small business specifically with respect to fixed microwave services. For purposes of this analysis, the Commission uses the SBA small business size standard for the category "Cellular and Other Telecommunications," which is 1,500 or fewer employees.[116] The Commission does not have data specifying the number of these licensees that have more than 1,500 employees, and thus is unable at this time to estimate with greater precision the number of fixed microwave service licensees that would qualify as small business concerns under the SBA's small business size standard. Consequently, the Commission estimates that there are up to 22,015 common carrier fixed licensees and up to 61,670 private operational-fixed licensees and broadcast auxiliary radio licensees in the microwave services that may be small and may be affected by the rules and policies adopted herein. We noted, however, that the common carrier microwave fixed licensee category includes some large entities.

42. *Offshore Radiotelephone Service.* This service operates on several UHF television broadcast channels that are not used for television broadcasting in the coastal areas of states bordering the Gulf of Mexico.[117] There are presently approximately 55 licensees in this service. We are unable to estimate at this time the number of licensees that would qualify as small under the SBA's small business size standard for "Cellular and Other Wireless Telecommunications" services.[118] Under that SBA small business size standard, a business is small if it has 1,500 or fewer employees.[119]

43. *39 GHz Service.* The Commission created a special small business size standard for 39 GHz licenses – an entity that has average gross revenues of $40 million or less in the three previous calendar years.[120] An additional size standard for "very small business" is: an entity that, together with affiliates, has average gross revenues of not more than $15 million for the preceding three calendar years.[121] The SBA has approved these small business size standards.[122] The auction of the 2,173 39 GHz licenses began on April 12, 2000 and closed on May 8, 2000. The 18 bidders who claimed small business status won 849 licenses. Consequently, the Commission estimates that 18 or fewer 39 GHz licensees are small entities that may be affected by the rules and polices adopted herein.

44. *Broadband Radio Service and Educational Broadband Service.* Broadband Radio Service comprises Multichannel Multipoint Distribution Service (MMDS) systems and Multipoint Distribution Service (MDS).[123] MMDS systems, often referred to as "wireless cable," transmit video programming to subscribers using the microwave frequencies of MDS and Educational Broadband Service (formerly

[116] 13 C.F.R. § 121.201, NAICS code 517212.

[117] This service is governed by Subpart I of Part 22 of the Commission's rules. *See* 47 C.F.R. §§ 22.1001-22.1037.

[118] 13 C.F.R. § 121.201, NAICS code 513322 (changed to 517212 in October 2002).

[119] *Id.*

[120] *See Amendment of the Commission's Rules Regarding the 37.0-38.6 GHz and 38.6-40.0 GHz Bands*, ET Docket No. 95-183, Report and Order, 63 Fed. Reg. 6079 (Feb. 6, 1998).

[121] *Id.*

[122] *See* Letter to Kathleen O'Brien Ham, Chief, Auctions and Industry Analysis Division, Wireless Telecommunications Bureau, FCC, from Aida Alvarez, Administrator, SBA (Feb. 4, 1998).

[123] *Amendment of Parts 1, 21 73, 74, and 101 of the Commission's Rules to Facilitate the Provision of Fixed and Mobile Broadband Access, Educational and Other Advanced Services in the 2150-2162 and 2500-2690 MHz Bands*, WT Docket No. 03-66, RM-10586, Report and Order and Further Notice of Proposed Rulemaking, 19 FCC Rcd 14165 (2004).

known as Instructional Television Fixed Service).[124] In connection with the 1996 MDS auction, the Commission established a small business size standard as an entity that had annual average gross revenues of less than $40 million in the previous three calendar years.[125] The MDS auctions resulted in 67 successful bidders obtaining licensing opportunities for 493 Basic Trading Areas (BTAs). Of the 67 auction winners, 61 met the definition of a small business. MDS also includes licensees of stations authorized prior to the auction. In addition, the SBA has developed a small business size standard for Cable and Other Program Distribution, which includes all such companies generating $12.5 million or less in annual receipts.[126] According to Census Bureau data for 1997, there were a total of 1,311 firms in this category, total, that had operated for the entire year.[127] Of this total, 1,180 firms had annual receipts of under $10 million and an additional 52 firms had receipts of $10 million or more but less than $25 million. Consequently, we estimate that the majority of providers in the Broadband Radio Service category are small businesses that may be affected by the rules and policies adopted herein. This SBA small business size standard also appears applicable to Educational Broadband Service. There are presently 2,032 Educational Broadband Service licensees. All but 100 of these licenses are held by educational institutions. Educational institutions are included in this analysis as small entities.[128] Thus, we tentatively conclude that at least 1,932 licensees are small businesses.

45. *Local Multipoint Distribution Service.* Local Multipoint Distribution Service (LMDS) is a fixed broadband point-to-multipoint microwave service that provides for two-way video telecommunications.[129] The auction of the 1,030 Local Multipoint Distribution Service (LMDS) licenses began on February 18, 1998 and closed on March 25, 1998. The Commission established a small business size standard for LMDS licenses as an entity that has average gross revenues of less than $40 million in the three previous calendar years.[130] An additional small business size standard for "very small business" was added as an entity that, together with its affiliates, has average gross revenues of not more than $15 million for the preceding three calendar years.[131] The SBA has approved these small business size standards in the context of LMDS auctions.[132] There were 93 winning bidders that qualified as small entities in the LMDS auctions. A total of 93 small and very small business bidders won approximately 277 A Block licenses and 387 B Block licenses. On March 27, 1999, the Commission re-auctioned 161 licenses; there were 40 winning bidders. Based on this information, we conclude that the number of small LMDS licenses consists of the 93 winning bidders in the first auction and the 40 winning bidders in the re-auction, for a total of 133 small entity LMDS providers.

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[124] *See id.*

[125] 47 C.F.R. § 21.961(b)(1).

[126] 13 C.F.R. § 121.201, NAICS code 513220 (changed to 517510 in October 2002).

[127] U.S. Census Bureau, 1997 Economic Census, Subject Series: Information, "Establishment and Firm Size (Including Legal Form of Organization)", Table 4, NAICS code 513220 (issued October 2000).

[128] In addition, the term "small entity" within SBREFA applies to small organizations (nonprofits) and to small governmental jurisdictions (cities, counties, towns, townships, villages, school districts, and special districts with populations of less than 50,000). 5 U.S.C. §§ 601(4)-(6). We do not collect annual revenue data on ITFS licensees.

[129] *See Local Multipoint Distribution Service*, Second Report and Order, 12 FCC Rcd 12545 (1997).

[130] *Id.*

[131] *See id.*

[132] *See* Letter to Dan Phythyon, Chief, Wireless Telecommunications Bureau, FCC, from Aida Alvarez, Administrator, SBA (Jan. 6, 1998).

46. *218-219 MHz Service.* The first auction of 218-219 MHz spectrum resulted in 170 entities winning licenses for 594 Metropolitan Statistical Area (MSA) licenses. Of the 594 licenses, 557 were won by entities qualifying as a small business. For that auction, the small business size standard was an entity that, together with its affiliates, has no more than a $6 million net worth and, after federal income taxes (excluding any carry over losses), has no more than $2 million in annual profits each year for the previous two years.[133] In the *218-219 MHz Report and Order and Memorandum Opinion and Order*, we established a small business size standard for a "small business" as an entity that, together with its affiliates and persons or entities that hold interests in such an entity and their affiliates, has average annual gross revenues not to exceed $15 million for the preceding three years.[134] A "very small business" is defined as an entity that, together with its affiliates and persons or entities that hold interests in such an entity and its affiliates, has average annual gross revenues not to exceed $3 million for the preceding three years.[135] We cannot estimate, however, the number of licenses that will be won by entities qualifying as small or very small businesses under our rules in future auctions of 218-219 MHz spectrum.

47. *24 GHz – Incumbent Licensees.* This analysis may affect incumbent licensees who were relocated to the 24 GHz band from the 18 GHz band, and applicants who wish to provide services in the 24 GHz band. The applicable SBA small business size standard is that of "Cellular and Other Wireless Telecommunications" companies. This category provides that such a company is small if it employs no more than 1,500 persons.[136] According to Census Bureau data for 1997, there were 977 firms in this category, total, that operated for the entire year.[137] Of this total, 965 firms had employment of 999 or fewer employees, and an additional 12 firms had employment of 1,000 employees or more.[138] Thus, under this size standard, the great majority of firms can be considered small. These broader census data notwithstanding, we believe that there are only two licensees in the 24 GHz band that were relocated from the 18 GHz band, Teligent[139] and TRW, Inc. It is our understanding that Teligent and its related companies have less than 1,500 employees, though this may change in the future. TRW is not a small entity. Thus, only one incumbent licensee in the 24 GHz band is a small business entity.

48. *24 GHz – Future Licensees.* With respect to new applicants in the 24 GHz band, the small business size standard for "small business" is an entity that, together with controlling interests and

[133] *Implementation of Section 309(j) of the Communications Act – Competitive Bidding*, PP Docket No. 93-253, Fourth Report and Order, 59 Fed. Reg. 24947 (May 13, 1994).

[134] *Amendment of Part 95 of the Commission's Rules to Provide Regulatory Flexibility in the 218-219 MHz Service*, WT Docket No. 98-169, Report and Order and Memorandum Opinion and Order, 64 Fed. Reg. 59656 (Nov. 3, 1999).

[135] *Amendment of Part 95 of the Commission's Rules to Provide Regulatory Flexibility in the 218-219 MHz Service*, WT Docket No. 98-169, Report and Order and Memorandum Opinion and Order, 64 Fed. Reg. 59656 (Nov. 3, 1999).

[136] 13 C.F.R. § 121.201, NAICS code 513322 (changed to 517212 in October 2002).

[137] U.S. Census Bureau, 1997 Economic Census, Subject Series: Information, "Employment Size of Firms Subject to Federal Income Tax: 1997," Table 5, NAICS code 513322 (issued Oct. 2000).

[138] *Id.* The census data do not provide a more precise estimate of the number of firms that have employment of 1,500 or fewer employees; the largest category provided is "Firms with 1,000 employees or more."

[139] Teligent acquired the DEMS licenses of FirstMark, the only licensee other than TRW in the 24 GHz band whose license has been modified to require relocation to the 24 GHz band.

affiliates, has average annual gross revenues for the three preceding years not in excess of $15 million.[140] "Very small business" in the 24 GHz band is an entity that, together with controlling interests and affiliates, has average gross revenues not exceeding $3 million for the preceding three years.[141] The SBA has approved these small business size standards.[142] These size standards will apply to the future auction, if held.

2. Cable and OVS Operators

49. *Cable and Other Program Distribution.* This category includes cable systems operators, closed circuit television services, direct broadcast satellite services, multipoint distribution systems, satellite master antenna systems, and subscription television services. The SBA has developed small business size standard for this census category, which includes all such companies generating $12.5 million or less in revenue annually.[143] According to Census Bureau data for 1997, there were a total of 1,311 firms in this category, total, that had operated for the entire year.[144] Of this total, 1,180 firms had annual receipts of under $10 million and an additional 52 firms had receipts of $10 million or more but less than $25 million. Consequently, the Commission estimates that the majority of providers in this service category are small businesses that may be affected by the rules and policies adopted herein.

50. *Cable System Operators (Rate Regulation Standard).* The Commission has developed its own small business size standard for cable system operators, for purposes of rate regulation. Under the Commission's rules, a "small cable company" is one serving fewer than 400,000 subscribers nationwide.[145] The most recent estimates indicate that there were 1,439 cable operators who qualified as small cable system operators at the end of 1995.[146] Since then, some of those companies may have grown to serve over 400,000 subscribers, and others may have been involved in transactions that caused them to be combined with other cable operators. Consequently, the Commission estimates that there are now fewer than 1,439 small entity cable system operators that may be affected by the rules and policies adopted herein.

51. *Cable System Operators (Telecom Act Standard).* The Communications Act of 1934, as amended, also contains a size standard for small cable system operators, which is "a cable operator that, directly or through an affiliate, serves in the aggregate fewer than 1 percent of all subscribers in the

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[140] *Amendments to Parts 1,2, 87 and 101 of the Commission's Rules to License Fixed Services at 24 GHz*, Report and Order, 15 FCC Rcd 16934, 16967 (2000); *see also* 47 C.F.R. § 101.538(a)(2).

[141] *Amendments to Parts 1,2, 87 and 101 of the Commission's Rules to License Fixed Services at 24 GHz*, Report and Order, 15 FCC Rcd 16934, 16967 (2000); *see also* 47 C.F.R. § 101.538(a)(1).

[142] *See* Letter to Margaret W. Wiener, Deputy Chief, Auctions and Industry Analysis Division, Wireless Telecommunications Bureau, FCC, from Gary M. Jackson, Assistant Administrator, SBA (July 28, 2000).

[143] 13 C.F.R. § 121.201, North American Industry Classification System (NAICS) code 513220 (changed to 517510 in October 2002).

[144] U.S. Census Bureau, 1997 Economic Census, Subject Series: Information, "Establishment and Firm Size (Including Legal Form of Organization)," Table 4, NAICS code 513220 (issued October 2000).

[145] 47 C.F.R. § 76.901(e). The Commission developed this definition based on its determination that a small cable system operator is one with annual revenues of $100 million or less. *Implementation of Sections of the 1992 Cable Act: Rate Regulation,* Sixth Report and Order and Eleventh Order on Reconsideration, 10 FCC Rcd 7393 (1995), 60 FR 10534 (Feb. 27, 1995).

[146] Paul Kagan Associates, Inc., *Cable TV Investor*, February 29, 1996 (based on figures for December 30, 1995).

United States and is not affiliated with any entity or entities whose gross annual revenues in the aggregate exceed $250,000,000."[147] The Commission has determined that there are 67,700,000 subscribers in the United States.[148] Therefore, an operator serving fewer than 677,000 subscribers shall be deemed a small operator, if its annual revenues, when combined with the total annual revenues of all its affiliates, do not exceed $250 million in the aggregate.[149] Based on available data, the Commission estimates that the number of cable operators serving 677,000 subscribers or fewer, totals 1,450.[150] The Commission neither requests nor collects information on whether cable system operators are affiliated with entities whose gross annual revenues exceed $250 million,[151] and therefore are unable, at this time, to estimate more accurately the number of cable system operators that would qualify as small cable operators under the size standard contained in the Communications Act of 1934.

52. *Open Video Services.* Open Video Service (OVS) systems provide subscription services.[152] The SBA has created a small business size standard for Cable and Other Program Distribution.[153] This standard provides that a small entity is one with $12.5 million or less in annual receipts. The Commission has certified approximately 25 OVS operators to serve 75 areas, and some of these are currently providing service.[154] Affiliates of Residential Communications Network, Inc. (RCN) received approval to operate OVS systems in New York City, Boston, Washington, D.C., and other areas. RCN has sufficient revenues to assure that they do not qualify as a small business entity. Little financial information is available for the other entities that are authorized to provide OVS and are not yet operational. Given that some entities authorized to provide OVS service have not yet begun to generate revenues, the Commission concludes that up to 24 OVS operators (those remaining) might qualify as small businesses that may be affected by the rules and policies adopted herein.

3. Internet Service Providers

53. *Internet Service Providers.* The SBA has developed a small business size standard for Internet Service Providers (ISPs). ISPs "provide clients access to the Internet and generally provide related services such as web hosting, web page designing, and hardware or software consulting related to Internet connectivity."[155] Under the SBA size standard, such a business is small if it has average annual receipts

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[147] 47 U.S.C. § 543(m)(2).

[148] *See FCC Announces New Subscriber Count for the Definition of Small Cable Operator*, Public Notice DA 01-158 (Jan. 24, 2001).

[149] 47 C.F.R. § 76.901(f).

[150] *See FCC Announces New Subscriber Count for the Definition of Small Cable Operators*, Public Notice, DA 01-0158 (rel. Jan. 24, 2001).

[151] The Commission does receive such information on a case-by-case basis if a cable operator appeals a local franchise authority's finding that the operator does not qualify as a small cable operator pursuant to § 76.901(f) of the Commission's rules. *See* 47 C.F.R. § 76.909(b).

[152] *See* 47 U.S.C. § 573.

[153] 13 C.F.R. § 121.201, NAICS code 513220 (changed to 517510 in October 2002).

[154] *See* <http://www.fcc.gov/csb/ovs/csovscer.html> (current as of March 2002).

[155] U.S. Census Bureau, "2002 NAICS Definitions: 518111 Internet Service Providers" (Feb. 2004) <www.census.gov>.

of $21 million or less.[156] According to Census Bureau data for 1997, there were 2,751 firms in this category that operated for the entire year.[157] Of these, 2,659 firms had annual receipts of under $10 million, and an additional 67 firms had receipts of between $10 million and $24, 999,999. Consequently, we estimate that the majority of these firms are small entities that may be affected by our action. In addition, limited preliminary census data for 2002 indicate that the total number of Internet service providers increased approximately five percent from 1997 to 2002.[158]

4. Other Internet-Related Entities

54. *Web Search Portals.* Our action pertains to VoIP services, which could be provided by entities that provide other services such as email, online gaming, web browsing, video conferencing, instant messaging, and other, similar IP-enabled services. The Commission has not adopted a size standard for entities that create or provide these types of services or applications. However, the census bureau has identified firms that "operate web sites that use a search engine to generate and maintain extensive databases of Internet addresses and content in an easily searchable format. Web search portals often provide additional Internet services, such as e-mail, connections to other web sites, auctions, news, and other limited content, and serve as a home base for Internet users."[159] The SBA has developed a small business size standard for this category; that size standard is $6 million or less in average annual receipts.[160] According to Census Bureau data for 1997, there were 195 firms in this category that operated for the entire year.[161] Of these, 172 had annual receipts of under $5 million, and an additional nine firms had receipts of between $5 million and $9,999,999. Consequently, we estimate that the majority of these firms are small entities that may be affected by our action.

55. *Data Processing, Hosting, and Related Services.* Entities in this category "primarily . . . provid[e] infrastructure for hosting or data processing services."[162] The SBA has developed a small business size standard for this category; that size standard is $21 million or less in average annual receipts.[163] According to Census Bureau data for 1997, there were 3,700 firms in this category that

[156] 13 C.F.R. § 121.201, NAICS code 518111 (changed from previous code 514191, "On-Line Information Services," in Oct. 2002).

[157] U.S. Census Bureau, 1997 Economic Census, Subject Series: Information, "Establishment and Firm Size (Including Legal Form of Organization)," Table 4, NAICS code 514191 (issued Oct. 2000).

[158] *See* U.S. Census Bureau, 2002 Economic Census, Industry Series: "Information," Table 2, Comparative Statistics for the United States (1997 NAICS Basis): 2002 and 1997, NAICS code 514191 (issued Nov. 2004). The preliminary data indicate that the total number of "establishments" increased from 4,165 to 4,394. In this context, the number of establishments is a less helpful indicator of small business prevalence than is the number of "firms," because the latter number takes into account the concept of common ownership or control. The more helpful 2002 census data on firms, including employment and receipts numbers, will be issued in late 2005.

[159] U.S. Census Bureau, "2002 NAICS Definitions: 518112 Web Search Portals" (Feb. 2004) <www.census.gov>.

[160] 13 C.F.R. § 121.201, NAICS code 518112 (changed from 514199 in Oct. 2002).

[161] U.S. Census Bureau, 1997 Economic Census, Subject Series: Information, "Establishment and Firm Size (Including Legal Form of Organization)," Table 4, NAICS code 514199 (issued Oct. 2000). This category was created for the 2002 Economic Census by taking a portion of the superseded 1997 category, "All Other Information Services," NAICS code 514199. The data cited in the text above are derived from the superseded category.

[162] U.S. Census Bureau, "2002 NAICS Definitions: 518210 Data Processing, Hosting, and Related Services" (Feb. 2004) <www.census.gov>.

[163] 13 C.F.R. § 121.201, NAICS code 518210 (changed from 514210 in Oct. 2002).

operated for the entire year.[164] Of these, 3,477 had annual receipts of under $10 million, and an additional 108 firms had receipts of between $10 million and $24,999,999. Consequently, we estimate that the majority of these firms are small entities that may be affected by our action.

56. *All Other Information Services.* "This industry comprises establishments primarily engaged in providing other information services (except new syndicates and libraries and archives)."[165] Our action pertains to VoIP services, which could be provided by entities that provide other services such as email, online gaming, web browsing, video conferencing, instant messaging, and other, similar IP-enabled services. The SBA has developed a small business size standard for this category; that size standard is $6 million or less in average annual receipts.[166] According to Census Bureau data for 1997, there were 195 firms in this category that operated for the entire year.[167] Of these, 172 had annual receipts of under $5 million, and an additional nine firms had receipts of between $5 million and $9,999,999. Consequently, we estimate that the majority of these firms are small entities that may be affected by our action.

57. *Internet Publishing and Broadcasting.* "This industry comprises establishments engaged in publishing and/or broadcasting content on the Internet exclusively. These establishments do not provide traditional (non-Internet) versions of the content that they publish or broadcast."[168] The SBA has developed a small business size standard for this new (2002) census category; that size standard is 500 or fewer employees.[169] To assess the prevalence of small entities in this category, we will use 1997 Census Bureau data for a relevant, now-superseded census category, "All Other Information Services." The SBA small business size standard for that prior category was $6 million or less in average annual receipts. According to Census Bureau data for 1997, there were 195 firms in the prior category that operated for the entire year.[170] Of these, 172 had annual receipts of under $5 million, and an additional nine firms had receipts of between $5 million and $9,999,999. Consequently, we estimate that the majority of the firms in this current category are small entities that may be affected by our action.

58. *Software Publishers.* These companies may design, develop or publish software and may provide other support services to software purchasers, such as providing documentation or assisting in installation. The companies may also design software to meet the needs of specific users. The SBA has developed a small business size standard of $21 million or less in average annual receipts for all of the following pertinent categories: Software Publishers, Custom Computer Programming Services, and Other

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[164] U.S. Census Bureau, 1997 Economic Census, Subject Series: Information, "Establishment and Firm Size (Including Legal Form of Organization)," Table 4, NAICS code 514210 (issued Oct. 2000).

[165] U.S. Census Bureau, "2002 NAICS Definitions: 519190 All Other Information Services" (Feb. 2004) <www.census.gov>.

[166] 13 C.F.R. § 121.201, NAICS code 519190 (changed from 514199 in Oct. 2002).

[167] U.S. Census Bureau, 1997 Economic Census, Subject Series: Information, "Establishment and Firm Size (Including Legal Form of Organization)," Table 4, NAICS code 514199 (issued Oct. 2000). This category was created for the 2002 Economic Census by taking a portion of the superseded 1997 category, "All Other Information Services," NAICS code 514199. The data cited in the text above are derived from the superseded category.

[168] U.S. Census Bureau, "2002 NAICS Definitions: 516110 Internet Publishing and Broadcasting" (Feb. 2004) <www.census.gov>.

[169] 13 C.F.R. § 121.201, NAICS code 516110 (derived from 514199 and other 1997 codes).

[170] U.S. Census Bureau, 1997 Economic Census, Subject Series: Information, "Establishment and Firm Size (Including Legal Form of Organization)," Table 4, NAICS code 514199 (issued Oct. 2000). This category was created for the 2002 Economic Census by taking portions of numerous 1997 categories.

Computer Related Services.[171] For Software Publishers, Census Bureau data for 1997 indicate that there were 8,188 firms in the category that operated for the entire year.[172] Of these, 7,633 had annual receipts under $10 million, and an additional 289 firms had receipts of between $10 million and $24, 999,999. For providers of Custom Computer Programming Services, the Census Bureau data indicate that there were 19,334 firms that operated for the entire year.[173] Of these, 18,786 had annual receipts of under $10 million, and an additional 352 firms had receipts of between $10 million and $24,999,999. For providers of Other Computer Related Services, the Census Bureau data indicate that there were 5,524 firms that operated for the entire year.[174] Of these, 5,484 had annual receipts of under $10 million, and an additional 28 firms had receipts of between $10 million and $24,999,999. Consequently, we estimate that the majority of the firms in each of these three categories are small entities that may be affected by our action.

5. Equipment Manufacturers

59. The equipment manufacturers described in this section are apparently merely indirectly affected by our current action, and therefore would not formally be a part of this RFA analysis. We have included them, however, to broaden the record in this proceeding and to alert them to our decisions.

60. *Wireless Communications Equipment Manufacturers*. The SBA has established a small business size standard for Radio and Television Broadcasting and Wireless Communications Equipment Manufacturing. Examples of products in this category include "transmitting and receiving antennas, cable television equipment, GPS equipment, pagers, cellular phones, mobile communications equipment, and radio and television studio and broadcasting equipment"[175] and may include other devices that transmit and receive IP-enabled services, such as personal digital assistants (PDAs). Under the SBA size standard, firms are considered small if they have 750 or fewer employees.[176] According to Census Bureau data for 1997, there were 1,215 establishments[177] in this category that operated for the entire year.[178] Of those, there were 1,150 that had employment of under 500, and an additional 37 that had employment of

[171] 13 C.F.R. § 121.201, NAICS codes 511210, 541511, and 541519.

[172] U.S. Census Bureau, 1997 Economic Census, Subject Series: Information, "Establishment and Firm Size (Including Legal Form of Organization)," Table 4, NAICS code 511210 (issued Oct. 2000).

[173] U.S. Census Bureau, 1997 Economic Census, Subject Series: Professional, Scientific, and Technical Services, "Establishment and Firm Size (Including Legal Form of Organization)," Table 4a, NAICS code 541511 (issued Oct. 2000).

[174] U.S. Census Bureau, 1997 Economic Census, Subject Series: Professional, Scientific, and Technical Services, "Establishment and Firm Size (Including Legal Form of Organization)," Table 4a, NAICS code 541519 (issued Oct. 2000).

[175] Office of Management and Budget, North American Industry Classification System 308-09 (1997) (NAICS code 334220).

[176] 13 C.F.R. § 121.201, NAICS code 334220.

[177] The number of "establishments" is a less helpful indicator of small business prevalence in this context than would be the number of "firms" or "companies," because the latter take into account the concept of common ownership or control. Any single physical location for an entity is an establishment, even though that location may be owned by a different establishment. Thus, the numbers given may reflect inflated numbers of businesses in this category, including the numbers of small businesses. In this category, the Census breaks-out data for firms or companies only to give the total number of such entities for 1997, which were 1,089.

[178] U.S. Census Bureau, 1997 Economic Census, Industry Series: Manufacturing, "Industry Statistics by Employment Size," Table 4, NAICS code 334220 (issued Aug. 1999).

500 to 999. The percentage of wireless equipment manufacturers in this category was approximately 61.35%,[179] so we estimate that the number of wireless equipment manufacturers with employment of under 500 was actually closer to 706, with an additional 23 establishments having employment of between 500 and 999. Consequently, we estimate that the majority of wireless communications equipment manufacturers are small entities that may be affected by our action.

61. *Telephone Apparatus Manufacturing.* This category "comprises establishments primarily engaged primarily in manufacturing wire telephone and data communications equipment."[180] Examples of pertinent products are "central office switching equipment, cordless telephones (except cellular), PBX equipment, telephones, telephone answering machines, and data communications equipment, such as bridges, routers, and gateways."[181] The SBA has developed a small business size standard for this category of manufacturing; that size standard is 1,000 or fewer employees.[182] According to Census Bureau data for 1997, there were 598 establishments in this category that operated for the entire year.[183] Of these, 574 had employment of under 1,000, and an additional 17 establishments had employment of 1,000 to 2,499. Consequently, we estimate that the majority of these establishments are small entities that may be affected by our action.

62. *Electronic Computer Manufacturing.* This category "comprises establishments primarily engaged in manufacturing and/or assembling electronic computers, such as mainframes, personal computers, workstations, laptops, and computer servers."[184] The SBA has developed a small business size standard for this category of manufacturing; that size standard is 1,000 or fewer employees.[185] According to Census Bureau data for 1997, there were 563 establishments in this category that operated for the entire year.[186] Of these, 544 had employment of under 1,000, and an additional 11 establishments had employment of 1,000 to 2,499. Consequently, we estimate that the majority of these establishments are small entities that may be affected by our action.

63. *Computer Terminal Manufacturing.* "Computer terminals are input/output devices that connect with a central computer for processing."[187] The SBA has developed a small business size standard for this category of manufacturing; that size standard is 1,000 or fewer employees.[188] According to Census

[179] *Id.* at Table 5.

[180] Office of Management and Budget, North American Industry Classification System 308 (1997) (NAICS code 334210).

[181] *Id.*

[182] 13 C.F.R. § 121.201, NAICS code 334210.

[183] U.S. Census Bureau, 1997 Economic Census, Industry Series: Manufacturing, "Telephone Apparatus Manufacturing," Table 4, NAICS code 334210 (issued Sept. 1999).

[184] Office of Management and Budget, North American Industry Classification System 306 (1997) (NAICS code 334111).

[185] 13 C.F.R. § 121.201, NAICS code 334111.

[186] U.S. Census Bureau, 1997 Economic Census, Industry Series: Manufacturing, "Electronic Computer Manufacturing," Table 4, NAICS code 334111 (issued Aug. 1999).

[187] Office of Management and Budget, North American Industry Classification System 307 (1997) (NAICS code 334113).

[188] 13 C.F.R. § 121.201, NAICS code 334113.

Bureau data for 1997, there were 142 establishments in this category that operated for the entire year, and all of the establishments had employment of under 1,000.[189] Consequently, we estimate that the majority or all of these establishments are small entities that may be affected by our action.

64. *Other Computer Peripheral Equipment Manufacturing.* Examples of peripheral equipment in this category include keyboards, mouse devices, monitors, and scanners.[190] The SBA has developed a small business size standard for this category of manufacturing; that size standard is 1,000 or fewer employees.[191] According to Census Bureau data for 1997, there were 1061 establishments in this category that operated for the entire year.[192] Of these, 1,046 had employment of under 1,000, and an additional six establishments had employment of 1,000 to 2,499. Consequently, we estimate that the majority of these establishments are small entities that may be affected by our action.

65. *Fiber Optic Cable Manufacturing.* These establishments manufacture "insulated fiber-optic cable from purchased fiber-optic strand."[193] The SBA has developed a small business size standard for this category of manufacturing; that size standard is 1,000 or fewer employees.[194] According to Census Bureau data for 1997, there were 38 establishments in this category that operated for the entire year.[195] Of these, 37 had employment of under 1,000, and one establishment had employment of 1,000 to 2,499. Consequently, we estimate that the majority of these establishments are small entities that may be affected by our action.

66. *Other Communication and Energy Wire Manufacturing.* These establishments manufacture "insulated wire and cable of nonferrous metals from purchased wire."[196] The SBA has developed a small business size standard for this category of manufacturing; that size standard is 1,000 or fewer employees.[197] According to Census Bureau data for 1997, there were 275 establishments in this category that operated for the entire year.[198] Of these, 271 had employment of under 1,000, and four establishments had employment of 1,000 to 2,499. Consequently, we estimate that the majority or all of these establishments are small entities that may be affected by our action.

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[189] U.S. Census Bureau, 1997 Economic Census, Industry Series: Manufacturing, "Computer Terminal Manufacturing," Table 4, NAICS code 334113 (issued Aug. 1999).

[190] Office of Management and Budget, North American Industry Classification System 307-08 (1997) (NAICS code 334119).

[191] 13 C.F.R. § 121.201, NAICS code 334119.

[192] U.S. Census Bureau, 1997 Economic Census, Industry Series: Manufacturing, "Other Computer Peripheral Equipment Manufacturing," Table 4, NAICS code 334119 (issued Aug. 1999).

[193] Office of Management and Budget, North American Industry Classification System 330 (1997) (NAICS code 335921).

[194] 13 C.F.R. § 121.201, NAICS code 335921.

[195] U.S. Census Bureau, 1997 Economic Census, Industry Series: Manufacturing, "Fiber Optic Cable Manufacturing," Table 4, NAICS code 335921 (issued Nov. 1999).

[196] Office of Management and Budget, North American Industry Classification System 331 (1997) (NAICS code 335929).

[197] 13 C.F.R. § 121.201, NAICS code 335929.

[198] U.S. Census Bureau, 1997 Economic Census, Industry Series: Manufacturing, "Other Communication and Energy Wire Manufacturing," Table 4, NAICS code 335929 (issued Nov. 1999).

67. *Audio and Video Equipment Manufacturing.* These establishments manufacture "electronic audio and video equipment for home entertainment, motor vehicle, public address and musical instrument amplifications."[199] The SBA has developed a small business size standard for this category of manufacturing; that size standard is 750 or fewer employees.[200] According to Census Bureau data for 1997, there were 554 establishments in this category that operated for the entire year.[201] Of these, 542 had employment of under 500, and nine establishments had employment of 500 to 999. Consequently, we estimate that the majority of these establishments are small entities that may be affected by our action.

68. *Electron Tube Manufacturing.* These establishments are "primarily engaged in manufacturing electron tubes and parts (except glass blanks)."[202] The SBA has developed a small business size standard for this category of manufacturing; that size standard is 750 or fewer employees.[203] According to Census Bureau data for 1997, there were 158 establishments in this category that operated for the entire year.[204] Of these, 148 had employment of under 500, and three establishments had employment of 500 to 999. Consequently, we estimate that the majority of these establishments are small entities that may be affected by our action.

69. *Bare Printed Circuit Board Manufacturing.* These establishments are "primarily engaged in manufacturing bare (i.e., rigid or flexible) printed circuit boards without mounted electronic components."[205] The SBA has developed a small business size standard for this category of manufacturing; that size standard is 500 or fewer employees.[206] According to Census Bureau data for 1997, there were 1,389 establishments in this category that operated for the entire year.[207] Of these, 1,369 had employment of under 500, and 16 establishments had employment of 500 to 999. Consequently, we estimate that the majority of these establishments are small entities that may be affected by our action.

70. *Semiconductor and Related Device Manufacturing.* These establishments manufacture "computer storage devices that allow the storage and retrieval of data from a phase change, magnetic, optical, or magnetic/optical media."[208] The SBA has developed a small business size standard for this

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[199] U.S. Census Bureau, "2002 NAICS Definitions: 334310 Audio and Video Equipment Manufacturing" (Feb. 2004) <www.census.gov>.

[200] 13 C.F.R. § 121.201, NAICS code 334310.

[201] U.S. Census Bureau, 1997 Economic Census, Industry Series: Manufacturing, "Audio and Video Equipment Manufacturing," Table 4, NAICS code 334310 (issued Aug. 1999).

[202] U.S. Census Bureau, "2002 NAICS Definitions: 334411 Electron Tube Manufacturing" (Feb. 2004) <www.census.gov>.

[203] 13 C.F.R. § 121.201, NAICS code 334411.

[204] U.S. Census Bureau, 1997 Economic Census, Industry Series: Manufacturing, "Electron Tube Manufacturing," Table 4, NAICS code 334411 (issued July 1999).

[205] U.S. Census Bureau, "2002 NAICS Definitions: 334412 Bare Printed Circuit Board Manufacturing" (Feb. 2004) <www.census.gov>.

[206] 13 C.F.R. § 121.201, NAICS code 334412.

[207] U.S. Census Bureau, 1997 Economic Census, Industry Series: Manufacturing, "Bare Printed Circuit Board Manufacturing," Table 4, NAICS code 334412 (issued Aug. 1999).

[208] U.S. Census Bureau, "2002 NAICS Definitions: 334413 Semiconductor and Related Device Manufacturing" (Feb. 2004) <www.census.gov>.

category of manufacturing; that size standard is 500 or fewer employees.[209] According to Census Bureau data for 1997, there were 1,082 establishments in this category that operated for the entire year.[210] Of these, 987 had employment of under 500, and 52 establishments had employment of 500 to 999.

71. *Electronic Capacitor Manufacturing.* These establishments manufacture "electronic fixed and variable capacitors and condensers."[211] The SBA has developed a small business size standard for this category of manufacturing; that size standard is 500 or fewer employees.[212] According to Census Bureau data for 1997, there were 128 establishments in this category that operated for the entire year.[213] Of these, 121 had employment of under 500, and four establishments had employment of 500 to 999.

72. *Electronic Resistor Manufacturing.* These establishments manufacture "electronic resistors, such as fixed and variable resistors, resistor networks, thermistors, and varistors."[214] The SBA has developed a small business size standard for this category of manufacturing; that size standard is 500 or fewer employees.[215] According to Census Bureau data for 1997, there were 118 establishments in this category that operated for the entire year.[216] Of these, 113 had employment of under 500, and 5 establishments had employment of 500 to 999.

73. *Electronic Coil, Transformer, and Other Inductor Manufacturing.* These establishments manufacture "electronic inductors, such as coils and transformers."[217] The SBA has developed a small business size standard for this category of manufacturing; that size standard is 500 or fewer employees.[218] According to Census Bureau data for 1997, there were 448 establishments in this category that operated for the entire year.[219] Of these, 446 had employment of under 500, and two establishments had employment of 500 to 999.

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[209] 13 C.F.R. § 121.201, NAICS code 334413.

[210] U.S. Census Bureau, 1997 Economic Census, Industry Series: Manufacturing, "Semiconductor and Related Device Manufacturing," Table 4, NAICS code 334413 (issued July 1999).

[211] U.S. Census Bureau, "2002 NAICS Definitions: 334414 Electronic Capacitor Manufacturing" (Feb. 2004) <www.census.gov>.

[212] 13 C.F.R. § 121.201, NAICS code 334414.

[213] U.S. Census Bureau, 1997 Economic Census, Industry Series: Manufacturing, "Electronic Capacitor Manufacturing," Table 4, NAICS code 334414 (issued July 1999).

[214] U.S. Census Bureau, "2002 NAICS Definitions: 334415 Electronic Resistor Manufacturing" (Feb. 2004) <www.census.gov>.

[215] 13 C.F.R. § 121.201, NAICS code 334415.

[216] U.S. Census Bureau, 1997 Economic Census, Industry Series: Manufacturing, "Electronic Resistor Manufacturing," Table 4, NAICS code 334415 (issued Aug. 1999).

[217] U.S. Census Bureau, "2002 NAICS Definitions: 334416 Electronic Coil, Transformer, and Other Inductor Manufacturing" (Feb. 2004) <www.census.gov>.

[218] 13 C.F.R. § 121.201, NAICS code 334416.

[219] U.S. Census Bureau, 1997 Economic Census, Industry Series: Manufacturing, "Electronic Coil, Transformer, and Other Inductor Manufacturing," Table 4, NAICS code 334416 (issued Aug. 1999).

74. *Electronic Connector Manufacturing.* These establishments manufacture "electronic connectors, such as coaxial, cylindrical, rack and panel, pin and sleeve, printed circuit and fiber optic."[220] The SBA has developed a small business size standard for this category of manufacturing; that size standard is 500 or fewer employees.[221] According to Census Bureau data for 1997, there were 347 establishments in this category that operated for the entire year.[222] Of these, 332 had employment of under 500, and 12 establishments had employment of 500 to 999.

75. *Printed Circuit Assembly (Electronic Assembly) Manufacturing.* These are establishments "primarily engaged in loading components onto printed circuit boards or who manufacture and ship loaded printed circuit boards."[223] The SBA has developed a small business size standard for this category of manufacturing; that size standard is 500 or fewer employees.[224] According to Census Bureau data for 1997, there were 714 establishments in this category that operated for the entire year.[225] Of these, 673 had employment of under 500, and 24 establishments had employment of 500 to 999.

76. *Other Electronic Component Manufacturing.* These are establishments "primarily engaged in loading components onto printed circuit boards or who manufacture and ship loaded printed circuit boards."[226] The SBA has developed a small business size standard for this category of manufacturing; that size standard is 500 or fewer employees.[227] According to Census Bureau data for 1997, there were 1,835 establishments in this category that operated for the entire year.[228] Of these, 1,814 had employment of under 500, and 18 establishments had employment of 500 to 999.

77. *Computer Storage Device Manufacturing.* These establishments manufacture "computer storage devices that allow the storage and retrieval of data from a phase change, magnetic, optical, or magnetic/optical media."[229] The SBA has developed a small business size standard for this category of manufacturing; that size standard is 1,000 or fewer employees.[230] According to Census Bureau data for

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[220] U.S. Census Bureau, "2002 NAICS Definitions: 334417 Electronic Connector Manufacturing" (Feb. 2004) <www.census.gov>.

[221] 13 C.F.R. § 121.201, NAICS code 334417.

[222] U.S. Census Bureau, 1997 Economic Census, Industry Series: Manufacturing, "Electronic Connector Manufacturing," Table 4, NAICS code 334417 (issued July 1999).

[223] U.S. Census Bureau, "2002 NAICS Definitions: 334418 Printed Circuit Assembly (Electronic Assembly) Manufacturing" (Feb. 2004) <www.census.gov>.

[224] 13 C.F.R. § 121.201, NAICS code 334418.

[225] U.S. Census Bureau, 1997 Economic Census, Industry Series: Manufacturing, "Printed Circuit Assembly (Electronic Assembly) Manufacturing," Table 4, NAICS code 334418 (issued Sept. 1999).

[226] U.S. Census Bureau, "2002 NAICS Definitions: 334419 Other Electronic Component Manufacturing" (Feb. 2004) <www.census.gov>.

[227] 13 C.F.R. § 121.201, NAICS code 334419.

[228] U.S. Census Bureau, 1997 Economic Census, Industry Series: Manufacturing, "Other Electronic Component Manufacturing," Table 4, NAICS code 334419 (issued Aug. 1999).

[229] U.S. Census Bureau, "2002 NAICS Definitions: 334112 Computer Storage Device Manufacturing" (Feb. 2004) <www.census.gov>.

[230] 13 C.F.R. § 121.201, NAICS code 334112.

1997, there were 209 establishments in this category that operated for the entire year.[231] Of these, 197 had employment of under 500, and eight establishments had employment of 500 to 999

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

78. Should the Commission decide to adopt any regulations to ensure that consumer protection needs are met by all providers of broadband Internet access service, the associated rules potentially could modify the reporting and recordkeeping requirements of certain broadband Internet access services providers. We could, for instance, require that broadband Internet access service providers must comply with slamming, truth-in-billing-type protections, or network outage reporting requirements. These proposals may impose additional reporting or recordkeeping requirements on entities. We seek comment on the possible burden these requirements would place on small entities. Also, we seek comment on whether a special approach toward any possible compliance burdens on small entities might be appropriate. Entities, especially small businesses, are encouraged to quantify the costs and benefits of any reporting requirement that may be established in this proceeding.

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

79. The RFA requires an agency to describe any significant alternatives that it has considered in reaching its proposed approach, which may include (among others) the following four alternatives: (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, standards; and (4) an exemption from coverage of the rule, or any part thereof, for small entities.[232]

80. The Commission's primary objective is to develop a framework for consumer protection in the broadband era – a framework that ensures that consumer protection needs are met by all providers of broadband Internet access service, regardless of the underlying technology. We seek comment here on the effect the various proposals described in the *Notice*, and summarized below, will have on small entities, and on what effect alternative rules would have on those entities. We invite comment on ways in which the Commission can achieve its goal of protecting consumers while at the same time impose minimal burdens on small broadband Internet access service providers. With respect to any of our consumer protection regulations already in place, has the Commission adopted any provisions for small entities that we should similarly consider here?

81. *CPNI.* In this *Notice*, the Commission asks whether it should extend privacy requirements similar to the Act's CPNI requirements to providers of broadband Internet access services.[233] We ask, for example, whether we should forbid broadband Internet access providers from disclosing, without their customers' approval, information about their customers that they learn through the provision of their

[231] U.S. Census Bureau, 1997 Economic Census, Industry Series: Manufacturing, "Computer Storage Device Manufacturing," Table 4, NAICS code 334112 (issued July 1999).

[232] 5 U.S.C. § 603(c).

[233] *See supra Notice* at para. 149.

broadband Internet access service.[234] By developing the record with respect to privacy concerns, the Commission can appropriately determine whether providers of broadband Internet access services, including small entities, should be subject to similar privacy regulations.[235]

82. *Slamming.* We seek comment on whether we should impose slamming requirements on providers of broadband Internet access service and to explain in what circumstances subscribers to broadband Internet access could get "slammed."[236] We also ask whether the provisioning process for broadband Internet access service is such that an unauthorized change in provider is more likely in situations where the provider relies on third-party broadband transmission facilities.[237] We recognize that small broadband Internet access service providers may rely more on third-party broadband transmission facilities and could potentially inform the Commission as to whether slamming is likely to occur in those situations.

83. *Truth-in-Billing.* We invite comment on whether we should impose requirements on broadband Internet access service providers that are similar to our truth-in-billing requirements or are otherwise geared toward reducing slamming, cramming, or other types of telecommunications-related fraud.[238] We ask parties to explain what problems customers of broadband Internet access service are likely to have with their bills and whether we should address these problems through truth-in-billing-type requirements.[239] What effect will this proposal have on small entities, and are there alternatives to imposing truth-in-billing type regulations?

84. *Network Outage Reporting.* We seek comment as to whether broadband Internet access service providers should notify the Commission of outages of thirty or more minutes that affect a substantial number of customers or involve major airports, major military installations, key government facilities, nuclear power plants, or 911 facilities.[240] We encourage small entities to identify any alternatives that would protect consumers while at the same time minimizing any burden on small broadband Internet access providers.

85. *Section 214 Discontinuance.* In the *Notice,* the Commission stated that section 214 of the Act limits a telecommunications carrier's ability to discontinue unilaterally its service to customers.[241] The Commission's implementing rules generally require that domestic carriers wishing to "discontinue, reduce, or impair" services must first request authority to do so from the Commission and must notify affected customers and others of their plans. We ask whether the Commission should impose discontinuance-type requirements on providers of broadband Internet access service.[242]

86. *Section 254(g) Rate Averaging Requirements.* In the *Notice*, the Commission explains that section 254(g) required the Commission to adopt rules "to require that the rates charged by providers of

[234] *See id.* at para. 149.

[235] *See id.* at para. 149.

[236] *See id.* at para. 151.

[237] *See id.* at para. 151.

[238] *See id.* at para. 153.

[239] *See id.* at para. 153.

[240] *See id.* at para. 154.

[241] *See id.* at para. 155.

[242] *See id.* at para. 156.

interexchange telecommunications services to subscribers in rural and high cost areas . . . be no higher than the rates charged by each such provider to its subscribers in urban areas."[243] We ask, for example, whether we should adopt similar rate averaging requirements on providers of broadband Internet access services, particularly as consumers substitute broadband services and applications for narrowband services that were covered by section 254(g).[244]

87. In the *Notice*, we ask commenters to address whether the imposition of regulations pursuant to our ancillary jurisdiction, and the corresponding ability of consumers to take advantage of Commission avenues for resolution of consumer protection issues, is desirable and necessary as a matter of public policy, or whether we should rely on market forces to address some or all of the areas listed.[245] The option of relying on market forces may benefit entities, especially small entities, who may find it costly or burdensome to comply with Commission regulations. We also ask whether these types of regulations are more or less relevant in the context of broadband Internet access service than they are for traditional telephony services.[246] In addition, we ask commenters to describe any technical, economic, or other impediments that may affect the ability of broadband Internet access service providers to comply with such regulations. We also ask whether there are areas of consumer protection not listed above for which the Commission should impose regulations.[247]

88. *Federal and State Involvement.* To the extent that the Commission finds it necessary to impose consumer protection and related regulations on broadband Internet access service providers, we also seek comment on how best to harmonize federal regulations with the states' efforts and expertise in these areas.[248]

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

89. None.

[243] *See id.* at para. 157.

[244] *See id.* at para. 157.

[245] *See id.* at para. 147.

[246] *See id.* at para. 147.

[247] *See id.* at para. 147.

[248] *See id.* at para. 158.

STATEMENT OF
CHAIRMAN KEVIN J. MARTIN

Re: Appropriate Framework for Broadband Access to the Internet over Wireline Facilities, Universal Service Obligations of Broadband Providers (CC Docket No. 02-33), *Review of Regulatory Requirements for Incumbent LEC Broadband Telecommunications Services* (CC Docket No. 01-337), *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* (CC Docket Nos. 95-20, 98-10), *Conditional Petition of the Verizon Telephone Companies for Forbearance Under 47 U.S.C. § 160(c) with Regard to Broadband Services Provided Via Fiber to the Premises; Petition of the Verizon Telephone Companies for Declaratory Ruling or, Alternatively, for Interim Waiver with Regard to Broadband Services Provided Via Fiber to the Premises* (WC Docket No. 04-242), *Consumer Protection in the Broadband Era* (WC Docket No. 05-271)

The Order that we adopt today is a momentous one. It ends the regulatory inequities that currently exist between cable and telephone companies in their provision of broadband Internet services. As I have said on numerous occasions, leveling the playing field between these providers has been one of my highest priorities. With this Order, wireline broadband Internet access providers, like cable modem service providers, will be considered information service providers and will no longer be compelled by regulation to unbundle and separately tariff the underlying transmission component of their Internet access service.

Most importantly, however, the actions we take in this Order are an explicit recognition that the telecommunications marketplace that exists today is vastly different from the one governed by regulators over 30 years ago. The *Computer Inquiry* requirements that were adopted several decades ago were based on the assumption that, without the imposition of strict regulation, telephone companies would be able to exert considerable market power over unaffiliated entities in the provision of information services. To the extent that this assumption was true at the time, it is no longer true in today's broadband market.

As the item recognizes, the broadband Internet access market today is characterized by multiple platforms that are vigorously competing for customers. Such changed market conditions require, as the Supreme Court in the *Brand X* decision phrased it, a "fresh analysis." I am pleased that the Commission so quickly undertook this analysis, and, in so doing, removed legacy regulation that applied to only one of the platform providers – the telephone companies.

Broadband deployment is vitally important to our nation as new, advanced services hold the promise of unprecedented business, educational, and healthcare opportunities for all Americans. Perpetuating the application of outdated regulations on only one set of Internet access providers inhibits infrastructure investment, innovation, and competition generally.

In taking these actions, we recognize that change is never easy. Nor can it be effectuated overnight. ISPs currently rely on the transmission offerings that the telephone companies have been compelled by regulation to make available. Such a transition is vital to the continuity of service for thousands of customers. To this end, we require the telephone companies to make their current transmission offerings available for one year from the effective date of this Order.

Similarly, we cannot permit the telephone companies to immediately cease contributing to the universal service fund on the portion of revenues derived from these tariffed Internet access offerings. We must ensure the stability of the fund. Accordingly, we require telephone companies to continue

contributing to the universal service fund on their Internet access services based on their current contribution levels for 270 days following the effective date of the Order or until we adopt new contribution rules, whichever comes first. Either way, the Commission will act diligently to ensure that there will be no adverse impact to the fund as a result of the holdings today.

Although we are confronting a changed marketplace, government will continue to have a role in this dynamic, new broadband marketplace. Together with our state colleagues, the Commission must vigilantly ensure that law enforcement and consumer protection needs continue to be met. To accomplish this, we adopt a Notice of Proposed Rulemaking seeking comment on the extent to which we need to develop a consumer protection framework that applies to all broadband Internet access platform providers, regardless of the underlying technology.

We also adopt today a vitally important companion item that confirms that facilities-based Internet access providers (as well as interconnection VoIP providers) are subject to the requirements of CALEA. Law enforcement agencies must have the ability to conduct electronic surveillance over broadband technologies.

The Commission also adopts today a Policy Statement that reflects each Commissioner's core beliefs about certain rights all consumers of broadband Internet access should have. Competition has ensured consumers have had these rights to date, and I remain confident that it will continue to do so.

I believe that, with the actions we take today, consumers will reap the benefits of increased Internet access competition and enjoy innovative high-speed services at lower prices. There is, however, more to do to stimulate infrastructure investment, broadband deployment, and competition in the broadband market. We intend to tackle these challenges in the upcoming months.

Finally, I want to thank my colleagues for their perseverance and commitment to work together to adopt this item today. It is an honor and a privilege to serve with such dedicated and capable public servants.

STATEMENT OF COMMISSIONER KATHLEEN Q. ABERNATHY

Re: Appropriate Framework for Broadband Access to the Internet over Wireline Facilities, Universal Service Obligations of Broadband Providers (CC Docket No. 02-33), *Review of Regulatory Requirements for Incumbent LEC Broadband Telecommunications Services* (CC Docket No. 01-337), *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* (CC Docket Nos. 95-20, 98-10), *Conditional Petition of the Verizon Telephone Companies for Forbearance Under 47 U.S.C. § 160(c) with Regard to Broadband Services Provided Via Fiber to the Premises; Petition of the Verizon Telephone Companies for Declaratory Ruling or, Alternatively, for Interim Waiver with Regard to Broadband Services Provided Via Fiber to the Premises* (WC Docket No. 04-242), *Consumer Protection in the Broadband Era* (WC Docket No. 05-271)

Three and a half years ago, my colleagues and I made a promise to the American people: we promised that efforts to deploy twenty-first century broadband technologies for public use would not be crushed by the weight of 1930s-era regulations. To that end, we initiated a series of proceedings designed to reevaluate the role of traditional common carrier regulations in the blossoming market for broadband Internet access services.

We quickly determined that cable modem services should be free from the heavy burdens of Title II regulation. That determination was soon subject to legal challenge, and the resulting litigation effectively prevented action with regard to similar services provided over wireline facilities. In June's *NCTA v. Brand X* decision, the Supreme Court brought that period of uncertainty to a close, validating the Commission's authority to classify a broadband Internet access service as a Title I information service.

Today, with the benefit of the Court's guidance, we extend similar relief to providers of wireline broadband Internet access. Specifically, we clarify that wireline broadband Internet access services – like the cable modem services at issue in *Brand X* – are "information services," and thus not automatically subject to the full range of Title II requirements designed for a narrowband, analog, one-wire world. We also lift the so-called "*Computer Inquiry*" requirements, which were crafted to prevent companies that exercised substantial market power in the provision of telecommunications from leveraging that dominance into the provision of enhanced services. Requirements such as these were never meant to apply in a competitive, multi-platform communications market such as the market for high-speed Internet access services.

And let there be no doubt: competition among broadband providers is flourishing. The Commission's most recent statistics show that over 80 percent of zip codes in America are served by two or more high-speed providers, about two-thirds are served by three or more, and over half are served by four or more. Moreover, I fully expect that providers taking advantage of new platforms will soon offer consumers even more choices in even more areas. Over 1.2 million high-speed lines in service today use wireless, satellite, fiber-optic, and powerline technologies; that number is poised to rise dramatically in the very near future. The result of such competition will be better and better services at lower and lower prices, with offerings designed to match customers' needs rather than regulators' preferences.

Today's decision is *not*, however, the end of the story. Wireline broadband providers are not subject to Title II or to the *Computer Inquiry* requirements, but that does not mean that they are immune from *all* regulatory requirements. When the Commission first issued its tentative conclusion that these services were outside the scope of Title II, I emphasized my commitment to preserving any specific

regulatory requirements that are necessary for the furtherance of critical policy objectives. In June, the *Brand X* majority made clear that the Commission retains the prerogative to exercise its Title I "ancillary jurisdiction" to do just that. The Commission has already made clear its intention to ensure access to emergency services as Americans transition to packet-switched communications technologies, irrespective of how those services are classified under the Communications Act. As we make clear in today's *Notice*, we will now turn our attention to other "social policy" requirements, such as those involving disability access, slamming, and consumer privacy. Where action is warranted, we will act.

There is still work to be done as we endeavor to establish a new, minimally regulated framework for the digital era. But however we address the issues that remain before us, I expect that our decision today will spur future investment in broadband infrastructure and provide the flexibility to which companies in a competitive market and their customers are entitled.

In short, I am confident that today's Order does much to fulfill our promise to the American people, and I am happy to support this item.

STATEMENT OF
COMMISSIONER MICHAEL J. COPPS,
CONCURRING

Re: *In the Matter of Appropriate Framework for Broadband Access to the Internet over Wireline Facilities; Universal Service Obligations of Broadband Providers; Review of Regulatory Requirements for Incumbent LEC Broadband Telecommunications Services; 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; Conditional Petition of the Verizon Telephone Companies for Forbearance Under 47 U.S.C. § 160(c) with Regard to Broadband Services Provided via Fiber to the Premises; Petition of the Verizon Telephone Companies for Declaratory Ruling or, Alternatively, for Interim Waiver with Regard to Broadband Services Provided via Fiber to the Premises; Consumer Protection in the Broadband Era*, Report and Order and Notice of Proposed Rulemaking (CC Docket Nos. 02-33, 01-337, 95-20, 98-10, WC Docket No. 04-242)

My goal as a Commissioner has always been to advance the public interest as far as I can with the tools at my disposal at the time. I objected strenuously to our original reclassification of cable modem and our tentative reclassification of wireline broadband. But the Supreme Court has fundamentally changed the legal landscape. I personally find the jurisprudence of Justice Scalia far more persuasive than that of the Court majority, and I agree wholeheartedly with Justice Scalia's observation that the previous Commission chose to achieve its objectives "through an implausible reading of the statute, and has thus exceeded the authority given it by Congress."

But neither Justice Scalia's opinion nor my personal reading will guide the Commission's approach going forward. The handwriting is on the wall. DSL ***will*** be reclassified, either now or soon from now, whether I agree or not. This is not a situation of my making or my preference, and I believe that it does not inure to the benefit of this institution or to consumers across the land. But when fundamental responsibilities like homeland security, universal service, disabilities access, enterprise competition, and Internet discrimination protections are on the chopping block, I feel compelled to work hard and be creative to advance the public interest rather than throwing up my hands. I therefore will concur in this proceeding to protect our ability to meet these core responsibilities.

As we enter the world of Title I today, we all know what the FCC's goals must be. Among other things, we must continue to protect homeland security. We must meet our universal service responsibilities. We must maintain disabilities access. We must protect fledgling competition. And we must state clearly that innovators, technology companies, and consumers will not face unfair discrimination on the Internet by network providers.

Our ability to advance these critical goals should progress as we advance to broadband. They should not shrink as we fiddle with legalisms and parse definitions. This item is not an exercise in hair-splitting about telecommunications services and information services. It is about how we promote the deployment of advanced communications while still staying true to our core values. Nonetheless, in recent years this Commission has irresponsibly reclassified services without addressing the larger implications of its decisions.

Today we begin to face up to this shortfall. The Order is far from ideal. But our actions today

are infinitely better than they otherwise might have been because of the intensive discussions we have had among the Commissioners. We have avoided the unacceptable scenario of reclassifying DSL and then punting all of the critical responsibilities listed above to some uncertain future deliberation. I could not have been party to that approach. But in the end, we moved away from that and made progress on numerous important statutory obligations:

- *Homeland Security*: We ensure that law enforcement officials will have the tools that they need to protect our country through the Communications Assistance for Law Enforcement Act and the National Security Emergency Preparedness Telecommunications Service Priority System.

- *Universal Service*: In addition, we ensure the stability of the universal service contribution base until the Commission agrees on a path forward. Universal service is critical to the Nation and critical to Congress. It is one of the pillars upon which the Communications Act is built, and I would never be party to this agency abandoning this program and the millions of Americans who depend on it. Absent the *Brand X* decision, we would have more with which to work, but in order to shield the program in this specific item we put in place a nine-month stay on any changes to DSL universal service responsibilities, unless the full Commission agrees on a new system before that time. If we do not do so within nine months the Order states that: "the Commission will take *whatever action is necessary* to preserve existing funding levels, *including extending the [nine-month] period discussed above or expanding the contribution base*" (emphasis added). That is a firm and strong commitment from the Chairman and Commissioners that at the end of this period the program will be protected. We do not often commit to "take whatever action is necessary" and the promise that we will even expand the base if needed is a major achievement. I will continue to fight to keep rural America connected.

- *Disabilities*: But we had to protect more than homeland security and universal service. We had to craft protections for Americans with disabilities. I know this much: The disabilities communities did not fight for so many years to obtain "functional equivalency" and equal access to technology only to have their hard-won victories stolen by some regulatory sleight of hand. So I fought to ensure that the item guarantees accessible technologies for the 54 million Americans with disabilities.

- *Competition*: We also take significant action to protect competition. We ensure access to facilities and interconnection so that small and medium businesses can continue to enjoy the lower prices and increased choices that competition brings.

- *Internet Openness*: And critically, for the first time ever, the Commission has adopted a policy statement with principles that will guide our effort to preserve and promote the openness that makes the Internet so great.

I am especially pleased at my colleagues' adoption of this Statement of Policy on Internet openness. This is something I have been advocating for nearly two years. This Statement lays out a path forward under which the Commission will protect network neutrality so that the Internet remains a vibrant, open place where new technologies, business innovation and competition can flourish. We need a watchful eye to ensure that network providers do not become Internet gatekeepers, with the ability to dictate who can use the Internet and for what purpose. Consumers do not want to be told that they cannot use their DSL line for VoIP, for streaming video, to access a particular news website, or to play on a particular company's game machine. While I would have preferred a rule that we could use to bring enforcement action, this is a critical step. And with violations of our policy, I will take the next step and push for Commission action. A line has been drawn in the sand. I am particularly appreciative of the

Chairman's support of this item.

I also want to note that the Supreme Court's *Brand X* decision makes it clear that the Commission's ancillary authority can accommodate our work on homeland security, universal service, disabilities access, competition, and Internet discrimination protections—and more. But we have a ways to go. Today, in addition to our Order, we release a Notice of Proposed Rulemaking on consumer protection in the broadband era. I would have much preferred positive action on this now, but we at least put these issues squarely on the table and now we have a proceeding to deal with them. I believe that a combination of a strong record, good wide stakeholder input and Commission sensitivity to the priority Congress places on consumer issues can preserve such protections as privacy, truth-in-billing, and other safeguards for the communications tools our citizens rely upon no matter how they may be classified. Hard-won consumer protections must never be allowed to erode simply because we change the classification of the tools people rely upon to communicate with one another. So I think we come out here with a framework for consumer protection in a digital world—a framework accommodating and encouraging the expertise and authority that reside in our state public service commission counterparts. I look forward to the record that develops and to working with my colleagues and all stakeholders so that we can move ahead without further delay.

Let me sum up by reminding the Commission that we are saying today that we take the dramatic step of reclassifying DSL in order to spur broadband deployment and to help consumers. I want us to test that proposition a year from now. If by next year consumers have more broadband options, lower prices, higher speeds and better services, maybe this proposition holds true. If our broadband take-rate reverses course and the United States begins to climb up the ladder of broadband penetration rather than falling further behind so many other nations, then we'll have something to crow about. If we get no complaints about higher bills, loss of privacy and diminished access for the disability communities, we can take a bow. And critically, if we make progress on public safety and homeland security, we can be proud of our actions. So I hope next year the Commission will put its money where its mouth is and check to see if its theory yields real world results for American consumers. And if it doesn't achieve these results, I hope we'll admit it. I plan to keep tabs.

In closing, I want to thank Chairman Martin for not only permitting, but encouraging, open and genuine Commission dialogue on these difficult issues. I want to thank him, and Commissioners Adelstein and Abernathy, for their contributions to making this a better item. The Bureau toiled mightily with this proceeding and we are indebted to their diligence, hard work and creative thought all along the way. Our personal staffs performed with distinction. And I would be both ungrateful and remiss if I did not recognize the extraordinary—indeed, often heroic—exertions of my Legal Advisor Jessica Rosenworcel for helping ***all*** of us navigate these perilous waters and arrive at somewhat more tranquil shores.

STATEMENT OF
COMMISSIONER JONATHAN S. ADELSTEIN
CONCURRING IN FCC 05-150, APPROVING IN FCC 05-153

Re: Appropriate Framework for Broadband Access to the Internet over Wireline Facilities, Universal Service Obligations of Broadband Providers (CC Docket No. 02-33), *Review of Regulatory Requirements for Incumbent LEC Broadband Telecommunications Services* (CC Docket No. 01-337), *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* (CC Docket Nos. 95-20, 98-10), *Conditional Petition of the Verizon Telephone Companies for Forbearance Under 47 U.S.C. § 160(c) with Regard to Broadband Services Provided Via Fiber to the Premises; Petition of the Verizon Telephone Companies for Declaratory Ruling or, Alternatively, for Interim Waiver with Regard to Broadband Services Provided Via Fiber to the Premises* (WC Docket No. 04-242), *Consumer Protection in the Broadband Era* (WC Docket No. 05-271) (Concurring)

Re: Communications Assistance for Law Enforcement Act and Broadband Access and Services First Report and Order and Further Notice of Proposed Rulemaking (ET Docket No. 04-295, RM-10865) (Approving)

The items before us are a real tribute to the consensus building dedication of Chairman Kevin Martin and all of my colleagues. It took extraordinary efforts by all of us because the stakes are so high, the consequences so far reaching, and the concerns so acute. And we did all of this work in an incredibly compressed time-frame.

Today, we implement the Supreme Court's guidance in the *Brand X* decision and embark on a new but uncharted path in its treatment of wireline broadband Internet access services, the high-speed DSL and fiber-to-the-home connections. These technologies are revolutionizing the way that consumers connect, learn, work, and socialize through the Internet. With the Broadband Reclassification Order and NPRM, we move toward a measured and technology-neutral approach to broadband regulation. Critical aspects of the reclassification approach, however, give me considerable pause.

Indeed, were the pen solely in my hand, these are not the precise items I would have drafted or the procedural framework I would have chosen. In the wake of the Supreme Court decision, however, this reclassification was inevitable. Moreover, the Broadband Reclassification Order reflects meaningful compromise by each of my colleagues, and I appreciate the efforts to address many of my concerns about issues including the stability of the universal service fund, access for persons with disabilities, and the ability of competitive carriers to access essential input facilities. What we've done here is ensure it was done in a fashion that protects, or holds the promise of addressing, many critical policy goals that Congress and the Commission have long held as fundamental to a "rapid, efficient, Nation-wide, and world-wide wire and radio communication service."

As we move to this less-regulated framework, I'm pleased that we take up the Supreme Court's invitation to use our Title I ancillary jurisdiction to address critical policy issues. Commissioner Copps and I have worked hard to address or lay the groundwork for addressing many important consumer and public policy concerns, and I appreciate Chairman Martin and Commissioner Abernathy's willingness to engage in a constructive discussion about a technology-neutral framework for policy in the broadband age. I'm particularly pleased that recent changes to the Broadband Reclassification Order reiterate our commitment to access for persons with disabilities and consumer protection, and provide for meaningful provisions to address the needs of carriers serving Rural America. I'm also pleased that we adopt a

companion Order applying the Communications Assistance for Law Enforcement Act (CALEA) to facilities-based broadband Internet access providers and providers of interconnected VoIP services. Finally, we adopt concurrently a companion Policy Statement that articulates a core set of principles for consumers' access to broadband and the Internet. Collectively, these provisions are essential for my support of this item.

We undertake these proceedings against the backdrop of the *Brand X* decision, in which the Supreme Court upheld the FCC's earlier determination that cable modem broadband services may be classified as information services, rather than as traditional telecommunications services. By doing so, the FCC defined these cable broadband services out of Title II of the Act, which applies to common carrier offerings. I was not at the Commission when this reclassification approach was first proposed, but the approach has always given me some grounds for real concern. By reclassifying broadband services outside of the existing Title II framework, the Commission steps away from some of the core legal protections and grounding afforded by Congress. This approach also gave a significant and articulate minority of the Supreme Court grounds for questioning whether the Commission had fundamentally misinterpreted the Communications Act. But, my reservations notwithstanding, the Supreme Court majority upheld the reclassification and we must respond to this changed landscape.

In fact, there is much to be said for a measured regulatory approach for broadband services. The applications that can ride over broadband services are bringing increased educational, economic, health, and social opportunities for consumers. I'm increasingly convinced that our global economic success will also be shaped by our commitment to ubiquitous advanced communications networks. Our challenge is to create an environment in which providers can invest in their networks and compete, application and content providers can innovate and reach consumers, and we can all maintain the core policy goals that we've worked hard to achieve.

The Broadband Reclassification Order acknowledges that the marketplace and technology of today's broadband Internet access services are markedly different from those that existed three decades ago, when most of the *Computer Inquiries'* requirements were first adopted. Although we adopt this new regulatory approach with the blessing of the Supreme Court, many of the implications for consumers are largely yet undefined. To some degree, we ask consumers to take a leap of faith based on our predictive judgment about the development of competition in an emerging and very fluid broadband marketplace.

It remains unclear whether the approach we have taken thus far has been a success. Not all consumers have a choice between affordable broadband providers, and Americans continue to pay relatively high prices for relatively limited bandwidth. As we move forward, I am pleased that the Commission adopts a one-year transition for independent ISPs and encourages parties to engage in prompt negotiations to facilitate the transition process. While this is helpful, we have a lot more work to do to establish a coherent national broadband policy that signifies the level of commitment we need as a nation to speed the deployment of affordable broadband services to all Americans. So we will have to monitor closely the development of the broadband market and the effectiveness of this approach. If results don't improve, I hope we will reconsider what measures are needed to spur the level of competition necessary to lower prices and improve services for consumers.

A critical aspect of our decision to eliminate existing access requirement for ISPs is the Commission's adoption of a companion Policy Statement that articulates a core set of principles for consumers' access to broadband and the Internet. These principles are designed to ensure that consumers will always enjoy the full benefits of the Internet. I am also pleased that these principles, which will inform the Commission's future broadband and Internet-related policymaking, will apply across the range

of broadband technologies. I commend in particular my colleague, Commissioner Copps, for his attention to this issue.

I am also pleased that changes were made to the Broadband Reclassification Order that affirm our authority under Title I to ensure access for those with disabilities. Through sections 225 and 255 of the Act, Congress codified important principles that have ensured access to functionally-equivalent services for persons with disabilities. Millions of Americans with disabilities can benefit from widely-available and accessible broadband services. Indeed, at last month's open meeting, the Commission recognized the importance of broadband services to persons with disabilities, and celebrated the 15th anniversary of the Americans with Disabilities Act (ADA), by adopting a series of orders that improved the quality of and access to important communications services for the deaf and hard of hearing community. I strongly believe that we must not relegate the ADA's important protections to the world of narrowband telephone service, and I appreciate my colleagues' willingness to address this concern.

I'm also particularly pleased that the Broadband Reclassification Order includes meaningful provisions to address the needs of carriers serving Rural America. By allowing rural providers to continue to offer their broadband services on a common carrier basis, and by allowing them to participate in the NECA pooling process, we maintain their ability to reduce administrative costs, minimize risk, and create incentives for investment in broadband facilities that are so crucial to the future of Rural America.

We also take important interim action in the Broadband Reclassification Order to preserve the stability of our universal service funding. Reclassifying broadband services as information services removes revenues from wireline broadband Internet access services from the mandatory contribution requirements of section 254, taking out a rapidly-growing segment of the telecommunications sector from the required contribution base. I would have preferred to exercise our permissive contribution authority now to address this potential decline in the contribution base permanently, but I am glad that we were able to agree to adopt an interim measure to preserve existing levels of universal service funding on a transitional basis. I also appreciate the Commission's commitment to take whatever action is necessary to preserve existing funding levels, including extending the transition or expanding the contribution base. These modifications to the Broadband Reclassification Order are critical to my support of the item.

The Commission will also need to assess how the reclassification of wireline broadband services might affect our ability to support broadband services through the universal service fund, should we decide to do so in the future. Given the growing importance of broadband services for our economy, public safety, and society, I hope that we can preserve our ability to support the deployment of these services for consumers that the market may leave behind.

I'm also glad that we've added an important Notice of Proposed Rulemaking that seeks comment on how we can ensure that we continue to meet our consumer protection obligations in the Act. On some issues, like consumer privacy, it would have been far wiser to act now. I'm troubled by the prospect that we might even temporarily roll back consumer privacy obligations in the Broadband Reclassification Order, particularly during this age in which consumers' personal data is under greater attack than ever. The Commission must move immediately to address these privacy obligations. We should also act quickly to assess the effect on our Truth-in-Billing rules and the rate averaging requirements of the Act, which ensure that charges for consumers in rural areas are not higher than those for consumers in urban areas. This Notice sets the foundation for our consumer protection efforts across all broadband technology platforms and I look forward to working with my colleagues as we move forward promptly to address these issues.

For all these reasons, I concur in today's Broadband Reclassification item and support the CALEA item.

I would like to thank my colleagues for their willingness to engage in constructive dialogue and to take meaningful steps to acknowledge many of my concerns. I also want to thank Tom Navin and the dedicated and professional staff of our Wireline Competition Bureau, who have worked many long hours to produce these companion items so quickly. All of our personal staffs have worked incredibly long hours with great dedication to speed this process along. I would like to acknowledge my personal gratitude to Scott Bergmann for his incredible stamina and persistence. I would be remiss if I didn't also thank his entire family for sacrificing their sacred time with him over these past few weeks. I look forward to working with you all as we moved forward together.