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

Petition for the FCC To Investigate Whether the Laws and Current Enforcement That Allow Small Telecom Businesses, including Internet Service Providers To Offer Competitive Services To US Customers Are Adequate or Properly Enforced.	)
Petition for Rulemaking to Establish a Broadband Bill of Rights	)

PETITION

Teletruth Petitions the FCC To Investigate Whether Current Regulations and Enforcement Policies That Allow Internet Service Providers (ISPs) And Competitive Local Exchange Companies (CLECs) To Offer Competitive Services To US Customers Are Adequate to Protect Consumers of Interstate DSL Services.

Teletruth Petitions the FCC To Establish a Broadband Bill of Rights

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Table of Contents

Petition

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Petition for Rulemaking to Establish a Broadband Bill of Rights

This Petition requests:

- The FCC should start an investigation and seek out public comments as to whether current laws and regulations designed to protect small telecom-intensive businesses, including Internet Service Providers and CLECs, as well as their customers, from anti-competitive behavior by the incumbents are being properly enforced.

- The FCC should investigate and seek out public comments as to whether current regulations are adequate to protect the rights of small telecom-intensive businesses, as well as their customers.

- The FCC should investigate and seek out public comments on the true state of the current ISP market and its importance to America's broadband deployment.

- The FCC should investigate and seek out public comments on ILECs' (Incumbent Local Exchange Company) failure to fulfill longstanding, state-by-state broadband commitments before it removes ILECs' line sharing obligations and pre-empts state-specific action on these issues.

- The FCC should seek out public comments on how it can better fulfill its obligations under the Regulatory Flexibility Act to understand and fully consider the interests of small telecom-intensive businesses as part of any significant regulatory action.

- The FCC should seek out public comments on the adoption of the "Broadband Bill of Rights" to enforce and strengthen current "Quality of Service" problems encountered by Customers ordering DSL. The FCC should also seek out public comments on whether the current FCC complaint process is working for small businesses.

NOTE: The largest ILECs are the BellSouth, Qwest, SBC and Verizon.

Introduction

- **A customer orders DSL from an ISP in New York City and is told that there is NO available copper wiring in the building. The customer then contacts the ILEC ISP and is quickly given service to the same location that previously did not have available wiring.**

- **A customer orders DSL from an ISP in Philadelphia and is told they must stop using their local competitive phone service, MCI, and return to Verizon, before they can get DSL.**

- **A customer in California waits home all day for an installer for DSL that never shows up.**

- **A customer is dropped from their DSL service because their ISP can't make any money reselling it.**

- **Customers across the US may lose their choice of ISP or DSL service provider if the FCC's current proposed rules about line sharing and next generation networks remain.**

In the Commission's rush to both promote broadband deployment and deregulate ILEC broadband activities, the independent ISPs and DSL consumers have been left out in the cold. The quotes above, taken directly from customers, are but a few of the thousands of problems that face customers trying to get DSL today. Unfortunately, even while claiming to be trying to ***promote*** broadband deployment, the Commission has repeatedly failed to examine or enforce current laws and regulations protecting the true source of innovation and growth in this sector: America's competitive small Internet Service Providers.

The fate of ISPs at the hands of the ILECs is also the fate of the millions of customers who depend on these companies for services today and in the future.

However, ISPs are in crisis. It is clear from the respondents of the New Networks Institute (NNI) 4th nationwide ISP survey (Appendix Two) that the ILECs are using their monopoly power to force the ISPs out of business, and that the Commission is not properly enforcing current laws and regulations, or properly defending the rights of ISP competitors. See: http://www.teletruth.org/docs/ISPsurvey2003.doc

This situation does NOT just affect the ISPs. As the quotes above clearly show, it affects the rights of ALL U.S. Internet and DSL customers by interfering with their ability to receive competitive services at reasonable prices.

Compounding these problems is the Commission's recent ruling eliminating line sharing. Line sharing allows competitors to utilize residential or business customers' existing phone lines for DSL. Another ruling could eliminate the ILECs' existing requirements to sell DSL–based transport services to ISPs that compete with the ILECs' own ISP operations.

All of these rulings reflect a serious failure by the Commission — doubtless besieged by well-heeled lobbyists for the multi-billion-dollar ILECs — to appreciate the critical, positive role of America's small, independent ISPs. It was this group of entrepreneurs who brought the American public into the Digital Age. Independent ISPs, not the ILECs, are responsible for the widespread availability of access to the Internet and World Wide Web throughout the US. And they, not the ILECs, have been on the front line selling broadband.

According to our survey, over 60% of ISPs offer broadband, mostly through competitive local phone companies (CLECs). More importantly, in those cases where ISPs do not sell broadband, the main reason is the ILECs' predatory pricing to resellers or problems with ordering and installations.

America now has more than 5000 small independent ISPs. The Commission's current policy direction seems to involve a preference for the interests of large, rich, integrated corporations over small, entrepreneurial specialist firms. There seems to be no other rational explanation for the Commission's seemingly total disregard for the rights and interests of these firms. But if America's small ISPs are put out of business, America will lose innovation and choice, and the American public will be stuck with inferior services and a slowed economy.

Six Major Issues Facing This Industry That The FCC Should Investigate.

The responses to the NNI ISP survey revealed major problems that the Commission has thus far ignored, even though they critically affect virtually all ISPs throughout the US. These problems are destroying these small, competitive firms – and destroying broadband in the US.

- **First, There Are Problems With Fulfilling 30-40% Of All Broadband Orders Placed By Independent ISPs.**

This industry-wide "dirty little secret" is at the core of the difficulties in realizing rapid, widespread broadband deployment. When a customer orders broadband from an independent ISP, the customer is entitled to an installation without major problems – and when an order has problems, it is the customer, as well as the ISP, who is harmed.

There are literally hundreds of individual issues cited by ISPs about the problems their customers encounter.

- The ILEC doesn't show up for the installation,
- The ILECs' networks are lacking adequate facilities,
- The order has line problems that are not fixed quickly,
- The customer can't get service because the customer is using a competitive CLEC for voice services.

Despite the Commission's repeated statements emphasizing the importance of widespread broadband availability, it has no method in place even to reliably track these issues, much less to force incumbents to perform at acceptable levels of service quality from the perspective of consumers. New Networks Institute suggests that these kind of problems — plain old inadequate telephone service by the ILECs — are a key component of the discrepancy between the supposed wide "availability" of DSL and its present, low penetration rate.

- **Second, Throughout The US, ISPs Face A DSL Resale "Price Squeeze".**

ISPs must obtain DSL from an LEC to resell to the ISPs' subscribers "underneath" the ISP's information service. If there are no competitive providers in the area, then the only available option is the ILEC's DSL transport service. But the required DSL arrangements are priced so high — compared to the ILECs' own integrated DSL+Internet Access offerings — that independent ISPs can't make any money. This isn't the result of inefficiency by the independent ISPs or non-existent "economies of scope and scale" for the ILECs. It is the result of a price squeeze by the ILECs.

This fact has been presented by the ISPs in various ways to the FCC. For example, the Texas ISP Association filed a Complaint about this problem in 2001.

When an ISP resells ILEC DSL, the "wholesale" rate is close to retail. To make matters worse, once the ISP signs a deal, purchasing the necessary equipment, the ILEC then lowers the price to end users, or gives end users free modems, activation and installation – all of which are fees that the ISP must pay or costs the ISP must incur.

According to one account by a Texas ISP, it will take almost 12 years to actually turn a profit on reselling DSL at the current prices. Worse, of the 40% of ISPs who do not offer DSL, the primary reason has been predatory pricing or harm caused through anti-competitive behaviors dealing with the installation and ordering issues.

Not only has this slowed the deployment of DSL nationwide; it is also eliminating choice and quality services. The reason is simple: when independent ISPs stop selling DSL, it is the customer who loses out.

Teletruth and NNI submit that these pricing arrangements are unjust and unreasonable, and probably discriminatory as well. We therefore request an examination as to whether this ILEC scheme violates Section 201 of the Communications Act. Section 201(b) requires that all "charges, practices, classifications, and regulations for and in connection with" interstate communication service be just and reasonable. Even if a combined DSL-Internet access service is an "information service" (as the Commission may shortly rule), that does not mean that plain old high-speed transmission — DSL service itself — stops being a normal "telecommunications" service subject to Section 201. Moreover, Section 201(a) states that it is the "duty" of interstate carriers to offer services that they are technically capable of offering "on reasonable request therefor." In other words, an ILEC may not fold its hands and refuse to provide services that customers request just because it doesn't want to or just because it conflicts with some extrinsic ILEC business purpose. If the ISP wants "broadband" last mile transport, all too often the only source is the ILEC.

The point of a "duty" is that you have to do it even if you ***don't*** want to.

- **Third, The ILECs Are Exploiting Their Monopoly Control Over Loop Plant In Various Ways.**

ILEC ISP operations are supposed to operate at "arms' length" from other ILEC businesses. In fact, the ILECs seem to create below-cost deals between their ISP operations and their common carrier transport (DSL) operations. Moreover, ILECs are not shy about disparaging their independent competitors. Our survey shows that customers are being told that independent ISPs offer inferior products and (supposedly) can't sell DSL. The ILECs are actually stealing customers from ISPs when the customer places an order for a new phone service. Teletruth submits that this is both unreasonable under Section 201(b) and inherently discriminatory under Section 202(a).

To address these problems, we request that a system be created to effectively and efficiently identify and pay compensation to those ISPs and their customers who have suffered from the various burdensome and inefficient installation and anti-competitive practices. ***See*** 47 U.S.C. §§ 206, 208.

- **Fourth, ISPs Are Being Closed Out Of The Broadband Future. The ISP Industry Is Under Multiple Regulatory Attacks.**

The Commission's decision to eliminate line sharing, with all due respect, is completely wrong-headed. It will most likely cause a second telecom crash and a deepening of the telecom recession. CLECs serving ISPs have every incentive to identify new and innovative uses of existing ILEC loop plant — they have to add value to survive in the marketplace, and finding new uses for existing plant, such as line-sharing, is one way to do it. By contrast, ILECs have little incentive to make new and innovative use of their existing plant. It requires new capital, new procedures, and taking risks in the marketplace — precisely what firms that have spent the last 100 years as government-protected monopolies are particularly terrible at doing.

In other words, if the Commission actually wants to see efficient and innovative use of ILEC loop plant, it is a fundamental mistake to look to the ILECs to identify and implement those efficient and innovative uses. Their entire business model involves extracting revenue from customers for the minimum possible new effort and investment. That's the whole ***point*** of being an incumbent with a legacy infrastructure. The purpose of the 1996 Act is not to ensure that ILECs can get the maximum return on their legacy plant. In this context, the purpose of the 1996 Act is to establish a regulatory structure in which ***competitors*** can make maximum, innovative use of ILEC legacy plant, subject only to the obligation that ILECs be paid a rate for that use that is not so low as to be confiscatory. Line-sharing meets these requirements. For precisely that reason, the ILECs hate it. The Commission, unfortunately, appears to have been blinded by the rhetoric of "investment incentives" and "deregulation" into ignoring the sad reality that today, right now, if consumers want or need high-bandwidth transport on a ***common carrier*** basis — to use as ***they*** like, not as the provider dictates — the only place to get it is the ILEC. Failing to regulate the ILEC in these circumstances to ***require*** that they make their facilities available to third parties is simply abandoning the Commission's primary responsibility to consumers.

A more detailed analysis of the decision to abandon line sharing, as well as its harm to competitors and customers, is available at:
http://www.newnetworks.com/idiotsdelight.htm

The Small Business Administration's Office of Advocacy has also found that this ruling would be harmful to the ISP markets. The SBA's analysis is available at:
http://www.sba.gov/advo/laws/comments/fcc02_0827.html

Cable operators are exempt from any obligation to make their networks available to independent ISPs, since cable operators are not viewed as common carriers. This ruling regarding cable operators makes it all the more critical that the entities that ***are*** common carriers — the ILECs — actually perform their common carrier duties. The Commission's solicitude for ILECs supposedly operating under more "onerous" regulations than cable operators is, we submit, utterly misplaced. The Commission's solicitude should be directed squarely at the small firms and consumers who depend

on the availability of reasonably priced, reliable DSL-based services, without restrictive or discriminatory terms and conditions.

- **Fifth the Commission's Data Collection and Analysis on this Topic Is Seriously Flawed.**

As we have filed in numerous proceedings at the Commission, from the data supplied in its Initial Regulatory Flexibility Act,[1] to its lack of consideration of state-level broadband plans that exist today and that in some cases contain commitments extending through 2015, the Commission needs to have a clearer picture of both the Broadband and ISP market before it puts thousands of companies out of business and harms America's Digital Future.

On these topics, the data the Commission has relied upon has been lacking in scope, precision and understanding. As Teletruth pointed out in our comments for the six broadband proceedings, the Commission has ignored numerous Regulatory Flexibility Act provisions calling on the agency to examine the impacts its regulations laws will have on small businesses, including small telecom and ISP businesses.

- **Sixth, There Is No Clear and Simple Statement of Consumers' And Small Business' Rights Regarding Ordering And Receiving Broadband Services.**

In 2001, a group of individuals and companies, concerned about the immense problems customers were having with the installation and ordering of DSL, especially when using a competitive service, created a set of principles that would strengthen the laws dealing with the enforcement of customer services. These principles became known as the "Broadband Bill of Rights." To see the principles and read the original Broadband Bill of Rights see: http://www.newnetworks.com/broadbandbill.htm

However, it is clear that in 2003, while some of the original problems seem to have been alleviated, other, more pervasive issues still remain. As pointed out previously, 1/3 of all orders still create frustration for customers.

Eventually, the Broadband Bill of Rights was revised into possible new legislation, directing the Commission to take certain steps to protect consumers and users of broadband services. Although cast as possible legislation, in most respects it is clear that the Commission has full and adequate authority under Section 201(b) to promulgate the substantive requirements of the draft legislation as regulations. Appendix One is the draft legislation, modified to be FCC rules. We request that these

[1] The Initial Regulatory Flexibility Analysis is required as part of the Regulatory Flexibility Act (as amended) and it is essentially an impact study on how the proposed laws will affect small businesses.

draft rules be placed out for public comment, as proposed regulations to protect consumers of broadband services.

One key issue addressed in the Broadband Bill of Rights is the difficulties with the Commission's current processes by which a small business or residential broadband customer can lodge a complaint. Most of the ISPs surveyed felt that the current complaint system is not useful or effective because of the excessive costs associated with a formal complaint, and an informal complaint does not yield results. Even the FCC's "Rocket Docket" has been described as an expensive exercise in futility. 89% of ISPs felt that the FCC was in fact not helpful, not effective, or simply useless in protecting the ISPs' rights.

Conclusion

> The Commission plainly has the power and the duty to investigate matters bearing on the impact that its rules and policies have on firms participating in, or consuming the services of, the telecommunications industry. ***See*** 47 C.F.R. § 1.1. Similarly, the Commission also has the power and the duty to investigate the acts, practices and charges of carriers under its jurisdiction. ***See*** 47 U.S.C. § 205(a). These acts, practices and charges must be just, reasonable and nondiscriminatory. ***See*** 47 U.S.C. §§ 201, 202. Teletruth submits that the acts and practices of ILECs in relation to the provision of DSL and related services to small independent ISPs (and/or to the CLECs that serve those ISPs) are unjust, unreasonable, and discriminatory. We therefore urge the Commission to investigate these matters and take the necessary corrective action.

It is time for the Commission to do its job and enforce the laws before any more companies go bankrupt and the country's telecom problems take down the economy. It is also time for the FCC to take into account the ISPs' role in the Digital Future before it "deregulates" these firms out of business.

In order to do so, the FCC should open a docket that examines the seriousness of our claims and allows a record to be presented that includes ISPs and their customers.

The remainder of this Petition will outline the current problems, and what we believe the FCC should do about it. The main problem areas discussed below are:

- Installation Violations: Problems With Orders, Installations
- Predatory Pricing Violations
- Regulatory Flexibility Act Violations
- Lack of Accurate Data Collection
- Adoption Of The “Broadband Bill Of Rights” And The Issues Surrounding The Current Complaint Process.

1.0 Installation Violations: Problems With Orders, Installations, Etc.

According to our survey, 1/3 of all customers who order through a competitive provider of DSL service will have to face one of several common problems.

- **A customer orders DSL from an ISP in New York City and is told that there is NO available copper wiring in their building.**

- **A customer orders DSL from an ISP in Philadelphia and is told they must stop using their local competitive phone service, MCI and return to Verizon, before they can get DSL.**

- **A customer in California waits home all day for an installer for DSL that never shows up.**

- **A customer is dropped from their DSL service because their ISP can't make money reselling DSL service.**

All of these problems were evident in the ISP survey (attached by reference in Appendix Two). From New York to Utah, California to Louisiana, Los Angeles to Texas, ISPs trying to place orders for their clients have been stymied by problems that the FCC should have examined over the last five years.

UTAH ISP

> "Constant billing errors, every order we put through we have some problem with, even the order system is a 50/50 chance that it will work when you need it to, service techs tell our customers stories to make trouble with our new clients or to steal them away."

CALIFORNIA ISP

> "Most installations require at least one trouble ticket. Technicians either are a no show or go to the client site without calling first, as we always instruct them to do. They will leave a note that they missed them, when it was their fault for not calling first to arrange for the person to meet them at the location. Very often there is something that one aspect of the system or process that they forgot, and didn't complete, thus the trouble."

LOUISIANA ISP

> "Last month (October 2002) I had 23 outages on 8 T1's."

TEXAS ISP

> "SBC actively inhibits the sales of our products. They claim there are no pairs where there clearly are pairs available. Once service is up, it runs reliably. However every step up the way before circuit "turn up" is a guaranteed money loser, both from Bell ineptness and Bell anti-competitiveness."

NEW YORK ISP

> "Of the 40% of orders that don't go through, we have about 25% of those where there is no copper wire available --- they can't find a copper pair in the Empire State Building or the Carnegie Towers. Some areas of Brooklyn you can't even get a second line nowadays. Imagine what the customer thinks of our company when we can't take their order? And so, for whatever reason, Verizon can't supply a line for the customer. We also found that when Verizon orders the line for their customers at the same address, their order seems to go through."
>
> "More recently, we're losing another 25% of our potential orders because the customer who wants the service does not have Verizon for their local phone service. That right. If the Customer decided to use another local phone company, like MCI, they can't get DSL from us.
>
> "The bulk of the other stuff are hundreds of other things – The company doesn't show for the installation. It doesn't work so they have to check the line, the phoneline is too old to work and needs new copper without the noise, the noise is caused by something they can't find, the stuff works for a day and the[n] goes dead, the mailing address doesn't match the street address and they can't find the phoneline, they have to go through some neighbor's yard…. On and on."

It is easy to dismiss any particular missed installation or false ILEC excuse that no facilities are available as an aberration, or simply part of what consumers "have to" put up with. But the fact is that these kinds of problems constitute an ongoing pattern and practice of ILEC abuse of DSL customers served by independent ISPs. The Commission cannot reasonably trust the ILEC to report truthfully either the number of problems their practices create, or how badly those problems hurt consumers and competitors. The ILECs have every incentive and every ability to mislead, to obscure, and, frankly, to lie about how bad their services really are. We submit that the Commission has an obligation to consumers to conduct an independent investigation of these issues.

Putting it bluntly, the issue of protecting consumers from ILEC abuses regarding DSL installation and service is an area where the Commission needs to "lead, follow, or get out of the way."

If the Commission is intent on keeping legal control over DSL services by deeming them to be interstate in nature, then the Commission has a responsibility to the ILECs' customers (ISPs and end users) to ensure that the services are offered on terms that are just and reasonable — which would not include the kinds of abuses noted above. That would be "leading".

As an alternative, the Commission could re-affirm earlier rulings that DSL services are jurisdictionally mixed and expressly affirm that state may require ILECs to file tariffs establishing the terms and conditions on which DSL would be offered in a state. Just as a plain old dial-tone line is primarily regulated by states but is used for both interstate and intrastate services, so too could DSL services (also provided using dial-tone lines) be primarily regulated by the states. That would be "following".

Finally, if the Commission is intent on treating these services as deregulated and to preempt traditional state regulatory activity, then the Commission should make absolutely and utterly clear that in the provision of deregulated DSL-related services (whether deemed subject in whole or in part to Title II), ILECs are legally "on their own", fully subject to all state- and federal-level consumer protection, unfair trade practices or anti-trust laws. It would be a travesty if ILECs were permitted to run amok in the marketplace on the grounds that this agency concluded that these services should be deregulated, but then hide behind the existence of special telecom regulatory statutes and policies when they are called to account by the FTC, by state attorneys general, and under normal state-level consumer protection statutes that apply to normal "unregulated" commercial transactions. Ensuring that ILECs would be subject to these independent consumer protection and business practice laws would be "getting out of the way".

1.1 Anti-Competitive Behavior On The Part Of The ILECs Seems To Be A Major Cause Of These Problems.

There is an enormous amount of data — that this Commission has chosen thus far to ignore —about the anti-competitive behavior of the local monopolies to supply services to customers via an ISP.

The ongoing stream of complaints from the ISP community, including the charges made by major ISP associations, should not be news to the Commission. For example, the California ISP Association (CISPA) filed comments with the Commission that clearly demonstrated that the Bell-company ILEC was giving preferential treatment to its own ISP in numerous ways.

These included:[2]

- BOCs Are Using Control of DSLAM Infrastructure to favor their Affiliated ISPs
- BOCs Favor their Affiliated ISPs in DSLAM Port Provisioning
- BOCs Are Providing Advance Information to their ISPs
- BOCs Are Gaming the Loop Qualification System
- BOC-affiliated ISPs Receive Preferential Pricing for DSL
- BOCs are Forcing ISPs to Accept Predatory DSL Contracts
- BOC ISPs Enjoy Superior Access to BOC Ordering and Billing Systems
- BOC-provided Ordering Systems Are Inferior to those Used by Affiliate ISPs
- ISPs Suffer More from Inaccurate BOC Billing than do Affiliated ISPs
- Independent ISPs are Stonewalled by BOC Representatives
- BOCs Are Sharing Marketing and Customer Information Between the Infrastructure Provider and the Controlled ISP
- BOCs are Unfairly Utilizing CPNI to Market their ISP's Services
- BOCs are Using Their Existent Phone Monopoly to Promote Their Affiliated ISPs
- BOCs Are Changing their Network Architecture to Monopolize the Emerging Enhanced Services Market
- BOCs are Preventing Customers from Switching to Competing ISPs

Every one of these problems directly affects the customer – the consumers and small businesses that rely on ISPs for Internet access. When an independent ISP's customer can't easily switch from one provider to another without service problems, when the ILEC gets advantageous provisioning and use of the basic components of the DSL service, such as the DSLAM, when the ordering system doesn't work, every one of these problems is NOT simply an ISP problem. It is the ***customer*** who is harmed, and it is time for the FCC to investigate these problems.

The ILEC's captive ISP operation is NOT supposed to be getting preferential treatment. The reason the Bell companies were supposed to use Comparably Efficient Interconnection and/or Open Network Architecture to make sure that this kind of hanky-panky was eliminated.[3]

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[2] Further Notice of Proposed Rulemaking In the matter of the Computer III Remand Proceedings: Bell Operating Company Provision of Enhanced Services 1998 Biennial Regulatory Review – Review of Computer III and ONA Safeguards and Requirements, CC Docket No. 95-20 CC Docket No. 98-10, DA 01-620 (Published in Federal Register March 15, 2001) COMMENTS OF THE CALIFORNIA ISP ASSOCIATION, INC., April 16, 2001.

[3] ***In re*** Amendment of Section 64.702 of the Commission's Rules and Regulations (Second Computer Inquiry), Docket No. 20828, Final Decision, 77 FCC 2d 384, 231 (May 2, 1980); Frame Relay, para. 13. ***See also*** In re Review Of Customer Premises Equipment And Enhanced Services Unbundling Rules In the Interexchange, Exchange Access and Local Exchange Markets, CC Docket No. 98-183; CC Docket No. 96-61, Notice of Proposed Rulemaking, para 33 (October 9, 1998).

Carriers that own common carrier transmission facilities and provide enhanced services must unbundle basic from enhanced services and offer transmission capacity to other enhanced service providers under the same tariffed terms and conditions under which they provide such services to their own enhanced service operations."

And yet, according to the ISP survey results and ISP filings, the rules are honored principally in the breach. This litany of problems is a clear indication of various violations of Section 202 of the Telecom Act, which specifically prohibits this type of behavior.

> **"SEC. 202. [47 U.S.C. 202] DISCRIMINATION AND PREFERENCES.**
> (a) It shall be unlawful for any common carrier to make any unjust or unreasonable discrimination in charges, practices, classifications, regulations, facilities, or services for or in connection with like communication service, directly or indirectly, by any means or device, or to make or give any undue or unreasonable preference or advantage to any particular person, class of persons, or locality, or to subject any particular person, class of persons, or locality to any undue or unreasonable prejudice or disadvantage."

The Act provides that when a carrier violates its terms, the carrier is liable for the damages caused. ***See*** 47 U.S.C. § 206. The Commission is empowered to remedy these violations. ***See*** 47 U.S.C. §§ 205, 208. This petition requests that a system be created to pay compensation to those ISPs and their customers who have experienced various Installation and anti-competitive practices, as discussed in the Broadband Bill of Rights.

The FCC should immediately investigate the extent to which these regulations have been ignored and compensate those customers and ISPs who have been affected.

2.0 Price Squeeze Issues

Imagine offering a service where you lose money every time you take an order. That is the situation facing ISPs throughout America. The Commission, unfortunately, has not done an adequate investigation of this problem over the last five years.

The FCC has been given the task to make sure that Advanced Services, such as DSL, be distributed in a timely and reasonable manor. And yet at every turn, the FCC has ignored the ISP community's issues dealing with this deployment.

Probably one of the most detrimental examples of this has been the deaf ear the Commission has turned to the examination of the resale requirements applicable to ILEC DSL services.

The basic issue is as follows: The ILECs have essential, unique facilities — their ubiquitously deployed networks. They offer DSL by placing a DSLAM in the central office that enables the DSL service. But the service goes over the same phone line used for voice. Thus, the DSLAM essentially splits the line into two "channels" — one channel for voice service and the other for DSL.

An Internet provider who would like to offer DSL through the Bell company essentially rents the DSL portion of the line and resells it — in theory.

In practice, based on the pricing of the DSL portion of the service, as well as restrictions on service, the ISP has been frozen out of this market. ISPs have been complaining about the price of Bells' resale of DSL since the Bells started to roll out this service in 1998. In 1999, New Networks Institute with CIX (Commercial Internet Exchange) supplied the FCC model of Verizon's pricing structure, under which ISPs which clearly demonstrated that the prices being offered were "predatory" – a form of a price squeeze. An ISP offering the service could not possibly have a profitable business. This model is available at: http://newnetworks.com/baadslscrewisp.htm

This same lack of consideration has continued throughout the history of DSL.

For example, the FCC in August of 2001 allowed SBC, which also owns Ameritech and Pac Bell, to establish a tariff with NO cost support, even though SBC is still the dominant supplier of essential network facilities. As noted by the affected companies:[4]

[4] Petition for Investigation, Suspension, And Rejection of SBC-ASI Tariff, F.C.C. No. 1, Petition for Reconsideration and, Application for Review of, Special Permission No. 01-095, TEXAS INTERNET SERVICE PROVIDERS, September 13, 2001.

> "On the evening of Friday, August 31, 2001, SBC-ASI filed with the Commission an Application for Special Permission and an illustrative Tariff F.C.C. No. 1, asking that the Commission grant permission to file the tariff on one day's notice without cost support. On the afternoon of Friday, September 7, 2001, SBC-ASI amended this application. Shortly thereafter, Special Permission No 01-095 was granted, and that evening, after the close of business, SBC-ASI filed with the Commission a cover letter and its Tariff F.C.C. No. 1, effective Monday, September 10, 2001.
>
> "The net result of this process was that SBC-ASI, a dominant carrier, was permitted to file a tariff covering its services with no notice and with no cost support."

The Commission, unfortunately, has ignored this petition and this issue. There has been no cost support supplied by the ILECs, nor has there been any due process for ISPs on this issue. To the contrary, as discussed below, consideration of the needs of small ISPs has been shut out of the proceedings.

However, that hasn't stopped the Commission from issuing decisions that harm the entire industry. In a recent decision, the FCC has decided that it is all right to remove the tariff requirements from SBC for their DSL services (ASI is the SBC affiliate):[5]

> "Consistent with the Commission's approach in the ***SBC/Ameritech Merger Order***, we conclude that, to the extent SBC operates in accordance with the separate affiliate structure established in that Order, with SBC's commitments made in this record, and with the safeguards set forth below, it is not necessary to impose the burdens of tariff regulation on ASI's rates, terms, and conditions for the advanced services subject to this petition. Therefore, in this limited instance and subject to all of the conditions set forth herein, forbearance from applying tariffing regulation to ASI's advanced services operations meets the statutory criteria."

Fundamentally, one of the clearest problems is that the ILECs, even with their own separate affiliates, have been able to take advantage of their monopoly power. They have been able to bundle the services with their other services below cost, they have been able to 'upsell' a customer who calls to order a second line with their own services. Many ISPs report that customers are being told that an ISP service is inferior or has problems.

[5] Review of Regulatory Requirements , for Incumbent LEC Broadband, Telecommunications Services Petition for Forbearance by SBC, CC Docket No. 01-337, Adopted: December 30, 2002.

A second point the Commission has failed to examine is the fact that in many states, these DSL services have been "customer-funded". That is, the incumbent — typically a former Bell company — has had the costs of upgrading its network to permit DSL and similar services paid for by state-regulated ratepayer funds. Those funds were received because the Bell company typically represented to the public and the state regulators that in return for regulatory relief — pricing flexibility, rate caps when rate reductions would have been justified, etc. — the Bell company would spend the money needed to provide widespread access to real broadband services. And then the Bell company has simply, utterly failed to deliver.

The ILECs' failure to deliver on their promises to state regulators is not merely an arcane bit of regulatory history. To the contrary, it goes to the heart of the logic of the Commission's current flirtation with deregulation and regulatory policy "incentives" to promote ILEC innovation and investment in broadband facilities and services. The key point is that, when the ILECs made these same sorts of deals with state regulators, ***they failed to deliver the goods; instead, they took the money and ran.***

It is simply incomprehensible that the Commission would allow itself to be led down this same primrose path by the ILECs when over and again the same ILECs have misled state regulators on this same topic and reneged on their deals.

The Commission may have a sound broad policy point that deregulated markets are better, in the long run, than regulated ones. And the Commission may have a point that in the long run, real, robust, facilities-based competition is better than competition based on different firms making different use of a single underlying monopoly infrastructure. But as long as there is only one common carrier infrastructure available for use — and that is the real situation today, regardless of what might be possible with WiFi, ultra-wideband, competing local fiber networks, or what-have-you — then unless the owner of the monopoly common carrier infrastructure is ***regulated*** — that is, told what it has to do and what it may not do — then it will act in its own self-interest, which basically means taking advantage of customers and harming its competitors.

The incumbents do not need additional "incentives", in the form of increased profits or fewer regulatory constraints, to encourage the provision of broadband. Think about it. The fact that they are whining about the need for more incentives means that, at bottom, ***the ILECs do not want to be bothered to deploy broadband.*** They only got into the business when they were forced to by competition from outsiders — mainly, ISPs that secured "burglar alarm" or data circuits, and later the cable operators — and when CLECs (not bound by the ILECs' "exploit-the-legacy-network-with-the-least-possible-effort" business model) started using loops in new ways. And yet there are thousands of firms — ISPs, CLECs, small business consumers — who would gladly pay for reasonably-priced broadband services. When the regulatory structure permits these firms to obtain broadband on reasonable terms, they buy it. What is needed is

not additional ILEC “incentives”. What is needed is regulations that force the ILEC to get out of the way of the small, entrepreneurial, innovative firms that want to actually bring these services to consumers.

One fundamental problem has been that the costs of these services have priced the ISP out of business. According to ISP supplied data, 40% of ISPs do not offer DSL and of that 1/3 stated that they stopped offering DSL because it was not profitable.

One Texas ISP wrote:

> “We tried reselling Bell DSL but stopped because SBC pricing guarantees no one, even an efficient and profitable ISP can make money reselling DSL. Then there is the ordering process, which is a guaranteed time waster for your staff and insures that if we made any profit reselling DSL, you then lose it through the ILEC's laborious ordering process. We dropped DSL in May as just about ALL ISPs.”

The Texas ISP Association (TISPA) recently posted this analysis of the price of resale for SBC DSL. It shows that an ISP would lose money for almost 12 years before making a small profit. As you can see from this analysis, the ISP has a number of different charges to pay before they can even offer service.

> “Presently, SBC Telephone is required to sell all Texas ISPs connections to the telephone network at equitable wholesale rates. Homes and businesses can choose from ISPs competing to serve them, whether the ISP is owned locally or by a national corporation. The SBC wholesale rate is $36 a month for a DSL phone line, plus $6.00 a month for the ISPs connection to the Bell cloud, plus $99 for the install kit. SBC has created a their own subsidiary ISP however, which charges a retail customer only $34.95 for a DSL line, including Internet access, e-mail, web pages, technical support, installation kit, and a free modem. So Texas ISPs not owned by Bell pay more for a “wholesale” DSL telephone line alone than the Bell subsidiary charges retail customers for all services. This means the ISP will break even and start making a profit after 142 months of service. “(comparison chart)

Below is a summary of the calculations. To see the entire 142 month chart ***see:*** http://www.tispa.org/isppayout.htm

ISP Revenues, Costs and Profits in Offering SBC DSL

	MONTH 1	MONTH 2	MONTH 3	MONTH 4
DSL LINE COST	-36	-36	-36	-36
ATM TO SBC CLOUD	-6	-6	-6	-6
MAIL SUPPORT	-0.01	-0.01	-0.01	-0.01
WEB PAGE SUPPORT	-0.01	-0.01	-0.01	-0.01
ADMIN, SALES, OVERHEAD	-0.97	-0.97	-0.97	-0.97
BANDWIDTH TO INTERNET	-5	-5	-5	-5
ONE TIME MODEM CHARGE	-99			
CHARGE TO CLIENT (MATCHING SBC'S RETAIL OFFERING	34.95	34.95	34.95	34.95
ISP'S PROFIT / LOSS	-112.04	-13.04	-13.04	-13.04

The Commission has been told about this problem by other ISP associations as well.[6] The California ISP Association filed comments with the FCC in April 16, 2001 on this topic. The Association documented how the ISP contracts were anti-competitive and helped to close down many ISPs from offering DSL. To read their full Comments see: http://www.cispa.org/fl008.html

This ISP association noted that "BOCs are Forcing ISPs to Accept Predatory DSL Contracts." In March, 2001, SBC presented its California ISP "partners" with a contract for DSL services. The contract reflects a continuation of SBC's anti-competitive conduct. It:

- Allows SBC to sell other services over the DSL line. Thus ISPs can offer Internet services via DSL, but SBC reserves the right to market other high margin services over the DSL connection directly to the independent ISPs' customers - video on demand, videoconferencing, and other services not yet commercialized or even imagined;
- Reduces commission payments for DSL customers to $50, a reduction from $99 per new subscriber. This is only available to members of the Internet Access Services Program, for which not all ISPs qualify;

[6] Further Notice of Proposed Rulemaking In the matter of the Computer III Remand Proceedings: Bell Operating Company Provision of Enhanced Services 1998 Biennial Regulatory Review – Review of Computer III and ONA Safeguards and Requirements, CC Docket No. 95-20 CC Docket No. 98-10, DA 01-620 (Published in Federal Register March 15, 2001) COMMENTS OF THE CALIFORNIA ISP ASSOCIATION, INC., April 16, 2001.

- Eliminates discounts on DSL modems. They cost $253 each from ASI;
- Imposes new $50 service order charge for non-electronic orders. No charge for orders sent via their "ASOS" ordering system, although ASOS is highly unreliable and often forces ISPs to resort to manual orders;
- Requires customers to self-install DSL. If consumer is unsuccessful, then ISPs will be charged $150 for a technician to be sent to the customer to identify the problem, i.e. a "truck roll;"
- Eliminates "non-split-billing." This arrangement allowed ISPs to have their DSL charges appear on customers' Pacific Bell phone bills and reduced ISPs' billing/collection expenses. Under the new regime, the ISP would be responsible for collecting from the customer, despite the fact that the ISP no longer has exclusive control over the DSL line.

> "Most CISPA members have refused to sign the contracts due to these many problems. SBC's response to date is to "take it or leave it." Such a contract of adhesion falls outside the accepted practices expected by Computer III. CISPA has not been provided the opportunity to review the contracts between SBC and its affiliated ISPs to determine whether the terms and conditions are similar to those being forced upon CISPA's members. Even if the terms are identical, which is highly unlikely, the ability to cross-market services and absorb massive financial losses in order to gain customers would place BOC ISPs in a superior position."

CISPA has also found that SBC's own DSL service received preferential treatment.

> "BOC-affiliated ISPs Receive Preferential Pricing for DSL
> BOC ISPs have paid substantially less for DSL lines than do competitive ISPs. During 1999 in California's SBC territory, PBI was paying approximately $30 per month [10] for DSL lines and then selling DSL Internet service for $39.95. Independent ISPs received a price of $39 for the same line. As such, independent ISPs were required to sell DSL at a substantially higher price in order to break even, or incur a loss of at least $10 per month for every DSL line sold. This price discrepancy was due to a "volume discount" for ISPs ordering a minimum of 500,000 lines. Obviously, only PBI, due to its unique history as the affiliate of a statewide monopoly telephone company, was in a position to accept. Further, PBI - given the financial backing of its parent - could also afford to lose money on every line sold and not risk near certain bankruptcy, as would an independent ISP. For a small local ISP wishing to sell DSL, the only option was to rely on customer loyalty and hope customers would pay well in excess of $10-$20 more per month for DSL. Only large, very well-capitalized national ISPs could even attempt to compete at this below-cost price point, but even they could not sustain this strategy for the long term. The price squeeze

instituted by SBC favored its affiliate ISP over competitors and represents an obvious violation of both the literal language and the spirit of Computer III.

"The "success" of this pricing strategy has recently come to fruition in California. Having eliminated much of the competition and captured a large majority of the DSL market, PacBell Internet has recently raised its price to $49.95 and eliminated volume discounts. Apparently, SBC and PBI are confident that they no longer need to rely on under-market price schemes to maintain their mutual customer base.

"Verizon has provided, and continues to provide, similar differentiation in pricing. Currently, Verizon Online is selling DSL to retail customers for $39.95. In addition, the BOC ISP is providing free activation, a free modem, and a free web camera. On the other hand, Verizon is providing DSL wholesale to independent ISPs for $39, charging $259 for the modem, and has never offered a web camera as part of the package. To compete, ISPs would effectively need to sell the ISP portion of the service (comprised of email, newsgroups, customer service, backhaul network circuits, marketing, equipment, employee salaries, rent, etc. costs of running any business) for $0.95 and subsidize a $259 modem by keeping every customer for over 259 months. The choice is clear for ISPs in Verizon territory- sell DSL service for at least $10-$15 more than Verizon Online or decline to provide DSL service in Verizon territory."

2.1 Competitive Alternatives?

To date, there are very few solutions an ISP can offer. The Commission has declared cable-modem service to be an unregulated information service, with no underlying common carrier obligation on the part of the cable operators. This means that ISPs cannot rely on using cable networks as an alternative source of supply — even if end user residential customers can do so. (Of the ISPs who have been allowed to use these networks, such as in the AOL-Time-Warner agreement, which required the cable company to open its networks to a limited number of ISPs, current ISPs have filed complaints about the problems using the service.) As a result, independent ISPs, with their history of innovation and responsive service to consumers and small businesses, have nowhere to go but the ILEC — whose every incentive is to put a stick in their spokes.

In theory, ISPs can use a competitive service, such as those offered by competitive "DLECs," companies that sell data services. But, since the beginning of 1999, hundreds of small competitive telecom providers have gone out of business, including Northpoint and Rhythms, and most of the other companies have either declared

bankruptcy for protection from creditors, or have not flourished. Only a few companies are still a viable alternative to offer any service. Of course, it is precisely these few remaining “DLECs” who will be destroyed by the Commission’s recent line-sharing ruling.

However, none of these companies can compete with the Bells’ pricing structure for offering ADSL, the most common product. This is because the Bell companies still charge these competitors for use of the phonelines, which in turn the ISP also pays fees to.

In many regions of the US, there are simply no viable choices for offer DSL service as an ISP if you do not use the incumbent’s network.

The result of the Commission’s failure to fully examine these issues is that an entire industry — independent ISPs — could be put out of business. From the customer prospective, this means inferior services offered by a monopoly (or a duopoly if you consider cable), with very little choice and higher prices. The FCC cannot truly entertain the notion that “deregulation” and the elimination of line sharing will result in the ILECs reducing prices, and that the lack of intra-modal competition will lead to innovation and responsiveness to consumer needs. History and any rational understanding of the incentives and natural inclination of any entity that controls an essential facility belie such a result.

2.2 Tax Issues

One of the maddening issues that the FCC has simply not examined is the affect its redefining DSL as an Interstate, Information Service has on tax issues. And according to ISPs, when in doubt, taxes are being applied, even if they are not supposed to be.

One New York ISP who uses the CLEC Covad wrote:

> “The basic problem is "what is the Internet", "what is broadband" and what is DSL". We're running into it because although DSL is supposedly an interstate service, Covad (prodded by NY State) is taxing us as if it's intrastate (since NY has in interstate exemption for sales tax, which exemption we're not getting). But we are also paying hefty FUSF (Federal Universal Service Fund) on Covad's gross interstate telecom revenues. There should be no FUSF on DSL if you look at the underlying description. the Universal Service Fund is to be placed on “telecommunications services”. “All telecommunications carriers that provide service between states and internationally pay contributions into the Fund.”[7] However, DSL is now being defined as an Information Service. In fact, every component

[7] See: http://www.fcc.gov/cgb/consumerfacts/usp_Schools.html.

> we buy is taxed as telecom service. But as an ISP we're not supposed to charge taxes on the "Internet".

It is clear that the FCC must get involved in not only clarifying its own definitions, but also on how these changed definitions affect the companies and customers' bottom line, since most taxes have to be paid by either the customer or the company.

3.0 Regulatory Flexibility Act Violations

The Federal Regulatory Flexibility Act of 1980 (as amended) requires all federal agencies, including the FCC, to ensure that the regulations they enact do not directly harm small businesses.

> "34. As required by the Regulatory Flexibility Act of 1980, as amended (RFA), the Commission has prepared the present Initial Regulatory Flexibility Analysis (IRFA) of the possible significant economic impact on a substantial number of small entities by the policies and rules proposed in this NPRM."[8]

The RFA requires that federal agencies consider the approximate number of companies that might be affected, the potential costs to these small companies including and an economic analysis, as well as proper notification so that companies who might be impacted can respond. As the SBA writes: (Source: "The Regulatory Flexibility Act: An Implementation Guide for Federal Agencies", U.S. Small Business Administration, Office of Advocacy 1998)

> "Section 603 requires agencies to examine the objectives, costs, and other economic implications on the industry sectors targeted by the rule. Impacts examined may include economic viability (including closure), competitiveness, productivity, and employment impacts. To be most useful, such an analysis would also present information on the uncertainty surrounding the analysis and would capture uncertainty within the analysis itself. The analysis should identify cost burdens for the industry sector and/or for the individual small entities affected. Costs might include engineering and hardware acquisition, maintenance and operation, employee skill and training, administrative practices (including recordkeeping and reporting), productivity, and promotion."[9]

And these reports can not be simply 'boilerplate' discussions, but a serious analysis.

> "The RFA establishes an analytical process, not merely procedural steps, for analyzing the impact of regulations on small entities**. Boilerplate analyses or certifications will not satisfy the law.** The law anticipates

[8] From the Federal Register listing for "CC Docket No. 01-337'--- "Review of Regulatory Requirements for Incumbent LEC Broadband Telecommunications Services".

[9] "The Regulatory Flexibility Act: An Implementation Guide for Federal Agencies", U.S. Small Business Administration, Office of Advocacy 1998.

> that something substantive will emerge from the process to ensure that public policy is enhanced." [10](emphasis added)

The SBA writes that these plans are supposed to be a roadmap for the commenters.

> "What the RFA anticipates is that the public be given a road map to an agency's thinking as to the nature of the problem it is trying to address, factors contributing to the problem, what is the most effective way to address the problem, and how much of the issue will be addressed by different regulatory alternatives."
>
> "The results of the analysis should allow commenters to compare the impacts of regulatory alternatives on the differing sizes and types of entities targeted and/or affected by the rule, allowing direct comparison of small and large entities to determine the degree to which the alternatives chosen disproportionately affect small entities or a targeted sub-sector."[11]

And the FCC must make these reports not only public but also be "proactive" in getting commenters who are effected by proposed laws.

> "In addition, when there will be a significant economic impact on a substantial number of small entities (hence, when an IRFA is required), section 609(a)–(b) requires the head of the agency to ensure **that proactive steps are taken to engage participation by small entities in the review of the rule during the early stages of the rulemaking."**[12] (emphasis added)

President Bush also strengthened these rules in 2002 with an Executive Order. According to SBA:

> "On August 14, 2002, President George W. Bush signed Executive Order 13272 that requires federal agencies to implement policies protecting small businesses when writing new rules and regulations. This Executive Order authorizes Advocacy to provide comment on draft rules to the agency that has proposed or intends to propose the rules and to the Office of Information and Regulatory Affairs of the Office of Management and Budget. It also requires agencies to give every appropriate consideration to any comments provided by Advocacy regarding a draft rule. The agency shall include, in

[10] Ibid.

[11] Ibid.

[12] Ibid.

any explanation or discussion accompanying publication in the ***Federal Register*** of a final rule, the agency's response to any written comments submitted by Advocacy on the proposed rule, unless the agency certifies that the public interest is not served by doing so."

3.1 The FCC's Broadband Proceedings are NOT in Compliance with the Law.

As shown below, unfortunately, the Commission has failed to fulfill essentially all of the requirements of the RFA or Executive Order, including lack of proper identification of the classes of customers harmed, lack of proper analyses, lack of alternatives, failure to do proper procedures for the gathering comments, among other issues.

To be more specific, over approximately the past year, the Commission has released six new inter-related Notices of Inquiry and Notices of Proposed Rule Making (collectively, NRPMs) that suggest or adopt policies that risk serious harm to competition and consumers without a realistic prospect of commensurate benefit to the goal of broadband service deployment and availability.[13]

In February 2003, the FCC announced its preliminary decisions about its Triennial Review, which would essentially eliminate Line-Sharing requirements of the Bell companies as well as give these same companies the rights to keep competitors off of any new networks.

As we have pointed out in our Comments, the Commission's actions in these proceedings do not satisfy the requirements of the Regulatory Flexibility Act of 1980 (as amended in 1995) (the "RFA"). To read our Comments see:
http://www.newnetworks.com/teletruthrfacomments.html

Specifically, the Commission has failed in each case to include a proper analysis of the action's impact on small businesses, in this case small Internet Service Providers (ISPs) and Competitive Local Exchange Companies (CLECs). Indeed, perhaps because so many of the relevant industry players, for such a long part of the industry's history, have been massive corporations such as Verizon and SBC, AT&T and MCI, it

[13] These comments are being filed as such in the captioned matters for which the period for comments and/or reply comments has not expired. In the other matters, these comments are being filed as an ***ex parte*** submission for the Commission's consideration. Each of these proceedings is "non-restricted" in nature, so that informal ***ex parte*** submissions are permissible. The Commission itself recognizes that all of these matters are related. For example, in the Commission's March 14, 2002 press release regarding classification of cable modem service, the Commission stated:

"Today's decision follows five other related proceedings - the Cable Modem NOI, the National Performance Measures NPRM, the Incumbent LEC Broadband Notice, the Triennial UNE Review Notice and, most recently, the Wireline Broadband NPRM. These proceedings, together with today's actions, are intended to build the foundation for a comprehensive and consistent national broadband policy."

appears that the Commission has had a difficult time actually assessing its actions from the point of view of the hundreds and thousands of smaller entities directly affected by the Commission's actions.

Under the RFA, the Commission is required to create an Initial Regulatory Flexibility Analysis (IRFA) for each proposed action to examine the potential impacts of the action on small businesses. The two classes of small businesses most affected by the pending Commission actions are small Information Service Providers (ISPs) and (CLECs). Unfortunately, the Commission has largely ignored one of its key obligations under the RFA, which is to proactively seek out and obtain small business commenters. Having thus deprived itself of the small-business-specific information it would need to conduct the legally-required consideration, the Commission has, unfortunately, offered no more than an inadequate, boilerplate "analysis" of the impact of its regulatory actions. Its IRFA analyses do not even ask, much less answer, basic questions about harms to the competitors; they leave out important issues; and they appear to represent an effort — whether conscious or not — to avoid facing up to the harms that the proposed new regulatory actions will have on thousands of small companies.[14]

The Commission's violations of the RFA include:

- In each of the inter-related NPRMs (as well as in previous rulemakings), the Commission has provided little more than a "boilerplate" IRFA analysis which does not satisfy the either the intent or specifics of the law or protect the public interest.
- The Commission has failed to be proactive (as defined by the law) in seeking small business customer comments on the IRFA.
- The Commission has failed to be proactive as defined by the law in seeking small business competitor comments on the IRFA.
- The Commission has failed to make a reasonable effort to accurately assess the number of small telecom competitors harmed by these rulings. This includes CLECs and — particularly in light of the Commission's current interest in how to handle ILEC (Incumbent Local Exchange Companies) offerings of integrated Internet access and telecommunications — ISPs. The analysis of the number of companies provided by the FCC incorporates data out of date and is inaccurate.
- The Commission has failed to accurately assess the number of small businesses that depend on these companies and the impact its decisions will have on this group of small businesses.
- The Commission has failed to articulate, consider or offer meaningful alternatives to the core impacts of its proposed rulings as required by law.

[14] ***See*** "The Small Business Regulatory Enforcement Fairness Act: New Options in Regulatory Relief," Barry A. Pineles, LEXSEE 5 CommLaw Conspectus 29, Winter, 1997, ***5 CommLaw Conspectus 29***.

- The Commission has failed to consider the effects on small business telecom and Internet customers, in violation of the RFA, by failing to examine the services small ISPs and CLECs offer small business customers that that the ILECs — primarily the former Bells — do not.

In short, the FCC has failed to comply with the Regulatory Flexibility Act's requirements on multiple levels.

In an effort to illustrate the magnitude of this failure in practical terms, New Networks Institute has conducted for TeleTruth an analysis of the likely impacts of some of the current proposals on small businesses. The Commission should (indeed, under the RFA, it must) consider this information — as well as alternatives that would be less harmful to small businesses — in reaching its final decisions on these various matters.

To read our "Small Business Impact Study, which outlines the harm these proposed laws could have on Customers as well as small businesses, see:
http://www.newnetworks.com/teletruthrfacomments.html

Teletruth is not alone in our analysis of the FCC's laxness in fulfilling its obligations under the law. The Small Business Administration's Office of Advocacy has found that the FCC has not properly examined the harm these new laws will have on small telecom business, including Internet Service Providers.
http://www.sba.gov/advo/laws/comments/fcc02_0827.html

> "The IRFA did not address these issues described above nor analyze what the impact will be on 7,000 small ISPs. The Commission is proposing changes to the regulatory foundation for an entire industry, which will have a sweeping and dramatic impact on all small ISPs. The Office of Advocacy recommends that the Commission revise its IRFA to include an analysis of the impact that classifying wireline broadband Internet access service as an information service would have on small ISPs. "

3.2 The Regulatory Flexibility Act's Requirements Have Not Been Fulfilled in Any Recent FCC Proceeding.

Besides these specific broadband NRPMs, it is also clear that the FCC has never adequately fulfilled its obligations in any proceeding under the Regulatory Flexibility Act.

We estimate 90% of the material in the Commission's "standard" IRFA is boilerplate.

In our analysis of IRFAs and RFAs from various rulemakings in the last five years, TeleTruth has found that identical flawed analyses appear in virtually all documents. For example, in the "Truth-In-Billing"[15] (RFA, CC Docket No. 98-170, Released: May 11, 1999), we find this specific paragraph about the Telecom industry from pertaining to the year 1992!

> 82. **Total Number of Telephone Companies Affected.** The U.S. Bureau of the Census ("Census Bureau") reports that**, at the end of 1992**, there were 3,497 firms engaged in providing telephone services, as defined therein, for at least one year. This number contains a variety of different categories of carriers, including local exchange carriers, interexchange carriers, competitive access providers, cellular carriers, mobile service carriers, operator service providers, pay telephone operators, personal communications services providers, covered specialized mobile radio providers, and resellers. It seems certain that some of those 3,497 telephone service firms may not qualify as small entities or small ILECs because they are not "independently owned and operated". For example, a PCS provider that is affiliated with an interexchange carrier having more than 1,500 employees would not meet the definition of a small business. It is reasonable to conclude that fewer than 3,497 telephone service firms are small entity telephone service firms or small ILECs that may be affected by our principles and guidelines."

This identical paragraph appears in the RFA and for "Intercarrier Compensation for ISP-Bound Traffic", CC Docket No. 99-68, as well as the current Dockets, including Docket Number 02-33. Unfortunately, this shows that the Commission appears to view its responsibilities under the RFA as a ticket to be punched along the way towards doing what it would do anyway, as opposed to an opportunity to gain new perspective — from outside the Beltway, from outside the traditional regulatory community — in short, from "outside the box" — on what the Commission is proposing to do.

Meanwhile, even in every important docket, the FCC has failed to consider small businesses or their customers.

For example, in "Deployment of Wireline Services Offering Advanced Telecommunications Capability", CC Docket No. 98-147, the IRFA is less than a page, The FCC has no clue as to how many companies are CLECs.

> "224. Competitive LECs. **Neither the Commission nor SBA has developed a definition of small entities specifically applicable to**

[15] Truth-in-Billing and Billing Format, FIRST REPORT AND ORDER AND FURTHER NOTICE OF PROPOSED RULEMAKING CC Docket No. 98-170, Adopted: April 15, 1999 Released: May 11, 1999.

> **providers of competitive LECs.** The closest applicable definition under the SBA rules is for telephone communications companies except radiotelephone (wireless) companies. The most reliable source of information regarding the number of competitive LECs nationwide is the data that we collect annually in connection with the TRS Worksheet. According the most recent Telecommunications Industry Revenue data, 109 companies reported that they were engaged in the provision of either competitive local exchange service or competitive access service, which are placed together in the data. **We do not have information on the number of carriers that are not independently owned and operated, nor have more than 1,500 employees, and thus are unable at this time to estimate with greater precision the number of competitive LECs that would qualify as small business concerns under the SBA definition. Consequently, we estimate that there are fewer than 109 small competitive LECs or competitive access providers**." (emphasis added)[16]

Meanwhile, the entire analysis doesn't include any mention of Internet Service Providers. Yet the decision concludes that there would be no harm to small companies. This is simply and horribly incorrect.

> "We tentatively conclude that our proposals in the NPRM would impose minimum burdens on small entities."

[16] "Deployment of Wireline Services Offering Advanced Telecommunications Capability CC Docket No. 98-147.

4.0 Lack of Accurate and Robust Data Collection.

While the Commission forges ahead with new regulatory initiatives pertaining to the future of broadband services, it is clear that the Commission's statistics and data used in this process have been seriously compromised through a lack of accurate and complete data. This affects not only every customer but also every competitor as well, since, we believe, many of the decisions will harm competition and customers alike.

For example, in the FCC's IRFA for the broadband proceedings we point out once again that the data being presented that is from the year 1992. This is before the creation of the Telecom Act, and the rise of the entire competitive market, including the Internet Service Providers, CLECs, and virtually every other competitive service.

> "82. **Total Number of Telephone Companies Affected.** The U.S. Bureau of the Census ("Census Bureau") reports that, **at the end of 1992,** there were 3,497 firms engaged in providing telephone services, as defined therein, for at least one year."

And even when the Commission updates the information in a specific broadband docket, we find that the data being used was not current in the least. According to the SBA's Ex Parte Letter pertaining to wireline broadband issues, (FCC Docket 02-33)[17]) the FCC's current analysis quotes 1997 data, even though other data from a later period was available, not to mention from other industry sources.

> **"a. Small ISPs Provide a Substantial Number of Competitors and Bring Competition to Rural Areas.** "In the IRFA, using 1997 data, the Commission identifies small ISPs as an affected class of entities and estimates there are between 2,829 to 2,940 small ISPs. One commenter noted that industry sources estimate the number of ISPs at more than 7,200. The latest numbers available to Advocacy support this claim. Based on 1999 North American Industry Classification System ("NAICS") data broken down by firm size, there are a total of 7,099 ISP firms, of which 6,975 have less than 500 employees. While this number is based on data that is three years old in a rapidly changing industry, it supports the commenters' assertion that there are approximately 7,000 small ISPs. Small ISPs have a substantial share of the Internet service market and are crucial to competition. Together, small ISPs serve 77 million customers, which represent 55 percent of the market. In addition, small ISPs have been instrumental in bringing service to rural areas where costs are high and returns on investment low."

[17] http://www.sba.gov/advo/laws/comments/fcc02_0827.html.

How can the FCC be making rules that can effect thousands of companies and not have accurate data to support their claims?

4.1 State Broadband Data Has Also Been Ignored

The FCC's current proposed rules will eliminate the ILECs' requirement to open new networks to competitors as well as block companies from using the current line sharing services. However, the FCC has continually failed to examine the current broadband/DSL commitments made on the state level that clearly gives competitors the right to use these networks because they are 'customer-funded' through higher phone rates and therefore there are obligations that pre-exist the FCC proposed rules.

The lack of the FCC's inclusion of state-by-state broadband data has persisted throughout the last five years of the FCC's broadband data collection and analyses, even though the FCC is obligated to properly examine these issues. Case in point — Section 706(b) of the Telecommunications Act of 1996 directs the Commission to "initiate a notice of inquiry concerning the availability of advanced telecommunications capability to all Americans." If "advanced telecommunications capability" is not being deployed "in a reasonable and timely fashion," the Commission is directed to "take immediate action to accelerate deployment of such capability." Its actions in this regard are to take two forms: the "remove[al] of barriers to infrastructure investment," and the "promot[ion of] competition in the telecommunications market."

As we have previously pointed out in other comments, petitions and filings, the Commission's data in its published reports does not include any of the state information about Pennsylvania's state broadband commitments, or any other state, such as California or Texas, or New York, or Massachusetts. However, there are thousands upon thousands of documents, statements made to the public and regulators, public service commission documents, comments, etc.

For example, New Networks Institute, joined by a number of other companies and citizens, filed a previous Petition on this topic in 1999, as well as Comments in the Advanced Networks study in 1998.

- Petition to the FCC to Investigate The Bell's Failed Broadband Deployment, 1999 http://www.newnetworks.com/petitionfiled.html

- NNI Comments to the FCC on Advanced Networks reporting (known as "706") 1998 http://www.newnetworks.com/NNI_FCC_9-98.txt

And what kinds of data has the FCC neglected to include? One primary example is the entire set of proceedings dealing with Verizon Pennsylvania's failed broadband deployment.

NOTE: On February 19th, 2003 Teletruth filed a Complaint with the Pennsylvania Public Utilities Commission. Our findings and the Complaint can be found at: http://www.newnetworks.com/PENNCOMPLAINTFIN.doc

Currently, the Pennsylvania Public Utility Commission (PUC) is holding Verizon accountable for the network upgrade commitments it made as part of its state Alternate Regulation. By 2004, Verizon is supposed to have rewired 50% of the state, equally deployed in all rural, suburban and urban areas, with fiber-optics that can deliver a two-way broadband service at speeds of over 45 MPS to homes and offices.

> "In view of Bell's **commitment to providing 45 Mbps** for digital video transmission both upstream and downstream, we look forward to Bell's providing this two-way digital video transmission at **45 Mbps**."[18]
>
> "Verizon PA has committed to making **20%** of its access lines in each of rural, suburban, and urban rate centers broadband capable within five days from the customer request date by **end of year 1998**; **50% by 2004;** and 100% by 2015."
>
> "In order to meet this commitment, Bell plans to deploy a broadband network using **fiber optic** or other comparable technology that is capable of supporting services requiring bandwidth of at least 45 megabits per second or its equivalent (in both directions)."

This is not ADSL, which is a mostly one-way service that goes over the 100 year-old copper phone networks. DSL also has distance limitations and can't properly service rural areas without additional technology. And DSL services are 50-100 times slower than what was stated in these commitments. The Pennsylvania commission wrote:

> "It is apparent that **DSL, as it currently exists today, (March 2002), is unable to provide the broadband availability of 45 Mbps both upstream** and downstream that the Company voluntarily committed to and the Commission approved in 1995."

[18] ORDER Re: Verizon Pennsylvania, Inc., Petition and Plan for Alternative Form of Regulation Under Chapter 30 P-00930715 2000 Biennial Update to Network Modernization Plan.

Teletruth estimates that over $785 per household has been paid by customers to Verizon for networks that the company has not delivered. We also claim that the DSL deployment has been 'cross-subsidized", meaning that the implementation of Verizon-Pennsylvania's DSL has been improperly funded through intrastate basic service customer revenues.

Some states, such as Louisiana and Oregon, have allowed for the funding of DSL through customer rates, with the caveat that these networks remain open for competitive use.

How did the FCC overlook for the last five years the thousands of documents pertaining to these customer-funded, state broadband deployments? **And,** since the FCC has not examined this issue, how can it then create regulations that will pre-empt state broadband projects?

This lack of accurate data also is shown in the FCC's decision to block competitors from using next generation, upgraded networks, even though competitors have been paying for non-existent upgrades.

Case in point ---The New York Public Service Commission based its prices on "100% fiber-optic feeder" (endpoints) in 1997, even though these upgrades never occurred. (It should be noted that DSL can not access fiber-optic endpoints today without special equipment.) Worse, according to documents filed in 1993, only 5% of the network had been upgraded to have fiber optic feeders.

> "We adopted New York Telephone's position and used, as an input, 100% fiber feeder. In doing so, we noted that this had been among the most highly contested issues in the proceeding and acknowledged the "incontrovertible evidence" that New York Telephone contemplated installing a broadband system and that fiber and associated equipment were needed for that system. We went on, however, to distinguish between that statement and the conclusion that New York Telephone was installing fiber solely or even primarily for the purpose of advancing its broadband plans."[19]

The obvious implication is that competitors have already paid for the right to use any upgrades. By ignoring this information, the FCC's analysis is seriously flawed and needs to be redone before any new laws based on the data are crafted.

[19] NYPSC 97-14, page 10, CASES 95-C-0657, 94-C-0095, and 91-C-14.

5.0 Adoption of the Broadband Bill of Rights and the Current Issues Surrounding the FCC's Complaint Process

According to Verizon New York's Communications Workers of America:

> "Verizon does not supply enough clean copper pairs to enable technicians to properly install new customer lines or replace defective pairs on existing customer lines. Instead of supplying clean copper pairs, Verizon utilizes a "short term" technological fix in order to get customers back in service quickly. The technology involves installing a special piece of equipment called an AML (asynchronous multi-line) or DAML (digital asynchronous multi-line)."

These phone lines can not even support DSL.

> "However, the AML/DAML quick fix causes many problems. The AML/DAML technology adversely affects customers because it can compromise the use of faxes and modems….AML/DAMLs also cannot support DSL service. …Also, competitors seeking to provide DSL to Verizon's voice customers via line sharing cannot do so where an AML/DAML exists on a customer's loop. Use of these temporary fixes therefore interferes with CLEC efforts to compete with Verizon in the DSL market."

The source of these quotes is available at:
http://newnetworks.com/cwareportaugust2002.htm

In 2001 a number of individuals and companies, frustrated with the problems of getting DSL, created "The Broadband Bill of Rights." This document laid out basic principles for broadband quality of service issues. As the opening quotes clearly demonstrate, even the workers at the company understand that Verizon is not fulfilling its obligations to give quality services to competitors, or even their own customers.

To read the original principles, which include the right to a timely installation and ordering without problems – and compensation to injured parties, see:
http://www.newnetworks.com/broadbandbill.htm

As noted above, the original Broadband Bill of Rights was drafted as possible legislation. Although certain aspects of that legislation (such as changes in the court to which appeals of certain Commission decisions would be made) cannot be promulgated by the Commission itself as regulations, in most respects the Commission has full and adequate authority under Section 201(b) to promulgate the substantive requirements of the draft legislation as regulations. Appendix One is the draft

legislation, changed to work as FCC rules. As noted above, we request that the Commission place these proposed rules out for public comment, as possible regulations to protect consumers of broadband services.

Ultimately, as long as the incumbent controls the underlying networks, without any enforcement of "quality of service" guarantees, then every customer, including Internet Service Providers and their customers, are at the mercy of the Bell companies' whims. Teletruth fully agrees with the Commission that the nation would be well-served, in the long run, by vigorous "intermodal" competition for the provision of broadband services. At this high level, one can imagine copper-based or fiber-based ILEC networks competing with fiber-coax cable networks, wireless services based on Wi-Fi, ultra-wideband, or other spectrum-based alternatives and even over power lines. But today, right now, there is not adequate competition to allow independent ISPs to offer their innovative, responsive services to consumers without relying on the ILECs for crucial aspects of the end-to-end service.

That means, plainly and simply, that ***as long as the desired inter-modal competition remains a policy objective and not a reality — that is, at least for the next several years —*** the ILECs need to be regulated. Otherwise, they will, without question, abuse their competitors and their customers, for the simple reason that providing rotten service while freezing out competitors is cheaper for the ILEC — better for the bottom line — than providing good service and allowing competitors to compete. Only if the Commission somehow thinks that ILECs are charitable organizations operating with the noble purpose of helping consumers — as opposed to the arguably noble, but operationally quite different purpose of maximizing shareholder return — can letting the ILECs loose on the marketplace without consumer protection regulation make any sense.

The evidence of how ILECs pursue the bottom line is easy to find. Verizon's 2002 Annual Report shows that over the last two years the company cut 14% of its staff and construction expenditures are down 42% for wireline telecommunications, meaning most customers' phone services. The CWA report noted above clearly ties the problems with network copper upgrades to these cuts in construction and the lack of adequate staff to do the work.

And while the company keeps talking about the impact of competition, Verizon's financial results (EBITDA), are up 6%, with an EBITDA of 45%, making it one of the most profitable companies in the US – essentially all from local phone services.

Obviously, without a financial or regulatory obligation to make the company comply with basic service requirements and adequate network facilities, then every customer (business and residential) and every competitor who is absolutely dependent on these essential facilities will be at the mercy of the monopoly. If the FCC intends to restrict

the use of the next generation of networks, as the Bells upgrade to fiber optics, it also means that the current copper facilities will become even more limited. What will happen when someone orders DSL and is told that the network is now fiber and can no longer supply DSL (DSL goes over the copper wiring)?

If the FCC doesn't consider that the incumbent may not quite be telling the truth about the deliverance of quality services as is required, we would like to point to another Communications Workers of America (CWA) report released in 2000 titled "Service Quality & Service Quality Reporting at Verizon-NY". A copy of this report can be found at: http://www.newnetworks.com/Final_Report_10-31-00_doc.pdf

The report's claims against Verizon include the falsification of company service quality data, inaccurate information, possible consumer fraud for inside wire maintenance plans, deterioration of the current phone networks, lack of experienced management, lack of proper training, and harm to company whistleblowers trying to call attention to the problems. In the CWA's own words:

> "CWA Service Quality Program has identified a number of management practices that result in the inaccurate reporting of service quality data to the PSC. Specifically, survey results, hotline reports and case studies verify inaccurate reporting of data for Customer Trouble Reports, Out of Service over 24 hours, Missed Repair and Installation Appointments, Installations Within Five Days, and Answer Time Performance. The misreporting of this data allows the company to artificially improve its service quality performance and reduce its exposure to PRP penalties and PSC sanctions."

There is a litany of documented harm. Here is some information taken directly from the report:

- **The Direct Falsification Of Company Service Quality Data By Management** Over 30% of those surveyed have directly seen management change the status of trouble reports.
- **Management Directing Workers To Close Out Troubles Before They Are Actually Completed** Over 60% of those surveyed have been directed by management to code a trouble as completed before it is really cleared of the trouble.
- **Management Directing Workers To Backtime** Over 54% of those surveyed have been asked by management to backtime -- to alter records identifying the date and time a trouble was completed.
- **Passing Installations Before Completion** 91% of surveyed field technicians reported that they were dispatched on repairs of recent installations only to find that dial tone had never been provided.

- **Deteriorating Plant Equipment** Due to a lack of investment in equipment, workers do not have the tools or materials needed to complete their jobs adequately and timely. Instead, the company directs workers to fix problems with "band-aid" approaches.

5.1 The Current Problem With the FCC's Complaint Process.

To date, the FCC has received terrible scores from ISPs on their ability to enforce the laws. According to the ISP survey, 89% of ISPs felt that the FCC was either "Not Effective and Not Helpful", or "Terrible and Useless". As we discussed in the section related to the Regulatory Flexibility Act, the FCC also has essentially failed to do the work necessary to protect small business that is required by law.

And this situation is not new. Dave Robertson, the head of the Texas ISP Association, (TISPA) recounted his meeting with Chairman Powell and senior staffers at the FCC Enforcement Bureau in 2001.

> "The meeting was Tuesday May 8th, 2001. In a nutshell, all the "bad acts" submitted to them to date have resulted in exactly "ZERO" dollars in fines, and little delay in their 271 approvals for the Bells to jump into the long distance market. We asked for something blatant as handwriting on a wall as to the future of the complaint process as we are approaching it. We got it. WE SHOULD EXPECT NOTHING FROM THE INFORMAL COMPLAINT PROCESS. We should expect nothing from any complaints we have submitted to date.
>
> "A couple of weeks ago we met with a senior person in the ENFORCEMENT BUREAU. After a one-hour meeting and receiving some heartfelt empathy for the plight of ISPs and the consumers who are being victimized by the illegal, anti-competitive behavior, I suggested that our best move might be to just jump out a window. He suggested we might want to consider throwing a chair out of the window first, so we wouldn't get cut on the glass as we jumped."

In fact, The Texas ISP Association presented an entire book of material showing violation after violation. To read this 113 page series of violations see:
http://www.teletruth.org/docs/SWBCOMPLAINTS0420.pdf

Sue Ashdown, Executive Director of the American ISP Association (AISPA) and a founder of an ISP in Utah, discussed a series of issues dealing with ISPs and the FCC.

The Rocket Docket: First, the FCC has something called a "Rocket Docket". We could find NO Small ISP who has taken this route. Sue Ashdown writes:

> "My understanding of the Rocket Docket is that for it to be accepted as such, you must obtain the signoff of a majority of commissioners. So it's political. It was too expensive for ISPs to risk the initial foray without knowing whether it would even be accepted. As an aside, I have spoken with one legal firm whose case (not ISP but similar) was accepted on the Rocket Docket, and led to settlement, as most of those cases do. It cost $1 million to get to settlement."

Based on interviews with law firms concerning potential cases on the the "Rocket Docket" it is clear that the complainant has to have very deep pockets for lawyers and the outcome is still questionable. Also, no small ISP we could find had taken a "Formal Complaint" because the expenses were excessive and the "Rocket Docket" is supposed to be the expedited version of a formal Complaint.

Informal Complaint Process: The FCC also has an "informal" complaint process. The Utah ISP association pursued this path because of the expense of the "Rocket Docket." They submitted a "Request for Enforcement." Here are the details, which are worth reading in full because of how much work the ISPs must endure for little or no outcome.

> "We pursued the informal complaint process, which the BOCs treat as an annoyance and a joke and a chance to delay, and when we had exhausted that option we had the option of going ahead with a formal complaint or the Rocket Docket which we decided not to do for the reasons above."

> "Separately we filed a Request for Enforcement, related to US West/Qwest's violations of Computer II and/or III. The Enforcement Bureau prefers to work quietly and privately, and likens itself to a District Attorney seeking an indictment. It gathers facts discreetly and does not communicate with the victim in the case about its progress, or even, whether the case has been accepted as one worth investigating. In our case, I inferred that Qwest was being asked for its side of the story, but have no concrete evidence of that fact. We reached that conclusion after repeated phone calls to the Enforcement Bureau where an FCC staffer (no longer there) would say, quite abusively, why he couldn't tell me anything."

> "After many months, I asked for a meeting with David Solomon, Suzanne Tetreault, and Brad Berry, where I explained that the absence of any visible action on the part of the Enforcement Bureau, even a letter admonishing Qwest of their violation and a warning not to repeat it, was

> nothing more than carte blanche for continued abuse of the Computer Rules. I learned at this meeting that indeed an investigation of sorts had taken place and that Qwest had told the Enforcement Bureau that it could not have violated Computer II, as it was operating under Computer III. (BOCs have the flexibility to choose one regime or another, but not mix and match.)
>
> "We pointed out that at the same time Qwest was making this assertion to the FCC, it was on record, under oath, in its merger proceedings in Utah, saying the opposite. So the FCC had, essentially, accepted a lie. Solomon said, "If you presented me with evidence of that, I would be very, very concerned."
>
> "Subsequent to the meeting we provided Solomon with transcripts from the merger proceeding documenting Qwest's assertion. I never received a response.
>
> "Early in 2002 I returned for a meeting with the Enforcement Bureau, to submit evidence on behalf of an ISP who had been unable to obtain facilities from Qwest for several months because he was repeatedly told by many different Qwest representatives that they did not exist. The company's CEI plan, however, stated that they did. Once again, either the CEI plan was false, or Qwest's representatives ignore it and actively mislead customer/competitors. The ISP ultimately was able to get the circuit installed through the intervention of an insider at Qwest.
>
> "I have no idea whatsoever about the Enforcement Bureau's handling of this case. I have never received any word on its disposition.
>
> "I do know that one year later, Qwest behaved in an extremely hostile fashion toward this particular ISP, demanding immediate payment on overbilled circuits, or the circuits would be disconnected."

Unfortunately, other ISPs had no success with the Informal Process at all. Peak-To-Peak filed an information complaint against US West for stealing one of their clients, a common problem documented by ISPs across the US.

> "Peak To Peak filed with the FCC about a stolen customer (Qwest took a letter of authorization we had a customer sign to move a line from McLeod to Qwest so we could serve the customer DSL.. then Qwest sold them the DSL themselves and pointed it to their Qwest.net ISP)"

The response from the FCC? We reviewed the materials and if you don't like our decision, file a formal complaint.

> "The division reviewed Peak To Peak Internet's informal complaint, as well as Qwest Communications' response, which was filed on March 18th, 2003. Based on a review of the pertinent information, the Division is not recommending further action on the informal complaint."
>
> "Section 1.717 of the Commission's rules, 47 CFR 1.717, provides that, if the complainant is not satisfied with a carriers' response to an informal complaint and the Commissioner's disposition of the complaint, the complainant may file a formal complaint alleging a violation of the Communications Act of 1934."

As of April 17th, 2003, Peak to Peak wrote they never saw a copy of the Qwest response. The process, by the way, took many months, and there was no "fast 30-day response."

> "We I never got a copy of Qwest's response to this customer theft of information informal complaint.
>
> "We originally filed this in December. So much for a 30-day response window from the RBOC.

With 1/3 of all orders having problems, based on the following scenarios, each complaint would take months to years to get resolved, and the resolution would cost millions of dollars, putting the ISP out of business from just legal fees.

State Complaints have been equally as bad for ISPs.

Numerous ISPs have filed complaints on the state level against the Bells over DSL installations and other telecom related problems and the outcomes have been equally as disappointing.

Kate Lynch, president of Bway.net in New York writes:

> "When we started offering Internet and DSL services, almost every order had problems and we would file complaints about these problems with the New York Public Service Commission --- hundreds of them. After awhile, the Commission simply put them into one file and had Verizon meet with us. They would make promises that they would fix the problems, but nothing ever happened. Also, the Commission refused to give us compensation for all of our troubles. This complaint process was a joke.

> We had to dedicate a great deal of staff time to fixing the messes Verizon would cause and it cost us not only paying for staff but also losing clients who thought we were to blame when Verizon didn't show up for an installation, or the line kept having problems."

Our survey found identical problems throughout the US. One national ISP headquartered in California wrote:

> "PAC BELL/SBC has cost us more business than we have ever gained via our relationship with them. We have moved toward taking all our clients from PAC BELL/SBC because of the way they continue to do business, our problems have been so large we have invested many hours and dollars in complaints with the California Public Utility Commission and other agents that is just not good business to deal with them anymore, All the rules of the game clearly benefit the LEC and not US or the consumers."

Or take the case of Iglou.net in Kentucky, which purchases services from BellSouth. The ISP filed a complaint in Kentucky that BellSouth's DSL roll out was discriminatory and the Kentucky Public Service Commission agreed.
http://www.iglou.com/pr/dec0600-1/pscorder.pdf

> "In short, it appears that the wholesale tariff of BellSouth unreasonably discriminates against most Kentucky independent ISPs and will not advance DSL service in Kentucky. IgLou is clearly correct in its contention that smaller ISPs simply cannot purchase the services its customers request in the volume necessary to receive the lowest tier price. BellSouth's FCC tariff is extremely complicated and contains severe pricing disparities between rates for which BellSouth qualifies and rates for which its average competitor could qualify. In addition, the tariff requires a term commitment with associated penalties for early termination. Under the current tariff, ISPs must market DSL service to a large regional customer base to secure, and guarantee under penalty, a minimum of 40,000 lines to take advantage of the lowest tier price. This tariff makes it extremely difficult, if not impossible, for the small independent ISP wishing to take advantage of BellSouth's currently proposed broadband rollout to compete against a regional ISP. Given this Commission's frequently reiterated position in favor of telecommunications competition, together with its support for the proposed broadband rollout, we can only find the practical result of BellSouth's DSL tariff unacceptable."

This clearly shows how the monopoly, BellSouth, was able to take control over the DSL markets and gain market share at the expense of all other providers. The Kentucky Commission wrote:

> "Specifically, BellSouth must modify its regional wholesale discount levels to Kentucky-specific levels and eliminate or greatly reduce the tariff penalties. …It is unreasonable, discriminatory, and destructive to the competitive market for BellSouth to provide itself DSL for $29.00 when its in-state competitors cannot qualify for this price without assuming other costs and burdens that would result from aggregating or entering the business of providing telecommunications themselves."

In the end, however, none of it matters because the FCC is claiming jurisdiction over these areas. Worse, the state Commission refused to compensate Iglou for any of its problems stating:

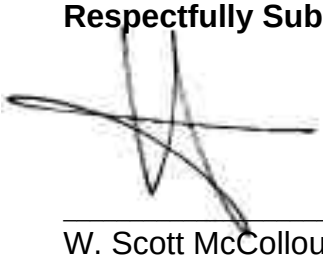
> "Second, we deny IgLou's demand for damages. This Commission has no jurisdiction to provide such a remedy."

CONCLUSION

The Commission has a choice. It can do its duty and protect consumers and the independent ISPs that have no choice but to obtain landline broadband services from local carriers. Or it can kill competition for information services and deny consumers competitive choice by continuing to ignore the egregious violations and unreasonable actions of the incumbent carriers. The FCC must, however, declare its intent. Failing to grant the requests in this Petition will prove what the ISPs and their customers have reported: that the FCC is more interested in serving its ILEC corporate masters than it is concerned about allowing those who brought the information age to America to survive and prosper so they can continue providing innovative and important competitive services.

The FCC has to date been able to ignore the issues by ignoring them or sweeping them under the rug. TeleTruth respectfully requests that the Commission do its job of protecting consumers or at least be honest enough to state that it will not do so.

Respectfully Submitted,



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APPENDIX ONE

The Broadband Bill of Rights

47 C.F.R. Part ____.

a. The purpose of these regulations is to ensure that consumers have meaningful protections against unjust, unreasonable, discriminatory and/or unfair practices by telecommunications carriers involved in providing consumers with broadband services.

b. The following constitute unjust, unreasonable, discriminatory and/or unfair practices by a telecommunications carrier involved in providing consumers with broadband services:

(1) Failure by the telecommunications carrier to confirm that the it actually has available the facilities needed to provide the broadband service ordered by the consumer a minimum of five (5) business days prior to the date provided to the consumer for the installation or activation of the service.

(2) In the event that facilities are unavailable, failure by the telecommunications carrier to advise the consumer in a writing received at least three (3) business days prior to the date scheduled with the consumer for the installation or activation of the service.

(3) In the event that facilities are unavailable, failure to install or repair equipment or facilities as necessary to provide broadband service to the consumer within forty-five (45) days of the date initially provided to the consumer for the installation or activation of the service.

(4) Providing preferential information or operation support system access to any entity that obtains the use of physical facilities to provide broadband information service in comparison to other entities.

(5) Disparaging the services, reputation or competence of an information service provider that has been selected by the consumer.

(6) Attempting to market the service of another information service provider during installation or at any other time after the consumer has expressed a choice of information service provider directly or through an agent.

(5) Any other practices that the Commission determines, from time to time, constitute unjust, unreasonable, discriminatory and/or unfair practices by a telecommunications carrier offering broadband services to consumers.

c. The regulations promulgated pursuant to subsection (a) shall require that the telecommunications carrier make substantial cash payments directly to the consumer, or up to three (3) months' free service, at the consumer's option, in the event that the carrier engages in any of the practices identified as unjust, unreasonable, discriminatory and/or unfair in subsection (b) and in any regulations promulgated by the Commission pursuant to this section.

d. In cases where multiple telecommunications carriers are involved in providing broadband service to a consumer, the requirements of subsections (b)(1), (b)(2) and (b)(3) (and associated Commission regulations) shall apply to the entity that owns and/or maintains the physical facilities used to provide the broadband service. In cases where the consumer purchases broadband service from one entity, which obtains the use of the underlying physical facilities from another entity, the entity directly dealing with the consumer shall be treated as the consumer's agent for all purposes under this section and the Commission's regulations.

e. The Commission shall adopt expedited and informal procedures by which consumers can bring complaints alleging violations of the requirements of this section and/or the Commission's regulations promulgated under this section to the Commission for resolution. Consumers shall be permitted to submit their complaints via email and via a World Wide Web interface that the Commission shall establish for this purpose. A consumer's complaint shall constitute prima facie evidence that the violation alleged has occurred. Unless the telecommunications carrier produces documentation establishing by a preponderance of the evidence that it has complied with the requirements alleged to have been violated, the consumer shall prevail on his or her complaint.

f. Notwithstanding any provision of this Title to the contrary, the regulations promulgated pursuant to subsection (a) shall apply to all broadband services offered to consumers by a telecommunications carrier, irrespective of whether the Commission, a State commission, or any other state or federal department or entity has regulatory or other jurisdiction over such broadband services, in whole or in part.

g. Nothing in this section shall be construed to preempt or limit the authority of any state or local government, or any other federal agency (including without limitation the Federal Trade Commission) to promulgate additional regulations imposing additional obligations on any telecommunications carrier offering broadband services to consumers.

h. ***Definitions.*** For purposes of this section, the following definitions shall apply:

(1) BROADBAND SERVICES—The term "broadband services" shall mean any service that permits the customer to send or receive data at a digital or analog data rate that meets or exceeds the equivalent of a digital rate of 128 kilobits per second.

(2) CONSUMER—The term "consumer" shall mean any natural person ordering broadband services for his or her personal use, and any business ordering broadband services for business use, as long as the business, prior to purchasing the broadband service, purchased telephone service from a local exchange carrier at the particular location comprising ten (10) or fewer voice-grade lines.

(3) EXPEDITED PROCEDURES—The term "expedited procedures" shall mean procedures to be established by the Commission under which the time from the lodging of a complaint to the final and appealable resolution of the complaint shall be thirty (30) days or less. The Commission may delegate to subordinate officers and

employees the task of making final resolution of any complaints under this section and/or Commission regulations promulgated hereunder.

(4) SUBSTANTIAL CASH PAYMENT—The term "substantial cash payment" shall mean an amount that is no less than the sum of (a) one-and-one-half times the affected telecommunications carrier's undiscounted monthly charge for the service ordered by the consumer and (b) the affected telecommunications carrier's undiscounted standard installation charge for the service ordered by the consumer.

(5) TELECOMMUNICATIONS CARRIER—The term "telecommunications carrier" shall have the same meaning as set forth in section 153(44) of Title 47, except that for purposes of this section a provider of services under spectrum authorizations pursuant to Title III of this Act shall not be considered telecommunications carriers. The requirements of this section shall apply to any entity that offers broadband services to consumers and that is also a telecommunications carrier as defined in section 153(44) of Title 47, with the exception noted above, irrespective of whether the broadband services being offered constitute "telecommunications" or "telecommunications service" under Title 47 or are otherwise subject to regulation by the Commission or by any State commission.

APPENDIX TWO

New Networks Institute 4th Annual ISP Survey
Available at http://teletruth.org/docs/ISPsurvey2003.doc
(incorporated by reference)