

**BEFORE THE  
FEDERAL COMMUNICATIONS COMMISSION  
WASHINGTON, DC 20554**

**In the Matter of** )  
 )  
**A National Broadband Plan For Our Future** ) **GN Docket No. 09-51**

**COMMENTS OF COMPTTEL**

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**COMMENTS OF COMPTTEL**

COMPTTEL hereby submits these comments in response to the Commission’s Notice of Inquiry on the development of a National Broadband Plan, FCC 09-31, released April 8, 2009 (“*NOI*”).<sup>1</sup>

**INTRODUCTION AND SUMMARY**

The *NOI* asks for comments on scores of issues and responses to hundreds of questions the Commission deems relevant to the creation of a National Broadband Plan “to enable the build-out and utilization of high-speed broadband infrastructure”<sup>2</sup> and to fulfill the goal of bringing access to “robust broadband services” to “every American citizen and every American business.”<sup>3</sup> Any National Plan to increase the availability and affordability of broadband services must incorporate a commitment to promote competition in the broadband market. In order to improve the competitive landscape, the Commission must take action on a myriad of rulemaking and declaratory ruling proceedings that have been gathering dust for years – proceedings that have the potential to level the playing field for broadband providers. In addition, COMPTTEL urges the

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<sup>1</sup> COMPTTEL also incorporates by reference the comments it filed in GN 09-40 on April 13, 2009.

<sup>2</sup> *NOI* at ¶1.

<sup>3</sup> *Id.* at ¶5.

Commission to review the deregulatory actions it has taken with respect to broadband and related services over the past eight years, acknowledge that the Commission's predictions that such deregulation would promote competition, increase innovation and lower prices have not panned out and, as required by Section 706(b) of the Telecommunications Act of 1996, 47 U.S.C. § 157nt, take immediate action to accelerate deployment of advanced telecommunications capability by removing barriers to infrastructure investment and by promoting competition in the telecommunications markets.

### **I. The Commission Must Reinvigorate Competition**

In its most recent Section 706 Report,<sup>4</sup> the Commission found, as it has done in all previous reports,<sup>5</sup> that broadband “telecommunications capability is being deployed to

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<sup>4</sup> *In the Matter of Inquiry Concerning the Deployment of Advanced Telecommunications Capability to All Americans in a Reasonable and Timely Fashion, and Possible Steps to Accelerate Such Deployment Pursuant to Section 706 of the Telecommunications Act of 1996*, GN Docket No. 07-45, Fifth Report, FCC 08-88 (rel. June 12, 2008) at ¶1 (*Fifth Report*).

<sup>5</sup> *In the Matter of Inquiry Concerning the Deployment of Advanced Telecommunications Capability to All Americans in a Reasonable and Timely Fashion, and Possible Steps to Accelerate Such Deployment Pursuant to Section 706 of the Telecommunications Act of 1996*, GN Docket No. 04-54, Fourth Report, FCC 04-208 (rel. Sept. 9, 2004) at ¶8 ; *In the Matter of Inquiry Concerning the Deployment of Advanced Telecommunications Capability to All Americans in a Reasonable and Timely Fashion, and Possible Steps to Accelerate Such Deployment Pursuant to Section 706 of the Telecommunications Act of 1996*, CC Docket No. 98-146, Third Report, FCC 02-33 (rel. Feb. 6, 2002) at ¶89; *In the Matter of Inquiry Concerning the Deployment of Advanced Telecommunications Capability to All Americans in a Reasonable and Timely Fashion, and Possible Steps to Accelerate Such Deployment Pursuant to Section 706 of the Telecommunications Act of 1996*, CC Docket No. 98-146, Second Report, FCC 00-290 (rel. Aug. 21, 2000) at ¶1; *In the Matter of Inquiry Concerning the Deployment of Advanced Telecommunications Capability to All Americans in a Reasonable and Timely Fashion, and Possible Steps to Accelerate Such Deployment Pursuant to Section 706 of the Telecommunications Act of 1996*, CC Docket No. 98-146, First Report, FCC 99-5 (rel. Feb. 21, 1999) at ¶7.

all Americans in a reasonable and timely fashion.” If, in fact, the Commission’s finding were valid, there would be no need for a National Broadband Plan to “bring broadband to everyone.”<sup>6</sup> The Commission has asked for comment generally on how effective and efficient existing mechanisms for ensuring broadband access by all people of the United States have been.<sup>7</sup> The short answer is that Congress would not have needed to allocate 7.2 billion dollars of taxpayer money to increase broadband deployment and affordability if existing mechanisms had been effective and efficient at ensuring broadband access for all Americans.

While the Commission acknowledges that competition between multiple broadband providers may lower prices and provide a greater diversity of services, it asks whether competition is an effective and efficient mechanism for ensuring broadband access.<sup>8</sup> Today, the broadband market is dominated by the cable operators and the incumbent local exchange carriers.<sup>9</sup> With this duopoly in place, the U.S. rankings in broadband speed and penetration are dismal when compared to those of other developed countries<sup>10</sup> and have dropped precipitously since 2001.<sup>11</sup> These factors underscore the

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<sup>6</sup> *NOI* at ¶5.

<sup>7</sup> *NOI* at ¶36.

<sup>8</sup> *NOI* at ¶49.

<sup>9</sup> FCC Industry Analysis and Technology Division, Wireline Competition Bureau, *High-Speed Services for Internet Access: Status as of December 31, 2007* (Jan. 2009).

<sup>10</sup> *NOI* at ¶ 5, n. 4.

<sup>11</sup> “United States Continues To Trail In World Broadband Rankings,” Broadcast Engineering, May 26, 2008, available at <http://broadcastengineering.com/new/US-continues-trail-world-broadband-rankings-0526>. *See also*, FCC Public Notice, “Commissioner Copps Reiterates Call For A National Broadband Strategy to Address America’s Drop in Broadband Rankings” (rel. Apr. 23, 2007).

need for the Commission to promote competition in the provision of broadband service by reinstating meaningful wholesale network access and rate regulation, the dismantling of which over the last several years has contributed significantly to the creation of the cable/incumbent LEC duopoly and the pricing of broadband service beyond the means of many potential subscribers.

It is clear that Congress contemplated that competition and competitive choice for consumers should be a central focus of the National Broadband Plan as well as the broadband grants and loans to be awarded by the National Telecommunications and Information Administration (“NTIA”) and the Rural Utilities Service (“RUS”). Congress directed the RUS to give priority in awarding loan funds to project applications that “will deliver end users a *choice* of more than one service provider.”<sup>12</sup> Congress directed the NTIA to condition any broadband grant awards on the awardee’s contractual agreement to adhere to the Commission’s Broadband Policy Principles.<sup>13</sup> One of those principles sets forth the consumer’s right to a competitive choice among broadband network providers, service providers, application providers and content providers:

To encourage broadband deployment and preserve and promote the open and interconnected nature of the public Internet, *consumers are entitled to competition among network providers, application and service providers, and content providers.*<sup>14</sup>

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<sup>12</sup> American Recovery and Reinvestment Act, Pub. L. No. 111-5, 123 Stat. 115, 118 (emphasis added).

<sup>13</sup> American Recovery and Reinvestment Act, Pub. L. No. 111-5, 123 Stat. 515, Section 6002(j).

<sup>14</sup> *In the Matter of Appropriate Framework for Broadband Access to the Internet Over Wireline Facilities*, CC Docket No. 02-33, Policy Statement, FCC 05-151 (rel. Sep. 23, 2005) at ¶4 (emphasis added).

Finally, Congress directed the Commission to include in the National Broadband Plan (1) an analysis of the most effective and efficient mechanisms for ensuring broadband access by all Americans and (2) a detailed strategy for achieving affordability of broadband service and maximum utilization of broadband infrastructure by the public.<sup>15</sup>

#### **A. Premature Deregulation Has Led To Higher Rates**

Any strategy for achieving affordability of broadband service must include a strategy for promoting competition in the provision of such service. Not surprisingly, the GAO has found that competition in the telecommunications and cable markets has benefited consumers in the form of lower prices and increased quality of service.<sup>16</sup> In contrast, where the Commission and state commissions have deregulated incumbent local exchange carriers in markets that lacked meaningful competition, prices have risen.<sup>17</sup>

There is an extensive and growing body of evidence that demonstrates that duopoly market conditions produce high prices, frustrate innovation and can lead to tacit

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<sup>15</sup> American Recovery and Reinvestment Act, Pub. L. No. 111-5, 123 Stat. 515, Section 6002(k)(2)(A) and (B).

<sup>16</sup> See e.g., U.S. General Accounting Office, *Wire-Based Competition Benefited Consumers in Selected Markets*, Report to the Subcommittee on Antitrust, Competition Policy and Consumer Rights, Committee on the Judiciary, U.S. Senate, GAO 04-241 at 4 (Feb. 2004); U.S. General Accounting Office, *Subscriber Rates and Competition in the Cable Television Industry*, Testimony of Mark L. Goldstein, Director Physical Infrastructure Issues, Before the Committee on Commerce, Science and Transportation, U.S. Senate, GAO-04-262T at 1 (Mar. 2004).

<sup>17</sup> Government Accountability Office, *FCC Needs To Improve Its Ability To Monitor and Determine The Extent of Competition in Dedicated Access Services*, Report to the Chairman, Committee on Government Reform, U.S. House of Representatives, GAO-07-80 at 13-14 (incumbent LECs increased their special access rates after being granted Phase II pricing flexibility based on the alleged presence of vigorous competition).

collusion by providers. Telecommunications (and its close relative, the multi-channel video distribution market) provide ample real-world evidence of these consumer harms.

The wireless markets have been studied to determine the effect of duopoly structure on pricing and possible collusion.<sup>18</sup> In the United States, Parker and Roller evaluated wireless pricing during 1984 and 1988 when the Commission licensed only two competing cellular services in each geographic area,<sup>19</sup> thereby creating a duopoly.<sup>20</sup> Their analysis concluded that the carriers' behavior was consistent with tacit collusion to sustain higher prices.<sup>21</sup>

There is also evidence that duopoly conditions in residential wireline markets produce higher rates for consumers when prices are deregulated. In California, the Public Utility Commission lifted a number of price controls on residential rates, relying on competition from cable (as well as wireless and VoIP) to constrain the ILECs' pricing behavior. A recent analysis concluded that most California consumers have a choice of

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<sup>18</sup> A useful survey addressing pricing in the wireless markets can be found in: Gans, J.S., King, S.P. and Wright, J., *Wireless Communications, Handbook of Telecommunications Economics V2*, M. Cave, S. Majumdar and I. Vogelsang, eds., North-Holland, 2005 at 260-264.

<sup>19</sup> *See, In the Matter of the Implementation of Section 6002(B) of the Omnibus Budget Reconciliation Act of 1993 Annual Report and Analysis of Competitive Market Conditions With Respect To Commercial Mobile Services*, 10 FCC Rcd 8844 (1995) at ¶3.

<sup>20</sup> *See Collusive Conduct in Duopolies: Multimarket Contact and Cross-ownership in the Mobile Telephone Industry*, P. Parker, and L.H. Roller, *RAND Journal of Economics*, 28(2) 1997 at 304-322.

<sup>21</sup> *See also Multimarket Contact and Price Coordination in the Cellular Telephone Industry*, M. Busse, *Journal of Economics and Management Strategy*, 9(3) 2000, at 287-320.

only two wireline providers – the ILEC and the cable provider.<sup>22</sup> Since 2006, AT&T and Verizon have increased basic local service rates by between 13% and 26%, increases that are estimated to cost California consumers more than \$100 million annually.<sup>23</sup> During that same period, Verizon has increased Lifeline rates by 12%, directory assistance rates by 188%, the price of a three minute toll call by 171%, and returned check charges by 233%.<sup>24</sup>

The California experience – *i.e.*, deregulation producing higher retail rates – has been repeated in other states. In 2006, the Illinois Commerce Commission deregulated most residential rates in the Chicago MSA, where AT&T and Comcast dominate the market, while the rest of the state remained under price cap regulation. As a consequence, AT&T implemented significant rate increases for residential local telephone services in the Chicago MSA. Indeed, the rates were raised to levels higher than the rates in the areas of the state where the services are deemed to be “non-competitive.” Thus, rather than reducing rates to respond to competitive pressures in the market, AT&T has been able to take advantage of the absence of price constraining regulation to increase rates in the allegedly “competitive” Chicago market, generating net revenue increases of \$149 million per year.<sup>25</sup> As the Illinois Attorney General

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<sup>22</sup> *Why “Competition” is Failing to Protect Consumers*, T. Roycroft, TURN, March 25, 2009, at iii.

<sup>23</sup> *Id.*, at i.

<sup>24</sup> *Id.*

<sup>25</sup> *See Report on the Competitiveness of the Residential Telecommunications Market and Price Changes in Illinois MSA 1 Since Entry of 2006 Final Order Submitted By The People Of The State Of Illinois*, filed in Illinois Commerce Commission Docket 06-0027 by the Illinois Attorney General’s Office on December 2, 2008.

concluded, “[t]he absence of serious price competition between AT&T Illinois and Comcast at the retail level and their combined . . . retail market share is by itself a compelling demonstration of the existence of a duopoly exhibiting implicit, if not explicit coordinated conduct.”<sup>26</sup>

In 2005, the Texas Legislature deregulated all of AT&T’s markets that had a population exceeding 30,000 and at least two competitors (including wireless). The only price protection provided consumers was for a “stand-alone” residential local exchange voice service which remained subject to price caps. Once deregulated, AT&T introduced a “new” version of its residential local exchange service, which it called “Standard Plus,” that automatically applied to any residential line that included *some* additional feature or service.<sup>27</sup> Since May 2006, AT&T has used Standard Plus to increase local rates (at least for any customer that subscribes to more than simply stand-alone basic local service) by between 58% (in its largest exchanges) and 90% (in its smallest markets).<sup>28</sup>

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<sup>26</sup> *Id.* at 16.

<sup>27</sup> Notably, customers did not affirmatively select Standard Plus service, as much as they were converted to the “new” local service by virtue of their decision under the prior rate schedule to add a feature or service to their account. Among the decisions that would land a consumer on “Standard Plus” service was the decision to add an additional directory listing.

<sup>28</sup> See Direct Testimony Of Joseph Gillan, Petition For Review Of Monthly Per Line Support Amounts From The Texas High Cost Universal Service Plan Pursuant To PURA § 56.031 And P.U.C Subst. R. 26.403, Texas Public Utilities Commission, PUC Docket No. 34723/SOAH Docket No. 473-08-0288, January 11, 2008, at 42-48. In Illinois, AT&T adopted similar rate increases for *uSelect 3* (local services with 3 custom calling features) after deregulation. In addition to imposing rate increases on existing *uSelect 3* customers, it grandfathered the offering to existing customers only, replacing it for new customers with the *Select Feature Package* priced 12% higher. *Report on the Competitiveness of the Residential Telecommunications Market and Price Changes in*

What these experiences show is that a market dominated by only two providers, such as today's broadband market, is unlikely to produce lower prices for consumers because the meaningful competition necessary to constrain prices is absent. The best way to increase affordability of broadband service is to increase the number of broadband providers by ensuring that competing broadband service providers and ISPs have nondiscriminatory wholesale access to the incumbents' broadband networks.

### **B. Broadband Networks Should Be Open**

The Commission seeks comment on the value of "open networks" as an effective means of ensuring broadband access and whether the definition of "open networks" should incorporate access, interconnection, nondiscrimination or infrastructure sharing principles.<sup>29</sup> COMPTTEL submits that "open networks" are critical to the goal of ensuring broadband access for all and that the definition of "open networks" must incorporate each and every one of the principles enunciated by the Commission. Any strategy for achieving maximum utilization of broadband infrastructure must include a requirement that incumbent LECs provide nondiscriminatory access to their broadband networks at wholesale rates to competing broadband service providers, competing Internet service providers and competing information service providers. At the very least, wholesale access must allow (1) competing facilities-based telecommunications providers to purchase discrete elements of the broadband network that can be combined with their own facilities to deliver service to customers; (2) competing information service providers and Internet service providers to purchase network capacity to serve their

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*Illinois MSA 1 Since Entry of 2006 Final Order Submitted By The People Of The State Of Illinois* at 8.

<sup>29</sup> *NOI* at ¶47.

customers; and (3) other competing providers to resell the network provider's services to their customers. Granting such access will benefit consumers by affording them both a choice of service providers and of service options at competitive rates. Establishing a regulatory environment that will maximize the alternatives available to consumers increases the likelihood that consumers will find a broadband offering that suits their needs and their pocketbooks. Maximum utilization of the nation's broadband infrastructure will follow.

To ensure that broadband traffic is exchanged in the most efficient manner possible, the Commission must remind the incumbent LECs that the interconnection and traffic exchange obligations of Section 251 of the Communications Act are technology neutral and continue to apply as technologies change and evolve. The public switched telephone network is being transformed from a circuit switched network to an all packet network. It was recently estimated that 90% of the interLATA PSTN and 60% of the intraLATA PSTN has been updated with Internet protocol ("IP") technology.<sup>30</sup> At least one incumbent LEC has argued to the Commission that the Section 251 interconnection and traffic exchange mandates do not apply to IP networks.<sup>31</sup> The Commission's open network principles should correct this misconception, confirm that the Section 251 interconnection and traffic exchange obligations apply to packet switched networks

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<sup>30</sup> Presentation of Carl Ford, Vice President, Crossfire Media, to National Association of Regulatory Utility Commissioners, Staff Telecommunications Subcommittee, February 14, 2009.

<sup>31</sup> See Opposition of Verizon filed in WC Docket No. 04-440 August 13, 2007 at n. 19 ("To the extent NCTA is seeking to expand the scope of [Sections 251(a), (b)(5) and (c)(2)] to impose legal interconnection or traffic exchange mandates on IP networks – thereby regulating for the first time a currently unregulated and highly competitive market segment, contrary to the requirements of the 1996 Act and Commission policy . . . .")

employing IP technology and confirm that incumbents must interconnect and exchange traffic on an IP-to-IP basis, if requested, and may not require interconnecting carriers to convert their packet switched traffic to TDM before passing it on the incumbent's IP network.

In its 2008 Section 706 Report, the Commission listed the deregulatory steps it has undertaken since 2003 to “promote broadband deployment.”<sup>32</sup> Among the actions it listed were (1) relieving incumbent LECs from the Section 251 obligation to offer fiber to the curb and fiber to the home loops on an unbundled basis, relieving incumbent LECs from the Section 251 obligation to offer the packetized functionality of hybrid loops on an unbundled basis, and relieving incumbent LECs from the Section 251 obligation to offer packetized switching on an unbundled basis;<sup>33</sup> (2) forbearing from enforcing the incumbent LECs' 271 obligations to offer broadband elements on an unbundled basis;<sup>34</sup> (3) classifying facilities-based broadband Internet access service as an information service and relieving incumbent LECs from the obligation to offer the wireline transmission component of such service as a stand alone telecommunications service and declining to apply the *Computer Inquiry* requirements to broadband Internet access

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<sup>32</sup> *Fifth Report at ¶¶39-53.*

<sup>33</sup> *In the Matter of Review of Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*, CC Docket No. 01-338, Report and Order and Order on Remand and Further Notice of Proposed Rulemaking, 18 FCC Rcd 16978 (2003); *In the Matter of Review of Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*, CC Docket No. 01-338, Order on Reconsideration, 19 FCC Rcd 20293 (2004).

<sup>34</sup> *Petition for Forbearance of the Verizon Telephone Companies Pursuant to 47 U.S.C. §160(c)*; *SBC Communications, Inc.'s Petition for Forbearance Under 47 U.S.C. §160(c)*; *Qwest Communications International Inc Petition for Forbearance under 47 U.S.C. §160(c)*; *BellSouth Telecommunications, Inc. Petition for Forbearance Under 47 U.S.C. §160(c)*, WC Docket No. 01-338, Memorandum Opinion and Order, 19 FCC Rcd 21496 (2004).

service;<sup>35</sup> and (4) preempting local laws, regulations and franchise agreement requirements to the extent they impose greater restrictions on market entry than the Commission's rules (to ensure that incumbent LECs had an easier time entering the broadband video market than their non-ILEC predecessors). In addition, the Commission failed to act on a Verizon request for forbearance from the entirety of Title II and the *Computer Inquiry* requirements to its broadband services, resulting in a "deemed grant" of its request for relief.<sup>36</sup> Subsequently, the Commission relieved AT&T and Qwest from dominant carrier and *Computer Inquiry* regulation of their non-TDM-based packet-switched broadband services and non-TDM-based optical broadband services.<sup>37</sup>

The Commission's deregulation of the incumbent LECs' non-TDM-based broadband services has denied competitive broadband and information service providers

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<sup>35</sup> *Appropriate Framework for Broadband Access to the Internet Over Wireline Facilities*, WC Docket No. 02-33, Report and Order and Notice of Proposed Rulemaking, 20 FCC Rcd 14853 (2005). The Commission subsequently classified wireless and BPL-enabled broadband Internet access services as information services also. *United Power Line Council's Petition for Declaratory Ruling Regarding the Classification of Broadband over Power Line Internet Access Service As an Information Service*, WC Docket No. 06-10, Memorandum Opinion and Order, 21 FCC Rcd 13281 (2006); *Appropriate Regulatory Treatment for Broadband Access to the Internet Over Wireless Networks*, WT Docket No. 07-53, Declaratory Ruling, 22 FCC Rcd 5901 (2007); see also, <sup>35</sup> *Inquiry Concerning High-Speed Access to the Internet Over Cable and Other Facilities et al*, GN Docket No. 00-185, CS Docket No. 02-25, Declaratory Ruling and Notice of Proposed Rulemaking, FCC 02-77 (2002).

<sup>36</sup> FCC News Release, *Verizon Telephone Companies Petition for Forbearance From Title II and Computer Inquiry Rules With Respect To Their Broadband Services Is Granted By Operation of Law*, WC Docket No. 04-440 (rel. Mar. 20, 2006).

<sup>37</sup> *Petition of AT&T, Inc. for Forbearance under 47 U.S.C. §160(c) from Title II and Computer Inquiry Rules With Respect to Its Broadband Services*, WC Docket No. 06-125, Memorandum Opinion and Order, 22 FCC Rcd 18705 (2007); *Qwest Petition for Forbearance Under 47 U.S.C. §160(c) from Title II and Computer Inquiry Rules With Respect to Its Broadband Services*, WC Docket No. 06-125, Memorandum Opinion and Order, FCC 08-168 (rel. Aug. 5, 2008).

wholesale access to the facilities they need to offer competitive services to the public. While competitors may still purchase special access TDM-based DS1s and DS3s to offer broadband services and to transport their traffic to Internet backbone networks, the Commission's deregulation of special access pricing through grants of pricing flexibility, despite the absence of meaningful competition, has produced supracompetitive rates for these essential facilities. It has been *more than four years* since the Commission opened a rulemaking to review special access pricing,<sup>38</sup> but it has taken no action. This problem is exacerbated by the Commission's lack of action on a Petition for Declaratory Ruling filed by the Georgia Public Service Commission more than three years ago requesting a clarification that State Commissions are not preempted from setting just and reasonable rates for high capacity unbundled loops and transport pursuant to Section 271 of the Act.<sup>39</sup> The Commission's do-nothing approach to the examination of the rates the ILECs are charging for high capacity loop and transport facilities forces competitors to pay the ILECs' supracompetitive special access rates because there is no alternative, and pass those higher costs on to their customers in the form of higher rates for broadband service.

The Commission's deregulation of broadband facilities and services has not delivered on the promise of bringing broadband to all Americans. In the absence of concrete evidence that broadband telecommunications capability is being deployed to all Americans in a reasonable and timely fashion, Section 706 mandates that the

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<sup>38</sup> *In the Matter of Special Access Rates For Price Cap Local Exchange Carriers*, WC Docket No. 05-25. Order and Notice of Proposed Rulemaking, FCC 05-18 (rel. Jan. 31, 2005).

<sup>39</sup> See *In the Matter of Georgia Public Service Commission's Petition For Declaratory Ruling and Confirmation of Just and Reasonableness of Established Rates*, WC Docket No. 06-90 (filed Apr. 28, 2006).

Commission “take immediate action to accelerate deployment of such capability by removing barriers to infrastructure investment and by promoting competition in the telecommunications market.” 47 U.S.C. §157 nt. Competition will afford consumers a choice of providers, a choice of services and lower rates, all of which are likely to increase the take rate for broadband services. The Commission has asked how it can encourage private sector investment in broadband technology and services.<sup>40</sup> The Commission can encourage private sector investment by creating an environment of regulatory certainty that is welcoming to product and service innovators. Ensuring that competitive broadband service providers and ISPs have nondiscriminatory access to the incumbents’ broadband networks is the key.

In an effort to jumpstart competition in the broadband market, COMPTTEL submits that the Commission’s National Broadband Plan should set forth a strong commitment to ensure open networks incorporating access, interconnection, nondiscrimination and infrastructure sharing principles. To fulfill that commitment, the Commission must act in the proceedings discussed below without further delay.

## **II. Immediate Action Is Required**

Section 251(c)(3) of the Act imposes on the incumbent LECs the duty to provide access to unbundled network elements (“UNEs”) on a nondiscriminatory basis at cost-based rates. Access to UNEs has allowed competitive carriers to condition copper loops and combine them with their own network facilities to provide voice, video, DSL, Ethernet and other broadband services to their customers. Last mile access to customers, as well as middle-mile transport, remain bottlenecks in the ILECs’ networks. These

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<sup>40</sup> *NOI* at ¶95.

facilities must remain available to requesting telecommunications carriers at cost-based rates in order to facilitate competition in the provision of broadband services. Although fiber and hybrid last mile loops are also bottlenecks that are equally infeasible to duplicate economically and ubiquitously, the Commission has provided ILECs substantial relief from their Section 251(c) and 271 obligations to make these loops available on an unbundled basis.<sup>41</sup> As discussed below, the Commission must rethink its premature deregulation and ensure that requesting carriers are able to access unbundled fiber and hybrid loops, as well as copper loops, at cost based rates in order to achieve the goal of bringing affordable broadband service to all Americans.

In its recent Rural Broadband Report,<sup>42</sup> the Commission acknowledged that there are a number of pending proceedings that affect the deployment and availability of broadband, including special access reform, spectrum access, network openness, and universal service reform, among others. The matters at issue in these proceedings are not going to resolve themselves nor will they be resolved by the “marketplace.” The

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<sup>41</sup> *In the Matter of Review of Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*, CC Docket No. 01-338, Report and Order and Order on Remand and Further Notice of Proposed Rulemaking, 18 FCC Rcd 16978 (2003); *In the Matter of Review of Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*, CC Docket No. 01-338, Order on Reconsideration, 19 FCC Rcd 20293 (2004); *Petition for Forbearance of the Verizon Telephone Companies Pursuant to 47 U.S.C. §160(c)*; *SBC Communications, Inc.’s Petition for Forbearance Under 47 U.S.C. §160(c)*; *Qwest Communications International Inc Petition for Forbearance under 47 U.S.C. §160(c)*; *BellSouth Telecommunications, Inc. Petition for Forbearance Under 47 U.S.C. §160(c)*, WC Docket No. 01-338, Memorandum Opinion and Order, 19 FCC Rcd 21496 (2004). Such unbundling relief has not been extended to the Bell Companies’ Section 271 obligation to provide access to dark fiber.

<sup>42</sup> *Bringing Broadband To Rural America: Report on A Rural Broadband Strategy* at ¶13 (May 22, 2009).

Commission's National Broadband Plan should include a report that it has *resolved* these proceedings with the objective of expanding broadband availability and affordability.

**A. Special Access (WC Docket No. 05-25; RM 10593)**

High capacity broadband special access services are used by competitive wireline and wireless carriers and ISPs to connect to their customers, to connect to Internet backbone networks, and to connect to cell towers. These last-mile and middle mile facilities are integral components of the broadband services provided by competitive carriers and one of the largest cost components of providing that service. In most markets, the Commission has deregulated the rates price cap ILECs can charge for special access services through grants of Phase I and/or Phase II pricing flexibility despite the absence of meaningful competition that could serve to discipline their rates. The ILECs continue to control over 90% of the special access market and their supracompetitive rates reflect that market dominance.<sup>43</sup> The issues raised in the Special Access Proceeding “directly affect the rates that price cap carriers may charge for access to middle-mile and other dedicated facilities for various types of broadband providers.”<sup>44</sup> The Commission must complete its analysis of whether there is sufficient competition in the special access market to constrain the ILECs' special access rates and, if not, reinstate price cap regulation where appropriate.

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<sup>43</sup> Indeed, in the Rural Broadband Report, the Commission found that special access facilities, especially in rural areas, can be prohibitively expensive. *Id.* at ¶114.

<sup>44</sup> *Id.* at ¶152.

**B. Forbearance Proceedings (WC Docket Nos. 06-125, 01-228, 03-235, 03-260, 04-48)**

The Commission must also revisit the substantial forbearance relief it has provided to ILECs with respect to their non-TDM-based packet switched and optical transmission facilities. The Commission's removal of dominant carrier and *Computer Inquiry* regulation has relieved the major ILECs of their long standing obligation to tariff Gigabit Ethernet, Frame Relay, ATM, OCn transmission, VPN, LAN and other packet-switched services at price cap rates (and to support those rates with cost documentation) as well as the obligation to separate out and offer the underlying transmission component of the services on a common carrier basis. Coupled with the grant of Section 251(c)(3) and Section 271 unbundling relief applicable to the incumbents' fiber to the home, fiber to the curb, packet switching and the packetized functionality of hybrid loops, the Commission has significantly restricted competitors' wholesale access to key network facilities and services used for the provisioning of competitive broadband service.

In granting forbearance relief, the Commission incongruously found that the broadband marketplace was highly competitive even though it lacked detailed market share information to support that finding. It also granted forbearance on a national basis even though buying decisions are made on a building-by-building basis and the facilities are priced on an MSA basis.<sup>45</sup> As in the *Wireline Internet Access Service Order*, in these

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<sup>45</sup> See, FCC News Release, *Verizon Telephone Companies Petition for Forbearance From Title II and Computer Inquiry Rules With Respect To Their Broadband Services Is Granted By Operation of Law*, WC Docket No. 04-440 (rel. Mar. 20, 2006); *Petition of AT&T, Inc. for Forbearance under 47 U.S.C. §160(c) from Title II and Computer Inquiry Rules With Respect to Its Broadband Services*, WC Docket No. 06-125, Memorandum Opinion and Order, 22 FCC Rcd 18705 at ¶ 20 (2007) (“AT&T Broadband Forbearance Order”); *Petition for Forbearance of the Verizon Telephone Companies Pursuant to 47 U.S.C. §160(c)*, WC Docket Nos. 1-338 *et al.*, Memorandum Opinion and Order, FCC 04-254 (2004).

Broadband Forbearance Orders, the Commission “analyzed” competitive conditions without regard to specific geographic markets, “finding that relying on specific geographic markets would force the Commission to premise findings on limited and static data that failed to account for all the forces that influence the future market development.”<sup>46</sup> It is unclear what “forces” the Commission was referencing, but clearly none have materialized to make broadband services available to all American citizens and businesses at affordable rates. If the Commission is to promote access and affordability in the broadband market, it must consider whether the forbearance relief granted for broadband services was ill-advised and should be revoked.<sup>47</sup>

### **C. Clarifying 271 Rates and Obligations (WC Docket No. 06-90)**

The Bell Operating Companies have an independent obligation under Section 271(c)(2)(B) of the Act to provide access to certain network elements, even when those network elements are no longer subject to unbundling under section 251. Specifically, Section 271(c)(2)(B) establishes an independent obligation for the Bell companies to provide access to loops, switching, transport, and signaling pursuant to competitive checklist items 4-6 and 10, regardless of whether impairment is found to exist under section 251. The Commission has determined that where a checklist item is no longer

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<sup>46</sup> *AT&T Broadband Forbearance Order* at ¶ 20.

<sup>47</sup> The Commission has stated repeatedly that if the predictive judgments on which it bases forbearance grants prove incorrect, it has the option (and COMPTTEL would submit, the duty) to reconsider its decisions granting forbearance. *See, e.g., In the Matter of Qwest Communications International, Inc. Petition for Forbearance from Enforcement of the Commission’s Dominant Carrier Rules As They Apply After Section 272 Sunsets Pursuant to 47 U.S.C. §160*, WC Docket No. 05-333, Memorandum Opinion and Order, FCC 07-13, at ¶55 (rel. Mar. 9, 2007); *Qwest Petition for Forbearance Under 47 U.S.C. §160(c) from Title II and Computer Inquiry Rules With Respect to Its Broadband Services*, WC Docket No. 06-125, Memorandum Opinion and Order, FCC 08-168, at n. 69 (rel. Aug. 5, 2008).

subject to Section 251 unbundling, its pricing should be governed by the “just and reasonable” standard of Sections 201 and 202. At the same time, however, the Commission has failed to identify a pricing methodology that would yield “just and reasonable” rates for 271 elements, failed to provide a definition for certain of the elements required by section 271 (*i.e.*, clarifying that the loop and transport obligations include line sharing and dark fiber), declined to clarify whether the Commission or the state commissions have jurisdiction to set Section 271 rates and has forborne from enforcing Section 271 for certain facilities critical to the provision of broadband services to the mass market. In other words, the Commission has failed to give any meaning to Section 271. These actions and inactions by the Commission have contributed to the lack of competition in the U.S. broadband market.

Several state commissions have attempted to assume the responsibility the Commission has avoided by issuing decisions on what is required of the Bell Companies under Section 271(c)(2)(B). But the courts have rejected these attempts, after finding that the Commission has responsibility for the implementation of 271.<sup>48</sup> Over three years ago, the Georgia Public Service Commission (“GPSC”) petitioned the Commission to either 1) clarify that it is not preempted by federal law from setting just and reasonable rates for Section 271 elements; 2) if it is preempted, declare that the rates set by the Georgia Commission for Section 271 elements are just and reasonable; or 3) set the rates

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<sup>48</sup> See *e.g.*, *Verizon New England, Inc. v. Maine Public Utilities Commission et al*, 509 F. 3d 1 (2007).

itself for the Section 271 elements.<sup>49</sup> The Commission has yet to act on the Georgia Commission's petition. Because the Commission has not set any Section 271 rates, nor articulated a methodology for how those rates should be set, nor authorized state commissions to set Section 271 rates, the Bell Companies have been able to price their broadband elements at the supracompetitive special access rates that are not just and reasonable. In an effort to promote competition in the provision of broadband services, the Commission must give meaning to the ILECs' Section 271 obligations.

#### **D. Copper Loop Retirement (RM-11358)**

More than two years ago, competitive carriers filed two different Petitions requesting that the Commission initiate a rulemaking to amend or clarify certain sections of the Part 51 rules applicable to the retirement of copper loops and subloops by the ILECs.<sup>50</sup> Although the Commission has invited comment on the Petitions,<sup>51</sup> it has taken no other action to date. Copper loops remain almost ubiquitous and can be conditioned to provide high speed data and video broadband services. As such, copper loops – where they remain available – can provide a robust competitive alternative to fiber and cable. The Part 51 rules currently require ILECs only to give public notice of their intent to

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<sup>49</sup> See In the Matter of Georgia Public Service Commission's Petition For Declaratory Ruling and Confirmation of Just and Reasonableness of Established Rates, WC Docket No. 06-90 (filed Apr. 28, 2006).

<sup>50</sup> See Petition For A Rulemaking To Amend Certain Part 51 Rules Applicable To Incumbent LEC Retirement of Copper Loops and Subloops filed by XO Communications, *et al.* on January 18, 2007 and Petition for Rulemaking and Clarification filed by BridgeCom International Inc., *et al.* on January 18, 2007, consolidated for consideration in RM-11358.

<sup>51</sup> FCC Public Notice in RM-11358. DA 07-29 (rel. Jan. 30, 2007).

retire copper loops and there is almost no opportunity for affected consumers and service providers to object to the proposed retirement.

As ILECs replace copper loops with fiber to the home and fiber to the curb, they remove a viable transmission medium that competitors can use to deliver broadband service to customers, thereby squelching both competition and broadband availability. In an effort to stem the loss of redundant facilities which are essential for the provision of competitive broadband services as well as for homeland security purposes, the Commission should act on the pending Petitions and establish a formal process to determine whether it serves the public interest and national security interest for the ILECs to continue to retire valuable copper loops and subloops at their sole discretion.

**E. Classification of Broadband Services as Information Services (WC Docket No. 02-33; GN Docket No. 00-285; CS Docket No. 03-53; WC Docket No. 06-10; WT Docket No. 07-53)**

The Commission should reinstate the right of competitive broadband service providers and ISPs to lease the transmission component of Internet access service by revisiting its decisions to classify Internet access service as an information service with no stand-alone telecommunications service component. Beginning with the *Cable Modem Declaratory Ruling* in 2002,<sup>52</sup> the Commission backtracked on years of

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<sup>52</sup> *Inquiry Concerning High-Speed Access to the Internet Over Cable and Other Facilities et al*, GN Docket No. 00-185, CS Docket No. 02-25, Declaratory Ruling and Notice of Proposed Rulemaking, FCC 02-77 (2002); *Appropriate Framework for Broadband Access to the Internet Over Wireline Facilities*, WC Docket No. 02-33, Report and Order and Notice of Proposed Rulemaking, 20 FCC Rcd 14853 (2005); *United Power Line Council's Petition for Declaratory Ruling Regarding the Classification of Broadband over Power Line Internet Access Service As an Information Service*, WC Docket No. 06-10, Memorandum Opinion and Order, 21 FCC Rcd 13281 (2006); *Appropriate Regulatory Treatment for Broadband Access to the Internet Over Wireless Networks*, WT Docket No. 07-53, Declaratory Ruling, 22 FCC Rcd 5901 (2007).

precedent holding that the transmission component of enhanced or information services is a telecommunications service subject to Title II of the Act that must be made available on a stand alone basis to competing telecommunications and information service providers. While the Courts have upheld the Commission’s decisions to classify Internet access service as an information service without a separate telecommunications service component,<sup>53</sup> the Commission’s interpretation is not mandated by statute. As Justice Scalia stated in his dissent in *Brand X*, the Commission concocted “‘a whole new regime of regulation (or of free-market competition)’ under the guise of statutory construction.”<sup>54</sup>

The Commission can and should revisit its determination that the transmission component of Internet access service is not a telecommunications service subject to Title II regulation. Reinstating the right of broadband and information service providers to access the transmission component on a wholesale basis will spark competition and provide consumers an alternative to the cable/ILEC duopoly.

#### **F. White Spaces (ET Docket Nos. 04-186, 02-380)**

As the Commission acknowledges in the *NOI*, backhaul is an essential input for all wireless broadband services.<sup>55</sup> The middle-mile infrastructure connects cell towers, switching centers, backbone networks and first responder networks, and provides broadband connectivity to municipal buildings such as medical facilities, schools and

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<sup>53</sup> *National Cable & Telecommunications Association v. Brand X Internet Services, Inc.*, 545 U.S. 967 (2005) (“Brand X”); *Time Warner Telecom v. FCC*, 507 F. 3d 205 (3<sup>rd</sup> Cir. 2007).

<sup>54</sup> *Id.* at 1005.

<sup>55</sup> *NOI* at ¶ 45.

libraries.<sup>56</sup> In the *NOI*, the Commission asks how the unused portions of the broadcast television spectrum (i.e., “White Spaces”) can be maximized to provide point-to-point backhaul in rural areas.<sup>57</sup>

In its recent *White Spaces Order*, the Commission adopted rules allowing unlicensed devices to operate in this spectrum, but failed to designate any portion of the spectrum for fixed, licensed use.<sup>58</sup> Without backhaul, broadband networks cannot operate.<sup>59</sup> Fixed licensed operation would likely accelerate broadband deployment and expand broadband capacity to underserved and unserved areas by providing the necessary middle mile connectivity in an economically efficient manner.<sup>60</sup> The Commission should expeditiously reconsider its *White Spaces* decision and dedicate at least a portion of the White Spaces for fixed, licensed use.

#### **G. Pole Attachments (WC Docket No. 07-245, RM-11293, RM-11303)**

Facilities-based providers of broadband services need access to poles, ducts and conduits to deploy their networks and the Commission’s regulation of the terms and

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<sup>56</sup> See Letter of FiberTower Corporation, *et al.* to Marlene Dortch, FCC, GN Docket No. 09-29, at 2 (filed Mar. 25, 2009).

<sup>57</sup> *NOI* at ¶ 45.

<sup>58</sup> *Unlicensed Operation in the TV Broadcast Bands*, ET Docket Nos. 04-186, 02-380, Second Report and Order and Memorandum Opinion and Order, FCC 08-260 (2008).

<sup>59</sup> See *e.g.*, *Ex Parte* filing by FiberTower *et al.*, ET Docket Nos. 04-186, 02-380 (filed Oct. 31, 2008).

<sup>60</sup> See Petition for Reconsideration by FiberTower *et al.*, *In the Matter of Unlicensed Operation in the TV Broadcast Bands*, ET Docket No. 04-186, *Additional Spectrum for Unlicensed Devices Below 900 MHz and in the 3 GHz Band*, ET Docket No. 02-380, at 5-6 (filed Mar. 19, 2009).

conditions under which utilities provide access is important to future deployment.<sup>61</sup>

Under the current rules, pole owners are permitted to charge telecommunications carriers a substantially higher rate than they charge cable operators, placing telecommunications carriers at a considerable competitive disadvantage. The Commission opened a rulemaking in 2007 to consider possible changes to its pole attachment rules, particularly the rules governing rates.<sup>62</sup> While it tentatively concluded that all categories of infrastructure providers should pay a uniform pole attachment rate in order to promote broadband deployment, it has yet to take any action in the rulemaking. The Commission should conclude this rulemaking and adopt a uniform rate for all broadband infrastructure providers.

### **III. Universal Service Reform**

The Commission has asked whether it should make broadband a supported service eligible to receive high-cost or low income universal service funds.<sup>63</sup> Before taking any steps to increase any funding commitments of the already overburdened high cost fund, the Commission should complete its overhaul of the current rules and policies that govern the contribution and distribution of high cost funds. If the Commission does

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<sup>61</sup> Section 224 confers on cable television systems and telecommunications carriers the right to pole attachments at just and reasonable rates, terms and conditions. 47 U.S.C. § 224. “Pole attachment” for purposes of section 224 includes “any attachment” to a “duct, conduit, or right-of-way owned or controlled by a utility.” 47 U.S.C. § 224(a)(4).

<sup>62</sup> The Commission tentatively concluded “that all attachments used for broadband Internet access service should be subject to a single rate, regardless of the platform over which those services are provided, and that that rate, for reasons discussed herein, should be greater than the current cable rate, yet no greater than the telecommunications rate.” *Implementation of Section 224 of the Act; Amendment of the Commission’s Rules and Policies Governing Pole Attachments*, WC Docket No. 07-245, RM-11293, RM-11303, Notice of Proposed Rulemaking, FCC 07-187, at ¶¶ 3, 36 (2007).

<sup>63</sup> *NOI* at ¶¶39-41.

decide that the universal service fund should subsidize broadband services, it must simultaneously require that all providers of broadband services, including broadband Internet access service providers, contribute to the universal service fund on the same basis as other telecommunications service providers and that all qualified service providers are eligible to receive support.

### **CONCLUSION**

For the foregoing reasons, the Commission's National Broadband Plan should include a commitment to promote competition in the provision of broadband services and products as a means of lowering prices and increasing the availability of services. In order to increase the availability of broadband service at affordable rates to all American citizens and businesses, the Commission must act without further delay in the above listed proceedings to facilitate entry and ensure that consumers have a choice of broadband services and service providers.

Respectfully submitted,

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