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

In the Matter of		
Review of Regulatory Requirements for Incumbent LEC Broadband Telecommunications Services	)	CC Docket No. 01-337
Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers; Implementation of the Local Competition Provisions of the Telecommunications Act of 1996; Deployment of Wireline Services Offering Advanced Telecommunications Capability	)	CC Docket No. 01-338
Appropriate Framework for Access to the Internet Over Wireline Facilities	)	CC Docket 02-33
Inquiry Concerning High-Speed Access to the Internet Over Cable and Other Facilities	)	GN Docket No. 00-185
FCC Classifies Cable Modem Service As "Information Service"	)	
Appropriate Regulatory Treatment for Broadband Access to the Internet Over Cable Facilities	)	CS Docket No. 02-52
Notice of Inquiry Concerning a Review of the Equal Access and Nondiscrimination Obligations Applicable to Local Exchange Carriers	)	CC Docket No. 02-39

COMMENTS BY TELETRUTH, PERTAINING TO THE IRFAs.

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STATEMENT OF INTEREST

TeleTruth is a national, independent, broad-based coalition of residential and business customers, small businesses and large corporations, industry experts and consultants, lawyers, Internet Providers and telco competitors. The organization was created to defend the public interests in telecommunication and broadband issues, educate and inform the public to combat monopoly control of critical telecommunications infrastructure, promote fairness, innovation and competition and accelerate (encourage) the deployment of advanced networks and new forms of communications.

Bruce Kushnick is Chairman of TeleTruth and Executive Director of New Networks Institute, a market research and consulting firm, focusing on telecom and broadband issues for the public interest. In 1992 New Networks Institute, (NNI) was created to investigate, on an independent and impartial basis, how the break-up of AT&T and the creation of Baby Bells had affected subscribers. Since that time we have completed extensive research, helped to initiate Class Action suits in specific states, filed comments and complaints with state and federal agencies in the hopes of creating change that benefits the telephone customer.

In 2000, New Networks Institute and TeleTruth associates proposed the adoption of a federal "Broadband Bill of Rights" to specifically delineate what rights consumers can expect and should have guaranteed to protect their interests in the emerging broadband marketplace. New Networks is independently funded through research and consulting projects and the sales of books and research reports and surveys.

PART I: OVERVIEW

EXECUTIVE SUMMARY

> "We've been begging the FCC to establish a National Broadband Policy. On Feb. 14th the FCC took action—only it might turn out to be as bloody for ISPs as the St. Valentine's Day Massacre was for George "Bugs" Moran's North Side Gang in Chicago, circa 1929."[1]
> Patty Fusco, Managing Editor, ISP Planet, March 1, 2002

Over the past several months, the Federal Communications Commission (FCC) 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.[2] As a result, these new rules are not justified or in the public's interest. Moreover, as shown below, 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"). 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 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.

As a result, in the matters that are still open before the Commission, it is imperative that the Commission re-analyze its proposed actions with specific regard for their impact on small ISPs and CLECs. In addition, we urge the Commission to reopen and reconsider any matters relevant to the deployment of broadband capabilities and services in which its RFA analysis was deficient.

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.[3]

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 (Incumbant 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.
- 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.

NOTE: The "ILECs" are mainly the Bell monopolies--- BellSouth, Qwest, SBC and Verizon. (This includes Pac Bell, Ameritech, Bell Atlantic, NYNEX, US West, and now GTE and SNET.)

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 matter. Our analysis shows that if the current proposals are adopted:

- Small competitive telecom companies could lose approximately $8 billion in revenue as customers — who cannot obtain broadband from competitive providers hobbled by RBOC intransigence — leave them and purchase whatever half-baked "broadband" offerings monopoly providers decide to roll out, or because ISPs cannot grow due to these constraints of selling broadband.
- Over 1500 ISPs meeting the definition of "small business" are in jeopardy if these proposals go through as articulated in the NPRMs.
- This will leave a minimum of 10-15 million people with the problem changing providers. In the case of small businesses that depend on specific ISP services, such as SDSL, web hosting and other services, this will cause serious problems.
- The potential harm to small businesses and small ISPs is actually greater, given the financial stresses on CLECs in present market conditions. Because small ISPs overwhelmingly receive their connections to the local phone networks, as well as their dedicated connections to small business customers, from CLECs, the collapse of the CLEC industry will bring down significant numbers of ISPs as well.

For these and other reasons, TeleTruth submits that the Commission cannot responsibly adopt the pending proposals. To the contrary, the Commission has an obligation under the RFA to proactively identify and obtain comments from small ISPs and other small business entities affected by its proposals, and to develop and consider alternative proposals that would accomplish the goals of competition in and robust availability of broadband services and capabilities — but would do so in a means that does not hand the market to the multi-billion-dollar mega-firms that will surely dominate these markets under the Commission's current proposals.

In this regard, TeleTruth submits that, not only is this more detailed and sensitive consideration of what small entities require the Commission's obligation under the RFA, it is also the Commission's obligation under the Communications Act. The sad fact is that the explosion of consumer and small business access to the Internet and broadband services in the last six years has not been facilitated or supported by the large ILECs who are the primary beneficiaries of the current proposals. To the contrary, consumer and small business access to the Internet was driven largely by small, independent ISPs and innovative CLECs who struggled to meet their needs in the face of continuing ILEC opposition, foot-dragging, and intransigence.

It is obviously tempting for the Commission to seek to rely on industry giants such as the ILECs as the Commission's chosen instruments to achieve policy goals. The ILECs have unparalleled financial resources. They have access to millions of customers. They can afford and deploy any technology that they want. Moreover, they deploy dozens if not hundreds of people to meet with the Commission and its staff, and with members and staff on Capitol Hill, to explain why their private interest in extracting all possible monopoly rents from their monopoly assets (primarily loops and central office-based connections to them) is, happily,

in harmony with the public interest in the deployment of new and innovative technologies — including broadband access to the Internet.

Unfortunately, the harmony that ILEC lobbyists struggle so hard to maintain is an illusion. The history of real consumer-friendly innovation in telecommunications shows that such innovation occurs when the ILECs get out of the way, not when they are given control of the field of play. Innovative CPE (Customer Premises Equipment) — whether cheap and simple phones or elaborate PBXs, whether home answering machines or computer modems — became widely available only ***after*** the Commission unbundled CPE from network services and at least temporarily banned the ILECs (then, mainly, the RBOCs) from the market. Innovative long distance pricing and service plans came not from the then-monopolistic Bell System, but from upstarts like MCI and Sprint. Despite having been allowed into the "information services" market starting in 1989, it was thousands of small ISPs — later aided by upstart CLECs — that effectively brought Internet access to the mass market. And it was the ISPs working with CLECs that brought small businesses the innovative high-bandwidth services, such as SDSL, that those businesses needed but that the ILECs themselves were unable or unwilling to make available.

This is not a new story. The history of economic development in America is replete with cases of an entrenched firm or oligopoly becoming too comfortable and failing to meet market demand, only to be displaced — or to miss major market opportunities that are exploited by — relatively small newcomers. The railroads, dominant in hauling freight for three-quarters of a century, were undercut by small trucking firms starting in the 1920s. American automobile, steel, and consumer electronics firms were all shocked out of complacency by innovative foreign firms (and some domestic ones) with new products and more efficient operations. IBM was shocked out of its dominance of computing by upstarts from the West, Apple, Intel and Microsoft (all of which started out as small businesses) who redefined the nature of what "computing" was and to whom it would be available.

What this means — or should mean — to the Commission is that, while it should not unreasonably hobble or interfere with the ability of large firms to compete, it must never forget that quick responses to marketplace demands, innovative service offerings, and radical, disruptive technologies offering better functionality at lower cost simply cannot be expected to come from massive monopolistic firms with billions of dollars of assets to ***protect.*** Because that understandable — indeed, inevitable — urge on the part of the ILECs to protect their existing assets, their existing revenues streams, their existing customer bases, and, hopefully (for them) their existing share prices, is in a fundamental way incompatible with the public interest in the development and rapid deployment of ***new*** assets, ***new*** revenue streams, and ***new*** customer bases. In the age of competitive telecom markets ushered in by, and mandated by, the 1996 Act, the Commission can only reasonably hope to achieve the statute's goals — and the Commission's stated policy goals — by ensuring that the regulatory environment is and remains hospitable to small, new entities seeking to do things a different way.

In short, focusing on and carefully accommodating the needs of small businesses, as required by the RFA, is not and should never be viewed as somehow inimical to or contrary to the goals of the Communications Act. To the contrary, history shows — and will show again, if the Commission only permits it — that this is the most effective way, if not the only way, to accomplish the substantive goals of the Communications Act.

Therefore, the FCC seriously consider the best course of action for all customers --- To restart this RFA process to allow Small Businesses and Small competitors to be properly notified and considered to make them part of this competitive process.

The FCC Documents Under Discussion (with our brief interpretation) are:

- **CC Docket No. 01-337** ---"Review of Regulatory Requirements for Incumbent LEC Broadband Telecommunications Services".
  - This NRPM proposes that the Bells will no longer have to resell their broadband plant to CLECs.

- **CC Docket No. 01-338**, "Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers; Implementation of the Local Competition Provisions of the Telecommunications Act of 1996; Deployment of Wireline Services Offering Advanced Telecommunications Capability"
  - This NRPM states that the Bells will no longer have to unbundle their Broadband network elements for CLECs.

- **CC Docket 02-33** "Appropriate Framework for Access to the Internet Over Wireline Facilities"
  - This NRPM declares that Broadband is an Information Service and therefore doesn't have to be resold to competitors. It also can add/increase new taxes.

- **GN Docket No. 00-185** Inquiry Concerning High-Speed Access to the Internet Over Cable and Other Facilities.
  - This Docket requests comments on whether high-speed cable services is an Information Service and therefore all of the current proposed openings for competitive Internet will be closed.

- **CS Docket No. 02-52** Internet Over Cable Declaratory Ruling Appropriate Regulatory Treatment for Broadband Access to the Internet Over Cable Facilities.
  - This Docket declares high-speed cable services is an Information Service and therefore all of the current proposed openings for competitive Internet will be closed.

- **CC Docket No. 02-39** Notice of Inquiry Concerning a Review of the Equal Access and Nondiscrimination Obligations Applicable to Local Exchange Carriers"
  - This proceeding proposes to eliminate equal access obligations just as the Bell companies are entering long distance.

1) Overview Of The NPRMs; Their Impacts; And The Current Telecom Landscape.

TeleTruth's Analysis:

Whether intentionally or by accident, it appears to TeleTruth that the Commission is pursuing a policy of creating a broadband duopoly, so that cable services and the ILECs are the only two real competitors left. This will happen by virtue of the Commission's proposals to shut off Competitive Local Exchange Company (CLEC) and ISP access to the broadband capabilities of existing and upgraded wireline phone networks.

The policy rational for this duopolization is "deregulation." Since cable operators are not and have never been subject to common carrier obligations with respect to their plant — which has always been used to offer information services, not telecom services — the logical response, it might seem, is to ensure that ILECs and cable operators can play on a "level" — and deregulated — playing field. So in the name of fairness, the Commission is considering policies that will block resale of ILEC broadband networks to competitors.

This will not promote competition. It will stifle the access of the most innovative entities in telecom/Internet space today — CLECs and small ISPs — to the essential facilities they need to survive, offer new services, and meet consumer needs. (As a separate matter, such a policy also has the effect of ***rewarding*** the Bell companies for years of strategic incompetence and non-compliance with Commission regulations implementing Sections 251 and 252 of the Act, while insulating them from competitive pressures.)

The Commission's stated interest in relying on "intermodal" competition does not justify this policy of "parity" either. Whether the focus is on communications services or in the broader economy, it is certainly true that intermodal competition has repeated "shaken up" established markets (*e.g.*, trucks vs. railroads; DBS vs. cable; undersea cables vs. satellites). But it has never done so by creating a regime in which the new intermodal competitor is regulated in the same way as the incumbent sought to be dislodged. To the contrary, incumbents in any industry are subject to rules and requirements that typically evolved over time based on extensive experience with the particular ways in which the incumbents need to be encouraged or restrained in the provision of their goods and services. The fact that a new firm with a different production technology figures out a way to attack a market that was monopolized or oligopolized by a group of incumbent firms does not remotely suggest that the incumbent should be relieved of the basic regulatory obligations that go along with incumbency — at least not until the insurgents have so thoroughly dislodged the former monopolist that there is no turning back.[4]

As a result, the effect of adopting deregulatory policies for the ILECs now will be that customers' broadband choices will be dramatically lessened. Satellite, wireless and all of the other promising technologies cannot yet fill the void that will exist if current small ISPs and

CLECs are frozen out of the market by prematurely acceding to ILEC demands to be freed from the restraints that Congress placed on them.

In this regard, if the FCC is serious about promoting intermodal competition with the ILECs, it should do everything that it can to ensure that entities with different and disruptive technologies that can be used to duplicate some or all of the functions of the ILECs' network are free from ILEC-like regulation to the maximum extent feasible. Cable operators seeking to offer switched telephony should be given as broad and as preemptive a deregulatory environment as possible. Wireless firms offering substitutes for landline service — whether narrowband or broadband — should not face any significant regulatory barriers to their offerings. From this perspective, the Commission's ongoing flirtation with "regulatory parity" and "level playing field" ideas actually ***discourages*** innovative investment and service offerings from currently unregulated players such as cable operators. To these entities, "regulatory parity" is an implicit threat — come too near the monopolists' preserve, and you, too, may be subject to regulation of the type we have developed historically for monopolists. These entities' only alternative is to stand mute while the monopolists promote their own deregulatory, anti-consumer agenda.

The ILECs will of course whine that to allow them to be subject to competition from unregulated entities while they remain regulated is unfair, and that such a situation somehow degrades their "incentive" to actually deploy new technologies needed to compete. This, of course, is nonsense. The ILECs have spent the last fifteen years selling that particular type of snake oil to regulators around the country. Over and again, the ILECs argued that new technology and new competition was radically affecting their businesses, and that only with new "incentives" in the form of relaxed regulation would the ILECs be able to actually deliver new services the market — typically some type of "fiber to the curb" or "fiber to the home" arrangement. Yet over and again, in states ranging from New Jersey to California, the ILECs received their regulatory breaks, and over and again failed to deliver the goods. This is seen most recently with SBC in Illinois, where — after announcing "Project Pronto" as part of its effort to get approval for purchasing Ameritech — SBC basically tried to bully regulators into offering regulatory concessions by holding the actual fiber deployment contemplated by Project Pronto hostage. Why this Commission thinks that things would turn out any differently if it buys the current iteration of ILEC advanced services snake oil is a mystery.[5]

It is also nonsense because nothing prevents the ILECs from competing fairly while treating their competitors and customers fairly as well. The very existence of the intermodal competition that the Commission rightly wants to encourage will force ILECs either to compete with the intermodal insurgents, or — equally acceptable from a public policy perspective — cede responsibility for that battle to CLECs who are more able to deal with the stresses of such activity. But adopting policies that freeze out the CLECs and their ISP customers in the hope that this will "encourage" the ILECs to engage in the competitive fray makes no sense. "Intermodal" competition is not ILECs versus cable operators. It is the

copper-and-fiber-and-switches telecom infrastructure versus the hybrid-fiber-coax cable infrastructure. In that battle, the ILECs and the CLECs are on the ***same side,*** against the cable operators — and the Commission should do everything it can to encourage the fight. Adopting policies that keep the CLECs from making the most effective and innovative use possible of the copper infrastructure is like sending the telecom side into battle without its Special Forces — the troops that may not play by the traditional rules, but whose activities are critical to the success of the mission.

Finally in this regard, most customers know that the price of their services keep rising, that the quality of services is deteriorating and that the roll out of DSL has been a nightmare. One of the major reasons for these problems has been that regulators, including this Commission, have not actively enforced the current laws. In surveys conducted by New Networks Institute over the last three years, we have documented these problems and it is clear that these current proposed rules by the FCC do not fix any of these issues, but instead removes problematical services from regulation rather than focusing on forcing recalcitrant Bell companies to obey the law.

In the comments below, we will show that the FCC has an obligation to make sure that the thousands of small telecom competitors, as well as customers, are treated fairly.

2) The FCC's Several NPRMs Violate the Regulatory Flexibility Act.

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."[6]

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."[7]

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 that something substantive will emerge from the process to ensure that public policy is enhanced." [8](emphasis added)

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

> "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 commentors 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."[9]

And the FCC must make these reports not only public but also be "proactive" in getting commentors 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."**[10] (emphasis added)

As shown below, unfortunately, the Commission has failed to fulfill essentially all of these requirements, 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.

This next section discusses why we believe the FCC is in violation of the laws surrounding the proper analysis required for an IRFA.

PART II: The FCC's IRFAs Do Not Comply With The Law.

This section highlights the various reasons we believe that the FCC's Regulatory Flexibility analyses are inadequate to meet the requirements of the law.

3) The Customer, Small Business And Small Business Telecom Competitor Have Been Totally Left Out Of These Discussions.

Violation: The FCC has failed to include Customers (including Small Business Customers) in these Telecom and Broadband Discussions

Violation: The FCC has failed to provide "Common Sense" language for customers.

In the first NRPM (the "Broadband" proceeding), there were 61 Comments and Reply Comments filed as of March 22nd, 2002 and the overall scorecard shows only two customers responded; the rest are mostly telephone companies, their law firms and a number of experts, some of whom are paid for by the phone companies. This means that approximately 3% of the total were comprised of customers or the public.

We could not find ***any*** small business competitors who knew anything about the IRFA.

There are two reasons for this. First, the FCC's hasn't created 'common sense' descriptions of the issues. More importantly, the FCC has neglected to get the word out to the affected community about any of their proposals, much less their obligations under the Regulatory Flexibility Act.

Common Sense Language and Definitions Do Not Exist.

For the average customer, the FCC documents might as well be in Aramaic, or Urdic, languages long forgotten except for obscure scholars. They were written by lawyers, using archaic descriptions of telecom legalese minutia and so, like the phone bill (the other unique telecom artifact that customers can't understand), the customer is left without a voice in any of these FCC proceedings.

And it is clear why this is happening. Here is the opening of the Broadband NRPM, CC Docket 01-337:

> "1. In this proceeding, we initiate an examination of the appropriate regulatory requirements for the incumbent local exchange carriers' (LECs') provision of domestic broadband telecommunications services ("broadband services"). Here, we focus on traditional Title II common carrier regulation, historically arising largely out of sections 201 and 202 of the Communications Act of 1934, as amended, as applied to

> incumbent LEC provision of broadband services. In particular, we seek comment on what regulatory safeguards and carrier obligations, if any, should apply when a carrier that is dominant in the provision of traditional local exchange and exchange access services provides broadband service. This is one of several proceedings addressing issues raised by changes in the marketplace for broadband services and related information services."[11]

This is not in any sense a text composed for a customer. Not only must readers be fluent in understanding the significance of various sections of the Telecom Act, they must also know the history of "Title II common carrier regulations."

Also, there is the complete disregard for the need to navigate through the FCC's materials and understand the process of Commenting. The FCC has made no attempt to make comments 'customer-friendly'. For example, on these items there are Docket numbers, FCC numbers, etc -- none of which match up in a logical sense. And using the form for submitting comments requires some understanding of the process.

Second, how is the customer (small business or otherwise) supposed to hear about the actions at the FCC that may effect their interests? While publication in the *Federal Register* or the *Daily Digest* may meet requirements of the Administrative Procedure Act for "notice," that hardly indicates that such publication meets the Commission's obligation under the RFA to ensure that affected small businesses actually become aware of agency actions that would affect their interests. TeleTruth has certainly never heard of any educational campaign to get customers or small businesses involved with the FCC

4) The IRFAs Are Hidden From View: The FCC Has failed to Notify Effected Parties.

Violation: The FCC has failed to be Proactive for Small Business Customer Comments on the IRFA

Violation: The FCC has failed to be Proactive for Small Business Competitor Comments on the IRFA

If the regular FCC proceedings are not being used by customers, the FCC has completely eliminated the chance its IRFAs will ever have commentors, especially from the small business participants, as well as the small competitive participants.

The IRFA documents do not appear, except at the end of a long and complicated document, or at the end of the Federal Register, which is not read in any normal course of business. The IRFAs are not linked to from the FCC's website, nor are they ever referenced or highlighted in any way as something that would be of interest to the small business.

For example, in the press release/announcement of the Cable Broadband as Information Services docket, CC Docket 02-33, there is no mention of Comments sought for the IRFA.[12]

This failure to actively and aggressively solicit comments on events that harm small businesses is a direct violation of the Act, which requests that the agency take a proactive role: According to the SBA:

> "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."[13]

And the Act states:

> "The publication of general notice of proposed rulemaking in publications likely to be obtained by small entities." (5 U.S.C. § 609(a)(2)).[14]
>
> "The direct notification of interested small entities." (5 U.S.C. § 609(a)(3))."[15]

However, the lack of notification can have devastating effects on small businesses because it asks for comments on issues that the small business may not be aware of, but threatens their very existence. In Docket 02-33, the effect of the Commission's proposal would be to relieve ILECs of the obligation to offer these small companies access to high-speed networks by changing the current definition of DSL from a telecom service to a telecom component of an information service.

In the IRFA the Commission duly states that it wants to know if there are alternatives if the FCC continues on its path.

> ."The NPRM asks parties to comment on alternative ways in which ISPs could acquire transmission necessary to provide their information service offerings if the Commission modifies or eliminates the current access requirements. Specifically, the Commission asks whether they can rely on negotiated contractual arrangements and how such arrangements could be priced. For purposes of this IRFA, we specifically seek comment from small entities on these issues, in particular, on the extent to which the use of alternative access arrangements could impact them economically. Similarly, the Commission also specifically seeks comment from all affected small entities regarding the incumbent LECs' obligations to provide access to network elements under sections 251 and 252 of the Act if it determines that the provision of wireline broadband Internet access service over a provider's own facilities is an information service and that the transmission input is telecommunications and not a telecommunications service, including the extent to which these

> determinations would economically impact them. In addition, the Commission generally asks small entities to comment on these and any other issues that could have an economic impact on them."[16]

These are, in some sense, the right questions to be asking (although the language in which they are posed is more suitable for telecom "insiders" than for small businesspeople). But the utter lack of proactive effort by the Commission to solicit and obtain input from the small entities — particularly small ISPs — that would be most affected means that the Commission will be deprived of information on critical issues that could affect the ability of these small entities to remain in business. Yet if no ISPs respond, the Commission may erroneously conclude that they don't care or that they agree with the Commission's approach. The entire point of the requirement of proactive solicitation of comments, in this regard, is designed to legally negate any implication that silence connotes assent.

It should also be observed that in the cable context, the FCC has declared broadband to be an "Information" service. The notion that this same conclusion should be extended to DSL-based broadband — the kind that competing entities have actually and actively been trying to use, and using, for many years — is very troubling, and quite a different matter (*see* discussion above about the logic of treating intermodal competitors differently from incumbents). Indeed, by asking for 'alternatives' in this context, the Commission has already harmed the small telecom business and without ISP commentary it can just go forward.

> "Indeed, the Commission notes in the NPRM that ISPs currently purchase transmission services under tariff to provide their own information services. The NPRM asks parties to comment on alternative ways in which ISPs could acquire transmission necessary to provide their information service offerings **if the Commission modifies or eliminates the current access requirements.**"[17] (CC Docket 02-33). (emphasis added)

In short, it appears that at this critical stage in the development of broadband services, the Commission is falling victim to the classic problem of "Regulatory Capture." The parties playing in the current game are the ILECs, their "astroturf" support groups, and a very occasional, isolated customer. The IRFA's responses probably have no customer or small business representation and there was no attempt to give this a fair airing to these small business competitors or customers. This lack of notification is a violation of the IRFA's principles.

5) Analysis of The IRFA's Data --- Boilerplate Analysis Does not Protect Public Interests.

Violation: In ALL cases the FCC has delivered a "Boilerplate" analysis which does not satisfy the law or protect the public interest.

As a stand alone document, the IRFAs presented in these six documents — and they are largely identical — would fail any course in business or law. They are pure boilerplate, and have neglected:

- Proper analysis of the number of companies harmed.
- Proper analysis of the cost impacts on these companies.
- Proper analysis of the loses of revenues, added costs, etc.
- Proper analysis of Alternatives for these companies.
- Proper analysis of analysis of impacts on small businesses who use these providers
- Proper analysis of what the small business competitors provide that is unique.

As the SBA Advocate writes:

> "As a preliminary step, an agency should develop a profile of different-sized entities likely to be affected by the rule. In addition, an agency needs to assess how each of these different-sized entities will be affected. This means that the agency needs to specify the number and type of entities affected, compliance costs, objectives to be achieved, and comparisons of regulatory alternatives to the regulation — alternatives that would minimize economic impacts without sacrificing stated objectives. Data, models, and assumptions should be identified and evaluated explicitly, together with adequate justifications for the alternatives selected."[18]

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 three years, TeleTruth has found that identical flawed analyses appear in virtually all documents. For example, in the "Truth-In-Billing"[19] RFA, CC Docket No. 98-170, Released: May 11, 1999, we find this specific paragraph:

> 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."[223] 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.

6) Failure To Do A Proper Analysis Of The Different Classes of Small Businesses and Competitors

Violation: The FCC has failed to accurately assess the number of small telecom competitors harmed by these rulings. This includes CLECs and ISPs.

Violation: The FCC has failed to accurately assess the number of small business entities that depend on these companies, from the small business users to the small business suppliers.

Each FCC NRPM document has a different IFRA, and each document has different companies it considers to be part of the class of small businesses that are being harmed. However, in ***all*** cases these analyses are so poorly constructed as to make them effectively valueless.

In the first NRPM **FCC Docket No. 01-337** ---"Review of Regulatory Requirements for Incumbent LEC Broadband Telecommunications Services" the FCC has failed to accurately present the marketplace that will be effected. If the ruling goes through as intended, then it could drop the requirement on the Bell companies to resell their new broadband networks to competitors-- therefore it effects every competitor who offers broadband and every customer who want to use a competitor.

However, this IRFA states that the entire universe of small businesses that will be effected by this ruling will be the small ILECs — that is, the small local monopolies that are not former Bells (including Verizon in this group). This is the ***entire*** "market" analysis in this case.

> "11. The Commission has included small incumbent LECs in this present RFA analysis. As noted above, a ``small business" under the RFA is one that, inter alia, meets the pertinent small business size standard (e.g., a telephone communications business having 1,500 or fewer employees), and ``is not dominant in its field of operation." The SBA's Office of Advocacy contends that, for RFA purposes, small incumbent LECs are not dominant in their field of operation because any such dominance is not ``national" in scope. The Commission has therefore included small incumbent LECs in this RFA analysis, although it emphasizes that this RFA action has no effect on FCC analyses and determinations in other, non-RFA contexts.
>
> 12. Local Exchange Carriers. Neither the Commission nor the SBA has developed a definition for small local exchange carriers. The closest applicable definitions for this type of carrier under SBA rules is for telephone communications companies other than radiotelephone (wireless) companies. The most reliable source of information regarding the number of LECs nationwide appears To be the data that we collect annually in connection with the Telecommunications Relay Service (TRS). According to our most recent data, there are 1,335 incumbent LECs. Although some of these carriers may not be independently owned and operated, or have more than 1,500 employees, the Commission is unable at this time to estimate with greater precision the number of LECs that would qualify as small business concerns under the SBA's definition. Consequently, the Commission estimates that there are no more than 1,335 small entity incumbent LECs that may be affected by the proposals in the NPRM."[20]

This two-paragraph analysis is supposed to represent the entire class of small businesses that are going to be harmed by this ruling. Where are the CLECs? Where are the ISPs? Where are the small businesses that depend on CLECs and ISPs to obtain their innovative broadband connectivity to the Internet? To assert, as the Commission does, that the small ILECs constitute the relevant "market," simply shows that the Commission lacks a working and realistic understanding of the actual telecom marketplace and how its regulations affect that marketplace.

Harm to The Clients of the ISPs and CLECs --- The Small Business Customer.

The Commission's analysis not only omits a number of the competitive companies being harmed in their analysis, such as ISPs and CLECs, but also all of the small businesses being harmed.

According to *ISP World*, a group that tracks the ISP markets, the small independent ISPs represent over 50% of all online accounts--- which equates to over 75 million customers.[21] While these are dial-up as well as DSL, the migration of Dialup customers over the wireline networks directly effects the entire small business community, both in choice as well as services that are offered that are unique from the ISP.

We will address these issues in depth in Section III.

7) Failure To Do A Proper Analysis Of The Number Of Companies Harmed.

Violation: The Analysis Of The Number Of Companies Provided By The FCC That Could Be Impacted Is Useless And Worthless, Including Using Out Of Date And Inaccurate Data.

Some of the other analyses, such as Docket 02-33, the FCC NRPM proposed to redefine wireline DSL as Information Services, use a slightly different IRFA, but they also fail to address any of the issues or impacts on relevant small businesses, including CLECs, ISPs and small business customers of those entities.

The FCC starts its analysis in Docket 02-33 with data from 1992. That would give anyone familiar with the concept of "Internet time" a strong clue that something is very, very wrong with the analysis.

> 38. Total Number of Telephone Companies Affected. **The United States Bureau of the Census (``the 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, PCS providers, covered SMR providers, and resellers. …[22]

But it gets worse. In the "Local Exchange Carrier" section, which including Competitive Local Exchange Companies (here called by its old, no longer used name "CAPs") the FCC has not created an analysis or even definition of the small telecom companies.

> "39. Local Exchange Carriers, Interexchange Carriers, Competitive Access Providers, Operator Service Providers, Payphone Providers, and Resellers. **Neither the Commission nor SBA has developed a definition particular to small local exchange carriers (LECs), interexchange carriers (IXCs), competitive access providers (CAPs), operator service providers (OSPs), payphone providers or resellers.** The closest applicable definition for these carrier-types under SBA rules is for telephone Communications companies other than radiotelephone (wireless) companies." [23](emphasis added)

The Commission itself has not undertaken to determine which of these entities should reasonably be considered "small" businesses for purposes of the RFA:

> "Although it seems certain that some of these carriers are not independently owned and operated, or have more than 1,500 employees, **we are unable at this time to estimate with greater precision the number of these carriers that would qualify as small business concerns under SBA's definition**. Consequently, the Commission estimates that there are fewer than 1,335 incumbent LECs, 349 CAPs, 204 IXCs, 21 OSPs, 758 payphone providers, and 541 resellers that may be affected by the decisions and rules adopted in this NPRM."[24] (emphasis added)

In fact, SBA has discussed the Commission's flawed analysis back in 1998, when it pointed out that the CLEC markets have different types of companies offering different services and that the laws will effect each one differently. The SBA suggested that correct analysis would take these needs into account. The agency wrote: (Reply Comments of SBA, Office of Advocacy, CC Docket No. 98-147)

> "The Initial Regulatory Flexibility Analysis ("IRFA") must identify all of the classes of small entities affected by the proceeding. …Small CLECs vary greatly in their means of entry into the local market, and therefore the proposed regulations will affect each class differently. Advocacy believes the Commission should tailor its analysis to consider the economic impact on each class of small CLECs and consider alternatives to minimize the economic impact accordingly.
>
> "In its initial implementation of the local competition provisions of the Telecommunications Act of 1996, the Commission identified three new paths of entry into the local market: construction of new networks, the use of unbundled elements of the incumbent's network, and resale. Accordingly, three classes of CLECs have evolved: (1) facilities-based competitive carriers, (2) unbundled network elements ("UNE") competitive carriers, and

> (3) resellers. Advocacy believes that a complete and thorough analysis of regulatory impact as required by the RFA necessitates an analysis of each class of CLECs.
>
> "All three classes of CLECs are important to bring competition to the local loop, but each class uses a different means to promote competition. Accordingly, the three classes have different characteristics, and regulations will affect each class differently. A CLEC, which has constructed an independent network, will not be concerned about a regulation that only affects resale, while the same regulation might cripple a reseller's capability to compete. With this in mind, the Commission should revisit the conclusions made in its IRFA and analyze the economic impact as it applies to each of the three classes of CLECs."[25]

The Information Service IFRA does continue and gives the following SBA-supplied information to the FCC about this market. According to the SBA, there were 2940 small ISPs.

> "41. Internet Service Providers. Under the new NAICS codes, SBA has developed a small business size standard for ``On-line Information Services," NAICS Code 514191. According to SBA regulations, a small business under this category is one having annual receipts of $18 million or less. According to SBA's most recent data, there are a total of 2,829 firms with annual receipts of $9,999,999 or less, and an additional 111 firms with annual receipts of $10,000,000 or more. Thus, the number of On-line Information Services firms that are small under the SBA's $18 million size standard is between 2,829 and 2,940. Further, some of these Internet Service Providers (ISPs) might not be independently owned and operated. Consequently, we estimate that there are fewer than 2,940 small entity ISPs that may be affected by the decisions and rules of the present action."[26]

However, as we will show in the next section, this information is from 1997 and doesn't match up to more complete information that is available on industry web sites currently.

In short, the FCC has previously ignored Comments by SBA on its preparation of these IRFA documents dealing with the market size and competition. And these documents show that the CLEC community is not being properly addressed, analyzed and the studies presented are not complete or accurate.

8) The SBA's Analysis of "Significant" Impacts --- FCC Failed to Perform Analysis of Cost Impacts on Small Competitors.

Violation: The FCC Failed To Perform The Proper Analysis Of The Cost Impacts On These Companies

The FCC has not submitted any information pertaining to potential impacts of its actions on small ISPs and CLECs, and therefore the agency has not fulfilled its IRFA obligations. However, the SBA states that some governmental agencies have addressed some of the issues surrounding this important analysis.

> "Some agencies have begun to develop criteria for determining whether a particular economic impact is significant and whether the proposed action will affect a substantial number of small entities. For example, the National Oceanic and Atmospheric Administration (NOAA) in the Department of Commerce considers a substantial number of small entities to be more than 20 percent of the industry. NOAA defines a significant effect as a regulation that is likely to (1) reduce gross revenues by more than 5 percent; (2) increase total costs of production by more than 5 percent; (3) cause small entities to incur compliance costs 10 percent greater than compliance costs of large entities; or (4) cause 2 percent of small entities to cease business operations."[27]

In this regard, the law pertains to both the costs of compliance to companies as well as to the harm caused by the proposed agency action. Therefore, we ask the Commission to articulate what it considers to be “acceptable” losses for CLECs and small ISPs that would occur as a result of implementing its policies. Without such an analysis, the FCC cannot rationally assess whether its proposed actions truly make sense in light of alternatives.

Despite this, the Commission asserts that its decisions could have a 'positive impact' on small entities because they "avoid[s] placing restrictions on their operations".

> "The Commission tentatively concludes that wireline broadband Internet access services are information services under the Act. If it classifies and regulates this service as an information service, providers of this service, including those providers that own transmission facilities, could be subject to minimal and/or reduced regulatory requirements. The Commission believes that this would have a positive economic impact on small entities to the extent that it avoids placing restrictions on their operations." [28]

To be blunt, this totally misses the point. Small ISPs, small CLECs, and small businesses who rely on them are not significantly restricted by the FCC now. But they are able to

function and take advantage of innovative services and technologies precisely because the ILECs ***are*** restricted in various ways. To say that a proposal to radically change the regulatory ***constraints*** on the "800-pound gorillas" in this space might "benefit" the affected small entities because no new restrictions would be put on the small entities is like saying that communities downstream from Hoover Dam would not be affected by blowing up the dam, since no new dams would be built to constrain the communities' existing water supply.

9) The FCC Has Failed To Examine Alternatives.

Violation: The FCC failed to offer useful alternatives to the proposed rulings.

Every IRFA is required to offer alternatives to the plan ruling being proposed.

> "The VI. Steps Taken To Minimize Significant Economic Impact on Small Entities, and Significant Alternatives Considered
>
> "14. The RFA requires an agency to describe any significant, specifically small business, alternatives that it has considered in reaching its proposed approach, which may include the following four alternatives"[29]

In Docket 01-337, the FCC has totally neglected this critical requirement. In Docket 02-33, which discusses redefining the DSL as an information service and therefore, could block resale of broadband on the phone networks, the FCC concludes it could have a positive effect because there are less restrictions, as noted above.

> "If it classifies and regulates this service as an information service, providers of this service, including those providers that own transmission facilities, could be subject to minimal and/or reduced regulatory requirements. The Commission believes that this would have a positive economic impact on small entities to the extent that it avoids placing restrictions on their operations."[30]

Again, this misses the point on the question of alternatives. Are there ways to encourage the deployment of broadband capability and to promote competition — both intermodal and intramodal — that would not have the devastating impact on ISPs and CLECs resulting from the Commission's proposals? Of course there are — but the Commission never mentions them.

The FCC concedes that this ruling replaces requirements the Bells have today to resell to ISPs using "Computer Inquiry"

> "49. The Commission notes that the Computer Inquiry requirements are only applicable to the BOCs, which are not small entities, but that ISPs,

> including small ISP entities, may obtain access to the BOCs' network to provide broadband Internet access service pursuant to these requirements. Indeed, the Commission notes in the NPRM that ISPs currently purchase transmission services under tariff to provide their own information services."[31]

But the FCC's entire Alternative plan is to ask — if we remove the laws that protect you and now you have to negotiate every deal with the Bell, is that OK? — knowing full well the history of the relationship with the Bells and the ISPs have been totally adversarial.

> "The NPRM asks parties to comment on alternative ways in which ISPs could acquire transmission necessary to provide their information service offerings if the Commission modifies or eliminates the current access requirements. Specifically, the Commission asks whether they can rely on negotiated contractual arrangements and how such arrangements could be priced."[32]

In fact, numerous ISP groups have made this point about broadband/DSL services. TISPA, the Texas ISP Association, specifically wrote about the Bell's total failure to negotiate in good faith. They believe that the in April 2001, that the terms and Bell actions are unjust unreasonable. and discriminatory."[33]

> "DSL Terms and Conditions. SBC has a general description of its DSL offering to ISPs at http://www.sbc.com/ISP/0,2951,25,00.html#portfolio. SBC will not negotiate any aspect of this contract with ISPs; it is purely "take it or leave it." Note also that the contracting party for SBC is not ASI. Instead it is **South Western Bell Telephone (SWBT)**. This alone destroys any charade of separation between any of the SBC operations for loop, DSL or Internet access. It all resides within SWBT, which is of course integrated with SBC's Internet operations. All carriers – whether they be CLECs or ILECs – must still maintain just, reasonable and nondiscriminatory rates, terms and conditions for telecommunications services… SBC's DSL terms are unjust and unreasonable. And, they are discriminatory."

TISPA is not the only ISP group having problems with SBC. The California ISP Association, after trying to negotiate with SBC, broke off talks and has filed a complaint with the state Commission that outlines how the current SBC contract for DSL gives an "unfair advantage to Pacific Bell Internet and related companies owned by its parent, SBC Communications Inc." and these contracts are "one sided". [34]

> "On July 26, CISPA filed a formal complaint with the California PUC outlining policies, anti-competitive conduct and contract terms that give an

> unfair advantage to Pacific Bell Internet and related companies owned by its parent, SBC Communications Inc.
>
> "CISPA asked regulators to prohibit SBC Advanced Solutions Inc., a Pacific Bell sister company, from unilaterally imposing new contracts for high-speed access on Aug. 1. CISPA said the new contracts are one-sided and force ISPs to accept terms that put them at a competitive disadvantage. CISPA also seeks a PUC injunction to prohibit Pacific Bell and SBC Advanced Solutions from disconnecting high-speed customers when they change Internet service providers. This practice discourages customers from discontinuing service with Pacific Bell's own ISP, Pacific Bell Internet."

So much for contractual arrangements between the Bell companies and ISPs.

Lack of providing any reasonable analysis or alternatives has also be questioned by SBA in other comments. "Promotion of Competitive Networks in Local Telecommunications Markets, SBA Comments , WT Docket No. 99-217, September 2, 1999"

> "2. The Commission Does Not Sufficiently Discuss the Regulatory Burden on Small Entities Nor Does it Propose Alternatives Designed to Minimize the Burden.
>
> "The Commission does not adequately discuss any significant economic impact its access proposal may have on small business nor does it propose sufficient alternatives that might minimize this impact, as is required by the RFA." [35]

And SBA makes in clear that the analysis needs to not only take into account the small business providing services but also the impact on the small business.

> "The Commission proposes exempting small buildings from certain requirements, but offers no alternatives for other affected small businesses. For instance, the Commission should consider alternatives for smaller LECs and ILECs, which lack the resources of larger companies and which may be placed at an unfair disadvantage to larger competitors."[36]

The SBA also noted back in 1999 that simply asking the question of alternatives does NOT satisfy the law. ("Promotion of Competitive Networks in Local Telecommunications Markets, SBA Comments, WT Docket No. 99-217, September 2, 1999")

> "…The Commission does not analyze these or any other possible alternatives and has not conducted a proper IFRA. Instead, the

> Commission invites commenters "to address the economic impact of all of our proposals on small entities and offer any alternatives" and thereby invites others to conduct its IFRA for it.
>
> "The Commission does not propose or analyze alternatives, as required by law. The Commission should carefully analyze compliance burdens, and alternatives that would minimize impact and still achieve its regulatory goals. This is an important part of regulatory flexibility review."[37]

10) Teletruth Is Not The Only Critic Of The FCC's Performance ---- FCC Has Never Complied With The IRFA Or The RFAs.

There are many examples of the FCC's failed compliance with the RF Act, and other authors have made comments which are almost identical to our own findings.

For example, an article in the Commlaw Conspectus by Barry A. Pineles[38] explains that even in 1997, the FCC implementation has been "problematic" and that the FCC has focused, not on small businesses but by the concerns of the monopolies.

> "Though in effect for approximately fifteen years, the Commission's implementation of the RFA has been problematic. A number of issues have arisen in the FCC's implementation of the RFA including: (1) the length and lack of definiteness in their notices of proposed rulemaking; (2) the requirement that comments on the RFA be submitted under separate cover; (3) the Commission's continued determination to regulate due to concerns regarding the dominance of local exchange carriers and cable operators in their fields; and (4) the failure of the agency to tier its regulations to different size businesses. The implementation problems have prevented the Commission from utilizing the RFA to minimize burdens on small telecommunications companies."

The author also found that the issues in the rulemaking were too complex for the average business.

> "The Commission's notices of proposed rulemaking, particularly for complex issues…Unless small business executives have a severe case of insomnia or the financial resources to hire special regulatory counsel, it is unlikely that they will peruse these announcements. Therefore, it is unlikely that individual small businesses will participate in these important proceedings."

And the author notes that the Notification in the Federal Register is not adequate and that the FCC has "made no effort" to conduct the types of outreach mandated in the RFA

> "The Commission compounds this error by generally summarizing the notices in the Federal Register. Important issues may frequently be buried in footnotes or material left out of the synopsis….Given the length of the Commission's issuances and the difficulty in obtaining them on a timely basis, the Commission forecloses substantial small-business participation. Furthermore, the Commission, except in the rarest of circumstances, has made no effort to conduct the type of outreach mandated in the RFA."

The author believes that the FCC has failed small competitive companies.

> "The Commission's compliance is, by no means, the worst in the federal bureaucracy. In fact, the Commission, despite its failures, often makes efforts at reducing the impact of its regulations on small entities. However, the goal of the RFA is to inculcate, at the earliest stages of rulemaking, the notion that regulatory flexibility is needed for small businesses. The Commission, like most federal agencies during the past fifteen years, has failed to achieve that goal".

The problems with these rulemakings seem to endemic throughout the last few years as well. Take the order Titled " Intercarrier Compensation for ISP-Bound Traffic**,** [39]

> "In these filings, the Office of Advocacy raises significant issues regarding our description, in the IRFA, of small entities to which our rules will apply, and the discussion of significant alternatives considered and rejected…. Specifically, the Office of Advocacy argues that the Commission has failed accurately to identify all small entities affected by the rulemaking by refusing to characterize small incumbent local exchange carriers (LECs), and failing to identify small ISPs, as small entities….
>
> "The Office of Advocacy also states that Internet service providers (ISPs) are directly affected by our actions, and therefore should be included in our regulatory flexibility analysis. We find, however, that rates charged to ISPs are only indirectly affected by our actions. We have, nonetheless, briefly discussed the effect on ISPs in the primary text of this Order."

SBA also comments on the fact that the FCC failed to address alternatives.

> "Last, the Office of Advocacy also argues that the Commission has failed to adequately address significant alternatives that accomplish our stated objective and minimize any significant economic impact on small entities".

The FCC answered that they asked small businesses to respond to their alternatives.

> "We note that, in the IRFA, we described the nature and effect of our proposed actions, and encouraged small entities to comment (including giving comment on possible alternatives). We also specifically sought comment on the two alternative proposals for implementing intercarrier compensation - one that resolved intercarrier compensation pursuant to the negotiation and arbitration process set forth in Section 252, and another that would have had us adopt a set of federal rules to govern such intercarrier compensation. We believe, therefore, that small entities had a sufficient opportunity to comment on alternative proposals."

TeleTruth, in an interview with SBA staff found that they know of ***no*** comments ever sent by an ISP in response to an IRFA. This reality cannot be squared with the Commission's affirmative obligations to make its proposals comprehensible to small entities and to actively solicit their input.

In short, there is ample proof that the FCC has ignored the protests of SBA and other groups to change their manner of doing these IRFA and RFA processes and analysis, and they have failed the small businesses and competitors

.

PART III: The FCC Failed to Present Proper Documents or Analyses: A Small Telecom Business Impact Study

This Small Telecom Business Impact Study was created by New Networks Institute for TeleTruth.

This section of these Comments provides a discussion of the current ISP (and CLEC) DSL marketplace. TeleTruth urges the Commission to consider this information in formulating its final decisions in these matters, as well as in RFA issues in these and future proceedings.

We will focus on small Internet Providers because of the extensive amount of data already collected by New Networks Institute, including national surveys, filings, comments, articles, and law suits, among other items.

We should also make clear the fact that TeleTruth is a customer coalition that includes small businesses, and small ISP and CLEC competitors. TeleTruth's board includes a number of ISPs and CLECs.

11) The ISP Marketplace

Internet Service Providers (ISPs) are mostly comprised of a rare breed of entrepreneurs who, at their own expense, clearly saw the need to supply customers with the foundations of the Digital Age -- Internet and web service provision, DSL services, and everything from e-mail to the creation of web sites. This group that has been the real innovators of our Digital Future, not the monopolies who supply local phone service, such as the Bell companies.

And alongside of this marketplace has also been the growth of the Data CLECs ("D-LECs") and CLECs who offer local voice services, though many companies offer both voice and data services .

As we will discuss: For the last 6 years,

- The Bell companies have been continually harming the ability of ISPs and CLECs to offer DSL services over the local phone networks.
- The Commission has largely failed to protect these small ISP and CLEC companies from ILEC refusals to abide by binding rules, and this lack of enforcement has slowed the deployment of DSL in America.
- The harm to ISPs and CLECs is a harm to small business customers.
- The ISPs and CLEC offer unique products that the Bells and Cable companies do not offer.

First, we will discuss the size of the marketplace, including customers and revenues.

12) Counting the ISP Small Business Market

As the opening quote of this documents announces, the FCC's decision could destroy the entire ISP market, and TeleTruth as well as most analysts agree with that assessment. Therefore, it is very important to understand how many companies will be affected by the FCC's rulings.

There are a number of sources that need to be discussed about the size of the market.

The FCC's information was supplied by the SBA. According to the SBA, there were 2940 small ISPs. As we pointed out previously, this statistic appears to be from 1997, before the growth of the entire Dot.com and Internet marketplace.

> "41. Internet Service Providers. Under the new NAICS codes, SBA has developed a small business size standard for ``On-line Information Services," NAICS Code 514191. According to SBA regulations, a small business under this category is one having annual receipts of $18 million or less. According to SBA's most recent data, there are a total of 2,829 firms with annual receipts of $9,999,999 or less, and an additional 111 firms with annual receipts of $10,000,000 or more. Thus, the number of On-line Information Services firms that are small under the SBA's $18 million size standard is between 2,829 and 2,940. Further, some of these Internet Service Providers (ISPs) might not be independently owned and operated. Consequently, we estimate that there are fewer than 2,940 small entity ISPs that may be affected by the decisions and rules of the present action."[40]

Another statistic we found from government sources was the published information for ALL ISPs in the Census. The new business identification codes (NAICs) that replaced the earlier (SIC) codes, shows that in the 1997 Census, there were 4,165 Internet Providers.

> "NAICS 514191: Online Information Services This U.S. industry comprises Internet access providers, Internet service providers, and similar establishments primarily engaged in providing direct access through telecommunications networks to computer-held information compiled or published by others. The data published with NAICS code 514191 are comprised of the following SIC industry 514191" [41]

On-line Information Services

Total Companies	4,165
Small Business	2,940

This means that the Small Business ISPs who qualify would be approximately 70% of the ISP market in terms of total companies for the year 1997.

However, there is a great deal of other data that the FCC should have quoted. For example, the most important source of ISP information is the ISP World's collection of ISP-market related companies and databases, including Boardwatch Magazine and ISP Planet, among others.

According to Broadwatch's most recent survey of ISPs in March 2001, there were 7,288 ISPs listed in their directory. [42]

> "Last year, we started the process of updating the database by deleting double entries. Even though we deleted a number of companies that had double entries, our ISP numbers still grew by over 2,200. This year we took the next step. Over the past six months, we proactively took steps to update our industry information. From July 2000 to March 2001, ISPworld Market Analyst Tisha White scrubbed the ISP list to find those providers that are out of business, were sold or took the time to register but did not provide any information. Because of this effort, for the first time since the Directory was published in 1997, the number of ISPs we are reporting in North America is down. **As of March 2001, 7,288 ISPs in North America have registered on our Web site."** (emphasis added)

TeleTruth believes that for the year 2002, the answer lies somewhere between the government numbers and the ISP Directory. However, the FCC is making decisions based on old, inaccurate data, and considering the impacts that can occur, it is clear that they are in violation of the IRFA's mandate to give accurate data. Also, the FCC could at any time call the ISP Directory and confirm the information through various means. With billions of dollars, thousands of companies and millions of customers effected, this work would be critical to making an informed decision.

13) The Number of Online Customers

According to the National Telecommunications and Information Administration's (NTIA) recent study, "A Nation Online: How Americans Are Expanding Their Use of the Internet", released February 2002, half of America, 143 million people, were online as of September 2001.[43]

> "More than half of the nation is now online. In September 2001, 143 million Americans (about 54 percent of the population) were using the Internet — an increase of 26 million in 13 months. In September 2001, 174

> million people (or 66 percent of the population) in the United States used computers."

And who's handling all those Internet surfers? Another series of numbers from the recent 2001 survey of ISP Planet claims that the Top 25 ISP companies control 45% of the marketplace (including DSL conductivity). This includes AOL, MSN, AT&T, Time Warner, the Bell companies, Earthlink. However, the majority, 55% of the market is controlled by the other, mostly small ISPs ---- representing a whopping 77 million customers nationwide http://www.isp-planet.com/research/rankings/usa_history_q42001.html

> "Of course, 54.2 percent of American's accessing the Internet and the World Wide Web do so through thousands of independent ISPs scattered across the country, which totals some 77.5 million subscribers nationwide."[44]

NOTE: It is hard if not impossible to compare all of these statistics with rigor because there are missing pieces of information.--- what is the number of total accounts and how does it compare to the total user population or what is the number of customers who use more than one account, or families who all use the same account, etc..

14) The Valuation, Revenues and Employees of the Small ISP Market.

If the amount of customers or the total amount of ISPs is still not an exacting piece of data, then the amount of revenues, staff, or the valuation of these companies is also more analytical artwork than exacting science.

For this analysis, we will use the Government supplied information, but with the caveat that that we consider their information to ***undercount***, not overcount, the marketplace. According to the Census, 1997, the entire ISP market averages out to a small business --- representing 4165 companies with average revenues of $8 million dollars and total industry revenues of 33.5 billion dollars.

Online Information Services, US Census Data, 1997

Total Companies	4,165
Total Employees	49,935
Revenues Avg.	$8,042,568
Total Payroll	$2,355,992
Industry Revenues	$33, 497, 299, 885
Payroll	$9,812, 706, 680

And the valuation of these companies are also very large. The chart below, compiled by ISP Planet, shows that the value of Dialup customer to be $678 in March 27, 2002 though it has decreased steadily since the arrival of broadband. [45]

History of Subscriber Values
(Source: ISP Planet)

February, 2002	$678
January, 2002	$888
December, 2001	$954
November, 2001	$1,093
October, 2001	$783
September, 2001	$665
August, 2001	$927
July, 2001	$1,090
June, 2001	$2,439
May, 2001	$2,459
April, 2001	$2,169

However, the fact that one customer is worth approximately three years worth of service is a sign that losses to any company of Dialup customers is harmful.

Out of these statistics what we see is that the ISP marketplace has been a fast growing industry made up of entrepreneurs. More work would be required by the FCC to qualify and quantify the size of the marketplace, though ISP World indicates that there are over 7000+ ISPs, almost all small business, who represent 75 million customers --- 1/2 of all online customers.

Also, SBA found that in 1997, the total ISP market was worth $33.5 billion and paid payrolls of $9.8 billion. Based on the information presented by ISP World, this revenue figure could be double or triple that. If customers are counted and the valuations made of the Dial-up customer valuations, the total for this marketplace would be worth triple the total revenues --- a very large number.

We will discuss the expected impacts these rulings could have on this marketplace in the next few sections. However, one thing is clear --- The FCC has No clue to the size and scope of the ISP marketplace today, and more research would be needed before even an educated guess could be made.

15) The Current Market Analysis Missing --Closing out the CLEC and ISP from Broadband

The TeleTruth Analysis: The current trend of customers is to leave Dialup and go to broadband, whether its cable modems or DSL. This is not a "new product" for customers, but it is still faster-better version what they currently have. "New Product" would denote seriously new applications, which today, because of the limitations of ADSL, the marketplace, while viable, is still not in revolutionary change -- just evolutionary change.

Therefore, ISPs offering DSL has been and continue to be the most viable next step for a customers to use broadband. Also, it is clear that the choice of cable modem is also not a 'new product' but an enhancement to current web and Internet use. And customers who choose cable modems are usually doing it out of convenience vs a dramatic difference in service offerings.

And so the FCC's current ruling harms ISPs and CLECs in that:

- The first Broadband NRPM and Unbundling rules would limit the CLEC from getting the necessary broadband services to resell to the ISP.
- In the actions that define DSL and Cable Modems as an Information Service, this would block the ISP from getting either the Wireline or Cable access for broadband resale.

Which brings us to the question the FCC refuses to answer or supply any data for in their IRFA.

- If the ISPs and CLECs are closed out of the broadband market places, then what happens to the entire industry -- the 70 % of the companies that handle approximately 50% of the entire ISP marketplace?

And while the rulings may or may not happen, there is another critical issue that needs to be addressed --- The FCC today is not actively defending the rights of the small ISPs and CLECs and this has caused serious problems for the current industry's health and growth.

16) FCC Has Not Acted to Fix ISP Problems, and These New NRPMs Do Nothing to Fix the Problems.

A true IRFA analysis about small business telecom competitors would conclude that the current FCC is in violation of the Telecom Act and all of its provisions.

To date, the FCC has not properly defended small business rights, especially the ISP and CLEC markets. In fact, the industry has consistently presented data to the FCC to defend the small businesses and it has fallen on deaf ears. Dave Robertson, the head of the Texas ISP

Association, (TISPA) recounted his meeting with Chairman Powell and senior staffers at the FCC Enforcement Bureau. [46]

> "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.newnetworks.com/SWBCOMPLAINTS0420.pdf

Another state ISP association, this time in California, is now fighting to have DSL oversight moved out of the FCC completely. A Complaint by the California ISP Association, CISPA, won the first round against SBC/Pac Bell. The California PUC has ruled (March 29th2002) that they have jurisdiction over DSL and they are willing to hear a case that Bell is discriminating against small ISPs who want to sell DSL in California.

> "This complaint seeks to enjoin SBC subsidiaries Pacific Bell and SBC-ASI from illegally discriminating against and refusing to provide Internet Service Providers ("ISPs") not affiliated with SBC and their customers with reasonable and adequate digital subscriber line ("DSL") transport services, on which services California consumers increasingly rely for high-speed Internet connections, and over which SBC-ASI has a virtual monopoly in most of California.
>
> "Through this unlawful denial of equal and adequate DSL services to independent ISPs and their customers -- conduct that violates California public utility law and the decisions of the California Public Utilities Commission ("CPUC") -- Pacific Bell and SBC-ASI are seeking to establish SBC affiliates, such as Pacific Bell Internet and Prodigy Communications

> Corporation, as the sole significant providers of ISP services that utilize DSL transport in California. SBC, through its California subsidiaries Pacific Bell and SBC-ASI, is thus seeking to leverage its control over DSL infrastructure into a new monopoly in California over both the provision of broadband Internet access and the delivery of Internet content, thereby fundamentally limiting consumer choice and eliminating the diversity of services now offered by independent ISPs. "[47]

There are thousands of other documents, including filings, Comments, etc., at both the state and federal level that show that the small ISPs and CLECs are regularly being harmed and that enforcement is totally missing.

An article "Disconnect How Bush and Michael Powell are Killing the New Economy. And how to turn it around" by Karen Kornbluh that appeared in Washington Monthly, Oct. 2001, lays out how Rhythms, a bankrupt CLEC who provided DSL with their affiliate ISPs, was harmed by this lack of enforcement.
http://www.washingtonmonthly.com/features/2001/0110.kornbluh.html

More recently, another Washington Post article, "Cheating or Competing", April 12th, 2002, tells the story of how other CLECs, including Cavalier and Ntegrity, that offered local phone competition had a litany of problems that caused the local Bell monopoly.
http://www.washingtonpost.com/wp-dyn/articles/A37318-2002Apr12.html

17) Current Broadband Marketplace ----- ISPs Who Do and Do Not Offer DSL

New Networks Institute's surveys of Internet Providers gives us a glimpse into the FCC's current handling of ISPs and we need to bring this into the analysis. According to our nationwide survey, approximately half of ISPs offer DSL today. [48]

ISPs Who Offer DSL, 2001

57% Offer DSL
71% of those who offer DSL do it through a CLEC
43% do not offer DSL,

A little over half (57%) of the responding US ISPs offer DSL. However, it is clear from this survey that many ISPs are being blocked from offering DSL, or have stopped all together for a number of reasons. As the exhibit below shows, of those that do not offer DSL, the primary reasons are: (Many ISPs had more than one reason for the problems.)

- 59% of ISPs said that the Bell's pricing to ISPs does not allow the ISP to earn a profit,
- 35% who do not offer DSL said that there was no competitive phone company alternative

- 35% stated that the phone companies' overall treatment of their services was "sub-standard" in terms of getting installations or that there were serious problems with the phonelines.

Primary Reasons the ISPs do Not Offer DSL

59% state that they do not offer because it is unprofitable
35% did not have a viable alternative, or the CLEC went out of business
35% had line problems or problems with an uncooperative local company.

Service problems caused by the Bells can be so bad that the ISP can not offer a quality product. As one Texas ISP states:

> "We tried but stopped because of installation delays, circuits wired wrong and circuits that did work but were constantly going down. Bell was killing our business and giving us a bad reputation by saying the problem was ours. We had to pull the plug and asked all customers to find an alternative."

The harm caused by the Bell companies means that many ISP customers will not have the ability to use their ISP for DSL. As one ISP wrote:

> "The complexities created and the poor level of cooperation from our phone company makes this a losing business proposition. We are not expanding the business until we see changes that will allow us to compete fairly."

The prices and handling of the Bells resale of DSL to the ISPs has also played a factor in harming the ISP's ability to compete. As one Texas ISP put it:

> "We are no longer able to add new DSL services in the Southwestern Bell (SWB) area as SWB is trying to force us to sign a new, unreasonable contract. SWB is threatening to turn off our existing SWB based DSL customers after 1/1/02 if we do not sign the new contract."

The Texas ISP Association filed a Complaint over this issue, and as we mentioned, there is currently another battle being fought by the California ISP association (CISPA).[49]

Sadly, this situation is not new. In our Nationwide ISP Survey of 2000, the same issues were prevalent dealing with broadband. This exact same theme was echoed by a Washington ISP who uses US West.[50]

> "US West is finally beginning to offer DSL in our service area (a very small part of it) we are unable to offer it. They have cherry picked and so diluted the market there is no economical way for us to enter the current or projected market and compete. US West and the other ILECs are SELLING BELOW COST. The words 'predatory pricing' keep echoing in my mind."

18) CLEC Have Been Harmed by the Bell Companies.

Most industry analysts believe that the actions at the FCC will harm the DLECs, the competitive companies that handle DSL and Data services, and the CLECs, who offer both voice and DSL services. Since most of these companies are dwarfed by the Bell companies, the industry is comprised of mostly small independent companies. And it is also clear in previous quotes --- the FCC does not have a clue about the number of small companies vs the larger ones.

However, there are three important issues dealing with CLECs regardless of their size:

- First, the CLECs will be harmed by the decisions in these proceedings --- in the case of the resale of broadband, or the definition of DSL as an information service, these rulings would stifle these companies ability to grow.

- Secondly, the ISPs are also inextricably to this marketplace because ISPs resell the DSL from these CLECs. Companies, such as Covad, Focal, or New Edge Networks all have ISPs as customers who offer the CLEC DSL bundled with their own ISP services. So if the CLECs go out of business, the are numbers of ISPs who will be dragged down and not have any other provider to go to, since the Bells will control their DSL and the ISPs will be restricted from the cable networks. Large ISPs may fair better than smaller ISPs, and this analysis is of course important -- but missing.

- Thirdly, there are the small business customers of these businesses -- the small businesses that depend on these companies.

The current situation is not pleasant for the CLECs. The FCC has not enforced the laws.

As we discussed in the ISP section, the laws are not being enforced -- and this is for both voice as well as current DSL deployments. The situation is not new either. Covad Communications, a CLEC that sells competitive DSL, testified in front of the Massachusetts Department of Telecommunications and Energy (DTE) that the Bell caused problems are continuous -- everything from not completing the wiring installation to playing favoritism with its own DSL product. (NOTE: Bell Atlantic Massachusetts is now Verizon.) [51]

- "Bell Atlantic fails to complete office wiring on time;
- Bell Atlantic fails to complete loop installation work (activities in the field) on time;
- A significant number of loop orders require multiple dispatches.
- On average, it takes nearly 40 days for Covad to provide DSL service to its end users.
- The primary reason for this long interval is BA-MA's (Bell Atlantic-Massachusetts)
- failure to complete loop installations on time. This interval starkly contrasts with the
- interval BA-MA promises its DSL customers. BA-MA has promised its DSL customers
- service in 7-10 days."

Hundreds of CLECs and ISPs have gone out of business over the last year. Clark McLeod, Chairman and CEO, of McLeod USA testified at "Competition in the Local Telephone Marketplace", a Senate Commerce Committee hearing on June 19th, 2001. He clearly stated that the local Bell monopolies have not opened their networks to competitors and the lack of enforcement of the current laws has harmed the entire CLEC business. [52]

Mr McLeod stated:

> "Local competition has developed much slower than long distance competition. The reason is that the Bell companies have successfully denied competitors equal access (both economic and functional) to their local network."[53]

His point of view is that the networks are not open and there is no "equal access" today.

> "The answer for local competition is to mandate equal access and enforce it. Unfortunately, there is not equal access today, either economic or functional. Economic equal access does not exist today, because competitors are not getting what they pay for. Competitors pay for 100% service from the Bells but receive far less."[54]

And he believes that without fixing the current Bell caused problems there will not be an industry.

> "Competitors, after spending billions of dollars, have averaged a 1% marketshare gain per year. If you extrapolate, there will be no one is this room still alive by the time we have meaningful local competition. And in fact, competition may die enroute. Congress needs to finish what was started in 1996 and take action now to mandate equal access and enforce it."[55]

If the harm to the CLEC market continues and they are restricted from using the customer-funded wireline networks, then not only will the CLEC markets be harmed, but also the small

ISP and their customers will also be effected. To read more about the problems in the CLEC markets see: http://www.newnetworks.com/clecharm.htm

19) The FCC Has Failed To Perform A Proper Analysis Of Impacts On ALL US Small Businesses --- The "Chain-of-Choice"

Violation: The FCC is in violation of not providing an impact to the small business customers of these companies. --- "The Chain-of-Choice"

A "class" of small business that is totally missing from ALL of the IRFAs are the small businesses that depends on these ISPs and CLECs --- The "Chain of Choice". The ISP and CLEC companies are not the only loser if the FCC creates a duopoly. The duopoly will block choice, innovation, and the small businesses across America are the losers. The "Chain-of-Choice'--- the small business customer, the ISP and the CLEC all are partners in services. And all of them in fact depend on using the phone networks supplied by the monopoly provider. If the ISP or CLEC has a problem caused by the local phone company, it also effects the customer.

The FCC writes:

> "Through this proceeding, the Commission intends to further its goals of encouraging the ubiquitous availability of broadband to all Americans, promoting the development and deployment of multiple broadband platforms, fostering investment and innovation in a competitive broadband market, and developing an analytical framework for regulating broadband that is consistent, to the extent possible, across multiple platforms."[56]

However, the FCC in no way encourages competition and uses of the local networks. Instead the FCC talks broadly about platforms --- though they offer no proof that their plan will encourage broadband, foster investment or innovation.

The FCC has failed to identify the fact that it has been the independent ISP and CLEC that have created the Digital Age, not the Bell companies--- and it is best to have many companies use the wireline networks, not just the Bell companies. As we previously mentioned, it was the independent ISPs and CLECs and entrepreneurs who are the innovators, bringing to marketplace web sites, Internet , email, web hosting and a host of other innovations. The Bell companies were not responsible for the web or Internet, have repeatedly filed to charge more for these services and have done everything possible to eliminate the primary drivers of innovation and the distribution of these technologies.

And we have documented in numerous places the fact that the Bell reneged on all of their fiber-optic plans to the home -- even when they were given relaxed regulations and money to build these new networks.[57]

The ISPs are smaller local firms that have not lost sight of customer needs, and as a result, will usually deliver a higher-quality product. If this segment of the industry does not survive, then the entire telecom and tech sector is hurt, and the American public is left with no choice but a monopoly product with little innovation, cost savings, or quality customer service.

Additionally, a survey conducted by NetAction of customer satisfaction of DSL, (released 7/25/01) clearly showed that competitors have a smaller percentage of complaints as compared to the Bell company services. [58]

> "Broadband users who get service from competitive DSL providers or cable companies have a smaller percentage of complaints than DSL users served by the incumbent regional Bell monopolies, according to a NetAction report on consumer satisfaction."
>
> "In general, the Bells' customers had to wait longer to have service installed, were more likely to have been billed before service commenced, and are less satisfied with technical support and customer service,"

Once again it is clear that customers will lose choice and quality services if the Bell companies succeed in harming competition.

20) Failure To Perform Proper Analysis Of What The Small Business Telecom Providers Offer That Is Unique?

Violation: The FCC is in Violation of the IFRA for not examining the unique services the competitors offer that the Bells do not.

Voice over IP and SDSL are just two innovative areas that the Bell companies are blocking and harming. And yet they are services and the essential technologies for the small business.

SDSL is the two-way DSL product that neither the Bell nor the Cable companies offer and it is the small business enabler-- the lower cost alternative to small company high speed services. The Bell companies offer two alternatives to broadband -- a "T1", which is an expensive business service that comprises of a bandwidth the equivalent of 24 lines--- and can handle both voice or data calls. The other service is ADSL, which is essentially a one-way product for residential use.

Covad and other competitors with their ISPs offer an in-between product -- SDSL, a two-way product that is a low-cost equivalent for a small business of the more expensive T1. The Bells will never seriously offer this product because it cannibalizes their T1 service. And the cable companies do not offer this service or will with any rigor for years.

Therefore, there is a strong reason for the ISPs and CLECs to exist to deliver new, innovative products that the other monopolies will not offer --- and a duopoly will never fulfill.

Voice over IP -- Another interesting fact is that the Bells ADSL product has serious flaws as compared to the Competitor product. The current Bell product has a technical glitch that makes it hard to use "voice over IP" services, the innovative competitor to regular voice phone services that uses the Internet as its network to deliver voice calls. It can also block streaming video because of the service limitations. The Competitive DSL and SDSL products do not have these problems.
The FCC is in violation of the IRFA for not including these new technologies brought by these small companies as having an impact on the overall health of the US.

Markets that are not covered by the Bell or Cable Companies. --- In the numerous discussions of the Bell Companies and Cable companies becoming the Competitive duopoly, one of the most overlooked items is the fact that there are many rural areas of the country where the competitive local phone companies -- or even the Internet providers, have been the active force to deliver dial-up services and broadband. For example, New Edge Networks provides broadband to smaller markets and serves over 100 markets with NO broadband alternative Baby Bell, Cable or other service provider.[59]

Another case is the Willowbrook Metropolitan District in Summit County, Colorado, a geographic area not served by the ILEC DSL (Qwest) nor by the cable modem company (AT&T). In fact, the Ruby Ranch Internet Cooperative Association was formed to deliver services to this area and it has been a long struggle to get US West to actually give these independent ISPs the "subloops" which are needed to connect the DSL technology, known as "DSLAM" to the subscriber homes. (See www.rric.net which describes this independent groups' process to give these underserved customers service.) The Coop found that the technology part was easy... It's getting access from the local monopoly that is the hard part. It required the group to file an informal complaint with the FCC, and required arbitration from the state Commission.

> "By far the biggest challenge faced by the Coop, a challenge that dwarfed any of the Coop's technical and financial challenges, was gaining access to subloops from Qwest under the Telecommunications Act of 1996. (The subloops are needed to connect the DSLAM to the subscriber homes. The buried telephone cable in our neighborhood has some three times as many subloops as are actually needed for voice service, and the subloops we wish to rent are among the hundreds of spare subloops which otherwise would generate no revenue for Qwest.) The course of negotiations was such that the Coop found it necessary to file an informal complaint with the Federal Communications Commission and subsequently found it necessary to pursue arbitration before the Colorado Public Service Commission ("CoPUC")." [60]

21) Summary of Impacts to Small Business Customers, ISPs and CLECs.

Violation: The FCC is in violation of the IRFA for not providing an analysis about the harm to investment, revenues, jobs, and other tangible and intangible impacts to the ISP and CLEC market segment, as well as the number of small business customer issues.

As we have demonstrated, the current environment is harming the ISPs and CLECs and these new laws will put the nail in the coffin. NNI estimates that the majority of small ISPs and CLECs will be harmed, costing billions of dollars of revenues, jobs, etc.

Using the data supplied by the SBA on these companies, of the 2940 companies, we expect over half to have impacts, including the closing of their business. Therefore, we are looking at approximately 1500 companies to have serious impacts on their business. Is this acceptable?

On the revenue side, if the we expect [61]

- approximately $8 billion in loses, potentially more, as the number of customers leave dial-up and go to broadband.
- This will leave over approximately 10-15 million people with a problem of having to get another provider. As we point out, in the case of Small businesses who depend on specific products, such as SDSL, web hosting and other services, this will cause serious problems.

Secondly, the recent collapse of the CLEC market which was in part caused by the Bell companies will continue because the small CLECs will be unable to purchase needed network services. This will also effect the entire segment from investment and capital, not to mention the ISPs and customers.

END NOTES

[1] "Taxing Proposal For Broadband Internet Access" Patty Fusco, Managing Editor, ISP Planet, March 1, 2002http://isp-planet.com/politics/2002/broadband_tax.html

[2] 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."

[3] *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*

[4] For example, after several decades of asymmetric regulation, in which trucking firms became well-established as freight carriers and private automobiles became well-established as a means of personal transportation, railroads were in many respects deregulated themselves. But this occurred only after *decades*, not when automotive competition was still nascent. In some cases, of course, Congress builds a standard for deregulation into the relevant statute. For example, while Congress regulated cable rates in 1992, it stated that when a competing provider (basically, in the real world, DBS) reached a 15% market share, cable rate regulation would end. In telecom, Congress provided in Section 10 of the Act a means for deregulating ILECs when market conditions warrant. But for the key procompetitive requirements of Sections 251(c) and 271, Congress expressly mandated that deregulation was inappropriate until the procompetitive requirements of those sections had been "fully implemented." The minuscule market shares of CLECs — and the continuing problems that CLECs face in making use of unbundled network elements and collocation — show that significant deregulation of the ILECs in this regard is not only a bad idea — it's also against the law.

[5] By 2000, half of America was supposed to be wired, and by 2002, approximately $67 billion has been collected in excess charges on customer's phonebills and tax write-offs that were never used for new construction. Data is updated from "How the Bells Stole America's Digital Future", Published by NetAction, http://www.netaction.org/broadband/bells/ This information was originally presented in "The Unauthorized Bio of the Baby Bells", published by New Networks Institute, 1998. In some states, such as Louisiana or Washington, the Bell companies have also been able to 'cross-subsidize' their DSL rollout, meaning that they have been able to get state regulators to allow them to use excess charges on customer phone bills

to pay for the roll out of DSL. This is an anti-competitive, but more importantly, these new proposed laws would allow the Bell company to own those services without having to resell them for competitors to also use. New Networks Institute has filed related Comments on this topic. See: http://www.newnetworks.com/nni706noi2001.htm

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

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

[8] Ibid.

[9] Ibid.

[10] ibid.

[11] "CC Docket No. 01-337'--- "Review of Regulatory Requirements for Incumbent LEC Broadband Telecommunications Services".

[12] http://www.fcc.gov/Bureaus/Common_Carrier/News_Releases/2002/nrcc0202.html

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

[14] Ibid.

[15] Ibid.

[16] CC Docket 02-33 "Appropriate Framework for Access to the Internet Over Wireline Facilities,

[17] Ibid.

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

[19] 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

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

[21] "Top U.S. ISPs by Subscriber: Analysis of 2001 Year End Reports" ISP Planet, 2/11/2002 http://www.isp-planet.com/research/rankings/usa_history_q42001.html

[22] From the Federal Register for CC Docket 02-33 "Appropriate Framework for Access to the Internet Over Wireline

[23] Ibid.

[24] Ibid.

[25] Reply Comments of SBA, Office of Advocacy, CC Docket No. 98-147.

[26] Ibid.

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

[28] From the Federal Register for CC Docket 02-33 "Appropriate Framework for Access to the Internet Over Wireline

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

[30] From the Federal Register for CC Docket 02-33 "Appropriate Framework for Access to the Internet Over Wireline

[31] Ibid.

[32] Ibid.

[33] Reply Comments by TISPA, 1998 Biennial Regulatory Review, Review of Computer III ONA, Safeguards, and Requirements, CC Docket No. 98-10, April 30th, 2001

[34] Coalition of California ISPs Breaks off Settlement Talks with SBC Communications, Pursues Complaint before State PUC, CISPA, October 1st, 2001

[35] . "Promotion of Competitive Networks in Local Telecommunications Markets, SBA Comments , WT Docket No. 99-217, September 2, 1999"

[36] Ibid.

[37] Ibid.

[38] " 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*

[39] " Intercarrier Compensation for ISP-Bound Traffic, CC Docket No. 99-68, ORDER ON REMAND AND REPORT AND ORDER" Released: April 27, 2001.

[40] From the Federal Register for CC Docket 02-33 "Appropriate Framework for Access to the Internet Over Wireline

[41] Statistic directly from http://www.census.gov

[42] "Introduction To The Directory Of Internet Service Providers," 13th Edition , by Todd Judd Erickson. http://www.ispworld.com/isp/Introduction.htm

[43] , "A Nation Online: How Americans Are Expanding Their Use of the Internet", NTIA, released February 2002, http://www.ntia.doc.gov/ntiahome/dn/index.html

[44] "Introduction To The Directory Of Internet Service Providers," 13th Edition , by Todd Judd Erickson. http://www.ispworld.com/isp/Introduction.htm

[45]History of Subscriber Values, March 27th, 2002

http://www.isp-planet.com/research/subvalues/subvalues_history.html

[46] Based on an email posted by David Robertson to Cybertelecom, March 10th, 2001

[47] BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA, California ISP Association, Inc., Complainant, v. Pacific Bell Telephone Company (U-1001-C); SBC Advanced Solutions, Inc. (U-6346-C) and Does 1-20, , Defendants. Case 01-07-027 ASSIGNED COMMISSIONER'S AND ADMINISTRATIVE LAW JUDGE'S RULING DENYING DEFANDANTS' MOTION TO DISMISS, 3/28/2002,

[48] 3rd Nationwide Annual Survey of Internet Service Providers (ISPs), released December 14th, 2001 http://www.newnetworks.com/prispsurvey2001.htm

[4949] BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA, California ISP Association, Inc., Complainant, v. Pacific Bell Telephone Company (U-1001-C); SBC Advanced Solutions, Inc. (U-6346-C) and Does 1-20, , Defendants. Case 01-07-027 ASSIGNED COMMISSIONER'S AND ADMINISTRATIVE LAW JUDGE'S RULING DENYING DEFANDANTS' MOTION TO DISMISS, 3/28/2002,

[50] Nationwide Survey of ISPs, with USISPA., April 12th, 2000, http://www.newnetworks.com/isprelease.html

[51]"Summary Of Testimony" DTE 99-271, Testimony Of John Berard, Michael Clancy, And Minda Cutcher On Behalf Of Covad Communications Company.

[52] . Clark McLeod, Chairman and CEO, of McLeod USA testimony at "Competition in the Local Telephone Marketplace", a Senate Commerce Committee hearing on June 19th, 2001. http://www.mccleodusa.com/html/ir/presentations.php3

[53] Ibid.

[54] Ibid.

[55] Ibid.

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

[57] See: "How the Bells Stole America's Digital Future", published by NetAction, 6/22/00. http://www.netaction.org/broadband/bells/

[58] "DSL Customer Satisfaction NetAction's Survey of DSL & Cable Broadband Users' Experience With
Customer Service & Technical Support", released 7/25/01:
http://www.netaction.org/broadband/dsl/

[59] Online Posting by Dan Moffat, President of New Edge Networks, 4/26/02

[60] see: www.rric.net

[61] We estimate that of the 2800 hundred companies under 10 million half could go out of business, We estimate an avg. of $5 million a company, for 7 billion in losses. We take 55 companies who average 14 million and there an additional $770 million in losses. The average number of customers was estimated from these ISPs.