

In the Matter of)
)
Restoring Internet Freedom) WC Docket 17-108

service, and seek assurance they will continue to be able to do so notwithstanding a decision by the Commission to reclassify BIAS as an information service.

I. BACKGROUND

In its 2005 *Wireline Broadband Order*,³ the Commission determined that broadband internet access services offered by facilities-based wireline carriers were “information services” outside the scope of the Commission’s Title II jurisdiction.⁴ However, the 2005 *Order* permitted facilities-based wireline carriers to continue to offer the transmission component of BIAS (often referred to as digital subscriber line or “DSL” services) on a common carriage basis.⁵ Carriers offering broadband transmission in this manner could do so under tariff, or could use non-tariff arrangements.⁶

Ten years later, after extensive proceedings, the Commission decided to classify BIAS as a Title II service.⁷ In connection with this reclassification, the Commission decided to grant forbearance from numerous provisions of Title II and its own rules governing the provision of common carrier services, including provisions relating to rate regulation and last-mile unbundling.⁸ The *Title II Order* also affirmatively prohibited carriers from tariffing BIAS, but consistent with the approach taken in the 2005 *Order* explicitly permitted wireline carriers to continue tariffing their broadband transmission services.⁹ The *Title II Order* made clear such

³ *Appropriate Framework for Broadband Access to the Internet over Wireline Facilities*, CC Docket No. 02-33, et al. Report and Order and Notice of Proposed Rulemaking, 20 FCC Rcd. 14853 (2005) (2005 *Order*).

⁴ *Id.* ¶ 12.

⁵ *Id.* ¶ 138.

⁶ *Id.* ¶ 94.

⁷ *See Protecting and Promoting the Open Internet*, WC Docket No. 14-28, Report and Order on Remand, Declaratory Ruling, and Order, 30 FCC Rcd. 5601 (2015) (*Title II Order*).

⁸ *See id.* ¶¶ 37, 417.

⁹ *Id.* ¶ 460.

tariffed services continued to be subject to the full panoply of Title II obligations, including USF contribution obligations.¹⁰

Finally, in 2016, the Commission issued its *Rate of Return USF Reform Order*, which, among other things, extensively revised USF support mechanisms for rate-of-return regulated (RoR) carriers. Among other things, the *Rate of Return USF Reform Order* created two paths for RoR carrier USF support; a model-based option for companies wishing to receive support based on the Commission's Alternative Cost Accounting Model (A-CAM) and a Broadband Loop Support (BLS) mechanism that replaced Interstate Common Line Support (ICLS) for non-model companies. That Order recognized that RoR carriers may offer broadband-only loops through their interstate access tariffs as an input to wireline broadband internet access service, and permitted carriers to begin charging a consumer broadband-only loop (CBOL) charge for consumer broadband-only loop services.¹¹ The *Rate of Return USF Reform Order* also permitted carriers to offer such consumer services on a detariffed basis, and established rules for allocating costs from special access services to the new CBOL service, but did not otherwise address or limit RLECs' ability to provide broadband internet access transmission services on a common carriage basis.

¹⁰ *Id.* (“[P]rior to this Order some incumbent local exchange carriers or other common carriers chose to offer Internet transmission services as telecommunications services subject to the full range of Title II requirements. Our forbearance with respect to broadband Internet access service does not encompass such services. As a result, such providers remain subject to the rights and obligations that arise under Title II and the Commission’s rules by virtue of their elective provision of such services, along with the rules adopted to preserve and protect the open Internet to the extent that those services fall within the scope of those rules.”)

¹¹ *Connect America Fund*, WC Docket No. 10-90, *ETC Annual Reports and Certifications*, WC Docket No. 14-58, *Developing a Unified Intercarrier Compensation Regime*, CC Docket No. 01-92, Report and Order, Order and Order on Reconsideration, and Further Notice of Proposed Rulemaking, 31 FCC Rcd. 3087 (2017) ¶¶ 192-198 (*Rate of Return USF Reform Order*).

The current NPRM proposes, among other things, to restore the prior Title I information service classification for BIAS offerings, and asks what effects removing Title II classification will have on the provisions of the Act from which the Commission forbore in the *Title II Order*.¹² It specifically seeks comment on the effect of reinstating an information service classification on providers that voluntarily offered broadband transmission on a common carrier basis under the *2005 Order's* framework.¹³ In particular, the NPRM asks if providers voluntarily electing to offer broadband transmission on a common carrier basis should be able to do so under the *Title II Order's* forbearance framework if the Commission reclassifies BIAS as an information service, and if not, whether any transition mechanisms would be required for such providers to enable them to revert to the *2005 Order's* framework. The NPRM also asks whether the Commission should extend forbearance to any other rules or statutory provisions for carriers that choose to offer broadband transmission on a common carrier basis.

II. THE COMMISSION SHOULD CONFIRM IN THIS PROCEEDING THAT BROADBAND TRANSMISSION MAY CONTINUE TO BE OFFERED BY RLECs AS A COMMON CARRIER SERVICE.

The Commission has wrestled with questions relating to the proper regulatory classification of broadband internet access services for nearly two decades.¹⁴ Throughout this period, however, it has continuously permitted RLECs to provide broadband internet transmission services to ISPs on a Title II common carriage basis, with substantial flexibility in deciding how such services may be offered (i.e., on a tariffed or non-tariffed basis). This has provided small carriers with much-needed regulatory certainty and stability as they have sought

¹² *NPRM* ¶¶ 64-65.

¹³ *Id.* ¶ 65.

¹⁴ *See, e.g., Federal-State Joint Board on Universal Service*, CC Docket No. 96-45, Report to Congress, 13 FCC Rcd. 11501 (1998).

to deploy and maintain broadband services to their customers. These carriers typically serve rural, sparsely-populated areas and obtain significant benefits from the provision of broadband transmission services on a common carriage basis, including availability of high-cost universal service support and the ability to participate in common tariff arrangements via the NECA pools. They accordingly should continue to have the option to offer wireline broadband transmission services in this manner.

The broadband transmission services currently offered by RLECs under tariff differ substantially from the broadband internet access services primarily at issue in this proceeding.¹⁵ Broadband transmission services do not provide end users with direct connectivity to the internet backbone or content, but instead enable data traffic generated by end users to be transported to an internet service providers' (ISPs) Access Service Connection Point over RLEC local exchange service facilities for subsequent interconnection with the internet backbone.¹⁶ These services are thus fundamentally different from the BIAS arrangements that are the subject of the NPRM's reclassification proposal, and as such should not be impacted by a decision in this proceeding to reclassify BIAS as an information service. Nevertheless, consistent with past practice, the Commission should confirm in any order adopted in response to the NPRM that RLECs will continue to have the ability to offer broadband internet transmission services under

¹⁵ As the Commission recently explained in the context of its proceeding on rural broadband USF reform, the term "wireline broadband Internet access service" refers to "a mass-market retail service by wire that provides the capability to transmit data to and receive data from all or substantially all Internet endpoints, including any capabilities that are incidental to and enable the operation of the communications service, but excluding dial-up Internet access service." *Rate of Return USF Reform Order* n.421.

¹⁶ See, e.g., *NECA Tariff No. 5*, Section 8.1.1, at 8-1. A DSL Access Service Connection Point is an interconnection point designated by the Telephone Company in NECA Tariff F.C.C. No. 4 at which the customer may interconnect its ADSL Access Service provided by the Telephone Company under this tariff or its wireline broadband Internet transmission service provided on a non-tariffed, common carrier basis with the tariffed, interstate access services. *Id.*

Title II, either pursuant to tariff or on a non-tariffed basis. Doing so will maintain the *status quo* and assure continued regulatory certainty for small providers of broadband internet transmission services.¹⁷

III. CONCLUSION

Regardless of the classification approach the Commission ultimately decides may be appropriate for broadband internet access services, the Commission should take care in this proceeding to assure carriers that currently offer their broadband transmission service on a common carrier basis that they may continue doing so notwithstanding a decision to forbear from the tariff filing requirements of section 203 of the Act.

Respectfully submitted,

NATIONAL EXCHANGE CARRIER
ASSOCIATION, Inc.

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By:
Richard A. Askoff
Its Attorney
80 South Jefferson Road
Whippany, NJ 07981
(973) 884-8000

¹⁷ The NPRM also seeks comment on whether the Commission should extend forbearance to any other rules or statutory provisions for carriers that choose to offer broadband transmission on a common carrier basis. *NPRM* ¶ 65. On June 14, 2017, NTCA-the Rural Broadband Association and the United States Telecom Association filed a petition seeking forbearance from USF contribution obligations imposed on broadband internet transmission services provided by RLECs on a common carriage basis. The requested forbearance relief would be temporary, pending completion of comprehensive USF contribution reform by the Commission. NECA agrees that temporary forbearance from USF contribution obligations is warranted, and accordingly supports prompt and favorable consideration of such relief in response to the NTCA/USTelecom petition.