

**Before the**  
**FEDERAL COMMUNICATIONS COMMISSION**  
**Washington, D.C. 20554**

In the Matter of	)	
	)	
Appropriate Framework for	)	CC Docket No. 02-33
Broadband Access to the Internet	)	
Over Wireline Facilities	)	
	)	
Universal Service Obligations	)	
Of Broadband Providers	)	
	)	
Computer III Further Remand	)	CC Dockets Nos.
Proceedings: Bell Operating	)	95-20, 98-10
Company Provision of Enhanced	)	
Services; 1998 Biennial Regulatory	)	
Review - Review of Computer II and	)	
ONA Safeguards and Requirements	)	

COMMENTS OF THE SECRETARY OF DEFENSE

The Secretary of Defense, through duly authorized counsel, pursuant to Section 201 of the Federal Property and Administrative Services Act of 1949, 40 USC Section 481, and the memorandum of understanding between the Department of Defense and the General Services Administration dated November 27, 1950, hereby files these

comments as Executive Agent of the National Communications System (NCS).<sup>1</sup>

**Statement of Interest and Position**

The Secretary's comments address national security and emergency preparedness (NS/EP) communications. The Commission requested comments on this issue in its NPRM herein in paragraphs 54 and 55.

NS/EP communications are currently provided by carriers subject to Title II of the Communications Act of 1934, as amended, and are implemented pursuant to various NCS programs authorized by the Commission's Rules and Regulations. Existing NCS programs for NS/EP communications, in order to remain relevant in the Twenty-First Century, must expand and grow with the rapidly evolving telecommunications infrastructure. This includes ensuring priority NS/EP communication services for voice, data, and video utilizing evolving technologies and capabilities, including Internet and broadband services. NS/EP communication functions will be best served if the

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<sup>1</sup> Executive Order No. 12472, "Assignment of National Security and Emergency Preparedness Telecommunications Functions", April 3, 1984 (49 Fed. Reg. 13471, 1984), established the National Communications System which consists of an administrative structure involving the Executive Agent, the National Security Emergency Preparedness Committee (originally the Committee of Principals, renamed in Executive Order 13231, "Critical Infrastructure Protection in the Information Age"), the Manager, and the telecommunications assets of the Federal organizations represented on the NS/EP Committee. Section 1(e) of EO 12472 designates the Secretary of Defense as Executive Agent of the NCS. There are 22 Federal agencies represented on the NS/EP Committee.

provisioning of broadband Internet access over wireline facilities remains classified as a "telecommunication service" that can be regulated by the Commission under Title II of the Act.

If the provisioning of wireline broadband Internet access service is classified as an "information service" subject to Title I of the Act, problems will arise if the NCS attempts to establish a program requiring priority wireline broadband Internet access service for NS/EP communications. Such a classification will necessitate adoption by the FCC of new rules or regulations in which its Title I ancillary jurisdiction, instead of Title II jurisdiction, is exercised to require the provisioning of priority wireline broadband Internet access service for NS/EP communications.

**National Security/Emergency Preparedness Communications Are Currently Provided by Title II Carriers**

Traditional Title II carriers currently provide priority communications required for NS/EP pursuant to programs administered by the NCS. An example is the Telecommunications Service Priority (TSP) System rules set forth in Part 64.401 of the Commission's Rules and

Regulations.<sup>2</sup> Another example is the Priority Access Service set forth in Part 64.402 of the Commission's Rules and Regulations.<sup>3</sup> In addition, the Government Emergency Telecommunications Service, while not provided under Commission rules, was the subject of a letter from the Commission staff in response to an inquiry about potential carrier liability under Section 202(a) of the Act.<sup>4</sup>

**Impact of the Commission's Tentative Conclusion that Wireline Broadband Internet Access Services are Information Services**

If broadband access to the Internet over wireline facilities is classified as an "information service" no longer covered under Title II of the Act, existing NCS programs applicable to Title II carriers will not apply to wireline broadband Internet access services. Accordingly, NS/EP telecommunication functions will be best served if such services are not reclassified as "information services." The Commission should reserve its Title II regulatory authority over such services, especially as they

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<sup>2</sup> "The communications common carrier shall maintain and provision and, if disrupted, restore facilities and services in accordance with the policies and procedures set forth in Appendix A to this part."

<sup>3</sup> "Commercial mobile radio service providers that elect to provide priority access service to National Security and Emergency Preparedness personnel shall provide priority access service in accordance with the policies and procedures set forth in Appendix B to this part."

<sup>4</sup> Letter from James R. Keegan, Chief, Domestic Facilities Branch, Common Carrier Bureau, to Carl W. Smith, National Communications System, August 30, 1995. The letter concluded, "...call-by-call priority is a feature of the federally managed GETS program. Lawful tariffs implementing that service have gone into effect; thus it appears that the request for declaratory ruling filed on November 29, 1993 is moot..."

pertain to NS/EP matters. If the Commission wishes to pursue a deregulatory scheme in this area, this should be accomplished by exercising its authority under 47 U.S.C. §160 to partially forbear from applying Title II regulations to such "telecommunications services" while continuing its regulation of NS/EP services. This approach would eliminate the need for the Commission to establish new Rules and Regulations pertaining to broadband Internet access at wireline facilities based on its Title I ancillary jurisdiction to support NS/EP functions, addressed next.

**The Commission's Ancillary Jurisdiction Under Title I As Authority to Require NS/EP Services**

If broadband access to the Internet over wireline facilities is not a Title II service, the Commission may nonetheless and should exercise its ancillary jurisdiction to assure the provision of NS/EP services in this area. Ancillary jurisdiction may be employed in the Commission's discretion where the Commission (1) Has subject matter jurisdiction over the communications at issue under Title I, and (2) Its assertion is reasonably required to perform an express statutory obligation. United States v. Southwestern Cable Co., 392 U.S. 157, 178 (1968).

## **I. The Commission Has Subject Matter Jurisdiction Over All Communications by Wire or Radio**

Subject matter jurisdiction for NS/EP communications and all other communications by wire or radio flows from three sections in Title I. Section 1 establishes the Commission "(f)or the purposes of regulating interstate and foreign commerce in communications by wire or radio..." Section 2 grants the Commission jurisdiction over "all interstate and foreign communications by wire or radio" and "all persons engaged within the United States in such communication..." Section 3 defines "communication by wire" and "communication by radio" as including "the transmission ... of writing, signs, signals, pictures and sounds of all kinds ... including the instrumentalities, facilities, apparatus, and services (among other things, the receipt, forwarding, and delivery of communications) incidental to such transmission".

Based on these three sections, it is evident that the existence of the communication by wire or radio and not the technology employed, broadband or otherwise, affords the Commission subject matter jurisdiction. While network convergence may complicate the drawing of distinctions between services and technologies, the Commission nonetheless has subject matter jurisdiction.

## **II. NS/EP Communications Are Reasonably Required to Perform an Express Statutory Obligation**

Broadband access to the Internet over wireline facilities functionally provides many of the same data and voice services now provided by traditional methods.

Without the exercise of the Commission's ancillary jurisdiction, the future of effective NS/EP communications is in doubt. Both the Commission's TSP and PAS rules were adopted in part to assure there would be one, nationwide system providing those services. NS/EP interests would not be served by a hodgepodge of potentially conflicting state and local regulations or service offerings selectively chosen by providers.

It is further noted that providers of broadband services are increasingly using what is termed a Service Level Agreement (SLA) rather than a tariff to set forth terms and conditions of service. An SLA is simply a contract between the provider and its customer that sets out, among other things, the grade or level of service. NS/EP interests are not parties to these contracts. Only Commission-asserted jurisdiction will ensure that NS/EP communications will receive a national-interest priority when necessary.<sup>5</sup>

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<sup>5</sup> A recent research note from Legg Mason Wood Walker, Inc., reported in Telecommunications Reports, April 1, 2002, page 4, highlights that

Finally, on numerous occasions the Commission has acknowledged the NS/EP mandate assigned in Title 1 of the Communications Act. Most recently, it cited Section I stating, "The purpose of our PAS Rules is to comply with our statutory mandate "to make available... a rapid, efficient Nation-wide...communication service...for the purpose of national defense, (and) for the purpose of promoting safety of life and property..." The PAS Rules enable CMRS providers to offer PAS to federal, state and local public safety personnel to help meet the Nation's NS/EP needs."<sup>6</sup> A similar mandate exists for other NS/EP communications, such as wireline broadband Internet access.

### **Conclusion**

NS/EP telecommunications needs will be best served if broadband wireline Internet access is not classified as an "information service." However, if reclassified, Title I ancillary jurisdiction may and should be used to assure the continued availability of NS/EP communications. This, in

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concern. As reported, the research note states that wireless carriers could offer premium level priority network access to "platinum" customers and realize millions of dollars in incremental cash flow. The idea reportedly occurred to the analysts following the federal government's call for priority access for NS/EP personnel after September 11, 2001. It is unlikely that federal, state and local NS/EP responders can outbid "platinum" subscribers for priority services. Importantly, it is not in the public interest that they be required to do so.

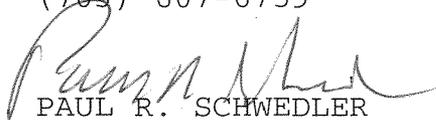
<sup>6</sup> In the Matter of VoiceStream Wireless Corporation Petition for Waiver of Section 64.402 of the Commission's Rules, WT docket No. 01-133, Memorandum Opinion and Order, released April 3, 2002.

turn, will necessitate new regulations to support NS/EP communications involving such access.

Respectfully submitted,



CARL WAYNE SMITH  
General Counsel  
Defense Information Systems Agency  
701 S. Courthouse Road  
Arlington, VA 22204  
(703) 607-6759



PAUL R. SCHWEDLER  
Deputy General Counsel, Regulatory  
and International Law  
Defense Information Systems Agency  
701 S. Courthouse Road  
Arlington, VA 22204  
(703) 607-6092



KEITH R. ALICH, LT COL, USAF  
Attorney-Advisor  
Defense Information Systems Agency  
701 S. Courthouse Road  
Arlington, VA 22204  
(703) 607-6096