

BEFORE THE  
FEDERAL COMMUNICATIONS COMMISSION  
WASHINGTON, D.C. 20554

In the Matter of

Appropriate Framework for Broadband  
Access to the Internet over Wireline  
Facilities

CC Docket No. 02-33

Universal Service Obligations of  
Broadband Providers

Computer III Further Remand  
Proceedings: Bell Operating Company  
Provision of Enhanced Services; 1998  
Biennial Regulatory Review – Review  
of Computer III and ONA Safeguards  
and Requirements

CC Dockets Nos. 95-20, 98-10

**COMMENTS OF THE PEOPLE OF THE STATE OF CALIFORNIA  
AND THE CALIFORNIA PUBLIC UTILITIES COMMISSION**

GARY M. COHEN  
LIONEL B. WILSON  
ELLEN S. LEVINE

505 Van Ness Ave.  
San Francisco, CA 94102  
Telephone: (415) 703-2047  
Fax: (415) 703-2262

Attorneys for the People of the  
State of California and the  
Public Utilities Commission of  
the  
State of California

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## **I. SUMMARY**

Over twenty years ago, the FCC recognized that basic transmission services underlying the provision of information services were bottleneck services that the FCC could, and should, regulate to ensure that incumbent local exchange carriers fairly and reasonably competed in offering their own unregulated information services. The FCC thus required that these facilities-based carriers unbundle and offer the transmission component of information services under tariff, and acquire such transmission service for their own information services under tariff. In the 1996 Act, Congress recognized that incumbent local exchange carriers continued to exercise bottleneck control over essential “last mile” transmission facilities” and required these carriers to share and unbundle these facilities at cost-based rates to competitors. In carrying out Congress’ mandate, the FCC has previously and consistently included facilities-based DSL service as a common carrier transmission service subject to the 1996 Act’s unbundling obligations.

Nothing has significantly changed since the adoption of federal unbundling and interconnection requirements to warrant their removal. The incumbent local exchange carriers continue to maintain exclusive control over essential, bottleneck transmission facilities required by competitors to provide their own information services using broadband technology. This is particularly true in California, where forty-five percent of its residents living in locales with access to broadband service have DSL service as their sole broadband option. There are presently no comparable alternatives for these customers, including cable modem service. Maintaining existing unbundling and

interconnection requirements is therefore critical to ensuring nondiscriminatory and reasonable access to these facilities if consumers are to realize the 1996 Act's promise and goal of having access to a choice of services from competing providers at lower prices.

Against this backdrop, the FCC's proposal to reclassify essential, bottleneck broadband transmission services, currently under the exclusive control of the incumbent local exchange carrier, is seriously misguided as a matter of public policy. Until the essential bottleneck controlled by the incumbent local exchange carrier is broken by continuing to enforce federal unbundling and interconnection requirements, the means to achieve 1996 Act's goals – through robust and viable competition – cannot be effectuated.

The FCC's proposal is also wrong as a matter of law. The bottleneck transmission facilities of the incumbent local exchange carrier are Title II common carrier services that the FCC is not free to reclassify. Nothing in the 1996 Act evidences an intent by Congress to exempt these services from the scope of Title II simply because they employ broadband technology. To the contrary, section 251 makes no distinction between conventional and high-speed transmission technologies in defining the obligations of incumbent local exchange carriers. And in section 706 Congress made clear that it expected the FCC and the states to use their regulatory tools over common carrier services to further the deployment of advanced telecommunication services, including DSL service, to all Americans. Among the tools identified is regulatory forbearance, a

tool defined in section 160 that gives the FCC the authority to forbear from applying Title II requirements to telecommunications transmission services under specified criteria. The FCC's proposal to reclassify broadband transmission services that the FCC itself consistently classified as common carriage constitutes an impermissible end-run around section 160.

In light of the above, California strongly urges the FCC to reconsider its proposal, and to maintain and enforce the federal safeguards and obligations currently in place. The need for regulatory certainty and stability is essential if the consumer benefits of the 1996 Act are to be finally and fully realized.

## **II. INTRODUCTION**

### **A. Background**

The People of the State of California and the California Public Utilities Commission ("California") respectfully submit these comments in response to the Notice of Proposed Rulemaking, issued February 15, 2002, by the Federal Communications Commission ("FCC") in the above-captioned proceedings. In its NPRM, the FCC seeks comment regarding the appropriate legal and policy framework for broadband access to the Internet provided over domestic wireline facilities, consistent with the Telecommunications Act of 1996 ("1996 Act" or "Act").

Broadband access to the Internet is defined by the FCC as "domestic wireline broadband Internet access services . . . over existing and future infrastructure of the traditional telephone network." NPRM, ¶ 1 n.1. As defined by the FCC, Internet access

services consists of both an information and transmission component. The information component consists of services other than transport, such as interaction with content on web sites and e-mail service. These services are classified as information services, and are not currently regulated under the Communications Act. The other component consists of the underlying transmission facilities upon which the information services are transported. These transmission facilities, when provided by facilities-based local exchange carriers, are the “last-mile” facilities to the customers over which incumbent facilities-based local exchange carriers (“ILECs”) have virtual monopoly control. Until now, transport service over these transmission facilities, which includes DSL service, has consistently been classified as a common carrier telecommunications service. Under federal law and regulation, transport service, when provided by facilities-based carriers, is required to be unbundled from the information services and offered on reasonable terms and conditions.

In these comments, California agrees that, once a customer’s call is transported to the Internet, a customer receives from an Internet Service Provider (“ISP”) “information” services. California, however, believes that the transmission services of facilities-based carriers used to connect the customer to the Internet in order to access the Internet and Internet-based information services, remain telecommunications services under Title II of the Act, regardless of the technology used. The fact that these the facilities-based carrier bundles transmission services with information services does not change the character of the transmission services as common carriage.

One of the principal objectives of the 1996 Act is to promote the widespread and rapid deployment of new telecommunications technologies, including high-speed access services, while at the same time preserving opportunities for broadband competition.<sup>1</sup> The 1996 Act further seeks through competition to secure lower prices and higher quality services as well as to enhance the choices of services available to consumers. The dual duties of nondiscrimination and interconnection “together . . . mandate a network architecture that prioritizes consumer choice, demonstrated by vigorous competition among telecommunications carriers.” AT&T v. City of Portland, 216 F.3d 871, 879 (9<sup>th</sup> Cir. 2000).

Congress recognized that the key to realizing competition in all markets was the requirement that the incumbent LEC share its network with competitors – by allowing the purchase of local telephone services at wholesale rates for resale to end-users, by allowing competitors to lease elements of the incumbent’s network that have been unbundled, and by allowing competitors to interconnect their own facilities with the incumbent’s network. AT&T Corp. v. Iowa Utils. Bd., 525 U.S. 366, 371 (1999). Except as otherwise expressly provided in the 1996 Act, Congress did not intend to relieve the ILECs of their network sharing obligations, notwithstanding that competing technologies (e.g., cable) might also spur local competition.

Currently, one of three California residents live in areas where DSL service is the sole means of gaining broadband transport to an ISP. The incumbent LECs are the

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<sup>1</sup> Preamble to 1996 Act.

dominant, and in many cases, the exclusive provider of broadband service in California. Certain customers in discrete metropolitan areas may also obtain transport to the Internet from cable operators via a cable modem transmission service over cable facilities; however, in California, primarily because of the substantial cost in upgrading cable facilities to provide cable modem service, such service is limited to certain suburban areas with spotty coverage in downtown urban areas. Other transport methods of accessing the Internet use wireless, broadcast, and unlicensed spectrum technologies. These technologies for transport to the Internet, however, are not widely available to California customers as a viable alternative to either DSL service or cable modem service.

The FCC has previously recognized that the market for high-speed transport services used by residential customers to access the Internet is local in nature:

The relevant geographic markets for residential high-speed Internet access services are local. That is, a consumers' choices are limited to those companies that offer high-speed Internet access services in his or her area, and the only way to obtain different choices is to move. While high-speed ISPs other than cable operators may offer service over different local areas (e.g., DSL or wireless), or may offer service over much wider areas, even nationally (e.g., satellite), a consumer's choices are dictated by what is offered in his or her locality.

In the Matter of Applications for Consent to the Transfer of Control of Licenses and Section 214 Authorizations by Time Warner Inc, and America Online, Inc., 16 FCC Rcd 6547, ¶ 74 (2001) ("Merger Order").

No substantial changes have occurred in the broadband market which would justify a new definition of the relevant residential market.

Because of the essential, bottleneck nature of DSL service, this service since its inception has been regulated as a tariffed, common carrier telecommunications service when provided by the ILEC. With respect to cable modem transmission service, however, the FCC has relied exclusively on market forces to promote competition for this access service. Rather than spurring competition, the FCC's reliance on market forces alone has generally led to an exclusive arrangement in each market between the operators of cable networks and a single ISP, either affiliated or non-affiliated. As a result, aside from otherwise applicable merger agreements, customers utilizing cable facilities effectively have no choice but to subscribe to the services of the ISP selected by the cable operator if they seek to access the Internet via cable facilities. The FCC has declined to require open access to the cable modem platform of cable providers that parallels the open access requirement applicable to the wireline platforms of incumbent LECs.<sup>2</sup>

On March 15, 2002, the FCC issued a Declaratory Ruling and NPRM on the legal classification and regulatory framework governing access to the Internet via cable facilities. Cable modem transport service offered by cable operators is the functional equivalent of DSL service offered by wireline providers. In its Declaratory Ruling, the FCC classified cable modem transport service as an "information" service. The ruling is currently the subject of judicial challenges.

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<sup>2</sup> Customers could subscribe to the access services of an unaffiliated ISP, but in doing so, would be paying twice for access – once to the ISP affiliated with the cable operator, and again to the ISP of the customer's choosing.

## **B. The NPRM**

In this NPRM, the FCC seeks to define the appropriate legal and policy framework for wireline broadband services, such as DSL service, which will promote competition, investment in and deployment of new technologies and services, and customer choice. The FCC tentatively concludes that wireline broadband Internet access service provided over a carrier's own facilities should be statutorily classified as an "information service" under the Act, and seeks comment on that conclusion. NPRM, ¶ 25. The FCC further tentatively concludes that the transmission component of wireline Internet access service is "telecommunications," and not a "telecommunications service." Id. The FCC also seeks comment on the appropriate statutory classification of broadband transmission when it is not coupled with the Internet access component, including whether the provision of wholesale xDSL transmission should be considered "telecommunications" or "telecommunications service" under the Act. Id., ¶ 26.

The FCC next asks for comment on the appropriate regulatory framework that would apply to wireline broadband Internet access services if classified as information services. In particular, the FCC seeks comment on what regulatory requirements, if any, should attach to the "telecommunications input" of these services. NPRM, ¶ 30. In particular, the FCC asks whether it should modify or eliminate existing access obligations on facilities-based providers who self-provision wireline broadband Internet services, including those access obligations applicable to transmission services necessary to access the Internet. NPRM, ¶ 16.

The FCC also seeks comment generally on the role of state authorities with respect to these services. Id. Finally, the FCC asks for comment on whether facilities-based providers of broadband services using wireline and other platforms, including cable and wireless, should be required to contribute to universal service. Id.

California will generally track the organization of issues set forth in the NPRM in addressing these issues.

### **III. STATUTORY CLASSIFICATION OF WIRELINE BROADBAND INTERNET ACCESS SERVICES**

The FCC tentatively concludes that the provision of wireline broadband Internet access service is an “information service,” subject to Title I of the Act, when such service is provided by an entity over its own transmission facilities bundled with Internet services. The FCC suggests that when provided on a stand-alone basis by a facilities-based entity over its own transmission facilities at wholesale to an ISP, the transmission component of wireline broadband Internet access service is “telecommunications,” and not a “telecommunications service,” under the statute because the offering is not made “directly to the public” within the meaning of section 153(46).

California strongly disagrees with the FCC’s conclusions. California believes that the transport component of “Internet access services” is properly subject to regulation as a common carrier transmission service under Title II when provided by a facilities-based carrier, regardless of whether that service is bundled with the carrier’s own information services or offered on a stand-alone basis to ISPs or other end users.

### **A. Definition of Internet Access Service**

In its NPRM, the FCC defines “Internet access service” to include both the transmission component used to obtain access to the Internet, and information services that travel over the transmission component. Until now, federal law has treated the transmission component as a separate and distinct service that, when provided by a facilities-based carrier, qualifies as common carriage subject to Title II. This is so whether or not the facilities-based carrier bundles the transmission service with information services into a single packaged “service.” Advances in technology to allow greater speeds of transmission do not alter the regulatory classification of transmission service as common carriage subject to Title II.

### **B. Internet Access Using DSL Service Consists of Both a Telecommunications Service Component and an Information Service Component**

Section 153(43) defines “telecommunications” as the “transmission, between or among points specified by the user, of information of the user’s choosing, without change in the form or content of the information as sent and received.” Section 153(46) defines a “telecommunications service” as the “offering of telecommunications for a fee directly to the public, or to such classes of users as to be effectively available directly to the public, regardless of the facilities used.” Section 153(20) defines an “information service” as “the offering of a capability for generating, acquiring, storing, transforming, processing, retrieving, utilizing, or making available information via telecommunications ...”

Based on these definitions, the transmission component of wireline broadband services used or offered by facilities-based carriers qualifies as a “telecommunications service.” This is so whether this component is bundled by the facilities-based carrier with other services or is offered on a stand-alone basis. Transport service necessary to access an ISP, whether via narrowband or broadband, consists of making available a two-way transmission path between an end-user and an ISP upon which content may be sent. An end use customer using these services simply seeks connectivity to an ISP, and does not change the format or content of the transmission itself. The service is functionally an access transport service comparable to other services used to access interstate and intrastate long distance networks. The FCC itself has said as much:

Like the point-to-point private line service high volume telephony customers purchase for direct access to IXCs' networks, GTE's ADSL service provides end users with a direct access to their selected ISPs, over a connection that is dedicated to ISP access.

GTE DSL Order, 13 FCC Rcd 22466, ¶ 25.

Services provided by the ISP to an end-use customer after the customer is connected via a high-speed transmission service to the ISP qualify as “information services,” as defined under Section 153(20). These ISP-provided services enable an ISP customer to access information, e-mail, or other services offered over the Internet. These ISP-provided services ride on top of the transmission service. A customer may also interact with the data stored on the facilities of a wireline provider, but such interaction is

distinct from the transmission service to the storage facilities themselves. From the subscriber's point of view, the transmission service is transparent.

It is true that certain services, such as protocol conversion and information storage, are essential for obtaining access to content on the Internet. The FCC recognized that “[w]ithout the use of these ‘information service’ data links, schools and libraries would not be able to obtain access” to content on the Internet. In the Matter of Federal-State Joint Board on Universal Service, 12 FCC Rcd 8776, ¶ 441 (1997). The FCC, however, has appropriately classified these services as a necessary requirement to enable transmission, which do not convert the transmission service to an information service. Computer II Final Decision, 77 FCC 2d 384 (1980), ¶ 95 (data processing, computer memory or storage, and switching techniques can be components of a basic service if they are used solely to facilitate the movement of information); Advanced Services Order, 13 FCC Rcd 24011 (1998) at n.57 (“Use internal to the carrier’s facility of ... bandwidth compression techniques, ... packet switching, error control techniques, etc. that facilitate economical, reliable movement of information does not alter the nature of the basic service.”)

The FCC has also previously recognized that the transmission service, used to access the information service, does not become an information service when both are combined by an ILEC. As the FCC reported to Congress, “[i]t is plain ... that an incumbent local exchange carrier cannot escape Title II regulation of its residential local

exchange service simply by packaging that service with [an information service such as] voicemail.” Report to Congress, 13 FCC Rcd 11501 (1998), ¶ 60.

Against this backdrop, the FCC proposes to reclassify DSL and other broadband transport services as non-common carrier services when combined with Internet access services. The FCC claims that it had previously told Congress that “Internet access services are appropriately classified as information, rather than telecommunications, services.” NPRM, ¶ 20 n.44. This claim is misleading. In the Report to Congress, the FCC determined that “Internet access providers” should be classified as providers of information services. The FCC, however, made clear that it was treating Internet access services, as particularly defined in that Report, as synonymous with the types of services provided by Internet Service Providers, such as information on web sites. Report to Congress, 13 FCC Rcd 11501, ¶ 63 n.125 (“We will use the terms “Internet access providers” and Internet service providers” interchangeably in this Report.”). The FCC was not referring to the regulatory classification of dial-up and high-speed transport services necessary to reach the “Internet access provider.” Indeed, in the Report, the FCC carefully distinguished Internet access services from the transmission services necessary to reach an ISP via a wireline carrier, defining the latter as those provided either by dial-up connections over the public switched telephone network, or by dedicated data circuits over wireline networks. Id., ¶¶ 63, 66-67. Whether conventional or high speed, the transmission services used to obtain access to an ISP are functionally equivalent, and have always been classified as telecommunications services when

provided by an ILEC. *Id.* at ¶ 67 (“The provision of leased lines [by telecommunications carriers ] to Internet service providers ... constitutes the provision of interstate telecommunications.”).

In its NPRM, the FCC for the first time suggests that because broadband access services allow subscribers the “capability” of interacting with stored data retrieved from the Internet, the ILEC-provided transmission services used to access an ISP somehow transmute into information services. Under this logic, plain old voice telephone service that connects to a voice mail information service would also be transformed into an information service because the voice service gives the caller the “capability” of using the voice mail box. The FCC’s reasoning proves too much. Not only does the FCC’s logic impermissibly read the term “telecommunications service” out of the Act, but in a regulatory sleight of hand, the FCC would effectively gut the common carrier foundation upon which the entire Act rests.

**C. The FCC’s Proposal is Contrary to the Language, Structure and Purpose of the Act**

**1. DSL service is a “telecommunications service” under the Act when bundled with Internet access service by an ILEC**

Nothing in the 1996 Act evidences an intent by Congress to alter the bedrock foundation of the Communications Act that requires monopoly carriers to offer bottleneck services on a non-discriminatory basis under tariffed rates, terms and conditions. To the contrary, Congress amended the Communications Act to require more extensive unbundling of essential, bottleneck network facilities controlled by incumbent

LECs in order to promote access to the network by competitive local exchange carriers (“CLECs”). Thus, Congress went beyond the previous mandates of the Computer Inquiries and the Modification of Final Judgment by enacting sections 251, 252 and 271. Congress well understood that interconnection by CLECs to the networks of incumbent, facilities-based carriers was the key to fostering local competition so as to produce a greater choice of services at lower prices for consumers.

In particular, section 251 makes clear that Congress intended ILECs to share and unbundle their last-mile bottleneck transmission facilities – whether conventional or high-speed – and to offer these facilities at cost-based prices, to enable meaningful and direct competition by CLECs. Nothing in the Act evidences an intent by Congress to exempt bottleneck transmission services from the scope of Title II simply because these services use high-speed broadband technology.

At the same time, Congress recognized that once the goals of a robust competitive local marketplace were fully realized, the need for regulation of services and facilities subject to Title II might no longer be necessary. Accordingly, Congress enacted section 160(a), which enables the FCC to forbear from applying Title II regulation if certain, specific conditions are met. There is no evidence that Congress intended that the FCC could achieve the same result prematurely by unilaterally redefining fundamental terms in the Act, and effectively nullifying section 160(a). The FCC cannot accomplish by regulatory fiat what Congress alone has the authority to change.

The FCC's proposal to redefine ILEC-provided broadband transmission services as information services not only is inconsistent with sections 160(a), 251, 252, and 271 of the Act, but it also is in conflict with sections 153(46), 272 and 706.<sup>3</sup>

Section 153(46) provides that a "telecommunications service" is a common carrier service provided directly or indirectly to the public and subject to Title II, "regardless of the facilities used." The FCC nevertheless distinguishes ILEC-provided transmission services for disparate regulatory treatment based precisely on the facilities used. The FCC correctly does not contend that narrowband services (i.e., dial-up services) lose their character as common carrier transmission services because they allow a subscriber to connect to the Internet for information services. Cf. AT&T v. City of Portland, 216 F.3d at 877-878 (Internet service transmitted through telephone pipeline is telecommunications service). The same is true for DSL and other broadband transmission services. Indeed, the FCC itself said, "xDSL and packet switching are simply transmission technologies and are *telecommunications* services... Incumbent LECs ... are currently offering a variety of services in which they use xDSL technology and packet switching to provide members of the public with a transparent, unenhanced, transmission path..." Advanced Services, 13 FCC Rcd 24011, ¶ 35 & 36 (citations omitted) (emphasis added). The fact that a high-speed transmission technology rather than a low-speed, dial-up technology is utilized to reach a carrier's or ISP's point of presence in order to access the Internet does not transform DSL and other special access

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<sup>3</sup> Section 706 has been codified in the note to section 157 of the 1996 Act.

services from Title II services to information services. See, e.g., Universal Service Order, 12 FCC Rcd 8776 (1997), ¶ 780 (FCC expressly included special access services within the definition of “telecommunications.” DSL is a type of special access service.); Advanced Services Order, 13 FCC Rcd 24011, ¶ 41 (rejecting contention that terms of the Act refer only to local circuit-switched technology or close substitutes: “The plain language of the statute ... refutes any attempt to tie ... statutory definitions to a particular technology.”)

The FCC’s proposal also conflicts with section 272, which evidences congressional intent to treat high-speed transmission service to the Internet as common carriage. Section 272 provides that Bell Operating Companies (“BOCs”) may not offer in-region interLATA services until they meet the market-opening requirements of section 271. In implementing that section, the FCC stated in its Non-Accounting Safeguards Order that if a BOC’s provision of an Internet or Internet access service incorporates a bundled, in-region interLATA transmission component –whether via dial-up or dedicated access -- over its own facilities or through resale, the BOC may not provide Internet or Internet access service until it receives in-region interLATA authority under section 271. Non-Accounting Safeguards Order, 11 FCC Rcd 21905 (1996), ¶ 127 and n.291. By reclassifying the interLATA transmission component of an ILEC’s Internet access service as an information service, the FCC effectively reads section 272 out of the Act.

The FCC’s proposal further conflicts with section 706. In that section, Congress evidenced an intent to treat high-speed transmission service to the Internet via wireline

broadband facilities as Title II telecommunications services, not information services. Specifically, Congress directed the FCC and state commissions with authority over “telecommunications services” to encourage the deployment of “advanced telecommunications capability” to all Americans, including schools in particular. In section 706(c), Congress made clear that “advanced telecommunications capability” is defined *without regard to any transmission medium or technology*, as high-speed, switched, broadband *telecommunications* capability that enables users to originate and receive data and voice and other communications *using any technology*.” (emphasis added).

The express language used in section 706 is significant for two reasons. First, “advanced telecommunications capability” is a transmission service. This is evidenced by Congress’ inclusion of the term “telecommunications” as a modifier to “advanced capability” and a description of the service as one that enables a customer to send and receive communications – a description that parallels the definition of “telecommunications” in section 153(46). 47 U.S. C. § 153(46) (“telecommunications” means the transmission ... by the user... of the information sent and received.”)<sup>4</sup>

Second, Congress made clear that this advanced telecommunications capability remains a transmission service, whatever technology it uses. The fact that a high-speed

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<sup>4</sup> In contrast, in section 254(h)(2), Congress used the unmodified term “advanced services” when it meant to broadly include both advanced telecommunications and advanced information services. Specifically, in subsection (2)(A), Congress provided that the FCC “shall establish competitively neutral rules to enhance, to the extent technically feasible and economically reasonable, access to advanced telecommunications and information services.” In this section, Congress further distinguished “access to” --i.e., transmission to – these advanced services from the advanced services themselves, and intended that such access remain affordable so that it is available “on a universal basis.”



access service, such as DSL, is used in lieu of a narrowband service to connect a customer to an ISP does not alter the classification of this transport function as common carriage under Title II. This is confirmed by the language of section 706 that leaves discretion to the FCC to use “price cap regulation, “regulatory forbearance,” and “other methods that remove barriers and provide the proper incentives for infrastructure investment.” These measures apply only and directly to services subject to Title II. It would not have been necessary for Congress to specify regulatory measures applicable only to common carrier services if Congress intended that the FCC could simply reclassify these services as non-common carriage and unilaterally remove them from the scope of Title II to achieve the FCC’s desired policy goals.

The FCC’s proposal to reclassify DSL-type services as information services constitutes an arbitrary reversal of its own recent construction of the Act. At least three times, the FCC previously told the D.C. Circuit that advanced services qualify as common carrier “telecommunications services.” In Association of Communications Enterprises v. FCC, 235 F.3d 662 (D.C. Cir. 2001), the court reversed the FCC’s decision that advanced telecommunications services provided through a telephone company’s subsidiary were not subject to sections 251 and 252 of the Act. In that decision, the FCC conceded that advanced telecommunications services were subject to Title II. Id. at 664, 668. In Worldcom, Inc. v. FCC, 246 F.3d 690, 694 (D.C. Cir. 2001), the FCC affirmed that DSL-based advanced services qualify as “telecommunications services.” The court

vacated in part the order at issue there on other grounds. The same affirmation was made in Association of Communications Enterprises v. FCC, 253 F.3d 29, 31 (D.C. Cir. 2001).

In the end, the FCC appears to assume that there is a clear regulatory demarcation between so-called “broadband Internet access services” and other telecommunications services that use broadband technology, yet declines to define where that demarcation lies. Increasingly, as voice traffic migrates to broadband technologies, voice traffic itself will be swept into the FCC’s definition of an information service, and not subject to the consumer protections of Title II applicable to common carriers. The FCC’s construction of the Act effectively and impermissibly enables the FCC to read Title II out of the Act. Louisiana Pub. Serv. Comm’n v. FCC, 476 U.S. 355, 376 (1986) (“only Congress can rewrite this statute”).

Not only is the FCC’s analysis contrary to the statute, but it is also at odds with judicial opinions that focus on the general status of the provider as a common carrier, rather than the nature of the service, in determining whether Title II applies. In California v. FCC, 905 F.2d 1217 (9<sup>th</sup> Cir. 1990), the Ninth Circuit made clear that statutory language contained in the Act “distinguishes between *providers* of communications services, i.e., between carriers and non-carriers. When services are provided by facilities-based carriers (such as the Bell Operating Companies) who are otherwise common carriers, the statute makes no distinction based on the terms and conditions on which the services are offered, i.e., whether on a common carrier or private contract basis.” Id. at 1240 (emphasis in original). See also Nat’l Ass’n of Regul. Util.

Comm’rs v. FCC, 525 F.2d 630, 643 (D.C. Cir.), cert. denied, 425 U.S. 992 (1976) (“NARUC I”) (noting general status of cellular common carriers requires that they may not discriminate against particular users in offering private dispatch services); Worldcom, Inc. v. FCC, 246 F.3d at 694 (upholding FCC decision that an ILEC does not lose its status as such, and remains subject to section 251(c) when providing services other than telephone exchange and exchange access services). Even the FCC previously acknowledged that “[c]ompanies that are in the business of offering interstate telecommunications functionality to end users are ‘telecommunications carriers, and therefore are covered under the relevant provisions of sections 251 and 254 of the Act. *These rules apply regardless of the underlying technology those service providers employ, and regardless of the applications that ride on top of their services.*” Report to Congress, 13 FCC Rcd 11501, ¶ 105 (emphasis added).

**2. DSL service offered at wholesale on a stand-alone basis is a telecommunications service**

The FCC next seeks comment on whether to narrow the definition of “telecommunications services” so as to exclude from its scope transmission services sold by facilities-based carriers at wholesale. This approach must be rejected. As discussed, Congress intended that dominant, facilities-based carriers, such as the ILECs, continue to be subject to Title II in their provision of bottleneck transmission services, without regard to whether the ILEC bundles these services with ILEC-affiliated ISP services, or sells

them at wholesale or retail.<sup>5</sup> For this reason, “telecommunications service” is defined without distinction between wholesale and retail telecommunications service, but as service “to such classes of users as to be *effectively* available directly to the public, regardless of the facilities used.” 47 U.S.C. § 153(46). When offered on a wholesale basis to a CLEC or to an ISP, the services are “effectively available” directly to the public.<sup>6</sup>

Once again, the FCC previously told Congress that “common carrier services include services offered to other carriers, such as exchange access service, and not just services provided to end users.” Report to Congress, 13 FCC Rcd 11501, ¶ 115. Citing the legislative history and definition of common carriage in the Act, the FCC also explained in the Non-Accounting Safeguards Order, 11 FCC Rcd 21905, ¶¶ 264-265, that the term “telecommunications services” “was not intended to create a retail/wholesale distinction, but rather a distinction between common and private carriage. Common carrier services include services offered to other carriers .... Neither the Commission nor the courts ... has construed ‘the public’ as limited to end-users of a service ... we decline to limit the definition of telecommunications services to retail services” (citing NARUC I, 525 F.2d at 641).

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<sup>5</sup> The D.C. Circuit further concluded that the ILEC could not avoid the unbundling provisions of section 251 merely by offering these advanced access services through an affiliate. Ass’n of Communications Enterprises v. FCC, 235 F.3d at 666.

<sup>6</sup> The degree of Title II regulation depends on the entity which is purchasing the service. When these lines are leased to an ISP, whether unbundled or bundled with other services, the ILEC is subject to Title II provisions against discrimination and charging unjust and reasonable rates. When leased to a CLEC, an ILEC must comply with additional unbundling and costing rules apply pursuant to section 251.

The FCC nevertheless recognizes that when an entity, such as an ILEC, offers broadband service on a stand-alone basis to third parties, a different analysis may apply. In that circumstance, the FCC concedes that the provision of such services may constitute telecommunications services.<sup>7</sup> The FCC, however, fails to demonstrate that Congress, on the one hand, intended to exempt an ILEC, a dominant facilities-based carrier, from the provisions of Title II when it bundles its DSL service with its own ISP services, but on the other hand, intended to regulate an ILEC under Title II when it sells unbundled DSL services directly to third parties. No such dichotomy exists either in the language, structure or policy of the Act, and indeed the opposite is true. The very purpose of the Act was to spur competition in local markets by requiring the incumbent LEC to unbundle its bottleneck facilities – whether existing, conventional facilities or new, broadband facilities -- to enable competitors to obtain wholesale access to these facilities in order to enter these markets. In recognition of that fact, the FCC has repeatedly recognized that broadband access services provided by wireline carriers qualify as “telecommunications services.” In addition, in its Advanced Services Order, 14 FCC Rcd 19237, ¶ 21 (1999), the FCC agreed with the NTIA that “bulk DSL services sold to Internet Service Providers ... are telecommunications services, and as such, incumbent LECs must continue to

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<sup>7</sup> See Qwest Communications Corp. v. Berkeley, 146 F.Supp. 2d 1081, 1096 (N.D. Cal. 2001) (concession by Qwest that its offering of “high-quality broadband Internet-based data, voice, and imagery connectivity ... to businesses, consumers, and other communications service providers” is a common carrier service).

comply with their basic common carrier obligations with respect to these services.”<sup>8</sup>

The FCC’s agreement with the NTIA is consistent with its own longstanding policy to treat ISPs as end-use subscribers which purchase retail services, including broadband transmission services, from the ILEC. See Association of Communications Enterprises v. FCC, 253 F.3d at 5 (“end-users and ISPs to which the ILECs offer [advanced] services are ‘subscribers who are not telecommunications carriers’ within the meaning of § 251(c)(4)(A)”). The ILEC may not lawfully discriminate against ISPs by refusing to sell them DSL service under the same tariffs applicable to other end-use customers.

By suggesting that the offering of stand-alone transport service, in contrast to bundled transport service, deserves disparate regulatory treatment as a common carrier service, the FCC essentially leaves it to the ILEC to decide unilaterally whether or not to offer this service to its competitors. The FCC, however, properly recognized over twenty years ago in *Computer II* that an ILEC which offers an information service must unbundle the bottleneck transmission service upon which the information service rides to prevent anticompetitive conduct. Congress not only did not change that requirement in the 1996 Act, but in fact strengthened it by requiring additional unbundling by an ILEC of its bottleneck facilities for lease to CLECs. Consistent with the pro-competitive objective of the Act, it cannot be a matter of discretion for the ILEC to offer, or not to

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<sup>8</sup> “These obligations include: provisioning of such DSL services upon reasonable request; on just, reasonable, and nondiscriminatory terms; and in accordance with all applicable tariffing requirements.” Id.

offer, this common carrier service to third parties when the ILEC itself bundles this service with its own information services.

**D. The FCC's Proposal Arbitrarily Deviates from Longstanding Federal Policy**

Not only is the FCC's proposal to reclassify broadband services contrary to the Act, but it also constitutes a sharp, illogical reversal of longstanding FCC policies. For over two decades, the FCC has consistently stated that information or enhanced services ride atop basic transmission service, and has treated the two services separately.

Advanced Services Order, 13 FCC Rcd 24011, ¶ 36 (“the first service is a telecommunications service (e.g., the xDSL-enabled transmission path), and the second service is an information service, in this case Internet access.”)<sup>2</sup> The FCC has never blurred the two into a single, deregulated service, as it attempts to do here. While it is true that the FCC has chosen not to regulate the transmission component of information services when offered by non-facilities-based carriers, the FCC has always asserted jurisdiction under Title II to regulate the transmission component of such services when offered by traditional facilities-based common carriers, like the incumbent LECs. In its Computer II proceedings, the FCC correctly recognized that basic transmission service used in connection with information services was a bottleneck service. The FCC properly

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<sup>2</sup> See also In the Matter of Federal-State Joint Board on Universal Service, 13 FCC Rcd 5318 (1997) at n. 827 (“the fact that the reseller provides an enhanced service with a basic service for a single price does not render the basic voice service an enhanced service. In that instance, the enhanced service is not combined with the basic service into a single enhanced offering because, functionally, the consumer is receiving two separate and distinct services, voice-grade telephone service and Internet service.”)



asserted its Title II authority over the provision of such service by requiring that it be unbundled and provided on a nondiscriminatory basis under tariff for the ultimate benefit of consumers.

Today in California, Pacific/SBC, the incumbent LEC, is virtually the only provider of DSL service to residential and small business customers in its service territory. There are few alternate, unaffiliated, facilities-based providers of DSL service. Currently, forty-five percent of Californians who live in cities with broadband service have DSL service as their only broadband option. There are no substitutable broadband alternatives for these customers. In these circumstances, it would be an irrational reversal of longstanding federal policy to allow the ILEC to bundle essential, bottleneck transmission services with Internet information services to escape regulation under Title II, simply based on the transmission technology the ILEC chooses to use.

Indeed, just a few short years ago the FCC rejected the very type of “contamination” theory it proposes to adopt here. In the Frame Relay Order, 10 Rcd 13717 (1995), ¶ 41, AT&T argued that its provision of basic frame relay service, a telecommunications service, combined with protocol conversion service, an information service, rendered the combined service an information service outside the scope of Title II. The FCC squarely rejected the application of the contamination theory to facilities-based carriers, making clear that, as a facilities-based carrier, AT&T was required, pursuant to Computers II and III, to unbundle its basic frame relay service from combined enhanced protocol conversion service, and to offer the former service under

tariff. Id.,

¶ 44 and n.73 (“The [FCC] has stated that application of the contamination doctrine to the BOCs would result in an ‘improper policy result,’” citing Computer III Notice, FCC 85-397, ¶ 32); see also California v. FCC, 39 F.3d 919, 930 (9<sup>th</sup> Cir. 1994) (fundamental unbundling is a key safeguard against access discrimination). The FCC further recognized in its Computer III proceeding, in which it adopted unbundling requirements for the provision of information services under Open Network Architecture, that the transmission component of information services does not lose its character as a common carrier telecommunications service subject to Title II, even though the information service itself is not subject to Title II.<sup>10</sup> Accord, Advanced Services Order, 13 FCC Rcd 24011,

¶ 36. The FCC’s proposal is an arbitrary departure from its longstanding precedent in order to achieve its desired end.

The FCC’s proposal to regulate under Title I an ILEC’s combined provision of broadband access services and ISP services as an information service subject to Title I is likewise flawed. In California v. FCC, the Ninth Circuit stated that Title I contains no specific grant of jurisdiction to the FCC. The FCC’s Title I authority over enhanced services is ancillary to its Title II authority over interstate common carrier services. 905 F.2d at 1240 n.35. In Computer III, the FCC asserted ancillary authority under Title I over the ILEC’s enhanced services because of its continued regulation under Title II of

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<sup>10</sup> GTE DSL Order, 20.

the ILEC's underlying common carrier transmission service upon which the enhanced services rode. Here, by reclassifying the ILEC's underlying transmission service as an information service, the FCC has removed the predicate Title II service upon which its Title I authority depends. The FCC's exercise of its Title I authority is thus no longer ancillary to the exercise of any specific responsibilities under Title II, and as discussed, Title I is not an independent source of authority. At a minimum, the FCC must demonstrate, as it did in the Computer Inquiries, how its assertion of Title I authority over ILEC-provided broadband services is ancillary to its traditional Title II concerns against unjust or unreasonable discrimination or unjust and unreasonable rates in the offering of Title II services.. That showing has not been made here.

In the end, the FCC's gyrations used to reclassify broadband transmission services from Title II to Title I result in an arbitrary and capricious reversal of past federal policy. The rationale that justified its longstanding policy continues to apply.

**E. The Transport Component of DSL Service Is Not Private Carriage**

Acknowledging that an ILEC's provision of unbundled transport may qualify as a telecommunications service subject to Title II, the FCC next asks whether the provision of transport service may nevertheless be classified as "private carriage." The answer is unequivocally no. Under the test for common carriage in NARUC I, the ILEC's practice in selling DSL service is to hold itself out indiscriminately to subscribers, and to offer the service under standardized terms and conditions. When the ILEC sells the DSL service

at wholesale to a CLEC for resale, the ILEC is “effectively making this service available to the general public.” When the ILEC sells the DSL service to ISPs, whose ultimate customer is the general public who buys the service under standard terms and conditions, the ILEC is indirectly making available this service to the public as well. In both cases, the offering of DSL service is a common carrier offering.

The ILEC cannot escape regulation of DSL service, currently provided under tariff as a common carrier service, by deciding to enter into private contracts with CLECs or ISPs. If that were allowed, then nothing would prevent ILECs from choosing unilaterally to remove any given tariffed service from common carrier regulation. Frame Relay Order, 10 FCC Rcd 13717, ¶ 52 (“A carrier cannot vitiate its common carrier status merely by entering into private contractual relationships with customers.”) Moreover, it would be unduly discriminatory to permit an ILEC to offer DSL service to its own end-use customers either directly or through its affiliate under standardized terms and conditions, while requiring unaffiliated providers to obtain the same service under contractual terms dictated by the ILEC. In addition, nothing would prevent the ILEC from refusing to contract with a competitor altogether.

The FCC does not have “unfettered discretion ... to confer or not confer common carrier status on a given entity, depending upon the regulatory goals it seeks to achieve.” NARUC I, 525 F.2d at 644. The FCC’s prior classification of an ILEC’s DSL transport service as a common carrier service is fully consistent with the language, structure and purpose of the 1996 Act. The FCC cannot unilaterally change that classification simply

to achieve a desired regulatory goal. Cf. MCI Telecommunications Corp. v. AT&T, 512 U.S. 218, 234 (1994) (FCC's desirable policy goal cannot alter the meaning of the Act).

#### **IV. REGULATORY FRAMEWORK FOR WIRELINE BROADBAND INTERNET ACCESS SERVICES**

Based on its tentative proposal to classify wireline broadband Internet access services as “information services” with a “telecommunications input,” the FCC asks what regulations, if any, should apply to the provision of these services and this input.

Alternatively, the FCC seeks comment on the regulatory obligations that should attach if the transmission component of wireline broadband service is considered a “telecommunications service.” The FCC also asks whether it should maintain the framework adopted in its Computer Inquiries governing the provision of these services.

In its Computer Inquiries, the FCC allowed facilities-based carriers to compete in the market for enhanced services so long as they complied first, with structural safeguards and later, with nonstructural safeguards governing their provision. These safeguards were deemed essential to prevent facilities-based carriers from discriminating in favor of their own enhanced services or those of their affiliates; from improperly cross-subsidizing their unregulated enhanced services with regulated services; and from engaging in other anticompetitive conduct and practices. NPRM, ¶ 38. In Computer III, the FCC relieved the facilities-based carrier from the requirement that it structurally separate enhanced service from its regulated operations, and instead required the carrier to unbundle essential network facilities and allow access under tariff under “Open

Network Architecture.” Other nonstructural safeguards governing accounting, disclosure of network information, and access to customer information were also adopted.

In adopting these safeguards, the FCC properly recognized that the basic transmission service underlying the provision of enhanced services was a bottleneck common carrier facility that the FCC could, and should, regulate to ensure that the BOCs (the facilities-based common carriers) fairly and reasonably competed in offering their own unregulated enhanced services.

Nothing has significantly changed that justifies the removal of the Computer Inquiry nonstructural safeguards. The BOCs continue to maintain exclusive control over essential bottleneck transmission facilities required by competitors for their own information services using wireline broadband technology. As such, the BOCs continue to have the ability and incentive to engage in discriminatory, anticompetitive conduct that favors their own information services. Unless and until the bottleneck is broken by actual, robust competition in residential and small commercial markets from other broadband technologies (intermodal) or from other facilities-based competitors using wireline broadband technology (intramodal), it is premature to eliminate the Computer Inquiry safeguards. The requirement that BOCs unbundle and offer the transmission component of information services under tariff, and acquire such transmission service for their own information services under tariff, must be maintained. This is equally important where BOCs, like SBC, market their DSL services through an affiliate. It would be unduly discriminatory to allow the BOC affiliate to obtain the bottleneck

transport service from the BOC on more favorable prices, terms and conditions than those offered to unaffiliated competitors.

**A. Access Safeguards**

In its NPRM, the FCC seeks comment “on what significance we should place on the extent to which broadband Internet access services can be or are provided over a variety of differentiated network platforms, such as cable, wireless, and satellite.”

NPRM, ¶ 44.

As previously discussed, the FCC has stated that the relevant geographic market for residential high-speed Internet access services is local. A customer’s choice among various broadband technologies (DSL, cable, satellite) is dictated by what is actually offered in his or her area. Merger Order, 16 FCC Rcd 6547, ¶ 74.

Currently, in California the incumbent LECs remain the dominant provider of broadband services to residential and small commercial customers. More specifically, Pacific Bell/SBC controls the vast majority of California’s 735,677 ADSL lines,<sup>11</sup> and is virtually the only provider of DSL service in its service territory. More California customers are served by Pacific Bell/SBC’s DSL service than by competing cable modem services, and Pacific/SBC’s market share is growing. While just two years ago there were several competitors offering DSL service in competition with Pacific

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<sup>11</sup> Advanced Services Order, FCC 02-339 February 6, 2002).

Bell/SBC, they have since exited the market, and today, only a single DSL service competitor, partly owned by Pacific Bell/SBC, remains.<sup>12</sup>

Moreover, while broadband service over cable facilities has been deployed, the availability of this service is far less ubiquitous than DSL service. Because of the high cost of upgrading cable facilities, broadband cable service is limited to suburban residential communities with some spotty coverage within downtown urban areas where the cable plant has been upgraded.<sup>13</sup> Wireless broadband technologies are only sparsely deployed in California, and where available, are generally not price-competitive. Virtually all transport service to the Internet via broadband is thus provided to end users in California by the owner of the transmission facilities – either the ILEC or the cable operator and/or their affiliates.

As noted, today forty-five percent of Californians who live in locales with broadband capability have DSL service as their only broadband option.<sup>14</sup> To the extent that cable modem service is provided, the physical plants do not generally overlap to

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<sup>12</sup> Pacific Bell/SBC, through SBC's subsidiary SBC Advanced Solutions, Inc. ("ASI"), is by far the largest provider when it comes to DSL market share. ASI's DSL service offerings were initially provided by Pacific Bell and, as a result, ASI has been able to gain and hold market share.

<sup>13</sup> According to a 2001 NetAction report, it would take \$21 billion to upgrade 50 percent of existing cable networks nationally, and another \$31 billion to upgrade the remaining networks. One factor contributing to the high cost of upgrading cable systems is the fact that upgrades often requiring replacement of the old one-way cable with two-way capability. The cost of upgrading California's cable network may be higher than national averages since, California's cable network is older and may require more investment to upgrade. Additionally, California's many densely populated communities substantially increase the time and construction costs associated with upgrades. The fragmented ownership of cable systems in California also makes comprehensive and coordinated statewide cable modem deployment very difficult.

<sup>14</sup> This figure is from data provided by California ILECs and the California Cable and Telecommunications Ass'n to the CPUC. Only 30 percent of the state's population live in communities where both DSL and cable modem services are available. Wireless broadband services are in retreat. Sprint has stopped accepting new customers for its wireless broadband service in California, and the future for its existing customers is unclear.

enable residential customers to have a choice between cable service and DSL service. To date, because cable facilities do not serve many commercial customers, for the small to medium-sized businesses that desire relatively inexpensive broadband service, DSL service generally is their sole option. Wireless technology for Internet access typically is not a viable option due to its limited availability and its inability to meet the service needs of these customers.<sup>15</sup>

Alternate modes of transmission to access the Internet are thus not available to a significant portion of the California population. The ILEC continues to remain the dominant provider of this transmission service with exclusive control over essential bottleneck facilities that underlie the provision of this service.<sup>16</sup> Maintaining existing unbundling and interconnection requirements is therefore critical to ensuring nondiscriminatory and reasonable access to these facilities to promote intramodal competition. California appreciates that in the future, more extensive intermodal and intramodal broadband competition may emerge. However, until it does, the dominant facilities-based provider of DSL service must remain subject to the unbundling and interconnection safeguards of section 251 and the Computer Inquiry currently in place.

California further cautions the FCC not to permit an unregulated duopoly in the few areas where competition may exist between facilities-based providers of DSL service

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<sup>15</sup> Large businesses have greater bandwidth needs, such as dedicated frame relay or ATM networks to connect multiple sites, and may require integrated solutions of voice/data/video services at DS3 or OC3 speeds. Cable modem service is not an alternative in this market. Fixed wireless service likewise is not an option because of the line-of sight issues, and satellite service is not widely available to date and is far more costly than DSL or cable modem service.

<sup>16</sup> See in general California's Reply Comments in CC Docket No. 01-337 discussing ILEC-dominance

and cable modem service. Not only would an unregulated duopoly framework detrimentally affect consumers by causing higher prices and fewer service options, but it is contrary to Congress' intent to make broadband services widely available and affordable.

The case of cellular service is instructive. The FCC initially established an unregulated duopoly framework for cellular service, which led to very high prices. The mere threat of competition from PCS and other spectrum options was not enough to discipline these prices. Only when these alternatives were actually offered and became widely available did cellular prices begin to soften and more service options become available. Moreover, it is significant that, as a matter of public policy, cellular service originally was viewed as a premium, discretionary service, so that high prices and fewer options could be tolerated. The opposite is true for broadband services. In section 706, Congress provided for the widespread availability "to all Americans" of advanced telecommunications services that would lead to affordable – i.e., lower – prices and greater service choices. Congress thus viewed broadband service as essential.

Further, the assumption that potential competition in the future should discipline prices charged by broadband providers is belied by recent history. Five years ago, Pacific Bell/SBC faced three other major competitors for DSL service in California. Today, there is only one competitor, and that one is partly owned by Pacific/SBC. The degree of competition has thus substantially dwindled, not expanded in recent years,

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over the California broadband market.

leaving customers with fewer choices or, for others, without a choice at all. Moreover, in the last year and one half, Pacific/SBC has increased the price for its DSL service by 25 percent.<sup>17</sup> At the same time, Pacific/SBC has slowed the deployment of its DSL service.<sup>18</sup> These factors thus rebut any assumption that market conditions have changed, or can be expected to change in the near term, so as to justify the removal of existing safeguards applicable to the dominant provider of the predominant type of broadband services in California.

In its NPRM, the FCC suggests that the Computer Inquiry safeguards may no longer be relevant to services offered over broadband technology rather than the narrowband technology in place at the time these safeguards were adopted. NPRM, ¶ 47. California submits that the critical question is not whether the technical characteristics of the network dictate a different regulatory regime (indeed, the 1996 Act precludes distinguishing telecommunications services based on technology), but whether the BOCs continue to maintain bottleneck control over network facilities that are essential to the provision of broadband services by competitors. If so, then the safeguards requiring the unbundling and interconnection must be maintained for the very same reasons that they were initially imposed.

The FCC next asks whether it should remove the Computer III requirements once a BOC receives authority under section 271 to provide long distance service. NPRM, ¶

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<sup>17</sup> In February, 2001, Pacific Bell/SBC increased the price for residential DSL service from \$39.95 to \$49.95.

<sup>18</sup> See [Convergedigest.com](http://Convergedigest.com), 10/22/01, "SBC to Slow Its Broadband Network Deployment"; [Broadband.com](http://Broadband.com), 10/10/01, "SBC Takes Pronto Out of DSL Buildout Pace."

48. California opposes this proposal. Allowing a BOC to close down its network to competitors as soon as the FCC certifies that the BOC has opened its market to competition would thwart the purpose of section 271. So long as the BOC has market power, the Computer III safeguards should be neither relaxed nor removed. Indeed, Congress stated as much in section 160(d) by providing that the FCC may not forbear from applying the requirements of section 251(c) and 271(a) until they have been fully implemented. At a minimum, the FCC would need to undertake periodically a comprehensive review to ascertain whether the BOC continues to remain dominant in its provision of last-mile facilities.

The FCC asks further whether it should replace the standard of cost-based pricing or tariffed rates under section 251 and the Computer Inquiries, respectively, with a standard of “market-based prices” or “commercially reasonable rates.” As discussed, wireline service remains the sole means of transport to the Internet for the majority of customers in California. A standard of “market-based” or “commercially reasonable” rates not only is too vague and ill-defined, but it provides little, if any, assurance of promoting the goals of the 1996 Act of lower priced services and greater customer choice through viable competition. The FCC should not eliminate the requirement that a facilities-based LEC make broadband transmission service available to non-affiliated ISPs under tariff on a nondiscriminatory basis. A facilities-based LEC should likewise continue to offer to CLECs interconnection to broadband transmission services at cost-based prices pursuant to sections 251 and 252 of the Act.

An approach that allows an ILEC to rely on negotiated commercial agreements with CLECs and ISPs for broadband transmission service is also ill-advised. At best, such an approach would allow only the largest CLECs or ISPs unaffiliated with the ILEC to enter into contracts at the expense of innovative, smaller CLECs and ISPs, to the detriment of customers whose choices would be circumscribed. California therefore does not support an approach that relies solely on negotiated agreements.

Specifically, a negotiated approach would allow an ILEC to negotiate more favorable agreements with its own affiliates, or even larger unaffiliated ISPs who could potentially add a large number of customers to the ILEC's Internet access market at the expense of smaller, unaffiliated ISPs. Not only would smaller ISPs themselves be disadvantaged, but this approach would also limit the customer's choice of ISP and limit innovation in the marketplace that smaller ISPs tend to bring.

In addition, while a nondiscrimination provision could be required, this would not be enough to ensure reasonable agreements. This is because the ILEC could negotiate excessively high rates with its affiliated ISP that would be made available to the unaffiliated ISP on a nondiscriminatory basis. The excessive rates would undoubtedly harm unaffiliated ISPs, particularly smaller ISPs with limited resources.

In the end, so long as the LEC remains dominant in its provision of bottleneck transmission services, the incentive and ability to restrain competition persists. It is therefore essential that the FCC retain the existing Computer Inquiry and other statutory safeguards to mitigate these harms.

The FCC seeks comment on how a regulatory framework, if deemed necessary, could reduce the regulatory burden on wireline broadband providers while promoting the availability of broadband service to both competitors and consumers. NPRM, ¶ 51. California submits that the existing regulatory framework, based on the statutory requirements described above, has not been demonstrated to be unduly burdensome. Congress has made clear that the public policy benefits of having an open telecommunications network warrant additional costs that may arise due to the obligations imposed on ILECs. Experience in the cable modem service arena makes clear that a hands-off, “market-based” approach cannot be relied upon at this stage of broadband development to ensure that carriers meet their market-opening obligations.

The FCC also asks for comment on the incentives that could be created by the imposition of requirements other than those under the Computer Inquiries in providing wireline broadband Internet access service. NPRM, ¶ 52. Again, as the experience with cable modem service demonstrates, there is no reason to expect that ILECs would voluntarily provide broadband transmission over last-mile facilities to competing ISPs or CLECs.

## **B. Other Obligations**

The FCC seeks comment on how other obligations might be affected by its classification of wireline broadband services as information services. NPRM, ¶ 54. Among other things, the FCC asks how this classification will affect consumer protection requirements, safeguards against slamming, truth in billing guidelines, access to service

by the disabled, and access to customer proprietary network information. The FCC further asks whether the presence of competitive alternatives for wireline broadband services obviates the need for regulatory intervention to safeguard consumer interests.

As a general matter, by removing wireline broadband transmission services from common carrier regulation, the FCC eliminates the panoply of safeguards otherwise applicable to these services. As discussed, California believes that the reclassification of these services is directly contrary to the 1996 Act. Cognizant of the pre-existing Computer Inquiry and MFJ equal access requirements applicable to dominant, facilities-based carriers, Congress clearly intended to continue common carrier regulation of bottleneck transmission services provided by these carriers in order to achieve the principal goals the 1996 Act – greater choice of services for consumers at lower prices through competition.

At the same time, Congress recognized that once robust competition occurred for telecommunications services like transmission, the FCC could forbear from asserting its common carrier regulation. The FCC's reclassification of essential transmission services impermissibly short circuits this statutory framework. As California has demonstrated, robust competition for broadband services does not presently exist in California, and the ILEC remains the sole or dominant provider of broadband transmission services to a substantial portion of California's population.

Significantly, as voice traffic migrates to broadband transmission technologies, all of the consumer protections attendant to even the most basic common carrier voice

service will no longer automatically apply if the FCC deems the broadband services to be non-common carriage. These protections include the assurance of fair and reliable service at just and reasonable rates; the assurance of just and reasonable terms and conditions of service, such as billing and service termination practices; and the assurance of compliance with basic service quality standards. The FCC's reclassification of broadband services as information services turns the Communications Act on its head.

The FCC's reclassification also undercuts additional goals that Congress intended to achieve. Congress recognized that common carrier regulation of essential, bottleneck services was necessary to ensure that low-income customers, customers in high-cost areas, and disabled customers have reasonable and affordable access to the network. 47 U.S.C. §§ 254, 255. Congress further sought to ensure that confidential customer information would be safeguarded from disclosure. 47 U.S.C. § 258. All of these provisions, however, apply solely to "telecommunications services."

In short, nothing in the Act demonstrates an intent by Congress to leave it to the FCC, in its sole discretion under its vaguely-defined authority under Title I (a provision that is not a specific grant of jurisdiction) to decide unilaterally whether and how to regulate essential bottleneck transmission services to further the Act's goals. Nor is it clear how the FCC could simply assert its Title I ancillary authority to extend basic consumer protections applicable to Title II services to Title I services.

The FCC next seeks comment on how its proposal affects the incumbent LECs' obligation to provide access to network elements under sections 251 and 252 of the Act.

Because section 251(c)(3) only requires telecommunications carriers to provide unbundled access for the provision of telecommunications service, it appears that the FCC's approach would eliminate this critical statutory provision as it applies to broadband transmission. The statutory underpinnings of the FCC's line sharing and line splitting rules would disappear. Consistent with California's view that wireline broadband transmission should be made available as a telecommunications service, the FCC should not bar a carrier that leases unbundled network elements for telecommunications services pursuant to section 251 from using these elements to provide wireline broadband Internet access service. A CLEC should be allowed to use the network elements to provide DSL service to any end user, including an ISP.

### **C. Impact on Federal and State Responsibilities**

In California v. FCC, the Ninth Circuit held that section 152(b) of the Act does not restrict the states to regulating only common carrier services offered by a telephone carrier. To the contrary, section 152(b) by its terms broadly permits states to regulate services "for or in connection with" communications services provided by telephone carriers. 905 F.2d at 1239-1240. The court went on to find that states have the authority to regulate the intrastate enhanced services offered by a telephone carrier. Id. at 1240-41. "That these enhanced services are not themselves provided on a common carrier basis is beside the point. As long as enhanced services are provided by communications carriers over the intrastate telephone network, the broad 'in connection with' language of § 2(b)(1) places them squarely within the regulatory domain of the states." Id. The

Court further stated that the state's authority over intrastate communications services in section 152(b) is the same as the FCC's authority over interstate communications services in section 152(a). *Id.* at 1241-1242, citing Nat'l Ass'n of Regul. Util. Comm'rs. v FCC, 880 F.2d 422 (D.C. Cir. 1989).

Against this backdrop, states may continue to regulate a telephone carrier's provision of intrastate information and transmission services. In particular, to the extent that a telephone carrier offers intrastate voice service via broadband wireline transmission technology, states would continue to have authority to regulate all aspects of it, including rates, service quality, and other terms and conditions of service, even if the FCC classifies the services as information services for federal purposes.

## **V. UNIVERSAL SERVICE OBLIGATIONS OF ALL PROVIDERS OF BROADBAND INTERNET ACCESS**

In its NPRM, the FCC asks whether facilities-based providers of broadband Internet services should be required to contribute to federal universal service programs. The FCC also seeks comment on how any obligation to contribute to universal service can be administered in an equitable and non-discriminatory manner. NPRM, ¶ 66.

As the FCC notes, under its existing rules and policies, telecommunications carriers providing telecommunications services, including broadband transmission services, are subject to federal universal service contribution requirements. The FCC, however, does not require facilities-based ISPs that lease telecommunications facilities and transmission from telecommunications carriers to contribute to federal universal

service programs. The FCC asks whether this policy should be changed. In addition, the FCC asks how to sustain universal service as traditional voice services migrate to broadband platforms.

Facilities-based providers of broadband Internet services – both wireline and cable – can and should be required to contribute to universal service. While a substantial portion of universal service funding goes to support voice telecommunications services, the schools and libraries program provides support for Internet access. There is no reason why universal service support for Internet access should be funded solely through assessments on providers of voice telecommunications. If the FCC maintains the Computer Inquiry safeguards, as California recommends, universal service contributions can continue to be assessed on the basis of the tariffed rates for the telecommunications services used as inputs to the Internet access services. The same structure should also be created for cable providers which offer functionally equivalent broadband services.

The FCC next asks parties to comment on the ways in which reform of the current contribution methodology might alter its analysis of the proper treatment of wireline broadband Internet access. NPRM, ¶ 67. As discussed in our comments in CC Docket No.96-45 et al., filed April 22, 2002, California opposes a connection-based universal service assessment mechanism. Such a mechanism would unfairly shift more of the burden of supporting universal service to low-usage residential end users. This type of mechanism would also create administrative problems and arbitrage opportunities for multi-line business customers. Regardless of the universal service assessment

mechanism, removal of the requirement that incumbent LECs maintain non-discriminatory, tariffed broadband service offerings would make it more difficult to extract universal service contributions from incumbent LECs that self-provide transmission for broadband Internet services.

The FCC further seeks comment on whether voice traffic will migrate to broadband Internet platforms, and the impact of such migration on universal service support. NPRM, ¶ 82. Deregulating self-provisioned broadband Internet services would encourage the migration of voice traffic to wireline broadband Internet platforms, even compared to other broadband platforms. Deregulation would favor the ILECs' use of the Internet for voice traffic, rather than the development of their own packet-switched networks, since the transmission of voice over the Internet would be treated as an unregulated information service. In contrast, voice transmission over an ILEC's own packet network would continue to be regulated as a telecommunications service. At the same time, despite the fact that an ILEC-controlled packet network currently can provide higher-quality voice service than service over Internet-based transmissions, the ILEC would have an incentive to favor the lower quality technology for its voice traffic to escape regulation.

Another significant issue is how carriers would receive universal service support if voice migrates to deregulated, broadband Internet platforms. Carriers in high cost areas and low-income customers would be discouraged from migrating their voice traffic to broadband Internet platforms if to do so means the loss of universal service support.

Such an outcome would exacerbate the digital divide between wealthy and less-wealthy population segments.

The FCC seeks comment on how to ensure that services supported by universal service bear no more than a reasonable portion of the costs of facilities used to provide both supported and unsupported Internet access. NPRM, ¶ 83. The FCC's proposal would treat broadband transmission through last-mile facilities variously as a deregulated information service, as deregulated telecommunications, or as a regulated telecommunications service, depending on who uses the transmission capability and how it is provided. This polyglot approach would needlessly complicate the cost allocation process and increase the likelihood that a carrier could allocate more than a reasonable portion of its facilities costs to services supported by universal service funding. This is just one more reason why the FCC should not adopt the proposal set forth in the NPRM.

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## VI. CONCLUSION

For all the reasons discussed, California respectfully submits that the FCC's proposal to reclassify the transmission component of Internet access service from a telecommunications service to an information service is contrary to law and not supported by sound public policy.

Respectfully submitted,

GARY M. COHEN  
LIONEL B. WILSON  
ELLEN S. LEVINE

By: /s/ ELLEN S. LEVINE

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ELLEN S. LEVINE

Attorneys for the People of the  
State of California and the  
California Public Utilities Commission

505 Van Ness Ave.  
San Francisco, CA 94102  
Telephone: (415) 703-2047  
Fax: (415) 703-2262

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