

**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 Docket Nos. 95-20, 98-10
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INITIAL COMMENTS OF SPRINT CORPORATION

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Sprint Corporation ("Sprint") on behalf of its incumbent local exchange ("ILEC"), competitive LEC ("CLEC")/long distance and wireless subsidiaries, hereby respectfully submits its initial comments in response to the Commission's *Notice of Proposed Rulemaking* ("NPRM"), FCC 02-42 issued February 15, 2002, in the above-captioned proceeding.

I. INTRODUCTION AND SUMMARY.

As the district court judge responsible for the enforcement of the Modified Final Judgment (MFJ), *United States of America v. Western Electric Company Inc., et al.* 552 F. Supp. 131 (D.D.C. 1982), *aff'd sub nom., Maryland v. United States*, 460 U.S. 1001 (1983), the Honorable Harold Greene was required to rule on a plethora of requests by the Regional Bell Operating Companies ("RBOCs") seeking waivers of the requirements established by the MFJ so as to be able to enter prohibited markets. One of Judge Greene's more prescient observations in dealing with these waivers was that the RBOCs would invariably read any concession by the

district court, no matter how narrowly drawn, "broadly so as to encompass activities that no one could reasonably have intended to include therein." *U.S. v. Western Electric*, 1989 U.S. Dist. LEXIS 5250, *12 (1989). Judge Greene often commented on what he termed was "this 'slippery slope' syndrome." *U.S. v. Western Electric*, 1990 U.S. Dist. LEXIS 8826, **9 (1990). *See also U.S. v. Western Electric*, 1989 U.S. Dist. LEXIS 13695,*14-*15 (1989) and *U.S. v. Western Electric*, 627 F. Supp. 1090, 1097 (fn. 25) (D.D.C. 1986).

Far from being considered a footnote in the history of the telecommunications industry, Sprint believes that Judge Greene's experience in dealing with RBOC efforts to erode the requirements of the MFJ should give the Commission considerable pause as it examines the issues the Commission has raised in this *NPRM*. Sprint has no quarrel with the Commission's tentative conclusion that "the provision of wireline broadband Internet access service is an information service." *NPRM* at ¶17. That proposed finding is unremarkable and consistent with the Commission's basic-enhanced service dichotomy adopted over two decades ago in its *Computer II* decision.¹ What concerns Sprint is the possibility that the Commission will eliminate the safeguards adopted in the *Computer II* and *Computer III*² decisions (collectively, *Computer Inquiry*), at least with respect to the provision of broadband transmission facilities. Sprint believes that the elimination of the requirement that a facilities-based carrier

¹ *Amendment of Section 64.702 of the Commission's Rules (Second Computer Inquiry)*, 77 FCC 2d 384 (1980), *recon.*, 84 FCC 2d 50 (1980), *further recon.*, 88 FCC 2d 512 (1981), *aff'd sub nom., Computer & Communications Industry Ass'n v. FCC*, 693 F.2d 198 (D.C. Cir. 1982), *cert. denied*, 103 S.Ct. 2109 (1983).

² The Commission's *Computer III Phase I* decision adopted in *Amendment of Section 64.702 of the Commission's Rules (Third Computer Inquiry)* is reported at 104 FCC 2d 958 (1986), subsequent history omitted. The Commission's *Computer III Phase II Order* is reported at 2 FCC Rcd 3072 (1987), subsequent history omitted.

providing broadband transmission facilities to itself for its own information services operations must make such facilities available to other unaffiliated information service providers at the same price and on the same terms and conditions would have untoward effects on wireline competition in the provision of common carrier services.

If RBOC attempts to exploit any relaxation of the requirements imposed by the MFJ are any guide -- and Sprint believes that they are -- the RBOCs will undoubtedly seek to exploit the elimination of the *Computer Inquiry* safeguards to further solidify their bottleneck control over last mile access to end users. Even though the Commission may well intend to limit the scope of any decision here only to cases where the broadband transmission facility is connected to the RBOC's own Internet access services (*i.e.*, the services offered as an Internet Service provider ("ISP")), the Commission cannot be assured that such facility will be used only for that purpose as it is commonly understood today. On the contrary, in time Internet access may well be useable for the provision of voice, data and other basic telecommunications services. In fact, as the Commission observes, "broadband technologies may ultimately replace legacy narrowband networks." *NPRM* at ¶13.

As the RBOCs and other ILECs increasingly make broadband facilities available to end users, mainly by re-engineering "last mile" copper loops to make them xDSL-capable, they can be expected to use such facilities to provide both telecommunications services and Internet access services as they do today with line sharing. Of course, by doing so they make more efficient use of such facilities. But perhaps more importantly, if freed from the *Computer II* requirement to provide the underlying broadband transport facilities on an unbundled basis in common carriage, the RBOCs will have a powerful incentive to incorporate telecommunications services such as voice telephony into their ISP services so as to provide such services over

telecommunications facilities without having to make those facilities available to other ISPs. At the same time, the RBOCs are arguing in CC Docket No. 01-338 (*Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*) that they should not have to make broadband-capable loops available to other carriers as unbundled network elements.

Should they succeed, their obligations under Section 251(c) would be limited to the provision of narrowband legacy facilities (to the extent such facilities remained) or possibly the narrowband portion of an xDSL-conditioned or other broadband loop. Given this Commission's expectation that the telecommunications market will evolve into one where end users will be provided bundles of telecommunications and information services over broadband facilities, wireline carriers that can only secure narrowband "last-mile" facilities from the RBOCs would find it difficult, if not impossible, to compete for end users. In contrast, the RBOCs would have been deregulated in the provision of broadband facilities with their bottleneck control over the "last-mile" local loop relatively intact. The RBOCs would be able to dominate the ISP market at the very least, and could effectively foreclose competition for voice and basic data services as well.

Such an outcome would be totally at odds with the goals envisioned by Congress when it enacted the 1996 Telecom Act as well as with the Commission's goal in this rulemaking "to ensure that competition in the provision of broadband capabilities can thrive, and thereby ensure that the needs and demands of the consuming public are met." *NPRM* at ¶4. Moreover, allowing the RBOCs and other ILECs to provide broadband facilities outside of the regulatory paradigm established by the *Computer Inquiry* decisions is simply not necessary to encourage the deployment of broadband facilities. Rather, all available evidence suggests that there is no supply side problem in the provision of broadband facilities. Any problems that may exist are on the demand side. Continuing to apply the *Computer Inquiry* regulatory structure to the ILECs'

provision of broadband facilities would enable competition and would be the most direct and efficacious way to attack the demand problem. Multiple providers stimulate demand by providing a variety of new and innovative services at attractive prices. Elimination of the *Computer Inquiry* regulatory framework would, therefore, be a step in the wrong direction.

Sprint discusses these issues further below. In the next Section, Sprint shows that the *Computer Inquiry* framework has not delayed the deployment of broadband wireline facilities. In Section III, Sprint demonstrates that the elimination of the *Computer Inquiry* framework would be wrong as a policy matter. Sprint also points out that the Commission's *Computer Inquiry* decisions were not limited to the basic transmission capacity then being deployed and the information services then being provided over such facilities. In Section IV, Sprint explains that Verizon's theories regarding the classification of "telecommunications services" as "private carriage" are baseless. And in Section V, Sprint reiterates its position in CC Docket No. 96-45 (*Federal-State Joint Board on Universal Service*) regarding the imposition of universal service funding obligations upon carriers.

II. THERE IS NO EVIDENCE TO SUPPORT THE NOTION THAT THE COMPUTER INQUIRY SAFEGUARDS ARE HINDERING THE DEPLOYMENT OF BROADBAND FACILITIES.

The Commission states that its "primary policy goal" in this proceeding is "to encourage the ubiquitous availability of broadband to all Americans." *NPRM* at ¶3. To reach this goal, or so the Commission says, "broadband services should exist in the minimal regulatory environment that promotes investment and innovation in a competitive market." *Id.* at ¶5. The problem here is that the Commission does not explain what aspects of today's "regulatory environment" have hindered "investment and innovation" in the provision of wireline broadband facilities. In particular, there is nothing in the *NPRM* that demonstrates that the basic/enhanced

services structure established in *Computer II* and later modified by *Computer III*, which, at most, subjects facilities-based carriers' provision of information services to "minimal" regulation under Title I, has delayed the deployment of wireline broadband facilities on a ubiquitous basis.

It would, of course, be rather difficult for the *NPRM* to have made such a demonstration. Less than ten days before the instant *NPRM*, the Commission released its *Third 706 Report* on the deployment of advanced telecommunications services in the United States.³ There, the Commission found that advanced telecommunications "is being deployed to all Americans in a reasonable and timely manner"; that "the availability of and subscribership to advanced telecommunications has increased significantly;" and, that "investment in infrastructure for advanced telecommunications remains strong." *Third 706 Report* at ¶1. Although the Commission points out that "capital expenditures in [advanced services] infrastructure have slowed in recent months, especially within the competitive LEC market," it attributes such slowdown to "excess capacity," and not to its regulatory policies. *Third 706 Report* at ¶106.

Moreover, as detailed recently by various commenting parties in the Commission's *Triennial UNE Review* proceeding,⁴ the marketplace activities of the RBOCs belie the notion that Commission regulation has created a supply-side problem in the provision of broadband

³ *Inquiry Concerning the Deployment of Advanced Telecommunications Capability to All Americans in Reasonable and Timely Fashion, and Possible Steps to Accelerate such Deployment Pursuant to Section 706 of the Telecommunications Act of 1996* (CC Docket No. 98-116), *Third Report* (FCC 02-33) released February 6, 2002 (*Section 706 Third Report*). xDSL lines which are currently being deployed by the RBOCs and other ILECs to provide broadband services are generally considered by the Commission to be advanced telecommunications services. See *Third 706 Report* at Appendix B ¶¶24-26; see also *NPRM* at fn. 1 & fn. 2

⁴ *Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*, CC Docket No. 01-338, *Notice of Proposed Rulemaking*, FCC 01-361 (released December 20, 2001).

infrastructure. For example, in its comments AT&T has detailed what can only be considered an explosion in deployment of xDSL facilities by the RBOCs (see Redacted Comments at 69-71) which, as it explains "should put to rest any concerns that the service is competitively disadvantaged or that the current regulatory regime has impeded the growth of broadband investment." Redacted Comments at 69. Covad also points out that Commission regulation has not deterred the RBOCs from deploying broadband facilities at "an incredible clip." Comments at 14. And WorldCom notes that all of the RBOCs "reported substantial growth in DSL lines in 2001." Comments at 93.

Administration officials have come to the conclusion that the problem in broadband today is on the demand side because acceptance rates by consumers have not kept pace with the broadband deployment. See "Bush Administration Focuses on Increasing Demand for Broadband," *Washington Telecom Newswire* (March 5, 2002), quoting Professor Glenn Hubbard, Chairman of the Council of Economic Advisors. Plainly the way to attack this broadband demand problem is through policies that enable broadband competition. Competition creates a "virtuous circle" of innovative service offerings at attractive prices leading to increased demand for those services. Certainly this has been the experience in the mobile services market. The emergence of new wireless carriers in the early 1990s, breaking up what had essentially been a Commission-sanctioned duopoly comprised of a wireline LEC controlling one half of the allotted spectrum and a non-wireline entity controlling the other half in a given market, has led to the offering of innovative mobile services at lower prices which, in turn, has led to record increases in subscriber growth. See *e.g.*, *Annual Report and Analysis of Competitive Conditions With Respect to Commercial Mobile Services, Sixth Report*, 16 FCC Rcd 13350, 13370 (2001).

Moreover, "available data indicate that the entrance of new competitors into the mobile telephone market continues to reduce prices." *Id.* at 13376.

Although the *NPRM* does not tentatively conclude that ILEC provision of broadband facilities should be exempted from the *Computer Inquiry* requirements, there is a strong perception that given its recent declaratory ruling concerning the provision of high-speed Internet access over cable facilities, the Commission may have already pre-judged the issue here.⁵ Thus, in its *Cable Modem Ruling*, the Commission determined that the requirements of *Computer II* were inapplicable to information services provided over cable facilities. *Cable Modem Ruling* at ¶¶43-44. Moreover, just in case it was later determined that *Computer II* was applicable, the Commission "waive[d] on [its] own motion the requirements of *Computer II* in situations where the cable operator additionally offers local exchange service." *Id.* at ¶45. As Commissioner Copps observed in his Dissenting Statement to the *Cable Modem Ruling* (p.74), "[t]hose who conclude that the Commission has now resolved [the instant] proceeding after just one month may be pardoned."

A similar decision here to exempt ILEC provision from the *Computer Inquiry* regulatory paradigm, even in cases where the ILECs provide telecommunications services over such facilities, will ignore the lessons learned from the mobile services market. Instead of adopting policies or, as is the case here, maintaining current policies, that enable the entry of competitors to the ILECs in the provision of broadband services, the Commission will have adopted a policy

⁵ *Inquiry Concerning High-Speed Access to the Internet Over Cable and Other Facilities* (GN Docket No. 00-185) *Declaratory Ruling and Notice of Proposed Rulemaking*, FCC 02-77 (released March 15, 2002), *appeal pending*, sub nom., *Brand X Internet et. al v. FCC*, Case No. 2-70518 (9th Circuit) ("*Cable Modem Ruling*").

that will inevitably lead to the creation of a deregulated cable operator/ILEC duopoly in the provision of broadband services -- both information services and eventually telecommunications services -- to residential end users and an ILEC monopoly in the provision of broadband services to mass market business customers.⁶ The Commission professes that one of its goals here is to have a regulatory framework under which "competition in the provision of broadband capabilities can thrive, and thereby ensure that the needs and demands of the consuming public are met." *NPRM* at ¶4. However, it is difficult to understand how the creation of a duopoly in the residential mass market and a monopoly in the business mass market will achieve that goal.⁷ Conventional economic teachings and the Commission's own experiences in the mobile services market would strongly suggest otherwise. Vigorous price competition and service innovations are simply not characteristics of duopolistic or monopolistic markets.

In short, the *NPRM* has failed to present any empirical evidence that the requirements of

⁶ Mass market business customers do not subscribe to cable modem services, even if offered, because of security and reliability concerns. *See, e.g.*, Comments of Ad Hoc Telecommunications Users Committee filed March 1, 2002 in CC Docket No. 01-337 (*Review of Regulatory Requirements for ILEC Broadband Telecommunications Services*) at 17-19. Thus, the elimination of intramodal broadband competition that would result if the ILECs were relieved of their *Computer II* obligations in the provision of broadband facilities would likely give the ILECs a monopoly in the provision of such broadband services to mass market business customers.

⁷ In CC Docket No. 01-337 (*Review of Regulatory Requirements for ILEC Broadband Telecommunications Services*), certain RBOCs have argued that fixed broadband wireless services can increasingly be relied upon as providing a competitive alternative to the broadband services provided by the RBOCs. *See, e.g.*, Comments of BellSouth at 36; Qwest at 21. It may well be true that some day fixed wireless services will become a viable competitive alternative to the broadband services of the RBOCs. But, as the Commission recently reported to Congress, that day is unlikely to arrive anytime in the near future. *See Section 706 Third Report* at Appendix B (¶31) (pointing out that technical limitations and capital market conditions have put severe constraints on the deployment and the effectiveness in certain settings of fixed wireless technologies).

Computer Inquiry have created a supply-side problem in the deployment of broadband facilities. All available information proves otherwise. The ILECs continue to deploy broadband facilities in a "reasonable and timely manner," notwithstanding the unbundling obligations imposed by the *Computer Inquiry* decisions. Thus there is simply no factual justification for the Commission to exempt the ILECs' provision of broadband facilities from the safeguards established by those decisions.

III. THERE IS NO LEGAL OR POLICY JUSTIFICATION FOR EXEMPTING THE ILECS' PROVISION OF BROADBAND TELECOMMUNICATIONS FROM THE COMPUTER INQUIRY SAFEGUARDS.

Similarly, there are no legal or policy grounds for scrapping the *Computer Inquiry* framework and, in particular, the *Computer II* safeguards, with respect to the ILECs' provision of broadband facilities. The rationale underlying the imposition of such safeguards is still valid, and the Commission's *Computer II* decision itself confirms that broadband facilities were included within its scope.

A. There Is No Sound Policy Reason To Dismantle The *Computer Inquiry* Framework.

Under the *Computer II* regulatory structure, a basic service is the offering of a "pure transmission capability over a communications path that is virtually transparent in terms of its interaction with customer supplied information." 77 FCC 2d at 420 (¶96). Such basic transmission services, in turn, provide the "building block[s] supporting the provision of enhanced services," *id.* at 423, which are services that "employ computer processing applications that act on the format, content, code, protocol or similar aspects of the subscriber's transmitted information; provide the subscriber additional, different, or restructured information; or involve subscriber interaction with stored information." 47 CFR 64.702(a). Carriers that provide basic transmission facilities are allowed to use such facilities to provide enhanced services. However,

carriers "must unbundle basic from enhanced services and offer transmission capacity to other enhanced service providers under the same tariffed terms and conditions under which they provide such services to their own enhanced service operations."⁸ This is the heart of the *Computer Inquiry* framework.

As the Commission has found, "Congress intended the 1996 Act to maintain the *Computer II* framework."⁹ Although the definitions of the term "information services" under the Act and the term "enhanced services" as adopted in *Computer II* are worded differently, both terms "can and should be interpreted to extend to the same functions."¹⁰ Likewise "telecommunications" as defined in the Act, 47 USC 153(43), provides the same functionality and serves the same purpose as "basic services" in the Commission's *Computer II* regulatory regime. Telecommunications is the transparent transmission path for the movement of customer-supplied information without change to the form or content of such information and is the building block upon which information services are offered. Thus telecommunications, like

⁸ *Independent Data Communications Manufacturers Association, Inc., Petition for Declaratory Ruling*, 10 FCC Rcd 13717, 13719 (¶13) (1995) (*Frame Relay Order*). See also *Deployment of Wireline Services Offering Advanced Telecommunications Capability*, 13 FCC Rcd 24011, 24030 (¶36) (1998) (*Advance Services Decision*) where the Commission stated that while the ILEC-provided xDSL-enabled "transparent, unenhanced, transmission path" may be utilized by end users together with an information service such as Internet access, but that consistent with the *Computer II* regulatory paradigm, the Commission must "treat the two services separately: the first service is a telecommunications service...and the second service is an information service...."

⁹ *Federal-State Joint Board on Universal Service, Report to Congress*, 13 FCC Rcd 11501, 11524 (¶45) (1998) (*Universal Service Report*).

¹⁰ *Implementation of the Non-Accounting Safeguards of Section 271 and 272, of the Communications Act of 1934, as amended*, 11 FCC Rcd 21905, 21955-56 (¶102) (1996) (*Non-Accounting Safeguards Order*). See also NPRM at fn. 38 ("The term 'information service' follows from the distinction the Commission drew in the *First, Second and Third Computer Inquiries*...").

basic services, must be offered on an unbundled, standalone basis to other entities, *i.e.*, as "telecommunications services."¹¹

In the *NPRM* at ¶43, the Commission asks, almost in passing, whether the *Computer Inquiry* regulatory framework should simply be eliminated. The reasons why the unbundling and nondiscrimination safeguards were necessary at the time the Commission adopted *Computer II* are just as valid today some two decades later. These safeguards were found necessary because of the indisputable economic principle that without them a carrier operating in a putatively competitive market but with bottleneck control over facilities needed by its competitors in such market has to the ability and the incentive to exploit its control to harm competition. In the over 6 years since the passage of the 1996 Telecom Act, there has been little erosion in the ILECs' bottleneck control over last mile facilities.¹² This is especially true in the case of broadband Internet access wireline facilities which, for all practical purposes, must be obtained from the RBOCs.¹³

¹¹ The addition of the term "telecommunications service" to the Act does not alter the *Computer II* structure. Rather, the purpose of the term was to codify the distinction between common carriage and private carriage that had been drawn in Commission and court decisions since the 1934 Act had become law. *Non-Accounting Safeguards Order*, 11 FCC Rcd at 22033 (¶265).

¹² See *e.g.*, *Policy and Rules Concerning the Interstate, Interexchange Marketplace: Reviews of Customer Premises Equipment and Enhanced Services Unbundling Rules in the Interexchange, Exchange Access and Local Exchange Markets*, 16 FCC Rcd 7418, 7425 (¶12), 7443-44 (¶43) (2001) (*Enhanced Services/CPE Unbundling Order*) (finding that incumbent LECs have the market power to act anticompetitively but nonetheless allowing such carriers to offer bundled packages consisting of local exchange services and enhanced services in part because of the *Computer II* unbundling and nondiscrimination requirements. See also *Computer III Further Remand Proceedings: Bell Operating Company Provision of Enhanced Services*, 14 FCC Rcd 4289, 4301 (¶16) (finding that ISPs must still obtain basic transmission facilities from the RBOCs).

¹³ See, *e.g.*, Comments filed in Docket No. 01-337 by WorldCom at 15; Time Warner at 6-7; Information Technology Association of America at 2; Covad at 3 and Earthlink at 5. At the

B. The Commission's *Computer Inquiry* Decisions Apply To The Provision of Broadband Transmission Facilities.

Plainly, the elimination of the unbundling and nondiscrimination safeguards established in *Computer II* would be unjustified and given the *NPRM*'s cursory treatment of the issue, the Commission does not seem to be seriously considering such step. Rather, the Commission suggests that it may be appropriate to carve out a wireline broadband exception to such requirements. This is so, according to the Commission, "[b]ecause the rules adopted in the *Computer Inquiries* were based on assumptions shaped largely by certain service and market characteristics prevalent at the time," *NPRM* at ¶44, and the *Computer Inquiry* "framework was constructed to accomplish certain goals in a world in which the services at issue were more akin to voicemail and other narrowband applications, rather than to broadband Internet access." *NPRM* at ¶31.

The Commission does not point to language in its *Computer Inquiry* opinions that would support such a limited reach for those decisions. Nor could it. There is no language in any of the *Computer Inquiry* decisions that even remotely suggests that the regulatory framework established by those decisions would only be applicable to the basic transmission capacity then being deployed and the information services then being provided over such facilities. In *Computer II*, for example, the Commission did not qualify or characterize the basic "transmission capacity" that carriers offer "for the movement of information." It simply explained that such capacity could be used "for the analog or digital transmission of voice, data,

same time, there is a limited amount of competition at the retail level, and as a result, ILECs should be allowed some pricing and tariff filing flexibility at the retail telecommunications service level as well as tariff filing relief with respect to their provision of DSL services. See Comments and Reply Comments of Sprint in CC Docket No. 01-337.

video, etc. information." It went on to state that the type of transmission offered varied and depended upon "a) the bandwidth desired, b) the analog and/or digital capabilities of the transmission medium, c) the fidelity, distortion, or other conditioning parameters of the communications channel to achieve a specified transmission quality, and d) the amount of transmission delay acceptable to the user." *Computer II*, 77 FCC 2d at 419. Clearly, the Commission intended its analysis to apply regardless of "the bandwidth desired," and indeed video can only be provided as a practical matter over broadband facilities.

Moreover, contrary to the Commission's apparent view today that the *Computer II* was confined to voice services and a few "narrowband" enhanced services applications and that it could not be applied in today's world of "bandwidth-intensive, multimedia information services" using powerful computers, *NPRM* at ¶13, it is clear the Commission in 1980 was forward-looking and, in fact, visionary. Thus, it pointed out that "[t]raditionally transmission capacity has been offered for discrete services, such as telephone service" but then found that

[w]ith the incorporation of digital technology into the telephone network and the inclusion of computer processing capabilities into both terminal equipment located in the customer's premises and the equipment making up a firm's "network," this is no longer the case. Telecommunications services is no longer just "plain old telephone service" to the user. A subscriber may use telephone service to transmit voice or data. Both domestic and international networks allow for voice and data use of the communications path. Thus in providing a communications service, carriers no longer control the use to which the transmission medium is put. *More and more the thrust is for carriers to provide bandwidth or data rate capacity adequate to accommodate a subscriber's communications needs, regardless of whether subscribers use it for voice, data, video, facsimile or other forms of transmission.*

Id., emphasis supplied. Given such findings, there is simply no basis upon which to conclude that a *Computer II* was confined to "narrowband" services and that it has no applicability to today's Internet-based information service offerings.

IV. BROADBAND TRANSMISSION IS CLEARLY COMMON CARRIAGE AND, EVEN IF PROVIDED ONLY TO UNAFFILIATED ISPS, CANNOT BE CLASSIFIED AS PRIVATE CARRIAGE.

In paragraph 26 of the *NPRM* the Commission asks (1) whether the provision of standalone broadband transmission is a "telecommunications service," and (2) whether the offering of standalone broadband transmission capacity on a wholesale basis to a limited class of customers -- *e.g.*, ISPs -- may be classified as "private carriage" instead of a telecommunications service offered on a common carrier basis. These issues appear to be raised in response to an *ex parte* letter dated January 9, 2002 from Verizon. *NPRM* at fn. 61. Verizon's theories are without merit.

Clearly, the stand-alone offering of broadband transmission is a "telecommunications service." Such services have been offered for decades in varying capacity levels, from T-1s or DS-1s through OCNs (*e.g.*, OC-3, OC-12, OC-48 and OC-148) as private lines and special access. These services can be used to transmit "information of the user's choosing, without change in the form or content of the information sent or received" and hence are "telecommunications," as defined in Section 3(43) of the Act. And, since such "telecommunications" is, and for many years has been, offered "for a fee directly to the public..." it is a "telecommunications service as defined in Section 3(46) of the Act. Sprint is at a loss to understand how the contrary proposition could be seriously entertained.

Moreover, the fact that a carrier offers a wholesale service to a limited number of customers is not sufficient to remove the offering from common carriage. Long-standing judicial precedent holds that a service offering may be common carriage regardless of the price and regardless of whether the offering may be attractive to only to a few customers. As the Ninth Circuit has explained, "it is immaterial" to common carriage "that the service offered will

be attractive only to a limited group"; that "it may be performed pursuant to special contract"; or that the service "may be furnished at cost, at a loss, or even without charge." *Las Vegas Hacienda v. CAB*, 298 F.2d 430, 434 (9th Cir. 1962), *cert. denied*, 369 U.S. 885 (1962). *See also*, cases cited therein and *NARUC v. FCC*, 525 F.2d 630, 641 (D.C. Cir. 1976) (*NARUC I*) ("One may be a common carrier though the nature of the service rendered is sufficiently specialized as to be of possible use to only a fraction of the total population").

Verizon is correct that not all services provided by a common carrier need be provided on a common carrier basis subject to Title II of the Act. January 9 Letter at 1. But this rather unremarkable statement does not justify allowing Verizon or other ILECs to provide standalone broadband transmission capacity pursuant to private carriage. Instead, the Commission must have a principled basis for determining whether to confer or not to confer common carrier status on a service offering by a carrier. Verizon suggests that the basis for determining whether a service offering should be classified as common carriage is whether the carrier has market power in the provision of the service. *Id.* at 3. Verizon is incorrect.

Common carrier status is not a function of a carrier's market power. Nondominant carriers, *i.e.*, those without market power, are still common carriers and must comply with the substantive requirements of Title II of the Act.¹⁴ Rather, common carrier status depends upon the type of services being provided, *i.e.*, whether the services are within Title II, and whether the carrier providing such service holds itself out indiscriminately, either in practice or under legal

¹⁴ Nondominant interexchange carriers, for example, are subject to the requirements of Sections 201 and 202 of the Act. 47 USC §§201 & 202. Although such carriers no longer are required to file schedules of their rates, terms and conditions of service with the Commission pursuant to Section 203(a) of the Act, 47 USC §203(a), they nonetheless are required to post such rates, terms and conditions on their web sites.

compulsion, to provide service to all customers seeking its service and which it is suited to serve. As the D.C. Circuit explained in *NARUC I*, "[a] particular system is a common carrier by virtue of its functions, rather than because it is declared to be so." 525 F.2d at 644.

Under Verizon's private carriage proposal, common carrier status would depend solely on a carrier's declaration that it was offering "broadband" transmission capacity. Nothing else would change. Verizon would still be able to provide all of the services it currently provides today over the broadband facility and would be able to solicit customers for its various services through advertising, telemarketing, mail brochures, etc. In other words, Verizon would continue to be able to hold itself out to provide broadband service on an indiscriminate basis.¹⁵ And, Verizon's "private broadband transmission" customers would be able to continue to use such transmission to "transmit intelligence of their own design and choosing," which is a "prerequisite of common carrier status." *NARUC v. FCC*, 533 F.2d 601, 609 (D.C. Cir. 1976) quoting *Industrial Radiolocation Service*, 5 FCC 3d 197, 202 (1966).

The only difference between the way Verizon conducts business today and the way that it would presumably conduct business if the Commission were to adopt Verizon's private carriage proposal is that Verizon would be able to avoid all of the requirements of Title II, including the requirements of Section 251(c), in its provision of standalone broadband transmission facilities.¹⁶ Verizon would be able to do so simply by designating a particular facility as providing "broadband capacity" for the provision of what otherwise would be common carrier services.

¹⁵ The holding out test is "an objective one, relying upon what the carrier actually does rather than upon the label which the carrier attaches to its activity or the purpose which motivates it." *Las Vegas Hacienda v. CAB*, 298 F.2d at 434.

¹⁶ The Commission expresses concern that private arrangements would lead to a lessening of competition. *NPRM* at ¶¶51-52.

Plainly the facilities distinction that Verizon asks the Commission to accept for conferring or not conferring common carrier status is legally irrelevant. If Verizon or any ILEC holds itself out as a provider of broadband transmission capacity -- and there is no question that each ILEC does so today -- then it is under a "legal compulsion" to provide such communications services on a common carrier basis. *NARUC I* at 642. The legal standard for determining common carrier status and the substantive requirements of Title II are not so flimsy that they can be avoided by carrier declaration.

V. THERE IS NO NEED TO MODIFY UNIVERSAL FUND OBLIGATIONS IN THIS PROCEEDING.

Because the Commission intends to "continue to pursue and protect the core objectives of universal service" in this proceeding, *NPRM* at ¶65, it has asked commenters to discuss "how to sustain universal service" in a market where "traditional services" are likely to "migrate to broadband platforms." *Id.* at ¶66. In its recently filed comments in CC Docket No. 96-45 (*Federal-State Joint Board on Universal Service*), Sprint has proposed the adoption of a connection-based recovery mechanism for universal service funding obligations. As explained there, such mechanism

will be more stable over time than the current revenue-based system; it will be equitable to consumers who all benefit from universal service; it will be easier for consumers to understand the current collection method; and it will be more cost-efficient from the standpoint for those who ultimately bear the costs of universal service programs -- consumers -- than the current method.

Comments of Sprint filed April 22, 2002 at 4. Sprint also believes that its proposed connection-based method will, at least for the time being, allay any concerns that the Commission has voiced in this proceeding for the same reasons as those set forth in its April 22 Comments in CC Docket No. 96-45 and will not repeat those reasons here.

Sprint, however, does wish to emphasize under a connection-based method, dedicated Internet access services would continue to be exempt from universal service fund obligations.¹⁷ Although it may be that in time, Internet access services provided by ISPs will include other services such as voice telephony, that is not true on any large scale today, and thus there is no need, with the adoption of the connection-based proposal Sprint advocates, to include connections dedicated to Internet access. There is simply no over-arching public policy reason for the Commission to broaden the types of services required to contribute to the universal service fund, especially in view of the fact that Sprint's connection-based method should ensure the collection of the necessary funds without such expansion.

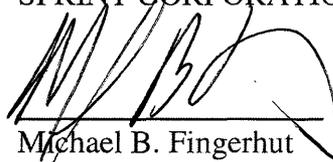
¹⁷ In paragraph 72 of the *NPRM*, the Commission suggests that when a wireline carrier provides broadband Internet access service, it must contribute to the universal service fund based on the Commission's revenue-based methodology. In support, the Commission cites its decision in its *Enhanced Services/CPE Unbundling Order*. However that *Order* cannot be read as imposing universal service fund obligations on a carrier's provision of broadband Internet access service. Rather, that *Order* only addressed the methodology to be used by carriers offering a bundled package consisting of telecommunications services and CPE and/or information services so as to isolate the revenues associated with the provision of telecommunications services. Indeed, the imposition of universal service fund obligations on the provision of a broadband Internet access service that is not coupled with a telecommunications service would be inconsistent with the Commission's tentative finding that such service is not a telecommunications service but rather an information service. *NPRM* at ¶17.

VI. CONCLUSION.

Sprint respectfully requests that any Commission decision in this proceeding be consistent with Sprint's positions as set forth above.

Respectfully submitted,

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