

Telecommunications Act of 1996 (Act). NTCA members are full service telecommunications carriers providing local, wireless, cable, Internet, satellite and long distance services to their communities. NTCA members are rate-of-return regulated carriers.

I. THE STAND-ALONE xDSL TRANSMISSION SERVICES OFFERED BY RATE OF RETURN REGULATED CARRIERS ARE A “TELECOMMUNICATIONS SERVICE.”

The Act defines “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 to the public, regardless of facilities used.”² An entity provides “telecommunications” only when it provides a transparent transmission path and does not change the form or content of the information.³ The Commission tentatively concludes that providers of wireline broadband Internet access service do not provide a “telecommunications service” because they offer more than a transparent transmission path to end-users.⁴ The tentative conclusion is that they instead offer an “information service” because in addition to the transmission path, these providers offer the capability to run a variety of applications that generate, acquire, store, transform, retrieve, utilize, or make information available.⁵

When a ROR regulated rural incumbent LEC offers a high-speed transmission path available on a stand alone basis pursuant to a NECA tariff, it is offering a “telecommunications service.” Under this scenario, Rural incumbent LECs do not

² 47 U.S.C. § 153(46).

³ *Id.* § 153(43).

⁴ NPRM, ¶ 20.

⁵ NPRM, ¶ 26.

combine the transmission portion with the offering of information services; they merely offer telecommunications to the public (any ISP).

A. Small ILECs are Offering Broadband Transmission on a Stand-Alone Basis.

The Commission tentatively concludes that in the case where an entity combines transmission over its own facilities with its offering of wireline Internet access service, the classification of that transmission input is telecommunications, and not a telecommunications service.⁶ The Commission further concludes that an entity is providing a telecommunications service to the extent that the entity provides only broadband transmission on a stand-alone basis, without a broadband Internet access service.⁷

NTCA agrees with this conclusion. Most NTCA members offer broadband transmission services such as DSL on a stand-alone basis. These services are tariffed and offered to any qualifying entity under identical terms and conditions. Any carrier, including a subsidiary of the offering carrier may purchase the transmission. The fact that a subsidiary of the transmission provider offers the Internet access does not change the fact that the transmission portion is offered on a stand-alone basis. The transmission and Internet access are not combined and offered by the ILEC on an integrated basis. The tariffed broadband transmission is a “telecommunications service.”

B. Small ILECs Offer xDSL “for a Fee Directly to the Public.”

In order for broadband transmission to be classified as “telecommunications service” it must be offered for a fee “directly to the public, or to such classes of users as to be effectively available to the public.” The Commission questions whether the

⁶ NPRM, ¶ 25.

provision of xDSL on a wholesale basis as an input to ISPs' information services is being offered "directly to the public." NTCA submits that it is.

Previously, the Commissioner determined that "telecommunications services" means "only telecommunications provided on a common carrier basis."⁸ The term "common carriage" has thus been used to define "the public." The "key factor" for a common carrier determination is said to be, "that the operator offer indiscriminate service to whatever public its service may legally and practically be of use."⁹ There is no requirement that a service be offered at retail.

In 2000, the Commission found that Iowa Communications Network (ICN) was a common carrier even though it did not offer service to all potential users.¹⁰ The FCC determined that ICN offered its services to qualified users on generally available terms and conditions and did not make individualized decisions, in particular cases, whether and on what terms to deal. The Commission determined that the key factor is whether an entity "offers indiscriminate service to whatever public it is legally authorized to service."¹¹

Following this reasoning, to make a determination of whether a service is being offered "directly to the public," it is appropriate to determine the "public" for whom a service is of legal or practical use, and then determine whether the service is offered indiscriminately to that public.

⁷ NPRM, ¶ 26.

⁸ *Federal-State Joint Board on Universal Service*, Report and Order, 12 FCC 8776, 9177 (1997).

⁹ *Nat'l Assoc. of Regulatory Util. Commissioners v. FCC*, 525 F.2d 630 (D.C. Cir.), cert. Denied, 425 U.S. 992 (1976).

¹⁰ *Federal-State Joint Board on Universal Service*, Order on Remand, CC Docket No. 96-45, 16 FCC Rcd 571 (2000), on remand from the D.C. Circuit, *State of Iowa v. FCC*, 218 F.3d 756 (D.C. Cir. 2000).

¹¹ *Id.*, ¶ 9.

ROR carriers that offer xDSL through the NECA tariff offer the service for a fee on a wholesale basis to any and all interested ISPs on identical terms and conditions. The service is offered to ISPs because they are the parties for whom the service is of “practical use.” ISPs, not their retail customers, purchase the service from the LEC in much the same way that other carriers purchase interstate access services from other LECs. The service is available to a class of users (the ISPs) so as to be effectively available directly to the public, thus fitting squarely within the definition for “telecommunications service.” The xDSL service that NECA tariff participants offer on a wholesale basis, as an input to ISPs’ information service, is a “telecommunications service.” The ILECs offer and do not change the form or content of the information that is transmitted over xDSL facilities.¹²

II. SOUND PUBLIC POLICY DICTATES THAT THE COMMISSION PERMIT OPTIONAL TARIFFING OF BROADBAND TRANSPORT SERVICES.

The Commission questions what role Section 706 should have in this proceeding. It is, by the Commission’s own admission, an integral component of this proceeding. The Commission states that its decision will be guided by the Congressionally mandated goal to “encourage the deployment on a reasonable and timely basis” of broadband capabilities to “all Americans.”¹³

In furtherance of that goal, the Commission states, “broadband services should exist in a minimal regulatory environment that promotes investment and innovation in a

¹² See, *In the Matter of Wireline Services Offering Advanced Telecommunications Capability, Second Report and Order*, 14 FCC Rcd 19237, 19247 concluding that DSL services targeted to ISPs are a “telecommunications” service.

¹³ § 706 of the Telecommunications Act of 1996 (Act), Pub. L. 104-104, Title VII, Feb. 8, 1996.

competitive market.”¹⁴ While NTCA generally supports the Commission’s goal, we caution the Commission that mandatory detariffing of broadband transmission will not foster broadband investment for all carriers. The Commission should adopt a flexible approach that permits tariffing for those carriers who choose to remain under rate of return regulation. Pricing flexibility should also be permitted.

Rate of return (ROR) regulation enables independent rural incumbent local exchange carriers (LECs) to obtain the capital necessary to build, operate and maintain telecommunications facilities. ROR regulation minimizes the risks involved, providing investors and lenders a reasonable degree of assurance that the rural incumbent LEC will remain financially solvent. It has helped small and rural carriers grow and provide quality, reliable and affordable telecommunications services to rural America.

The NECA pooling structure, in place for the last two decades, similarly works as a stabilizing factor for small carriers by reducing administrative costs, creating incentives and spreading the substantial risks of investing in rural areas among its participants.

ROR regulation and the pooling structure have enabled rural carriers to not only survive, but to thrive. Americans living in remote and difficult to serve regions of the United States have access to state of the art telecommunications services because of it.

ROR carriers face different challenges and market conditions than their urban counterparts. The tariffing of broadband transport within the NECA pool permits ROR carriers to share risks and offer xDSL services at attractive rates. Many ROR regulated rural incumbent LECs are offering xDSL today.¹⁵ However, ubiquitous deployment is very costly. The upgrading of certain long loops is estimated to cost almost \$10,000 per

¹⁴ NPRM, ¶ 5.

¹⁵ NTCA 2001 Internet/Broadband Availability Survey (Dec. 2001), available at www.ntca.org.

loop.¹⁶ Full deployment requires a substantial investment, yet rural carriers lack the subscribers over which to spread the cost. Without the pool, many rural carriers would be forced to forego providing high-speed service because they would have to price it out of the range of affordability. The rural consumer would suffer and lag technologically behind those residing in urban areas, counter to the expressed goals of the Act.

While not all wireline broadband Internet access service will currently meet the Commission's definition of "advanced telecommunication service,"¹⁷ the existence of the NECA pools is a necessary predecessor to advanced services roll out. The Commission should not abandon policies and practices that have promoted broadband deployment in rural areas.

III. ALL PROVIDERS OF BROADBAND INTERNET ACCESS SHOULD CONTRIBUTE TO UNIVERSAL SERVICE

The Commission questions whether it should exercise its permissive authority to require other broadband Internet access providers (e.g., wireless, cable and satellite) that supply last-mile connectivity over their own facilities to contribute to universal service based upon their self-provision of telecommunications. The Commission also asks for comments on potential changes that could result from the reclassification of "telecommunications services" as "information services" or "telecommunications."

NTCA believes that Congressional goals will best be served if the list of contributors expands.

¹⁶ NECA Rural Broadband Cost Study: Summary of Results, p. 4 (June 21, 2000).

¹⁷ The Commission has defined "advanced telecommunications capability" as "having the capability of supporting, in both the provider-to customer (downstream) and the customer-to-provider (upstream directions, a speed (in technical terms, 'bandwidth') in excess of 200 kilobits per second (kbps) in the last mile." *Second Section 706 Report*, 15 FCC Rcd at 20919-20.

In a separate proceeding, NTCA argued that the universal service contribution base should include cable, wireless and satellite carriers who use their platforms to provide broadband Internet access services.¹⁸ NTCA pointed out that the current rules put ROR carriers at a competitive disadvantage. Incumbent LECs are required to make universal service contributions to the extent they provide broadband transmission services or other telecommunications services on a stand-alone basis to affiliated or non-affiliated Internet service providers or end-users. These requirements do not apply to cable, wireless, or satellite providers of broadband transmission services or other providers of access.

To achieve competitive neutrality, all facilities based broadband providers should be treated alike and contribute to the universal service fund. As technology changes, the consumer will be unable to distinguish the service and features of one type of provider from another. Different facilities and technologies are emerging as substitutes for traditional circuit switched telecommunications services and broadband Internet access services. Interstate traffic is migrating to these facilities and the carriers that operate them benefit from the nation-wide network made possible by universal service. Requiring only incumbent LECs to contribute to the fund places these carriers at a distinct competitive disadvantage.

If the Commission adopts the tentative conclusion that wireline broadband Internet access offered on an integrated basis is an “information service,” it should use its permissive authority to assess the telecommunications component of this service. Cable, wireless, and satellite providers, who provide information service, should also be

¹⁸ See Reply Comments of NTCA, Federal-State Joint Board on Universal Service, CC Docket No. 96-45, FCC 02-41 (submitted April 25, 2002).

assessed. Carriers that benefit from universal service should not escape the obligation of support just because they bundle services or escape designation as “telecommunications carriers.”

The technology that consumers want and expect to have access to is changing. As Congress anticipated, the current definition of universal service must evolve to keep pace with the consumer need. The universal service support ensures comparable and affordable services throughout the nation. Cable, wireless and satellite providers of broadband Internet access will benefit from the nationwide network made possible by universal service. They should contribute. Moreover, expanding the list of contributors to the fund is critical to its continued success.

IV. THE COMMISSION SHOULD TAKE PRECAUTIONS TO ENSURE THAT STATE AUTHORITY UNDER SECTION 253 IS PRESERVED

The Act leaves to the States the authority to regulate entry and to ensure that competitive entry in rural areas does not harm universal service or impede the delivery of high quality telecommunications services.¹⁹ The Commission’s redesignation of previously classified “telecommunications services” as “telecommunications” or “information services” subject to the interstate jurisdiction has the potential to deprive the states of the ability to regulate entry through the certification process and to enforce Section 253(b)(3). NTCA urges the Commission to consider the effect of its proposal and take precautions to ensure that the states preserve their ability to decide what carriers may obtain certificates of public convenience and necessity and to impose public interest and additional safeguards on all entrants. This is necessary to ensure that subscribers of services typically certificated by the states continue to receive the benefits of universal

service. The rush to replace state authority with federal regulatory parity could harm the public and ultimately retard universal service if states are deprived of their traditional ability to issue certificates and to impose conditions to safeguard universal service pursuant to Section 253.

V. CONCLUSION

For the above stated reasons, the Commission should permit rate of return regulated carriers to continue to offer their stand-alone broadband transport service as a “telecommunications service” and tariff it in the interstate jurisdiction. The Commission should also require all facilities-based providers of broadband Internet services to contribute to the universal service fund. Irrespective of the action the Commission takes in this proceeding, it should take precautions to ensure that existing state authority is preserved.

Respectfully submitted,

NATIONAL TELECOMMUNICATIONS
COOPERATIVE ASSOCIATION

By: /s/ L. Marie Guillory
L. Marie Guillory
(703) 351-2021

By: /s/ Jill Canfield
Jill Canfield
(703) 351-2020

Its Attorneys

4121 Wilson Boulevard, 10th Floor
Arlington, VA 22203
703 351-2000

¹⁹ 47 U.S.C. § 253(b)

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CERTIFICATE OF SERVICE

I, Gail C. Malloy, certify that a copy of the foregoing Comments of the National Telecommunications Cooperative Association in CC Docket No. 02-33, CC Docket No. 95-20, CC Docket No. 98-10, FCC 02-42 was served on this 3rd of May 2002 by first-class, U.S. Mail, postage prepaid, to the following persons.

/s/ Gail C. Malloy

Gail C. Malloy

Chairman Michael Powell
Federal Communications Commission
445 12th Street, SW, Room 8B201
Washington, D.C. 20554

Commissioner Kathleen Q. Abernathy
Federal Communications Commission
445 12th Street, SW, Room 8-A204
Washington D.C. 20554

Commissioner Kevin J. Martin
Federal Communications Commission
445 12th Street, S.W., Room 8-C302
Washington, D.C. 20554

Commissioner Michael J. Copps
Federal Communications Commission
445 12th Street, S.W., Room 8-A302
Washington, D.C. 20554

Qualex International Portals II
445 12th Street, S.W.
Room CY-B402
Washington, D.C. 20554