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

COMMENTS OF MONET MOBILE NETWORKS, INC.

Monet Mobile Networks, Inc. ("Monet") submits the following comments in response to the Federal Communications Commission's ("FCC" or "Commission") *Notice of Proposed Rulemaking* inviting comment concerning, among other matters, the universal service obligations of broadband Internet access providers.[1]

Monet agrees strongly with the Commission that advanced, broadband Internet access should be available to all Americans. In fact, Monet was formed in 1999 for the express purpose of deploying high-speed, low-cost, mobile wireless broadband Internet access and other advanced mobile data services to underserved markets. Monet's innovative service employs affordable wireless modems for connection to personal or notebook computers to provide broadband Internet access

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[1] *See Appropriate Framework for Broadband Access to the Internet over Wireline Facilities; 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*, Notice of Proposed Rulemaking, FCC 02-42 (Feb. 15, 2002) ("*Broadband NPRM*").

to consumers and small businesses. Because most of the markets targeted by Monet's licensed service are underserved areas that lack ubiquitous broadband Internet access services, such as those provided by cable modems and digital subscriber lines, Monet's solution to opening the "last mile" bottleneck to the Internet often will be the *only* means of broadband Internet access for these underserved customers. Accordingly, Monet's service is ideally suited to promote the Commission's goal of broadband Internet access deployment to all regions of the country.[2]

This goal will not be served, however, if the Commission retreats from its consistent refusal to saddle information services generally -- and the Internet in particular -- with legacy common-carrier regulations such as the obligation to contribute to universal service ("USF") funds. The Commission's refusal to regulate the Internet is one of its great success stories, and the dramatic growth of the Internet is in part a testament to this Commission's vision and restraint. For this reason, and because any USF obligations that the Commission chooses to impose upon wireline Internet access providers may form the basis for imposition of similar obligations upon wireless providers, Monet urges the Commission not to retreat from its deregulatory policy in this proceeding.[3]

Fortunately, the Communications Act and this Commission's precedents support the continuation of the existing, well-established deregulatory approach to broadband services. The imposition of contribution obligations upon facilities-based

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[2] Monet also is a licensed provider of commercial mobile radio service ("CMRS") voice services, which are subject to universal service contribution requirements and other regulations of this Commission. Monet does not dispute its obligation to contribute to the universal service fund on the basis of its regulated voice services, but opposes the imposition of contribution obligations on its wireless Internet access services.

[3] *Broadband NPRM* at ¶ ¶ 79-80. Monet does not concede, however, that a decision to require USF contributions from wireline Internet access providers will support the extension of similar obligations to wireless providers.

ISPs is not authorized by the mandatory contribution provisions of section 254(d) of the Communications Act and cannot be squared with the Commission's precedents or the statutory criteria for exercise of the Commission's permissive authority to require contributions. For these reasons, and because the imposition of such contribution obligations will harm rather than promote the public interest in universal service, the Commission should not take this ill-advised step.

I. FACILITIES-BASED BROADBAND INTERNET ACCESS PROVIDERS ARE NOT SUBJECT TO MANDATORY USF CONTRIBUTIONS

Section 254(d) of the Communications Act of 1934, as amended (the "Act"), requires USF contributions from providers of "interstate telecommunications services" on a mandatory basis.[4] The Commission has consistently declined to impose these mandatory contribution obligations on ISPs, including facilities-based ISPs, on the ground that those entities provide only "information services" rather than telecommunications services.[5] The *Broadband NPRM* proposes to retain the classification of ISPs as providers of information services, with the additional refinement of noting that the information service provided by the ISP includes a telecommunications input.[6] To the extent the Commission does not propose to change its overall classification of ISP services as information services, and therefore does not purport to create a basis for including ISP services within the category subject to mandatory USF contribution obligations, Monet has no objection to the Commission's classification proposal. In order to avoid any confusion, however, the Commission should take the opportunity of this proceeding to reconfirm that

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[4] 47 U.S.C. § 254(d).

[5] *See Federal-State Joint Board on Universal Service*, 12 FCC Rcd 8776, 8822-23, 9179-80 (1997) ("*USF Report and Order*").

[6] *Broadband NPRM* at ¶¶ 24, 25.

ISPs - whether they provide their own transport facilities or obtain transport services from other providers - are not subject to the mandatory contribution obligation of section 254(d).

II. FACILITIES-BASED BROADBAND INTERNET ACCESS PROVIDERS SHOULD NOT BE SUBJECT TO USF CONTRIBUTION OBLIGATIONS UNDER THE COMMISSION'S PERMISSIVE AUTHORITY

The Commission also asks whether it may require USF contributions from facilities-based ISPs on the strength of its permissive authority, under section 254(d) of the Act, to require contributions from "[a]ny other provider of interstate telecommunications . . . if the public interest so requires."[7] Resolution of this issue requires us to answer two questions. First, is a facilities-based ISP a provider of telecommunications under the Act? Second, if the first question is answered in the affirmative, does the public interest require the extension of contribution obligations to facilities-based ISPs? Both questions must be answered in the negative.

A. Imposition of USF Contribution Obligations on Facilities-Based Internet Access Providers Is Inconsistent with the Communications Act

The Commission's "permissive" authority to require universal service contributions is limited to the imposition of such obligations on "provider[s] of interstate telecommunications."[8] As the Commission has made clear in the past, this category does not include ISPs that provide only Internet access service.

This point was made most clearly in the Commission's April, 1998 *Report to Congress,* where the Commission discussed at length the functionalities that an ISP provides to its customer.[9] Describing each of those functionalities in turn, the

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[7] 47 U.S.C. § 254(d).

[8] *Id*.

[9] *Federal-State Joint Board on Universal Service*, Report to Congress, 13 FCC Rcd 11501, 11536-40 ("*Report to Congress*").

Commission showed that none can fairly be described as telecommunications - *i.e.*, "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."[10] Accordingly, the Commission quite logically concluded that "Internet access services should [not] be classed as telecommunications," and that the service an Internet access provider offers to its customer is an information service rather than a telecommunications service.[11]

In the *Broadband NPRM*, the Commission does not expressly revisit its earlier conclusion that an ISP, to the extent it provides Internet access, does not provide telecommunications to its customer. However, the Commission suggests that facilities-based broadband ISPs "self-provision telecommunications inputs" - that is, that facilities-based ISPs provide telecommunications, not necessarily to their customers, but to themselves.[12] With this suggestion the Commission appears to revive the observation, made in the *Report to Congress*, that a facilities-based ISP could arguably be regarded as "providing telecommunications to itself,"[13] and therefore might be subject to permissive contribution obligations as a telecommunications provider.

The notion that a facilities-based ISP is a provider of telecommunications to itself, however, cannot be squared with the Act's definition of telecommunications. According to the Act, telecommunications is the "transmission, between or among points specified by the *user,* of information of the *user's* choosing, without change in

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[10] *Report to Congress* at 11514-15.

[11] *Id*. at 11540.

[12] *Broadband NPRM* at ¶ 77.

[13] *Report to Congress* 11569-70.

the form or content of the information as sent and received."[14] Accordingly, any entity that provides telecommunications must, by definition, provide that function to a user that specifies the end points of the transmission and chooses the information to be transmitted.

Under this definition, a facilities-based ISP that furnishes only Internet access cannot be a provider of telecommunications to the customer *or* itself. As the Commission made clear in the *Report to Congress,* the ISP does not provide telecommunications to its customer because the customer does not specify the end points of the transmission and the information to be transmitted. Similarly, the ISP does not provide telecommunications to itself because the ISP, like the customer, does not choose the end points or the information to be transmitted.[15] Accordingly, a facilities-based ISP that provides only Internet access service is a provider of an information service, and uses transmission facilities as part of that service, but does not provide telecommunications to anyone.[16] Because the ISP does not provide

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[14] 47 U.S.C. § 153(43) (emphasis added).

[15] As the Commission's detailed description of Internet access in the *Report to Congress* makes clear, Internet access cannot be classified as a telecommunications service because it involves much more than simple transmission. Even to the extent Internet communications include "transmission" functions, however, the ISP neither chooses the information transmitted over its system nor the end points of the transmissions to and from its server. The customer - not the ISP - chooses the destinations to which the transmissions will be sent by selecting URLs, Internet addresses or other locator information. Similarly, the information carried over the server is created and selected, not by the ISP or its customer, but by untold numbers of content providers with which the ISP's server interacts in the course of its customers' Internet sessions.

[16] This is not to suggest that no entity ever provides telecommunications to itself. For example, a company that buys transmission facilities and uses those facilities strictly to transmit its internal communications is both a user of telecommunications (because it chooses the information to be transmitted and the end points of the communications) and a provider of telecommunications (because it furnishes the transparent transmission capacity that it also uses).

telecommunications, it may not be subjected to permissive USF contribution obligations under section 254(d).[17]

B. Imposition of USF Contribution Obligations on Facilities-Based ISPs Is Inconsistent with the Commission's Past Decisions

In past exercises of its permissive authority under section 254(d), the Commission has extended contribution obligations only to entities that provide an identifiable telecommunications service to others. Specifically, the Commission has extended permissive contribution obligations to payphone aggregators and to private network operators that make excess telecommunications capacity available to end users on a private contractual basis.[18] The Commission also has indicated that entities that offer a package of information and telecommunications services for a single fee, where the telecommunications service is separate and distinguishable in use from the information service, should contribute to USF based upon the telecommunications service that is bundled with the information service.[19] In all of these cases, the Commission based its conclusion on the fact that the entities in question "provide telecommunications in competition with common carriers," and that "their non-common carrier status results solely from the manner in which they have chosen to structure their operations."[20] At the same time, the Commission has so far declined to impose permissive contribution obligations upon entities "that

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[17] The Commission appears to recognize this fact at paragraph 25 of the *Broadband NPRM,* when it makes this observation: "Indeed, it seems as if a provider offering the service over its own facilities does not offer 'telecommunications' to anyone, it merely uses telecommunications to provide end-users with wireline broadband Internet access services . . ."

[18] *Broadband NPRM* at ¶ 71.

[19] *Id*. at ¶ 72.

[20] *Id*. at ¶ 71.

provide telecommunications solely to meet their internal needs," on the ground that telecommunications does not constitute the "core" of a self-provider's business.[21]

If the Commission chooses to extend USF contribution obligations to ISPs that offer only Internet access services, its action will find no support in these precedents. Notably, facilities-based ISPs do not, like payphone aggregators, network operators selling excess capacity and providers of telecommunications services bundled with information services, provide a distinguishable telecommunications service to others. Similarly, like those self-providers from which the Commission has declined to require contributions in the past, ISPs do not provide telecommunications as the "core" of their business, and do not provide telecommunications "in competition with common carriers." Accordingly, in order for the Commission to extend USF obligations to facilities-based ISPs, it must adequately explain its departure from the rationale of all previous exercises of its permissive authority under section 254(d).

C. Imposition of USF Contribution Obligations on Facilities-Based Internet Access Providers Is Not Required by the Public Interest

In order to sustain an exercise of its permissive authority under section 254(d), it is not enough for the Commission to find that its action will promote the public interest: it must find that "the public interest *so requires*."[22] More specifically, as the Conference Committee Report on the Telecommunications Act of 1996 makes clear, this public interest finding must demonstrate that "the

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[21] *Id.*

[22] 47 U.S.C. § 254(d) (emphasis added).

public interest requires [imposition of a contribution obligation] to preserve and advance universal service."[23]

The *Broadband NPRM* does not suggest how the preservation and advancement of universal service would be served by - much less require - the extension of USF contribution obligations to facilities-based ISPs. As Commissioner Martin rightly points out, "there has been no finding that the current contribution mechanism is insufficient to meet the needs of the universal service fund."[24] Even if such a showing could be made, the Commission must demonstrate how the extension of contribution obligations to facilities-based ISPs would broaden the base of the fund without, at the same time, undermining the goal of extending affordable broadband service to all Americans.[25] Such a showing cannot be made on the facts of the present marketplace. In the case of Monet's service, in particular, such a requirement would increase the cost of one of the most promising means of extending broadband Internet access service to customers in areas that presently have no high-speed Internet service available to them. Accordingly, the Commission should decline to take this action as contrary to the public interest.

CONCLUSION

The Commission's present rules concerning mandatory and permissive USF contribution obligations are logical and consistent with the Communications Act and

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[23] Joint Explanatory Statement of the Committee of Conference, H. Conf. Rep. 104-458, *reprinted in* 1996 U.S.C.C.A.N. 124,143.

[24] *Broadband NPRM*, Separate Statement of Commissioner Kevin J. Marvin, Approving in Part and Dissenting in Part, at 2.

[25] *See, e.g.*, 47 U.S.C. § 230(b) ("It is the policy of the United States (1) to promote the continued development of the Internet and other interactive computer services and other interactive media . . ."); Telecommunications Act of 1996, § 706 ("The Commission and each State commission with regulatory jurisdiction over telecommunications services shall encourage the deployment . . . of advanced telecommunications capability to all Americans . . . by using . . . regulatory forbearance . . .").

the public interest. Any extension of those contribution obligations to facilities-based ISPs, however, would be contrary to the Act, the Commission's precedents and the public interest, and should not be undertaken.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, James S. Bucholz, hereby certify that on this 3rd day of May, 2002, I caused copies of the foregoing **Comments** to be delivered, via first-class postage prepaid mail, to the following:

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