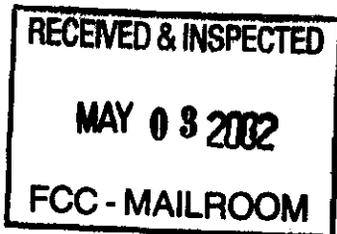


J. TAYLOR GREER
RICHARD L. SPANGLER, JR.
ALLEN L. OVERCASH
PAUL M. SCHUDEL
EDWARD H. TRICKER
WM. LEE MERRITT
JOSEPH H. BADAMI
KERRY L. KESTER
ROBERT B. EVNEN
JOEL D. HEUSINGER
TERRY C. DOUGHERTY
JENNIFER J. STRAND
CRAIG C. DIRRIM
BRUCE A. SMITH
JEFFERY T. PEETZ
KRISTA L. KESTER
KENT E. ENDACOTT
SHANNON L. DOERING
LENA A. LUCAS
KARA E. MICKLE

WOODS & AITKEN

L • L • P

THOMAS C. WOODS (1895-1958)
WILLIAM I. AITKEN (1896-1978)
PHILIP M. AITKEN (1902-1998)



May 2, 2002

OF COUNSEL
BERT L. OVERCASH
RICHARD W. SMITH

SUITE 500
301 SOUTH 13TH STREET
LINCOLN, NEBRASKA 68508-2578
FAX (402) 437-8558

TELEPHONE (402) 437-8500

Email: PSchudel@woodsaitken.com
Direct Dial: (402) 437-8509

VIA FEDERAL EXPRESS

Marlene H. Dortch, Secretary
Federal Communications Commission
9300 East Hampton Drive
Capitol Heights, MD 20743

Re: CC Docket Nos. 02-33, 95-20, and 98-10

Dear Ms. Dortch:

Enclosed please find an original and four copies of the Comments of The Nebraska Independent Companies for filing in CC Docket 02-33. Since more than one docket appears in the caption of this proceeding, an additional two copies are enclosed for each of Docket Nos. 95-20 and 98-10 (for a total of four additional copies). These materials are provided to you in accordance with the instructions published by the FCC and contained in FCC 02-42.

In addition, I have enclosed a further copy of these comments, together with a self-addressed, stamped envelope. Please return a file-stamped copy of such comments to me in the enclosed envelope.

In accordance with the instructions contained in FCC 02-42, copies of the comments are being provided to the below referenced persons in diskette form. Please do not hesitate to contact the undersigned in the event any questions arise in conjunction with this filing.

Very truly yours,

PMS/dh
Enclosures

No. of Copies rec'd
List ABCDE

078

Marlene H. Dortch, Secretary

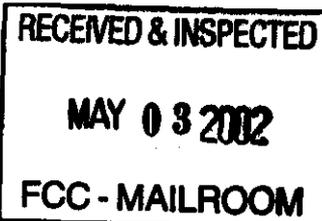
May 2, 2002

Page 2

cc: Janice Myles (via Federal Express, 1 diskette copy)
Policy & Program Planning Division
Common Carrier Bureau
Federal Communications Commission
236 Massachusetts Avenue, NE, Suite 110
Washington, DC 20002

Qualex International (via Federal Express, 1 diskette copy)
Portals II
445 12th Street S.W., CY-B402
Washington, DC 20554

Before the
Federal Communications Commission
Washington, D.C. 20554



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

Comments of
The Nebraska Independent Companies

I. Introduction

The Nebraska Independent Companies¹ (the “Companies”) hereby submit comments in the above captioned proceeding. With this Notice of Proposed Rulemaking² (“NPRM”) the Federal Communications Commission (the “Commission”) launches a thorough examination of the appropriate legal and policy framework under the Communications Act of 1934, as amended, for broadband access to the Internet provided

¹ Companies submitting these collective comments include: Arlington Telephone Company, The Blair Telephone Company, Cambridge Telephone Company, Clarks Telecommunications Co., Consolidated Telephone Company, Consolidated Telco, Inc., Eastern Nebraska Telephone Company, Great Plains Communications, Inc., Hartington Telecommunications Co., Inc., Hershey Cooperative Telephone Company, Inc., Hooper Telephone Company, K&M Telephone Company, Inc., NebCom, Inc., Nebraska Central Telephone Company, Northeast Nebraska Telephone Co., Pierce Telephone Co., Rock County Telephone Company, Stanton Telephone Co., Inc. and Three River Telco.

² See *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, FCC 02-42 (“*Wireline Broadband Access NPRM*”) (rel. Feb. 15, 2002).

over domestic wireline facilities. The Commission has launched several parallel notices associated with broadband services. The first investigates the appropriate regulatory classification for cable modem service.³ The second examines the dominant status of incumbent local exchange carriers (“LECs”) when they provide broadband Internet access services.⁴ And the third examines the obligations of incumbent LECs to make their facilities available as unbundled network elements to competitive LECs for the provision of broadband services.⁵ By contrast, this NPRM addresses the fundamental definitional and classification questions for wireline broadband Internet access service⁶. Unfortunately, no recognition appears to be given in this NPRM to the effects on rural subscribers as a result of any reclassification of wireline broadband Internet access service.

In these comments the Companies focus specifically on digital subscriber line (“xDSL”) services offered by wireline carriers either on a wholesale basis to Internet service providers or on a retail basis to end users. The Companies maintain that there are fundamental inconsistencies with the functionality of xDSL service compared with the Commission’s definition of an Internet access service. xDSL services can clearly be distinguished from those information services that are typically offered by Internet

³ See *Inquiry Concerning High-Speed Access to the Internet Over Cable and Other Facilities*, Notice of Inquiry, 15 FCC Rcd 19287 (2000) (“*Cable Modem Notice*”).

⁴ See *Review of Regulatory Requirements for Incumbent LEC Broadband Telecommunications Services*, CC Docket No. 01-377, Notice of Proposed Rulemaking, FCC 01-360 (“*Incumbent LEC Broadband Notice*”) (rel. Dec. 20, 2001).

⁵ See *Review of Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*, CC Docket No. 01-338, *Implementation of the Local Competition Provisions of the Telecommunications Act of 1996*, CC Docket No. 96-98; *Deployment of Wireline Services Offering Advanced Telecommunications Capability*, CC Docket No. 98-147, Notice of Proposed Rulemaking, FCC 01-361 (rel. Dec. 20, 2001).

⁶ See *Wireline Broadband Access NPRM*.

service providers. The Companies assess the negative policy implications, especially in rural areas of the nation served by rural ILECs, of specifying xDSL services as Internet access service and thus classification as an information service. The Companies assert that there would likely be grave consequences for universal service and continued advancement of broadband services in rural high cost markets if joint and common costs associated with the network are allocated to non-regulated activities and therefore are no longer supported by federal and state universal service systems. Finally the Companies suggest that the more appropriate treatment for xDSL services is as a non-dominant telecommunications service over which the Commission would retain the regulatory oversight, but with less onerous requirements for rate makings and tariff terms than dominant services. Such a designation is absolutely essential to ensuring that rural companies will be able to continue to offer xDSL services that are affordable to rural customers yet recover the overall cost of the network required to provide those services.

II. The Functionality of xDSL Services does not Comport with the Definition of an Internet Access Service.

In its *Report to Congress* on universal service, the Commission stated that Internet access providers do not offer a pure transmission path but combine computer processing, information provision, and other computer-mediated offering with data transport. Based on that description the Commission found that Internet access services are appropriately classified as information rather than telecommunications services.⁷ The Companies maintain that xDSL service, in and of itself, does not meet the standard set forth above to be specified as an Internet access service. First, xDSL service is a distinct

⁷ See *Id.* at para. 14.

service currently identified as such in interstate access tariffs filed with the Commission⁸. It is provided as a service to Internet Service Providers or directly to end-users. It is only bundled with information services when the retailer chooses to do so. Second, xDSL services are properly represented as a multiplexing function. At the customer premise the data transmission is multiplexed over the voice frequencies in order to derive a dedicated transmission channel (not unlike a private line in nature). At the central office the Digital Subscriber Line Multiplexers (“DSLAMs”) further multiplex the collective data paths to a DS1 or fiber optic interface to be routed upchain in the network. It is clear that xDSL service does not include a computer processing function and does not provide information or a computer-mediated offering. Further xDSL service cannot be construed to provide accessibility to such functions in the case where it is being utilized in conjunction with Internet routing services to construct virtual private networks (“VPNs”).

The Commission should not include xDSL in the set of Internet access services because it does not provide the defined functionality of an information service and is clearly a transmission service only, and therefore a telecommunications service.

III. The Ability to Include xDSL Cost Recovery in the National Exchange Carrier Association (“NECA”) Pool Represents a Significant Incentive for Investment in Broadband Services in High Cost Areas.

In this NPRM the Commission articulates four policy goals that will guide its decisions in this proceeding⁹. The first goal reflects an explicit charge by Congress to encourage the deployment of broadband capabilities to all Americans. The second goal would preserve opportunities for broadband competition, the third would promote

⁸ See Id. at para. 26.

⁹ See Id. at paras. 3-6.

investment and innovation, and the fourth would make policy consistent across all delivery platforms. The Companies assert that any policy decisions that would prevent an opportunity for high cost rural companies to pool xDSL costs and average rates in the NECA access tariff would be patently inconsistent with the Commission's goals in this proceeding. The ability to pool costs and average prices allows LECs in high cost markets to offer xDSL services at prices that promote demand levels that justify investments in a broadband-capable network. Because the xDSL service prices are particularly elastic in high cost markets where income is below the national average (as in Nebraska)¹⁰ pricing at actual service costs will ultimately represent a disincentive for investment as demand for the service will be severely limited. The Commission should carefully consider any policy decision that would result in eliminating the opportunity for high cost rural companies to pool costs and average prices.

IV. Deregulation of xDSL will Limit Competition for Internet Services and Therefore xDSL should be Classified as a Non-dominant Service.

A regulatory framework that defines xDSL service as an information service will limit a consumer's choice for broadband Internet access to the provider that has deployed the underlying transmission facilities. Defining xDSL service as an information service will allow the carrier to discontinue to offer xDSL as a stand-alone service offering. Thus, under such a classification, the carrier's only xDSL service offering will be integrated with the carrier's Internet access service to provide broadband Internet access service. As such, only those subscribers who continue to access the Internet through dial-

¹⁰ Per capita personal income for Nebraska non-metropolitan regions was \$23,136 in 1999 compared to per capita personal income for the United States of \$28,546 in 1999. Source: Bureau of Economic Analysis, Regional Accounts Data, Local Area Personal Income, Table CA1-3, available at: <http://www.bea.doc.gov/bea/regional/reis/drill.cfm>.

up will be allowed a choice of Internet service providers. Meanwhile, private unregulated contractual arrangements will not have the desired outcome of additional independent Internet service providers. These providers would be placed at a price disadvantage given they would have little or no bargaining strength in negotiations. In order to avoid this consequence, the Commission should classify xDSL services as non-dominant.

V. Allocation of Common Costs Associated with Deregulating xDSL will have a Devastating Effect on Rural LECs and their Customers in High Cost Areas.

The Commission asks for comments on the impact of a finding that wireline broadband Internet access service is an information service on the allocation of joint and common costs of facilities used to provide both information services and telecommunications services.¹¹ Specifically, the Commission asks if the rules for allocating joint and common costs under Part 64.901 of its rules should be modified, and if so, how.¹² The Companies strongly believe that any reallocation of joint and common costs such as the loop to information services would very likely have a devastating effect on rural LECs and, more importantly their customers, in terms of cost recovery through universal service support and other mechanisms. Furthermore, the allocation of additional joint and common costs to wireline broadband Internet access service would make such services unaffordable in most rural areas. Such a result is clearly contrary to the nation's policy of spurring broadband access deployment throughout the nation.

The current federal universal service support mechanism for loop costs of rural carriers compensates such carriers for a portion of their unseparated loop costs above the

¹¹ See *Wireline Broadband Access NPRM* at para. 63.

¹² *Ibid.*

national average cost.¹³ This method of support for the loop ensures relatively stable cost recovery.¹⁴ On the other hand, allocating even a small portion of rural carriers' loop costs to a non-regulated service could place such carriers at great risk for sufficient cost recovery. This is because rural carriers would then have to be dependent solely upon sufficient demand for their non-regulated services to ensure that they receive revenues to cover the costs allocated to the non-regulated services. However, the receipt of sufficient revenues is highly unlikely, as the allocation of costs to the non-regulated services would drive up the cost and rates for the non-regulated services and in turn reduce the demand, as explained following.

Rates for xDSL services through the NECA tariff, which constitutes a rate used by the majority of rural LECs, are presently \$35.95 per month.¹⁵ These rates do not currently include any costs for use of the loop. If any loop costs were allocated to the provision of xDSL services, it could dramatically increase the rates for such services in rural areas. For example, the Rural Task Force ("RTF") found that the total net plant per loop for rural carriers ranges from \$360 to \$29,200, which is far greater than the range for non-rural carriers, which is \$205 to \$529.¹⁶ It is obvious from these large differences in investment that if a portion of loop cost is required to be allocated towards the cost of xDSL service, it will greatly increase the rates of rural carriers relative to the rates of

¹³ See 47 C.F.R. Section 36.631.

¹⁴ There is a cap on the growth of the High Cost Loop ("HCL") fund, and, when the cap is reached, each carrier's share of HCL funds is reduced on a pro-rata basis.

¹⁵ See National Exchange Carrier Association, Inc., Tariff F.C.C. No. 5, 4th Revised Page 17-42.1, effective July 3, 2001.

¹⁶ See The Rural Difference, Rural Task Force White Paper 2, January 2000, available at: <http://www.wutc.wa.gov/rtf> at 49.

non-rural carriers. Because xDSL is largely a discretionary service, especially for residential users, an increase in the rate will lead to a decrease in demand. Recovery of all joint and common costs such as the loop is unlikely to occur in such a scenario especially among rural LECs in high cost areas such as Nebraska. However, because the loop is used in the provision of universal service, insufficient cost recovery of this basic component of universal service could have serious consequences for the provision of universal service. Thus, the potential allocation of loop costs to xDSL service could harm all customers in rural areas both by making xDSL service unaffordable and by jeopardizing universal service.

Due to the potentially harmful effects on rural LECs and their customers of allocating common costs such as the loop to xDSL service, the Companies recommend that the current cost allocation rules in Part 64.901 should not be altered. The Commission's handling of line-sharing, which is an unbundled network element that allowed sharing of the loop for the provision of both voice and data services such as xDSL, serves as a precedent for this recommendation. The Commission found it reasonable "to presume that the costs attributed by LECs in the interstate tariff filings to the high-frequency portion of the loop cover the incremental costs of providing xDSL service on a loop already in use for voice services."¹⁷ Furthermore, the Commission noted that "[i]n setting prices for interstate xDSL services, moreover, incumbent LECs currently attribute little or no loop cost to those services."¹⁸ Given the precedent of not

¹⁷ *Deployment of Wireline Services Offering Advanced Telecommunications Capability*, CC Docket No. 98-147, and *Implementation of the Local Competition Provisions of the Telecommunications Act of 1996*, CC Docket No. 96-98, Third Report and Order in CC Docket No. 98-147, Fourth Report and Order in CC Docket No. 96-98, FCC 99-355 (rel. Dec. 9, 1999) at para. 140.

¹⁸ *Id.* at para. 133.

allocating a portion of the loop to the cost of xDSL services in the context of establishing rates for line sharing, the Companies recommend that loop costs not be allocated to the provision of xDSL service, regardless of the regulatory classification assigned to this service.

VI. A Non-Dominant Classification of xDSL Services is the Correct Determination of Regulatory Treatment for Such Services.

In its NPRM to investigate the dominant status of incumbent LECs in the provision of broadband telecommunications services, the Commission invited comments on SBC Communications' Petition requesting an expedited ruling that it is non-dominant in the provision of broadband services.¹⁹ SBC contends in its petition, that in the mass market for broadband services that four different service platforms (xDSL, cable modem, satellite, and fixed wireless) exhibit sufficient substitutability to be considered evidence of intermodal competition.²⁰ In Nebraska, CATV providers such as Time Warner, Cox Communications, Galaxy, Cable One, Charter Communications, TCI, and others have ubiquitous offerings of cable modem service, and therefore broadband services provided by telecommunications carriers warrant a non-dominant status declaration.

The advantages of non-dominant status for xDSL services over a deregulation classification is even more evident when one considers the impact of such a ruling on broadband competition and incentives for broadband deployment. With non-dominant status for xDSL the rural incumbent would have an opportunity to exercise pricing flexibility to meet competitive pressures, however the Commission would retain the

¹⁹ See *Incumbent LEC Broadband Notice* at para. 7.

²⁰ See *SBC Petition For Expedited Ruling That It Is Non-Dominant In Its Provision Of Advanced Services And For Forbearance From Dominant Carrier Regulation Of Those Services*, filed Oct. 3, 2001

authority to prevent a withdrawal of xDSL services to competitive ISPs if that action were deemed to be a result of anti-competitive behavior. Further, the Commission would avoid the deleterious impact that deregulation could have on universal service support due to the allocation of common infrastructure costs out of the system.

VII. Conclusion

The Commission should consider xDSL services as distinctly provisioned services and based on its functional character should remain classified as telecommunications services as defined by the 1996 Telecommunications Act. Further, based on the ubiquitous availability of substitutable services from competitive platforms the Commission should specify xDSL services provided by incumbent LEC as non-dominant in the mass market.

A decision to classify xDSL services as information services and imply the deregulation of such services would necessarily result in a significant curbing of investment in rural markets. Further, a decision that would require the allocation of significant portions of common network costs to non-regulated activities under Part 64 would mortally wound the universal service system by eliminating significant amounts of support from service providers in high cost areas.

Dated this 2nd day of May, 2002.

Respectfully submitted,

Arlington Telephone Company
Blair Telephone Company,
Cambridge Telephone Company,
Clarks Telecommunications Co.,
Consolidated Telephone Company,
Consolidated Telco Inc.,
Eastern Nebraska Telephone Company,
Great Plains Communications, Inc.,
Hartington Telecommunications Co., Inc,
Hershey Cooperative Telephone Company,
Inc.,
Hooper Telephone Company,
K&M Telephone Company, Inc.,
Nebcom, Inc.,
Nebraska Central Telephone Company,
Northeast Nebraska Telephone Company,
Pierce Telephone Co.,
Rock County Telephone Company,
Stanton Telephone Co., Inc., and
Three River Telco

By: Paul M. Schudel
Paul M. Schudel, No. 13723
WOODS & AITKEN LLP
301 South 13th Street, Suite 500
Lincoln, Nebraska 68508
(402) 437-8500
(402) 437-8558 Facsimile