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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

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

INITIAL COMMENTS OF THE NATIONAL ASSOCIATION OF REGULATORY UTILITY COMMISSIONERS

The National Association of Regulatory Utility Commissioners ("NARUC") respectfully submits this response to the Notice of Proposed Rulemaking ("*Notice*") issued by the Federal Communications Commission ("Commission" or "FCC") in the above-captioned proceedings.[1] The *Notice* proposes, through the use of Title I, a new, undefined, and potentially unlimited paradigm shift in federal authority to regulate incumbent local exchange carrier ("ILEC") "information services."

This shift must not occur without a comprehensive review and understanding of its potential impact. If the proposed shift is adopted, State initiatives must be accommodated by an allocation of facilities used to provide integrated information services and an appropriate allocation of the related jointly-used facilities to Part 64 Non-Regulated Operations.

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[1] *In the Matter of Appropriate Framework for Broadband Access to the Internet over Wireline Facilities; Universal Service Obligations of Broadband Providers*; CC Docket No. 02-33; *Computer III Further Remand Proceedings: Bell Operating Company Provision of Enhanced Services; 1998 Biennial Regulatory Review – Review of Computer III and ONA Safeguards and Requirements*, CC Dockets Nos. 95-20, 98-10, Notice of Proposed Rulemaking, (rel. Feb. 15, 2002) ("*Notice*").

The undefined scope of the proposed classification scheme, threatens to supplant, State authority over any voice services offered as part of an integrated package of "information services."[2] The *Notice*, points out that "the Ninth Circuit Court of Appeals affirm(s) the Commission's authority to preempt [S]tate regulation of jurisdictionally mixed enhanced services," and asks parties to address specific State laws that ". . .are in fact subject to preemption under that decision."[3]

The explicit preemption questions and the sweeping changes in the existing regulatory paradigm raise numerous issues of interest to NARUC's State commission membership. Some of these issues include: the appropriate allocation of loop costs associated with this newly defined "information service;"[4] the impact of the "information service" carrying an integrated POTS voice substitute on State authority to regulate POTS as a stand alone product, require unbundling, universal service policies; authority to oversee service quality; emergency communications and many other issues.

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[2] Voice over DSL is still in its infancy and cable-based telephony has reached over a million subscribers. The FCC's finding in a parallel proceeding that "cable modem" service is an "information service" that does not include a Title II "telecommunications service," also raises issues regarding the scope of State authority. See, Declaratory Ruling and Notice of Proposed Rulemaking, *In the Matter of Inquiry Concerning High-Speed Access to the Internet Over Cable and Other Facilities*, Mar. 15, 2002, FCC 02-77., The California Public Utility Commission appealed that ruling to the Ninth Circuit Court of Appeals; at least one other commission has intervened in that appeal.

[3] The FCC's proposed scheme will present NARUC's member commissions that directly or indirectly regulate DSL transport or service quality, or have State legislative/regulatory initiatives that require DSL/cable modem rollout with unnecessary resource sapping litigation over the scope of their authority. See, Lee, Chang Hee, "REGULATION OF SERVICE QUALITY FOR ADVANCED SERVICES - A Follow-up Survey on Advanced Services" National Regulatory Research Institute (May 2001) at http://www.nrri.ohio-state.edu/programs/telcom/pdf/RegofQoS.pdf. See also, Lee, Chang Hee, "STATE REGULATORY COMMISSION TREATMENT OF ADVANCED SERVICES: RESULTS OF A SURVEY," National Regulatory Research Institute (March 2001) at http://www.nrri.ohio-state.edu/programs/telcom/pdf/broadband_survey_3-01.pdf. [Cf. note 16, *infra*.

[4] This classification exacerbates underlying misallocation problems. If the service is determined to be an "information service", then some allocation of the loop costs to the non-regulated category under Part 64 is appropriate.

In an earlier related docket, NARUC urged the FCC ". . .to specify that DSL-based advanced services (1) based on both their technological capabilities and anticipated use, are, in fact, substitutable for traditional circuit switched services and therefore constitute "comparable" "telephone exchange service" within the meaning of 47 U.S.C. § 153(47)(B), and (2) are potentially subject to unbundling as a "telecommunications service" under § 251(c)."[5]

Here, NARUC respectfully suggests that, if the Commission affirms its tentative redefinition of the term "information services," at a minimum it should defer action until States can be certain this new regulatory paradigm does not negatively impact either the market for broadband services or existing State initiatives designed to enhance deployment and competition.

I. NARUC'S INTEREST

NARUC is a quasi-governmental nonprofit organization founded in 1889. NARUC represents the government officials in the fifty States, the District of Columbia, Puerto Rico, and the Virgin Islands, charged with the duty of regulating, *inter alia*, the telecommunications common carriers within their respective borders. The United States Congress and federal courts have recognized that NARUC is a proper party to represent the collective interest of the State regulatory commissions.[6]

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[5] See, NARUC's September 24, 1999 Initial Comments filed *In the Matter of Deployment of Wireline Services offering Advanced Telecommunications Capability*, CC Docket No. 98-147, CC Docket Nos. 98-11, 98-26, 98-32, 98-78, and 98-91, and CCB/CPD No. 98-15, RM 9244. Those comments focus on assuring § 251's obligations apply to such advanced services and that, inter alia, unbundling may be required. See also Sprint's Initial Comments in the same proceeding at 7: "advanced technologies can be used to provide conventional services, such as switched voice service, [finding such services are NOT subject to 251 obligations] would permit ILECs to evade the fundamental obligations placed upon them simply though the deployment of new technology over the passage of time."

[6] See, e.g., 47 U.S.C. § 410 (1986), where Congress calls NARUC "the national organization of the State commissions" responsible for economic and safety regulation of the intrastate operation of carriers and utilities. Cf, 47 U.S.C. § 254 (1996). See also *USA v. Southern Motor Carrier Rate Conference, et al.*, 467 F.Supp. 471 (N.D. Ga. 1979), aff. 672 F.2d 469 (5th Cir. Unit "B" 1982); aff. en banc, 702 F.2d 532 (5th Cir. Unit "B" 1983, rev'd, 471 U.S. 48 (1985). See also *Indianapolis Power and Light Co. v. ICC*, 587 F.2d 1098 (7th Cir. 1982); *Washington Utilities and Transportation Commission v. FCC*, 513 F.2d 1142 (9th Cir. 1976).

NARUC's member commissions regulate intrastate telecommunications services and particularly the local service supplied by incumbent local exchange carriers ("ILECs"). The commissions are obligated to ensure ILECs provide local telephone service at just and reasonable rates.

The commissions have a direct interest in unfettered competition in the intrastate telecommunications market as part of their responsibilities in implementing: (1) State law and (2) federal statutory provisions specifying ILEC obligations to interconnect and provide nondiscriminatory access to competitors. See, 47 U.S.C. § 252 (1996).[7] Federal law requires the States (and the FCC) to promote advanced telecommunications services like those at issue here. See, 47 U.S.C. § 706 (1996) and *Notice* at ¶ 3.

The FCC seeks comment on "generally on the role of the [S]tates with respect to regulating wireline broadband Internet access services." Specifically, the *Notice* asks ". . .whether, and if so how, classification of wireline broadband Internet access service as an information service would affect the balance of responsibilities between the Commission and the [S]tates. We ask parties to comment on what they consider an appropriate role for the [S]tates in this area, taking into account both policy considerations and legal constraints, including any applicable limitations on delegations of authority to the [S]tates under Title I . . . Additionally, parties should comment on whether current [S]tate regulations, if any, should be preempted to any extent if the Commission were to find that wireline broadband Internet access service is appropriately classified under Title I of the Act." *Notice* at ¶ 15 & 63.

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[7] *Communications Act of 1934, as amended by the Telecommunications Act of 1996*, 47 U.S.C. § 151 et seq., Pub.L. No. 101-104, 110 Stat. 56 (1996) (West Supp. 1998) ("1996 Act" or "Act")

The FCC tentatively concludes ILEC broadband offerings should be classified as "information services" under Title I of the Act. *Notice* at ¶¶ 30–61. The impact on existing State initiatives to promote deployment of advanced services,[8] as well as the consequences of a "federalized" DSL loop providing a combination of voice and the FCC's new "information services," deeply concern NARUC's State members.

II. DISCUSSION

If the FCC Affirms Its Redefinition Of "Information Services," It Should Defer Final Action Until States Can Be Certain This New Regulatory Paradigm Does Not Negatively Impact Either The Market For Broadband Services Or Existing State Initiatives Designed To Enhance Deployment And Competition.

In the *Notice*, the FCC concludes the wireline broadband Internet access services - whether provided over a third party's facilities or self-provisioned facilities - are "information services", with a "telecommunications" component, rather than "telecommunications services" as defined in the 1996 legislation. The FCC concluded that when an entity provides wireline broadband Internet access service over its own transmission facilities, this service, too, is an information service under the Act. The goals of developing "an analytical approach that is, to the extent possible, consistent across multiple platforms" and to minimize regulation of broadband where there is competition are good ones.

[8] One possible outcome of the proposed classification scheme is that ILEC § 251-2 unbundling and resale obligations would depend solely on what it offers to the "public." If it offers a pure transport service, i.e., DSL that the end user combines with a non-ILEC Internet Service Provider ("ISP"), then the transport will have to be made available to competitors on a wholesale basis. But if the ILEC only offers to end-users a combined transport and ISP service, then it could be exempt from resale and unbundling. Note, however, it might still have to offer a transmission service to other ISPs under the Computer II/III "comparatively efficient interconnection" regime, which is also targeted for review and possible revision in this proceeding.

However, classification of ILEC Internet access service as an integrated "information service" with a "telecommunications" component rather than a "telecommunications services" component is inconsistent with the legislative history.[9] This classification is also inconsistent with FCC precedent, court decisions, and the policy goals enunciated in the *Notice*.[10]

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[9] xDSL is colloquially described as "a loop on steroids". It relies on a modem installed at the customer's premises and a modem installed in a carrier's central office to derive additional bandwidth from the existing copper loop. This reliance upon existing copper loops has implications for allocation of joint and common costs. The Act's definition of exchange service covers traditional analog, voice grade service - a telecommunications service. With DSL-based services packet switches, not traditional circuit switches, perform the switching functions; however the functions are comparable and there is no other significant difference. The content being transmitted by both services is the same at each end, no matter how they may be temporarily transformed to fit various transmission media. If traditional voice grade service provides "transmission...without change in the form or content of the information sent and received", then the same can be said of DSL-based services. "Integration" of this common carrier service into "information services" does not change that character. See also note 10, *infra.*

[10] *Legislative History:* The *Notice* at ¶ 3 points out Congress explicitly charged the FCC (and States) to "encourage the deployment on a reasonable and timely basis" of broadband capabilities to "all Americans," and gave the FCC authority to "take immediate action to accelerate deployment of such capability by removing barriers to infrastructure investment." The *Notice* also suggests in ¶ 5 that a "minimal regulatory environment" is needed to "preserve the vibrant and competitive free market that presently exists for the Internet and other interactive computer services, unfettered by Federal and State regulation." (Citing 47 U.S.C. § 230(b)(2)). *It is clear from the explicit textual references, that Congress was aware of and very interested in broadband deployment issues.* If the FCC is correct, Congress was also interested in discouraging regulation for "the Internet and other interactive computer services." It is hard to square those Congressional concerns and the Act's numerous specific provisions addressing both "advanced" and "information" services, with the *Notice*'s implied contention that Congress wants the FCC to assert sweeping and undefined Title I authority over the "internet and other interactive computer services" through what the *Notice* concedes is a new approach to defining "information service." When Congress wishes to discourage regulation and regulatory oversight, it has no difficulty doing so. See, e.g., 47 U.S.C § 160, § 161, & § 274(g)(2). The FCC's view of Congressional intent is inconsistent with (1) the very limited legislative history of the "information service" definition in the Act, (See, e.g., *House Conference Report 104-458* (January 31, 1996) at 114 – 116, where Congress chose not to go with the "Senate definition" which arguably can be read to support the FCC's view, but rather went with the House version that based the definition on the Modified Final Judgment.) and (2) the uses of the term "information services" elsewhere in the Act. The *Notice*'s view of "information service" specifically includes what the FCC *has already found* to be a common carrier "telecommunications service." Other uses of the term "information service" in the Act undercut such an interpretation of Congressional intent. The Act repeatedly uses the term "information service" in a much narrower context, that of a consumer purchase of information that is delivered to the customer through a telecommunications service. See, e.g., the narrow usage of the term at 47 U.S.C. § 544(b)(1) which describes "video programming or other information services" {emphasis added} suggesting that information service is similar to or consists of providing content, content that is then transmitted over the cable system. See also 47 U.S.C. § 228 regarding pay-per-call services where "information services" are referenced numerous times. The usage is informative because it involves the purchase of information services using "telecommunications services." The text demonstrates that its authors thought information services and common carrier services were distinct, e.g., § 228 (c)(8)(B)(i) speaks of subscribers paying "information services" by means of a "phone bill." This provision can be understood only if one assumes that "information service" is distinct from the subscriber's phone service. Under the *Notice*'s tentative conclusions, the information service and the "telecommunications services" merge. Similarly, § 228(c)(8)(B)(ii) requires a disclaimer that prohibits common carriers from disconnecting "local or long distance telephone service for failure to pay disputed charges for information services." The assumption is that phone service (a "telecommunications service") and "information services" are distinct, even if the latter are sometimes billed with the former. Finally, § 228(c)(8)(E) concerns termination of service by a common carrier of the telecommunication services offered to an information service provider. The statute assumes two distinct players. It is the common carrier providing a "telecommunications service" that terminates service to the information service provider. *Prior FCC Precedent*: Treatment of an ILEC consolidated DSL-ISP offering, as not including a "telecommunications service" is also inconsistent with the FCC's numerous findings that DSL is a Title II telecommunications service that can be tariffed at the federal level. See, e.g., *GTE Operating Companies Tariff No. 1*, 13 F.C.C.R. 22466, 1998 WL 758441 (1998) at ¶16. ("We agree that GTE's DSL Solutions-ADSL service offering is an interstate service that is properly tariffed at the federal level.") A recent FCC report to Congress found that, to the extent certain forms of phone-to-phone IP telephony are interstate 'telecommunications,' and to the extent that providers of such services offer such services directly to the public for a fee, those providers would be classified as 'telecommunications carriers' and therefore subject to the

The *Notice's* tentative conclusions *depend on what the FCC ultimately concludes on a range of issues in the companion broadband and UNE proceedings, as well as how the FCC applies its conclusions in this docket.* This amorphous approach is unacceptable to the State commissions. NARUCs position is that DSL-based "advanced services" are "telecommunications services." The impact of the proposed new classification of such services on both broadband deployment and State commission initiatives, mandates deferring final action in this proceeding until it can be ascertained that the new regulatory paradigm will not negatively impact the nascent market for broadband services or undermine existing State initiative designed to enhance broadband deployment or assure service quality and universal service of local voice services. Some areas that require additional examination follow:

1. Impact on Intra-Platform Competition: Broadband services are provided over several different technology platforms: wireline broadband Internet access (primarily via xDSL service provided over the legacy telephone infrastructure); wireless broadband Internet access; cable modem broadband Internet access; and satellite broadband Internet access. All these platforms have different availability and performance characteristics and are not substitutes for one another.[11] Consumers in markets with only one provider per technology platform for broadband service may be faced with no choice at all, depending on their specific needs.

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requirement to contribute to universal service mechanisms." As the FCC acknowledges in ¶ 15 of the *Notice*, that report, in suggesting transmission of an information service is separate from the information service itself, also conflicts with the tentative conclusions in the *Notice*. *Federal-State Joint Board on Universal Service*, CC Docket No. 96-45, Report to Congress, 13 FCC Rcd 11501, 11529, ¶ 57 (rel. Apr. 10, 1998). *Court Decisions:* Cf. *AT&T Corp. v. City of Portland*, 216 F.3d 871 (9th Cir June 22, 2000).

[11] See, e.g., *EchoStar's Ergen Says Next-generation Satellites Needed*, COMMUNICATIONS TODAY, Vol. 8, No. 83, May 2, 2002 NEW YORK--Hard lessons learned by sinking $150 million into floundering satellite broadband services have convinced EchoStar Communications Corp. Chairman . . . Ergen that next-generation satellites and a host of technical enhancements are needed for the technology to compete on cost with cable and DSL rivals. Satellite broadband currently charges about $70 a month -- roughly double the price charged by cable and DSL alternatives, Ergen said. *THAT PRICE DIFFERENCE MAKES SATELLITES UNCOMPETITIVE WITH CABLE AND DSL IN URBAN AND SUBURBAN AREAS.*" In the same article, at least a temporary limitation on some intra-platform competition is also discussed: "Ergen's investments in StarBand and WildBlue that totaled a combined $150 million have not panned out and he has stopped offering further funding for either satellite broadband system."

The approach suggested by the *Notice* may allow specific platform technologies, e.g., cable modem or ILEC DSL facilities, to retain a monopoly of specific facilities.[12] Before taking any action, the FCC should seek additional comment on the potential impact its proposed revised regulatory structure may have on intra-platform competition and innovation.

2. ***Lack of Demand for Existing Facilities:*** In ¶ 3 of the *Notice*, the FCC suggests that the primary focus of this proceeding is to promote deployment and penetration of broadband services. The range and number of questions on a variety of critical issues raised in the *Notice* underlines the FCC's effort to revise the current regulatory structure. As Chairman Powell suggested in his October 24, 2001 presentation to the *National Summit on Broadband Deployment*, the existing regulatory structure *may not* be the root cause of the existing penetration problem.[13] In his presentation, Chairman Powell noted: "According to J.P. Morgan, 73% of households have cable modem service available, and 45% of households have access to DSL. Combined broadband availability is estimated to be this year almost 85%. The intriguing statistic is that though this many households have availability, only 12% of these households have chosen to subscribe." The General Accounting Office's February 2001 report on its survey of Internet users buttresses the J.P Morgan figures, finding only 12 percent of the respondents subscribed to broadband, while 52 percent of the respondents had access to broadband.

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[12] The *Notice* assumes that ILECs and CATV providers will compete head to head for the same customers in every market. This assumption requires simultaneous deployment of both technologies in identical geographic service territories. Even if these deployments overlap in some, or many, markets, absent vigorous, effective competition from competitive LECs, the market structure may effectively become a two-firm duopoly outside of rural areas, with a few niche CLECs operating with varying degrees of success in selected markets. In rural areas, satellite DSL or Internet access providers (if applicable) may enjoy a monopoly or a duopoly or another oligopoly (depending upon the number of providers serving a particular rural area or small town). History provides no evidence that ILEC DSL footprints will expand without the spur of intra-platform competition.

[13] The FCC February 2002 Section 706 report to Congress buttresses that notion. In the report, the FCC found "that advanced telecommunications is being deployed to all Americans in a reasonable and timely manner." It was also noted that the FCC is "encouraged that the advanced services market continues to grow, and that the availability of and subscribership to advanced telecommunications has increased significantly." The Commission further concluded ". . . that although investment trends have slowed recently, investment in infrastructure for advanced telecommunications remains strong." *In the Matter of Inquiry Concerning the Deployment of Advanced Telecommunications Capability to All Americans in a Reasonable And Timely Fashion, and Possible Steps To Accelerate Such Deployment Pursuant to Section 706 of the Telecommunications Act of 1996* CC Docket 98-146, Third Report, adopted February 6, 2002, released February 6, 2002; p. 2.

These reports suggest demand and not supply is the primary existing impediment to the expansion of this market. The lack of demand has been identified, but the reasons for that lack of demand have not been fully explored. The United Kingdom's recent experience suggests that one major factor limiting demand may be the way current services are priced.[14] Others have suggested copyright and content issues have negatively affected demand. A more careful examination of what factors affect take rates for broadband Internet access will help the FCC determine when it should act. The work of the Joint Conference illustrates that in many cases, local economic development initiatives and public/private partnerships have been effective in spurring broadband demand at the local level. Similarly, the National Research Council report, *Bringing Home the Bits*, summarizes of fifteen representative local initiatives and suggests positive steps that can be taken at the grassroots to overcome demand and supply-side barriers.[15] Collecting and disseminating this information and sharing success stories would be an effective method to increase broadband demand under the *existing* regulatory framework. Before significantly altering the existing regulatory framework, the FCC must consider further assessment of demand-side issues and solutions.

3. ***Impact on Ongoing State Proceedings:*** The FCC's new definition of "information services" will significantly enhance the prospect for protracted litigation over "authority" questions at both the State and federal level. Introducing a new and wholly unknown scheme of regulation into the market at this point injects a qualitatively different level of uncertainty, and that itself is damaging. Existing FCC and State precedent provides no useful basis to make predictions on how

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[14] See, e.g., *Playing to Lose in the DSL Pricing Game*, BROADBAND NETWORKING NEWS, Vol. 12, No. 8 (April 9, 2002) ("Even as cable companies eat their lunch, U.S. DSL providers are raising prices looking for a sweet spot where they can make money. Indeed a forthcoming Yankee Group study reportedly calls high prices the greatest factor preventing broadband adoption from hitting the marks predicted a couple years ago. In the U.K. they've suddenly inverted the situation. BT Group's recent move to slash the wholesale prices it charges British ISPs for providing service through its network has thrown the market into a tizzy. BT announced earlier this year that, as of April 1, it would cut wholesale rates by some 40 percent.") See also – Emling, Shelley, "Broadband Providers Moving to Tiered Fees", Austin American-Statesman April 11, 2002. "Companies say tiered pricing gives them the chance to attract customers who haven't signed up for broadband because of the price."

[15] National Research Council, *Broadband – Bringing Home the Bits* (2002) at 206-215.

either the FCC or States might proceed under the *Notice's* novel interpretation of the FCC's Title I authority.[16] Any regulations that the FCC adopts in this area must not preempt extensive work already done in a number of States, following FCC guidelines, seeking to promote competition. There are many ongoing proceedings/initiatives designed to foster competition and facilitate broadband deployment, (271 proceedings, DSL transport proceedings, comprehensive OSS testing, UNE pricing dockets),[17] that should be concluded before significant changes are made to the existing regulatory paradigm. If wireline broadband Internet access service is designated as an "information service" and the component transmission path is considered "telecommunications" rather than a "telecommunications service," under the current regulatory framework, wireline broadband Internet access service would be subject only to Title I regulation. The *Notice,* at ¶ 61, explicitly leaves open the possibility that such access would not be subject to provisions of the Act that require unbundled access to competitors. Under that scenario, access to the transmission path by telecommunications competitors is foreclosed. As a result, a significant number of those

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[16] Compare, e.g., *FCC v. Midwest Video Corporation*, 99 S.Ct. 1435, 59 L.Ed.2d 692 (April 2, 1979) Where the Supreme Court held that rules promulgated by FCC were not within its statutory authority. The rules required certain cable television systems to develop, at a minimum, 20-channel capacity by 1986, to make available certain channels for access by third parties, and to furnish equipment and facilities for access purposes were not reasonably ancillary to effective performance of FCC's various responsibilities for regulation of television broadcasting .

[17] One element of the Indiana commission's ("IURC") Section 271 case is evaluating Ameritech's OSS systems. The IURC found Ameritech is effectively offering ADSL services at retail due to its affiliations: "The record - including Ameritech's admissions and the marketing information from Ameritech's web site - proves conclusively that AIMS' services are designed for and sold to residential and business end-users. *Furthermore, without the ADSL Transport Services provide to AIMS by ASI, AIMS could not reach its end-users.* In other words, one Ameritech affiliate is providing ADSL transport services to another Ameritech affiliate that is an ISP providing enhanced services to end-users." (*IURC Cause 41657*, EDR-1, Order at 4.) Ameritech argued that the IURC's finding was wrong, " that its DSL Internet access service was not within the scope of the checklist because DSL is an information service and not a telecommunications service." (*See Indiana Bell Telephone Company d/b/a Ameritech Indiana, Ameritech Advanced Data Services of Indiana, Inc. d/b/a SBC Advanced Solutions, Inc. and Ameritech Interactive Media Services, Inc. vs Indiana Utility Regulatory Commission*, No. 93A02-0107-EX-491, Cause No. 41657 (EDR-1) (Court of App. Of Indiana, March 12, 2002 at 1.) Ameritech further stated that while its DSL services are sold to large business customers and are subject to the resale requirement, they should not be included in OSS testing because they are not sold in Indiana and that the remaining DSL sold at wholesale is to ISPs, service that is exempt from the discount-for-resale provision of section 251(c)(4). Cf. *In the Matter of AT&T Communications of Ohio, Inc.'s and TCG Ohio's Petition for Arbitration of Interconnection Rates, Terms, and Conditions and Related Arrangements with Ameritech Ohio*, Entry on Rehearing, Case No. 00-1188-TP-ARB, October 16, 2001. Issues 34, 38, and 43 (see Finding 15 on p. 7) "In regard to Issue 34, the Commission agrees that Ameritech has the obligation to permit competing carriers to engage in line splitting using the UNE-P were AT&T purchase the entire loop and provides its own splitter. As we stated in our Award, this signifies that AT&T can purchase the entire loop or UNE-P, provide its own splitter, and make the necessary network modifications on their own. Ameritech is only obligated to provide the full functionality of the unbundled loop or UNE-P so that AT&T may provide telecommunications as contemplated by the Telecommunications Act of 1996 (1996 Act) and the FCC's rules." The impact of the FCC's proposed classification on these proceedings is unclear.

competitors may lose the ability to compete for the whole package of services demanded by today's telephone consumers.

4. Potential Impact On State/Federal Universal Service Programs And Related Protections That Apply Only To Common Carrier Services: Adding to the difficulty of analyzing the impact and applicability of the FCC proposals, the Notice applies only to "domestic wireline broadband Internet access services," but does not fully define "broadband." Notice at footnote 1. Specifically, the Notice is not explicit on whether "broadband wireline Internet access" includes all of a customer's communications, such as voice traffic. It describes "broadband" as an "elusive concept," and reports on two earlier Commission efforts to define similar terms. Notice at footnote 2. It does specify that that broadband "presently" consists primarily of DSL services, but nowhere addresses explicitly how the FCC will treat voice service associated with such a DSL service. Significantly, nothing in the Notice suggests that the FCC anticipates a different regulatory scheme in which only Internet access over DSL is subject to the scheme instigated by the Notice, and voice service is subject to some other kind of regulation. The Notice itself, in ¶ 82 questions raising the specter of problems with universal service, highlights this deficit. The FCC asks "[s]pecifically, if voice traffic over broadband Internet platforms increases and traditional circuit-switched voice traffic decreases, how, if at all, will that impact our ability to support universal service in an equitable and non-discriminatory manner? Will migration lower or raise the cost of providing service? What, if any, will be the impact on the level of high-cost universal service support needed as voice traffic migrates from traditional circuit switched networks to broadband Internet platforms?" See also ¶ 62 where the FCC first notes its expectation that "traditional services [will] migrate to broadband platforms." {Emphasis Added} These questions raise concerns about the FCC's perception of regulatory oversight of Voice over DSL services. Aside from the possible impact on State and Federal universal service programs raised in the Notice, for customers who

communicate (both voice and data) only through an integrated DSL service, the Commission's decision in this proceeding could eliminate many protections now in place under common carriage principles and Title II of the Communications Act.[18] It could also have a substantial impact on State authority over any local/toll voice service integrated with an ILEC "information service."

If The FCC Proceeds With The Proposed Classification Scheme, It Must Simultaneously Take Measures To Minimize The Impact Of Its Ruling On State Initiatives Including an Immediate Allocation of All Facilities Used To Provide the Integrated "Information Service" Service, And An Appropriate Allocation of the Related Jointly-Used Facilities, To Part 64 Non-Regulated Operations.

In ¶ 83 of the *Notice,* the FCC raises a cost allocation issue that should be resolved simultaneously with any decision affirming the proposed new "information services" classification. The FCC notes that Section 254(k) prohibits carriers from using services that are not competitive to subsidize services that are subject to competition and seeks comment on how this provision should be implemented for wireline broadband Internet access. Specifically, the FCC says:

> ". . .Section 254(k) also requires that services supported by universal service bear no more than a reasonable share of joint and common costs of the facilities used to provide these services. Because information services do not currently fall within the definition of services supported by universal service, deeming wireline broadband Internet access to be an information service would mean that the Commission would have to ensure that the costs of the network are properly allocated between regulated Title II services and Title I information services to comply with this statutory mandate."

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[18] See *Notice* at ¶ 61-63 acknowledging and seeking comment on the potential impact of the new classification scheme on existing consumer protection requirements on common carriers (aka, providers of "telecommunications services"), including, e.g., 47 U.S.C. § 258 protections against "slamming", 47 U.S.C. § 214's limitations on the ability of a telecommunications carrier to unilaterally discontinue telecommunications service to customers, 47 C.F.R. §§ 64.2001-2009 rules restricting carrier use and disclosure of customer proprietary network information derived from the provision of a "telecommunications service" 47 U.S.C. § 255's requires a provider of "telecommunications service" to ensure the service is accessible and usable by individuals with disabilities, if that is readily achievable. 47 U.S.C. § 201's obligations applicable to the furnishing of service and charges for "communication service" and § 202 restriction preventing "common carriers" from "unreasonably discriminat[ing] with regard to like "communications services."

But even if the FCC ignores the requirements of § 254(k), if the proposed classification scheme is adopted, regulatory accounting principles require the FCC to immediately directly allocate to Part 64 all equipment used to offer any ILEC DSL "information service." In addition, the FCC must allocate an appropriate share of the joint and common costs of the loop and other plant shared between "telecommunications services" and "information services" to Part 64.[19]

The last time the FCC considered an analogous problem, in a proceeding on Video Dialtone that also involved the allocation of costs to "broadband" ILEC services using the local loop, the FCC tentatively proposed a 50% allocation of joint and common costs as a starting point.[20]

The FCC asks what State programs or laws may be worthy of preemption under the new approach. State commissions may also highlight potential preemption concerns in their comments responding to the *Notice*. In any final order affirming the proposed classification scheme, the FCC should include statements to forestall or limit litigation over questions raised by those comments or suggested by State commissions.

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[19] To ensure the requirements of § 254(k) are met, the FCC must determine which costs and facilities provide service to "universal services" in common with other services and then devise a method for assigning those costs to the various services. The largest category of these costs is the cost of the local loop. The ILECs will likely wish to shift the entire cost burden of the local loop away from their DSL services – which have more elastic demand, to increase profits; however, it is incontrovertible that the local loop investment is joint and common, or "shared" by the services that use it. It would violate the language of § 254(k) to assign 100% of joint and common local loop cost to universal services as a group.

[20] See, *In the Matter of Allocation of Costs Associated with Local Exchange Carrier Provision of Video Programming Services*, Notice of Proposed Rulemaking, CC Docket No. 96-112, (FCC 96-214), 11 FCC Rcd 17211 (rel May 10, 1996) Where in ¶ 39, the FCC sought ". . . comment in particular on specific allocation factors, such as 50 percent n52 that would split the costs of loop plant equally between regulated and nonregulated activities or some other factor. For example, the cable television providers have proffered that 28 percent of common costs might be allocated to telephony. (footnote omitted) A fixed factor has the advantage of simplicity, and would eliminate the need for usage projections and measurements as well as subsequent reallocations to adjust for inaccurate projections." Citing "Testimony of David F. Clark and Wayne R. Davis on behalf of The Southern New England Telephone Company," Application of SNET Personal Vision, Inc. for a Certificate of Public Convenience and Necessity to Operate a Community Antenna Television System, State of Connecticut Department of Public Utility Control, Docket No. 96-01, at 9 (Jan. 25, 1996), submitted with Southern New England Telephone Company's "Application Under Sec. 214 for Permission to Construct Telecommunications Facilities," (filed with the Com. Car. Bur. January 25, 1996), discussing a fixed allocation factor of 50 percent.

CONCLUSION

The FCC and the State commissions have jointly taken significant steps toward deregulation of the local exchange carriers and have promoted competition in telecommunications services. These efforts must be continued jointly. Telecommunications and broadband markets are linked. The approach offered in this proceeding is inconsistent with the Act and will disrupt existing State broadband and competition-related initiatives. The action proposed in this docket is, at best, premature. NARUC urges the FCC to carefully consider the issues raised in this and other NARUC State member fillings before taking any final action in this docket. The competitive telecommunications market is not mature enough to absorb limiting or restricting access to underlying components of the provision of wireline broadband Internet access. However, if the FCC chooses to affirm the proposed scheme, it should also simultaneously resolve the related cost allocation issues and address the other specific State concerns involving consumer protection and regulatory oversight discussed *supra*.

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