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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 Provisions of Enhances Services; 1998 Biennial Regulatory Review — Review of Computer III and ONA Safeguards and Requirements	)	CC Docket Nos. 95-20, 98-10

COMMENTS OF THE PUBLIC UTILITIES COMMISSION OF OHIO

BACKGROUND

On February 19, 2002, the Federal Communications Commission (FCC) released a Notice of Proposed Rulemaking (NPRM) in the above-captioned proceedings. Among other things, the FCC's NPRM tentatively concludes that wireline broadband Internet access services – whether provided over a third party's facilities or self-provisioning facilities – are information services, with a telecommunications component, rather than telecommunications services. That is, the FCC tentatively concludes that digital subscriber line (DSL) should be provisioned as an "information service" subject to Title I rather than a telecommunications service subject to Title II.

The NPRM seeks comment on the implications of its tentative conclusions that the provision of wireline broadband Internet access service over a provider's own facilities is an "information service" and that the transmission component of such service is "telecommunications" and not a "telecommunications service." The FCC also invites comments on the implications of this analysis for incumbent LECs' obligations to provide access to network elements under sections 251 and 252. In addition, given that section 251(c)(3) allows a requesting carrier to request access to network elements "for the provision of a telecommunications service," the FCC questions whether a provider would be prohibited from using network elements pursuant to section 251 to provide wireline broadband Internet access service. The FCC seeks comment on what regulations should apply in the future if broadband offerings are found to be information services regulated only under Title I of the Communications Act. The FCC also seeks comment on the role of the States with respect to regulating wireline broadband Internet access services.

Initial comments in the above-captioned proceedings are due the FCC on May 3, 2002. In response to the FCC's February 19, 2002 NPRM, The Public Utilities Commission of Ohio (Ohio commission) hereby submits its initial comments.

INTRODUCTION

Despite the FCC's attempt to distance itself from its own precedents, a cursory review of past orders reveal that DSL-based advanced services have consistently been considered "telecommunications services" under the Act. Failure to specifically address those prior decisions and ensure consistency with them, absent a specific justification for departing from those precedents, will only perpetuate the controversy concerning the regulatory classification of Internet-bound traffic and create an obvious

basis for reversible error. Instead, as required by the case law, the FCC should make a diligent and thorough effort to harmonize the current decision with its prior decisions.

The Ohio commission believes that the FCC can accomplish its policy goals without doing harm to its existing precedent and without adopting a lopsided policy that favors one segment of the industry. The Ohio commission submits that DSL transport should remain a "telecommunications service" under Section 153(46), regardless of whether it is being made available on a wholesale or retail basis. This would ensure that UNEs, subject to the normal "necessary" and "impair" standards, would remain available to support facilities-based competition for DSL services. For example, this might justify making loops and inter-office transport available to requesting carriers, but not DSLAMs or ATM switches. Classifying DSL transport as a "telecommunication service" would also ensure that non-discriminatory resale would be available for requesting carriers (although the "avoided cost discount" may not apply to non-retail DSL transport offerings). That would help ensure that ILE affiliates are not given discriminatory and preferential treatment, but would not require a unjustified discount on those services that could otherwise remove incentives for additional facilities deployment.

Even if the FCC classifies under Title I and largely deregulates DSL services, the Ohio commission submits that the same basic policies should apply. ILECs should be required to lease the UNEs that are bottleneck facilities at cost-based prices to requesting carriers, based on the fact that ratepayers have financed those bottleneck facilities. Deployment of new technology and network facilities may be different (DSLAMs and ATM switches), but loop and transport facilities have been paid for by ratepayers. On a policy level, the FCC should recognize that interamodal and

intermodal competition will be more effective that intermodal competition alone. To that end, it should impose a non-discriminatory resale similar to the one imposed on CMRS spectrum providers for decades, prior to fully developed competition in that industry.

The NPRM appears to favor one form of competition and a segment of providers (ILECs) over all others. The Ohio commission believes that only through a more balanced approach can the FCC promote DSL competition in a responsible and effective manner, thereby also creating a legally defensible order. The "middle ground" approach outlined in the Ohio commission's comments provides such a balanced approach. Regardless of the approach taken for DSL-based Internet access service, the order must clarify the narrow scope of the rulemaking (to exclude DSl-based voice IP services, telecommuting DSL, corporate LAN applications, etc.). Finally, USF assessments must be based on regulated revenues associated with interstate telecommunications services only.

DISCUSSION

I. Contrary to Paragraph 14 of the NPRM, the FCC's existing decisions and related Federal Court decisions have consistently treated DSL-based advanced services as "telecommunications services" under 47 U.S.C. § 153(46).

The NPRM claims that "the legal and policy issues associated with classifying Internet access service as either a telecommunications service or an information service under the Act have been raised previously, but not fully resolved, in two [FCC] proceedings." NPRM at ¶ 14. Of the two "proceedings" mentioned, one was a report to Congress and was not a proceeding at all. The proceeding that was mentioned involved different issues in the context of a Section 271 application. Unfortunately, the NPRM does not meaningfully discuss the FCC's own applicable precedents.

Well beyond the two obscure examples cited in Paragraph 14 of the NPRM, the reality is that the FCC has repeatedly and consistently confirmed that the provision of DSL-based advanced services by incumbent local exchange carriers (ILECs) does amount to a "telecommunications service" under § 153. By not addressing its own line of decisions and implicitly failing to explain the drastic departure proposed in the NPRM, the FCC dooms its decision to failure under the legal standard required when it decides to change its past decisions. *Cox Television Stations, Inc. v. FCC*, 280 F.3d 1027, 1043 (D.C. 2002) (the FCC is required to explain the reasons for which it believes its contrary views set out in its past decision were incorrect or are inapplicable in the light of changed circumstances); *AT&T Corp. v. FCC*, 236 F.3d 729, 736 (D.C. Cir. 2001) (affirmative explanation of changed position required); *Southwestern Bell Tel. v. FCC*, 153 F.3d 523, 544 (8th Cir. 1998) (satisfactory explanation required for change in position); *Radio Television S.A. de C.V. v. FCC*, 130 F.3d 1078, 1083 (D.C. Cir. 1997) (agency must justify change in interpretation of statute).

Also, because existing remand proceedings and pending appeals also apply to the same underlying legal issues, the FCC's approach in the NPRM (in its current form) is destined to be challenged. The approach outlined in the NPRM would surely perpetuate the embroiling jurisdictional disputes surrounding Internet-bound traffic. Instead of following that path, the FCC should look to its own precedents and applicable court decisions. The Ohio commission believes that a middle ground approach should be taken that would remove disincentives for deployment of new technology and equipment while promoting intramodal competition for DSL services among facilities-based providers beyond the ILEC. That would be a more responsible approach and would also promote regulatory stability and continuity, as well as respect

for its prior decisions and the work State commissions have done to implement those prior decisions. Another significant benefit to such an approach would be that the FCC's resulting decision would be far less vulnerable to legal attack and this would help resolve the ongoing regulatory and legal uncertainty surrounding Internet traffic. As further discussed below, the Ohio commission maintains that DSL transport should continue to be considered a "telecommunications service" in a manner that promotes DSL deployment and facilities-based competition.

In *Deployment of Wireline Services Offering Advanced Telecommunications Capability,* 13 FCC Rcd. 24,012 (August 6, 1998) ("*Advanced Services Order*"), the FCC specifically found that "advanced services are telecommunications services." *Advanced Services Order* at ¶ 10. In the *Advanced Services Order,* the FCC determined that "the pro-competitive provisions of the 1996 Act *apply equally to advanced services and to circuit-switched voice services*" and that "incumbent LECs are subject to the interconnection obligations of sections 251(a) and 251(c)(2) with respect to both their circuit-switched and packet-switched networks." *Advanced Services Order* at ¶ 11 (emphasis added). If that were not plain enough, the FCC also clarified that "the facilities and equipment used by incumbent LECs to provide advanced services are network elements and subject to the obligations in section 251(c)(3)." *Id. See also Advanced Services Order* at ¶ 35 (the plain terms of the Act requires that advanced services offered by ILECs are telecommunications services).

In response to an appeal of the *Advanced Services Order* taken by US West, the FCC requested and received a voluntary remand. *US West Communications, Inc. v. FCC,* No. 98-1410 (D.C. Cir. Aug. 25, 1999). The FCC issued a remand decision on December 23, 1999. *In re Deployment of Wireline Services Offering Advanced Telecommunications*

Capability, 15 FCC Rcd. 385 (December 23, 1999) ("*Advanced Services Remand Order*"). In the *Advanced Services Remand Order*, the FCC again found that ILECs' provision of DSL-based advanced services to be subject to § 251(c) obligations. *See eg. Advanced Services Remand Order* at ¶¶ 3, 9, 10, 11. The FCC acutely observed that "if Congress intended to remove xDSL-based advanced services from the reach of section 251(c)(2), Congress would have done so in a more explicit fashion." *Id.* at ¶ 10. In support of these conclusions, the FCC relied heavily on its prior decision and rationale in the *ISP Order. Advanced Services Remand Order* at ¶ 33. Significantly, this suggests that dial-up Internet access should be classified the same as DSL-based Internet access.

In the appeal concerning the validity of the *Advanced Services Remand Order*, the D.C. Circuit directly referred to, and relied upon, the FCC's argument in that appeal "that DSL-based advanced services qualify as 'telecommunications services' as to which § 251(c) imposes many of its duties on incumbent LECs . . ." *MCI WorldCom v. FCC*, 246 F.3d 690, 692-693 (D.C. Cir. 2001). Relative to the *Advanced Services Remand Order*'s classification of DSL-based advanced services as either "telephone exchange service" or "exchange access," the Court observed that the rationale used was the same one that the D.C. Circuit had recently vacated regarding dial-up access to the Internet in *Bell Atlantic Telephone Cos. v. FCC*, 206 F.3d 1 (D.C. Cir. 2000). *MCI WorldCom v. FCC*, 246 F.3d at 693. The Court also noted that the FCC "does not seriously contest that its decision here, classifying certain DSL offerings as either 'telephone exchange service' or 'exchange access' under 47 U.S.C. § 153, relied not only on the Reciprocal Compensation Order vacated in Bell Atlantic but also on its defective reasoning . . ." *MCI WorldCom v. FCC*, 246 F.3d at 696. Consequently, the Court summarily reversed that portion of the *Advanced Service Remand Order. Id.*

The *MCI WorldCom* Court's reversal is significant because it illustrates the relationship between dial-up access to the Internet and DSL-based access to the Internet. Indeed, the FCC's approach to DSL taken in the *Advanced Services Remand Order* summarily incorporated, and relied exclusively upon, the FCC's original *ISP Order*. *Advanced Services Remand Order* at ¶ 33. The Court's reliance, in turn, on *Bell Atlantic* to dispose of the *Advanced Services Remand Order* also leads to the conclusion that that dial-up Internet access and DSL-based Internet access are governed by the same legal parameters.

In other words, both the FCC and the D.C. Circuit agreed that the *Bell Atlantic* decision (reversing the original *ISP Order* and involving dial-up access to the Internet) governed the Court's review of the *Advanced Services Remand Order* (involving DSL-based access to the Internet) —and consequently required a reversal of the FCC's approach. Similarly, the *ISP Remand Order* directly referenced and deferred to the then-pending *MCI WorldCom* appeal (involving DSL-based Internet access) as governing the proper classification of ISP-bound dial-up Internet traffic. *ISP Remand Order* at ¶ 42 (note 76). These examples draw into question whether access to the Internet using DSL-based advanced services can be legally distinguished from regular dial-up access to ISP providers.

In that context and in light of the fact that NARUC (along with several State commissions including the Ohio commission) appealed the *ISP Remand Order*'s conclusion that dial-up ISP traffic is encompassed within § 251(g) as information access traffic, the outcome of that appeal may also govern the outcome of this proceeding. This is particularly true given that the *ISP Remand Order*'s conclusion regarding the applicability of Section 251(g) to ISP-bound traffic is premised upon the determination

that ISP-bound traffic is "telecommunications" and the dial-up Internet access link is a "telecommunications service." Dial-up Internet access is considered a telecommunications service under the *ISP Remand Order* and DSL transport should continue to be considered a telecommunications service in this proceeding.

Ultimately, it is even questionable whether the FCC has jurisdiction to modify or collaterally undermine its own conclusions in the *ISP Remand Order* while the D.C. Circuit appeals are pending, since that Court currently has exclusive jurisdiction over the fate of the *ISP Remand Order*. Even if the *ISP Remand Order* is affirmed by the D.C. Circuit, it is far from clear that the approach taken in this current broadband access NPRM is consistent with the *ISP Remand Order*'s classification of Internet-bound traffic. Again, the FCC must harmonize all of its relevant decisions if it truly wishes to formulate a viable and legally defensible classification for DSL-based Internet access.

It does make sense, from a jurisdictional perspective, to examine the function of a service rather than focusing on the modality of the platform or the particular network facilities being utilized. Telecommunications services should be classified and regulated according to the nature and effect of the service offering, not the technology being used. That approach was also used in prior FCC decisions. In the *Advanced Services Order*, the FCC determined that "the pro-competitive provisions of the 1996 Act *apply equally to advanced services and to circuit-switched voice services*." *Advanced Services Order* at ¶ 11 (emphasis added). The *Advanced Services Order* also unreservedly applied its conclusions involving dial-up ISP traffic to DSL-based traffic. *Advanced Services Order* at ¶ 16. More to the point here, the FCC has consistently maintained that DSL-based advanced services are "telecommunications services" under § 153.

The *ASCENT I* and *ASCENT II* decisions issued by the D.C. Circuit, as well as the related FCC decisions, are also relevant and material. In *Association of Communications Enterprises v. FCC*, 235 F.3d 662 (D.C. Cir. 2001) ("*ASCENT I*"), the D.C. Circuit reversed part of the FCC's order approving the SBC-Ameritech merger. In doing so, the Court noted that the FCC had "determined that *advanced services are telecommunications services like any others* and may not be provided by an ILEC unless the ILEC complies with § 251(c)." *ASCENT I*, 235 F.3d at 664 (citing to the *Advanced Services Order;* emphasis added). The D.C. Circuit reversed the FCC's attempt to allow SBC to avoid its resale obligation by providing advanced services through an affiliate. The Court found that "to allow an ILEC to sidestep § 251(c)('s requirements by simply offering *telecommunications services* through a wholly owned affiliate seems to us a circumvention of the statutory scheme." *ASCENT I*, 235 F.3d at 666 (emphasis added). It is also significant, as noted above, that the *ASCENT I* Court itself independently referred to advanced services as "telecommunications services."

In the *Advanced Services Second Report and Order*, the FCC again addressed the regulatory classification and treatment of DSL-based Internet offerings. *In re Deployment of Wireline Services Offering Advanced Telecommunications Capability*, CC Docket No. 98-147, Second Report and Order (November 9, 1999), 1999 WL 1016337 ("*Advanced Services Second Report and Order*"). As a threshold matter, the *Advanced Services Second Report and Order* reinforced the FCC's prior conclusion that "by the plain terms of the Act, advanced services offered by incumbent LECs are telecommunications services." *Advanced Services Second Report and Order* at ¶ 5. The FCC then proceeded to interpret and apply the phrase "at retail" that is used in § 251(c)(4), concluding that the

discount-for-resale provision applies when an incumbent offers DSL service to an end-user but not when it offers DSL service to an ISP.

Significantly, the FCC observed that ISPs "combine a regulated telecommunications service with an enhancement, Internet service, and offer the resulting service, an unregulated information service, to the ultimate end-user." *Advanced Services Second Report and Order* at ¶ 17. The FCC again characterized the DSL transport service provided by an ILEC to an ISP as a "regulated telecommunications service." In other words, DSL transport is a telecommunications service and has already been classified as such by the FCC, regardless of the fact that the avoided cost discount required by Section 251(c)(4) may not apply to certain non-retail DSL offerings. In fact, the *Advanced Services Second Report and Order* specifically concludes that "although bulk DSL services sold to Internet Service Providers are not retail services subject to section 251(c)(4), these services are telecommunications services . . ." *Advanced Services Second Report and Order* at ¶ 21. *See also Id.* at ¶¶ 14, 19 (note 41) (referring to DSL services as "telecommunications services" under the Act). Contrary to Paragraph 14 of the NPRM, there can be no question that the FCC has already classified DSL transport service as a telecommunications service.

The *Advanced Services Second Report and Order* was challenged in the D.C. Circuit. The Court noted that the FCC's decision was based on the premise that "[a]s the Commission acknowledged, it had previously determined that advanced services constitute 'telecommunications services' and that the end-users and ISPs to which the ILECs offer such services are 'subscribers who are not telecommunications carriers' within the meaning of § 251(c)(4)(A)." *Association of Communications Enterprises v. FCC*, 253 F.3d 29, 31 (D.C. Cir. 2001) ("*ASCENT II*"). The *ASCENT II* Court rejected the

appeal and instead found the FCC's order "in all respects reasonable." *ASCENT II*, 253 F.3d at 33.

The *Line Sharing Order* is another example of a prior FCC decision entirely premised on the conclusion that advanced services (or at a minimum, DSL transport) must be considered "telecommunications services." *Deployment of Wireline Services Offering Telecommunications Capability and Implementation of the Local Competition Provisions of the Telecommunications Act of 1996*, Third Report and Order in CC Docket No. 98-147, Fourth Report and Order in CC Docket No. 96-98, 14 FCC Rcd 20912 (1999) (*Line Sharing Order*). The *SBC/Ameritech Merger Order* is yet another instance in which the FCC considered DSL to be a telecommunications service, when requiring the merged entity to enhance its OSS relative to DSL and required a commitment for a broadband service offering to requesting carriers. *Applications of Ameritech Corp., Transferor, and SBC Communications, Inc., Transferee, For Consent to Transfer Control of Corporations Holding Commission Licenses and Lines Pursuant to Sections 214 and 310(d) of the Communications Act and Parts 5, 22, 24, 25, 63, 90, 95, and 101 of the Commission's Rules*, CC Docket 98-141, Memorandum Opinion and Order, 14 FCC Rcd 14712 (1999) (*SBC/Ameritech Merger Order*). *See also In re Ameritech Corp.*, 2000 WL 1269831, 15 F.C.C.R. 17,521, 15 FCC Rcd. 17,521, 21 Communications Reg. (P&F) 278 (F.C.C., Sep 08, 2000) (NO. CC 98-141, FCC 00-336) (Second Memorandum and Order). Having consistently interpreted and treated DSL Internet services as telecommunications services and after being affirmed by the D.C. Circuit, the FCC cannot simply depart without comment from its well established statutory interpretations involving DSL. Instead, the FCC must develop an explicit discussion and clearly articulate the

reasoning consistent with, or thoroughly justifying any departure from, its prior decisions.

Most recently, in an appeal before the United States Supreme Court involving pole attachments under § 224 of the Act, Justice Thomas observed that the FCC has considered high-speed Internet access as having two components: (1) transmission service from a customer's home to an ISP's point of presence, provided either by a cable or phone company, and (2) a service delivered by an ISP to provide the connection between its point of presence and the Internet. *National Cable & Telecommunications Association v. Gulf Power Co.*, 122 S.Ct. 782, 796 (2002) (Thomas dissenting in part). Justice Thomas (joined by Justice Souter) noted that the FCC has classified the second step of the process, the service provided by an ISP, as an information service. And, although it was not as clear in the case presented there involving cable companies, *the opinion did explicitly reference the fact that the FCC had definitively decided relative to the DSL example that the first step was considered a telecommunications service. Id.*

Given the FCC's repeated application of the "telecommunications service" analysis, the fact that State commissions have widely relied upon and followed that analysis, and the fact that the FCC has carried this position forward before the highest court in the land, the FCC needs to respect its prior decisions and not change its entire view of the controlling statutes at this late stage. Indeed, the FCC was correct in its prior decisions when concluding that DSL is a telecommunications service. Contrary to the tentative conclusions reached in Paragraphs 20 through 26 of the NPRM, the telecommunications service offered by ILECs and their affiliates is distinct from the information service offered by ISPs. The Ohio commission maintains that the statutory

definition of an "information service" does not encompass the separate components of DSL-based broadband Internet access.

If the FCC decides to proceed with the tentative conclusions reached in Paragraphs 20-26 of the NPRM, it needs to confront and explicitly resolve the deep-seeded conflict between its several prior decisions classifying DSL and the current NPRM. It must directly explain the changed circumstances and justify the reasons supporting this dramatic shift in position. *Cox Television Stations, supra; AT&T Corp., supra; Southwestern Bell Tel., supra.* As suggested above, the Ohio commission urges the FCC to follow its prior decisions and believes that the FCC's goals of promoting facilities-based competition for broadband Internet access can be achieved without resorting to such drastic and legally unsupported means.

The Ohio commission believes, at a minimum, that the FCC should continue to consider DSL transport a telecommunications service. Two important consequences flow from that classification: (1) UNEs would remain available to support DSL offerings by facilities-based CLECs, and (2) DSL transport would be available on a non-discriminatory basis to CLECs for resale (even if the avoided cost discount does not apply). The Ohio commission believes this "middle ground" approach represents an appropriate balance of competing policy interests while remaining faithful to the terms of the Act.

The Ohio commission's approach would promote the deployment of DSL-related facilities by carriers, both incumbent and new entrants alike, and would promote real competitive choices for consumers. Under the Ohio commission's approach, the legal defensibility of the resulting decision is substantially increased and the uncertainty associated with the resulting decision is diminished. In short, the FCC should move

forward with its existing advanced services policies and avoid creating a major ground shift that will perpetuate uncertainty and litigation.

II. DSL transport service should continue to be classified as a "telecommunications service" under 47 U.S.C. § 153(46).

The NPRM tentatively concludes that provision of wireline broadband Internet access service is properly classified as an "information service" under § 153(20) of the Act. NPRM at ¶ 20. More specifically, the NPRM tentatively concludes that a provider of wireline broadband Internet access service offered over its own facilities offers an information service, not a telecommunications service. NPRM at ¶ 24. The NPRM acknowledges that there is a "telecommunications input" into the information service, but that no "telecommunications service" is offered in that example. NPRM at ¶ 25. As a related matter, the NPRM tentatively concludes that stand-alone broadband transport service is a telecommunications service, NPRM at ¶ 19, and asks for comment on specific forms of transmission, including the manner in which wholesale DSL transport service to ISPs should be classified, NPRM at ¶ 26.

The Ohio commission disagrees with the novel approach embodied in the tentative statutory interpretation offered by the FCC in Paragraph 19-26 of the NPRM, to the extent those conclusions would prevent the FCC from classifying DSL transport, whether purchased by an ISP or another carrier, as a telecommunications service. In particular, the NPRM concludes that an ISP offers information services via telecommunication, it is using telecommunications not providing telecommunications. NPRM at ¶ 19. Further, the NPRM carefully postulates that a provider of broadband Internet access service offers more than a transparent transmission path (i.e., telecommunications service) because the ability to establish "home pages" or store files

on the World Wide Web might also be offered as part of a bundled package of services. NPRM at ¶ 20-21. That line of reasoning is not only tenuous as a matter of logic, but is also legally fragile and fosters a significant potential for abuse and manipulation.

Although it is not mentioned in the NPRM, the statutory definition of "information service" *expressly excludes* the use of information capability (*i.e.*, capability to generate, acquire, store, transform, process, retrieve, utilize or make available) for the "management of a telecommunications service." 47 U.S.C. § 153(20). This is a significant limitation on the scope of information services and undermines the expansive interpretation conveyed in the NPRM. It suggests that a service offering made in the dynamic marketplace can be: (1) primarily an information service with incidental telecommunications components, or (2) primarily be a telecommunications service with incidental information service components. But it is clear that using information services capability to manage a telecommunications service is excluded from the definition of "information services."

The tentative conclusion in the NPRM has not given meaning to this important limitation and effectively eliminated it. The Ohio commission submits that this explicit exclusion crafted by Congress was intended to avoid any "tail-wagging-the-dog" analysis such as that being considered for adoption in the NPRM. Applied to the marketplace offerings of DSL for broadband Internet access, it is clear that consumers are purchasing broadband Internet access primarily to use the telecommunications DSL pipeline, not to create their own "home page" on the Internet. Moreover, personal home pages are created using the consumer's computer and the ISP's software and hardware, without the use of any of the broadband Internet access provider's facilities.

In any case, it cannot be seriously disputed that the vast majority of DSL-based broadband Internet access usage involves a consumer surfing websites and sending/receiving e-mail. In both of these activities, the user merely transmits and receives "information of the user's choosing," as contemplated by the definition of "telecommunications" 153(43). Nor do DSL service providers "change the form or content of the information as sent or received," as provided for in § 153(43). Relying on the incidental (and largely unused) ability to create a personal "home page" as part of a broadband Internet access service as the linchpin driving the statutory classification of DSL is neither sound logic nor reasonable policy.

Instead, consistent with the above discussion involving existing FCC and court decisions, the Ohio commission maintains that DSL-based advanced services should continue to be considered "telecommunications services" under § 153, at least relative to DSL transport. It is important that the provision of advanced services by ILECs (including provision of DSL transport service by an ILEC affiliate) continue to be considered "telecommunications services." In this vein, the Ohio commission does not necessarily agree with the NPRM's observation in Paragraph 25 that a provider of wireline broadband Internet access service using its own facilities does not offer "telecommunications" to anyone. This is a particularly transparent distinction when considering the complex corporate affiliate structures being used by ILECs.

Using SBC/Ameritech's typical offering of DSL-based Internet access service as an example, Ameritech Ohio (the regulated ILEC) uses regulated facilities to serve AADS (regulated provider of competitive telecommunication services) who, in turn, sells DSL transport service to AIMS (unregulated ISP) for use in its retail DSL service offering to consumers. At a minimum, the offering of DSL transport service by AADS

to AIMS should be considered a telecommunication service. Thus, critical questions do not appear to be addressed in the NPRM involving the treatment of ILEC affiliates in this context. Even though an ILEC and its affiliates may work cooperatively to produce a singular retail DSL offering made available to consumers through an unregulated affiliate, the underlying ILEC (or another affiliate) provides DSL transport service as a separate and distinct transaction between affiliates. The separate affiliate structure requires a separate transaction of DSL transport between the involved affiliates.

Also, it is important for the FCC to recognize that, although the underlying telecommunications input is bundled with Internet access when an ISP offers broadband Internet access to the ultimate consumer, the stand-alone DSL transport service is discretely purchased by the ISP for its comprehensive capacity needs and not specifically for resale to an individual customer. Consequently, DSL transport service should be separately accounted for and made available to other carriers on a non-discriminatory basis. By contrast, the implication of Paragraphs 24-26 of the NPRM is that, because an ISP offers an information service to end-users, the underlying transactions to support the unregulated retail offering may also be subsumed within the same category. Such reasoning is not only illogical, but it defies reality and conflicts with prior decisions of the FCC. That is like saying, because the sale of newspapers is unregulated, a retail convenience store operator need not comply with transportation safety laws in obtaining stock for its operations and is also free to disregard minimum wage and workers' compensation laws relative to his employees. The flawed nature of such reasoning is self-evident.

Just because the ultimate retail sale may be considered an unregulated transaction, that does not mean that the underlying wholesale transactions are similarly

exempt or that other laws or regulatory requirements are inapplicable to separate transactions that support the retail sale. Similarly, even if an ISP's sale of DSL-based Internet access service to retail consumers is considered an unregulated transaction involving an information service, the ISP's transaction with an ILEC (of ILEC affiliate) in obtaining DSL transport is not necessarily exempt from regulation and is a distinct transaction from the information service sold to consumers. *See eg. Indep. Data Communications Manuf. Ass'n., Inc. Petition for Declaratory Ruling and Am. Tel. and Tel. Co. Petition for Declaratory Ruling,* 10 FCC Rcd. 13717 (1995).

Application of *ASCENT I* decision requires that an ILEC not be permitted to create or use affiliates to circumvent its § 251 obligations. If an unregulated ISP were offering broadband Internet access service using *its own facilities* (not the ILEC affiliate's facilities), that would be one thing. But allowing an ILEC to leverage its traditional bottleneck network to the exclusion of other unaffiliated carriers would betray the letter and spirit of § 251 (as well as the 1996 Act in general).

In further response to Paragraph 26 of the NPRM, the Ohio commission reiterates that DSL transport to ISPs should be considered a telecommunications service. But the rate offered to ISP-style DSL transport offerings, whether affiliated or not, may not need to be discounted by the normal avoided cost discount rate (but any retail service offered by an ILEC affiliate would remain subject to resale with the avoided cost discount). The significance of being designated as a telecommunications service would be that there would continue to be a legal duty to provide the service to competitive carriers for resale (possibly at a different discount rate) and the underlying UNEs would remain available to competitive carriers for use in promoting facilities-based competition for advanced services. Arguably, under 47 U.S.C. § 251(c)(3), the

scope of an ILEC's duty to provide UNEs is limited to requesting carriers for the provision of a telecommunications service. To that extent, it would appear that, assuming *arguendo* that DSL transport is not considered a telecommunications service, ILECs would not be obligated to sell UNEs to competing LECs for the purpose of providing DSL transport to the competing LEC's ISP customers or to self-provision DSL transport to the competing LEC's own retail DSL affiliate. Thus, characterization of DSL transport as a telecommunications service is a critical component to the approach being advocated by the Ohio commission.

But there is no reason that the FCC could not determine, for purposes of establishing regulatory pricing requirements for wholesale DSL transport service, that the normal avoided cost discount does not apply. As previously determined in the *Advanced Services Second Report and Order*, ISP-style offerings of DSL transport service may differ significantly from retail DSL transport offerings. Particular ISP-style offerings may already include bulk discounts and the pricing may already exclude costs associated with marketing, billing, and customer service. *Advanced Services Second Report and Order* at ¶ 6-8.

The Act defines a "telecommunications service" as the offering of telecommunications for a fee "to the public, or to such classes of users as to be effectively available directly to the public." 47 U.S.C. § 153(46). The statutory concept of being "effectively available" to the public is not mentioned in the NPRM, although it is an explicit distinction used by Congress in defining telecommunications services. It is not clear why the FCC has ostensibly failed to give meaning to this statutory language that makes the definition of "telecommunications service" more flexible than it is portrayed in the NPRM. But the additional language in the statutory definition of

"telecommunication service" gives the FCC the flexibility it needs to ensure that wholesale DSL transport service is available.

The Ohio commission believes that, with respect to DSL transport, the sale to ISPs (whether affiliated or non-affiliated) is tantamount to being "effectively available" to the public. But there is a limited market for bulk DSL transport and the public (or the average consumer) is not the target market. Instead, it is selective business users and ISPs. ISPs are essentially large business customers and the DSL-based Internet access would not be available to the public but for DSL transport being made available to ISPs. Provision of DSL transport to ISPs is the *sine qua non* of DSL-based Internet access and it is made "effectively available" to the public through the sale of DSL transport to ISPs. Until now, the FCC has consistently treated ISPs as end-users in addressing Internet access services sold by ILECs to ISPs. *ISP Remand Order*, at ¶ 10; *ESP Exemption Order*, 3 FCC Rcd. at 2635 n.8, 2637 n. 53; *Access Charge Reform Order*, 12 FCC Rcd. at 13133-35.

Most importantly in this regard, the FCC has already definitively concluded that DSL transport as a regulated telecommunications service and the D.C. Circuit has affirmed that conclusion in the *ASCENT II* decision. In the *Advanced Services Second Report and Order*, the FCC observed that ISPs "combine a *regulated telecommunications service* with an enhancement, Internet service, and offer the resulting service, an unregulated information service, to the ultimate end-user." *Advanced Services Second Report and Order* at ¶ 17 (emphasis added). *See also Id.* at ¶¶ 14, 19 (note 41), 21 (all referring to DSL services as "telecommunications services" under the Act).

Relative to the specific pricing implications of the *Advanced Services Second Report and Order*, the conclusion that the avoided cost discount may not generally apply to DSL transport should not prevent the FCC in the current NPRM from concluding that DSL

transport is a telecommunications service. On the contrary, as discussed above, the *Advanced Services Second Report and Order* refers to DSL transport as a "regulated telecommunications service." In the *Advanced Services Second Report and Order* that certain bulk offerings of DSL capacity were not considered to be "at retail" under Section 251(c)(4), because the FCC found that application of the avoided cost discount would not make sense given that certain offerings may not include various retail functions normally covered by the avoided cost discount (marketing, billing, customer service, etc.). *Advanced Services Second Report and Order* at ¶ 6. By contrast, issue here is whether DSL transport sold to ISPs is being made "effectively available" to the public. Although Paragraph 26 of the current NPRM does not reference that statutory standard, it is nevertheless applicable.

Not only is that conclusion consistent with the existing FCC decisions that classify DSL-based advanced services as "telecommunications services," but it avoids the result (implied from the current NPRM's tentative conclusions) whereby the ILEC can easily avoid its regulatory obligations merely by corporate restructuring or creating an affiliate. Allowing an ILEC (the regulated entity) to decide what inputs are available for use by other carriers, based on its own economic interests, does not serve the public interest and unlawfully abdicates the FCC's own role. Such a result would also violate the *ASCENT I* Court's interpretation of Section 251(c), as discussed above.[1] And as the FCC itself concluded, "if Congress intended to remove xDSL-based advanced services

1 For particular ILECs, there may be other legal obligations that would independently require them to provide DSL transport service to CLECs (or DLECs). For example, as part of the SBC/Ameritech merger, Ameritech was required to offer wholesale DSL transport service. *SBC/Ameritech Merger Order*, at Appendix C. The Ohio commission also notes that several issues relating to Ameritech Ohio's provision of DSL transport and DSL-related UNEs are pending before the Ohio commission in various cases. These comments may not be interpreted as speaking to any of those pending issues.

from the reach of section 251(c)(2), Congress would have done so in a more explicit fashion." *Advanced Services Remand Order* at ¶ 10. It also would tend to circumvent the statutory standard for regulatory forbearance, given that 47 U.S.C. § 159(d) prohibits forbearance involving an ILEC's duties under Section 251(c) until the requirements of that section have been fully implemented.

As further discussed below, the Ohio commission's position does not mean that all DSL-related facilities would be designated as UNEs. As explained above, it also does not mean that the normal avoided cost discount would apply. But the ILEC and its affiliates would have to make available, on a non-discriminatory basis, wholesale DSL transport service. It would also have to make available the normal UNEs that support a CLEC's (or DLEC's) provision of advanced services, such as DSL-capable loops, sub-loops, and dark fiber transport capacity (but not necessarily DSLAMs or ATM switching). This would allow facilities-based CLECs (or DLECs) to co-locate in remote terminals to deploy their own DSLAMs and also to purchase their own ATM switches for self-deployment, while leasing existing components of the traditional switched network that has been built for, and purchased by, wireline customers of the ILEC. This approach would preserve the core resale and UNE obligations relative to DSL transport and promote facilities-based competition, while acknowledging limits for economic regulation of retail DSL.

III. Important policy considerations Support the Ohio commission's position regardless of the legal/jurisdictional framework utilized by the FCC.

Rather, these comments reflect the Ohio commission's recommendations to the FCC regarding the generic rules to be prospectively adopted and applied as a result of this proceeding.

The FCC seeks comments on the implications of its tentative conclusions that the provision of wireline broadband Internet access service over a provider's own facilities is an "information service" and that the transmission component of such service is "telecommunications" and not a "telecommunications service." The FCC further notes that it is particularly interested in the implications of this analysis for incumbent LECs' obligations to provide access to network elements under Sections 251 and 252. Because a "network element" is defined as a "facility or equipment used in the provision of a telecommunications service," the FCC questions how an incumbent LEC provider of wireline broadband Internet access service over its own facilities would be required to provide access to those facilities as "network elements" if those facilities are used by the incumbent LEC exclusively to provide information services.

The FCC further questions if an incumbent LEC provider of wireline broadband Internet access service over its own facilities uses certain facilities to provide both information services and telecommunications services, to what extent would the LEC be required to provide access to such shared-use facilities as "network elements," if it is providing broadband Internet services over the same facilities. Specifically, the FCC seeks comment on whether it could compel the unbundling of network elements used in the provision of information services, pursuant to Title I or some other statutory authority. Because Section 251(c)(3) allows a carrier to request access to network elements "for the provision of a telecommunications service," the issue becomes whether a provider would be prohibited from using network elements pursuant to Section 251 to provide wireline broadband Internet access service. NPRM at ¶ 61.

Beyond legal and jurisdictional considerations, there are practical matters that the FCC must take into consideration regarding the proposed reclassification of DSL

and related transmission facilities to Title I. In particular, the FCC's proposal could result in the elimination of ILECs' obligation to resell DSL and/or to provide DSL components as UNEs. The Ohio commission submits that the FCC's tentative conclusions reflect a selective and somewhat myopic interpretation the 1996 Act. The 1996 Act is designed to promote both the deployment of advanced services and local exchange competition, although the primary goal of the 1996 Act is to promote local exchange competition and promotion of advanced services is a secondary, albeit important, concern. The Ohio commission believes that the FCC's proposal is intended to promote the advancement of broadband services, but perhaps at the expense of local competition. Of course, it is debatable whether the NPRM's tentative approach would actually promote advanced services competition. But consideration of the impact on local competition should be a paramount concern.

The Ohio commission believes that end result of the FCC's proposal to reclassify wireline broadband services and associated local transmission facilities to Title I jurisdiction will be a precipitous decrease in the level of local exchange competition for the provision of advanced services. If local distribution facilities are only made available to the ILEC affiliate data provider, the result will be less competition, fewer customer options, and uneconomic pricing. The Ohio Commission cautions the FCC not to promote one goal (deployment of advanced services) of the 1996 Act at the expense of another more fundamental goal (local competition). The Ohio Commission maintains that the FCC should also move cautiously not to adopt rules that favor one industry segment (ILECs) at the expense of another industry group (CLECs or competitive data LECs). As discussed in more detail below, the Ohio commission believes that the FCC can establish impartial rules that promote local service

competition while simultaneously advancing the provision of broadband services over the local exchange network consistent with the 1996 Act's directives.

To strike this balance, the Ohio commission maintains that the FCC must continue to uphold its line sharing requirements adopted in CC Docket No. 98-147 and its UNE rules adopted in CC Docket No. 96-98 that apply to support the provision of advanced services. These rules must remain in tact as they apply to the use of ILEC local transmission facilities by CLECs and competitive data providers to ensure a robust marketplace for the provision of advanced services.[2] Consequently, the FCC must reaffirm that its previous decisions will remain intact regarding the provision of local transmission facilities as UNEs, line sharing, and loop conditioning to CLEC data providers. Likewise, the FCC must uphold its decisions concerning collocation of competitors facilities to ensure that CLECs can economically locate their own DSL-related facilities (*e.g.*, DSLAMS) at the ILECs' central offices and remote switches. Rejection of these recommendations would result in deleterious consequences for the CLEC industry to the eventual harm of end user customers and the public at large.

Expressed another way, the Ohio commission submits that the FCC must continue to ensure nondiscriminatory access to ILEC bottleneck local transmission facilities. Such an undertaking will realize both goals of promoting both local competition and the deployment of advanced telecommunications services. The FCC must assure that its does not loose sight of all of the 1996 Act's directives in an attempt

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2 On April 5, 2002, the Ohio Commission filed comments with the FCC in CC Docket 01-338 reflecting that the FCC should establish a flexible list of unbundled network elements (UNEs) to which State commissions would be able to include additional elements or eliminate elements based on FCC guidelines. Consistent with that position, the Ohio commission submits here that the FCC should continue to allow UNEs to be used in support of advanced services by CLECs (subject to the same "necessary" and "impair" standards), recognizing that application of the same test may well yield different results in the DSL

to fulfill one obligation to the benefit of one type of provider. That is, the FCC must act to strike a balance to promote all of the 1996 Act's directives. By maintaining its current rules regarding the provision of UNEs, line sharing, and collocation to non-affiliate local data LEC, the FCC will promote the advancement of competition in the provision of broadband services to consumers, which should result in lower prices and an increased level of broadband market penetration. The Ohio commission maintains that competition will not grow rapidly unless the FCC continues to allow competing LECs access to the ILECs' local distribution facilities.

Moreover, the FCC should act to ensure that the ILECs' *customers* receive benefits from the local distribution facilities for which they have provided funding and to ensure that ILECs are not discriminating in favor of their own data provider. These two goals will be accomplished by requiring ILECs to establish a separate data service provider affiliate. ILECs would be required to provide unaffiliated requesting carriers the same services on non-discriminatory terms and conditions.

This undertaking would ensure that all data LECs are being provided wholesale service on a nondiscriminatory basis under the identical rates, terms, and conditions. Moreover, requiring services to be furnished to all providers will further ensure that services are being provided on a non-discriminatory basis and that local ratepayers are being adequately compensated for the local network that they built and financed. On a related matter, since local ILEC customers financed the construction of the local network, the Ohio commission believes that they should be afforded the benefit and

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context. For example, the FCC may continue to allow circuit switching to be available as a UNE for voice services and decide not to make ATM switches available as a UNE for DSL services.

option of more than just one data provider over these same facilities. Under the FCC's tentative proposal, the ILEC may be the only DSL provider available.

The Ohio commission respectfully suggests that the FCC policy initiative is premised on a mistaken belief that reclassification of DSL and related transmission facilities to Title I jurisdiction will result in the ubiquitous deployment of DSL at reasonable prices. But the FCC fails to provide any empirical support for that premise. Somehow, the FCC appears to have concluded that *less competition* in the provision of advanced services will promote the deployment of DSL at reasonable prices. Such reasoning defies basic economic theory. The FCC fails to acknowledge that the end result of its proposal will result in less competition (not more) for the provision of advanced services.

The FCC appears to base its proposal on an implied commitment for the ILEC industry that if such virtual deregulation occurs, advanced services will be nonetheless be deployed at reasonable prices. As discussed in more detail below, the Ohio commission notes that there is nothing in the record indicating that these services are not currently being offered (using deployed network facilities). Consequently, the more likely outcome of this proposal will be fewer providers and higher prices to end users. Moreover, higher prices for DSL can only act to the detriment of the proliferation of broadband services. Even if DSL is available at additional locations, fewer customers will be able to afford the service.

In support of its conclusions and recommendations on this matter, the Ohio commission observes that the FCC's March 14, 2002, decision in GN Docket No. 00-185 *et al., In the Matter of Inquiry Concerning High-Speed Access to the Internet Over Cable and Other Facilities,* notes that certain industry analysts estimate that high speed Internet

access service is now available to approximately 75-80 percent of all homes in the United States. The FCC further notes that approximately 11 percent of households subscribe to such services. The Ohio commission submits that this relatively low market penetration level is directly correlated to the high price of DSL. If the FCC invokes decisions that will limit the provision of DSL to only a few players, the Ohio commission questions whether these penetration levels will increase, especially when the price is unlikely to decrease.

The Ohio commission submits that the FCC cannot reasonably rely entirely on intermodal competition among satellite and cable providers to ensure robust competition in the broadband marketplace. The Ohio commission maintains that these are not desirable alternatives when compared to the level of competition and market penetration that could be realized through the continuation of policies promoting intramodal competition (or competition among various competing local exchange providers). As a related matter, the FCC cannot guarantee that a reliance on competition from broadband cable companies and satellite providers will not result in duopoly or oligopoly pricing for the provision of broadband services, particularly since not all three options are available in many markets.[3] Requiring the ILECs to make their local distribution facilities available to all data providers will facilitate competition among data providers to the benefit of end user customers.

The FCC's extensive experience in the wireless industry with only two wholesale spectrum providers personifies this line of reasoning. Having only two wholesale spectrum providers per market did not ensure adequate pricing safeguards to end user

3 In this regard, the Ohio Commission notes that in early April 2002, EchoStar (a satellite-based Internet service provider) announced that it is pulling out of the satellite Net access business. EchoStar's recent decision personifies the continued lack of broadband service providers.

customers. Rather, to facilitate real competition, the FCC always required resale on a non-discriminatory basis. Only after nearly twenty years of fostering intramodal competition through that resale requirement, is the cellular market mature enough now to justify eliminating the resale requirement. Another cogent example is found in a recent pleading filed by the FCC before the United States Supreme Court regarding cable services pole attachments.

In that case, the FCC argued that requiring incumbents to share their infrastructure (*i.e.*, by making pole attachments available to other carriers on a non-discriminatory basis) would *"certainly"* fulfill Section 706 of the 1996 Act to encourage the deployment of broadband capability to all Americans. *National Cable Television Ass. V. Gulf Power Co.*, Nos. 00-832, 00-843 (U.S. Supreme Court), FCC Brief at 20, 2001 W.L. 345195 (emphasis added). The FCC maintained that imposing the network sharing requirement would certainly encourage the development of broadband capability and remove barriers to infrastructure development by the cable industry to provide such capability. The FCC pleading went on to assert that "[i]ndeed, as utilities themselves increasingly enter the market for provision of Internet access, they have an incentive not only to charge monopolistic prices for pole attachments, *but also to discriminate against their cable company competitors with respect to the terms and conditions of access to bottleneck facilities at issue here.*" *Id.* (emphasis added).

In other words, the FCC forcefully argued that requiring incumbents to share their bottleneck facilities with requesting carriers on a non-discriminatory basis would *most certainly* promote competition for advanced services. The same argument applies in the current NPRM. Local distribution facilities are as important to competing local

exchange data providers as are telephone poles to a cable provider. If the ILECs are not required to provide non-discriminatory access and pricing to competing CLEC broadband service providers for local distribution (bottleneck) facilities, ILECs will be incented to abuse their monopoly position to the detriment of competing broadband data providers. Absent regulation to guarantee such nondiscriminatory pricing and access, it is only natural and instinctive for an organization to move to protect itself in such a manner.

All things considered, the Ohio commission submits that the FCC must reaffirm that local transmission facilities remain available to CLECs on a nondiscriminatory basis. The FCC must assure that its does not lose sight of all of the 1996 Act's directives in an attempt to fulfill one obligation to the benefit of one type of provider. The FCC must act to strike a balance to promote all of the 1996 Act's directives. By maintaining rules regarding the provision of UNEs and line sharing to non-affiliate local data LEC, the FCC will promote the advancement of competition in the provision of broadband services to end user subscribers, which should result in lower prices to customers.

On a related mater, the Ohio commission notes that the argument will most likely be made that the current low market penetration levels for broadband services are no different than any other new technology in its nascent stages of the product lifecycle, such as television and cellular telephones. But neither televisions nor wireless telephone service were widely available to their respective mass markets until the prices for each was reduced appreciably. Premature deregulation of DSL may well serve to doom that service to mass market failure for the near future.

The Ohio commission also observes that the FCC's previous decisions concerning competitive deployment of advanced served are the basis for the extensive

development of CLEC business plans. Significant capital investment and venture capital were assembled based on the FCC's previous decisions. Consequently, the FCC cannot amend the regulatory game plan midstream. The CLEC industry must be afforded a reasonable degree of regulatory certainty to continue to attract investors. This degree of currently cannot be accomplished if the FCC initiates sweeping changes to its current policy positions.

IV. Whatever statutory interpretation is utilized, the FCC Needs to Ensure and Clarify that the Scope of this NPRM Remains Narrow and Well-Defined

As alluded to above, the FCC is well aware that there has been a substantial amount of controversy and uncertainty concerning Internet bound traffic and related services. The Ohio commission has faithfully attempted to implement the FCC's decisions, as well as applicable Federal court decisions, in the context of interconnection disputes and arbitration proceedings under § 252. Consequently, State commission have been thrust into the position of defending those decisions in Federal courts in appeals under § 252(e)(6). To the extent that the NPRM does not explicitly limit its scope to DSL-based Internet access service, there will be a significant (and unnecessary) level of added controversy and litigation regarding the resulting order.

To illustrate, even if a State commission had no quibble with a decision to deregulate retail DSL-based Internet services, adopting the NPRM's definitional approach without clarification could suggest (even if not intended) that the FCC decision to deregulate DSL in general is likely to cause a substantially higher level of discomfort (thereby substantially increasing the prospects that more State commissions and others would appeal the decision). Categorical deregulation of DSL at this time would be in highly inappropriate for three primary reasons: (1) regulatory classification

depends on the nature of the service, not the underlying technology used, (2) the FCC does not have jurisdiction over all forms of DSL services, and (3) it would adversely affect development of facilities-based competition for both advanced services and basic local telephone services.

Telecommunications services should be classified and regulated according to the nature and effect of the service offering, not the technology being used. This is true under Ohio law and under Federal law. *See eg.* Ohio Revised Code Ann. §§ 4905.01, 4905.02 (Baldwin 2002); 47 U.S.C. § 153(46). As the FCC itself noted in the *Advanced Services Remand Order* (note 40):

> We note that xDSL itself is not a service. Rather, sDSL is a technology used to provide transmission services.

In other words, the regulatory classification of a wireline service is not dependent upon the specific network technology used (*eg.* circuit switching, DSL-based, packet switched, etc.) Instead, it is dependent upon the nature of the particular service being offered.

Because the NPRM, at times, generally references DSL-based services or broadband services without limiting the specific context, *eg.* NPRM at ¶¶ 4-7, the Ohio commission wishes to ensure that the resulting FCC order unequivocally clarifies the limited context of the proposed rulemaking: DSL-based Internet access service. Other DSL-based services are beyond the scope of this proceeding and if the FCC fails to clarify the limited scope of the rulemaking, it will surely be faced with additional legal challenges and will unnecessarily exacerbate the resulting jurisdictional conflict presented.

The most obvious service that falls into this category would be a DSL service that offers voice capability using Internet protocol technology. If the FCC fails to clarify that these services are beyond the scope of the rulemaking (or if the FCC attempts to affirmatively encompass such services within the rulemaking), the ensuing litigation will be significantly magnified and the resulting jurisdictional conflict unnecessarily expanded. That would not only be unlawful, as referenced above, but would also violate the FCC's own precedents on this subject. And it would magnify, not reduce, the legal and financial uncertainty surrounding DSL services.

Another example of services that should be beyond the scope of this proceeding are non-Internet DSL services such as corporate LAN or telecommuting applications. Previously, the FCC has consistently acknowledged that such services are properly within the jurisdiction of State commissions. *Advanced Services Remand Order* at ¶ 16; *GTE ADSL Tariffing Order*, 13 FCC Rcd. 22,466 (October 30, 1998 Opinion and Order) at ¶ 27; *Advanced Services Second Report and Order*, at ¶ 19 (note 41). It is critical that the FCC clarify the narrow scope of this rulemaking.

V. State commissions should maintain their role relative to DSL issues relating to the wholesale market.

The FCC also seeks comment generally on the role of the States with respect to wireline broadband Internet access services if the FCC does attempt to regulate DSL under Title I of the Act. Given that the FCC has previously found that when DSL transmission is used to provide Internet access services, these services are interstate, comment is sought on how classification of wireline broadband Internet access service as an information service would affect the balance of responsibilities between the FCC and State commissions.

Parties are asked to comment on what they consider an appropriate role for the State commissions in this area, taking into account both policy considerations and legal constraints, including any applicable limitations on delegations of authority to the States under Title I of the Act. Additionally, parties should comment on whether current State regulations, if any, should be preempted to any extent if the FCC were to find that wireline broadband Internet access service is appropriately classified under Title I of the Act. Moreover, the FCC requests comment on whether any State laws contrary to the FCC's decision on this matter should be preempted. NPRM at ¶ 63.

The Ohio commission remains vitally interested in resolving competitive DSL issues at the wholesale level. Relative to DSL transport, the Ohio commission's position is outlined in detail above. And the Ohio commission would not expect to change its ongoing role in that area. Similarly, under the approach recommended by the Ohio commission, we would expect to continue arbitrating and pricing UNEs that are used to support retail DSL services.

VI. Universal Service Assessments must be based on regulated revenues for interstate telecommunications services.

The FCC seeks comment broadly on whether facilities-based providers of broadband Internet access services provided over wireline and other platforms, including cable, wireless and satellite should be required to contribute to universal service. NPRM at ¶ 110. The Ohio commission believes that Federal assessments should be based on regulated revenues for interstate telecommunications services. Consequently, both CLECs and ILECs should be rendered assessments on those interstate components of the network that are purchased from the incumbent carrier.

CONCLUSION

The PUCO wishes to thank the FCC for the opportunity to file comments in this proceeding.

Respectfully submitted,

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