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

In the Matter of

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

Reply Comments of the
Regulatory Commission of Alaska

Introduction

The Regulatory Commission of Alaska (RCA) welcomes the opportunity to provide reply comments in response to changes being considered in the Notice of Proposed Rulemaking (NPRM) released February 15, 2002 regarding the appropriate framework for broadband access to the Internet over wireline facilities. [FCC 02-42, 67 Federal Register 9232 (February 28, 2002)].

The RCA recommends that the FCC not adopt its proposed regulatory framework which would reclassify an undefined number of

incumbent local exchange carrier (ILEC) broadband services from Title II common carrier status to Title I private carrier status. We believe the proposed framework will not promote the deployment of broadband services. We believe the statutory basis for the proposed framework relies upon a contorted interpretation of the Telecommunications Act of 1996 (the Act). We strongly recommend that the FCC work with the state commissions to build a record on the impact of this proposal in local markets.

Comments

1. The FCC's proposal will not promote broadband usage.

In the NPRM, the FCC tentatively concludes that wireline broadband Internet access service is an information service, and that "the transmission component of retail wireline broadband Internet access service provided over an entity's own facilities is "telecommunications" not a "telecommunications service." Based upon this new interpretation, the FCC would reclassify an undesignated number of ILEC wireline broadband services (most prominently xDSL service) from Title II common carrier status to Title I private carrier status.[1]

[1]"The majority frames this Notice as an exploration of the statutory classification of telecommunications, telecommunications services, and information services. But what we are really deciding is whether the transmission component for broadband services, including for Internet access, should be offered outside of the statutory framework that applies to telecommunications carriers." Separate Statement of Commissioner Michael J. Copps, FCC 02-42.

While the FCC states that its tentative conclusion and reclassification proposal are based upon its own statutory interpretation of these terms as defined by the Act, it is also clear that the FCC's interpretation is heavily influenced by its belief that intermodal competition, rather than wireline intramodal competition, offers a better means of accomplishing four specific broadband policy goals:

- Encourage the ubiquitous availability of broadband access to the Internet to all Americans
- Promote competition across different platforms for broadband services
- Ensure that broadband services exist in a minimal regulatory environment that promotes investment and innovation
- Develop an analytical framework that is consistent, to the extent possible, across multiple platforms.

We do not dispute these goals, but we question whether the FCC's shift from an emphasis on intramodal to intermodal competition will help to achieve its broadband goals. Specifically, we question a number of the FCC's underlying assumptions that do not appear to be supported by the facts. These assumptions are generally as follows:

1. ILECs will have a greater incentive to invest in their own networks if they are freed from their obligation to unbundle their network to competitors.[2]

[2]"In the context of this [broadband] competition, telephone companies and various Internet and technology companies have begun to advocate that

2. Wireline competitors, if deprived of unbundled access to ILEC network elements, would be more inclined to invest in their own facilities.[3]

3. Consumers already have sufficient non-wireline broadband access alternatives due to flourishing and increasingly ubiquitous intermodal competition.[4]

The notion that ILECs would have greater incentive to invest in new technologies if they were freed of the requirement to unbundle the telecommunications component of their own Internet access services may be misplaced. According to the FCC's own broadband report, there was significant growth in ILEC broadband investment in just the last year in spite of existing ILEC unbundling requirements. ADSL lines increased 36% to 2.7 million in just the first half of 2001, with 93% of these lines provided by ILECs. Measured from December 1999 when the number of lines was only 370,000,

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the Commission take steps that, to the extent the Act allows, would reduce the regulatory burdens and regulatory uncertainties the telephone companies face, and thereby provide incentive for those companies to continue or accelerate their investments in critical broadband infrastructure." FCC 02-42, para. 37.

[3]"[Pricing wireline broadband internet access in the context of a minimal regulatory Title I regime] might encourage market participants to deploy broadband networks more expeditiously and increase facilities-based competition." FCC 02-42, para. 50-51.

[4]"…information service providers may access customers over a variety of network platforms, such as cable, wireless and satellite." FCC 02-42, para. 36; "…competition between cable and telephone companies is particularly pronounced…" FCC 02-42, para. 37.

ADSL has grown 700%. These numbers do not suggest that ILECs have been inhibited by the unbundling requirements of the Act or FCC rules. Rather they suggest that ILEC deployment of broadband Internet access service has been stimulated by the competition from wireline broadband providers that rely on ILEC unbundled services and network elements.[5]

While it may be intuitively appealing to assume that if CLECs and ISPs are denied access to bundled ILEC facilities they will be more likely to invest in their own facilities, the facts may, once again, suggest otherwise. AT&T and others suggest that strong unbundling requirements actually promote both CLEC and ILEC facilities investments.[6] CLECs also argue that

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[5]The Supreme Court of the United States recently dismissed the charge that the UNE framework based on the FCC's TELRIC pricing is incapable of stimulating facilities-based investment. ("At the end of the day, theory aside, the claim that TELRIC is unreasonable as a matter of law because it stimulates but does not produce facilities-based competition founders on fact. The entrants have presented figures showing that they have invested in new facilities to the tune of $55 billion since the passage of the Act (through 2000); "…a regulatory scheme that can boast such substantial competitive capital spending over a 4-year period is not easily described as an unreasonable way to promote competitive investment in facilities." "Nor, for that matter, does the evidence support Justice Breyer's assertion that TELRIC will stifle incumbents' 'incentive…either to innovate or to invest' in new elements…." As Justice Breyer himself notes, incumbents have invested 'over $100 billion' during the same period." *Verizon Communications Inc. et al. v. Federal Communications Commission et al.,* No. 00-511, decided May 13, 2002, p. 45-46, n. 33.

[6]*See* AT&T Comments in CC Docket No. 01-338, p. 18, April 5, 2002. ("…residential UNE-P competition has existed in New York since 1999, but has been unavailable in California because the TELRIC rates have precluded CLECs from earning positive margins and the necessary OSS support has not been implemented. California is a much larger state, but in New York, AT&T has deployed more switches (both in absolute terms, and on a per-line

high transaction costs associated with unbundled access provide additional incentive for CLECs to migrate customers to their own facilities as soon as possible.[7] To the extent that these CLEC assertions are supported by the facts, FCC actions to eliminate unbundling requirements could lead to reduced facilities-based investment by both CLECs and ILECs.[8] We believe a closer examination of empirical evidence on a national and local level is warranted before the FCC reverses course on existing unbundling policies.

The FCC's faith in the short term potential for intermodal broadband competition may also be misplaced. The level of, and potential for, intermodal competition may not currently be great enough to sustain meaningful Internet access service competition. By some accounts broadband Internet access is largely a duopoly between cable companies (using cable modems) and ILECs (primarily using ADSL). Prices for both services have increased nation-wide over the last year as a number of

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basis), has extended fiber to more buildings, and is serving far more customers through combinations of AT&T's own switches and unbundled loops.)

[7] *See, for example*, GCI Comments in CC Docket No. 01-338, p. 34, April 5, 2002. ("Assuring oneself of a guaranteed source of supply, and freeing oneself from constant regulatory battles and gamesmanship with respect to the rates, terms and conditions for UNEs are among the biggest incentives for a CLEC to invest in its own facilities.")

[8] *See,* AT&T Comments, p. 65. AT&T suggests that in the absence of wireline broadband Internet access competition, ILEC would have less incentive to invest because it cuts into a lucrative market for second lines.

wireline competitors have left the market or been forced into reorganization.[9] Fixed wireless and satellite are not currently viable competitive[10] options in most areas and may never be. Satellite is more expensive than either cable or wireline and therefore primarily an option for customers outside of areas served by cable or wireline providers. Fixed wireless suffers from capacity constraints and so far in Alaska and the rest of the U.S. has proved a failure as a ubiquitous broadband alternative to either cable modem or DSL services.

The current need is not for more wireline or intermodal facility investment, but rather for lower broadband prices. The FCC's most recent advanced services study shows that the supply of broadband Internet access currently far outstrips demand. Although 75 percent to 80 percent of U.S. households have access to high-speed Internet access, only 7 percent actually subscribe.[11] This is up from 1.6 percent a year earlier but there still remains a huge gap between actual customers and potential customers. These statistics do not indicate a shortage of facilities but rather a shortage of

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[9]*See* Joint Comments of WorldCom, et. al., CC Docket 02-33, p. 38), May 3, 2002. ("Retail prices for high-speed Internet access (bundled with broadband facilities) have risen markedly over the past year. In 2001, for example, ARS Inc. estimates that the average monthly rates for cable Internet access service increase from $39.40 to $44.22, while the average monthly rates for DSL-based Internet access service increased from $47.18 to $51.67.")

[10]The FCC reports 200,000 high-speed lines over satellite and fixed wireless combined FCC News Release on Third Report on deployment of advanced services. CC Docket 98-146, FCC 02-33, released February 6, 2002.

demand at current prices. The best prospect for stimulating demand for broadband services is not to undermine wireline broadband Internet access competition by cutting off CLEC and ISP access to unbundled elements and service, but rather to continue current policies that require unbundling. Unbundling will produce more providers of wireline broadband Internet access, which will in turn drive down the prices and contribute to increased demand. Increasing numbers of broadband users will stimulate more competition and facility investment.

2. The statutory basis for the FCC's proposed reclassification of wireline broadband Internet access service is flawed.

With the Act, Congress adopted a policy framework "designed to accelerate rapidly private sector deployment of advanced telecommunications and information technologies and services to all Americans by opening all telecommunications markets to competition…" Congress explicitly recognized the bottleneck nature of local exchange networks and set out mechanisms to open those networks. One of most important of those mechanisms was to require ILECs to unbundle network elements to competitors. Congress also adopted, largely intact, the Computer Inquiry II/III framework that requires ILECs to unbundle the underlying telecommunications used in the provision of ILEC enhanced services. However, the FCC is now proposing a broadband exemption to not

[11] *Id*. at para. 118.

only the *Computer Inquiry* framework but to the unbundling provisions of the Act itself. We question the FCC's alleged statutory basis for creating a broadband exemption.

In the *Computer Inquiry II* proceeding, the FCC categorized telecommunications services as either basic or enhanced.[12] Currently basic services are subject to Title II common carrier regulation; enhanced services are not. However, under the *Computer Inquiry* rules, ILECs are required to unbundle and offer for resale the underlying basic services used in the provision of enhanced services. Until now the FCC has not disputed that Congress largely incorporated the *Computer Inquiry* framework into the Telecommunications Act.[13] The Act respectively uses the terms

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[12]"In *Computer II*, the Commission created the regulatory categories of "basic" services and "enhanced" services in order to more clearly distinguish regulated common carrier services from unregulated computer-data services. It defined basic transmission service as limited to the Title II common carrier offering of transmission capacity for the movement of information. Enhanced services, on the other hand, were described as using computer processing applications to act on the content, code, protocol or other aspects of the subscriber's information. The Commission further found that it possessed jurisdiction over enhanced services under Title I, even as it re-affirmed and bolstered its justification for not imposing common carrier obligations on enhanced service providers. It declined to exercise that jurisdiction and regulate enhanced services, however, because it found that market to exhibit "effective competition." It reserved the right to exercise its Title I jurisdiction and to intervene should problems involving enhanced services arise." NPRM para. 39, footnotes omitted.

[13]"…in considering the statutory history of the 1996 Act, we note that at the time the statute was enacted, the Computer II framework had been in place for sixteen years…looking at the statute and the legislative history as a whole, we conclude that Congress intended the 1996 Act to maintain the

"telecommunications service"[14] and "information service" [15] instead of the "basic service" and "enhanced service", but any fundamental differences have been consider by the FCC to be insignificant or nonexistent. However, six years after the adoption of the Telecom Act, the FCC has found new statutory meaning in the interplay between the terms "information service", "telecommunications service", and "telecommunications."[16] This new statutory interpretation, combined with the Act's mandate to promote advanced service deployment, is now the basis for the FCC's broadband exemption.

As we understand it, the logic behind the FCC's broadband exemption goes something like this:

Computer II framework." Report to Congress, CC Docket No. 96-45, FCC 98-67, April 10, 1998.

[14]"The term "telecommunications service" means the offering of telecommunications for a fee directly to the public, or to such classes of users as to be effectively available directly to the public, regardless of the facilities used.

[15]"The term "information service" means the offering of a capability for generating, acquiring, storing, transforming, processing, retrieving, utilizing, or making available information via telecommunications, and includes electronic publishing, but does not include any use of any such capability for the management, control, or operation of telecommunications system or the management of a telecommunications service."

[16]"The term "telecommunications" means the transmission, between or among points specified by the user, of information of the user's choosing, without change in the form or content of the information as sent and received."

1. Wireline broadband Internet access service provided over the provider's own facilities is an information service.

2. The transmission component of wireline broadband Internet access service provided over an ILEC's own facilities is "telecommunications" not a "telecommunications service."

3. The transmission component of wireline broadband Internet access service provided over an ILEC's own facilities is not a telecommunications service because the ILEC is not offering telecommunications directly to the public for a fee.

4. Because the underlying transport component of an ILEC's information service is telecommunications, rather than a telecommunications service, there is no service to unbundle.

From here the FCC goes on to suggest that ILECs should no longer be required to unbundle and separately tariff as a common carrier service the broadband transport (e.g., xDSL transport) it uses in the provision of its own wireline broadband Internet access services. The FCC also questions whether ILECs should be relieved of the Act's § 251(c) requirement to unbundle network elements used by CLECs to provide broadband Internet access service.

> [B]ecause § 251(c)(3) allows a requesting carrier to request access to network elements 'for the provision of a telecommunications service,' would a provider be prohibited from using network

> elements pursuant to section 251 to provide wireline broadband Internet access service?[17]

In other words, under the FCC's proposed framework, an information service provider would no longer have the right purchase the same unbundled transport that an ILEC uses in its own information services offerings unless the ILEC chose to voluntarily tariff the broadband service to the general public. In addition, CLEC could be denied the right to use the high frequency portion of a copper loop if it intends to use it for the provision of xDSL Internet access service.

The only place that the FCC seems to have drawn the line on the application of this potentially far-reaching new framework is with regard to narrowband services. The FCC contends that the *Computer Inquiries* focused on narrowband rather than broadband services.[18] However, this assertion is directly challenged by AT&T and others:

> The *NPRM* suggests [ ] that the *Computer Inquiries* regulations were designed to address "analog" and other service that "were more akin to voicemail and other narrowband applications, rather than to broadband Internet access[ ]". That is simply wrong. The *Computer Inquiries* obligations were a response to services that allowed remote computer terminals to access centrally located computers over digital services (such as T1-based services) that do not differ in any relevant technological respect from the digital

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[17]FCC 02-42, NPRM, at para. 61.

[18]FCC 02-42, NPRM, at para. 31. "…[The *Computer Inquiry*] framework was constructed to accomplish certain goals in a world in which the services at issue were more akin to voicemail and other narrowband applications, rather than to broadband Internet access."

> DSL-based services that the Bells and other incumbent LECs offer over their copper loops today." [AT&T Comments, p. 52, references omitted].

Assuming AT&T is correct, the FCC has no justification for excluding narrowband from its proposal based upon *Computer Inquiry* precedent.

The statutory basis for distinguishing between narrowband information services and broadband information services is equally suspect. The Act terms "telecommunications", "telecommunications service", and "information service", upon which the FCC's statutory interpretation is based, make no mention of bandwidth. If the FCC's proposed rules were ultimately through court challenge to be found applicable to narrowband as well as broadband services, then voice telephony, which is also used for Internet access, could potentially be declassified from Title II common carrier status to private carrier status. This would have unfortunate and disastrous consequences to numerous to mention.

We believe that the FCC's proposal to radically restructure common carrier regulation is contrary to Congressional intent and the public interest. We believe that if Congress intended to reverse several decades of FCC *Computer Inquiry* rules it would have been more explicit in the Act. The fact that Congress is itself currently entrenched in a vigorous debate over these very same issues should give the FCC reason to question whether its proposal to reverse twenty years or more of federal telecommunications policy and key provisions of the Act is based upon a firm statutory foundation.

Conclusion

The FCC should not adopt its proposed broadband framework to reclassify ILEC broadband services from common carrier to private carrier status. The proposed framework is not supported by the Telecommunications Act of 1996, is contrary to twenty or more years of Computer Inquiry regulations, and will not promote broadband deployment.

RESPECTFULLY SUBMITTED this ___ day of June, 2002.

_/s/_____
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