

BEFORE THE
Federal Communications Commission
WASHINGTON, D.C.

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
)	

REPLY COMMENTS OF TIME WARNER TELECOM

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Time Warner Telecom Corporation ("TWTC"), by its attorneys, hereby submits these reply comments in response to the Notice of Proposed Rulemaking¹ in the above-referenced proceeding.

I. INTRODUCTION AND SUMMARY

There is little question that broadband Internet access provided by ILECs is currently classified as an information service with a telecommunications service transmission component and that there is no basis for pursuing further the wholesale reclassification of broadband transmission as "telecommunications" or "private carriage." All commenters, including the ILECs, agree that the regulatory treatment of broadband should be determined based on a market

¹ See *Appropriate Framework for Broadband Access to the Internet over Wireline Facilities*, Notice of Proposed Rulemaking, 17 FCC Rcd 3019 (2002) ("NPRM").

power analysis. That analysis must be performed in the *Non-Dominance*² and *Triennial Review*³ proceedings. The Commission should conclude in those proceedings that ILECs continue to exercise market power in the provision of broadband transmission for all relevant product markets, but most especially for the high-capacity end-user circuits needed to provide frame relay, ATM, and similar services demanded by medium-sized and large businesses. Given this market power, reclassification of broadband transport would give ILECs the opportunity to harm competition by denying inputs needed by competitors.

Moreover, there is no basis for concluding that the Commission's recent decision to classify the transmission component of cable modem service as "telecommunications" (and not a Title II telecommunications service) requires an identical classification for ILEC broadband transport. The Commission's classification of cable modem transport simply assigned the appropriate classification to cable modem transport based on the manner in which cable operators have provided it. It said nothing about the more relevant question of what regulations should be imposed on broadband providers to prevent anti-competitive behavior.

But even if the Commission were to conclude that it would be appropriate to reduce the level of regulation applicable to broadband, there is no basis for removing ILEC transmission from Title II. Such an approach would embroil the Commission needlessly in extremely complex and onerous accounting issues, jeopardize deployment of broadband in rural and high-cost areas, and preclude the Commission from enforcing such bedrock statutory requirements as

² See *Review of Regulatory Requirements for Incumbent LEC Broadband Telecommunications Services*, Notice of Proposed Rulemaking, 16 FCC Rcd 22745 (2001) ("*Non-Dominance*").

³ See *Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers; Implementation of the Local Competition Provisions of the Telecommunications Act of 1996; Deployment of Wireline Services Offering Advanced Telecommunications Capability*, Notice of Proposed Rulemaking, 16 FCC Rcd 22781 (2001) ("*Triennial Review*").

CALEA and customer privacy protections. Indeed, when one considers the broader statutory framework, one in which Congress (1) was aware that broadband is treated as a telecommunications service, (2) gave the Commission extensive powers to lighten the hand of regulation applicable to Title II services, and (3) made many fundamental statutory goals dependent on the retention of the telecommunications classification, it is clear that Congress intended that the Title II classification for broadband would endure regardless of the changes in the ILECs' market power. The Commission may not disregard this intent.

II. DISCUSSION

In its comments in this proceeding, TWTC explained that there is little question under existing Commission precedent that broadband Internet access is an information service, but that the underlying transmission service used by ILECs to provide that information service to end users is a telecommunications service. *See* TWTC Comments at 9-16. TWTC further explained that, to the extent the Commission is concerned that the currently applicable regulations are not appropriately tailored to the market conditions in which ILECs offer broadband services, the only appropriate and lawful means of adjusting those regulatory requirements is to retain the telecommunications service classification of broadband transmission and to exercise the authority granted the Commission under Title II to forbear from any currently applicable regulations. *See id.* at 16-32. Any such decisions must be made in the Commission's *Triennial Review* and *Non-Dominance* proceedings. Beyond simply clarifying the current law regarding the regulatory classification of broadband service, the instant proceeding serves no logical purpose.

The comments in this proceeding fully support these conclusions. To begin with, the comments demonstrate that the extent to which ILEC broadband service should be regulated

turns on the ILECs' market power in the provision of those services. The ILECs themselves all focus their arguments on their purported lack of market power in the provision of broadband. See SBC Comments at 20-24; Verizon Comments at 11-12; BellSouth Comments at 15-16; Qwest Comments at 16-17. Yet that is a question that can only be addressed in the context of the Commission's *Non-Dominance* and *Triennial Review* proceedings.

In those proceedings, the Commission can assess the extent to which there are true substitutes for ILEC broadband service in the relevant product and geographic markets, and whether those substitutes have reduced the ILECs' market power both in the provision of retail broadband service and of wholesale inputs needed to provide those services. Notwithstanding the broad and often superficial accounts of market activity provided in the ILECs' so-called "Fact Reports" in those proceedings, there is every indication that the Commission will conclude in both the *Triennial Review* and the *Non-Dominance* proceedings that the ILECs continue to have the incentive and opportunity to harm consumer welfare by denying, delaying, degrading, and overpricing access to the inputs needed by competitors and that regulation of ILEC behavior is still necessary. This appears to be the case for all of the relevant product markets for broadband including the market for ADSL and cable modem service.⁴

But this conclusion is most obviously valid with regard to broadband services such as ATM and Frame Relay demanded by many medium-sized and large businesses. It is striking that the ILECs' discussions of their position in the broadband market in their comments contain only brief, passing references to the market for ATM and Frame Relay (and similar services) and no mention at all of their market power in the provision of special access end-user circuits that

⁴ See TWTC Comments at 17 (quoting a leading analyst's conclusion that in the vast majority of geographic markets, providers of ADSL, cable modem service, and substitute services face no intermodal competition at all).

all competitors in this market need in order to compete. But it is control over just such inputs that gives the ILECs the power to harm consumer welfare by crippling competitors' ability to compete and then raising prices in the downstream retail market once they have received Section 271 authorization and can provide Frame Relay, ATM and similar services on an unrestricted basis (albeit through a separate affiliate). Indeed, these are the kinds of critical market-specific issues the Commission must now examine as a result of the D.C. Circuit's recent decision in *United States Telecom Association v. FCC*⁵ with regard to UNEs. Logically, the Commission must also focus on these issues in the *Non-Dominance* proceeding.⁶ But in all events a simple change in definitions for all broadband would arbitrarily and capriciously ignore these fundamentally important issues.

Such a misguided approach would create opportunities for the ILECs to exploit ambiguities in the law to deny, delay, degrade, and overprice high-capacity end-user connections. TWTC provided some concrete examples of exactly how the ILECs might accomplish this in its comments. *See* TWTC Comments at 19-21. The ILECs' comments confirm that a simple reclassification of broadband transmission as a non-Title II service would offer them numerous opportunities to harm competition and consumer welfare. For example, SBC argues (as TWTC anticipated it would) that a requesting carrier would not have the right to obtain unbundled access to ILEC facilities that the ILEC uses to provide information services. *See* SBC Comment at 32. SBC also argues (as TWTC also anticipated it would) that a

⁵ *United States Telecom Ass'n v. FCC*, 290 F.3d 415 (D.C. Cir. 2002).

⁶ As TWTC explained in its comments in the *Non-Dominance* proceeding, the ILECs' control over high-capacity end-user connections does not require that the ILECs be treated as dominant in the provision of ATM, Frame Relay, and similar services. But it does require that the ILECs continue to be treated as dominant in the provision of high-capacity circuits and that the Section 272 structural separation requirement apply indefinitely after a BOC receives Section 271 approval in a particular state. *See* TWTC Comments, CC Docket No. 01-337 at 11-13 (filed Mar. 1, 2002).

requesting carrier would not have the right to obtain unbundled access even to ILEC facilities that the ILEC uses to provide telecommunications services so long as the requesting carrier plans to use the facility to exclusively provide an information service. *See id.* Similarly, Verizon argues that the requirements of Section 251 (including collocation and unbundling) do not apply to services offered on a private carriage basis. *See Verizon Comments at 32-33.* It should be obvious to the Commission that the ILECs will use arguments such as these to deny CLECs access to network elements in as many cases as they can. Such a strategy will be successful if it delays CLEC entry, regardless of whether the ILECs' legal arguments are ultimately rejected. Again, such arguments would be available to ILECs to deny access to wholesale inputs over which the ILECs unquestionably possess market power if the Commission were to adopt a definitional approach to diminishing regulations of broadband because such an approach would offer little or no room for different regulatory treatment of ILEC wholesale inputs for different product and geographic markets.

Moreover, contrary to ILEC arguments, the *Cable Modem Order*⁷ does not require that the Commission classify ILEC broadband as a Title I service. *See SBC Comments at 3; Qwest Comments at 18-20.* That order consisted of a Declaratory Ruling in which the Commission *described* the manner in which cable operators provide the transmission service associated with cable modem service as well as the legacy regulations that have applied to that transmission. In the Declaratory Ruling, the Commission concluded that "cable modem service, *as it is currently offered*, is properly classified as an interstate information service, not as a cable service, and that

⁷ *See Inquiry Concerning High-Speed Access to the Internet Over Cable and Other Facilities; Internet Over Cable Declaratory Ruling; Appropriate Regulatory Treatment for Broadband Access to the Internet Over Cable Facilities*, Declaratory Ruling and Notice of Proposed Rulemaking, 17 FCC Rcd 4798, ¶ 39 (2002) ("*Cable Modem Order*").

there is no separate offering of a telecommunications service.” *Cable Modem Order* ¶ 7 (emphasis added). At every stage of its analysis in that order, the Commission was careful to limit its discussion to the proper classification of the service “as currently provided.” *Id.* ¶¶ 33, 38, 48. Chairman Powell explained further in his separate statement that the task of the Commission in the Declaratory Ruling was merely to “faithfully apply the statutory definition to a service, based on the nature of the service.”⁸ Moreover, in concluding that *Computer II* and *III* requirements do not apply to cable modem service, the Commission relied primarily on the fact that those requirements had not been applied to cable modem service in the past, and that they applied only to the “telephone network.” *Cable Modem Order* ¶¶ 43-44.⁹

In the Declaratory Ruling portion of the item, the Commission did not reach the more important question of what form of regulation it should *prescribe* for cable modem service in the future. That was the subject of the notice of proposed rulemaking released at the time of the Declaratory Ruling. In the notice of proposed rulemaking, the Commission sought comment on the extent to which it should impose duties to deal on cable operators so that they would not deny, delay, or degrade access to unaffiliated ISPs. *See id.* ¶ 74. As Chairman Powell explained, the Commission will use the notice of proposed rulemaking to examine the extent to which regulatory prescriptions should be imposed on cable modem providers “to guard against public

⁸ *See Cable Modem Order* at 4867 (“Separate Statement of Chairman Michael Powell”).

⁹ The Commission addressed the application of *Computer II* and *III* requirements to cable modem service providers that also provide telephone service by again avoiding the question of what regulation should be prescribed and limiting itself to a generic description of cable modem service. As it explained, “[I]f we were to require cable operators to unbundled cable modem service merely because they also provide cable telephony service, we would in essence create an open access regime for cable Internet service applicable only to some operators.” *Id.* at 46. The Commission recognized that such an arbitrary result should be avoided and that “it is more appropriate to examine the issue of open access on a national basis involving all those Title VI cable systems that choose to offer cable modem service.” *Id.*

interest harms and anti-competitive results.” Separate Statement of Chairman Michael Powell at 4867.

It is clear then that the *Cable Modem Order* has no bearing on the appropriate regulatory prescription for ILEC broadband service. The *Cable Modem Order* merely assigned a regulatory classification to the service that the cable operators have been providing up until now. The question of the appropriate regulatory prescription for both ILEC broadband service and cable modem service must be determined in regulatory proceedings that focus on the market power possessed by ILECs and cable operators. For ILECs, that means the *Non-Dominance* and *Triennial Review* proceedings. For cable operators, that means the proceeding concerning the notice of proposed rulemaking that accompanied the *Declaratory Ruling*.

Not only is the Commission under no compulsion to classify ILEC broadband service as an information service, but, as TWTC explained in its comments, such a reclassification would create numerous and serious practical implementation problems. See TWTC Comments at 17-29. First, as TWTC explained in its comments, classifying broadband as an unregulated service would create extremely difficult cost allocation problems. See *id.* at 22-24. Recognizing this problem, BellSouth suggests simply that the Commission should not apply Part 64 to broadband. See BellSouth Comments at 26-29. BellSouth claims that this would be appropriate because the Part 64 requirements were designed to prevent ILEC cross-subsidy of unregulated services, an issue that BellSouth claims is no longer a problem under price caps. See *id.* at 28-29. But as TWTC explained in its comments, both the Commission and economists have recognized and real world experience confirms that ILECs continue to have the incentive to misallocate costs of unregulated services under price caps. See TWTC Comments at 23-24. There is simply no basis, therefore, for BellSouth’s proposal. Moreover, there is no basis for concluding that the

requirements of Section 254(k) (which prohibits cross-subsidy between competitive and non-competitive services and which requires that the state commissions and the FCC ensure that services subject to universal service do not bear a disproportionate share of joint and common costs) could possibly be met without some attempt to allocate the costs of regulated and unregulated broadband service. The Commission cannot simply ignore this requirement.

Second, reclassifying broadband service as an information service without a telecommunications service component holds grave consequences for the deployment of broadband in rural and high costs areas. To begin with, such a definitional approach would preclude the Commission from classifying broadband as a service eligible for universal service support. *See id.* at 25-26. This is not to say that the Commission should rule that broadband is eligible for universal service support. But given the importance that Congress placed on deployment of broadband, it is completely inappropriate for the Commission to apply a regulatory classification to broadband that would foreclose the application of subsidies even in a narrowly targeted fashion.

Furthermore, reclassification would effectively preclude the use of existing NECA pooling arrangements used by rural ILECs to pay for broadband deployment in many rural communities.¹⁰ Specifically, without a telecommunications service component, rate-of-return ILECs would be prohibited from using the NECA tariffing and pooling mechanisms for their xDSL transmission services. NECA pooling of rural xDSL services spreads investment risks and increases incentives for broadband deployment in rural areas. Indeed, as the rural ILEC

¹⁰ See The Nebraska Independent Companies Comments at 4-5; National Exchange Carrier Association (“NECA”) Comments at 2-4; Fred Williamson and Associates Comments at 25; National Rural Telecom Association Comments at 16-18; Organization for the Promotion and Advancement of Small Telecommunications Companies (“OPASTCO”) Comments at 3-5; National Telecommunications Cooperative Association Comments at 5-7; GVNW Consulting Comments at 6.

commenters explain, “for many small ILECs, deployment of advanced services would not be viable without pooling.” OPASTCO Comments at 3. Specifically, without pooling, rural ILECs would be unable to average costs among carriers and would instead be required to recover all costs directly from customers. This in turn would require many rate-of-return carriers to significantly raise xDSL prices paid by end users, often rural customers who are among the most price sensitive. *See* The Nebraska Independent Companies Comments at 5. The inevitable result would be that many customers would be forced to cancel (or decline to subscribe to) rural xDSL services because they would simply be too expensive. This effect would not only deny rural Americans the promise of broadband but would leave many rural carriers with stranded investment. Since the NECA xDSL special access tariff was introduced, “over 480 of the rate-of-return ILECs ... have opted to provide this form of broadband service under the terms of the tariff.” NECA Comments at 3-4. Under the Commission’s proposed reclassification, these carriers would likely be unable to continue the investment and deployment.

Third, classifying broadband Internet access as an information service without a telecommunications service component would limit the Commission’s ability to implement and enforce a variety of statutory priorities, including the important law enforcement provisions of CALEA and consumer protection provisions of the Communications Act. *See* SBC Comments at 37-41; Verizon Comments at 39-42. The ILECs do not deny that the application of these provisions turns on the regulatory classification of services. Instead, they cavalierly dismiss the underlying importance of the statutory mandates. The Commission cannot take this approach. Among the Commission’s most important responsibilities as competition emerges are implementation of CALEA to ensure effective law enforcement efforts and of privacy protections. Congress did not envision that these regulations would become unnecessary as

competition developed. If anything, Congress envisioned this class of regulations would become increasingly important as competition develops (as would be the case with regard to the restriction in Section 222(b) on the use a wholesale carrier may make of information obtained from its wholesale carrier customers). Yet if broadband were to be removed from Title II entirely, the Commission's authority to enforce critical provisions of CALEA and the Act would be unquestionably narrowed or even eliminated entirely.

For example, CALEA applies by its terms to "telecommunications carriers" and not to "persons or entities insofar as they are engaged in providing information services." 47 U.S.C. §§ 1002(a), 1001(8). The statute expressly excludes information services and transmission provided on a private carriage basis from its assistance capability requirements. *See id.* § 1002(b)(2). If the Commission concludes that broadband Internet access is an information service with no telecommunications service component, the transmission services associated with that information service would no longer be subject to CALEA's requirements. Not to worry, the ILECs assert. The reduced effectiveness of CALEA under this proposed scheme is irrelevant, they say, because law enforcement has plenty of authority under other law enforcement statutes. *See SBC Comments at 39; Verizon Comments at 39-40.* But whether to make law enforcement tools available is a judgment for neither the Commission nor the ILECs. Congress made the legislative choice to grant law enforcement authority under CALEA, and the Commission may not negate that authority simply because other statutes outside the area of communications law grant law enforcement authority. There is simply no basis for concluding that Congress intended that CALEA would no longer apply to services once they are subject to competition.

As another example, the Act's protections governing customer proprietary network information ("CPNI"), apply only to telecommunications services. *See 47 U.S.C. § 222.* The

ILECs' arguments that reclassification would be insignificant because consumer protections would continue to apply to voice services and other telecommunications services merely muddles the issue. *See Verizon Comments* at 42. The ILECs hope to divert attention from the fact that, if the Commission adopts a classification that does not include a telecommunications service component, it would be unable to enforce consumer protection provisions with respect to broadband. But, again, there is no basis for concluding that Congress intended that CPNI requirements would be inapplicable to competitive services. On the contrary, the requirements of Section 222 expressly apply to all telecommunications carriers, a group that Congress knows would include new entrants that face fierce competition from ILECs and other new entrants. It would be utterly illogical, then, to discontinue application of these requirements only when the ILECs become subject to competition in the provision of a particular service.

Finally, the broader statutory context demonstrates that Congress intended that the Commission would operate within Title II when adjusting regulatory requirements to suit market conditions. *See TWTC Comments* at 31-32. The Commission is bound to construe that statute in a manner that comports with the broader framework established by Congress.¹¹ Thus, it would not just be bad policy, but unlawful for the Commission to rely on regulatory reclassification rather than forbearance power (as well as the power to remove unbundling obligations under Section 251(d)(2)) granted under Title II.

¹¹ *See FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 133 (2000) (quoting *Davis v. Michigan Dept. of Treasury*, 489 U.S. 803, 809 (1989)) (“[it is a] fundamental canon of statutory construction that the words of a statute must be read in their context and with a view to their place in the overall statutory scheme.”); *see also Nat’l Rifle Ass’n v. Reno*, 216 F.3d 122, 127 (D.C. Cir. 2000).

