

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

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

COMMENTS OF THE NATIONAL RURAL TELECOM ASSOCIATION

National Rural Telecom Association

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REPLY COMMENTS OF THE NATIONAL RURAL TELECOM ASSOCIATION

The National Rural Telecom Association (NRTA) submits this reply in response to comments regarding the Commission's Notice of Proposed Rulemaking in the above-captioned proceeding.¹ This brief response will focus primarily on issues that affect NRTA's members, commercial Rural Utilities Service and Rural Telephone Bank borrowers which are also "rural telephone companies" under 47 U.S.C. §153(37).

Introduction and Summary

The Commission has tentatively decided to define wireline broadband Internet access as an "information service" with a "telecommunications" component. As NRTA explained in its comments (pp. 9-18), the implications of proceeding by redefinition or reclassification of an

entire telecommunications function are sweeping, largely unavoidable and deprive the Commission of reliable means to correct unfortunate fallout from the new classification. Comments representing a large variety of interests have warned that the reclassification will produce an equally large variety of adverse – and often unintended – effects. A few proponents claim that reclassification is necessary for competitive neutrality because the Commission has already attached the "information service" label to functionally-equivalent competing broadband Internet access provided via a cable modem platform. Others claim that "unfettered competition" will best spur growth in the market for broadband Internet access, at least in comparison to today's regulation directed solely at wireline providers. However, there are other ways to achieve competition and competitive neutrality without the damaging side effects and risks of reclassification. These parties' needs can be met through existing Commission powers, without forsaking Title II's reliable and flexible tools to engage in uncertain, controversial and unpredictable experiments under Title I.

Regardless of the merits of individual claims of adverse side effects, it is apparent from the record that to reclassify broadband Internet access as an "information service" with no "telecommunications service" component is to wield a deregulatory meat axe, where a public policy scalpel is needed. Instead, NRTA urges the Commission to recognize that broadband Internet access involves both "information service" and "telecommunications service" components for all providers and all platforms. The Commission will then have the authority it needs to balance the responsibilities placed on all broadband Internet access providers to ensure competitive neutrality, to assess the broadest possible base of contributors to fund universal service and to retain its ability to achieve the Communications Act's goals even for those

¹ Appropriate Framework for Broadband Access to the Internet Over Wireline Facilities, Universal Service Obligations of Broadband Providers, CC Docket No. 02-33, Notice of Proposed Rulemaking (rel. Feb. 15, 2002) (NPRM).

locations and population segments that Congress recognized cannot count on marketplace forces alone for the network capabilities and services they need.

Reclassifying Broadband Internet Access as an "Information Service" Will Seriously Jeopardize the Commission's Authority to Effectuate the Statutory Universal Service and Broadband Deployment Policies in Rural Areas

The Commission has espoused (NPRM, ¶3) the primary goal of encouraging the ubiquitous availability of broadband to all Americans. Congress has also adopted the policy in §254(b)(3) that rural and urban customers should have access to "reasonably comparable" services, including advanced telecommunications and information services, at "reasonably comparable" rates. As NRTA explained in its comments, classifying Internet access as exclusively an information service will interfere with expansion of the definition of supported universal services, since the evolving definition contemplated by §254(c) is limited to "telecommunications services." OPASTCO warns, too, (pp. 5-7) that redefinition deprives the Commission of the tool of including these services in the definition in the future, if support should be necessary. Mescalero Apache Telecom (pp.3-10), a tribal telephone company, adds its warning that redefinition will both reduce its universal service support by 50% and undercut the Commission's commitment to encouraging deployment and service availability in Indian Country.

NRTA is convinced that, when the market has developed to the point where it is discernable where market forces alone will not deploy broadband, support will be necessary to "finish the job" of implementing §§254 and 706. The sufficiency and structure of universal service support mechanisms are in flux. Increasing the incentives to avoid the public switched network by turning to Internet-based telephony, for example, adds to the uncertainty facing rural

telephone providers.² Therefore, the Commission should neither define broadband Internet access out of the realm of supportable universal service capabilities nor provide new artificial advantages for avoiding common carrier offerings.

Comments also confirm that redefining wireline broadband Internet access as an "information service" will thwart broadband deployment and service availability for customers served by National Exchange Carrier Association (NECA) pool members. As NRTA explained in its comments (pp. 10-13), the redefinition approach converts Internet access from a "telecommunications service" to, at most, a "telecommunications" activity outside the Title II common carriage regime. Other comments confirm (FW&A, pp. 5-6; NTCA, pp. 5-7; OPASTCO, pp. 3-5) that the DSL offerings in the NECA tariffs used by the majority of rate-of-return-regulated local exchange carriers (LECs) enable many carriers to provide reasonably priced DSL service that would otherwise not be feasible in their high cost service areas. Part 69 access charges, Part 61 tariffs and the NECA pools are all creatures of Title II common carrier regulation that do not apply to Title I information services or to recovery of the costs of non-regulated services.

As NECA explains (p. i), reclassification could retard broadband investment in these markets, contrary to the Commission's and Congress's intent. The Western Alliance explains (p. 8) that Title I regulation could force broadband rates to more than "\$200 per month in many rural areas." The comments on this issue and NRTA's original comments seek accommodation so that, in the event that the Commission chooses to reclassify these services as Title I information services, small and rural carriers may continue to participate in NECA's tariffs and pools for their broadband Internet access offerings. NTCA urges (pp. 3-5) letting companies continue to

² Interestingly, Cinergy opposes the Commission proposal for the opposite reason – that depriving Internet telephony providers of the UNEs by which they furnish Voice over Broadband will give the largest ILECs too much market power.

provide stand-alone broadband Internet access under tariff as a "telecommunications service." USTA proposes (pp. 11-12) that NECA pool members have the ability to choose not to remove their broadband services from Title II. The Western Alliance suggests (pp. 9-10) that the Commission exempt rural broadband services from Title I reclassification.

NRTA agrees that the Commission will have to find a way to prevent loss of Title II status from drying up investment and pushing rural broadband prices above what rural markets can absorb. However, in view of the weight of the record of problems from reclassification, NRTA does not consider making an exception to the definition of broadband services as "information services" a sufficiently risk-free approach to preserving rural broadband investment incentives. The comments do not provide a justification for defining identical urban and rural broadband functions differently that can be sure of passing judicial muster. Moreover, Title I regulation is subject to controversy and uncertainty that rural markets simply cannot afford. Accordingly, NRTA urges the Commission not to redefine wireline broadband Internet access as an "information service" because of the adverse impact on rural DSL deployment and prices and the uncertain validity and sustainability of a rural exception or ability to opt out of a general definition for otherwise identical broadband offerings.

Other Parties' Comments Demonstrate that the Far-Reaching Side Effects of Reclassification Require the Commission to Choose Less Risky and More Predictably Beneficial Means to Promote Broadband Deployment and Reduce Regulation

NRTA's focus is on the potentially devastating rural deployment and universal service consequences of the reclassification approach on its members' rural, high-cost service areas. However, even without trying to evaluate the merits of the many concerns raised by other comments (not all of which NRTA shares), it is clear that proceeding by reclassification has far-reaching and highly controversial side effects. Risking these and as yet unidentified side effects

is not necessary if the Commission uses regulatory tools that allow more targeted actions, with more limited and predictable consequences.

The record abounds with examples of unintended or, to the concerned parties, undesirable consequences. For example, representatives of those with disabilities, such as the Rehabilitation Engineering Research Center (pp. i-18) and the Arizona Consumer Council, et al., (p. 22), worry that loss of telecommunications services status for broadband will not maintain adequate support for TRS, or protect access to services that the marketplace does not provide for disabled customers. Similarly, Telecommunications for the Deaf seeks assurances, possibly in vain, that some Title I replacement can be fashioned to enable the disabled community to obtain and use information services. The Secretary of Defense (pp. 2-5), echoed by Beacon Telecommunications Advisors, LLC (p. 8) and the Ohio Internet Providers Association, et al., (pp. 66-70), caution that Title II regulation is necessary for national security and emergency preparedness. Consumer groups, such as the United Church of Christ, et al., (pp. 4-5) point out that reclassification will sacrifice regulatory protections for consumers and competitors. The Pennsylvania Office of Consumer Advocate, et al., (Section 5) argue that existing cost allocation mechanisms are not up to the problems caused by reclassification. Arizona, et al., a group of fifteen consumer organizations, also criticizes (pp. 21, 81-89, 103-109) the "closed" cable network model and the resulting loss of consumer protections continued under the Commission's recent reclassification of cable modem broadband Internet access. State regulators raise multiple concerns, ranging from access and interconnection concerns (e.g., California, pp. 32-41; Illinois Commerce Commission, p. 4-20) shared by Competitive Local Exchange Carriers (CLECs) (e.g., US LEC, pp. 20, 31-52), to disparate treatment of functionally similar facilities depending on who uses them (Vermont PSB, p. Section VI, pp. 36-37) and disparate treatment of narrowband and broadband services in spite of their essential similarity (Oregon PSC, p. 2).

NARUC observes (p. 8) that (as Chairman Powell has also noted) lack of demand may be the major obstacle to broadband deployment and penetration. NARUC states that "the existing regulatory structure *may not* be the root cause of the existing penetration problem" (footnote omitted), identifies a number of related issues raised by the proposal that require careful evaluation, and opposes the reclassification proposal (p. 14) as "at best, premature."

In short, no reader of the record in this proceeding could fail to be struck by the enormous scope and number of controversial side effects flowing from the Commission's proposed use of what the Arizona group (p.21) calls "legal gymnastics" to redefine hybrid broadband offerings and profoundly alter the regulatory landscape. As the United Church of Christ group says (p.4), "[b]y removing broadband Internet services from the statutory framework, the public must enter a no-man's land where the Commission's power is not limited or predictable." Regulatory prudence dictates selecting a less perilous means to the Commission's goals.

The Commission Can Achieve its Deregulatory and Neutrality Goals Without Abdicating Its Authority and Jeopardizing Other Statutory Purposes

Many comments point out that there is simply no need for the Commission to take the dangerous reclassification route, since it has sufficient authority to accomplish its purposes without putting all sorts of other public benefits at risk. Comments point to the Commission's forbearance authority (Arizona, et al., pp. 11-12), its ability to forbear partially (Secretary of Defense, p.5), its ability to establish deregulation in a measured manner under Title II (e.g., C Beyond, et al., pp. 35-40) and the authority reflected in its Computer Inquiries requirements for the largest incumbent LECs (Big Planet, pp. 6-24). Time Warner Telecom argues (pp. 34-35) that the Commission can best deal with wireline broadband deregulation in the Non-Dominance and Triennial review proceedings. The Commission also has an ongoing proceeding on line sharing obligations. The Commission will have to revisit its UNE and line sharing determinations, in any event, in response to the D.C. Circuit decision in United States Telecom

Association, v. FCC, ___ F.3d ___ (D.C. Cir. 2002) (No. 00-1012, issued May 24, 2002)

(USTA). Thus, many or most of the issues raised in comments are already before the Commission.

In the past, the Commission has tailored deregulatory steps such as streamlining, pricing flexibility, and different regimes for large metropolitan LECs and midsize, small and rural LECs. Indeed, the record bristles with arguments about necessary exceptions and new safeguards, including those required to prevent adverse consequences for rural areas, national security needs and various consumer interests in the event the Commission pursues Title I reclassification. Using Title II authority and forbearance flexibility would provide far simpler, more predictable and much more reliable relief, as well as far less controversy. In short, the record demonstrates why the Commission should pursue its goals under Title II. It can respond best to a continually changing marketplace by retaining its authority and exercising it judiciously to deregulate where and when it is appropriate.

The Commission has no need to yield to the conclusory claims of the Aron, et al., and Arrow, et al., economist groups that unfettered competition is a good in and of itself throughout the nation. Nor should it reclassify wireline broadband Internet access just because it took that route for cable modem access even before it reached the question here. Competitive neutrality would require a change of direction, to be sure, if the Commission prudently decides not to abdicate its authority over Internet access for wireline carriers. Its decision to reclassify cable modem Internet access as a Title I information service should be reconsidered, in any event, since it has unwisely thrown away its ability to regulate the broadband market leader under Title II. It should rescind its reclassification of cable modem Internet access and classify facilities-based broadband Internet access on any platform as a hybrid service, containing both information service and telecommunications service components. The Commission should then apply

§254(d) to all such providers on the basis of the telecommunications service component of their broadband Internet access service, in addition to all other providers of interstate telecommunications services already subject to the mandatory contribution requirement of §254(d).³

All Facilities-Based Internet Access Providers on Any Platform Should Contribute to Federal Funding for Universal Service

Even if the Commission persists in its proposal to redefine wireline broadband Internet access as an "information service" with a "telecommunications" component, it should broaden the base of contributors as much as possible and foster competitive and platform neutrality by requiring all facilities-based broadband Internet access providers to contribute to federal universal service funding. Comments (California PUC, pp. 45-46; Arizona, et al., pp. 62-64; NTCA, pp. 7-9) stress the need for adequate contributions and restrictions on providers' ability to avoid contributing to universal service funding to provide long term viability for universal service programs. Many comments (e.g., BellSouth, pp. 29-32) urge that all providers, including Information Service Providers that provide transmission for themselves must bear the same contribution to achieve competitive neutrality and avoid arbitrage. The Commission should ignore self-serving pleas from satellite providers (e.g., Hughes Network Systems, p.1; SES Americom, pp. 2-4), wireless broadband providers (Wave Rider Communications, pp.1-2; Monet Mobile Networks, pp. 3-8), and broadband Internet access providers (Information Technology Association of America, pp. 15-19) to be spared from the duty to contribute or to preserve the current system (e.g., Sprint, pp.18-19; Socket Holdings, p.9). The Pennsylvania

³ The Commission should reject the unlawful and illogical suggestion of the Texas Attorney General that only providers of Internet access eligible to receive universal service support should be required to contribute. Section 254(d) does not contain any requirement that a contributor be eligible as a recipient. All providers of interstate telecommunications must contribute, unless their assessment would be de minimis, although many are not eligible as recipients. Moreover, the Commission's discretionary authority to require all providers of telecommunications to contribute is obviously designed to include non-recipients when the public interest requires. As the Texas filing

Office of Consumer Advocate and seven other state consumer advocates correctly point out (pp. 61-64) that the Commission has ample statutory authority to require broadband Internet access providers to contribute to universal service, as telecommunications services or telecommunications providers, and should exercise that authority because the public interest will be served.

Conclusion

The record is clear that classifying broadband Internet access as an "information service" with a "telecommunications" component raises problems and uncertainties that will prejudice many consumers and providers. The Commission should recognize that the service contains both information and telecommunications service components, retain its Title II authority and use other powers besides redefinition to pursue the goals of competitive neutrality and deregulation.

Respectfully submitted,

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states, the proposal "would require a complete redefinition of what sorts of entities are eligible for universal service support." The Commission should reject the invitation to consider how to revise the statute in this proceeding.

CERTIFICATE OF SERVICE

I, Naja Gamble-Wheeler, employee of Holland & Knight LLP, 2099 Pennsylvania Avenue, Suite 100, Washington, DC 20006, do hereby certify that a copy of the foregoing Comments of The National Rural Telecom Association was served on this 1st day of July, 2002, via hand delivery or by first class mail, to the following parties:

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