

**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
)	
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 Nos. 95-20, 98-10

**REPLY COMMENTS OF THE
ALLIANCE OF LOCAL ORGANIZATIONS
AGAINST PREEMPTION**

The Alliance of Local Organizations Against Preemption (“ALOAP”)¹ hereby replies to the comments of others in the captioned proceeding. Although the chief impetus for the formation of ALOAP has been the FCC’s order classifying cable modem service (“CMS”) as an interstate information service,² this proceeding is considered the wireline “functional equivalent” of the cable matter and raises similar issues of competition and consumer protection.³

¹ ALOAP is composed of the National League of Cities, the National Association of Counties, the U.S. Conference of Mayors, the National Association of Telecommunications Officers and Advisors and the International Municipal Lawyers Association.

² Declaratory Ruling and Notice of Proposed Rulemaking (“NPRM”), FCC 02-77, released March 15, 2002. ALOAP and other parties have sought judicial review of the Declaratory Ruling. *National League of Cities v. FCC*, Court of Appeals Docket No. 02-71425 (9th Cir. 2002).

³ Notice of Proposed Rulemaking (“Notice”), CC Dockets 02-33, 95-20, 98-10, FCC 02-42, released February 15, 2002, ¶9.

As ALOAP indicated in its Comments in the CMS classification rulemaking:

The Communications Act requires regulatory disparity, not parity in the treatment of common carriers and cable systems (NPRM ¶ 85.) Hence, regardless of the desirability of "regulatory parity," the result in this rulemaking cannot be driven by that goal.⁴

Nor should the outcome in this wireline proceeding be so driven by a transitory balancing of equities that it overlooks the very different histories of common carrier telecommunications service and cable television service.

Congress had the history of telecommunications common carriage in mind in 1996, when it transferred to the FCC the judicial oversight of the AT&T Consent Decree of 1982.⁵ For example, Section 274(d) of the Communications Act, added by the Telecommunications Act of 1996, required that Bell Company participation in "electronic publishing" be separated from basic telephony operations and that the basic service (tariffed) rates charged to competing publishers be no higher than those charged to its own publishing affiliate. Since first providing a statutory framework for cable television in 1984, the Congress has kept steadily in mind the policy determination -- dating from pre-statutory FCC regulation of the industry -- not to treat the offering of cable television service as common carriage.⁶

These two models specified in Titles II and VI of the Communications Act have served the cause of competition and consumers well, and ought not lightly be transformed into some

⁴ Comments, June 17, 2002, at iv, in CS Docket 02-52.

⁵ *United States v. AT&T*, 552 F.Supp 131 (D.D.C. 1982), *aff'd mem.sub nom Maryland v. United States*, 460 U.S. 1001 (1983). Section 151 of the Telecommunications Act of 1996 added Part III to Title II of the Communications Act, containing new Sections 271-276.

⁶ Section 621(c) of the Communications Act, added by the Cable Communications Policy Act of 1984, P.L. 98-549, codified cable television's status as a non-common carrier, judicially determined in *FCC v. Midwest Video Corp.*, 440 U.S. 689 (1979).

third form of information service defined only by the non-specific (and thus subjective) declarations of Title I. In this respect, ALOAP supports the similar arguments put forth by several state commissions, consumer organizations and at least one Internet Service Provider (“ISP”).⁷

The Notice begins (¶19) by extracting two words, “via telecommunications,” from the statutory definition of information service to distinguish the provision of telecommunications (a “service”) from its mere use (not a service). The Commission next points out (¶21) that Congress intended telecommunications service and information service to be mutually exclusive categories. It does not follow, however, that one can never be both a provider and a user of telecommunications service. As in the case of Bell Company electronic publishing, carriers may provide basic transport service to themselves and to others.⁸ In doing so, they are constrained by the fundamental principles of common carriage from favoring themselves over others.

But what if a carrier only offers a service to itself and never to others? The Notice relates (¶15), with apparent equanimity, SBC’s assertion “that it does not provide DSL telecommunications service at retail and thus, had no obligation to make these services available for resale . . .” The FCC and the state commissions ought rightly to ask why, if true, SBC made this choice? Being chiefly in the business of providing telecommunications service, why would a carrier remove itself from retail DSL? To escape resale obligations? To persuade the FCC that self-provision of DSL transport is *sui generis*, and thus can be moved from Title II to Title I?

⁷ California PUC; NARUC; NYSDPS; Ohio PUC; Vermont Public Service Board; Wisconsin PSC; United Church of Christ, et al.; Media Access Project; Consumer Federation of America et al.; EarthLink.

⁸ The four-year sunset of the electronic publishing statute, Section 274(g)(2), does not change the force of the analysis but simply emphasizes that the significant subtraction from Title II regulation proposed here should be made by Congress, not the FCC.

What does it do for consumers and competition when a seemingly well-equipped carrier that willingly supplies DSL transport wholesale to ISPs elects not to offer the service to consumers at retail?

The relevance of the wholesale-retail distinction is less than clear. The offering of a service (such as wholesale DSL) to a limited segment of the public (ISPs) does not make the service any less a “holding out indifferently” rather than an individualized negotiation of unique terms.⁹ The Notice (¶26) puts the question thus:

If xDSL is being offered on a wholesale basis as an input to ISPs’ information services, is it being offered “directly to the public?”

The answer surely is affirmative, and has only been reinforced by the outcome on remand from the *State of Iowa* order (Notice, n.63). In that ruling, the court sent the case back to the FCC because

the Commission failed to address Iowa's argument that offering services to all potential customers to whom the carrier, under state law, may provide services makes the ICN a common carrier for purposes of the 1996 Act.¹⁰

On remand, the FCC found ICN to be a common carrier, noting that “a common carrier may make reasonable distinctions in the terms and conditions of service offered to different classes of customers.”¹¹

Given the essential reality that an incumbent LEC (such as SBC) which provides itself DSL in order to bundle internet access service at retail is competing with those very ISPs to

⁹ *National Ass'n of Regulatory Utility Commissioners v. FCC*, 173 U.S.App.D.C. 413, 525 F.2d 630, cert. denied, 425 U.S. 992 (1976).

¹⁰ *State of Iowa v. FCC*, 218 F.3d 756, 759 (D.C. Cir. 2000)

¹¹ Federal-State Joint Board on Universal Service, CC Docket No. 96-45, 16 FCC Rcd 571, 575 (2000).

whom it may offer DSL at wholesale, there is every reason for both sets of customers -- retail and wholesale -- to want to know what the LEC is charging itself for DSL transport. Title I oversight will not necessarily provide the answer.

Having considered the above, we agree with APPA (Corrected Comments, 7-11) that Congress should finish the job of deciding whether wireline broadband internet access is to be treated as the unique information service bundle the Commission proposes to make of it.¹² All the more so, Congress alone must determine “what the appropriate statutory classification of broadband transmission should be when it is not coupled with the Internet access component.” (Notice, ¶26)¹³ The underlying assumption that broadband transport is competitively available should be compared with the contrary finding of the Ad Hoc Telecommunications Users Committee,¹⁴ among others, and with the contradictory trends in consumer prices.¹⁵

¹² See, e.g. H.R. 1542, “Internet Freedom and Broadband Deployment Act” (“Tauzin-Dingell bill”).

¹³ The Notice’s question about uncoupled broadband transport is derived from a letter of January 9, 2002 to Chairman Powell from William P. Barr of Verizon. The letter’s argument is based on the alleged need for regulatory parity and the contention that broadband internet access is a competitive service not requiring Title II regulation.

¹⁴ Comments, March 1, 2002, 17-19, in CC Docket 01-337, Review of Regulatory Requirements for Incumbent LEC Broadband Telecommunications Services.

¹⁵ See, e.g., Sam Ames, “Consumer Broadband Prices Keep Rising,” C-NET News.com, May 29, 2002. (CMS monthly price rose 4% to \$44.95 in first quarter 2002; DSL price increased 1.4% to \$51.82.)

For the reasons discussed above, the Commission should leave to Congress the major questions of how to classify wireline broadband internet access for purposes of Communications Act oversight.

Respectfully submitted,

ALLIANCE OF LOCAL ORGANIZATIONS
AGAINST PREEMPTION

By _____

Nicholas P. Miller
James R. Hobson
Miller & Van Eaton, P.L.L.C. (202) 785-0600
1155 Connecticut Avenue, N.W., Suite 1000
Washington, D.C. 20036-4320

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ITS ATTORNEYS