

**Before the  
FEDERAL COMMUNICATIONS COMMISSION  
Washington, D.C. 20054**

In the Matter of	)	
	)	
Appropriate Framework of 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	)	CC Dockets Nos. 95-20, 98-10
Enhanced Services; 1998 Biennial Regulatory	)	
Review – Review of Computer III and ONA	)	
Safeguards and Requirements	)	

REPLY COMMENTS OF MCLEODUSA TELECOMMUNICATIONS SERVICES, INC.

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## **I. SUMMARY**

The evidence presented overwhelmingly indicates that the sweeping changes contained in the Commission's Notice of Proposed Rulemaking:<sup>1</sup> 1) violate existing federal law and regulatory precedent; 2) are unwarranted and fail to promote broadband deployment; 3) will undermine the competitive telecommunications industry; and 4) will hurt consumers. The proposals contained in the NPRM are sharply criticized by the CLEC industry, the internet service provider industry, the interexchange carrier industry, state public utility commissions and consumer groups. The only significant support for the proposals contained in the Notice comes from the regional bell operating companies ("RBOCs") who seek to use the NPRM as a means of expanding their monopoly control of the telecom market place to broadband service.

## **II. THE PROPOSALS CONTAINED IN THE NPRM VIOLATE EXISTING FEDERAL LAW AND REGULATORY PRECEDENT**

The Commission's tentative conclusion that broadband transmission services provided by ILECs are not telecommunications services<sup>2</sup> is inconsistent with the Commission's own orders and with numerous provisions of the Telecom Act, namely Sections 251, 252, 271, 153(46), 272 and 706.<sup>3</sup>

The FCC's tentative conclusion that the transmission function of retail wireline services provided over an entity's own facilities is "telecommunications," and not a "telecommunications service," begs the conclusion that CLECs who provide broadband services are not "telecommunications carriers" and, therefore, are not entitled to use Section 251(c) for the

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<sup>1</sup> *In Re Appropriate Framework For Broadband Access To The Internet Over Wireline Facilities*, Notice of Proposed Rulemaking, 17 F.C.C.R. 3019 (2002) ("Notice" or "NRPM").

<sup>2</sup> Notice Pars. 16-17, 24-25, 27.

<sup>3</sup> Comments of the People of the State of California and the California Public Utilities Commission CC Docket No. 02-33, 95-20, 98-10 ("California Comments") p. 16.

provision of such services. And, of course, this is precisely the conclusion the ILECs reach in their respective Comments, as discussed below.

However, as set forth in Section 251 of the Telecom Act, it is clear that Congress mandated that ILECs are to make their last mile bottleneck transmission facilities available to CLECs in order to promote meaningful and direct competition for local telecommunications services. Furthermore, nothing in the Act demonstrates that it was Congress' intention to exempt bottleneck transmission services from the rubric of Title II regulation by virtue of the fact that such services use high-speed broadband technology.<sup>4</sup> As California notes, the FCC "cannot accomplish by regulatory fiat what Congress alone has the authority to change."<sup>5</sup>

The FCC tentatively concludes that wireline broadband internet services are information services, and concludes that any other service or transmission path which is coupled with such broadband wireline internet services, becomes an information service as well. The FCC's tentative conclusions propose that there are no longer underlying transmission services, only competitive information services.

The FCC, however, has previously determined in the *Computer Inquiry* line of cases that "basic transmission services are traditional common carrier communications services," but that "enhanced services are not."<sup>6</sup> The FCC has also indicated further that basic service is limited to the "common carrier offering of transmission capacity for the movement of information," which clearly contemplates the provision of a communications path for the transmission of voice and data information.<sup>7</sup>

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<sup>4</sup> California Comments p. 15.

<sup>5</sup> *Id.*

<sup>6</sup> Computer II, Final Order, 77 FCC Rcd 384 (1980) at 430 (Par 119).

<sup>7</sup> *Id.* at par 93.

The FCC now mistakenly attempts to conclude that an incumbent monopolist carrier's last mile bottleneck transmission facilities cease to retain their common carrier characteristics should the monopolist attempt to use such facilities to provide its own internet access service. According to the current FCC's new interpretation, if a carrier bundles a telecom service with an information service, the telecom service apparently disappears. This is a poor policy and contrary to the *Computer Inquiry* cases which refused to apply the "contamination doctrine" to services provided by dominant facilities-based carriers.<sup>8</sup> ILECs should not be able to shirk their responsibilities as common carriers by merely bundling an information service with its basic transmission services.

Up to this point, this Commission has recognized the importance of separating the availability of the underlying transmission service as a means of preventing ILECs from discriminating against customers.<sup>9</sup> Now, under a misinterpretation of the Telecom Act's definitional provisions, the FCC attempts to throw out this important principle.<sup>10</sup> According to the tentative conclusions reached by the FCC in this NPRM, if an ILEC offers internet access over its own facilities, it is not offering "telecommunications for a fee directly to the public," and, accordingly, is not offering a "telecommunications service."<sup>11</sup>

The definitions of the terms "information service," "telecommunications service," and "telecommunications" were expressly intended to acknowledge the concept from the *Computer Inquiry* cases that there is always a "telecommunications service" underlying every "information service." The FCC's tentative conclusion that Congress intended exactly the opposite is not accurate, and will lead to very troublesome results for competitors and consumers.

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<sup>8</sup> Comments of CBeyond Communications, LLC, El Paso Networks, LLC, Focal Communications Corporation, New Edge Network, Inc., and PAC-West Telecom, Inc., CC Docket No. 02-33 ("Comments of CBeyond et al.") pp 32-34.

<sup>9</sup> CPE/Enhanced Services Bundling Order par. 44.

Another important cornerstone of the Telecom Act which the NPRM proposes to overturn is Section 706, which delegates authority jointly to the FCC and the state commissions with respect to encouraging deployment of advanced services. The ILECs have urged the Commission to pre-empt all state regulation of broadband internet access service,<sup>12</sup> with BellSouth even going so far as to suggest that the Commission also order that any stand-alone transmission service offered by an ILEC be determined to be subject only to federal jurisdiction.<sup>13</sup> The direction contemplated by the NPRM appears to circumvent the division of responsibility between federal and state regulators intended by Congress. As a result, NARUC and most state commissions have indicated significant concerns that the NPRM's tentative conclusions violate existing law and regulatory precedent.<sup>14</sup>

The Commission is simply not free to enact such sweeping changes amounting to an abrupt policy shift which overturns its past rulings. It is an axiomatic tenet of administrative law that a federal agency may not rescind a past ruling or otherwise engage in a sweeping policy shift without providing a detailed analysis explaining and justifying such change.<sup>15</sup> However, no such analysis has been provided in this proceeding.

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<sup>10</sup> NPRM Par. 25.

<sup>11</sup> NPRM Par. 61.

<sup>12</sup> Comments of SBC Communications Inc., CC Docket 02-33, ("SBC Comments") p. 32-37; Comments of Verizon, CC Docket 02-33, ("Verizon Comments") pp. 36-39; Comments of BellSouth Corporation, CC Docket 02-33, ("BellSouth Comments") pp 24-26.

<sup>13</sup> BellSouth Comments, pp 24-25.

<sup>14</sup> Initial Comments of the National Association of Regulatory Utility Commissioners, CC Docket 02-33 ("NARUC") pp 5-6. Comments of the New York State Department of Public Service ("NY PSC Comments") pp 3-4; Comments of the Illinois Commerce Commission, CC Docket 02-33, ("ICC Comments"), pp 9-10; Comments of the Vermont Public Service Board, CC Docket 02-33 ("VT PSB Comments"), pp 21-26; The Commissions of New York and Minnesota have pointed out that DSL internet access service consists of both a telecommunications service and an information service. NY PSC Comments p. 3; Minnesota Comments p. 3. California has noted that a transmission service remains as common carriage even though that transmission service may be bundled with an information service. (California Comments pp 4, 9.) Michigan has urged the Commission to maintain existing Title II rules. (Michigan Comments p. 3.) The Commissions of Illinois, Oregon and Vermont have all clearly indicated that the sweeping regulatory changes contemplated in the NPRM will harm competition and undermine the market opening provisions of the 1996 Act; (ICC Comments p. 4, OR Comments p. 2, VT PSB Comments pp. 6-10.)

<sup>15</sup> *Motor Vehicle Mfrs. Assoc. of the U.S.V. State Farm Mut. Auto Ins. Co.* 463 U.S. 29, 40-43, 48-49, 57 (1983) ("State Farm").

### **III. THE MASSIVE DEREGULATION OF THE ILECS CONTEMPLATED BY THE NPRM WILL NOT PROMOTE BROADBAND DEPLOYMENT BUT WILL GREATLY HARM THE TELECOM INDUSTRY AND CONSUMERS**

According to their very own information, ILECs have already aggressively deployed broadband services and are continuing to aggressively deploy broadband services throughout the country.<sup>16</sup> As the data submitted by the ILECs themselves suggests, the repeated refrain that there is a problem with broadband deployment “that requires a radical shift in regulatory approach is difficult to square with any available evidence.”<sup>17</sup> To the contrary, significant evidence indicates that the pace of broadband deployment is not being hampered by “excessive” regulation.<sup>18</sup>

Based on the comments filed in this proceeding, the ILECs are clearly intending via this NPRM to circumvent their unbundling obligations contained in the 1996 Telecom Act and in applicable FCC orders. The ILEC’s argument toward this end is specious. According to the ILECs, the existence of cable internet access has eliminated the last mile bottleneck for broadband services.<sup>19</sup> As a result, so say the ILECs, there is no need for the unbundling provisions of the Telecom Act to apply to broadband services. Indeed the ILECs make no bones about it, they are admittedly seeking to deny CLECs access to unbundled network elements for the purpose of providing broadband services.<sup>20</sup>

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<sup>16</sup> Initial Comments of McLeodUSA Telecommunications Services, Inc., CC Docket No. 02-33, p. 5; Comments of CBEYOND et al., pp 7-9. Joint Comments of WorldCom, Inc., the Competitive Telecommunications Association, and the Association for Local Telecommunications Services, CC Docket No. 02-33 (“Joint Comments of WorldCom et al.”), pp 39-41. As discussed in McLeodUSA’s comments, Verizon represents that it has currently deployed DSL service to central offices serving 79% of all access lines in its service territory, BellSouth reports that it presently offers DSL service to 70% of its total customers, and SBC claims that it is “the nation’s leading DSL internet access service provider”, providing DSL service providing DSL service to more than 60% of its total customers. The Comments of CBEYOND, et al. further detail numerous additional statistics that indicate the rapid and increasing development with which ILECs are deploying broadband services.

<sup>17</sup> Joint Comments of WorldCom et al., p. 41.

<sup>18</sup> Covad Comments pp 26-32; CBEYOND, et al. Comments pp 9-11; Joint Comments of WorldCom et al., pp 39-42.

<sup>19</sup> SBC Comments p. 21; Verizon Comments pp 10-17; BellSouthComments pp 15-18.

<sup>20</sup> SBC Comments p. 32; Verizon Comments pp. 32-33.

The ILECs further claim that because bottleneck facilities do not exist for wireline broadband services, the unbundling requirement contained in the *Computer Inquiry* cases is no longer necessary.<sup>21</sup> Thus the ILECs claim that no regulation is necessary of their broadband networks because broadband services are currently being deployed over multiple alternative platforms.<sup>22</sup>

The impact of this will be extremely negative for the entire competitive telecom industry and for consumers. CLEC obviously depend on, and have planned for, access to unbundled network element in order to provide broadband services. Numerous CLECs have predicated their current business plans on the Commission's current regulatory framework, which has consistently classified the transmission component used to provide broadband access service as a telecommunications service.<sup>23</sup>

Consumers will be significantly harmed by the lack of competitive choice and by the strengthening of the ILECs monopoly control. As the Vermont Public Service Board articulately sets forth, what is at stake is more than just the number of providers from which the consumer may select, but the consumer's very right and ability to obtain and send information:

America's citizens deserve the right to send and receive information of their own design and choosing on broadband wireline facilities. Customers are guaranteed this right when they are served by a telecommunications common carrier, and the right should not be eliminated when the customer chooses to be served by broadband. By removing local exchange carriers' broadband service from Title II, the Commission places this right at risk. The risk is magnified where a single entity can use its unified control of each citizen's primary mode of access to information in order to dominate the selection of the content that the citizen ultimately sees. Where that control is exercised to favor the political preferences of a controlling entity, there is a significant risk to the most fundamental element of democracy itself: free and open information in the market place of ideas.<sup>24</sup>

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<sup>21</sup> SBC Comments p. 24; Comments of Qwest Communications International, CC Docket No. 02-33, p. 23.

<sup>22</sup> SBC Comments p. 22; Verizon Comments p. 15.

<sup>23</sup> Covad Comments p. 18.

<sup>24</sup> Vermont PSB Comments, p. i.

#### IV. CONCLUSION

McLeodUSA respectfully submits that the present regulatory framework, which includes the Telecom Act of 1996, and the *Computer Inquiry* rules is more than adequate to address the goal of ubiquitous broadband deployment. The existing regulatory framework is more than flexible enough to accommodate the deployment of broadband and the “next generation” networks. The existing regulatory framework, however, must be enforced by the FCC and state commissions to a greater degree than has been the case in the past. Even if the FCC were to diverge from the existing regulatory framework, the radical changes proposed by the FCC are not warranted. However, if the FCC does determine that the existing framework needs to be modified to effectuate various policy goals, the Commission must necessarily conclude that broadband access includes both telecommunications and information services.

The fact that information and telecommunications services may be bundled together and offered to the public as “broadband access” does not change the nature of either of the included services. For example, the Commission has stated that “[i]t is plain, for example, that an incumbent local exchange carrier cannot escape Title II regulation of its residential local exchange service simply by packaging that service with voice mail.”<sup>25</sup> Nor does such bundling require any change to the conclusion that telecommunications and information services are mutually exclusive categories.<sup>26</sup> Instead, all that is required is a recognition that the product offered to customers is a bundle of both types of services (in the same way that bundling of local exchange service and voice mail, even if the bundle is marketed to customers as a single product, does not change the underlying nature of the included services themselves). This approach

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<sup>25</sup> *Report to Congress*, CC Docket No. 96-45, FCC 98-67 (April 10, 1998), Par. 60.

<sup>26</sup> *Id.*, Par. 39

would be much more consistent with existing federal law and regulatory precedent, and would be far less harmful to the telecommunications industry and consumers.

Respectfully submitted,

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