

ORIGINAL

Kenneth R. Boley
boleym@l-law.com

Tel 202/887-6230
Fax 202/887-6231

VIA HAND-DELIVERY

April 29, 2003

RECEIVED

APR 29 2003

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

Marlene Dortch
Secretary
Federal Communications Commission
The Portals
TW-A325
445 12th Street, S.W.
Washington, D.C. 20554

Re: Ex Parte Presentation, CC Docket Nos. 02-33, 98-10, 95-20, 01-337

Dear Ms. Dortch:

EarthLink, Inc., files this *ex parte* presentation to explain the legal framework requiring incumbent local exchange carriers ("LECs") to provide wholesale DSL to independent Internet service providers ("ISPs") on a common carrier basis. Further, as explained below, the facts in the record in this *Wireline Broadband* proceeding show that these services must continue to be provided on a common carrier basis for the foreseeable future. In short, the Communications Act ("Act"), as interpreted by the courts and the Commission, requires carriers to provide wholesale DSL to independent ISPs on a common carriage basis because there are no alternative common carrier wholesale broadband services reasonably available to independent ISPs to meet their needs for providing hundreds of thousands of end-users high-speed Internet access services.

The NARUC I Test Is Mandatory and Controlling.

In *Virgin Islands*,¹ the D.C. Circuit upheld the Commission's ruling that the term "telecommunications carrier," defined in the Act as a "provider of telecommunications services," has the same meaning under the Act's current language that "common carrier" had under the Act prior to the 1996 amendments, and as defined twenty-three years earlier by the same court in *NARUC I*.² In that case, the court looked to "the common law of carriers to construe the Act"

¹ *Virgin Islands Tel. Corp. v. F.C.C.*, 198 F.3d 921, 925-926 (D.C. Cir. 1999) ("*Virgin Islands*") (affirming FCC holding that "the definition of 'telecommunications services' in the 1996 Act was 'intended to clarify that telecommunications services are common carrier services'") (citing *Cable & Wireless, PLC*, 12 FCC Rcd 8516, ¶¶ 14-15 (1997)).

² *Nat'l Ass'n of Regulatory Util. Comms. v. FCC*, 525 F.2d 630 (D.C. Cir. 1976) ("*NARUC I*").

No. of Copies rec'd
List A B C D E

078

Ex Parte Presentation, CC Dkt. Nos. 02-33, 98-10, 95-20; 01-337.

April 29, 2003

Page 2

and determined that the statutory definition of “common carrier”—now “telecommunications carrier”—was an entity that “undertakes to carry for all people indifferently.”³ In other words, whether wholesale DSL provided to independent ISPs is a “telecommunications service” under the Act is determined by applying the common law test set out in NARUC I and its progeny. Application of the NARUC I analysis is *mandatory*, and it cannot be changed by the Commission: “The common law definition of common carrier is sufficiently definite as not to admit of agency discretion in the classification of operating communications carriers.”⁴

In order to determine if incumbent LECs undertake to carry wholesale DSL for all people indifferently, the FCC and, ultimately, the courts consider a range of factors, broken generally into two prongs: “first, whether there [is] any legal compulsion thus to serve indifferently, and if not, second, whether there are reasons implicit in the nature of [provider] operations to expect an indifferent holding out to the eligible user public.”⁵ Incumbent LEC-provided wholesale DSL service meets this test today and will continue to meet it for the foreseeable future; as a result, it must continue to be classified as common carriage.

The First Prong of the NARUC I Test Requires Common Carriage for BOC-Provided Wholesale DSL Service.

Applying the facts of wholesale DSL service to the first of these prongs, the Bell Operating Companies (“BOCs”) are currently under a legal compulsion to offer wholesale DSL indifferently under generally available tariffed terms. This compulsion was made explicit in 1980 when the Commission imposed upon the BOCs the *Computer II* obligation to unbundle and make available under tariff the transmission component of enhanced services offered by the BOC itself.⁶

³ *Id.* at 641. In addition to carrying for all people indifferently, common carriage status also turns on whether “the system [is] such that customers transmit intelligence of their own design and choosing.” National Ass’n of Regulatory Util. Comms. v. FCC, 533 F.2d 601, 609 (D.C. Cir. 1976) (“NARUC II”) (citations and internal quotations omitted). Because wholesale DSL provided to independent ISPs clearly meets this test, this point is not at issue in this proceeding. See *Deployment of Wireline Services Offering Advanced Telecommunications Capability, Memorandum Opinion and Order*, 13 FCC Rcd. 24011, ¶ 36 (1998) (incumbent LEC xDSL services are “telecommunications services” offering “a transparent, unenhanced, transmission path”); see also, U.S. Telecom Ass’n v. F.C.C., 295 F.3d 1326, 1335-1337 (D.C. Cir. 2002) (upholding FCC decision that state-run network was common carrier because, among other reasons, use limitations did not include policing content).

⁴ NARUC I at 644; see Computer and Communications Industry Ass’n v. FCC, 693 F.2d 198, 212 (D.C. Cir. 1982) (Title II “does not give the Commission unfettered discretion to regulate or not regulate common carrier services”).

⁵ *Id.* at 642.

⁶ *In the Matter of Amendment of Section 64.702 of the Commission’s Rules and Regulations (Second Computer Inquiry), Final Decision*, 77 F.C.C. 2d 384, 428 (1980) (“The common carrier offering of basic transmission services are regulated under Title II of the Act.”) (“*Computer II*”).

Ex Parte Presentation, CC Dkt. Nos. 02-33, 98-10, 95-20; 01-337.

April 29, 2003

Page 3

There is no question that BOCs are currently under such a compulsion; indeed, this is among the very requirements they seek to eliminate in this proceeding.⁷ The *Computer II* and *Computer III* provisions that impose this compulsion, in fact, were imposed under the Commission's Title II authority, reflecting the Commission's view that, even in the absence of the *Computer Inquiry* requirements, these services were "common carrier" services and were therefore subject to the reasonableness and non-discrimination provisions of Sections 201 and 202 of the Act.⁸

Currently and for the Foreseeable Future, the Public Interest Requires Common Carriage for Incumbent LEC-Provided Service Under the First Prong of the NARUC I Test.

The Commission has interpreted this prong of the NARUC I test to include a determination of "whether there is a public interest reason for the Commission to require facilities to be offered on a common carrier basis."⁹ Specifically, in conducting this public interest analysis, the Commission has "focused on the availability of alternative common carrier facilities."¹⁰ Thus, if permitting a carrier to offer wholesale DSL as private carriage would result in a shortage of common carrier alternatives for independent ISPs requiring such wholesale service, the Commission would have to find such an action fails its public interest test. Stated alternatively: "Under NARUC I and Commission precedent, our decision necessarily must consider whether the proposed [service] is a competitive 'bottleneck' (i.e., whether there are no competitive substitutes, enabling the owner to restrict output or raise prices), or whether there are, in fact,

⁷ Comments of BellSouth Corp. at 12 (filed May 3, 2002); Comments of Qwest Communications International, Inc. at 21 (filed May 3, 2002); Comments of SBC Communications Inc. at 18 (filed May 3, 2002); Comments of Verizon at 34 (filed May 3, 2002).

⁸ *Computer II*, 77 F.C.C. at 428; *Filing and Review of Open Network Architecture Plans, Memorandum Opinion and Order*, 4 FCC Rcd 1, ¶ 274 (1988) ("We do not accept Bell Atlantic's argument that basic services with interstate enhanced services are not subject to interstate tariffing under Title II of the Act."); 47 U.S.C. § 201(b)(carrier rates and practices must be "just and reasonable"), § 202(a) (carrier may not engage in "any unjust or unreasonable discrimination"); *1998 Biennial regulatory Review - Review of Customer Premises Equipment and Enhanced Services Unbundling Rules in the Interexchange, Exchange Access and Local Exchange Markets, Report and Order*, 16 FCC Rcd 7418, ¶ 46 (2001) (Sections 201 and 202 prevent carriers from discriminating against competing information service providers)

⁹ *Tel-Optik Ltd.*, Memorandum Opinion and Order, 100 F.C.C.2d 1033, ¶ 29 (1985) ("*Tel-Optik*"); see *Commission Consideration of Applications under the Cable Landing License Act, Notice of Proposed Rulemaking*, 15 FCC Rcd 20789, ¶ 65 (2000) ("*CLLA NPRM*"). In *Tel-Optik*, based on an analysis of common-carrier alternatives available to a proposed private-carriage submarine cable system, the Commission established a "general policy direction on private alternative submarine cable systems." *Tel-Optik* at ¶ 43. Pursuant to that policy, as of 2000, "the Commission has not denied non-common carrier status to a submarine cable applicant that has requested it." *CLLA NPRM* at ¶ 69. The Commission has not adopted a similar policy for any domestic wireline service, including wholesale DSL provided to independent ISPs.

¹⁰ *CLLA NPRM*, ¶ 65 (citing *Cable & Wireless, Cable Landing License*, 12 FCC Rcd 8516, ¶¶ 15-16 (1997)).

Ex Parte Presentation, CC Dkt. Nos. 02-33, 98-10, 95-20; 01-337.

April 29, 2003

Page 4

competitive alternatives.”¹¹ This makes perfect sense: if reclassification would result in independent ISPs being unable to obtain wholesale DSL service at reasonable rates, terms and conditions to meet their needs for the provision of broadband Internet access service to end-users, then the public interest would be disserved.¹²

In order to qualify as an alternative sufficient to meet the public interest inquiry in the first prong of NARUC I, a broadband access service or group of services would have to be priced competitively in order to restrain the incumbent LEC from increasing wholesale DSL prices.¹³ It would have to be currently available, rather than simply planned,¹⁴ and it would have to be capable of meeting ISPs’ needs by absorbing a mass influx of new access orders in the event the incumbent LEC raises wholesale DSL rates or manipulates the terms of the service in an abusive fashion; otherwise it would not be capable of serving as a competitive alternative.¹⁵ Finally, the service or group of services would have to be of sufficient quality that it could serve ISPs’ access

¹¹ *AT&T Submarine Systems, Inc., Cable Landing License*, 11 FCC Rcd 14885, ¶ 39 (1996) (“*AT&T-SSI*”).

¹² Because the alternatives being considered must be reasonable substitutes for wholesale DSL, they also must be *wholesale* services capable of serving customers such as the independent ISPs that currently purchase wholesale DSL service from incumbent LECs. In fact, many of the cases addressing this issue involve services sold at wholesale to retail service providers. See *Domestic Fixed-Satellite Transponder Sales, Memorandum Opinion, Order, and Authorization*, 90 F.C.C.2d 1238, ¶ 1 n 2 (1982) (“*Transponder Sales*”) (satellite transponders used, among other things, to transmit television channel with associated audio, “the large majority of transponders should remain available on a common carrier basis”), see also *Revisions to Part 21 of the Commission’s Rules Regarding the Multipoint Distribution Service, Report and Order*, 2 FCC Rcd 4251, ¶¶ 7, 8 (1987) (Multipoint Distribution Services “offer transmission capacity to customer-programmers, who in turn provide subscription video entertainment programming to end-users,” FCC considered alternative transmission options). Accordingly, arguments that the FCC should be unconcerned with making wholesale DSL available to independent ISPs as long as at least one incumbent LEC-preferred ISP receives DSL transmission do not serve to meet the requirements of NARUC I. See *EarthLink Ex Parte Letter to Carol Matthey, Deputy Chief, Wireline Competition Bureau* (March 19, 2003) (responding to *SBC Ex Parte Letter to Marlene H. Dortch* (March 7, 2003)).

¹³ As noted above, the alternative must be “competitive substitutes” preventing the incumbent LEC from being able to “restrict output or raise prices” for wholesale DSL. *AT&T-SSI* at ¶ 39.

¹⁴ *Personal Communications Industry Association’s Broadband Personal Communications Services Alliance’s Petition for Forbearance for Broadband Personal Communications Services, Memorandum Opinion and Order and Notice of Proposed Rulemaking*, 13 FCC Rcd 16857, ¶ 22 (“*PCIA Broadband PCS*”) (Refusing to forbear from applying Title II provisions because, among other reasons, “licensees do not exert any disciplinary effect in their markets until after they announce their intentions to commence operations, identify the services they intend to offer, and begin soliciting business. While six broadband PCS licenses have now been awarded in most areas, many licensees have yet to begin offering services”).

¹⁵ *Wold Communications, Inc. v. FCC*, 735 F.2d 1465, 1474 (DC Cir. 1984) (a “key concern” in the Commission’s public interest evaluation was “the adequacy of the remaining common carrier capacity to serve users’ needs”).

Ex Parte Presentation, CC Dkt. Nos. 02-33, 98-10, 95-20; 01-337.

April 29, 2003

Page 5

needs at least as well as the incumbent LEC-provided wholesale DSL service.¹⁶ Unless the alternative meets all of these criteria, it cannot be expected to restrain an incumbent LEC from abusing its wholesale DSL customers.

In this proceeding, five types of wholesale broadband service for independent ISPs have been suggested as alternatives to ILEC-provided DSL: competitive LEC-provided DSL, satellite, wireless, power line, and cable transmission. As explained below, even in the absence of a *Computer Inquiry* obligation to serve indiscriminately, both BOC and non-BOC incumbent LECs would still have to provide wholesale DSL service as common carriage because there are no common carriage alternatives for wholesale broadband transmission, nor will there be for the foreseeable future.¹⁷

Competitive LECs – A few competitive LECs (sometimes called data LECs or “DLECs”), primarily Covad, also provide wholesale DSL service to ISPs, but DLECs do not amount to a substantial alternative with the capacity or even the geographic coverage to function as a substituting vendor relative to the ubiquity of the BOC DSL offering. Four years ago, the Commission found that competition among competitive LECs had not progressed enough to support the elimination of competitive safeguards designed to protect ISPs. “[W]e do not believe that our progress in implementing the 1996 Act has reduced the threat of discrimination sufficiently to warrant removal of any of these additional safeguards at this time.”¹⁸ In the ensuing years, the availability of DLEC wholesale DSL as an alternative to incumbent LEC wholesale DSL has not significantly improved. Since the fall-out in the telecommunications sector starting in 1999, almost all of the DLECs offering wholesale DSL have suffered insolvency, financial instability, and loss of customer base. Companies such as Rhythms, NorthPoint, DSL.net, Prism and others that were to provision wholesale DSL transport to ISPs are today either completely

¹⁶ See, *AT&T-SSI* at ¶ 42 n. 40 (satellite facilities not relied upon as alternatives to proposed private carriage cable system because of problems with quality).

¹⁷ Even if a single viable alternative to incumbent LEC-provided wholesale DSL were reasonably available, the resulting duopoly would not restrain either provider’s behavior to protect independent ISPs and their end users from anticompetitive action and the extraction of supra-competitive prices. In rejecting the EchoStar/DirectTV merger, the Commission was unwilling to create an MVPD market it characterized as “at best resulting in a merger to duopoly.” *Application of EchoStar Communications Corp., General Motors Corp., and Hughes Electronics Corp.*, Hearing Designation Order, 17 FCC Rcd 20559, ¶ 275 (2002). Recognizing the potential for “coordinated interaction among firms in the relevant market ... could result in substantial consumer welfare losses, the Commission found that such limited competition “is likely to harm consumers by ... creating the potential for higher prices and lower service quality, and negative impacts on future innovation.” *Id.*, ¶ 280. Also, see *PCIA Broadband PCS*, ¶ 21 (describing early, pre-competitive broadband PCS market as “enjoy[ing] duopoly market power”).

¹⁸ *In the Matter of Computer III Further Remand Proceedings*, Report and Order, 14 FCC Rcd. 4289, ¶ 16 (1999), *recon.*, Order, 14 FCC Rcd. 21628 (2001).

Ex Parte Presentation, CC Dkt. Nos. 02-33, 98-10, 95-20, 01-337.

April 29, 2003

Page 6

out of the market or have significantly retreated from offering wholesale broadband transport.¹⁹ Even the Verizon spin-off Genuity has exited the wholesale DSL market after severe financial strain and bankruptcy.²⁰ Covad Communications, which is perhaps the only remaining national DLEC still in the market, today operates post-bankruptcy and, according to its most recent releases, provides 339,000 DSL service arrangements on a wholesale basis.²¹ By contrast, SBC (just one of the large incumbents) boasted 2.5 million DSL lines in the first quarter of 2003.²² According to the FCC's most recent *High Speed Data Report*, as of June 30, 2002—approximately three years after the Commission found competition insufficient to support elimination of competitive safeguards protecting ISPs—only four percent of ADSL service arrangements are provided by DLECs.²³ In addition to issues of scale, the financial turmoil in the competitive LEC market makes it difficult for ISPs to rely heavily upon DLECs for wholesale DSL service, especially because the DLEC's demise or provisioning failures would impose severe strain on the ISP's customer relationship. Given DLECs' financial straits, it is unlikely that any DLEC can or will in the foreseeable future be able to handle the volume of ISP-directed business necessary to provide a reasonable alternative to incumbent LEC-provided wholesale DSL.

Moreover, in many cities and towns in the U.S., DLECs are not an alternative source of common carrier facilities because they do not provide any service there at all.²⁴ Covad reported this month that it provides services (which may include DSL) in 94 Metropolitan Statistical Areas of the country, with coverage of 45% of US homes and businesses.²⁵ Thus, there is not even the

¹⁹ Companies in the telecommunications "sector accounted for nearly half of the \$45 billion of defaults in high-yield bonds in 2001." N.Y. Sunday Times, Business Section, "Will he be K.O.'d by XO? Forstmann Enters the Ring, Again," at 7 (Feb. 24, 2002).

²⁰ *Comments Invited on Genuity Telecom Inc. Application to Discontinue Domestic Telecommunications Services, Public Notice*, DA 03-693 (rel. March 7, 2003) ("As part of its liquidation, Genuity now seeks to discontinue its remaining domestic interstate services . . ."). "Genuity Posts Fourth-Quarter Loss After Charges," Reuters (Feb. 7, 2002) (Genuity "stock as fallen 89 percent since June 2000, when it was spun off from GTE Corp.").

²¹ Covad Communications Group, Inc., SEC Form 8-K Report, at 1 (April 10, 2003) ("Covad 8-K").

²² SBC Communications Inc., *Investor Briefing*, at 8 ("SBC now has 2.5 million DSL subscribers") (April 24, 2003), found at: http://www.sbc.com/Investor/Financial/Earning_Info/docs/1Q_03_IB_FINAL.pdf.

²³ "High Speed Services for Internet Access: Status as of June 30, 2002," Industry Analysis and Technology Division, Wireline Competition Bureau, at 3 (rel. Dec. 17, 2002) ("*High Speed Data Report*").

²⁴ Forty-two percent of American communities (as reflected by zip codes) have zero or only one high-speed provider in service. *Third Report*, Appendix C, Table 9.

²⁵ Covad 8-K, at Ex. 99.1 and 1.

Ex Parte Presentation, CC Dkt. Nos. 02-33, 98-10, 95-20; 01-337.

April 29, 2003

Page 7

possibility of DLEC coverage, and competition, for at least 55% of homes and businesses today.²⁶ Moreover, in some communities served by DLECs, coverage likely does not include the entire community, leaving parts of the community unserved entirely, particularly in rural areas and small towns.²⁷ Thus, DLECs cannot generally be viewed as a sufficient alternative to the incumbent LEC.

Finally, EarthLink notes that a number of issues that could have tremendous relevance to the viability of the DLEC as an alternative source of DSL are currently under consideration by the Commission in the *UNE Triennial Review* proceeding.²⁸ Because of the Commission's *ex parte* rules, EarthLink will not comment on that proceeding or its possible impact on the *Wireline Broadband* proceeding at this time. EarthLink reserves the right, however, to address fully those issues once the Commission releases an order in the *UNE Triennial Review* proceeding.

Satellite and Terrestrial Wireless Providers – Satellite and terrestrial wireless services are promising but insignificant sources of wholesale broadband transport in today's market. As stated in the *High Speed Data Report*, satellite and fixed wireless combined provided approximately 220,588 high-speed lines in June 2002,²⁹ and, according to the 2002 *Third Report*, terrestrial wireless accounts for "50,000 to 150,000 high-speed lines."³⁰

Satellite providers—EchoStar and DirecTV—do not currently offer a viable substitute for incumbent LEC DSL. For the most part, satellite services provide only a downstream high-speed connection and require a return channel via an analog telephone modem connection. Further, satellite services, with their high nonrecurring charge and recurring wholesale monthly rates, are significantly more expensive than the wholesale offerings of broadband transmission via DSL or cable. Neither the quality nor the price factors are expected to change in the foreseeable future. EarthLink does offer Internet access via such services, but they are useful only as a last resort for the rare end-user willing to endure the quality and price drawbacks.

²⁶ It may be that 55% underestimates of the lack of availability of residential ADSL, since it would appear that Covad's report is based on its total xDSL services to both homes and businesses, and does not break out numbers for ADSL serving residential consumers.

²⁷ See, *High Speed Data Report*, Table 11 (showing tendency for small and rural areas to have far fewer high-speed providers).

²⁸ *Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers, Notice of Proposed Rulemaking*, 67 Fed. Reg. 1947 (Jan. 15, 2002).

²⁹ *High Speed Data Report*, Table 1.

³⁰ *Inquiry Concerning the Deployment of Advanced Telecommunications Capability, Third Report*, 17 FCC Rcd 2844, ¶¶ 55, 60 (2002) ("*Third Report*").

Ex Parte Presentation, CC Dkt. Nos. 02-33, 98-10, 95-20; 01-337.

April 29, 2003

Page 8

Terrestrial wireless services, such as point-to-point microwave or 3G services, are simply not a feasible alternative to wholesale DSL transport service. In the *Third Report* (§ 55), the Commission estimated that between 50,000 to 150,000 lines are provisioned via fixed wireless services. Moreover, fixed wireless service providers, such as Winstar and Teligent, have suffered serious financial losses and, in many cases, bankruptcies.³¹ Even the top MMDS licensees, including Sprint and AT&T, have announced plans to scale back or suspend their fixed wireless operations.³² As a result, such services are not now, nor will they be in the foreseeable future, viable alternatives to incumbent LEC wholesale DSL service.

Power Line Communications – While EarthLink believes that power line communications (“PLC”) holds much promise and is actively engaged in PLC development, it is also true that PLC is currently a technology in the trial stages.³³ It is not a technology that has been commercially deployed, it has not demonstrated any history of handling scale, and it certainly is not today a viable alternative source of wholesale broadband transmission, nor can it currently be relied upon to be an alternative in the foreseeable future.

Cable transmission. As noted above, key to the NARUC I test is a determination of whether any *common carrier* alternative services are reasonably available. Because the Commission has ruled that the pure broadband transmission underlying cable modem Internet access service is not a common carrier service, such transmission cannot serve as an alternative sufficient to meet the NARUC I inquiry, even if it were reasonably available to independent ISPs

Further, wholesale broadband transmission is not reasonably available to independent ISPs from cable providers, even if on a private carriage basis. Indeed, of all ISPs unaffiliated with a cable provider, EarthLink has been the most successful in obtaining wholesale cable access, but such access is limited to one cable network and two cities on another, covering approximately 20-25 percent of the cable market nationwide. In short, because cable providers do not make their transmission services available at wholesale to more than a few independent ISPs and have thus far offered such services only on a limited basis, broadband transmission over cable cannot be

³¹ “Liquidation Could Be in Winstar’s Future.” Broadband Week (Dec. 11, 2001), “Turbulent Times At Teligent,” Broadband Week (Nov. 15, 2001).

³² “AT&T Bags Fixed Wireless,” Broadband Week (Oct. 24, 2001), “Status of Sprint Broadband Direct,” at www.sprintbroadband.com/statusFAQ.html (describing that Sprint has suspended accepting new customers for fixed wireless).

³³ “High Speed Net Coming to a Plug Near You?” *USA Today*, April 14, 2003 (“At least a dozen utilities are conducting field trials, including, among the USA’s 15 largest, the Southern Company of Atlanta, American Electric Power of Columbus, Ohio, and New York-based Con Edison. At least two utilities — Pennsylvania Power & Light and Ameren of St. Louis — are expected to launch service in a few neighborhoods this year. Some utilities in Europe and Asia already offer limited service.”).

Ex Parte Presentation, CC Dkt. Nos. 02-33, 98-10, 95-20, 01-337.

April 29, 2003

Page 9

expected to constrain the behavior of an incumbent LEC providing wholesale DSL to independent ISPs on a private carriage basis.

As the above discussion shows, the Commission in *Computer Inquiry* made express a legal compulsion for the BOCs to serve indifferently, thus meeting the NARUC I test for common carriage. Even in the absence of *Computer Inquiry* obligations, however, the NARUC I test is nonetheless met for all incumbent LECs because there is a public interest reason to treat wholesale DSL service as common carriage: there are no reasonably available common carrier alternatives to incumbent LEC (both BOC and non-BOC) wholesale DSL for independent ISPs, not will there be in the foreseeable future. Accordingly, the public interest reason sought by NARUC I exists, establishing a compulsion that such service be treated as common carriage.

ILECs Hold Themselves Out to Serve Indifferently and Are Therefore Common Carriage, Under the Second Prong of NARUC I.

The NARUC I analysis provides that if a service meets the first prong (whether there is a legal compulsion to serve indiscriminately), then the service is common carriage, and the second prong is not reached.³⁴ Since, as described above, incumbent LEC-provided wholesale DSL does meet that first prong, the second prong is inapplicable. Even if the Commission nevertheless proceeds to apply the second prong, it is clear that the service is currently provided on a common carriage basis, as the following discussion demonstrates.

In determining “whether there are reasons implicit in the nature of [provider] operations to expect an indifferent holding out to the eligible user public” under the second prong of the NARUC I test,³⁵ the courts and the Commission have considered the following factors, listed and addressed below. In short, application of these factors yields that virtually every incumbent LEC’s offering of wholesale DSL is currently common carriage under the second prong of NARUC I, as well as the first prong, described above.

Individualized Decisions. “[A] carrier will not be a common carrier where its practice is to make individualized decisions, in particular cases, whether and on what terms to deal.”³⁶ By contrast, the Commission has found a service provider to be acting as a common carrier where it

³⁴ NARUC I at 642 (“we must inquire, *first*, whether there will be any legal compulsion thus to serve indifferently, and if not, *second*, whether there are reasons implicit in the nature of [the service] to expect an indifferent holding out to the eligible user public.”) (emphasis added).

³⁵ Id.

³⁶ Id. at 641.

Ex Parte Presentation, CC Dkt. Nos. 02-33, 98-10, 95-20; 01-337.
April 29, 2003
Page 10

“ha[s] set generally applicable prices and terms of service.”³⁷ Incumbent LECs (including both BOCs and non-BOCs) provide wholesale DSL to independent ISPs pursuant to generally available tariffed terms. They do not decide on an individual ISP basis “whether and on what terms to deal.”

Relatedly, the Act requires that a “telecommunications service” be provided “directly to the public.”³⁸ According to the NARUC I court, “This does not mean a given carrier’s services must practically be available to the entire public. One may be a common carrier though the nature of the service rendered is sufficiently specialized as to be of possible use to only a fraction of the total population.”³⁹ Recently, the D.C. Circuit reaffirmed and strengthened this view, upholding the Commission’s decision that a state-run network available by statute only to state agencies and private schools, hospitals, and physician clinics was nonetheless provided “to the public” under the Act.⁴⁰

Stable Clientele. In NARUC I, the court found as evidence that the carrier would not be “holding itself out to the public” (*i.e.* not acting as a common carrier) the fact that the carrier’s clientele for the service in question “might remain relatively stable, with terminations and new clients the exception rather than the rule.”⁴¹ The carrier’s practice of engaging customers in primarily medium-to-long term contracts is a key indicator of such clientele stability.⁴² Incumbent LECs offer wholesale DSL to independent ISPs pursuant to various generally available tariffed contractual terms ranging from as little as one month to as much as five years.

Contracts tailored to needs of customers. “Pertinent to [the ‘holding out to serve indiscriminately’] analysis [is] the extent to which contracts are tailored to the needs of particular

³⁷ *Philippine Long Distance Tel. Co. v. International Telecom, Ltd.*, Memorandum Opinion and Order, 12 FCC Rcd 15001, ¶ 14 (1997).

³⁸ 47 U.S.C. § 3(46).

³⁹ NARUC I at 641. In fact, although ISPs are the best-known customers of incumbent LEC wholesale DSL, the offerings are not limited to ISP customers.

⁴⁰ U.S. Telecom Ass’n v. F.C.C., 295 F.3d 1326, 1328, 1333 (D.C. Cir. 2002). As a result, Qwest’s argument that wholesale DSL sold to independent ISPs is sold “to those ISPs alone, not ‘the public,’” and is therefore not a “telecommunications service,” must fail. Comments of Qwest Communications International, Inc., CC Dkt. Nos. 02-33, 95-20, 98-10 (filed May 3, 2002) at 17.

⁴¹ NARUC I, 525 F.2d at 643; *see Transponder Sales*, ¶ 43 (“Each transponder will be offered (sold) only once by the domsat licensee, and once the transponders are sold, the licensee’s marketing efforts are ended. Consequently, the business relationship under consideration here exceeds even the ‘high level of stability’ found significant in NARUC I.”).

⁴² NARUC I, 525 F.2d at 643; *NorLight*, Declaratory Ruling, 2 FCC Rcd 132, ¶¶ 20-21 (1986) (“*NorLight*”) (leases of five and ten years considered long-term).

Ex Parte Presentation, CC Dkt. Nos. 02-33, 98-10, 95-20; 01-337.

April 29, 2003

Page 11

customers.”⁴³ For example, in approving the sale of domestic satellite transponders on a private carriage basis, the FCC has relied on “evidence that the transponder buyer and seller have very particularized technical and marketing needs.”⁴⁴ Although some generally available tariffed offerings of wholesale DSL may originate in agreements with individual independent ISPs, each of those arrangements is tariffed and made generally available to all other ISPs. These tariffs, of course, are not individualized to the needs of each ISP purchaser. As a result, even for the rare wholesale DSL contract that can be said to be negotiated with an ISP purchaser, the resulting tariff must also reflect terms the carrier needs in order to be able to make it available to all.⁴⁵

Sophisticated Customers. Another factor is whether the service “will be used primarily by business entities and institutions with sufficient ability and interest to represent themselves adequately in dealings with” the carrier.⁴⁶ While some of the larger ISPs, such as EarthLink, may fit this description, the majority of ISPs purchasing wholesale DSL from ILECs are relatively small entrepreneurial entities.⁴⁷

Protection of Facilities. “A key aspect of private carriage is the care taken by the system operator ‘in allowing others to use [its] system, given [its] concern, first and foremost, that [it] preserve the integrity of the system for meeting [its] own communications needs.’”⁴⁸ While incumbent LECs do impose very generalized facility-protection requirements upon ISPs buying wholesale DSL, these conditions are standard tariff provisions applicable across a number of access services. Moreover, since their inception and continuing on today, it is the BOCs’ core business to offer use of their facilities to third-party carriers and end users, and there is no

⁴³ *NorLight*, ¶ 20.

⁴⁴ *Transponder Sales*, ¶ 44.

⁴⁵ Qwest argues that its “four separate offerings” of DSL are evidence that its wholesale DSL service is “tailored to the needs of particular customers.” This argument may hold up if Qwest had only four ISP customers, but that is almost certainly *not* the case. In fact, Qwest also explains that end users purchasing its retail, stand-alone, pure transmission DSL service can access “over 400 independent ISPs,” suggesting that there are certainly more independent ISPs purchasing Qwest wholesale DSL than could possibly have their “individualized needs” met by Qwest’s four “tailored” offerings. Comments of Qwest Communications International, Inc., CC Dkt. Nos. 02-33, 95-20, 98-10 (filed May 3, 2002) at 30, 16 n 40 (emphasis in original).

⁴⁶ *NorLight*, ¶ 19.

⁴⁷ See, *Ex Parte* Presentation of the U.S. Small Business Administration (filed Sept. 25, 2002) at 4 (“there are approximately 7,000 small ISPs ... serv[ing] 77 million customers, which represents 55 percent of the market”), and 5 (“Small ISPs have no leverage and no alternatives but to take whatever deal is offered to them by the wireline carriers”).

⁴⁸ *NorLight*, ¶ 22 (service provider using five percent of capacity for own communications needs and requiring maintenance of very high reliability factor were evidence of private carriage) (citation omitted).

Ex Parte Presentation, CC Dkt. Nos. 02-33, 98-10, 95-20; 01-337.

April 29, 2003

Page 12

suggestion that “preserv[ing] the integrity of the system for meeting [their] own communications needs” is a concern at all, much less “first and foremost.”

The Nature of Wholesale DSL Service Offerings in the Foreseeable Future Depends on the Ability of Reasonably Available Substitutes to Restrain Carrier Behavior.

As explained above, there will be no alternative wholesale broadband services reasonably available to independent ISPs for the foreseeable future, and as a result, the first prong of the NARUC I test would require such services to be offered as common carriage; application of the second-prong factors then would necessarily yield the conclusion that the service is common carriage. That is why the test does not go beyond a finding of common carriage in the first prong. In addition, while a carrier endeavoring to alleviate Commission concerns about ISP treatment may commit to serve indiscriminately even if it wins the reclassification it seeks, this would lead to the same result. To the extent the carrier subsequently lives up to those commitments, the courts would apply the second prong of NARUC I and find that the service is, in fact, common carriage (*i.e.*, the carrier has elected to subject the service to common carriage regulation).⁴⁹

The goal of any business, however, is to sell its product to more people and increase profits as a result. The retail Internet access business is no different, and broadband ISPs, both incumbent LEC-affiliated and -nonaffiliated, currently compete vigorously for market share. As *EarthLink and other parties have stated repeatedly*, if the FCC reclassifies wholesale DSL, the incumbent LEC can be expected to try to use its control of the service to win retail customers away from independent ISPs in favor of its preferred ISP (either affiliated or not), thus increasing retail market share.⁵⁰ The carrier would do this by offering its preferred ISP better wholesale DSL service at more favorable terms than it offers competing ISPs, enabling its preferred ISP to

⁴⁹ As the core of the NARUC I test suggests, a carrier may elect to offer a service as common carriage, even if it is under no obligation to do so: “[T]o be a common carrier, one must hold oneself out indiscriminately It is not necessary that a carrier be required to serve all indiscriminately; it is enough that its practice, is, in fact, to do so.” NARUC I at 641. Thus, “optionality” or any other approach that would give a carrier a “choice” between private and common carriage is no different from simple reclassification; a private carrier almost always has the choice of behaving like, and thus becoming, a common carrier. See *Ex Parte* Letter from Lawrence E. Sarjeant, USTA, to William Maher, FCC (April 2, 2003) at 1 (urging FCC to give incumbent LECs “the option to provide common carrier broadband transport service [or] private carrier broadband transport service”). At that point, it is up to the FCC to determine what common carrier regulation to apply: “If practice and experience show [the service providers] to be common carriers, then the Commission must determine its responsibilities from the language of Title II common carrier provisions.” NARUC I at 644.

⁵⁰ For example, Qwest, which does not promote an affiliated ISP, has a preferred ISP arrangement with MSN. See “DSL—MSN Broadband Powered by Qwest,” found at http://www.qwest.com/pcat/for_home/product/1,1354,853_1_11,00.html

Ex Parte Presentation, CC Dkt. Nos. 02-33, 98-10, 95-20; 01-337.

April 29, 2003

Page 13

provide retail customers a more attractive Internet access service than could EarthLink and other independent ISPs subject to the less favorable wholesale conditions.

Such behavior is not only common sense, it is also common business practice, and the NARUC I analysis presumes that, given the opportunity, private carriers will engage in it. “Under NARUC I and Commission precedent, our decision necessarily must consider whether the proposed [service] is a competitive ‘bottleneck’ (i.e., whether there are no competitive substitutes, enabling the owner to restrict output or raise prices), or whether there are, in fact, competitive alternatives.”⁵¹ Thus, the question is not whether, following a decision that wholesale DSL may be provided as private carriage, an incumbent LEC will attempt to use its wholesale services to gain retail market share; the law anticipates it will do just that. Rather, the key inquiry is asked under the first prong of NARUC I: whether other wholesale broadband services are reasonably available to ISPs that a private DSL carrier will be restrained from following that course.

Discontinuance of Common Carrier Service Under Section 214 and Forbearance Under Section 10 Both Involve Consideration of Alternative Services.

The availability of alternative common carrier services is a common, recurring theme in the Commission’s efforts to carry out its Title II statutory mandates. Whether it is applying NARUC I to determine the proper regulatory classification, or conducting an inquiry pursuant to Section 214 of the Act for the discontinuance of a common carrier service, or determining whether to forbear from applying certain Title II provisions, the FCC must consider the availability of alternatives.

Under Section 214, discontinuance of a common carrier service requires the carrier to “obtain[] from the Commission a certificate that neither the present nor future public convenience and necessity will be adversely affected thereby.”⁵² A key factor in determining whether to grant such certificate is “the availability of reasonable substitutes, and whether customers have had a reasonable opportunity to migrate.”⁵³

⁵¹ *AT&T-SSI*, ¶ 39.

⁵² 47 U.S.C. § 214(a).

⁵³ *Rhythms Links Inc. Section 63.71 Application to Discontinue Domestic Telecommunications Services*, Order, 16 FCC Rcd 17024, ¶ 8 (2001); *Comments Invited on Econ-o-Call, Inc. Application to Discontinue Domestic Telecommunications Services*, Public Notice, Comp. Pol. File No. 646, DA 03-1202 (April 22, 2003) (“The Commission will normally authorize proposed discontinuances of service unless it is shown that customers or other end users would be unable to receive service or a reasonable substitute from another carrier”).

Ex Parte Presentation, CC Dkt. Nos. 02-33, 98-10, 95-20; 01-337.

April 29, 2003

Page 14

Likewise, the Commission's ability to forbear from regulation is contingent upon findings that "enforcement ... is not necessary to ensure that the charges [and] practices ... are just and reasonable," that "enforcement ... is not necessary for the protection of consumers," and that "forbearance ... is consistent with the public interest."⁵⁴ In meeting this test, the Commission must consider whether the service at issue, or a reasonable substitute, will remain available to consumers. For example, in deciding not to forbear from applying Sections 201 and 202 of the Act to broadband PCS service, the Commission noted that "even if a licensee is providing service in part of its licensed service area, there may be large areas left without competitive service."⁵⁵ Accordingly, if the Commission should move under Section 10 to forbear from applying Title II provisions to incumbent LEC wholesale DSL, it still would have to consider, as in the contexts of NARUC I and a Section 214 discontinuance, the reasonable availability of alternative services.

In accordance with the Commission's *ex parte* rules, eight copies of this letter are being provided to you for inclusion in the public record in the above-captioned proceedings. Should you have any questions, please contact us.

Sincerely,



Mark J. O'Connor
Kenneth R. Boley
Counsel for EarthLink, Inc.

⁵⁴ 47 U.S.C. § 10.

⁵⁵ *PCIA Broadband PCS*, ¶ 22.