

**THE APPROPRIATE LEGAL FRAMEWORK FOR
TRANSMISSION INPUTS USED IN INCUMBENT LEC
BROADBAND INTERNET ACCESS**

CC Docket Nos. 02-33, 01-337

- THE RECLASSIFICATION OF ILEC BROADBAND INPUTS AS TITLE I SERVICES WOULD CAUSE THE FCC TO ABDICATE ITS “PRIMARY RESPONSIBILITY” UNDER TITLE II -- PROTECTING CUSTOMERS FROM THE ABUSE OF ILEC MARKET POWER
- THE QUESTIONS RAISED IN THE NPRM REGARDING THE APPROPRIATE REGULATION OF ILEC BROADBAND INPUTS RAISE THE SAME QUESTIONS AND WARRANT THE SAME ANSWERS AS IN THE *COMPUTER INQUIRIES*
- THE FCC MAY NOT INTERPRET SECTION 10 OUT OF THE ACT BY RESORTING TO DEFINITIONAL CHANGES
- THE STANDARD FOR FORBEARANCE SET FORTH IN SECTION 10 CANNOT BE MET HERE
- THE FCC CANNOT APPLY TITLE II-LIKE REGULATIONS PURSUANT TO TITLE I IN THIS SITUATION
- EVEN IF UPHELD, THE *CABLE MODEM ORDER* DOES NOT BIND THE FCC TO CLASSIFY ILEC BROADBAND INPUTS AS TITLE I OFFERINGS

I. THE RECLASSIFICATION OF ILEC BROADBAND INPUTS AS TITLE I SERVICES WOULD CAUSE THE FCC TO ABDICATE ITS “PRIMARY RESPONSIBILITY” UNDER TITLE II

- A central goal of the *Computer Inquiries* has been preventing the ILECs from exploiting their entry into the information services market to evade the requirements of the Act (e.g., that service be offered on just, reasonable and not unjustly or unreasonably discriminatory terms and conditions) and undermine the policy goals of the Act (e.g., “to make available, so far as possible, to all the people of the United States . . . a rapid, efficient, Nation-wide, and world-wide wire and radio communication service with adequate facilities and reasonable charges”) *with regard to transmission services*. The focus has always been on ensuring that the transmission services over which the ILECs have market power remain subject to appropriate regulation.
- “The dangers” associated with ILEC entry into the information services market are their ability “to favor their own data processing activities by discriminatory services, cross subsidization, improper pricing of common carrier services, and related anticompetitive practices and activities.” *Computer I Final Decision*, 28 FCC 2d, 267 ¶ 12.
- The Second Circuit upheld *Computer I* because it was “logically directed at eliminating the potential hazards to efficient and economic phone service which is *clearly the Commission’s primary responsibility* and interest here.” *GTE Services Corp. v. FCC*, 474 F.2d 724, 730 (emphasis added).
- The Second Circuit also upheld *Computer I* on the ground that it was “aimed at the protection of efficient telephone service to the public by eliminating the possibility of a diversion of facilities to other purposes.” *Id.* at 732.
- The separate affiliate requirement of *Computer II* was justified because “the benefits of any improvements introduced into [the Bell System’s] transmission facilities to accommodate the needs of its subsidiary would become available to all users of the underlying facilit[ies].” *Computer II Recon. Order*, 84 FCC 2d 50, ¶ 78.
- The *Computer III* CEI and ONA rules were designed to ensure “equal access to the BOCs’ basic facilities” and to give all customers the ability to “utilize those basic facilities.” *Computer III Order*, 104 FCC 2d 958, ¶ 97.

II. THE QUESTIONS RAISED IN THE NPRM REGARDING THE APPROPRIATE REGULATION OF ILEC BROADBAND INPUTS RAISE THE SAME QUESTIONS AND WARRANT THE SAME ANSWERS AS IN THE *COMPUTER INQUIRIES*

- The NPRM asks how ILEC transmission inputs used for broadband Internet access should be classified for purposes of regulation: telecommunications service, telecommunications, or other.
- Under the relevant legal standard, a service must be deemed a common carrier/telecommunications service if (1) the FCC deems it necessary to require that an entity make a service available under Title II in order to meet the policy objectives of that Title; or (2) a firm volunteers such an offering. *Cable & Wireless*, 12 FCC Rcd 8516, ¶ 14.
- The FCC has already repeatedly held that xDSL, DS1, DS3, and high-capacity packet-based transmission services are telecommunications services.
- Continued classification of these transmission services as telecommunications services is necessary to meet the policy objectives of Title II with regard to *broadband* service:
 - The ILECs have unquestioned market power over two types of end user connection: (1) DS1s and equivalents (including packet-based successor services); and (2) DS3s and equivalents (including packet-based successor services).
 - In the *Triennial Review Order*, the FCC found that competitors are impaired without dark fiber, DS1, and DS3 loops, requiring a national finding of market power. *See Triennial Review Order*, ¶¶ 311, 320, 325.
 - Only “between 3-5% of the nation’s commercial office buildings are served by competitor-owned fiber.” *Triennial Review Order*, n. 856.
 - The FCC’s continued regulation of ILEC special access is expressly based on the ILECs’ market power over underlying facilities. *Access Charge Fifth Report and Order*, 14 FCC Rcd 14,221, ¶ 68.
 - There is no intermodal competition of any significance for DS1 equivalents or above.
 - Eliminating regulation of DS1, DS3 and equivalent end user connections will lead to well-understood and predictable consequences: (1) unreasonable and discriminatory prices for end users, and (2) unreasonable and discriminatory prices and service quality for competitors leading to less competition and innovation.

- Unbundling obligations cannot be relied upon to constrain the exercise of any of this market power because unbundling no longer applies to next-generation packet-based loops, and there are legal risks associated with imposing Section 251(c) unbundling on Title I services.
- Continued classification of broadband transmission inputs as telecommunications services is necessary to meet the policy objectives of Title II with regard to *narrowband* service because ILECs will be able to evade regulation of basic voice service by offering bundled voice and data services (*e.g.*, over an integrated packetized platform). The FCC will have no jurisdiction to regulate prices for these services and no ability to prevent ILECs from diverting all innovation in the network to the unregulated service offering.

III. THE FCC MAY NOT INTERPRET SECTION 10 OUT OF THE ACT BY RESORTING TO DEFINITIONAL CHANGES

- By enacting Section 10, Congress explicitly resolved any uncertainty as to how the FCC may go about reducing the level of regulation of services currently classified as telecommunications services.
- In *ASCENT v. FCC*, 235 F.2d 662, the DC Circuit held that the FCC may not rely on strained interpretations of the Act as a means of reducing the application of Title II requirements -- that result can only be accomplished under Section 10.
- In reaching its holding, the D.C. Circuit relied heavily on the FCC's own conclusion that xDSL service is a telecommunication service.
- ASCENT dealt with stand-alone xDSL service (not bundled with Internet access), *but Congress clearly expected the transmission inputs used for Internet access would continue to be classified as telecommunication services:*
 - “Congress intended the 1996 Act to maintain the *Computer II* framework.” *Report to Congress*, 13 FCC Rcd 11,501, ¶ 46.
- Section 706 cannot be relied upon to evade Section 10 because it does not constitute an independent basis for forbearance. 13 FCC Rcd 24,012, ¶ 69.

IV. THE STANDARD FOR FORBEARANCE SET FORTH IN SECTION 10 CANNOT BE MET HERE

- Reclassification would result in an impermissible forbearance of Section 251(c) requirements (e.g., resale) before any finding that those provisions have been “fully implemented” as required under Section 10(d).
- For the reasons explained, the FCC could not meet the standards of Section 10(a) (e.g., that a service is “not necessary to ensure that [the terms of service] are just and reasonable and are not unjustly or unreasonably discriminatory”) with regard to the Title II requirements designed to constrain ILEC market power.
- The FCC could not meet the standards of Section 10(a) (e.g., that “regulation . . . is not necessary for the protection of consumers” and forbearance is “consistent with the public interest”) with regard to the statutory requirements unrelated to constraining market power: Universal service; CPNI; Access to the Disabled; Slamming; and CALEA.

V. THE FCC CANNOT APPLY TITLE II-LIKE REGULATIONS PURSUANT TO TITLE I IN THIS SITUATION

- The exercise of ancillary jurisdiction must be “imperative if [the FCC] is to perform with appropriate effectiveness” its responsibilities under Title II. *U.S. v. Southwestern Cable*, 392 U.S. 157, 178. This standard could not be met here, since the FCC would have just removed the services in question from Title II.
- In addition, the statute prohibits this approach: a “telecommunications carrier shall be treated as a common carrier under this Act only to the extent that it is engaged in providing telecommunications services.” 47 U.S.C. § 153(44). To the extent that the FCC classifies transmission inputs as “telecommunications,” they are not “telecommunications services” and ILECs cannot be “treated” as common carriers when providing those services.
- The Supreme Court reached this conclusion in a similar situation when it overturned the FCC’s attempt to impose common carrier-like regulations on cable service. *See Midwest Video II*, 440 U.S. 689, 704-06.

VI. EVEN IF UPHELD, THE CABLE MODEM ORDER DOES NOT BIND THE FCC TO CLASSIFY ILEC BROADBAND INPUTS AS TITLE I OFFERINGS

- The logic of the *Computer Inquiries* is that transmission services must be subject to Title II where there is a risk that an entity's market power over transmission services is such that allowing it to enter the market for unregulated information services will allow it to evade needed common carrier regulation of the transmission facilities. The *Computer Inquiries* rules were required to meet the policy goals of Title II.
- In order for the FCC to try to apply common carrier regulation to cable modem service, it would at least need to conclude that such regulation is necessary to ensure that transmission services are available on just, reasonable and not unjustly or unreasonably discriminatory terms and conditions. This in turn must be based on a market power analysis. The FCC reached no such conclusion and engaged in no such analysis in the *Cable Modem Order*.
- In contrast, it is clear from numerous FCC orders examining the extent and consequences of ILEC market power over broadband end user connections that the policy goals of Title II continue to mandate that ILEC broadband service be subject to common carrier regulation.