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February 11, 2005

Marlene H. Dortch
Secretary
Federal Communications Commission
445 12th Street, SW
Washington D.C. 20554

**Re: Petition of the Verizon Telephone Companies For Forbearance Under 47
U.S.C. §160(c) From Application of Computer Inquiry and Title II Common
Carrier Requirements, WC Docket No. 04-440**

Dear Ms. Dortch:

On February 8, 2004, Sprint Corporation filed comments on the above-referenced petition. Unfortunately, the docket set forth on the comments was the one involving a nearly-identical petition filed earlier by BellSouth (WC Docket 04-405) instead of WC Docket No. 04-440. Thus, Sprint is re-filing its comments with the correct docket designation. Sprint regrets any inconvenience its error may cause.

Sincerely,

A handwritten signature in black ink, appearing to read "M.B.F.", written over a faint, large, light-colored watermark or background mark.

Attachment

cc: Brad Koerner (via email)
Edward Shakin, (via first class mail)
Best Copy and Printing, Inc. (via email)

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554**

In the Matter of)	
)	
Petition of the Verizon Telephone Companies)	
For Forbearance Under 47 U.S.C. §160(c) From)	WC Docket No. 04-440
Application of Computer Inquiry and Title II)	
Common Carrier Requirements)	
_____)	

COMMENTS OF SPRINT CORPORATION

Sprint Corporation (“Sprint”), on behalf of its wireline and wireless operating divisions, hereby respectfully submits its comments on the above-captioned petition by the Verizon Telephone Companies asking that the Commission eliminate Title II regulation of broadband transport facilities, including the application of the safeguards adopted in the Commission’s *Computer II* and *Computer III* decisions (collectively, *Computer Inquiry*)¹ to the provision of such facilities by incumbent local exchange carriers (ILECs), through forbearance. Verizon’s petition must be denied. It is nothing more than a repackaged version of Verizon’s pleadings in CC Docket No. 02-33 (*Appropriate Framework for Broadband Access to the Internet over Wireline Facilities*) where the Commission is considering whether to eliminate the safeguards adopted in *Computer Inquiry* with respect to the provision of broadband transmission facilities. The record in that proceeding conclusively demonstrates that the elimination of such safeguards

¹ The Commission’s Computer II safeguards were adopted in *Amendment of Section 64.702 of the Commission’s Rules*, 77 FCC 2d 384 (1980), *recon.*, 84 FCC 2d 50 (1980), *further recon.*, 88 FCC 2d 512 (1981), *aff’d sub nom.*, *Computer & Communications Industry Ass’n v. FCC*, 693 F.2d 198 (D.C. Cir. 1982), *cert. denied*, 103 S.Ct. 2109 (1983). The Commission’s *Computer III Phase I* safeguards were adopted in *Amendment of Section 64.702 of the Commission’s Rules*, 104 FCC 2d 958 (1986), subsequent history omitted and the Phase II decision adopting safeguards is reported at 2 FCC Rcd 3072 (1987), subsequent history omitted.

would be contrary to the public interest. Indeed, there was near unanimity of opinion across the broad telecommunications sector of the economy that competition in all telecommunications markets, that national security and emergency preparedness, and that the goal of ensuring access to the telecommunications by Americans with disabilities would be imperiled if the Commission were to do away with *Computer Inquiry* safeguards.²

Verizon and the other Regional Bell Operating Companies (RBOCs) were about the only parties in CC Docket No. 02-33 to urge the elimination of such safeguards; but their arguments were devoid of factual substance and misrepresented the Act and legal precedent. Of equal importance, and of particular relevance to standards for judging Verizon's forbearance petition, neither Verizon nor any other RBOC demonstrated that the elimination of the *Computer Inquiry* safeguards would serve the public interest. The Commission simply cannot ignore such record when it evaluates Verizon's forbearance petition. And that record compels denying the relief sought by Verizon.

Respectfully submitted,

SPRINT CORPORATION



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February 8, 2005

² Sprint hereby incorporates by reference its Comments filed May 3, 2002 and its Reply Comments filed July 1, 2002. For the staff's convenience, Sprint has attached copies of these pleadings hereto.

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
)	
Universal Service Obligations of Broadband)	
Providers)	
)	
Computer III Further Remand Proceedings:)	
Bell Operating Company Provision of)	
Enhanced Services; 1998 Biennial Regulatory)	CC Docket Nos. 95-20, 98-10
Review -- Review of Computer III and ONA)	
Safeguards and Requirements)	
_____)	

INITIAL COMMENTS OF SPRINT CORPORATION

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May 3, 2002

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Safeguards and Requirements)	
)	

INITIAL COMMENTS OF SPRINT CORPORATION

Sprint Corporation ("Sprint") on behalf of its incumbent local exchange ("ILEC"), competitive LEC ("CLEC")/long distance and wireless subsidiaries, hereby respectfully submits its initial comments in response to the Commission's *Notice of Proposed Rulemaking* ("NPRM"), FCC 02-42 issued February 15, 2002, in the above-captioned proceeding.

I. INTRODUCTION AND SUMMARY.

As the district court judge responsible for the enforcement of the Modified Final Judgment (MFJ), *United States of America v. Western Electric Company Inc., et al.* 552 F. Supp. 131 (D.D.C. 1982), *aff'd sub nom., Maryland v. United States*, 460 U.S. 1001 (1983), the Honorable Harold Greene was required to rule on a plethora of requests by the Regional Bell Operating Companies ("RBOCs") seeking waivers of the requirements established by the MFJ so as to be able to enter prohibited markets. One of Judge Greene's more prescient observations in dealing with these waivers was that the RBOCs would invariably read any concession by the

district court, no matter how narrowly drawn, "broadly so as to encompass activities that no one could reasonably have intended to include therein." *U.S. v. Western Electric*, 1989 U.S. Dist. LEXIS 5250, *12 (1989). Judge Greene often commented on what he termed was "this 'slippery slope' syndrome." *U.S. v. Western Electric*, 1990 U.S. Dist. LEXIS 8826, **9 (1990). *See also U.S. v. Western Electric*, 1989 U.S. Dist. LEXIS 13695, *14-*15 (1989) and *U.S. v. Western Electric*, 627 F. Supp. 1090, 1097 (fn. 25) (D.D.C. 1986).

Far from being considered a footnote in the history of the telecommunications industry, Sprint believes that Judge Greene's experience in dealing with RBOC efforts to erode the requirements of the MFJ should give the Commission considerable pause as it examines the issues the Commission has raised in this *NPRM*. Sprint has no quarrel with the Commission's tentative conclusion that "the provision of wireline broadband Internet access service is an information service." *NPRM* at ¶17. That proposed finding is unremarkable and consistent with the Commission's basic-enhanced service dichotomy adopted over two decades ago in its *Computer II* decision.¹ What concerns Sprint is the possibility that the Commission will eliminate the safeguards adopted in the *Computer II* and *Computer III*² decisions (collectively, *Computer Inquiry*), at least with respect to the provision of broadband transmission facilities. Sprint believes that the elimination of the requirement that a facilities-based carrier

¹ *Amendment of Section 64.702 of the Commission's Rules (Second Computer Inquiry)*, 77 FCC 2d 384 (1980), *recon.*, 84 FCC 2d 50 (1980), *further recon.*, 88 FCC 2d 512 (1981), *aff'd sub nom., Computer & Communications Industry Ass'n v. FCC*, 693 F.2d 198 (D.C. Cir. 1982), *cert. denied*, 103 S.Ct. 2109 (1983).

² The Commission's *Computer III Phase I* decision adopted in *Amendment of Section 64.702 of the Commission's Rules (Third Computer Inquiry)* is reported at 104 FCC 2d 958 (1986), subsequent history omitted. The Commission's *Computer III Phase II Order* is reported at 2 FCC Red 3072 (1987), subsequent history omitted.

providing broadband transmission facilities to itself for its own information services operations must make such facilities available to other unaffiliated information service providers at the same price and on the same terms and conditions would have untoward effects on wireline competition in the provision of common carrier services.

If RBOC attempts to exploit any relaxation of the requirements imposed by the MFJ are any guide -- and Sprint believes that they are -- the RBOCs will undoubtedly seek to exploit the elimination of the *Computer Inquiry* safeguards to further solidify their bottleneck control over last mile access to end users. Even though the Commission may well intend to limit the scope of any decision here only to cases where the broadband transmission facility is connected to the RBOC's own Internet access services (*i.e.*, the services offered as an Internet Service provider ("ISP")), the Commission cannot be assured that such facility will be used only for that purpose as it is commonly understood today. On the contrary, in time Internet access may well be useable for the provision of voice, data and other basic telecommunications services. In fact, as the Commission observes, "broadband technologies may ultimately replace legacy narrowband networks." *NPRM* at ¶13.

As the RBOCs and other ILECs increasingly make broadband facilities available to end users, mainly by re-engineering "last mile" copper loops to make them xDSL-capable, they can be expected to use such facilities to provide both telecommunications services and Internet access services as they do today with line sharing. Of course, by doing so they make more efficient use of such facilities. But perhaps more importantly, if freed from the *Computer II* requirement to provide the underlying broadband transport facilities on an unbundled basis in common carriage, the RBOCs will have a powerful incentive to incorporate telecommunications services such as voice telephony into their ISP services so as to provide such services over

telecommunications facilities without having to make those facilities available to other ISPs. At the same time, the RBOCs are arguing in CC Docket No. 01-338 (*Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*) that they should not have to make broadband-capable loops available to other carriers as unbundled network elements. Should they succeed, their obligations under Section 251(c) would be limited to the provision of narrowband legacy facilities (to the extent such facilities remained) or possibly the narrowband portion of an xDSL-conditioned or other broadband loop. Given this Commission's expectation that the telecommunications market will evolve into one where end users will be provided bundles of telecommunications and information services over broadband facilities, wireline carriers that can only secure narrowband "last-mile" facilities from the RBOCs would find it difficult, if not impossible, to compete for end users. In contrast, the RBOCs would have been deregulated in the provision of broadband facilities with their bottleneck control over the "last-mile" local loop relatively intact. The RBOCs would be able to dominate the ISP market at the very least, and could effectively foreclose competition for voice and basic data services as well.

Such an outcome would be totally at odds with the goals envisioned by Congress when it enacted the 1996 Telecom Act as well as with the Commission's goal in this rulemaking "to ensure that competition in the provision of broadband capabilities can thrive, and thereby ensure that the needs and demands of the consuming public are met." *NPRM* at ¶4. Moreover, allowing the RBOCs and other ILECs to provide broadband facilities outside of the regulatory paradigm established by the *Computer Inquiry* decisions is simply not necessary to encourage the deployment of broadband facilities. Rather, all available evidence suggests that there is no supply side problem in the provision of broadband facilities. Any problems that may exist are on the demand side. Continuing to apply the *Computer Inquiry* regulatory structure to the ILECs'

provision of broadband facilities would enable competition and would be the most direct and efficacious way to attack the demand problem. Multiple providers stimulate demand by providing a variety of new and innovative services at attractive prices. Elimination of the *Computer Inquiry* regulatory framework would, therefore, be a step in the wrong direction.

Sprint discusses these issues further below. In the next Section, Sprint shows that the *Computer Inquiry* framework has not delayed the deployment of broadband wireline facilities. In Section III, Sprint demonstrates that the elimination of the *Computer Inquiry* framework would be wrong as a policy matter. Sprint also points out that the Commission's *Computer Inquiry* decisions were not limited to the basic transmission capacity then being deployed and the information services then being provided over such facilities. In Section IV, Sprint explains that Verizon's theories regarding the classification of "telecommunications services" as "private carriage" are baseless. And in Section V, Sprint reiterates its position in CC Docket No. 96-45 (*Federal-State Joint Board on Universal Service*) regarding the imposition of universal service funding obligations upon carriers.

II. THERE IS NO EVIDENCE TO SUPPORT THE NOTION THAT THE COMPUTER INQUIRY SAFEGUARDS ARE HINDERING THE DEPLOYMENT OF BROADBAND FACILITIES.

The Commission states that its "primary policy goal" in this proceeding is "to encourage the ubiquitous availability of broadband to all Americans." *NPRM* at ¶3. To reach this goal, or so the Commission says, "broadband services should exist in the minimal regulatory environment that promotes investment and innovation in a competitive market." *Id.* at ¶5. The problem here is that the Commission does not explain what aspects of today's "regulatory environment" have hindered "investment and innovation" in the provision of wireline broadband facilities. In particular, there is nothing in the *NPRM* that demonstrates that the basic/enhanced

services structure established in *Computer II* and later modified by *Computer III*, which, at most, subjects facilities-based carriers' provision of information services to "minimal" regulation under Title I, has delayed the deployment of wireline broadband facilities on a ubiquitous basis.

It would, of course, be rather difficult for the *NPRM* to have made such a demonstration. Less than ten days before the instant *NPRM*, the Commission released its *Third 706 Report* on the deployment of advance telecommunications services in the United States.³ There, the Commission found that advanced telecommunications "is being deployed to all Americans in a reasonable and timely manner"; that "the availability of and subscribership to advanced telecommunications has increased significantly;" and, that "investment in infrastructure for advanced telecommunications remains strong." *Third 706 Report* at ¶1. Although the Commission points out that "capital expenditures in [advanced services] infrastructure have slowed in recent months, especially within the competitive LEC market," it attributes such slowdown to "excess capacity," and not to its regulatory policies. *Third 706 Report* at ¶106.

Moreover, as detailed recently by various commenting parties in the Commission's *Triennial UNE Review* proceeding,⁴ the marketplace activities of the RBOCs belie the notion that Commission regulation has created a supply-side problem in the provision of broadband

³ *Inquiry Concerning the Deployment of Advanced Telecommunications Capability to All Americans in Reasonable and Timely Fashion, and Possible Steps to Accelerate such Deployment Pursuant to Section 706 of the Telecommunications Act of 1996* (CC Docket No. 98-116), *Third Report* (FCC 02-33) released February 6, 2002 (*Section 706 Third Report*). xDSL lines which are currently being deployed by the RBOCs and other ILECs to provide broadband services are generally considered by the Commission to be advanced telecommunications services. See *Third 706 Report* at Appendix B ¶¶24-26; see also *NPRM* at fn. 1 & fn. 2.

⁴ *Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*, CC Docket No. 01-338, *Notice of Proposed Rulemaking*, FCC 01-361 (released December 20, 2001).

infrastructure. For example, in its comments AT&T has detailed what can only be considered an explosion in deployment of xDSL facilities by the RBOCs (see Redacted Comments at 69-71) which, as it explains "should put to rest any concerns that the service is competitively disadvantaged or that the current regulatory regime has impeded the growth of broadband investment." Redacted Comments at 69. Covad also points out that Commission regulation has not deterred the RBOCs from deploying broadband facilities at "an incredible clip." Comments at 14. And WorldCom notes that all of the RBOCs "reported substantial growth in DSL lines in 2001." Comments at 93.

Administration officials have come to the conclusion that the problem in broadband today is on the demand side because acceptance rates by consumers have not kept pace with the broadband deployment. See "Bush Administration Focuses on Increasing Demand for Broadband," *Washington Telecom Newswire* (March 5, 2002), quoting Professor Glenn Hubbard, Chairman of the Council of Economic Advisors. Plainly the way to attack this broadband demand problem is through policies that enable broadband competition. Competition creates a "virtuous circle" of innovative service offerings at attractive prices leading to increased demand for those services. Certainly this has been the experience in the mobile services market. The emergence of new wireless carriers in the early 1990s, breaking up what had essentially been a Commission-sanctioned duopoly comprised of a wireline LEC controlling one half of the allotted spectrum and a non-wireline entity controlling the other half in a given market, has led to the offering of innovative mobile services at lower prices which, in turn, has led to record increases in subscriber growth. See e.g., *Annual Report and Analysis of Competitive Conditions With Respect to Commercial Mobile Services, Sixth Report*, 16 FCC Red 13350, 13370 (2001).

Moreover, "available data indicate that the entrance of new competitors into the mobile telephone market continues to reduce prices." *Id.* at 13376.

Although the *NPRM* does not tentatively conclude that ILEC provision of broadband facilities should be exempted from the *Computer Inquiry* requirements, there is a strong perception that given its recent declaratory ruling concerning the provision of high-speed Internet access over cable facilities, the Commission may have already pre-judged the issue here.⁵ Thus, in its *Cable Modem Ruling*, the Commission determined that the requirements of *Computer II* were inapplicable to information services provided over cable facilities. *Cable Modem Ruling* at ¶¶43-44. Moreover, just in case it was later determined that *Computer II* was applicable, the Commission "waive[d] on [its] own motion the requirements of *Computer II* in situations where the cable operator additionally offers local exchange service." *Id.* at ¶45. As Commissioner Copps observed in his Dissenting Statement to the *Cable Modem Ruling* (p.74), "[t]hose who conclude that the Commission has now resolved [the instant] proceeding after just one month may be pardoned."

A similar decision here to exempt ILEC provision from the *Computer Inquiry* regulatory paradigm, even in cases where the ILECs provide telecommunications services over such facilities, will ignore the lessons learned from the mobile services market. Instead of adopting policies or, as is the case here, maintaining current policies, that enable the entry of competitors to the ILECs in the provision of broadband services, the Commission will have adopted a policy

⁵ *Inquiry Concerning High-Speed Access to the Internet Over Cable and Other Facilities* (GN Docket No. 00-185) *Declaratory Ruling and Notice of Proposed Rulemaking*, FCC 02-71 (released March 15, 2002), *appeal pending*, sub nom., *Braun X Internet et. al v. FCC*, Case No. 2-70518 (9th Circuit) ("*Cable Modem Ruling*").

that will inevitably lead to the creation of a deregulated cable operator/ILEC duopoly in the provision of broadband services -- both information services and eventually telecommunications services -- to residential end users and an ILEC monopoly in the provision of broadband services to mass market business customers.⁶ The Commission professes that one of its goals here is to have a regulatory framework under which "competition in the provision of broadband capabilities can thrive, and thereby ensure that the needs and demands of the consuming public are met." *NPRM* at ¶4. However, it is difficult to understand how the creation of a duopoly in the residential mass market and a monopoly in the business mass market will achieve that goal.⁷ Conventional economic teachings and the Commission's own experiences in the mobile services market would strongly suggest otherwise. Vigorous price competition and service innovations are simply not characteristics of duopolistic or monopolistic markets.

In short, the *NPRM* has failed to present any empirical evidence that the requirements of

⁶ Mass market business customers do not subscribe to cable modem services, even if offered, because of security and reliability concerns. *See, e.g.*, Comments of Ad Hoc Telecommunications Users Committee filed March 1, 2002 in CC Docket No. 01-337 (*Review of Regulatory Requirements for ILEC Broadband Telecommunications Services*) at 17-19. Thus, the elimination of intranodal broadband competition that would result if the ILECs were relieved of their *Computer II* obligations in the provision of broadband facilities would likely give the ILECs a monopoly in the provision of such broadband services to mass market business customers.

⁷ In CC Docket No. 01-337 (*Review of Regulatory Requirements for ILEC Broadband Telecommunications Services*), certain RBOCs have argued that fixed broadband wireless services can increasingly be relied upon as providing a competitive alternative to the broadband services provided by the RBOCs. *See, e.g.*, Comments of BellSouth at 36; Qwest at 21. It may well be true that some day fixed wireless services will become a viable competitive alternative to the broadband services of the RBOCs. But, as the Commission recently reported to Congress, that day is unlikely to arrive anytime in the near future. *See Section 706 Third Report at Appendix B (¶31)* (pointing out that technical limitations and capital market conditions have put severe constraints on the deployment and the effectiveness in certain settings of fixed wireless technologies).

Computer Inquiry have created a supply-side problem in the deployment of broadband facilities. All available information proves otherwise. The ILECs continue to deploy broadband facilities in a "reasonable and timely manner," notwithstanding the unbundling obligations imposed by the *Computer Inquiry* decisions. Thus there is simply no factual justification for the Commission to exempt the ILECs' provision of broadband facilities from the safeguards established by those decisions.

III. THERE IS NO LEGAL OR POLICY JUSTIFICATION FOR EXEMPTING THE ILECS' PROVISION OF BROADBAND TELECOMMUNICATIONS FROM THE COMPUTER INQUIRY SAFEGUARDS.

Similarly, there are no legal or policy grounds for scrapping the *Computer Inquiry* framework and, in particular, the *Computer II* safeguards, with respect to the ILECs' provision of broadband facilities. The rationale underlying the imposition of such safeguards is still valid, and the Commission's *Computer II* decision itself confirms that broadband facilities were included within its scope.

A. There Is No Sound Policy Reason To Dismantle The *Computer Inquiry* Framework.

Under the *Computer II* regulatory structure, a basic service is the offering of a "pure transmission capability over a communications path that is virtually transparent in terms of its interaction with customer supplied information." 77 FCC 2d at 420 (¶96). Such basic transmission services, in turn, provide the "building block[s] supporting the provision of enhanced services," *id.* at 423, which are services that "employ computer processing applications that act on the format, content, code, protocol or similar aspects of the subscriber's transmitted information; provide the subscriber additional, different, or restructured information; or involve subscriber interaction with stored information." 47 CFR 64.702(a). Carriers that provide basic transmission facilities are allowed to use such facilities to provide enhanced services. However,

carriers "must unbundle basic from enhanced services and offer transmission capacity to other enhanced service providers under the same tariffed terms and conditions under which they provide such services to their own enhanced service operations."⁸ This is the heart of the *Computer Inquiry* framework.

As the Commission has found, "Congress intended the 1996 Act to maintain the *Computer II* framework."⁹ Although the definitions of the term "information services" under the Act and the term "enhanced services" as adopted in *Computer II* are worded differently, both terms "can and should be interpreted to extend to the same functions."¹⁰ Likewise "telecommunications" as defined in the Act, 47 USC 153(43), provides the same functionality and serves the same purpose as "basic services" in the Commission's *Computer II* regulatory regime. Telecommunications is the transparent transmission path for the movement of customer-supplied information without change to the form or content of such information and is the building block upon which information services are offered. Thus telecommunications, like

⁸ *Independent Data Communications Manufacturers Association, Inc., Petition for Declaratory Ruling*, 10 FCC Rcd 13717, 13719 (¶13) (1995) (*Frame Relay Order*). See also *Deployment of Wireline Services Offering Advanced Telecommunications Capability*, 13 FCC Rcd 24011, 24030 (¶36) (1998) (*Advance Services Decision*) where the Commission stated that while the ILEC-provided xDSL-enabled "transparent, unenhanced, transmission path" may be utilized by end users together with an information service such as Internet access, but that consistent with the *Computer II* regulatory paradigm, the Commission must "treat the two services separately: the first service is a telecommunications service...and the second service is an information service...."

⁹ *Federal-State Joint Board on Universal Service, Report to Congress*, 13 FCC Rcd 11501, 11524 (¶45) (1998) (*Universal Service Report*).

¹⁰ *Implementation of the Non-Accounting Safeguards of Section 271 and 272, of the Communications Act of 1934, as amended*, 11 FCC Rcd 21905, 21955-56 (¶102) (1996) (*Non-Accounting Safeguards Order*). See also NPRM at fn. 38 ("The term 'information service' follows from the distinction the Commission drew in the *First, Second and Third Computer Inquiries*...").

basic services, must be offered on an unbundled, standalone basis to other entities, *i.e.*, as "telecommunications services."¹¹

In the *NPRM* at ¶43, the Commission asks, almost in passing, whether the *Computer Inquiry* regulatory framework should simply be eliminated. The reasons why the unbundling and nondiscrimination safeguards were necessary at the time the Commission adopted *Computer II* are just as valid today some two decades later. These safeguards were found necessary because of the indisputable economic principle that without them a carrier operating in a putatively competitive market but with bottleneck control over facilities needed by its competitors in such market has to the ability and the incentive to exploit its control to harm competition. In the over 6 years since the passage of the 1996 Telecom Act, there has been little erosion in the ILECs' bottleneck control over last mile facilities.¹² This is especially true in the case of broadband Internet access wireline facilities which, for all practical purposes, must be obtained from the RBOCs.¹³

¹¹ The addition of the term "telecommunications service" to the Act does not alter the *Computer II* structure. Rather, the purpose of the term was to codify the distinction between common carriage and private carriage that had been drawn in Commission and court decisions since the 1934 Act had become law. *Non-Accounting Safeguards Order*, 11 FCC Rcd at 22033 (¶265).

¹² See *e.g.*, *Policy and Rules Concerning the Interstate, Interexchange Marketplace: Reviews of Customer Premises Equipment and Enhanced Services Unbundling Rules in the Interexchange, Exchange Access and Local Exchange Markets*, 16 FCC Rcd 7418, 7425 (¶12), 7443-44 (¶43) (2001) (*Enhanced Services/CPE Unbundling Order*)(finding that incumbent LECs have the market power to act anticompetitively but nonetheless allowing such carriers to offer bundled packages consisting of local exchange services and enhanced services in part because of the *Computer II* unbundling and nondiscrimination requirements. See also *Computer III Further Remand Proceedings: Bell Operating Company Provision of Enhanced Services*, 14 FCC Rcd 4289, 4301 (¶16) (finding that ISPs must still obtain basic transmission facilities from the RBOCs).

¹³ See, *e.g.*, Comments filed in Docket No. 01-337 by WorldCom at 15; Time Warner at 6-7; Information Technology Association of America at 2; Covad at 3 and Earthlink at 5. At the

B. The Commission's *Computer Inquiry* Decisions Apply To The Provision of Broadband Transmission Facilities.

Plainly, the elimination of the unbundling and nondiscrimination safeguards established in *Computer II* would be unjustified and given the *NPRM*'s cursory treatment of the issue, the Commission does not seem to be seriously considering such step. Rather, the Commission suggests that it may be appropriate to carve out a wireline broadband exception to such requirements. This is so, according to the Commission, "[b]ecause the rules adopted in the *Computer Inquiries* were based on assumptions shaped largely by certain service and market characteristics prevalent at the time." *NPRM* at ¶44, and the *Computer Inquiry* "framework was constructed to accomplish certain goals in a world in which the services at issue were more akin to voicemail and other narrowband applications, rather than to broadband Internet access." *NPRM* at ¶31.

The Commission does not point to language in its *Computer Inquiry* opinions that would support such a limited reach for those decisions. Nor could it. There is no language in any of the *Computer Inquiry* decisions that even remotely suggests that the regulatory framework established by those decisions would only be applicable to the basic transmission capacity then being deployed and the information services then being provided over such facilities. In *Computer II*, for example, the Commission did not qualify or characterize the basic "transmission capacity" that carriers offer "for the movement of information." It simply explained that such capacity could be used "for the analog or digital transmission of voice, data,

same time, there is a limited amount of competition at the retail level, and as a result, ILECs should be allowed some pricing and tariff filing flexibility at the retail telecommunications service level as well as tariff filing relief with respect to their provision of DSL services. See Comments and Reply Comments of Sprint in CC Docket No. 01-337.

video, etc. information." It went on to state that the type of transmission offered varied and depended upon "a) the bandwidth desired, b) the analog and/or digital capabilities of the transmission medium, c) the fidelity, distortion, or other conditioning parameters of the communications channel to achieve a specified transmission quality, and d) the amount of transmission delay acceptable to the user." *Computer II*, 77 FCC 2d at 419. Clearly, the Commission intended its analysis to apply regardless of "the bandwidth desired," and indeed video can only be provided as a practical matter over broadband facilities.

Moreover, contrary to the Commission's apparent view today that the *Computer II* was confined to voice services and a few "narrowband" enhanced services applications and that it could not be applied in today's world of "bandwidth-intensive, multimedia information services" using powerful computers, *NPRM* at ¶13, it is clear the Commission in 1980 was forward-looking and, in fact, visionary. Thus, it pointed out that "[t]raditionally transmission capacity has been offered for discrete services, such as telephone service" but then found that

[w]ith the incorporation of digital technology into the telephone network and the inclusion of computer processing capabilities into both terminal equipment located in the customer's premises and the equipment making up a firm's "network," this is no longer the case. Telecommunications services is no longer just "plain old telephone service" to the user. A subscriber may use telephone service to transmit voice or data. Both domestic and international networks allow for voice and data use of the communications path. Thus in providing a communications service, carriers no longer control the use to which the transmission medium is put. *More and more the thrust is for carriers to provide bandwidth or data rate capacity adequate to accommodate a subscriber's communications needs, regardless of whether subscribers use it for voice, data, video, facsimile or other forms of transmission.*

Id., emphasis supplied. Given such findings, there is simply no basis upon which to conclude that a *Computer II* was confined to "narrowband" services and that it has no applicability to today's Internet-based information service offerings.

IV. BROADBAND TRANSMISSION IS CLEARLY COMMON CARRIAGE AND, EVEN IF PROVIDED ONLY TO UNAFFILIATED ISPS, CANNOT BE CLASSIFIED AS PRIVATE CARRIAGE.

In paragraph 26 of the *NPRM* the Commission asks (1) whether the provision of standalone broadband transmission is a "telecommunications service," and (2) whether the offering of standalone broadband transmission capacity on a wholesale basis to a limited class of customers -- *e.g.*, ISPs -- may be classified as "private carriage" instead of a telecommunications service offered on a common carrier basis. These issues appear to be raised in response to an *ex parte* letter dated January 9, 2002 from Verizon. *NPRM* at fn. 61. Verizon's theories are without merit.

Clearly, the stand-alone offering of broadband transmission is a "telecommunications service." Such services have been offered for decades in varying capacity levels, from T-1s or DS-1s through OCNs (*e.g.*, OC-3, OC-12, OC-48 and OC-148) as private lines and special access. These services can be used to transmit "information of the user's choosing, without change in the form or content of the information sent or received" and hence are "telecommunications," as defined in Section 3(43) of the Act. And, since such "telecommunications" is, and for many years has been, offered "for a fee directly to the public..." it is a "telecommunications service as defined in Section 3(46) of the Act. Sprint is at a loss to understand how the contrary proposition could be seriously entertained.

Moreover, the fact that a carrier offers a wholesale service to a limited number of customers is not sufficient to remove the offering from common carriage. Long-standing judicial precedent holds that a service offering may be common carriage regardless of the price and regardless of whether the offering may be attractive to only to a few customers. As the Ninth Circuit has explained, "it is immaterial" to common carriage "that the service offered will

be attractive only to a limited group"; that "it may be performed pursuant to special contract"; or that the service "may be furnished at cost, at a loss, or even without charge." *Las Vegas Hacienda v. CAB*, 298 F.2d 430, 434 (9th Cir. 1962), *cert. denied*, 369 U.S. 885 (1962). *See also*, cases cited therein and *NARUC v. FCC*, 525 F.2d 630, 641 (D.C. Cir. 1976) (*NARUC I*) ("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").

Verizon is correct that not all services provided by a common carrier need be provided on a common carrier basis subject to Title II of the Act. January 9 Letter at 1. But this rather unremarkable statement does not justify allowing Verizon or other ILECs to provide standalone broadband transmission capacity pursuant to private carriage. Instead, the Commission must have a principled basis for determining whether to confer or not to confer common carrier status on a service offering by a carrier. Verizon suggests that the basis for determining whether a service offering should be classified as common carriage is whether the carrier has market power in the provision of the service. *Id.* at 3. Verizon is incorrect.

Common carrier status is not a function of a carrier's market power. Nondominant carriers, *i.e.*, those without market power, are still common carriers and must comply with the substantive requirements of Title II of the Act.¹⁴ Rather, common carrier status depends upon the type of services being provided, *i.e.*, whether the services are within Title II, and whether the carrier providing such service holds itself out indiscriminately, either in practice or under legal

¹⁴ Nondominant interexchange carriers, for example, are subject to the requirements of Sections 201 and 202 of the Act, 47 USC §§201 & 202. Although such carriers no longer are required to file schedules of their rates, terms and conditions of service with the Commission pursuant to Section 203(a) of the Act, 47 USC §203(a), they nonetheless are required to post such rates, terms and conditions on their web sites.

compulsion, to provide service to all customers seeking its service and which it is suited to serve. As the D.C. Circuit explained in *NARUC I*, "[a] particular system is a common carrier by virtue of its functions, rather than because it is declared to be so." 525 F.2d at 644.

Under Verizon's private carriage proposal, common carrier status would depend solely on a carrier's declaration that it was offering "broadband" transmission capacity. Nothing else would change. Verizon would still be able to provide all of the services it currently provides today over the broadband facility and would be able to solicit customers for its various services through advertising, telemarketing, mail brochures, etc. In other words, Verizon would continue to be able to hold itself out to provide broadband service on an indiscriminate basis.¹⁵ And, Verizon's "private broadband transmission" customers would be able to continue to use such transmission to "transmit intelligence of their own design and choosing," which is a "prerequisite of common carrier status." *NARUC v. FCC*, 533 F.2d 601, 609 (D.C. Cir. 1976) quoting *Industrial Radiolocation Service*, 5 FCC 3d 197, 202 (1966).

The only difference between the way Verizon conducts business today and the way that it would presumably conduct business if the Commission were to adopt Verizon's private carriage proposal is that Verizon would be able to avoid all of the requirements of Title II, including the requirements of Section 251(c), in its provision of standalone broadband transmission facilities.¹⁶ Verizon would be able to do so simply by designating a particular facility as providing "broadband capacity" for the provision of what otherwise would be common carrier services.

¹⁵ The holding out test is "an objective one, relying upon what the carrier actually does rather than upon the label which the carrier attaches to its activity or the purpose which motivates it." *Las Vegas Hacienda v. CAB*, 298 F.2d at 434.

¹⁶ The Commission expresses concern that private arrangements would lead to a lessening of competition. *NPRM* at ¶¶51-52.

Plainly the facilities distinction that Verizon asks the Commission to accept for conferring or not conferring common carrier status is legally irrelevant. If Verizon or any ILEC holds itself out as a provider of broadband transmission capacity -- and there is no question that each ILEC does so today -- then it is under a "legal compulsion" to provide such communications services on a common carrier basis. *NARUC I* at 642. The legal standard for determining common carrier status and the substantive requirements of Title II are not so flimsy that they can be avoided by carrier declaration.

V. THERE IS NO NEED TO MODIFY UNIVERSAL FUND OBLIGATIONS IN THIS PROCEEDING.

Because the Commission intends to "continue to pursue and protect the core objectives of universal service" in this proceeding, *NPRM* at ¶65, it has asked commenters to discuss "how to sustain universal service" in a market where "traditional services" are likely to "migrate to broadband platforms." *Id.* at ¶66. In its recently filed comments in CC Docket No. 96-45 (*Federal-State Joint Board on Universal Service*), Sprint has proposed the adoption of a connection-based recovery mechanism for universal service funding obligations. As explained there, such mechanism

will be more stable over time than the current revenue-based system; it will be equitable to consumers who all benefit from universal service; it will be easier for consumers to understand the current collection method; and it will be more cost-efficient from the standpoint for those who ultimately bear the costs of universal service programs -- consumers -- than the current method.

Comments of Sprint filed April 22, 2002 at 4. Sprint also believes that its proposed connection-based method will, at least for the time being, allay any concerns that the Commission has voiced in this proceeding for the same reasons as those set forth in its April 22 Comments in CC Docket No. 96-45 and will not repeat those reasons here.

Sprint, however, does wish to emphasize under a connection-based method, dedicated Internet access services would continue to be exempt from universal service fund obligations.¹⁷ Although it may be that in time, Internet access services provided by ISPs will include other services such as voice telephony, that is not true on any large scale today, and thus there is no need, with the adoption of the connection-based proposal Sprint advocates, to include connections dedicated to Internet access. There is simply no over-arching public policy reason for the Commission to broaden the types of services required to contribute to the universal service fund, especially in view of the fact that Sprint's connection-based method should ensure the collection of the necessary funds without such expansion.

¹⁷ In paragraph 72 of the *NPRM*, the Commission suggests that when a wireline carrier provides broadband Internet access service, it must contribute to the universal service fund based on the Commission's revenue-based methodology. In support, the Commission cites its decision in its *Enhanced Services/CPE Unbundling Order*. However that *Order* cannot be read as imposing universal service fund obligations on a carrier's provision of broadband Internet access service. Rather, that *Order* only addressed the methodology to be used by carriers offering a bundled package consisting of telecommunications services and CPE and/or information services so as to isolate the revenues associated with the provision of telecommunications services. Indeed, the imposition of universal service fund obligations on the provision of a broadband Internet access service that is not coupled with a telecommunications service would be inconsistent with the Commission's tentative finding that such service is not a telecommunications service but rather an information service. *NPRM* at ¶17.

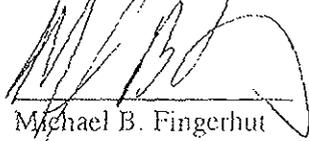
Comments of Sprint Corporation
CC Docket Nos. 02-33, 95-20, 98-10
May 3, 2002

VI. CONCLUSION.

Sprint respectfully requests that any Commission decision in this proceeding be consistent with Sprint's positions as set forth above.

Respectfully submitted,

SPRINT CORPORATION



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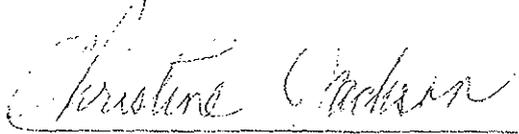
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May 3, 2002

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing **INITIAL COMMENTS OF SPRINT CORPORATION** was sent by electronic mail and United States first-class mail, postage prepaid on this the 3rd day of May, 2002 to the below listed parties.


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CC Docket Nos. 02-33, 95-20, 98-10
June 3, 2002

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
)	
Universal Service Obligations of Broadband)	
Providers)	
)	
Computer III Further Remand Proceedings:)	
Bell Operating Company Provision of)	
Enhanced Services; 1998 Biennial Regulatory)	CC Docket Nos. 95-20, 98-10
Review -- Review of Computer III and ONA)	
Safeguards and Requirements)	
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July 1, 2002

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Reply Comments of Sprint Corporation
CC Docket Nos. 02-33, 95-20, 98-10
July 1, 2002

Before the
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Safeguards and Requirements)	
)	

REPLY COMMENTS OF SPRINT CORPORATION

Sprint Corporation ("Sprint") on behalf of its incumbent local exchange ("ILEC"), competitive LEC ("CLEC")/long distance and wireless subsidiaries, hereby respectfully submits its reply to the comments submitted in response to the Commission's *Notice of Proposed Rulemaking* ("NPRM"). FCC 02-42 issued February 15, 2002, in the above-captioned proceeding.

I. INTRODUCTION AND SUMMARY.

Given the myriad of diverse interests that exist within the broad telecommunications sector of the national economy, it is relatively rare that in a major rulemaking proceeding the overwhelming number of commenting parties representing those interests would agree that the Commission's proposals being considered in the rulemaking are contrary to fact, law and the

public interest.¹ Such is the case, here and the near unanimity of opinion is undoubtedly due, in large measure, to the fact that the Commission has for the first time, to Sprint's knowledge, instituted a rulemaking proceeding in which the ultimate issue is whether to eliminate Title II regulation of bottleneck "last-mile" common carrier facilities. *See* WorldCom/Comptel/ALTS at 2 ("...the FCC has convened one of the most startling rulemaking proceedings in its 68-year history"). These parties recognize that competition in all telecommunications markets, that national security and emergency preparedness, and that the important access goals for Americans with disabilities embodied Section 255 would all be imperiled should the Commission decide, contrary to fact, law and the public interest, to adopt its radical suggestion to eliminate Title II regulation of the ILECs' bottleneck last mile loops simply because such loops are xDSL-capable and are now mainly being used to provide Internet access and perhaps other information services to end users.

About the only parties not to share the view that the elimination of common carrier regulation being considered here would be as unwise as it is unjustified are the Regional Bell Operating Companies ("RBOCs").² But the RBOCs' arguments are devoid of factual substance;

¹ These parties include individual citizens writing one or two page letters; ISPs ranging from those serving a few thousand customers to AOL Time Warner as well as and various ISP associations; non-profit organizations; State regulatory commissions; State Consumer Advocates; non-RBOC ILECs such as Sprint and associations representing the interests of small to mid-size ILECs, especially rural ILECs; CLECs and the CLECs' association ALTS; providers of high speed telecommunications services, *e.g.*, Covad, DSLNet; and virtually all IXC's either in separate comments, *e.g.*, Sprint, AT&T and WorldCom or as part of their industry associations, *e.g.* Comptel and ASCENT.

² The United States Telecom Association ("USTA") which represents many but not all of the incumbent local exchange carriers (ILECs), but which is effectively controlled by the RBOCs, also unsurprisingly endorses the elimination of Title II regulation of the ILECs' bottleneck last mile facilities.

misinterpret the Act and legal precedent; and are contrary to the public interest.

Below, Sprint discusses the several flaws inherent in the RBOCs' arguments. Sprint demonstrates that the RBOCs' claim that Title II regulation has all but eliminated their incentive to invest in broadband infrastructure has no basis in fact; that, despite what the RBOCs are telling the Commission in their Comments, elimination of *Computer Inquiry* safeguards will seriously jeopardize the ability of carriers to secure access to the RBOCs' broadband-enabled last mile transmission facilities so as to provide needed intramodal competition to the RBOCs; that, contrary to the RBOCs' argument, Section 706 of the 1996 Telecommunications Act does not require that the Commission regulate cable modem service and broadband Internet access service in an identical manner; and, that the private carriage arguments of the RBOCs are totally without merit.

Given such flaws, the only legally sustainable outcome of this proceeding is for the Commission to simply re-affirm that the continued applicability of the *Computer Inquiry* regulatory structure to the ILECs' provision of broadband transmission facilities used to provide information services is the only way to fulfill the over-arching goal of the Act to enable competition across all telecommunications markets. As stated in its Initial Comments (at 2), Sprint has "no quarrel with the Commission's tentative conclusion that 'the provision of wireline broadband Internet access service is an information service'. *NPRM* at ¶17." But affirmation of the *Computer Inquiry* decisions will mean that these carriers must unbundle their basic common carrier wireline broadband transmission facilities from their information services and offer the transmission capacity on a standalone basis to other information service providers (ISPs) "under

the same tariffed terms and conditions under which they provide such services to their own [information] service operations."³

II. THE RBOCS DO NOT PROVIDE ANY EVIDENCE TO SUPPORT THE NOTION THAT TITLE II REGULATION INHIBITS INVESTMENT IN AND DEPLOYMENT OF BROADBAND FACILITIES.

The RBOCs claim that Title II regulation, including the Commission requirements adopted pursuant to Section 251 of the Act as well as the Commission's policies adopted in *Computer II* and *Computer III*, have all but eliminated their incentive to invest in and deploy broadband facilities and services. BellSouth (at 5), for example, advances the notion that the "[u]nbundling of ILEC facilities and giving them away at TELRIC-based prices... will assure very limited deployment of [broadband facilities] by LECs and CLECs." SBC (at 26) argues that that the "*Computer Inquiry* service unbundling requirements are [] a drag on the development of new and innovative ways of provisioning broadband Internet access services." And, Verizon (at 26) claims that by doing away with the "*Computer Inquiry* regime, the Commission will remove a significant hindrance to development and deployment of important new broadband technologies and applications." However, the RBOCs do not support such claims with any

³ *Independent Data Communications Manufacturers Association, Inc., Petition for Declaratory Ruling*, 10 FCC Rcd 13717, 13719 (¶13) (1995) (*Frame Relay Order*). See also *Deployment of Wireline Services Offering Advanced Telecommunications Capability*, 13 FCC Rcd 24011, 24030 (¶36) (1998) (*Advanced Services Decision*) where the Commission stated that while the ILEC-provided xDSL-enabled "transparent, unenhanced, transmission path" may be utilized by end users together with an information service such as Internet access, consistent with the *Computer II* regulatory paradigm, the Commission must "treat the two services separately: the first service is a telecommunications service...and the second service is an information service...."

facts.⁴ Indeed, it would be difficult, if not impossible, for them to supply such information. This is so because RBOC decisions to deploy or not to deploy broadband facilities are based on marketplace facts and not on Commission regulation. *See, e.g.*, Sprint (at 5-10), AT&T (at 62-72), WorldCom/Comptel/ALTS (at 39-41), Time Warner Telecom (at 5-9) and Covad (at 8-13). Thus, when confronted with the need to respond to cable modem services being offered by cable companies to residential customers and to the xDSL-based services offered by data CLECs to business customers, the RBOCs began to deploy xDSL services at a rapid clip, notwithstanding the unbundling obligations of *Computer II* or TELRIC pricing requirements. Covad at 33. The RBOCs are now the dominant providers of xDSL-based services. *See e.g.*, WorldCom/Comptel/ALTS at 40 and AT&T at 67. The elimination of the *Computer Inquiry* safeguards will not only solidify the RBOCs dominance but could also lead to an ILEC-monopoly in the provision of wireline broadband services, including both information services and eventually telecommunications services, since all current and potential wireline competitors must have access to the RBOCs' (and other ILECs') last-mile bottleneck facilities if end-users are to be given a choice of the broadband service providers. Such an outcome is simply not in the public interest.

⁴ The RBOCs' inability to provide factual data to show that their "no investment incentive" rhetoric is based on marketplace reality appears to be fairly typical. Certainly, they did not persuade the Supreme Court in *Verizon, et al. v. FCC, et al.*, No. 00-511 *et al.*, that TELRIC pricing does not stimulate infrastructure investment. The Supreme Court refused to be taken in by the RBOCs' speculative argument, holding that "at the end of the day" and "theory aside" the RBOCs' position "founders on fact." *Slip op.* at 45 (May 13, 2002). Given that the RBOCs' position regarding broadband deployment similarly "founders on fact," the Commission should, at long last "put theory aside" and inform the RBOCs that Commission policy cannot be based on speculation.

III. CONTINUED APPLICATION OF THE COMPUTER INQUIRY SAFEGUARDS IS NECESSARY TO REDUCE, IF NOT ELIMINATE, DISPUTES OVER THE RBOCs' RESPONSIBILITIES UNDER SECTION 251 OF THE ACT.

The RBOCs would have the Commission ignore such untoward results at least with respect to the provision of Internet access services. They tell the Commission that they have no incentive to require end-users who subscribe to their broadband services to use the Internet access services of their ISP-affiliate and claim that they will allow end users the ability to choose their own ISPs. Indeed, SBC alleges (at 28) that it "currently does business with hundreds of ISPs" and "it has no desire to discontinue those business relationships." *See also* Verizon at 31 and Qwest at 29. Of course, the RBOCs are required by the unbundling and nondiscrimination requirements of *Computer Inquiry* to "do business" with unaffiliated ISPs, although as set forth in comments by the American ISP Association (at 1), it appears that despite these requirements the RBOCs "have successfully locked America's ISPs out of the broadband portion of the nation's public phone networks by a combination of pricing and provisioning discrimination."⁵ Thus, the fact that SBC or any RBOC currently provides access to unaffiliated ISPs has no predictive value in determining whether the RBOCs will continue to "do business" with unaffiliated ISPs if, contrary to the public interest, the Commission were to exempt the ILECs' provision of broadband Internet access services from the *Computer Inquiry* safeguards.

Even if the RBOCs were willing to continue to "do business" with unaffiliated ISPs, there is absolutely no assurance that the prices the RBOCs would charge such ISPs would be

⁵ It has been widely documented that the RBOCs would rather pay millions of dollars in fines for failing to comply with Commission or State policies designed to enable competition than cede any part of their bottleneck control of last mile access to end users. *See*, Covad at 26-32.

reasonable. Certainly, basic economics teaches that an entity that exercises bottleneck control over an essential input has the ability and the incentive to set its prices for access to such input either to reap monopoly rents or to exclude competitors to the entity's own service. The RBOCs' own comments suggest that they will exploit their bottleneck last mile facilities in such manner. For example, SBC (at 15) argues without any support whatsoever that it is costly for a wireline carrier to provision its broadband facilities to provide "Internet connectivity in a multiple ISP environment" and goes on to tell the Commission (at 28) that once freed from the *Computer Inquiry* safeguards, it will be able to re-structure its business relationships with unaffiliated ISPs. Qwest (at 28) also suggests that end users will have to pay more than the rates charged by the RBOCs for xDSL Internet access service to the RBOCs' affiliated ISPs if they wanted to access non-RBOC-affiliated ISPs of their own choosing. The ability of an entity to raise rivals' costs or exclude them from the marketplace is the essence of market power exploitation. The Commission's *Computer Inquiry* safeguards were designed to enable the Commission to prevent the exercise of such anticompetitive behavior and ensure that all enhanced service providers had non-discriminatory access to basic transmission facilities, 77 FCC 2d at 474-475 (¶231). For this reason alone, such safeguards should not -- indeed, consistent with Commission's statutory mandate to enable competition, cannot -- be eliminated.

Moreover, continuation of the *Computer Inquiry* unbundling and nondiscrimination safeguards is necessary to eliminate any controversy as to whether all carriers will continue to be able to secure access to the RBOCs' broadband-enabled last mile transmission facilities so as to provide needed intramodal competition to the RBOCs. Currently, under Section 251(c) of the Act, carriers are entitled to obtain such transmission facilities either on an unbundled basis at rates that are just, reasonable and nondiscriminatory or on a resale basis at wholesale rates.

Several commenting parties have explained, with considerable force, that even if the RBOCs used their broadband-enabled bottleneck facilities to provide only Internet access service, carriers would still be able to obtain such facilities on an unbundled basis under Section 251(c)(3). See, e.g., AT&T at 29-40, Covad at 78-84, WorldCom/Comptel/ALTS at 72-78.

SBC and Verizon take the different view. They insist that a finding that a broadband transmission facilities used to provide broadband information service are not a telecommunications service, coupled with the rescission of the *Computer Inquiry* requirement that such transmission facilities be unbundled and offered on a standalone basis pursuant to tariff, eliminates their obligations under Section 251(c) of the Act. SBC at 31-32; Verizon at 32-34.

Plainly, this disagreement will lead to more court litigation and create more regulatory uncertainty within the industry. And regulatory uncertainty discourages capital investment by CLECs (in an already difficult time) which, in turn, will inhibit competition in the provision of broadband services contrary to the goals of this rulemaking and the Communications Act. See Time Warner Telecom at 7-8. See also Letter dated June 10, 2002 from the Honorable Robert H. Bork to Chairman Michael Powell at 2 (Regulatory uncertainty makes it "difficult for new entrants to develop business plans that rely on the availability of a particular network element in a particular location."). Sprint strongly believes that the only way to forestall such controversies is to make clear that while the use of broadband transmission facilities to provide Internet access is an information service, such transmission facilities must be unbundled and offered on a standalone basis under Title II. Stated differently, the Commission should simply re-affirm that

the *Computer Inquiry* safeguards continue to apply to the provision of broadband transmission facilities used to provide information services.⁶

IV. THE COMMISSION'S RECENT *CABLE MODEM ORDER* DOES NOT JUSTIFY SCRAPPING THE *COMPUTER INQUIRY* SAFEGUARDS.

All of the RBOCs invoke, in talisman-like fashion, the concept of regulatory parity to argue that they should be exempt from the safeguards established in *Computer Inquiry* when providing information services, including Internet access services, over basic broadband transmission facilities. See generally, BellSouth at 12-15; Qwest at 29; SBC, 8-11; and Verizon at 36. Verizon goes further and calls for the elimination of Title II regulation of all broadband facilities regardless of whether such facilities are used in the provision of an information service or used by the customer on a standalone basis as a transparent transmission path for the movement of customer-supplied information without change to the form or content of such information. Thus, Verizon would have the Commission define a broadband service as "either a service that uses a packet-switched or successor technology or a service that includes the capability of transmitting information that is generally not less than 200 kbps in both directions." Verizon at 5 (emphasis in original). Verizon concedes that this definition would include services such as frame relay which are unquestionably common carrier services. *Id.* at 6. SBC also appears to suggest that the Commission should deregulate all broadband services including those

⁶ SBC (at 20) and Verizon (at 34-35) argue that the *Computer Inquiry* safeguards have no relevance in today's telecommunications marketplace. But their arguments in this regard simply parrot the *NPRM's* view that such safeguards were adopted for narrowband applications then being offered. As Sprint (at 13-15) and others have shown, see e.g., AT&T at 52-54, WorldCom/Comptel/ALTS at 47-52, there is nothing in the *Computer Inquiry* decisions to support such a narrow view.

provided to large businesses. SBC at 23-24.

The primary basis for the RBOCs' regulatory parity argument is Section 706 of the Act which they claim sets forth a specific Congressional mandate that the Commission must treat all providers of similar services the same. *See e.g.*, SBC at 11; Verizon at 23. Thus, or so the RBOCs' argument goes, since the Commission decided to exempt cable modem service from the *Computer Inquiry* regulatory structure, the Commission must abolish the safeguards established in its *Computer Inquiry* decisions for wireline carriers.

Of course, by adopting its tentative conclusion that "the provision of wireline broadband Internet access service is an information service," *NPRM* at ¶17, the Commission will establish regulatory parity with respect to retail offerings of such information service as between ILECs and cable companies whose cable modem Internet access service is also classified as a information service. Moreover, although Sprint does not concede that the Commission has a statutory duty to do so, the Commission may well determine, at some point in the future, that it is necessary to further rationalize its regulation of the disparate entities within its jurisdiction.⁷ However, the RBOCs' reliance on Section 706 to argue that the Commission is required to apply its findings in the *Cable Modem Order* to the RBOCs' provision of wireline broadband services is passing strange. The Act subjects different industry segments, *e.g.*, telephony and cable,

⁷ Currently cable companies providing telephony services over the cable plant must meet all applicable requirements of Title II with respect to those services. *See, e.g., Applications for Consent to the Transfer of Control of Licenses and Section 214 Authorizations from Tele-Communications Inc, Transferor to AT&T Corp., Transferee*, 14 FCC Rcd 3160, 3190 (1999). Sprint would note that because the Commission is still considering the appropriate regulatory structure for cable modem service, it is as premature as it is incorrect for the RBOCs to claim that there is no regulatory parity between their provision of wireline broadband Internet access service and cable modem service provided by cable companies.

wireless and wireline, to different regulatory schemes, and there is no language in Section 706, which is but a footnote to Section 7 of the Act, 47 USC §157, that even remotely suggests that Congress intended to amend those schemes to require that the Commission regulate all of these diverse entities in an identical manner when they are providing broadband services.

The RBOCs do not point to any language in Section 706 that unequivocally sets forth such a requirement. Rather, their claim here rests on the notion that Congress implanted a "regulatory parity" requirement in the definition of the term "advanced telecommunications capability." In particular, they argue that because this capability is defined "without regard to any transmission media or technology," the Commission is required to regulate all providers of broadband services in an identical manner. *See e.g.* SBC at 11; Verizon at 24. That the RBOCs can find a Congressional mandate for parity in the regulation of broadband services in a phrase buried in the definitional subparagraph of a provision added to the Act as a footnote is truly remarkable. Consistent with principles of statutory construction, Congress uses the language of command if it wants the Commission to take a particular action. It does not impose stealth mandates. *See e.g.*, Section 332(c)(1) to the Act, 47 USC §332(c)(1) in which Congress explicitly directed the Commission to treat all providers of commercial mobile services as common carriers. Plainly, the language that the RBOCs rely upon here does not even come close to being command language. As stated, the language is part of a definition and simply cannot be read as imposing any requirement upon the Commission. Thus the Commission would invite

legal error if it were to accept the RBOC's argument that a Congressional "mandate" for parity in regulation of broadband providers is embodied in Section 706.⁸

Verizon also argues that regulatory parity is required by "the equal protection component of the Fifth Amendment's Due Process Clause." Verizon at 24. But for Verizon to prevail here it must demonstrate that there is not "any reasonably conceivable state of facts that could provide a rational basis" for disparate treatment of the RBOCs *vis-à-vis* the cable companies. *FCC v. Beach Communications, Inc.*, 113 S.Ct. 2096, 2098 (1993). See also *Heller v. Doe by Doe*, 133 S.Ct. 2637, 2642 (1993) ("[A] classification cannot run afoul of the Equal Protection Clause if there is a rational relationship between the disparity of treatment and some legitimate government purpose."). As stated, the continued application of the *Computer Inquiry* safeguards to the RBOCs is justified for a number of reasons, including the need to enable intramodal wireline competition and thereby help meet one of major goals of the 1996 Telecom Act of breaking apart the RBOCs' bottleneck control of last mile facilities. See *WorldCom/Comptel/ALTS* at 52-53. Because such justification provides the necessary rational

⁸ SBC (at 12) argues that the Court's decision in *Southwestern Bell Telephone Company v. FCC*, 19 F.3d 1475 (D.C. Cir. 1994) requires regulatory parity since, according to SBC, the Court held that the Commission has "a duty to apply a functional approach that treats all services alike and not to make distinctions based on the identity of the provider or the technology used." This case, however, dealt with the issue of whether the Commission could impose Title II regulation on every activity of a common carrier. In particular, the Court examined whether the Commission met the standards for determining common carriage as articulated by the Court in *National Association of Regulatory Utility Commissioners v. FCC*, 533 F.2d 601, 608-09 (D.C. Cir. 1976) with respect to the Southwestern Bell Telephone's provision of dark fiber. The Court found that the Commission had not done so because it did not find that Southwestern Bell held itself out to provide dark fiber indifferently or that Southwestern Bell was legally compelled to do so. The case had nothing to do with the issue of regulatory parity and SBC's reliance on it to support SBC's regulatory parity claims is wholly misplaced.

basis for differences in regulatory treatment, Verizon's complaint that it will be denied equal protection under the Constitution if the Commission does not scrap the *Computer Inquiry* safeguards is totally without merit.

Verizon also raises what has become the rather routine RBOC argument in proceedings such as this one. It claims that its First Amendment free speech rights are violated by the continued application of common carrier regulation, including line sharing, to its provision of its broadband services. Verizon at 27-29. See also SBC at 28 which claims in passing and without any discussion that continued application of the *Computer Inquiry* safeguards to the RBOCs raises First Amendment concerns. It is ironic that Verizon and to a much lesser extent SBC ask the Commission to abolish *Computer II* and *Computer III* obligations on First Amendment grounds. "It is a purpose of the First Amendment to achieve 'widest possible dissemination of information from diverse and antagonistic sources.'" *United States v. AT&T*, 673 F. Supp. 525, 585 (D.D.C. 1987) quoting *Associated Press v. United States*, 65 S. Ct. 1416, 1424 (1945). This diversity principle which "has been repeatedly recognized by the Supreme Court," *id.* at 585 and fn. 270, is clearly advanced by continuation of the *Computer II* unbundling and nondiscrimination safeguards, since such safeguards will enable end users to have the widest possible array of ISPs from which to choose to obtain their information. In contrast, the elimination of these safeguards would limit customer choice, since the RBOCs would be able to restrict end user Internet access service to their own affiliated ISP. In short, *Computer II* regulation does not prevent the RBOCs from talking with their customers; it simply prevents the RBOCs from exercising bottleneck control over last-mile facilities to limit the free speech rights of their customers. Verizon's and SBC's First Amendment argument here should be summarily rejected.

V. THE RBOC CLAIM THAT THEIR PROVISION OF STANDALONE BROADBAND TRANSMISSION CAPACITY IS PRIVATE CARRIAGE CANNOT WITHSTAND SCRUTINY.

In its Initial Comments (at 15-18), Sprint explained that the offering of standalone broadband transmission capacity, even to a limited class of customers, is a common carriage service and could not, consistent with relevant precedent, be classified as private carriage. Thus, Sprint stated that the Commission should reject Verizon's proposal for the Commission to declare RBOC provision of broadband transmission services to be private carriage. *See also* AT&T at 24 ("The Commission simply has no authority to exempt the Bell's common carrier broadband services from Title II regulation by declaring them to be 'private' carriage"; WorldCom/Comptel/ALTS at 68, quoting *Frame Relay Order*, 10 FCC Red at 13724 (¶52) ("A carrier cannot vitiate its common carrier merely by entering into private contractual relationships with [its] customers'").

Nothing in the comments of the RBOCs justifies a finding that their offering of broadband transmission capacity constitutes private carriage. None of the RBOCs allege that their provision of standalone broadband transmission services involves an offering of unique facilities for which there is no general demand and which are designed to meet the highly specialized needs of a particular customer. *See* AT&T at 23. Nor could they, since broadband transmission facilities, *e.g.*, T-1s, DS-1s and OCNs, have long been offered on a common carrier basis, and demand for broadband transmission, including xDSL enabled facilities, is widespread.

However, the RBOCs do raise "unique" arguments in seeking to convince the Commission to classify their broadband offerings as private carriage. Verizon, for example, not only continues to argue that market power is the determinant of whether a carrier is providing a service as a common carrier or in private carriage, it also goes even further by claiming that the

only purpose of Title II is to "constrain perceived market power on the part of local telephone companies in the narrowband voice world of days gone by." Verizon at 12. Leaving aside the fact that the RBOCs' bottleneck control of last mile facilities over which their broadband services are being provided enable the RBOCs to exercise significant market power, Verizon's notion that a finding of common or private carriage turns on market power is simply incorrect. Sprint at 16-17; AT&T at 22. Moreover, there is absolutely no language in Title II or any case precedent to support Verizon's claim that the Commission's regulatory power under that Title is limited to the provision of voice services provided over narrowband facilities. In fact, the courts have long recognized that the Commission Title II regulatory powers are not confined to a particular set of circumstances or, as Verizon would have it, to a particular type of service provided over a particular type of facility, but are sufficiently flexible to enable the Commission to adapt to "the dynamic and rapidly changing nature of the communications industry." *Competitive Carrier Rulemaking*, 85 FCC 2d 1, 12 (¶29) (1980).

Qwest (at 15-16) argues that the FCC decision in allowing NorLight to operate a fiber optic network in private carriage, *NorLight, Request for Declaratory Ruling*, 2 FCC Red 132 (1987), compels a finding that the RBOCs should be allowed to provide broadband transmission facilities on a private carriage basis. The decision in *NorLight*, however, was based on a set of factors none of which are applicable to the RBOCs' offering of standalone broadband transmission facilities. In particular, NorLight was formed by several utility companies in Wisconsin and Minnesota to build and operate an interstate communications network for the provision of voice, data, and video services to its parent companies and other users, primarily interexchange carriers. The main purpose of Norlight's network was to meet the internal communications needs of its parent utilities and it was designed to the utilities' particularized

specifications. Only excess capacity was to be offered to users whose operations were compatible with these special features. And, "because the compatibility of the system users [was] crucial to the communications needs of the utility companies, *NorLight* [was] not in a position to hold itself out indiscriminately to the public in leasing the network's excess capacity." *Id.* at 135 (¶23). Plainly, none of these factors are present in the provision of standalone broadband transmission at issue here, and the FCC's *NorLight* decision is of no precedential value.

At bottom, the private carriage arguments of the RBOCs amount to nothing more than a plea for the Commission to reclassify what are indisputably common carrier services as private carriage. Such "reclassification" would enable the RBOCs to assert the right to deny competitors access to their bottleneck last-mile facilities directly or engage in discriminatory pricing so as to make it very difficult, if not impossible, for viable intramodal competition to develop. As the comments of Sprint and others have demonstrated, the requirements of Title II and the competitive goals of the Act are not so easily evaded.

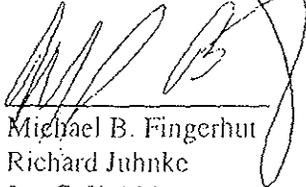
Reply Comments of Sprint Corporation
CC Docket Nos. 02-33, 95-20, 98-10
July 1, 2002

VI. CONCLUSION.

Sprint respectfully requests that any Commission decision in this proceeding be consistent with Sprint's positions as set forth in its Initial Comments and as set forth above.

Respectfully submitted,

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February 8, 2005

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