

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554**

In the Matter of)	
)	
Framework for Broadband Internet Service)	GN Docket No. 10-127
)	
)	

**COMMENTS
of the
NATIONAL EXCHANGE CARRIER ASSOCIATION, Inc.;
NATIONAL TELECOMMUNICATIONS COOPERATIVE ASSOCIATION;
ORGANIZATION FOR THE PROMOTION AND ADVANCEMENT OF SMALL
TELECOMMUNICATIONS COMPANIES;
WESTERN TELECOMMUNICATIONS ALLIANCE; and
EASTERN RURAL TELECOM ASSOCIATION**

The *Notice of Inquiry* (NOI)¹ in the above-captioned proceeding requests comment on the legal framework for regulation of broadband Internet service and seeks input on three potential approaches:

- Maintaining the current “information service” classification for broadband Internet service;
- Reclassifying the underlying transmission portion of broadband Internet service (i.e., Internet connectivity) as a “telecommunications service” subject to all the requirements of Title II of the Act; or
- A new “Third Way” that would identify Internet connectivity as a telecommunications service, but forbear from applying all but six of the forty-eight provisions in Title II governing telecommunication services to it.

The Associations participating in this filing² primarily represent rural rate-of-return incumbent local exchange carriers (RLECs), all of whom currently provide wireline broadband

¹ *Framework for Broadband Internet Service*, GN Docket No. 10-127, *Notice of Inquiry* FCC 10-114 (rel. June 17, 2010) (*Notice of Inquiry* or *NOI*).

² The National Exchange Carrier Association, Inc. (NECA) is responsible for preparation of interstate access tariffs and administration of related revenue pools, collection of certain high-cost loop data, and administering the interstate Telecommunications Relay Services (TRS) fund. *See generally*, 47 C.F.R. §§ 69.600 *et seq.*; *MTS and WATS Market Structure*, CC Docket No. 78-72, Phase I, Third Report and Order, 93 FCC 2d 241 (1983). The National Telecommunications

transmission services on a Title II common carriage basis, as permitted by the Commission's 2005 *Wireline Broadband Order*.³ These services permit customers to transmit simultaneous voice and data communications over local exchange service facilities, enabling data traffic from a customer's modem to be transported to an aggregation point designated by the local exchange carrier to serve end-user customers located in their service territory.⁴ RLECs who offer such services on a Title II basis benefit from the ability to do so, and would like to maintain the option to continue offering wireline broadband transmission services in this manner.

As discussed below, the proposed classification approaches may not impact currently-tariffed broadband transmission offerings because these services appear to differ in key respects from the Internet connectivity services described in the NOI. If, however, the Commission

Cooperative Association (NTCA) is a national trade association representing more than 580 rural rate-of-return regulated telecommunications providers. The Organization for the Promotion and Advancement of Small Telecommunications Companies (OPASTCO) is a national trade association representing approximately 470 small incumbent local exchange carriers (ILECs) serving rural areas of the United States. The Western Telecommunications Alliance (WTA) is a trade association that represents over 250 small rural telecommunications companies operating in the 24 states west of the Mississippi River. The Eastern Rural Telecom Association (ERTA) is a trade association representing approximately 68 rural telephone companies operating in states east of the Mississippi River.

³ Appropriate Framework for Broadband Access to the Internet over Wireline Facilities, CC Docket No. 02-33, Universal Service Obligations of Broadband Providers, Review of Regulatory Requirements for Incumbent LEC Broadband Telecommunications Services, CC Docket No. 01-337, Computer III Further Remand Proceedings: Bell Operating Company Provision of Enhanced Services; 1998 Biennial Regulatory Review – Review of Computer III and ONA Safeguards and Requirements, CC Docket Nos. 95-20, 98-10, Conditional Petition of the Verizon Telephone Companies for Forbearance Under 47 U.S.C. § 160(c) with Regard to Broadband Services Provided Via Fiber to the Premises; Petition of the Verizon Telephone Companies for Declaratory Ruling or, Alternatively, for Interim Waiver with Regard to Broadband Services Provided Via Fiber to the Premises, WC Docket No. 04-242, Consumer Protection in the Broadband Era, WC Docket No. 05-271, Report and Order and Notice of Proposed Rulemaking, 20 FCC Rcd 14853 (2005) at ¶¶ 89-95 (*Wireline Broadband Order*); *Notice of Inquiry* at ¶ 21.

⁴ See, National Exchange Carrier Association, Tariff F.C.C. No. 5, Section 8.1.1, at 8-1 (*NECA Tariff No. 5*).

determines these transmission services do fall within the scope of the services described in the NOI, the Associations respectfully request the Commission ensure any actions taken in this proceeding maintain the *status quo* for RLECs that wish to continue offering such services under tariff.

The Associations further suggest that any classification decisions eventually reached in this proceeding be made with the overall goals of the National Broadband Plan firmly in mind. For example, as comments submitted in response to the Commission's recent *Notice of Inquiry* and *Notice of Proposed Rulemaking* in the National Broadband Plan proceeding⁵ make clear, success of the Commission's Plan depends on prompt action by the Commission to expand the contribution base for the federal Universal Service Fund (USF) to include all broadband Internet service providers in an equitable manner. In addition, the Commission must find ways to adapt existing high-cost USF mechanisms to the broadband world; for example, by developing programs that explicitly support broadband connectivity in high-cost areas all the way from the end user to the Internet backbone. It is critical that actions taken in this proceeding regarding Commission jurisdiction over Internet services do not impede the Commission's ability to develop solutions for USF broadband funding issues in related proceedings.

I. BACKGROUND

In the 2005 *Wireline Broadband Order*,⁶ the Commission determined that wireline broadband Internet access service, including the underlying transmission component, is an

⁵ See, *Connect America Fund*, WC Docket No. 10-90, *A National Broadband Plan for Our Future*, GN Docket No. 09-51, *High-Cost Universal Service Support*, WC Docket No. 05-337, Notice of Inquiry and Notice of Proposed Rulemaking, 25 FCC Rcd 6657(2010) (*USF NOI and NPRM*).

⁶ See, *Wireline Broadband Order* at ¶¶ 12-17.

“information service” subject to Title I of the 1996 Act⁷. In the same Order, however, the Commission gave carriers the option to offer the transmission portion of their wireline broadband Internet service on either a common carriage or non-common carriage basis.⁸ Carriers offering such services on a common carrier basis could also select whether they wanted to offer the service under tariff or on a non-tariffed basis.⁹ Approximately 840 incumbent local exchange carriers (ILECs) exercised the option to offer the transmission portion of the broadband Internet service as a Title II telecommunications service.¹⁰ Of those 840 ILECs offering their transmission service under Title II, as of July 9, 2010, roughly 785 offer Digital Subscriber Line (DSL) Access Service through NECA’s Access Tariff.¹¹

Following the D.C. Circuit’s recent decision in *Comcast v. FCC*, the NOI raises a number of questions about the Commission’s ability to regulate broadband Internet services under the Title I information services classification adopted in the *Wireline Broadband Order*. Consequently, the Commission now seeks comment on the extent of its authority over broadband Internet services under the current Title I classification.¹² Specifically, the NOI seeks comment on whether to retain the current information services classification, or whether the Commission should consider reclassifying the transmission portion of broadband Internet services as a telecommunications service, subject either to the full panoply of Title II regulation or, via forbearance under section 10 of the Act, to a subset of Title II provisions.

⁷ *Id.* at ¶ 12.

⁸ *Id.* at ¶ 94.

⁹ *Id.*

¹⁰ *Notice of Inquiry*, at ¶ 21, n. 53.

¹¹ *Id.*

¹² *Id.* at ¶ 27.

Included among the Title II provisions that would be subject to forbearance under this “Third Way” approach would be section 203 of the Act, 47 U.S.C. § 203, which governs the filing of tariffs for interstate services. Although the Commission proposes not to disturb the *status quo* for carriers currently offering DSL transmission services under tariff, the NOI specifically asks whether forbearance from section 203 of the Act under the “Third Way” alternative would in fact affect carriers’ ability to file tariffs voluntarily.¹³

II. DISCUSSION

A. The Commission Should Maintain The Status Quo For Currently-Tariffed Broadband Transmission Services.

The NOI makes clear that under the proposed “Third Way” approach to regulating broadband Internet service, the Commission does not intend “to disrupt the status quo for incumbent local exchange carriers or other common carriers that choose to offer their Internet transmission services as telecommunications services.”¹⁴ This would necessarily include the ability of RLECs to provide broadband transmission services under tariff, which they are presently able to do.¹⁵

As a threshold matter, the Associations note the DSL transmission services currently offered by Association members do not appear to fall within the ambit of the “Internet connectivity service” described in the NOI. There, the Commission describes “Internet

¹³ *Id.* at ¶ 91.

¹⁴ *Id.* at ¶ 72.

¹⁵ The Commission also states it does not intend “to alter the *status quo* with regard to the application of section 254(k) and related cost-allocation rules” for carriers offering broadband transmission services as telecommunications services. *Id.*, citing *Wireline Broadband Order* at ¶¶ 139-44.

connectivity” as including “the functions that enable [subscribers] to transmit data communications to and from the rest of the Internet.”¹⁶

In contrast, the common carrier transmission services currently offered by RLECs under tariff typically do not provide direct connectivity to the Internet backbone, but instead enable data traffic generated by a customer-provided modem “to be transported to a DSL Access Service Connection Point using the Telephone Company’s local exchange service facilities.”¹⁷ In other words, existing DSL access services do not allow end users to seamlessly connect to the Internet; they are merely one component of Internet access service, providing a transmission pathway to an ILEC network aggregation point where an interface is created allowing for connection to an Internet Service Provider (ISP) customer. Typically at that point the local ISP arranges through third party Internet Protocol (IP) aggregators for middle mile transport, Internet backbone connections, and also adds the functionality required for end users to access the Internet. Thus, it appears the NECA DSL Access Service is fundamentally different from the Internet connectivity defined in the NOI.¹⁸ If so, the proposed regulatory classifications for

¹⁶ *Id.* at ¶ 64.

¹⁷ *NECA Tariff No. 5*, Section 8.1.1, at 8-1. A DSL Access Service Connection Point is an interconnection point designated by the Telephone Company in NECA Tariff F.C.C. No. 4 at which the customer may interconnect its ADSL Access Service provided by the Telephone Company under this tariff or its wireline broadband Internet transmission service provided on a non-tariffed, common carrier basis with the tariffed, interstate access services described below. *Id.* The DSL Access Service Connection Point aggregates Asymmetric Digital Subscriber Line (ADSL) Access Service and/or wireline broadband Internet transmission service data traffic from and to suitably equipped Telephone Company Serving Wire Centers (SWCs). *Id.* Similar tariff provisions exist for Symmetric Digital Subscriber Line (SDSL) Access Service. *See, NECA Tariff F.C.C. No. 5*, Section 8.2.

¹⁸ *See*, Letter from Henry Hultquist, AT&T, to Marlene H. Dortch, FCC, GN Docket No. 10-127 (filed June 24, 2010) (explaining why NECA’s DSL Access Service referenced in the *Notice of Inquiry* do not fit the definition of an “Internet Connectivity Service.”)

broadband Internet transmission service may not have any impact on carriers who currently provide such services.

If the Commission determines otherwise, however, it should avoid taking any actions in this proceeding or subsequent proceedings that may inadvertently limit or prevent RLECs from offering such services under tariff. In *MCI Worldcom, Inc. v. FCC*, for example, the D.C. Circuit reviewed a challenge by MCI to the Commission's decision to forbear from applying section 203 of the Act to non-dominant carrier tariffs. In that situation, the Commission had used its forbearance authority under section 10 of the Act¹⁹ explicitly to prohibit non-dominant carriers from filing tariffs, even on a voluntary basis. In upholding the Commission's decision, the court noted that:

The crucial phrase in the statute is not “forbear from enforcing” but rather “forbear from applying” which suggests a broader authority. As the Commission correctly points out no provision of the Communications Act except § 203(a) requires tariffing, and no provision gives a carrier a positive right to file a tariff, so if it forbears from applying § 203(a) the Commission's staff is not obliged to accept filings.²⁰

Thus, a decision to forbear from “applying” section 203 may in fact raise significant questions about carriers' abilities to continue filing tariffs for broadband transmission services on a voluntary basis. If, however, the Commission chose to “forbear from enforcing” rather than “forbear from applying” section 203, while making clear its intent to continue accepting tariff filings for broadband transmission services, carriers that wish to offer these services on a common carrier basis under tariff should be able to continue doing so without having to seek exemptions from forbearance or otherwise request special permission from the Commission.

¹⁹ See, 47 U.S.C. § 160(a).

²⁰ *MCI WorldCom, Inc. v. FCC*, 209 F.3d 760, 764 (D.C. Cir. 2000).

B. All Determinations Made in this Proceeding or Related Proceedings Should Be Consistent with the Goals of the Commission's National Broadband Plan.

The NOI requests comment on the Commission's ability to require broadband Internet service providers to contribute to the USF under each of the proposed regulatory classifications.²¹ The Associations strongly support immediate action by the Commission to expand the base of USF contributors to include, at a minimum, all broadband Internet service providers over all technological platforms.²² Among other things, this would bring equity to the current USF contribution methodology, which requires carriers, and their customers to contribute to USF when broadband transmission is offered on a common carrier basis but exempts providers who offer broadband transmission on a non-common carrier basis.²³

The NOI also asks whether the Commission under the "Third Way" approach should temporarily forbear from the contribution obligation on broadband connectivity providers, until it adopts rules governing specifically how these providers should calculate their contribution.²⁴ Such a delay is entirely unnecessary. The Commission can immediately impose a contribution requirement on all broadband Internet access providers by temporarily using the same methodology used today for assessing RoR ILECs that contribute on the revenues earned from their stand-alone broadband transmission service. This would adhere to the statutory requirement that every provider of interstate telecommunications services contribute on an "equitable and nondiscriminatory basis."²⁵

²¹ *Notice of Inquiry* at ¶¶ 32, 66, 79.

²² *See*, Joint Comments of NECA, *et al.*, WC Docket No. 10-90 (July 12, 2010) at 68, 73. (*Joint RLEC Association Comments*).

²³ *Wireline Broadband Order* at ¶ 113, n. 357.

²⁴ *Notice of Inquiry* at ¶ 80.

²⁵ *Id.*; *see also*, Connecting America: The National Broadband Plan, FCC (rel. Mar. 16, 2010) at 140-151.

Even if the Commission retains the current Title I classification for those carriers that select it, the Commission can use its permissive authority under section 254(d) of the Act to require providers of interstate telecommunications to contribute to the USF.²⁶ Broadband Internet service providers' contributions are necessary to sustain the Fund for the long-term, which is certainly in the public interest.²⁷ Moreover, expansion of the contribution base would permit prudent growth in the size of the Fund, since both broadband Internet access connections and revenues are growing. Finally, the addition of these contributions to the USF fund would also be consistent with a reformed high-cost program that explicitly supports broadband services and networks.²⁸

The Commission should also ensure that decisions made in this proceeding do not interfere with its authority to develop USF programs that explicitly support all components of broadband Internet connectivity from the end user to the Internet backbone. Existing high-cost mechanisms primarily target "last mile" loop infrastructure and, to a lesser extent, local switching facilities. For broadband Internet services, however, a more significant factor increasing costs and limiting speeds may well be the high cost of obtaining "middle mile" transport between rural service areas and the Internet backbone.²⁹ Developing support mechanisms targeted to these facilities may significantly improve RLECs' abilities to provide customers with higher broadband speeds at lower rates, which in turn will improve broadband adoption rates in rural areas as well.

²⁶ *See*, 47 U.S.C. § 254(d).

²⁷ *Joint RLEC Association Comments* at 68.

²⁸ The Commission may also wish to require that all service providers seeking to participate in universal service support distribution programs be required to offer broadband transmission service on a Title II-type basis as a condition of receiving USF support in rural areas. *See id.* at 61-63.

²⁹ *Id.* at 8, 58.

The Commission also requests comment on the impact of different classification approaches on its ability to prevent broadband Internet service providers from engaging in discriminatory or preferential practices with respect to end users or content providers.³⁰ The Associations continue to recommend that RLECs be permitted wide latitude in how they manage their networks and services.³¹ The need for rural broadband providers to manage their network traffic is becoming more acute due to the increasingly bandwidth-intensive applications and services being utilized by consumers. Moreover, many Internet-based applications and services cannot function properly, or in a manner consistent with users' expectations, if they experience latency, jitter, or packet loss. Therefore, the ability to utilize reasonable network management practices will enable RLECs to meet subscribers' service quality expectations.

In addition, the ability to offer "managed" or "specialized" services will improve the ability and incentive of RLECs to invest in their broadband networks, to the benefit of all of their subscribers. Thus, an outright prohibition on all forms of discrimination could significantly impede the ability of rural broadband providers to offer value-added services beneficial to customers. This, in turn, could limit deployment and adoption of broadband offerings, contrary to the goals of the National Broadband Plan.

III. CONCLUSION

Regardless of the classification approach the Commission ultimately decides may be appropriate for broadband Internet services, the Commission should take care in this proceeding to assure carriers that currently offer their broadband transmission service on a common carrier basis may continue doing so notwithstanding a decision to forbear from the tariff filing

³⁰ *Notice of Inquiry* at ¶ 45.

³¹ *See, e.g.*, NECA Comments, GN Docket No. 09-191 (filed Jan. 14, 2010) at 2, 12; NTCA Comments, GN Docket No. 09-191 (filed Jan. 14, 2010) at 5-8; and OPASTCO Comments, GN Docket No. 09-191 (filed Jan. 14, 2010) at 2-6.

requirements of section 203 of the Act. In addition, the Commission should assure classification decisions eventually made with respect to broadband Internet access services do not adversely affect the Commission's ability to pursue the goals of the National Broadband Plan, including, for example, expansion of USF contribution requirements to include all broadband providers and services.

July 15, 2010

Respectfully submitted,

NATIONAL EXCHANGE CARRIER
ASSOCIATION, Inc.

By:



Richard A. Askoff
Linda A. Rushnak
Its Attorneys
80 South Jefferson Road
Whippany, NJ 07981
(973) 884-8000

NATIONAL TELECOMMUNICATIONS
COOPERATIVE ASSOCIATION

By: /s/ Daniel Mitchell

Daniel Mitchell

Vice President, Legal and Industry
4121 Wilson Boulevard, 10th Floor
Arlington, VA 22203
(703) 351-2000

ORGANIZATION FOR PROMOTION
AND ADVANCEMENT OF SMALL
TELECOMMUNICATIONS
COMPANIES

By: /s/ Stuart Polikoff

Stuart Polikoff

Vice President – Regulatory Policy and
Business Development
2020 K Street, NW, 7th Floor
Washington, DC 20006
(202) 659-5990

WESTERN TELECOMMUNICATIONS
ALLIANCE

By: /s/ Derrick Owens

Derrick Owens

Director of Government Affairs

317 Massachusetts Avenue N.E., Ste. 300C

Washington, DC 20002

(202) 548-0202

EASTERN RURAL TELECOM
ASSOCIATION

By: /s/ Jerry Weikle

Jerry Weikle

Regulatory Consultant

5910 Clyde Rhyne Drive

Sanford, NC 27330

(919) 708-7404

CERTIFICATE OF SERVICE

I hereby certify that a copy of the Associations' Comments was served this 15th day of July, 2010 by electronic filing and e-mail to the persons listed below.

By: /s/ Elizabeth R. Newson
Elizabeth R. Newson

The following parties were served:

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

Best Copy and Printing, Inc.
Room CY-B402
445 12th Street, SW
Washington, DC 20554
fcc@bcpiweb.com