

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

In the Matter of	)	
	)	
Appropriate Framework for Broadband	)	CC Docket No. 02-33
Access to the Internet over Wireline Facilities	)	
	)	
Universal Service Obligations of Broadband	)	
Providers	)	
	)	
Computer III Further Remand Proceedings:	)	CC Docket Nos. 95-20, 98-10
Bell Operating Company Provision of	)	
Enhanced Services; 1998 Biennial Regulatory	)	
Review – Review of Computer III and ONA	)	
Safeguards and Requirements	)	

**COMMENTS OF**

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**COMMENTS OF UCC, *ET AL.***

**Introduction and Summary: The Commission Proposes to Depart, Without Analytical Support, from Thirty Years of Successful Communications Policy**

In the above-captioned Notice of Proposed Rulemaking (“*NPRM*”), the Federal Communications Commission considers the “appropriate legal and policy framework ... for broadband access to the Internet provided over domestic wireline facilities.” *NPRM* at ¶ 1. The Commission appears to believe that broadband Internet access is completely new, leaving the Commission free to write on a blank slate. The Commission concludes that broadband Internet services are a single, fused information service with no separate telecommunications service component that ought be unbundled and made available to others on a nondiscriminatory basis. *NPRM* at ¶ 17.

This conclusion flies in the face of history. The Commission’s policy for the last 30 years with respect to these issues can be boiled down to a simple principle:

Whether an information service is unregulated depends on whether an underlying telecommunications component is available separately and on a non-discriminatory basis to

anyone else who wishes to offer that information service.

For each information service provider, the question has been and should be answered by looking at whether it owns facilities over which telecommunications are provided, and, if so, whether it possesses market power that would enable it to engage in anti-competitive conduct against other information service providers.

The Commission has admittedly not always been clear about its approach. Some of this is understandable. At the time, these issues and ideas were relatively new. The Commission was creating a new framework and attempting to make distinctions amid a new and rapidly-changing era. Sometimes the Commission pointed erroneously to certain characteristics or theories to reach a particular result. For example, the Commission's early contamination theory did not logically distinguish services that were regulated from those that ought to be deregulated. Even so, the bedrock principle above is vigorous and will stand up through each and every Commission principle and decision.

When the Commission and opponents of open access quote past decisions intending to show the complete deregulation of enhanced and information services, they ignore the realities of the time when those decisions were written. In the past, non-telephone companies *could not offer* basic/telecommunications services. So, to the extent enhanced/information services were "unregulated" they were unregulated because the basic/telecommunications component was *necessarily* subject to Title II— thus it was tariffed and offered nondiscriminatorily to the public. Enhanced service providers of the 1970s and 1980s purchased their telecommunications inputs and *resold* them to the public along with data processing. Those that did own their own facilities were too small, with too little market power to harm other competitors, especially because the dominant

incumbent LECs were subject to rigorous unbundling requirements under the *Computer Inquiry* decisions. Thirty years later, the Commission has abandoned this approach without an attempt to explain its change in policy and without providing any analytical distinction between services that will be deregulated and those that will remain regulated.

The FCC's "intermodal" approach anticipates the day when we benefit from rigorous facilities-based competition. This goal envisions a world where, presumably, any individual can purchase telephone service, Internet access, or other services, from a wide number of providers, each of whom maintains a separate, proprietary transmission network. The approach presumes that network owners must control them completely. Owners could package their networks with content or computer applications exclusively, or sell them to others. It would be entirely feasible that some services would be available on some networks, but not available on others, depending on the business plan of the network owner. Perhaps a large number of network competitors could produce vibrant competition, but today the projected number of modalities for most consumers barely reaches three – cable, telephone, and some wireless provider (satellite, mobile wireless, or various fixed wireless services).

Regardless of what might occur in the future, the facts today do not support the FCC's proposal. Most consumers do not have choice, not among two providers let alone more than two. Without evidence that consumers have intermodal choice, the Commission's proposals make no sense and cannot withstand scrutiny.

The Commission's proposed approach is lacking in analysis and seemingly ignorant of history. This approach will engender the very condition the Commission seeks to avoid: uncertainty in the business place. The Commission's proposed definitional structure will make its job in every area

more difficult and fraught with lengthy and uncertain court battles. In many areas, the Commission will deregulate broadband only to be immediately be faced with the task of creating remedies from its own ancillary authority rather than relying on the clear authority of the Act. By removing broadband Internet services from the statutory framework, the public must enter a no-man's land where the Commission's power is not limited or predictable. Whereas, for example, individuals receive clear protection under Section 255, they must now hope the Commission successfully protects them and that courts uphold the Commission. This approach, therefore, will not even achieve the Commission's own ends.

A final note. In the present *NPRM*, the Commission asks often whether, despite its new definitional pronouncements, safeguards are needed and can be implemented to protect competition. The answer is yes, safeguards are needed and yes, the Commission has the authority to implement them. *UCC et al.* support these safeguards even as we contest the legality of the proposed decision. If the Commission proceeds with its incorrect analytical approach, but chooses to try to protect consumers anyway, *UCC et al.* will not turn down the half loaf even as *UCC et al.* await a later victory that will provide a full meal predicated on vibrant competition rather than monopoly.

*UCC et al.* describes its concerns with the Commission's proposal below. In sum, the Commission's proposals are insufficiently reasoned and violate its own rules and the statute for the following reasons:

- The Commission analysis that broadband Internet access is an information service does not provide any analytical distinction between broadband Internet access and narrowband Internet access. Therefore, under the Commission's proposed analysis, dial-up Internet access must be treated the same. Such an action would completely undermine the local telephone competition provisions of the Act and eliminate the vibrant ISP market.
- The Commission relies on misstatements of past policy that imply enhanced services were completely deregulated.

- The Commission's conclusion that broadband Internet access is fused into a single information service applies the long-discredited contamination theory to broadband Internet.
- The Commission's analysis neuters the Act's local competition provisions. In so doing, it violates not only those provisions, but the forbearance provision in Section 10, which prohibits the Commission from forbearing from the core local competition provisions, Sections 251(c).
- The Commission's proposed safeguards linking broadband Internet deregulation with local telephone competition performance make no sense – they link markets and services that are unrelated under the Commission's analysis and will do nothing to ameliorate the harm the Commission's proposal will bring. Moreover, the public will lose the protection of Section 214, which prevents sudden loss of service, Sections 201 and 202 which provide for nondiscriminatory service to all areas of the country, and of Section 255, which aids individuals with disabilities.

**I. The Commission Does Not Distinguish Broadband Internet Access from Narrowband Internet Access in Any Meaningful Way.**

The Commission's analysis that broadband Internet access is an information service that should not be unbundled does not provide any meaningful analytical distinction between broadband Internet access and narrowband Internet access. Speed has never been a relevant distinction for regulatory treatment, and the Commission does not explain why speed is relevant here. Therefore, under the Commission's proposed analysis, dial-up Internet access must be treated in the same manner that the Commission proposes to treat broadband. Such an action would completely undermine the local telephone competition provisions of the Act and eliminate the vibrant ISP market.

Moreover, the description the Commission utilizes to describe broadband Internet access is indistinguishable from services described by the Commission in the 1970s. These services were certified as common carriage under *Computer I*. In 1973, Packet Communications Inc (PCI) applied to the FCC to be certified as a common carrier in order to offer packet switched store and forward data transmission to the public. *Application of PCI for 214 Authorization*, 43 F.C.C.2d 922 (1973). PCI wanted to "institute and operate a communications network providing terminal-computer and computer-computer communications utilizing technology known as 'packet-switching.'" This service is barely distinguishable from descriptions of Internet access offered today. The Commission described the offering as follows:

'Packet Switching' technology was initially developed by U.S. Government sponsored research for the Department of Defense Advanced Research Projects Agency (ARPA). Unlike the conventional telephone system, in which circuits are switched to provide an individual customer with exclusive use of a particular line or circuit, a 'packet switching' circuit transmits small groups (packets) of digitized data over a network of lines to a designated recipient, usually a computer. These packets are stored and forwarded over the best available path through the network.



*Id.* at ¶ 2.

After analyzing the service, the Commission concluded, “it is our opinion that the services PCI initially will offer the public over its proposed facilities would constitute PCI a common carrier within the meaning of Section 3(h) of the Communications Act and thus subjects PCI to the certification and other applicable requirements of Title II of the Communications Act.” *Id.* at ¶ 16. Other companies received permission under Section 214 to offer similar services. *See Application of Graphnet for Section 214 Authority*, 44 F.C.C.2d 800 (1974) (nation wide computerized, packet switched store-and-forward facsimile communications system); *Application of Telenet for 214 Authority*, 46 F.C.C.2d 680 (1974) (terminal-computer and computer-computer communications by packet-switching and high speed transport).

A 1976 decision clarifies that not only was data transmission via computer technology common carriage, but facilities-based common carriers must unbundle it. Tymnet, a subsidiary of the data processing company Tymshare, sought permission via Section 214 to offer common carriage services. *Application of Tymnet for Section 214 Authorization*, 65 F.C.C.2d 247 (CCB 1976) As a subsidiary of Tymshare, Tymnet planned to create “a ‘resale’ common carrier data communications network” that was “essentially an extension of Tymshare's existing private shared network” which it “[d]eveloped as a natural adjunct to its time sharing data processing business.” Tymnet would become a facilities owner by acquiring some of Tymshare’s private network components to expand its service. *Id.* at ¶ 2.<sup>1</sup>

Not only did the Common Carrier Bureau agree that telecommunications offered by a data

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<sup>1</sup> Tymnet filed the application because a compliant alleged that, prior to that date, Tymshare had been offering common carriage services in conjunction with its data processing services. *Id.* at ¶ 4.

processing corporation were subject to common carrier regulation, the Commission also required Tymnet and Tymshare to comply fully with the *Computer Inquiry* separate subsidiary and other safeguards in effect at the time. *Id.* at ¶¶ 5-9. Thus, the subsidiary Tymnet was designated a common carrier, while its parent company continued to offer data processing services free of regulation. The underlying transmission component was regulated; the data processing service based on the regulated service was not.

Nothing of regulatory significance distinguishes the services offered by PCI, Graphnet, and Tymnet 25 years ago from modern Internet access. The Commission's factual description of broadband Internet services cannot distinguish those services from those analyzed 25 years ago. *See NPRM* at ¶ 21. Two lessons flow from this fact. First, the FCC cannot claim to make a completely new determination based on its analysis of broadband Internet access. Second, the Commission cannot materially distinguish broadband service from narrowband service.

The Commission's discussion of broadband Internet service offerings cannot distinguish those early offerings from the present offerings. Those providers of yesteryear offered the ability to "store," "interact with," and "make available" data, just like modern broadband Internet service providers. The only difference between those technologies and modern technology, is *speed*. Speed, however, is not a factor in any of the relevant statutory definitions.

The flaws in the Commission's analysis are easily seen when one tries to test its limits. What is not an unregulated Title I service under the Commission's definition? Certainly not narrowband dial-up Internet access. Both broadband and dial-up offer the end user an opportunity to store data for web pages and retrieve data from others' web pages, the example cited in the FCC's *NPRM*. *NPRM* at ¶21. The Commission makes no attempt to describe technologically or otherwise how the

examples in paragraph 21 distinguish broadband Internet from any service classified as common carriage in the past.

## **II. Descriptions of Enhanced Services as Completely “Unregulated” Are Inaccurate: Unbundled Telecommunications Were Always Available.**

When the Commission and opponents of open access quote past decisions intending to show the complete deregulation of enhanced and information services, they ignore the realities of the time when those decisions were written. In the past, non telephone companies *could not offer* basic/telecommunications services. So, to the extent enhanced/information services were “unregulated” they were unregulated because the basic/telecommunications component was *necessarily* subject to Title II— thus it was tariffed and offered nondiscriminatorily to the public. Enhanced service providers of the 1970s and 1980s purchased their telecommunications inputs and *resold* them to the public along with data processing. Those that did own their own facilities were too small, with too little market power to harm other competitors, especially because the dominant incumbent LECs were subject to rigorous unbundling requirements under the *Computer Inquiry* decisions. A review of the Commission’s past decisions demonstrates the fiction of complete unregulation.

In the original 1971 *Computer Inquiry* decision, the FCC required common carriers to submit descriptions of services that combined telecommunications and data processing elements so that the FCC had an opportunity to consider whether the service should be unbundled. 28 FCC 2d at 279. But the Commission did not require non-common carriers to make such a submission because it “the non-common carrier generally will be using communications facilities leased from a common carrier to provide these services.” *Id.*

Under *Computer I*, even when the whole service was not tariffed, common carriers that

offered it were still required to unbundle and offer the telecommunications component separately. So, although the Commission called them “unregulated,” it referred to the service offered as an integrated package, it explicitly excluded the underlying telecommunications component. For example:

...where message-switching is offered as an integral part of and as an incidental feature of a package offering that is primarily data processing, there will be total regulatory forbearance with respect to the entire service whether offered by common carrier or non-common carrier, *except to the extent that the common carriers offering such a hybrid service will do so through affiliates and will be subject to regulatory safeguards....*

*First Computer Inquiry Final Decision*, 28 F.C.C.2d 267, 305 (emphasis added).

If, on the other hand, the package offering is oriented essentially to satisfy the communications or message-switching requirements of the subscriber, and the data processing feature or function is an integral part of the and incidental to message-switching, *the entire service will be treated as a communications service for hire, whether offered by a common carrier or non-common carrier and will be subject to regulation under the Communications Act.*

*Id.* (emphasis added).

The FCC recognized that carriers would have incentives to combine services so that they could offer common carriage offerings free of regulation and migrate previously tariffed services to unregulated offerings. 28 F.C.C.2d at 280-81. Thus, the FCC required carriers to provide notice and explanation to the FCC explaining why the service should not be subject to regulation and, required common carriers to provide 90 days notice before they detariffed an element that could be used as an input for another carrier’s combined service. 28 F.C.C.2d a 279-81.

In *Computer II*, the Commission reapplied the separation requirements under *Computer II*’s new definitions, “enhanced” and “basic” service. This new requirements freed companies purchasing and reselling common carrier services from structural separation. *Computer II*, 77 F.C.C.2d at 459, ¶ 195. But it required all basic services to be offered to the public at tariff. These services could be

purchased by others and resold to the public as part of enhanced services by so-called “resale” carriers:

Carriers owning communications transmission facilities [are] required to offer enhanced services only on a resale basis, which would necessitate the acquisition of the underlying transmission facilities pursuant to tariff if they desired to offer enhanced services. As a result of this modification, underlying carriers would still be limited to the provision of regulated services, but resale carriers could offer both regulated and unregulated services with the latter being offered on a non-tariffed basis.

77 F.C.C.2d at 458, ¶ 192. “Availability of the telecommunications network would be a common denominator for any new entrant or existing provider of enhanced services; the same communications services would be available to all providers of enhanced services on the same terms and conditions.”

*Id.* at 458-59, ¶ 193.

The Commission explained that this system would:

establish a structure under which common carrier transmission facilities are offered by them to all providers of enhanced services (including their own enhanced subsidiary) on an equal basis. Inherent in the resale structure is the fact that the separate corporate entity may not construct, own, or operate its own transmission facilities. In essence, *the resale subsidiary must acquire all its transmission capacity from an underlying carrier pursuant to tariff. This means that the same transmission facilities or capacity provided the subsidiary by the parent, must be made available to all enhanced service providers under the same terms and conditions.*

*Id.* at 474, ¶ 229 (emphasis added).

“Because enhanced services are dependent upon the common carrier offering of basic services, a basic service is the building block upon which enhanced services are offered. Thus those carriers that own common carrier transmission facilities and provide enhanced services, but are not subject to the separate subsidiary requirement, must acquire transmission capacity pursuant to the same prices, terms, and conditions reflected in their tariffs when their own facilities are utilized.” *Id.* at 475, ¶ 231.

In the original *Computer III* notice, the Commission acknowledged its description of enhanced services as “unregulated” was misleading. It acknowledged that although “[t]he rule provides that, ‘Enhanced services are not regulated under Title II of the Act[,]’” [but] the structure is essentially a resale one, and under the rule ... underlying services ... are ‘offered over common carrier transmission facilities used in interstate communications,’ implying that underlying facilities are obtained subject to common carrier regulation.” *Computer III NPRM*, 50 Fed. Reg. 33581, 33583 (1985). As the Commission explained, “[e]nhanced service offerings that are made by a carrier's separate affiliate (whether the affiliate is employed by choice, or is required) are unregulated in their entirety. What remains subject to regulation is the underlying transmission offering of the carrier upon which the enhanced service is engrafted.” *Id.* at 33588.

### **III. The Contamination Theory is Not Appropriate Policy.**

The Commission’s “new” discovery that broadband Internet access service is wholly unregulated because it combines telecommunications with information services is analytically indistinguishable from the Commission’s poorly-reasoned “contamination” theory. This theory has been discredited because of applying it indiscriminately creates dangerous regulatory loopholes.

As early as the 1980s, entrants other than telephone companies began to compete in the market for long-distance data processing. These providers did not own their own telecommunications facilities. They purchased tariffed telecommunications services from common carriers, combined it with their own data processing services, and sold them to the public. These providers were sometimes called value added networks, or “VANs.”

Because VANs did not own their own transmission facilities and purchased them at tariff from common carriers, the Commission recognized that they should be regulated differently, and developed

the “contamination” theory. *See Computer III Phase II Order*, 2 FCC Rcd 3072, 3080 (1987); *Frame Relay Order*, 10 FCC Rcd 13717, 13719-21 (1995). The contamination theory held that the information service offering “contaminated” the underlying telecommunications component thus deregulating the whole bundle. *Id.* The contamination theory contributed to confusion when it was divorced from an understanding of which carriers it reached. The Commission explained:

These disparate policies (i.e., a “contamination” one for entities lacking market power and a non-“contamination” one for dominant carriers such as AT&T and the BOCs) have made sense as a policy matter, but since we have not articulated a basis for treating the two groups differently some confusion may have been created. Deregulation of entities that do not have underlying facilities and that obtain transmission capacity from others pursuant to their tariffs is sensible; no policy goal is served by regulating any aspect of these entities' offerings. *Conversely, the offerings of dominant carriers are often monopoly or near-monopoly ones.* Such offerings are needed and used by competitors and can be manipulated anticompetitively. Ensuring that such offerings continue to be made subject to the common carrier duties of reasonableness and avoidance of unreasonable discrimination serves important policy goals.

*Computer III NPRM*, 50 Fed. Reg. at 33588, n.34 (emphasis added). In the *Computer III Order*, the Commission rejected the contamination theory as it applied to BOCs and AT&T. *Frame Relay Order*, 10 FCC Rcd at 13723, n.68.

Applying the contamination theory to a facilities-based carrier “would allow circumvention of the *Computer II* and *Computer III* ... framework. [A carrier] would be able to avoid ... unbundling and tariffing requirements for any basic service that it could combine with an enhanced service. This is obviously an undesirable and unintended result.” *Frame Relay Order* at 13723, ¶44; *see also Computer III NPRM*, 50 Fed. Reg. at 33586 (“Were we to have followed the ‘contamination’ theory, at some point it might be argued that conventional exchange telephone service also will be unregulated because it is contaminated with the enhanced service of protocol conversion.”)

The Commission’s analysis of broadband Internet access is no different than its rejected application of the contamination theory to facilities-based carriers. *NPRM* at ¶¶ 21, 25. The

Commission provides no limit to its conclusion that offering an information service in conjunction with broadband telecommunications removes it from Title II. The Commission acknowledges this outcome: “would the removal of all unbundling requirements motivate incumbent LECs, including BOCs, to only provide broadband transmission as part of integrated information services in order to restrict its availability?” *NPRM* at ¶ 52. This conclusion is even more sweeping because, as described above, the Commission failed to meaningfully distinguish broadband from narrowband telecommunications. Under the Commission’s approach, the contamination theory will eventually be allowed to deregulate all telecommunications services.

#### **IV. The Commission’s Proposal Violates Section 10 of the Act by Forbearing From Section 251(c).**

The Commission’s analysis neuters the Act’s local competition provisions. In so doing, it violates not only those provisions, but the forbearance provision in Section 10, which prohibits the Commission from forbearing from the core local competition provisions, Sections 251(c).

The Commission acknowledges that its determination that broadband services are not telecommunications services would remove them from Sections 251 and 252, *see NPRM* at ¶ 61, where it previously had subjected them to 251 and 252, *NPRM* at ¶ 26, n.60. Moreover, as described above, the Commission has not distinguished broadband from narrowband Internet access, thus adopting it will eventually lead to removal of narrowband telecommunications services from Section 251.

This action will violate the forbearance provision, Section 10 by *de facto* forbearing from Section 251(c). The Commission is proscribed from forbearing from Sections 251(c) of the Act until it has been “fully implemented.” 47 U.S.C. § 160(d). The Commission cannot begin to show that those provisions have been fully implemented. The Courts of Appeals have not allowed the



Commission to do indirectly what it is prohibited from doing directly.

**V. The Retail/Wholesale Distinction is Not Relevant to the definition of Common Carriage.**

The Commission seeks comment about whether xDSL service offered as a stand-alone service or as a wholesale service to ISPs is a common carriage offering. *NPRM* at ¶¶ 26-27.

Although the Commission is not completely clear on this point, the Commission appears to believe that the term “at retail” in Section 251(c)(4) somehow informs the definition of what constitutes a telecommunications service (which, is provided “to the public.”) The wholesale discount provision in Section 251 is designed to allow other telecommunications providers to offer telecommunications services to the public by purchasing services from an ILEC and reselling them to the public. Common carriage, on the other hand, produces non-discriminatory treatment but is not concerned with promoting local competition as is Section 251.

The commission considered the limits of a “retail” service when it considered whether the telecommunications services purchased by ISPs as an input to their information service offering was subject to a discount under Section 251(c)(4). The Commission concluded that the statutory term “at retail” referred most logically to services that were to be ultimately consumed by the user, and not to services that were going to be packaged by an intermediary who would sell it to the end user. *AOL Bulk Services Order*, 14 FCC Rcd 19237, 19244, ¶ 14 (1999). Moreover, as the Commission explained, “Congress intended section 251(c)(4) to apply to services targeted to end-user subscribers, because only those services would involve an appreciable level of avoided costs that could be used to generate a wholesale rate.” *AOL Bulk Services Order*, 14 FCC Rcd at 19245, ¶ 17 (citing *First Local Competition Order*).

The term “retail” has a different meaning from “to the public.” Common law precedent defines

a “common carrier.” The courts have concluded, as the Commission confirmed, that a common carrier service need not be a retail service. A provider may offer a common carrier service to other carriers. “Common carrier services include services offered to other carriers, such as exchange access service, which is offered on a common carrier basis, but is offered primarily to other carriers.” *Universal Service Order*, 12 FCC Rcd 8776, 9177, ¶ 785 (1998).

The definition of what is provided “to the public” is quite different from what is provided “at retail” for good reason. An offering can be a common carriage offering even if it is a “wholesale” service logically not subject to a discount. This makes sense both as a matter of law and as a matter of policy. It is logical that a firm must offer whole sale services without discrimination (so that, for example, all similarly situated wholesale purchasers are treated the same) but that those services should not be subject to an additional statutory discount (because those services are already subject to a discount).

#### **VI. Proposed Safeguards are Illogical; Other Safeguards will be Lost.**

After spending a significant portion of the *NPRM* assuming that broadband services and narrowband services are completely separate, and thus regulated under different systems, the Commission then asks whether *Computer II and III* safeguards should be linked to BOC performance in the market for dial-up services. Without foundation or explanation, the Commission asks whether application of BOC *Computer III* safeguards should be dependent upon whether the BOCs are “achieving certain performance levels in the delivery of non-broadband services.” *NPRM* at ¶ 48. The Commission does not explain why performance measures in non-broadband services should allow a BOC regulatory freedom in the offering of broadband services. The Commission asks whether BOCs that have opened their networks under Section 271 should be allowed greater latitude with

respect to broadband services. These two areas are not logically linked. Such safeguards would, at best, produce more competition in local telephony, while the more profitable and growing market in broadband service remains in the control of a few dominant carriers. The Commission does not articulate what it hopes to gain with such safeguards, and they are not self-evident.

The Commission asks whether self-providing wireline broadband providers should be required to “make transmission available to competitors at market-based prices” or “commercially reasonable rates.” *NPRM* at ¶ 50. In some sense, these proposals do not differ much from the Title II obligation to provide prices at non-discriminatory rates. Certainly, were the FCC to travel down the wrong-headed path of deregulating all broadband services through definitional gymnastics as proposed here, such an obligation would help to ameliorate the damage wrought, although it would not be sufficient.

The Commission is correct to note that removing broadband services from Title II would foreclose both state and federal regulators from protecting consumers from sudden loss of service, those with disabilities, and general nondiscrimination obligations. *NPRM* at ¶ 57, 59. Providers would because providers would not be required to seek permission for discontinuing service under Section 214. Given the status of the telecommunications market, this is not an idle threat. @Home and other Internet service providers have suddenly gone out of business, leaving consumers stranded and regulators powerless. *See, e.g.,* Mike Wendland, “Comcast’s Switch Nets Complaints,” *Detroit Free Press* (Jan. 3, 2002). Those in rural areas, supposedly the ones who should benefit from increased deployment, will not be able to seek nondiscriminatory deployment of service under 201 and 202 of the Act.

Similarly, individuals with disabilities would lose the automatic protection of Section 255 if broadband Internet access services are not telecommunications services. 47 U.S.C. § 255(c). This

result further underlines that the Commission's analysis is in direct tension with the structure and goals of the Act. What services could be more beneficial to enhancing the lives of people with disabilities of not broadband Internet and the future broadband information services to come? *Regardless, if the Commission determines to proceed ahead with its proposal, it must use its ancillary authority to protect individuals with disabilities from the negative consequences of this decision.* UCC, *et al.* worry that, like the businesses that seek certainty but instead will receive litigation-oriented uncertainty, individuals with disabilities will suffer unnecessary risk and delay as the Commission's proposed change leaves them without the crystal clear protection of Section 255.

### **Conclusion**

The Commission's tentative conclusions in this NPRM represent a seismic shift in the regulatory treatment of information services. These proposals are insufficiently distinguished from past FCC decisions. The decision as proposed will not only shut down the vibrant competitive ISP market, but deprive the public of protections provided for it by Congress in Title II of the Communications Act. With analysis of this caliber, the Commission will reap reversal in court, and thus undermine the regulatory certainty the Commission seeks and the public desperately needs. The Commission should reconsider its tentative conclusions, reaffirm its prior holdings that enhanced

services include within them telecommunications services, and regulate those providers who have the power to anti-competitively use their control of those services.

Respectfully submitted,

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