

The Broadband Internet Access Order Does Not Require Cost Reallocation For Provision of Non-Common Carrier Broadband Transmission Capability By Rate-of-Return LECs

- I. *The Commission's Goal in the Broadband Internet Access proceeding was "to facilitate deployment in the manner that best promotes wireline broadband investment and innovation, and maximizes the incentives of all providers to deploy broadband."*¹
 - A. For this reason, the Commission permitted "all wireline broadband providers" -- not only price cap carriers -- the option of offering these services on a non-tariffed or on a non-common carrier basis.²
 - B. Price cap carriers were not required to perform any cost reallocation to offer broadband transmission capability on a non-common carrier basis, but rate-of-return carriers were left without clear direction, and therefore are at a competitive disadvantage in pricing their DSL transmission capability.³
- II. *The Broadband Internet Access Order's ambiguity as to rate-of-return carriers creates unnecessary costs and inhibits their ability to compete.*
 - A. In discussing broadband internet access transmission capability, the Commission held that the goal of promoting broadband deployment can best be achieved "by providing *all* wireline broadband providers the flexibility to offer these services in the manner that makes the most sense as a business matter and best enables them to respond to the needs of consumers in their respective service areas."⁴
 - B. The Commission further held that when *price cap* carriers provide broadband transmission services on a non-common carrier basis, they do *not* need to reclassify their loop costs as non-regulated nor allocate any portion of their loop costs to their non-regulated activities.⁵

¹ *Appropriate Framework for Broadband Access to the Internet over Wireline Facilities Universal Service Obligations of Broadband Providers*, CC Docket No. 02-33, *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 USC §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 & Order and Notice of Proposed Rulemaking, 20 FCC Rcd 14853, para. 89 (2005), *appeal pending* ("BIAS Order").

² *Id.* paras. 89, 91.

³ *Id.* paras. 134-35.

⁴ *Id.* para. 89 (emphasis added).

⁵ *BIAS Order* paras. 134-35 (finding the costs of such reclassification would outweigh the benefits), para. 142 (rejecting a NARUC proposal to require reallocation of a portion of the loop cost and a corresponding reduction in subscriber line charges).

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- C. Even as the Commission provided rate-of-return carriers the option of providing broadband Internet access transmission services on a non-common carrier basis, it did not reach a decision on cost allocation.⁶
1. The basis for this result was the Commission's belief that "all rate-of-return carriers that have participated in this proceeding have stated that they wish to continue offering broadband transmission as a Title II common carrier service."⁷
 2. The letters cited by the Commission, however, *do not* state that "all" such carriers wish to continue offering broadband transmission as a common carrier service – only that many carriers do, and therefore the option should be preserved.
 3. The Commission's statement also overlooked comments by another party pointing out the diversity among rate-of-return carriers that would likely affect which carriers would choose to keep a tariffed offering and which would not.⁸
 4. Moreover, because the Commission did not specifically seek comment on offering price cap carriers a non-common carrier option but denying that option to some rate-of-return LECs, it should not have assumed no rate-of-return carriers would object, based purely on two *ex parte* letters.
 5. The remainder of the BIAS Order clearly grants the option of detariffing to all wireline LECs, price cap and rate-of-return regulated carriers alike.
- D. Requiring rate-of-return carriers to continue offering broadband Internet access transmission services on a common carrier basis requires them to continue to contribute to universal service on the end-user revenues from these services, and to incur other costs that would not be incurred in a non-common carrier environment.

⁶ *BIAS Order*, para. 138 ("we do not, at this time, address the treatment of private carriage arrangements by rate-of-return carriers because the issue is entirely hypothetical").

⁷ *Id.* (citing *ex parte* letters of NTCA and OPASTCO).

⁸ Reply Comments of Independent Telephone and Telecommunications Alliance (ITTA) in WC Docket No. 02-33, filed July 1, 2002, at 2-3 and n. 8 ("given the broad diversity among midsize and smaller carriers' operations, service territories, and customer bases, the Commission should recognize that some of these carriers might rationally choose to offer the transmission component as a separately-tariffed telecommunications service, while others might decide to offer this component, if at all, only as part of a broadband Internet access information service"). The Commission's *Notice of Proposed Rulemaking* did not seek comment on treating price cap and rate-of-return LECs in such disparate manners, so there was little comment on the question in the record.

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- III. *Commission precedent supports treating rate-of-return carriers the same as price cap carriers in this context, and not requiring reallocation of loop costs merely because the loop becomes capable of more than one application.*
- A. End-user broadband Internet access service is classified as an information service whether provided by price cap carriers or rate-of-return carriers (or their cable competitors).⁹ Thus, Universal Service contribution obligations no longer apply.
 - B. “The public switched telephone network is not a single-use network. Modern network infrastructure can provide access not only to voice services, but also to data, graphics, video, and other services.”¹⁰
 - C. Adding advanced service capability (like the addition of enhanced and information services before) has no effect on the continuing availability of the loop for narrowband service. The narrowband customer is receiving no less service merely because the loop has new capabilities; therefore rates for narrowband voice service should not be reduced merely because the loop has added capabilities.¹¹
 - D. There is no economic justification in burdening a new, competitive service with costs that are being recovered by an existing service.¹²
 - E. The Commission also has held that Section 254 of the Act is not violated if carriers use federal high-cost loop support to invest in, maintain and upgrade loop facilities so that they are capable of advanced applications not yet eligible for support.¹³

⁹ *BIAS Order* para. 5.

¹⁰ *See, e.g., Federal-State Joint Board on Universal Service, Multi-Association Group (MAG) Plan for Regulation of Interstate Services of Non-Price Cap Incumbent Local Exchange Carriers and Interexchange Carriers*, CC Docket Nos. 96-45, 00-256, Fourteenth Report and Order, Twenty Second Order on Reconsideration, 16 FCC Rcd 11244, para. 201 (2001), *recon. Pending* (“*RTF Order*”).

¹¹ *BIAS Order, supra*, para. 143 (“It would cause a consumer who buys the two services over the same loop to pay much more for that facility than a consumer who buys only narrowband service, even though the cost of that facility is fixed and does not vary in proportion to usage”). The Commission also rejected as irrational the idea of reallocating costs only for those customers who purchase both narrowband and broadband capabilities, *id.*, para. 143.

¹² *BIAS Order* para. 143 (“This form of cost reallocation produces anomalous results, and we do not adopt it.”).

¹³ *See, e.g., RTF Order* para. 201 (“use of support to invest in infrastructure capable of providing access to advanced services does not violate section 254(e)”).

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- IV. *The same treatment should be afforded rate-of-return carriers and their broadband competitors.*
- A. The Commission already has held that rate-of-return carriers need not reallocate loop costs or decrease their federal universal service support merely because the loop becomes capable of new applications.¹⁴
- B. The Commission specifically stated that its policies should not create regulatory barriers to the deployment of advanced services, but instead should encourage that carriers deploy plant capable of advanced capability, and encourage replacement of plant that cannot provide access to advanced services.¹⁵
- C. The Commission also specifically stated that such policies should apply “uniformly to all local exchange carriers.”¹⁶
- D. At his confirmation hearing in September, Chairman Martin testified:

We have removed legacy regulations, like tariffs and price controls, which discourage investment in broadband networks. We have also worked to create a level playing field among broadband platforms so that high-speed Internet access offered by phone companies is treated the same as high-speed Internet access offered by cable companies.¹⁷

The Commission should not exclude rate-of-return carriers from the pro-competitive benefits of this important deregulatory step.

¹⁴ See, e.g., *RTF Order* para. 201(citations omitted):

The public switched telephone network is not a single-use network. Modern network infrastructure can provide access not only to voice services, but also to data, graphics, video, and other services. High-cost loop support is available to rural carriers ‘to maintain existing facilities and make prudent facility upgrades[.]’ Thus, although the high-cost loop support mechanism does not support the provision of advanced services, our policies do not impede the deployment of modern plant capable of providing access to advanced services. Rural carriers may consider both their present and future needs in determining what plant to deploy, knowing that prudent investment will be eligible for support. The measures that we adopt in this Order will increase incentives for carriers to modernize their plant by increasing the total amount of high-cost loop support available under the cap.

¹⁵ See, e.g., *RTF Order* para. 202.

¹⁶ *RTF Order* para 202 (policy should apply to all LECs, including rural and non-rural LECs).

¹⁷ U.S. Senate Committee on Commerce, Science and Transportation, Hearing on Nominations (Sept. 12, 2006), transcript p. 31 (12-19).