EX PARTE OR LATE FILED

1515 North Court House Road
Suite 500
Arlington, VA 22201-2909

January 9, 2002

Honorable Michael Powell
Chairman
Federal Communications Commission
445 12th Street, SW
Washington, DC 20554

CC Docket No. 02-33

Dear Chairman Powell:

I applaud your initiation of a new proceeding on the appropriate regulatory classification for broadband services.

The need for a national broadband policy is critical. While cable companies are moving to enhance their already dominant position in broadband – through the merger of AT&T Broadband and Comcast, for example – their key competitors continue to be hamstrung by onerous common carrier regulations designed for the traditional voice world as it existed in years gone by. If the broadband market is to develop on a competitive basis, it is critical that the Commission remove artificial barriers to investment and, most importantly, that it treats all broadband providers alike. Further, handicapping telephone company broadband services thwarts the ability of telephone companies to compete with cable in its core video market. Only by establishing a competitively neutral national broadband policy can the Commission ensure that market forces, not regulation, will determine the winners and losers in the broadband and video marketplaces.

We believe that the best way for the Commission to establish a comprehensive policy for these new services is to start afresh by declaring that all broadband services fall under Title I of the Act. This is certainly the right approach for our bundled high-speed information service offerings, given that the Commission has long classified all of our other information services under Title I. *But it is just as essential for all broadband transmission services, regardless of whether they are part of a bundled service offering or offered on a stand-alone basis.* It is therefore vital that the Commission's upcoming proceeding address the appropriate regulatory classification for these stand-alone broadband transmission services.

There are strong policy reasons and ample legal authority for classifying *all* broadband services – *including stand-alone transmission services* – under Title I, regardless of the heritage of the company that provides them. Although the full case will be made in the upcoming proceeding, there are a number of reasons why the Commission should strongly consider this approach from the outset.

First, the Commission must eliminate regulatory requirements that deter investment in broadband facilities if phone companies and other broadband providers are to have appropriate market-based incentives to build broadband facilities. As you have recognized, this country is still in the early stages of broadband deployment, and billions of dollars of new investment are needed to increase the availability of broadband services. Classifying broadband transmission services under Title I will allow the Commission to adopt a new policy specifically tailored to these new services – one that will free the market to drive efficient investment.

Second, classifying broadband transmission services under Title I will avoid creating a significant disincentive for the owners of broadband facilities to provide these services on a stand-alone basis. If the Commission were to place only bundled high-speed information services under Title I, then telephone companies and cable companies alike would be discouraged from using their facilities to offer stand-alone broadband transmission services, whether to their own customers or to other providers as an input for new service offerings. Put to a choice of using their broadband facilities to offer either unregulated bundles of services or heavily regulated pure transmission, companies likely will choose the former.

Third, the Commission has ample legal authority to declare that all broadband transport services fall under Title I – though it could not lawfully do so for one class of providers only, such as for cable companies but not telephone companies. Whether provided by telephone companies or cable companies, high-speed data transmission may constitute a form of "telecommunications" under the terms of the Communications Act. But that does not mean that, when offered on a stand-alone basis, the resulting service must be classified as a "telecommunications service" (which the Commission has interpreted to be synonymous with common carriage) subject to common carrier regulation under Title II.

On the contrary, it is well established that telephone companies can be common carriers for some purposes but not others, and telephone companies have long provided a broad array of non-common carrier services. In upholding the right of telephone companies to offer dark fiber services on a non-common carrier basis, the D.C. Circuit noted that "[w]hether an entity in a given case is to be considered a common carrier" turns not on its typical status but "on the particular practice under surveillance."[1]

---

[1] *Southwestern Bell Tel. Co. v. FCC*, 19 F.3d 1475, 1481 (D.C. Cir. 1994); *see also NARUC v. FCC*, 533 F. 2d 601, 608 (D.C. Cir. 1976) (finding it "logical to conclude that one can be a common carrier with regard to some activities but not others")..

Traditionally, the Commission has imposed common carrier regulation on services only to counteract market power in the underlying transport market.[2] Absent such market power, the Commission has allowed service providers to elect for themselves whether to offer their services on a common carrier or non-common carrier basis. And it is clear that telephone companies can act as non-common carriers where they offer transmission services or facilities, just as they can for other types of services.[3]

In the broadband market, telephone companies are the new entrants challenging the cable incumbents, leaving no reason for the Commission to subject their broadband offerings to the requirements of Title II. Moreover, there is no inconsistency in treating telephone companies as common carriers in the narrowband voice market but not in broadband, given the very different economics and competitive dynamics of the two markets. Accordingly, the Commission has ample legal authority to allow telephone companies to elect to offer broadband transmission services on a non-common carrier basis.

Finally, the Commission has previously adopted precisely the approach advocated here to permit other emerging markets and technologies to develop free of regulatory constraints. In its *Computer II* decision, for instance, the Commission found that, although it had jurisdiction over "computer-enhanced" services under Title I, it would not serve the public interest to subject enhanced services to traditional common carriage regulation under Title II because, among other reasons, the enhanced services market was "truly competitive."[4] And it reached the same conclusion for computers and other forms of customer premises equipment that were once part of the AT&T services tariffed under Title II. Just as the Commission has used Title I in the past to enable market forces to shape then-emerging markets, it should do so again with broadband.

---

[2] *See, e.g., AT&T Submarine Systems, Inc.*, Mem. Op. and Order, 13 FCC Rcd 21585, 21589 ¶¶ 9, 12 (1998) (explaining that "public interest requires common carrier operation" of facilities only where incumbent operator "has sufficient market power to warrant regulatory treatment as a common carrier"); *Cox Cable Communications, Inc., Commline, Inc. and Cox DTS, Inc.*, Mem. Op., Decl. Ruling, and Order, 102 F.C.C.2d 110, 121-22, ¶¶ 26-27 (1985) (finding no "compelling reason" to impose common carrier regulation on carrier that had "little or no market power"); *see generally* M. Kende, Office of Plans and Policy, FCC, *The Digital Handshake: Connecting Internet Backbone*, at 9 (OPP Working Paper No. 32, Sept. 2000) (common carrier regulation "serve[s] to protect against anti-competitive behavior by telecommunications providers with market power. In markets where competition can act in place of regulation as the means to protect consumers from the exercise of market power, the Commission has long chosen to abstain from imposing regulation.").

[3] *See, e.g., Virgin Islands Telephone Corp. v. FCC*, 198 F.3d 921 (D.C. Cir. 1999) (upholding regulation of undersea fiber optic telecommunications cable on non-common carrier basis); *Southwestern Bell Tel. Co.*, 19 F.3d 1475 (recognizing provision of dark fiber on non-common carrier basis); FLAG Pacific Limited, *Cable Landing License*, DA00-2568 (Int'l Bur. 2000) (involving undersea telecommunications cable on a non-common carrier basis); FLAC Atlantic Limited, *Cable Landing License*, DA99-2041 (Int'l Bur. 1999) (same).

[4] *Amendment of Section 64.702 of the Commission's Rules and Regulations (Second Computer Inquiry)*, Final Decision, 77 F.C.C.2d 384, 430, ¶ 119, 432, ¶ 124, 433, ¶ 128 (1980) ("*Computer II*").

You suggested in a recent speech that the proper response when "someone advocates regulatory regimes for broadband that look like, smell like, feel like common carriage" is to "scream at them." We're not screaming, but we are asking the Commission in the upcoming proceeding seriously to consider treating *all* broadband services under Title I, thus allowing marketplace competition to deliver better services at lower prices – just as the Commission did with such spectacular success in the case of computers, the Internet, and other information services.

Sincerely,

William P. Barr

Cc: Commissioner Abernathy
Commissioner Copps
Commissioner Martin