

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

In the Matter of

Appropriate Regulatory Treatment for
Broadband Access to the Internet Over Cable
Facilities

CS Docket No. 02-52

COMMENTS OF VERIZON

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Summary

While the Commission can and should subject the broadband services of all providers to minimal regulation under Title I, it should only do so for cable to the extent it does so at the same time for telephone companies. This is required not only by the Act, but also by the APA and the Constitution. If market forces can be relied upon to ensure adequate negotiated ISP access to the almost 70 percent of mass-market broadband connections controlled by cable companies, the Commission would have no basis to doubt that those same forces will operate to ensure adequate ISP access to the much smaller number of broadband customers served by telephone companies. Moreover, leaving cable deregulated without also removing the regulatory shackles that hamper telephone companies' ability to compete would be counterproductive, and it would risk allowing cable to extend its lead and jeopardize the continued competitiveness of the broadband market.

¹ The Verizon telephone companies are the local exchange carriers affiliated with Verizon Communications Inc. listed in Attachment A.

I. The Market For Broadband Mass Market Services is Fully Competitive.

Cable modem services are offered in the residential and small business broadband market, which the Commission has referred to as the “mass market” -- a market which is fully competitive, in large part as a result of competition from companies like Verizon.² The Commission has noted with approval “a continuing increase in consumer broadband choices within and among the various delivery technologies,” which indicates that “no group of firms or technology will likely be able to dominate the provision of broadband services.”³ Each of the four main delivery technologies competes head to head with the others in a single broadband mass market.⁴ All four are functionally similar: they all provide Internet access at comparable speeds. In addition, as the Commission has previously recognized, broadband services using different technologies are available at similar prices.⁵

² Accompanying these comments are the *Broadband Fact Report* (Exhibit A) and Declaration of Dennis W. Carlton and Hal S. Sider (Exhibit B) first filed with Verizon’s Comments in CC Docket No. 01-337 (March 1, 2002).

³ *Rulemaking to Amend Parts 1, 2, 21, and 25 of the Commission’s Rules to Redesignate the 27.5-29.5 GHz Frequency Band, to Reallocate the 29.5-30.0 GHz Frequency Band, to Establish Rules and Policies for Local Multipoint Distribution Service and for Fixed Satellite Services*, 15 FCC Rcd 11857, ¶ 19 (2000); see also, e.g., *Applications for Consent to the Transfer of Control of Licenses and Section 214 Authorizations from MediaOne Group, Inc., Transferor, to AT&T Corp., Transferee*, 15 FCC Rcd 9816, ¶ 116 (2000) (finding that cable operators, despite having a commanding share of the broadband market, face “significant actual and potential competition from . . . alternative broadband providers”).

⁴ See Carlton/Sider Decl. ¶¶ 14-15.

⁵ *Broadband Fact Report* at 9-10. Two-way satellite services, which have been commercially available for about a year, are somewhat more expensive than cable modem, DSL, or fixed wireless services at present — *i.e.*, they cost about \$70 per month rather than \$35-\$50. But broadband satellite prices have already begun to decline and are expected to decline further in the near future. Moreover, as with cable providers, the equipment needed for broadband satellite may also be used for video service, which provides added value that must be factored into any straight comparison. And some satellite providers have begun offering special discounts to customers that purchase both video and Internet access services. See *id.* at 10.

Currently, four main technologies are being used to provide broadband services to mass-market consumers: cable modem, DSL, satellite, and fixed terrestrial wireless.⁶ Cable companies are the largest providers of these services, with existing broadband-capable infrastructure reaching nearly two-thirds of U.S. homes.⁷ DSL lags behind, reaching only about 40 percent of U.S. homes last year.⁸ As of September 2001, there were 6.2 million cable modem subscribers in the U.S., compared to 2.8 million residential DSL subscribers.⁹ Cable also continues to add new subscribers at a faster rate than providers using other technologies.¹⁰ Over the past year, cable has increased its market share of new subscriber additions. Even before cable operators began this latest growth spurt, the Commission predicted that cable operators would continue to serve the majority of residential broadband customers until at least 2004,¹¹ and industry analysts expect cable to maintain a considerable lead over DSL and other broadband technologies for the foreseeable future.¹²

⁶ Other technologies, not yet widely available, may be used to deliver broadband in the future, including fiber to the home.

⁷ *Broadband Fact Report* at 4 & n.5

⁸ *Broadband Fact Report* at 5 & n.13.

⁹ *Broadband Fact Report* at 1.

¹⁰ *Broadband Fact Report* at 1.

¹¹ *Inquiry Concerning the Deployment of Advanced Telecommunications Capability to All Americans in a Reasonable and Timely Fashion, and Possible Steps to Accelerate Such Deployment Pursuant to Section 706 of the Telecommunications Act of 1996*, 15 FCC Rcd 20913, ¶ 189 (2000) (“*Second Advanced Services Report*”) (“Many analysts expect that over the next five years, cable modem subscriptions will continue to increase dramatically, reaching an average estimate of 15.2 million subscribers by year-end 2004.”); *id.* at 20986, ¶ 191 (“Many analysts predict that, over the next five years, residential DSL subscription will grow to 13 million”).

¹² *Broadband Fact Report* at 12.

Although both two-way satellite and fixed wireless are new technologies with very small market shares at present, they are expected to grow rapidly and to take share from cable modem and DSL operators in the coming years.¹³ According to one report, “[t]wo-way satellite broadband Internet access will be the fastest growing single-access technology. . . . This rapid growth will reflect the introduction and aggressive marketing of several high-profile satellite Internet services to the residential market during the 2002 to 2004 period, as well as the continued expansion of the installed base of satellite dishes in U.S. households for satellite TV broadcast services such as DirecTV.”¹⁴ WorldCom has announced that it would begin offering “two-way broadband access to business customers throughout the continental U.S.”¹⁵ As far as terrestrial wireless services are concerned, in addition to the already-licensed MMDS and LMDS services, the Commission recently authorized the creation of a new Multipoint Video and Data Distribution Service, which will be licensed to share the 12.2-12.7 GHz band with DBS and other satellite operators.¹⁶

These emerging technologies may offer unexpected solutions. A story last week in the *New York Times* reported that a small company called Etherlink has developed a service using an inexpensive wireless data standard known as Wi-Fi “to build a system that can transmit Internet

¹³ *Broadband Fact Report* at 8.

¹⁴ Business Communications Co., *Market for Broadband Internet Access Continues to Soar*, Broadband Opportunities: A Mini Series (Nov. 1, 2001) at <http://www.bccresearch.com/editors/RG-262B.html>.

¹⁵ Press Release, *WorldCom Launches New Internet Access Services: Two-Way Satellite, Gigabit Ethernet and OC-48 Services Offer more Accessibility, Speed and Reliability to Businesses Nationwide*, at http://www.worldcom.com/about_the_company/press_releases/display.phtml?cr/20011127.

¹⁶ See generally *Amendment of Parts 2 and 25 of the Commission's Rules to Permit Operation of NGSO FSS Systems Co-Frequency with GSO and Terrestrial Systems in the Ku-Band Frequency Range*, 16 FCC Rcd 4096 (2000).

data up to 20 miles at high speeds — enough to blanket entire urban regions and make cable or D.S.L. connections obsolete.”¹⁷ The company says that its devices could be made for less than \$150 and that its service will enable it “to skate around the cable and phone companies.” *Id.*

Equally significant, service providers clearly view one another as direct competitors. Time Warner and AOL have touted the “significant actual and potential competition affording consumers adequate choice across existing and emerging [broadband] platforms.”¹⁸ The refusal of cable companies to sell advertising time to telephone companies seeking to promote DSL service confirms that cable modem providers perceive DSL providers to be their direct competitors.¹⁹ For its part, Verizon views cable modem operators as the main competitors to its DSL offerings.

Consumers also view the technologies as interchangeable. Recent survey results confirm the opinions of industry analysts who describe mass-market broadband consumers as “platform agnostic.”²⁰ Earthlink CEO Garry Betty confirmed that “[c]ustomers don’t care if its cable or

¹⁷ “2 Tinkerers Say They’ve Found a Cheap Way to Broadband,” *New York Times*, June 10, 2002 at <http://www.nytimes.com/2002/06/10/technology/10WIRE.html>.

¹⁸ Reply of America Online, Inc. and Time Warner Inc., *Applications of America Online, Inc. and Time Warner Inc. for Transfers of Control*, CS Docket No. 00-30, at 16 (May 11, 2000).

¹⁹ Seth Schiesel, *Cable Giants Block Rival Ads in Battle for Internet Customers*, *N.Y. Times*, June 8, 2001, at C1; Erik Wemple, *Cable Giants Hit Over ISP Ad Policies*, *Cable World*, June 11, 2001.

²⁰ *Broadband Fact Report* at 8; *see also, e.g.*, Ariana E. Cha, *Broadband’s a Nice Pace If You Can Get It*, *Washington Post*, Feb. 28, 2001 at G04 (“People don’t really care whether it’s cable or DSL or satellite, or a carrier pigeon for that matter, as long as they have the quality they need for a price they find affordable.” (citing Lisa Pierce, Telecommunications Analyst, Giga Information Group)); Tim Greene and Denise Pappalardo, *The Last Mile Access Race is Heating Up*, *Network World Fusion* (Apr. 24, 2000), at <http://www.nwfusion.com/news/2000/0424lastmile.html> (“Ultimately, it won’t matter to customers what the access method is so long as it’s fast.” (citing Nick Stanley, Analyst, Communications Industry Research)).

D.S.L.”²¹ This is to be expected — consumers want broadband functionality, and they do not care what kind of hardware or software is used to implement that functionality.

II. A Deregulatory Framework for All Broadband Services Will Promote Deployment of Such Services.

The Notice asks “whether there are legal or policy reasons why we should reach different conclusions with respect to wireline broadband Internet access service and cable modem service.”²² There are no reasons to treat similar, competitive services differently, and every reason to treat them the same.

The Notice goes on to ask whether the Commission should exercise its Title I authority over cable modem services.²³ The answer is that it should, but only to the extent that it exercises that authority over telephone company mass market broadband services. All services should be regulated the same and only to the minimum extent absolutely necessary.

Two central goals of the 1996 Act are to promote facilities-based competition and to encourage deployment of new technologies. Indeed, the preamble to the 1996 Act describes it as an act “to promote competition and reduce regulation . . . and encourage the rapid deployment of new telecommunications technologies.”²⁴ Given the newness of and rapid rate of change in the

²¹ Saul Hansell, *Demand Grows for Net Service at High Speed*, N. Y. Times, Dec. 24, 2001, at C1.

²² Notice ¶ 78.

²³ Notice ¶ 77.

²⁴ Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56, preamble; *see also* Pub. L. No. 104-104, § 706, 110 Stat. 56, 153 (codified at 47 U.S.C. § 157 note). Similarly, Section 706 of the 1996 Act commands the Commission to “encourage the deployment on a reasonable and timely basis of advanced telecommunications capability to all Americans,” by using, among other things, “regulatory forbearance, measures that promote competition in the local telecommunications market, or other regulating methods that remove barriers to infrastructure investment.” And Sections 10 and 11 of the Communications Act require the Commission to remove regulatory requirements that it cannot justify as “necessary” to

broadband market, the lack of any market power by any provider in the marketplace, and the Commission's prudent historical reluctance to impose burdensome regulations on emerging industries, the most rational regulatory approach to the broadband market would be to treat all broadband services under Title I of the Communications Act. Likewise, those same facts dictate that the resulting rules should be only that minimum set necessary for all competing platforms and technologies.

A. Strong Policy Considerations Support Deregulation of Mass Market Broadband Services, Particularly Telephone-Company-Provided Broadband.

Traditionally, the Commission regulated services in order to counteract market power. By contrast, “[i]n 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.”²⁵ As demonstrated above, the broadband mass market is already competitive. Hence, there is no need to regulate any provider or class of providers as dominant carriers in their provision of broadband. There is certainly no justification for so regulating one class of providers while declining to impose the same requirements on all others.

The lopsided imposition of dominant-carrier Title II regulation is bad competition policy. The Department of Justice has recognized that “[a]pplying different degrees of regulation to firms in the same market necessarily introduces distortions into the market; competition will be harmed if some firms face unwarranted regulatory burdens not imposed on their rivals.”²⁶

serve the public interest. Collectively, these statutory mandates require the Commission to lift the regulatory burdens that inhibit broadband deployment.

²⁵ M. Kende, Director of Internet Policy Analysis, Office of Plans and Policy, FCC, *The Digital Handshake: Connecting Internet Backbones*, OPP Working Paper No. 32, at 12 (Sept. 2000) at http://www.fcc.gov/Bureaus/OPP/News_Releases/2000/nrop0002.html.

²⁶ Reply Comments of the U.S. Department of Justice, *Competition in the Interstate Interexchange Marketplace*, CC Docket No. 90-132, at 26 n.42 (Sept. 28, 1990).

Experience shows that the market will pick winning strategies and technologies if regulators will get out of the way and allow the market to work. As Professor Kahn and Dr. Tardiff explain:

“No one can possibly know the ultimate size of the market and how it will be supplied. The task of policy is to remove all remedial hindrances to the competitive market’s giving us the definitive answers.”²⁷

Professor Kahn and Dr. Tardiff also note the “absurdity of shackling a competitor running in second place,” as the current regulatory scheme does to local telephone companies in the broadband market.²⁸ They then go on to identify four distinct harms to consumers from the application of dominant-carrier regulations to local telephone companies, but not other broadband competitors: First, “by increasing the costs and risks of only one type of competitor,” the regulatory scheme “makes it less likely that the services those competitors are uniquely qualified to offer will make it to the market.”²⁹ Second, “handicapping one group could prevent the lower-cost supplier from taking over the share of the market that it would otherwise obtain.”³⁰ Third, the regulatory advantage enjoyed by the local telephone companies’ broadband competitors “could give them an advantage in the provision of services other than broadband — such as video — thereby weakening and conceivably distorting competition in the supply of such complementary services.”³¹ Fourth, by depressing the local telephone companies’ incentives to

²⁷ Declaration of Alfred E. Kahn & Timothy J. Tardiff, ¶ 8 (Dec. 18, 2001) (“Kahn/Tardiff Dec.”), Exhibit B to Comments of Verizon, NTIA Docket No. 011109273-1273-01 *Request for Comments on Deployment of Broadband Networks and Advanced Telecommunications* (filed Dec. 19, 2001) (Attached here as Exhibit C).

²⁸ Kahn/Tardiff Dec. ¶ 18.

²⁹ Kahn/Tardiff Dec. ¶ 18.

³⁰ Kahn/Tardiff Dec. ¶ 18.

³¹ Kahn/Tardiff Dec. ¶ 18.

invest and innovate, dominant-carrier regulation also dampens “the efforts of rivals of the successful innovator, by their own efforts, to invent around and surpass the originator.”³²

Lopsided regulation, therefore, could potentially destroy telephone companies as a viable broad-scale competitor for cable, leaving the dominant provider to face only wireless competitors.

Experience teaches that, once the Commission has identified a market as competitive, freeing non-dominant carriers from unnecessary regulatory burdens successfully stimulates both competition and investment. Wireless services, for instance, flourished in the wake of detariffing and a leveling of the regulatory playing field. Investment in wireless services took off in earnest after Congress required the Commission to regulate all commercial wireless services in a similar manner in 1993, and the Commission shortly thereafter determined that it would subject wireless operators to minimal regulation.³³ Notwithstanding the fact that, at the time the Commission made its decision to deregulate wireless services, “the cellular services marketplace” was not “fully competitive,” the Commission found that “[c]ompetition, along with the impending advent of additional competitors, leads to reasonable rates.”³⁴ As a result of the Commission’s deregulatory course, the number of wireless customers has increased nine-fold, and prices have fallen by nearly one third.³⁵

³² Kahn/Tardiff Dec. ¶ 18.

³³ See generally *Broadband Fact Report* at 31.

³⁴ *Implementation of Sections 3(n) and 332 of the Communications Act*, Second Report and Order, 9 FCC Rcd 1411, ¶ 174 (1994) (“*Wireless Deregulation Order*”).

³⁵ See Cellular Telecommunications & Internet Association, *Background on CTIA’s Semi-Annual Wireless Industry Survey*, Charts on Wireless Subscribership & Average Local Monthly Bill (June 30, 2001), available at http://www.wow-com.com/pdf/wireless_survey_2000a.pdf (measuring time-period between 1993 and 2001).

B. Cable Modem Services May Be Regulated Under Title I Only to the Extent that Local Telephone Company Provision of Broadband Is as Well.

The Commission may not continue to allow cable modem providers to go largely or completely unregulated³⁶ unless it ends its dominant-carrier regulation of telephone company broadband services. Because local telephone companies do not have market power with respect to broadband, eliminating dominant-carrier regulation and regulating only under Title I is both consistent with Commission precedent and required by the Communications Act and the U.S. Constitution.

1. The Commission Has Authority To Treat Telephone Company Broadband Transmission Under Title I.

The Commission has concluded that cable modem service is not a Title II telecommunications service. The Act requires it to reach the same conclusion as to telephone company broadband. The Act defines a “telecommunications service” as “the offering of telecommunications for a fee directly to the public, or to such classes of users as to be effectively available directly to the public, regardless of the facilities used.”³⁷ The Commission has found that this definition “is intended to encompass only telecommunications provided on a common carrier basis” — that is, telecommunications offered not simply to the public, but “indifferently [to] all potential users.”³⁸

The Commission has implemented a court-directed two-part test for common carriage. Under that test, “a carrier does not have to be regulated as a common carrier if (1) it intends to

³⁶ This would be the case whether the Commission regulates cable modem service under Title I or forbears from Title II regulation, as may be required to reach this result in the state covered by the Ninth Circuit. Notice ¶¶ 94-95.

³⁷ 47 U.S.C. § 153(46).

³⁸ *Federal-State Joint Board on Universal Service*, 12 FCC Rcd 8776, ¶ 785 (1997).

make ‘individualized decisions, whether and on what terms to serve’ or (2) the public interest does not require the common carrier to be legally compelled to serve the public indifferently.”³⁹:

As the D.C. Circuit noted, “If the carrier chooses its clients on an individual basis and determines in each particular case ‘whether and on what terms to serve’ and there is no specific regulatory compulsion to serve all indifferently, the entity is a private carrier for that particular service and the Commission is not at liberty to subject the entity to regulation as a common carrier.”⁴⁰

Employing this test, the Commission has afforded Title I treatment to offerings that either are pure transmission or have a transmission component. For example, the Commission has given providers of satellite services the option of offering service on a private carrier basis under Title I.⁴¹ Other examples include submarine cables,⁴² for-profit microwave systems,⁴³ dark fiber⁴⁴ and various mobile services.⁴⁵ A list of additional examples is attached as Exhibit D. The Commission can and should add broadband transmission to this list.

³⁹ *AT&T Submarine Systems, Inc.*, 13 FCC Rcd 21585, 21588 (1998), *aff’d*, *Virgin Islands Tel. Corp. v. FCC*, 198 F.3d 921 (D.C. Cir. 1999);

⁴⁰ *Southwestern Bell Tel. Co. v. FCC*, 19 F.3d 1475, 1481 (D.C. Cir. 1994).

⁴¹ *Licensing Under Title III of the Communications Act of 1934, as amended*, 8 FCC Rcd 1387 (1993) (allowing certain satellite services on a private carriage basis, including mobile voice, data, facsimile, and position location for both domestic and international subscribers); *Application of Loral/Qualcomm Partnership, L.P.*, 10 FCC Rcd 2333 (1995) (allowing use of the Globalstar system for mobile voice, data, facsimile, and other services as a non-common carrier).

⁴² *AT&T Submarine Systems, Inc.*, 13 FCC Rcd 21585 (1998), *aff’d*, *Virgin Islands Tel. Corp. v. FCC*, 198 F.3d 921 (D.C. Cir. 1999); *FLAG Pacific Limited*, 15 FCC Rcd 22064 (2000).

⁴³ *See, e.g., General Tel. Co. of the Southwest*, 3 FCC Rcd 6778 (1988) (providing that for-profit microwave systems may be offered as private carriage, even if interconnected with the public switched telephone network).

⁴⁴ *Southwestern Bell Tel. Co.*, 19 F.3d 1475.

⁴⁵ *Amendment of the Commission’s Rules to Establish New Personal Communications Services*, 6 FCC Rcd 6601 (1991); *Inquiry Into the Use of the Bands 825-845 MHz and 870-890 MHz for Cellular Communications Systems*, 89 F.C.C.2d 58 (1982) (dispatch

The Commission has in the past classified services under Title I in circumstances similar to those prevailing in the broadband market today. Perhaps the best known example is the Commission’s decision in *Computer II* to classify information services and customer premises equipment under Title I.⁴⁶ The Commission found that it would not serve the public interest to subject enhanced services to traditional common-carriage regulation under Title II because, among other reasons, these markets were “truly competitive.”⁴⁷ The Commission did, however, invoke its ancillary jurisdiction under Title I to preempt any inconsistent state or local regulation, thus ensuring that regulation of enhanced services did not materialize at the local level.⁴⁸ In affirming the Commission’s *Computer II* decision, the D.C. Circuit emphasized that that competition and innovation were occurring in these markets and that new competition would assure the availability of these services at reasonable prices.⁴⁹ These same considerations apply to the broadband market: The market is truly competitive and characterized by innovation. This robust, facilities-based competition will assure the availability of broadband at reasonable prices.

The central inquiry in determining whether to require that a service be offered on a common-carrier basis is whether that requirement is needed in order to prevent the exercise of market power. The Commission has explained that “public interest requires common carrier

services may be offered either on a common or non-common carrier basis); *Petition for Reconsideration of Amendments of Parts 2 and 73 of the Commission’s Rules Concerning Use of Subsidiary Communications Authorization*, 98 F.C.C.2d 792 (1984) (private carrier paging system may be offered either on a common or non-common carrier basis).

⁴⁶ *Amendment of Section 64.702 of the Commission’s Rules and Regulations (Computer II)*, 77 F.C.C.2d 384 (1980).

⁴⁷ *See id.* at ¶¶ 119, 124, 128.

⁴⁸ *See id.* at ¶¶ 113-114.

⁴⁹ *Computer and Communications Industry Ass’n v. FCC*, 693 F.2d 198, 209 (D.C. Cir. 1982) (“CCIA”).

operation” of facilities only where the incumbent operator “has sufficient market power to warrant regulatory treatment as a common carrier.”⁵⁰ As Verizon has recently explained in some detail, and as documented in the attached Broadband Fact Report, local telephone companies lack market power in both the broadband mass market and the larger business market.⁵¹ Moreover, local telephone companies control no bottleneck facilities or other essential inputs: cable modem service, satellite service and terrestrial wireless all have their own pathways to the customer. Thus, local telephone companies could not, even theoretically, use control over any bottleneck facility to acquire market power.

Because competition can act in place of regulation to protect consumers from the exercise of market power, there is simply no good reason to impose the burdens of common-carrier regulation. Indeed, as the Commission has previously recognized, imposing such regulation inappropriately can be counterproductive. For example, in its landmark *Computer II* decision, the Commission determined that it would disserve the public interest to subject enhanced services to traditional common carriage regulation not only because, as discussed above, the enhanced services market was rapidly evolving and sufficiently competitive,⁵² but also because

⁵⁰ *AT&T Submarine Systems, Inc.*, 13 FCC Rcd at ¶ 9; *see also, e.g., Cox Cable Communications, Inc., Comline, Inc. and Cox DTS, Inc.*, 102 F.C.C.2d 110, ¶¶ 26-27 (1985) (finding no “compelling reason” to impose common carrier regulation on a carrier that had “little or no market power”); *see generally* Michael Kende, Office of Plans and Policy, FCC, *The Digital Handshake: Connecting Internet Backbones* at 12 (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”).

⁵¹ *See* Comments and Reply Comments of Verizon, *Review of Regulatory Requirements for Incumbent LEC Broadband Telecommunications Services*, CC Docket No. 01-337 (FCC filed Mar. 1, 2002 & Apr. 22, 2002, respectively).

⁵² *See Computer II*, 77 F.C.C.2d at ¶¶ 113, 128.

“the very presence of Title II requirements [would] inhibit[] a truly competitive, consumer responsive market.”⁵³ Upholding this decision, the D.C. Circuit stated that even if some enhanced services were common carrier communications activities within the reach of Title II, the Commission was not required to identify those services and subject them to Title II regulation.⁵⁴ The court decided that “the latitude accorded the Commission by Congress in dealing with new communications technology includes the discretion to forbear from Title II regulation.”⁵⁵

The Commission should use this discretion to take broadband out of Title II altogether. Just because the Commission has always thought of telephone company broadband in Title II terms does not mean that Title II is the appropriate regulatory pigeonhole for broadband. Indeed, the D.C. Circuit affirmed the Commission’s early decision not to regulate cable television systems as common carriers under Title II even though, as the court stated, “we assumed that CATV systems were common carriers.”⁵⁶ Whatever assumptions the Commission may have about telephone companies, it must consider the state of development and the state of competition in the broadband market and then make a deliberate regulatory classification based on the facts rather than on its assumptions or regulatory reflexes.

When EarthLink proposed applying the *Computer Inquiries* unbundling rules to cable modem service, the Commission dismissed the idea out of hand, saying, “EarthLink invites us, in essence, to find a telecommunications service inside every information service, extract it, and

⁵³ *Computer II* at ¶ 109.

⁵⁴ *CCIA*, 693 F.2d at 209.

⁵⁵ *CCIA* at 212.

⁵⁶ *CCIA* at 212 (citing *Philadelphia Television Broad. Co.*, 359 F.2d 282 (1966)).

make it a stand-alone offering to be regulated under Title II of the Act. Such radical surgery is not required.”⁵⁷ This radical surgery is already being performed, reflexively and without proper forethought, on local telephone companies. It is time to stop the cutting and allow the patients to heal.

This is not the approach the Commission has taken with respect to telephone company broadband up to now. Historically, the Commission has assumed that whenever a traditional local telephone company provided a new service, the service had to be offered on a common-carrier basis. By contrast, when other entities, particularly non-telephone companies, have introduced new services, the contrary assumption has applied. As a result, even before the Commission’s recent *Cable Modem Declaratory Ruling*, cable companies (and satellite and wireless companies) were free to offer broadband transmission on a non-common-carrier basis — or, indeed, not to offer transmission on a stand-alone basis at all. Likewise, the long-distance companies that enjoy a giant market-share advantage in the larger business segment are treated as non-dominant in their provision of broadband and thus escape most of Title II’s more onerous regulations (although they, too, should be regulated under Title I in their provision of broadband). The traditional local telephone companies, however, are subject not only to the full range of Title II regulations but also to a host of additional requirements under the *Computer Inquiries* rules, including an obligation to provide the underlying transmission component of bundled information services on a stand-alone basis subject to tariff.

The mere fact that local telephone companies are regulated under Title II when they provide narrowband voice transmission provides no impediment to regulating their broadband transmission under Title I. Indeed, it is well established that telephone companies can act as non-

⁵⁷ *Cable Modem Declaratory Ruling* ¶ 43.

common carriers when they offer transmission services or facilities, just as they can when they offer other types of services.⁵⁸ As the D.C. Circuit has noted, “[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.”⁵⁹

This dramatic difference in the regulatory treatment of substantially identical services did not represent a considered judgment on the part of the Commission. Rather, the difference resulted from “regulatory creep.” That is, because the telephone companies provided voice services subject to Title II, the Commission reflexively subjected them to Title II regulation in their provision of broadband as well. The result is that functionally equivalent services are regulated haphazardly based on the parentage or traditional business of the company that provides them.

The Title II regime was designed to constrain perceived market power on the part of local telephone companies in the narrowband voice world of days gone by. There is no sound reason to extend that regime (either directly or indirectly) to the broadband data world of today, in which the so-called incumbent local telephone companies are not incumbents but are in fact new entrants. And there is certainly no legal justification for shackling local telephone companies

⁵⁸ See, e.g., *Virgin Islands Tel. 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. v. FCC*, 19 F.3d 1475 (D.C. Cir. 1994) (recognizing provision of dark fiber on non-common carrier basis); *FLAG Pacific Limited*, 15 FCC Rcd 22064 (2000) (involving undersea telecommunications cable on a non-common carrier basis); Cable Landing License, *FLAG Atlantic Limited*, 15 FCC Rcd 21359 (1999) (same).

⁵⁹ *Southwestern Bell Tel. Co.*, 19 F.3d at 1481; 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”).

with Title II regulation while leaving their many competitors substantially free of regulation in their provision of broadband.

2. The Commission Must Treat Local Telephone Company Broadband as It Treats Cable Modem Service.

The Commission may not deregulate cable modem service unless it also deregulates wireline broadband transmission. This is not simply because, as indicated above, the same legal reasoning and policy considerations apply to local telephone companies as to cable companies in their provision of broadband. Rather, it is because the law requires the Commission to treat these functionally identical services the same.

To begin with, section 706 of the 1996 Act makes it clear that advanced telecommunications capability is to be defined and regulated “without regard to any transmission media or technology.”⁶⁰ The Commission’s mandate under section 706 is to “remov[e] barriers to infrastructure investment and promot[e] competition.”⁶¹ The broadband Internet access and transmission provided by local telephone companies are functionally identical to the broadband Internet access services and transmission provided over cable modem, wireless, or satellite. It would thus flatly contradict the 1996 Act to regulate broadband transmission differently depending on the facilities or medium of transmission used, or to remove barriers to investment for some technologies but not for others.

This result is also consistent with the Act’s definition of a telecommunications service. The definition, which has been linked by the Commission and the Courts to common carrier regulation, makes clear that a service is included as a telecommunications service, “regardless of

⁶⁰ 47 U.S.C. §§ 153(46), 157 note.

⁶¹ 47 U.S.C. § 157 note.

the facilities used.” 47 U.S.C. § 153 (46). Thus, if cable modem service is not a telecommunications service, then competing services that use different facilities cannot be either.

Furthermore, the APA and the equal protection component of the Fifth Amendment’s due process clause require that the Commission “not treat like cases differently”⁶² and prohibit the Commission from “improperly discriminat[ing] between similarly situated . . . services without a rational basis.”⁶³ There is no question that cable modem broadband and DSL broadband compete head-to-head in the mass-market segment and that “consumers view” the services “as performing the same functions.”⁶⁴ Cable operators control the largest share of the mass market by far and have more of their networks upgraded to provide broadband access.⁶⁵ Local telephone companies therefore have no *ability* greater than that of cable operators to exercise monopoly power in the broadband access market.

Nor do local telephone companies, as compared to cable operators, have any *incentive* to undermine competition or diversity among broadband ISPs or content providers. The most innovative broadband applications — streaming video programming and movies on demand — compete with the core monopoly product offered by cable operators. Far from seeking to limit competition in this key content market, local telephone companies have an incentive to see it

⁶² *Freeman Engineering Assoc., Inc. v. FCC*, 103 F.3d 169, 178 (D.C. Cir. 1997) (citation and internal quotation marks omitted); *see also, e.g., Hing v. Crowley*, 113 U.S. 703, 708 (1885) (regulators are forbidden from subjecting “persons engaged in the same business . . . to different restrictions” or granting “different privileges” to firms offering a service “under the same conditions”).

⁶³ *C.F. Communications Corp. v. FCC*, 128 F.3d 735, 740 (D.C. Cir. 1997).

⁶⁴ *C.F. Communications Corp. v. FCC*, 128 F.3d at 742 (citation and internal quotation marks omitted).

⁶⁵ Moreover, once upgraded, their networks do not suffer from “legacy . . . conditions” that limit their “access to certain end-users even in upgraded areas.” *Second Advanced Services Report*, ¶ 31; *see also id.* at ¶¶ 190, 196.

flourish, because broadband services afford local telephone companies an opportunity to compete, at least to a limited extent, in a market that cable operators dominate.⁶⁶ Cable operators, on the other hand, have a significant incentive to limit customers' access to outside broadband content, because consumers' use of that content siphons away revenues from their core business.⁶⁷ The Commission therefore cannot rationally conclude that local telephone companies pose a greater risk to competition in broadband than cable operators. Since the Commission has elected to regulate cable operators under Title I, the APA and the Due Process Clause require that it treat local telephone companies' broadband transmission and facilities under Title I as well.

A key feature of the *Cable Modem Declaratory Ruling* is the Commission's decision to allow cable modem operators to provide broadband transmission to unaffiliated ISPs on a non-common-carrier basis.⁶⁸ This establishes the critical principle that broadband transmission, which is undeniably a form of "telecommunications," can be offered as something other than a common-carrier "telecommunications service," even by the dominant players in a market segment. Once that principle is established, there is no sound basis, given the nascent and

⁶⁶ *Implementation of Section 3 of the Cable Television Consumer Protection and Competition Act of 1992*, 15 FCC Rcd 10927, ¶ 12 (2000) ("relatively few cable operators face effective competition"); *id.* at ¶ 49 ("DBS exerts only a modest influence on the demand for cable service"); *Annual Assessment of the Status of Competition in Markets for the Delivery of Video Programming*, 15 FCC Rcd 978, ¶ 5 (2000) ("Cable television is still the dominant technology for delivery of video programming to consumers"); *id.* at ¶ 140 ("The market for the delivery of video programming to households continues to be highly concentrated and characterized by substantial barriers to entry").

⁶⁷ Petition To Deny of Verizon Telephone Cos. and Verizon Internet Solutions d/b/a Verizon.net App. B (Declaration of Robert W. Crandall) ¶¶ 20-21, MB Docket No. 02-70, *Applications for Consent to the Transfer of Control of Licenses From Comcast Corp. and AT&T Corp., Transferors, To AT&T Comcast Corp., Transferee*, (filed Apr. 29, 2002).

⁶⁸ *Cable Modem Declaratory Ruling* ¶¶ 60-68.

competitive state of the broadband marketplace, to force secondary players in the market to offer broadband transmission on a common-carriage basis. The formal ratification of Title I treatment for broadband transmission may have begun with cable modem service, but it must not stop there.

In *Fox TV Stations, Inc. v. FCC*, the D.C. Circuit found that the Commission had no rational basis for retaining certain ownership regulations based on an expressed interest in curbing the undue market power of broadcasters when the record contained insufficient evidence of such undue market power.⁶⁹ For the Commission to retain common carrier regulations for local telephone companies in their provision of broadband would, given their lack of market power, likewise lack any rational basis, especially in view of the Commission’s decision *not* to regulate the dominant cable companies as common carriers.

In addition, serious First Amendment concerns are raised by the one-sided burdens and restrictions that the present regulatory regime places on the deployment and use of local telephone companies’ broadband services and facilities.⁷⁰ Broadband transmission (together with the facilities used to provide it) constitutes a medium through which telephone companies are able to deliver a form of speech — the companies’ own Internet and other content and services, possibly packaged with content from other sources or with commercial advertising and solicitations — to their customers.⁷¹ It is no different in that regard from the pages of a

⁶⁹ *Fox TV Stations v. FCC*, 280 F.3d 1027 (D.C. Cir. 2002).

⁷⁰ See Notice ¶ 80.

⁷¹ *Cf.*, e.g., *Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622, 636 (1994); *see also Denver Area Educational Telecomms. Consortium, Inc. v. FCC*, 518 U.S. 727, 737 (1996) (“the editorial function itself is an aspect of ‘speech’”); *Hurley v. Irish-American Group*, 515 U.S. 557, 570 (1995) (“Nor, under our precedent, does First Amendment protection require a speaker to generate, as an original matter, each item featured in the communication”); *Miami Herald Publ’g*

newspaper, the screen at a movie theater or the bandwidth used by a cable operator to deliver its program guide and video programming. The First Amendment protects not merely the content of speech, but also the physical and commercial means by which it is delivered to the public. The Supreme Court has extended First Amendment protection not only to the selection and formation of content, but also to the means of its dissemination.⁷² The Supreme Court has also recognized that burdensome economic regulation can silence free expression as effectively as outright prohibitions on speech.⁷³

Accordingly, if the Commission were to regulate cable operators under Title I while maintaining common carrier obligations on local telephone companies, both the Commission's reason for continued regulation *and* its reason for distinguishing between cable operators and local telephone companies would be subject to "intermediate scrutiny."⁷⁴ A decision by the

Co. v. Tornillo, 418 U.S. 241, 258 (1974) (the "choice of material" that goes into a publication "constitute[s] the exercise of editorial control and judgment" protected by the First Amendment).

⁷² *City of Lakewood v. Plain Dealer Publ'g Co.*, 486 U.S. 750, 768 (1988) ("The actual 'activity' at issue here [placement of newsracks] is the circulation of newspapers, which is constitutionally protected"); *Lovell v. City of Griffin*, 303 U.S. 444, 452 (1938) ("The ordinance [prohibiting the distribution of circulars] cannot be saved because it relates to distribution and not to publication"). *See also Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622, 629 (1994) ("Cable programmers and cable operators engage in and *transmit speech*, and they are entitled to the protection of the speech and press provisions of the First Amendment") (emphasis added).

⁷³ *Minneapolis Star & Tribune Co. v. Minnesota Comm'r of Revenue*, 460 U.S. 575, 585 (1983) ("Differential taxation of the press . . . places such a burden on the interests protected by the First Amendment that we cannot countenance such treatment unless the State asserts a counterbalancing interest of compelling importance that it cannot achieve without differential taxation").

⁷⁴ *BellSouth Corp. v. FCC*, 144 F.3d 58, 69 (D.C. Cir. 1998) ("intermediate scrutiny" applies to restrictions on speech that apply exclusively to RBOCs). Under intermediate scrutiny, a regulation will withstand judicial review only "if it advances important governmental interests unrelated to the suppression of free speech and does not burden substantially more speech necessary to further those interests." *Id.* at 69-70 (citation and internal quotation marks omitted).

Commission maintaining Title II obligations on local telephone companies could not pass this exacting standard. According to the Commission’s own factual findings, local telephone companies serve a small percentage of the broadband market.⁷⁵ Moreover, because the Commission has repeatedly concluded that the broadband access market is open and competitive, continued regulation of local telephone companies under a theory that they control a bottleneck broadband facility would address a harm that, by the Commission’s own admission, is not just “merely conjectural,”⁷⁶ it is inconsistent with the realities of the marketplace and the Commission’s own findings.

Nor could the Commission’s decision to treat telephone companies differently from cable companies pass muster under the First Amendment. It is well settled that if a regulation “affecting speech appears underinclusive, *i.e.*, where it singles out some conduct for adverse treatment, and leaves untouched conduct that seems indistinguishable in terms” of the regulation’s “ostensible purpose, the omission” itself is subject to heightened judicial scrutiny.⁷⁷ It would be impossible for the Commission to justify a distinction between broadband services provided over the cable system platform and those using the telephone company wireline platform, particularly given their relative market positions.⁷⁸ The regulatory burdens imposed on

⁷⁵ *Second Advanced Services Report* at ¶¶ 31, 38-40, 190, 195-196.

⁷⁶ *Turner Broad.*, 512 U.S. at 664.

⁷⁷ *News Am. Publ’g, Inc. v. FCC*, 844 F.2d 800, 804-05 (D.C. Cir. 1988); *see also City of Ladue v. Gilleo*, 512 U.S. 43 (1994); *Turner Broad.*, 512 U.S. at 676 (O’Connor, J., concurring) (regulations “that single out particular speakers are substantially more dangerous” to First Amendment values, “even when they do not draw explicit content distinctions”).

⁷⁸ Although the Commission does not have authority to pass on the constitutionality of the statutes it is charged with administering, *see Johnson v. Robison*, 415 U.S. 361, 368 (1974), the Commission is nevertheless obligated to adopt regulations that comport with the Constitution. Verizon reserves all its rights to seek appropriate judicial relief in any available forum for violation of its First Amendment rights.

local telephone companies here are like a tax imposed only on expressive activity undertaken by them using their own networks. “A tax that singles out the press, *or that targets individual publications within the press*, places a heavy burden on the State to justify its action.”⁷⁹

Finally, the Commission has sought comment on whether imposing a requirement of multiple ISP access to cable networks might “constitute a ‘per se’ or ‘regulatory’ taking of the cable operator’s property without just compensation under the Takings Clause of the Fifth Amendment to the U.S. Constitution.”⁸⁰ To the extent that the Commission concludes that the Takings Clause is an impediment to the imposition of an open access requirement for multiple ISPs on cable networks, it would likewise be an impediment to the imposition of such a requirement on local telephone company networks.

For all these reasons, because the Commission has chosen to regulate cable companies under Title I in their provision of broadband, the Commission must likewise regulate local telephone companies under Title I in their provision of broadband.

IV. The Content of Title I Regulation.

Regulating broadband under Title I gives the Commission a regulatory clean slate: it allows the Commission to keep broadband essentially unregulated, imposing only those discrete regulatory obligations (on telephone companies, cable companies and other providers alike) that the Commission finds necessary in the public interest. The principal restriction on the Commission’s regulatory authority under Title I is that, for the reasons set forth above, it must treat all broadband providers equally, no matter what platform or technology they use to deliver broadband.

⁷⁹ *Minneapolis Star*, 460 U.S. at 592-93.

⁸⁰ Notice ¶ 81.

Under this Title I regime, most Title II regulations — including tariffing and section 251(c) facilities unbundling rules — would not apply. The Commission should decline to impose similar unbundling, tariffing and other obligations under the *Computer Inquiries* regime. In order to create a truly national broadband policy, the Commission should preempt attempts by state or local governments to impose inconsistent regulations on broadband facilities or services. Finally, the regulation of broadband under Title I will have little or no impact on the obligations of telephone companies regarding consumer protection.

CI II/ONA. The Commission should not impose any of the *Computer Inquiries* ONA and CEI requirements on broadband — including any obligation to unbundle and offer under tariff the telecommunications component of information services.⁸¹ The existing *Computer Inquiry* rules were designed for the narrowband world and were premised on the notion that the Bell companies retained some measure of bottleneck control over narrowband telecommunications services. Indeed, the Commission has expressly stated that it adopted these rules to prevent the former Bell companies from using their control over “the *local exchange network* and the provision of basic services . . . to engage in anticompetitive behavior against ISPs that must obtain basic network services from the BOCs in order to provide their information service offerings.”⁸² But, as has been noted, the Bell companies have no bottleneck control over

⁸¹ Other ONA/CEI requirements include the obligation to track and report on installation, maintenance, and repair intervals; to provide comparable end-user access to signaling and derived channels; to impute tariffed rates for short cross-connections; and to comply with various unnecessary accounting requirements. The Commission has previously recognized that unnecessary “filing and reporting requirements . . . impose[] administrative costs upon carriers” that can “lead to increased rates for consumers” and have “adverse effects on competition.” *Wireless Deregulation Order*, ¶ 177.

⁸² *Computer III Further Remand Proceedings*, 13 FCC Rcd 6040, ¶ 43 (1998) (emphasis added); *see also id.* at ¶ 9 (“one of the Commission’s main objectives in the *Computer III* and ONA proceedings has been to . . . prevent[] the BOCs from using their local exchange

the networks used to deliver broadband access, and ISPs need not “obtain basic services from BOCs” to reach their customers. Rather, the nascent broadband market includes many different facilities-based providers using different technologies to deliver broadband transmission service.⁸³ Because information service providers have a wide range of competitive options when purchasing basic services, the unbundling and ONA/CEI requirements — which were predicated on the notion that a single firm controls access to basic services — are wholly inapposite to broadband. Extending these burdensome and costly regulations to broadband would stifle innovation and investment, and would harm consumers by slowing the development of new broadband services.

Moreover, it would make no sense to classify broadband services (including broadband transmission) under Title I, thus giving the Commission a fresh, technologically neutral environment in which to craft a uniform regulatory scheme for broadband, and then to impose *Computer Inquiries* regulations on broadband that require, in effect, the creation of new, tariffed Title II services. The *Computer Inquiries* rules are essentially a roundabout way of imposing the very inappropriate common-carrier regime on broadband that the Commission ought to be

market power to engage in improper cost allocation and unlawful discrimination against” providers of information services).

⁸³ See, e.g., *Rulemaking to Amend Parts 1, 2, 21, and 25 of the Commission’s Rules to Establish Rules and Policies for Local Multipoint Distribution Service and for Fixed Satellite Services*, 15 FCC Rcd 11857, ¶ 19 (2000) (“The record before us, which shows a continuing increase in consumer broadband choices within and among the various delivery technologies — xDSL, cable modems, satellite, fixed wireless, and mobile wireless, suggests that no group of firms or technology will likely be able to dominate the provision of broadband services”); *AT&T/MediaOne Order*, 15 FCC Rcd at ¶ 116 (finding that cable operators, despite having a commanding share of the residential broadband market, face “significant actual and potential competition from . . . alternative broadband providers”); *Inquiry Concerning the Deployment of Advanced Telecommunications Capability to All Americans*, 14 FCC Rcd 2398, ¶ 48 (1999) (“preconditions for monopoly appear absent” in the broadband access market, and “there are, or likely will soon be, a large number of actual participants and potential entrants”).

eliminating. Certainly, it would be neither logical nor permissible for the Commission to impose *Computer Inquiries* regulations solely on local telephone companies in their provision of broadband. Having decided to forbear from extending the *Computer Inquiries* rules to cable broadband service,⁸⁴ the Commission must be consistent and do likewise for local telephone companies.

Preemption of the States. Having created a minimally regulated environment for broadband, the Commission should preempt state and local attempts to regulate mass-market broadband.⁸⁵ Permitting states to regulate these services would be at cross purposes with creating a uniform national broadband policy. This is not merely a hypothetical concern, for the states are already starting to creep into this area.⁸⁶

Allowing states to regulate broadband in this way would subject broadband providers to a patchwork of regulation that would make expanding services more difficult and thereby impede the development of broadband services. And just as the Commission should preempt states from regulating broadband services directly, it should also make clear that they may not do so indirectly. In particular, the Commission should preempt any state efforts to regulate broadband

⁸⁴ *Cable Modem Declaratory Ruling* ¶¶ 44-47.

⁸⁵ See Notice ¶¶ 96-99.

⁸⁶ *E.g.*, Assigned Commissioner's and ALJ's Ruling Denying Defendant's Motion to Dismiss, *Cal. ISP Ass'n v. Pacific Bell*, Case 01-07-027 (Cal. Pub. Utils. Comm'n rel. Mar. 28, 2002) (asserting jurisdiction over complaints about DSL service). California is not alone in regulating broadband services. Final Decision 116-17, *Investigation into Ameritech Wisconsin's Unbundled Network Elements*, Docket No. 6720-T1-161 (Wis. Pub. Serv. Comm'n rel. Mar. 22, 2002) (Wisconsin Public Service Commission order requiring Ameritech to provide unbundled packet switched broadband service); Revised Arbitration Award, *Petition of Rhythms Links, Inc. Against Southwestern Bell Tel. Co. for Post-Interconnection Dispute Resolution under the Telecommunications Act of 1996 Regarding Rates, Terms, and Related Arrangements for Line Sharing*, Docket No. 22469 (Tex. Pub. Util. Comm'n rel. Sept. 21, 2001) (Texas Public Service Commission Arbitration order requiring SBC to offer unbundled packet switching).

by imputing revenues from broadband to other regulated services (effectively denying or severely limiting broadband providers from profiting from their risky investments in new broadband services or facilities), or allocating costs from regulated services to broadband services (effectively driving up the price of broadband to the detriment of consumers and of competition). Indirect regulation through artificially imputing revenues and allocating costs would impede the growth of broadband, and the Commission should not permit states to impose this sort of indirect regulation (nor should it indulge in this sort of indirect regulation itself).

The Commission has authority to pre-empt state and local regulation of Internet access services because Internet access is predominantly interstate in nature. “[A]lthough some traffic destined for information service providers (including ISPs) may be intrastate, the interstate and intrastate components cannot be reliably separated. Thus, ISP traffic is properly classified as interstate”⁸⁷ This holding is consistent with Commission rulings going back to 1998,⁸⁸ and nothing has happened to cause the Commission to change this conclusion.

The Commission has ample authority to preempt any state and local attempts at regulating broadband, just as it has preempted state regulation in other areas such as information services, CPE, and special access. As a general matter, preemption of state regulation is permissible when a matter is entirely interstate or: “(1) the matter to be regulated has both interstate and intrastate aspects; (2) FCC preemption is necessary to protect a valid federal regulatory objective; and (3) state regulation ‘would negate[] the exercise by the FCC of its own lawful authority’ because regulation of the interstate aspects of the matter cannot be ‘unbundled’

⁸⁷ *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996: Intercarrier Compensation for ISP-Bound Traffic*, 16 FCC Rcd 9151, ¶ 52 (2001).

⁸⁸ *GTE Telephone Operating Cos., GTOC Tariff No. 1, GTOC Transmittal No. 1148*, 13 FCC Rcd 22466, ¶ 1 (1998) (concluding that internet access is interstate).

from regulation of the intrastate aspects.”⁸⁹ Moreover, under *California v. FCC*, 39 F.3d 919 (9th Cir. 1994), the Commission has authority to preempt even purely intrastate state regulation when the state regulation cannot feasibly coexist with the federal regulation.⁹⁰

The Commission has ample authority to preempt any state and local attempts at regulating broadband. Preemption of state regulation is permissible when a matter is entirely interstate, or when the intrastate aspects are inextricably intertwined with the interstate aspects so that state regulation would negate Commission’s the exercise own lawful authority.⁹¹

The *Cable Modem Declaratory Ruling* classified cable modem service as interstate, recognizing that “an examination of the location of the points among which cable modem service communications travel” reveals that the points “are often in different states and countries.”⁹²

This is also true of broadband services provided by telephone companies. More fundamentally, however, data services should be presumptively regarded as interstate in nature, because it is

⁸⁹ See *Public Serv. Comm’n v. FCC*, 909 F.2d 1510, 1515 (D.C. Cir. 1990) (citations omitted).

⁹⁰ See also *Louisiana Pub. Serv. Comm’n v. FCC*, 476 U.S. 355, 375-76 n.4 (1986) (FCC may preempt state regulation of intrastate telecommunications matters when (1) it is impossible to separate the interstate and intrastate components of the Commission’s regulation, and (2) the state regulation would negate the Commission’s lawful authority over interstate communication).

⁹¹ See *Louisiana Pub. Serv. Comm’n v. FCC*, 476 U.S. 355, 375-76 n.4 (1986) (FCC may preempt state regulation of intrastate telecommunications matters when (1) it is impossible to separate the interstate and intrastate components of the Commission’s regulation, and (2) the state regulation would negate the Commission’s lawful authority over interstate communication); *Public Serv. Comm’n v. FCC*, 909 F.2d 1510, 1515 (D.C. Cir. 1990); *California v. FCC*, 39 F.3d 919, 931-32 (9th Cir. 1994) (upholding FCC pre-emption of purely intrastate state regulations where, although compliance with federal and state regulations is technically possible, it is unlikely for operational and economic reasons).

⁹² *Cable Modem Declaratory Ruling* ¶ 59.

simply not practical to distinguish between interstate and intrastate data communication, nor to subject isolated data flows to different regulatory regimes. These services thus present a classic example of when compliance with both state and federal regulation, even if technically possible, is unlikely due to operational and economic considerations. The Ninth Circuit upheld the Commission's pre-emption of certain purely intrastate regulations in similar circumstances in *California v. FCC*. Because broadband is predominately interstate, and because separately regulating the interstate and intrastate components of broadband (if it is even possible) would undermine the Commission's efforts to remove regulatory disincentives to broadband investment, pre-emption is appropriate.

Consumer Protection Rules. Nor should classification of broadband under Title I lead to any erosion of the consumer protection provisions of the Communications Act. First, broadband providers will almost always be providers of telecommunications services too and will provide them to the same customers to whom they provide broadband. To the extent that these consumer protection provisions are keyed to the provision of telecommunications services — like the Commission's CPNI and truth-in-billing requirements, for instance⁹³ — the protection they afford will remain unaffected.

More fundamentally, however, to the extent that the Commission finds that consumer protection provisions are needed in the public interest, it can and should impose them equally on all broadband providers under Title I. Regulating broadband under Title I does not necessarily equate to total deregulation — it means applying regulations tailored to suit the needs of the

⁹³ See generally *Telecommunications' Carriers Use of Customer Proprietary Network Information and Other Customer Information*, 14 FCC Rcd 14409 (1999); 47 CFR § 64.2400 *et seq.* (truth-in-billing requirements).

broadband market (rather than trying to force broadband into a Title II regulatory straightjacket designed for different services as they existed in years gone by).

Universal Service. To the extent that broadband is regulated under Title I, it does not trigger a *mandatory* universal service contribution, because the basic contribution requirement is tied to the provision of “interstate *telecommunications services.*”⁹⁴ The Commission could, however, require broadband-based contributions to the fund under its permissive authority, since “[a]ny other provider of interstate *telecommunications* may be required to contribute . . . if the public interest so requires.”⁹⁵ Because monies from the schools and libraries fund today are used to subsidize the purchase of broadband services from cable companies, telephone companies and other providers, it would be in the public interest to require all broadband providers to contribute to the schools and libraries fund, but only that fund. The schools and libraries fund is the only portion of the universal service fund used to subsidize the purchase of broadband services.⁹⁶ It is both logical and equitable that broadband providers contribute to that portion of the federal program that is used to subsidize the purchase of their services.

Broadband providers’ contributions should be proportionate to the services being supported so that contributions to the fund by broadband are not used to subsidize other universal service objectives. Cross-subsidization of services would result in distortions in the contribution

⁹⁴ 47 U.S.C. § 254(d) (emphasis added).

⁹⁵ 47 U.S.C. § 254(d) (emphasis added).

⁹⁶ 47 U.S.C. § 254(c)(3) (“[I]n addition to the services included in the definition of universal service,” the Commission “may designate additional services for such support mechanisms for schools, libraries, and health care providers for the purposes of subsection (h) of this section”); 47 C.F.R. § 54.503.

obligations of entities providing different services and would violate the requirement in section 254(b)(4) that contribution obligations to the universal service fund should be “equitable.”

Whatever universal service obligations are imposed on one class of provider must be the same as the obligations imposed on other classes. If telephone companies face unique universal service obligations, for example, then telephone companies will bear an additional expense that will be passed on to their customers. This would make their services relatively less attractive than cable, satellite, and terrestrial wireless broadband and would result in market distortions.

Imposing disparate obligations would be unlawful for three reasons. First, the Commission’s own definition of the public interest underlying universal service obligations includes the criterion that to the extent possible, carriers with universal service contributions should not be put at a competitive disadvantage.⁹⁷ Second, the universal service provisions of the Act itself directs that every carrier be required to contribute “on an equitable and nondiscriminatory basis”⁹⁸ and that the Commission must establish “competitively neutral” rules to enhance schools and libraries’ access to advanced services.⁹⁹ Third, at the extreme, a difference in treatment would violate the APA, the Equal Protection component of the Due Process Clause, and the First Amendment.¹⁰⁰

⁹⁷ *Universal Service Report*, 13 FCC Rcd 11501 at ¶ 117 (1998).

⁹⁸ 47 U.S.C. §§ 254(b) & 254(d).

⁹⁹ 47 U.S.C. § 254(h)(2)(A).

¹⁰⁰ See *supra* at 20-21. *Cf. also Minneapolis Star*, 460 U.S. at 592-93 (tax that “targets individual publications within the press, places a heavy burden on the State to justify its action”).

Conclusion

The principles are simple. Competitive markets require little regulation. Unnecessary regulation adds costs and discourages investment. Whatever regulation there is must be applied equally to all providers. Applying these principles to broadband is also relatively simple — the Commission should apply uniform regulation to all providers of broadband through regulation of all broadband services under Title I.

Respectfully submitted,



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THE VERIZON TELEPHONE COMPANIES

The Verizon telephone companies are the local exchange carriers affiliated with Verizon Communications Inc. These are:

Contel of the South, Inc. d/b/a Verizon Mid-States
GTE Midwest Incorporated d/b/a Verizon Midwest
GTE Southwest Incorporated d/b/a Verizon Southwest
The Micronesian Telecommunications Corporation
Verizon California Inc.
Verizon Delaware Inc.
Verizon Florida Inc.
Verizon Hawaii Inc.
Verizon Maryland Inc.
Verizon New England Inc.
Verizon New Jersey Inc.
Verizon New York Inc.
Verizon North Inc.
Verizon Northwest Inc.
Verizon Pennsylvania Inc.
Verizon South Inc.
Verizon Virginia Inc.
Verizon Washington, DC Inc.
Verizon West Coast Inc.
Verizon West Virginia Inc.