

**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

REPLY COMMENTS OF VERIZON

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Most of the commentors focus on what the Commission should, or should not, do with respect to its regulation of cable modem services. Few take a broader view and answer the Commission's questions in the context of what regulatory scheme the Commission should adopt for the broadband services marketplace generally. But as Verizon showed, the Commission must take this broader approach, as it may not develop regulatory policies for cable modem services without adopting similar policies for telephone-company-provided broadband services too. Thus, the Commission can and should subject the broadband services of cable operators to minimal regulation only to the extent it does so at the same time for telephone companies.

One thing the commentors generally agree on is that compulsory access and unbundling requirements add costs and inhibit investment. NCTA states, "access regulation would deter investment and impede deployment of facilities and services."¹ Another trade association agrees:

¹ NCTA at 24.

“Nearly all ACA members surveyed indicated that they would not risk the investment necessary for this expansion if burdensome regulations were imposed on cable modem services in their markets.”²

Cox explains,

“Mandated access to the cable modem platform would discourage such forward-looking investments and innovations, both today and in the future. ... Moreover, the threat of regulation and resultant uncertainty would deter other providers from making the tremendous risk investments necessary to develop and deploy broadband services. ... Rather than spurring investment in additional broadband facilities, therefore, an access requirement would impeded investment and innovation — contrary to the Commission’s express policy objectives in this proceeding.”³

And Cablevision concludes, “Saddling cable operators with new regulatory requirements based upon distorted and one-sided notions of parity will not promote the Congressional and Commission goal of accelerating deployment of broadband services.”⁴

This, of course, is every bit as true for telephone companies as it is for cable operators. And Verizon agrees completely that imposing regulatory burdens and obligations on broadband service providers will not accelerate broadband deployment — indeed they will inhibit it — and are inconsistent with the mandate from Congress. And for this reason the Commission should remove the regulatory burdens and obligations it has put on telephone company broadband services. Notions of fairness and parity require no less.

And the law, particularly the Constitution, requires no less as well. One-sided burdens and restrictions that the present regulatory regime places on the deployment and use of local telephone companies’ broadband services and facilities raise serious First Amendment concerns. Broadband transmission constitutes a medium through which telephone companies are able to

² ACA at 7.

³ Cox at 32.

⁴ Cablevision at 11.

deliver a form of speech. If the Commission were to regulate cable operators under title I while maintaining common carrier obligations on local telephone companies, that distinction would be subject to “intermediate scrutiny,” a test that this decision could not pass.

AT&T argues that “the Commission’s goal of ‘an analytical approach that is, to the extent possible, consistent across multiple platforms’ ... does not entail parallel regulation.”⁵ This is true, AT&T says, because there are “key distinctions between cable and local telephone networks and services.”⁶ Each of AT&T’s supposed “key distinctions” is illusory.

First, AT&T claims that the Bell companies “ha[ve] anti-competitive incentives (and the accompanying ability) to deny access on commercially reasonable terms,” while cable companies do not.⁷ The facts, of course, show that the reverse is true, as it is cable companies that have been able to completely deny access to all ISPs other than their hand-picked provider. This practice is merely a natural extension of cable operators’ ability to exclude video programmers from their cable systems, such as Cablevision’s exclusion of the YES network in large portions of the New York City metropolitan area.⁸ Telephone companies offer a competitive alternative to cable companies and their history of exclusionary practices.

Second, AT&T claims that it would be hard for cable companies to provide access, while telephone networks were designed from the beginning to provide access and interconnection for all.⁹ This is nonsense. As AT&T well knows, it was only in the 1980’s, as a result of antitrust

⁵ AT&T at 23.

⁶ AT&T at 23.

⁷ AT&T at 24.

⁸ *See, e.g.,* Richard Sandomin, *Cablevision Unmoved by Yes’s Offer*, N.Y. Times, July 27, 2002 at D5.

⁹ AT&T at 25.

litigation against it, that the telephone network was opened to all interexchange carriers on equal terms. And the 1996 Act required local carriers to spend billions of dollars to reengineer their networks to allow other providers to interconnect and to use elements of them. Where public policy demands equal access, service providers have been required to spend money to provide it. The same could be true for cable operators.

Moreover, other cable companies are disproving AT&T's claim. These cable companies have promised to support open access, and the feasibility of open access has been demonstrated by Time Warner's compliance with the FTC decree.

AT&T's final supposed distinction is that "Congress in Title VI specifically rejected a common carrier approach" for cable companies.¹⁰ Any such rejection, of course, is limited to services that are within title VI, namely "cable service,"¹¹ and does not extend to other services offered by those companies. To the extent that cable companies offer services other than "cable service," title VI is not a bar to regulating those services in the same way that similar services offered by others are regulated. Regardless of whether mass market internet access is classified as a title II or title I service, such classification should be identical for all providers, be they cable companies or telephone companies. As a result, AT&T's point (that regulation should follow the contours of the Act) requires equivalent regulation for these equivalent services.

AT&T goes on to claim that the existing disparate regulation is not a problem for local telephone companies — that "the evidence is overwhelming that 'regulatory burdens' have not

¹⁰ AT&T at 26.

¹¹ The Act does in fact impose certain carriage requirements on cable companies' cable service. *See* 47 U.S.C. §§ 532, 534, 535.

kept the Bells from competing effectively.”¹² The evidence is clear, however, that cable companies are dominant in the mass broadband market, with roughly a 70 percent share.¹³

And AT&T’s claim that “DSL dominates the market for providing broadband services to business”¹⁴ is also contrary to the facts. Larger business customers focus on frame relay, ATM and other packet-switched data services, which are provided mostly by interexchange carriers.¹⁵ Nationwide, Verizon has only about a 4.2 percent share of the Frame Relay revenues, and about a 5.6 percent share of ATM revenues — a far-from-dominant position by any standard.¹⁶

Moreover, cable operators are increasingly touting their broadband offerings for businesses.¹⁷ Six of the seven largest cable system operators (which collectively represent over 90 percent of consumer cable modem subscribers) already offer broadband Internet access to

¹² AT&T at 28.

¹³ *Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*, CC Docket No. 01-338, Comments of Verizon, Attachment B, *UNE Fact Report 2002*, at IV-19, figure 6 (filed April 5, 2002).

¹⁴ AT&T at 29.

¹⁵ Comments of Verizon, Exhibit A, *Broadband Fact Report* at 27-28.

¹⁶ Comments of Verizon, Exhibit A, *Broadband Fact Report* at 30 & n. 163.

¹⁷ *See, e.g.*, Road Runner, *Commercial Service, High Speed Access*, at <http://www.rr.com/rdrun/> (visited Mar. 29, 2002) (“Road Runner Business Class Access Service provides an “always-on,” high-speed connection to the Internet with the needs of business in mind. Designed to be flexible according to individual business needs, our Broadband Access Service gives you the freedom to pay only for the services you want. At the core of our service is broadband, hybrid fiber/coaxial (HFC) Internet access that keeps your business connected 24 hours a day.”); Cox Business Solutions, *Cox@Work Internet*, at <http://www.cox.com/CoxAtWork> (visited Mar. 29, 2002) (“The Business Services division of Cox Communications can provide your business with high-speed Internet access today. You too can surf the World Wide Web to perform research, download files, host a server, and send and receive e-mail at lightning speed.”); *see also Cable MSOs Get Down to Business According to Yankee Group Study*, Bus Wire, Mar. 14, 2002; Margie Semilof, *Cable Takes Aim at Ex-DSL Users*, InternetWeek, Aug. 27, 2001, at 11.

small businesses.¹⁸ The number of small businesses served over cable's hybrid fiber/coax infrastructure is expected to more than double from 522,000 in 2001 to over 1.2 million in 2006.¹⁹ Equally important, satellite broadband is available ubiquitously, and Hughes recently inaugurated satellite broadband services specifically targeting small business customers.²⁰

Cablevision opposes parity of federal regulation because “[c]able companies have local obligations that are far more exhausting and completely foreign to phone companies.”²¹ Plainly Cablevision has never enjoyed the experience of regulatory oversight by state public utility commissions. More important, the Cable Act preempts virtually all local regulation of pricing and access terms, and there is, as a result, no local regulation that is relevant to the matters at issue in this proceeding. Cablevision's apparent claim that being regulated on some other issues (cable TV service, for example) means that its broadband services ought not be regulated is a non-sequitur. And the fact that cable companies are subject to local regulation on non-broadband services is certainly no reason to regulate telephone company broadband services.

The deployment of broadband services offers the promise of both of overall economic stimulation and new and useful services for consumers. If that promise is to become a reality, the Commission must ensure that its rules do not create disincentives to this deployment, both by cable and telephone companies. A title I regime best achieves that result. At the same time, the

¹⁸ Yankee Group, *Cable MSOs: Ready to Take Off in the Small and Medium Business Market* at 4 (Mar. 2002).

¹⁹ *Id.* at 2, 9 (Ex. 3).

²⁰ Hughes Network Systems, *Business Edition Internet Access*, at http://www.hns.com/direcway/for_small_business/learn_more/business_edition.htm (Hughes offers “three tiers of Internet business service for the DIRECWAY System – Business Edition Basic, Plus, and Premium – so you get the flexible, powerful solution that best suits your needs”).

²¹ Cablevision at 11.

Commission should ensure that state regulation does not interfere with the national policy to encourage broadband deployment. Permitting states to regulate these broadband 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.²² 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.²³ As it has in the past (with information services and CPE), the Commission should make clear that its title I regime preempts state regulation of these services.

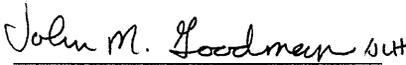
²² E.g., Assigned Commissioner's and ALJ's Ruling Denying Defendant's Motion to Dismiss, *Cal. ISP Ass'n v. Pacific Bell*, Case 01-07-027 (Cal. Pub. Utils. Comm'n rel. Mar. 28, 2002) (asserting jurisdiction over complaints about DSL service). California is not alone in regulating broadband services. See Final Decision 116-17, *Investigation into Ameritech Wisconsin's Unbundled Network Elements*, Docket No. 6720-T1-161 at (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).

²³ 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 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).

Conclusion

Verizon is not seeking greater regulation of cable broadband services, because broadband is competitive, and competitive markets require little regulation. Unnecessary regulation of broadband adds costs and discourages investment. Whatever regulation there is must be applied equally to all providers. Thus, 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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