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March 27, 2003

Ms. Marlene H. Dortch
Secretary
Federal Communications Commission
445 Twelfth Street, S.W.
Washington, DC 20554

Ex Parte: CC Dockets No. 02-33, 95-20, 98-10, 01-337 and CS Docket No. 02-52

Dear Ms. Dortch:

On March 26, 2003, Dee May, Edward Shakin, Augie Trinchese and the undersigned met with Barbara Esbin, Kyle Dixon, John Norton, John Kiefer, Peggy Green, Peter Corea, Jamila Bess Johnson, and Alison Greenwald of the Media Bureau to discuss the appropriate regulatory framework for broadband access to the Internet over wireline and cable facilities. We reviewed the First Amendment implications of a federally mandated system of multiple ISP access on cable operators and incumbent local telephone companies. We discussed how the Commission is precluded from regulating broadband Internet access provided over cable systems differently from the functionally equivalent broadband Internet access services provided over telephone lines, consistent with Verizon's Petition for Review in the Ninth Circuit Court of Appeals. Copies of Verizon's briefs in that proceeding are attached.

We stressed the importance of treating ILEC broadband services, including standalone transmission, under Title I of the Act and the harmful effects of imposing Computer III and ONA-type restrictions on broadband services. We also discussed the similarities of the facilities used to provide broadband access in both cable and wireline telephone networks and how ISPs connect to those networks. The attached charts were used in the discussion.

Please associate this notification with the record in the proceedings indicated above. If you have any questions regarding this matter, please call me at (202) 515-2530.

Sincerely,

A handwritten signature in black ink, appearing to read "W. Scott Randolph".

W. Scott Randolph

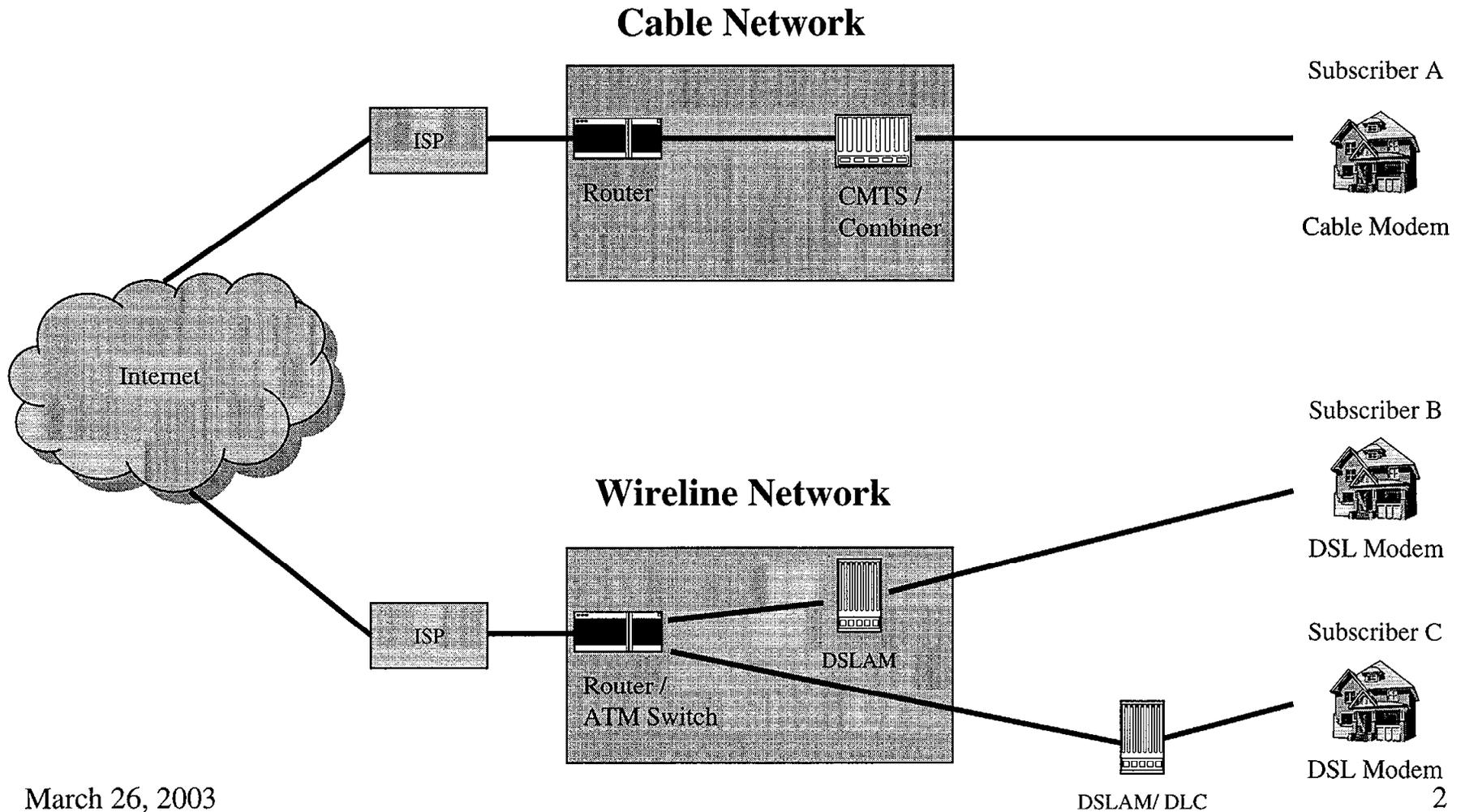
Attachments

cc: Barbara Esbin
Kyle Dixon
John Norton
John Kiefer
Peggy Green
Peter Corea
Jamila Bess Johnson
Alison Greenwald



Broadband

Network Symmetry



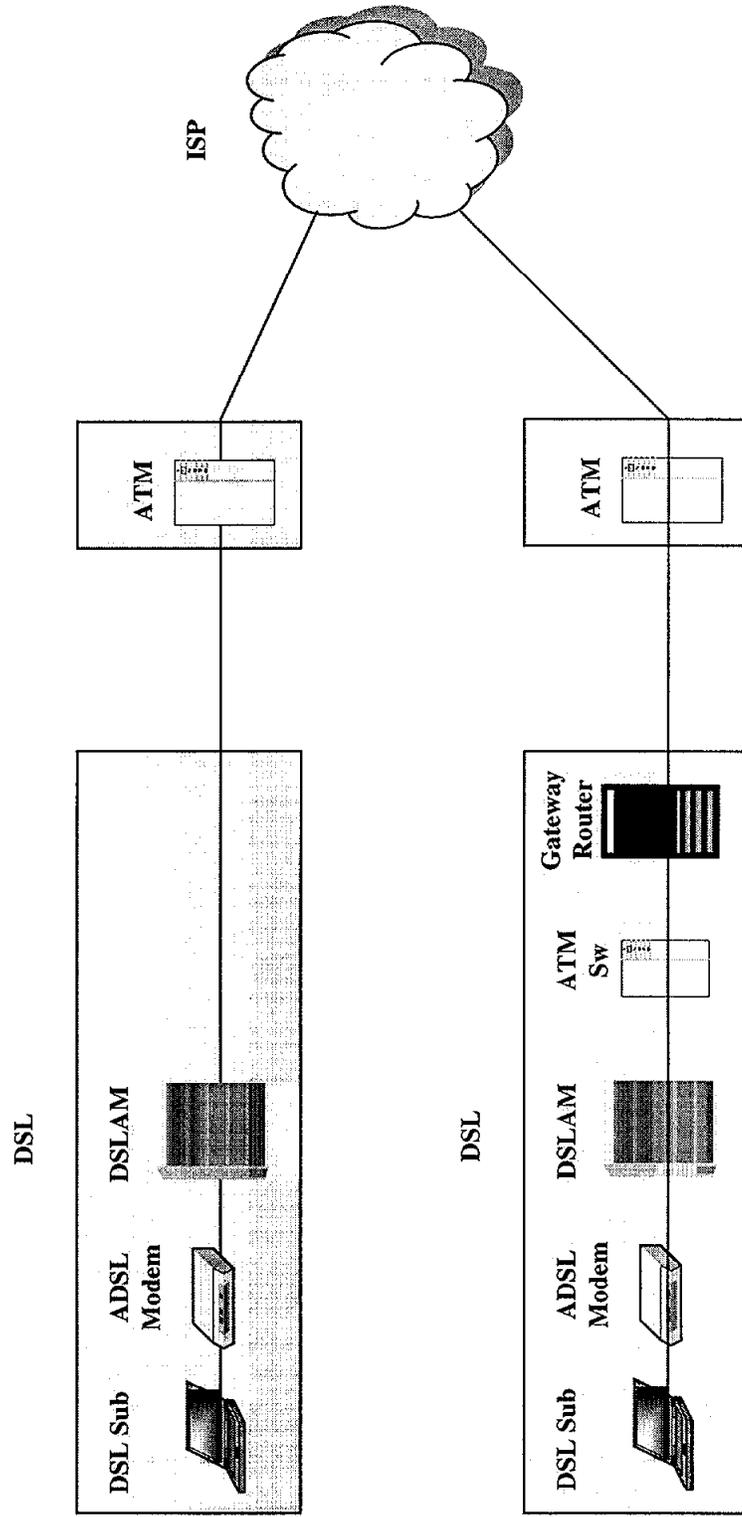
March 26, 2003

Network Symmetry

- Packet loop facilities are used to provide broadband access in both cable and wireline networks
 - Voice / Data
 - Cable TV / Data / Voice
- Networks are functionally similar
 - Routers access internet
 - CMTS / Combiner and DSLAM / ATM switch provide similar functionality
 - Services require specialized CPE (modems)



Generic DSL Transport Architectures



Nos. 02-70518, 02-70684, 02-70685, 02-70686, 02-70879, 02-71425, 02-72251

**IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT**

BRAND X INTERNET SERVICES, ET AL., AND

WORLDCOM, INC., ET AL., PETITIONER-INTERVENORS

v.

FEDERAL COMMUNICATIONS COMMISSION, RESPONDENT, AND

CHARTER COMMUNICATIONS, ET AL., RESPONDENT-INTERVENORS, AND

**UTILITY, CABLE AND TELECOMMUNICATIONS COMMITTEE
OF CITY COUNSEL OF NEW ORLEANS, ET AL., INTERVENORS**

**PETITION FOR REVIEW OF AN ORDER OF THE FEDERAL
COMMUNICATIONS COMMISSION**

**BRIEF FOR PETITIONERS THE VERIZON TELEPHONE COMPANIES
AND VERIZON INTERNET SOLUTIONS INC. d/b/a VERIZON.NET**

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 26.1 of the Federal Rules of Appellate Procedure, undersigned counsel respectfully submits this corporate disclosure statement for Petitioners the Verizon telephone companies and Verizon Internet Solutions Inc. d/b/a Verizon.net.

The following Verizon telephone companies are wholly owned subsidiaries of Verizon Communications Inc., a publicly held company. These are:

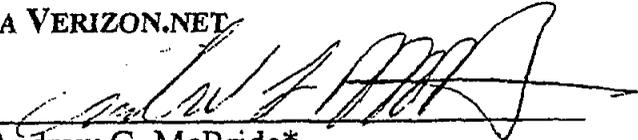
- Contel of the South, Inc. d/b/a Verizon Mid-States
- GTE Midwest Incorporated d/b/a Verizon Midwest
- GTE Southwest Incorporated d/b/a Verizon Southwest
- The Micronesian Telecommunications Corporation
- Verizon California Inc.
- Verizon Delaware Inc.
- Verizon Florida Inc.
- Verizon Hawaii Inc.
- 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.

Verizon Internet Solutions Inc. d/b/a Verizon.net is a wholly owned subsidiary of Verizon Technology Corp. which itself is an indirect wholly owned subsidiary of Verizon Communications Inc. Verizon Communications Inc. is a

Delaware corporation with its principal place of business in New York. Insofar as relevant to this litigation, the general nature and purpose of Verizon Communications Inc. (directly or through its subsidiaries) is to provide a variety of communications and related services to residential and business customers, including digital subscriber line and Internet access services. Verizon Communications Inc. has no parent company. No publicly owned company owns more than 10% of its stock.

Respectfully submitted,

**THE VERIZON TELEPHONE COMPANIES
AND VERIZON INTERNET SOLUTIONS INC.
D/B/A VERIZON.NET**

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Dated: October 10, 2002

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INTRODUCTION

This case involves a failure of reasoned decision-making by the FCC that resulted in the application of disparate regulatory requirements to functionally equivalent services without so much as even addressing the effect of these disparate requirements on competing providers or on competition generally. The FCC's failure to address these issues, after expressly recognizing their importance and requesting comment on them, has profound consequences for the First Amendment and statutory rights of one class of providers of high-speed Internet access. As the FCC has repeatedly noted, cable companies, telephone companies, satellite carriers, and wireless telephone providers are all capable of providing functionally equivalent high-speed Internet access services. The FCC, the courts, and other regulatory bodies all have recognized that these broadband services form a separate and highly competitive market.

In the *Notice of Inquiry* initiating this proceeding, the FCC alluded to this "convergence" of competing technologies and specifically requested comment on how its statutory approach to cable broadband technology should affect the regulatory treatment of other high-speed Internet access services. In response, Verizon argued that under the Communications Act, the First Amendment, and established principles of administrative law, the Commission was obligated to classify and regulate functionally equivalent broadband services in a like manner.

Numerous other parties argued in favor of equal treatment for all broadband services.

In the *Declaratory Ruling* under review, the FCC concluded that broadband Internet access services provided by cable companies are properly classified as services that are subject to minimal regulation under Title I of the Communications Act. While the Commission reasonably could have reached this conclusion with respect to *all* broadband providers, the FCC's order *failed to even address* the statutory and constitutional implications of this ruling for competing broadband technologies—despite the fact that it had expressly requested comment on these issues. The ruling thus creates, without any explanation whatsoever, an asymmetric regulatory regime where cable-based broadband Internet access is almost entirely free from regulation while broadband Internet access offered by telephone companies is subject to costly and intrusive common carrier regulation. Because the agency was obligated to address the effect of its decision on competing broadband providers before arriving at a statutory classification for any one broadband service in isolation, a remand to the FCC is necessary.

STATEMENT OF JURISDICTION

Pursuant to 47 U.S.C. § 402(a), 28 U.S.C. §§ 2342 and 2344, and Fed. R. App. P. 15(a), the Verizon telephone companies and Verizon Internet Solutions Inc. d/b/a Verizon.net (collectively “Verizon”) petitioned the United States Court

of Appeals for the D.C. Circuit¹ on March 25, 2002 for review of the final order of the Federal Communications Commission (the “Commission” or the “FCC”), captioned *Inquiry Concerning High-Speed Access to the Internet Over Cable and Other Facilities; Internet Over Cable Declaratory Ruling; Appropriate Regulatory Treatment for Broadband Access to the Internet Over Cable Facilities*, 17 FCC Rcd 4798 (2002) (the “*Declaratory Ruling*”).

The FCC had statutory authority to issue the *Declaratory Ruling* under 47 U.S.C. §§ 151, 152, 153, 154, 303, 403, and 521 and Section 706 of the Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56 (1996).

The *Declaratory Ruling* constitutes a “final order of the Federal Communications Commission made reviewable by section 402(a) of title 47,” within the meaning of 28 U.S.C. § 2342(1). The *Declaratory Ruling* was released on March 15, 2002. Verizon’s Petition for Review was filed on March 25, 2002, within the 60-day period prescribed by 47 U.S.C. § 402(a), and was therefore timely filed.

Venue lies in this Court pursuant to 28 U.S.C. § 2343.

STATEMENT OF THE ISSUE

Whether the FCC’s decision to classify one broadband Internet access technology in isolation without even considering arguments expressly invited in

¹ The case was later transferred to this Court pursuant to 28 U.S.C. § 2112(a).

the FCC's own *Notice of Inquiry* that the Communications Act, the First Amendment and the Administrative Procedure Act require consistent statutory classification and regulatory treatment of all broadband Internet access services requires a remand to the Commission.

STATEMENT OF THE CASE

On September 28, 2000, the Commission issued a Notice of Inquiry entitled *Inquiry Concerning High-Speed Access to the Internet Over Cable and Other Facilities*, 15 FCC Rcd 19287 (2000) ("*Notice of Inquiry*") to address the statutory classification of high-speed Internet access services, including such services provided by cable operators. (E.R. 1-24).² In its response to the Commission's request for comment on the effect that its decision regarding the statutory classification of cable-based broadband Internet access service would have on other broadband providers, Verizon argued that the Communications Act, the First Amendment, and the Administrative Procedure Act prevent the Commission from regulating broadband Internet access provided over upgraded cable systems differently from the functionally equivalent broadband Internet access services provided over upgraded telephone lines, such as the digital subscriber line ("DSL") services offered by Verizon. *Comments of Verizon Communications* in GN Docket No. 00-185 at 11-12, 31-40 (filed Dec. 10, 2000) ("*Verizon Comments*") (E.R. 38-

² The Excerpts of Record required by 9th Cir. Rules 17-1 and 30-1 are cited as "E.R. ___."

39, 58-67); *Reply Comments of Verizon Communications* in GN Docket No. 00-185 at 17-18, 27-31 (filed Jan. 10, 2001) (“*Verizon Reply Comments*”) (E.R. 87-88, 97-100). Numerous other parties also argued that cable-based Internet access service and DSL must occupy the same statutory classification and receive the same regulatory treatment. *See infra*, note 3.

On March 15, 2002, the FCC released the *Declaratory Ruling*, which classified cable broadband service as an interstate information service, subject only to the Commission’s authority under Title I of the Act, *Declaratory Ruling*, 17 FCC Rcd at 4819-32 (¶¶ 33-59) (E.R. 124-37), and determined that broadband Internet access provided over cable systems does not contain any separate “telecommunications service” offering to subscribers or to Internet Service Providers (“ISPs”) that is subject to regulation on a common carrier basis, *see id.* at 4802, 4827-32 (¶¶ 3, 48-59) (E.R. 106, 132-37). The Commission also concluded that cable-based Internet access service is not subject to the FCC rules applicable to wireline telephone companies that provide information services along with traditional voice telephony over their facilities. *See id.* at 4824-25 (¶¶ 42-44) (E.R. 129-30). Even where a cable operator provides traditional voice telephony and broadband services over its facilities, the FCC waived, on its own motion, the regulatory requirements that otherwise would apply to the information service and the underlying telecommunications component thereof. *See id.* at 4824-26 (¶¶ 42-

47) (E.R. 129-31). In reaching these conclusions, the FCC did not address the arguments, pressed by Verizon and other parties in their comments, regarding the statutory and constitutional problems raised by the disparate regulation of expressive media that offer consumers the same basic functionalities and compete with each other in the same product market.

Verizon timely filed a Petition for Review of the *Declaratory Ruling* in the United States Court of Appeals for the D.C. Circuit. Verizon's Petition was subsequently transferred to this Court pursuant to 28 U.S.C. § 2112(a) and consolidated with the Petitions for Review filed by a number of other parties.

STATEMENT OF FACTS

This case involves the proper statutory classification of broadband services used to access the Internet. High-speed or "broadband" service refers to the high rate of data transmission between the consumer and an ISP achieved by certain transmission facilities. *See Applications for Consent to the Transfer of Control of Licenses and Section 214 Authorizations by Time Warner Inc. and America Online, Inc., Transferors, to AOL Time Warner, Inc., Transferee*, 16 FCC Rcd 6547, 6571-72 (¶ 63) (2001) ("*AOL-Time Warner Merger Order*"). These high-speed connections allow consumers to retrieve information from the Internet in "real-time" and allow reception of high-quality graphics, pictures or even video through the Internet, without the lag associated with other types of service. Moreover,

broadband Internet connections are “always on,” allowing consumers to access the Internet without delay. *See, e.g., Inquiry Concerning the Deployment of Advanced Telecommunications Capability to All Americans in a Reasonable and Timely Fashion*, 14 FCC Rcd 2398, 2427 n.116 (¶ 54 n.116) (1999) (“*First Section 706 Report*”) (cable broadband); *Inquiry Concerning the Deployment of Advanced Telecommunications Capability to All Americans in a Reasonable and Timely Fashion*, 17 FCC Rcd 2844, 2857 (¶ 25) (2002) (“*Third Section 706 Report*”) (DSL). These characteristics distinguish broadband technologies from “narrowband” or “dial up” Internet access services. *See AT&T Corp. v. City of Portland*, 216 F.3d 871, 873-74 (9th Cir. 2000) (discussing characteristics of broadband technology as opposed to traditional “dial up” Internet access).

In a classic example of “technological convergence,” both traditional telephone companies and cable operators have made alterations to their existing infrastructure to provide consumers with two-way, high-speed Internet connections. Cable systems have been modified to provide two-way broadband service through the use of high-speed routing facilities and a network of fiber optic cables connected to the coaxial cable that enters the consumers’ premises. *See Declaratory Ruling*, 17 FCC Rcd at 4806-07 (¶ 12) (E.R. 111-12). Similarly, DSL service offered by wireline telephone companies uses the same copper-paired telephone lines that deliver voice communications, combined with high-speed

routing facilities and a network of fiber optic cables. *See Third Section 706 Report*, 17 FCC Rcd at 2857 (¶ 25).

Both cable operators and telephone companies must make substantial capital investments to upgrade their systems to provide broadband capability. At present, the investments required to upgrade traditional telephone networks to provide high-speed access exceed those necessary to upgrade cable plant. *See First Section 706 Report*, 14 FCC Rcd at 2415-16 (¶ 37) (cable); *id.* at 2419-2420 (¶ 42) (DSL). DSL providers must invest more to add a broadband capability because, as the FCC has recognized, “traditional telephone networks are not ideally suited for broadband.” *Id.* at 2422-23 (¶ 46). In part due to the greater cost associated with upgrading existing telephone networks to provide broadband services, the cable investment has mostly been completed, while wireline telephone companies still face large capital outlays to extend the reach of their current broadband offerings. *See Inquiry Concerning the Deployment of Advanced Telecommunications Capability to all Americans in a Reasonable and Timely Fashion*, 15 FCC Rcd 20913, 20985-86, 20988 (¶¶ 190, 196) (2000) (“*Second Section 706 Report*”); *Third Section 706 Report*, 17 FCC Rcd at 2873 (¶ 68). These and other factors have resulted in cable-based broadband technologies obtaining a dominant position in the market for broadband Internet access.

The current broadband offerings of both cable operators and wireline telephone companies, as well as those of the alternative broadband providers discussed below, allow consumers to access a full range of Internet-related functionalities, including electronic mail, the ability to access any address on the Internet, chat rooms, and proprietary content provided by the subscriber's ISP. *Declaratory Ruling*, 17 FCC Rcd at 4822-23 (¶ 38) (E.R. 127-28). Whether a customer chooses cable-based Internet access service, DSL, or an alternative provider, the consumer receives the same basic functionalities and services. For this reason, consumers view the various broadband technologies as substitutes for each other. *See AOL-Time Warner Merger Order*, 16 FCC Rcd at 6571-72 (¶ 63) ("High-speed (or 'broadband') Internet access is available through several different technologies, including cable [and] digital subscriber line ('dsl')"); *id.* at 6572 (¶ 65) ("the main competitor to cable in the market for residential high-speed Internet services is currently DSL"); Analysis of Proposed Consent Order to Aid Public Comment at 2, *America Online, Inc. and Time Warner Inc.*, FTC Docket No. C-3989 (FTC filed Dec. 14, 2000), available at www.ftc.gov/os/2000/12; *see also*, e.g., A. 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."); McKinsey & Co. and J.P. Morgan H&Q, *Broadband*

2001, Apr. 2, 2001, at 37 (most customers are “platform agnostic”); Michael Pastore, *Cable or DSL? Consumers See Little Difference*, Dec. 1, 2000, at www.cyberatlas.com (reporting results of Harris Interactive TechPoll of 69,000 Internet users which concluded that “subscribers saw little difference between DSL and cable modem services”).

A. The Distinct Market for Broadband Internet Access Services

The FCC and other regulatory bodies have repeatedly recognized that broadband Internet access services occupy a discrete product market—distinct from that of traditional “dial up” Internet access. The Commission’s current definition of broadband requires speeds of 200 kbps in each direction, clearly distinguishing broadband from narrowband services. *See, e.g., First Section 706 Report*, 14 FCC Rcd at 2406-07 (¶¶ 20, 22). Every court or governmental agency that has considered the question has agreed that a distinct market exists for broadband services. *See, e.g., United States Telecom Ass’n v. FCC*, 290 F.3d 415, 428-29 (D.C. Cir. 2002) (“*USTA*”); *AOL Time Warner Merger Order*, 16 FCC Rcd at 6571-72 (¶ 63); Complaint ¶ 21, *America Online, Inc. and Time Warner Inc.*, FTC Docket No. C-3989 (FTC filed Dec. 14, 2000) (“*FTC AOL Time Warner Complaint*”), available at www.ftc.gov/os/2000/12/; Dep’t of Justice, Antitrust Division, Competitive Impact Statement, *United States v. AT&T Corp. and*

MediaOne Group, Inc., No. 00-1176 (D.D.C. filed May 25, 2000), available at www.usdoj.gov/atr/cases/f4800/4842.htm.

Currently, four categories of facilities-based competitors offer broadband Internet access services to consumers, with additional technology platforms capable of offering the same services on the near horizon. Participants in the broadband market include: cable operators; wireline telephone companies, including incumbent local exchange carriers (“ILECs”) such as Verizon; satellite operators; and fixed wireless providers. *See, e.g., Third Section 706 Report*, 17 FCC Rcd at 2853-54 (¶ 16); *id.* at 2913 (Appendix B, ¶ 9); *Second Section 706 Report*, 15 FCC Rcd at 20928 (¶ 28). Power line communications and mobile wireless broadband services are expected to be widely deployed in the next several years. *See Third Section 706 Report*, 17 FCC Rcd at 2878 (¶ 80); Michael P. Bruno, *Online Access Planned Through Power Lines*, Washington Post, Jan. 25, 2002, at E5; *The FCC’s Powell on Broadband Rules*, Business Week Online, Feb. 22, 2001. The FCC has properly recognized that this distinct broadband market is vibrantly competitive, and has observed that “the preconditions for monopoly appear absent” in the broadband market. *First Section 706 Report*, 14 FCC Rcd at 2423-24 (¶ 48); *see Implementation of the Local Competition Provisions of the Telecommunications Act of 1996*, 15 FCC Rcd 3696, 3835-3836 (¶ 307) (1999).

Nevertheless, cable is the leader in broadband, serving some two-thirds or more of the market for broadband services. See Kinetic Strategies, Cable Datacom News, *Cable Modem Market Stats & Projections*, as of September 9, 2002, at www.cabledatacomnews.com/cmhc/cmhc16.html (“*Cable Datacom News*”).

Upgraded cable service is currently available to approximately 81 million American homes. See *Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming*, 17 FCC Rcd 1244, 1265-66 (¶ 44) (2002) (“*Eighth Video Competition Report*”). As of September 30, 2002, cable operators had more than 10 million high-speed Internet access customers. See *Cable Modem Customers Top 10 Million*, at www.ncta.com/press/press.cfm.

DSL, by contrast, has only slightly over a 30 percent share of the broadband market, see *Cable Datacom News*, and is currently available to only approximately 51.5 million homes, *Eighth Video Competition Report*, 17 FCC Rcd at 1265-66 (¶ 44). The FCC has predicted that cable companies will maintain their dominant position in the broadband Internet access market for the foreseeable future. *E.g.*, *Second Section 706 Report* 15 FCC Rcd at 20985 (¶ 189) (concluding that cable will continue to serve the majority of broadband customers until at least 2004); Common Carrier Bureau, Industry Analysis Division, *High-Speed Services for Internet Access, Subscription as of June 30, 2001*, Feb. 2002, at 2.

B. The FCC's Regulatory Treatment of Broadband Internet Access Services

The regulatory regime that currently applies to broadband Internet access services offered by wireline telephone companies is a result more of accident than design. The FCC simply extended common carrier obligations applicable to voice telephony to the transmission component of residential broadband Internet access service. See *Deployment of Wireline Services Offering Advanced Telecommunications Capability*, 14 FCC Rcd 19237, 19247 (¶ 21) (1999) (“*Second Advanced Services Order*”) (“incumbent LECs must continue to comply with their basic common carrier obligations with respect to” DSL services, including “providing such DSL services on reasonable request . . . on . . . nondiscriminatory terms”); see also 47 U.S.C. § 202(a). Similarly, incumbent telephone companies were reflexively required to comply with federal tariffing requirements for their broadband Internet access services. See *GTE Telephone Operating Companies*, 13 FCC Rcd 22466, 22483 (¶ 32) (1998); *Second Advanced Services Order*, 14 FCC Rcd at 19247 (¶ 21); see also 47 U.S.C. § 203. In essence, the Title II “common carrier” regime, designed for the regulation of monopoly services, was mechanically transposed to the broadband offerings of telephone companies.

By contrast, the *Declaratory Ruling* classifies broadband services offered by cable operators in a radically different manner. Specifically, the FCC concluded

that cable-based Internet access service is subject to regulation, if at all, only under Title I of the Communications Act. *Declaratory Ruling*, 17 FCC Rcd at 4819-32 (¶ 33-59) (E.R. 124-37). The Commission exempted cable broadband service from numerous regulatory requirements and burdens that apply to functionally equivalent high-speed Internet access services offered by telephone companies. *Id.* at 4824-25 (¶¶ 42-44) (E.R. 129-30). Although the FCC alluded in passing to other regulatory proceedings related to the classification of broadband Internet access provided over wireline telephone facilities, *e.g.*, *id.* at 4826 n.179 (¶ 47 n.179) (E.R. 131), the Commission nowhere addressed, or even mentioned, the statutory and constitutional arguments against the creation of disparate regulatory burdens that were properly advanced by Verizon and others in this proceeding.

In both its opening and reply comments, Verizon made clear that disparate statutory classification of cable broadband Internet access service and other broadband technologies, such as DSL, was contrary to principles of technological and competitive neutrality that are central to the Communications Act. *See Verizon Comments* at 12 (E.R. 39); *Verizon Reply Comments* at 17-20 (E.R. 87-89). Numerous other parties made the same point— that the text and purpose of the Act require even-handed regulation of functionally equivalent services so that

consumers may enjoy the full benefits of intermodal competition.³ Verizon also argued that disparate treatment of similarly situated expressive media presented a constitutional problem under the First Amendment.⁴ This was particularly so, Verizon pointed out, where the non-dominant speaker was subject to intrusive common carrier regulation while the dominant speaker in the market was left unregulated. *See Verizon Comments* at 32-39 (E.R. 59-66); *Verizon Reply Comments* at 27-30 (E.R. 97-100). Despite the fact that these arguments were within the scope of the agency's own definition of its task in the *Notice of Inquiry*,

³ *See Comments of United States Telecom Ass'n* in GN Docket No. 00-185, at 9 (filed Dec. 1, 2000) ("Functionally equivalent services should receive the same regulatory treatment regardless of the technological platform used to distribute the service."); *Comments of SBC Communications Inc. and BellSouth Corp.* in GN Docket No. 00-185, at 1 (filed Dec. 1, 2000) ("[L]ike services must be treated alike, regardless of the name, corporate history, or traditional lines-of-business of the service provider. Broadband Internet access is the same service, whether it is provided over the coax, over copper, or through the air."); *Comments of Qwest Communications Int'l* in GN Docket No. 00-185, at 8 (filed Dec. 1, 2000) ("There is simply no reason why a cable provider's cable modem service should be treated any differently from a regulatory perspective than the DSL service by an ILEC."); *Reply Comments of SBC Communications Inc. and BellSouth Corp.* in GN Docket No. 00-185, at 9 (filed Jan. 10, 2001) ("A service is regulated based on what it offers to the consumer, not based on the name or history of the entity that provides it."); *id.* at 11 (the statute "does not . . . leave the Commission the room to go one way for DSL and the other for cable."); *Reply Comments of the United States Telecom Ass'n* in GN Docket No. 00-185, at 1 (filed Jan. 10, 2001) (urging the Commission to "eliminat[e] arcane regulations which perpetuate asymmetrical regulation of carriers providing Internet transport services simply because the technological platform used to deploy Internet transport services are different").

⁴ Ironically, numerous cable operators argued before the FCC that applying common carrier regulation to their broadband Internet access services—*e.g.*, the regulatory regime that now applies to DSL—would violate the First Amendment. *See, e.g., Comments of Comcast Corp.* in GN Docket No. 00-185, at 26 (filed Dec. 1, 2000) ("Imposing a requirement that cable operators provide non-discriminatory access to their cable Internet platform would limit a cable operator's First Amendment editorial discretion."); *Comments of the Nat'l Cable Television Ass'n* in GN Docket No. 00-185, at 38-39 (filed Dec. 1, 2000) (competition in the broadband market "would render any federal access requirement unconstitutional").

the Commission simply ignored these comments and arrived at a statutory classification of cable-based Internet access without regard to the proper treatment of competing services.

As a result of the *Declaratory Ruling*, high-speed cable Internet access service and the high-speed Internet access offerings of wireline telephone companies are currently subject to vastly different regulatory regimes. Cable broadband, the dominant form of broadband Internet access, is classified under Title I of the Act, and is essentially free from federal, state or local regulation. At the same time, DSL, by the Commission's own admission the distant second player in a competitive market, is subject to intrusive and costly common carrier regulation. Through inaction and happenstance, the FCC has placed its thumb on the competitive scales without ever addressing the statutory and constitutional issues raised by this disparate treatment.

SUMMARY OF THE ARGUMENT

Under well-settled principles of administrative law, an agency is obligated to provide a reasoned factual and legal basis for any decision. This includes the examination of possible alternatives and response to significant comments that are within the scope of the agency's inquiry. *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983); see *Nat'l Wildlife Fed'n v. FERC*, 801 F.2d 1505, 1512 (9th Cir. 1986). It also includes a response to any constitutional

objections and, in particular, First Amendment concerns connected with a particular regulatory path. *E.g.*, *Nat'l Treasury Employees Union v. Fed. Labor Relations Auth.*, 986 F.2d 537, 540 (D.C. Cir. 1993) (agency obligated to consider First Amendment implications of its interpretation of statute); *Meredith Corp. v. FCC*, 809 F.2d 863, 872 (D.C. Cir. 1987) (the “Commission [i]s required . . . to respond to [the charged party's] constitutional challenge”).

In this case, the FCC expressly recognized in its *Notice of Inquiry* that the question of the proper statutory classification of cable-based broadband technologies was inextricably bound-up with the proper classification of functionally equivalent competing technologies. *Notice of Inquiry*, 15 FCC Rcd at 19287, 19293 (¶¶ 1, 15) (E.R. 1, 7). Yet, inexplicably, the agency failed to address the arguments made by Verizon and numerous other parties that the statute and the Constitution did not allow the FCC to accord favorable regulatory treatment to one broadband provider in isolation. Given the immediate and continuing First Amendment and economic harms caused by unfavorable regulatory treatment in a highly competitive market, the FCC was obligated to address those concerns in this proceeding. While the FCC could reasonably conclude that *all* broadband services should be classified under Title I of the Communications Act, it was not free to so classify one such service in isolation and without explanation. Because the Commission failed to address statutory and constitutional issues encompassed

within its own *Notice of Inquiry* and raised by the parties, its decision is arbitrary and capricious within the meaning of the Administrative Procedure Act and a remand is necessary.

REVIEWABILITY AND STANDARD OF REVIEW

The issue of the appropriate statutory classification of cable-based broadband Internet access and the ramifications of that classification for the regulatory treatment of competing broadband providers was squarely raised in the record in this proceeding. *See Notice of Inquiry* (E.R. 1-24); *Verizon Comments* (E.R. 25-67); *Verizon Reply Comments* (E.R. 68-102); *see also supra*, n. 3. In addition, Verizon specifically argued that disparate treatment of similarly situated speakers and expressive platforms violated the First Amendment in its comments before the agency. *Verizon Comments* at 35-40 (E.R. 62-67); *Verizon Reply Comments* at 27-31 (E.R. 97-101).

Under the Administrative Procedure Act, this court must set aside agency action that is “arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.” 5 U.S.C. § 706(2)(A). This standard requires the FCC to respond to all “significant comments” in the administrative record. *E.g.*, *NAACP v. FCC*, 682 F.2d 993, 997-98 (D.C. Cir. 1982). The Commission is also required to address any constitutional objections to a particular course of agency action. *E.g.*, *Meredith Corp.*, 809 F.2d at 872. While an agency’s interpretation of a statute it is

charged with enforcing is generally entitled to deference, *Chevron U.S.A., Inc. v. Nat. Res. Def. Council*, 467 U.S. 837, 843 (1984), such deference does not apply where the agency’s interpretation raises “substantial constitutional question[s].” *Ma v. Ashcroft*, 257 F.3d 1095, 1105 n.15 (9th Cir. 2001); see *Williams v. Babbitt*, 115 F.3d 657, 661-63 (9th Cir. 1997) (discussing *Edward J. DeBartolo Corp. v. Florida Gulf Coast Bldg. & Constr. Trades Council*, 485 U.S. 568 (1988); and *Rust v. Sullivan*, 500 U.S. 173 (1991)).

ARGUMENT

I. THE FCC WAS NOT FREE TO SIMPLY IGNORE OR DEFER STATUTORY AND CONSTITUTIONAL ARGUMENTS THAT ALL BROADBAND TECHNOLOGIES MUST RECEIVE LIKE REGULATORY TREATMENT.

A. The Communications Act Requires Like Classification and Regulatory Treatment of Functionally Equivalent Services.

Any decision regarding the statutory classification of a particular communications service must be informed by the policy of competitive and technological neutrality—a central tenet of the original Communications Act that was reinforced by the 1996 Act. See, e.g., *Federal-State Joint Board on Universal Service (Report and Order)*, 12 FCC Rcd 8776, 8802-8803 (¶ 50) (1997) (discussing the importance of competitive and technological neutrality to promote competition). One of Congress’s main goals in the 1996 Act was to break down legal and administrative barriers to competition among entities that had previously occupied different regulatory classifications. Congress itself eliminated numerous

regulatory barriers to the provision of new services by cable operators, telephone companies, and other utilities, thereby opening previously closed markets to new entrants. *See* Pub. L. No. 104-104, § 253(a) (1996) (*codified at* 47 U.S.C. § 253(a)); *id.* § 303, 110 Stat. 70 (*codified at* 47 U.S.C. § 541(b)(3)); *id.* § 302, 100 Stat. 57 (*codified in part at* 47 U.S.C. § 571-73); *id.* § 103, 110 Stat. 81 (*codified at* 15 U.S.C. §§ 79z-5c)). The Act further directs the Commission to “remov[e] barriers to infrastructure investment and promot[e] competition” in the provision of broadband services. 1996 Act, § 706, 110 Stat. 153 (*reproduced in* 47 U.S.C. § 157 note).

The Act seeks to create a level playing field among providers of functionally equivalent communications services, regardless of corporate identity or the particular facilities employed. Thus, any entity offering telecommunications services—whether a local telephone network, an upgraded cable system, or an electric utility—is regulated as a provider of telecommunications services, “regardless of the facilities used.” 47 U.S.C. § 153(46); *City of Portland*, 216 F.3d at 879. By the same token, where a telecommunications carrier offers cable service to the public, it is regulated as any other cable system. *See* 47 U.S.C. § 571(a)(3).

Congress explicitly codified this principle of competitive neutrality in the context of broadband services. The Act requires that broadband services be

defined and regulated “without regard to any transmission media or technology.” *Id.* § 706, 110 Stat. 153 (*reproduced in* 47 U.S.C. § 157 note); *see City of Portland*, 216 F.3d at 879 (acknowledging that “[i]n the Telecommunications Act, Congress defined advanced telecommunications capability ‘without regard to any transmission media or technology’”). Classification by functionality ensures that service providers and their investors are treated fairly and that consumers reap the maximum benefits of price and service competition among different facilities-based providers.

The fact that Verizon provides basic telephone service or that a cable operator provides cable service is *irrelevant* to the proper statutory classification of their separate broadband offerings. A provider of “telecommunications services” is a “telecommunications carrier,” and is to be “treated as a common carrier . . . *only to the extent that it is engaged in providing telecommunications services.*” 47 U.S.C. § 153(44) (emphasis added). Similarly, a cable operator’s provision of “telecommunications services” is expressly excluded from regulation under the provisions of the Communications Act applicable to cable service. *See id.* § 541(b)(3). Thus, it is clear that a single entity may be a “common carrier” for some purposes but not others. *See, e.g., Southwestern Bell Tel. Co. v. FCC*, 19 F.3d 1475, 1481 (D.C. Cir. 1994) (“The mere fact that petitioners are common carriers with respect to some forms of telecommunication does not relieve the

Commission from supporting its conclusion that petitioners provide dark fiber on a common carrier basis.”); *Nat’l Ass’n of Regulatory Util. Comm’rs v. FCC*, 533 F.3d 601, 608 (1975) (“*NARUC*”) (“it is at least logical to conclude that one can be a common carrier with regard to some activities but not others”).

The Commission correctly relied upon these general principles in the ruling under review. It noted that service classification turns “on the function that is made available,” not “on the particular types of facilities used.” *Declaratory Ruling*, 17 FCC Rcd at 4821 (¶ 35) (E.R. 126); *see also id.* at 4866 (Separate Statement of Chairman Michael K. Powell) (E.R. 171) (observing that rights and obligations under the Communications Act apply “differently, depending on the nature of the service offered without regard to the means in which it is offered”). The Commission has also recognized that these general principles point in the direction of uniform regulation of all broadband providers. *See, e.g. First Section 706 Report*, 14 FCC Rcd at 2407 (¶ 23)(“[W]hether a capability is broadband does not depend on the use of any particular technology or the nature of the provider.”); *see also* Amicus Br. of FCC at 25, *AT&T Corp. v. City of Portland*, No. 99-35609 (9th Cir. filed Aug. 16, 1999) (stating that broadband transmission “provided through cable modem is no different from the broadband capability provided over other facilities;” accordingly, the “classification of the service should [not] vary with the facilities used to provide [it]”).

B. The Commission Could Reasonably Conclude that Broadband Services Offered by All Providers are Properly Classified and Regulated Under Title I of the Communications Act.

The FCC correctly concluded that broadband Internet access services do not fit within the statutory definition of either a “telecommunications service” or a “cable service.” *See Declaratory Ruling*, 17 FCC Rcd at 4820-39 (¶¶ 34-69) (E.R. 125-44). Rather, the Commission rightly determined that broadband Internet access services are properly classified as “information services” and that the underlying transmission function is a non-common carrier telecommunications offering subject to the Commission’s authority under Title I of the Act.

Under Title I of the Communications Act, the FCC may adopt regulations that are reasonably ancillary to the exercise of the Commission’s express statutory authority. *See* 47 U.S.C. § 154(i); *United States v. Southwestern Cable Co.*, 392 U.S. 157, 178 (1968). The Commission has long exercised this authority to regulate the provision of computer-generated data services defined as “enhanced services.” *See Amendment of Section 64.702 of the Commission’s Rules and Regulations*, 77 FCC 2d 384, 432 (¶ 124) (1979) (subsequent history omitted) (“*Computer IP*”) (asserting Title I jurisdiction over enhanced services). In the 1996 Act, Congress created a new statutory classification of “information services” that codified the FCC’s earlier definition of “enhanced services.” *See* 47 U.S.C. § 153(20); *see also City of Portland*, 216 F.3d at 878 (describing the statutory

category of “information services” as “the codified term for what the FCC first called ‘enhanced services’”) (citations omitted). The Commission has made clear that its regulation of “information services” is undertaken pursuant to its Title I authority. *See Access to Telecommunications Service, Telecommunications Equipment and Customer Premises Equipment by Persons with Disabilities*, 16 FCC Rcd 6417, 6457 (¶ 98) (1999) (asserting Title I jurisdiction to regulate information services). The Commission has similarly exercised Title I authority over non-common carrier telecommunications offerings. *See, e.g., Norlight*, 2 FCC Rcd 132, 136 (¶ 33) (1987); *see also Wold Communications, Inc. v. FCC*, 735 F.2d 1465, 1474-76 (D.C. Cir. 1984).

The statute defines an information service as “the offering of a capability for generating, acquiring, storing, transforming, processing, retrieving, utilizing, or making available information via telecommunications, and includes electronic publishing, but does not include any use of any such capability for the management, control, or operation of a telecommunications system or the management of a telecommunications service.” 47 U.S.C. § 153(20). The FCC’s determination that the package of functions that broadband Internet access providers typically offer subscribers, including e-mail, newsgroups, the ability to create web pages that are accessible to other users, as well as domain name

resolution through a domain name system (“DNS”),⁵ is a reasonable one that fits comfortably within the statutory definition of an information service. *See Declaratory Ruling*, 17 FCC Rcd at 4822-23 (¶ 38) (E.R. 127-28).

As the FCC acknowledged, the Internet connectivity functions offered by broadband Internet access providers enable subscribers to “transmit data communications to and from the rest of the Internet.” *Id.* at 4810 (¶ 17) (E.R. 114). These services include not only “establishing a physical connection between the cable system and the Internet,” but also “protocol conversion, IP address number assignment, . . .[DNS] . . ., network security, and caching.” *Id.* Such operations involve more than the simple transmission of data, they include the “storing, transforming, processing retrieving, utilizing or making available” of information—all functionalities that fall squarely within the statutory definition of information services. *See* 47 U.S.C. § 153(20).

By focusing on the provision of these services “taken together,” the Commission reconciled its decision with its previous conclusion that Internet access service is appropriately classified as an “information service” because “the provider offers a single, integrated service to the subscriber.” *Declaratory Ruling*, 17 FCC Rcd at 4821 (¶ 36) (E.R. 126); *see Federal-State Joint Board on Universal*

⁵ DNS is the online data retrieval and directory service that is used to provide IP addresses associated with domain names, to perform reverse address-to-name lookups, and to identify and locate email servers. *Declaratory Ruling*, 17 FCC Rcd at 4810 n. 74 (¶ 17 n.74) (E.R. 114-15).

Service (Report to Congress), 13 FCC Rcd 11501, 11530 (¶ 59) (1998). In this regard, the FCC correctly refused to disaggregate the elements of broadband Internet access service and separately classify each element. As the Commission noted, consumers receive a package of services that constitutes “Internet access,” including the capability to generate, acquire, store, transform, process and retrieve information. *See* 47 U.S.C. § 153(20).

Every communications service (including all forms of broadband Internet access) has an underlying transmission medium, but the mode of transmission does not govern the proper service definition.⁶ As the Commission noted, “[a]ll information services require the use of telecommunications to connect customers to the computers or processors that are capable of generating, storing, or manipulating information.” *Declaratory Ruling*, 17 FCC Rcd at 4823 (¶ 40) (E.R. 128); *Implementation of the Non-Accounting Safeguards of Section 271 and 272 of the Communications Act of 1934, as amended*, 16 FCC Rcd 9751, 9758 (¶ 16), 9758-59 (¶ 32) (2001). Accordingly, it was well within the FCC’s discretion to decline to “find a telecommunications service inside every information service, extract it, and make it a stand-alone offering to be regulated under Title II.” *Declaratory Ruling*, 17 FCC Rcd at 4825 (¶ 43) (E.R. 130); *see also Howard v.*

⁶ For example, a telecommunications service can be provided over traditional copper-paired wires, an upgraded cable system, or by terrestrial wireless means. 47 U.S.C. §§ 153(46), 541(b)(3)(A).

America Online Inc., 208 F.3d 741, 753 (9th Cir. 2000) (citing approvingly the FCC's determination that Internet access services are "hybrid" and "are information . . . services and are not telecommunication[s] services").

The Commission also found that broadband Internet access was properly classified as an information service regardless of the interrelationship of corporate entities that provide the service. Thus, the FCC found that a broadband Internet access provider's offering of a transmission function in combination with another entity's provision of Internet connectivity and other Internet-related services remains a joint offering of "a single service," rather than distinct "transmission" and "content" services that require separate classification under the Act. *Id.* at 4828 (¶ 51) (E.R. 133). Although another corporate entity may offer some or all of the functionalities that make Internet access an information service, it is the broadband provider that offers the entire package to the consumer as an information service. *Id.* As the FCC put it: "As provided to the end user the telecommunications is part and parcel of cable modem service and is integral to its other capabilities." *Id.* at 4823 (¶ 39) (E.R. 128); *see also Federal-State Joint Board on Universal Service (Report to Congress)*, 13 FCC Rcd at 11520 (¶ 39) (noting that an information service provider "uses telecommunications" but does not offer telecommunications to the public and thus "the categories of

‘telecommunications service’ and ‘information service’ in the 1996 Act are mutually exclusive”).

This conclusion is fully consistent with the division the Act draws between “telecommunications,” defined in 47 U.S.C. § 153(43), and “telecommunications service,” defined in 47 U.S.C. § 153(46). As the FCC noted, by definition information services are provided “*via telecommunications.*” *Declaratory Ruling*, 17 FCC Rcd at 4823 (¶ 39) (E.R. 128) (quoting 47 U.S.C. § 153(20)). The Act defines “telecommunications,” as “the transmission, between or among points specified by the user, of information of the user’s choosing, without change in the form or content of the information as sent and received.” 47 U.S.C. § 153(43). A “telecommunications service,” in turn, is defined 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.” *Id.* § 153(46). As the Commission has long recognized, there is a category of private carriage that constitutes “telecommunications” but not “telecommunications service.” *See, e.g., NARUC*, 533 F.2d at 608-09. This category of private interstate telecommunications services is subject only to the Commission’s general Title I jurisdiction. *See Southwestern Bell Tel. Co.*, 19 F.3d at 1481.⁷

⁷ Indeed, cable operators rely upon a pure transmission or “telecommunications” function in receipt and delivery of video programming within their cable systems. The presence of this telecommunications component

Under Commission precedent, the decision whether to classify a particular service as “private telecommunications” or “telecommunications service” depends upon two factors: (1) the carrier’s intention to make individualized decisions regarding the terms and conditions of carriage; and (2) whether the public interest requires that the carrier be legally compelled to serve the public indifferently. *See AT&T Submarine Sys., Inc.*, 13 FCC Rcd 21585, 21588 (¶ 7) (1998), *aff’d*, *Virgin Islands Tel. Corp. v. FCC*, 198 F.3d 921 (D.C. Cir. 1999). Cable operators, satellite providers, and wireless providers already are offering their broadband transmission services on a “private carriage” basis and, quite logically, the wireline telephone companies would choose to compete on the same basis. Moreover, the public interest preconditions for common carrier regulation are completely lacking in the broadband market. The Commission and the courts have repeatedly recognized that the market is “truly competitive.” *Computer II*, 77 FCC 2d at 430, 432, 433 (¶¶ 119, 124, 128); *see Rulemaking to Amend Parts 1, 2, 21 and 25 of Commission’s Rules to Redesignate 27.5-29.5 GHz Frequency Band*, 15 FCC Rcd 11857, 11866 (¶ 21) (2000) (accepting commenters’ argument that “fixed broadband-suitable spectrum is difficult to monopolize to forestall competing broadband entry” due to competition in the broadband market); *First Section 706*

(Continued . . .)

does not cause any part of these services to be classified as common carriage or to be subjected to regulation under Title II.

Report, 14 FCC Rcd at 2423-24 (¶ 48) (“preconditions for monopoly appear absent” in broadband market); *see also USTA*, 290 F.3d at 422 (noting highly competitive nature of broadband market). Accordingly, even to the extent that broadband providers can be viewed as offering a stand-alone transmission service, the Commission appropriately reasoned that such a service would be a “private carrier service” rather than a “telecommunications service.” *Declaratory Ruling*, 17 FCC Rcd at 4829-31 (¶ 54-55) (E.R. 134-36).⁸

C. **The Commission’s Failure to Consider or Address Statutory and Constitutional Arguments That All Broadband Internet Access Services Must be Classified and Regulated in the Same Manner Necessitates a Remand.**

In determining whether agency action is arbitrary and capricious, the Court must not only “ensure that the agency’s decision is not contrary to law,” but also must make certain that the decision is “based on a consideration of the relevant factors.” *NAACP*, 682 F.2d at 997. To this end, the agency’s decision must be based on substantial evidence in the record. *Id.* at 998 n.3. In addition, an agency has a specific duty to respond to “significant comments made in the” administrative record. *Id.* at 997-998 (citing *Ala. Power Co. v. Costle*, 636 F.2d

⁸ This conclusion is further supported by numerous prior FCC decisions that have afforded services constituting pure transmission (or having a transmission component) Title I treatment. *See, e.g., Licensing Under Title III of the Communications Act of 1934*, 8 FCC Rcd 1387 (1993) (allowing provision of certain satellite services on private carriage basis); *Application of Loral/Qualcomm Partnership, L.P.*, 10 FCC Rcd 2333 (1995) (allowing use of Globalstar system for mobile voice, data, facsimile and other services on a private carriage basis).

323, 384-85 (D.C. Cir. 1979)); *see Brookings Mun. Tel. Co. v. FCC*, 822 F.2d 1153, 1169 (D.C. Cir. 1987). As demonstrated below, the FCC has failed to comply with these requirements here, requiring a remand.

1. Verizon Argued in Its Comments That the Regulatory Requirements Applicable to Broadband Internet Access Service Must Apply Equally to All Providers.

In response to the FCC's specific request for comment regarding the interrelationship of the statutory classification of cable broadband and other broadband services, *see Notice of Inquiry*, 15 FCC Rcd at 19293 (¶ 15) (E.R. 7), Verizon argued that broadband Internet access provided over cable systems is functionally equivalent to broadband Internet access provided via DSL, requiring that the two services receive the same statutory classification and be regulated in a like manner. *See Verizon Comments* at 11-12, 31-40 (E.R. 38-39, 58-67); *Verizon Reply Comments* at 17-18, 27-31 (E.R. 87-88, 97-101). Numerous other parties also commented that the various types of broadband services should be classified and regulated equally. *See supra*, note 3. As the FCC's own *Notice of Inquiry* demonstrates, comment on these issues was expressly invited in the proceeding that led to the *Declaratory Ruling* under review.

Issuance of the *Notice of Inquiry* was expressly premised upon "[t]he convergence of technologies that allows the provision of high-speed services over traditional cable television facilities, telecommunications lines, and other

facilities.” *Notice of Inquiry*, 15 FCC Rcd at 19287 (¶ 1) (E.R. 1). Accordingly, the Commission explicitly sought comment on “the impact of [its] approach [to cable broadband service] on other providers of high-speed services.” *Id.*

Moreover, the FCC’s goal was to “develop a record that examines the full range of high-speed service providers, including providers that use cable, wireline, wireless, satellite, broadcast, and unlicensed spectrum technologies.” *Id.* at 19288 (¶ 3) (E.R. 2). Throughout the *Notice*, the FCC discussed the impact of its approach to cable modem technology on providers of DSL and other services. *See id.* at 19287-91, 19293, 19296, 19304-05 (¶¶ 2, 6-7, 11, 15, 21, 43-44, 46) (E.R. 1-5, 7, 10, 18-19).

Answering the Commission’s request for a discussion of these important issues, Verizon explained that the Commission is obligated to regulate cable broadband services and DSL in an evenhanded manner pursuant to the Act’s requirement that services be classified based on the functionality provided to consumers. *See Verizon Comments* at 11-12, 31-40 (E.R. 38-39, 58-67); *Verizon Reply Comments* at 17-18, 27-31 (E.R. 87-88, 97-101). Specifically, Verizon pointed out that “the Act requires the Commission to define and regulate indistinguishable services identically ‘regardless of the facilities used.’” *Verizon Comments* at 11 (E.R. 38). Numerous other parties advanced this argument as well. *See supra*, note 3 (listing commenters). Moreover, Verizon argued that any

decision that perpetuated the disparate regulation of cable-based Internet access service and equivalent services provided by wireline telephone companies would run afoul of the Administrative Procedure Act's requirement that an agency engage in reasoned decision-making, particularly because cable is presently the dominant player in the broadband Internet access market. *See Verizon Comments* at 34 (E.R. 61).

Verizon also argued that maintenance of lopsided regulation would violate the First Amendment. *See id.* at 35-40 (E.R. 62-67); *Verizon Reply Comments* at 27-31 (E.R. 97-101). Just as the bandwidth used by a cable operator to deliver broadband Internet access provides a platform for protected speech, Verizon's broadband platform is a medium through which it offers a form of speech—its own Internet and other content services—to its customers. *See Verizon Comments* at 35-39 (E.R. 62-66); *Verizon Reply Comments* at 27-28 (E.R. 97-98). Federal courts have uniformly recognized that regulations that affect the ability of telephone companies to employ their facilities for expressive purposes are subject to heightened First Amendment scrutiny.⁹ Broadband, in other words, is the

⁹ For example, every court to consider the issue found that prohibiting telephone companies from providing video programming over their facilities within their service territories, *see* 47 U.S.C. § 533(b) (1985), *repealed by* Telecommunications Act of 1996 § 302(b)(1), Pub. L. No. 104-104, 1996 U.S.C.C.A.N. (110 Stat. 124), violated the First Amendment. *See Southern New Eng. Tel. Co. v. United States*, 886 F. Supp. 211 (2nd Cir. 1995); *Chesapeake & Potomac Tel. Co. v. United States*, 42 F.3d 181 (4th Cir. 1994), *vacated on other grounds*, 516 U.S. 415 (1996); *US West v. United States*, 48 F.3d 1092 (9th Cir. 1994), *vacated on other grounds*, 516 U.S. 1155 (1996); *NYNEX Corp. v. United*

microphone through which telephone companies (like their cable competitors) speak, and governmental restrictions that inhibit the reach or use of that microphone necessarily impinge on First Amendment interests.¹⁰ Moreover, as Verizon noted in its comments to the Commission, First Amendment scrutiny is particularly unforgiving where the government regulation imposes disparate regulatory burdens on similarly situated expressive media. *Verizon Reply Comments* at 29 (E.R. 99) (citing, *inter alia*, *News Am. Publ'g, Inc. v. FCC*, 844 F.2d 800, 804-05 (D.C. Cir. 1988); *Turner I*, 512 U.S. at 659; *City of Ladue v. Gilleo*, 512 U.S. 43, 51 (1994); and *City of Cincinnati v. Discovery Network*, 507 U.S. 410, 424 (1993)). Indeed, disparate regulatory treatment operates to suppress the expressive output of one provider in a manner similar to disparate taxation of competing media outlets. *See, e.g., 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

(Continued . . .)

States, No. 93-323-P-C (D. Me. Dec. 8, 1994); *United States Telecom Ass'n v. United States*, No. 1:94CV01961 (D.D.C. Feb. 13, 1995); *Southwestern Bell Corp. v. United States*, No. 3:94-CV-0193-D (N.D. Tex. Mar. 27, 1995); *Ameritech Corp. v. United States*, 867 F. Supp. 721 (N.D. Ill. 1994); *Bell South Corp v. United States*, 868 F. Supp. 1335 (N.D. Ala. 1994).

¹⁰ The Supreme Court has extended First Amendment protection to numerous “speech distribution” facilities or activities, including newsrack placement, *see City of Lakewood v. Plain Dealer Publ'g Co.*, 486 U.S. 750, 768 (1988), the public distribution of pamphlets, *see Lovell v. City of Griffin*, 303 U.S. 444, 452 (1938), control over the participants in a parade, *see Hurley v. Irish-American Group*, 515 U.S. 557, 570 (1995), and a cable operator’s control over the expressive capacity of its cable system. *See Turner Broad. Sys. v. FCC*, 512 U.S. 622, 629 (1994) (“*Turner I*”).

cannot countenance such treatment unless the State asserts a counterbalancing interest of compelling importance that it cannot achieve without differential taxation.”).¹¹

2. The Declaratory Ruling Failed To Address These Important Issues, Requiring A Remand To The FCC.

Nowhere in the *Declaratory Ruling* did the FCC even mention the disparate regulatory treatment of cable-based broadband services as compared to DSL, let alone address Verizon’s specific comments regarding the statutory and constitutional infirmities associated with the perpetuation of an asymmetric regulatory regime. The FCC utterly disregarded its duty to respond to “significant comments” in the administrative record. *NAACP*, 682 F.2d at 997-98; *see Brookings Mun. Tel. Co.*, 822 F.2d at 1169; *Ala. Power Co.*, 636 F.2d at 384-85. The FCC’s refusal to consider Verizon’s arguments requires a remand so that adequate consideration can be given to these issues. *Beno v. Shalala*, 30 F.3d 1057, 1073 (9th Cir. 1994) (“[W]e cannot infer an agency’s reasoning . . . where

¹¹ While Verizon might well choose to offer its broadband services to other content providers under particular terms and conditions, much as the Commission recognized that cable companies might choose to do as well, *see supra*, pp. 29-30, there is an obvious First Amendment distinction between a voluntary decision to carry content of others and governmental compulsion to act as a common carrier. *See Buckley v. Valeo*, 424 U.S. 1, 85-109 (1976) (although imposition of a mandatory limit on campaign expenditures violated a candidate’s First Amendment rights, a voluntary system under which candidates agreed to limit campaign expenditures in exchange for public financing of their campaigns was constitutionally permissible); *George v. Pacific-CSC Work Furlough*, 91 F.3d 1227, 1230 (9th Cir. 1996) (state action is a “necessary threshold” to a First Amendment claim).

the agency failed to address significant objections and alternative proposals.”); see *Darrell Andrews Trucking, Inc. v. Fed. Motor Carrier Safety Admin.*, 296 F.3d 1120, 1134-35 (D.C. Cir. 2002) (“substantial” argument “requires an answer from the agency”); *Telocator Network of Am. v. FCC*, 691 F.2d 525, 537 (D.C. Cir. 1982) (quoting *NAACP*, 682 F.2d at 998). Indeed, “the Commission’s failure to address [commenters’] arguments requires that [the Court] remand this matter for the Commission’s further consideration.” See *Iowa v. FCC*, 218 F.3d 756, 759 (D.C. Cir. 2000). Because the FCC’s decision to classify cable broadband service without regard to the treatment of functionally equivalent services “is not sustainable on the administrative record” the decision must be “remanded to the agency for further consideration.” *Almay, Inc. v. Califano*, 569 F.2d 674, 681 (D.C. Cir. 1977) (quoting *Nat’l Nutritional Foods Ass’n v. Weinberger*, 512 F.2d 688, 701 (2d Cir. 1975)).

The FCC made no attempt to explain its decision to address only half of the regulatory problem presented by its own *Notice of Inquiry*. Nor did the Commission present an explanation for its decision to leave cable operators—the dominant providers of broadband Internet access—virtually unregulated, while continuing to subject the broadband offerings of non-dominant wireline telephone companies to common carrier regulation. The absence of any such explanation is all the more glaring given the Commission’s recognition that cable and DSL

compete in a single broadband market, *see, e.g., AOL-Time Warner Merger Order*, 16 FCC Rcd at 6571-72 (¶ 63), in which cable operators are the market leaders, *see, e.g., First Section 706 Report*, 14 FCC Rcd at 2423 (¶ 47). Moreover, the FCC's perpetuation of an asymmetric regulatory framework in the broadband market is inconsistent with its regulatory response in analogous situations where incumbent telephone providers, such as Verizon, are non-dominant participants in a competitive market. *See Regulatory Treatment of LEC Provision of Interexchange Services Originating in the LEC's Local Exchange Area and Policy and Rules Concerning the Interstate, Interexchange Marketplace*, 12 FCC Rcd 15756, 15873-77 (¶¶ 206-10) (1997) (concluding that ILECs would not have market power in the provision of in-region long distance services upon entry into that market and thus classifying them as non-dominant).

The Commission's failure to address these issues takes on added importance because First Amendment freedoms are at stake. Because this disparate regulatory treatment works an ongoing First Amendment injury, the FCC had an obligation to address the First Amendment issue when properly raised in proceedings before it. *See Meredith Corp.*, 809 F.2d at 872 (remanding case to FCC for consideration of First Amendment issues); *WAIT Radio v. FCC*, 418 F.2d 1153, 1156 (D.C. Cir. 1969) (same); *see also Elrod v. Burns*, 427 U.S. 347, 373 (1976) ("The loss of First Amendment freedoms, for even minimal periods of time, unquestionably

constitutes irreparable injury.”); accord *Bery v. City of New York*, 97 F.3d 689, 693-94 (2d Cir. 1996) (alleged deprivation of a constitutional right constitutes irreparable injury).

The Administrative Procedure Act also requires the FCC to “provide adequate explanation before it treats similarly situated parties differently.” See, e.g., *Petroleum Communications v. FCC*, 22 F.3d 1164, 1172 (D.C. Cir. 1994); *Adams Telcom v. FCC*, 38 F.3d 576, 581 (D.C. Cir. 1994) (quoting *Melody Music, Inc. v. FCC*, 345 F.2d 730, 733 (D.C. Cir. 1965)); *United Gas Improvement Co. v. Fed. Power Comm’n*, 283 F.2d 817, 823 (9th Cir. 1960) (“The significance of any disparities . . . should be explained by Commission findings based upon substantial evidence.”). And more generally, the courts have made clear that the Commission must, in making its decisions, take into account the competitive context. See, e.g., *Fox Television Stations, Inc. v. FCC*, 280 F.3d 1027, 1050-51 (D.C. Cir. 2002) (finding that the FCC’s failure to consider competition to cable companies from satellite providers, standing alone, was arbitrary and capricious and required reversal); *USTA*, 290 F.3d at 429 (vacating requirements imposed on DSL providers alone based on the FCC’s “naked disregard of the competitive context” and the fact that the FCC “completely failed to consider the relevance of competition in broadband services coming from cable (and to a lesser extent from satellite)”). Accordingly, the FCC would have been obligated to supply an

adequate explanation for its decision to impose differential regulatory burdens on cable-based broadband service and functionally equivalent broadband services provided by wireline telephone companies *even in the absence of Verizon's comments*.¹²

Finally, the Commission is not free, in an effort to belatedly salvage its flawed order, to gin up the missing explanation for its failure to address the important statutory and constitutional issues associated with its disparate treatment of cable versus wireline broadband Internet access services in the context of this case. It is well established that “courts may not accept appellate counsel’s post hoc rationalizations for agency action.” *Bowen v. Georgetown Univ. Hosp.*, 488 U.S. 204, 212 (1988) (quoting *Burlington Truck Lines v. United States*, 371 U.S. 156, 168 (1962)). “An agency’s action may be upheld, if at all, on the same basis articulated in the order by the agency itself.” *Burlington Truck Lines*, 371 U.S. at 165; *see SEC v. Chenery Corp.*, 332 U.S. 194, 196 (1995) (requiring reviewing court to evaluate agency action based solely upon the justification set forth by the agency).

¹² Although the FCC has pending before it a number of proceedings that may address some of the issues raised in Verizon’s comments, principles of administrative law required the Commission to address the issues properly raised in this proceeding and prohibited the FCC from addressing only half of the regulatory problem framed by its own *Notice of Inquiry*. *State Farm*, 463 U.S. at 43 (decision arbitrary and capricious where agency “entirely failed to consider an important aspect of the problem”); *Beno*, 30 F.3d at 1073. This is particularly so where one expressive medium has been subject to disparate regulation in a highly competitive market, causing continuing First Amendment and competitive injury.

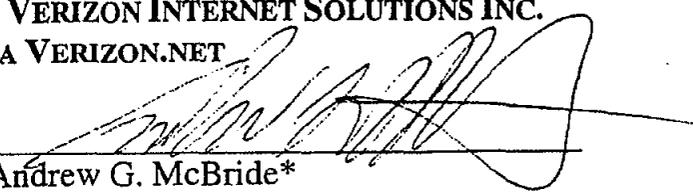
The FCC has arrived, without explanation, at the lopsided regulation of a highly competitive market. It has not done what it said it would do in its *Notice of Inquiry*—and has refused to conduct a detailed examination of the statutory and constitutional issues involved in the classification of *all* broadband Internet access services. For these reasons, a remand to the Commission is necessary.

II. CONCLUSION

For the foregoing reasons, Verizon respectfully requests that the Court remand this docket to the FCC with instructions to consider the statutory, constitutional, and administrative law issues associated with maintaining differential regulation of cable-based broadband Internet access services and functionally equivalent broadband Internet access services offered by wireline providers.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE PURSUANT TO FED. R. APP. P.
32(A)(7)(C)

I certify that pursuant to Fed. R. App. P. 32(a)(7)(C) and Ninth Circuit Rule 32-1, the attached opening brief is proportionately spaced, has a typeface of 14 points or more and contains 9406 words.



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STATEMENT OF RELATED CASES

Federal Court Proceedings:

1. *Worldcom, Inc. v. FCC*, 288 F.3d 429 (D.C. Cir. 2002), *reh'g denied* (Sept. 24, 2002).
2. *United States Telecom Ass'n v. FCC*, 290 F.3d 415 (D.C. Cir. 2002), *reh'g denied*, 2002 WL 31039663 (Sept. 4, 2002).

Administrative Proceedings:

1. *Inquiry Concerning High-Speed Access to the Internet Over Cable and Other Facilities; Internet Over Cable Declaratory Ruling; Appropriate Regulatory Treatment for Broadband Access to the Internet Over Cable Facilities*, Notice of Proposed Rulemaking, 17 FCC Rcd 4798 (2002).
2. *Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers, Implementation of the Local Competition Provisions of the Telecommunications Act of 1996, Deployment of Wireline Services Offering Advanced Telecommunications Capability*, Notice of Proposed Rulemaking, CC Docket Nos. 01-338, 96-98, 98-147, FCC 01-361 (rel. Dec. 20, 2001).
3. *Review of Regulatory Requirements for Incumbent LEC Broadband Telecommunications Services*, Notice of Proposed Rulemaking, CC Docket No. 01-337, FCC 01-360 (rel. Dec. 20, 2001).

4. *Appropriate Framework for Broadband Access to the Internet over Wireline Facilities, Universal Service Obligations of Broadband Providers, Computer III Further Remand Proceedings: Bell Operating Company Provision of Enhanced Services; 1998 Biennial Regulatory Review – Review of Computer II and ONA Safeguards and Requirements*, CC Docket No. 02-33, 95-20, 98-10, FCC 02-42, (rel. Feb. 15, 2002).

Nos. 02-70518, 02-70684, 02-70685, 02-70686, 02-70879, 02-71425, 02-72251

**IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT**

BRAND X INTERNET SERVICES, ET AL., AND

WORLDCOM, INC., ET AL., PETITIONER-INTERVENORS

V.

FEDERAL COMMUNICATIONS COMMISSION, RESPONDENT, AND

CHARTER COMMUNICATIONS, ET AL., RESPONDENT-INTERVENORS, AND

**UTILITY, CABLE AND TELECOMMUNICATIONS COMMITTEE
OF CITY COUNSEL OF NEW ORLEANS, ET AL., INTERVENORS**

**PETITION FOR REVIEW OF AN ORDER OF THE FEDERAL
COMMUNICATIONS COMMISSION**

**REPLY BRIEF FOR PETITIONERS THE VERIZON TELEPHONE
COMPANIES AND VERIZON INTERNET SOLUTIONS INC. d/b/a
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SUMMARY OF ARGUMENT

As Verizon demonstrated in its opening brief, the FCC violated the Administrative Procedure Act (“APA”), the Communications Act (“Act”), and the First Amendment when it classified all cable-based broadband transmission services under Title I of the Act without addressing the impact of that decision on the proper statutory classification and regulatory treatment of competing broadband providers. The Commission now attempts to justify that omission by resort to its general authority to order its proceedings. But an agency’s discretion to control its own docket cannot extend to ignoring comments that it has expressly invited in the proceeding at issue. Nor can it justify the erection of a disparate regulatory regime that violates both the Act and the First Amendment. The FCC was obligated either to extend the same statutory classification and regulatory treatment to all broadband transmission services or, at a minimum, to *address* the regulatory anomaly created by its *Declaratory Ruling*.¹

The *post hoc* rationalizations offered by the Commission and certain Intervenors are both too little and too late. They are too little because they are directly contrary to the principles of competitive and technological neutrality that underlie the entire Communications Act. They are too late because it is well

¹ *Inquiry Concerning High-Speed Access to the Internet Over Cable and Other Facilities; Internet Over Cable Declaratory Ruling*, 17 F.C.C.R. 4798 (2002) (“*Declaratory Ruling*”) (E.R. 103-176).

settled that counsel cannot supply in briefs before this Court what is lacking in an agency's decision. The *Declaratory Ruling* creates significant competitive advantages for one expressive medium in a highly competitive market. Arguments that such a course of action would violate both the Act and the First Amendment, properly presented in the record below, received only silence in response.

A decision that relieves the leading broadband provider of substantial regulatory burdens based upon a finding of adequate competitive alternatives, while retaining those same regulatory requirements as to alternative providers, without any explanation, is arbitrary and capricious. The FCC took the unusual step of waiving, *sua sponte*, the regulatory requirements of its *Computer Rules* as they might otherwise apply to cable broadband transmission. The Commission's primary reason for doing so—that no class of providers enjoys bottleneck control in the broadband market—was undoubtedly correct. But the FCC did not even attempt to explain why a similar conclusion was not compelled in the case of broadband services offered by wireline telephone companies, such as Digital Subscriber Line (“DSL”). Likewise, the Commission acted within its discretion in determining that the cable broadband transmission is private carriage not subject to common carrier treatment under Title II of the Act. But the FCC again transgressed the boundaries of reasoned decisionmaking by failing to acknowledge

that its conclusions with respect to cable apply equally to other broadband services, including DSL.

Finally, any suggestion that Verizon lacks standing or that its claims are not ripe is specious. Verizon is currently suffering ongoing competitive and First Amendment injuries that are directly linked to the Commission's failure to address its comments in the *Declaratory Ruling*. Obviously, whether *this* order comports with the APA is a pure question of law. Further agency action can have no bearing on that question. The flaws in the *Declaratory Ruling* necessitate a remand to the FCC with specific instructions to resolve the statutory and constitutional issues raised by the disparate statutory classification and regulatory treatment of competing broadband transmission services.

ARGUMENT

I. THE COMMISSION'S DISCRETION TO ORDER ITS PROCEEDINGS CANNOT INSULATE AGENCY ACTION THAT VIOLATES THE APA, THE COMMUNICATIONS ACT AND THE FIRST AMENDMENT FROM THIS COURT'S SCRUTINY.

As Verizon established in its opening brief, the *Declaratory Ruling* failed to address a critical aspect of the problem before the agency—the proper statutory classification and regulatory treatment of *all* broadband services in light of the Commission's decision to classify cable-based broadband transmission as a non-common carrier service under Title I of the Communications Act. Verizon and other commenters squarely placed two legal issues before the FCC: (1) whether

the Communications Act requires that all broadband transmission services receive the same statutory classification regardless of the identity of the provider or the facilities used; and (2) whether the imposition of unique and onerous regulatory burdens on the non-dominant player within an expressive medium violates the First Amendment. *See Verizon Br.* at 14-15, 31-35.

The Commission did not provide any analysis of these legal issues, thereby violating well-settled principles of administrative law. *See, e.g., Beno v. Shalala*, 30 F.3d 1057, 1073 (9th Cir. 1994) (“we cannot infer an agency’s reasoning . . . where the agency failed to address significant objections and alternative proposals”). The FCC’s failure to address these issues left in place *today* a regime of disparate statutory classification and regulatory treatment of similarly situated parties—in violation of the APA, the Communications Act and the First Amendment. *See Petroleum Communications v. FCC*, 22 F.3d 1164, 1172 (D.C. Cir. 1994) (APA requires Commission to “provide adequate explanation before it treats similarly situated parties differently”); 47 U.S.C. § 157 note (broadband services must be defined and regulated “without regard to any transmission media or technology”); *Ark. Writers’ Project v. Ragland*, 481 U.S. 221, 229 (1987) (“treat[ing] some magazines less favorably than others” violates First Amendment).

In addition, the *Declaratory Ruling* completely fails to recognize or consider the state of competition in the broadband market. The continued imposition of substantial regulatory burdens on a secondary provider could well result in a net decrease in competitive choices for consumers. *United States Telecom Ass'n v. FCC*, 290 F.3d 415, 428-29 (D.C. Cir. 2002) (“*USTA*”). Under the APA, the FCC was obligated to explain (if it could) how the regulatory disparities created by the *Declaratory Ruling* make sense in light of current competitive realities in the broadband market. The failure to provide such an explanation constitutes an independent violation of the APA. *Id.*; *Fox Television Stations, Inc. v. FCC*, 280 F.3d 1027, 1050-51, *reh'g granted in part on other grounds*, 293 F.3d 537 (D.C. Cir. 2002).

The Commission relies primarily on its general discretion to order its proceedings as a justification for the lack of any reasoned analysis of these issues in the *Declaratory Ruling* itself. *See* FCC Br. at 62-63. The FCC also points to other pending proceedings where *some* of the statutory and regulatory disparities that exist today *might* be corrected. *See id.* at 60-64. The Commission’s reliance on general principles of administrative docket control is misplaced here. The freedom of administrative agencies to fashion their own procedures does not encompass the liberty to ignore well-established principles of administrative law, statutory requirements, or the Constitution. *See, e.g., United States Lines Inc. v.*

Federal Maritime Comm'n, 584 F.2d 519, 543 n.63 (D.C. Cir. 1978). In fact, the FCC is violating the very principle it seeks to rely upon. The Commission recognized *in this proceeding* that the proper statutory classification of cable broadband services was tied directly to the classification of other broadband services and expressly invited comment on this issue. This Court does no violence to the FCC's authority to order its own proceedings when it demands that the agency offer a reasoned response to comments invited by its own definition of the regulatory issue to be addressed.

The Commission now attempts to recast the "narrow question" involved in this proceeding as "how to classify cable modem service" as if that question could be asked and answered in a vacuum. FCC Br. at 4. Yet, the scope of its *Notice* was considerably broader, as it sought to "develop a record that examines the full range of high-speed service providers, including providers that use cable, wireline, wireless, satellite, broadcast, and unlicensed spectrum technologies." *Inquiry Concerning High-Speed Access to the Internet Over Cable and Other Facilities*, 15 F.C.C.R. 19287, 19288 (2000) ("*Notice*") (E.R. 2). Moreover, as the *Notice* acknowledged, the appropriate statutory classification of one category of broadband providers cannot be determined without reference to "the impact of [its] approach on other providers of high-speed services." *Id.* at 19287 (E.R. 1). Thus, the statutory and constitutional issues associated with disparate classification of

cable broadband transmission and competing broadband technologies fell squarely within the scope of the agency's own definition of its task. Verizon Br. at 15, 17, 31-32; *Notice*, 15 F.C.C.R. at 19293 (E.R. 7); *see id.* at 19287, 19287-91, 19296, 19304-05 (E.R. 1-5, 10, 18-19). The FCC and its supporters simply chose to ignore or gloss over this inconvenient fact in their submissions to this Court.²

Nor does the Commission have discretion to bifurcate a legal issue where the Communications Act itself commands uniform treatment. Verizon's position is that the principles of competitive and technological neutrality contained in the Act itself, and in particular in its definitional sections, *compel* like statutory classification of functionally equivalent broadband transmission services. The FCC was not free to ignore this argument while erecting the very disparity that Verizon argued was forbidden by the Act. The Commission was obligated either to classify all broadband services in a like manner or to explain its decision not to do so *in this proceeding*.

² Although the FCC may well have authority to determine "the scope of inquiry" in a given proceeding, and assuming that can decide whether to address issues "contemporaneously or successively," FCC Br. at 62, once the Commission defines the scope of a proceeding it may not "completely fail[] to address" comments submitted in response, *AT&T Corp. v. FCC*, 86 F.3d 242, 247 (D.C. Cir. 1996), and has a duty to "respond to . . . constitutional challenge[s]." *Meredith Corp. v. FCC*, 809 F.2d 863, 872 (D.C. Cir. 1987); *see Verizon Br.* at 18, 30-36 (citing cases).

Finally, the FCC ignored arguments that disparate regulatory treatment of similarly situated expressive media violates the First Amendment. No administrative agency is free to ignore an argument that its regulations violate the Constitution. *Meredith Corp.*, 809 F.2d at 872; *WAIT Radio v. FCC*, 418 U.S. 1153, 1156 (D.C. Cir. 1969). This is particularly so where an ongoing First Amendment injury is concerned—loss of expressive rights even for a day is *per se* irreparable injury. *Jacobsen v. U.S. Postal Serv.*, 812 F.2d 1151, 1154 (9th Cir. 1987). The Commission was required to confront these constitutional arguments directly or accept them and conform its regulations to the Constitution.

The FCC acknowledges that it may not “entirely fail[] to consider an important aspect of the problem,” FCC Br. at 16-17 (citing *Safari Aviation Inc. v. Garvey*, 300 F.3d 1144, 1150 (9th Cir. 2002)), but that is exactly what it did here. The Commission’s decision to blind itself to competitive realities and the legal arguments before it violates the APA and necessitates a remand.

II. THIS COURT MUST ASSESS THE LEGALITY OF THE DECLARATORY RULING BASED ON THE GROUNDS FOR DECISION CONTAINED IN THE ORDER ITSELF.

Implicitly recognizing the deficiencies in the *Declaratory Ruling*, counsel for the FCC and several Intervenors advance arguments and legal analysis found nowhere in the order under review. While the Commission does not deny that the Communications Act commands like statutory classification of all broadband

providers, it suggests that it may nonetheless impose different regulatory burdens on broadband providers. FCC Br. at 61-62; *see id.* at 42-43. The FCC does not even address Verizon's arguments that disparate treatment violates the First Amendment, other than to label those contentions "premature." *Id.* at 63.³

Several intervenors go further and advance purported legal and factual arguments for disparate treatment of cable-based broadband services and other broadband services under the Communications Act. *See* AT&T Br. at 13-23; WorldCom Br. II at 9-20.⁴ WorldCom also attempts to explain away the impact of disparate regulation on the First Amendment rights of wireline telephone companies. *See* WorldCom Br. II at 20-23.

As Verizon pointed out in its opening brief, however, it is well established that "courts may not accept appellate counsel's *post hoc* rationalizations for agency action." *Burlington Truck Lines v. United States*, 371 U.S. 156, 168 (1962); *see Bowen v. Georgetown Univ. Hosp.*, 488 U.S. 204, 212 (1988); *Louisiana-Pacific Corp., Western Div. v. NLRB*, 52 F.3d 255, 260 (9th Cir. 1995). Nor may this Court consider arguments advanced by Intervenors that are not contained in the

³ The FCC thus chooses to ignore the fact that Verizon raised its First Amendment argument in both its opening comments and reply comments *in this docket*. *See* Verizon Br. at 33-35, 37-38. It also ignores the fact that the disparate regulatory treatment Verizon complains of exists *today* as a direct result of the *Declaratory Ruling*.

⁴ Citations to "WorldCom Br. II" refer to the brief filed by WorldCom, Inc., the Competitive Telecommunications Association, Focal Communications, and the Information Technology Association of America in support of Respondents on December 9, 2002.

agency order at issue. *Elec. Consumers Res. Council v. FERC*, 747 F.2d 1511, 1518 (D.C. Cir. 1984). “[A]n agency’s action may be upheld, if at all, on the same basis articulated in the order by the agency itself.” *Burlington Truck Lines*, 371 U.S. at 168-69; see *SEC v. Chenery Corp.*, 332 U.S. 194, 196 (1995).

In its *Declaratory Ruling*, the Commission did not even essay a response to arguments that disparate statutory classification and regulatory treatment of competing broadband services was forbidden by the Communications Act, the First Amendment and the APA. Nor did the FCC consider the effects of this disparate regime on the highly competitive broadband market, let alone articulate any justification for disparate regulation tied to market realities. Because the briefs of counsel cannot supply the analysis and legal reasoning missing from the agency’s order, this Court must remand to allow the agency to address these statutory and constitutional issues based upon the record before it.

III. THE COMMISSION WHOLLY FAILED TO ADDRESS THE SIGNIFICANT STATUTORY AND REGULATORY DISPARITIES AMONG PARTICIPANTS IN A COMPETITIVE MARKET CREATED BY ITS ORDER.

The FCC took two critical steps in the order now under review. First, it *sua sponte* waived the regulatory requirements of its *Computer Rules* to the extent they would require cable operators to grant access to their transmission facilities at cost-based rates. *Declaratory Ruling*, 17 F.C.C.R. at 4825-26 (E.R. 130-31). Second, the Commission concluded that all cable-based broadband transmission should be

classified as private carriage, subject only to limited regulation, if at all, under Title I of the Communications Act. *Id.* at 4828-31 (E.R. 133-36). In both cases, the FCC's reasoning was based upon the competitive nature of the broadband market. Yet in each case, the Commission did not even consider the implications of its findings for the statutory classification and regulatory treatment of other broadband providers.

A. **The FCC Failed to Address the Reasons its *Computer Rules* Cannot Continue to Apply to Other Broadband Providers in Light of its Decision to Relieve Cable Operators of Those Requirements.**

The Commission's *Computer Rules* were born of conditions in the market for traditional narrowband telephone services that do not, and never have, existed in the separate broadband market. Those rules were designed to ensure that enhanced service providers could gain access to their customers in the face of "bottleneck" control of the traditional narrowband market by entities that, at the time the rules were adopted, enjoyed significant market power. *Declaratory Ruling*, 17 F.C.C.R. at 4820 n.139 (E.R. 125) (*Computer Inquiries* were directed at "bottleneck common carrier facilities") (emphasis added). Indeed, in *Computer II*, the FCC expressly found that carriers that had no control over local bottleneck facilities, and therefore "d[id] not have . . . market power," would not be in a position to act anticompetitively. *Amendment of Section 64.702 of the*

Commission's Rules and Regulations, 77 F.C.C.2d 384, 468-69 (1980) (“*Computer IP*”) (subsequent history omitted).⁵

The core assumption underlying the *Computer Rules* is not valid in the market for broadband. The FCC has repeatedly found that there is a market for broadband transmission services that exists separate and apart from the market for narrowband transmission. *E.g.*, *Applications for Consent to the Transfer of Control, Time Warner, Inc. and America Online, Inc.*, 16 F.C.C.R. 6547, 6571-72 (2001). The FCC has further concluded that the separate broadband market includes at least *four* competing transmission media, and that “[t]he last mile connection to the end-user can take the form of cable modem service, [DSL] service or some other LEC-provided service, terrestrial wireless service, or satellite service.” *Inquiry Concerning the Deployment of Advanced Telecommunications Capability to All Americans in a Reasonable and Timely Fashion*, 15 F.C.C.R. 20913, 20928 (2000).

The Commission has also repeatedly found that no party enjoys a bottleneck monopoly in the provision of broadband transmission, and that the preconditions for monopoly, or even duopoly, are absent in broadband market. *Verizon Br. at*

⁵ This Court’s decisions reviewing the *Computer Rules* also reflect the understanding that the rules were designed to address bottleneck control of transmission facilities in a monopoly environment. *See California v. FCC*, 39 F.3d 919, 923-24 (9th Cir. 1994) (*Computer Rules* responded to the belief that “the telephone industry could use its monopoly of the [telephone] lines to prevent competition from developing in the enhanced services industry”); *California v. FCC*, 905 F.2d 1290, 1224 (9th Cir. 1990).

11; *see USTA*, 290 F.3d at 428 (“robust competition” exists “in the broadband market”); *Rulemaking to Amend Parts 1, 2, 21, and 25*, 15 F.C.C.R. 11857, 11865 (2000) (“no group of firms or technology will likely be able to dominate the provision of broadband services”); *Applications for Consent to the Transfer of Control, MediaOne Group, Inc. and AT&T Corp.*, 15 F.C.C.R. 9816, 9866 (2000) (cable faces “significant actual and potential competition from . . . alternative broadband providers”). Indeed, in the *Declaratory Ruling* itself, the FCC “recognize[d] that residential high-speed access to the Internet is evolving over multiple electronic platforms.” 17 F.C.C.R. at 4802 (E.R. 107).

The Commission was undoubtedly correct in concluding that current conditions in the broadband transmission market render it impossible to conclude that any provider possesses the kind of “bottleneck” control that would justify the imposition of price and access mandates. However, the FCC offered no explanation for the retention of the *Computer Rules* in the case of DSL. The omission is particularly troubling given the Commission’s recognition in the *Declaratory Ruling* itself that cable operators have continued to outpace all of their broadband competitors, including DSL. *Declaratory Ruling*, 17 F.C.C.R. at 4802-04 (E.R. 107-09) (“Throughout the brief history of the residential broadband business, cable modem service has been the most widely subscribed to technology, with industry analysts estimating that approximately 68% of residential customers

today use cable modem service.”). The application of agency rules born of concerns over bottleneck control of transmission facilities to the non-dominant player in a competitive market (while the dominant player is exempted from such a rule) is, by definition, arbitrary and capricious. The FCC’s failure in this order to even attempt an explanation of this regulatory anomaly compels this Court to remand the *Declaratory Ruling* with specific instructions to address this issue.⁶

B. The Commission Was Obligated to Address Verizon’s Arguments that the Communications Act Requires Like Statutory Classification of All Broadband Services.

The question of whether a service is appropriately classified as “private telecommunications” or a common carrier “telecommunications service” depends on two factors: (1) whether the carrier “intends to make individualized decisions, whether and on what terms to serve,” and (2) whether “the public interest . . . require[s] the carrier to be legally compelled to serve the public indifferently.”

AT&T Submarine Sys., Inc., 13 F.C.C.R. 21585, 21588 (1998), *aff’d*, *Virgin*

Islands Tel. Corp. v. FCC, 198 F.3d 921 (D.C. Cir. 1999). In essence, common

⁶ In granting waivers of its rules, the Commission must, as it is required to do in other contexts, treat similarly situated parties in a like manner or provide an adequate explanation for failing to do so. *Garrett v. FCC*, 513 F.2d 1056, 1060-61 (D.C. Cir. 1975). In justifying selective exercise of its waiver authority, the FCC must “do more than enumerate factual differences, if any . . . it must explain the relevance of those differences to the purposes of the . . . Act.” *Adams Telecom, Inc. v. FCC*, 38 F.3d 576, 581 (D.C. Cir. 1995) (quoting *Melody Music, Inc. v. FCC*, 345 F.2d 730, 733 (D.C. Cir. 1965)). In this context as well, “[i]t is neither for counsel nor for [the Court], but for the Commission itself, to explain any distinguishing characteristics it finds appealing, and to do so on a basis demonstrative of their pertinence to its statutory responsibilities.” *Garrett*, 513 F.2d at 1061.

carrier status arises either from a voluntary decision offer service indiscriminately or from a need to constrain market power through regulatory price and service mandates. *See Declaratory Ruling*, 17 F.C.C.R. at 4830 (E.R. 135) (the “*sine qua non* of common carrier status is a quasi-public character, which arises out of the *undertaking* to carry for all indifferently.” (quoting *Nat’l Ass’n of Regulatory Comm’rs v. FCC*, 533 F.2d 601, 608-09 (D.C. Cir. 1976)) (emphasis added); *AT&T Submarine Sys., Inc.*, 13 F.C.C.R. at 21589 (the “public interest requires common carrier operation” only where an operator “has sufficient market power.”).⁷

Again, the FCC was undoubtedly correct in its decision that common carrier status is unnecessary and legally unjustified in the broadband transmission market. The Commission’s repeated findings that there is robust, intermodal competition in that market, that new technologies are entering the market, and that the preconditions for monopoly and duopoly are absent, compel the conclusion that the test for imposition of common carrier duties cannot be met. *See supra*, p. 13. Moreover, contrary to the suggestion advanced by several parties, *see California Br.* at 53, 55-56, *Earthlink Br.* at 45-48, there is nothing remarkable about classifying broadband transmission services as private carriage as opposed to a

⁷ The courts have similarly found that the analysis of “whether [a carrier] has sufficient market power to warrant regulatory treatment as a common carrier” depends on whether “sufficient alternative facilities” exist. *Virgin Islands Tel. Co.*, 198 F.3d at 925.

telecommunications service. In numerous other contexts, the FCC has classified services that constitute pure transmission (or have a transmission component) as private carriage in the absence of a transmission bottleneck.⁸

Although the Commission's analysis in the *Declaratory Ruling* regarding the proper classification of cable broadband transmission was reasonable, its failure to address arguments that it was required to reach the same result as to other broadband providers was arbitrary and capricious. Verizon pointed to the plain language of the statute, which requires classification of services without regard to the facilities used. It also highlighted the fact that the 1996 Act was designed to promote intermodal competition by ensuring that regulation remained competitively and technologically neutral across any communications market. *Comments of Verizon Communications*, GN Docket No. 00-185, at 11-12 (filed Dec. 1, 2000) (E.R. 38-39); *Reply Comments of Verizon Communications*, GN Docket No. 00-185, at 17-20 (filed Jan. 10, 2001) (E.R. 87-89). In the face of

⁸ See, e.g., *Licensing Under Title III of the Communications Act*, 8 F.C.C.R. 1387 (1993) (satellite services including mobile voice, data, facsimile); *Application of Loral/Qualcomm Partnership, L.P.*, 10 F.C.C.R. 2333 (1995) (same); *AT&T Submarine Sys., Inc.*, 13 F.C.C.R. 21585 (submarine cables); *FLAG Pacific Ltd.*, 15 F.C.C.R. 22064 (2000) (same); *General Tel. Co. of the Southwest*, 3 F.C.C.R. 6788 (1988) (for-profit microwave systems interconnected with public switched telephone network); see also *Computer and Communications Indus. Ass'n v. FCC*, 693 F.2d 198 (D.C. Cir. 1982) (protocol processing and customer premises equipment); *Detariffing of Billing and Collection Services*, 102 F.C.C.2d 1150 (1986) (billing services); *International Communications Policies*, 104 F.C.C.2d 208 (1986) (digital optical-fiber cable); *NorLight*, 2 F.C.C.R. 5167 (1987) (interstate fiber optic systems); *Amendment of the Commission's Rules to Establish New Personal Communications Services*, 6 F.C.C.R. 6601 (1991) (mobile services); *Truth-in-Billing and Billing Format*, 14 F.C.C.R. 7492 (1999) (certain paging services).

these arguments, the FCC classified all cable-based broadband transmission as private carriage under Title I, while retaining common carrier treatment for all DSL services under Title II. Verizon's contention that the resulting disparate treatment was precluded by statute simply went unanswered.

Before this Court, the Commission does not deny that the Act requires like classification of all broadband services, but argues that it may erect regulatory disparities even given like statutory classification. FCC Br. at 61-62; *see id.* at 42-43. Other parties also argue that the fact that DSL providers are presently required to provide stand-alone transmission by Commission regulation is determinative of the proper statutory classification of the service, stating that DSL has to remain a common carrier service because the *Computer Rules* previously have compelled an indiscriminate offering. *See* AT&T Br. at 1-3; WorldCom Br. II at 12-20.

Neither argument was adopted by the FCC in its order, however, and therefore neither argument may be considered here. Moreover, both arguments are without merit and do violence to the statutory classifications contained in the Communications Act, under which the Commission must classify and regulate broadband "without regard to any transmission media or technology," 47 U.S.C. § 157 note, and "regardless of the facilities used." 47 U.S.C. § 153(46). The suggestion that the FCC may recognize that two competing services occupy the same statutory classification, but then place its regulatory thumb on the scales in

favor of one such service, finds no support in the Act or the principles behind it. Congress required statutory classification based upon consumer functionality in order to create a level playing field among competing technologies. The imposition of disparate regulatory regimes within a single service classification is directly contrary to this goal and would allow the FCC, rather than consumer choice, to dictate market winners. *See Verizon Br.* at 19-22.

The latter argument regarding common carrier treatment is entirely circular, *e.g.*, because the *Computer Rules* compel DSL providers to offer indiscriminate carriage, DSL is properly classified as a common carrier service. But the test for common carrier treatment rests upon either the nature of a carrier's *voluntary* offer to deal (selective or indiscriminate) or on a need to impose common carrier regulation due to market power. Common carrier status is not conferred by regulatory *ipse dixit*.⁹

⁹ The argument that *regulatory compulsion* to make an indiscriminate offer of carriage can itself justify the imposition of common carrier status is contrary to a substantial body of judicial precedent. *See, e.g., Nat'l Ass'n of Regulatory Comm'rs v. FCC*, 525 F.2d 630, 641 (D.C. Cir.), *cert. denied*, 425 U.S. 992 (1976) ("a carrier will not be a common carrier where *its practice* is to make individualized decisions, in particular cases, whether and on what terms to deal") (emphasis added); *id.* at 642 ("holding oneself out to serve indiscriminately" is an "essential element" of common carrier classification—great weight must be given to a carrier's voluntary choice, "if one is to draw a coherent line between common and private carriers"); *id.* at 644 (rejecting attempt by the Commission to "imply an unfettered discretion . . . to confer or not confer common carrier status on a given entity, depending on the regulatory goals it seeks to achieve" and noting that a "particular system is a common carrier by virtue of its functions, rather than because it is declared to be so").

IV. VERIZON'S PETITION FOR REVIEW IS PROCEDURALLY PROPER AND THIS COURT MUST ADDRESS THE ISSUES IT PRESENTS.

Contrary to the suggestions advanced by the Commission, *see* FCC Br. at 61-62, and certain Intervenors, *see* AT&T Br. at 8-12, WorldCom Br. II at 7, Verizon's claims are procedurally proper.

A. Verizon Has Standing Based Upon Competitive and First Amendment Injuries that are Directly Linked to the APA Violations at Issue Here.

The APA confers standing on “[a] person suffering a legal wrong because of agency action, or adversely affected or aggrieved by agency action.” 5 U.S.C. § 702. Verizon has been adversely affected and is aggrieved by the FCC's failure to address the statutory and constitutional implications of continuing to classify and regulate functionally equivalent broadband services differently.

A party may establish standing to challenge agency action by demonstrating: (1) a substantive harm that flows from the agency's action; (2) the existence of a procedural right designed to protective that substantive interest; and (3) that the substantive harm is within the “zone of interests” protected by the APA and the statutory scheme at issue. *See Yesler Terrace Comm. Council v. Cisneros*, 37 F.3d 442, 446 (9th Cir. 1994) (citing *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 572 (1992)); *Takhar v. Kessler*, 76 F.3d 995, 1001 (9th Cir. 1996); *Douglas County v.*

Babbitt, 48 F.3d 1495, 1500-01 (9th Cir. 1995). The suggestion that Verizon does not meet this test is without any merit.

Verizon competes actively in the market for broadband services and is thus injured by the FCC's decision in the *Declaratory Ruling* to grant cable companies relaxed regulatory treatment in their provision of broadband services, while leaving wireline competitors highly regulated. It is beyond dispute that allegations of injury resulting from lost opportunities to compete for economic benefits are sufficient to establish "injury-in-fact" for purposes of standing. *See, e.g., Ass'n of Data Processing Svc. Orgs., Inc. v. Camp*, 397 U.S. 150, 154 (1970); *Viceroy Gold Corp. v. Aubry*, 75 F.3d 482, 488 (9th Cir. 1995); *Int'l Longshoreman's and Warehouseman's Union v. Meese*, 891 F.2d 1374, 1379 (9th Cir. 1989); *Bullfrog Films, Inc. v. Wick*, 847 F.2d 502, 506 (9th Cir. 1988).

The *Declaratory Ruling* also perpetuates a violation of Verizon's First Amendment rights. It is well established that the disparate treatment of similarly situated expressive media violates the First Amendment. It is also beyond dispute that First Amendment injury is *per se* irreparable injury, which requires expeditious judicial correction of any violations. *See Elrod v. Burns*, 427 U.S. 347, 373 (1976) ("The loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury."); *Jacobsen*, 812 F.2d at 1154 ("the prevention of access to a [transmission platform] is, each day, an irreparable

injury”); *see also Bery v. City of New York*, 97 F.3d 689, 693-94 (2d Cir. 1996). Had the Commission addressed Verizon’s comments it would have been compelled to conclude that both the Communications Act and the First Amendment require it to extend the same statutory classification and regulatory treatment to DSL that it has accorded to cable-based broadband services. Thus, Verizon has suffered a substantive harm that flows from the agency’s action.

As a participant in the FCC’s proceedings that is directly affected by the agency’s decision, Verizon is within the zone of interests that the APA’s reasoned decisionmaking requirements are designed to protect. *See Lujan*, 497 U.S. at 883. As a speaker, Verizon is within the zone of interests protected by the First Amendment. Verizon’s claims also fall squarely within the zone of interests protected by the Communications Act, because the service definitions contained in the Act seek to create a level playing field among providers of functionally equivalent services, irrespective of corporate identity or the facilities used. *See Verizon Br.* at 19-22; *Int’l Bhd. of Teamsters v. Pena*, 17 F.3d 1478, 1484 (D.C. Cir. 1994).

Contrary to the position taken by the Commission and several Intervenors, *see FCC Br.* at 60-61, *AT&T Br.* at 8-12, *WorldCom Br. II* at 6-8, the possibility that the FCC might eventually decide to regulate all functionally equivalent services in the same manner in the course of ongoing proceedings does not deprive

Verizon of standing. The Commission's violation of Verizon's APA rights has resulted in the erection of a discriminatory regime that harms Verizon's interests every day it remains in place. An agency always has discretion to change its mind—the possibility that wholly discretionary future action might end Verizon's injury cannot eliminate the injury-in-fact it is clearly suffering today. *See Nat'l Ass'n of Farmworkers Orgs. v. Marshall*, 628 F.2d 604, 621-22 (D.C. Cir. 1980); *Kootneai Tribe of Id. v. Veneman*, 313 F.3d 1094, 1113 (9th Cir. 2002). *Cf. Gorbach v. Reno*, 219 F.3d 1087, 1092 (9th Cir. 2000).

In this case, the FCC's failure to address Verizon's comments amounted to a deprivation of its meaningful right to participate in the agency's proceedings. Indeed, "the opportunity to comment is meaningless unless the agency responds to significant points raised by the public." *HBO, Inc. v. FCC*, 567 F.2d 9, 35-36 (D.C. Cir. 1977). Moreover, "[t]he FCC's later receipt of complaints about [its] . . . rules does not change the fact that the Commission . . . decided to adopt the rules irrespective of the complaints" previously submitted by parties to the proceeding. *Reeder v. FCC*, 865 F.2d 1298, 1304 (D.C. Cir. 1989). Accordingly, it is clear that both substantive and procedural harms are involved here, rendering a judicial direction that the agency address the legal issues connected with those harms *in this docket* necessary to redress the injuries suffered by Verizon.

B. The Legal Issues Presented by Verizon's Claims are Ripe for Review.

Contrary to the contentions advanced by the FCC, AT&T and WorldCom, *see* FCC Br. at 60-61, AT&T Br. at 8-12, WorldCom Br. II at 6-8, the harm suffered by Verizon as a result of the agency's failure to consider the statutory and constitutional implications of perpetuating a disparate regulatory regime is immediate and appropriate for judicial resolution. Indeed, nothing in any pending administrative docket can change the fact that the Commission has classified cable-based broadband transmission as private telecommunications, subject only to regulation under Title I of the Act. *See Declaratory Ruling*, 17 F.C.C.R. at 4819-32 (E.R. 124-37). Nor can the speculative possibility that the Commission might, in its complete discretion, relax some of the rules applicable to DSL in a future proceeding justify ignoring the clear APA violations committed by the agency in this case.

The traditional grounds for declining jurisdiction on the basis of ripeness are completely absent here. The FCC has rendered a final decision as to the proper statutory classification of cable-based broadband services and has indicated no intention of altering that decision. The Commission considered the appropriate regulatory classification of cable broadband for over two years and received over 300 submissions before issuing the *Declaratory Ruling*, rendering specious any suggestion that the record before it requires further development.

Nor are the effects of the FCC's arbitrary decisionmaking in this case "hypothetical or abstract." *City of Auburn v. Qwest Corp.*, 260 F.3d 1160, 1171 (9th Cir. 2001) (quoting *Ry. Mail Ass'n v. Corsi*, 326 U.S. 88, 93 (1945)). Verizon is currently forced to provide access to its broadband facilities pursuant to its "basic common carrier obligations with respect to" DSL services, including all the attendant regulatory burdens that accompany that status. *Deployment of Wireline Services Offering Advanced Telecommunications Capability*, 14 F.C.C.R. 19237, 19247 (1999) ("*Second Advanced Services Order*"); see 47 U.S.C. § 202(a). Thus, unlike cable operators, the rates, terms and conditions of Verizon's broadband services are subject to regulatory mandates rather than market forces. Verizon must also comply with federal tariffing requirements for its broadband services. See *GTE Telephone Operating Companies*, 13 F.C.C.R. 22466, 22483 (1998); *Second Advanced Services Order*, 14 F.C.C.R. at 19247; see also 47 U.S.C. § 203.

The allegation that these burdensome regulatory requirements work no ongoing injury, while as a result of the *Declaratory Ruling* Verizon's cable competitors are able to offer their service without these regulatory burdens, is absurd. Moreover, controlling legal precedent makes clear that ongoing First Amendment injuries are both "immediate" and "irreparable." See *Elrod*, 427 U.S. at 373; *Bery*, 97 F.3d at 693-94; *Jacobsen*, 812 F.2d at 1154. As Verizon is currently suffering not only a procedural injury, but also a competitive injury and a

First Amendment injury, the Commission's decision to classify broadband service provided by cable operators under Title I is far from an "abstract disagreement[] over administrative policies." *Abbott Labs. v. Gardner*, 387 U.S. 136, 148 (1967).

Like the disparate taxation of newspapers, *Minneapolis Star & Tribune Co. v. Minnesota Comm'r of Revenue*, 460 U.S. 575, 585 (1983), or disparate treatment of newsracks, *City of Lakewood v. Plain Dealer Publ'g Co.*, 486 U.S. 750, 768 (1988), the FCC's rules now operate to favor cable-based expressive services over those provided over telephone lines. Even if the Communications Act authorized such a discrimination based upon the identity of the provider, the First Amendment does not. See, e.g., *Chesapeake & Potomac Tel. Co. v. United States*, 42 F.3d 181 (4th Cir. 1994), *vacated on other grounds*, 516 U.S. 415 (1996); *US West v. United States*, 48 F.3d 1092 (9th Cir. 1994), *vacated on other grounds*, 516 U.S. 1155 (1996); *Southern New Eng. Tel. Co. v. United States*, 886 F. Supp. 211 (D. Conn. 1995); *Ameritech Corp. v. United States*, 867 F. Supp. 721 (N.D. Ill. 1994); *BellSouth Corp v. United States*, 868 F. Supp. 1335 (N.D. Ala. 1994).

Verizon's claims are also clearly appropriate for judicial resolution at this time. See *Hawaii Newspaper Agency v. Bronster*, 103 F.3d 742, 746 (9th Cir. 1996) (citing *Abbott Labs.*, 387 U.S. at 149). Under this Court's precedents, if a controversy is "essentially legal in nature," it is fit for judicial decision. *City of Auburn*, 260 F.3d at 1171; see *Whitman v. Am. Trucking Ass'ns, Inc.*, 531 U.S.

457, 479-80 (2001). “The core question is whether the agency has completed its decisionmaking process, and whether the result of that process is one that will directly affect the parties.” *Franklin v. Massachusetts*, 505 U.S. 788, 797 (1992). The Commission has completed its decisionmaking process with respect to the statutory classification of cable broadband transmission. *Declaratory Ruling*, 17 F.C.C.R. at 4819-32 (E.R. 124-37). The question of whether the FCC violated the APA in that decisionmaking process is a purely legal one. No subsequent agency proceedings can shed any further light upon that question.

Finally, Verizon will continue to suffer harm for an indeterminate period if the court declines to consider the issues raised here. *See Hawaii Newspaper Agency*, 103 F.3d at 746 (citing *Abbott Labs.*, 387 U.S. at 149). Absent intervention by this Court, the Commission is under no obligation to take any action to examine or redress the statutory and constitutional problems with the *Declaratory Ruling*. The pendency of informal rulemaking proceedings cannot eliminate the harm suffered here. The FCC was simply not permitted to address only half of the regulatory problem framed by its own *Notice*, *see Motor Vehicle Mfrs. Ass’n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983), and this Court is the only proper judicial forum for correction of that error.

V. CONCLUSION

For the foregoing reasons, Verizon respectfully requests that the Court remand this docket to the Commission with specific instructions to consider the statutory, constitutional, and administrative law issues associated with maintaining differential statutory classification and regulatory treatment of cable-based broadband transmission services and functionally equivalent broadband transmission services offered by Verizon and other telephone companies.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE PURSUANT TO FED. R. APP. P.
32(a)(7)

I certify that pursuant to Fed. R. App. P. 32(a)(7)(C) and Ninth Circuit Rule 32-1, the attached reply brief is proportionately spaced, has a typeface of 14 points or more and contains 6442 words.

Andrew G. McBride

CERTIFICATE OF SERVICE

I, Andrew G. McBride, hereby certify that on January 21, 2003, I caused one original and fifteen copies of the foregoing **Reply Brief for Petitioners the Verizon telephone companies and Verizon Internet Solutions Inc. d/b/a Verizon.net** to be sent, via United Parcel Service (“UPS”) overnight delivery, upon the Clerk of the Court, United States Court of Appeals, 95 Seventh Street, San Francisco, California, 94103-1526.

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