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**Ex Parte**

Marlene H. Dortch  
Secretary  
Federal Communications Commission  
445 12<sup>th</sup> Street, SW  
Washington, DC 20554

**Re: WC Docket Nos. 01-337, 01-338, 02-33 and 02-52**

Dear Ms. Dortch:

On Friday, December 19, 2003, Suzanne Guyer and Mike Glover of Verizon met with Commissioner Martin and Dan Gonzalez to review Verizon's positions of record in the above dockets. In addition, Verizon discussed the relevance of the 9<sup>th</sup> Circuit's Brand X decision in the above proceedings. The attachment is being provided as a follow up to that discussion. Please let me know if you have any questions.

Sincerely,

A handwritten signature in black ink that reads "Ann D. Berkowitz".

Attachment

cc: D. Gonzalez

## **The Ninth Circuit's *Brand X* Decision Is Not A Barrier To Adopting A Comprehensive Broadband Policy**

### **1. The *Brand X* decision did not limit the FCC's ability to classify broadband transmission services as private carriage under Title I.**

- The FCC's *Declaratory Ruling* on cable modem services contained three separate conclusions:
  - Cable modem service offered to end users is an information service subject to Title I (*see* ¶ 38);
  - Cable companies are free to provide broadband transmission service to ISPs or other content providers on a private carriage basis under Title I (*see* ¶¶ 52-55); and
  - Alternatively, waived the *Computer Inquiries* unbundling rules and tentatively concluded that it should forbear from applying Title II requirements to the extent that courts should find them otherwise applicable (*see* ¶¶ 45-47, 58 & n.219).
- *Brand X* addressed only the first of these determinations, leaving cable modem service largely deregulated regardless of the outcome in the Ninth Circuit.
  - The court expressly said that it was not addressing the ability of cable companies to offer broadband service on a private carriage (as opposed to common carriage) basis, and that this was an issue for the FCC.
  - The court also said it was not addressing the FCC's authority to waive or forbear from any common carrier rules that would otherwise apply.
    - "Because the various petitioners' claims all revolve around the FCC's central classification decision, which we have vacated, we decline here to consider their remaining claims (including those directed at the validity of the FCC's determination that AOL Time Warner offers cable transmission to unaffiliated ISPs on a private carriage basis and its waiver of the *Computer II* requirements for cable companies who also offer local exchange service), leaving them for reconsideration by the FCC on remand." 345 F.3d at 1132 n.14.
  - The Commission therefore remains free to classify these services as private carriage arrangements subject to Title I for cable companies and for telephone companies alike.

### **2. By acting now to establish a technology-neutral policy for classifying broadband, the FCC would strengthen its chances of prevailing on appeal.**

- As an initial matter, the *Brand X* panel did not even consider the substance of the Commission's order; it simply followed, without analysis, the Ninth Circuit's prior decision in *AT&T v. City of Portland*, 216 F.3d 871 (9th Cir. 2000), which was wrongly decided wrongly for at least two reasons:
  - The *City of Portland* panel did not have the benefit of the FCC's expert views; and
  - The panel was influenced by the inconsistency between the Commission's treatment of cable modem services and other types of broadband services. In fact, the panel pointedly noted that DSL is "a high-speed competitor to cable broadband" that is

regulated “as an advanced telecommunications service subject to common carrier obligations,” and held, “[u]nder the Communications Act, this principle of telecommunications common carriage governs cable broadband as it does other means of Internet transmission such as telephone service and DSL, ‘regardless of the facilities used.’” 47 U.S.C. § 153(46).” 216 F.3d at 879.

- In previous cases, where the Commission has classified various services under Title I on the grounds that common-carrier regulation is not necessary *due to the presence of competition in the relevant market*, the courts have upheld its decisions.
  - See, e.g., *Computer and Communications Industry Ass’n v. FCC*, 693 F.2d 198, 207, 208 (D.C. Cir. 1982) (upholding Title I classification of enhanced services and CPE because “the market for enhanced services is ‘truly competitive,’” and “charges for CPE provided by carriers need no longer be regulated . . . because of the competitive market conditions now prevailing”).
  - There is a long line of FCC precedent permitting carriers to offer service on a private carriage basis in the absence of market power. A list of examples is attached.
- In *Brand X*, however, the differing regulatory treatment of DSL and cable modem service prevented the Commission from defending its cable modem classification on the simple and valid ground that competition in the broadband market makes common-carrier regulation of cable modem service unnecessary.
  - By eliminating the common-carrier rules currently placed on telephone company-provided broadband, the Commission would enable this powerful new argument in support of its policy determinations, not only for telephone companies *but for cable companies as well*.
  - The Commission has repeatedly concluded that broadband is a separate market, and that it is developing competitively and “the preconditions for monopoly appear absent” in the broadband market. *Inquiry Concerning the Deployment of Advanced Telecommunications Capability to All Americans in a Reasonable and Timely Fashion*, 14 FCC Rcd 2398, at 2423-24 (¶ 48). See also Third Report and Order and Memorandum Opinion and Order, *Rulemaking to Amend Parts 1, 2, 21, and 25 of the Commission’s Rules to Establish Rules and Policies for Local Multipoint Distribution Service and for Fixed Satellite Services*, 15 FCC Rcd 11857, 11865, ¶ 19 (2000) (“The record before us, which shows a continuing increase in consumer broadband choices within and among the various delivery technologies – xDSL, cable modems, satellite, fixed wireless, and mobile wireless, suggests that no group of firms or technology will likely be able to dominate the provision of broadband services”).
- Although the *Brand X* panel considered itself to be bound by the previous *City of Portland* decision, the *en banc* court and the Supreme Court will not be so bound.
  - The Commission can help the courts to avoid the mistake made in *City of Portland* by providing further guidance in the form of a consistent national broadband policy.
  - By adopting a consistent regulatory classification for broadband services offered by all providers, the Commission would eliminate an obstacle to the court’s adoption of the Commission’s own well-considered statutory classification.

- Conversely, as long as the Commission continues to apply disparate regulatory classifications to broadband services provided by cable companies and telephone companies respectively, it is likely to encounter resistance to its regulations in the courts.

**3. The Commission can take the same belt and suspenders approach in adopting a comprehensive national broadband policy that it took with respect to cable-provided broadband services.**

- The Commission should begin by classifying broadband services provided by all providers under Title I.
  - In particular, the FCC should classify broadband transmission services offered by all providers, including stand-alone transmission services offered on a private carriage basis, under Title I of the Act.
- The Commission should also specifically declare that, to the extent that a court should disagree with that interpretation, the FCC waives or forbears from applying the common carrier and *Computer Inquiries* requirements that otherwise would apply.
- By doing so, the Commission will then be able to start from a clean slate in defining the rules that it believes should apply to broadband providers generally, while ensuring that the Commission's policy determinations will be given effect.

## Examples of Services and Facilities Regulated under Title I

### Enhanced and Other Services

- Enhanced services, including protocol processing, and CPE are non-common carrier services and are not subject to Title II of the Act. They are, however, “communications” services subject to Title I. *See Computer and Communications Industry Assoc. v. FCC*, 693 F.2d 198 (D.C. Cir. 1982) (upholding FCC’s *Second Computer Inquiry*.); *In re Filing and Review of Open Network Architecture Plans*, 4 FCC Rcd 1 (1988); *In re Amendment to Sections 64.702 of the Commission's Rules and Regulations (Third Computer Inquiry)*, 3 FCC Rcd 1150 (1988).
- Billing and collection services performed by a LEC for an unaffiliated IXC are not common carriage within Title II of the Communications Act. *See In re Detariffing of Billing and Collection Services*, 102 F.C.C.2d 1150 (1986); *In re Filing and Review of Open Network Architecture Plans*, 4 FCC Rcd 1 (1988); *In re The Public Service Commission of Maryland and Maryland People's Counsel Applications for Review of a Memorandum Opinion and Order*, 4 FCC Rcd 4000 (1989). Similarly, 900-number billing and collection services are not common carriage. *See In re Audio Communications, Inc. Petition for a Declaratory Ruling that the 900 Service Guidelines of US Sprint Communications Co. Violate Sections 201(a) and 202(a) of the Communications Act*, 8 FCC Rcd 8697 (CCB, 1993).
- Advertising and notification practices directly relating to a carrier’s provision of interstate communications services seem to fall under Title I. *See In re Petitions of MCI Telecommunications and GTE Sprint Communications Corporation Regarding the Validity of Connecticut Statute and Decisions of the Connecticut Department of Public Utility Control Relating to Unauthorized Intrastate Traffic*, 1 FCC Rcd 270 (1986).
- AOL’s instant message (“IM”) and advanced instant message high-speed (“AIMHS”) services are subject to Title I regulation. *See In re Applications for Consent to the Transfer of Control of Licenses and Section 214 Authorizations by Time Warner Inc. and America Online, Inc.*, 2001 FCC Lexis 432 (2001) (stating that the Commission declined to classify the IM or AIMHS services as either information services, cable services or telecommunications services.).

### Facilities

- Digital, optical-fiber cable may be provided between North America and Europe on a non-common carrier basis. *See In re International Communications Policies Governing Designation of Recognized Private Operating Agencies, Grants of IRUs in International Facilities and Assignment of Data Network Identification Codes*, 104 F.C.C.2d 208 (1986).
- Provisioning of infrastructure sharing agreements need not be subjected to common carrier obligations. *See In the Matter of Implementation of Infrastructure Sharing Provisions in the Telecommunications Act of 1996*, 12 FCC Rcd 5470 (1997).

- Interstate fiber optic systems can be offered as private carriage, preempting certain state regulations. See *In re NorLight*, 2 FCC Rcd 5167 (1987).

### **Satellite Services**

- Satellite services may be provided as private carriage, including leasing space segment capacity to resellers or offering mobile voice, data, facsimile position location, and other mobile satellite services for both domestic and international subscribers. See *Brightstar Communications Limited*, 8 FCC Rcd 1387 (1993); *In re Volunteers in Technical Assistance*, 12 FCC Rcd 3094 (IB, 1997); *In re Volunteers in Technical Assistance*, 11 FCC Rcd 1358 (IB, 1995); *In re Application of Loral/Qualcomm*, 10 FCC Rcd 2333 (IB, 1995) (allowing LQP to use its Globalstar system for mobile voice, data, facsimile, position location, and other mobile satellite services for both domestic and international subscribers as a non-common carrier. LQP is also authorized to offer space segment capacity on its satellite system on a private carriage basis); *In re Application of TRW Inc. for Authority to Construct, Launch, and Operate a Low Earth Orbit Satellite System*, 10 FCC Rcd 2263 (IB, 1995); *In re Application of Motorola Satellite Communications, Inc. for Authority to Construct, Launch, and Operate a Low Earth Orbit Satellite System*, 10 FCC Rcd 2268 (IB, 1995); *In the Matter of Application of Orbital Communications Corp. for Authority to Construct, Launch and Operate a Non-Voice, Non-Geostationary Mobile-Satellite System*, 9 FCC Rcd 6476 (1994); *In re National Rural Telecommunications Coop.*, 7 FCC Rcd 3213 (CCB, 1992).

### **Mobile Services**

- Mobile services can be offered either as common or private carriage. See *In re Amendment of the Commission's Rules to Establish New Personal Communications Services*, 6 FCC Rcd 6601 (1991). Land mobile radio service is private carriage, unless the provider resells interconnected telephone services for profit. See *In the Matter of Mobile Radio New England Request for Rule Waiver*, 8 FCC Rcd 349 (1992) [Note: These two rulings were superseded in part by Section 332, adopted in 1993.].
- SMR licensees who do not resell interconnected services are not common carriers under Section 331(c)(1), regardless of who their customers are. See *In re Amendment of Part 90, Subparts M and S, of the Commission's Rules*, 3 FCC Rcd 1838 (1988).
- In the context of CALEA, PMRS operators are not telecommunications carriers when they offer PMRS services, unless they use their facilities to offer interconnected services for profit to the public or a substantial portion of the public (they would then be CMRS providers). See *In re Communications Assistance for Law Enforcement Act*, 15 FCC Rcd 7105, (1999).
- Dispatch services may be offered either on a common or non-common carrier basis. See *In re An Inquiry Into the Use of the Bands 825-845 MHz and 870-890 MHz for Cellular Communications Systems*, 89 F.C.C.2d 58 (1982).

## **Paging**

- Some paging services qualify as private carriers. *See In re Truth-in-Billing and Billing Format*, 14 FCC Rcd 7492 (1999); *In re Toll Free Service Access Codes*, 13 FCC Rcd 9058 (1998).
- A nationwide Private Carrier Paging System may be offered either on a common or non-common carrier basis. *See In re Petition for Reconsideration of Amendment of Parts 2 and 73 of the Commission's Rules Concerning Use of Subsidiary Communications Authorization*, 98 F.C.C.2d 792 (1984).
- Private carriage is permitted on SERS paging-only channels. Moreover, private carriage may be offered to all “present” (*i.e.*, in 1988) classes of SERS eligibles, including medical service eligibles. *See In the Matter of Amendment of Subpart C of Part 90 of the Commission's Rules to Permit Commercial Enterprises to be Licensed Directly in the Special Emergency Radio Service*, 5 FCC Rcd 3471 (1990); *In re Amendment of Subpart C of Part 90 of the Commission's Rules to Permit Commercial Enterprises to be Licensed Directly in the Special Emergency Radio Service*, 3 FCC Rcd 3677 (1988).

## **Microwave Services**

- For-profit microwave systems may be offered as private carriage, even if interconnected with the public switched telephone network. *See In the Matter of General Telephone Co. of the Southwest*, 3 FCC Rcd 6778 (PRB, 1988).
- Microwave spectrum may be used by private operational fixed users. MDS licensees, which may be non-common carriers, are subject to the current MDS rules and application filing procedures. *See In re Reorganization and Revision of Parts 1, 2, 21, and 94 of the Rules to Establish a New Part 101 Governing Terrestrial Microwave Fixed Radio Services*, 11 FCC Rcd 13449 (1996); *In re Revision of Part 21 of The Commission's Rules*, 2 FCC Rcd 5713 (1987).
- Common carriers whose operating systems are licensed under Part 94 will be permitted to lease capacity for private carriage, unless they carry common carrier communications by Section 94.9 of the Rules. *See In re Amendment of Part 94 of the Commission's Rules and Regulations to Authorize Private Carrier Systems in the Private Operational-Fixed Microwave Radio Service*, 1985 FCC LEXIS 3605 (1985).
- Private carriage rules will apply to an ITFS licensee who does not engage in an indiscriminate holding out. *See In re Amendment of Parts 2, 21, 74 and 94 of the Commission's Rules and Regulations in regard to frequency allocation to the Instructional Television Fixed Service*, 1983 FCC Lexis 479 (1983).
- Local cable companies and DBS operators are non-common carriers. *See In re Amendment of Parts 2 and 25 of the Commission's Rules to Permit Operation of*

*NGSO FSS Systems Co-Frequency with GSO and Terrestrial Systems in the Ku-Band Frequency Range*, 16 FCC Rcd 4096 (2000).

**Proposed Regulations (never finalized)**

- High-end services (*e.g.*, services provided to large customers, or other services requiring great customization) should be permitted on a private carriage basis. *See Competition In the Interstate Marketplace*, 5 FCC Rcd 2627 (1990) (recognizing that because large customers are increasingly seeking long-term commitments, these high-end services are “taking on the characteristics of private carriage”).
- PCS may be eligible for either common or non-common carriage regulation, or a combination of both. *See In re Amendment of the Commission's Rules to Establish New Personal Communications Services*, 6 FCC Rcd 6601 (Policy Statement and Order (38267)) (1991). [Note: This ruling was superseded in part by Section 332, adopted in 1993.].
- MVDDS licensees could be allowed to provide one-way video programming and data services; video services would be treated as non-common carrier services. MVDDS providers would be permitted to provide switched voice and data services as common carriers. *See In re Amendment of Parts 2 and 25 of the Commission's Rules to Permit Operation of NGSO FSS Systems Co-Frequency with GSO and Terrestrial Systems in the Ku-Band Frequency Range*, 16 FCC Rcd 4096 (2000).