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January 7, 2004

**Ex Parte**

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

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

Dear Ms. Dortch:

The attached letter from William Barr of Verizon was provided to Chairman Powell today. Please place it on the record in the above proceeding. Please let me know if you have any questions.

Sincerely,

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

Attachment

cc: Commissioner Abernathy  
Commissioner Adelstein  
Commissioner Martin  
Commissioner Copps  
B. Tramont  
C. Libertelli  
M. Brill  
D. Gonzalez  
J. Rosenworcel  
L. Zaina

**William P. Barr**  
Executive Vice President and General Counsel



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January 7, 2004

Honorable Michael Powell  
Chairman  
Federal Communications Commission  
445 12th Street, SW  
Washington, D.C. 20554

Dear Chairman Powell:

As the new year dawns, there remain pending before the Commission a number of issues that are important to the development and deployment of next generation broadband networks and services. The purpose of this letter is to recap those issues that are most critical to the near term deployment of these vital facilities and services.

Even before becoming Chairman you spoke eloquently about the need for “an agenda that is reflective of the Broadband Digital Migration,” and about the need to “clear away the regulatory underbrush to bring greater certainty and regulatory simplicity to the market” because the Commission’s “bureaucratic process is too slow to respond to the challenges of Internet time.”<sup>1</sup> Likewise, two years ago, you quite rightly recognized that “[t]he widespread deployment of broadband infrastructure has become the central communications policy objective today,” and have consistently reinforced that view since.<sup>2</sup> Your fellow Commissioners have expressed similar views, both as to the central importance of broadband policy and the need for rapid action to provide the clarity and certainty needed to foster investment.

While these insights were on target when made, the need for decisive Commission action has become even more acute with the passage of time. Today, the next generation of broadband networks is ready to move off the drawing board and into deployment. Given that current regulations continue to favor broadband services provided by cable companies over those provided by telephone companies like Verizon, the establishment of a clear national broadband policy that covers *all* competitors is critical to that near term deployment.

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<sup>1</sup> Michael K. Powell, Commissioner, FCC, “The Great Digital Broadband Migration,” remarks before the Progress & Freedom Foundation, Washington, D.C. (Dec. 8, 2000).

<sup>2</sup> Michael K. Powell, Chairman, FCC, “Digital Broadband Migration” Part II, FCC Press Conference (Oct. 23, 2001); *see also* Separate Statement of Chairman Michael K. Powell, CC Docket No. 01-338 (Feb. 20, 2003) (“I have long stated that broadband deployment is the most central communications policy objective of our day”).

Already, in just the time since the Commission announced its Triennial Review order in February of last year, Verizon has significantly increased the reach of its broadband services in reliance on the statements made at the time. Since the beginning of last year, we invested more than \$600 million to increase the availability of our DSL services, including the addition of more than 10 million additional DSL-qualified lines by year's end. We also slashed DSL prices, increased the speed of our basic DSL offering, and introduced new symmetrical service offerings. These steps not only benefit our own customers, but they also increase the competitive pressure on the dominant cable providers and have prompted several of the major cable companies to respond in kind, by increasing the speed of their own broadband offerings, reducing prices, or both.

Even more importantly, Verizon has moved ahead aggressively with plans to roll out the second generation of broadband networks that will bring new fiber-optic connections to homes and small businesses. Already, we have completed the process of issuing requests for proposals and selecting vendors for the equipment and facilities that will make up these advanced broadband networks. Even now, we are preparing for the initial deployments beginning early this year, with a target of reaching one million homes by the end of the year. And we are prepared to devote some \$1 billion in investment capital to achieving this goal.

But while we are doing our part to deliver the benefits of advanced broadband capabilities to consumers and to the nation's economy, we still do not know what the regulatory rules are for these new networks and services. In particular, there are two critical sets of issues that remain to be resolved.

1. *The first priority is to clarify the unbundling rules for broadband network facilities.*

At the time that the Triennial Review decision was announced, the Commission was clear that it intended to provide broad relief for broadband facilities in order to provide incentives for all providers to invest in broadband networks. This was reflected both in the news release announcing the Commission's decision and in the statements made by you and your fellow commissioners. And we have commended the Commission for taking bold action, and have acted based on the Commission's statements.

When the text of the Commission's decision was released, it too expressed an intent to provide broad relief from unbundling for broadband facilities, and recognized the benefits that would result. As the Commission put it, "with the *certainty* that their fiber optic and packet-based networks will remain free of unbundling requirements, incumbent LECs will have the opportunity to expand their deployment of these networks, enter new lines of business, and reap the rewards of delivering broadband services to the mass market." *Triennial Review* ¶ 272 (emphasis added). Likewise, "with the knowledge that incumbent LEC next-generation networks will not be available on an unbundled basis," competing providers also will have strong new incentives to pursue innovative alternatives. *Id.* "The end result is that consumers will benefit from this race to build next generation networks and the increased competition in the delivery of broadband services." *Id.*

Regrettably, the rules adopted in that proceeding do *not* provide the intended certainty that we will be able to benefit from our broadband investments. When it comes to the all-important details, the rules in certain key respects create new uncertainties and leave critical questions unanswered. In particular, there are three issues that are key to our near term deployment.

*First*, while the order provides that unbundling is not required for certain broadband facilities under section 251, a different section of the order construes section 271 to impose independent unbundling obligations that continue to apply even when elements do not meet the unbundling standard under section 251. Applying that conclusion to broadband elements would have the same negative effects on broadband deployment that the Commission correctly concluded would result from requiring unbundling under section 251. For example, these next generation networks are fundamentally different from previous circuit switched architectures, and are not readily disaggregated into component parts. As a result, construing section 271 to require access to separate elements of these new networks would require, at a minimum, a significant redesign of these integrated fiber networks to create new and artificial points of access to individual network components. In some cases, our engineers do not even know how to do that, and some functions, such as switching, no longer are performed by individual pieces of equipment but are dispersed throughout the network. In addition, there obviously is more to deploying these networks than just the underlying network facilities, and imposing unbundling obligations also would require the design and development of costly new operations support systems to manage access at these new access points.

Moreover, in order to make our broadband networks as efficient as possible, and thereby reduce the cost, we need to be able to design these networks and the operations systems and practices that support them to common standards as we deploy these networks across the country. Imposing unbundling obligations under section 271, however, would result in different regulatory regimes for former Bell companies than for others, and, in our case, different obligations for former Bell Atlantic service areas compared to former GTE service areas. And these disparate regulatory regimes obviously would defeat efforts to employ common facilities, systems and practices and significantly undermine efforts to deploy broadband network facilities in the most efficient and lowest cost manner.

All of this would greatly inflate the cost and delay deployment of these advanced networks. And the problem is further compounded by the fact that unbundling obligations have proven to evolve over time, adding new cost with each iteration, and increasing the uncertainty and risk. Given all of this, the Commission should simply forbear from applying any separate unbundling obligations that section 271 might ultimately be interpreted to impose.

*Second*, the order provides that fiber to the premises loops generally do not have to be unbundled in the case of mass-market customers, but imposes greater unbundling obligations for enterprise customers. While we believe it is mistaken to impose greater unbundling obligations on fiber network facilities in the highly competitive enterprise segment of the market, the crucial issue at the moment is that the order does not even define which customers are in the mass-

market for these purposes. As a result, we do not know which customers we can serve without becoming subject to unbundling requirements, which obviously presents a significant problem as we plan our near term deployments. Moreover, as noted above, we need to be able to design and build these networks to common standards in order to deploy them in the most efficient manner possible. What is needed is an objective, bright line *national* standard for determining when customers are and are not in the mass market for these purposes, such as the 48 numbers standard that has been proposed by Verizon.

*Third*, while the order provides that, as a general rule, fiber to the premises loops to mass market customers are not subject to an unbundling obligation, it suggests those same customers nonetheless are subject to unbundling obligations if they are located in multi-unit buildings. This makes no sense. These concentrated customer locations are among the first to be targeted by cable companies and other competitors with their own broadband services. And there obviously is no reason that owners of single family homes or lawyers with home offices should be able to obtain the benefits that these new broadband networks can deliver, but that less affluent customers renting apartments in nearby multi-unit buildings, or smaller businesses in strip malls or nearby office buildings, should not.

Moreover, the rules should make clear that fiber loops that extend to the basement of these multi-unit buildings are fiber to the premises loops, regardless of whether the fiber extends further to individual units in that building, and that these loops are not subject to unbundling. Fiber to the building *is* fiber to the premises and ought to be regulated as such. To the extent there is a concern about access to any copper wiring in the building that is owned by the incumbent, the Commission's rules can and do address that issue separately.

*2. The second priority is to apply the same regulatory classification to telephone company-provided broadband services that the Commission already has applied to cable broadband.*

In addition to clarifying the unbundling rules that will apply to the underlying network, another critical step is to establish the rules that will apply to the broadband services delivered over these new networks.

As you know, we have long advocated classifying all broadband services, including stand-alone broadband transmission services, as private carriage arrangements under Title I of the Act as the most straightforward way to establish a new regulatory regime for these competitive services. This is the approach that the Commission has taken in a long line of cases under similar competitive conditions, and has been upheld in the courts.<sup>3</sup> It also would ensure that telephone company-provided broadband services are afforded the same regulatory treatment

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<sup>3</sup> See, e.g., *AT&T Submarine Sys., Inc.*, 13 FCC Rcd. 21585, ¶¶6-11 (1998) (submarine cables); *Gen. Tel. Co. of the S.W.*, 3 FCC Rcd. 6778, ¶¶7-11 (1988) (for-profit microwave systems interconnected with public switched telephone network); *NorLight*, 2 FCC Rcd. 5167, ¶¶12-19 (1987) (interstate fiber optic systems); *Licensing Under Title III*, 8 FCC Rcd. 1387, ¶¶11-19 (1993) (satellite services); *Loral/Qualcomm P'shp, L.P.*, 10 FCC Rcd. 2333, ¶22 (1995) (same); see also n. 4 *infra*.

that today applies to cable-provided broadband services. And, of course, it is consistent with the approach that you and fellow commissioners have supported in public statements.

Some parties have expressed concern about moving forward with this approach with litigation pending in the 9th Circuit over the Commission's regulatory classification of cable modem services. We believe, however, that the Commission can establish a comprehensive broadband regulatory policy consistent with the 9th Circuit's *Brand X* decision, and that doing so would enhance the Commission's litigation posture so that its view of the correct policy result prevails for cable and telephone company-provided broadband alike.

First, the *Brand X* decision itself is very narrow and expressly left intact the Commission's ability to classify broadband transmission services as private carriage arrangements under Title I. As you know, the Commission's *Declaratory Ruling* on cable modem services actually did three separate things: i) it determined that cable modem service offered to end users constitute an information service subject to Title I; ii) it determined that cable companies are free to provide broadband transmission service to ISPs or other content providers on a private carriage basis under Title I; and iii) in a belt-and-suspenders approach to the issue, it waived the *Computer II* unbundling rules and tentatively concluded the Commission should broadly forbear from applying Title II requirements to the extent that courts should find them otherwise applicable.

The *Brand X* decision addressed only the first of these determinations, so that, even in the wake of that decision, cable modem service would remain largely deregulated. In particular, the court did not disturb the Commission's conclusion that cable companies are free to offer transmission services on a private carriage basis subject to Title I. On the contrary, the panel 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. While this obviously is an important principle in the case of cable companies, and preserves incentives for those companies to provide transmission services on negotiated, commercially reasonable terms, it is equally significant in the case of telephone-company provided broadband services. Indeed, the overwhelming majority of our broadband transmission services are sold on a wholesale basis to ISPs and other content providers, and, under the express terms of the 9th Circuit's decision, the Commission remains free to classify these services as private carriage arrangements subject to Title I.

Second, as to the one issue that the *Brand X* decision does address, the Commission would actually improve its chances of ultimately prevailing by acting now to establish a technology-neutral policy for classifying broadband services. As an initial matter, the *Brand X* panel did not even consider the substance of the Commission's order; instead, 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). But the *City of Portland* case itself was decided wrongly not only because the panel did not have the benefit of the agency's expert views, but also because it was influenced by the glaring inconsistency between the Commission's treatment of cable modem services and other types of broadband services. In fact, the *City of Portland* panel pointedly noted that DSL is "a high-speed competitor to cable broadband" that the FCC regulates DSL "as an advanced

telecommunications service subject to common carrier obligations.” 216 F.3d at 879. The regulatory classification of DSL plainly influenced the panel’s determination that cable modem service likewise should be classified, at least in part, as a telecommunications service: “Under 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).” *Id.*

In sharp contrast, in previous cases where the Commission has adopted a consistent policy classifying particular services offered by all providers 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.<sup>4</sup> In the *Brand X* case, the Commission obviously could not point to any such consistent treatment. Nor could it rely on the fact that it has repeatedly concluded that the broadband market is developing in a competitive fashion, and that the preconditions for monopoly are absent, because the Commission was, at the same time, imposing common-carrier regulation on broadband services provided by the minority player in the market. The disparity in treatment of DSL and cable modem service under the existing regulatory scheme thus 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*.

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 coherent national broadband policy. By allowing DSL and other broadband services provided by telephone companies to be offered on a private carriage basis, the Commission would eliminate a major obstacle to the court’s adoption of the Commission’s own well-considered statutory classification. Conversely, as long as the Commission continues to impose radically greater regulatory burdens on telephone companies in their provision of broadband than it does on their competitors, it is likely to encounter resistance to its broadband regulations in the courts.

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<sup>4</sup> See, e.g., *Computer and Communications Industry Ass’n v. FCC*, 693 F.2d 198, 207-210 (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”); *Virgin Islands Tel. Corp. v. FCC*, 198 F.3d 921, 925-27 (D.C. Cir. 1999) (recognizing that transmission services may be subject to a compulsory common carrier obligation only in the presence of market power); *Nat’l Ass’n of Regulatory Util. Comm’rs v. FCC*, 525 F.2d 630, 642-645 (D.C. Cir. 1976) (upholding Commission decision to treat certain commercial mobile services as non-common carrier telecommunications); see also H.R. Conf. Rep. No. 104-458, at 115 (1996) (stating that the definition of telecommunications service “recognizes the distinction between common carrier offerings . . . and private services”).

Third, the Commission can (and should) take the same belt and suspenders approach in adopting a comprehensive national broadband policy that it took with respect to cable-provided broadband services. Specifically, it should classify broadband services offered by all providers, including stand-alone transmission services offered on a private carriage basis, under Title I of the Act. And it should also specifically declare that, to the extent a court should disagree with that interpretation, it is broadly forbearing from applying the common carrier 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.

Finally, one additional issue warrants attention. Representatives of the law enforcement community have urged the Commission to ensure that moving to Title I does not render CALEA inapplicable. On that score, I want to be clear. Verizon does not seek by having its broadband transmission services re-classified under Title I to avoid any CALEA obligations that would otherwise apply. Nor do we believe that would be the effect. This is so because, while CALEA imposes certain obligations on "telecommunications carriers," it has its own *unique definition* of that term, which is independent of the definition that is in the Communications Act. The CALEA definition of a "telecommunications carrier" includes an entity that acts as a "common carrier," as does the Communications Act. But, in addition, the CALEA definition also includes *other* providers that would not be telecommunications carriers under the Communications Act. Specifically, it includes any other providers of "wire or electronic communication switching or transmission service to the extent the Commission finds that such service is a replacement for a substantial portion of the local exchange service and that it is in the public interest to deem such a person or entity to be a telecommunications carrier for purposes of this chapter." 47 U.S.C. § 1001(8)(B)(ii). So merely classifying broadband transmission services under Title I for purposes of the Communications Act does not determine their status for purposes of CALEA, and the Commission has authority to apply whatever CALEA obligations would apply to those services if they remained under Title II. Of course, the same rule necessarily must apply to any comparable services provided by cable companies or others in order to avoid skewing the competitive market. And, at least in many instances, the technical details of what it would mean for CALEA to apply to broadband services and the manner in which that could be accomplished will need to be resolved. But that is true regardless of whether these services are re-classified under Title I or remain subject to Title II. Accordingly, this issue likewise presents no impediment to moving ahead to classify these services under Title I.

Sincerely,



William P. Barr