Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

In the Matter of	)	
	)	
Petition of the Verizon Telephone Companies for Declaratory Ruling or, Alternatively, for Interim Waiver with Regard to Broadband Services Provided via Fiber to the Premises and Verizon's Conditional Petition for Forbearance Under 47 U.S.C. § 160(c) with Regard to Broadband Services Provided via Fiber to the Premises	)	WC Docket No. 04-242

COMMENTS OF SBC COMMUNICATIONS, INC.

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Introduction and Summary

It has been almost three years since the Commission launched its first proceeding to deregulate wireline broadband services.[1] In that proceeding, the Commission invited parties to address "how the Commission can best balance the goals of encouraging broadband investment and deployment, fostering competition in the provision of broadband services, promoting innovation, *and eliminating unnecessary regulation.*"[2] Shortly after the *ILEC Broadband NPRM* was issued, the Commission reached the same tentative conclusion even more comprehensively in its *Wireline Broadband NPRM*, noting that "broadband services should exist in a minimally regulated environment that promotes investment and innovation in a competitive market,"[3] and

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1 *See* Notice of Proposed Rulemaking, *Review of Regulatory Requirements for Incumbent LEC Broadband Telecommunications Services*, 16 FCC Rcd 22745 (2001) ("*ILEC Broadband NPRM*").

2 *Id.* at 22747 ¶ 7.

3 Notice of Proposed Rulemaking, *Appropriate Framework for Broadband Access to the Internet over Wireline Facilities*, 17 FCC Rcd 3019, 3022 ¶ 5 (2002) ("*Wireline Broadband NPRM*"); *see also id.* at 3042-3043

proposing to deregulate wireline broadband altogether by clarifying its status as a Title I information service.[4] The Commission also made clear that wireline broadband services should not be subject to more stringent regulation than cable modem services.[5]

Unfortunately, the Commission has yet to complete the job it started in these proceedings. While it has eliminated some of the regulations that were inhibiting deployment of wireline broadband services, others remain, and competition continues to be distorted by the lack of balance between the Commission's approach to cable modem service versus LEC-provided broadband services.

The best course of action would be for the Commission to act on its *Wireline Broadband NPRM* and its *ILEC Broadband NPRM*. Rather than constrain itself to continued piecemeal and selective deregulation of services provided over specific technologies or architectures, the Commission should finish the job it started three years ago and comprehensively deregulate *all* wireline broadband Internet access services. In other words, the Commission should afford these services the same regulatory relief it already has afforded cable modem service.[6]

Such a comprehensive approach is firmly rooted in the Act. Section 706 is architecture-agnostic in its codification of broadband deployment as a national policy, as is the Act's overall deregulatory framework for implementing that policy. Indeed, section 706 itself requires the

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¶ 51 (seeking comment on how best to "reduce the regulatory burdens on wireline broadband providers while promoting the availability of broadband").

4 *See id.* at 3029 ¶ 17.

5 *Wireline Broadband NPRM* ¶ 6 (noting the Commission's desire "to develop an analytical framework that is consistent, to the extent possible, across multiple platforms."); *see also id.* at 3029 ¶ 17 (tentatively concluding that wireline broadband service is an information service).

6 For example, the Commission should make clear that wireline broadband Internet access services are not subject to the *Computer Inquiry* rules, Title II requirements, or disparate treatment with respect to universal service obligations.

Commission to consider "regulatory forbearance" as well as other "regulating methods that remove barriers to infrastructure investment."[7] National broadband deployment policy will remain unfulfilled absent relief for all broadband Internet access services from the legacy regulations identified three years ago in the Commission's pending notices.

In the absence of quick decisions in these proceedings, however, additional deregulation of broadband services is imperative. Thus, if the Commission does not act soon in those proceedings (because of the challenges posed by the *Brand X* ruling[8] or otherwise), it should in the interim deregulate all broadband Internet access services provided over architectures that drive fiber deeper into customer neighborhoods. Therefore, while SBC supports Verizon's petitions, it emphasizes that any interim relief afforded by the Commission need not and should not be limited to the FTTP architecture that Verizon intends to deploy. To the contrary, the same rationale for deregulating FTTP broadband Internet access services applies with equal force to all fiber-intensive architectures and technologies used to provide such services. At a minimum, the Commission should provide interim relief for all fiber to the neighborhood architectures, including, for example, the fiber to the node ("FTTN") architecture that SBC intends to deploy.[9] By providing such interim relief, the Commission would further its stated objectives of encouraging broadband deployment and eliminating irrational regulatory disparities, without prejudging the broader deregulatory proposals that sit before it.

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7 47 U.S.C. § 157 note.

8 *Brand X Internet Services v. FCC*, 345 F. 3d 1120 (9th Cir. 2003), *petitions for certiorari pending*.

9 *See* Press Release, *SBC Communications Announces Advances In Initiative To Develop IP-Based Residential Network For Integrated Video, Internet, VoIP Services* (June 22, 2004), *available at* http://www.sbc.com/gen/press-room?pid=4800&cdvn=news&newsarticleid=21207 ("*SBC Press Release*").

Discussion

I. THE COMMISSION'S CONCLUSIONS IN THE CABLE MODEM ORDER HAVE EVEN GREATER FORCE IN THE WIRELINE CONTEXT.

In the *Cable Modem Order*, the Commission concluded that applying Title II's burdensome requirements to cable modem services would "disserve the goal of Section 706" to encourage the deployment of advanced telecommunications.[10] As Verizon notes, the Commission accordingly adopted a deregulatory approach with respect to such services, declaring them to be Title I information services; it then backed that relief up through waiver and tentative forbearance.[11] In reaching these determinations, the Commission noted that it is "mindful of the need to minimize both regulation of broadband services and regulatory uncertainty in order to promote investment and innovation in a competitive market."[12] The same rationales apply to wireline broadband service — with even greater force.

To begin with, the deployment of advanced, fiber-based wireline broadband services will require substantial investment. Industry estimates for deployment of FTTP deployment costs are

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10 Declaratory Ruling and Notice of Proposed Rulemaking, *Inquiry Concerning High-Speed Access to the Internet Over Cable and Other Facilities,* 17 FCC Rcd 4798, 4826 ¶ 47 (2002) ("*Cable Modem Order*"), *rev'd on other grounds sub nom. Brand X Internet Services v. FCC*, 345 F. 3d 1120 (9th Cir. 2003), *petitions for certiorari pending*; 47 U.S.C. § 157nt(a) (directing the Commission to "encourage the deployment on a reasonable and timely basis of advanced telecommunications capability to all Americans").

11 *Cable Modem Order* at 4819 ¶ 33, 4825-26 ¶ 45, 4847-48 ¶ 95 (tentatively concluding "that enforcement of Title II provisions and common carrier regulation is not necessary for the protection of consumers"). As Verizon also notes, although the Ninth Circuit reversed the Commission's determination that cable modem service is properly classified as an information service and not a telecommunications service, it left intact the Commission's waiver of its common carrier rules with respect to these services, which was never challenged on appeal. *Brand X Internet Services* 345 F. 3d at 1127. And it specifically invited the Commission to rely on its forbearance authority to address any need for elimination of unnecessary Title II regulation. *Id.* at 1138 ("Naturally, the FCC may choose to forbear from enforcing [Title II] regulations if it determines they are not necessary to promote competition or protect consumers.").

12 *Cable Modem Order* at 4840 ¶ 73.

as much as $2,000 per home served.[13] And the new generation of FTTN-based services that SBC intends to deploy in already-wired areas also require substantial capital outlays.[14] Those services would require, for instance, the deployment of significant amounts of additional fiber and network electronics, as well as new optical networking units, new inside wiring, and new customer premises equipment. Indeed, SBC estimates that deployment of its FTTN architecture will cost between *$4 billion and $6 billion* during the five-year rollout period.[15]

In the *Triennial Review Order*,[16] the Commission already recognized that inducing incumbents to make those substantial investments requires a light regulatory touch, given that the costs of fiber deployment "are both fixed and sunk, and deployment is expensive."[17] For example, in eliminating the section 251 unbundling requirements for FTTP loops, the Commission noted that the application of unbundling obligations to costly, "next-generation network elements would blunt the deployment of advanced telecommunications infrastructure by

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13 Business Week Online, *Verizon's Gutsy Bet*, Aug. 4, 2003 (citing market researcher Render, Vanderslice & Associates); *see also* Joanna Glasner, *Coming Soon: Fiber to the Home*, WIRED, Oct. 30, 2000, at *2 *available at* http://www.wired.com/news/business/0,1367,39648,00.html (FTTP provider Winfirst estimated that FTTP would cost $2,000 for every home); Paul E. Green, Jr., "Fiber-to-the-Home White Paper," Feb. 21, 2003, at 8, *available at* http://www.FTTHcouncil.org/ dbfiles/techexchange/FTTH%20White%20Paper%20PaulGreen%200203.pdf ("FTTH White Paper") (estimating that "the total cost of PON equipment plus fiber facilities installation [is] $2000 to $2500 per residence"); Corning, Inc. *Ex Parte* Letter, *Review of the Section 251 Unbundling Obligations of Local Exchange Carriers*, CC Docket No. 01-338 (Nov. 20, 2002), Attach., *A Proposed Regulation to Implement the Policy Recommendations of Corning, Inc. and Supporting Legal Analysis* at 7 ("[T]he cost of FTTH today ranges between $600 to $900 per home passed, and from $1,700 to $2,200 per subscriber served.").

14 SBC is planning to provide FTTN in existing neighborhoods and FTTP in new, or "greenfield," housing developments. *SBC Press Release.*

15 *Id.* In addition, according to one estimate, deploying VDSL costs approximately $1,000 per customer. Ted Appel, *Next Level Gets $20 Million Loan*, THE PRESS DEMOCRAT, Dec. 19, 2001, 2001 WL 25865439.

16 Report and Order and Order on Remand and Further Notice of Proposed Rulemaking, *Review of the Section 251 Unbundling Obligations of Local Exchange Carriers*, 18 FCC Rcd 16978 (2003) ("*Triennial Review Order*").

17 *See Triennial Review Order* at 17142 ¶ 274; *see also* Third Report and Order, *Deployment of Wireline Services Offering Advanced Telecommunications Capability*, 14 FCC Rcd 20912, 20919, App. B ¶ 30 ("*Third Advanced Services Report*").

incumbent LECs and the incentive for competitive LECs to invest in their own facilities, in direct opposition to the express statutory goals authorized in section 706."[18] That is just as true for FTTN and other architectures that drive fiber deeper into customer neighborhoods as it is for FTTP.

One-sided regulation of incumbent LECs' fiber-intensive broadband offerings is especially unjustified given LECs' second-place status in the broadband market. As the Commission itself has noted, cable companies have "a leading position in the marketplace," with by far the largest share of the broadband market, and cable's rate of growth "continues to outpace" the rate of growth of local telephone companies' broadband services.[19] Indeed, according to the Commission's most recent data, as of December 2003, high-speed cable lines (defined as over 200 kbps in at least one direction) held about 63 percent of the market of residential and small business customers, compared with DSL's market share of about 35 percent. Cable's position in the market for advanced services lines (defined as over 200 kbps in *both* directions) was even stronger, with cable holding a market share of 84.5 percent, compared with DSL's share of 15 percent.[20] Moreover, this gap continues to grow: One recent study

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18 *Id.* at 17149 ¶ 288 (emphasis added).

19 *Triennial Review Order* at 17157 ¶ 292; *see also id.* ¶ 262 ("cable modem service is the most widely used means by which the mass market obtains broadband services," and "the gap between cable modem and ADSL subscribership continues to widen").

20 *High Speed Services for Internet Access: Status as of December 31, 2003*, Industry Analysis and Technology Division, Wireline Competition Bureau, Tables 3 & 4 (rel. June 8, 2004) ("*2004 Broadband Report*"); *see also* Cable Still Dominates the Broadband Rollout, CableFAX Databriefs, Mar. 8, 2004, *available at* http://www.cablefax.com/cfaxdb/archives/databriefs030804.htm (citing Leichtman Research Group study finding that cable modem service held 63 percent of the broadband market by the end of 2003); Jube Shiver Jr., *Broadband Market Is About to Heat Up; Phone Companies Offering DSL Services Are Set to Battle Cable Rivals This Summer*, June 17, 2004 (DSL providers "are a distant second [behind cable modem], accounting for just more than one-third of the 30 million broadband lines."); *Triennial Review Order* at 17157 ¶ 292 n.841.

estimates that the number of homes using cable modem service will grow by 5.2 million in 2004, while only 2.9 million households will add DSL service during that same period.[21]

Particularly in light of cable's continued advantage in the broadband market, ILECs can hardly be expected to invest enthusiastically and wholeheartedly in the deployment of fiber broadband services if they know that, in addition, out of the gate, they and they alone — unlike the market leader — will face a serious artificial competitive handicap of one-sided regulation. As noted by Chairman Powell, in order to "stimulate [the] enormous private sector investment" necessary to promote broadband, the Commission must "[l]imit the [r]isk and [u]ncertainty of [r]egulation."[22] Section 706 therefore mandates regulatory relief to encourage investment in and deployment of these advanced services.

Furthermore, the incumbent LECs' secondary position in this market — and the fact that cable modem providers already are providing service *without* onerous regulatory restrictions, illustrate that regulation of wireline broadband services is not *necessary* to protect consumers or ensure proper operation of the market. 47 U.S.C. § 160(a). In a robustly competitive market such as this, the Commission can and should allow the market to operate unfettered, and need not second guess or over-regulate by reflexively applying legacy requirements. As the Commission has recognized, "competition is the most effective means of ensuring that charges, practices, classifications, and regulations . . . are just and reasonable, and not unjustly or unreasonably discriminatory."[23] If regulation of the leading providers of broadband Internet access services is

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21 M2 Presswire, *8.5 Million US Homes to Add Broadband in 2004; Performance, Bundling are Key Advantages for Cable*, Apr. 27, 2004.

22 *Wireline Broadband NPRM*, Separate Statement of Chairman Michael K. Powell at 1.

23 Memorandum Opinion and Order, *Petition of U S West Communications, Inc. for a Declaratory Ruling Regarding the Provision of National Directory Assistance*, 14 FCC Rcd 21086 ¶ 31 (1999).

unnecessary to achieve these ends, then burdensome regulation of their smaller competitors is even more unnecessary.

II. INTERIM RELIEF IS NOT ONLY APPROPRIATE BUT ALSO COMPELLED BY THE REQUIREMENTS OF THE 1996 ACT.

Granting interim relief with respect to fiber-intensive broadband architectures would be fully consistent with, and indeed is required by, the pro-competitive, deregulatory thrust of the 1996 Act. The fundamental principle of the Act is "to provide for a pro-competitive, deregulatory national policy framework designed to accelerate rapidly private sector deployment of advanced telecommunications and information technologies and services to all Americans by opening all telecommunications markets to competition."[24] Consistent with this principle, the Act provides various mechanisms, such as the Commisson's forbearance authority under section 10,[25] and the biennial review procedures set forth in section 11,[26] that permit and in fact *compel* the Commission to regularly gauge changing market conditions, and to decrease the burden of regulatory requirements accordingly.[27]

The Act's deregulatory objectives apply with even greater force in the context of wireline broadband services. As the Commission well knows, section 706 of the Act directs it to "encourage the deployment on a reasonable and timely basis of advanced telecommunications

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24 Joint Statement of Managers, S. CONF. REP. 104-230, 104th Cong. 2d Sess. 1 (1996).

25 47 U.S.C. § 160.

26 47 U.S.C. § 161

27 Indeed, the purpose of section 10 is to "force the [FCC] to eliminate outdated regulations, and do so in a timely manner." *See* 141 Cong. Rec. S7881-02, S7898 (1995) (statement of Sen. Dole).

capability to all Americans,"[28] and specifically instructs the Commission to use all methods at its disposal to achieve that end, including specifically "regulatory forbearance," and other "measures that promote competition in the local telecommunications market, or other regulating methods that remove barriers to infrastructure investment."[29] As Chairman Powell has recognized, "[s]ection 706 mandates that we promote the availability of broadband . . . [which] is clearly imperative if we are to enjoy the full promise of our economy and our democratic society."[30] President Bush also recently made clear that encouraging the deployment of broadband is a national priority: "This country needs a national goal for broadband technology, for the spread of broadband technology. We ought to have a universal, affordable access for broadband technology by the year 2007[.]"[31] As noted by Commissioner Abernathy, in order to achieve these goals, "it is critical for the FCC to continue its efforts to facilitate the deployment of broadband infrastructure."[32] Granting interim relief to facilitate fiber investment as a way of promoting broadband competition, in light of the market-leading position enjoyed by cable modem providers, during the pendency of the Commission's wireline broadband proceedings is now critical in ensuring the promotion of this Nation's broadband policy.

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28 47 U.S.C. § 157nt(a). Section 706(c) defines "advanced telecommunications capability" as "high-speed, switched, broadband telecommunications capability that enables users to originate and receive high-quality voice, data, graphics, and video telecommunications using any technology." *Id.* § 157nt(c)(1).

29 *Id.*; *see also* Memorandum Opinion and Order and Notice of Proposed Rulemaking, *Deployment of Wireline Services Offering Advanced Telecommunications Capability*, 13 FCC Rcd 24011, 24045 ¶ 69 (1998) ("[S]ection 706(a) directs the Commission to use the authority granted in other provisions, including the forbearance authority under section 10(a), to encourage the deployment of advanced services.").

30 *Third Advanced Services Report*, Separate Statement of Chairman Michael K. Powell at 2.

31 President Bush Meets with First-Time Homebuyers in NM and AZ (Mar. 26, 2004), *available at* http://www.whitehouse.gov/news/releases/2004/03/20040326-9.html.

32 Remarks of Commissioner Kathleen Q. Abernathy, *VOIP: The Opportunities and Challenges Ahead*, Feb. 19, 2004.

Nor is there any impediment to the Commission's granting such relief. While the best solution is for the Commission to complete its pending wireline broadband proceedings, it also may grant interim relief without pre-deciding the broader issues presented in the prior proceedings. The earlier proceedings address *all* wireline broadband offerings, including standard DSL services. Verizon's petitions are specific to services provided over architectures that drive fiber deeper into customer neighborhoods. And in any event, as noted by Verizon, the Commission previously has granted interim waivers of regulatory requirements pending the adoption of permanent rules.[33] Such interim waivers are particularly warranted where, as here, the relief sought is consistent with previously established Commission policies.[34]

As Verizon has shown, its petitions satisfy the standards for both waiver and forbearance. There is good cause for waiver of Commission regulations that impose more burdensome requirements on fiber-based wireline broadband services than cable modem services, because application of those requirements will deter investment and will further skew the competitive marketplace, given the increasing market gains that cable modem providers, unburdened by any threat of burdensome regulation, are making during the pendency of the Commission's proceedings. For the same reasons, section 10 compels the Commission to forbear from applying onerous regulations to such services. As noted above, the robust competition in the broadband market faced by ILECs, clearly illustrates that enforcement of one-sided regulatory

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33 *See, e.g.,* Order, *Verizon Petition for Interim Waiver of Sections 61.42(g), 61.38 and 61.49 of the Commission's Rules*, 17 FCC Rcd 11010, 11012-13 ¶ 9 (2002); Order, *Petition for Waiver of the Commission's Price Cap Rules for Services Transferred from VADI to the Verizon Telephone Companies*, 19 FCC Rcd 7095, 7097-98 ¶ 8 (2004)).

34 *See, e.g.,* Order Granting Petition for Rulemaking, Notice of Proposed Rulemaking, and Order Granting Interim Partial Waiver, *National Exchange Carrier Association Petition to Amend Section 69.104 of the Commission's Rules*, WC Docket No. 04-259, RM-10603, FCC 04-174 ¶¶ 35-45 (rel. July 19, 2004) (granting interim partial waiver where waiver was consistent with prior Commission ruling in analogous context).

requirements is not necessary (1) "to ensure the charges, practices, classifications, or regulations" for wireline broadband service "are just and reasonable and are not unjustly or unreasonably discriminatory" or (2) "for the protection of consumers." And (3) forbearance is plainly consistent with the public interest, because it will promote broadband investment and the deployment of new and advanced services to the Nation. 47 U.S.C. § 160(a).

Conclusion

For the reasons set forth above, the Commission should grant one or more of the Verizon's petitions in order to accomplish the Commission's and the Act's goal of widespread broadband Internet access. In doing so, however, the Commission should afford the same deregulatory relief already provided to cable modem service to *all* wireline broadband Internet services provided over architectures that drive fiber deeper into customer neighborhoods, including, at a minimum, FTTN.

Respectfully submitted,

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