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December 22, 2004

Ex Parte

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

Re: Petition of the Verizon Telephone Companies for Forbearance under 47 U.S.C. § 160(c) from Title II and *Computer Inquiry* Rules with Respect to Their Broadband Services, WC Docket No. 04-440

Dear Ms. Dortch:

Please place the attached on the record, in the above proceeding.

Sincerely,

Dee May

Attachment

cc: Michelle Carey
Thomas Navin
Julie Veach

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)
	)
Petition of the Verizon Telephone	)
Companies for Forbearance under	)
47 U.S.C. § 160(c) from Title II and	)
Computer Inquiry Rules with Respect to	)
Their Broadband Services	)
	)

PETITION OF THE VERIZON TELEPHONE COMPANIES FOR FORBEARANCE

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December 20, 2004

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PETITION OF THE VERIZON TELEPHONE COMPANIES[1/]
FOR FORBEARANCE

On October 27, BellSouth petitioned the Commission to forbear from applying Title II and the *Computer Inquiry* rules to broadband to the extent that any of those requirements might ultimately be construed to apply.[2] As addressed in the comments we are filing contemporaneously, that petition should be granted. In addition, Verizon hereby petitions the Commission to forbear from applying those requirements to any broadband services offered by Verizon.

To date, the Commission has yet to make a conscious decision as to whether and to what extent traditional common carriage regulations should be imposed on broadband services offered by companies that historically provided local telephone service. Those issues remain under

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[1] The Verizon telephone companies ("Verizon") are the affiliated local telephone companies of Verizon Communications Inc. These companies are listed in Attachment A.

[2] *See Petition of BellSouth Telecommunications Inc. for Forbearance Under 47 U.S.C. § 160(c) from Application of Computer Inquiry and Title II Common Carriage Requirements*, WC Docket No. 04-405 (filed Oct. 27, 2004) ("*BellSouth Petition*").

consideration in a series of ongoing rulemaking proceedings.[3] In addition, the Commission is considering previous petitions filed by Verizon requesting declaratory relief, or alternatively forbearance, to make clear that certain of its broadband services offered over its fiber-to-the-premises ("FTTP") networks[4] and other packet-switched services such as ATM and Frame Relay services[5] remain free of these common carriage regulations. The forbearance petition filed by BellSouth, however, is broader than these previous requests, and seeks forbearance from traditional common carriage requirements for all broadband services that BellSouth does or may offer. Accordingly, Verizon hereby requests that same relief to the extent that it is not covered by Verizon's previous petitions. For example, Verizon requests that the Commission forbear from subjecting Verizon's DSL broadband service to common carriage requirements, such as the requirements that Verizon file tariffs or offer the transport component of DSL broadband service on a stand-alone basis.

The Title II common carriage requirements and *Computer Inquiry* rules are vestiges of a regulatory regime that developed in a "one-wire" world. Given the intense intermodal competition in the broadband market today, ILECs' secondary status in *every* segment of the

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[3] *See Appropriate Framework for Broadband Access to the Internet over Wireline Facilities*, 17 FCC Rcd 3019 (2002) ("*Wireline Broadband NPRM*"); *Review of Regulatory Requirements for Incumbent LEC Broadband Telecommunications Services*, 16 FCC Rcd 22745 (2001) ("*ILEC Broadband NPRM*").

[4] *See Petition of Verizon for Declaratory Ruling or, Alternatively, for Interim Waiver with Regard to Broadband Services Provided Via Fiber to the Premises*, WC Docket No. 04-242 (filed June 28, 2004); *Conditional Petition of the Verizon Telephone Companies 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 (filed June 28, 2004)..

[5] *Verizon Petition for Waiver to Allow It to Exercise Pricing Flexibility for Advanced Services Where the Commission Has Granted Relief for Traditional Special Access Services*, WC Docket No. 02-246 (filed June 25, 2004); *Verizon Petition, in the Alternative, for Forbearance to Allow It to Exercise Pricing Flexibility for Advanced Services Where the Commission Has Granted Relief for Traditional Special Access Services*, WC Docket No. 02-246 (filed June 25, 2004).

broadband market, and the lower regulatory burdens on *all* other participants in the market – including the dominant cable broadband providers and long distance carriers – saddling Verizon with these unnecessary regulations would be contrary to law and logic. Moreover, applying these regulations to broadband would affirmatively harm consumers by preventing more effective competition and hindering increased deployment of broadband services.

Also, applying these regulations would squarely conflict with its obligations under Section 706 of the Telecommunications Act of 1996 ("Telecommunications Act"), Pub. L. No. 104-104, 110 Stat. 56, in which Congress directed the Commission to "encourage the deployment on a reasonable and timely basis of advanced telecommunications capability to all Americans," and to do so "without regard to any transmission media or technology." The Commission has acknowledged that an environment of "[m]inimal regulation of advanced telecommunications networks and services is needed to ensure this happens,"[6] and has applied a "light hand"[7] in the regulation of other broadband providers, including those that dominate certain segments of the market,[8] and the same treatment should apply to broadband services offered by Verizon and other incumbent local exchange carriers ("ILECs").

I. BACKGROUND

A. The Broadband Market Is Vibrantly Competitive and ILECs Are Not Dominant in Any Segment of the Market.

The Commission has repeatedly recognized that the market for broadband services is marked by intense, intermodal competition with cable modem providers as the distinct market

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[6] *Fourth Section 706 Report* at 9.

[7] Statement of Chairman Michael K. Powell, *Fourth Section 706 Report*, at 3.

[8] *See, e.g.,* Declaratory Ruling and Notice of Proposed Rulemaking, *Inquiry Concerning High-Speed Access to Internet over Cable and Other Facilities*, 17 FCC Rcd 4798 (2002) ("*Cable Broadband Ruling*").

leader, followed far behind by DSL offered by both incumbents and competitive local exchange carriers ("CLECs").[9] In this still-developing market, consumer prices are dropping, services are improving, and new competitors (and even whole new competitive technological platforms) are emerging. *Id.* at 13. Only recently, Chairman Powell and Commissioner Abernathy recognized that "the broadband market has no dominant incumbent service provider."[10] And that statement is particularly true of Verizon and other ILECs who are, at best, distant second-place competitors in each segment of the broadband market.

In the mass market, cable companies emerged early on as the market leaders, and they have dominated ever since.[11] Today, cable is such a significant force in the broadband mass market that the D.C. Circuit recently found that because of the "robust intermodal competition from cable providers[,] . . . even if all CLECs were driven from the broadband market, mass market consumers will still have the benefits of competition."[12]

According to the Commission's latest *High-Speed Services Report*, as of December 2003, cable controlled nearly *two-thirds* of all high-speed lines provided to residential and small-

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[9] *See Fourth Report to Congress on Availability of Advanced Telecommunications Capability in the United States*, 19 FCC Rcd 20540, at 13, 16 (2004) ("*Fourth Section 706 Report*")

[10] Joint Statement of Chairman Michael K. Powell and Commissioner Kathleen Q. Abernathy, *Amendment of Part 15 Regarding New Requirements and Measurement Guidelines for Access Broadband Over Power Line Systems; Carrier Current Systems, Including Broadband Over Power Line Systems*, ET Docket Nos. 04-37 and 03-107, FCC 04-245, 2004 FCC LEXIS 6134, at *182 (rel. Oct. 1, 2004) ("*BPL Order*").

[11] *E.g.*, *Wireline Broadband NPRM*, ¶ 37; *Inquiry Concerning the Deployment of Advanced Telecommunications Capability to All Americans in a Reasonable and Timely Fashion and Possible Steps to Accelerate Such Deployment Pursuant to Section 706 of the Telecommunications Act of 1996*, 14 FCC Rcd 2398, ¶ 47 (1999).

[12] *United States Telecom Ass'n v. FCC*, 359 F.3d 554, at 581 (D.C. Cir. 2004) ("*USTA II*").

business customers.[13] Similarly, in the recent *Fourth Section 706 Report*, the Commission indicated that, as of the end of last year, cable made up over *three-quarters* of the fast-growing, high-speed "advanced services" segment of the market. *Fourth Section 706 Report* at 16, Chart 2. Moreover, incumbent telephone companies like Verizon have no way to avoid this competition given the near-ubiquitous availability of cable modem service. For example, in the top 25 Verizon MSAs, on average, 92% of the population has access to cable modem service.[14]

Despite cable's dominance, Verizon and other ILECs continue to compete vigorously in the mass market, both in terms of price and service. Verizon, for example, is in the early stages of its massive rollout of an FTTP network that will increase competition between itself and cable companies with respect not only to broadband services, but also with respect to video and telephony. As part of its FTTP rollout, Verizon plans to pass three million homes and business by the end of 2005.[15] Accordingly, Verizon intends not only to increase competition and improve the broadband services they are providing to consumers, but also intends to bring new competition into markets like video where cable continues to dominate.

Competition is also fierce for business customers of all sizes. Both a March 2004 study commissioned by the Small Business Administration and two recent studies by In-Stat/MDR found that that cable modem service is now the broadband technology *most used* by small

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[13] Ind. Anal. & Tech. Div., Wireline Competition Bureau, FCC, *High-Speed Services for Internet Access: Status as of December 31, 2003* at Table 3 & Chart 6 (June 2004).

[14] *See* Letter from Dee May, Verizon, to Marlene H. Dortch, FCC, *Technological and Market Developments Since the Triennial Review Further Demonstrate that Competitors Are Not Impaired Without Access to Unbundled Mass Market Switching,* CC Docket Nos. 01-338, 96-98, 98-147, at Attachment 2 (filed June 24, 2004).

[15] *See* Verizon Oct. 21, 2004 News Release, "Verizon Deploying Fiber Optics to Homes and Businesses in 6 More States in Northeast and Mid-Atlantic," at http://newscenter.verizon.com/proactive/newsroom/release.vtml?id=87633.

businesses.[16] Moreover, competition for mass market residential and small business customers is not limited to cable and DSL. Although cable is the undisputed market leader at this time, the Commission has found that both cable and DSL face "significant actual and potential competition from . . . alternative broadband providers."[17] The growing list of competitive, broadband platforms includes fixed wireless, Broadband over Power Lines ("BPL"), satellite, and 3G wireless.[18] As Chairman Powell and Commissioner Abernathy recently noted, competition from multiple technological platforms has changed things dramatically from "[j]ust a few short years ago, [when] critics argued that competition for the 'last mile' would never become a reality because no one could duplicate or bypass the telephone line that ran from the curb into the home."[19] Under the Commission's own well-settled precedent, it must take all of

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[16] *March 2004 Broadband Update* at 4; K. Burney & C. Nelson, In-Stat/MDR, *The Business Hot Wire!: Data Access in the Commercial and Residential Environments of US Businesses; Part One: Cable Modem Services* at 20, Table 11 (Nov. 2003); K. Burney & C. Nelson, In-Stat/MDR, *The Business Hot Wire!: Data Access in the Commercial and Residential Environments of US Businesses; Part One: Cable Modem Services* at 20, Table 11 (Nov. 2003).

[17] *Applications for Consent to the Transfer of Control of Licenses and Section 214 Authorizations from MediaOne Group, Inc., Transferor, to AT&T Corp., Transferee*, 15 FCC Rcd 9816, ¶ 116 (2000); *see* also *Fourth Section 706 Report* at 14-23; *Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*, 18 FCC Rcd 16978, ¶ 263 (2003) ("*Triennial Review Order*") ("[T]he Commission also has acknowledged the important broadband potential of other platforms and technologies, such as third generation wireless, satellite, and power lines").

[18] *See Broadband Competition: September 2004*, originally Appendix A to UNE Fact Report 2005, Prepared for and Submitted by BellSouth, SBC, Qwest, and Verizon, WC Docket 04-313, CC Docket No. 01-338, at A-3 to A-5, A8 to A-19, & Tables 3, 5 & 6 (filed October 4, 2004) ("*Broadband Competition September 2004*"); *see also* Letter from Dee May, Verizon, to Marlene H. Dortch, FCC, WC Docket Nos. 01-337, 02-33, 98-10, 98-20 at 10-17 (filed Nov. 13, 2003); Letter from Edward Shakin, Verizon, to Marlene H. Dortch, FCC, WC Docket Nos. 01-338, 96-98, 98-147, 02-33, 01-337 (filed Jan. 15, 2003).

[19] Joint Statement of Chairman Michael K. Powell and Commissioner Kathleen Q. Abernathy, *BPL Order* at *181-82.

these alternatives into account in its analysis of broadband competition,[20] particularly given that that the broadband market is still "in the earliest stages" and is evolving rapidly.[21]

Likewise, broadband competition for large business customers is intense. This segment of the market has long been dominated by the major long-distance carriers. Today, AT&T, MCI, and Sprint collectively control approximately *three-quarters* of the market for packet-switched broadband data services such as ATM and Frame Relay[22]—data services that are now the single largest telecom expenditure for large enterprise customers.[23] As of January 2004, these three long distance carriers together controlled 79% of the Frame Relay market and 60% of the ATM market, for a combined market share for enterprise broadband services of approximately 75%.[24] In contrast, Verizon accounts for only 4.2% of nationwide Frame Relay revenues, and only 5.6% of nationwide ATM revenues.[25] The big three long distance providers are also the major providers for other specialized high-speed data services provided to business customers, such as IP VPN.[26] And while AT&T, MCI & Sprint dominate, other carriers, such as such as Level 3,

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[20] The Commission has held that a proper market analysis must "examine not just the markets as they exist today," but must also take account of "future market conditions," including technological and market changes, and the nature, complexity, and speed of change of, as well as trends within, the communications industry. *Applications of NYNEX Corp., Transferor, and Bell Atlantic Corp., Transferee, for Consent To Transfer Control of NYNEX Corp. and Its Subsidiaries*, 12 FCC Rcd 19985, ¶¶ 7, 41 (1997) ("*Bell Atlantic/NYNEX Merger Order*").

[21] *Bell Atlantic/NYNEX Merger Order*, ¶¶ 40-41.

[22] M. Bowen, *et al.*, Schwab Soundview Capital Markets, *AT&T Corp.* at 3 (Jan. 21, 2004).

[23] *Id.* at 3 ("ATM and frame relay services constitute the majority of telecom spending by businesses."); R. Kaplan, IDC, *U.S. Packet/Cell-Based Services Market Forecast and Analysis, 2000-2005* at 1 (Mar. 2001) ("*Packet Switching Report*") (ATM and Frame Relay accounted for over 96% of revenues in the packet/cell-based services market in 2000).

[24] M. Bowen, *et al.*, Schwab Soundview Capital Markets, *AT&T Corp.* at 3 (Jan. 21, 2004).

[25] *Packet Switching Report* at Figures 9 & 32.

[26] *See, e.g.*, H. Goldberg, In-Stat/MDR, *VPNs Take a New Look: Trends in the US IP VPN Services Market* at Table 5 (Jan. 2004); Forrester Research, *VPN Sales Are Strong, With AT&T*

Qwest, and XO, also actively compete for large business customer, and, as the Commission recently recognized, even the cable companies are making important in-roads into this segment of the market.[27]

In light of these facts, the Commission correctly concluded in the *Triennial Review Order* that "broadband services [] are currently provided in a competitive environment."[28] Thus, "the broadband market has no dominant incumbent service provider, [and] only minimal regulations are appropriate."[29]

II. DISCUSSION

A. The Commission's Regulations Should Not Be Applied to Broadband Services Under Title II and the *Computer Inquiry* Rules.

Under Title II, which was developed in the context of "a prior era of circuit-switched, analog voice services characterized by a one-wire world for access to communications," ILECs are generally treated as dominant carriers, and are subjected to the certain common carriage requirements under Title II. *ILEC Broadband NPRM*, ¶¶ 4, 5. This includes, among other things, tariff filing, cost support, and pricing requirements. *See, e.g.*, 47 U.S.C. §§ 201-204, 214. Applying these regulations to broadband services would inhibit Verizon's and other ILECs' ability to compete efficiently.

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in the Lead, https://forrester.com/Research/Document/Excerpt/0,7211,34903,00.html (excerpt of report by M. Lopez, *et al.* published Sept. 20, 2004) ("Almost 90% of the 116 large enterprises that Forrester interviewed are using VPNs today. Similar to last year, AT&T ranked as the top provider for VPN sales, with almost double the percentage of its nearest competitor").

[27] *Petition for Forbearance of the Verizon Telephone Companies Pursuant to 47 U.S.C. § 160(c)*, 19 FCC Rcd 21496, ¶ 22 (2004) ("*Section 271 Order*") ("[C]able operators have had success in acquiring not only residential and small-business customers, but increasingly large business customers as well").

[28] *Triennial Review Order* at ¶ 292.

[29] Joint Statement of Chairman Michael K. Powell and Commissioner, Kathleen Q. Abernathy, *BPL Order* at *182.

Moreover, because Verizon was deemed to have had market power in the wireline market of the 1970s and 1980s, its narrowband services are subject to the anachronistic *Computer Inquiry* rules.[30] The *Computer Inquiry* rules impose a series of obligations on wireline common carriers that own transmission facilities and offer "enhanced services," including, among other things, Comparably Efficient Interconnection ("CEI") and Open Network Architecture ("ONA") requirements that force them to unbundle their broadband transmission services and to separate out and offer the transmission component of their services pursuant to tariff, on cost-based terms and conditions. *Wireline Broadband NPRM*, ¶ 42.[31] Here again, the Commission has acknowledged that the *Computer Inquiry* rules were adopted at a time when "very different legal, technological and market circumstances" existed. *Id.* at ¶ 35.

1. The Commission Has Concluded that Cable Modem Should Not Be Regulated Under Title II and the *Computer Inquiry* Rules.

Although the Commission has not concluded its rulemaking proceedings concerning the proper scope of regulation of ILEC broadband services, it *has* already considered the state of the current broadband market and adopted a "hands off" regulatory approach for the dominant cable providers. *See Cable Broadband Ruling.* There, the Commission reached four key conclusions:

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[30] *See* Final Decision and Order, *Regulatory and Policy Problems Presented by the Interdependence of Computer and Communication Services and Facilities (Computer I)*, 28 F.C.C.2d 267 (1971); Final Decision, *Amendment of Section 64.702 of the Commission's Rules and Regulations (Second Computer Inquiry)*, 77 F.C.C.2d 384 (1980) ("*Computer II*"); Report and Order, *Computer III Further Remand Proceedings: Bell Operating Co. Provision of Enhanced Services; 1998 Biennial Review – Review of Computer III and ONA Safeguards and Requirements*, 14 FCC Rcd 4289 (1999) (collectively the "*Computer Inquiry*" rules).

[31] *See also CPE/Enhanced Services Bundling Order* ¶ 40; *Deployment of Wireline Services Offering Advanced Telecommunications Capability*, 14 FCC Rcd 19237, ¶ 21 (1999); *GTE Telephone Operating Cos., GTOC Tariff No. 1, GTOC Transmittal No 1148*, Memorandum Opinion and Order, 13 FCC Rcd 22466 (1998) ("*GTE DSL Order*"); 47 U.S.C. §§ 202(a), 203.

First, the Commission concluded that cable modem service offered to end users is a Title I "information service," and not a Title II common-carrier "telecommunications service."[32]

Second, the Commission concluded that it would waive its *Computer Inquiry* rules for cable modem providers.[33] In this regard, the Commission concluded that applying the *Computer Inquiry* rules "would also disserve the goal of Section 706 that we encourage the deployment on a reasonable and timely basis of advanced telecommunications capability to all Americans . . . by utilizing . . . measures that promote competition in the local telecommunications market, or other regulating methods that remove barriers to infrastructure investment."[34] Here again, the Ninth Circuit's decision left undisturbed the decision to waive the *Computer Inquiry* rules.

Third, the Commission concluded that, if cable companies offer broadband transmission to ISPs, they do so on a private carriage basis that permits them to negotiate separate agreements on an individual basis and on terms that are tailored to the specific needs of their customers.[35] On appeal, the Ninth Circuit expressly *declined* to disturb "the validity of the FCC's determination that AOL Time Warner offers cable transmission to unaffiliated ISPs on a private carriage basis,"[36] so this aspect of the order likewise remains intact and in full effect.

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[32] *See Cable Broadband Ruling* at ¶ 38. The Ninth Circuit overturned the Commission's conclusion on this issue in *Brand X Internet Services, Inc. v. FCC*, 345 F.3d 1120 (9th Cir. 2003), but, as the Commission is well aware, the Supreme Court recently granted certiorari in that case and will revisit the Ninth Circuit's dubious decision in the next few months. *See FCC v. Brand X Internet Services*, No. 04-281, *cert. granted*, 2004 U.S. LEXIS 7980 (Dec. 3, 2004).

[33] *See Cable Broadband Ruling* at ¶ 45.

[34] *Id.* at ¶ 47 (internal quotation marks omitted).

[35] *See, e.g.*, *id.* at ¶ 55 (noting that if "cable providers elect to provide pure telecommunications to selected clients with whom they deal on an individualized basis, we would expect their offerings to be private carrier service").

[36] *Brand X Internet Servs.*, 345 F.3d at 1132 n.14. Although the court in this passage spoke of "unaffiliated ISPs," the Commission did not limit its analysis only to unaffiliated ISPs. *See Cable Broadband Ruling*, ¶ 55.

Fourth, the Commission tentatively concluded that even if Title II applied to cable modem service, it likely would forbear from applying those regulations to cable companies.[37] None of the parties to the Ninth Circuit appeal challenged the Commission's authority to forbear, and that aspect of the order remains in effect.[38]

2. The Long Distance Carriers Who Dominate the Large Business Segment of the Market Are Also Largely Unregulated.

It would be equally irrational to apply the burdensome Title II and *Computer Inquiry* rules to Verizon and other ILECs when they provide packet-switched services like ATM and Frame Relay to large business customers. AT&T, MCI and Sprint, who dominate this segment of the market, bear no such burdens. While these long distance carriers are nominally subject to Title II, the Commission now largely permits these carriers to operate free of regulation.[39]

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[37] *See Cable Broadband Ruling* ¶ 95 (tentatively concluding that forbearance "would be in the public interest because cable modem service is still in its early stages; supply and demand are still evolving; and several rival networks providing residential high-speed Internet access are still developing," so that "enforcement of Title II provisions and common carrier regulation is not necessary for the protection of consumers or to ensure that rates are just and reasonable and not unjustly or unreasonably discriminatory").

[38] *Brand X Internet Servs.*, 345 F.3d at 1132 n.14.

[39] The Commission initially reduced the regulation of long distance interexchange carriers by declaring that they were non-dominant, and accordingly not subject to many of the regulations of Title II. *See, e.g., Motion of AT&T Corp. to Be Reclassified as a Non-Dominant Carrier*, 11 FCC Rcd 3271, ¶ 1 (1995) ("the record evidence demonstrates that AT&T lacks market power in the interstate, domestic, interexchange market, and accordingly, we grant its motion to be reclassified as a non-dominant carrier with respect to that market"). Later, the Commission removed most other Title II regulation when it ordered that it would "no longer require or allow nondominant interexchange carriers to file tariffs pursuant to Section 203 for their interstate, domestic, interexchange services." *Policy and Rules Concerning the Interstate, Interexchange Marketplace, Implementation of Section 254(g) of the Communications Act of 1934*, 11 FCC Rcd 20730 ¶ 3 (1996) ("*Detariffing Order*"). The *Detariffing Order* marked the end of the deregulatory transition for interexchange carriers, resulting in a situation where "carriers in the interstate, domestic, interexchange marketplace will be subject to the same incentives and rewards that firms in other competitive markets confront." *Id.* ¶ 4.

Given the Commission's decisions not to regulate the dominant players in each segment of the broadband market, it must also refrain from regulating Verizon and other secondary market participants. As the U.S. Department of Justice has long recognized, "[a]pplying different degrees of regulation to firms in the same market necessarily introduces distortions into the market; competition will be harmed if some firms face unwarranted regulatory burdens not imposed on their rivals."[40]

B. The Forbearance Statute, Particularly When Taken Together with Section 706, Requires the Commission to Forbear from Regulating Verizon's Broadband Services.

"The goal of the Telecommunications Act of 1996 [was] to establish 'a pro-competitive, de-regulatory national policy framework,'" and the Commission recently acknowledged that:

> An integral part of this framework is the requirement, set forth in section 10 of the 1996 Act, that the Commission forbear from applying any provision of the Act, or any of the Commission's regulations, if the Commission makes certain specified findings with respect to such provisions or regulations. Specifically, the Commission *is required* to forbear from any statutory provision or regulation if it determines that: (1) enforcement of the regulation is not necessary to ensure that charges and practices are just and reasonable, and are not unjustly or unreasonably discriminatory; (2) enforcement of the regulation is not necessary to protect consumers; and (3) forbearance is consistent with the public interest. In making such determinations, the Commission must also consider pursuant to section 10(b) "whether forbearance from enforcing the provision or regulation will promote competitive market conditions."

Section 271 Order, at ¶ 11 (footnotes and citations omitted, emphasis added). Section 10 thus requires the Commission to "reduce the regulatory burdens on a carrier when competition develops, or when the FCC determines that relaxed regulation is in the public interest."[41]

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[40] Reply Comments of the U.S. Department of Justice, *Competition in the Interstate Interexchange Marketplace*, CC Docket No. 90-132, at 26 n.42 (filed Sept. 28, 1990) ("*DOJ Sept. 28, 1990 Replies*").

[41] 141 Cong. Rec. S7881, S7887 (daily ed. June 7, 1995).

Moreover, in the current context, Section 706 underscores the propriety of forbearing from applying the burdensome Title II and *Computer Inquiry* rules to Verizon's broadband services. "Section 706 of the 1996 Telecommunications Act directs both the Commission and the states to encourage deployment of advanced telecommunications capability to all Americans on a reasonable and timely basis . . . [and] to take action to accelerate deployment, if necessary." *Fourth Section 706 Report* at 8. Notably, in instructing the Commission to encourage broadband deployment, Section 706 states that broadband should be defined and regulated "without regard to any transmission media or technology."[42] And Section 706 "direct[s] 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."[43]

In light of these standards, the Commission tentatively concluded in the *Cable Broadband Ruling*, subject to later notice and comment, that forbearance of Title II regulations would be appropriate in the broadband market, even for the dominant cable modem providers, because the broadband market "is still in its early stages; supply and demand are still evolving; and several rival networks providing residential high-speed Internet access are still developing." *Cable Broadband Ruling* at ¶ 95. Any other conclusion with respect to the broadband services provided by Verizon, a secondary player in a vibrant market marked by intermodal competition, would be arbitrary and capricious. Accordingly, as explained below, the Commission should grant this petition.

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[42] Section 706(c)(1), 110 Stat. 153.

[43] *Deployment of Wireline Services Offering Advanced Telecommunications Capability; Petition of Bell Atlantic Corporation For Relief from Barriers to Deployment of Advanced Telecommunications Services* 13 FCC Rcd 24011, ¶ 69 (1998) (emphasis added) ("*Advanced Services Order*").

1. The Commission Should Forbear from Applying Title II to Regulations to Verizon's Broadband Services.

As the Commission has observed, "[t]he basic elements of the existing regulatory requirements for the provision of broadband services by incumbent LECs were initially developed in a prior era of circuit-switched, analog voice services characterized by a one-wire world for access to communications" that existed "well before the development of competition between providers of broadband services" and were based upon a perceived need to curb the exercise of anti-competitive market power. *ILEC Broadband NPRM*, ¶¶ 4, 38. Given the broadband services available over multiple, technological platforms, this "one-wire" world simply does not exist in today's broadband market. Like the application of the *Computer Inquiry* rules, discussed below, applying Title II common carrier requirements in this age of abundant broadband competition would not be justified, particularly in light of the Commission's statutory duty under Section 706 to promote broadband development and deployment through reduced regulation. As explained in the *BellSouth Petition*, it would be unlawful for the Commission to apply any of the Title II common carriage requirements to the broadband services offered by ILECs.

To the extent they ultimately were to be construed to apply, the Title II common carrier regulations would impose several unnecessary burdens on Verizon and other ILECs that prevent, rather than protect, competition. For example:

- Applying the Title II rules to broadband would contribute significantly to the delay in introducing new broadband services to consumers because, unlike its competitors, Verizon would be required to develop and file detailed cost support data, provide extensive analyses of charges assessed by their competitors for similar services, develop and file rebuttals to challenges to their filings by third parties, and respond to Commission staff questions.
- Imposing mandatory tariffs would reduce Verizon's ability to respond efficiently to customer demand and cost; impose substantial administrative costs; limit the ability of customers to negotiate and obtain service arrangements specifically tailored to

their needs; and inhibit carriers from introducing new services and responding to new offerings by rivals, who obtain advance notice of tariffed carriers' services and promotions and can respond by undercutting the new offerings even before the tariff becomes effective.

- Imposing a requirement that broadband rates be cost-justified or be comparable to traditional narrowband wireline benchmarks would prevent Verizon and other ILECs from experimenting with market-based pricing models, such as pricing based on revenue sharing or on the number of visits to a given Web site. These methods are already available to all other broadband competitors, and prohibiting ILECs from using them would deter innovative pricing arrangements that ultimately would benefit competition.

As the Commission has concluded, "deregulation or reduced regulation may lower administrative costs, encourage investment and innovation, reduce prices and offer consumers greater choice."[44] Imposing these Title II regulatory requirements on ILECs, but not competitors, would have precisely the opposite effect. Given that ILECs have no market power in the broadband market, there would be no justification to apply the Title II common carriage requirements. *See BellSouth Petition* at 29-33.

Moreover, given that the Commission has specifically, if tentatively, concluded that forbearance from the Title II requirements would be appropriate in the case of the market-leading cable modem providers, even if Title II applied, *Cable Broadband Ruling*, ¶ 95, it has no choice but to decline to apply those regulations to secondary market participants like Verizon. If regulation of the dominant player in the market is unnecessary, then regulation of the distant second-place player makes even less sense.[45]

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[44] *ILEC Broadband NPRM*, ¶ 39; *see Policy and Rules Concerning Rates for Competitive Common Carrier Services and Facilities Authorizations Therefor*, 84 FCC 2d 445, ¶ 12 (1981) (noting that even in a market that is not yet fully competitive, the costs of regulatory compliance "can have profoundly negative implications for consumer welfare" such that a reduction in regulatory burdens is appropriate).

[45] In addition, refusing to forbear from Title II regulations would be inconsistent with the repeated recognition of both the federal courts and the Commission that a carrier may

a. "Just and Reasonable" Prices

To grant forbearance, the Commission must first determine that "enforcement of [the challenged] regulation or provision is not necessary to ensure that the charges, practices, classifications, or regulations by, for, or in connection with that telecommunications carrier or telecommunications service are just and reasonable and are not unjustly or unreasonably discriminatory." 47 U.S.C. § 160(a)(1). In light of the competitive market in which Verizon and other ILECs compete to sell their broadband services, the regulations imposed by Title II and the *Computer Inquiry* rules are not needed to ensure competitive prices, but instead prevent more effective competition that would lower prices and improve services for consumers.

As an initial matter, the Commission recently made clear that in the broadband market, it is appropriate to focus on the prices to consumers in deciding whether this forbearance requirement is met. *See Section 271 Order* ¶ 21. The Commission found that in light of "the developing nature of the broadband market at both the wholesale and retail levels, including the ongoing introduction of new services and deployment of new facilities," the competition within the retail market was the proper focus for determining whether forbearance was appropriate.[46]

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appropriately be treated as a common carrier with respect to some services but not others, *Southwestern Bell Tel. Co. v. FCC*, 19 F.3d 1475, 1481 (D.C. Cir. 1994), and that, in the absence of a *voluntary* undertaking to serve all customers indiscriminately, common carrier duties may only be imposed upon a service based on a finding that "the public interest . . . require[s] the carrier to be legally compelled to serve the public indifferently" because an operator "has sufficient market power." *See AT&T Submarine Sys., Inc.*, 13 FCC Rcd 21585, ¶¶ 7-9 (1998), *aff'd*, *Virgin Islands Tel. Corp. v. FCC*, 198 F.3d 921, 925-27 (D.C. Cir. 1999); *Nat'l Ass'n of Regulatory Util. Comm'rs v. FCC*, 525 F.2d 630, 642 (D.C. Cir. 1976); *Nat'l Ass'n of Regulatory Util. Comm'rs v. FCC*, 533 F.2d 601, 608 (D.C. Cir. 1976). Here, the competitive status of the broadband market *precludes such a finding*.

[46] This approach is consistent with the Communication Act's purpose of making available "to the people of the United States . . . communication service with adequate facilities at reasonable charges." 47 U.S.C. § 151.

Furthermore, the Commission recently noted that the robust competition in the market, together with the secondary role of ILECs within the market, is an adequate safeguard of just and reasonable prices and practices within the market. *See Section 271 Order* at ¶¶ 21-22. Simply put, "[t]he broadband market is still an emerging and changing market, where . . . the preconditions for monopoly are not present," and Title II regulation is unnecessary. *Id.* at ¶ 22.

Similarly, the competitive nature of the broadband market will ensure that broadband will be available to wholesale customers at reasonable rates. In granting forbearance in the *Section 271 Order*, the Commission stated:

> [T]he evidence currently before us, taken as a whole, leads us to conclude that competition from multiple sources and technologies in the retail broadband market, most notably from cable modem broadband providers, will pressure the BOCs to utilize wholesale customers to grow their share of the broadband markets and thus the BOCs will offer such customers reasonable rates and terms in order to retain their business. Verizon plausibly claims that because BOCs face intense intermodal competition . . . they will need to find ways to keep traffic "on-net," which we conclude would likely include the provision of wholesale offerings.

Section 271 Order ¶ 26. The same is true of the regulations as to which Verizon currently seeks forbearance. As the Commission previously recognized in conducting the Section 10(a)(1) analysis, "competition is the most effective means of ensuring that . . . charges, practices, classifications, and regulations . . . are just and reasonable, and not unjustly or unreasonably discriminatory."[47]

Other recent precedent further supports Verizon's petition. For example, the Commission concluded that Verizon's, SBC's, and BellSouth's request for forbearance with respect to their international directory assistance services satisfied section 10(a)(1) because these

[47] Memorandum Opinion Order, *Petition of US West Communications, Inc. for a Declaratory Ruling Regarding the Provision of National Directory* Assistance, 14 FCC Rcd 16252, ¶ 31 (1999).

carriers "would be new entrants in the market for [these services]" and, "[a]s such, . . likely would face competition from interexchange carriers . . . , Internet service providers, and others in the provision of those services."[48] The Commission also found it highly relevant that there was "no indication that the petitioners have used, or could use, their ownership interests in dominant foreign carriers to control access by other domestic carriers to directory listing information for the countries where those carriers operate." *SBC IDA Order* ¶ 19.

That reasoning applies with at least as much force here because Verizon likewise "do[es] not exercise control over the components used to provide" the broadband services of its intermodal competitors,[49] and because it faces competition in the broadband market at least as rigorous as that found in the international directory assistance market. As set out above, competition exists in all segments of the broadband market, and this competition will ensure just and reasonable prices. Therefore, the first forbearance requirement is clearly satisfied.

Moreover, the conclusion that forbearance is warranted is strongly reinforced by the Commission's overarching obligation under Section 706 to resolve ambiguities in a way that promotes the long-term deployment of greater broadband infrastructure.[50] In turn, this increased

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[48] Memorandum Opinion and Order, *Petition of SBC Communications Inc. for Forbearance from Structural Separation Requirements of Section 272 of the Communications Act of 1934, as Amended, and Request for Relief to Provide International Directory Assistance Services*, 19 FCC Rcd 5211, ¶ 16 (2004) (*"SBC IDA Order"*).

[49] *SBC IDA Order* ¶ 20.

[50] *See* 47 U.S.C. § 157; *Advanced Services Order* ¶ 69. Forbearance here is also consistent with the Commission's decision to forbear from applying tariffing requirements to SBC's provision of advanced services through its affiliate, ASI. Memorandum Opinion and Order, *Review of Regulatory Requirements for Incumbent LEC Broadband Telecommunications Services*, 17 FCC Rcd 27000 (2002). In that order, the Commission concluded that tariff regulation is not "necessary for ensuring that the rates, terms, and conditions for ASI's advanced services are just, reasonable, and are not unjustly or unreasonably discriminatory," instead finding that "the better policy is to allow ASI to respond to technological and market developments without our

investment will help to ensure effective competition in the long term against the dominant cable modem providers and long distance carriers. Forbearance will give Verizon and other ILECs the appropriate incentives to invest in broadband facilities to compete with the dominant cable providers, thus furthering the Act's goal of "'boosting competition in broader markets.'" *USTA II,* 359 F.3d at 579 (quoting *USTA I).*

Here, allowing Verizon and other ILECs who clearly lack market power in the broadband market to compete on equal terms with other market participants will promote competition for broadband services in a market currently dominated by cable modem providers and long distance carriers, thereby leading to lower prices and better service for all broadband consumers.

b. Consumer Protection and Public Interest

For largely the same reasons, Section 10(a)(2) and (3) are satisfied as well: *i.e.*, imposing Title II regulation on Verizon's broadband services is unnecessary to protect consumers, *see* 47 U.S.C. § 160(a)(2), and forbearance is in the public interest, *id.* § 160(a)(3).

First, as was the case in the *Section 271 Order*, Title II regulations are unnecessary to protect consumers in light of intermodal competition and Verizon's secondary status in the market. There, the Commission noted that "BOCs have limited competitive advantages with regard to the broadband elements, given their position with respect to cable modem providers and others in the emerging broadband market." *Section 271 Order* ¶ 30. Therefore, the increased competition from Verizon and other ILECs will benefit consumers. *Id.* ¶ 31; *see also SBC IDA Order* ¶¶ 20-21. Section 10(a)(2) is thus satisfied.

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reviewing in advance the rates, terms, and conditions under which ASI provides service." *Id.* ¶ 22.

Likewise, the Commission has repeatedly recognized that increased competition and the resulting consumer benefits satisfy the "public interest" prong of the forbearance test. *See Section 271 Order* ¶ 33; *SBC IDA Order* ¶¶ 20-21. As the statute requires, in deciding what is in the public interest, the Commission must consider whether forbearance will "promote competitive market conditions." 47 U.S.C. § 160(b). Treating Verizon and other secondary players in a manner that is at least as favorable as that afforded to the dominant players in the market easily meets that test and will promote more aggressive competition that will inevitably lead to lower prices, better service, and increased availability of broadband services.

The Commission's own words in deciding that forbearance would be appropriate to shield cable modem providers from the constraints of Title II should resolve the issue of whether to grant Verizon's petition. There, the Commission said that forbearance "would be in the public interest because [broadband] service is still in its early stages; supply and demand are still evolving; and several rival networks providing residential high-speed Internet access are still developing," so that "enforcement of Title II provisions and common carrier regulation is not necessary for the protection of consumers or to ensure that rates are just and reasonable and not unjustly or unreasonably discriminatory." *Cable Broadband Ruling* ¶ 95. So too here. Allowing Verizon to offer broadband services on a private carriage basis free from the regulatory strictures of Title II will enable it to better compete against its well-financed, entrenched competitors and will encourage investment in broadband facilities.

2. The Commission Should Forbear from Applying the *Computer Inquiry* Rules to Verizon's Broadband Offerings.

For similar reasons, and as set out more fully in the *BellSouth Petition*, the Commission should also forbear from applying the intrusive *Computer Inquiry* rules to Verizon's broadband services, to the extent those rules otherwise were to be construed to apply. *See BellSouth*

Petition at 17-29. In particular, the Commission should forbear from applying the CEI and ONA requirements that would force Verizon and other carriers subject to these rules to unbundle their transmission services and to separate out and offer the transmission component of their broadband Internet access services pursuant to tariff, on cost-based terms and conditions. *Wireline Broadband NPRM*, ¶ 42.[51] Given Verizon's place in the broadband market, these rules are counterproductive and should be lifted.

As explained above, the *Computer Inquiry* rules were adopted at a time when "very different legal, technological and market circumstances" existed,[52] and "the core assumption underlying the *Computer Inquiry* rules was that the telephone network is the primary, if not exclusive, means through which information service providers can obtain access to customers."[53] Yet, as shown above, no category of competitors in the broadband market—certainly not DSL broadband providers like Verizon—enjoys "bottleneck" control over broadband transmission facilities in any segment of the broadband market. Thus, the "core assumption" underlying the *Computer Inquiry* rules is misplaced when it comes to broadband services provided by Verizon.

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[51] As explained in BellSouth's forbearance petition, *see BellSouth Petition* at 23-24, the Commission also should forbear from applying the related cost allocation rules set out in 47 C.F.R. § 64.900, which require the allocation of ILECs' costs between regulated and non-regulated services. Verizon's views on the proper method for allocating costs are set out in the letter from Richard T. Ellis, Verizon, to Marlene H. Dortch, FCC, WC Docket Nos. 02-33, 01-337, 95-20, and 98-10 (filed Jan. 6, 2004).

[52] *Wireline Broadband NPRM* ¶ 35.

[53] *Cable Broadband Ruling* at 34 n.139 (stating that the *Computer Inquiry* rules were directed at "*bottleneck* common carrier facilities"). Indeed, in *Computer II*, the Commission 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 anti-competitively. *Computer II* at ¶ 221; *see California v. FCC*, 39 F.3d at 923-24 (*Computer Inquiry* 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").

Applying the *Computer Inquiry* rules to Verizon's broadband services would conflict directly with Congress's clearly expressed desire to promote broadband development and deployment through reduced regulation. These rules hinder the development of new broadband services as well as the development of network and service arrangements that customers want, and the unnecessary costs of these rules discourage investment and discourage new broadband deployment. For example:

- Applying the requirement that Verizon and other Regional Bell Operating Company ("RBOCs") separate out and offer separately the physical components of their services would hamper the development of new or customized services and applications and forces adoption of less-than-optimal network designs. Indeed, manufacturers are designing next-generation equipment for other providers that already are not seen as being subject to the possibility of facing similar regulatory constraints (*e.g.*, cable operators).
- Applying the CEI and tariffing rules would render it difficult for Verizon to tailor solutions to customer needs. Instead, it would be forced to offer "one-size-fits-all" products and services, impeding its ability to respond to ISP requests for more efficient network solutions.
- Applying the *Computer Inquiry* rules would require Verizon to waste resources by mandating that it offer mass-market solutions even when there is no market demand for such products and services. For instance, new technology is available that allows certain enhanced functions to be performed closer to the end-user customer, enhancing the ISP's overall service capabilities. However, the *Computer Inquiry* rules would require Verizon to develop a new generic service offering that could be made available to any other requesting ISP, and potentially create new access points within its network for that service offering, even if only a limited number of ISPs are interested in the configuration. Moreover, tariffs would have to be filed in accordance with the Commission's review process. This would effectively restrict Verizon's ability to offer anything other than a limited set of service configurations.
- Applying the requirement that the transmission component of Verizon's broadband services be separated and offered under tariff at cost-based rates would interfere with the development of innovative and beneficial arrangements for ISPs to deliver content and applications to consumers.

The Commission has, moreover, already determined that these rules should *not* apply to cable operators, who are, as noted above, by far the leaders in the broadband mass market. *Cable Broadband Ruling*, ¶¶ 42-47. Imposing rules that inhibit Verizon's ability to compete in

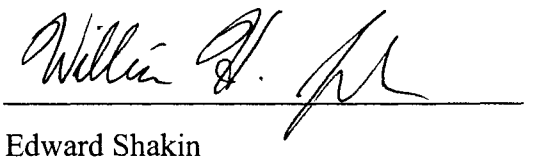
the broadband market while the dominant players in the market are free from similar regulatory requirements simply could not be justified.

In sum, the three prerequisites for forbearance are easily met in the case of the *Computer Inquiry* rules. As discussed above in the context of the Title II regulations, declining to apply these vestigial regulations will lead to more effective competition in an already competitive market made up of competitors using several, separate technological platforms. This intermodal competition prevents any possibility that Verizon could charge anything other than "just and reasonable" prices or take other steps that would harm consumers. Moreover, the public will benefit from the more efficient competition that Verizon would be able to put up against the dominant cable modem providers. The Commission already reached the conclusion that that these rules should not apply, even in the case of the dominant cable modem providers. *See Cable Broadband Ruling* ¶ 45. The same conclusion must follow in the case of Verizon and other secondary players in the market.

III. CONCLUSION

For the foregoing reasons, the Commission should grant the *BellSouth Petition* and this petition and forbear from applying Title II common carrier requirements or *Computer Inquiry* rules to the extent that they might ultimately be construed to apply to any of Verizon's broadband services.

Respectfully submitted,



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ATTACHMENT A

THE VERIZON TELEPHONE COMPANIES

The Verizon telephone companies are the local exchange carriers affiliated with Verizon Communications Inc. These are:

Contel of the South, Inc. d/b/a Verizon Mid-States
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.