



July 12, 2005

Chairman Kevin J. Martin
Federal Communications Commission
445 12th Street SW
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Commissioner Jonathan S. Adelstein
Federal Communications Commission
445 12th Street SW
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Commissioner Kathleen Q. Abernathy
Federal Communications Commission
445 12th Street SW
Washington, DC 20554

Commissioner Michael J. Capps
Federal Communications Commission
445 12th Street SW
Washington, DC 20554

Re:

Appropriate Regulatory Treatment for Broadband Access to the Internet over Cable Facilities, CS Docket No. 02-52; Appropriate Framework for Broadband Access to the Internet over Wireline Facilities, CC Docket No. 02-33; and IP-Enabled Services, WC Docket No. 04-36.

Dear Commission:

On behalf of the Telecommunications Industry Association (“TIA”), I am writing to urge the Federal Communications Commission (“the Commission”) to act expeditiously with respect to the classification of broadband platforms and broadband-enabled services under the Communications Act (“the Act”). In light of the U.S. Supreme Court’s recent decision in *Brand X*¹ to uphold the Commission’s classification of cable modem services as “information services” under the Act,² TIA strongly recommends that the Commission maintain a path consistent with this ruling by acting quickly to classify all broadband platforms and broadband-enabled services

¹ *National Cable & Telecommunications Assn. v. Brand X Internet Services*, 545 U.S. ___ (2005).

² The Communications Act defines “information service” as “the offering of a capability for generating, acquiring, storing, transforming, processing, retrieving, utilizing, or making available information via telecommunications.” 47 U.S.C. 153(20). The Communications Act defines “telecommunications” as the “transmission between or among points specified by the user, of information of the user’s choosing, without change in the form or content of the information as sent and received.” 47 U.S.C. 153(43). The Act defines telecommunications service” as “the offering of telecommunications for a fee directly to the public.” 47 U.S.C. 153(46).

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as interstate information services, subject to the Commission's exclusive jurisdiction. TIA supports the principle that, to the greatest extent feasible, all providers in the very competitive broadband services market should operate in the same minimally regulated environment.³

TIA recognizes that certain aspects of the agency's proceedings related to classification of broadband platforms and broadband-enabled services are complex and may take an additional amount of time to resolve. We believe, however, that it is both feasible and highly imperative that the Commission rule on at least one issue within 90 days of the Supreme Court's affirmation of the Commission's *Cable Modem Declaratory Ruling*⁴ – specifically, that wireline broadband services, like cable modem services, are information services.⁵

THE DISPARITY OF THE CURRENT REGULATORY FRAMEWORK IMPOSES SUBSTANTIAL BURDENS ON WIRELINE BROADBAND PROVIDERS, PLACING THEM AT A COMPETITIVE DISADVANTAGE WITH OTHER BROADBAND PROVIDERS

TIA, the principal industry voice for the information and communications technology (ICT) sector, strongly believes that the Commission's classification of broadband platforms and broadband-enabled services as information services will have an immediate, positive, and lasting impact on investment in communications networks.⁶ TIA applauds the Commission's initiative to create a regulatory framework that will achieve this goal. However, without building upon a partial success – classifying cable modem services as information services, which TIA fully

³ See, generally, *Appropriate Regulatory Treatment for Broadband Access to the Internet over Cable Facilities*, Comments of the High Tech Broadband Coalition, CS Docket No. 02-52 (filed June 19, 2002); *Appropriate Framework for Broadband Access to the Internet over Wireline Facilities*, Reply Comments of the High Tech Broadband Coalition, CC Docket No. 02-33 (filed July 1, 2002); and *IP-Enabled Services*, Comments of the Telecommunications Industry Association, WC Docket No. 04-36 (filed May 28, 2004). See also Brief of Telecommunications Industry Association as *Amicus Curiae* in Support of Petitioner, *National Cable & Telecommunications Assn. v. Brand X Internet Services*, 545 U.S. ___ (2005).

⁴ *Inquiry Concerning High-Speed Access to the Internet Over Cable and Other Facilities*, 17 F.C.C.R. 4798 (2002) (“*Declaratory Ruling*”).

⁵ See *Appropriate Framework for Broadband Access to the Internet over Wireline Facilities*, CC Docket No. 02-33.

⁶ See *supra* note 3.

supported – the current framework places substantial burdens on wireline broadband providers, by imposing inappropriate Title II obligations on their broadband facilities and services.

As mentioned by Chairman Martin in an editorial published in the *Wall Street Journal*, “Cable companies will continue to have incentives to invest in broadband networks without fear of having to provide their rivals access at unfair discounts. The decision also paves the way for the FCC to place telephone companies on equal footing with cable providers. We can now move forward and remove the legacy regulation that reduces telephone companies’ incentives to provide broadband.”⁷ TIA applauds and strongly encourages such action.

As an example of the disparity in the treatment of cable and wireline broadband providers, the latter are being forced to provide their digital subscriber lines (DSL) at discount rates – pursuant to the *Computer Inquiries* requirements that incumbent local exchange carriers (ILECs) offer to unaffiliated Internet service providers (ISPs) the same broadband transmission services that the ILEC provides to its affiliated ISP at non-discriminatory rates, terms, and conditions⁸ – after investing billions of dollars in their facilities.⁹ These requirements are not imposed upon cable modem service providers, nor should they be. As the Commission itself has

⁷ Kevin J. Martin, *United States of Broadband*, *The Wall Street Journal*, pg. A12, July 7, 2005.

⁸ *Regulatory and Policy Problems Presented by the Interdependence of Computer & Communications Services and Facilities*, 28 FCC 2d 267 (1971), *aff’d in part sub nom. GTE Service Corp. v. FCC*, 474 F.2d 724 (2d Cir. 1973), decision on remand, 40 FCC 2d 293 (1973) (*Computer I*); *Computer II*, 77 FCC 2d 384; *Computer III Phase I Order*, 104 FCC 2d 958, *recon.*, 2 FCC Rcd 3035 (1987) (*Phase I Recon. Order*), *further recon.*, 3 FCC Rcd 1136 (1988) (*Phase I Further Recon. Order*); *second further recon.*, 4 FCC Rcd 5927 (1989) (*Phase I Second Further Recon.*), *Phase I Order and Phase I Recon. Orders, vacated, California v. FCC*, 905 F.2d 1217 (9th Cir. 1990) (*California I*); *Phase II*, 2 FCC Rcd 3072 (1987) (*Phase II Order*), *recon.*, 3 FCC Rcd 1150 (1988) (*Phase II Recon. Order*), *further recon.*, 4 FCC Rcd 5927 (1989) (*Phase II Further Recon. Order*), *Phase II Order vacated, California I*, 905 F.2d 1217 (9th Cir. 1990); *Computer III Remand Proceedings*, 5 FCC Rcd 7719 (1990) (*ONA Remand Order*), *recon.*, 7 FCC Rcd 909 (1992), *pets. for review denied, California v. FCC*, 4 F.3d 1505 (9th Cir. 1993) (*California II*); *Computer III Remand Proceedings; Bell Operating Company Safeguards and Tier I Local Exchange Company Safeguards*, 6 FCC Rcd 7571 (1991) (*BOC Safeguards Order*), *recon. dismissed in part, Order*, CC Docket Nos. 90-623 and 92-256, 11 FCC Rcd 12513 (1996); *BOC Safeguards Order vacated in part and remanded, California v. FCC*, 39 F.3d 919 (9th Cir. 1994) (*California III*), *cert. denied*, 115 S.Ct. 1427 (1995); *Computer III Further Remand*, 13 FCC Rcd 6040, Report and Order, 14 FCC Rcd 4289, *recon.*, 14 FCC Rcd 21628 (1999).

⁹ See Amy Schatz, *FCC to Seek Parity After Net Ruling: Push to Let Phone Firms Keep Exclusive Line Access Planned After Cable Decision*, *The Wall Street Journal*, pg. B9, June 29, 2005.

acknowledged, these requirements are outmoded in light of competition among broadband platforms; as a result, they need to be revisited.¹⁰

The wireline broadband providers are at a significant competitive disadvantage to other broadband providers, such as cable, satellite, and fixed wireless operators – none of which are subject to such extensive regulatory burdens. Freeing wireline broadband providers from these obligations with respect to their broadband facilities and services, accordingly, holds the promise of unleashing competition among all players in the broadband arena.

EXPEDITIOUS ACTION IS NEEDED TO ENSURE THE CONTINUED RECOVERY OF THE INFORMATION AND COMMUNICATIONS TECHNOLOGY SECTOR

An expeditious decision to not place Title II obligations on wireline broadband providers likely will boost continued recovery and growth of the ICT sector. The current regulatory framework is suppressing capital spending, with the result being lost opportunities for job growth and economic expansion.¹¹

¹⁰ See *Appropriate Framework for Broadband Access to the Internet over Wireline Facilities*, Notice of Proposed Rulemaking, CC Docket No. 02-33 at para. 36. “[T]he core assumption underlying the *Computer Inquiries* was that the telephone network is the primary, if not exclusive, means through which information service providers can obtain access to customers. This network was optimized primarily to carry voice traffic and narrowband data applications, such as voicemail. Yet now information service providers may access customers over a variety of network platforms, such as cable, wireless and satellite.”

¹¹ See *Digital Age Communications Act: Proposal of the Regulatory Framework Working Group*, pg. 9, June, 2005, at http://www.telecomweb.com/readingroom/PFF_Regulation_Release_1.0.pdf. “The continuation of public utility regulation and of service-based regulatory uncertainty has substantial costs, which are recognized in the increasing calls for a re-write of the current statute. The complaints are widespread, and only two recent examples are the conclusions of Jerry Ellig, who estimates that the nonspectrum costs of current FCC regulation exceed \$37 billion annually (*citing to*, Jerry Ellig, *Costs and Consequences of Federal Telecommunications and Broadband Regulations*, Mercatus Center Working Paper (Feb. 2005)) and the conclusion of Thomas Hazlett and others that current regulation had ‘contribute[d] to the pronounced long-lived telecommunications slump’ by causing a loss of capital spending of ‘more than \$20 billion for incumbent operators and an additional \$2 billion to \$3.5 billion for competitive entrants’ (*citing to* Thomas W. Hazlett, et al., *Sending the Right Signals: Promoting Competition Through Telecommunications Reform* (Sept. 22, 2004)).

Wireline broadband providers will enjoy increased incentives to invest in broadband facilities. TIA believes that investment will flourish, as it did after the *Triennial Review Order*, a result that TIA similarly predicted.¹²

THE U.S. WILL FALL BEHIND OTHER NATIONS IN BROADBAND DEPLOYMENT IF WIRELINE BROADBAND PROVIDERS CONTINUE TO BE DISCOURAGED FROM INVESTING IN THEIR FACILITIES

Recent studies indicate that the U.S. continues to fall behind other nations in broadband deployment.¹³ The Commission should act expeditiously so that wireline broadband providers are on equal footing with other broadband providers so that their investment in facilities can contribute to the U.S. maintaining its leadership role in a global, competitive environment.

The onerous Title II requirements that are placed on wireline broadband providers discourage them from investing in their facilities and the upgrades that are necessary to provide advanced applications and services. As a result, consumers are being deprived of their widespread availability. It is in the public interest, both socially and economically, to encourage broadband deployment, which can be best achieved through a uniform, minimally regulated environment for all potential competitors.

¹² *In the Matter of Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*, CC Docket No. 01-338; *Implementation of the Local Competition Provisions of the Telecommunications Act of 1996*, CC Docket No. 96-98; *Deployment of Wireline Service Offering Advanced Telecommunications Capability*, CC Docket No. 98-147, Comments of the Telecommunications Industry Association, FCC 01-361 (rel. Dec. 20, 2001). “TIA continues to believe that the regulatory framework that governs broadband and high-speed Internet access networks impedes the investment that is necessary to make these service offerings more widely available and more robust. TIA also has recognized that in order for the ‘broadband effect’ to be realized, regulatory policy must promote increased and sustained facilities-based competition.”

¹³ The Organization for Economic Co-operation and Development (OECD), *OECD Broadband Statistics*, December, 2004, at http://www.oecd.org/document/60/0,2340,en_2825_495656_2496764_1_1_1_1,00.html, ranked the United States 12th in broadband subscribers, per 100 inhabitants. While there have been challenges to the geographic variables of the study for ranking purposes – the U.S. has more remote and widely dispersed rural areas than other countries – it remains clear that DSL is the leading broadband platform in 27 OECD countries, but only Canada (ranked 5th), the United States (ranked 12th) and Portugal (ranked 19th) have more cable modem than DSL subscribers.

Accordingly, in light of the clear policy and legal arguments against imposing inappropriate Title II obligations on wireline broadband providers, TIA respectfully urges the Commission to determine within 90 days that wireline broadband services are information services under the Act.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "Matthew Flanigan". The signature is written in a cursive, flowing style.

Matthew Flanigan
President

cc:

Thomas Navin, Wireline Competition Bureau Chief
Donna C. Gregg, Media Bureau Chief (acting)
Catherine W. Seidel, Wireless Telecommunications Bureau Chief (acting)
Michelle Carey, Legal Advisor to the Chairman
Scott Bergmann, Legal Advisor to Commissioner Adelstein
Russell Hanser, Acting Legal Advisor to Commissioner Abernathy
Jessica Rosenworcel, Legal Advisor to Commissioner Copps