

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

In the Matter of)	
)	
Appropriate Framework for Broadband Access to the Internet over Wireline Facilities 33)	CC Docket No. 02-
)	
Universal Service Obligations of Broadband Providers)	
)	
Computer III Further Remand Proceedings: Bell Operating Company Provision of Enhanced 20, 98-10 Services; 1998 Biennial Regulatory Review – Review of Computer III and ONA Safeguards and Requirements)	CC Docket Nos. 95-
)	

OPPOSITION OF COMPTTEL

COMPTTEL, pursuant to 47 C.F.R. § 1.429(f), files this opposition to Verizon’s Petition for Reconsideration (the “*Petition*”)¹ in the above-captioned dockets. For the reasons stated below, Verizon’s *Petition* provides no legal or factual basis for the Commission to amend its *Wireline Broadband Order*,² and the *Petition* should be denied in its entirety.

¹ *Verizon Petition for Limited Reconsideration of Title I Broadband Order*, CC Docket No. 02-33 (filed Nov. 16, 2005); 70 Fed. Reg. 74016 (published Dec. 14, 2005) (hereinafter “*Petition*”).

² *Appropriate Framework for Broadband Access to the Internet over Wireline Facilities*, CC Docket No. 02-33, Report and Order and Notice of Proposed Rulemaking (rel. Sept. 23, 2005) (the “*Order*”).

1. The Relief Requested Is Exceedingly Broad.

Verizon characterizes the relief that it seeks as “limited.”³ That characterization is grossly inaccurate. The relief here – removal of all Title II requirements for “all transmission services that use a packet-switched or successor technology”⁴ -- is on its face exceedingly broad. This is essentially the same relief that Verizon seeks in its forbearance petition in WC Docket No. 04-440, a petition for which the Commission has extended the decision deadline because it “raises significant questions regarding whether forbearance from application of Title II of the Act and *Computer Inquiry* requirements to all broadband services that Verizon may offer meets the statutory requirements under section 10(c).”⁵

The Commission’s *Order* most directly impacted ISPs and had no effect on the availability of unbundled network elements (UNEs) to competitive local exchange carriers (CLECs) seeking to provide wireline broadband Internet access service and other broadband services. The relief sought by Verizon in the instant Petition, on the other hand, would have a substantial effect on the availability of interconnection, UNEs, resale, and other network access provisions that are vital inputs to competitive broadband transmission service offerings. As the Commission properly held in its *Order*, the

³ *Petition* at 7.

⁴ *Id.* at 2 n.3.

⁵ *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, Order (rel. Dec. 19, 2005).

availability of UNEs does not depend on the statutory classification of the service that the ILEC provides.⁶ That is not the case, however, with respect to services purchased pursuant to the resale provisions of section 251(c)(4) of the Act. There, the resale requirement only applies to “telecommunications services,” i.e., common carrier services, that the ILEC provides at retail. Verizon’s *Petition* would take all broadband services out of the “telecommunications service” classification, thus eliminating any possibility of resale. Moreover, granting the relief that Verizon seeks would mean that ILEC special access tariffs could cease to exist, cutting off a critical purchasing vehicle for CLECs with respect to these important broadband services. Further, if all packet-switched broadband transmission services were deemed to be “private carriage,” and therefore not common carrier telecommunications services, then the interconnection requirements of sections 251(c) and 251(a)(1) would cease to apply with respect to virtually all broadband services, as would the basic requirements under sections 201 and 202 of the Act to provide service upon request at reasonable and nondiscriminatory rates.⁷ If existing mandatory interconnection requirements were repealed in this way, in addition to stranding many CLEC broadband enterprise offerings, the broadband Internet would cease to function as an open network. There is, in short, nothing even remotely

⁶ *Order* at ¶ 127 (“Thus, competitive LECs will continue to have the same access to UNEs, including DS0s and DS1s, to which they are otherwise entitled under our rules, regardless of the statutory classification of service the incumbent LECs provide over those facilities.”).

⁷ 47 U.S.C. §§ 251(a)(1), 201, 202.

“limited” about the Verizon *Petition*. It would erase virtually all existing statutory authority to regulate broadband communications as common carriage, including the very basic authority that is necessary for the Internet to function.

Against this backdrop, there would have to be both compelling legal and factual grounds for the Commission to consider granting the *Petition*. There is neither.

2. The *Petition* Completely Fails To Address the Legal Standard For Distinguishing Between Common Carriage and Private Carriage.

The *Petition* appears to assume that the question of whether a particular transmission service is a common carrier service or a private carrier service is one that is left entirely to the discretion of the Commission. It is not. *NARUC I*,⁸ upon which both Verizon in its *Petition* and the Commission in its *Order* rely,⁹ succinctly restates the settled law on this point:

Further, we reject those parts of the Orders which imply an unfettered discretion in the Commission to confer or not confer common carrier status on a given entity, depending upon the regulatory goals it seeks to achieve. The common law definition of common carrier is sufficiently definite as not to admit of agency discretion in

⁸ *National Ass’n of Regulatory Utility Commissioners v. FCC*, 525 F.2d 630 (D.C. Cir. 1976).

⁹ See *Petition* at 9 n.14, *Order* at ¶ 103 n.318.

the classification of operating communications entities. *A particular system is a common carrier by virtue of its functions, rather than because it is declared to be so.*¹⁰

When Congress amended the Communications Act in 1996 and added the definition of “telecommunications carrier,” it too adopted a test for common carriage that turns on how the carrier is in fact operating. The definition of that term states that “[a] telecommunications carrier shall be treated as a common carrier under this Act only to the extent that it is engaged in providing telecommunications services, except that the Commission shall determine whether the provision of fixed and mobile satellite service shall be treated as common carriage.”¹¹

“Telecommunications service,” in turn, is defined as “the offering of telecommunications for a fee directly to the public, or to such classes of users as to be effectively available directly to the public, regardless of the facilities used.”¹² The D.C. Circuit has upheld a Commission order in which the

¹⁰ *NARUC I*, 525 F.2d at 644 (emphasis added; footnotes omitted). Verizon also cites *Computer and Communications Indus. Assoc. v. FCC*, 693 F.2d 198 (D.C. Cir. 1982) (“*CCIA*”), for the proposition that the Commission has been upheld when it has “allowed telecommunications providers to choose whether to offer service on a common- or non-common-carrier basis. . . .” Verizon Petition at 8. Verizon’s reliance on that case is especially ill-placed, because that is the case in which the court upheld the Commission’s adoption of the *Computer II* regime, repeal of which is a necessary predicate to the Commission’s even being able to entertain Verizon’s *Petition*. More specifically, with respect to the transmission component of the services at issue, the court agreed with the Commission that the purposes of the Communications Act could “best be accomplished . . . by regulating the rates of only the activities *clearly* within the scope of Title II. *Id.* at 210-11 (emphasis in original). It is precisely those transmission services that Verizon now claims are outside of Title II.

¹¹ 47 U.S.C. § 153(44). The express delegation to the Commission of the discretion to determine when satellite services are to be treated as common carriage reinforces the lack of any such discretion with respect to other services.

¹² 47 U.S.C. § 153(46).

Commission ruled that “the term ‘telecommunications carrier’ means essentially the same as common carrier. . . .”¹³ Under both the Communications Act and governing case law, then, “[a] particular system is a common carrier by virtue of its functions, rather than because it is declared to be so.”¹⁴

There is nothing in the Notice of Proposed Rulemaking (“NPRM”)¹⁵ in this docket or in the Commission’s *Order* that suggests in any way that the Commission intended to change the well-settled dividing line between common carriage and private carriage, and Verizon has urged no such change either in the proceedings leading up to the issuance of the *Order* or in its pending *Petition*. Accordingly, since there has been no notice that any such change of interpretation was being considered, Verizon’s *Petition* must be evaluated against the existing standard for determining when a service is common carriage versus private carriage. That standard holds that:

[T]he critical point is the quasi-public character of the activity involved. To create this quasi-public character, it is not enough that a carrier offer his services for a profit, since this would bring within the definition private contract carriers which the courts have

¹³ *Virgin Islands Telephone Corp. v. FCC*, 198 F.3d 921, 925 (D.C. Cir. 1999). It bears noting that the court in *Virgin Islands* expressly did not rule on “the question of whether the Commission applied the NARUC I test correctly” to the submarine cable installation there at issue. *Id.* at 925 n.6. *Virgin Islands* only specifically addressed the reasonableness of the Commission’s interpretation of the phrase “or to such classes of users as to be effectively available directly to the public” from the definition of “telecommunications service,” 47 U.S.C. § 153(46).

¹⁴ *NARUC I*, 525 F.2d at 644.

¹⁵ *Appropriate Framework for Broadband Access to the Internet over Wireline Facilities*, CC Docket No. 02-33, Notice of Proposed Rulemaking (rel. Feb. 15, 2002).

emphatically excluded from it. What appears to be essential to the quasi-public character implicit in the common carrier concept is that the carrier “undertakes to carry for all people indifferently”

This does not mean that a given carrier’s services must practically be available to the entire public. One may be a common carrier though the nature of the service rendered is sufficiently specialized as to be of possible use to only a fraction of the total population. And business may be turned away either because it is not of the type normally accepted or because the carrier’s capacity has been exhausted. But a carrier will not be a common carrier where its practice is to make individualized decisions, in particular cases, whether and on what terms to deal. It is not necessary be required to serve all indiscriminately; it is enough that its practice is, in fact, to do so.¹⁶

Another case on which Verizon relies¹⁷ also emphasizes that the issue of common carriage turns on the specific facts of how a carrier interacts with its customers:

Whether an entity in a given case is to be considered a common carrier turns on the particular practice under surveillance. If the carrier chooses its clients on an individual basis and determines in each particular case “whether and on what terms to serve” and there is no specific regulatory compulsion to serve all indifferently, then the entity is a private carrier for that particular service and the Commission is not at liberty to subject the entity to regulation as a common carrier.¹⁸

¹⁶ *NARUC I*, 525 F.2d at 641. *See also NARUC II*, 533 F.2d 601, 608-609 (D.C. Cir. 1976).

¹⁷ *See Petition* at 12 n.26.

¹⁸ *Southwestern Bell Telephone Co. v. FCC*, 19 F.3d 1475, 1481 (D.C. Cir. 1994) (emphasis added).

3. There Are No Facts In This Record That Support The Sweeping Private Carriage Designation That Verizon Seeks.

Applying the settled common carrier test to the broad class of services (all packet-switched broadband transmission services)¹⁹ for which Verizon seeks a private carriage classification, it is readily apparent that there are no facts in the record upon which such a designation could be made.

Verizon's entire factual argument is directed to its asserted lack of market power and the purported competitiveness of the national broadband transmission market in general. Even assuming that these arguments did not suffer from severe factual and methodological problems, which they do, they are entirely irrelevant to the issue of whether Verizon is acting as a common carrier in its offering of broadband transmission services. The common carrier determination with respect to services that are actually being offered has nothing whatsoever to do with market power or the lack of it.²⁰

¹⁹ See *Petition* at 2 n.3.

²⁰ The competition arguments they have no bearing on the common carriage/private carriage issue raised by Verizon's *Petition* in this docket (02-33). See *NARUC I*, 525 F.2d at 641 ("In such cases as the Motor Carrier Act of 1935, relatively competitive carrying industries have been subjected to entry, rate and equipment regulations on the basis of the quasi-public character of the activities involved. Whether the common carrier concept is invoked to support strict tort liability or as a justifying basis for regulation, it appears that the critical point is the quasi-public character of the activity involved.") Verizon's misplaced emphasis on market power appears to arise from a misapplication of part of the common carriage test set forth in *NARUC I*. There, faced with a service that had not yet been deployed, the court asked first whether there "would be any legal compulsion to serve indifferently," *NARUC I*, 525 F.2d at 642, and then asked "whether there are reasons implicit in the nature of SMRS operations to expect an indifferent holding out to the eligible user public." *Id.* Presumably it is the first part of this test that prompts *Verizon* to emphasize its arguments about market power. The problem with Verizon's approach is that the "legal compulsion" part of the test never comes into play with respect to a service that has already been deployed, because the

Instead, the proper inquiry in determining whether Verizon is a common carrier with respect to the packet-switched broadband transmission services covered by the *Petition* requires a factual examination of the manner in which Verizon interacts with its customers.

In order to determine whether a transmission provider is making an indiscriminate “holding out” to the public, it is useful to consider such factors as how many customers it serves, what types of customers it serves, the terms under which the carrier offers service, and whether the carrier independently tailors and negotiates service with each customer, or, in contrast, whether the offerings are more accurately characterized as generic or “off-the-shelf” services. In order to evaluate those factors, it would be necessary for the Commission to receive evidence of how this broad class of services are in fact provided.

In *Southwestern Bell*, for example, a case relied upon by Verizon,²¹ the court reached its determination that the filing of individual case basis (“ICB”) contracts with the FCC was inadequate by itself to trigger common carriage regulation after a factual analysis of the manner in which the services were offered:

question in that instance is simply whether the carrier is in fact making an indiscriminate holding out to the public. As the court observed in *NARUC II*: “Nor is it essential that there be a statutory or other legal commandment to serve indiscriminately; it is the practice of such indifferent service that confers common carrier status.” 533 F.2d at 608 (footnote omitted).

²¹ See *Petition* at 12 n.26.

Petitioners offered certain telecommunications services on a common carrier basis, *e.g.*, ordinary telephone service. Their entry into the dark fiber market, however, began as a limited, customer-specific service. The FCC originally had permitted petitioners to provide special services, including dark fiber, on an ICB basis without filing conventional tariffs until the carriers “develop rates or generally applicable regulations for these facilities.” These ICB service contracts were individually-tailored arrangements negotiated to last for periods of five to ten years. As an initial matter, therefore, they were not like the indiscriminate offering of service on generally-applicable terms that is the traditional mark of common carrier service.²²

Here, no detailed evidence of the sort cited in *Southwestern Bell* regarding the manner in which broadband transmission services are offered has been provided, and it is too late to do so now.²³ Accordingly, the Commission has no basis upon which it could even begin the detailed factual analysis required before it could reverse its current holding that the services addressed by the *Petition* are in fact common carrier services. What *is* known, however, is that Verizon sells packet-switched broadband services to individuals, all sizes of businesses, other telecommunications carriers, governments, educational institutions, and ISPs, among many others. Although it is certainly possible that some customers will have different needs in terms of the type of service ordered, necessary capacity, configuration, etc., it is also reasonable to assume, especially in light of the

²² *Southwestern Bell*, 19 F.3d at 1481 (internal citations omitted).

²³ *See* 47 C.F.R. § 1.429(b) (facts not previously submitted to Commission may not be relied upon in petition for reconsideration except in enumerated circumstances).

complete lack of any evidence to the contrary, that the vast majority of those customers are buying from a common menu of standard Verizon offerings.²⁴ Indeed, the Commission has in large part justified its *Order* on the assumption that facilities-based broadband wireline carriers will seek to obtain “as much traffic and as many customers as possible regardless of whether such customers are wholesale or retail.”²⁵ That does not sound like a situation in which carriers will “make individualized decisions, in particular cases, whether and on what terms to deal.”²⁶ Finally, whatever the precise arrangements that Verizon might have with its many broadband customers, there is no authority in common carrier law with respect to any network or transportation industry that holds that a company that serves hundreds of thousands of customers (perhaps millions) with the same general type of offering may be deemed to be a private carrier. To state such a proposition is to refute it.²⁷

It is no answer for Verizon to argue that it is only offering its stand-alone broadband transmission services on a common carrier basis because it has been required to do so. Except with respect to transmission services

²⁴ See, e.g., Verizon Telephone Companies FCC Tariff No. 1 (Access Services), available at http://svartifoss2.fcc.gov/cgi-bin/ws.exe/prod/ccb/etfs/webpublic/browse.htm?IdTariff=218&IdLec=120&User_Type=2&IdLec_User=&id_user=

²⁵ *Order* at ¶ 74.

²⁶ *NARUC I*, 525 F.2d at 641.

²⁷ See *Southwestern Bell v. FCC*, 19 F.3d 1475, 1481 (D.C. Cir. 1994) (“To be sure, a carrier cannot vitiate its common carrier status merely by entering into private contractual relationships with its customers.

underlying information services as addressed in the *Computer Inquiry* rules,²⁸ the Commission has only very rarely (and *never* with respect to the services at issue in the *Petition*) required Verizon or any other carrier to serve indiscriminately. Rather, Verizon's offering serves the public indifferently with respect to these services, the Commission has recognized that it is a common carrier and has required it to comply with the Act's Title II requirements. Verizon could choose to dramatically restrict its operations, forego the revenues associated with selling services to all willing buyers, and thereby seek to convince the Commission that it is a "private carrier."²⁹ Instead, Verizon seeks to convince the Commission that its common carrier offering is really private carriage without in any way changing the services that the Commission (and indeed Verizon) have properly recognized as common carrier services. Verizon has no basis to ask the Commission by fiat

²⁸ Even there, the requirement with respect to the offering of underlying transmission at tariff merely implemented the existing statutory requirement. Any "legal compulsion" in *Computer II* involved the separate subsidiary requirement that the Commission placed on certain carriers.

²⁹ Verizon is also simply wrong when it argues that it is deemed a common carrier today only because the Commission "reflexively" and not as "the product of a considered decision on the part of the Commission" has treated broadband transmission services as common carriage. *Petition* at 12. In fact, the Commission has expressly and with ample analysis ruled broadband services to be common carriage on multiple occasions. One example that is particularly obvious is the Commission's 1989 determination -- in the same docket that led to the *Southwestern Bell* dark fiber case cited by Verizon -- that lit fiber DS3 service was a common carrier service. See *Southwestern Bell*, 19 F.3d at 1478 n.2 and accompanying text. See also *Independent Data Mfr's Ass'n, Inc.*, Mem. Op. and Order, 10 F.C.C.R. 13,717 (1995) (holding that AT&T's offering of frame relay service, either as a stand-alone transmission service or in conjunction with an enhanced service, is a common carrier service). Frame relay, of course, is also one of the services that is expressly covered by the *Petition*.

to declare Verizon a “private carrier,” and the Commission has no authority to issue such a declaration.³⁰

With respect to the point that the carrier may always “choose” to be a private carrier by conducting itself in the limited and specialized fashion associated with that class of carriers, it bears noting that Verizon in its *Petition* acknowledges that it currently offers DSL as a stand-alone, common carrier service. There, in describing the services for which it seeks private carrier treatment, Verizon states:

In addition to any broadband transmission services used to access the Internet, the broadband transmission services entitled to Title I treatment should include all transmission services that use a packet-switched or successor technology. *Examples include Digital Subscriber Line (DSL) services (while most DSL services are offered as part of an Internet access service, that is not always the case), Frame Relay services, Asynchronous Transfer Mode (ATM) services, gigabit Ethernet services, and optical services.*³¹

In light of the Commission’s unequivocal statement “that a facilities-based wireline broadband Internet access provider may not simultaneously offer the same type of broadband Internet access transmission on both a common carrier and a non-common carrier basis,”³² Verizon’s offering of DSL

³⁰ *See NARUC I*, 525 F.2d at 644 (“The common law definition of common carrier is sufficiently definite as not to admit of agency discretion in the classification of operating telecommunications companies.”); *see also NARUC II*, 533 F.2d at 618 (“This court has previously held that the term ‘common carrier’ has a coherent legal meaning which courts can grasp and apply in reviewing the Commission [sic] construction of its own Act.”).

³¹ *Petition* at 2 n.3 (emphasis added).

³² *Order* at ¶ 95.

service on a common carrier basis for some purposes requires it to offer such service as a common carrier basis for all purposes (including to ISPs), whether or not that transmission is also tied with or offered as an input to an Internet access service. The *Order* in no way changes that longstanding rule.

4. The *Petition* Misreads the Commission’s *Cable Modem Declaratory Ruling* and the Supreme Court’s *Brand X* Decision.

Like the Commission in its *Order*, Verizon in its *Petition* relies on the Commission’s *Cable Modem Declaratory Ruling*³³ and the Supreme Court’s *Brand X*³⁴ decision. That reliance is misplaced for two reasons. First, the *Petition* materially misstates the substance of those two rulings. Second, the *Petition* fails to appreciate that the Supreme Court upheld the *Cable Modem Declaratory Ruling* on the narrow ground that it found reasonable the Commission’s *factual* finding that the transmission component of cable modem service was at that time an inseverable part of the Internet access service offering made to the public by cable companies.³⁵

With respect to the *Petition*’s mischaracterization of the *Cable Modem Declaratory Ruling*, Verizon claims that “the Commission decided that any ‘stand-alone transmission service’ offered by cable companies to ISPs would

³³ *Inquiry Concerning High-Speed Access to the Internet Over Cable and Other Facilities*, GN Docket No. 00-185, Declaratory Ruling (rel. March 15, 2002).

³⁴ *NCTA v. Brand X Internet*, 125 S.Ct. 2688 (2005).

³⁵ It is worth noting that COMPTTEL disputes the Commission’s conclusion in the Wireline Broadband Internet Access Order that the services at issue in that proceeding constitute an “information service” offering without a separate “telecommunications service” component. Along with several other parties, COMPTTEL has challenged the Commission’s decision in federal court.

be ‘private carrier service and not a common carrier service.’”³⁶ What the Commission actually decided in the cited paragraph was far more conditional and far less categorical than Verizon claims. Paragraph 54 of the *Cable Modem Declaratory Ruling* states in its entirety:

It is possible, however, that when EarthLink or other unaffiliated ISPs offer service to cable modem subscribers, they receive from AOL Time Warner an “input” that is a stand-alone transmission service, making the ISP an end user of “telecommunications,” as that term is defined in the Act. *The record does not contain sufficient facts by which to make that determination. To the extent that AOL Time Warner is providing a stand-alone telecommunications offering to EarthLink or other ISPs, we conclude that the offering would be a private carrier service and not a common carrier service, because the record indicates that AOL Time Warner determines on an individual basis whether to deal with particular ISPs and on what terms to do so.*³⁷

Contrary to Verizon’s suggestion that the Commission in the quoted passage stated some sort of universal rule about the private carriage classification of cable-based transport sold to ISPs, the actual language indicates a ruling that is both narrow (applicable only to transmission sold by a single company) and fact-specific (based on record evidence that “indicates that AOL Time Warner determines on an individual basis whether to deal with particular ISPs and on what terms to do so.”)³⁸ Moreover, in light of the

³⁶ *Petition* at 10-11, citing *Cable Modem Declaratory Ruling* at ¶ 54.

³⁷ *Cable Modem Declaratory Ruling* at ¶ 54 (emphasis added).

³⁸ *Id.* In the next paragraph, 55, the Commission elaborates on the distinction between common carriage and private carriage. There, citing *NARUC I, NARUC II, and Virgin Islands*, the Commission emphasized the fact-based nature of that distinction: “The Commission and courts have long distinguished between common carriage and private

Commission’s observation that “[n]o commenter claims that AOL Time Warner is providing any telecommunications or information service offering to an ISP,”³⁹ the discussion is dictum in any case. Finally, contrary to Verizon’s suggestion that the Supreme Court upheld the Commission on a holding that transmission by cable companies to ISPs is private carriage,⁴⁰ the Supreme Court in *Brand X* never even considered, much less ruled on, that issue.

Beyond Verizon’s misstatements about the specifics of what the Commission and the Supreme Court actually said about the proper classification of the transmission component of cable modem service, there is a broader problem with Verizon’s reliance on the *Cable Modem Declaratory Ruling* and *Brand X*. On the question of the classification of the transmission portion of wireline broadband Internet access (the core classification upon which Verizon’s *Petition* builds), the Commission held that “[w]e conclude, consistent with *Brand X*, that such a transmission component is mere

carriage by examining the particular service at issue. As the D.C. Circuit has stated, ‘the primary sine qua non of common carrier status is a quasi-public character, which arises out of the undertaking to carry for all people indifferently.’” *Id.* (*internal citations omitted*).

³⁹ *Id.* at ¶ 54 n.203.

⁴⁰ *See Petition* at 11 (juxtaposing assertion regarding private carriage classification of cable transmission sold to ISPs with statement that the “Supreme Court’s decision in *Brand X* subsequently affirmed the Commission’s application of Title I to cable operators’ broadband services.”). Even if the latter statement were true by itself (which it is not, because the Supreme Court left open the scope of the FCC’s Title I authority), it has no relation whatsoever to the sentence regarding private carriage that precedes it. By the same token, the Supreme Court’s observation (quoted in the *Petition* at 11) that “[t]he Commission has long held that ‘all those who provide some form of transmission services are not necessarily common carriers,’” 125 S.Ct. at 2706, was lifted from *Computer II*, and has nothing at all to do with the private carriage/common carriage distinction raised by the *Petition*.

‘telecommunications’ and not a ‘telecommunications service.’”⁴¹ Cable modem service, of course, is not broadband wireline Internet access service, which is one reason the Commission dealt with the two services in separate proceedings. Moreover, unlike the case with cable modem service, the *Order* recounts that DSL transmission service *is* offered separately from Internet access service in some cases,⁴² a fact that Verizon confirms in its *Petition*.⁴³ Furthermore, the Commission, until it issued the *Order*, had as a matter of policy for years treated the transmission component of broadband wireline Internet access as being separate services:

An end user may utilize a telecommunications service together with an information service, as in the case of Internet access. In such a case, however, we treat the two services separately: the first service is a telecommunications service (e.g., the DSL-enabled transmission path), and the second service is an information service, in this case Internet access.⁴⁴

In its *Order*, the Commission only purported to change that longstanding holding with respect to wireline broadband Internet access, which includes both a broadband transmission component and Internet access component. Notwithstanding the clear limitation of both *Brand X* and the Commission’s *Order* to the specific services at issue in those proceedings,

⁴¹ *Order* at ¶ 104 n.321.

⁴² *Id.* at ¶ 74.

⁴³ *Petition* at 2 n.3.

⁴⁴ *Deployment of Wireline Services Offering Advanced Telecommunications Capability*, 13 F.C.C.R. 24,012, 24,030, ¶ 36 (1998).

Verizon now asks the Commission to extend relief to “those services [that] are not used for Internet access.”⁴⁵ Ignoring the fact that the Supreme Court and the Commission expressly limited their factual and legal analyses to retail services that combine a broadband transmission service with Internet access service, Verizon asks the Commission to eliminate regulation of all transmission services that can be classified as “data” services.⁴⁶ In short, Verizon exaggerates the holdings of *Brand X* and the Commission’s *Order*, and ignores decades of Commission and court rulings, in order to support its argument that the relief requested in its *Petition* is the natural outgrowth of existing precedent. Because, as Verizon concedes, the services at issue in its *Petition* do not have an Internet access component to them, but rather are stand-alone telecommunications services, it is difficult to see how *Brand X* or the Commission’s *Order* are even relevant to the relief requested. Certainly the Supreme Court’s holding regarding cable modem services, which upheld as reasonable the Commission’s factual determination that cable modem services combine transmission and Internet access into a single service, cannot be construed as supporting a finding that Verizon’s broadband transmission services, which contain no Internet access component, are not common carrier service offerings. Indeed, the Supreme Court itself explicitly

⁴⁵ *Petition* at 2.

⁴⁶ *Id.* at 2 n.3. Verizon includes as examples such basic transmission services as ATM, Frame Relay, gigabit Ethernet, and optical services in its request for relief, and more broadly requests relief for “all transmission services that use a packet-switched or successor technology,” which could be construed to include almost every transmission service that Verizon offers today – including local exchange service. *Id.*

foreclosed reliance on *Brand X* in dealing with wireline broadband, stating that “we express no view on how the Commission should, or lawfully may, classify DSL service.”⁴⁷ Verizon’s attempt to transform these Supreme Court and Commission findings on unrelated service offerings into justification for the relief it requests is nonsensical and should be rejected.

5. Conclusion.

The Verizon *Petition* seeks sweeping relief. If granted, the impacts of that relief would dwarf the impacts of the Commission’s original *Order*. The Commission chose in its *Order* not to follow the extreme course proposed by Verizon, and there is nothing in the *Petition* that supports a different result on reconsideration. The *Petition* also fails utterly on the merits. Instead of addressing the “indiscriminate holding out” test that distinguishes between common carriage and private carriage, the *Petition* addresses issues of market power and “legal compulsions to serve,” inquiries that are not dispositive of the question of whether a service that is in fact being offered to the public is common carriage or private carriage. Finally, the *Petition* is premised on an overly broad reading of the Commission’s *Cable Modem Declaratory Ruling* and the Supreme Court’s opinion in *Brand X*.

For all of the reasons set forth above, the *Petition* must be denied.

Respectfully submitted,

⁴⁷ *Brand X*, 125 S.Ct. at 2711.

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