Before the
Federal Communications Commission
Washington, D.C. 20554

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

COMMENTS OF VERIZON

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Introduction and Summary

Just as it recently did with respect to broadband services provided by cable companies, the Commission should classify broadband services provided by telephone companies under Title I of the Communications Act, regardless of whether the broadband service is part of a bundled Internet access service or is offered as a stand-alone transmission service. Classifying all broadband services under Title I would promote each of the key objectives articulated by the Commission and by Chairman Powell. Specifically, (1) it will promote the widespread availability of broadband-capable infrastructure; (2) it will promote the substantial risk

[1] The Verizon telephone companies ("Verizon") are the local exchange carriers affiliated with Verizon Communications Inc. identified in the list attached as Exhibit D hereto.

investment needed to develop an deploy that infrastructure (as well as the innovation that will flow from that investment); and 3) it will allow the Commission to develop a sound regulatory policy that harmonizes the rights and obligations of all providers across different technological platforms.[2]

As the Commission has recognized, this country is still in the early stages of broadband deployment. Thus far, the broadband marketplace has developed in a competitive manner, with multiple providers using multiple platforms to reach customers. In order for the market to continue to develop competitively, however, billions of dollars of new investment are needed. In particular, if they are to effectively challenge the dominance of cable modem operators in the provision of mass-market broadband, local telephone companies will need to make large new investments to upgrade their existing networks and expand the number of customers who can be served by broadband-capable facilities such as copper-based Digital Subscriber Line ("DSL") technology and next-generation fiber optic technology.

At present, traditional local telephone companies face strong regulatory disincentives to this needed investment and deployment. Despite the fact that they are relative newcomers to the broadband market, these companies face a host of burdensome Title II regulatory obligations when they provide DSL to mass-market customers or packet-switched services like Asynchronous Transfer Mode ("ATM") or frame relay to larger business customers. In contrast, the cable companies that dominate the broadband mass market are free from all of the strictures

[2] *See, e.g.*, Notice of Proposed Rulemaking, *Appropriate Framework for Broadband Access to the Internet over Wireline Facilities*, CC Docket Nos. 02-33, 95-20, 98-10, FCC 02-42, ¶¶ 3-7 (rel. Feb. 15, 2002) ("*NPRM*"); Michael K. Powell, Chairman, FCC, Remarks at the Broadband Technology Summit, U.S. Chamber of Commerce (Apr. 30, 2002) ("Chairman's Broadband Remarks").

of common-carrier regulation. In the larger business market, things are hardly more rational. When satellite or terrestrial wireless operators offer broadband, they do so under Title I, and the dominant long-distance carriers, while nominally classified under Title II, have been allowed to operate largely free from regulation. By regulating local telephone companies as common carriers but leaving their competitors essentially unregulated, the current regulatory scheme creates disincentives to new investment that hinder deployment of new facilities and reduce the competitive pressure on other providers.

To remedy this situation, the Commission should classify all broadband services under Title I of the Communications Act, regardless of provider. On the retail side of the business, regulating broadband under Title I would eliminate the requirement that local telephone companies file cost-justified tariffs for their own broadband transmission services, thus allowing them to experiment with different and innovative pricing schemes. Relatedly, the Commission should decline to extend to broadband the telecommunications unbundling, tariffing and other obligations set forth in the *Computer Inquiries* orders, for it would make no sense to remove these regulations under Title II only to reimpose substantially the same regulations under the *Computer Inquiries.* Indeed, the *Computer Inquiries* obligations were based on the key assumption that information service providers needed use of the local telephone companies' networks in order to reach their customers. Regardless of the validity of that assumption today in the narrowband market, it certainly is not valid in the broadband market, where local telephone companies utterly lack market power in either the mass-market segment or the larger business segment. On the wholesale side of the business, treating wireline broadband under Title I would mean lifting (with respect to broadband services and facilities) the facilities unbundling,

remote terminal collocation, and other burdensome and unnecessary requirements that increase the cost and risk – and decrease the returns – of investment in broadband facilities and services.

Recently the Commission decided to regulate cable modem service as an information service under Title I and, importantly, determined that cable companies could offer the telecommunications component of the bundled service to unaffiliated ISPs on a non-common-carriage basis.[3] The Commission's declaratory ruling regarding cable modem service is of decisive importance in these proceedings because the reasons supporting the Commission's classification of cable modem services apply with equal or greater force to local telephone companies in their provision of broadband.

As Chairman Powell suggested in a recent speech, the Commission should light a "revolutionary fire" in broadband regulation. Given the nascent state of that market, the local telephone companies' utter lack of market power in broadband, and the Commission's classification of competing services under Title I, the right way to ignite that fire is to classify all broadband services under Title I regardless of provider. Harmonizing the regulatory requirements in this way will ensure that all broadband providers have the correct market-based incentives to invest and innovate, will avoid favoring one technology over another, and will maintain competitive pressure on the incumbent cable and long-distance companies that dominate the broadband landscape. And harmonizing the regulatory requirements that apply to all broadband providers not only is sound policy, it is also legally required. There is simply no lawful basis on which to impose different regulatory requirements on various providers of

[3] Declaratory Ruling and Notice of Proposed Rulemaking, *Inquiry Concerning High-Speed Access to the Internet Over Cable and Other Facilities*, GN Docket No. 00-185, FCC 02-77, ¶ 73 (rel. Mar. 15, 2002) ("*Cable Modem Declaratory Ruling*").

functionally equivalent services, and that is all the more true where the new entrant is subject to more onerous requirements than the dominant providers in the market.

Discussion

By creating a minimal regulatory regime that allows the market to drive efficient investment, the Commission will meet the policy goals set forth in the NPRM: it will promote the "ubiquitous availability of broadband to all Americans" by removing regulatory disincentives to investment, encourage facilities-based competition by "avoid[ing] policies that . . . embrac[e] too quickly any one technology or service," maintain a "minimal regulatory environment that promotes investment and innovation in a competitive market," and provide a regulatory framework that is "consistent . . . across multiple platforms" and focuses on the "nature of the service provided to consumers, rather than . . . the technical attributes of the underlying architecture."[4]

As Verizon has noted in other ongoing proceedings, the Commission's working definition for broadband, which requires speeds of 200 kbps in each direction,[5] may inadvertently exclude some data services provided via new technologies that may be accessible at lower speeds. The Commission should expand its definition to cover these new services in

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[4] *NPRM* ¶¶ 3-7.

[5] Report, *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, 2406-07, ¶¶ 20, 22 (1999) ("*First Advanced Services Report*"); *see also* Third Report, *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*, CC Docket No. 98-146, FCC 02-33 (rel. Feb. 6, 2002) ("*Third Advanced Services Report*").

order to eliminate regulatory obstacles to the development and deployment of such new technologies. Verizon proposes the following working definition of broadband for use in these proceedings: A broadband service is *either* a service that uses a packet-switched or successor technology, *or* a service that includes the capability of transmitting information that is generally not less than 200 kbps in both directions.[6] Examples include Digital Subscriber Line ("DSL") services, Frame Relay services, Asynchronous Transfer Mode ("ATM") services, and optical services.

I. The Commission Should Regulate Local Telephone Company Broadband Under Title I of the Communications Act

In its recent *Cable Modem Declaratory Ruling*, the Commission decided that both broadband Internet access and stand-alone broadband transmission provided over cable should be regulated under Title I of the Communications Act.[7] It should reach the same conclusion with respect to broadband services offered by local telephone companies, regardless of whether those services are part of a bundled Internet access service or are offered as a stand-alone transmission service. As will be discussed below, classifying all broadband services under Title I is the best way to create a regulatory environment conducive to investment and increased deployment. Equal regulatory treatment of all broadband providers is thus sound public policy and comports

[6] This definition does not include (1) traditional non-packet-switched data services, such as 56 kbps and 1.5 Mbps services, regardless of whether these services are provided over copper or fiber infrastructure (2) lower-speed data services that are based on circuit technology, such as ISDN, (3) x.25-based and x.75-based packet technologies, or (4) circuit switched services (such as circuit-switched voice-grade service) regardless of the technology, protocols, or speeds used for the transmission of such services.

[7] *Cable Modem Declaratory Ruling* ¶¶ 41-42, 54.

fully with the Commission's stated intention to focus on the "nature of the service provided to consumers, rather than . . . the technical attributes of the underlying architecture."[8]

A. Bundled Broadband Internet Access Is Unquestionably a Title I Information Service

The Commission has long regarded Internet access as an information service.[9] Thus, the Commission's "tentative conclusion" that wireline providers of bundled high-speed Internet access service offer an "information service," while unquestionably correct, merely restates existing law.[10]

This existing law makes perfect sense. The Commission properly notes in its *NPRM* in the current proceeding that wireline broadband Internet access service fits squarely within the definition of "information service" set forth in the Communications Act. The Act defines "[i]nformation service" as "the offering of a capability for generating, acquiring, storing, transforming, processing, retrieving, utilizing, or making available information via telecommunications."[11] Broadband Internet access service does precisely this. As the Commission put it in the *Cable Modem Declaratory Ruling*:

> [e]-mail, newsgroups, the ability for the user to create a web page that is accessible by other Internet users, and the [domain name system] are applications that are commonly

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[8] *NPRM* ¶ 7.

[9] *See, e.g.*, Report to Congress, *Federal-State Joint Board on Universal Service*, 13 FCC Rcd 11501, 11529-30, ¶¶ 58-59 (1998) ("*Universal Service Report*") (concluding that Internet access is an "information service"); Order on Remand, *Deployment of Wireline Services Offering Advanced Telecommunications Capability*, 15 FCC Rcd 385, 401, ¶ 34 (same); First Report and Order and Further Notice of Proposed Rulemaking, *Implementation of the Non-Accounting Safeguards of Sections 271 and 272 of the Communications Act of 1934, as amended*, 11 FCC Rcd 21905, 21967-68, ¶ 127 (1996) (same).

[10] *See NPRM* ¶ 17.

[11] 47 U.S.C. § 153(20).

> associated with Internet access service. Each of these applications encompasses the capability for 'generating, acquiring, storing, transforming, processing, retrieving, utilizing, or making available information via telecommunications.' Taken together, they constitute an information service, as defined in the Act.[12]

Precisely the same analysis applies to broadband Internet access service provided by local telephone companies.

Classifying broadband Internet access service as an information service forecloses the possibility that it can be regulated under Title II. It is by now well established that a particular service cannot be both an information service and a telecommunications service at once: by adding an information component to a telecommunications service, the entire service becomes an information service.[13] In the *Cable Modem Declaratory Ruling*, the Commission correctly concluded that "[t]he cable operator providing cable modem service over its own facilities . . . is not offering telecommunications service to the end user, but rather is merely using telecommunications to provide end users with cable modem service."[14] Similarly, because wireline broadband Internet access service is an information service, the Commission's "tentative conclusion" that "the transmission component of the end-user wireline Internet access

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[12] *Cable Modem Declaratory Ruling* ¶ 38 (quoting 47 U.S.C. § 153(20)) (internal citations omitted); *see also NPRM* ¶ 21.

[13] *See Cable Modem Declaratory Ruling* ¶ 41 ("In the *Universal Service Report*, the Commission concluded that the Act's 'information service' and 'telecommunications service' definitions establish mutually exclusive categories of service: 'when an entity offers transmission incorporating the 'capability for generating, acquiring, storing, transforming, processing, retrieving, utilizing, or making available information,' . . . it offers an 'information service' even though it uses telecommunications to do so.'") (quoting *Universal Service Report*, 13 FCC Rcd at 11520, ¶ 39); *see also* Order on Remand, *Implementation of the Non-Accounting Safeguards of Section 271 and 272 of the Communications Act of 1934, as amended*, 16 FCC Rcd 9751, 9770, ¶ 36 (2001) ("*Non-Accounting Safeguards Remand*").

[14] *Cable Modem Declaratory Ruling* ¶ 41.

service provided over [a provider's own facilities] is 'telecommunications' and not a 'telecommunications service'" is also entirely correct as a matter of elementary statutory interpretation.[15]

B. Broadband Transmission Sold Alone Is Properly Classified as "Telecommunications," Not as a Common-Carrier "Telecommunications Service"

The provision of stand-alone broadband transmission should likewise be classified as "telecommunications" subject to regulation under Title I, and not a common-carrier "telecommunications service" under Title II. This reclassification should apply not only to the telecommunications component of bundled information services but also to broadband transmission services offered on a stand-alone basis. The Commission has often either mandated that services or facilities be taken outside of Title II completely or allowed telecommunications providers to choose whether to offer service on a common or non-common carrier basis, particularly when those services are innovative or involve emerging technologies, and its legal authority to do so has consistently been upheld.[16]

In the cable modem context, the Commission concluded that broadband transmission should not be regulated as common carriage because it was not, in fact, being offered to the public on a common-carrier basis. The local telephone companies, by contrast, historically have been required to offer their broadband transmission as a common-carrier service under tariff. So

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[15] *NPRM* ¶ 25.

[16] *See, e.g.*, *Computer & Communications Indus. Assoc. v. FCC*, 693 F.2d 198, 208-09 (D.C. Cir. 1982) ("*CCIA*") (affirming the reasonableness of the Commission's determination that enhanced services and CPE were outside the scope of Title II); *see also Philadelphia Television Broad. Co. v. FCC*, 359 F.2d 282 (D.C. Cir. 1966).

[16] *CCIA*, 693 F.2d at 212.

the fact that telephone companies act as common carriers when they provide broadband cannot justify applying common-carrier regulations to their broadband services since they do so only because the Commission has *required* them to offer their broadband transmission under tariff. Unlike the recent *Cable Modem Classification Proceeding*, therefore, the decisive question in these proceedings cannot be whether the transmission is in fact offered indiscriminately to all comers. Instead, it must be whether there is any justification for requiring that the transmission must continue to be so offered.

As Verizon will explain below, the Commission should not impose such a requirement. Telephone companies, like cable companies, should be free to offer broadband transmission on a non-common-carriage basis. There is ample precedent in past Commission practice (including the recent *Cable Modem Declaratory Ruling*) for regulating stand-alone broadband transmission under Title I. Sound policy considerations favor this treatment. And, having chosen to treat cable modem service under Title I, it would be contrary to the Communications Act, the APA, and the Constitution to treat stand-alone broadband transmission differently when provided by local telephone companies.

1. Commission Precedent Confirms that the Commission Has Authority To Treat Stand-Alone Broadband Transmission Under Title I

The Communications Act defines a "telecommunications service" 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."[17] The Commission has found that this definition "is intended to encompass only telecommunications provided on a common carrier basis" – that is, telecommunications offered not simply to the public, but "indifferently

[17] 47 U.S.C. § 153(46).

[to] all potential users."[18] Historically, the Commission has assumed that whenever a traditional local telephone company provides a new service, the service must typically be offered on a common-carrier basis. By contrast, when other entities, particularly non-telephone companies, have introduced new services, the contrary assumption has applied. As a result, even before the Commission's recent *Cable Modem Declaratory Ruling*, cable companies (and satellite and wireless companies) were free to offer broadband transmission on a non-common-carrier basis – or, indeed, not to offer transmission on a stand-alone basis at all – while telephone companies were obliged to operate as common carriers under Title II. Likewise, the long-distance companies that enjoy a giant market-share advantage in the larger business segment are treated as non-dominant in their provision of broadband and thus escape most of Title II's more onerous regulations (although they, too, should be regulated under Title I in their provision of broadband). The traditional local telephone companies, however, are subject not only to the full range of Title II regulations but also to a host of additional requirements under the *Computer Inquiries* rules, including an obligation to provide the underlying transmission component of bundled information services on a stand-alone basis subject to tariff.

This dramatic difference in the regulatory treatment of substantially identical services did not represent a considered judgment on the part of the Commission. Rather, the difference resulted from "regulatory creep." That is, because the telephone companies provided voice services subject to Title II, the Commission reflexively subjected them to Title II regulation in their provision of broadband as well. The result is that functionally equivalent services are

[18] Report and Order, *Federal-State Joint Board on Universal Service*, 12 FCC Rcd 8776, 9177-78, ¶ 785 (1997) ("*Universal Service Order*").

regulated haphazardly based on the parentage or traditional business of the company that provides them.

The Title II regime was designed to constrain perceived market power on the part of local telephone companies in the narrowband voice world of days gone by. There is no sound reason to extend that regime (either directly or indirectly) to the broadband data world of today, in which the so-called incumbent local telephone companies are not incumbents but are in fact new entrants. And there is certainly no legal justification for shackling local telephone companies with Title II regulation while leaving their many competitors substantially free of regulation in their provision of broadband.

The mere fact that local telephone companies are regulated under Title II when they provide narrowband voice transmission provides no impediment to regulating their broadband transmission under Title I. Indeed, it is well established that telephone companies can act as non-common carriers when they offer transmission services or facilities, just as they can when they offer other types of services.[19] As the D.C. Circuit has noted, "[w]hether an entity in a given case is to be considered a common carrier" turns not on its typical status but "on the particular practice under surveillance."[20]

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[19] *See, e.g.*, *Virgin Islands Tel. Corp. v. FCC*, 198 F.3d 921 (D.C. Cir. 1999) (upholding regulation of undersea fiber optic telecommunications cable on non-common carrier basis); *Southwestern Bell Tel. Co. v. FCC*, 19 F.3d 1475 (D.C. Cir. 1994) (recognizing provision of dark fiber on non-common carrier basis); Cable Landing License, *FLAG Pacific Limited*, 15 FCC Rcd 22064 (Int'l Bur. 2000) ("*FLAG Pacific*") (involving undersea telecommunications cable on a non-common carrier basis); Cable Landing License, *FLAG Atlantic Limited*, 15 FCC Rcd 21359 (Int'l Bur. 1999) (same).

[20] *Southwestern Bell Tel. Co.*, 19 F.3d at 1481; *see also NARUC v. FCC*, 533 F.2d 601, 608 (D.C. Cir. 1976) (finding it "logical to conclude that one can be a common carrier with regard to some activities but not others").

The Commission has in the past classified services under Title I in circumstances similar to those prevailing in the broadband market today. Perhaps the best known example is the Commission's decision in *Computer II* to classify information services and customer premises equipment ("CPE") under Title I.[21] The Commission found that it would not serve the public interest to subject enhanced services to traditional common-carriage regulation under Title II because, among other reasons, these markets were "truly competitive."[22] The Commission did, however, invoke its ancillary jurisdiction under Title I of the Act to preempt any inconsistent state or local regulation, thus ensuring that regulation of enhanced services did not materialize at the local level.[23] In affirming the Commission's *Computer II* decision, the D.C. Circuit emphasized that that competition and innovation were occurring in these markets and that new competition would assure the availability of these services at reasonable prices.[24] These same considerations apply to the broadband market: The market is truly competitive and characterized by innovation. This robust, facilities-based competition will assure the availability of broadband at reasonable prices.

Moreover, the Commission unquestionably has authority to classify stand-alone transmission under Title I. In fact, the Commission has already afforded Title I treatment to offerings that either are pure transmission or have a transmission component. For example, the Commission has given providers of satellite services the option of offering service on a private

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[21] Final Decision, *Amendment of Section 64.702 of the Commission's Rules and Regulations (Computer II)*, 7 F.C.C.2d 384 (1980).

[22] *See id.* at 430, ¶ 119, 432, ¶ 124, 433, ¶ 128

[23] *See id.* at 428, ¶¶ 113-114.

carrier basis under Title I.[25] Other examples include submarine cables,[26] for-profit microwave systems,[27] dark fiber,[28] and various mobile services.[29] A fuller list is attached as Exhibit C. The Commission can and should add broadband transmission services to this list.

Under the Commission's precedents, in determining whether to require that a service be offered on a common-carrier basis, the decisive question is whether such a requirement is needed in order to prevent the exercise of market power. The Commission has explained that "public interest requires common carrier operation" of facilities only where the incumbent operator "has

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[24] *Computer and Communications Industry Ass'n v. FCC*, 693 F.2d 198, 209 (D.C. Cir. 1982).

[25] Declaratory Ruling, *Licensing Under Title III of the Communications Act of 1934, as amended*, 8 FCC Rcd 1387 (1993) (allowing certain satellite services on a private carriage basis, including mobile voice, data, facsimile, and position location for both domestic and international subscribers); Order and Authorization, *Application of Loral/Qualcomm Partnership, L.P.*, 10 FCC Rcd 2333 (Int'l Bur. 1995) (allowing use of the Globalstar system for mobile voice, data, facsimile, and other services as a non-common carrier).

[26] Memorandum Opinion and Order, *AT&T Submarine Systems, Inc.*, 13 FCC Rcd 21585 (1998), *aff'd*, *Virgin Islands Tel. Corp. v. FCC*, 198 F.3d 921 (D.C. Cir. 1999); *FLAG Pacific.*

[27] *See, e.g.*, Memorandum Opinion and Order on Reconsideration, *General Tel. Co. of the Southwest*, 3 FCC Rcd 6778 (Priv. Rad. Bur. 1988) (providing that for-profit microwave systems may be offered as private carriage, even if interconnected with the public switched telephone network).

[28] *Southwestern Bell Tel. Co.*, 19 F.3d 1475.

[29] Policy Statement and Order, *Amendment of the Commission's Rules to Establish New Personal Communications Services*, 6 FCC Rcd 6601 (1991); Memorandum Opinion and Order on Reconsideration, *Inquiry Into the Use of the Bands 825-845 MHz and 870-890 MHz for Cellular Communications Systems*, 89 F.C.C.2d 58 (1982) (dispatch services may be offered either on a common or non-common carrier basis); Memorandum Opinion and Order, *Petition for Reconsideration of Amendments of Parts 2 and 73 of the Commission's Rules Concerning Use of Subsidiary Communications Authorization*, 98 F.C.C.2d 792 (1984) (private carrier paging system may be offered either on a common or non-common carrier basis).

sufficient market power to warrant regulatory treatment as a common carrier."[30] As Verizon has recently explained in some detail, and as documented in the attached Broadband Fact Report, local telephone companies lack market power in both the broadband mass market and the larger business market.[31] In the broadband mass market, broadband is offered by providers relying on four competing technologies – wireline, cable, satellite, and wireless. The local telephone companies have a small market share, far lower than that of the incumbent cable modem providers. The presence of competing service offerings means that any price increase by the telephone companies would lead to defections of DSL customers to other modes of accessing the Internet. Moreover, local telephone companies control no bottleneck facilities or other essential inputs: cable modem service, satellite service, and terrestrial wireless all have their own pathways to the customer. Thus, local telephone companies could not, even theoretically, use control over any bottleneck facility to acquire market power.

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[30] *AT&T Submarine Systems, Inc.*, 13 FCC Rcd at 21589, ¶ 9; *see also*, *e.g.*, Memorandum Opinion, Declaratory Ruling, and Order, *Cox Cable Communications, Inc., Commline, Inc. and Cox DTS, Inc.*, 102 F.C.C.2d 110, 121-22, ¶¶ 26-27 (1985) (finding no "compelling reason" to impose common carrier regulation on a carrier that had "little or no market power"); *see generally* Michael Kende, Office of Plans and Policy, FCC, *The Digital Handshake: Connecting Internet Backbones* at 12 (OPP Working Paper No. 32, Sept. 2000) (common carrier regulation "serve[s] to protect against anti-competitive behavior by telecommunications providers with market power. In markets where competition can act in place of regulation as the means to protect consumers from the exercise of market power, the Commission has long chosen to abstain from imposing regulation.").

[31] *See* Comments and Reply Comments of Verizon, *Review of Regulatory Requirements for Incumbent LEC Broadband Telecommunications Services*, CC Docket No. 01-337 (FCC filed Mar. 1, 2002 & Apr. 22, 2002, respectively) ("Verizon Broadband Non-Dominance Comments" and "Verizon Broadband Non-Dominance Reply Comments"). The (Broadband Fact Report) attached hereto as Exhibit A describes in detail the state of broadband network deployment and the trends affecting the market. This Broadband Fact Report was previously filed as Exhibit A to Verizon's Broadband Non-Dominance Comments.

In the larger business market, the incumbent long-distance carriers are the dominant players. Verizon has only about a 4.2 percent share of Frame Relay revenues, and a 5.6 percent share of ATM revenues nationally.[32] Even within its own region, Verizon accounts for only about 12 percent of the Frame Relay revenues, and about 15.2 percent of ATM revenues – far from dominant shares by any standard.[33] And any attempt by local telephone companies to raise the price or reduce their output of ATM, Frame Relay, Gigabit Ethernet or other broadband services would lead customers to defect to other suppliers of the same services, who have ample capacity to spare.

Because in the broadband market competition can act in place of regulation to protect consumers from the exercise of market power, there is simply no good reason to impose the burdens of common-carrier regulation. Indeed, as the Commission has previously recognized, imposing such regulation inappropriately can be counterproductive. For example, in its landmark *Computer II* decision, the Commission determined that it would disserve the public interest to subject enhanced services to traditional common carriage regulation not only because, as discussed above, the enhanced services market was rapidly evolving and sufficiently competitive,[34] but also because "the very presence of Title II requirements [would] inhibit[] a truly competitive, consumer responsive market."[35] Upholding this decision, the D.C. Circuit stated that even if some enhanced services were common carrier communications activities within the reach of Title II, the Commission was not required to identify those services and

[32] Broadband Fact Report at 30.

[33] *Id.* at 29.

[34] *See Computer II*, 77 F.C.C.2d at, 428, ¶ 113, 433, ¶ 128.

subject them to Title II regulation.[36] The court decided that "the latitude accorded the Commission by Congress in dealing with new communications technology includes the discretion to forbear from Title II regulation."[37]

The Commission should use this discretion to take broadband out of Title II altogether. Just because the Commission has always thought of telephone company broadband in Title II terms does not mean that Title II is the appropriate regulatory pigeonhole for broadband. Indeed, D.C. Circuit affirmed the Commission's early decision not to regulate cable television ("CATV") systems as common carriers under Title II even though, as the court stated, "we assumed that CATV systems were common carriers."[38] Whatever assumptions the Commission may have about telephone companies, it must consider the state of development and the state of competition in the broadband market and then make a deliberate regulatory classification based on the facts rather than on its assumptions or regulatory reflexes.

When EarthLink proposed applying the *Computer Inquiries* unbundling rules to cable modem service, the Commission dismissed the idea out of hand, saying: "EarthLink invites us, in essence, to find a telecommunications service inside every information service, extract it, and make it a stand-alone offering to be regulated under Title II of the Act. Such radical surgery is not required."[39] This radical surgery is already being performed, reflexively and without proper

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[35] *Id.* at 426, ¶ 109.

[36] *CCIA*, 693 F.2d at 209.

[37] *Id.* at 212.

[38] *Id.* (citing *Philadelphia Television Broad. Co.*, 359 F.2d 282).

[39] *Cable Modem Declaratory Ruling* ¶ 43.

forethought, on local telephone companies. It is time to stop the cutting and allow the patients to heal.

2. Strong Policy Considerations Counsel in Favor of Regulating Broadband Transmission Under Title I

Strong policy considerations counsel in favor of regulating broadband transmission under Title I. The market is in a nascent state and deserves to develop through competition and customer choices without being subject to Title II regulations that interfere with the operation of market forces. Classifying broadband under Title I will allow the Commission to write on a clean regulatory slate, imposing only those regulations that are truly necessary in the public interest without the regulatory overhang of a common-carrier regime designed for voice services in days gone by. Furthermore, regulating bundled information services under Title I, while placing some pure transmission services under Title II, would discourage carriers from offering transmission on a stand-alone basis. Put to a choice of using their broadband facilities to offer either unregulated bundles of services or heavily regulated pure transmission, companies likely will choose the former.

In addition, as explained in the accompanying declaration of economists Alfred Kahn and Timothy Tardiff, regulatory parity is an important goal in itself.[40] In the presence of competition between technologies, applying Title II regulation to local telephone companies in their provision of broadband penalizes otherwise efficient technologies and firms and can result in less efficient firms supplanting more efficient ones. Applying Title II regulation to local telephone companies under competitive conditions can thus result in a *reduction* in competition – not an

[40] Declaration of Alfred E. Kahn & Timothy J. Tardiff ¶¶ 18-24 ("Kahn/Tardiff Decl.") (attached hereto as Exhibit B). This declaration was previously submitted to the Commission as Exhibit C to Verizon's Broadband Non-Dominance Comments.

enhancement – and contribute to the creation of inefficient dominant technologies. Now that the Commission has placed cable companies firmly in Title I in their provision of broadband, it should do the same for all broadband providers. Under the current fractured regulatory scheme, the cable incumbents who dominate mass-market broadband are not common carriers in any respect, and the long-distance incumbents who dominate service to larger business customers are classified as "non-dominant" common carriers, while the local telephone companies are weighed down with the full burden of Title II regulation even though they are new entrants in both of these broadband market segments. This arbitrary, lopsided regulatory regime distorts the market, deters investment, and dampens competition.

On the wholesale side, unbundling and other Title II wholesale obligations raise telephone company costs and magnify the already substantial risk of investing in broadband technologies and services. Title II wholesale regulations allow competitive local exchange carriers to free-ride on telephone company investment at artificially low rates, while forcing telephone company shareholders to bear the full costs of any investment that fails. If new offerings lose out to the competition, the telephone companies can recover none of the costs. Furthermore, regardless of whether new offerings are successful, the telephone companies have to make the underlying facilities available to competitive local carriers at rock-bottom prices. This disparate treatment of investment successes and failures undermines the incentive to undertake costly and risky investments in innovation.[41] (Furthermore, as Verizon explained in

[41] Kahn/Tardiff Decl. ¶¶ 18-19; Verizon Broadband Non-Dominance Reply Comments Exh. A ¶¶ 9-10 ("Carlton/Sider/Bamberger Reply Decl.").

the recent *UNE Triennial Review Proceeding*, even under Title II's existing standards, there should be no mandatory unbundling of broadband facilities and services.[42])

Other potential Title II wholesale regulations would be similarly counterproductive. A requirement that local telephone companies facilitate collocation at remote terminals for broadband, for example, would inhibit deployment by telephone companies of their own broadband facilities and services. To begin with, the very existence of facilities-based competition in the broadband marketplace demonstrates that competing broadband providers can succeed without collocating at remote terminals. Cable modem, satellite and wireless providers obviously reach their end-user customers by securing their own space and deploying their own facilities.

Providing DSL service through remote terminals already costs significantly more than providing DSL service through a central office. This cost difference would be even greater if telephone companies were required to provide unbundled access for line cards at remote terminals, or to try to find some way to allow line cards of other carriers to be collocated there, which the equipment manufacturers have said is not feasible.[43] Line card collocation would

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[42] Comments and Contingent Petition for Forbearance of the Verizon Telephone Cos. at 47-48, *Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*, CC Docket Nos. 01-338, 96-98, 98-147 (FCC filed Apr. 5, 2002); *see also supra* note 29.

[43] At a public forum on remote terminal collocation held by the Commission, Alcatel referred to the concept of a "universal back plane" that would accommodate multiple types of line cards as "laughable." Public Forum: Competitive Access to Next-Generation Remote Terminals, Transcript at 108 (May 10, 2000). Likewise, Lucent commented that development of a universal back plane would not only be extremely time-consuming, it would also require a redesign of "the whole system management and integration." *Id.* at 110. Copper Mountain concurred, calling the required modifications "ludicrous." *Id.* at 111. In short, all of the manufacturers who appeared before the Commission stated that the concept of attaching disparate line cards to incumbents' equipment is not a viable concept.

increase inventory management costs and other operational costs and complexities, and would require development of costly new operations support system capabilities. Furthermore, there would be added costs and security concerns related to the potential requirement that other providers would be entitled to access these remote locations. And a collocation requirement for remote terminals makes particularly little sense to the extent that it would require carriers to prepare, power, and condition larger remote terminals with space for potential collocation that may never be used. Indeed, all of these costs would be incurred before any competitor might use these "services" – which is unlikely at best.

On the retail side of the business, Title II tariffing and rate regulation obligations are equally pernicious. Where, as here, there is no potential for monopoly-type abuses, competitors should be free to charge market rates without filing tariffs. And in charging market rates, telephone companies should be free to experiment with innovative pricing schemes of the type that cable modem companies and Internet companies are already using – for example, rates based on a percentage of the customer's revenue generated using the service.

The sheer newness of the broadband market means that there is no guarantee that telephone companies will succeed in the broadband marketplace. But where they do succeed, they deserve to be rewarded for making the massive investments necessary to bring success.[44] Although it is too soon to know what pricing formulas will be successful as the market develops, telephone companies should be free to experiment with different revenue models, just as their competitors are doing. Regulating the telephone companies' retail rates distorts their investment decisions, handicaps them in the marketplace, and ultimately retards the growth and development

[44] Kahn & Tardiff Decl. ¶ 13.

of the market as a whole. Any regulation-induced delay in broadband deployment comes at enormous social cost. One recent study estimated the economic and consumer benefits of widespread broadband deployment at up to $500 billion *each year*.[45]

Experience teaches that once the Commission has identified a market as competitive, freeing non-dominant carriers from unnecessary regulation successfully stimulates both competition and investment. Wireless services, for instance, have flourished in the wake of detariffing and a leveling of the regulatory playing field. Investment in wireless services took off in earnest after Congress required the Commission to regulate all commercial wireless services in a similar manner in 1993, and the Commission shortly thereafter determined that it would subject wireless operators to minimal regulation. Notwithstanding the fact that, at the time the Commission made its decision to deregulate wireless services, "the cellular service marketplace" was not "fully competitive," the Commission found that "[c]ompetition, along with the impending advent of additional competitors, leads to reasonable rates."[46] As a result of the

[45] Robert W. Crandall & Charles L. Jackson, Criterion Economics, L.L.C., *The $500 Billion Opportunity: The Potential Economic Benefit of Widespread Diffusion of Broadband Internet Access* at 64-65 (July 2001) ("*The $500 Billion Opportunity*"). This study was placed in the public record as Exhibit A to comments that Verizon recently filed with the National Telecommunications and Information Administration. *See* Comments of Verizon Communications Inc., *Request for Comments on Deployment of Broadband Networks and Advanced Telecommunications*, Docket No. 011109273-1273-01 (NTIA filed Dec. 19, 2001). ("Verizon NTIA Comments").

[46] Second Report and Order, *Implementation of Sections 3(n) and 332 of the Communications Act*, 9 FCC Rcd 1411, 1478, ¶ 174 (1994) ("*Wireless Deregulation Order*").

Commission's deregulatory course, the number of wireless customers increased ninefold, and prices have fallen by nearly a third between June 1993 and June 2001.[47]

In addition, the spectacular growth and success of the Internet itself provides perhaps the greatest testament to the pro-competitive benefits of a minimally regulatory environment under Title I. Even in purely economic terms, without attempting to quantify the tremendous social and quality-of-life benefits the Internet has wrought, the Internet's impact has been astonishing. A recent study led by economist Hal Varian estimates that the adoption of Internet business solutions has already yielded a current, cumulative cost savings of $155.2 billion to U.S. organizations.[48] In addition, these organizations indicate that their Internet business solutions have also helped to increase revenues cumulatively to approximately $444 billion.[49]

3. The Commission Must Treat Local Telephone Company Broadband As It Treated Cable Modem Service in the *Cable Modem Declaratory Ruling*

Finally, having decided in the *Cable Modem Declaratory Ruling* that the transmission component of cable modem service is not a telecommunications service, the Commission cannot regulate wireline broadband transmission as a telecommunications service.[50] This is not simply because, as indicated above, the same legal reasoning and policy considerations apply to local telephone companies as to cable companies in their provision of broadband. Rather, it is because the law requires the Commission to treat these functionally identical services the same.

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[47] *See* CTIA, *Background on CTIA's Semi-Annual Wireless Industry Survey*, Charts on Wireless Subscribership & Average Local Monthly Bill (June 30, 2001) (measuring time-period between 1993 and 2001), *available at* http://www.wow-com.com/industry/stats/surveys.

[48] *Net Impact Study: Key Findings*, at http://www.netimpactstudy.com/key.html.

[49] *Id.*

[50] *See Cable Modem Declaratory Ruling* ¶¶ 40-41.

To begin with, Section 706 of the 1996 Act makes it clear that advanced telecommunications capability is to be defined and regulated "without regard to any transmission media or technology."[51] The Commission's mandate under Section 706 is to "remov[e] barriers to infrastructure investment and promot[e] competition."[52] The broadband Internet access and transmission provided by local telephone companies are functionally identical to the broadband Internet access services and transmission provided over cable modem, wireless, or satellite. It would thus flatly contradict the 1996 Act to regulate broadband transmission differently depending on the facilities or medium of transmission used, or to remove barriers to investment for some technologies but not for others.

Furthermore, the APA and the equal protection component of the Fifth Amendment's Due Process Clause require that the Commission "not treat like cases differently,"[53] and prohibit the Commission from "improperly discriminat[ing] between similarly situated . . . services without a rational basis."[54] There is no question that cable modem broadband and DSL broadband compete head-to-head in the mass-market segment, and that "consumers view" the services "as performing the same functions."[55] Cable operators control the largest share of the

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[51] 47 U.S.C. §§ 153(46), 157 note.

[52] *Id.* § 157 note.

[53] *Freeman Engineering Assoc., Inc. v. FCC*, 103 F.3d 169, 178 (D.C. Cir. 1997) (citation and internal quotation marks omitted); *see also, e.g.*, *Hing v. Crowley*, 113 U.S. 703, 708 (1885) (regulators are forbidden from subjecting "persons engaged in the same business . . . to different restrictions" or granting "different privileges" to firms offering a service "under the same conditions").

[54] *C.F. Communications Corp. v. FCC*, 128 F.3d 735, 740 (D.C. Cir. 1997).

[55] *Id.* at 742 (citation and internal quotation marks omitted).

mass market by far and have more of their networks upgraded to provide broadband access.[56] Local telephone companies therefore have no *ability* greater than that of cable operators to exercise monopoly power in the broadband access market.

Nor do local telephone companies, as compared to cable operators, have any *incentive* to undermine competition or diversity among broadband ISPs or content providers. The most innovative broadband applications – streaming video programming and movies on demand – all compete with the core monopoly product offered by cable operators. Far from seeking to limit competition in this key content market, local telephone companies have an incentive to see it flourish, because broadband services afford local telephone companies an opportunity to compete, at least to a limited extent, in a market that cable operators presently dominate.[57] Cable operators, on the other hand, have a significant incentive to limit customers' access to outside broadband content, because consumers' use of that content siphons away revenues from their core business.[58] The Commission therefore cannot rationally conclude that local telephone

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[56] Moreover, once upgraded, their networks do not suffer from "legacy . . . conditions" that limit their "access to certain end-users even in upgraded areas." *Second Advanced Services Report*, 15 FCC Rcd at 20929, ¶ 31; *see also id.* at 20985-86, ¶ 190, 20987-88, ¶ 196.

[57] *See* Report on Cable Industry Prices, *Implementation of Section 3 of the Cable Television Consumer Protection and Competition Act of 1992*, 15 FCC Rcd 10927, 10930, ¶ 12 (2000) ("relatively few cable operators face effective competition"); *id*. at 10946, ¶ 49 ("DBS exerts only a modest influence on the demand for cable service"); Sixth Annual Report, *Annual Assessment of the Status of Competition in Markets for the Delivery of Video Programming*, 15 FCC Rcd 978, 981, ¶ 5 (2000) ("Cable television is still the dominant technology for delivery of video programming to consumers."); *id.* at 1044, ¶ 140 ("The market for the delivery of video programming to households continues to be highly concentrated and characterized by substantial barriers to entry.").

[58] Petition To Deny of Verizon Telephone Cos. and Verizon Internet Solutions d/b/a Verizon.net App. B (Declaration of Robert W. Crandall) ¶¶ 20-21, *Applications for Consent to the Transfer of Control of Licenses From Comcast Corp. and AT&T Corp.*, Transferors, To AT&T Comcast Corp., Transferee, MB Docket No. 02-70 (FCC filed Apr. 29, 2002).

companies pose a greater risk to competition in broadband than cable operators. Since the Commission has elected to regulate cable operators under Title I, the APA and the Due Process Clause require that it treat local telephone companies' broadband transmission and facilities under Title I as well.[59]

A key feature of the *Cable Modem Declaratory Ruling* is the Commission's decision to allow cable modem operators to provide broadband transmission to unaffiliated ISPs on a non-common-carrier basis.[60] This establishes the critical principle that broadband transmission, which is undeniably a form of "telecommunications," can be offered as something other than a common-carrier "telecommunications service," even by the dominant players in a market segment. Once that principle is established, there is no sound basis, given the nascent and competitive state of the broadband marketplace, to force secondary players in the market to offer broadband transmission on a common-carriage basis. This is just as true for the larger business market segment as for the mass-market segment. There is no reason why satellite and terrestrial wireless operators should be allowed to offer high-speed data services to larger business customers on a private carriage basis while telephone companies that lack market power must offer exactly the same services as common carriers.[61] The formal ratification of Title I treatment

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[59] The Commission has sought comment on whether imposing a requirement of multiple ISP access to cable networks might "constitute a 'per se' or 'regulatory' taking of the cable operator's property without just compensation under the Takings Clause of the Fifth Amendment to the U.S. Constitution." *Cable Modem Declaratory Ruling* ¶ 81. To the extent that the Commission concludes that the Takings Clause is an impediment to the imposition of an open access requirement for multiple ISPs on cable networks, it would likewise be an impediment to the imposition of such a requirement on local telephone company networks.

[60] *Cable Modem Declaratory Ruling* ¶¶ 60-68.

[61] Nor does it improve matters that the biggest players in the larger business segment – the large long-distance companies – are also formally Title II common carriers. First, these

for broadband transmission may have begun with cable modem service, but it must not stop there.

In *Fox TV Stations, Inc. v. FCC*, the D.C. Circuit recently found that the Commission had no rational basis for retaining certain ownership regulations based on an expressed interest in curbing the undue market power of broadcasters when the record contained insufficient evidence of such undue market power.[62] For the Commission to retain common-carrier regulations for local telephone companies in their provision of broadband would, given their lack of market power, likewise lack any rational basis, especially in view of the Commission's decision *not* to regulate the dominant cable companies as common carriers.

In addition, serious First Amendment concerns are raised by the one-sided burdens and restrictions that the present regulatory regime places on the deployment and use of local telephone companies' broadband services and facilities. Broadband transmission (together with the facilities used to provide it) constitutes a medium through which telephone companies are able to deliver a form of speech – the companies' own Internet and other content and services, possibly packaged with content from other sources or with commercial advertising and solicitations – to their customers.[63] It is no different in that regard from the pages of a

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leading players are considered "non-dominant" in their provision of broadband. Therefore, unlike traditional local telephone companies, they are free from many of Title II's more onerous requirements. But even these big hitters should not be subjected to regulation as common carriers when their competitors are not.

[62] *Fox TV Stations v. FCC*, 280 F.3d 1027 (D.C. Cir. 2002).

[63] *Cf., e.g., Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622, 636 (1994); *see also Denver Area Educational Telecomms. Consortium, Inc. v. FCC*, 518 U.S. 727, 737 (1996) ("the editorial function itself is an aspect of 'speech'"); *Hurley v. Irish-American Group*, 515 U.S. 557, 570 (1995) ("Nor, under our precedent, does First Amendment protection require a speaker to generate, as an original matter, each item featured in the communication."); *Miami Herald*

newspaper, the screen at a movie theater, or the bandwidth used by a cable operator to deliver its program guide and video programming. Case precedent makes abundantly clear that the First Amendment protects not merely the content of speech, but also the physical and commercial means by which it is delivered to the public. The Supreme Court has extended First Amendment protection not only to the selection and formation of content, but to the means of its dissemination.[64] The Supreme Court has also recognized that burdensome economic regulation can silence free expression as effectively as outright prohibitions on speech.[65]

Accordingly, if the Commission were to regulate cable operators under Title I while maintaining common carrier and line sharing obligations on local telephone companies, both the Commission's reason for continued regulation *and* its reason for distinguishing between cable operators and local telephone companies would be subject to "intermediate scrutiny."[66] A

Publ'g Co. v. Tornillo, 418 U.S. 241, 258 (1974) (the "choice of material" that goes into a publication "constitute[s] the exercise of editorial control and judgment" protected by the First Amendment).

[64] *See City of Lakewood v. Plain Dealer Publ'g Co.*, 486 U.S. 750, 768 (1988) ("The actual 'activity' at issue here [placement of newsracks] is the circulation of newspapers, which is constitutionally protected."); *Lovell v. City of Griffin*, 303 U.S. 444, 452 (1938) ("The ordinance [prohibiting the distribution of circulars] cannot be saved because it relates to distribution and not to publication."). *See also Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622, 629 (1994) ("*Turner I*") ("Cable programmers and cable operators engage in and *transmit speech*, and they are entitled to the protection of the speech and press provisions of the First Amendment.") (emphasis added).

[65] *See Minneapolis Star & Tribune Co. v. Minnesota Comm'r of Revenue*, 460 U.S. 575, 585 (1983) ("Differential taxation of the press . . . places such a burden on the interests protected by the First Amendment that we cannot countenance such treatment unless the State asserts a counterbalancing interest of compelling importance that it cannot achieve without differential taxation.").

[66] *BellSouth Corp. v. FCC*, 144 F.3d 58, 69 (D.C. Cir. 1998) ("intermediate scrutiny" applies to restrictions on speech that apply exclusively to RBOCs). Under intermediate scrutiny, a regulation will withstand judicial review only "if it advances important governmental interests

decision by the Commission maintaining Title II obligations on local telephone companies could not pass this exacting standard. According to the Commission's own factual findings, local telephone companies serve a small percentage of the broadband market.[67] Moreover, because the Commission has repeatedly concluded that the broadband access market is open and competitive, continued regulation of local telephone companies under a theory that they control a bottleneck broadband facility would address a harm that, by the Commission's own admission, is "merely conjectural."[68]

Nor could the Commission's decision to treat telephone companies differently from cable companies pass muster under the First Amendment. It is well settled that if a regulation "affecting speech appears underinclusive, *i.e.*, where it singles out some conduct for adverse treatment, and leaves untouched conduct that seems indistinguishable in terms" of the regulation's "ostensible purpose, the omission" itself is subject to heightened judicial scrutiny.[69] In the present case it would be impossible for the Commission to justify a distinction between broadband services provided over the cable system platform and those using the telephone

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unrelated to the suppression of free speech and does not burden substantially more speech necessary to further those interests." *Id.* at 69-70 (citation and internal quotation marks omitted).

[67] Second Report, *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*, 15 FCC Rcd 20913, 20929, ¶ 31, 20931-32, ¶¶ 38-40, 20985-86, ¶ 190, 20987-88, ¶¶ 195-196 (2000) ("*Second Advanced Services Report*").

[68] *Turner Broad.*, 512 U.S. at 664.

[69] *News Am. Publ'g, Inc. v. FCC*, 844 F.2d 800, 804-05 (D.C. Cir. 1988); *see also City of Ladue v. Gilleo*, 512 U.S. 43 (1994); *Turner Broad.*, 512 U.S. at 676 (O'Connor, J., concurring) (regulations "that single out particular speakers are substantially more dangerous" to First Amendment values, "even when they do not draw explicit content distinctions").

company wireline platform, particularly given their relative market positions.[70] The regulatory burdens imposed on local telephone companies here are like a tax imposed only on expressive activity undertaken by them using their own networks. "A tax that singles out the press, *or that targets individual publications within the press,* places a heavy burden on the state to justify its action."[71]

For all these reasons, because the Commission has chosen to regulate cable companies under Title I in their provision of broadband, the Commission must likewise regulate local telephone companies under Title I in their provision of broadband.

II. Effect of Title I Classification on Local Telephone Company Obligations

Regulating wireline broadband under Title I gives the Commission a regulatory clean slate: it allows the Commission to keep broadband essentially unregulated, imposing only those discrete regulatory obligations (on telephone companies, cable companies, and other providers alike) that the Commission may deem necessary in the public interest. The principal restriction on the Commission's regulatory authority under Title I is that, for the reasons set forth above, it must treat all broadband providers equally, no matter what platform or technology they use to deliver broadband services.

As discussed below, under this Title I regime, most Title II regulations – including tariffing and Section 251(c) facilities unbundling rules – would, by their terms, cease to apply.

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[70] Although the Commission does not have authority to pass on the constitutionality of the statutes it is charged with administering, *see Johnson v. Robison*, 415 U.S. 361, 368 (1974), the Commission is nevertheless obligated to adopt regulations that comport with the Constitution. Verizon reserves all its rights to seek appropriate judicial relief in any available forum for violation of its First Amendment rights.

[71] *Minneapolis Star*, 460 U.S. at 592-93.

The Commission should decline to impose similar service unbundling, tariffing, and other obligations under the *Computer Inquiries* regime. In order to create a truly national broadband policy, the Commission should pre-empt attempts by state or local governments to impose inconsistent regulations on broadband facilities or services. Finally, the regulation of broadband under Title I will have little or no impact on the obligations of telephone companies regarding law enforcement or consumer protection.

Verizon's support for classifying broadband under Title I does not mean that Verizon wants to adopt a closed network like some of its cable competitors. On the contrary, Verizon believes there can be significant value in maintaining a wholesale business that allows other broadband service providers to reach their customers over Verizon's network. Verizon will incur huge fixed costs updating its network. The more traffic there is on the network, the easier it is to recover those costs – provided that Verizon is permitted to negotiate commercially reasonable, market-based rates with others who use the network. Accordingly, Verizon has suggested it would be willing, on commercially reasonable, market-based terms, not only to offer its broadband transmission services to Internet service providers not affiliated with Verizon but also to offer service at its central offices to other carriers so that they could reach their customers over Verizon's network. Indeed, Cable Companies evidently are beginning to recognize the soundness of this business logic. AOL/Time Warner, AT&T and Comcast have all recently opened their networks to unaffiliated ISPs on a private carriage basis.[72] In its *Cable Modem Declaratory Ruling*, the Commission declined to impose a requirement that the Commission

[72] *See Cable Modem Declaratory Ruling* ¶ 26.

offer broadband transmission to ISPs on a common-carrier basis.[73] Having concluded that market forces, rather than a requirement to offer transmission on a common-carrier basis, could be relied upon to ensure adequate negotiated ISP access to the approximately 70% of mass-market broadband connections controlled by cable companies, the Commission has no basis to doubt that those same forces will operate to ensure adequate ISP access to the much smaller number of customers served by telephone companies.

A. Obligations Under Title II

As noted above, local telephone companies are currently subject to a variety of onerous, unnecessary, and counterproductive regulations under Title II. If the Commission were to classify wireline broadband facilities and services under Title I, most of these regulations would, on their face, no longer apply. Title II generally applies only to the extent telephone companies are engaged in common carriage. For example, on the retail side, the obligation to offer stand-alone broadband transmission at cost-justified, tariffed rates applies only to "common carrier[s]."[74] Hence, if the Commission classifies telephone company broadband as "telecommunications" that can be offered on a non-common carrier basis (instead of as a "telecommunications service" that cannot), these obligations will cease to apply.

On the wholesale side, the unbundling, collocation, and other obligations of section 251 would also cease to apply to facilities used for broadband offered in a non-common-carrier manner. This is not only because, as noted above, Title II as a whole applies only to common-carrier services, but also because the express terms of section 251 make it clear that its mandate

[73] *Id.* ¶¶ 60-68.

[74] 47 U.S.C. §§ 201, 203.

applies only to common-carrier offerings. For example, the requirement to make services available for resale at a wholesale discount applies only to "telecommunications services."[75] Furthermore, for purposes of the unbundling requirement of section 251(c)(3), the Act defines "network element" as "a facility or equipment *used in the provision of a telecommunications service*" and the "features, functions, and capabilities that are provided by means of *such* facility or equipment."[76] From this it follows that unless an incumbent local telephone company uses a given facility or feature to provide a telecommunications service, the company has no obligation to offer that facility or feature on an unbundled basis (even assuming that the other unbundling criteria apply).[77] Since broadband services, if they were classified under Title I, would not be "telecommunications services," the facilities used to provide them would not be "network elements." As a result, such facilities – including fiber in the loop, packet switches, and the

[75] 47 U.S.C. § 251(c)(4).

[76] 47 U.S.C. § 153(29) (emphases added).

[77] *Cf.* First Report and Order, *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, 11 FCC Rcd 15499 ("*Local Competition Order*"), *modified on recon.*, 11 FCC Rcd 13042 (1996): 15632-33, ¶¶ 260-262, *vacated in part, Iowa Utils. Bd. v. FCC*, 120 F.3d 753 (8th Cir. 1997), *aff'd in part, rev'd in part sub nom. AT&T Corp. v. Iowa Utils. Bd.*, 525 U.S. 366 (1999), *decision on remand, Iowa Utils. Bd. v. FCC*, 219 F.3d 744 (8th Cir. 2000), *petitions for cert. granted sub nom. Verizon Communications Inc. v. FCC*, 531 U.S. 1124 (2001). ¶¶ 260-262 (explaining that, in addition to physical facilities, "logical features, functions, and capabilities" fall within the definition of "network element" because "[i]ncumbent LECs provide telecommunications services not only through network facilities . . . but also through information," thereby confirming that the relevant inquiry for determining what falls within the scope of the term "network element" is the use that the *incumbent* telephone company makes of the facility or feature.)

high-frequency portion of the copper loop – would not be subject to unbundling or collocation requirements.[78]

B. Obligations Under the *Computer Inquiries* Orders

The Commission should refrain from imposing any of the *Computer Inquiries* ONA and CEI requirements on broadband – including any obligation to unbundle and offer under tariff the telecommunications component of information services.[79] The existing *Computer Inquiry* rules were designed for the narrowband world and were premised on the notion that the Bell companies retained some measure of bottleneck control over narrowband telecommunications services. Indeed, the Commission has expressly stated that it adopted these rules to prevent the former Bell companies from using their control over "the *local exchange network* and the provision of basic services . . . to engage in anticompetitive behavior against ISPs that must obtain basic network services from the BOCs in order to provide their information service offerings."[80] But as has been noted, the Bell companies have no bottleneck control over the

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[78] In addition, the Act permits a requesting carrier to use a UNE only to provide a "telecommunications service." 47 U.S.C. § 251(c)(3). This feature of the statute is a separate and independent reason why any competitive provider offering a non-common-carrier service would not be able to access UNEs.

[79] Other ONA/CEI requirements include the obligation to track and report on installation, maintenance, and repair intervals; to provide comparable end-user access to signaling and derived channels; to impute tariffed rates for short cross-connections; and to comply with various unnecessary accounting requirements. The Commission has previously recognized that unnecessary "filing and reporting requirements … impose[] administrative costs upon carriers" that can "lead to increased rates for consumers" and have "adverse effects on competition." *Wireless Deregulation Order*, 9 FCC Rcd at 1479, ¶ 177.

[80] Further Notice of Proposed Rulemaking, *Computer III Further Remand Proceedings*, 13 FCC Rcd 6040, 6067-68, ¶ 43 (1998) (emphasis added); *see also id.* at 6048, ¶ 9 ("one of the Commission's main objectives in the *Computer III* and ONA proceedings has been to . . . prevent[] the BOCs from using their local exchange market power to engage in improper cost allocation and unlawful discrimination against" providers of information services).

networks used to deliver broadband access, and ISPs need not "obtain basic services from BOCs" to reach their customers. Rather, the nascent broadband market includes many different facilities-based providers using different technologies to deliver broadband transmission service.[81] Because information service providers have a wide range of competitive options when purchasing basic services, the unbundling and ONA/CEI requirements – which were predicated on the notion that a single firm controls access to basic services – are wholly inapposite to broadband. Extending these burdensome and costly regulations to broadband would stifle innovation and investment, and would harm consumers by slowing the development of new broadband services, for the same reasons described above in relation to existing Title II regulations.

Moreover, it would make no sense to classify broadband services (including broadband transmission) under Title I, thus giving the Commission a fresh, technologically neutral environment in which to craft a uniform regulatory scheme for broadband, and then to impose *Computer Inquiries* regulations on broadband that require, in effect, the creation of new, tariffed Title II services. The *Computer Inquiries* rules are essentially a roundabout way of imposing the

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[81] *See, e.g.*, Third Report and Order and Memorandum Opinion and Order, *Rulemaking to Amend Parts 1, 2, 21, and 25 of the Commission's Rules to Establish Rules and Policies for Local Multipoint Distribution Service and for Fixed Satellite Services*, 15 FCC Rcd 11857, 11865, ¶ 19 (2000) ("The record before us, which shows a continuing increase in consumer broadband choices within and among the various delivery technologies – xDSL, cable modems, satellite, fixed wireless, and mobile wireless, suggests that no group of firms or technology will likely be able to dominate the provision of broadband services."); *AT&T/MediaOne Order*, 15 FCC Rcd at 9866, ¶ 116 (finding that cable operators, despite having a commanding share of the residential broadband market, face "significant actual and potential competition from . . . alternative broadband providers"); Report *Inquiry Concerning the Deployment of Advanced Telecommunications Capability to All Americans*, 14 FCC Rcd 2398, 2423-24, ¶ 48 (1999) ("preconditions for monopoly appear absent" in the broadband access market, and "there are, or likely will soon be, a large number of actual participants and potential entrants").

very inappropriate common-carrier regime on broadband that the Commission ought to be eliminating. Certainly, it would be neither logical nor permissible for the Commission to impose *Computer Inquiries* regulations solely on local telephone companies in their provision of broadband. Having decided to forbear from extending the *Computer Inquiries* rules to cable broadband service,[82] the Commission must be consistent and do likewise for local telephone companies.

C. Preemption of State and Local Obligations

Having created a minimally regulated environment for broadband, the Commission should preempt state and local attempts to regulate mass-market Internet access and packet-switched networks for larger businesses. Permitting states to regulate these broadband services would be at cross purposes with creating a uniform national broadband policy. This is not merely a hypothetical concern, for the states are already starting to creep into this area.[83]

Allowing states to regulate broadband in this way would subject broadband providers to a patchwork of regulation that would make expanding services more difficult and thereby impede the development of broadband services. And just as the Commission should preempt states from

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[82] *Cable Modem Declaratory Ruling* ¶¶ 44-47.

[83] *See, e.g.*, Assigned Commissioner's and ALJ's Ruling Denying Defendant's Motion to Dismiss, *Cal. ISP Ass'n v. Pacific Bell*, Case 01-07-027 (Cal. Pub. Utils. Comm'n rel. Mar. 28, 2002) (asserting jurisdiction over complaints about DSL service). California is not alone in regulating broadband services. *See* Final Decision 116-17, *Investigation into Ameritech Wisconsin's Unbundled Network Elements*, Docket No. 6720-T1-161 at (Wis. Pub. Serv. Comm'n rel. Mar. 22, 2002) (Wisconsin Public Service Commission order requiring Ameritech to provide unbundled packet switched broadband service); Revised Arbitration Award, *Petition of Rhythms Links, Inc. Against Southwestern Bell Tel. Co. for Post-Interconnection Dispute Resolution under the Telecommunications Act of 1996 Regarding Rates, Terms, and Related Arrangements for Line Sharing*, Docket No. 22469 (Tex. Pub. Util. Comm'n rel. Sept. 21, 2001) (Texas Public Service Commission Arbitration order requiring SBC to offer unbundled packet switching).

regulating broadband services directly, it should also make clear that they cannot do so indirectly. In particular, the Commission should preempt any state efforts to regulate broadband by imputing revenues from broadband to other regulated services (effectively denying or severely limiting broadband providers from profiting from their risky investments in new broadband services or facilities), or allocating costs from regulated services to broadband services (effectively driving up the price of broadband to the detriment of consumers and of competition). Indirect regulation through artificially imputing revenues and allocating costs would impede the proliferation of broadband, and the Commission should not permit states to impose this sort of indirect regulation (nor should it indulge in this sort of indirect regulation itself).

The Commission has ample authority to preempt any state and local attempts at regulating broadband, just as it has preempted state regulation in other areas such as information services, CPE, and special access. As a general matter, preemption of state regulation is permissible when a matter is entirely interstate or: "(1) the matter to be regulated has both interstate and intrastate aspects; (2) FCC preemption is necessary to protect a valid federal regulatory objective; and (3) state regulation 'would negate[] the exercise by the FCC of its own lawful authority' because regulation of the interstate aspects of the matter cannot be 'unbundled' from regulation of the intrastate aspects."[84] Moreover, under *California v. FCC*, 39 F.3d 919

[84] *See Public Serv. Comm'n v. FCC*, 909 F.2d 1510, 1515 (D.C. Cir. 1990) (citations omitted).

(9th Cir. 1994), the Commission has authority to preempt even purely intrastate state regulation when the state regulation cannot feasibly coexist with the federal regulation.[85]

The Commission has authority to pre-empt state and local regulation of Internet access services because Internet access is predominantly interstate in nature.[86] The Commission has repeatedly affirmed the view that ISP-bound traffic carried over local telephone facilities is interstate.[87] The *Cable Modem Declaratory Ruling* classified cable modem service as interstate, recognizing that "an examination of the location of the points among which cable modem service communications travel" reveals that the points "are often in different states and countries."[88] This is also true of mass-market broadband provided by telephone companies. Furthermore, broadband services demanded by larger businesses, like ATM and Frame Relay, are typically predominately interstate (*e.g.*, hooking up Local Area Networks ("LANs") in different states and with the Internet). The Commission's treatment of special access services provides further

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[85] *See also Louisiana Pub. Serv. Comm'n v. FCC*, 476 U.S. 355, 375-76 n.4 (1986) (FCC may preempt state regulation of intrastate telecommunications matters when (1) it is impossible to separate the interstate and intrastate components of the Commission's regulation, and (2) the state regulation would negate the Commission's lawful authority over interstate communication).

[86] *See* Order on Remand and Report and Order, *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996: Intercarrier Compensation for ISP-Bound Traffic*, 16 FCC Rcd 9151, 9175, ¶52 (2001) ("[A]lthough some traffic destined for information service providers (including ISPs) may be intrastate, the interstate and intrastate components cannot be reliably separated. Thus, ISP traffic is properly classified as interstate, and it falls under the Commission's section 201 jurisdiction.") (footnotes omitted); Memorandum Opinion and Order, *GTE Telephone Operating Cos., GTOC Tariff No. 1, GTOC Transmittal No. 1148*, 13 FCC Rcd 22466, 22466, ¶ 1 (1998) (concluding that internet access is interstate).

[87] *See, e.g.*, Memorandum Opinion and Order, *Starpower Communications, LLC v. Verizon South Inc.*, File No. EB-00-MD-19, ¶ 30 (rel. Apr. 8, 2002) ("the Commission has long categorized traffic to enhanced service providers [], including ISPs, as predominately interstate").

[88] *See Cable Modem Declaratory Ruling* ¶ 59.

evidence that preemption is appropriate here. The Commission has concluded that providers of connections to the public switched network are providers of interstate telecommunications services because end-user connections to the public switched network have an interstate component, and it has treated special access or private lines as interstate so long as interstate traffic constitutes more than 10 percent of the total traffic on the line.[89] Moreover, even purely intrastate users connect to interstate networks (including the Internet), and corporate LANs often provide for remote digital access. Because broadband is predominately interstate, and because separating the interstate and intrastate components of broadband (if it is even possible) would undermine the network and defeat the purposes of deregulation, preemption is warranted.

D. Obligations Respecting Law Enforcement and Consumer Protection

The classification of broadband services as Title I services would have no substantive effect on the obligations of local telephone companies respecting law enforcement or consumer protection.

On the law enforcement front, the Government's authority to intercept electronic communications is found in various criminal statutes, including the Electronic Communications Privacy Act, 18 U.S.C. §§ 2510-2522, the Computer Fraud and Abuse Act, 18 U.S.C. § 1030, and the Foreign Intelligence Surveillance Act, 50 U.S.C. § 1801-1811, and this authority was recently strengthened by the USA PATRIOT Act of 2001.[90] These acts generally refer to wire, oral, and/or electronic communications rather than telecommunications services or information

[89] *See* 47 C.F.R. § 36.154(a).

[90] Pub. L. No. 107-56, 115 Stat. 272 (2001).

services, and without reference to common carriage or non-common carriage.[91] Accordingly, classifying broadband under Title I would have no effect on the scope of these acts and therefore would not affect government access to communications for law enforcement or national security purposes.

Indeed, to Verizon's knowledge, only one federal statute could even arguably be affected. The Communications Assistance for Law Enforcement Act[92] (CALEA) requires "telecommunications carriers" to ensure that their "equipment, facilities, or services that provide a customer or subscriber with the ability to originate, terminate, or direct communications" are cable of "expeditiously" enabling the government, pursuant to a court order, to intercept communications and to access call identifying information reasonably available to the carrier.[93] By its terms, CALEA excludes "persons or entities insofar as they are engaged in providing information services."[94] Hence, even today, CALEA does not apply to carriers insofar as they

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[91] *See, e.g.*, 18 U.S.C. § 2511 (governing interception of "wire, oral, or electronic communications"); *id.* § 2703 (governing access to contents of and records relating to "electronic communications"); 50 U.S.C. § 1802 (referring to electronic communications).

[92] Pub. L. No. 103-414, 108 Stat. 4279 (1994) (codified as amended at 18 U.S.C. § 2522 and 47 U.S.C. §§ 229, 1001-1010) ("CALEA").

[93] *See* 47 U.S.C. § 1002. CALEA defines a "telecommunications carrier" in relevant part as "a person or entity engaged in the transmission or switching of wire or electronic communications as a common carrier for hire" and also "a person or entity engaged in providing wire or electronic communication switching or transmission service to the extent that the Commission finds that such service is a replacement for a substantial portion of the local telephone exchange service and that it is in the public interest to deem such a person or entity to be a telecommunications carrier for purposes of this subchapter." *Id.* § 1001(8).

[94] 47 U.S.C. § 1001(8)(C); *see also id.* at 1002(b)(2) (the "requirements of subsection (a) do not apply to … information services"); *United States Telecom Assoc.*, 227 F.3d at 455 ("CALEA does not cover 'information services' such as e-mail and internet access.") (quoting 47 U.S.C. §§ 1001(8)(C)(i), 1002(b)(2)(A)).

provide information services.[95] The legislative history refers to "Internet service providers or services such as Prodigy and America-On-Line" as examples of information services.[96] The Commission has previously found that "[w]here facilities are used to provide both telecommunications and information services, however, such joint-use facilities are subject to CALEA in order to ensure the ability to surveil the telecommunications services."[97] Because most local wireline network facilities are used to provide telecommunications services as well as information services, law enforcement's access to these facilities will be unaffected by the reclassification of broadband transmission. The Commission has also found that DSL services are generally subject to CALEA "even though the DSL offering often would be used in the provision of information services."[98] While a reclassification of DSL as a non-common-carrier service might arguably provide grounds for the Commission to revisit this determination, even that change would have no substantive impact on the ability of law enforcement or national security officials to surveil electronic communications. As the D.C. Circuit has held, CALEA "does not alter the existing legal framework for obtaining wiretap and pen register authorization, 'providing law enforcement with no more and no less access to information than it had in the past.'"[99]

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[95] Examples of "information services" included in the statute are a service that permits a customer to retrieve stored information from, or file information for storage in, information storage facilities, electronic publishing and electronic messaging services. CALEA § 102(6)(B).

[96] H.R. Rep. No. 103-827(I), at 21, reprinted in 1994 U.S.C.C.A.N. 3489, 3498.

[97] Second Report and Order, Communications Assistance for Law Enforcement Act, 15 FCC Rcd 7105, 7120, ¶ 27 (1999).

[98] *Id.*

[99] *United States Telecom Ass'n v. FCC*, 227 F.3d 450, 455 (D.C. Cir. 2000) (quoting H.R. Rep. No. 103-827, at 22).

Nor should classification of broadband under Title I lead to any erosion of the consumer protection provisions of the Communications Act. First of all, to the extent that these provisions are keyed to the provision of telecommunications services – like the Commission's CPNI and truth-in-billing requirements, for instance[100] – the protection they offer will remain largely unaffected because local telephone companies will continue to provide voice or other telecommunications services to most of their customers.

More fundamentally, however, to the extent that the Commission finds that consumer protection provisions are needed in the public interest, it can and should impose them equally on all broadband providers under Title I. Regulating broadband under Title I does not necessarily mean completely deregulating broadband facilities and services; it means applying regulations tailored to suit the needs of the broadband market (rather than trying to force broadband into a Title II regulatory straightjacket designed for different services as they existed in years gone by).

III. Universal Service Obligations

A. All Broadband Providers Should Have the Same Obligations

Whatever universal service obligations are imposed on local telephone companies in their provision of broadband must be the same as the obligations imposed on other broadband providers. If telephone companies face universal service obligations for broadband that are not imposed on cable, satellite, and terrestrial wireless providers, then telephone companies will bear an additional expense that will be passed on to their customers. That will make their services

[100] *See generally* Order on Reconsideration and Petition for Forbearance, *Telecommunications' Carriers Use of Customer Proprietary Network Information and Other Customer Information*, 14 FCC Rcd 14409 (1999); 47 CFR § 64.2400 *et seq.* (truth-in-billing requirements).

relatively less attractive than cable, satellite, and terrestrial wireless broadband and will result in market distortions. The Commission should avoid subjecting wireline broadband providers to obligations that cable and wireless broadband providers do not have for at least three reasons. First, the Commission's own definition of the public interest underlying universal service obligations includes the criterion that to the extent possible, carriers with universal service contributions should not be put at a competitive disadvantage.[101] Second, the universal service provisions of the Act itself directs that every carrier be required to contribute "on an equitable and nondiscriminatory basis"[102] and that the Commission must establish "competitively neutral" rules to enhance schools and libraries' access to advanced services.[103] Third, at the extreme, a difference in treatment would violate the APA, the Equal Protection component of the Due Process Clause, and the First Amendment.[104]

B. The Commission Should Require All Broadband Providers to Contribute to the Schools and Libraries Fund, and Only That Portion of the Universal Service Fund

To the extent that either bundled service or transport is regulated under Title I, it does not trigger a *mandatory* universal service contribution because the basic contribution requirement is tied to the provision of "interstate *telecommunications services*."[105] The Commission could, however, require broadband-based contributions to the fund under its permissive authority, since

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[101] S*ee Universal Service Report*, 13 FCC Rcd at 11557, ¶ 117.

[102] 47 U.S.C. §§ 254(b) & 254(d).

[103] 47 U.S.C. § 254(h)(2)(A).

[104] *See supra* Part I.B.3. *Cf. also Minneapolis Star*, 460 U.S. at 592-93 (tax that "targets individual publications within the press, places a heavy burden on the State to justify its action").

[105] *See* 47 U.S.C. § 254(d) (emphasis added).

"[a]ny other provider of interstate *telecommunications* may be required to contribute . . . if the public interest so requires."[106] Because monies from the schools and libraries fund today are used to subsidize the purchase of broadband services from cable companies, telephone companies, and other providers alike, Verizon believes it would be in the public interest to require all broadband providers to contribute to the schools and libraries fund, but only that fund. The schools and libraries fund is the only portion of the universal service fund used to subsidize the purchase of broadband services.[107] It is both logical and equitable that broadband providers contribute to that portion of the federal program that is used to subsidize the purchase of their services.

Broadband providers' contributions should be proportionate to the services being supported so that contributions to the fund by broadband are not used to subsidize other universal service objectives. Cross-subsidization of services would result in distortions in the contribution obligations of entities providing different services and would violate the requirement in § 254(b)(4) that contribution obligations to the universal service fund should be "equitable."

Finally, the Commission should not use the advent of broadband to expand the range of services supported by the general universal service fund. This means that broadband providers should neither pay into any federal universal service fund other than the schools and libraries fund based on their broadband revenues, nor should broadband services be supported by any such fund. Section 254(c)(1) sets forth criteria for defining those services that will be supported

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[106] *Id.* (emphasis added).

[107] *See* 47 U.S.C. § 254(c)(3) ("[I]n addition to the services included in the definition of universal service," the Commission "may designate additional services for such support mechanisms for schools, libraries, and health care providers for the purposes of subsection (h) of this section."); 47 C.F.R. § 54.503.

by the universal service fund. These criteria include that the service should be essential to the education, public health, or public safety and be subscribed to by a substantial majority of residential customers.[108] Broadband does not meet these criteria. Unlike telephone service, broadband typically is not used to summon emergency service, and only a minority of Americans subscribe to a broadband service.[109] Perhaps most important, the broadband market is robustly competitive and will remain so under a Title I regime. There is no basis to shunt aside market forces and create a new general subsidy program for broadband.

To sum up, the Commission has determined under Section 254(h)(2) that broadband should be made available to schools and public libraries.[110] Consistent with this determination, the Commission should require that all broadband operators – not just telephone companies – contribute on the basis of their revenues to the schools and libraries fund that is used to support the services they provide. The Commission should exempt broadband revenues, however, from contribution to the remaining portion of the universal service fund.

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[108] *See* 47 U.S.C. § 254(c)(1) (a)-(b).

[109] *See The Broadband Household*, *at* http://www.supernet2001.com/newsletter /broadbandhousehold.cfm (reporting as of November 2001 that 10 million Americans were expected to have broadband service by the end of the year).

[110] *See generally* 47 C.F.R. §§ 54.501–54.503 (providing that telecommunications carriers will be eligible for universal service support for providing supported services to secondary and elementary schools and public libraries, and defining supported services to include Internet access).

Conclusion

Whatever regulations the Commission imposes on local telephone companies in their provision of broadband must apply equally to their broadband competitors. In view of the Commission's recent decision to regulate cable modem service under Title I of the Communications Act (and not to require that the cable broadband transmission be offered on a common-carrier basis), the Commission should classify all broadband services – including stand-alone transmission services – under Title I, regardless of the heritage of the company that provides them.

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Respectfully submitted,

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