

STATE OF NEW YORK DEPARTMENT OF PUBLIC SERVICE

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Secretary

February 8, 2005

Hon. Marlene H. Dortch
Secretary
Federal Communications Commission
445 12th Street, SW
Suite TW-A325
Washington, D.C. 20554

Re: Comments of the New York State Department of Public Service in the Matter of Petition of the Verizon Telephone Companies for Forbearance under 47 U.S.C. § 160(c) from Title II and *Computer Inquiry* Rules with Respect to Their Broadband Services; WC Docket No. 04-440

Dear Secretary Dortch:

Enclosed please find the comments of the New York State Department of Public Service in response to the Commission's Public Notice issued on December 23, 2004 in the above-referenced proceeding.

Should you have any questions concerning this filing, please call me at (518) 474-7687.

Very truly yours,

John C. Graham
Assistant Counsel

enc.

**BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C.**

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

**COMMENTS OF THE
NEW YORK STATE DEPARTMENT OF PUBLIC SERVICE**

On December 23, 2004, the Commission issued a Public Notice in the above-entitled proceeding inviting comments on a petition for forbearance (“Petition”) from applying Title II and the *Computer Inquiry* rules to any broadband services offered by the Verizon Telephone Companies (“Verizon”), filed with the Commission on December 20, 2004 by Verizon. The New York State Department of Public Service (“NYDPS”) submits these comments in response to the aforementioned Public Notice.

Although the Petition raises important policy issues, the Commission should not consider Verizon’s request for forbearance until after the United States Supreme Court decides the appeal of Brand X Internet Services v. F.C.C.,¹ currently before the Court. Verizon looks to its competition with cable modem service as justification for its forbearance request, arguing that because cable modem service is not subject to Title II

¹ 345 F.3d 1120 (9th Cir. 2003); *reh’g denied* 2004 U.S. App. LEXIS 8023 (9th Cir. 2004); *cert. granted sub nom. Nat’l Cable and Telecommunications Ass’n v. Brand X Internet Services*, 73 U.S.L.W. 3331 (U.S. Dec. 3, 2004) (No. 04-277) (“Brand X”).

regulation, neither should Verizon be with respect to its broadband services.² This argument, however, rests upon assumptions that the Court will find the transport component of cable modem service not to be a telecommunications service, and if the Court finds otherwise, that the Commission will forbear from applying Title II regulation to cable modem service. Both of these assumptions are premature at best. The first prejudices the outcome of the Brand X appeal, particularly its impact upon the statutory classification of cable modem service.³ The second presumes that Commission forbearance would be granted.⁴ Consequently, it is unclear whether cable modem service will be subject to common carrier regulation under Title II of the Act. Because the regulatory status of cable modem service is yet uncertain, granting Verizon's forbearance request at this time could very well produce regulatory asymmetry between Verizon broadband services and cable modem service. Such an inequity would be inconsistent with the public interest.⁵

² Petition at 5, 19.

³ The statutory classification issue in Brand X is whether cable modem service is an “information service” pursuant to the Telecommunications Act of 1996 (“1996 Act”), see 47 U.S.C. § 153 (20) (definition of information service), or whether the transmission component of that service is a “telecommunications service” under the 1996 Act, see 47 U.S.C. § 153 (46) (definition of telecommunications service). If the latter, cable modem service would be subject to common carrier regulation pursuant to Title II of the Communications Act of 1934, as amended by the 1996 Act.

⁴ While the Commission tentatively concluded that forbearance would be justified, see In the Matter of Inquiry Concerning High-Speed Access to the Internet Over Cable and Other Facilities, Declaratory Ruling and Notice of Proposed Rulemaking, GN Docket No. 00-185, 17 FCC Rcd 4798, ¶ 95 (rel. Mar. 15, 2002) (“Cable Broadband Ruling”), the Commission has requested comment on this conclusion, see id. It cannot be speculated, however, whether the record in that proceeding will support the statutorily required findings for forbearance, see 47 U.S.C. § 160 (a,b), or what the Commission would ultimately decide.

⁵ See 47 U.S.C. § 160 (a) (3).

Facilities-based providers, such as incumbent telephone companies and cable companies, should be subject to similar regulation with regard to services provided over their broadband transmission facilities, absent a compelling reason not to such as market power. As Verizon indicates in its Petition, it offers or plans to offer services via its wireline facilities that are similar to services currently being offered via the cable modem platform.⁶ Likewise, Verizon indicates that it competes for broadband subscribers in the same markets as cable broadband.⁷ Consequently, Verizon's and cable modem providers' broadband services, to the extent those services are functionally similar, should be subject to the same regulation.

In addition to the issues it raises concerning cross-platform regulatory symmetry for broadband services, Verizon's Petition implicates important public policies concerning network accessibility. The interests of consumers are best served by an open and accessible network that allows any end user to access any content, service or application via any device chosen by the end user, free from any interference, unreasonable discrimination, or constraint imposed by the service provider.⁸ Therefore, irrespective of any present or future action the Commission takes regarding Verizon's

⁶ Petition at 3-5.

⁷ Id.

⁸ Chairman Powell recently articulated four "Internet Freedoms" which express similar policies regarding broadband network accessibility: the freedom to access content, to use applications, to attach personal devices and to obtain service plan information. See Chairman Michael K. Powell, Remarks at the Silicon Flatirons Symposium on "The Digital Migration: Toward a Regulatory Regime for the Internet Age" (Feb. 8, 2004) (transcript available at http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-243556A1.pdf). We would add that access to broadband networks should be provided free from unreasonable discrimination regarding service providers, services, users, or user content.

Petition, or any similar forbearance petitions presently before the Commission⁹, the NYDPS urges the Commission to affirmatively conclude that as new platforms, applications and services become available, consumers will retain the ability to access, on a non-discriminatory basis, their choice of services and applications offered by providers other than the last-mile facilities owner. The Commission should further assure that customers may attach devices which would typically be network-compatible, particularly those used in Internet telephony or VoIP, without unreasonable interference introduced by the network facilities owner.

For the foregoing reasons, the NYDPS respectfully requests that the Commission deny the Petition without prejudice to renew after the Supreme Court decides Brand X. Should the Commission ultimately consider the Petition, the Commission should act in a manner that would foster open and accessible networks.

Respectfully submitted,

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Dated: February 8, 2005
Albany, New York

⁹ See e.g., Petition of SBC Communications Inc. For Forbearance from the Application of Title II Common Carrier Regulation to IP Platform Services, WC Docket No. 04-29 (filed Feb. 5, 2004); Petition of BellSouth Telecommunications, Inc. For Forbearance Under 47 U.S.C. § 160 From Application of *Computer Inquiry* and Title II Common-Carriage Requirements, WC Docket No. 04-405 (filed Oct. 27, 2004).