Federal Communications Commission
Washington, D.C. 20554

October 13, 2005

Via Federal Express

Cathy Catterson, Clerk
United States Court of Appeals
for the Ninth Circuit
95 Seventh Street
San Francisco, CA 94103

RE: *Brand X Internet Services v. FCC*, No. 02-70518 (and consolidated cases)

Dear Ms. Catterson:

By order dated September 14, 2005, this Court directed the parties to file letter briefs "addressing what issues, if any, remain outstanding in this case and what action this court should take with respect thereto." In accordance with that order, the Federal Communications Commission respectfully submits this letter brief.

In October 2003, this Court ruled that the FCC erred in failing to classify the transmission component of high-speed cable Internet access service (or "cable modem" service) as a telecommunications service. *Brand X Internet Services v. FCC*, 345 F.3d 1120 (9th Cir. 2003). After granting certiorari on this issue, the Supreme Court reversed this Court's ruling in a decision rendered on June 27, 2005. *National Cable & Telecommunications Ass'n v. Brand X Internet Services*, 125 S. Ct. 2688 (2005). In that decision, the Court held that the FCC lawfully construed the Communications Act when the agency classified cable modem service as an "information service" with no separate "telecommunications service" component. The Supreme Court remanded the case "for further proceedings consistent with this opinion." *Brand X*, 125 S. Ct. at 2712.

There is no need for further proceedings in this case. With respect to the claims of some petitioners that the Communications Act mandates the classification of cable modem service as a "cable service" (National League of Cities Br. 20-58; Conestoga Township Br. 21-33), this Court correctly rejected

those claims, and the Supreme Court declined to review that part of the Court's ruling. Accordingly, this Court's disposition of those claims is final.

In its *Brand X* opinion, this Court expressly declined to consider some of the other petitioners' claims, "leaving them for reconsideration by the FCC on remand." 345 F.3d at 1132 n.14. In our judgment, virtually all of those claims have either been resolved by the Supreme Court or rendered moot by subsequent agency action. For example, the Supreme Court upheld the FCC's decision that its *Computer Inquiry* rules, which were originally designed to apply to incumbent local telephone companies, should not apply to cable operators. *Brand X*, 125 S. Ct. at 2708, 2710-11. That ruling undermines the claims of some petitioners that the *Computer Inquiry* requirements must necessarily apply to cable operators as well as incumbent local phone companies. *See* EarthLink Br. 34-45, 51-60; Brand X Br. 39-41. The Supreme Court also held that the Commission "need not immediately apply" an information service classification to digital subscriber line ("DSL") service as well as cable modem service. *Brand X*, 125 S. Ct. at 2711. In view of that holding, there is no basis for Verizon's contention to the contrary. *See* Verizon Br. 19-40. In any event, these claims have been rendered moot by the FCC's recent wireline broadband order, which classified DSL service as an information service and eliminated the *Computer Inquiry* requirements at issue in this case. *See Appropriate Framework for Broadband Access to the Internet over Wireline Facilities*, FCC 05-150, 2005 WL 2347773 (released September 23, 2005).

We do not expect that petitioners will attempt to pursue any remaining claims in this case. In any event, even assuming that any issues remain to be resolved, we believe, for the reasons stated in our brief filed on November 25, 2002, that the Court should uphold the FCC's order in all respects. Nonetheless, if the Court believes that any issues remain outstanding, we respectfully request an opportunity to file a supplemental brief addressing any such issues. Supplemental briefing would allow the parties to bring pertinent new developments to the Court's attention. For example, the Court should be aware that the FCC, in a recent policy statement, adopted principles of Internet neutrality "to ensure that broadband networks are widely deployed, open, affordable, and accessible to all consumers." *Appropriate Framework for Broadband Access to the Internet over Wireline Facilities*, FCC 05-151, 2005 WL 2347767, ¶ 4 (released Sept. 23, 2005) ("*Policy Statement*"). The *Policy Statement* provides further evidence that, contrary to the claims of some consumer groups (Consumer Federation Br. 27-58),

the FCC stands ready to take additional action (if necessary) to ensure that subscribers to broadband Internet access services have unfettered access to the lawful Internet content of their choice. Moreover, as we previously explained, there was no need for the FCC to adopt access regulations in the order on review because the record in this case contained no evidence that consumers' access to any web sites had been blocked by any provider of cable modem service. *See* FCC Br. 50-53.

For the foregoing reasons, the Court should dismiss or deny the petitions for review and enter judgment for the federal respondents in this case. We have been authorized to state that the United States, the other respondent in this case, agrees with our position in this letter brief.

Respectfully submitted,

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Daniel M. Armstrong
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James M. Carr
Counsel

cc: Counsel for all parties