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October 15, 2014

Marlene H. Dortch
Secretary
Federal Communications Commission
445 12th Street, SW
Washington, DC 20554

Re: Notification of Ex Parte Presentation of the National Cable & Telecommunications Association, GN Docket Nos. 14-28, 10-127

Dear Ms. Dortch:

On October 10, 2014, Rick Chessen of the National Cable & Telecommunications Association (“NCTA”) along with the undersigned and Matthew Murchison, both of Latham & Watkins LLP, met with Matthew DelNero and Claude Aiken of the Wireline Competition Bureau and Stephanie Weiner of the Office of General Counsel in connection with the above-captioned proceedings.

At the meeting, we reiterated that the Commission’s consideration of further open Internet rules in light of the *Verizon* decision¹ should be guided by the basic principles set forth in NCTA’s comments and reply comments in this proceeding, which enjoy broad support in the record. In particular, we urged the Commission to rely on its authority under Section 706 of the Telecommunications Act of 1996 as the basis for new open Internet rules and to reject proposals to reclassify any component of broadband Internet access under Title II. We explained that Section 706 provides ample authority for the Commission to adopt robust rules to protect and promote Internet openness, including a strong presumption against harmful paid prioritization arrangements (in the unlikely event a broadband provider were to consider entering into such an arrangement), and that a Title II approach would be wholly unnecessary to achieve the Commission’s regulatory objectives. We also explained that pursuing any Title II reclassification theory would be immensely destabilizing and would undermine the ongoing network investments necessary to fuel the “virtuous cycle” of deployment, innovation, and

¹ *Verizon v. FCC*, 740 F.3d 623 (D.C. Cir. 2014), *affirming in part, vacating and remanding in part, Preserving the Open Internet; Broadband Industry Practices*, Report and Order, 25 FCC Rcd 7905 (2010).

adoption that the Commission has long sought to promote. We also noted that, as a legal matter, it is doubtful that the Commission could simply abandon its prior classification determinations, especially given that (a) any telecommunications-service classification would rest on “factual findings that contradict those which underlay [the Commission’s] prior policy,” and (b) the information-service classification has engendered substantial reliance interests.² And we explained that the Commission’s forbearance authority is not the “cure-all” that proponents of Title II make it out to be, and that the forbearance process would only add to the uncertainty presented by Title II reclassification, as the Commission has recognized.³

In addition, we pointed out that the alternative Title II approaches proposed by some parties in the record would do nothing to address the serious legal and policy problems posed by Title II. In particular, we explained that Mozilla’s proposal to reclassify the transmission functionality available to edge providers as a Title II service would require reversing established Commission precedent (notwithstanding Mozilla’s assertions to the contrary),⁴ and also runs headlong into the requirement that a “telecommunications service” be offered for a “fee.”⁵ We noted that Mozilla cannot satisfy the “fee” requirement by pointing to some nebulous “value” that access to Internet content supposedly confers on ISPs; there is no support for such an expansive interpretation of the term “fee,”⁶ nor is there support for the proposition that *all* edge-

² *FCC v. Fox Television Stations*, 556 U.S. 502, 515 (2009).

³ *See, e.g.*, Petition for Writ of Certiorari, U.S. Dept. of Justice and FCC, *FCC v. Brand X Internet Servs.*, No. 04-277, at 28 (Aug. 27, 2004).

⁴ *See, e.g.*, *Appropriate Framework for Broadband Access to the Internet over Wireline Facilities*, Report and Order and Notice of Proposed Rulemaking, 20 FCC Rcd 14853 ¶¶ 14, 39 (2005) (finding that “wireline broadband Internet access service” is “a single, integrated service” that “provides the user with the ability to *send and receive* information at very high speed, and to access the applications and services available through the Internet” (emphasis added)); *Inquiry Concerning High-Speed Access to the Internet Over Cable and Other Facilities*, Declaratory Ruling and Notice of Proposed Rulemaking, 17 FCC Rcd 4798 ¶¶ 10, 17 (2002) (describing the cable modem service being classified as including “the ability to *retrieve* information from the Internet, including access to the World Wide Web” and as enabling “cable modem service subscribers to transmit data communications *to and from* the rest of the Internet” (emphasis added)); *see also* Comments of the National Cable & Telecommunications Association, GN Docket Nos. 14-28, 10-127, at 39-40 (filed Jul. 15, 2014) (discussing other orders addressing this issue).

⁵ 47 U.S.C. § 153(53); *see* Reply Comments of the National Cable & Telecommunications Association, GN Docket Nos. 14-28, 10-127, at 21-23 (filed Sep. 15, 2014) (addressing the “fee” issue in greater detail).

⁶ *See* Black’s Law Dictionary (9th ed. 2009) (defining “fee” as “a charge for labor or services”); *see also, e.g.*, *LSSi Data Corp. v. Time Warner Cable, Inc.*, 892 F. Supp. 2d 489, 521 (S.D.N.Y. 2012) (holding that an entity did not qualify as a provider of

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provider content necessarily confers value on ISPs, particularly where that content may be offensive or repugnant to many of the ISP's subscribers.⁷ We also noted that the "hybrid" proposal from Rep. Waxman to reclassify broadband under Title II, forbear from virtually all of Title II's provisions, and then use Section 706 as a basis for additional rules, could be the worst of all possible worlds, as it would present all the risks of any other Title II proposal (including the substantial uncertainty that would surround any forbearance efforts) while potentially giving rise to a regulatory framework that is even more rigid than Title II on its own. We discussed NCTA's blog posts describing the pitfalls of these and other Title II proposals, and those posts are attached to this letter.

Finally, we reiterated that any new open Internet framework should apply evenhandedly to fixed and mobile broadband providers. We noted that the Commission should account for any differences between fixed and mobile networks through the application of its "reasonable network management" standard, not by adopting entirely separate standards for the two platforms.

Please contact the undersigned if you have any questions regarding these issues.

Sincerely,

/s/ Matthew A. Brill

Matthew A. Brill

*Counsel for the National Cable &
Telecommunications Association*

cc: Matthew DelNero
Stephanie Weiner
Claude Aiken

Attachments

telecommunications services under the Act where, as a factual matter, "the caller [was] not charged any incremental fee" for the entity's service).

⁷ *Cf. Comcast Cable Communications, LLC v. FCC*, 717 F.3d 982, 986 (D.C. Cir. 2013) (questioning, in the context of applying the Commission's program carriage rules, whether the availability of third-party content on a distribution platform necessarily confers any net benefit on the platform provider).

ATTACHMENT A

TITLE II IS THE WRONG APPROACH FOR A MODERN INTERNET: A LEGAL REALITY CHECK

Steven Morris and Jennifer McKee; NCTA Legal Department

The FCC is currently engaged in the hard work of developing Open Internet rules that will pass judicial scrutiny. We haven't been shy in urging the Commission to maintain the light regulatory touch—or Title I—that has propelled the Internet to become such a success. Our view is pretty simple: don't fix what isn't broken.

In addition to focusing on how light regulation has led to a better web, we have addressed precisely how proponents of heavy regulation – or Title II – are glossing over the true impact of this prescription. NCTA's legal team has dissected and debunked the arguments for Title II in the five-part blog series that follows.

The Series Examines:

- Why regulating broadband under Title II is not “highly deregulatory” as advocates have suggested;
- The legal risks and unintended consequences of imposing Title II on broadband;
- Why forbearance isn't a fast or easy solution to the problems created by Title II;
- Why Title II doesn't ensure “bright line” rules that provide clear guidance on difficult issues like paid prioritization;
- What is at stake if the FCC decides to reverse decades of light touch regulation and impose Title II on broadband.

The issues raised by the Open Internet rulemaking are extremely important for American consumers, businesses, our economy and our future. NCTA takes very seriously the role that cable broadband providers play in building and delivering an open Internet experience. We hope this series demonstrates the complexity of the issues at stake and the need for the FCC to grapple with the significant real world implications its decisions might have.

As the Commission begins to seriously consider its broadband policies in light of the decision in *Verizon v. FCC*, we thought it would be worthwhile to take a closer look at what it would mean for the Commission to classify broadband Internet access as a Title II telecommunications service. The descriptions of Title II regulation advanced by parties advocating reclassification bear little resemblance to our experiences in this area over the last two decades. In particular, the portrayal of Title II as a legal framework that offers clear and simple answers to difficult policy questions is simply false. Whether the issue is special access regulation, universal service reform, or network unbundling, the Commission consistently has struggled to develop clear and effective policies because Title II is ill-equipped to deal with the complex reality of today's marketplace, where multiple providers compete using different technologies, different service offerings, and different coverage areas.

As we will explain in this series of blog posts, moving to Title II regulation of broadband Internet access services and providers would be a hugely disruptive process that is unlikely to produce any of the benefits claimed by its supporters. In this first post, we will address what may be the most outrageous claim yet regarding Title II. Specifically, in its recent comments, Free Press asserts that Title II “is not a burdensome regulatory framework in any respect. It is in fact a highly deregulatory framework . . .”

“The descriptions of Title II regulation advanced by parties advocating reclassification bear little resemblance to our experiences in this area over the last two decades. In particular, the portrayal of Title II as a legal framework that offers clear and simple answers to difficult policy questions is simply false.”

The suggestion by Free Press that imposing Title II regulation on broadband providers is somehow “highly deregulatory” is pure nonsense. To repeat what should be well known at this point, cable operators have never been subject to Title II with respect to their broadband services. Since these services were introduced, they have been subject to limited regulation pursuant to Title I of the Act. By definition, imposing new Title II regulation on these companies is a regulatory act, not a deregulatory one.

It is the case, as Free Press points out, that the Commission has a fair amount of discretion in how it applies Title II to entities that are classified as telecommunications carriers. It has, for example, decided not to apply the full panoply of Title II regulations to competitive local exchange carriers and mobile wireless voice services.

Reducing Title II regulation in this way has produced substantial benefits for these companies and their customers as compared to applying all of Title II. But that is a far cry from the current debate over how to regulate ISPs, who have been subject to light regulation for two decades and unquestionably would face increased regulation under Title II, even if the Commission granted significant forbearance (and as we will explain in a future post, the forbearance process is a regulatory morass that would occupy the resources of the Commission and the industry for years to come).

Given this analysis, the real question facing the Commission is whether it should abandon the Title I regime that has applied since the beginning of the broadband era and instead attempt to develop a new, untested Title II regime for broadband. We look forward to continuing this conversation and explaining the significant risks and challenges the Commission would face in attempting to develop such a regime, the significant costs associated with this approach, and the limited benefits it likely would produce.

One of the primary misconceptions in the debate about how to regulate broadband is that “reclassifying” it as a Title II telecommunications service would be a simple correction of the Commission’s decisions to treat cable modem and DSL as information services rather than telecommunications services. The parties supporting Title II are not seeking to reinstate a longstanding regulatory regime, but instead they are advocating an entirely new, untested approach that entails significant legal risk for the Commission and tremendous potential for unintended consequences.

The first question the Commission would have to confront with Title II is how to define the “telecommunications service” that is subject to Title II regulation. In general, when telecommunications and information processing and storage capabilities are functionally integrated into a single retail service, that service has been treated as an information service. That is the approach the Commission adopted with cable modem service in 2002 based on its finding that “cable modem service is an offering of Internet access service, which combines the transmission of data with computer processing, information provision, and computer interactivity, enabling end users to run a variety of applications. . . . Cable modem service is not itself and does not include an offering of telecommunications service to subscribers.” The Supreme Court affirmed this determination in the 2005 Brand X decision, and the Commission reached the same conclusion for wireline broadband services in 2005, for broadband provided over power lines in 2006, and for wireless broadband services in 2007.

“For example, if broadband is considered a telecommunications service notwithstanding the additional information processing and storage functionality offered by ISPs, why would a different result apply to the integrated services offered by cloud providers like Amazon and Google, the CDN services of Akamai and Limelight, or communications services such as Skype?”

To be clear, before 2005, the Commission viewed the wholesale transmission capability provided by telephone companies to ISPs as a “telecommunications service.” This wholesale transmission was sold to ISPs so they could connect consumers to the Internet. But this framework never entailed classifying the retail broadband Internet access service provided by the ISP as a “telecommunications service.” In fact, the Commission consistently viewed ISP retail broadband service as an “information service”; the ISP purchased this transmission service for each of its retail customers, along with facilities connecting its own equipment to the carrier’s equipment, and combined it with other functionality (information processing and storage) necessary to provide an integrated Internet access service to the customer.

Imposing the pre-2005 regime on ISPs would not satisfy the concerns expressed by net neutrality advocates regarding potential blocking or discrimination because the Internet access service provided in this scenario is not subject to Title II. Under the pre-2005 regime for DSL, which many rural telephone companies have chosen to follow, the ISP unquestionably is providing information services and is not subject to the non-discrimination requirement, or any other requirements, of Title II.

Consequently, to achieve their goal of regulating ISPs, Title II advocates would need the Commission to depart from the pre-2005 regime and instead regulate the entire end-to-end Internet access service offered to consumers as a Title II telecommunications service. But this approach has some very significant pitfalls. First, it is legally risky because it is a significant departure from precedent. Such an approach would have to be based on a Commission finding that any information processing and storage functions provided by an ISP are so insignificant as to not warrant consideration. But the Commission has never made such a finding in two decades of decisions governing Internet access and there is no factual basis to make such a finding today.

To the contrary, as NCTA has explained, and as the Commission has historically always agreed, information processing and storage capabilities are an integral part of the Internet access service offered to consumers that cannot be ignored in the Commission's analysis. A decision to treat retail Internet access purely as a telecommunications service could have significant implications for numerous other types of services. While this proceeding has focused on residential broadband, this ruling would open the door to regulation of services offered to businesses as well. For example, if broadband is considered a telecommunications service notwithstanding the additional information processing and storage functionality offered by ISPs, why would a different result apply to the integrated services offered by cloud providers like Amazon and Google, the CDN services of Akamai and Limelight, or communications services such as Skype? All of these services transmit information between points selected by customers using a mix of telecommunications and information processing and storage capabilities.

Treating information processing and storage functionality as inconsequential to the classification decision, as the Title II advocates are suggesting, could trigger a major reassessment of the regulatory status of key aspects of the Internet ecosystem. Perhaps that explains why major players in the Internet space have refused to jump on the Title II bandwagon and why the Commission should decline to pursue such a risky approach.

It is widely acknowledged that imposing the full array of Title II regulation on broadband Internet access would be incredibly burdensome and disruptive to ISPs, jeopardizing continued network investment and service innovation. Some parties have suggested that the Commission easily can mitigate this harm by forbearing from any unnecessary requirements imposed by Title II. But as we'll explain, that is simply not the case. There are a number of significant challenges, which suggest that the entire forbearance process is likely to become a regulatory morass.

First, the sheer complexity of determining whether and how certain statutory provisions and rules will apply will be overwhelming. Those advocating the "Title II plus forbearance" approach are essentially advocating that the Commission create an entirely new regulatory regime for broadband Internet access from whole cloth. Fundamental questions such as whether, and if so how, to regulate market entry (under Section 214), retail prices (under Sections 201, 202, and 203), and network interconnection (under Section 251(a)), would have to be addressed for the first time in the context of broadband Internet access. (While Title II was applied to DSL in the past, that regime does not really provide useful precedent because, [as we explained in a prior post](#), there are significant differences between that previous regime and the regime that Title II advocates are seeking today.)

Second, there is a fundamental tension between the type of findings that would justify regulating broadband as a Title II service and the findings that would be necessary to justify forbearance. Given the lack of existing rules applicable to broadband Internet access service, the adoption of new rules under Title II likely will be based on some finding that the current approach might not be sufficient to protect consumers of these services. Conversely, to justify forbearance, the Commission would need to find that rules are not necessary to protect consumers. For example, there could be tension between the arguments that the Commission has made explaining the need for broadband transparency requirements

and the findings that would be necessary to justify forbearing from the tariff provisions of Section 203. (A recent [paper from the Phoenix Center](#) addresses concerns about the application of Title II tariff provisions to broadband in more detail.)

As a result of these significant tensions, the administrative burden on the Commission would be staggering. The forbearance provisions in Section 10 have been on the books for almost two decades and “easy” cases have been few and far between. Virtually all forbearance petitions are opposed, and often opposed vigorously. The Commission routinely extends the 12-month statutory deadline on forbearance petitions by three months, as permitted under the statute, and often makes its decision in these cases on the last week, often on the last day.

Further adding to the time and complexity of the forbearance process, it also is possible that the Commission could provide different relief for different types of entities or different locations. Some of the Commission’s more recent forbearance decisions, specifically its 2010 order denying a forbearance request from Qwest’s Phoenix market, have taken a fairly granular approach to the Section 10 forbearance analysis with respect to service definition and geography. Were the Commission to take a similar approach in the context of broadband Internet access services, it would take years to establish a new regulatory regime.

“Given the challenges the Commission faces resolving forbearance petitions when a single carrier requests relief from a single provision or rule, the idea that it will be easy for the Commission to decide whether to forbear with respect to dozens of Title II provisions for hundreds of companies defies all logic and experience.”

Given the challenges the Commission faces resolving forbearance petitions when a single carrier requests relief from a single provision or rule, the idea that it will be easy for the Commission to decide whether to forbear with respect to dozens of Title II provisions for hundreds of companies defies all logic and experience. It should be of particular concern to the Commission that many of the parties arguing most loudly that “[forbearance is easy](#)” have in fact [filed comments suggesting](#) that there are almost no provisions of Title II for which they would support forbearance. There is no escaping the fact that adopting the “Title II plus forbearance” policy will occupy the resources of the Commission and the industry for years to come. Given the entirely speculative benefits this exercise is likely to produce, the Commission should decline to start down this road at all.

In the debate over regulation of broadband services, some have suggested that Title II will result in bright line rules that can more easily be enforced (e.g., a ban on “paid prioritization”) than a “commercial reasonableness” test under section 706, which would be applied on a case-by-case basis as suggested in the [Open Internet NPRM](#). Those who see Title II as a path to clear and easily enforceable rules obviously have never participated in a formal complaint proceeding at the Commission.

While it is theoretically possible that the Commission could establish a set of rules that clearly outline the rights and obligations of ISPs, edge providers, and end users, such an outcome is rare in the context of traditional Title II telecommunications services and seems even more unlikely with respect to broadband, where technology and business models change far more rapidly. For example, let’s suppose the Commission finds that small edge providers could be harmed if large edge providers were able to pay ISPs for priority access to consumers and declared that a ban on paid prioritization would be in the public interest. For a variety of reasons, we believe Title II does not provide the best path to accomplish this outcome.

“While it is theoretically possible that the Commission could establish a set of rules that clearly outline the rights and obligations of ISPs, edge providers, and end users, such an outcome is rare in the context of traditional Title II telecommunications services and seems even more unlikely with respect to broadband . . .”

First, the Commission typically has interpreted key provisions of Title II, such as the prohibition on unreasonable practices (under Section 201) or unreasonable discrimination (under Section 202), on a case-by-case basis. With rare exception, there is no “bright line” distinguishing reasonable practices from unreasonable practices or reasonable discrimination from unreasonable discrimination. Rather, the Commission makes such decisions based on the particular facts and circumstances presented in each case. In today’s complex marketplace, these decisions are rarely simple or straightforward. In the context of special access services, for example, the reasonableness of rates, terms, and conditions offered by incumbent telephone companies has been in dispute for over a decade, and the Commission still has not made a final determination as to what is “reasonable” in this context. Why the Title II advocates expect a different result in the context of broadband Internet access services remains a mystery to us.

Second, while the Commission has on occasion established an outright ban on a particular practice under Section 201, enforcing such a rule would still be difficult in the context of paid prioritization. For starters, the Commission has no real world experience to guide its consideration of where to draw the line between permissible agreements between ISPs and edge providers and impermissible ones. In particular, how exactly would the Commission define prioritization? Would prioritization include any existing arrangements between ISPs and edge providers, such as arrangements where an edge provider places equipment in an ISP facility or where a wireless ISP does not count the usage of particular applications? Should there be exceptions for situations involving public safety and national security? How about for health care or educational content? None of these questions are simple to answer given the dynamic nature of the Internet marketplace and considering them under a Title II framework, rather than a Section 706 framework, does not make them any easier to resolve.

The bottom line is that rules adopted under Title II, including a “bright line” rule banning paid prioritization, are no more likely to provide clarity than rules adopted under Section 706. Given all the other negative implications associated with Title II regulation of broadband, the better course is for the Commission to adopt the proposal in the NPRM to rely on Section 706 as the basis for any new rules.

PART 5 THE RISK OF STAGNATION

In this series of blog posts, we have explored some of the real world implications of proposals to regulate broadband Internet service under Title II of the Communications Act. Contrary to the rosy scenarios painted by Title II advocates, transitioning to a Title II regime for broadband would be highly disruptive for the industry and the Commission while producing none of the benefits that advocates are touting.

As the FCC decides how best to proceed – perhaps even more important than the legal considerations – we must consider the enormous progress and real world impact that has been achieved since the Commission, under Chairman Kennard in the 1990's, embraced a policy of light regulation. As the Commission has repeatedly recognized, we've witnessed a virtuous circle that has promoted continuing rounds of investment and innovation by ISPs and edge providers, all for the benefit of American consumers. As just one example of this virtuous circle, [NCTA pointed out](#) the other day a company like Twitch likely would not be acquired for almost \$1 billion were it not for a steady stream of speed upgrades by broadband providers across the country.

Proponents of adopting a Title II regime seem to believe that the disruption and cost of imposing new regulation on ISPs is the only way to preserve the environment that edge providers and consumers have come to expect. These proponents ignore the significant risk that Title II regulation will diminish ISP incentives to continue investing in their networks, thereby breaking this virtuous circle. As demonstrated by Professor Chris Yoo's recent [study](#) of the European broadband market, the American approach of light regulation "is more effective in terms of driving broadband investment" than the European approach of imposing traditional common carrier regulation on broadband providers.

“If the Commission follows their advice and they are wrong about the effect Title II would have on broadband investment . . . the Commission would bear direct responsibility for stagnation in the most vibrant sector of the American economy.”

Despite this evidence, many Title II advocates downplay the significance of ISP investment incentives, assuming that ISP investments would somehow be unaffected by increased regulatory burdens. But is it really so implausible that Title II regulation might cause cable operators to delay rolling out the next generation of [Gigasphere](#) equipment? Or that Google, which already has chosen not to offer voice service over its fiber networks due to concerns about common carrier regulation, might decide to scale back further deployment of new fiber networks, thereby [hampering the broadband competition](#) that Chairman Wheeler is trying to promote? Or that investment in technologies such as fixed wireless and satellite might dry up?

In short, what if the Title II advocates are wrong? There are many smart people working at Free Press and Public Knowledge and other advocacy groups, but they do not operate ISPs and they do not bear responsibility for billions of dollars in capital investment. If the Commission follows their advice and they are wrong about the effect Title II would have on broadband investment, as the Yoo study strongly suggests, the Commission would bear direct responsibility for stagnation in the most vibrant sector of the American economy. Of all the risks and concerns identified by the various parties to this proceeding, we see this as the biggest risk of all and the most important of the many reasons why the Commission should not go down the path of Title II regulation.

The Internet has been nothing short of a tremendous success for American consumers, our economy and our society. It's hard to imagine how imposing the heavy hand of government on this vibrant and open platform will do anything but set us back.

ATTACHMENT B

PLATFORM: PUBLIC POLICY

Waxman Proposal Fails To Eliminate Harms of Title II

The latest twist in the net neutrality drama comes from Congressman Henry Waxman, who last week proposed a “hybrid approach” for adopting open Internet rules that calls for reclassifying broadband Internet access as a Title II ‘telecommunications service’ (with forbearance from virtually all of the provisions in that title) *plus* reliance on Section 706 of the Telecommunications Act of 1996. While perhaps deserving of marks for creativity and effort, sadly this trial balloon is made of lead. In many respects, this “hybrid” would be the worst of all worlds, presenting all the risks of any other Title II reclassification proposal while creating a regulatory framework that is even *more* rigid than the standards designed for telephone monopolies under the 1934 Act.

For starters, the Waxman proposal fails at the threshold because it wrongly assumes that reclassifying broadband as a Title II “telecommunications service” would survive court scrutiny. As our [FCC comments](#) explain, any effort to justify reclassification under Title II must contend with the repeated factual findings by the FCC (and endorsed by the Supreme Court) demonstrating that broadband Internet access is an information service. Especially in light of the consistent factual findings the FCC would have to repudiate and the broadband industry’s substantial reliance on those findings over the last decade, the FCC cannot simply choose a new classification to address any perceived shortcomings of its authority under Section 706.

The legal impediments to reclassification would be even more pronounced under this and other hybrid proposals. Even while acknowledging the serious concerns that attend imposing “traditional utility-style regulation that is unsuited to the modern Internet,” Congressman Waxman proposes to embrace Title II for the sake of correcting a “problem” he perceives with the *Verizon* case. Such an ‘ends-justifies-the-means’ approach would seem certain to provoke profound skepticism by courts questioning the rationality of action that adopts a Title II common carrier classification but immediately forbears from obligations that make it common carrier (including Sections 201 and 202). To be sure, as a policy matter, we strongly agree that the FCC should refrain from imposing those traditional utility requirements on broadband providers, but as a legal matter, doing so by adopting a Title II classification and simultaneously undoing its effects likely would be considered arbitrary and capricious.

Another fatal flaw in the Waxman proposal beyond reclassification itself is its dependence on sweeping forbearance to eliminate the unwanted provisions of Title II. As we have [explained previously](#), the highly uncertain prospect of forbearance cannot cure the ills of Title II reclassification. Among other serious challenges, forbearing from virtually all of Title II would encounter strong opposition, as most groups supporting reclassification favor the broad imposition of common carrier duties on broadband providers. Such opposition guarantees the process would be incredibly complex and time-consuming, even if the FCC ultimately were to agree to grant the requested relief. As the FCC and the Department of Justice recognized a decade ago in urging the Supreme Court to uphold the information-service classification, the forbearance process not only is unlikely to mitigate the harms associated with a Title II classification but *itself* could be a source of investment-chilling and job-killing uncertainty.

But the problems don't stop there. While both Title II and Section 706 generally leave room for companies to offer different classes of services at different prices, the combination of the two statutes under Congressman Waxman's proposal would completely prohibit such offerings, creating a form of 'super-common carriage' that would prove *more* restrictive than the standards that apply to monopoly telephone providers. That would turn the Act on its head. Whereas Congress directed the FCC in Section 230 to preserve the unregulated status of Internet services, Congress Waxman's proposal would rule out even the sort of pro-competitive and pro-consumer business arrangements that monopoly telephone providers would be free to implement under Title II.

In the end, legal infirmities and practical realities doom the "hybrid" approach. Any proposal that depends on Title II will have significant negative consequences for ISPs, their customers, and the rest of the Internet and no amount of forbearance can fully eliminate those harms. Nor is it necessary for the Commission to pursue such an approach, given the availability of less radical options that can the Commission can effectively use – such as reliance on its court-recognized authority under section 706 — to bar commercial arrangements that are antithetical to consumers or competition.

As we move forward, we should recognize that our success over the past decade in growing the Internet economy has been predicated on a 'light touch' approach to regulation. For that progress to continue, broadband providers will need to attract private capital on reasonable terms to fund the upgrades required to provide Internet service at super-fast speeds, to expand coverage, and to boost opportunities for low-income consumers and other underserved segments of society. Those investments, in turn, are vital to our economic well-being and global competitiveness as well as to the strength of our educational and health care systems and our democracy. The problems of Title II underscore the need for a balanced and flexible regulatory approach under Section 706, not a gimmicky mash-up of regulation that threatens all of the core investment and innovation objectives at issue.