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October 29, 2014

Marlene H. Dortch
Secretary
Federal Communications Commission
445 12th Street, S.W.
Washington, D.C. 20554

Re: *Open Internet Remand Proceeding, GN Docket No. 14-28*;
Framework for Broadband Internet Service, GN Docket No. 10-127

Dear Ms. Dortch:

As Verizon and others have explained previously, any attempt to "reclassify" broadband Internet access service as a Title II telecommunications service would be a radical and risky change to the Commission's long-standing policy with significant harmful consequences. Many proponents of Title II assume that the Commission has broad authority simply to declare broadband Internet access service to be a common-carrier telecommunications service subject to Title II. The attached white paper, as well as previous filings, makes clear that this is not the case. Any effort to reclassify broadband Internet access service would have significant legal vulnerabilities.

The Commission has authority under Section 706, as interpreted by the D.C. Circuit, to address any concerns relating to paid prioritization. As a result, any effort to classify broadband Internet access service under Title II is wholly unnecessary and ultimately would be unlikely to survive appeal.

Respectfully submitted,

Michael E. Glover

TITLE II RECLASSIFICATION AND VARIATIONS ON THAT THEME: A LEGAL ANALYSIS

October 29, 2014

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INTRODUCTION

Supporters of the various Title II proposals in the Commission's Open Internet proceeding casually presume that the Commission can simply *deem* broadband service to be subject to Title II because it wishes to do so. But that is not the case. Title II merely sets out the requirements that apply to a service that already *is* being offered as a common-carriage telecommunications service, and the courts have long made clear that the Commission does not possess unfettered discretion to impose common-carriage requirements on services that are not actually being offered on a common-carriage basis. Accordingly, as explained below, any attempt to "reclassify" broadband Internet access as a common-carrier service subject to Title II would face significant legal challenge and would be unlikely to withstand appeal. That is doubly true in the case of mobile Internet access service, which is statutorily exempted twice over from common-carrier regulation.

I. The Commission Lacks Authority To Compel Broadband Internet Access Providers To Operate As Common Carriers.

Contrary to the suggestion of some, the Commission does not enjoy broad discretion to declare broadband providers to be common carriers. The D.C. Circuit long ago rejected the proposition that the Commission has "unfettered discretion . . . to confer or not confer common-carrier status on a given entity depending upon the regulatory goals it seeks to achieve." *See Nat'l Ass'n of Regulatory Util. Comm'rs v. FCC*, 525 F.2d 630, 644 (D.C. Cir. 1976) ("*NARUC I*"). Instead, according to some forty years of case precedent, what is determinative is the nature of the service that actually is being offered to customers: "A particular system is a common carrier by virtue of its functions," the D.C. Circuit has explained, "rather than because it is declared to be so." *Id.*; *see also Verizon v. FCC*, 740 F.3d 623, 651-52 (D.C. Cir. 2014) (collecting cases).

This long-standing background principle of common-carrier law was reflected in the Telecommunications Act of 1996 ("the 1996 Act"). Congress reinforced the circumscribed scope of the Commission's authority by expressly exempting certain categories of service from common-carrier regulation, two of which are directly relevant here. *First*, the 1996 Act limited the Commission's power to apply common-carrier requirements to a service provider only "to the extent" that that provider "*is engaged*" in providing common-carriage "telecommunications services," 47 U.S.C. § 153(51) (emphasis added), *i.e.*, the transmission of data for a fee "without change in the form or content of the information," *id.* § 153(50). Section 153(51) thus categorically exempts from common-carriage regulation all "information service[s]": those services that offer the capability of (*inter alia*) "storing, transforming, processing, retrieving, [and] utilizing" data "via telecommunications," *id.* § 153(24). As courts and the Commission long have recognized, these definitions established two, "mutually exclusive categories of service." *Inquiry Concerning High-Speed Access to the Internet over Cable and Other Facilities*, Declaratory Ruling and Notice of Proposed Rulemaking, 17 FCC Rcd 4798, 4824 ¶ 41 (2002) ("*Cable Broadband Order*") (emphasis added); *see Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs.*, 545 U.S. 967, 992-93 (2005); *Cellco P'ship v. FCC*, 700 F. 3d 534, 538 (D.C. Cir. 2012). By creating two non-overlapping categories of services, Congress thereby could exempt one category from—and subject the other category to—common-carriage regulation. *See, e.g.*, *Verizon*, 740 F.3d at 630-32.

Second, in the case of wireless services subject to Title III, Congress in 1993 defined an additional set of "private mobile services" that are likewise categorically exempt from common-carrier regulation, regardless of whether or not those services also qualify as information services. 47 U.S.C. § 332(d)(2); *see Cellco*, 700 F.3d at 538. As the Supreme Court held with

respect to a parallel provision of the Communications Act that exempts cable services from common-carrier regulation, the statute thus "forecloses any discretion" in the FCC to impose common-carrier rules on these services. *FCC v. Midwest Video Corp.*, 440 U.S. 689, 705 (1979) ("*Midwest Video II*").

Indeed, there is *nothing* in Title II itself that purports to authorize the Commission to require that particular services be offered subject to its terms. On the contrary, Title II merely defines the requirements that apply to a service that already *is* offered as a common-carrier telecommunications service. And while the Commission has sometimes invoked Title I, and Section 1 specifically, as a source of authority for certain actions, *see*, *e.g.*, *Comcast Corp. v. FCC*, 600 F.3d 642, 649-51, 651-52 (D.C. Cir. 2010), that provision does not grant the agency authority to require that a broadband Internet access service be offered as common carriage. Rather, Section 1 sets out the broad purposes of the Communications Act, but is not an independent grant of authority. *See id.* at 651 ("The Commission's exercise of ancillary authority . . . must, to repeat, be independently justified.") (quotation and citation omitted).[1]

That Title II contains no grant of authority to compel particular services to be offered on common-carrier terms is not surprising, because the ability to compel a broadband provider involuntarily to commit its private property to the use of others would be an extraordinary power raising significant issues of constitutional dimension. *See Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622, 684 (1994) (O'Connor, J., concurring in part and dissenting in part, joined by Scalia,

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[1] In only one instance does Title I even arguably authorize the Commission to determine whether a particular service should be treated as common carriage: fixed and mobile satellite services. *See* 47 U.S.C. § 153(51) (providing that ". . . the Commission shall determine whether the provision of fixed and mobile satellite service shall be treated as common carriage"). But that provision does not apply here, and it only makes clear that Congress knows how to speak directly to the issue when it wants to do so.

Thomas, and Ginsburg, J.J.) (observing that obligating cable operators to act as common carriers would implicate the Takings Clause). The Supreme Court has long established that "a private carrier cannot be converted into a common carrier by mere legislative command." *State of Wash. ex rel. Stimson Lumber Co. v. Kuykendall*, 275 U.S. 207, 211 (1927); *see Mich. Pub. Utils. Comm'n v. Duke*, 266 U.S. 570, 577-78 (1925).[2]

At a bare minimum, the exercise of such an extraordinary power would require express statutory authorization. *See generally*, *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 585-86 (1952); *Midwest Video II*, 440 U.S. at 709. As demonstrated above, however, the Communications Act does not provide statutory authorization to require that a particular service be offered on a common carriage basis. On the contrary, the D.C. Circuit has previously held that the Act—and Title II in particular—does *not* "supply [the] clear warrant" needed to commit a taking. *See Bell Atlantic Tel. Cos. v. FCC*, 24 F.3d 1441, 1446 (D.C. Cir. 1994).[3]

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[2] Indeed, forcing common-carrier status on a provider that has not chosen to operate its business in that manner would grant the equivalent of a permanent easement on private broadband networks—a per se taking. *See Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 435 (1982).

[3] In addition, the exercise of such extraordinary power could be justified only to the extent that a carrier enjoys monopoly power, *see, e.g.*, *Munn v. Illinois*, 94 U.S. 113, 131-32 (1876); *see also Computer & Commc'ns Indus. Ass'n v. FCC*, 693 F.2d 198, 210 (D.C. Cir. 1982) (upholding Commission determination that "CPE is not a common carrier activity" because of "healthy competition in the CPE market by non-common carriers"). But there is no plausible basis for making a uniform finding of market power nationwide and for all broadband providers, as would be needed to justify uniform, nationally effective rules requiring that a particular broadband service be offered as common carriage. For example, Verizon's FiOS Internet service competes head-to-head against cable's next-generation broadband services essentially everywhere that FiOS is offered. There is likewise no possible basis for a nationwide finding of market power with respect to wireless broadband Internet access services, a sector in which multiple nationwide providers compete head-to-head, thereby expanding output and lowering prices.

Accordingly, the Commission could not apply Title II common carriage rules to broadband Internet access service unless that service is in fact being offered as a common-carrier telecommunications service. As explained below, it is not.

II. The Commission Cannot Lawfully Treat Broadband Internet Access As A Common-Carrier Telecommunications Service.

The Commission has now found—on four separate occasions—that broadband Internet access providers do *not* offer a common-carrier telecommunications service, and instead offer an integrated information service exempt from common-carrier regulation under Title II.[4] In order to reverse those multiple decisions now, the Commission would have to do one of two things: (1) conclude as a factual matter that all broadband services offered nationwide no longer constitute integrated information service offerings; or (2) change its interpretation of the statute. Neither path is likely to withstand challenge, especially because the Commission's reversal of decades of policy would be subject to heightened scrutiny.

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[4] *See Appropriate Regulatory Treatment for Broadband Access to the Internet over Wireless Networks*, Declaratory Ruling, 22 FCC Rcd 5901, 5911, ¶ 26 (2007) ("*Wireless Broadband Order*") ("we find that wireless broadband Internet access service is similarly an 'information service.' Like cable modem service, . . . wireless broadband Internet access service offers a single, integrated service to end users, Internet access . . . ."); *United Power Line Council's Petition for Declaratory Ruling Regarding the Classification of Broadband over Power Line Internet Access Service As an Information Service*, Memorandum and Opinion, 21 FCC Rcd 13281, 13286-87, ¶ 9 (2006) ("we find that BPL-enabled Internet access service is an information service because it offers a single, integrated service (*i.e.*, Internet access) to end users"); *Appropriate Framework for Broadband Access to the Internet over Wireline Facilities*, Report and Order and Notice of Proposed Rulemaking, 20 FCC Rcd 14853, 14863-64, ¶¶ 14-15 (2005) ("*Wireline Broadband Order*") ("The capabilities of wireline broadband Internet access service demonstrate that this service, like cable modem service, provides end users more than pure transmission"), *review denied by Time Warner Telecom, Inc. v. FCC*, 507 F.3d 205 (3d Cir. 2007); *Cable Modem Order*, 17 FCC Rcd at 4823 ¶ 39 ("Cable modem service is not itself and does not include an offering of telecommunications service to subscribers."); *see also Federal-State Joint Board on Universal Service, Report to Congress*, 13 FCC Rcd 11501 (1998) ("*Stevens Report*") ("We find that Internet access services are appropriately classed as information, rather than telecommunications, services. Internet access providers do not offer a pure transmission path.").

A. The Commission Cannot Reasonably Find, As A Factual Matter, That Broadband Internet Access Is A Telecommunications Service.

The Commission has repeatedly recognized that broadband is an information service—and thus *not* a telecommunications service—because, seen from the end user's perspective, "the telecommunications [aspect of broadband] is part and parcel of [the Internet access] service and is integral to its other capabilities." *Cable Broadband Order*, 17 FCC Rcd at 4823, ¶ 39. In other words, customers use this integrated service to access, store, process, and retrieve web content—not to transmit information transparently, as they would with a telecommunications service. *See id.* at 4824, ¶ 41; *Stevens Report*, 13 FCC Rcd at 11,540, ¶ 81. The Supreme Court upheld this classification in *Brand X*, agreeing that broadband Internet access service offers users the ability *inter alia* to retrieve, utilize, process and store information from web sites and content providers around the globe, as well as to make information available for retrieval and use by others. 545 U.S. at 975, 1000. As the Court recognized, broadband Internet access thus inherently falls squarely within the statute's definition of an information service because it offers the capability for "generating, acquiring, storing, transforming, processing, retrieving, [or] utilizing" information. 47 U.S.C. 153(20); *see Brand X*, 545 U.S. at 999-1000. Regulatory proponents were therefore "mistaken," the Court explained, to think that broadband providers offered a "'transparent' transmission" service: any high-speed transmission component was "functionally integrated" with Internet access service, meaning that it was used "only in connection with further processing of information" and was "necessary to provide [that] service." *Brand X*, 545 U.S. at 998.

As a factual matter, the Commission could not reach a different conclusion today. Broadband remains an integrated service offering for accessing, utilizing, storing, processing and retrieving information using the Internet via high-speed telecommunications. *See id.* at 987. Far

from being offered on a stand-alone basis, data transmission remains an inherently integrated part of the finished service offered to consumers. There still is no way to *use* the Internet and to access, utilize, retrieve or process the stored information available through web sites around the world "without also purchasing a *connection to* the Internet," *id.* at 992 (emphasis added).[5] Similarly, the connection itself would be of little use to consumers without the integrated capabilities to access, use, store, process and retrieve information.

Indeed, given developments in the nature of broadband services offered since the time of *Brand X*, the conclusion that broadband Internet access is an integrated offering is even more true today. The typical broadband Internet access services today use telecommunications to perform even more information service capabilities than they did when *Brand X* was decided. New parental controls, for example, allow customers to identify and filter inappropriate content. Multiple e-mail accounts allow customers to store, access, utilize and make available information. And on-line storage services are a common part of broadband Internet access offerings and allow customers both to store information they retrieve on-line and then to access, utilize, and further process that information. *All* of these information services are "functionally integrated" services that "transmit data only in connection with the further processing of information" and require the use of telecommunications. *Brand X*, 545 U.S. at 998. It would

[5] Some Title II proponents argue that, inasmuch as *Brand X* found the definitions of "telecommunications services" and "information services" to be ambiguous, that decision means that the Commission is free to reclassify broadband Internet access service under the Act. In fact, however, the *Brand X* Court held only that the Commission was not *required* to treat broadband as a telecommunications service, 545 U.S. at 989, and that the Commission acted reasonably in treating that service solely as an information service, *id.*, at 997. *Brand X* thus does not establish that the Commission could lawfully classify broadband Internet access service as a telecommunications service. Indeed, as noted above, the Court found it "mistaken" to conclude that such service was a "'transparent' transmission" service. *Id.* at 998.

therefore be an even bigger "mistake[]" today to conclude that broadband providers offer a 'transparent' transmission service, *id.*—they clearly do not.

Moreover, in order to make the requisite factual findings to adopt uniform, nationwide rules, the Commission would have to examine every broadband Internet access service offered by every provider and conclude that all providers offered stand-alone, pure transmission services. The Commission could not rationally make such a finding. Moreover, any such finding would merely encourage providers to change the nature of their offering in order to ensure that their service would not be classified as a telecommunications service. They could, for instance, even further integrate selected content and applications into their Internet access service. In other words, reclassification on this basis not only would leave the keys to classification in the hands of the service providers, but may well ultimately have the *opposite* effect than that desired by regulatory proponents.

To avoid that result, the Commission could be tempted to take the drastic step of compelling broadband providers to unbundle and sell separately the component parts of their services. That measure, however, would require the express statutory authorization that the Commission lacks, as explained above. Moreover, forced unbundling would be disastrous for consumers. Unbundling would create prohibitive complexities in delivering separate services; customers would have to pay for both types of services, which would raise consumer costs; and all of this would drive away consumers and providers from broadband service, thereby harming the Commission's goal of promoting broadband deployment. *See* 47 U.S.C. § 1302(a). That is why, in Europe, unbundling has contributed to slower access speeds, less deployment of fiber and LTE, and higher prices. *See, e.g.*, Christopher S. Yoo, U.S. vs. European Broadband

Deployment: What Do the Data Say? 11-12 (June 2014), https://www.law.upenn.edu/live/files/3352-us-vs-european-broadband-deployment.

B. The Commission Cannot Reasonably Change Its Interpretation Of The Communications Act In Order To Classify Broadband Internet Access As A Telecommunications Service.

Some have suggested that the Commission alternatively could also change its interpretation of the 1996 Act so that information services and telecommunications services are no longer mutually exclusive categories, thus allowing the agency to impose Title II common-carriage requirements on broadband based on the existence of a telecommunications component of that service. Specifically, this approach, which essentially adopts the dissenters' view in *Brand X*, would allow for a single information service to consist simultaneously of an "offer" of both an information service and a separate telecommunications service. *See* 545 U.S. at 1007-08 (Scalia, J., dissenting). Such "radical surgery," *Cable Broadband Order*, 17 FCC Rcd at 4825, ¶ 43, however, would be unlawful and have harmful consequences for the Internet ecosystem as a whole.

First, the *Brand X* majority explicitly rejected this approach because it would "conflict with [the] regulatory history" against which the 1996 Act was adopted and thereby work *sub silentio* an "abrupt shift in Commission policy." 545 U.S. at 994, 995 (majority). As the Court found, the Commission had a long-standing policy of not subjecting so-called "enhanced" services to common carrier regulation, but the approach urged by the respondents (and dissent) in that case suddenly would subject the transmission component of every information service to common carrier regulation, including when offered by entities the Commission had never classified as common carriers. *Id.* at 994-95; *see Cable Broadband Order*, 17 FCC Rcd at 4823-25, ¶¶ 41-43. Congress created two, non-overlapping definitions in order to insulate

information-service providers from Title II regulation. By permitting the Commission to regulate information services generally as common-carrier telecommunications services, however, this alternative approach would effectively collapse these two categories into one over-arching category of "telecommunications services." It would thereby nullify Congress' intent that the two distinct types of services be treated in two distinct regulatory ways. *See Brand X*, 545 U.S. at 995; *see also Jama v. Immigration & Customs Enforcement*, 543 U.S. 335, 357 (2005) (explaining that "when the legislature uses certain language in one part of the statute and different language in another, the court assumes different meanings were intended.") (quotation marks and citation omitted); *United States v. Monzel*, 641 F.3d 528, 533 (D.C. Cir. 2011) (same).

Second, and as a result, the alternative approach would produce absurd results not intended by Congress. As the *Brand X* Court warned, the practical consequence of this approach would be to "subject to mandatory common-carrier regulation" "all information-service providers that use telecommunications as an input to provide information service to the public." *Brand X*, 545 U.S. at 994; *see Stevens Report*, 13 FCC Rcd at 11,529, ¶ 57 ("[I]f . . . some information services were classed as telecommunications services, it would be difficult to devise a sustainable rationale under which all, or essentially all, information services did not fall into the telecommunications service category."). But that class of providers includes virtually *all* Internet-based services, from streaming video services to web search engines, e-Readers and GPS services, VoIP services, and over-the-top service providers.

C. The Commission Cannot Now Reverse Course On Its Previous Findings That Broadband Internet Access Service Is Not A Telecommunications Service.

In addition to lacking the ability to regulate broadband providers as Title II common carriers, as a matter of fact or law, the Commission could not clear the heightened scrutiny that

would apply to such a dramatic reversal of policy under *FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 515 (2009).

In *Fox*, the Supreme Court held that an agency must provide "a more detailed justification" when its "new policy rests upon factual findings that contradict those which underlay its prior policy; or when its prior policy has engendered serious reliance interests that must be taken into account." *Id.*; *see also Smiley v. Citibank (South Dakota), N.A.*, 517 U.S. 735, 742 (1996) (a change in the agency's legal interpretation "that does not take account of legitimate reliance on prior interpretation . . . may be arbitrary, capricious [or] an abuse of discretion") (alteration in original) (internal citations and quotation marks omitted). "It would be arbitrary and capricious to ignore such matters," the Court explained, because "a reasoned explanation is needed for disregarding facts and circumstances that underlay or were engendered by the prior policy." *Fox*, 556 U.S. at 515-16. The opinions of other Justices were in accord. *See id.* at 537 (Kennedy, J., concurring in part and concurring in judgment) (explaining that when an agency "based its prior policy on factual findings," then the agency's "decision to change course may be arbitrary and capricious if the agency ignores or countermands its earlier factual findings without reasoned explanation for doing so"); *id.* at 549, 551 (Breyer, J., dissenting) (reasoning that an agency must provide "a more complete explanation" when changing its position either on "particular factual findings . . . or . . . on its view of the governing law," because then "one would normally expect the agency to focus upon those earlier views of fact, or law, . . . and explain why they are no longer controlling").

Any attempt to reclassify broadband service would therefore trigger both of the red flags identified in *Fox*. A wholly new factual analysis would require the Commission to contradict its longstanding prior factual findings regarding the nature and features of broadband, as described

above. And an about-face on either the Commission's evaluation of the facts or its interpretation of the law would uproot the "serious reliance interests" of Internet players who have invested billions in broadband networks and developed services and long-range economic plans premised on light-touch regulation. *Id.* at 515 (majority).

Reliance interests are especially relevant here because the avowed and express purpose of the Commission's prior classification orders was to *induce* the billions in investment that have now occurred.[6] Although the Supreme Court suggested in *Fox* that an agency may receive more leeway for a policy change when its prior views on the question were equivocal, 556 U.S. at 518, for almost two decades, the Commission has done precisely the opposite when it comes to classifying broadband. The Commission has repeatedly and unequivocally interpreted the 1996 Act to exclude broadband from Title II. As a result, providers designed and invested in broadband networks without the expectation of common-carriage obligations. When the Commission has been so clear for so long, and induced so much reliance, Supreme Court

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[6] *See, e.g.*, *Wireless Broadband Order*, 22 FCC Rcd at 5911, ¶ 27 ("Through this classification [of wireless broadband Internet access service as an information service], we provide the regulatory certainty needed to help spur growth and deployment of these services. Particularly, the regulatory certainty we provide through his classification will encourage broadband deployment in rural and underserved areas[.]"); Statement of FCC Chairman Kevin J. Martin, Appropriate Regulatory Treatment for Broadband Access to the Internet Over Wireless Networks (March 22, 2007), *available at* http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-271695A2.pdf ("Today's classification . . . will further encourage investment and promote competition in the broadband market."); *Wireline Broadband Order*, 20 FCC Rcd at 14,901, ¶ 89 ("Our primary goal in this proceeding is to facilitate broadband deployment in the manner that best promotes wireline broadband investment and innovation, and maximizes the incentives of all providers to deploy broadband."); *Cable Broadband Order*, 17 FCC Rcd at 4,802, ¶ 5 ("broadband services should exist in a minimal regulatory environment that promotes investment and innovation in a competitive market"); William E. Kennard, Chairman of the FCC, Speech to Federal Communications Bar, Northern California Chapter (July 20, 1999) ("The fertile fields of innovation across the communications sector and around the country are blooming because from the get-go we have taken a deregulatory, competitive approach to our communications structure—especially the Internet.").

precedent does not allow the Commission to simply change its mind to suit a new policy preference.

III. The Commission Especially Cannot Lawfully Treat Wireless Broadband Internet Access As A Title II Service.

Wireless broadband Internet access is statutorily immune from Title II common-carriage regulation for a second and independent reason, regardless of whether it qualifies as an information service. *See Cellco*, 700 F.3d at 538. Congress limited common-carriage regulation of wireless to only providers of "commercial mobile services" (commonly known as CMRS). *See* 47 U.S.C. § 332(c)(1). The statute thus precludes treating a "private mobile service"—*i.e.*, "any mobile service . . . that is not a commercial mobile service or the functional equivalent [thereof]," *id.* § 332(d)(3)—"as a common carrier for any purpose under this [Act]." *Id.* § 332(c)(2). Because wireless broadband providers are private mobile service providers, they cannot be subject to Title II common carriage.

Under the plain terms of the statute, mobile broadband Internet access *cannot* be CMRS. CMRS is a mobile service that makes "available to the public" an "interconnected service"—*i.e.*, a service "that is interconnected with the public switched network." *Id.* § 332 (d)(1), (d)(2). Congress intended a specific network when it referenced *the* public switched network: as the Conference Report for this provision makes clear, the specific network referenced was the "public switched *telephone* network" ("PSTN"). H.R. Rep. 103-213, 103d Cong., 1st Sess. 496 (1993) ("Conference Report") (emphasis added). Indeed, the Commission had long equated the public switched network with "the traditional local exchange or interexchange switched network" for voice telephony. *Regulatory Treatment of Mobile Services*, Second Report and Order, 9 FCC Rcd 1411, 1436-37, ¶ 59 (1994) (collecting sources). In adopting the Commission's term of art, therefore, Congress presumably "intended it to have its established

meaning." *McDermott Int'l, Inc. v. Wilander*, 498 U.S. 337, 342 (1991). The bill introducing this amendment thus was entitled "The Local Exchange Infrastructure Modernization Act" and, according to its House sponsor, was "designed to ensure the broad availability of an advanced *telephone* network." 139 Cong. Rec. 617 (Mar. 11, 1993) (Rep. Boucher) (emphasis added).

Mobile broadband Internet access, however, by definition provides a dedicated connection to the Internet, not to the public switched telephone network. *See Wireless Broadband Order*, 22 FCC Rcd at 5917, ¶ 45 & n.118. Nor does it matter that *other* services or applications—such as VoIP—that may ride over the top of a mobile broadband connection may, separately, interconnect with the public switched network after first traversing the Internet. *Id.* at 5901, ¶ 45. Even though such over-the-top applications may themselves be considered interconnected with the PSTN, those applications are fundamentally distinct from broadband Internet access and would not convert the distinct broadband service into an interconnected service.

Some have advocated that, in order to regulate wireless broadband providers as common carriers, the Commission could simply revisit regulations to amend the CMRS definition. *See, e.g.*, Rep. Henry A. Waxman, Letter to Chairman Wheeler (Oct. 3, 2014), *available at* http://democrats.energycommerce.house.gov/sites/default/files/documents/Wheeler-FCC-Net-Neutrality-2014-10-3.pdf. The Commission does not have that power, and in any event the *NPRM* in the current proceedings did not provide any notice that the Commission might change its regulations or the interpretation thereof.[7] Although the agency is statutorily authorized to define the "public switched network" (*see* 47 U.S.C. § 332(d)(2)), or "the functional equivalent

[7] *Protecting and Promoting the Open Internet*, Notice of Proposed Rulemaking, 29 FCC Rcd 5561 (2014) ("*NPRM*")

of" a CMRS (*id.* § 332(d)(3)), those definitions cannot contravene the statute's clear text and Congressional intent. Accordingly, no matter how the Commission may redefine the "public switched network," any new definition still would need to be anchored to public switched phone networks, which is what Section 332 was designed to address. And, as the Conference Report indicates, no matter how the Commission defines the "functional equivalent" of a CMRS service, at a minimum that definition still would need to involve interconnection to the public switched network. *See* Conference Report, 496.

Any attempt to squeeze mobile broadband Internet access into the definition of CMRS also would lead to absurd results. In order for the Commission to do so, the service would have to interconnect with the public switched network. But mobile broadband Internet access by definition interconnects with the Internet, which means the Internet itself would have to be deemed to be part of the public switched network, thereby opening the door to significant future regulation of the Internet itself. Because mobile broadband does not interconnect to the public switched telephone network, it cannot be classified as a CMRS or its equivalent—even through the back-door of any attempted reinterpretation of the Commission's regulations.

IV. None Of The Proposed Variations On Title II Reclassification Avoids These Legal Problems.

Although a few "hybrid" and other variations on the theme of Title II have emerged, none resolves the above-described legal problems with reclassification itself. Whether under Congressman Waxman's proposals to rely on Section 706 while using Title II as a "back-stop" or to apply Title II and then forbear, or under Mozilla and Tim Wu's proposal to conjure up and then reclassify a distinct service purportedly offered to edge providers, the Commission in each case would, at a minimum, need to treat broadband as a telecommunications service provided on a common-carriage basis. Each of those basic prerequisites to applying Title II, however, would

be unlawful for the reasons we have given. Moreover, each of those proposals introduces new legal problems that make it unlikely that Title II reclassification could survive appellate review, regardless of how reclassification is packaged.

Congressman Waxman's so-called springing-Title II approach would be independently unlawful because a service cannot be both a lightly regulated information service and, at the same time, a common-carriage telecommunications service. Under Waxman's approach, the Commission would issue two decisions simultaneously: one treating broadband as an information service under Title I, and the other reclassifying broadband as a telecommunications service under Title II. *See NPRM*, 29 FCC Rcd at 5614, ¶ 150 (describing proposal from Representative Waxman). If a court struck down the first order, the Title II order would "spring" into place as a "'backstop authority.'" *Id.* In order to make sufficient factual findings to undergird the reclassification order, however, the Commission would need to find that broadband Internet access service is a Title II service *today*. It could not, after all, predict in any rational fashion what broadband would look like when—or if—Title II "springs" into effect. And once the Commission made that finding, broadband Internet access service would be subject to the full panoply of regulations under Title II. This is no compromise or middle ground at all.

Congressman Waxman's more recent "hybrid" proposal is to combine Title II classification with forbearance from *all* of the substantive provisions of Title II.[8] In other words, reclassification would be for sole purpose of avoiding the statute's prohibition on applying common carriage to information services. While creative, this approach ultimately fares no better. The Supreme Court has made clear that any rules that the Commission adopts must be "ground[ed] . . . in the statute," rather than on "reasoning divorced from the statutory text." *Util.*

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[8] *See* Rep. Waxman Oct. 3, 2014 Letter to Chairman Wheeler at 8-14.

Air Reg. Grp. v. EPA, 134 S. Ct. 2427, 2441 (2014) (quotation and citations omitted). Title II simply imposes specific, statutorily defined requirements on common carriers, as explained above. If the Commission forbears from those requirements, Title II provides no *additional* authority for the Commission to issue "common-carriage" regulations of its own design.

In addition to being unlawful, relying on Title II as a so-called "backstop" or in combination with forbearance would create perverse incentives leading to extended uncertainty and regulatory paralysis. Once the Commission finds that broadband is a Title II service, or attempts to forbear extensively from the substantive provisions of Title II, regulatory proponents would challenge the Commission's decision not to immediately apply or to forbear from the most onerous provisions of Title II, including ultimately rate regulation. Title II proponents have made no bones about this: they view reclassification as a means to rate regulation, for example, by regulating the ability of broadband Internet access service providers to employ usage sensitive pricing or to offer "sponsored data" plans that allow a content provider voluntarily to pay for the consumers' usage associated with its traffic.[9] Broadband providers, meanwhile, would have no choice but to cross-appeal or independently challenge the Title II reclassification itself. Far from providing closure to the net neutrality debate, then, Title II—under *either* proposal—would only prolong the debate, setting off shockwaves of regulatory uncertainty that could paralyze the Internet ecosystem for years to come.

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[9] *See, e.g.*, Comments of Public Knowledge, Benton Foundation and Access Sonoma Broadband, *Protecting and Promoting the Open Internet*, GN Docket No. 14-28, 10-127 & 09-191; WC Docket No. 07-52, at 102-04 (July 15, 2014) ("*Open Internet Remand*"); Free Press *Open Internet Remand* Reply Comments (Sept. 15, 2014) at 39-44.

Mozilla/Tim Wu's proposal to impose Title II regulations on a newly divined service offered to edge providers[10] is equally problematic, for two reasons. *First*, that proposal argues that the Commission should characterize the single integrated broadband service that broadband Internet access providers offer today as two separate services, one service for purposes of end-user subscribers and a separate service for edge providers. But that argument confuses the distinction between services being sold in the context of a two-sided market and the existence of two separate services.

As Mozilla acknowledges, there is no "technologically distinct" "service that includes the delivery of traffic, upstream and downstream, to a remote edge provider." *See* Mozilla *Open Internet Remand* Comments at 10. On the contrary, in a two-sided arrangement such as a sponsored data plan, the service that an edge provider is offered access to is the same, integrated information service offered to end users, including capabilities for the edge provider's customer to access, interact with, and even store its content online. The fact that the payment for that service may be split in some fashion between the edge provider and the end user does not magically convert the integrated information service into two separate offerings, one of which is pure transmission. The D.C. Circuit's decision in *Verizon* does not suggest otherwise; even as it discussed the two-sided nature of broadband Internet access services, the court never suggested there was anything other than a single integrated information service at issue. *See Verizon*, 740

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[10] *See* Mozilla, *Petition to Recognize Remote Delivery Services in Terminating Access Networks and Classify Such Services as Telecommunications Services under Title II of the Communications Act*, GN Docket Nos. 14-28, 10-127 & 09-191, at 4-5, 9 (May 5, 2014); Letter from Tim Wu and Tejas Narechania, Columbia University to Marlene H. Dortch, Federal Communications Commission, *Open Internet Remand*, GN Docket No. 14-28 (Apr. 14, 2014).

F.3d at 653-55 (rejecting argument that broadband providers were common carriers of "a service [for] edge providers").

Second, even if the Commission concluded that broadband Internet access providers offered a distinct service to edge providers, such services still would not be subject to common-carrier treatment. In the case of mobile services, any service offered to edge providers would be a private mobile service as explained above, and the Commission would be statutorily foreclosed from applying common carrier requirements under Title II. And regardless of whether the broadband Internet access service is mobile or fixed, the entire point of offering additional, optional commercial arrangements such as two-sided pricing arrangements to edge providers is to be able to enter into individually negotiated arrangements that meet the edge providers' needs. *See, e.g.*, Verizon *Open Internet Remand* Comments at 29-33. But such "individualized decisions, in particular cases, whether and on what terms to deal," are the hallmark of private carrier status. *NARUC I*, 525 F.2d at 641. And under long-standing precedent and the express terms of the statute, these private carrier arrangements are not common carriage and are not subject to Title II. *See* 47 U.S.C. § 153(51); *Verizon*, 740 F.3d at 653-54; *see also Cellco*, 700 F.3d at 538; *NARUC I*, 525 F.2d at 641.

Indeed, as with other Title II proposals, the Mozilla/Wu proposal would have bizarre consequences. Not least among them, it would *mandate* that edge providers pay a fee to broadband providers. Under the terms of the statute, in order to qualify as a telecommunications service subject to common-carrier regulation under Title II, a service must be offered "for a fee." 47 U.S.C. § 153(46). Accordingly, in order to reclassify the service provided to edge providers as a telecommunications service subject to Title II, edge providers would be required to pay a fee to access that service. It is no answer to say that any "benefit" broadband providers receive from

their own customers for accessing edge providers' content might somehow substitute for that statutorily mandated "fee." *Contra* Mozilla *Open Internet Remand* Comments at 12. If Congress had meant the word "benefit," the statute would say "benefit." *See Conn. Nat'l Bank v. Germain*, 503 U.S. 249, 253-54 (1992) ("courts must presume that a legislature says in a statute what it means and means in a statute what it says there."). But the statute says "fee," and, as reference to a dictionary makes clear, the plain meaning of "fee" is a charge for a specific service. *See, e.g.*, *Merriam-Webster's Collegiate Dictionary* 426 (10th ed. 1996) ("a sum paid or charged for a service"); *Merriam-Webster's Dictionary of Law* 190 (1996) (same). Mandating such fees, moreover, would inevitably lead to the extension of burdensome legacy regulations, such as rate regulations, to address disputes about the appropriate level of those fees, with all the attendant harms that the Commission has recognized.

CONCLUSION

In short, no matter how Title II reclassification is packaged, such action could not withstand judicial review.