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

Re: Notice of Ex-Parte Communication in GN Docket No. 10-127, *In the Matter of Framework for Broadband Internet Service*, and GN Docket 14-28, *In the Matter of Protecting and Promoting the Open Internet*.

Dear Ms. Dortch:

Since Chairman Wheeler announced that he intends to circulate a draft order to reclassify broadband Internet access service there have been an increasing flurry of ex-parte letters urging the Commission to forbear from applying all, or almost all, of the statutory provisions of Title II and the Commission's regulations to the reclassified service. This *ex parte* letter is submitted in opposition to such forbearance.

Full Service Network is a reseller that offers a complete range of services to consumers in the Commonwealth of Pennsylvania, including interexchange "long distance" service, toll free calling services, calling card plans, and local telephone exchange service. TruConnect is one of the Nation's largest competitive local exchange carriers focused on residential and small business customers in 12 states, offering local, long distance and Internet access service. Both companies use the market opening provisions Congress adopted in the Telecommunications Act of 1996 to provide their services. They also support reclassification of broadband Internet access service as a "telecommunications service" under the Communications Act.

Broadband Internet access service is the 21st Century version of public switched telephone service, providing business and residential customers with the local on-ramps to the "information superhighway" now commonly known as "the Internet." Congress was eagerly awaiting the arrival of broadband Internet access service in the early and mid-1990's when the Telecommunications Act of 1996 was being debated. The market opening provisions Congress adopted in that Act, including in particular resale, were intended to allow consumers to choose which provider would connect them to the Internet. However, the Commission has failed to comply with its own rules on forbearance. Further, the record does not support forbearance from the provisions Congress adopted in 1996 to open local markets to competition so that consumers can choose who will provide them access to the Internet.

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Executive Summary

This *ex parte* letter makes six points regarding reclassification and forbearance.

First, the three paragraphs of open ended questions in the *Notice of Proposed Rulemaking*¹ regarding forbearance do not meet the Commission's own requirements at 47 C.F.R. §1.54 for forbearance petitions. As a public servant the Commission is bound by the rule of law to follow its own regulations.² The *NPRM* attempts to rely on the "significant" and "considerable" comments received on forbearance from the *2010 Notice of Inquiry*,³ but provides no discussion or analysis of those comments that would indicate to the public what evidence the Commission believes those comments provided. Under the Commission's approach in the *NPRM* the public will only get to intelligently comment on the Commission's *prima facie* case and supporting analysis by challenging the final rule in court. That is not what Congress intended under the notice and comment requirements of the Administrative Procedure Act.

Second, broadband Internet access service as defined by the Commission at 47 C.F.R. § 8.11(a) is simply an alternative way of saying what Congress defined in 1996 as a "telecommunications service" under the Communications Act.⁴ Nothing in the Commission's definition of broadband Internet access service supports classification as an "information service" and the Commission should reclassify broadband Internet access service as a "telecommunications service."⁵

Third, broadband Internet access service, as a telecommunications service, is also a "telephone exchange service" under the plain language of the Act. Congress amended the definition of "telephone exchange service" in 1996 to include "a comparable service... that allows subscribers to originate or terminate a telecommunications service."⁶ This is precisely what broadband Internet access service does. Further, *any* provider of "telephone exchange service" is a "local exchange carrier" under the Act.⁷ Broadband Internet access service is the "local on-ramp" to

¹ *In the Matter of Protecting and Promoting the Open Internet*, GN Docket 14-28, Notice of Proposed Ruling (rel. May 15, 2014) (*NPRM*).

² *See Service v. Dulles*, 354 U.S. 363, 372 (1957) ("regulations validly prescribed by a government administrator are binding upon him as well as the citizen, and that this principle holds even when the administrative action under review is discretionary in nature.").

³ *In the Matter of Framework for Broadband Internet Service*, GN 10-127, Notice of Inquiry (rel. Jun. 17, 2010) (*2010 Notice of Inquiry*).

⁴ The Communications Act of 1934, as amended, 47 U.S.C. §§ 151 *et seq.* ("the Act").

⁵ *See* 47 U.S.C. §§ 153(24) and 153(53), respectively.

⁶ 47 U.S.C. § 153(54)(B).

⁷ 47 U.S.C. §153(32).

the “information superhighway” that Congress, the Executive Branch and the public were discussing extensively in the early to mid-1990s.⁸ Congress mandated a common carrier approach for these on-ramps in 1996 and included specific provisions in the Act, including prohibiting restrictions on resale and mandating access to unbundled network elements and interconnection, in order to open the local exchange market to competition.⁹

Fourth, because the broadband Internet access service is a local exchange service under the Act, Congress has directed that the geographic market for purposes of the forbearance analysis under section 10 of the Act¹⁰ is local, not national. The statutory construction of section 10 also makes clear that the Commission must find that *all three criteria for forbearance are met for each geographic market and specific regulation or provision of the Act* in the context of how Congress defined those provisions. As a result the Commission will need to conduct a local market-by-market analysis to support any forbearance and must specifically consider how resale, unbundled network elements, and other pro-competitive provisions are necessary to ensure rates are just and reasonable, protect consumers and innovation, and are in the public interest.

Fifth, the record does not support forbearance from numerous provisions of the Act that Congress expressly added in 1996 to promote competition in the local exchange market. These include sections 214(e), 218, 222 and 251 through 255.¹¹ Congress directed in section 251(b)(1) that all local exchange carriers, including new entrants, must permit resale of their service and

⁸ See, e.g. *Hearings on the National Communications Infrastructure*, U.S. House of Representatives Committee on Energy & Commerce (1993), TELECOM-LH 21A, 1993 WL 13147079 (A.&P.L.H.); *Hearings on S. 1086, the Telecommunications Infrastructure Act of 1993*, U.S. Senate Committee on Commerce, Science, and Transportation (1993), TELECOM-LH 19, 1993 WL 13147078 (A.&P.L.H.); *Hearings on the National Communications Infrastructure (Part 2) and (Part 3)*, U.S. House of Representatives Committee on Energy & Commerce (1994), TELECOM-LH 21B, 1994 WL 16186240 (A.&P.L.H.) and TELECOM-LH 21C, 1994 WL 16186241 (A.&P.L.H.); *Hearings on S. 1822, the Communications Act of 1994*, U.S. Senate Committee on Commerce, Science, and Transportation (1994), TELECOM-LH 18, 1994 WL 16186238 (A.&P.L.H.); *Hearing on Telecommunications Policy Reform*, U.S. Senate Committee on Commerce, Science, and Transportation (1995), TELECOM-LH 14, 1995 WL 17207517 (A.&P.L.H.) and TELECOM-LH 15, 1995 WL 17207518 (A.&P.L.H.); and *Hearings on Communications Law Reform*, U.S. House of Representatives Committee on Commerce (1995), TELECOM-LH 16, 1995 WL 17207519 (A.&P.L.H.).

⁹ See Telecommunications Act of 1996, Pub. L. 104-104, 110 Stat. 56 (“the 1996 Act”), which added numerous new sections to the Act. Among those were the definition of “telecommunications carrier” that states “a telecommunications carrier shall be treated as a common carrier...” 47 U.S.C. § 153(53). The 1996 Act also added Parts II and III to Title II of the Act specifically to open local exchange markets to competition. See 47 U.S.C. §§ 251 – 276.

¹⁰ 47 U.S.C. § 160.

¹¹ 47 U.S.C. §§ 214(e), 218, 222, and 251 – 255, respectively.

the Commission must apply this requirement to broadband Internet access service. In addition, there is no support in the record for denying consumers and competitors access to the courts and the award of attorney's fees and damages as provided in sections 206, 207, 406 and 407.¹²

Sixth, the Commission may not, as suggested in the *NPRM* and *2010 Notice of Inquiry*, grant forbearance from all or substantially all of Title II in order to preserve the Commission's "light touch" policy goal on a nationwide basis. The record evidence in front of the Commission demonstrates that the "light touch" policy¹³ has failed to achieve the broadband deployment, local competition, and protection of consumers that Congress intended when it adopted the 1996 Act. The Commission must now make available to competitors for broadband Internet access service all three methods of entry — resale, access to unbundled network elements, and interconnection of alternative facilities — that Congress provided in the Act to protect consumers and promote competition in the local exchange market.¹⁴ The record from 1996 to 2002 shows that doing so will promote broadband deployment by incumbents and allow competition to bring broadband Internet access service — the 21st Century "information superhighway" — to all Americans at affordable prices.

¹² 47 U.S.C. §§ 206, 207, 406, and 407, respectively.

¹³ See *2010 Notice of Inquiry*, Statement of Chairman Genokowski, 25 F.C.C.R. 7866 at 7914 ("In particular, I said the Commission would consider all appropriate legal theories that would continue the same light-touch approach to broadband access policy that the agency has pursued for the past decade.").

¹⁴ See *Implementation of the Local Competition Provisions of the Telecommunications Act of 1996*, CC Docket 96-98, Report and Order and Order on Remand and Further Notice of Proposed Rulemaking (rel. Aug. 21, 2003) (*Triennial Review Order*) at ¶ 1 ("Seven years ago, Congress enacted the Telecommunications Act of 1996 (1996 Act) for the benefit of the American consumer. This watershed legislation was partially designed to remove the decades old system of legal monopoly in the local exchange and open that market to competition. The 1996 Act did so by establishing broad interconnection, resale, and network access requirements, *designed to facilitate multiple modes of entry* into the market by intermodal and *intramodal* service providers.") (emphasis added, internal footnote omitted).

Argument

1. The NPRM Does Not Meet the Commission's Own Rules on Forbearance

Neither the *Notice of Proposed Rulemaking*¹⁵ nor the supplemental *ex parte* presentations recently filed in the above listed dockets meet the requirements of the Commission's regulations or the Commission's stated reasons for adopting those regulations.¹⁶ There is no reason the Commission should be held to a lesser standard for forbearance on its own motion than the standard to which it holds those who petition for forbearance under the same provision of law.¹⁷ Further, the Supreme Court has long held that "regulations validly prescribed by a government administrator are binding upon him as well as the citizen, and [] this principle holds even when the administrative action under review is discretionary in nature."¹⁸

The Commission stated in the order adopting the forbearance petition regulations that "*complete petitions permit interested parties to file complete and thorough comments on a fully articulated proposal. By contrast less than complete petitions present interested parties with a moving target, which frustrates their efforts to respond fully and early in the process. Keeping up with petitioner's unfolding arguments and evidence also unreasonably burdens the resources of stakeholders. This burden is especially onerous for smaller companies, which may be affected severely by grants of forbearance to large companies.*"¹⁹ As small companies that would be "affected severely" by a grant of forbearance to the few large incumbent telephone and cable companies that control the ubiquitous facilities necessary to provide broadband Internet access service to American consumers, we strongly agree.

¹⁵ *In the Matter of Protecting and Promoting the Open Internet*, GN Docket 14-28, Notice of Proposed Ruling (rel. May 15, 2014) (*NPRM*).

¹⁶ 47 CFR § 1.54 (2013) and *In the Matter of Petition to Establish Procedural Requirements to Govern Proceedings for Forbearance Under Section 10 of the Communications Act of 1934, As Amended*, WC Docket 07-267, Report and Order (rel. June 29, 2009) (*Forbearance Order*).

¹⁷ The Commission agrees. *Forbearance Order* at ¶ 20 ("The burden of proof is on the proponent in both formal rulemaking and formal adjudication."). See also *Id.*, at note 75 ("where the statute is silent, the 'ordinary default rule' applies: 'that plaintiff bears the risk of failing to prove their claims.' *Schaeffer v. Weast*, 546 U.S. 49, 56 (2005)").

¹⁸ *Service v. Dulles*, 354 U.S. 363, 372 (1957) (restating the rule from *United States ex rel. Accardi v. Shaughnessy*, 347 U.S. 260 (1954)). See also, *Wilkinson v. Legal Services Corp.*, 27 F.Supp.2d 32, 61 (D.D.C. 1998) ("Therefore, the Due Process Clause requires that agency officials follow their own rules, even those promulgated gratuitously.").

¹⁹ *Forbearance Order* at ¶ 12 (emphasis added).

The Commission's regulations at 47 C.F.R. § 1.54 state in subsection (a) that petitions for forbearance "must identify the requested relief, including:

- (1) Each statutory provision, rule, or requirement for which forbearance is sought.
- (2) Each carrier, or group of carriers, for which forbearance is sought.
- (3) Each service for which forbearance is sought.
- (4) Each geographic location, zone, or area for which forbearance is sought.
- (5) Any other factor, condition, or limitation relevant to determining the scope of the requested relief."

The regulations continue in 47 C.F.R. § 1.54(b) to require that the petition "must contain facts and arguments which, if true and persuasive, are sufficient to meet each of the statutory criteria" and "must specify how each of the statutory criteria is met with regard to each statutory provision or rule, or requirement from which forbearance is sought." Further, if the petitioner intends to rely on data from third parties, the petitioner must identify "the nature of the data or information" and "the relationship of the data or information to facts and arguments presented in the petition."

47 C.F.R. § 154(c) requires the petitioner to identify "any proceeding pending before the Commission" in which the petitioner has taken a position on the relief sought or state that they have taken none. 47 C.F.R. § 1.54(d) requires that the data submitted supporting the petition be "in a searchable format" and that a spreadsheet "containing a significant amount of data must be capable of being manipulated to allow meaningful analysis."

Most importantly, 47 C.F.R. § 1.54(e) states that petitions for forbearance shall include "a full statement of the petitioner's *prima facie* case for relief" and "*all supporting data upon which the petitioner intends to rely, including a market analysis...*" (emphasis added). The Commission does not provide the required supporting data or market analysis in the *NPRM* nor anything that could even be said to constitute such data or market analysis.

In fact, the *NPRM* contains none of the required information, and neither does the *2010 Notice of Inquiry*²⁰ on which the *NPRM* attempts to rely. How could either notice when the Commission has not yet identified to the public the boundaries of the "telecommunications service" the Commission proposes not to apply Title II requirements to?

In particular, will all or just part of "broadband Internet access service" be reclassified as a "telecommunications service?" If a part, what part? How will it be identified? Will only facilities based providers of broadband Internet access service be subject to a requirement to provide the "transmission component" of their broadband Internet access service as a

²⁰ *In the Matter of Framework for Broadband Internet Service*, GN 10-127, Notice of Inquiry (rel. Jun. 17, 2010) (*2010 Notice of Inquiry*).

“telecommunications service” available to other entities seeking to provide broadband Internet access service?²¹ Or will any offering of broadband Internet access service be found to be a “telecommunications service” under the Act?²² The answers to these questions are necessary before anyone — including the Commission — can even begin to meet the section 10 requirements to identify the service for which relief is sought, the carriers for which relief is sought, and the markets for which relief is sought, much less develop facts, arguments and analysis sufficient to support such relief.²³

The Commission’s request for comment on possible forbearance is unquestionably “a moving target” that “unreasonably burdens the resources of stakeholders”²⁴ like the small companies represented in this *ex parte*. The Commission’s “unfolding arguments” in the *NPRM* are not

²¹ See *In the Matters of Appropriate Framework for Broadband Internet Access to the Internet over Wireline Facilities*, CC Docket 02-33 (rel. Sep. 23, 2005), 20 FCCR 14853 at 14898, ¶ 92 (“our longstanding *Computer Inquiry* regulations... have required wireline carriers to provide wholesale transmission for Internet access, whether broadband or narrowband, since the genesis of the Internet.”). This was the *Computer II* “all carrier rule” the Commission successfully applied in the 16 years leading up to the 1996 Act. See *In Re Second Computer Inquiry*, 77 F.C.C.2d 384 (1980) (*Computer II*) at ¶ 231 (“Thus those carriers that own common carrier transmission facilities and provide enhanced services, but are not subject to the separate subsidiary requirement, must acquire transmission capacity pursuant to the same prices, terms, and conditions reflected in their tariffs when their own facilities are utilized. Other offerors of enhanced services would likewise be able to use such a carrier’s facilities under the same terms and conditions.”). Under this rule a common carrier could offer enhanced services on an unregulated basis if, and only if, they bought the basic transmission service at tariff from themselves or another common carrier. Congress effectively adopted this rule in the 1996 Act with the statement that “a telecommunications carrier shall be treated as a common carrier under this Act only to the extent it is engaged in providing telecommunications services.” Congress only prohibited the common carrier treatment of information services provided by a *regulated* telecommunications carrier. The Act is silent with respect to the treatment of information services provided by entities that are not “telecommunications carriers.”

²² See *NPRM* at ¶¶ 149 - 152 for a glimpse of the breadth of the unanswered questions and the absolute lack of even tentative conclusions in the *NPRM* regarding the possible answers to those questions. The Commission noted that it received “substantial comments” on this issue in the *2010 Notice of Inquiry* but provides no summary of the comments nor discussion or insight into what the Commission learned from them. *NPRM* at ¶ 149.

²³ As noted *supra*, the Commission’s order adopting the forbearance rules makes it clear that the “petitioner bears the burden of proof” because that “has historically been the case in American jurisprudence.” *Forbearance Order* at ¶ 20. The statute does not suggest or establish any different burden for the Commission vis-à-vis the public. See 47 U.S.C. 160(a) and (c) and *Forbearance Order* at note 75.

²⁴ *Id.* at ¶ 12.

“complete” as required in the Commission’s rules. In fact, the bulk of the *NPRM* is devoted to a discussion of the Commission’s authority to implement rules on broadband Internet access service under section 706 of the Telecommunications Act,²⁵ with only three out of 176 paragraphs devoted to forbearance, yet now sweeping forbearance is being considered for the final rule.²⁶

Even if the Commission were to argue that it should be granted greater latitude than the public the Commission’s *prima facie* case as set forth in the three paragraphs of questions in the *NPRM* would be subject to summary denial under 47 C.F.R. 1.56(a) if the *NPRM* was treated the same as a petition for forbearance. This is particularly true when one considers that, in the longest of the three paragraphs of the *NPRM* devoted to forbearance,²⁷ the extent of the Commission’s discussion is to say that in 2010

“the Commission contemplated that, if it were to classify the Internet connectivity component of broadband Internet access service, it would forbear from applying all but a handful of provisions — sections 201, 202, 208 and 254 — to the service. In addition, the Commission identified sections 222 and 255 as provisions that could be excluded from forbearance... We received considerable comment in that proceeding...”²⁸

The *2010 Notice of Inquiry* actually did contain some discussion of what the Commission *might* use as facts, arguments and analysis in support of forbearance.²⁹ However, by providing no

²⁵ 47 U.S.C. § 1302.

²⁶ As Full Service Network demonstrated in its earlier comments in GN Docket 14-28, section 706 of the Telecommunications Act, 47 U.S.C. § 1302, does not grant independent regulatory authority to the Commission. *See* Comments of Full Service Network, GN Docket 14-28 (Mar. 21, 2014). *See also*, Reply Comments of Earl Comstock, GN Dockets 10-127 and 14-28 (Sep. 15, 2014). As the Supreme Court noted in *McLean Trucking Co. v. U.S.*, 321 U.S. 67 (1944), a delegation by Congress to enforce one law — in this case the Communications Act — “does not necessarily include either the duty or authority to execute numerous other laws.” *Id.* at 79 – 80.

²⁷ *See NPRM* at ¶¶ 153 – 155.

²⁸ *Id.*, at ¶ 154. The Commission references “the Internet connectivity component” twice in the *NPRM*; once in note 302, where they provide the definition as “the functions that ‘enable [end users] to transmit data communications to and from the rest of the Internet’” and again in ¶ 154 as quoted. The definition provides no illumination of the Commission’s thinking on the matter. Further, the Commission never discusses how “the Internet connectivity component” discussed in the *2010 Notice of Inquiry* relates to the regulatory definition of “broadband Internet access service” used in the *NPRM*. *See NPRM* at ¶ 55 (“We tentatively conclude we should retain this definition [as set forth in 47 CFR 8.11(a)] without modification.”)(bracketed text added) and ¶ 149, note 302.

²⁹ *2010 Notice of Inquiry* at ¶¶ 66 – 92.

discussion or analysis in the *NPRM* of the “considerable comment” from its proceeding four years ago, the public is left entirely in the dark about what “evidence and analysis” presented in 2010 was sufficient “to withstand the evidence and analysis propounded by those opposing... forbearance.”³⁰ For example, the *2010 Notice of Inquiry* actually identified additional provisions — notably sections 214(a) and (d), 218, 224, and 257(c) of the Act — that are not even mentioned in the *NPRM*.³¹ Is the public to divine from the silence in the *NPRM* four years later that the Commission was persuaded by the “considerable comment” that it must forbear from these sections?

In essence the Commission is asking the public to shadowbox with itself. Under the Commission’s approach in the *NPRM* the public will only get to intelligently comment on the Commission’s *prima facie* case and supporting analysis by challenging the final rule in court.³²

That is precisely what Congress sought to prevent by requiring agencies to follow the notice and comment requirements of the Administrative Procedure Act. Nowhere in the *NPRM* does the Commission give notice to the public what *the Commission* believes constitutes the “telecommunications service” in broadband Internet access service nor what facts and arguments *the Commission* believes support forbearance from specific provisions of the Act for that service as provided in specific markets. As the U.S. Court of Appeals for the Second Circuit put it recently in a case involving the Commission:

“[G]eneral notice that a new standard will be adopted affords the parties scant opportunity for comment.” *Horsehead Res. Dev. Co. v. Browner*, 16 F.3d 1246, 1268 (D.C.Cir.1994). Thus, an agency’s APA “obligation is more demanding.” *Id.* It must “describe the range of alternatives being considered with reasonable specificity.” *Prometheus Radio Project v. FCC*, 652 F.3d 431, 450 (3d Cir.2011) (internal quotation marks omitted). “Otherwise, interested parties will not know what to comment on, and notice will not lead to better-informed agency decision-making.” *Id.* (internal quotation marks omitted). Indeed, “unfairness results unless persons are sufficiently alerted to likely alternatives so that they know whether their interests are at stake.” *National Black*

³⁰ *Forbearance Order* at ¶ 21 (footnote omitted).

³¹ 47 U.S.C. §§ 214(a), 218, 224, and 257(c), respectively. Compare *2010 Notice of Inquiry* at ¶¶ 87 – 90 with *NPRM* at ¶¶ 153 – 155.

³² See *Agape Church, Inc. v. F.C.C.*, 738 F.3d 397, 411 (D.C. Cir. 2013)(“When an agency promulgates a rule pursuant to congressionally delegated authority, it must provide the public with adequate notice of the proposed rule followed by an opportunity to comment on the rule’s content. 5 U.S.C. § 553(b)(3) ”); *Time Warner Cable Inc. v. F.C.C.*, 729 F.3d 137, 170 (2d Cir. 2013)(noting that an agency’s final rule must be a logical outgrowth of the issues described in the notice of proposed rulemaking); see also *Neighborhood Assistance Corp. of Am. v. Consumer Fin. Prot. Bureau*, 907 F. Supp. 2d 112, 124-25 (D.D.C. 2012).

Media Coal. V. FCC, 791 F.2d at 1023 (alteration and internal quotation marks omitted).³³

2. Broadband Internet Access Service, as Defined by the Commission, Describes a Common Carrier “Telecommunications Service” as Defined by Congress in 1996

The Commission’s definition of “broadband Internet access service” is simply an alternative way of describing what Congress defined as a “telecommunications service.”³⁴ Further, the Commission’s definition of the term “mass market” as “a service marketed and sold on a standardized basis to residential customers, small businesses and other end-user customers...”³⁵ is an alternative formulation of the classic common carrier definition as someone “who undertakes to carry for all people indifferently”³⁶ that Congress adopted in 1996 as “offers to the public, or to such classes of users as to be effectively available to the public...”³⁷

Nothing in the Commission’s definition of broadband Internet access service as “the capability to transmit data to and receive data from all or substantially all Internet end points”³⁸ even remotely suggests an offering that meets the statutory definition of “information service.”³⁹

Even assuming *arguendo*, that some element of broadband Internet access service, for example the necessary use of the Domain Name System (DNS) to translate a consumer’s description of the point with which they wish to communicate into a format understandable to the network over which the communication will travel, can arguably be said to be “offering” information

³³ *Time Warner Cable Inc. v. F.C.C.*, 729 F.3d 137, 170 (2d Cir. 2013). *Accord Forbearance Order* at ¶ 14 (“we find that the benefit to both commenters and the Commission of clarity and precision outweighs the burden on petitioner of explaining how forbearance from each regulation or statutory provision meets each prong.”).

³⁴ Compare 47 C.F.R. § 8.11(a) (definition of “broadband Internet access service”) with 47 U.S.C. §§ 153(50) (definition of “telecommunications”) and 153(53) (definition of “telecommunications service”).

³⁵ *NPRM* at ¶ 54.

³⁶ *National Association of Regulated Utility Commissioners v. FCC*, 525 F.2d 630, 641 (1976).

³⁷ 47 U.S.C. § 153(53) (definition of “telecommunications service”).

³⁸ *NPRM* at ¶ 54 and 47 C.F.R. § 8.11(a).

³⁹ 47 U.S.C. § 153(24) (“The term ‘information service’ means the offering of a capability for generating, acquiring, storing, transforming, processing, retrieving, utilizing, or making available information... but does not include any use of any such capability for the management, control, or operation of a telecommunications system or the management of a telecommunications service.”).

processing, Congress has spoken directly to the question by exempting from the definition of “information service” any information processing used for the management or provision of a telecommunications service.⁴⁰ The Commission’s own discussion of “internet connectivity” service in the *2010 Notice of Inquiry* clearly illustrates that DNS and other functions are necessary to enable transmissions over the Internet and are not being offered as an information processing capability to consumers.⁴¹

3. Broadband Internet Access Service is a “Telephone Exchange Service” and Broadband Internet Access Service Providers are “Local Exchange Carriers”

A critical aspect of reclassification that is nowhere discussed in the *NPRM*, but has clear statutory import on any forbearance decision, is the extent to which broadband Internet access service, as a telecommunications service, is also a “telephone exchange service” under the plain language of the statute.⁴²

In 1996 Congress amended the definition of “telephone exchange service” by adding a new subparagraph (B) to include any service comparable to the local telephone network “by which a subscriber can originate and terminate a telecommunications service.”⁴³ The local telephone network at the time was used not only for local voice calling, but also for local data transport and to connect to long distance voice and data networks.⁴⁴ Broadband Internet access service

⁴⁰ *Id.*

⁴¹ *2010 Notice of Inquiry* at ¶ 16 (“The Commission identified a portion of the cable modem service it called ‘Internet connectivity,’ which it described as establishing a physical connection to the Internet and interconnecting with the Internet backbone, and sometimes including protocol conversion, Internet Protocol (IP) address number assignment, domain name resolution through a domain name system (DNS), network security, caching, network monitoring, capacity engineering and management, fault management, and troubleshooting... The Commission distinguished these functions from ‘Internet applications [also] provided through cable modem services’...”).

⁴² 47 U.S.C. § 153(54).

⁴³ *Id.*

⁴⁴ See *Statement of James Q. Crowe*, TELECOM-LH 19, 1993 WL 13147078 (A.&P.L.H.), 30 (“MFS recently introduced several new service offerings specially tailored to meet the unique telecommunications needs of small and medium sized businesses and the increasingly complex high speed computer networking needs of both large and small business users. Many of these services and customer applications were not offered by the local exchange carriers prior to their introduction by MFS. Specifically, MFS’ subsidiary, MFS Intelenet, provides advanced telecommunications services to small and medium sized businesses as a single source for comprehensive telecommunications services, making available to smaller users quality and pricing levels that are comparable to those available to larger communications users. MFS Intelenet began providing this comprehensive telephone service in New

provides exactly the same transport functionality as the local phone network did in 1996; it connects end users to other end users on the same physical network in the local community and also to other local and long distance networks serving end users on other local networks.

The legislative history of the 1996 Act is clear that Congress expected that cable networks would be used to provide local voice and data services in competition with the existing phone companies,⁴⁵ and that cable and phone companies would compete on a level playing field in those services.⁴⁶ That could hardly have occurred if “telephone exchange service” was limited to then existing circuit-switched local telephone networks.

Because broadband Internet access service is a “telephone exchange service” then a provider of broadband Internet access service is a “local exchange carrier” under the plain language of the Act as well. A “local exchange carrier” is “any person engaged in the provision of telephone exchange service....”⁴⁷ No action by the Commission is required for a broadband Internet access service provider to be classified as such; Congress made clear in the statute that the only persons

York City earlier this month.”). *See also, Statement of Gary McBee, TELECOM-LH 19, 1993 WL 13147078 (A.&P.L.H.), 79* (“Second, Congress would enhance consumer choice in voice, switched video and high speed data services by freeing local exchange carriers to compete in the offering of enhanced services, such as S. 1086 would do for cable.”).

⁴⁵ *See Conference Report to Accompany S. 652, H. Rep. 104-458 (1996), at 148* (“The House has specifically considered how to describe the facilities-based competitor in new subsection 271(c)(1)(A). While the definition of facilities-based competition has evolved through the legislative process in the House, the Commerce Committee Report (House Report 104–204 Part I) that accompanied H.R. 1555 pointed out that meaningful facilities-based competition is possible, given that cable services are available to more than 95 percent of United States homes. Some of the initial forays of cable companies into the field of local telephony therefore hold the promise of providing the sort of local residential competition that has consistently been contemplated. For example, large, well established companies such as Time Warner and Jones Intercable are actively pursuing plans to offer local telephone service in significant markets. Similarly, Cablevision has recently entered into an interconnection agreement with New York Telephone with the goal of offering telephony on Long Island to its 650,000 cable subscribers.”).

⁴⁶ *See Testimony of Secretary of Commerce Ron Brown, Hearings on S. 1822, U.S. Senate Committee on Commerce, Science, and Transportation (1995)* (“At the same time, we must create a level playing field by achieving genuine regulatory symmetry. That is our second point. Regulation must be based on the services that are offered and the ability to compete—and not simply on the labels derived from past forms of governmental action. Thus, as telephone and cable companies begin to provide the same services, it is important that the open-access tradition of telephony be extended generally to all parts of the network that will be providing digital services.”) *TELECOM-LH 18, 1994 WL 16186238 (A.&P.L.H.) at 18.*

⁴⁷ 47 U.S.C. § 153(32).

providing telephone exchange service who are not automatically included by the definition are providers of commercial mobile service.⁴⁸

4. Because Broadband Internet Access Service is a Local Exchange Service Under the Act, the Geographic Market for Purposes of Section 10 is Local, Not National

The Commission stated that its decisions classifying broadband Internet access service as an “information service” “did not rely on any particular, defined geographic area” and that the *2005 Wireline Broadband Order* “granted forbearance on a nationwide basis.”⁴⁹ The Commission then asked if “the same approach would be warranted here, with the effect that forbearance would be granted or denied on a nationwide basis.”⁵⁰ This paragraph is the only discussion of the applicable market, and the *NPRM* provides no further comment or analysis. Given the specific requirement in the Commission’s own rules that a petitioner must include a market analysis,⁵¹ it is hard to see how the Commission can even suggest this one paragraph suffices.

More to the point, Congress has already spoken directly to the issue. Forbearance from applying Title II is “denied on a nationwide basis”⁵² by Congress until the Commission finds, after notice and public comment, that each of the statutory criteria of section 10 have been met with respect to each regulation or provision of the Act for which relief is provided. The statutory language of section 10 confirms that the Commission must conduct the analysis for each provision by the fact

⁴⁸ *Id.* (“Such term does not include a person insofar as such person is engaged in the provision of commercial mobile service...”).

⁴⁹ *2010 Notice of Inquiry* at ¶ 73.

⁵⁰ *Id.*

⁵¹ 47 C.F.R. § 1.54(e). See *Qwest Corp. v. FCC*, 689 F. 3d. 1214 at 1226 (10th Cir. 2012)(“the Commission has determined through a notice and comment proceeding that the burden of proof — encompassing the burdens of both production and persuasion — is on the petitioner.”). See also *Fed. Energy Regulatory Comm’n v. Triton Oil & Gas Corp.*, 750 F.2d 113, 116 (D.C. Cir. 1984) (“The Commission may not abuse its discretion by arbitrarily choosing to disregard its own established rules and procedures in a single, specific case. Agencies must implement their rules and regulations in a consistent, evenhanded manner.”).

⁵² *2010 Notice of Inquiry* at ¶ 73. The Commission also suggested that “[t]he forbearance analysis here has a different posture... it would be assessing whether to forbear from provisions of the Act that, because of our information service classification, do not apply at the time of the analysis.” *Id.* at ¶ 70 (underline added, italics in original). As the underlined section indicates, it was the Commission’s classification decision that exempted broadband Internet access service – incorrectly – from the requirements that Congress said should apply to the provision of “telecommunications service.” Once the Commission declares that broadband Internet access service is a “telecommunications service” Congress has spoken to the precise question at issue, so the forbearance analysis must be based on the plain language of the Act.

that it expressly allows the Commission to forbear for “a class of telecommunications carriers or telecommunications services” in section 10(a) but then requires the Commission to find that “enforcement of such regulation or provision” is not necessary in sections 10(a)(1) and 10(a)(2) and “forbearance from applying such provision or regulation” would be in the public interest in section 10(a)(3).⁵³

Congress also directed that the Commission determine forbearance on a “geographic market” basis. 47 U.S.C. § 160(a). Further, Congress directed that the Commission evaluate the effect of forbearance on competition. 47 U.S.C. § 160(b). In determining a provision’s effect on competition, and whether or not it is “necessary”⁵⁴ to ensure rates are just, reasonable and non-discriminatory or to otherwise protect consumers, the Commission must evaluate that provision *as defined by Congress and in the context in which Congress included that provision* to promote competition or protect consumers.⁵⁵ In the context of the local on-ramp to the Internet that incumbent phone and cable company broadband Internet access service provides to consumers, each provision needs to be evaluated and met on a local market-by-market basis because the requirements of section 10(a) are independent tests — all three must be satisfied for each rule or provision for forbearance to be granted.⁵⁶

For example, section 251(a) applies to all telecommunications carriers.⁵⁷ A telecommunications carrier is “any provider of telecommunications services,”⁵⁸ so the geographic market could in fact be nationwide, as it could be in the case of nationwide offerings of interstate interexchange services. However, section 251(b) applies only to “local exchange carriers” which means that the geographic market, as the name implies and the definition in the Act confirms, is *local* and not national.⁵⁹ Further, section 251(c) applies specifically to “incumbent local exchange

⁵³ 47 U.S.C. § 160(a).

⁵⁴ 47 U.S.C. § 160(a)(1) & (2).

⁵⁵ See e.g., Benjamin M. Zegarelli, *Terminating Beyond the Limits: CMS Is Overreaching in Its Attempt to Regulate ACOS According to Antitrust Standards*, 34 CARDOZO L. REV. 781, 784 (2012) (“When a federal agency steps this far outside the boundaries defined by Congress, federal courts have a responsibility to rein in the overreaching agency.”); see also *Id.* at 797 (“to establish the limits of the [Agency’s] power...we must scrutinize Congress’s intended meaning of these terms and the context in which Congress used them by employing the ‘traditional tools of statutory construction.’”).

⁵⁶ See *Cellular Telecomms. & Internet Ass’n v. FCC*, 330 F.3d 502, 509 (D.C. Cir. 2003) (“The three prongs of § 10(a) are conjunctive. The Commission could properly deny a petition for forbearance if it finds that any one of the three prongs is unsatisfied.”).

⁵⁷ 47 U.S.C. § 251(a).

⁵⁸ 47 U.S.C. § 153(44).

⁵⁹ 47 U.S.C. § 251(b). The Act defines “local exchange carrier” as “any person engaged in the provision of telephone exchange service or exchange access.” 47 U.S.C. § 153(32). “Telephone exchange service”

carriers,” which Congress defined to mean specifically “with respect to an area, the local exchange carrier that [] on February 8, 1996 provided telephone exchange service in such area....”⁶⁰ In order to forbear from applying section 251(c) with respect to any incumbent local exchange carrier, the Commission must evaluate the competitive effect of such forbearance on the specific geographic market for which such carrier was designated *by Congress* as the incumbent.⁶¹

5. The Record Does Not Support Forbearance From the Local Competition and Court Access Provisions of Title II

A primary purpose of the 1996 Act was to open local phone and cable markets to competition. Congress was well aware of the fact that digital technology was leading to convergence, so that phone and cable operators would both be able to offer the “triple play” of voice, video and data service over a single network.⁶² They wanted the same rules to apply to similar services, and in the end selected the common carrier model as the preferred regulatory platform. This choice — by a Republican Congress working with a Democratic President — is evident from the decision

is defined as “(A) service within a telephone exchange, or within a connected system of telephone exchanges within the same exchange area, and which is covered by the exchange service charge, or (B) comparable service... by which a subscriber can originate or terminate a telecommunications service.” 47 U.S.C. 153(54). “Exchange access” is defined as “offering access to telephone exchange services or facilities for the purpose of the origination or termination of telephone toll service.” 47 U.S.C. § 153(20). “Telephone toll service” is “service between stations in different exchange areas...” 47 U.S.C. § 153(55). The focus of both telephone exchange service and exchange access is the ability of users to originate and terminate communications, *i.e.*, local exchange service provides the consumer “on-ramp” to the larger network.

⁶⁰ 47 U.S.C. §§ 251(c) (Additional obligations of incumbent local exchange carriers) and 251(h)(1)(A) (definition of incumbent local exchange carrier).

⁶¹ The definition of “effective competition” included by Congress for rate relief for cable operators is instructive in this regard. The definition requires competition “in the franchise area” in order to be considered sufficient to meet the Congressional threshold. 47 U.S.C. 543(l)(1). So too is the exception Congress provided in section 253(f), 47 U.S.C. § 253(f), permitting States to require telecommunications carriers seeking to provide telephone exchange service in an area served by a rural telephone company to be designated as an eligible telecommunications carrier required to serve the entire area.

⁶² See *In the Matter of Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, 11 F.C.C. Rcd. 15499, ¶ 3 (1996) (“Three principal goals established by the telephony provisions of the 1996 Act are: (1) opening the local exchange and exchange access markets to competitive entry; (2) promoting increased competition in telecommunications markets that are already open to competition, including the long distance services market; and (3) reforming our system of universal service so that universal service is preserved and advanced as the local exchange and exchange access markets move from monopoly to competition.”).

to *expand* Title II⁶³ and to *add* Part V to Title VI⁶⁴ to exempt *common carrier* video transmission⁶⁵ and provide lighter regulatory burdens for “local exchange carriers” who used a non-discriminatory open video system to offer video programming to subscribers.⁶⁶

Further, Congress expressly provided that a “telecommunications carrier *shall* be treated as a common carrier...” 47 U.S.C. 153(51) (emphasis added). Congress could not have been much clearer in expressing its approval of common carrier regulation as the default approach for “telecommunications services.”

Section 251 of the Act is the first section in Part II of Title II, and Congress wasted no time in getting to the point. Section 251(a) states that *all* providers of telecommunications service are required to interconnect their networks directly or indirectly with other providers of telecommunications service, and are prohibited from “installing network features, functions or capabilities” that inhibit interoperability or access by persons with disabilities.⁶⁷ Given that a focus of the NPRM is preventing broadband Internet access service providers from prioritizing traffic or degrading interconnection it is difficult to see how the Commission could conclude that section 251(a), which speaks directly to these issues, should be a candidate for forbearance.⁶⁸ Likewise, it is hard to see how the Commission could conclude that a requirement to comply with rules providing access to consumers with disabilities is “not necessary to protect”⁶⁹ those very consumers.

With respect to local exchange service, sections 251(b) and 251(c) set out specific requirements that Congress, after years of hearings and debate on the issue,⁷⁰ decided were necessary to open local markets to competition. Section 251(b)⁷¹ applies to *all* local exchange carriers regardless of market power or history in the market. Under section 251(b)(1) incumbent companies and new entrants alike are prohibited from imposing unreasonable or discriminatory conditions or

⁶³ See Pub. L. 104-104, 110 Stat. 56 (1996), at 61 – 79 (adding Part II of Title II) and 86 – 107 (adding Part III of Title II), which are codified at 47 U.S.C. §§ 251 – 276.

⁶⁴ *Id.*, at 118 – 124 (adding Part V of Title VI), which is codified at 47 U.S.C. §§ 571 – 573.

⁶⁵ 47 U.S.C. § 571(a)(2) (exempting “transmission of video programming on a common carrier basis” from cable franchising and other requirements of Title VI).

⁶⁶ 47 U.S.C. § 573.

⁶⁷ 47 U.S.C. § 251(a).

⁶⁸ See NPRM at ¶¶ 89 and 109.

⁶⁹ 47 U.S.C. § 160(a)(2).

⁷⁰ See *supra*, note 8.

⁷¹ 47 U.S.C. § 251(b).

limitations on the resale of their telecommunications services. Congress imposed this condition on all local exchange carriers precisely because resale had been so effective at lowering prices and improving service quality for consumers in the long distance market.⁷² In addition, Congress required all local exchange carriers to allow number portability and to enter into reciprocal compensation arrangements to facilitate consumers' ability to switch providers and minimize the ability of local carriers — all of whom are terminating monopolies for the customers they serve — to impose discriminatory charges on connecting telecommunications carriers seeking to reach their consumers.⁷³

In section 251(c) Congress demonstrated a clear understanding that it is cost prohibitive for competitors to duplicate all or even part of a local network, especially in the face of incumbent companies who were allowed to build their ubiquitous networks in a monopoly environment.⁷⁴ As a result, Congress adopted defined unbundling and resale requirements, backed up by State commission arbitration and specific statutory pricing rules in section 252,⁷⁵ that are designed to open local markets to competitors so that consumers would get the benefits of lower prices, different services, and faster innovation that competition brings. *And Congress expressly provided that section 251(c) could not be forborn from until it had been "fully implemented."*⁷⁶

⁷² See H. Rep. 104-204 Part I (1995) at pp. 209 – 210 (“The FCC adopted its resale policy in the early 1970s in order to lessen the Commission’s regulatory burdens. The Commission determined that if an underlying carrier priced or discriminated in favor of a particular customer, then others can request the same deal from the underlying carrier. The adoption of this policy lessened substantially the FCC’s oversight of carrier tariff offerings under sections 201 and 202 of the Communications Act. Over AT&T’s objections at the time, the courts strongly affirmed the FCC’s resale policy and attached great weight to the Commission’s interpretation that the policy was deregulatory.”). See also “Information Superhighway: Issues Affecting Development”, GAO (Sep. 1994) at pp. 19 – 23. (Discussing the impact of the AT&T Consent decree on long distance competition and Congress’ desire to see similar competition developed in local telecommunications markets).

⁷³ 47 U.S.C. §§ 251(b)(2) & (b)(5) (number portability and reciprocal compensation, respectively). See *op cit.* at p. 24, note 7 (“This lack of reciprocal pricing could be an obstacle to competitors.”) and p. 43 (“Number portability, which would allow consumers to switch telecommunications carriers without changing their telephone numbers, is a second aspect of interoperability that will be important to the success of the superhighway.”).

⁷⁴ See “Competition Policy and the Telecommunications Revolution,” Speech by Anne Bingaman, Assistant Attorney General, Department of Justice (1994), 1994 WL 16484994, at *5 (“cable television and local telephone service are the most obvious markets in which more competition is necessary. Both are currently monopolized by existing providers, requiring government regulation to protect consumers from excessive rates.”).

⁷⁵ See 47 U.S.C. § 252(d).

⁷⁶ 47 U.S.C. 160(d) (emphasis added).

Further, Congress included the prescient authority, in section 251(h),⁷⁷ for the Commission to designate a new entity as the incumbent local exchange carrier subject to section 251(c)'s requirements if that entity occupies a dominant position in the telephone exchange market. In the case of broadband Internet access service, which is the 21st century telephone exchange service, that entity in many locations may be the incumbent cable operator, especially in places where the incumbent telephone company has not upgraded their facilities to fiber to the node or fiber to the home.⁷⁸

In section 252⁷⁹ Congress expressly delegated to State commissions the responsibility and authority to oversee and approve agreements between incumbent local exchange carriers and other telecommunications carriers seeking to interconnect or compete with such carriers through unbundled access or resale. This delegation specifically included authority to arbitrate disputes, set prices according to a statutory formula, and the obligation to reject agreements that discriminate against third parties or are not in the public interest.⁸⁰ It is important to note that Congress reserved this power to the State commissions; the Commission is only allowed to act under section 252 if a State commission abdicates its role in a particular proceeding. Then, and only then, the FCC is directed to exercise the statutory obligations of section 252 as if it was a State commission.⁸¹ Further, Congress reserved to the courts, and not the Commission, the authority to review State commission decisions.⁸² Congress gave State commissions the primary role because it determined over the course of its deliberations on the 1996 Act that State commissions, rather than the FCC, were in the best position to protect consumers and promote local competition in each of their States.⁸³

To underline its goal of ensuring local competition, and to address situations where State or local governments may be encouraged by incumbents to take action to thwart local competition,

⁷⁷ 47 U.S.C. § 251(h).

⁷⁸ See "Cablevision to Offer Wi-Fi Phone Service in New York Area," *Wall Street Journal* (Jan. 26, 2015), p. B4 (Cablevision chief operating officer Kristin Dolan said in an interview "over time Cablevision has become the dominant landline phone provider in its service area.").

⁷⁹ 47 U.S.C. § 252.

⁸⁰ 47 U.S.C. §§ 252(b) & (c) (compulsory arbitration), (d) (pricing standards) and (e) (approval by state commissions).

⁸¹ 47 U.S.C. § 252(e)(5).

⁸² 47 U.S.C. § 252(e)(6).

⁸³ 141 Cong. Rec. (Aug. 4, 1995) at H8466 (Statement of Mr. Goodlatte) ("I believe that the FCC and the State commissions will make sure that competition rolls out quickly and fairly and that local rate payers will not have to foot the bill.").

Congress added section 253 to the Act.⁸⁴ Section 253 prohibits State or local statutes or regulations that have the effect of prohibiting the ability of any entity to provide interstate or intrastate telecommunications service, while preserving State authority to enforce competitively neutral requirements to protect consumers and ensure the continue quality of telecommunications services. The Commission is directed, after notice and opportunity for public comment, to preempt any State or local law that is inconsistent with section 253, but only to the extent necessary to correct the inconsistency.⁸⁵ It is this authority the Commission would presumably use to implement the President’s recent call to preempt State laws that prohibit municipalities from building broadband Internet access networks.

Section 254 was another foundational section of law added by the 1996 Act. Universal service is a linchpin of the Nation’s economic success; just as universal access to telephone networks was crucial to economic growth in the 20th Century, universal access to broadband Internet access service — the new information superhighway — in rural and high cost areas of the Nation, as well as economically disadvantaged citizens living in urban areas, is essential for those consumers to participate successfully in the 21st Century economy.⁸⁶ Congress carefully crafted the universal service obligations in sections 214(e) and 254 to work hand in glove with the provisions in sections 251 through 253 to open local markets to competition.⁸⁷ Congress commanded that all telecommunications services should contribute to supporting universal service, and that an “evolving level” of telecommunications service should be supported using universal service funds to ensure universal access and relative parity between rural and urban areas in terms of the price paid by consumers.⁸⁸ One of the major benefits of reclassification of broadband Internet access is that the Commission will now be able to legally support broadband Internet access service using section 254.

⁸⁴ 47 U.S.C. § 253.

⁸⁵ 47 U.S.C. § 253(d).

⁸⁶ This was a topic of extensive government discussion leading up to the 1996 Act. *See, e.g.* “Making Government Work: Electronic Delivery of Federal Services”, Office of Technology Assessment (Sep. 1993) at p. 15 (“Electronic delivery of Federal services should take advantage of new transmission technologies as they become available... Universal, interoperable service is the hallmark of the public telephone system today, and will need to remain so in the future if electronic government service delivery is to remain accessible and affordable. These same standards would presumably be applied to any other vendors that become a de facto part of the public switched network, such as cable, satellite, mobile, or computer communications carriers.”)

⁸⁷ 47 U.S.C. §§ 214(e), 254, and 251 – 253, respectively.

⁸⁸ 47 U.S.C. § 254(c). Because Congress had clearly had before it the option of including “information service” in the definition of universal service when it adopted section 254 there is no ambiguity in the statute upon which a court should defer to the Commission; Congress explicitly chose to limit universal service to “telecommunications services” because telecommunications services provide “access to” information services. *See also* 47 U.S.C. 257(a) (“or to provide access to information services”).

In addition to sections 251 through 254 described above, the Commission has never explained, either in the *2010 Notice of Inquiry* or the *NPRM*, what public policy is served by forbearing from sections 206, 207, 406 and 407 of the Act.⁸⁹ These provisions provide access to the courts for injured parties, and are a means to enforce rights Congress provided in the Act. No competitor or consumer lightly undertakes a court proceeding due to the costs involved, especially against a incumbent phone or cable company with vastly greater resources. Should they chose to do so, however, section 206 affords the option for the court to award attorneys fees as well as damages, which provides an important remedy that allows consumers and new entrants to be made whole if they are forced to go to court to protect their rights.

Likewise, section 207 permits parties to seek damages through the Commission or the courts, but not both; absent preservation of this section how would the Commission award damages to parties actually injured should they file a complaint with the Commission? Section 406 is also an important section for consumers and competitors because it allows them to ask a court to *compel* compliance with obligations imposed by the Act. Section 407 allows parties to seek enforcement of an award of money damages through the courts, with payment of reasonable attorneys fees if the plaintiff prevails. It is hard to see what public interest is served, or how these provisions are not necessary for the protection of consumers, when they simply allow access and recovery through the courts of rights the Congress provided.

In the same vein, the Commission has not made the case for forbearance from section 222, which Congress specifically added to protect consumer privacy and to protect competition. Section 222 specifically prohibits a telecommunications carrier that is providing services to another carrier from using the information gained in that transaction.⁹⁰ This is essential if the Commission is serious about promoting competition and giving consumers a choice of who provides them Internet access service.

Finally, the Commission should apply its Part 68 rules⁹¹ to equipment used to provide broadband Internet access service. It was these rules, combined with the *Computer II* unbundling rules⁹² and the ability to demand service upon reasonable request and without unreasonable restrictions on resale under section 201,⁹³ that allowed innovators to create the Internet without having to ask permission of the local and long distance network operators to which they were attaching their packet-based, Internet protocol devices beginning in the mid-1970s.

⁸⁹ 47 U.S.C. §§ 206, 207, 406 and 407, respectively.

⁹⁰ 47 U.S.C. 222(b).

⁹¹ 47 C.F.R. Part 68 (2013).

⁹² *In Re Second Computer Inquiry*, 77 F.C.C.2d 384 (1980) at ¶ 231.

⁹³ 47 U.S.C. § 201.

6. The Commission's "Light Touch" Regime Has Failed to Promote Broadband Deployment, Increase Competition or Protect Consumers

The Commission seems to assume, without supporting analysis, that it would be justified in forbearing from all or most of the provisions of Title II in order to continue its stated policy goal of a "light touch" regulatory regime for broadband Internet access service.⁹⁴ That assumption is not justified in light of the many facts in front of the Commission in various proceedings that demonstrate the failure of that "light touch" policy. The Commission needs to compare the results of its new policy to the results of the *Computer II*, resale competition and MFJ policies that preceded it. It was those Federal policies, along with pioneering State commission efforts to promote local competition, which Congress used as the basis for the 1996 Act. The "light touch" policy was created out of whole cloth by the Commission based on a *reversal* of its prior *Computer II* policy and *refusal* to apply to incumbent broadband transmission service the very policies Congress enacted to promote competition in them.⁹⁵

The *Computer II* mandate that *all* facilities based providers offer wholesale transmission service, along with the section 201 right to purchase transmission service upon reasonable request, combined with Part 68 of the Commission's rules, ensured that anyone with an idea could create a new network providing new functions to consumers by purchasing bandwidth and attaching devices to the network *without the permission or knowledge* of the transmission facility owner. This is precisely how "the Internet" was able to be started over the existing telephone network and grow to become the successful transmission network it is today. Most importantly, under this pro-competitive regime the right to purchase the underlying transmission capacity and resell that capacity as part of your own service to consumers ensured that competing service providers could "own the customer" — meaning that *consumers had a competitive choice of who would stand between them and all of the "information services" they wanted to reach using the public switched network.*

⁹⁴ 2010 Notice of Inquiry at ¶ 22 ("The Commission's classification decisions in the *Cable Modem Declaratory Ruling* and later follow-on orders were intended to support the policy goal of encouraging widespread deployment of broadband. The Commission's hypothesis was that classifying all of broadband Internet service as an information service, outside the scope of any specific regulatory duty in the Act, would help achieve Congress's aims."). See also, *supra* note 13 (for reference to "light touch").

⁹⁵ See *In the Matter of Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*, CC Docket 01-338, Report and Order and Order on Remand and Further Notice of Proposed Rulemaking (rel. Aug. 21, 2003), at ¶¶ 3 – 4 ("Although we recognize that Congress intended to create a competitive landscape through resale, interconnection and facilities based provision, and a combination of these modes of entry, in practice we have come to recognize more clearly the difficulties and limitations inherent in competition based on the shared use of infrastructure through network unbundling... We eliminate most unbundling requirements for broadband...).

Congress was also very involved in funding the research and development of new transmission and switching technologies, with the goal of gigabit networks by 1996.⁹⁶ For more than four years in 1992 through 1995 Congress debated and discussed all this success by the FCC and courts, as well as the efforts by State commissions to open local networks through experiments with Rochester Telephone, Southern New England Telephone (SNET), Ameritech and others. The White House under President Clinton and Vice President Gore made the National Information Infrastructure, colloquially known as the “information superhighway,” a cornerstone of its efforts to maintain American leadership in the 21st Century. A key element of the “information superhighway” discussion was how digital convergence would enable incumbent telephone and cable networks to be upgraded with fiber so that each would be able to carry voice, video and data over a single “broadband” pipe.⁹⁷ The concern was that the “local on-ramps” to the information superhighway would be controlled by the incumbent phone and cable companies — each of whom built their ubiquitous local network under a monopoly franchise — and that was the reason Congress enacted technology neutral rules to open the local exchange market to competition.⁹⁸

During the six years that the Commission actually applied those rules to local telephone networks — or “wireline” networks as the Commission chose to refer to them — the data before

⁹⁶ See 15 U.S.C. 5512 (Codifying the National Research and Education Network (NREN), mandated by Congress in the High Performance Computing Act of 1991, which “shall, to the extent technically feasible, be capable of transmitting data at one gigabit per second or greater by 1996.” Further, “the Network shall provide for linkage of research institutions and educational institutions, government and industry in every State.” 15 U.S.C. 5512(a). The remaining provisions of section 5512 outline a prescient description of today’s Internet.).

⁹⁷ See, e.g. *Statement of the Honorable Jack Fields*, U.S. Senate Committee on Commerce, Science, and Transportation, Hearing on Telecommunications Reform Legislation, Jan. 9, 1995, TELECOM-LH 13, 1995 WL 17207516 (A.&P.L.H.) at 2 (“As you know, Mr. Chairman, the telecommunications industry is at a critical stage in its development. We are all familiar with the term convergence and what it means to this industry. From a technical perspective, it obviously means that a blurring of traditional lines separating different elements of the industry is rapidly occurring. From the legislative perspective, it implies the incredible responsibility of creating some ground rules to govern how this convergence takes place. These rules are essential to ensure fairness to all industry participants and to ensure a result that provides consumers with new telecommunications equipment and services at reasonable prices.”).

⁹⁸ See e.g. *Statement of the Honorable Zoe Lofgren*, U.S. House of Representatives Committee on the Judiciary, Hearing on Telecommunications, May 9, 1995, TELECOM-LH 17, 1995 WL 17207520 (A.&P.L.H.) at 148 (“As Congress regulates the expansion of the various telecommunications businesses into each other’s markets, our biggest concern should be affordable, universal service for all Americans for the new and existing services. It is critical that as we supervise the construction of the “Information Superhighway,” that the highway has on-ramps into urban and rural America. If we do not do this, the gulf between the haves and the have-nots in our country will only become wider than it already is.”).

the Commission shows that there was greater investment and competition than there is today.⁹⁹ Competitors used the section 251 rules and State supervised arbitrations under section 252 to offer *residential* consumers broadband Internet access service and IP voice services over the same line using DSL — a technology the RBOCs had been using since the mid-80s to serve *business* customers at a tremendous cost savings to the RBOC without passing those savings on to the business customers or offering the service to residential consumers. The competitors did pass those savings on to consumers, and the RBOCs were forced to offer lower rates to business consumers and, eventually, to offer DSL to residential consumers.¹⁰⁰ In the meantime, cable companies used the section 251 rules and State arbitrations under section 252 to interconnect their co-axial cable networks with the incumbent telephone networks and began offering broadband Internet access service to business and residential consumers — gaining an extra revenue stream to pay for the cable network — but without lowering cable rates to consumers.¹⁰¹

Compare the successful creation of the Internet, hundreds of long distance competitors, hundreds of independent Internet service providers, and dozens of local exchange competitors offering

⁹⁹ See *ex parte* letter from Matthew Brill on behalf of the National Cable and Telecommunications Association (Dec. 23, 2014) at note 5 (citing USTelecom, “Broadband Investment,” *available at* <http://www.ustelecom.org/broadband-industry/broadband-industry-stats/investment>). The “Historical Broadband Provider Capex” link on that page takes you to a chart that shows quite clearly that investment in broadband peaked in 2000 and 2001, right when the full implementation of the 1996 Act rules was in effect. A similar pattern is found under the “Historical Wireline Provider Capex” link on the same page, though that page shows even more starkly how the Commission’s policy has failed to incent investment.

¹⁰⁰ A striking example of the extent of the savings that could be provided through competition was given in testimony by William Ray, the superintendent of the Glasgow, Kentucky Electric Plant Board, who stated “We are also doing a 2-megabit-per-second data network on that highway throughout the community. The price we are able to charge for it is rather shocking to the phone company. It is 2 megabits per second. We sell it for \$19.95 a month. The phone company classically, for T-1, which is a little slower than that, may charge \$1,000 or \$1,200 a month.” *Hearings on S. 1086*, U.S. Senate Committee on Commerce, Science, and Transportation (1993), TELECOM-LH 19, 1993 WL 13147078 (A.&P.L.H.) at 245. It is a sad comment that 21 years later consumers are paying considerably *more* than \$19.95 a month for Internet access and the Commission until just last week still defined “broadband” as 4 mbps down / 1 mbps up.

¹⁰¹ The Commission’s most recent report to Congress on cable pricing found that “The price of expanded basic service has increased at a compound average annual growth rate of 6.1 percent during the period 1995-2012. The CPI increased at a compound average annual growth rate of 2.4 percent over the same period.” *In the Matter of Implementation of Section 3 of the Cable Television Consumer Protection and Competition Act of 1992*, MM Docket 92-266, Report on Cable Industry Prices (rel. Jun. 7, 2013) at ¶ 2. When consumer prices increase at more than twice the rate of inflation over nearly 20 years it seems difficult to conclude that competition is constraining prices. Further, the report shows that the average monthly price consumers pay for expanded basic service is \$62 per month compared to \$22 a month in 1995. *Id.*, Attachment 7.

lower prices, better service, and innovative offerings in 2000 to the situation that has resulted since the Commission refused to apply Title II to “broadband” services. The Commission has now found three times that “advanced telecommunications capability” is not being deployed in a reasonable and timely fashion to all Americans.¹⁰² Congress also enacted legislation in 2008 to demand the Commission do more to promote broadband deployment.¹⁰³

Even according to USTelecom, the incumbent phone company trade organization, the amount of investment in wireline facilities from 1996 to 2001, when Title II was applied to incumbent local exchange carrier provision of broadband services and it was uncertain if Title II would be applied to cable broadband facilities, was \$348 billion over six years. Compare that with \$169 billion in wireline facilities investment in the most recent six years USTelecom reports, from 2008 to 2013, when Title II was not applied to broadband Internet access service.¹⁰⁴

In addition, the Commission has had to open a new proceeding to re-regulate the special access market for *business* services because of anti-competitive pricing, the Commission has another open proceeding to try and promote the competitive provision of video programming, and the Commission is being asked to approve rules that would allow incumbent telephone companies to discontinue service over copper networks even though it would leave customers with no wired service available. And finally, twenty years after Congress and the White House were discussing 45 megabit per second symmetric broadband as the local on-ramp to the information superhighway, the Commission has just this past week increased its broadband definition to 25 megabits per second down and 3 megabits per second up. In the context of commercially available gigabit customer premises equipment and fiber networks, the Commission’s belated increase is a sad statement.

The evidence in the marketplace demonstrates that the Commission’s predictions justifying its “light touch” regime were wrong.¹⁰⁵ Competitive long distance providers have disappeared, as

¹⁰² See *In the Matter of Inquiry Concerning the Deployment of Advanced Telecommunications Capability to All Americans*, GN Docket 11-121, Eighth Broadband Progress Report (rel. Aug. 21, 2012) at ¶¶ 1, 9.

¹⁰³ See 47 U.S.C. §§ 1301, 1302(c), and 1303 – 1305.

¹⁰⁴ USTelecom, Broadband Investment “Historical Wireline Provider Capex” chart, *available at* <http://www.ustelecom.org/broadband-industry-stats/investment/historical-wireline-provider-capex> (viewed Jan. 27, 2015).

¹⁰⁵ For example, in the *Wireline Broadband Order* the Commission asserted that:

“In particular, competition from other broadband Internet service access service providers, in particular cable modem service providers, will pressure wireline carriers that chose to provide broadband Internet access transmission as a common carrier service to offer their customers rates, terms and conditions that are just, reasonable and not unreasonably discriminatory. These carriers, like wireline carriers that offer broadband Internet access transmission on a non-common

have independent ISPs. Just, reasonable, and non-discriminatory rates to allow competitive resale of business or residential service are unavailable in areas where Title II rules are not applicable.¹⁰⁶

Cable companies, far from expanding their networks to compete with each other, have simply opted to maintain their incumbent networks and merge. The seven RBOCs have been combined into three, and swallowed the two largest long distance providers in the process. Verizon did replace roughly half of its existing copper network with fiber — which is cheaper to build and maintain while providing unlimited, inexpensive bandwidth — but has now declared that it is not going to replace the other half.¹⁰⁷ AT&T and Centurylink, the other two RBOCs, have installed fiber the neighborhood at best and have no plans for fiber to the home in all but a tiny portion of their footprint. AT&T is buying DirectTV, Comcast is buying Time Warner, and the incumbent phone and cable operators have gotten State legislation adopted in many States to limit municipalities from building competing broadband networks.

carrier basis, will have business incentives to attract both end user and ISP customers to their networks in order to spread network costs over as much traffic and as many customers as possible.”

In the Matter of Appropriate Framework for Wireline Broadband Access to the Internet over Wireline Facilities, CC 02-33, Report and Order and Notice of Proposed Rulemaking (rel. Sep. 23, 2005) (*Wireline Broadband Order*) at ¶ 91.

¹⁰⁶ See, e.g. *Qwest Corp. v. F.C.C.*, 689 F.3d 1214, 1223-24 (10th Cir. 2012) (“Having excluded mobile wireless services, the Commission identified the market participants in the Phoenix area as Qwest, Cox, and various smaller competitors that relied predominantly, if not exclusively, on Qwest facilities. It found that retail mass-market services in the region were ‘highly concentrated with two dominant providers, Qwest and Cox.’ That duopolistic structure, with the potential for tacit price coordination, necessitated an inquiry into whether any other competitors in the Phoenix MSA had deployed or could deploy their own facilities to any significant degree and also into the potential for de novo entry by new competitors. On both fronts, the Commission found competition in the area insufficiently robust to put downward pressure on Qwest’s prices. That finding formed the basis for the Commission’s conclusion that regulatory requirements, particularly unbundling, remained necessary for continued assurance of ‘just, reasonable, and non-discriminatory’ terms of service. The Commission also held that these requirements ‘remain [ed] necessary to protect consumers,’ and that forbearance was not in the public interest because it would not ‘promote competitive market conditions’. The Commission denied forbearance.”) (internal citations omitted).

¹⁰⁷ See “Verizon nears ‘the end’ of FiOS builds,” *Ars Technica* (Jan. 23, 2015) (“It has been nearly five years since Verizon decided to stop expanding its FiOS fiber network into new cities and towns... ‘We are getting to the end of our committed build around FiOS...’ Verizon CFO Fran Shammo said yesterday in the Q4 2014 call with investors.”) available at <http://arstechnica.com/business/2015/01/verizon-nears-the-end-of-fios-builds/> (viewed Jan. 27, 2015).

In a “competitive” market with “light touch” regulation the evidence shows broadband is not being deployed quickly and prices are going up. Consumers only buy broadband Internet access service for the transmission service it provides — nothing else. Consumers’ computers and applications provided by companies on the “Internet” provide all of the “information services” — Netflix, ESPN, You Tube, Google search, Amazon shopping, cloud storage, on-line classes, chat rooms, Facebook, Twitter and other social media — that broadband Internet access services provide “access to.”¹⁰⁸ Consumers can get IP voice service from Skype or Vonage for a tenth of the price (or less) that they pay the incumbent phone or cable company for IP voice services. How is it that Skype and Vonage can provide the same service as the incumbent phone or cable company — IP voice — for so much less? The answer is that incumbent phone and cable companies are simply using their market power to charge captive customers more. You can’t get to Skype, Vonage or any other service offered as an application over the Internet without first buying transmission over the phone or cable transmission networks that are the “local on ramps” to the Internet. The service consumers’ buy that does exactly that is wired broadband Internet access service.¹⁰⁹

Requiring broadband Internet access service consumers to also pay full price for “voice service” is simply double dipping by the network operator, since the local voice price was set in a time when voice service paid for the entire network. It is the same with cable service, because those rates were initially set when only one service — video programming — paid the cost for the entire network. Now both incumbent network operators recover their network costs from three services, without lowering the price consumers’ pay for either of the original services. Exactly how much consumers are being overcharged for transmission will be impossible to determine until the Commission puts in place policies that provide access to adequate bandwidth to support competition in broadband Internet access service *and* over the top video competition. Which is precisely what Congress has been asking the Commission to do since it enacted the Cable Consumer Protection and Competition Act in 1992, and asked again when it adopted the Telecommunications Act in 1996.

¹⁰⁸ See 47 U.S.C. 254.

¹⁰⁹ Verizon Chief Financial Officer Fran Shammo also told investors that “*Fifty-nine percent of FiOS consumer Internet customers subscribed to data speeds of at least 50 Mbps*, up from 46 percent one year earlier.” *Id.* (emphasis added). Wi-Fi hotspots depend on wired backhaul using consumer broadband Internet access service, and commercial mobile wireless networks cannot offer consumers 50 Mbps and greater speeds. See *Annual Report and Analysis of Competitive Market Conditions With Respect to Mobile Wireless*, WT Docket 13-135, Seventeenth Report (rel. Dec. 18, 2014) at ¶ 194 and accompanying chart (showing maximum download speeds of 10.74 Mbps). As a result neither Wi-Fi nor mobile wireless are true competitive alternatives to wired broadband Internet access service offered over fiber or coaxial cable networks. See also “New Services Challenge the Wireless Model,” *Wall Street Journal* (Jan. 26, 2015) at p. B1 (“More than 90% of all mobile data traffic in the U.S. was carried over Wi-Fi networks in 2013, according to Cisco Systems.”).

Conclusion

The real issue in this proceeding is whether or not consumers will be able to choose who stands between them and all of the application based services that can be provided over digital communications networks. Today the Internet protocol is the common transport language that allows all of the various networks used to offer service to the public to “intercommunicate.” Tomorrow it may be some other protocol. Regardless, the fact remains that the expense of the physical infrastructure needed to offer ubiquitous service remains a significant barrier to entry, with the result that there will always be relatively few owners of that infrastructure. Without access to that infrastructure on reasonable terms and conditions for competitors – as Congress provided in the 1996 Act – that limited number of owners will always “own the customer” and stand between consumers and application providers.

The Commission should re-classify “broadband Internet access service” as a “telecommunications service” under the Act. Because “broadband Internet access service” is used to provide subscribers “intercommunicating service” within a local network through “a system of switches, transmission equipment, or other facilities... through which a subscriber can originate and terminate a telecommunications service” it is also a “telephone exchange service” under the Act. Providers of “telephone exchange service” are “local exchange carriers” under the Act. After 15 years of a failed “light touch” regulatory regime the Commission should now apply the provisions Congress adopted in 1996 with the express purpose of opening local markets to competition.¹¹⁰

Competition, not increased profits to incumbents, was what Congress believed would incent broadband deployment, and the information before the Commission proves Congress was correct. The Commission needs to examine the facts and provide the public with an opportunity to debate the Commission’s *prima facie* case for how each of the three statutory prongs in section 10 of the Act are met before making any decision to forbear from applying the provisions of Title II Congress adopted as necessary to open local markets in 1996. In the case of section 251(c), Congress specifically provided that such section could not be forboren from unless it had first been “fully implemented.” Because the Commission has never applied section 251(c) to the

¹¹⁰ As the Commission stated in 1999, “[t]he major economic obstacle to the development of competitive facilities-based networks, at least if pursued through a traditional wireline model, is the extensive investment necessary to duplicate the existing wireline networks.” *In the Matter of Promotion of Competitive Networks in Local Telecommunications Markets*, WT Docket 99-217 (rel. Jul. 7, 1999) at ¶ 19. The Commission continued, “competitive service providers must have the ability to access their potential customers... [and] must be free to provide services in a manner that will enable them most efficiently to offer the services or combination of services that consumers desire.” *Id.*, at ¶¶ 24 – 25.

provision of broadband Internet access service, the Commission is barred by statute from forbearing from that section.

As competitive resellers who depend on the remnants of the 1996 Act that the Commission has left in place for “narrowband” legacy voice and data service, we can attest that the provisions that Congress adopted work for the benefit of consumers when they are applied. There is no factual basis on which the Commission could legally find that those provisions should not be applied to broadband Internet access service when it is reclassified as a “telecommunications service” under the definitions in the Act.

Respectfully submitted,

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